

SUPREME COURT, STATE OF COLORADO	
Colorado State Judicial Building 2 East 14 th Avenue Denver, Colorado 80203	
Weld County District Court Honorable Judge Timothy G. Kerns Case No. 2018CR686	
IN RE: THE PEOPLE OF THE STATE OF COLORADO v. CORTES-GONZALEZ, JARED	
	σ COURT USE ONLY σ
Megan A. Ring Colorado State Public Defender Megan Bishop, #50348 Michele Newell, #37019 Ashley E. Sullivan, #45347 822 7 th St., Suite 300 Greeley, Colorado 80631 Phone: 970-353-8224 Fax: 970-352-8293 Email: Ashley.Sullivan@coloradodefenders.us	Case Number: __SA ____
IN RE: PEOPLE V. CORTES-GONZALEZ	

The Office of the State Public Defender (“Public Defender”) petitions this Court, pursuant to C.A.R. 21, to issue an order to show cause and to grant appropriate relief as requested below.

ISSUES PRESENTED

I. Whether the district court erroneously granted the prosecution’s *subpoena duces tecum* for original defense counsel’s file in its entirety for *in camera* review over counsel’s objection.

II. Whether the district court erroneously found a blanket waiver of attorney-client privilege by Mr. Cortes-Gonzalez based on his particular claim of ineffective assistance of counsel.

THE PARTIES

The petitioner in this original proceeding is the Office of the State Public Defender, original counsel for the defendant in the district court. The proposed respondents are the People of the State of Colorado (the prosecution), the Weld County District Court (the trial court), and Stephanie Perkins, alternate defense counsel for the defendant in the district court. *See People v. Williams*, 987 P.2d 232, 233 n.1 (Colo. 1999) (acknowledging that,

although any relief under C.A.R. 21 would issue against the tribunal below, the prosecution is the “real party in interest”).

TRIBUNAL BELOW

The tribunal that issued the order that is the subject of this original proceeding is the Weld County District Court. The contested order was issued in Case No. 18CR686.

ENTITY AGAINST WHICH RELIEF IS SOUGHT

The relief requested in this case would issue against the Weld County District Court.

RULINGS COMPLAINED OF AND RELIEF SOUGHT

Counsel is challenging Judge Kerns's complete waiver of Mr. Cortes-Gonzalez's attorney-client privilege due to his claim of ineffective assistance of counsel and Judge Kern's order to Counsel to turn over the complete case file for *in camera* review over Counsel's objection without making any findings of fact limiting the requested materials to the scope of the claim of ineffective assistance of counsel in direct violation of the holding of *People v. Madera*, 112 P.3d 688 (Colo. 2005).

Counsel requests this Court issue a rule to show cause as to why the district court's orders finding a complete waiver of attorney-client privilege and requiring counsel to disclose the entire file should not be reversed.

NO OTHER ADEQUATE REMEDY IS AVAILABLE

The Court should exercise its original jurisdiction. There is no other adequate remedy available because, despite the limited nature of Mr. Cortes-Gonzalez's ineffective assistance claims, the court has ordered counsel to turn

over the entire contents of their file for an *in camera* review, which will be a significant violation of attorney-client privilege. *See People v. Steen*, 318 P.3d 487, 490 (Colo. 2014) (relief is appropriate “where the normal appellate process would prove inadequate.”) This Court has long-recognized that this type of improper order requiring the disclosure of records which are protected by a statutory privilege warrants “immediate review” because “the damage to [the holder of the privilege] will occur upon their disclosure regardless of the ultimate outcome of any appeal from a final judgment.” *Clark v. Dist. Court*, 668 P.2d 3, 7 (Colo. 1983) (reversing a trial court’s discovery order where the defendant had not waived his privilege as to his psychiatric and psychological records regarding his drug and alcohol treatment); *see also, e.g. Rademacher v. Greschler*, 455 P.3d 769, 772-73 (Colo. 2020) (granting original jurisdiction to determine whether the district court’s finding that the defendant impliedly waived attorney-client privilege because the damage of the erroneous production of such records would damage the privilege-holder immediately upon disclosure of the records and could not be cured on appeal). Here - with the exception to materials relevant to the limited scope of Mr. Cortes-Gonzalez’s claim of ineffective assistance of counsel regarding advisement of the nature of the plea agreement – the entirety of the Public Defender’s case file is privileged attorney-client material, and the damage caused to the Public

Defender and Mr. Cortes-Gonzalez would occur immediately upon the District Court's review of privileged material which cannot be remedied on appeal.

