



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**STATE OF ARIZONA ex. rel. ALLISTER ADEL, MARICOPA
COUNTY ATTORNEY v. HON. JAY R. ADELMAN, JUDGE OF THE
SUPERIOR COURT, IN AND FOR THE COUNTY OF MARICOPA
CR-21-0157-PR**

PARTIES:

Petitioner: The State of Arizona ex. rel. Allister Adel, Maricopa County Attorney

Respondent: Hon. Jay R. Adelman, Judge of the Superior Court, in and for the County of Maricopa

Real Party in Interest: Shavonte Deshawn Beasley

Amici Curia: Arizona Attorneys for Criminal Justice (CCJ) and Arizona Capital Representation Project (ACRP) in support of Real Party in Interest

FACTS:

The State charged Beasley with multiple felonies, including first degree murder, and is seeking the death penalty. The defense claims that Beasley is intellectually disabled and will use this disability in its mitigation if he is convicted.

On March 4, 2020, Beasley's mitigation specialist sent MCSO Sgt. House an email with the subject line "Visitation – Legal." The mitigation specialist identified herself as a contract mitigation specialist for OPDS and provided her driver's license. Sgt. House responded that "[f]or the purpose of mitigation, this account has been marked professional, not recorded, and free."

To contravene any suggestion that Beasley was intellectually disabled, the State subpoenaed Beasley's jail tablet data. After analyzing the messages, the State disclosed them and the subpoena to Beasley. The disclosure included 200-300 text messages with the mitigation specialist and about 20 text messages with the defense team's paralegal.

On May 12, 2020, the State filed a "Motion to Determine Non-Privileged Status of Communications." The State claimed the messages between Beasley and the mitigation specialist/paralegal were not privileged and cited to the MCSO Rules and Regulations and the tablets' Terms and Conditions.

Respondent Judge issued a ruling on August 26th. Respondent Judge relied on ER 4.4, which places an obligation on the recipient of attorney-client privileged communication to stop reviewing the materials and to contact the "sender" immediately. Respondent Judge determined that the State unilaterally determined that the disclosed communications: (1) were not sent inadvertently; and (2) constituted a waiver of the attorney-client privilege.

Respondent Judge found that an evidentiary hearing was unnecessary, given that the court's inquiry should remain focused on Beasley's state of mind, as opposed to MCSO's protocols for disseminating these materials. Respondent Judge ruled that all of Beasley's communications with the paralegal and mitigation specialist were confidential, privileged, and non-discoverable because the defense had made reasonable efforts to secure private and confidential communications with Beasley, Beasley subjectively believed the communications were privileged, and the State did not establish that Beasley waived the attorney-client privilege.

The State filed a motion for reconsideration and request for evidentiary hearing in light of *Clements v. Bernini*, 249 Ariz. 434 (2020). Under *Clements*, the party claiming the privilege has the burden of making a prima facie showing that the privilege applies to a specific communication and must show that: (1) there is an attorney-client relationship; (2) the communication was made to secure or provide legal advice; (3) the communication was made in confidence; and (4) the communication was treated as confidential. The State asserted that Respondent Judge failed to hold Beasley to his burden of proving that the communications he claimed were privileged were made to secure legal advice, were made in confidence, and were treated as confidential. It argued the superior court should make specific findings as each communication, text message or group of communications necessitates.

Respondent Judge denied the motion for reconsideration and the request for an evidentiary hearing. Respondent Judge determined that *Clements* validated the original ruling. Respondent Judge again focused on Beasley's state of mind and found that Beasley met his burden of demonstrating the applicability of the attorney-client privilege and that his communications made it apparent that he intended to engage in legal communications with multiple members of his defense team. Specifically, Respondent Judge found that the record indicates that (1) Beasley's text messages evinced an attempt to secure private communications with members of his legal team; and (2) MCSO Sgt. House indicated that these communications would be treated as "professional, not recorded, and free." Therefore, (1) there was an identifiable attorney-client privilege between Beasley and his legal team; (2) the communications were made to secure or provide legal advice; (3) the communications were made in confidence; and (4) the communications were to be treated as confidential.

The State filed a special action with the court of appeals. The court of appeals determined that the first *Clements* element was undisputed. It determined that the State failed to properly join the second element because the State failed to request a document-specific review in its original motion. The court of appeals determined that the remaining two elements turned on when the text messages were sent. It concluded that the email dated March 4th from Sgt. House to the mitigation specialist provided the assurance of confidentiality necessary to comply with the third and fourth elements in *Clements*. Messages sent after that date were therefore privileged attorney-client communication.

As for the messages sent before that date, the court of appeals acknowledged that the MCSO Rules and Regulations for Inmate Addendum and the Telmate Terms and Conditions could be read in various ways, including as providing that, in fact, the assurances were to the contrary. It remanded for further proceedings to resolve the "fact specific" inquiries of whether the communications made prior to March 4th were made in confidence and treated as confidential applying the analysis set forth in *Clements*

The State filed a petition for review before the Arizona Supreme Court, which was granted.

ISSUES:

As rephrased by the Supreme Court:

Did the court of appeals err when it concluded that the defendant's efforts to shield potentially privileged communications warranted a blanket application of the attorney-client privilege rather than requiring the defendant, as the proponent of the privilege, to establish that each communication is privileged?

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