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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	) No. R-26-_____
	)
	) Petition to Amend Arizona Rules of
Petition to Amend Arizona Rules of	) Criminal Procedure 1.9, 15.1, 32.6,
Criminal Procedure 1.9, 15.1, 32.6, and	) and 33.6
33.6	)
	)
_____	)

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Petitioner, David J. Euchner, hereby submits the petition to amend Arizona Rules of Criminal Procedure 1.9, 15.1, 32.6, and 33.6, as specified in the Attachment, to allow ex parte motions and hearings for discovery.

Background.

It has always been understood that criminal defense lawyers who are investigating their cases, whether it be as a defense to the charge or for mitigation, may file an ex parte motion with the court. Ariz. R. Sup. Ct. 81, Canon 2.9. This is especially true in the arena of capital mitigation.

In *Morehart v. Barton*, 226 Ariz. 510 (2011), this Court held that a victim does not have the right to be present at an ex parte discovery hearing, because the

defendant does not have the right to be personally present at that hearing. Two weeks ago, in *State v. Smith*, -- Ariz. --, 1 CA-SA 25-0281, 2025 WL 3899501 (Ariz. Ct. App., Dec. 31, 2025), the court of appeals held that *Morehart* assumed without deciding that ex parte hearings were allowed, and that Smith in fact was not entitled to such an ex parte hearing (despite being provided several prior ex parte hearings without objection from the State).

Although Petitioner believes *Smith* was wrongly decided, and Smith will be filing a petition for review in this Court to challenge that ruling, Petitioner agrees with the court of appeals on one clear point: the text of the criminal rules does not expressly authorize ex parte motions for discovery in any stage of criminal litigation. It is undoubtedly preferable to have clear text that supports court action than having inferential extrapolation. *See Allen v. Sanders*, 240 Ariz. 569, 573 ¶ 22, 574 ¶ 29 (2016) (Bolick, J., concurring) (“[W]e should ... make any appropriate changes through our rulemaking process rather than on a case-by-case basis. . . . The rulemaking process allows members of the public to weigh in so that the Court can take into account competing interests and perspectives.”). Because ex parte discovery motions are a core component of effective advocacy for a criminal defendant, Petitioner requests this Court make the proposed amendments to the criminal rules.

The proposed amendments would do nothing more than put into the text what has always been the practice until the court of appeals disturbed the status quo in *Smith*. The *Smith* opinion purports to apply only to post-conviction mitigation investigations by defense counsel, but there is no limiting feature to its analysis that would keep it from applying to any ex parte hearing that is not “expressly” authorized by law. The holding legally ends ex parte proceedings in pretrial litigation and post-conviction litigation. It also, by its reasoning, applies to arrest warrants and search warrants because such proceedings are also not expressly authorized by Arizona law. *Smith*, 2025 WL 3899501, at *2 ¶ 10.

Considering the date of the *Smith* decision, and the pending rule change deadline, this petition was drafted and filed in haste. Petitioner anticipates the comment period will produce enlightening discussion on the issue, and this Court will have ample briefing on the subject such that it can adopt a simple and workable rule change in 2026 that will go into effect on January 1, 2027.

Ex parte hearings are allowed, even if not required.

Although ex parte proceedings are generally disfavored because of an appearance of bias, they are not prohibited. The *Smith* opinion cites Canon 2.9 and ER 3.5(b) to show that ex parte hearings should be disallowed. *Smith* misrepresented the plain text of each rule. Canon 2.9(A)(5) states: “A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.”

And ER 3.5(b) states, “A lawyer shall not[] communicate ex parte with such a person during the proceeding *unless authorized to do so by law or court order*” (emphasis added). Thus, once the trial court authorized the ex parte motion and hearing, the judge and defense counsel acted in accordance with the law.

The court in *Smith* cited *State v. Apelt*, 176 Ariz. 349, 365 (1993), for the proposition that ex parte proceedings are “inherently harmful.” *Smith*, 2025 WL 3899501, at *2 ¶ 10. But Arizona courts have recognized for decades that criminal defendants’ need for a thorough investigation outweighs the prosecution’s interest in knowing what the defense is investigating. *See, e.g., Morehart*, 226 Ariz. at 515 ¶¶ 22. Thus, even though this Court stated in *Apelt* that there was no legal authority for an ex parte hearing for the appointment of experts, it later adopted Rule 15.9 (now located at Rule 6.7) creating that legal authority.