Notably, this Court has previously exercised original jurisdiction on similar issues in *People v. Madera*, 112 P.3d 688 (Colo. 2005) and *People v. Trujillo*, 133 P.3d 539 (Colo. 2006).

FACTUAL AND PROCEDURAL BACKGROUND

I. Initial Proceedings

In 18CR686, Jared Cortes-Gonzalez was charged on March 23, 2018 with Second Degree Burglary, Assault in the Second Degree, Robbery, two counts of Child Abuse, and three counts of Violation of a Protection Order.

On November 21, 2018, Mr. Cortes-Gonzalez entered into a global plea agreement. At the time, Mr. Cortes-Gonzalez was represented by Kim McDonald, Deputy Public Defender. In 18CR868, Mr. Cortes-Gonzalez pleaded guilty to added Count 9: F4 Second Degree Burglary; in 18CR273, he pleaded guilty to Count 2: F5 First Degree Criminal Trespass; and in 16CR671 and 15CR74, he admitted to violating probation. In all four cases, the sentencing agreement was that the sentence would be open to the court, but no more than twenty (20) years in the Department of Corrections (D.O.C.) combined in Weld County cases 18CR686, 18CR273, 16CR671, and 15CR74. *See* Appendices A-D.

On January 17, 2019, the court sentenced Mr. Cortes-Gonzalez in this case to twelve (12) years in D.O.C., to be served consecutive to the sentence received in 18CR273. The court sentenced Mr. Cortes-Gonzalez to the maximum possible sentence permitted by the plea agreement: an aggregate of twenty (20) years in D.O.C. In 18CR273, the court sentenced Mr. Cortes-Gonzalez to six (6) years in D.O.C. In 16CR671, the court sentenced Mr. Cortes-Gonzalez to two (2) years in D.O.C. on Count 5 to be served concurrent to 15CR74 but consecutive to 18CR686 and 18CR273. In 15CR74, the court sentenced Mr. Cortes-Gonzalez to two (2) years in D.O.C. to be served concurrent to 16CR671 but consecutive to 18CR686 and 18CR273. *See* Appendices E-H.

II. Post-Conviction Motions

On January 31, 2019, Mr. Cortes-Gonzalez filed a “Motion to Consider 35-C” alleging Ms. McDonald failed to accurately advise him of the potential consequences of his plea agreement. Specifically, Mr. Cortes-Gonzalez alleged that Ms. McDonald advised him that he would be sentenced to 8 years in the halfway house or 8-12 years in the Department of Corrections. The court appointed alternate defense counsel (Stephanie Perkins) to represent Mr. Cortes-Gonzalez on this claim on February 1, 2019. Mr. Cortes-Gonzalez filed additional motions alleging ineffective assistance of counsel and requesting to

withdraw his plea agreement on February 5, 2019. On April 19, 2021, Ms. Perkins filed a Supplemental Motion Pursuant to Crim.P. 35(C) alleging two claims of ineffective assistance of counsel: (I) Mr. Cortes-Gonzalez's plea was not knowingly made because he was not fully aware of the consequences of his plea; and (II) Mr. Cortes-Gonzalez did not enter into a knowing and voluntary plea due to a language barrier. On June 3, 2021, Mr. Cortes-Gonzalez filed a *pro se* supplemental pleading alleging Ms. McDonald was ineffective in failing to file a motion for reconsideration of his sentence. *See* Appendices I-M.

III. Contested Orders

On June 4, 2021, Deputy District Attorney Travis Winter filed a Forthwith Motion for Order on Waiver of Attorney-Client Confidentiality and Privilege requesting the court “enter an order recognizing the extent of the defendant’s waiver of all confidential attorney-client privileges or relationships affected by the pursuit” of his motion pursuant to Crim.P. 35(c). The court granted the motion on June 5, 2021. *See* Appendices N-O.

On June 17, 2021, Mr. Winter served a Subpoena Duces Tecum on the Public Defender’s demanding the production of “ANY AND ALL papers, documents, and records possessed by the Public Defender’s Office in connection with Weld County Court cases 18CR686; 18CR273; 16CR671; 15CR74. On September 13, 2021, the Greeley Public Defender’s Office filed

an Objection to this Subpoena Duces Tecum, specifically arguing that the demand for the production of the entire file violated Mr. Cortes-Gonzalez's attorney-client privilege and failed to comply with the procedure and findings required by *Madera*, 112 P.3d 688. On September 29, 2021, the court ordered the Greeley Public Defender's Office to comply with the subpoena duces tecum as issued and provide the entire contents of Mr. Cortes-Gonzalez's file without making any findings of fact. On October 12, 2021, the Greeley Public Defender's Office filed a Motion to Reconsider this Order. *See* Appendices P-T.

