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IN THE ARIZONA SUPREME COURT

KPNX-TV Channel 12, a division of)
Multimedia Holdings Corporation,)
Phoenix Newspapers, Inc.,)
Meredith Corporation dba)
KPHO-TV and KTVK-3TV and)
Scripps Media, Inc. dba KNXV-TV,)
Petitioners,)
v.)
The Honorable Sherry Stephens,)
Judge of the Superior Court,)
of the State of Arizona, County of)
Maricopa,)
Respondent,)
and)
State of Arizona and)
Jodi Ann Arias,)
Real Parties in Interest.)

Supreme Court Case:
Court of Appeals Case:
1 CA-SA 13-0064
Maricopa County Superior
Court Case:
CR2008-031021-001

PETITION FOR REVIEW

Jodi Ann Arias, Real Party in Interest, submits this petition for review of the Court of Appeals decision to grant relief to Petitioner, vacating the October 30, 2014 ruling of the trial court which excluded the press and public from the courtroom during portions of the penalty phase of Arias' trial.

Issue Presented in Petition for Review

1. The Court of Appeals ignored specific findings by the trial court in determining that Arias' request to close the courtroom during the death penalty phase of her trial did not amount to clear and present danger.
2. The Court of Appeals failed to consider Arias' constitutional claims of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Because this is a death penalty case, Arias' rights must be balanced against the First Amendment rights of the public.

Issue Raised in Special Action

Petitioner, representing the news media, raised the following issues in its special action petition:

1. The trial court erred by closing the proceedings of a criminal trial to the public.
2. Even if the trial court could constitutionally close the proceedings, it must immediately identify the witness who is testifying, release the transcripts of its sealed findings and the proceedings and release the FTR audio/video recording.

Facts Material to Support Petition for Review

A jury convicted Arias of first-degree murder. Having alleged the death penalty, the state was unable to convince the original jury to impose death unanimously, and a mistrial was declared. A new jury was selected to determine whether the death penalty should be imposed. Between the first trial and the second penalty phase hearings, several mitigation witnesses refused to testify on Arias' behalf solely due to the media releasing their identities and the public

consequences thereafter including, among other things, death threats. The court was made aware of these issues in a sealed hearing for a change of venue on October 4, 2013. In that sealed hearing the following issues were brought to the attention of the court:

*In the initial trial, jurors faces were filmed and published against a court order (RT 10/4/13, p17)

*There was a circus-like atmosphere with the prosecutor giving autographs outside the courthouse, spectators selling their seats to the courtroom, among other things. (RT 10/4/13, p19, 65)

*The news outlets advertised that they were going to employ a lip reader to report on conversations between Arias and her attorney at defense table, necessitating a court order. (RT 10/4/13, p18, 29)

*A juror in the new penalty phase hearing was excused and the news media went to speak with her the same day. (RT 10/4/13, p28)

*Threats were made to defense counsel repeatedly from the general public. (RT 10/4/13, p20, 62, 63)

*Ms. Womack, a mitigation witness submitted a letter to the court through counsel that she would not testify due to threats she received after her name and picture was made public through the media the day before she was due to testify (RT 10/4/13, p20, p64)

*Ms. LaViolette, a defense expert, was going to testify in mitigation but refused, due to threats made to her after her initial testimony, which affected her health. (RT 10/4/13, p20, 23)

*Arias's defense team had to seek out new mitigation witnesses because of the nonparticipation of original witnesses that were unwilling to testify unless they could be assured that their names and or likenesses would not be broadcast. (RT 10/4/13, p 36) (RT 10/30/14, p19) See also Defendant's motion to dismiss state's

notice of intent to seek the death penalty due to defendant's inability to present a complete case for life (filed under seal September 2014) in which page after page is dedicated to witnesses that refuse to testify because of the media.

