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3 **(FIRM STATE BAR NO. 00032000)**

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9 **(STATE BAR NUMBER 017540)**

10 **ARIZONA SUPREME COURT**

11 **PETITION TO AMEND ARIZONA**  
12 **RULE OF CRIMINAL**  
13 **PROCEDURE RULE 15.8(a)**

R-22-0021

MARICOPA COUNTY ATTORNEY'S  
COMMENT IN OPPOSITION

14 The Maricopa County Attorney's Office ("MCAO") objects to the proposal of the  
15 Arizona Attorneys for Criminal Justice ("AACJ"). The petition seeks to remove the benefits  
16 of pre-arraignment early disposition courts ("EDC") by disincentivizing pre-arraignment plea  
17 offers. The petition ignores the reality of the criminal justice system and would lead to longer  
18 case processing times, the elimination of favorable early-resolution plea offers, and increased  
19 pretrial incarceration time for in-custody defendants. The petition represents poor public  
20 policy and should be denied.

21 **I. ARGUMENT**

22 **A. A plea offer may be conditioned on limited discovery.**

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24 The AACJ petition seeks to prohibit plea offers, or at least their expiration, before a  
25 defendant has all the discovery required by Rule 15.1. A criminal defendant does not,  
26 however, have a constitutional due process right to all available discovery before deciding  
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1 whether to accept a plea offer. The United States Supreme Court has reviewed the  
2 constitutionality of requiring a criminal defendant to accept less disclosure than would be  
3 required for trial as a condition of a plea offer. In *United States v. Ruiz*, 536 U.S. 622 (2002),  
4 the defendant entered a federal “fast track” plea bargain that offered leniency, pre-indictment,  
5 in exchange for the defendant waiving trial and appellate rights as well as the right to receive  
6 impeachment information relating to witnesses. *Id.* at 625. The defendant refused to accept  
7 the last term and the government withdrew the offer. The defendant later pled guilty without  
8 an agreement and asked for the same sentencing consideration from the court the government  
9 previously offered. The court refused and he appealed arguing that the government’s offer to  
10 plead guilty without receiving impeachment information was unconstitutional. *Id.*

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13 In rejecting the defendant’s argument, the Supreme Court noted that

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15 this Court has found that the Constitution, in respect to a defendant's awareness  
16 of relevant circumstances, does not require complete knowledge of the relevant  
17 circumstances, but permits a court to accept a guilty plea, with its accompanying  
18 waiver of various constitutional rights, despite various forms of  
19 misapprehension under which a defendant might labor.

20 *Id.* at 630 (citations omitted). The Court also noted that requiring full disclosure during a  
21 “fast track” process

22 could require the Government to devote substantially more resources to trial  
23 preparation prior to plea bargaining, thereby depriving the plea-bargaining  
24 process of its main resource-saving advantages. Or it could lead the  
25 Government instead to abandon its heavy reliance upon plea bargaining in a  
26 vast number—90% or more—of federal criminal cases.

27 *Id.* at 632.

28 The disclosure at issue in *Ruiz* was impeachment material—material that must be  
disclosed before trial as part of the constitution’s “fair trial” guarantee. *Id.* at 628. Despite

1 the fact that the prosecutors would be constitutionally required to disclose this information to  
2 the defendant before trial, the Supreme Court nevertheless concluded that the defendant was  
3 not entitled to that information before deciding to enter a plea. *Id.* at 633. Unlike the  
4 defendant in *Ruiz*, the discovery the AACJ seeks before deciding on a pre-arraignment plea  
5 offer is not of constitutional magnitude. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)  
6 (noting that “[t]here is no general constitutional right to discovery in a criminal case... .”);  
7 *R.S. v. Thompson*, 251 Ariz. 111, 117, ¶ 15, 485 P.3d 1068, 1074 (2021).  
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10 **B. Early resolutions benefit the State, the courts, and the defendant.**