On October 14, 2021, the Greeley Public Defender's Office produced a redacted copy of Mr. Cortes-Gonzalez's files relating to Weld County Cases 18CR686, 18CR273, 16CR671, and 15CR74 as it relates to the specific claims of ineffective assistance of counsel raised by Mr. Cortes-Gonzalez; the redacted copy was provided directly to the District Attorney. Additionally, the Greeley Public Defender's Office produced the full unredacted files relating to Weld County Cases 18CR686, 18CR273, 16CR671, and 15CR74 for *in camera* review, and renewed its objection to the court accepting the full file without limitation based on the claims of ineffective assistance of counsel in violation of *Madera* and Mr. Cortes-Gonzalez's right to attorney-client privilege. The court ordered the production of the complete file in order to conduct an *in camera* review, and

did not make any findings of fact or conclusions of law in accordance with *Madera* at this hearing. *See* Appendix U.

ARGUMENTS IN SUPPORT OF RELIEF UNDER C.A.R. 21

JUDGE KERNS SHOULD HAVE DENIED THE PROSECUTIONS SUPBOENA DUCES TECUM WITHOUT ANY LIMITATIONS BASED ON THE SCOPE OF THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, AND SHOULD NOT HAVE FOUND A COMPLETE WAIVER OF ATTORNEY-CLIENT PRIVILEGE BY MR. CORTES-GONZALEZ.

I. General Principles of Law Governing Attorney-Client Privilege

The attorney-client privilege is codified in Colorado in C.R.S. §13-90-107(1)(b):

An attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment.

Rule 1.6(a) of the Colorado Rule of Professional Responsibility, titled “CONFIDENTIALITY OF INFORMATION”, further provides in the context of the ethical rules that:

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

The comments to Rule 1.6 of the Colorado Rules of Professional Conduct further clarify that, “The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. . . .”

The burden of establishing a waiver of the attorney-client privilege rests with the party seeking to overcome the privilege. *Wesp v. Everson*, 33 P.3d 191, 198 (Colo. 2001).

II. Ineffective assistance of counsel claims are not a blanket waiver of attorney-client privilege.

Although a claim of ineffective assistance of counsel may result in an implied waiver of attorney-client privilege to the extent necessary to defend against such claim, it is not a blanket waiver as to all communications or work product.

The limited scope of any such waiver is specifically outlined in C.R.S. §18-1-417, titled “Ineffective Assistance of Counsel claims – waiver of privilege”, and providing as follows:

Notwithstanding any other provision of law, whenever a defendant alleges ineffective assistance of counsel, the defendant automatically waives any confidentiality, including attorney-client privilege and work-product privileges, between counsel and defendant, and between the defendant or counsel . . . , but only with respect to the information that is related to the defendant's claim of ineffective assistance.

Similarly, C.R.S. §16-12-206, titled "Postconviction Review – motion", also makes clear that any such waiver of privilege is limited in scope to matters pertinent to the defendant's claim:

By alleging that trial counsel rendered ineffective assistance, the defendant automatically waives confidentiality pursuant to the provisions of section 18-1-417, between the defendant and trial counsel, but only with respect to the information that is related to the defendant's claim of ineffective assistance.

The proper procedure for the trial court, when faced with a request for the compelled disclosure of information protected by the attorney-client privilege, is outlined in *People v. Trujillo*:

Before granting a request for an in camera inspection of an attorney's case file, the trial court must determine:

- (1) As precisely as possible, the information sought to be discovered,
- (2) Whether the information is relevant to a matter at issue,
- (3) Whether the information could be obtained by any other means,
- (4) Whether the information is privileged,
- (5) If it is privileged, whether the privilege has been waived,

- (6) If it is privileged, but has been waived, either explicitly or impliedly, the scope of the waiver.

144 P.3d 539 (Colo. 2006) (relying on *Madera*, 112 P.3d at 691). In *People v. Madera*, the Supreme Court also specifically addressed the issue of disclosing to the Court the entirety of the Public Defender's file without such findings and conclusions having been made:

A trial court should be reluctant to review the contents of an attorney's case file precisely because of the importance of the privileges involved. In camera disclosure to the court is still a form of disclosure. Even if it goes no further and the court declines to release any documents to the moving party, the court's review could have a chilling effect on attorneys and their clients, especially if in camera review occurred frequently or was easily obtained.