In another sealed hearing on October 30, 2014, the court conducted a *Waller* analysis (RT 10/30/14, p10) and considered Arias' ability, due to her documented psychological disorders, to present her own testimony in mitigation with the pressure and constant media broadcasting of what she was saying and how she was saying it and the additional factor, in her case, of the threats she endures as a part of her testimony. The court found this to be intimidating, (RT 10/30/14, p7, 9-10) Further the court found that specific people were attempting to visit Arias to threaten her. (RT 10/30/14, p15-16, 21)

Standard of Review

Denial of a public trial is a constitutional question and therefore reviewed de novo. *State v. Tucker, 231 Ariz. 125, 290 P.3d 1248 (2012)*

Reasons in Support of Granting Petition

1. The Court of Appeals ignored specific findings by the trial court in determining that Arias' request to close the courtroom during the death penalty phase of her trial did not amount to clear and present danger.
2. The Court of Appeals failed to consider Arias' constitutional claims of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Because this is a death penalty case, Arias' rights must be balanced against the First Amendment rights of the public.

The press and public do not have an unlimited right to attend court proceedings. Where specific, on the record findings are made demonstrating that

closure is essential to preserve higher values and the closure is narrowly tailored to serve that interest, the court can preclude the public from court proceedings.

Press-Enterprises Co. v. Superior Court 478 U.S. 1 (1986) Both federal and Arizona courts have recognized that the right to a public trial may be limited under some circumstances. *State v. Bush*, 148 Ariz. 325, 714 P.2d 818 (1986) Because the state and federal constitutional rights to a public trial appear to be coextensive, references to the federal rights apply to the state as well. *State v. Tucker*, 231 Ariz. 125, 290 P.3d 1248 (2012)

To justify closing the court to the public, the court's findings must show that there is a clear and present danger to a fair trial before an impartial jury. *Phoenix Newspapers v. Jennings*, 107 Ariz. 557 (1971), Rule 9.3b, Arizona Rules of Criminal Procedure

In its decision, the Court of Appeals only considered Arias' refusal to testify in her mitigation hearing as the basis to determine that the clear and present danger test was not met. "Although the court did not specifically find a clear and present danger to a fair trial before an impartial jury, we infer the court considered Arias' refusal to testify in a public proceeding and its potential legal implications to be a clear and present danger." (COA Decision, p6, paragraph 14)

However the trial court did consider other evidence supporting Arias' claim of clear and present danger to a fair trial and included it in her ruling:

"Defendant stated she is concerned that the media will report her testimony in a manner that will affect her mitigation case. Defendant stated the media, through its reporting, has generated public sentiment that has resulted in substantial harassing and threatening mail being sent to her at the jail. Defense counsel has also received such mail...In addition, at the last trial, some of the defendant's mitigation witnesses refused to testify at the penalty phase trial because of the intensive media coverage. That intensive media coverage has continued. Defendant is concerned the media may present her testimony in a manner that would affect the willingness of witnesses

to participate in this penalty phase re-trial. Additionally, Defendant stated her ability to testify would be affected and her ability to say what she needed to say to the jury would be impaired because of her concerns regarding the characterization of her testimony by the media and the public and how it will affect her future. (ME 10/31/14, p1-2)

The Court of Appeals determined that the threats in this case did not equal clear and present danger that would impede Arias' right to a fair trial with an impartial jury and that she would still be able to present mitigation. (COA Decision, p6-7)

However, this Court has consistently recognized that threats delivered to witnesses, trial counsel, jurors and/or court staff do have a significant impact on the fairness of a criminal trial holding that "the spirit of a fair trial is one in which the search for truth and justice is unhampered by any feelings of fear, intimidation or revenge. Witnesses and other persons must feel safe, secure and unafraid as they enter an Arizona courthouse." *Bush* at 330. *Bush* involved direct intimidation by the victim's family and friends, however in the 21st century, the advancements in technology put the public from around the world inside the courtroom, real time, with the ability to reach out to witnesses, counsel and defendant with a mere stroke of a keypad. At the end of the day, a witness testimony is played, replayed and analyzed before they can finish their testimony the next day. This atmosphere intensifies and increases public scrutiny as evidenced by defense witness Womack's refusal to testify in mitigation when she was threatened immediately after her appearance in the courtroom as a potential witness was broadcast. The courts have seen this before, and noted that there are many instances where public passion, often ignited by the press so possessed the community that due process required a new trial be granted. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507 (1966)

Federal and Arizona courts have found many instances where the standard of clear and present danger is met with threats alone. *Bush*, mentioned above is an example in Arizona while *Bowden v. Keen*, 237 F.3d 125 (2001) where the U.S. Court of Appeals, Second Circuit, held that a courtroom could be closed for the testimony of an undercover officer where he can articulate even a generalized fear that his safety could be endangered by testifying in open court, and explains in rough terms a basis for that fear.

