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THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,

Plaintiff,

JODI ARIAS

Defendant.

No. CR2008-031021-001

MOTION TO PRECLUDE WITNESSES
CONTAINED IN THE "NOTICE OF
POTENTIAL PENALTY PHASE
WITNESSES" FILED BY THE STATE ON
SEPTEMBER 19, 2014

(Hon. Sherry Stephens)

Ms. Arias, through undersigned counsel, pursuant to the dictates of Rule 15.1, Arizona Rules of Criminal Procedure, the dictates of *Skipper v. South Carolina* 476 U.S. 1 (1986) and the rights due her pursuant to Fifth, Eighth and Fourteenth Amendments of the United States Constitution, as well as Art. II, § 4 and Art. III of the Arizona Constitution, hereby requests that this Court preclude certain witnesses from the State's

Notice of Potential Penalty Phase Witnesses filed on September 19, 2014. Support for this motion can be found in the attached Memorandum of Points and Authorities which is incorporated herein by reference.

MEMORANDUM OF POINTS AND AUTHORITIES

I. RELEVANT FACTS

On September 19, 2014, six days before jury selection, the State finally disclosed a witness list that it labeled as a "Notice of Potential Penalty Phase Witnesses." Amongst this recently filed list are witnesses who either have not been previously asserted as "potential witnesses," expert witnesses whose diagnosis or opinions are not yet known by Ms. Arias and/or witnesses whose testimony relates to evidence that has already been precluded. In this regard, Ms. Arias is thus seeking to preclude the following witnesses as listed in the State's "Notice of Potential Penalty Phase Witnesses":

- 9. Jill Hayes
- 10. Janeen DeMarte
- 13. Marsha Parker
- 15. Zachary Billings
- 16. Taylor Searle
- 21. Alan Kreitel

Also of note is the fact that in recent court proceedings Counsel for the State advised that expert witnesses, Doctors DeMarte and Hayes did not currently have any opinions. Of course blame for this was placed on Ms. Arias, despite the fact that she disclosed the names of her expert witnesses months prior to trial.

In support of her claim that life is the appropriate penalty, Ms. Arias, in other pleadings, listed the following mitigating factors;

1. Ms. Arias has no prior criminal history.
2. Ms. Arias was just 27 years old when she committed her offense.
3. Ms. Arias is remorseful for her conduct.
4. Ms. Arias suffered both physical and emotional abuse as a child.
5. Ms. Arias suffered both physical and emotional abuse during her relationship with Mr. Alexander.
6. The abusive nature of the relationship caused Ms. Arias to suffer extreme emotional stress at the time of the incident.
7. Ms. Arias has been diagnosed with Post-Traumatic Stress Disorder.
8. Ms. Arias has been diagnosed with Borderline Personality Disorder.
9. Ms. Arias' psychological makeup impaired her ability to cope with the tumultuous relationship she had with Mr. Alexander.

II. LAW AND ARGUMENT

Pursuant to the dictates of A.R.S. 13-751 (C), Ms. Arias must prove that one of these mitigating factors exist by a preponderance of the evidence in order for her life to be spared. Apart from witness number 21 it would seem that the State is seeking to call the aforementioned witnesses to attempt to cast doubt on the existence of the aforementioned mitigating factors. The ultimate issue raised by this motion becomes the fact that Ms. Arias can, at present time, six days before trial, only speculate as to what the aforementioned witnesses will say because of this untimely disclosure by the State.

To be clear, the point of this motion is not only to assert that the State has once again violated Rule 15.1, Arizona Rules of Criminal Procedure or that in this case this most recent violation is deserving of sanctions per the dictates of *Jimenez v. Chavez*, 234 Ariz. 448, 323 P.3d 731 (2014). Instead, the additional and more prominent issue raised by this motion is how the State's late disclosure of witnesses whose participation was not

previously known and the inability of Ms. Arias to access the opinions of the State's experts because apparently they haven't been formed. While this game of hide and seek being played by the State may be advantageous to the State, such gamesmanship does not comport with the rights due Ms. Arias pursuant to Fifth, Eighth and Fourteenth Amendments of the United States Constitution, as well as Art. II, § 4 and Art. III of the Arizona Constitution.

The most prominent articulation of the aforementioned rights can be found in *Skipper v. South Carolina* 476 U.S. 1 (1986), which holds that a defendant cannot be put to death on evidence of which she is not aware. As it now stands, apart from witness number 21, Ms. Arias has no idea what many of the aforementioned witnesses will have to say on behalf of the State. To that end this state of affairs defies the undeniable constitutional mandate found in *Skipper*.

It must also be noted that in withholding the names of these witnesses until six days before trial ultimately amounts to a restriction on Ms. Arias' ability to present mitigation in that her experts have not had the chance to consider both the evidence that these additional witnesses will present, nor will they have an understanding of the opinions of the State's experts before they formulate their own opinions.

Ultimately then it is Ms. Arias' contention that the State's gamesmanship has placed Ms. Arias in a position where her efforts to present mitigation have been curtailed in a constitutionally impermissible manner. *Smith v. Texas*, 543 U.S. 37 (2004); *Tennard v. Dretke*, 542 U.S. 274 (2004), *Coker v. Georgia*, 433 U.S. 584 (1977), *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954 (1978) and *Eddings v. Oklahoma* 455 U.S. 104, 102 S.Ct.

869 (1982). Thus, based on these authorities that Ms. Arias would assert that witnesses 9. Jill Hayes. 10. Janeen DeMarte. 13. Marsha Parker. 15. Zachary Billings, and 16. Taylor Searle be precluded.

As to witness number 21. Alan Kreitel, Ms. Arias would ask that given the subject matter of his potential testimony deals with evidence that has been repeatedly precluded, Ms. Arias would ask that she be allowed to articulate her opposition to Mr. Krietal's potential testimony in sealed proceedings so as not to poison the jury pool with knowledge of evidence that is precluded, that lacks a basis in fact and is unfairly prejudicial to Ms. Arias.

III. CONCLUSION

The late disclosure of witnesses whose participation in these proceedings were unknown to Ms. Arias until 6 days before jury selection begins violates the rights due her pursuant to Fifth, Eighth and Fourteenth Amendments of the United States Constitution, as well as Art. II, § 4 and Art. III of the Arizona Constitution as articulated by the authorities mentioned above. Given this state of affairs, it appears that this Court is left with no other choice but to preclude these witnesses or risk that the testimony of these witnesses will aid in the State gaining a sentence of death via unconstitutional gamesmanship.

RESPECTFULLY SUBMITTED this 25th day of September, 2014

L. KIRK NURMI
COUNSEL FOR MS. ARIAS

By /s/ L. Kirk Nurmi
ATTORNEY AT LAW

Copy of the foregoing FILED/DELIVERED
This 25th day of September, 2014, to:

THE HONORABLE SHERRY STEPHENS
Judge of the Superior Court

JUAN MARTINEZ
Deputy County Attorney

By /s/ L. Kirk Nurmi
L. Kirk Nurmi
Attorney at Law