11 Knowing that it is appropriate for a plea offer to be conditioned on limited discovery,  
12 the AACJ frames the practice of trying to resolve cases in an EDC as coercive, stating that  
13 prosecutors “threaten[] defendants with a harsher plea or no plea at all if the [sic] move past  
14 the early disposition courts... .” [Petition at 7.] AACJ cites no facts or data nor any legal  
15 authority supporting its coercion theory, which is contrary to decades of controlling law on  
16 constitutional plea bargaining. When the prosecution offers a plea agreement, it is free to  
17 include such conditions and terms as it deems appropriate—even “harsh” ones—so long as  
18 the defendant is free to accept or reject the offer. This practice does not constitute  
19 prosecutorial punishment or retaliation in the plea-bargaining process. *See Bordenkircher v.*  
20 *Hayes*, 434 U.S. 357, 363-65 (1978) and its progeny; *see also State v. Felix*, 153 Ariz. 417,  
21 419, 737 P.2d 393, 395 (App. 1987); *State v. Caperon*, 151 Ariz. 426, 428, 728 P.2d 296,  
22 298 (App. 1986). MCAO, and it is likely true of the other prosecution offices that use an  
23 EDC, has made a policy decision to make *more lenient* plea offers to those defendants who  
24 accept responsibility for their actions before arraignment. The reason for this is simple: most  
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1 of Arizona's discovery rules are triggered by the arraignment so the State receives a significant  
2 resource benefit when a criminal case is resolved early in the process. Those defendants who  
3 are willing to take early responsibility for their actions receive a benefit, while the public  
4 benefits by the justice system's resources being focused on more serious cases and those  
5 unlikely to resolve by plea.  
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7 The AACJ wants to have their cake and eat it too. They want the more lenient plea  
8 offers afforded to defendants in an EDC, while simultaneously being afforded the full  
9 disclosure benefits currently only available after arraignment. The AACJ's position ignores  
10 the reality of present-day disclosure and the resource benefits of plea agreements.  
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12 Most importantly, limited pre-arraignment discovery is specifically authorized by Rule  
13 15.1(a). Limited discovery is one of the main resource-saving advantages of an EDC  
14 resolution. Disclosing all the evidence under Rule 15.1(b) is time consuming. Someone  
15 unfamiliar with the realities of criminal practice in Arizona might see compliance with Rule  
16 15.1(b) as a fairly simple matter as much of the rule simply requires the State to provide lists.  
17 *See* ARIZ. R. CRIM. P. 15.1(b)(5-7). But in practice, prosecutors must provide the actual items  
18 in Rule 15.1(b) because most defense attorneys file requests under Rule 15.1(e) shortly after  
19 arraignment. That rule requires the State to make the items listed in Rule 15.1(b) available to  
20 the defense for reproduction. But, as further explained below, most evidence must be  
21 reviewed and redacted before it can be made available to the defense for any purpose. The  
22 practical reality is that Rule 15.1 requires production of copies of the actual items listed in  
23 Rule 15.1(b) not simply lists as the rule suggests.  
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1 This practical reality is particularly problematic when handling digital evidence like  
2 officer body worn camera video and cell phone downloads. Digital evidence is now  
3 ubiquitous. Even a simple drug possession case could have dozens of body worn camera  
4 videos, consisting of hours of footage. Disclosing such digital evidence is not as simple as  
5 just creating a copy and sending it to the defense.  
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7 First, in a victim case, A.R.S. § 13-4434 requires that any victim's identifying and  
8 locating information be redacted prior to disclosure. Failure to do so violates the victim's  
9 rights and exposes the prosecuting agency to damages pursuant to A.R.S. § 13-4437. These  
10 statutes require that somebody review every minute of body worn camera footage in a victim  
11 case to ensure that all victim identifying information is redacted.  
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13 Second, even in non-victim cases, all body worn camera video must be reviewed before  
14 disclosure. A.R.S. § 41-1750(G) precludes the release of criminal history information, even  
15 in discovery under the criminal rules. As a result, prosecutors or their staff must review all  
16 body worn camera video to make sure that no criminal history information is displayed on a  
17 terminal in either an officer's vehicle or at a workstation. This information is routinely shown  
18 on multiple body worn cameras during the booking process.  
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21 Several prosecution offices have tried solutions to make faster disclosure while still  
22 complying with A.R.S. § 13-4434 and A.R.S. § 41-1750(G). One office made disclosure to  
23 the defense attorney under a protective order to not share identifying information with the  
24 defendant. That practice stopped when the legislature amended A.R.S. § 13-4434 to  
25 specifically prohibit it. Another office applies a light blur to all body worn camera video  
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1 disclosed to prevent unlawful disclosure pursuant to A.R.S. § 41-1750(G).<sup>1</sup> There is no rule,  
2 however, that specifically allows this practice. The agency that applies the light blur still  
3 provides a non-blurred, redacted version upon request to comply with the rules. Disclosure  
4 in the modern era, then, is onerous, requiring hours of review to disclose almost any form of  
5 digital evidence. There are significant resource-savings if a case can be resolved before the  
6 disclosures required in Rule 15.1(b).  
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9 Furthermore, the AACJ alleges “the only option in these cases is often to reject the initial  
10 plea offer in order to move and [sic] the case out of the early disposition courts and obtain  
11 sufficient evidence to evaluate the case and any subsequent plea offer.” [Petition at 6.] This  
12 allegation is not supported by facts or data. A review of MCAO’s data showed that of the  
13 cases handled in Maricopa County’s EDC between July 1, 2021 and April 22, 2022,<sup>2</sup> 76% to  
14 79%<sup>3</sup> were resolved before arraignment. MCAO typically selects cases for the EDC that are  
15 more likely to resolve by plea, sending other types of cases directly to the grand jury.  
16 However, during this timeframe grand jury panels in Maricopa County were greatly reduced  
17 due to COVID restrictions meaning cases that normally would not have been selected for the  
18 EDC were sent there, undoubtedly leading to a lower resolution rates than would have  
19 otherwise occurred. Nevertheless, in this timeframe, the EDC in Maricopa County resolved  
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23 <sup>1</sup> MCAO is conducting a pilot project to do the same at pre-arraignment courts. However,  
24 even if the pilot is successful, such a practice would not strictly comply with Rule 15.2, and  
25 under the proposed change to Rule 15.8, could result in sanctions under Rule 15.8(b).

