IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

STATE OF WASHINGTON Plaintiff, v. BRIAN MOORE, Defendant	No: 09-1-01570-9 SHELLYE STARK'S MOTION AND MEMORANDUM TO INTERVENE AND QUASH WARRANT

I. INTRODUCTION

Shellye Stark asks this Court to allow her to intervene in this matter for the limited purpose of quashing the State's subpoena of the investigative notes and materials from Ms. Stark's case file. Because Ms. Stark has not been afforded notice and an opportunity to be heard, because the subpoena disregards her Sixth Amendment right to counsel and because it ignores the work-product privilege, Ms. Stark asks this Court to quash the subpoena. Alternatively, Ms. Stark asks that this court set the matter for a hearing at which counsel can appear. Finally, if the Court concludes the materials should be disclosed to the

WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WASHINGTON 98101
(206) 587-2711

State, Ms. Stark asks the Court to delay such disclosure to afford her the opportunity to seek appellate review.

II. ARGUMENT

Ms. Stark filed a notice of appeal of her conviction on May 29, 2009. The Washington Appellate Project was appointed to represent her on June 4, 2009. The State, in its prosecution of Ms. Stark's alleged coconspirator, has subpoenaed the investigative materials from Ms. Stark's case file. Ms. Stark understands the Court has set July 10, 2009, as the return date on the subpoena. However, counsel only learned of the State's effort to obtain this protected material on June 9, 2009.

A. Ms. Stark is entitled to intervene.

CR 24(a) provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicants interest is adequately represented by existing parties.

A client's file belongs to the client and not the attorney. Bar Association Opinion 181. Thus, if the State wishes to access Ms. Stark's file it must afford her notice and an opportunity to be heard. At no point has the State provided counsel notice of its efforts to gain access to materials contained in Ms. Stark's file. In fact counsel first learned of these efforts on Thursday July 9, 2009, and then only from Mr. Moore's attorney.

WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WASHINGTON 98101
(206) 587-2711

Ms. Stark has a fundamental interest at stake in this matter: the protection of privileged information d and the protection of her Sixth Amendment right to counsel and her Fourteenth Amendment right to due process. Those rights will be substantially impaired if she is not permitted to intervene. As set forth below, the State's efforts to access Ms. Stark's file undercuts here constitutional rights.

B. The State is not entitled to disclosure of the investigative materials.

Unlike the federal constitution and the constitutions of many other states, Article I, § 22 of the Washington Constitution expressly guarantees the right to appeal in every criminal case. That appeal is not final until the issuance of a mandate. RAP 12.7. The mandate does not issue merely upon issuance of a decision on the first level of appeal, but rather no sooner than 30 days following the denial of all filed discretionary motions such as motions for reconsideration and petitions for review. RAP 12.5. Ms. Stark's conviction is not final. The considerations which would have barred discovery of this material before or during her trial remain constant at least until the conviction becomes final. Indeed, the work-product privilege will continue even after the conviction becomes final.

Disclosure of the materials contained in Ms. Stark's file would deprive her of her Sixth Amendment right to the effective assistance of counsel. The Sixth Amendment guarantees Ms. Stark the right to the effective assistance of counsel in a criminal proceeding. See Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). "The right to counsel plays a crucial role in the adversarial system

WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WASHINGTON 98101
(206) 587-2711

embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)). The effectuation of this right imposes a duty to fully investigate known potential defenses, and where necessary to retain qualified experts to assist in the preparation of that defense. See e.g., In re the Personal Restraint Petition of Brett, 142 Wn.2d 868, 880, 85 16 P.3d 601 (2001) (counsel ineffective for failing to investigate and retain experts for potential mental defense).

Because Ms. Stark's attorneys were constitutionally required to thoroughly investigate her defense, the product of that investigation is part and parcel to the attorneys' representation of Ms. Stark. A "prosecutor's intentional intrusion into the attorney-client relationship constitutes a direct interference with the Sixth Amendment rights of a defendant." State v. Garza, 99 Wn.App. 291, 299, 994 P.3d 868 (2000) (citing Shillinger v. Haworth, 70 F.3d 1132, 1142 (10th Cir.1995)). While Garza concerned a jail staff's seizure and review of legal materials of pre-trial inmates, its logic is equally applicable here.

Moreover, because Ms. Stark's case is not yet final and the potential for retrial exists, allowing the prosecution to access her file eviscerates her right to present a defense on retrial and would be contrary to all notions of fairness and due process. There could be no doubt that the State could not have had access to these materials during Ms. Stark's trial.

WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WASHINGTON 98101
(206) 587-2711

> To the extent the trial court's order encompassed the pretrial disclosure of statements, signed or unsigned, recorded or written, given by potential prosecution witnesses during interviews with defense counsel or their investigator, such order was not an abuse of the trial court's discretion. **The notes taken during such interviews, as well as the summaries of interviews prepared by defense counsel or their investigator, should not be included in this pretrial discovery order**; they may, however, be subject to disclosure at trial if counsel or the investigator should be called as a witness by the defense for the purpose of impeaching the testimony given by a previously interviewed prosecution witness.

(Emphasis added) State v. Yates 111 Wn.2d 793, 796, 765 P.2d 291 (1988) (citing United States v. Nobles, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975)). In Nobles, the Court applied the protections of the work-product rule to criminal cases. Thus, Yates concluded an attorney's and investigator's notes are covered by the work-product privilege and not generally discoverable. There is no reason to permit the State access to what it plainly could not access during trial, and would not be able to access should there be a retrial.

Importantly, the work-product privilege does not end with the litigation. Instead, the Supreme Court has said "where the work product doctrine is concerned, it is well-settled that the protection applies to materials created in anticipation of litigation, even after that litigation has terminated." Soter v. Cowles Publishing, 162 Wn.2d 716, 732, 174 P.3d 60 (2007). (citing, Harris v. Drake, 152 Wn.2d 480, 489-90, 99 P.3d 872 (2004)) Yates held that an investigator's notes are protected from disclosure, in part, by the work-product privilege. Because Ms. Stark's conviction is not yet final that privilege still applies. Further, that privilege will continue to apply even after her conviction does become final.

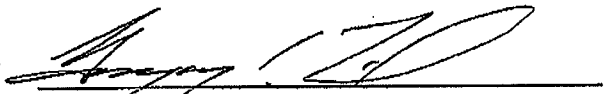
WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WASHINGTON 98101
(206) 587-2711

This court reasoned that because the State filed the subpoena in Mr. Moore's case, and because Ms. Stark's attorney never represented Mr. Moore, the materials were not protected. By that reasoning, whenever the State elects to charge codefendants under different cause numbers it would be entitled to subpoena one defendant's file so long as it did so under the co-defendant's cause number. That is a nonsensical distinction. Instead, if the information would not have been available to the State had it sought it in Ms. Stark's case, it does not become available merely because the State has sought it in a separate a matter.

III. CONCLUSION

The court should permit Ms. Stark to intervene in this matter and should quash the State's subpoena.

Respectfully submitted this 10th day of July, 2009.



GREGORY C. LINK - 25228
DAVID L. DONNAN - 19271
Washington Appellate Project – 91052
Attorneys for Appellant