There are other instances where the federal courts recognize the importance of closing the courtroom to the public in matters much less weighty than a death penalty hearing,. The Eight Circuit affirmed the closing of the courtroom for a minor victim's testimony of a defendant's sexual abuse against her to guard against her psychological harm. *United States v. Charboneau*, 2011 U.S. Dist. LEXIS 122969 (2011) The concurring opinion in *Arizona v. Agosto Ayson Biagon*, 510 F.3d 844, Ninth Circuit (2007), the court enumerated many federal matters that were routinely closed to the public (sealed or held in camera) such as sentencing proceedings when a defendant cooperates with the government, to protect him from being treated as a snitch in prison where he would be set up to be murdered or hurt by those who find out he testified against a co-defendant (regardless of who the co-defendant is); sexual matters in which a victim is molested can be held in camera not just to protect the defendant, but to protect the victim from testifying in public to embarrassing sexual information; and sentencing for financial crimes can be held in camera where exposure would further harm the victim and his business or charity that the defendant embezzled from)

Arias has already been convicted. The proceedings at this point are more akin to a sentencing hearing in which Arias is presenting mitigation in effort to spare her life.

Once clear and present danger is met, the court must then conduct the constitutional analysis in *Waller* to determine whether the proceedings should be closed. *Waller v. Georgia*, 467 U.S. 39 (1984) The trial court conducted the *Waller* analysis and found that it was met. The Court of Appeals found that the trial court, in conducting its *Waller* analysis, found an alternative that Arias “balked” at, thus not satisfying the test. However, the trial court did address the alternative of putting the media in the overflow room, and ultimately found that it would not alleviate the issue of the broadcast and threats. The court further found that not allowing Arias to testify in her own mitigation would not be a voluntary waiver of mitigation. (RT 10/20/14, p29)

Without authority, the Court went on to find that because Arias testified in open court during the guilt phase of the trial she cannot decide that she will not testify during the penalty phase unless the public is excluded. (COA Opinion, p 7) The Court of Appeals analysis brushes aside the constitutional arguments of Arias that she has the right to present mitigation in the penalty phase of a death penalty case, and cannot be forced to waive this right when her witnesses are unwilling to testify due to the media broadcast.

This case is not just about threats to the parties. The live media broadcast and public threats to the participants have gutted the mitigation case for Arias where the jury is determining if she will live or die. In a motion to dismiss the death penalty allegation, the defense submitted affidavits of witnesses unwilling to testify due to the media streaming and commenting on their testimony leading to threats and other humiliation. One cannot imagine a situation more compelling than a death penalty trial for which the courts need to protect the defendant’s right to a fair, impartial trial. *See. Skipper v South Carolina*, 476 U.S. 1 (1986), *Smith v. Texas*, 543 U.S. 37, (2004), *Tennard v. Dretke*, 542 U.S. 274 (2004) and the *Eighth and Fourteenth Amendments to the United States Constitution*. Death

penalty jurisprudence is clear in that a defendant must be afforded a heightened standard of due process. *See Reid v. Covert, 354 U.S. 1 (1957) and Gregg v. Georgia, 428 U.S. 153 (1976)*

Conclusion

Based on the foregoing, petitioner asks this court to review the decision of the Court of Appeals vacating the trial court's ruling to close the courtroom during parts of the mitigation phase of this trial. Petitioner asks that this court reverse the Court of Appeals and reinstate the trial court's ruling.

Respectfully submitted this 5th day of January, 2015, by:

/s/: Jennifer L. Willmott
Jennifer L. Willmott

Certificate of Compliance

Pursuant to Rule 23, Arizona Rules of Civil Appellate Procedure, undersigned counsel certifies that this Petition for Review filed via AZTurbo Court on January 5, 2015, is double spaced, uses 14-point Times New Roman type, and contains 2,307 words.

Certificate of Mailing

Counsel certifies that on January 5, 2015, a copy of the Petition for Review of was electronically filed with the Clerk of the Arizona Supreme Court (TurboCourt) and sent same date to:

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Submitted this 5th day of January, 2015, by:

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