Although *Apelt* and *Smith* both dealt with ex parte motions and hearings, the posture was significantly different. In *Apelt*, the question was whether the trial court was **required** to provide an ex parte hearing; in *Smith*, on the other hand, the question was whether the court was **permitted** to hold an ex parte hearing. Even in *Apelt*, this Court recognized that a prior case allowed such a hearing, and it did not disavow that process. 176 Ariz. at 365 (citing *State v. Fisher*, 152 Ariz. 116, 118 (1986)).

The *Smith* court did not follow this Court’s opinion in *State v. VanWinkle*, 230 Ariz. 387, 391 ¶ 11 (2012), where this Court cited Rule 15.9’s provision of ex parte hearings to support a request for a trial continuance: “[I]f VanWinkle was concerned about disclosing matters of trial strategy or work product, he could have requested an ex parte hearing.” True, this is dictum, *see Smith*, 2025 WL 3899501, *3 ¶ 17, but it is far-fetched to imagine that this Court used dictum to suborn ethical violations.

This Court recognizes that capital defense counsel must “be familiar with and guided by the performance standards in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, and the 2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases.” Ariz. R. Crim. P. 6.8(a)(5); *see also Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003). Guidelines 1.1, 10.7, 10.8, and 10.15.1 show the obligations of capital post-conviction counsel that necessitate ex parte requests. Although the court of appeals said, “nothing in the Guidelines [] contemplates ex parte discovery,” *Smith*, 2025 WL 3899501, at *5 ¶ 24, the need for ex parte proceedings is implicit when considering together the simultaneous requirements of both an aggressive investigation and protecting the privileged nature of all information discovered until it is ready to be disclosed.

This petition would codify the longstanding practice in Arizona courts.

For decades, capital defense attorneys have been using ex parte motions to gather discovery for mitigation, with the full knowledge of all prosecutors. In one case—*Smith*—a prosecutor decided to be the first to challenge the procedure, and this challenge occurred only after the trial judge granted several other ex parte filings. If ex parte hearings in this context were as unethical as the court of appeals suggests in *Smith*, then this Court was complicit in the practice through its opinions in *Morehart* and *VanWinkle*. Applying the Occam’s Razor principle, the more reasonable conclusion is that there is no ethical violation for defense lawyers or judges conducting ex parte proceedings for such discovery purposes.

As for any concerns that the process will be abused, this Court recognized the trial court’s “gatekeeper function” in ensuring the discovery rules are not abused in *R.S. v. Thompson (Vanders)*, 251 Ariz. 111, 119-20 ¶ 27 (2021). ER 3.3(d) also requires: “In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.” This is sufficient to ensure that the opportunity for ex parte proceedings will not be abused. The record in *Smith* shows that the trial judge did not indiscriminately grant ex parte motions in a blanket fashion; on the contrary, the judge denied the blanket request and instead reviewed

each motion to ensure the propriety of each request and that victim information was not sought.

The State is not prejudiced by the lack of access to the *ex parte* motion and hearing or to the discovery ultimately obtained by the defense. First, if the State wanted that discovery, it could file its own motion. Second, in the context of post-conviction proceedings, if the defendant raises a claim of ineffective assistance of counsel, the State may be entitled to discovery of information that would rebut the claim. *Naranjo v. Sukenic*, 254 Ariz. 467 (2023); Ariz. R. Crim. P. 32.6(f), 33.6(f). Third, the persons or agencies that control the documents or items are permitted to object if the request triggers legal concerns. Ironically, the same three-judge panel that decided *Smith* had also decided, only one month earlier, that the prosecution has no or limited standing to object to defense disclosure requests from third parties. *Lopez v. State*, -- Ariz. --, -- ¶¶ 15-22, 2025 WL 3210517, *3-4 (Ariz. Ct. App., Nov. 19, 2025).

