

Arizona Public Defender Association
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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

PETITION TO AMEND THE RULE 15 OF
THE RULES OF CRIMINAL PROCEDURE

No. R06-0024

**COMMENT OPPOSING MARICOPA
COUNTY ATTORNEY'S PETITION
TO AMEND RULE 15 OF THE RULES
OF CRIMINAL PROCEDURE**

The Arizona Public Defender Association (hereinafter, "APDA") respectfully submits its comment to the above captioned petition, and strongly opposes the proposed amendment for reasons of confidentiality, due process, equal protection, professional responsibility and judicial economy.

The APDA is an Arizona non-profit corporation comprised of public defense offices, programs, attorneys and support staffs throughout the State of Arizona. The primary purposes of our organization include improving the quality of legal representation of poor people who face the loss of their liberty, safeguarding the constitutional rights of indigent individuals, and resolving criminal matters effectively and fairly. Our offices defend the overwhelming majority of individuals who face

criminal charges in Arizona, handling in excess of 50,000 felony cases a year.

I. Ex parte communications are vital in some criminal cases

Ex parte communications play a necessary and vital role in the criminal justice system. Unlike in other areas of law, where the rules of disclosure are more expansive, the intensely adversarial nature of the criminal system mandates ex parte communications in various situations to ensure confidentiality, due process, and equal protection for the criminal defendant.

As the Maricopa County Attorney's petition makes clear, "there are often situations in criminal cases where counsel feels it is necessary to approach the court without opposing counsel being notified" and, due to the "nature of these communications, it is almost always defense counsel who approaches the court..." (Petition at 2). The County Attorney bases its argument on the fact that it is neither notified of nor invited to these ex parte communications and, therefore, cannot ensure that an adequate record is made. *Id.*

The County Attorney's petition is without merit and should not provide the basis for undermining the current status of ex parte communications within the criminal system.

a. Confidentiality

Ex parte communications are necessary in circumstances in which confidentiality is at issue. These communications are not requested for the purpose of excluding the other party, but rather because the inclusion of the State would defeat confidentiality and

undermine the attorney-client relationship, as well as raise due process and equal protection concerns.

Rule 15.9(b) of the Arizona Rules of Criminal Procedure specifically requires a proper showing concerning the need for confidentiality before such a request may be granted. Often, both the substance and the mere occurrence of the communication are confidential in nature. Therefore, the State should not be entitled to notice *before* the communication because to do so would defeat confidentiality.

b. Specific instances requiring ex parte communications

The Arizona Bar Association's Model Code of Judicial Conduct explicitly recognizes several exceptions to the general ban on ex parte communications. "Where circumstances require," ex parte communications are allowed to facilitate scheduling and other administrative purposes and to accommodate "emergencies that do not deal with substantive matters or issues on the merits," provided that the following conditions are satisfied: (1) "the judge reasonably believes that no party will gain a procedural or tactical advantage," and (2) the judge provides prompt notice about the substance of the communication to all other parties, who must be given a chance to respond. Code of Judicial Conduct, Canon 3(B)(7). The phrase "where circumstances require" strongly suggests that this exception must be considered on a case-by-case basis, without establishing a comprehensive exception to the general rule.

Not all ex parte communications for scheduling, administrative purposes, or emergencies dealing with substantive matters or issues on the merits are authorized; such

communications are legitimate only “where circumstances require.” First, to establish the applicability of this exception, it is necessary to show that certain facts or conditions demand an ex parte communication. Second, even “where circumstances require,” this exception does not apply to all communications described in the general rule. Finally, such ex parte communication is permissible under the Code only if the judge reasonably believes that no party will gain an advantage from it and the judge promptly notifies any parties about the substance of the communication and the opportunity to respond. However, in some instances, this notification and the opportunity to respond must be delayed to protect the confidentiality concerns that mandate the ex parte communication in the first place.

One example of ex parte requests that must remain confidential is those made to secure the transport of in-custody defendants to psychiatric evaluations and risk assessments. Obviously these evaluations and assessments need to be disclosed if the defense intends to present them at trial. However, many times these evaluations are utilized only to assist the attorney in developing defense strategy, communicating with his client, or in anticipation of possible defenses that never come to fruition. As such, they are not discoverable and the State is not entitled to know of their existence. Noticing the State may result in the County Attorney conditioning plea offers on non-discoverable risk assessments being turned over and other coercive measures.

Furthermore, aspects of nearly every request for expert assistance will necessarily divulge some element of defense strategy that is not discoverable. By merely identifying

the type of expert needed, the defendant will be forced to reveal attorney work-product in the form of defense theory, investigative method, and case strategy. For example, a defense attorney may need an expert's assistance to explore defenses involving weapon malfunction, ballistics not matching, or self-defense in a shooting case. In justifying its need for the expert, the defense will be required to disclose trial strategy beyond what is required under the rules of disclosure. Attorney work-product is not discoverable. These protected theories and strategies must be disclosed to obtain expert assistance for an indigent client. Therefore, ex parte communication is mandated by the rights to effective assistance of counsel and due process. The State is not entitled to non-discoverable attorney work-product and the defendant's indigency cannot change this basic tenet of law.

