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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter Of: Petition to Modify Rule 15.1 and Rule 15.4, Arizona Rules of Criminal Procedure	Supreme Court No. R17-0027 **COMMENT IN OPPOSITION TO MARICOPA COUNTY ATTORNEY'S PETITION TO MODIFY RULE 15.1 AND RULE 15.4, ARIZONA RULES OF CRIMINAL PROCEDURE**

The Maricopa County Public Defender ("MCPD"), Arizona Attorneys for Criminal Justice ("AACJ"), and the Arizona Public Defender Association ("APDA") (collectively, "Respondents") respectfully submit the following Comment in Opposition (the "Comment") to Petition R17-0027, Maricopa County Attorney's Petition to Modify Rule 15.1 and Rule 15.4, Arizona Rules of Criminal Procedure (the "Petition").

MCPD is the largest indigent defense firm in the State of Arizona with over 200 deputy public defenders providing indigent legal services in the Maricopa County Justice and Superior Courts. During the past fiscal year, the MCPD handled almost 36,000 criminal cases.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

APDA is a non-profit organization comprised of the entire county, city, federal and tribal indigent representation offices and programs in the state of Arizona. Its mission is to safeguard the constitutional rights of indigent individuals, thereby protecting the rights of all members of the community.

This Comment is supported by the following Memorandum.

MEMORANDUM

Respondents oppose the Petition because existing procedure already provides adequate remedies for Petitioner's concerns, and some the proposed amendments go far beyond the scope of addressing body-worn camera ("BWC") technology issues. Respondents also object to the Comment of the Arizona Prosecuting Attorney's Advisory Council ("APAAC") because APAAC's comment suggests adopting a narrow and restrictive definition of the term "defense investigator," which has the potential to interfere with the defense process.

Ultimately, if this Court remains concerned about the unique challenges BWC evidence presents, Respondents propose that this Court establish an *ad hoc* committee to explore possible solutions that balance the interests of all stakeholders, rather than adopting the flawed amendments Petitioner suggests.

A. The Arizona Rules of Criminal Procedure Already Provide Remedies for Petitioner's Concerns, Including Disclosure Extensions and Protective Orders.

Petitioner is correct when it states that BWC records everything during active police investigation (assuming the BWC remains activated). However, not every case involves a victim or presents a situation where victim-identifying information could be disclosed. In fact, such circumstances are the exception, and the current Rules already provide several mechanisms by which Petitioner can ensure it meets its obligations.

First, the Rules of Procedure presume that the parties will work together to alleviate concerns about the possible disclosure of victim-identifying and locating information through BWC footage. Rule 15.1(e) of the Arizona Rules of Criminal Procedure allows the State to "impose reasonable conditions, including an appropriate stipulation concerning chain of

custody to protect physical evidence produced under this section or to allow time to complete any examination of such items." This subsection is routinely invoked, for example, in cases involving voluminous records likely to contain confidential information, such as financial records, to facilitate interim disclosure via defense counsel while the State takes the time necessary to ensure the ultimate production to the defendant is properly redacted.

Second, if the parties are unable to resolve the issue using existing Rule 15.1(e), Rules 15.5 and 15.6 provide mechanisms for deferring disclosure obligations or extending deadlines. Rule 15.5 provides, in pertinent part:

> [u]pon motion of any party showing good cause, the court may at any time order . . . that any other disclosures required by this rule be denied, *deferred*, or regulated when it finds:
>
> (1) that the disclosure would result in a risk or harm outweighing any usefulness of the disclosure to any party; and
>
> (2) that the risk cannot be eliminated by a less substantial restriction of discovery rights.[1]

Similarly, Rule 15.6(e) provides for "reasonable extension[s] in which to complete the disclosure" in cases where a crime laboratory or expert need additional time to complete necessary processes. Thus, Rule 15 already contemplates situations where disclosure could pose a risk that victim-identifying information may be exposed to the defendant through BWC footage, and the Rules presume that trial courts will exercise discretion to defer or extend discovery in such circumstances. Indeed, in cases where the amount of time required to complete redactions for victims' rights compliance might result in speedy trial issues, Rule 15.5 empowers trial courts to enter protective orders limiting disclosure as necessary to

[1] ARIZ. R. CRIM. P. 15.5(a)(1)–(2) (emphasis added).

protect both victims' rights and the rights of the accused.[2] These procedures are commonly invoked in criminal litigation today.