A trial court undertakes a significant workload burden when it reviews an attorney's case file. Unless the information sought is very carefully delineated, the trial court will have no guidance as it examines the case file. Reviews in such an instance will be tedious at best, and probably unproductive as well.

112 P.3d 688, 691 (Colo. 2005).

Madera outlines the procedures and concerns which the Court must follow when faced with the compelled disclosure of information protected by attorney-client privilege. *Id.* Although the issue in *Madera* was brought under Rule 32(d) of the Colorado Rules of Criminal

Procedure (Withdrawal of Plea), and not under Rule 35(c), the issue of implied waiver of attorney-client privilege is the relevant issue, not the procedural basis for the claim.

The defendant in *Madera* moved to withdraw his plea pursuant to Rule 32(d) by alleging ineffective assistance of counsel. Mr. Cortes-Gonzalez, in this case, is alleging ineffective assistance of trial counsel under C.R.Crim.P. Rule 35(c). The attorney-client privilege is the same regardless of the type of post-conviction claim under which it is brought, and the analysis outlined in *Madera* must be completed by the Court before ordering that information protected by the attorney-client privilege be disclosed or even provided to the Court for *in camera* inspection.

The ultimate holding in *Madera* was that the trial court's order to require the entire case file to be given to the trial court for in camera review was premature, based both on a failure to follow the procedures outlined in *Madera* as well as issues regarding the substance of the defendant's claim that "the options and terms of the pre-arranged plea agreement were not fully explained to the Defendant." 112 P.3d at 692. The defendant in *Madera* waived attorney-client privilege only with respect to communications which the defendant's attorney had with him

regarding the potential sentence he faced. This Court held that the attorney could be examined under oath regarding communications he had with the defendant regarding his sentencing advice, and that the attorney would be required to disclose any relevant written materials he may have regarding the potential sentence. *Id.*

An explicit statement of the issues under which Mr. Cortes-Gonzalez is being allowed to proceed and the specific grievances regarding counsel's representation of Mr. Cortes-Gonzalez which have been raised will allow counsel to more directly determine what portions of the file may be relevant to Mr. Cortes-Gonzalez's claims. Undersigned counsel asserts, however, that the Court must first determine the specific issues about which Mr. Cortes-Gonzalez's original counsel can be examined regarding, and any relevant documentation in the file pertaining to those distinct issues can be provided to the Court for in camera review. Absent such determinations and specification, , a wholesale turning over of the entirety of Mr. Cortez-Gonzales's file violates his attorney-client privilege.

INDEX OF SUPPORTING DOCUMENTS

Appendix A: 18CR686 Plea Agreement
Appendix B: 18CR273 Plea Agreement
Appendix C: 16CR671 Plea Agreement
Appendix D: 15CR74 Plea Agreement
Appendix E: 18CR686 Mittimus
Appendix F: 18CR273 Mittimus
Appendix G: 16CR671 Mittimus
Appendix H: 15CR74 Mittimus
Appendix I: January 21, 2019 Pro Se Motion to Consider 35-C
Appendix J: February 1, 2019 Order: Motion to Consider 35-C
Appendix K: February 5, 2019 Pro Se Motion to Withdraw Plea
Appendix L: April 19, 2021 Supplemental Motion Pursuant to Crim.P. 35(c)
Appendix M: June 3, 2021 Pro Se Supplemental Motion for Post-Conviction Relief
Appendix N: June 4, 2021 Forthwith Motion for Order on Waiver of Attorney-Client Confidentiality and Privilege
Appendix O: June 5, 2021 Order granting Forthwith Motion for Order on Waiver of Attorney-Client Confidentiality and Privilege
Appendix P: Subpoena Duces Tecum
Appendix Q: September 13, 2021 Objection to Subpoena Duces Tecum for Counsel to Provide Entire File in Violation of Mr. Cortes-Gonzalez's Attorney-Client Privilege and for Court to Make Required Factual Findings Pursuant to People v. Madera Prior to Any Release of Privileged Information
Appendix R: September 29, 2021 Notice of Subpoena Duces Tecum and Motion to Show Cause
Appendix S: September 29, 2021 Order Granting Notice of Subpoena Duces Tecum and Motion to Show Cause
Appendix T: October 12, 2021 Motion to Reconsider Court Order Granting Notice of Subpoena Duces Tecum and Motion to Show Cause
Appendix U: October 14, 2021 Transcript

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CERTIFICATE OF SERVICE

I certify that, on October 20, 2021, a copy of In Re: People v. JARED CORTES-GONZALEZ was served through E-Filing on the Weld County District Attorney, Alternate Defense Counsel, and Weld County District Court.

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