

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

FILED

MAR 29 2010

STATE OF MISSOURI,)
Plaintiff)
)
v.)
)
ALYSSA D BUSTAMANTE,)
Defendant)

BRENDA A. UMSTATTD
CLERK CIRCUIT COURT
COLE COUNTY, MISSOURI

Cause No. 09AC-CR03516-01F

REQUEST TO FILE SOME MOTIONS EX PARTE

WHEN DEEMED APPROPRIATE BY THE COURT

COMES NOW the accused, Alyssa Bustamante, by and through counsel, and hereby respectfully requests that: (1) this honorable Court issue Orders to various agencies to release records relevant to Ms. Bustamante's case and to deliver said records to the defense; (2) this honorable Court issue an Order (attached hereto) to allow Ms. Bustamante to file facts in support of this Motion under seal; and, (3) this honorable Court issue an Order, when appropriate, allowing for an *ex parte* hearing in order to prove the factual basis for Investigaitve Motions -- facts which are privileged and contain information that is attorney work product and would reveal trial strategy. This motion is made pursuant to Ms. Bustamante's Fourteenth Amendment due process right to "a fair opportunity to present his defense," established in *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985), as well as her rights to equal protection, effective assistance of counsel, confrontation, compulsory process, and a reliable sentencing as guaranteed by Sixth and

Eight Amendments of the United States Constitution and Article I, Sections 10 and 18(a) of the Constitution of Missouri.

In support of this motion, counsel states as follows:

I. THE NEED FOR CERTAIN RECORDS

1. Ms. Bustamante is charged with one count of murder in the first degree and one count of armed criminal action.

2. In conducting the investigation into this case, it has become apparent to defense counsel that there may be mitigating circumstances and evidence from Ms. Bustamante's past that would be officially addressed in certain records by various institutions and agencies. These records are protected by rules of confidentiality and subject to agency policies. The defense can only gain access to these critical records through a court order.

II. THE NEED FOR AN EX PARTE FACTUAL HEARING

3. The Supreme Court's decision in *Ake* was based on its recognition that to deny an indigent accused basic, critical legal tools while the State has unfettered access to the same tools would render a criminal trial fundamentally unfair. *Id.* The truth finding function of the adversary process would also be lost if the prosecution were allowed simply to overwhelm the impoverished defendant with the wealth of its resources:

We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary

process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw material integral to the building of an effective defense. . . . (This Court) has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system."

Ake, 470 U.S. at 77, quoting *Ross v. Moffitt*, 417 U.S. 600, 612 (1974). Due process and fundamental fairness thus forbid the State from "legitimately assert[ing] an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." *Ake*, 470 U.S. at 79.

4. These same interests, which require the State to provide services essential to the defense, also require that applications for those services be considered *ex parte*. Ms. Bustamante's adversary, the Cole County Prosecutor, should have no more voice in determining whether Ms. Bustamante has the "raw materials" integral to an effective defense, or what records she has access to in presenting her defense, any more than an accused should have a voice in what police officers investigate her case or what State experts analyze her fingerprints or handwriting.

5. Nor does fundamental fairness tolerate requiring only the poor defendant to disclose prematurely, on account of her poverty, the lines of investigation she is undertaking, the names of those she is consulting in preparing her case and why, and

other confidential matters. The confidential decisions of client and counsel are among the "basic tools of an adequate defense" which must not be abridged due to inability to pay. *Ake*, 470 U.S. at 77, quoting *Britt v. North Carolina*, 404 U.S. 226, 227(1971). Involving the prosecution in the consideration of such sensitive defense matters would merely enhance the "strategic advantage" the *Ake* ruling was meant to minimize.

6. Obviously, to require poor defendants to reveal this information to the prosecution to obtain the basic tools of their defense would compromise their right to present a defense. See *Blazo v. Superior Ct.*, 315 N.E.2d 857, 860 n.8 (Mass. 1974) ("The reason *ex parte* application is allowed is that, just as a defendant able to foot the costs need not explain to anyone his reasons for summoning a given witness, so an impecunious defendant should be able to summon his witnesses without explanation that will reach the adversary").