26 <sup>2</sup> This includes cases that began in the EDC and were ultimately dismissed, resolved by plea,  
27 sent to diversion, were held to answer by preliminary hearing or straight waiver. It does not  
28 include cases that went to Rule 11 proceedings or cases where a bench warrant was issued in  
the EDC and the case was still in the EDC on April 22.

<sup>3</sup> A range is provided to account for the possibility of double counting cases as explained in  
fn. 4.

1 approximately 10,000 cases.<sup>4</sup> That is 10,000 felony cases that did not progress through the  
2 full criminal court system—a system that is already stretched thin. Contrary to the AACJ’s  
3 statement, the data shows that the “only option” in the vast majority of EDC cases is to resolve  
4 them.  
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6 The reason so many cases resolve in the EDC is not hard to understand: the defendant  
7 benefits from early resolution. Defendants have the opportunity to receive more favorable  
8 pleas. An in-custody defendant may have the opportunity to get out of custody sooner because  
9 EDC offers to resolve a case with probation can allow a defendant to quickly accept  
10 responsibility and get out of custody sooner and have the support of a probation officer. Many  
11 defendants simply want to resolve their criminal matter as quickly as possible to start putting  
12 it behind them and move forward with their lives.  
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15 **C. Modifying Rule 15.8 as requested would effectively end EDCs.**

16 Although the petition suggests that EDCs could somehow continue with the proposed  
17 changes to Rule 15.8, it is difficult to understand how or why EDCs would be useful at that  
18 point. The proposed amendment would, in many cases, make it nearly impossible for  
19 defendants to resolve their case quickly. If Rule 15.8 is amended, prosecutors are unlikely to  
20 make favorable offers pre-arraignment because, as a practical matter, they could not set any  
21 deadline on the offer until all discovery under Rule 15 is complete. Rule 15.8(b), left  
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24 <sup>4</sup> This includes dismissals, misdemeanor pleas, felony pleas, and defendants entering  
25 diversion. MCAO data counts events not individual case numbers so it is possible that a case  
26 could be counted twice if the defendant accepted diversion but did not successfully complete  
27 it and then entered a guilty plea in the EDC. That case would be counted as a diversion event  
28 and a plea event if both occurred within this timeframe. For that reason, this figure is  
presented as an approximation, but the actual number of resolution events in this timeframe  
is 11,241.

