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Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 9/5/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

AVTAR SINGH GREWAL, ) No. 1 CA-SA 13-0208  
)  
Petitioner, ) DEPARTMENT E  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
THE HONORABLE KAREN L. O'CONNOR, ) Rule 111, Rules of the  
Judge of the SUPERIOR COURT OF ) Arizona Supreme Court)  
THE STATE OF ARIZONA, in and for )  
the County of MARICOPA, )  
)  
Respondent Judge, )  
)  
STATE OF ARIZONA ex rel. WILLIAM )  
G. MONTGOMERY, Maricopa County )  
Attorney, )  
)  
Real Party in Interest. )  
\_\_\_\_\_ )

Petition for Special Action  
from the Superior Court in Maricopa County

Cause No. CR2007-006487-001  
The Honorable Karen L. O'Connor, Judge

**JURISDICTION ACCEPTED, RELIEF DENIED**

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**T H U M M A**, Judge

¶1 Petitioner Avtar Singh Grewal faces first degree capital murder and burglary charges and is alleged to have killed his wife N.K. on March 29, 2007 in Maricopa County and then fled the country. Grewal was arrested on March 31, 2007 upon his arrival at the Indira Gandhi International Airport in New Delhi, India. On April 3, 2007, Grewal was indicted in Maricopa County. Following lengthy extradition proceedings, Grewal was extradited from India and returned to Arizona in September 2011.

¶2 On September 13, 2011, the government of India transferred custody of Grewal to United States Federal Bureau of Investigation (FBI) agents in India to be transported to Arizona. At that time, Grewal had in his possession three binders (about 160 pages) of documents.<sup>1</sup> Whether the documents in those three binders are protected from disclosure by the attorney-client privilege is the issue to be resolved in this special action.

¶3 Although the circumstances are disputed, Grewal gave the binders to FBI Agent Wilson who forwarded them to law enforcement in Arizona. On November 3, 2011, Grewal filed a

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<sup>1</sup> Those binders properly are not part of the record provided to this court and apparently have never been provided to, or reviewed by, any judicial officer.

motion for protective order in Maricopa County Superior Court, claiming the entirety of the binders were privileged and seeking an order preventing law enforcement from reviewing the binders. On November 4, 2011, the superior court issued the requested protective order.

¶4 Grewal then filed a motion for finding of privilege and request for order to transfer materials to defense, arguing the binders were "protected by the sixth amendment and the attorney-client privilege" and that they should immediately be transferred to defense counsel. Grewal's Sixth Amendment argument was that he created the binders after his indictment, meaning he "had a sixth amendment right to counsel at the time he compiled the binders." Grewal's attorney-client privilege claim asserted that he "intended the binders to be read only by his counsel so they could render legal advice and prepare for his defense." The State opposed the motion and, among other things, asked that a special master review the binders and determine if any of the documents were privileged.

¶5 In a May 25, 2012 nunc pro tunc ruling (issued July 19, 2012), after briefing, other motion practice and oral argument (but not an evidentiary hearing), the superior court found that "[b]ased on the pleadings, it appears that the binders . . . are covered by the attorney-client privilege. . . . The binders were written by [Grewal] to assist his American

attorneys in defending him against the instant charges and possibly upon the advice of his Indian attorneys." Accordingly, the court directed the State to provide the binders to Grewal's counsel; that the State not be allowed to view the binders and found the appointment of a special master was not necessary.<sup>2</sup>

¶16 On August 1, 2012, the State provided the binders to Grewal's counsel, with whom they have remained ever since.

¶17 In March 2013, the State filed a motion to reconsider, attaching a portion of the FBI report and a handwritten note signed by Grewal, and claiming the binders "did not contain work product, but rather contained [Grewal's] . . . 'full confession.'" The FBI report and Grewal's note state Grewal "read out loud 'Part I' [the first binder]" to FBI Agents Wilson and Sharma, which "contains [Grewal's] full confession regarding the death of" N.K. Grewal opposed the motion, arguing there was no new information or evidence of waiver that would properly allow the court to reconsider the May 2012 ruling.

¶18 In July 2013, the superior court held an evidentiary hearing on the State's motion and FBI Agent Wilson testified. Agent Wilson testified that his involvement was limited to coordinating the transfer of Grewal from the government of India to the United States government at the Indira Gandhi

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<sup>2</sup> The superior court also rejected Grewal's reliance on the Sixth Amendment in seeking the return of the binders.

International Airport in New Delhi. Agent Wilson met with Grewal "to explain the process, how it would go that day in terms of his going through customs and immigration, being put on a plane with the U.S. Marshals, things of that nature." Agent Wilson also explained to Grewal his rights and gave him a standard advice of rights form that Grewal signed.