The logic of the *Smith* opinion, if applied equally to all *ex parte* hearings (as it must), would not only invalidate defense requests for mitigation information. It would also invalidate search warrants and arrest warrants. There is no express authorization for *ex parte* hearings for search warrants in the Fourth Amendment to the U.S. Constitution or article 2, section 8 of the Arizona Constitution. Although A.R.S. § 13-3016(B)(1) allows an agency to obtain discovery “without prior notice

to the subscriber or party[] by obtaining a search warrant pursuant to chapter 38, article 8 of this title,” the statutes governing search warrants say nothing about ex parte proceedings. §§ 13-3911 et seq. On the other hand, § 13-3017 provides a specific mechanism for obtaining ex parte orders for pen registers or trap-and-trace devices. “Where the legislature has specifically used a term in certain places within a statute and excluded it in another place, courts will not read that term into the section from which it was excluded.” *City of Flagstaff v. Mangum*, 164 Ariz. 395, 398 (1990). Since there is no “express” legal authority for these ex parte proceedings, *Smith* dictates that courts must immediately cease such proceedings immediately.

Of course, this is an absurd result. But it is no less absurd to deny criminal defendants the opportunity to ask for an ex parte hearing for defense discovery requests when the law has plainly allowed it for generations.

The proposal brings balance to the discovery abilities of the parties.

A.R.S. § 13-4071(D) expressly prohibits the use of blank subpoenas for discovery purposes in criminal cases. This statute creates the need for judges to get involved in discovery requests. But this statute only applies once a criminal case is filed; prior to that, the State is not so limited in using ex parte proceedings to obtain discovery, not only through search warrants but also through administrative subpoenas, *see State v. Mixton*, 250 Ariz. 282 (2021), and subpoenas duces tecum or subpoenas testificandum, *see Marston’s Inc. v. Strand*, 114 Ariz. 260, 263 (1977).

In many if not most criminal cases, once the State files the charging document, it has nearly completed its investigation. *See State v. Lacy*, 187 Ariz. 340, 346 (1996) (State not required to charge defendant in 1983 after inculpatory statement provided “sufficient evidence to prove guilt”; recovering the murder weapon in 1991 was “an important piece of evidence”).

It should be self-evident that in every capital case, the mitigation investigation will uncover not just favorable evidence but also unfavorable evidence. Whereas the State has a constitutional duty to disclose evidence it discovers that aids the defendant, *Brady v. Maryland*, 373 U.S. 83 (1963), the defendant owes no such duty to the prosecution to assist it in obtaining or affirming a conviction and a death sentence. And the State’s duty extends only to exculpatory evidence (for guilt or punishment), not to neutral evidence that helps neither party’s case.

Conclusion

For these reasons, Petitioner requests this Court grant the petition to amend Arizona Rules of Criminal Procedure 15.1, 32.6, and 33.6.

DATED (electronically filed): January 16, 2026.

By: /s/ David J. Euchner
David J. Euchner

ATTACHMENT¹

Ariz. R. Crim. P. 1.9

(a) [no change]

(b) Service of Motion; Response; Reply. Except for ex parte motions, ~~t~~The moving party must serve the motion on all other parties. No later than 10 days after service, another party may file and serve a response, and, no later than 3 days after service of a response, the moving party may file and serve a reply. A reply must be directed only to matters raised in a response. If no response is filed, the court may deem the motion submitted on the record.

(c)-(v) [no change]

Ariz. R. Crim. P. 15.1

(a)-(f) [no change]

(g) Disclosure by Court Order.

(1)-(2) [no change]

(3) Ex Parte Motions and Orders. The court may hear and grant ex parte motions filed by the defendant when the defendant makes a proper showing of the need for confidentiality. The court must make a verbatim record of any ex parte proceeding, communication, or request.

(h)-(j) [no change]

Ariz. R. Crim. P. 32.6

(a) [no change]

(b) Discovery.

(1)-(2) [no change]

¹ Changes or additions in rule text are indicated by **bold underscoring** and deletions from text are indicated by ~~strikeouts~~.

(3) *Ex Parte Motions and Orders.* The court may hear and grant ex parte motions filed by the defendant when the defendant makes a proper showing of the need for confidentiality. The court must make a verbatim record of any ex parte proceeding, communication, or request.

(c)-(f) [no change]

Ariz. R. Crim. P. 33.6

(a) [no change]

(b) Discovery.

(1)-(2) [no change]

(3) *Ex Parte Motions and Orders.* The court may hear and grant ex parte motions filed by the defendant when the defendant makes a proper showing of the need for confidentiality. The court must make a verbatim record of any ex parte proceeding, communication, or request.

(c)-(f) [no change]