If the State cannot complete necessary redactions within 30 days, the current rules already contain a solution. The State need only move for an extension or a protective order. These procedures are routinely invoked in criminal cases throughout the state today when necessary to adequately comply with victims' rights. Trial courts in Arizona generally grant such requests as a matter of course, often requiring little more than a target deadline for completion of the redactions and disclosure. Given the broad range of individualized circumstances encompassed by BWC footage, however, delay of disclosure should continue to be granted on an individualized basis rather than the categorical approach proposed by Petitioner.

B. The Proposed Changes to Rule 15.4 are Unnecessary and Beyond the Scope of the BWC Concerns Petitioner Raises.

The Petition proposes to amend Rule 15.4(d), as well, adding language that accomplishes two goals: (1) obligating parties who receive inadvertent disclosures of confidential information to notify opposing counsel and return the disclosure without duplication, and; (2) prohibiting "all counsel and parties" from using *any* evidence disclosed under Rule 15 for any purpose other than the instant litigation, including distribution over Internet fora, without leave of court. The first proposed amendment is redundant with Rule

[2] *See* ARIZ. R. CRIM. P. 15.5(d) (titled "Protective and Excision Order Proceedings"); *see also State v. Chavez ex rel. Maricopa (Gill)*, 234 Ariz. 255, 258 ¶ 21, 321 P.3d 420, 423 (2014) ("Moreover, to the extent that disclosing a victim's birth date may create a risk of harassment or other harm, we reiterate that the existing rules allow a prosecutor to seek a court order denying or limiting disclosure required by Rule 15.1").

4.4(b) of the Arizona Rules of Professional Conduct (the "Ethical Rules" or "ERs"), which, as Petitioner notes, "requires the return of information or documents that are inadvertently received."[3] Accordingly, the first proposed amendment, while not substantively objectionable, is a superfluous and unnecessary addition.

The second proposed amendment to Rule 15.4 is significantly more problematic due to its overbroad language, which appears to govern not only BWC, but *all material* the State discloses under Rule 15:

> ALL COUNSEL AND PARTIES ARE RESPONSIBLE FOR ENSURING THAT MATERIAL DISCLOSED UNDER *THIS RULE* IS USED ONLY FOR THE LITIGATION OF THE CRIMINAL CASE AND IS NOT DISTRUBUTED [sic] IN ANY FORUM, INCLUDING ANY SOCIAL MEDIA AND/OR ANY INTERNET WEBSITE OR MADE AVAILABLE FOR ANY OTHER DISSEMINATION OR DISTRIBUTION UNLESS THE COURT ORDERS OTHERWISE.[4]

The proposed language goes far beyond the scope of addressing the relatively narrow BWC concerns raised in the Petition and imposes what amounts to a permanent gag order on both defense counsel *and* defendants, covering *all* state disclosures in *every* criminal action. Perhaps of even greater concern, however, is the means by which the proposed amendment seeks to enforce this standing gag order. By its express terms making "all counsel and parties . . . responsible" for compliance, the proposed amendment to Rule 15.4 strains the attorney-client relationship by transforming defense counselors into defendants' keepers.

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[3] Petition at 8.

[4] *Id.* at 11 (proposed amendment to Rule 15.4(d)) (emphasis added).

Notably, in light of defense counsel's ethical obligations under ER 4.4(b) and the existing Rule 15.4(d)—which already prohibits defense *counsel* from disclosing Rule 15 materials beyond "the extent necessary for the proper conduct of the case"—Respondents must conclude that the proposed amendments to Rule 15.4 are primarily intended to place restrictions on defendants. In cases where an individualized need is shown, it might be appropriate for a court to issue such orders, and a defendant certainly has an obligation to obey court orders regarding disclosure of evidence. This rule would go further, though, requiring defense counsel to become responsible for monitoring and censoring their client's activities as a matter of course in every case. Not only would such monitoring foster mistrust in a relationship that *requires* privileged loyalty in order to function, but it would be impracticable to meaningfully implement.

