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ARIZONA SUPREME COURT

In the Matter of:

PETITION TO AMEND RULE
15.4(b), RULES OF CRIMINAL
PROCEDURE

Supreme Court No. R-22-0046

Joint Comment by the Directors of the
Maricopa County Indigent Defense
Agencies

We are the directors of the public defender agencies that handle most indigent felony cases filed in Maricopa County. We submit this comment in opposition of the proposal to amend Rule 15.4(b), *Ariz. R. Crim. P.* We believe that the amendment, as written, should

not be adopted by the Arizona Supreme Court. First, the information that would be routinely redacted under this proposed amendment is information that indigent defense agencies employ to ensure conflicts of interest do not arise. Second, Rule 15.4 already prohibits public disclosure of civilian witnesses' personal information. Third, Rule 15.5 currently provides a mechanism by which the State can seek a protective order for documents containing sensitive personal information. And finally, under the proposed amendment, defense counsels would face an unreasonable burden under Rule 15.1(g), *Ariz. R. Crim. P.* that would hinder witness investigation and, by extension, hamper defense preparation.

Maricopa County is one of the largest and fastest-growing counties in the United States.¹ Approximately 24,453 felony criminal cases were filed in Maricopa County Superior Court last year.² A significant number of those defendants cannot afford counsel. Institutional defense offices like the Maricopa County Offices of the Public Defender, Legal Defender, Legal Advocate, Public Advocate, and Public Defense Services represent thousands of clients per year with cases that commonly involve civilian witnesses. To ensure compliance with the Arizona Rules of Professional Conduct, attorneys and staff must quickly and effectively identify conflicts of interest so defendants receive the benefit of counsel as early as possible. In some circumstances, especially when civilian witnesses have common names and birthdays, other personal identifying information is necessary to

¹ *Maricopa County Quick Facts*, MARICOPA COUNTY, <https://www.maricopa.gov/3598/County-Quick-Facts> (last accessed March 30, 2023).

² *Statistics: Felony Filings by Fiscal Year*, ARIZ. SUP. CT., <https://www.azcourts.gov/statistics/Interactive-Data-Dashboards/Felony-Filings> (last accessed March 30, 2023).

recognize a conflict. It is imperative that conflict checks be unfettered by the proposed requirement to limit witness information.

Rule 15.4(d), *Ariz. R. Crim. P.*, already prohibits public disclosure of any materials furnished by the State, with disclosure only allowed to the extent necessary for proper conduct of the case. While defense attorneys cannot control the actions of those who receive the information, it is standard practice to advise defendants to not disseminate case materials, particularly materials containing witness information. This Rule adequately protects civilian witnesses' information.

Further, Rule 15.5, *Ariz. R. Crim. P.*, currently provides a mechanism for prosecutors to seek protective orders for materials believed to be sensitive in nature. If the assigned prosecutor in a case has specific concerns about confidentiality, the prosecutor may seek a protective order. It was noted in the Petition that the motions for a protective order are "invariably granted" upon request. While it may cause the State additional work, requiring prosecutors to make individualized determinations for each case ensures protective orders are sought when warranted.

The proposed amendment's procedure for requesting disclosure will unfairly burden defendants. Under the current draft, the State would be required to disclose this information only when the information is "necessary to prove a charged offense." As drafted, the proposed amendment would require defense lawyers seeking this type of civilian witness information to file a motion pursuant to Rule 15.1(g), *Ariz. R. Crim. P.* Defendants will be required to illustrate to the court (1) a substantial need for the information to prepare the case; and (2) that they cannot obtain the substantial equivalent without undue hardship.

Because the information will be redacted, it is difficult for defendants show substantial need and the lack of a substantial equivalent. *See* Rule 15.1(g), *Ariz. R. Crim. P.* While there may be the rare occasion the State seeks this information from defense pursuant to Rule 15.2(g), *Ariz. R. Crim. P.*, overwhelmingly, defense will bear this burden. Rule 15.1(g), *Ariz. R. Crim. P.*, would require defense to share with the State and the court confidential material about potential conflicts of interest to demonstrate a substantial need for the witness's personal information.³

Alternatively, this affirmative duty to prove a substantial need may require defendants to reveal details about case preparation and investigation that otherwise would not be shared with the State or the court. For example, defense investigators commonly use witness information contained in police reports to identify and locate witnesses. If the amendment to Rule 15.4, *Ariz. R. Crim. P.*, is adopted, defense may be forced to either divulge investigation strategies and theories to obtain the needed civilian witness information under Rule 15.1(g), *Ariz. R. Crim. P.*, or investigate with incomplete information.

While well-intentioned, the currently proposed amendment to Rule 15.4 would likely cause unintended complications and obstacles for defendants and indigent criminal defense attorneys. Consequently, the directors of the defense agencies of Maricopa County oppose the proposed amendment to Rule 15.4, *Ariz. R. Crim. P.*

³ If defense counsel seeks the social security number for civilian witness John Smith to identify a possible conflict, that necessarily reveals that defense counsel's office currently represents or previously represented at least one John Smith with a similar date of birth.

Respectfully submitted this 30th day of April, 2023.

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