7. In federal prosecutions, a defendant is protected by express statutory provisions in the Criminal Justice Act which require that an indigent's request for expert assistance be considered *ex parte*. 18 U.S.C. 3006A (e); Fed. R. Crim. P. 17 (b). See also H.R.Rep. No. 864, 88th Cong., 2d Sess. (1963) reprinted in 2 U.S.Code Cong. & Ad.News 2990 (1964) (Criminal Justice Act's *ex parte* procedure "prevents the possibility that an open hearing may cause a defendant to reveal his defense."); S.Rep. No. 346, 88th Cong., 1st Sess. 3 (1963) (*ex parte* requirement included in Criminal Justice Act "in order to protect the accused from premature disclosure of his case.") Judicial interpretations of the *ex parte* requirement have made clear that its function is to

protect the accused from having to make premature disclosure of confidential information to the State.

8. For example, in *United States v. Sutton*, 464 F.2d 552 (5th Cir. 1972), the defendant's conviction was reversed due to the trial court's failure to hold an *ex parte* hearing on his motion for an investigator. The reviewing court agreed that the defendant should not have had to reveal the names of his potential witnesses or the type of information sought by the investigation and thereby unveil his case to the prosecution. *Id.* at 553. The court in *Marshall v. United States*, 423 F.2d 1315, 1318 (10th Cir. 1970), similarly overturned a conviction when the accused was subject to an adversarial rather than *ex parte* hearing on his need for investigative aid, observing that "the manifest purpose of requiring that the inquiry be *ex parte* is to insure that the defendant will not have to make a premature disclosure of his case."

9. As stated by the United States Court of Appeals for the Fifth Circuit, these proceedings must be held *ex parte* because "[d]issemination of information critical to the defense permits the government to enjoy unauthorized discovery which is forbidden under our concept of criminal procedure" *United States v. Edwards*, 488 F.2d 1154, 1162 (5th Cir. 1974). *See also*, *United States v. Greschner*, 802 F.2d 373, 379-80 (10th Cir. 1986), *cert. denied*, 480 U.S. 908 (1987) (although waived by defense, court of appeals notes on its own motion that it was error for trial court to allow government attorneys to attend hearing on application for penologist, pathologist, blood tests and subpoenas at which defendants were required to disclose their theory of

self-defense in support of their applications); *United States v. Meriwether*, 486 F.2d 498, 506 (5th Cir. 1973) (intent of *ex parte* provision is to shield theory of defense from prosecutor's scrutiny); *Williams v. United States*, 310 A.2d 244 (D.C. App. 1973) (purpose of *ex parte* hearing is to ensure that defendant need not make premature disclosure of case to obtain access to expert services); *Gaither v. United States*, 391 A.2d 1364, 1367 n.4 (D.C. App. 1978) (eligibility and need for defense service must be determined in *ex parte* proceeding to afford accused opportunity to present request without prematurely disclosing merits of defense to prosecution).

10. The same considerations apply with equal force to this prosecution. To require Ms. Bustamante to disclose the nature of her defense, the names of institutions of whom she seeks to inquire, and the purposes for which she seeks the inquiry would compromise her right to present a defense and to prepare her case in confidence with counsel in violation of the principles of law cited in the opening paragraph of this motion.

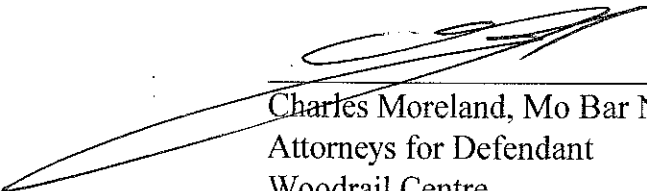
11. Moreover, disclosure of any reports that Ms. Bustamante seeks, should not be disclosed to the State until such time as counsel has made a thorough and confidential investigation of the case and whether or not the insertion of certain issues of the reports into the case will be in derogation of Ms. Bustamante's Fifth and Sixth Amendment rights.. *See, State v. Armentrout*, 8 S.W. 3d 99, 105 (Mo. banc 1999) (defendant does not need to relinquish one right in order to receive protection of the other).

WHEREFORE, for the foregoing reasons, Ms. Bustamante hereby respectfully

requests that: (1) this honorable Court issue Orders, when appropriate, to release records pertaining to Ms. Bustamante and to deliver said records to the defense; (2) this honorable Court issue an Order (attached hereto) to allow Ms. Bustamante to file facts in support of this Motion under seal; and, (3) this honorable Court issue an Order, when appropriate, allowing for an *ex parte* hearing in order to prove the factual basis for Investigaitve Motions -- facts which are privileged and contain information that is attorney work product and would reveal trial strategy.

Respectfully submitted,


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Certificate of Service

I certify that a true copy of the above and foregoing was served on all parties by regular US Mail, postage prepaid, to their address of record, all on this 25th day of March, 2010.


Donald Catlett