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VIELYN TINNELL  
SUPERIOR COURT CLERK

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

STATE OF ARIZONA, ) No. CR 2014 - 01193  
)  
Plaintiff, ) DEFENDANT RECTOR'S  
) MOTION FOR A PRE-FILING  
Vs. ) CLARIFICATION OF THE  
) ACCEPTABLE PROCEDURE  
) FOR FILING *EX PARTE*  
) MOTIONS UNDER SEAL  
JUSTIN JAMES RECTOR )  
Defendant. (ASSIGNED TO THE HONORABLE LEE JANTZEN)

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Defendant Justin Rector, by and through undersigned counsel, hereby requests clarification by this court on exactly how to proceed *ex parte*, and under seal, in Defendant's Motion to Allow Funding for Appointment of Experts, Renewed Motion for Discovery Pertaining to Previously Listed Confidential State Witnesses, and Motion for Discovery/ Release of Pertinent Juvenile Records, pursuant to his rights under the

Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, Article 2, §§ 4, 15, 24, 32, & 33 of the Arizona Constitution, and Rule 15.9 of the Arizona Rules of Criminal Procedure (allowing *ex parte* proceedings where need for confidentiality is shown).

Defense counsel has attempted to file previous motions under seal in this cause number regarding obtaining information on the States Confidential Witnesses; those witnesses forced the replacement of the previous 2<sup>nd</sup> chair Ron Gilleo, and his investigator, resulting in a lengthy delay as new counsel was located and appointed. Respectfully, this Court has indicated *on the record* a strong preference *against filing motions under seal*, preferring matters be addressed in open court before the public. The defense understands the Courts desire for transparency in cases. However, the defense maintains that preference *should not invade the province of the defense to do an independent investigation, develop defense and mitigation strategies in a confidential manner, and not be forced to allow the public into the development of the defenses' case.* The defense anticipates filing motions regarding confidential informants, funding for various defense experts, and various requests for Department of Children Services records regarding confidential juvenile records.

If the defense is not allowed to file under seal, the public will have access to information that could place witness lives in danger, telegraph defense strategy and confidential case development and investigation, and expose child records previous courts may have ordered sealed. These 3 scenarios are not appropriate for public disclosure. There may develop future scenarios also requiring *ex parte* filing under seal. **The defense does not want to run afoul of the Courts prior directive; however, some procedure must be permitted to allow filing of highly confidential matters. The defense seeks an order clarifying the exact procedure to govern such filings.**

Arizona Rules of Criminal Procedure, Rule 15.9, allows for *ex parte* requests for investigative assistance to assist counsel in the representation of an indigent defendant. The prosecution and public have no interest in the manner of representation of Mr. Rector in this matter, an issue which would not even be before this Court absent Mr. Rector's indigence. See, e.g. *Mason v. Arizona*, 504 F.2d 1345, 1352, n. 7 (9<sup>th</sup> Cir. 1974); *Knapp v. Hardy*, 111 Ariz. 107, 112, 523 P.2d 1308, 1313 (Ariz. 1974)(once a defendant is determined to be indigent, the county attorney has no standing to object to who will represent defendant). *Ex parte* proceedings are necessary to prevent the disclosure of defense strategy and to protect

information learned from confidential attorney-client conversations. *State v. VanWinkle*, 285 P.3d 308, ---, ¶11 (2012)(interpreting R.15.9(b) as providing a mechanism for defendants to prevent disclosure of trial strategy or work product in requests to the court); American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003), Guideline 10.4, *Commentary* ("Because the defense should not be required to disclose privileged communications or strategy to the prosecution in order to secure [investigative and expert] resources, it is counsel's obligation to insist upon making such requests *ex parte* and *in camera*."); *Id.*, n. 176 (citing numerous jurisdictions that permit resource requests to be made *ex parte* and under seal); *see also* ABA Criminal Justice Standards, Defense Function (3<sup>rd</sup> ed.), Standard 4-7.1 (*ex parte* communications may be necessary to protect confidential communications between lawyer and client); *see also*, Ariz.R.Crim.P. Rule 6.8 (adopting the ABA Guidelines).

The need for *ex parte* proceedings in criminal cases is well-established. In *Ake v. Oklahoma*, the United States Supreme Court specifically provided for *ex parte* applications by indigent defendants for expert assistance. 470 U.S. 68, 82 (1985). *Ex parte* proceedings are

permissible where they are necessary to protect the attorney-client relationship and confidential and privileged attorney-client communications.