Likewise, many conflict of interest issues must be dealt with ex parte. For example, many irreconcilable differences between attorney and client are not discoverable and are highly prejudicial to the defendant. Threatening or assaultive behavior towards a defense attorney that does not rise to the level of the duty to disclose, but does warrant withdrawal, is extremely prejudicial. The State is not entitled to this information and disclosure violates the defendant's rights to due process, equal protection and assistance of counsel.

The County Attorney's petition, if granted, will result in a severe chilling effect on the attorney-client relationship. Defendants will soon discover that the State will learn of the information they share with their attorneys through the notice and opportunity to

respond restraints on ex parte communications. Accordingly, they will be less likely to inform their attorney of information necessary to their defense. Without the ability to deal with the aforementioned situations ex parte, defendants' constitutional rights will be violated.

c. Equal protection concerns

The Equal Protection Clause of the 14th Amendment supports the proposition that indigent defendants in particular are entitled to ex parte proceedings. *See, e.g., State v. Barnett*, 909 S.W.2d 423, 428 (1995) (indigent defendants should not be forced to reveal defense theories to receive expert assistance when affluent defendants are not); *Blazo v. Superior Ct.*, 315 N.E.2d 857, 860 n.8 (Mass. 1974) (“The reason ex parte application is allowed is that, just as a defendant able to foot the costs need not explain to anyone his reasons for summoning a given witness, so an impecunious defendant should be able to summon his witnesses without explanation that will reach the adversary.”); *United States v. Theriault*, 440 F.2d 713, 717 (5th Cir. 1971) (right to ex parte proceedings founded on both due process grounds and “equality of rights” for indigent defendants).

Equal protection concerns increase the need for protection of ex parte communications. Non-indigent defendants who can bail out of jail will not be subjected to the same level of intrusion on defense strategy as those in-custody defendants who must rely on ex parte communications to acquire funding for expert witnesses. Those defendants who can afford to bond out of jail will not be forced to tip off prosecutors to privileged defense strategy.

Writing for an 8-1 majority in *Ake v. Oklahoma*, Justice Marshall observed that “mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense...” 470 U.S. 68, 77 (1985). The *Ake* Court found that the defendant’s “private interest in the accuracy of a criminal proceeding that places an individual’s life or liberty at risk is almost uniquely compelling.” *Id.* By contrast, the state’s interest in limiting expenditures is insubstantial and whatever interest it may have in prevailing at trial or holding a strategic advantage over a defendant “is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases.” *Id.* Therefore, the state may not legitimately assert these interests “if the result...is to cast a pall [over] the accuracy of the verdict obtained. *Id.* at 79.

d. Due process concerns

The due process requirement of fundamental fairness requires that an indigent defendant secure expert assistance through *ex parte* proceedings. The California Supreme Court recognized this need for *ex parte* communications in *People v. Anderson*, 742 P.2d 1306 (Cal. 1987) (discussing statute requiring *ex parte* application for expert services.) The *Anderson* court “freed the defense from the course it otherwise would have had to steer between the Scylla of publicly applying for needed funds and in so doing disclosing some of the defense to the prosecution and Charybdis of keeping the

defense secret but, in so doing, foregoing the necessary monies for its preparation and presentation.” *Id.* at 1322.

Without an ex parte hearing in which to request expert services or to deal with various confidential issues that arise during trial preparation, the defendant’s interest in the fairness and accuracy of the criminal proceeding is also compromised because the state wrongly benefits from what is, in effect, expanded pre-trial discovery.

The 5th Amendment requires the state to “shoulder the entire load” in a criminal prosecution and prevents the state from avoiding the “burdens of independent investigation by compelling self-incriminating disclosures.” *Murphy v. Waterfront Commn of N.Y. Harbor*, 378 U.S. 52, 55 (1964); *Garner v. United States*, 424 U.S. 648, 655-56 (1976); *see also generally Miranda v. Arizona*, 384 U.S. 436, 458-65 (1966) (discussing history of 5th Amendment). Self-incriminating information of a testimonial nature is frequently offered in an ex parte application or hearing for expert witness funding or conflicts of interest. The defendant is indirectly compelled to offer this information on the threat of not receiving the assistance that could free him. *See Simmons v. U.S.*, 390 U.S. 377, 394 (1968) (it is “intolerable that one constitutional right should have to be surrendered in order to assert another.”). The State is not entitled to this constitutionally protected information, and to provide it via notice and an opportunity to respond will undermine the protections of the 5th Amendment. The danger that the evidence presented in the course of requesting expert assistance or effective assistance of counsel is either itself self-incriminating or will lead to such evidence is always present.

If ex parte hearings are not required, indigent defendants would, in effect, be penalized for requesting expert assistance by being required to disclose specific facts and circumstances giving rise to potential defenses. Defendants may be deterred from seeking assistance because of the breadth of disclosure required. *State v. Barnett*, 909 S.W.2d 423, 429 (Tenn. 1995).