¶9 When they met, Grewal had the three binders and Agent Wilson recalled Grewal saying "they were his diary of what had transpired involving his wife." Grewal "stated that he did not want to lose them [the binders], but he wanted me [Agent Wilson] to have them. He said that they were definitely important documents."

¶10 Grewal tried to tell Agent Wilson what was in the binders and, when asked at the evidentiary hearing how that came about, Agent Wilson answered:

In fact, he - I wanted - because of the essence of time, I just wanted him to briefly tell me what was in the binders, but he demanded or was very assertive that he wanted to read out loud the binders. And in the time that we were given, he actually read through the entire volume one of three volumes, and would have read all three had we had sufficient time.

Grewal took these actions in the airport waiting area after Agent Wilson clearly identified himself to Grewal as an FBI agent and after Agent Wilson had explained to Grewal his rights. Agent Wilson was seated next to Grewal and "could read,

verbatim, as [Grewal] was reading out loud" and confirmed that Grewal was reading the binder verbatim. Agent Wilson tried to have Grewal summarize the documents "several times" to speed things along, "but [Grewal] felt compelled to read out loud the verbiage that was in this [sic] document." Although noting Grewal wanted the binders safe, Agent Wilson testified Grewal did not indicate what he wanted done with the binders after Agent Wilson took them, but "he definitely wanted me to have the binders."

¶11 On cross-examination, Agent Wilson confirmed that Grewal was not allowed to take any personal items on the airplane. When asked if Grewal read through binders two and three, Agent Wilson testified that "[h]e paraphrased much of it." After leaving Grewal with the U.S. Marshals and returning to his office, Agent Wilson "read the first binder cover to cover and then the second and third binders I flipped through. Quite frankly I didn't have enough time to read verbatim through . . . all three binders."

¶12 When asked about the contents of the binders, Agent Wilson testified there were photographs, writings and descriptions of

when things were good but then how things quickly turned south and how tumultuous the relationship was and how much pain and agony Mr. Grewal was suffering based upon his actions involving her death, as well as

other miscellaneous things like the shame that he had brought upon his family, and his inability to provide for his parents, which is something in the Indian culture that is very paramount.

And that seemed to be a continuation of the theme throughout all three binders. Even in binder one, when he was reading that material to me, it seemed to be very, very repetitive.

Agent Wilson testified that his associate, Foreign Service National Sharma, "was there the night of this event, and so he was privy to these documents as well."

¶13 On redirect, Agent Wilson testified that there was nothing in the binders or that Grewal read from binder one that was addressed to an attorney. When asked whether Grewal ever mentioned anything about getting the binders to an attorney, Agent Wilson said "[n]o." When asked whether he forced Grewal to read from the binders, or whether it was something Grewal wanted to do, Agent Wilson responded:

Quite frankly I didn't really want him to read from the binders because of the interest of time, but he was very emotional and he stated that he had to read these to me, and so I went ahead and let him read.

Several times I would try and cut him off and say, okay, we've got that, but he goes, no I want to read this. So he would read it verbatim.

¶14 After Agent Wilson testified, the superior court gave Grewal an express opportunity to present evidence. Grewal,

however, declined to present any evidence at the hearing, noting it was the State's motion to reconsider. The parties then presented argument.

¶15 The State argued the binders were "not made for a lawyer, for his attorneys to review" and, instead, were "something he wanted the law enforcement officer to hear. He wanted to make this statement and that's what these binders were. We're entitled to them." When Grewal argued that the binders "were written for his attorneys to assist in this case," the following exchange occurred:

THE COURT: What evidence do we have that they were written to assist his attorneys in the case?

[GREWAL'S COUNSEL]: What evidence do we have that they weren't? What we have is three binders that outline his case, and I'm just going to go through what we have.

He knew he would get counsel. He knew that he was being extradited to face these criminal charges. He had prepared these binders to assist in his case.

Grewal also argued, without elaboration, that what was said to Agent Wilson "was not a waiver of any privilege." Although noting Agent Wilson could testify about what Grewal told him, defense counsel argued the binders "are no different than if [Grewal] writes a letter to his attorney and he tells the State - or a police officer the same thing that's contained in the letter, he doesn't have to give over that letter." Grewal also



argued "[b]inders two and three are not the same as the first. They contain information on mitigation and his life story." Grewal summarized by stating "[w]e stand on our pleadings."

¶16 In rebuttal, the State argued Grewal had not presented any evidence the binders were privileged and there was nothing in the record "that supports these being privileged documents." "They were not prepared for an attorney. They were prepared for [Grewal] to confess and to give an explanation as to why he did it. When the first law enforcement officer talked to [Grewal], he did just that, and they're not privileged. They should be given to the State."