1 unchanged by the AACJ proposal, allows sanctions if the State does not make all the  
2 disclosures required under Rule 15.1(b) more than 30 days before the offer expires. Because  
3 a preliminary hearing must be held 10 or 20 days after an initial appearance, the State could  
4 never make an offer that expired before the preliminary hearing without violating Rule 15.8.  
5 The only option is to either continue the preliminary hearing multiple times until all discovery  
6 is complete or conduct the preliminary hearing without ever offering the defendant the chance  
7 to resolve the case.  
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10 Either way, the State cannot make an offer, or at least cannot set a deadline on an offer,  
11 until the State has invested hours of resources into the case and there is little incentive to  
12 provide as favorable an offer as a defendant could get today in an EDC. This not only hurts  
13 those defendants wishing to begin their rehabilitative efforts, but also adds to the congestion  
14 and backlog already plaguing the judicial system. Requiring full disclosure under Rule 15 for  
15 all cases before plea negotiations begin will also further backlog the prosecutor's office  
16 creating more case delays across the system.  
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19 The AAJC proposal appears to imagine a situation where the State would make the same  
20 type of more lenient offer currently made in an EDC to encourage early resolution but would  
21 then do all the necessary work to gather and prepare all the discovery in the case, provide all  
22 of that to the defense, and then set a plea deadline of that original offer 30 days later. The  
23 actual world the AACJ's proposal will create is one where prosecutors either make a regular  
24 "trial offer" at the outset knowing that it cannot expire until all discovery is complete, or they  
25 will wait until discovery is complete and then make a "trial offer." The State will have little  
26 incentive to encourage a plea once the main resource-saving benefits of a plea agreement are  
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1 lost. Presumably the State could also simply choose to never “extend[] a plea offer to a  
2 defendant” and avoid Rule 15.8 in its entirety, but it is difficult to understand how that system  
3 benefits anyone either.  
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5 **D. The petition paints an inaccurate view of EDCs.**

6 As discussed above, the AACJ underestimates the value of EDCs in terms of resolving  
7 criminal cases efficiently. In addition, it also minimizes the information available to the  
8 defense at these settings. Rule 15.1 was carefully constructed to create two separate  
9 disclosure periods. The first, described in Rule 15.1(a), requires initial disclosures to the  
10 defense which must include all police reports the prosecutor had when the charging decision  
11 was made. ARIZ. R. CRIM. P. 15.1(a). This is the discovery a defendant has today when their  
12 case is in an EDC. Despite the requirement that disclosure be made only before the actual  
13 preliminary hearing, most often that discovery is provided earlier than required along with a  
14 plea offer. The offer in the EDC expires if it is not accepted before a probable cause hearing.  
15 But that does not mean, as the petition seems to suggest, that a defendant must make a decision  
16 the day they receive the offer. While a defendant could accept a plea at the first setting, in  
17 most cases, the defense continues the first setting to review the discovery provided and give  
18 the defendant the time to consider the offer. More continuances frequently follow as the  
19 defense prepares mitigation material for the prosecutor to consider which usually also  
20 includes a counteroffer to resolve the case. Even if the case is not continued, a defendant  
21 typically has a few days between the first status conference and the actual preliminary hearing  
22 to consider the offer.  
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1 In Maricopa County, at least, the case may stay in the EDC for several weeks or even a  
2 few months while the defense gathers mitigation and considers the case. The State benefits  
3 by not having to invest hours into reviewing and redacting body worn camera and other  
4 evidence (much of which often has little probative value to the issues in the case), the defense  
5 benefits by being able to negotiate a favorable resolution, and the courts benefit by keeping  
6 cases off their regular trial dockets. For all the reasons discussed above, this apparently simple  
7 deletion of 10 words in Rule 15.8 will end these benefits while adding little of practical value  
8 for the defense in most cases. Indeed, they cite to no examples to support the need for this  
9 radical change to this Court's thoughtfully crafted system of pre and post arraignment  
10 discovery.  
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## 12 **II. CONCLUSION**

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15 Where they are used, EDCs provide systemwide benefits. Rule 15 was carefully  
16 designed to allow the State and defendants to negotiate a case before all the discovery work  
17 is complete. Particularly considering the nature of the available evidence today and backlogs  
18 throughout our court systems, it is critical that appropriate cases be resolved as early as  
19 possible. There is no question that some cases cannot reasonably be resolved before all the  
20 discovery is complete. But for appropriate cases, having the ability to make more lenient  
21 offers in exchange for resource savings is a benefit for everyone in the system. The petition  
22 would effectively end these benefits and, for that reason, it should be denied.  
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Respectfully submitted this 2<sup>nd</sup> day of May 2022.

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By /s/   
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