

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

David J. Euchner, SB#021768
33 N. Stone Ave., 21st Floor, Tucson, AZ 85701
TEL: (520) 724-6800
E-Mail: david.euchner@pima.gov

Grant D. Wille, SB#031989
314 S. Sixth Ave., Tucson, AZ 85701
Ralls & Wille, P.C.
TEL: (520) 884-1234
E-Mail: grant@rallslawoffice.com

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	) No. R-22-0046
	)
	) COMMENT OF ARIZONA
Petition to Amend Arizona Rule of	) ATTORNEYS FOR CRIMINAL
Criminal Procedure 15.4(b)	) JUSTICE (AACJ) OPPOSING
	) PETITION TO AMEND ARIZONA
	) RULE OF CRIMINAL
	) PROCEDURE 15.4(b)

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) hereby submits the following comment in opposition to the petition to amend Arizona Rule of Criminal Procedure 15.4(b).

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order 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.

When Arizona overhauled the Rules of Criminal Procedure in 1973, new “Rule 15 was promulgated to enable an accused to advisedly prepare his defense.” *State v. Fisher*, 141 Ariz. 227, 247 (1984). Arizona’s discovery rules in criminal proceedings are designed to “avoid unnecessary delay and surprise at trial.” *State v. Dodds*, 122 Ariz. 100, 102 (1975). *See also Wells v. Fell*, 231 Ariz. 525, 528 ¶ 12 (App. 2013) (“trial by ambush [is] a tactic no longer countenanced in Arizona courts.”) (quoting *Carlton v. Emhardt*, 138 Ariz. 353, 355 (App. 1983)). These rules permit counsel for the parties to quickly investigate cases, thereby creating efficiencies, incentivizing early resolution when appropriate, and allowing for the swift exoneration of wrongly accused defendants. In fact, the rules require the immediate disclosure of information at the time of a preliminary hearing or arraignment, which in turn helps ensure that evidence—and witnesses—do not disappear. *See Ariz. R. Crim. P. 15.1(a)(2)*.

When other external interests arise, the current rules have mechanisms to reasonably limit disclosure. As noted by the Petition, the rules permit a party to move to withhold sensitive information, and in the Petitioner’s experience, those motions

are *always* granted. Petition at 2. Moreover, although the Petition fails to acknowledge this provision, the rules also restrict the dissemination of disclosure beyond what is necessary: “Any materials furnished to a party or counsel under Rule 15 must not be disclosed to the public, and may be disclosed only to the extent necessary for the proper conduct of the case.” Ariz. R. Crim. P. 15.4(d).

While the Petition bemoans the fact that “[i]n today’s world, sadly, there is a risk of harm when sensitive personal identifying information is shared with untrusted sources,” Petition at 2, it provides no support or evidence for its claim that the current discovery rules have any connection or correlation to the general societal problem of identity fraud. In fact, although “[d]iscovery materials with this sensitive information are given out each day,” Petition at 2, Petitioner cannot provide even an anecdote of identity fraud vis-à-vis Rule 15.¹

In reality, even if all disclosure was posted on a public Internet site, data brokers who buy and sell identifying information would not have the time or inclination to capitalize on the breadcrumbs of information provided in individually disclosed reports.² Some market observers estimate that data brokerage is now a

¹ The petition also fails to provide the Court and the public with any review of how this issue is handled in other jurisdictions.

² For a primer on modern day data brokers, see “How to stop data brokers from selling your personal data,” Kaspersky (last accessed April 17, 2023), available at <https://www.kaspersky.com/resource-center/preemptive-safety/how-to-stop-data-brokers-from-selling-your-personal-information>.

quarter-trillion-dollar industry, with individual companies harvesting billions of data points each day. In comparison, the personally identifying information at issue in this petition is not even a drop in the bucket.

While there is no real connection between the proposed amendment and the purported goal of the amendment, it is readily apparent to AACJ that the proposal will create obstacles for defendants and their counsel when trying to investigate a case and construct a defense. A witness's identifying information is fundamental to the ability of counsel and their investigators to conduct an independent investigation quickly and effectively. What is worse, at the end of the day, obstructing defense counsel's ability to effectively conduct an investigation will ultimately harm the reliability and efficiency of our criminal justice system. *E.g.*, *Vega v. Ryan*, 735 F.3d 1093, 1097 (9th Cir. 2013) (granting *habeas corpus* relief in Arizona case due to ineffective investigation conducted by defense counsel); *State v. Denz*, 232 Ariz. 441, 447 ¶ 19 (App. 2013) (new trial granted due to defense counsel's ineffective investigation).

Petitioner asserts in a footnote that this Court implicitly directed it to bring this proposal in *State ex re. Montgomery v. Chavez/Gill*, 234 Ariz. 255, 258 ¶ 22 (2014). Petition at 1-2 n.1. Petitioner misreads that case to the extent it sees anything other than this Court's statement that it will not redraft rules through case law. Petitioner has chosen the correct process by which to seek a rule change, but that

does not mean that the substance of its proposal is wise. On the contrary, *Chavez/Gill* enumerated many of the countervailing reasons why redaction across the board is terrible public policy. *Id.* ¶¶ 19-20. None of these reasons is addressed in the present Petition. For example, the proposed language incorporates the “substantial need” standard from Rule 15.1(g). Petition at 3. But Petitioner fails to explain how defense counsel would inherently know that missing information is relevant and then show a substantial need for it; instead, the request might come off as a “fishing expedition.” See *State v. Hatton*, 116 Ariz. 142 (1977) (citing *State ex rel. Corbin v. Superior Court*, 103 Ariz. 465 (1968)).

Finally, as a practical matter, the proposal will not save resources as suggested. Petition at 2. As it stands, there are very few instances when the State can articulate a specific reason why identifying information should not be shared. When those instances arise, case management software can quickly generate a motion and proposed order, and the lower courts “invariably” grant those requests. Petition at 2. In contrast, the proposed amendment would put the onus on defense counsel to request even the most basic information needed to start his or her own investigation. And instead of the State having its motions “invariably” granted, the courts would be left to judge “substantial need” for basic information on a case-by-case basis.

This Petition is a solution in search of a problem. In the rare case where such information is appropriate to excise, the prosecutor should file a motion pursuant to

Rule 15.5, and the trial court can decide whether excision or a protective order is appropriate to protect witness information.

Conclusion

For these reasons, AACJ requests this Court deny the petition to amend Rule 15.4(b).

DATED (electronically filed): May 1, 2023.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By: /s/ David J. Euchner
David J. Euchner & Grant D. Wille

Comment electronically mailed to:

Paul Ahler, Maricopa County Attorney's Office