II. Ex parte communications are sufficiently regulated

The concerns expressed by the Maricopa County Attorney's Office regarding ex parte communications in criminal cases are adequately assuaged by the Rules of Criminal Procedure, the Canons of Judicial Conduct and the Rules of Professional Responsibility.

The State claims that because it "is neither notified of nor invited to these meetings, the State is unable to ensure that an adequate record is made for appellate review, or that a record is even made at all." (Petition at 2). However, Rule 15.9(b) of the Arizona Rules of Criminal Procedure specifically states "[a]ny [ex parte] proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review."

The County Attorney claims it should be notified of the request for an ex parte communication and given the opportunity to respond *before* the request is granted and the communication takes place. However, in an ex parte proceeding, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the

correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision. Therefore, “[i]n an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.” Arizona Rules of Prof. Conduct, ER 3.3(d). Accordingly, the judge’s affirmative duty to protect the State’s interest during the ex parte communication adequately addresses the County Attorney’s concerns.

a. Code of Judicial Conduct

Where circumstances require, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond. Code of Judicial Conduct, Canon 3(B)(7).

The Code does not prohibit in all cases ex parte communications. Instead, it required that a “judge should..., except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.” Code of Judicial Conduct Canon 3A(4). It is highly improper for the State to arbitrarily suggest that the defense bar and the entire judiciary would so egregiously violate the Rules of Criminal Procedure, Professional Responsibility and the Code of Judicial Conduct.

III. Judicial economy

The Maricopa County Attorney's petition suggests that if an opposing party objects to an ex parte proceeding, communication or request, the matter would then be assigned to the presiding criminal judge or his designee to determine the issue. However, this would unnecessarily delay the proceedings. "A judge shall dispose of all judicial matters promptly, efficiently and fairly" pursuant to Canon 3(B)(8) of the Code of Judicial Conduct.

Furthermore, the trial court judge is most familiar with the case and is best suited to consider the ex parte communication or request. Not only would the matter be unduly postponed while waiting for the presiding judge to address the ex parte communication, but his assessment of the request would be tainted by his lack of familiarity with the case.

The State Bar of Arizona Criminal Practice and Procedure Committee opposed the Maricopa County Attorney's petition seven to one on February 16, 2007. "The committee believed that the trial judge would be in a better position to ultimately decide the issue. The committee further believed that the ex parte procedure was not being abused in the first instance." State Bar of Arizona Criminal Practice and Procedure Committee Reporting Form, Feb. 16, 2007. The sole supporter of the petition was a prosecutor.

IV. Rule changes should not be dictated by individual circumstances

The Maricopa County Attorney's rule change petition is entirely driven by one case, *State v. Bearup*. CR2003-024938-001 DT. The petition itself admits as much. In

the *Bearup* case, Judge Granville granted a request for ex parte communication concerning the defendant's request to represent himself at the aggravation and penalty phases of his capital trial and his desire to waive the presentation of mitigation evidence. These ex parte communications were heard by Judge Granville and Judge Keppel. Although his request to represent himself was granted, Bearup was represented by counsel throughout the guilt phase of his trial, and had advisory counsel at the aggravation and penalty phases.

On January 30, 2007, the State filed a motion to examine the transcripts of the ex parte proceedings. In the resulting oral arguments, Bearup was represented by advisory counsel. Judge Granville denied the State's motion and sealed the transcript, but instructed the defendant that he may or may not answer questions regarding the prior ex parte communications. On February 5, 2007, in a post-verdict rule 20 motion and its response, there were no additional references to the ex parte communications.

In its rule change petition, the County Attorney claims that “[b]ecause the State was not present at [the ex parte] proceedings, neither the State nor the victims have any assurances that a complete record was made that would survive appellate review should the defendant later challenge the appropriateness of his self-representation, or any other issues that may have been raised during these proceedings.” (Petition at 2). However, there has been no indication of impropriety in this case. Furthermore, a complete record of the ex parte request and the resulting communication is required by the Rules of Criminal Procedure and both the defense bar and the judiciary are required to adhere to

those rules.

Interestingly, the rule change petition was filed in October, 2006, before *Bearup* went to trial and before the State made any motions regarding the ex parte communications. Not only is this particular case inadequate to support the County Attorney's claim that it should be noticed to ensure an adequate record is made, but rule changes should not be dictated by individual circumstances. The County Attorney provides no indication that ex parte proceedings have been abused or that the defense bar and superior court bench have violated the Rules of Criminal Procedure and Professional Responsibility. The *Bearup* case hardly provides justification for violations of future defendants' due process and equal protection rights.

V. Conclusion

For the reasons advanced herein, the Arizona Public Defender Association recommends that the Court deny the County Attorney's Petition to Amend Rule 15 of the Rules of Criminal Procedure.

RESPECTFULLY SUBMITTED this _____ day of May, 2007.

ARIZONA PUBLIC DEFENDER ASSOCIATION

By _____
Dana Hlavac, President

ORIGINAL and six copies
Filed with the Court this
_____ day of _____, 2007.

Copy mailed this ____ day
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By _____