¶17 In a July 17, 2013 minute entry, amended August 1, 2013 to reflect a different compliance date, the court noted new evidence was presented at the evidentiary hearing through Agent Wilson's testimony, including that Grewal wanted to read the binders to Agent Wilson after Grewal "was explained his rights and signed a waiver of rights form." Noting Grewal "advised that the binders were his diary of what happened involving his wife and read binder number one verbatim out loud" to Agent Wilson, "[t]here was not enough time for him to read the other binders but [Grewal] stated that he wanted Wilson to have them." The court found:

There is no evidence that the binders were prepared for [Grewal's] attorney. There is no evidence that [Grewal] requested either

directly or indirectly that the binders be transferred to his attorney.

Accordingly, the court found "the attorney-client privilege does not attach to the three binders;" vacated the May 2012 order and ordered Grewal's counsel to return the three binders to the State.

¶18 Grewal filed a motion to reconsider, which for the first time attempted to provide something more than argument to support the privilege claim. Specifically, the motion to reconsider attached what is described as a "signed statement by Avtar Grewal evidencing his intent regarding the three binders and the materials contained therein." Verbatim, that unsworn handwritten statement reads as follows:

July 19<sup>th</sup>/2013

I, Avtar Grewal, prepared the 3 Binders for my Attornies [sic] to assist them with my case defense.

I intended to give them to my Attornies [sic] when I had arrived in Phoenix. F.B.I. Agent Wilson would not let me take them with me. He promised to ship the Binders via Fed ex to me at the Jail in Phoenix.

Because I was not allowed to take the Binders with me, I entrusted Agent Wilson with them solely for transporting them to me in Phoenix, so that I could give them to my Attornies [sic] in Phoenix.

/s/ Avtar Grewal

Avtar Grewal

The superior court denied the motion to reconsider without directing a response.

¶19 Along with filing this special action, Grewal sought a stay pending consideration of the petition, which this court granted. This court has now reviewed Grewal's petition and attachments; the State's response and attachments and Grewal's reply.

## **DISCUSSION**

### **I. Special Action Jurisdiction.**

¶20 The existence of a privilege is a question of law and exercise of special action jurisdiction is appropriate when a party is ordered to disclose information that may be privileged. See *Blazek v. Superior Court*, 177 Ariz. 535, 536, 869 P.2d 509, 510 (App. 1994). An appeal is not an adequate remedy when a "court orders disclosures that a party or witness believes to be protected by a privilege." *Church of Jesus Christ of Latter-Day Saints v. Superior Court*, 159 Ariz. 24, 25-26, 764 P.2d 759, 760-61 (App. 1988). Accordingly, this court accepts jurisdiction of the special action petition.

### **II. Propriety Of Reconsidering The May 2012 Ruling.**

¶21 A superior court's grant of a motion to reconsider is reviewed for an abuse of discretion. *State v. King*, 180 Ariz. 268, 279, 883 P.2d 1024, 1035 (1994). Although claiming the court abused its discretion in considering the State's motion to

reconsider "without new material facts supporting a reversal," Grewal concedes the May 2012 ruling could be reconsidered "for good cause." Ariz. R. Crim. P. 16.1(d). As the superior court noted, the May 2012 ruling was based on the parties' filings, with no evidentiary record or support. By contrast, the July 2013 ruling granting the motion for reconsideration was issued after the receipt of evidence, including testimony from Agent Wilson. The very different factual record leading up to the July 2013 ruling contained new material facts and provided a proper evidentiary basis for the court to reconsider the May 2012 ruling. See *State v. Davis*, 137 Ariz. 551, 560, 672 P.2d 480, 489 (App. 1983) (finding no abuse of discretion in considering motion to reconsider where superior court observed "[t]here are some new factors that have been brought to my attention that were not mentioned at the time this motion was argued previously"). The superior court did not abuse its discretion in finding good cause to reconsider the May 2012 ruling.

### **III. Attorney-Client Privilege.**

¶22 "Whether a privilege exists is largely a question of law" and is subject to a *de novo* review. *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 254, ¶ 10, 63 P.3d 282, 285 (2003) (citation omitted). Arizona's<sup>3</sup> applicable attorney-client

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<sup>3</sup> Grewal's reply states "[a]ttorney-client privilege, not work-product, is the issue before this court." More specifically,

privilege is statutory: "A person shall not be examined as a witness in the following cases . . . An attorney, without consent of the attorney's client, as to any communication made by the client to the attorney, or the attorneys' advice in the course of professional employment." Arizona Revised Statutes (A.R.S.) section 13-4062(2) (2013);<sup>4</sup> accord A.R.S. § 12-2234(A).

