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ARIZONA SUPREME COURT

In the Matter of:

Petition to Amend Arizona Rules of
Criminal Procedure 1.9, 15.1, 32.6 and
33.6

Supreme Court No. R-26-0024

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

The Maricopa County indigent representation (IR) offices collectively handle most cases filed in Maricopa County in which there has been a finding of indigency. The Office of Public Defense Services (OPDS) provides administrative and financial oversight to the staffed offices and the Office of Contract Counsel (OCC). The staffed offices are

comprised of the Office of the Public Defender (OPD), the Office of the Legal Advocate (OLA), the Office of the Legal Defender (OLD), and the Office of the Public Advocate (OPA). We jointly submit this comment in support of the Petition to Amend Arizona Rules of Criminal Procedure 1.9, 15.1, 32.6 and 33.6.

Given the critical role of ex parte practice in protecting the rights of criminal defendants at all stages of proceedings, the Maricopa County indigent representation offices strongly support the adoption of these rule amendments which would expressly authorize ex parte discovery motions and hearings. Ex parte motions and hearings allow courts to address issues that are particularly sensitive and require confidentiality.

The need for ex parte communications arises at all stages of a criminal case, including in pre-trial litigation and in post-conviction proceedings. There are procedural safeguards to circumvent the risks that these ex parte motions may introduce as these motions are necessary to protect confidentiality and exercise effective assistance of counsel. The petition specifies these safeguards as well as the proposed amendments. Ex parte communications are an essential function in our criminal justice system, specifically at the inception of a case to conduct a thorough, detailed and effective investigation. This includes obtaining records, retaining and hiring experts, and strategically preparing a defense.

The Arizona Court of Appeals Division issued an opinion regarding the use of ex parte motions in criminal PCR proceedings. *State v. Smith*, 585 P.3d 808 (Ariz. Ct. App. 2025). This ruling, if interpreted incorrectly, risks undermining the long-standing practice in Arizona of ex parte discovery motions under Rule 6.7.

Because ARS 13-4071(D) prohibits the use of blank subpoenas to procure discovery in criminal cases, motions for 15.1(g) discovery orders are necessary to obtain documents held by third parties. This includes the defendant's own records from schools, employers, and medical providers. Motions for 15.1(g) orders might also include, for example: 1) obtaining a client's work records in order to establish an alibi defense, 2) obtaining an order to access prior competency proceedings from another agency or county, and 3) obtaining third party records/protected health information when a person is unable or unwilling to sign a release of information.

In all 15.1(g) motions, the defendant must not only disclose the names of the third-party record holders but also must articulate a "substantial need for the material or information to prepare the defendant's case." This information is quintessential work product that would not otherwise be subject to disclosure even if the underlying documents are ultimately disclosed to the State under the defense's Rule 15.2 obligations. Additionally, the State generally does not have standing to object to 15.1(g) orders on behalf of the record holders.¹ See *Lopez v. State*, 581 P.3d 741, 746 (App. 2025). And Rule 15.2 does not require disclosure of evidence unless the defendant intends to use it at trial. A defendant who participated in substance abuse treatment, underwent medical procedures, attended special education classes, etc, should not be required to disclose this information to the State just because the record holder requires a court order to release documents to defense counsel. Without allowance for ex parte requests under 15.1(g), a

¹ Exceptions include requests for victim records and requests for records held by certain state agencies for which the prosecuting agency also serves as civil counsel for the record-holding agency.

defendant must choose between alerting the State to the names and locations of potential record holders, as well as the reasons why the records are needed for his defense, or foregoing the records held by the third parties.

In capital litigation, the use of ex parte motions and hearings is particularly crucial for a defendant's mitigation investigation. This is because the State has broad leeway in a penalty phase to present any information relevant to mitigation, regardless of its admissibility under the Rules of Evidence (ARS 13-751(C)) and may present any evidence that demonstrates that the defendant should not be shown leniency regardless of whether the defendant presents evidence of mitigation (ARS 13-752(G)). Thus, information that would not be relevant during a non-capital trial could be used against a defendant in a capital sentencing proceeding. The Capital ABA guidelines, while not binding, have been widely relied upon in Arizona and require counsel to proceed ex parte when needed to protect confidentiality and avoid potentially adverse information being prematurely disclosed to the government. "Because the defense should not be required to disclose privileged communications or strategy ... it is counsel's obligation to insist upon making such requests ex parte and in camera." (Guideline 10.4).

This is why it is necessary for defense counsel to have a mechanism to obtain documents held by third parties without alerting the State to the existence of those documents or the reasons the documents are being sought. Once the documents have been obtained and reviewed by defense counsel, disclosure obligations under 15.2 apply just as any other evidence the defense intends to use at trial.

It is vital that this right to ex parte motions and hearings be solidified by this Court's rules. Following *State v. Apelt*, 176 Ariz. 349 (1993), it became apparent that the defense required a procedural mechanism to investigate independently, free from unnecessary intrusion by the State and opposing counsel. Since 2002, that mechanism has existed in former Rule 15.9, now Rule 6.7. Rule 6.7(b) expressly authorizes this Court to entertain and grant an application for an ex parte proceeding. In *Morehart v. Barton*, the court recognized that Rule 15.9 was modified in response to "[c]oncerns that defense counsel might improperly be required to disclose privileged or work product material in seeking to obtain mitigation evidence." 226 Ariz. 510, 513 ¶ 11. To address those concerns, "the rule was changed to expressly allow ex parte proceedings upon a 'proper showing ... [of a] need for confidentiality.'" *Id.* This court recognized that "certain requests may be made by ex parte motions . . . and courts often resolve such matters without a hearing." *Id.* at ¶ 12. To eliminate any confusion or misinterpretation of *Smith*, and to acknowledge *Morehart's* support for ex parte proceedings, an express criminal rule authorizing ex parte discovery motions and hearings is necessary to protect defendants' constitutional rights.

There are safeguards written into the rule and through other authorities. The Arizona Rules of Professional Conduct provide that counsel must inform the Court of all material facts in ex parte proceedings, whether or not the facts are adverse. (ER 3.3(d)). Additionally, the trial court must determine whether there is a need for confidentiality before proceeding with an ex parte request. The trial court must also consider whether victims' rights are implicated and, if so, must enforce those rights unless doing so would deprive the defendant of a fair trial. *Morehart* at 516.

This petition aligns with court precedent and *Morehart*. The use of ex parte motions and hearings for discovery requests protect client confidentiality and due process. For the reasons stated above, the directors of the indigent defense agencies of Maricopa County support the Petition to Amend Arizona Rules of Criminal Procedure 1.9, 15.1, 32.6 and 33.6.

Respectfully submitted this day of April 30, 2026.

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