*United States v. Scott*, 909 F.2d 488, 494 n.10 (11<sup>th</sup> Cir. 1990); *Green v. Johnson*, 116 F.3d 1115, 1124 (5<sup>th</sup> Cir. 1997). Filing these requests for Justin Rector *ex parte* is not sufficient to protect the confidentiality of Mr. Rector's ongoing pre-trial investigation. Filing several of Mr. Rector's motions *ex parte*, but not under seal, will not prevent the prosecution, victims, witnesses or any other members of the public from viewing the motion in the court file. Due to the sensitive nature of Mr. Rector's requests for various experts, his disclosure of defense strategy in so making those requests, and confidential juvenile records, it is further necessary that this Court allow Mr. Rector to file the requests under seal as well. In the U.S. District Court for the District of Arizona, confidential funding matters are filed *ex parte* and under seal as a matter of course. 18 U.S.C.A. 3006A. This is the most appropriate procedure here. Once the investigation is complete and this matter proceeds to trial or other resolution, it may be appropriate to unseal the above-referenced motion at a time post-resolution of this case.

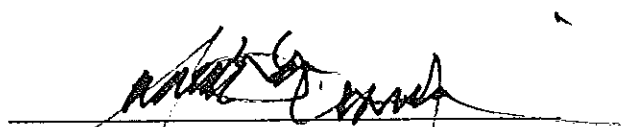
In light of the restrictions placed on an inmate's ability to appeal his conviction in federal court, state court proceedings are even more

important now than ever before, and federal law requires that state court proceedings be both full and fair. See Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), amending U.S. Code 28 U.S.C. §§ 2241-2254, and adding 28 U.S.C. § 2261, et seq. (1996). This tenet is made all the more vital by the U.S. Supreme Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which recognizes the significance of state post-conviction proceedings in resolving Sixth Amendment claims stemming from trial counsel's ineffective assistance. *Id.* (recognizing an equitable remedy for petitioners who were denied effective assistance of post-conviction counsel in litigating their ineffective assistance of trial counsel claims in Arizona where post-conviction is the first opportunity for such review). Development of a viable defense in Mr. Rector's case includes the right to proceed *ex parte* and under seal in requests for resources in order to develop of his constitutional claims for relief. This is especially true under Arizona Rule of Criminal Procedure 32.8(c), which places the burden of proof on a petitioner to prove his allegations by a preponderance of the evidence. See *Williams (Michael) v. Taylor*, 529 U.S. 420, 437 (2000) (“[C]omity is not served by saying a prisoner ‘has failed to develop a factual basis of a claim’ where he was unable to develop his claim in state court despite diligent effort.”). Mr. Rector’s trial counsel shares the exact same

concerns and obligations. The public has no right to invade the sanctity of the attorney-client privilege and development of mitigation. Defense counsel will be *prima facie* ineffective as counsel if such important protections are not safeguarded pre-trial.

In order to allow Mr. Rector a meaningful, independent defense to these charges, protect attorney-client confidentiality and privilege, and preserve his right to state and federal review, Mr. Rector requests this Court allow him to file his Motion for Appointment and Funding of Defense Expert Witnesses, Renewed Motion for Discovery of States Previously Listed Confidential Witnesses, and Motion for Discovery/ Release of Pertinent Juvenile Records *ex parte* and under seal. ***To do so, given this Court's previous directive, the Defense requests a clarification on the exact procedure the Court sanctions to permit filing and sealing of ex-parte motions.***

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of January, 2017.



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Gerald T. Gavin  
Co-Counsel for Justin Rector



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Julia Cassels  
Co-Counsel for Justin Rector

**ORIGINAL** of the forgoing filed  
This 27<sup>th</sup> day of January, 2017  
And hand delivered this date to:

Clerk of the Court, Mohave County  
Mohave County Courthouse  
401 E. Spring Street  
Kingman Arizona 86401

Honorable Lee Jantzen  
Mohave County Courthouse  
401 E. Spring Street  
2<sup>nd</sup> floor  
Kingman Arizona 86401

Greg McPhillips  
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Client Justin Rector  
Mohave County Jail

Client file

BY: 