¶123 As the party claiming the privilege, among other things, Grewal had the burden to show as a factual matter that: (1) "an attorney-client relationship" exists; (2) that the communication was "made to or by the lawyer for the purpose of securing or giving legal advice;" (3) the communication was "made in confidence" and (4) the communication was "treated as confidential." *Samaritan Found. v. Goodfarb*, 176 Ariz. 497, 501, 862 P.2d 870, 874 (1993); see also *State ex rel. Corbin v. Weaver*, 140 Ariz. 123, 129, 680 P.2d 833, 839 (App. 1984) (proponent of privilege has burden "to prove that an attorney-client privilege existed"); 27 C.J.S. *Discovery* § 147 (2013) ("Party objecting to discovery on the ground that the document is privileged has the burden of presenting facts establishing the privilege, unless it appears from the face of the document

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Grewal cites Arizona attorney-client privilege authority and has not argued that the law of any other jurisdiction should govern the analysis here.

<sup>4</sup> Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

itself that it is privileged.”) (citation omitted).<sup>5</sup> Grewal failed to discharge his burden to make this factual showing.

¶24 Prior to the July 2013 ruling, Grewal had not attempted to make any factual showing (as opposed to legal argument) that the binders were privileged. The May 2012 ruling was made solely based on unverified filings and argument, not any evidence provided. At the July 2013 evidentiary hearing, the superior court expressly offered Grewal an opportunity to submit evidence to make this required showing, but Grewal declined, noting it was the State’s motion to reconsider. Even when the court noted Grewal had provided no evidence that the binders were written to assist his attorneys in the case, Grewal responded: “What evidence do we have that they weren’t?”

¶25 Given this factual void for this essential aspect of claiming the attorney-client privilege, the superior court properly granted the State’s motion to reconsider. In doing so, the court properly found the three binders were not privileged because “[t]here is no evidence that the binders were prepared for [Grewal’s] attorney. There is no evidence that [Grewal] requested either directly or indirectly that the binders be transferred to his attorney.” In granting the State’s motion to

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<sup>5</sup> Although asserting that disclosure to the State is not required under Ariz. R. Crim. P. 15, Grewal did not present that argument to the superior court and cannot now raise that argument with this court for the first time. *Orfaly v. Tucson Symphony Soc’y*, 209 Ariz. 260, 265, ¶ 15, 99 P.3d 1030, 1035 (App. 2004).

reconsider, on the record before the superior court, there was no abuse of discretion.

¶126 Almost immediately after that ruling, Grewal attempted to cure the lack of evidence supporting his attorney-client privilege claim by providing a handwritten note. Both from an evidentiary perspective and substantively, that effort fails.

¶127 From an evidentiary perspective, Grewal's unsworn note was not admissible evidence that the superior court properly could consider in determining whether Grewal met his factual burden to support his privilege claim. *See, e.g.,* Ariz. R. Evid. 603 (oath or affirmation requirement for testimony); Ariz. R. Civ. P. 80(i) (setting forth requirements for "Unsworn Declarations Under Penalty of Perjury").<sup>6</sup> Even if admissible, the handwritten note simply states Grewal "prepared the 3 Binders for [his] Attornies [sic];" it does not present facts establishing the privilege for each document in each binder, as would be required to invoke the blanket privilege Grewal asserts in claiming the entirety of the binders are privileged. Because Grewal's handwritten note is not admissible and, even if admissible, does not properly support the blanket attorney-

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<sup>6</sup> The inadmissible unsworn note written and offered by Grewal is in contrast to Grewal's handwritten note offered by the State against Grewal in seeking reconsideration, which was admissible as a non-hearsay opposing party's statement. *See* Ariz. R. Evid. 801(d)(2).

client privilege claim, on the record before the superior court, there was no abuse of discretion in denying Grewal's motion to reconsider.<sup>7</sup>

**CONCLUSION**

¶128 This court accepts special action jurisdiction, denies relief from the superior court's order dated July 17, 2013 as amended August 1, 2013 and vacates this court's prior order granting Grewal's stay request.

/S/ \_\_\_\_\_  
SAMUEL A. THUMMA, Presiding Judge

CONCURRING:

/S/ \_\_\_\_\_  
JON W. THOMPSON, Judge

/S/ \_\_\_\_\_  
KENT E. CATTANI, Judge

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<sup>7</sup> Given this holding, the court need not address (and expressly does not decide) the State's argument (which the superior court did not address) that Grewal waived the privilege by reading binder one and portions of binders two and three to Agent Wilson and by providing the binders to Agent Wilson.