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7 **IN THE SUPREME COURT**
8 **STATE OF ARIZONA**

9 In the Matter of:

Supreme Court No. R-22-0046

10 **PETITION TO AMEND RULE**
11 **15.4(b) OF THE ARIZONA RULES**
12 **OF CRIMINAL PROCEDURE**

COMMENT

13 Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar
14 of Arizona (the “State Bar”) hereby submits the following as its comment to the
15 above-captioned Petition.

16 After study and review by the State Bar’s Criminal Practice and Procedure
17 Committee, the State Bar opposes the Petition. The Petition seeks to amend Rule
18 15.4(b), Arizona Rules of Criminal Procedure, to authorize State prosecutors to
19 unilaterally excise certain witness information prior to complying with its mandatory
20 disclosure obligations.
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22 **BACKGROUND OF ISSUE:**

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24 In *State ex rel. Montgomery v. Chavez ex rel. County of Maricopa*, 234 Ariz.
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1 255, 256 (2014) our supreme court observed: “In criminal prosecutions, Rule 15 of the
2 Arizona Rules of Criminal Procedure imposes general disclosure obligations on both
3 the prosecutor and the defendant...these disclosure requirements streamline discovery
4 in criminal prosecutions and help ensure that the parties receive all relevant
5 information.”
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7 The prosecution is obligated to disclose to defense counsel all law enforcement
8 reports, and other crime investigatory documents as originally written and/or compiled
9 (save for the redaction of certain victim information). The Petition here seeks to permit
10 redaction of “a witness’s social security number, driver license number, bank account
11 numbers or credit card numbers” from disclosure to the defense. Although the body
12 of the Petition also includes reference to a witness’s “medical identification numbers,”
13 the proposed rule modification omits such reference; consequently, it’s not discussed
14 herein.
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17 The Petition seeks to modify the rule to permit the prosecution the discretion
18 of disclosing the information or, alternatively, to seek a protective order limiting the
19 use and distribution of the information ordered to be disclosed, which Petitioner
20 proposes the court “must” grant. The Petition ignores that this information may be
21 necessary to analyze the State’s case and prepare the defense.
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DISCUSSION/ANALYSIS

Petitioner asserts that there are “some cases” where the witness’s information “may be a relevant aspect of the case,” however, such is not the case in “the majority of criminal filings” because the information “has no bearing on the facts of the case itself.” (Petition, p. 2).

Petitioner perhaps overlooks the import of the information at issue. In every criminal case, defense counsel has an affirmative obligation under State and Federal law to conduct an independent investigation of the facts. *Strickland v. Washington*, 466 U.S. 668 (1984). This duty exists because the Sixth Amendment right to counsel is a cornerstone of a fair trial. *Id.*, at 685. The failure to conduct an independent investigation undermines “the proper functioning of the adversarial process.” *Id.*, at 686.

Witness Social security numbers and drivers’ license numbers are not routinely collected and reported by police in departmental reports; however, police reports do routinely contain the social security number of the suspect/arrested person. In this vein, “[D]iscovery must be a two-way street. The State may not insist that trials be run as a ‘search for truth’ so far as defense witnesses are concerned, while maintaining ‘poker game’ secrecy for its own witnesses.” *Wardius v. Oregon*, 412 U.S. 470, 475 (1973).

1 On the rare occasion that witness social security numbers and/or drivers'
2 license numbers are reported, the information provides a vehicle through which
3 witnesses may be concretely identified, investigated, and located by the defense. The
4 information allows for investigation into whether the witness has a criminal history,
5 which can affect the witness's credibility. The information may allow defense counsel
6 to identify possible conflicts that could prevent counsel from representing a defendant.
7 Witness names and birthdates, standing alone, are frequently insufficient for a variety
8 of reasons, including incomplete or erroneous reporting by police, identical
9 information shared by more than one individual, or false information provided to police
10 by the witness.
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12 Under any scenario, Rule 15.5 "Excision and Protective Orders" permits the
13 court to deny, defer, or regulate the disclosure of any information which results "in a
14 risk or harm outweighing any usefulness of the disclosure" and "the risk cannot be
15 eliminated by a less substantial restriction of discovery rights." Rule 15.5(a)(2).
16 Therefore, if disclosure of sensitive information poses a risk, the court can issue a
17 protective order limiting the dissemination of the information at issue to the defense
18 team, excluding the defendant. Rule 15.5(c).
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20 In the experience of the practitioners that advised on this Comment, neither
21 law enforcement nor prosecutorial agencies routinely collect and report witness bank
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1 account numbers or credit card numbers. Such information is only collected and
2 reported in cases involving bank fraud, credit card fraud, credit card theft, or possibly
3 identity theft. In those cases, the information is relevant and critical to the
4 prosecution—and consequently, equally relevant, and critical to the defense.
5 Although disclosure is required, Rule 15.5’s provision for protective orders again
6 satisfies the State’s concerns of protecting a witness’s “sensitive information.”
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8 In sum, Petitioner’s proposed rule modification creates an injustice to the overall
9 integrity of the disclosure process. Unilateral prosecutorial excision of records
10 substantially hinders defense counsel’s duty and ability to conduct an independent
11 investigation. The amended, as proposed, would require defense counsel to seek
12 court assistance to conduct its investigation. This, in turn, necessarily informs the
13 prosecution of precisely what, or whom, the defense is investigating. “The Arizona
14 Rules of Criminal Procedure do not limit the right of a criminal defendant to conduct
15 an independent pretrial investigation,” *Carpenter v. Superior Court*, 176 Ariz. 486,
16 491 (App. 1993), and Rule 15 should not be modified to alter that crucial tenant.
17 Finally, requiring State prosecutors to redact witness information is overly
18 burdensome—particularly when Rule 15.5’s provision for court-issued protective
19 orders is undeniably sufficient to protect the witness’s privacy interests claimed by
20 Petitioner here.
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1 **CONCLUSION**

2 For these reasons, the State Bar respectfully requests that the Court deny the
3 Petition.
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5 RESPECTFULLY SUBMITTED this 1st day of May, 2023.
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7 /s/ Lisa M. Panahi

8 Lisa M. Panahi
9 General Counsel
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11 Electronic copy filed with the
12 Clerk of the Supreme Court of Arizona
13 this 1st day of May 2023.

14 by: PSeguin
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