The breadth of the amendments and their interference with the attorney-client relationship are not the only problems with the proposed amendments to Rule 15.4; the proposed gag order also burdens free speech. A defendant may wish to share evidence in his or her case with family members, friends, or the community for a variety of purposes, including gaining advice on the best course of action to take in the case. In circumstances where there is a particular need for restrictions on the dissemination of non-protected information, it is appropriate for the state to seek a court order restricting that dissemination, and this is commonly done. However, the proposed "standing gag order" amendment to Rule

15.4 appears to burden free speech in criminal litigation to such a significant degree that constitutional litigation is a virtual certainty.[5]

Finally, the proposed amendments to Rule 15.4 may conflict with the Arizona Public Records Law. BWC footage serves as the functional equivalent of departmental reports, which law enforcement agencies, at least, are required to produce for inspection and copying subject to the Arizona Public Records Law.[6] BWC videos are, thus, undeniably "public records" within the meaning of the Arizona Public Records Law, and as public entities, state defense and prosecution agencies may have an obligation to make BWC footage available on a valid public records request, subject only to narrow restrictions.[7]

While the scope and viability of any hypothetical First Amendment and/or Public Records Law litigation brought pursuant to the proposed changes to Rule 15.4 are unclear, what is clear is that Petitioner has presented no legitimate government interest warranting the invitation of such challenges. Most important, however, is that the proposed amendments to Rule 15.4 go far beyond the scope of any legitimate BWC concerns, and this aspect of the Petition, at least, should be rejected.

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[5] *See, e.g.*, *State v. Philip Brailsford*, CR2016-004743-001 (Apr. 8, 2016 Mot. Intervene) (various media entities seeking to intervene on First Amendment and public records grounds in criminal litigation to obtain BWC that was sealed by stipulation of both parties).

[6] *See Cox Ariz. Publ'ns v. Collins*, 175 Ariz. 11, 15, 852 P.2d 1194, 1199 (1993).

[7] *See* A.R.S. § 39-121 ("[p]ublic records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours."); A.R.S. § 39-121.01(B) ("All officers and public bodies shall maintain all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities . . . .").

C. The APAAC Suggestion Regarding Definition of Defense Investigators is Overly Narrow and Would Impede the Defense Process.

APAAC commented on the Petition with the suggestion, "To avoid having defendants designate friends, relatives, or other persons as their defense investigator, APAAC suggests adding a definition for the term . . . ."[8] APAAC goes on to propose a definition that encompasses the statutory definition of "private investigator" and any POST-certified peace officer. The definition proposed by APAAC, while well intentioned, likely interferes with the ability of agencies and private counsel alike to accomplish their necessary investigative tasks.

To begin, not every defense investigator employed by large agencies will meet either of these standards. Some rural counties may have one, or even no such investigators employed by their office. Private attorneys and contract counsel may employ a single assistant who serves multiple functions, such as investigation, mitigation, and file management. Such a person would also be unlikely to meet the proposed definition, but would be an appropriate and reasonable person to rely on for such an important task.

Second, it may be appropriate for a defense team to designate as an "investigator" someone that does not traditionally serve that function. If a paralegal, law clerk, administrative assistant, or mitigation specialist is available to view video and in a better position to advise the attorney or client of its contents, then it would be reasonable and efficient for an attorney to ask such a person to do so.

Finally, if the state becomes concerned that a person is being designated an investigator in bad faith, it can address the matter with the court, and ask that a more

[8] Comment of APAAC at 5.

appropriate representative be appointed. Ethical Rule 5.3 already requires that an attorney supervise non-attorney members of the defense team and ensure that such members meet with their obligations.

Because there are already safeguards in place that ensure defense team members are appointed in good faith to view evidence, and to ensure that defense counsel properly supervises non-lawyer team members, the Court should rely upon the defense attorney's supervision of defense team members' adherence to ER 5.3.

D. If Existing Rules Fail to Adequately Address Petitioner's Concerns, Respondents Suggest the Court Establish a Collaborative Task Force of Interested Stakeholders to Consider and Propose Balanced Solutions.

The proliferation of BWC in modern policing is not the first instance of technology creating tension in criminal justice procedures. In the late 1990s and early 2000s, the "realities of modern practice" inspired this Court to establish a committee of interested stakeholders to consider and propose amendments to Arizona's criminal disclosure procedures that contemplated growing challenges posed by, for example, DNA evidence and increases in cybercrime requiring complex computer forensics.[9]

Respondents were among those stakeholders represented on the committee that proposed what ultimately became the 2003 amendments to Rule 15, along with representatives from law enforcement agencies, crime laboratories, prosecutorial entities, and the judiciary. The committee balanced the interests of all parties as it carefully considered

[9] ARIZ. R. CRIM. P. 15.1, comm. cmt. 2003 ams. R. 15.1 ("The 2003 changes to Rule 15.1 are designed to redefine the scope and timing of disclosure by the State in criminal cases, in order to bring the disclosure rules more closely into alignment with the realities of modern practice.")

reasonable amendments to existing procedure that would alleviate some of the pressure on the State caused by technological advancements, but without sacrificing the rights of the accused or the interests of judicial economy.

For example, the committee comment to the 2003 amendments to Rule 15.6(e) explains that the extension procedures discussed in section II(A), above, were specifically implemented to create flexibility in cases where the vicissitudes of scientific evidence made it difficult to strictly comply with ordinary disclosure deadlines:

> Rule 15.6(e) is intended to provide standards for extending the date of disclosure in order to complete scientific testing and excluding that time from the time periods prescribed in Rules 8 and 15. In most cases, scientific evidence is anticipated to be ready for examination and disclosure within the time periods of Rule 15. However, there are circumstances in which the analysis and examination of scientific evidence cannot be completed within the prescribed time limits.[10]

The 2003 committee balanced all interests to craft remedies for challenges posed by advances in science and technology. The committee successfully addressed circumstances where the State needed lengthier disclosure periods due to the nature of the evidence, but it also protected the rights of the accused by imposing certain threshold requirements, such as an expert's affidavit swearing that additional time is required for testing purposes only, not because of "dilatory conduct, neglect, or other improper reason."[11]

Respondents do not outright reject the possibility that BWC presently causes, or will soon cause, workload and manpower challenges for the State. Respondents believe that, in time, as the benefits of early BWC disclosures are better understood, the overall impact of this

[10] ARIZ. R. CRIM. P. 15.6, comm. cmt. 2003 ams. R. 15.6.
[11] ARIZ. R. CRIM. P. 15.6(e).

category of evidence will be to promote judicial economy through more efficient case resolutions. If, however, Respondents are incorrect, the most efficient and effective way to address the challenges created by BWC will be to create a new committee or task force of interested stakeholders to study and comprehend the problem in its entirety, consider multiple possible solutions, and ultimately propose any necessary amendments to this Court after having balanced the interests of all parties.

The amendments proposed in the Petition do not benefit from careful and collaborative input from all stakeholders like the 2003 amendments did.[12] If this Court does not believe, as Respondents have argued, that current procedures adequately redress Petitioner's concerns, the correct response should be to create a new committee to evaluate solutions that will not cause inadvertent or irreparable harm to the system as a whole, and the many accused.

CONCLUSION

Respondents believe that Petitioner's concerns are already adequately addressed by existing rules. If this Court still has apprehensions about the impact BWC may have on efficient case management, however, instead of granting the flawed amendments Petitioner proposes, Respondents encourage this Court to adhere to its established protocol for fairly

[12] The import of peer review in this process is highlighted by a critical drafting error in the proposed amendments. Petitioner's intention appears to be that the State will have ninety (90) days from a written request to disclose BWC footage, but that depending on when that request is made, the State must still disclose the BWC footage no later than seven (7) days before trial. The actual language of the proposed amendment, however, appears to give the State until the very eve of trial to make its BWC disclosure: "WITHIN 90 DAYS OF A WRITTEN REQUEST AND *NO MORE THAN* 7 DAYS BEFORE TRIAL, . . . THE PROSECUTOR SHALL PROVIDE REDACTED COPIES OF THE VIDEOS TO THE DEFENSE." Petition at 10 (proposed amendment to Ariz. R. Crim. P. 15.1(e)(2) (emphasis added)). If this Court grants the Petition, Respondents request that this apparent typographical error be corrected to reflect Petitioner's intent.

resolving tensions created by technology—this Court should establish a collaborative task force to explore the scope of the challenges posed by BWC and recommend best practices for overcoming them without sacrificing the interests of any stakeholder, including victims and defendants.

RESPECTFULLY SUBMITTED this 22nd day of May, 2017.[13]

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This comment e-filed this
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[13] The undersigned entities want to thank MCPD law clerk Rachel Golubovich, J.D., Arizona State University, Sandra Day O'Connor College of Law, class of 2017, for her research and drafting contributions to this Comment.