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**IN THE SUPREME COURT  
STATE OF ARIZONA**

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

Comment of Arizona Attorneys  
for Criminal Justice in Support  
of Petition to Amend Arizona  
Rules of Criminal Procedure 1.9,  
15.1, 32.6, and 33.6 - to allow *ex  
parte* discovery motions and  
hearings.

Arizona Attorneys for Criminal Justice (“AACJ”), the Arizona affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and the attorneys who defend them. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals. Our organization is dedicated to safeguarding the rights of the accused in the courts and before the legislature; ensuring that criminal defendants, regardless of resources, receive fair treatment and meaningful access to justice; and defending the integrity of the adversarial system.

AACJ also promotes excellence in the practice of criminal law through education, training, and mutual assistance, and works to foster public understanding of citizens' rights, the criminal justice system, and the essential role defense attorneys play in preserving due process and equal justice under law.

Pursuant to Rule 28, Rules of the Supreme Court, AACJ respectfully submits this Comment in support of Petition to Amend Arizona Rules of Criminal Procedure 1.9, 15.1, 32.6, and 33.6, which seeks to sanction and establish the parameters of *ex parte* discovery motions and hearings.

**I. *Ex Parte* Discovery Motions Streamline the Discovery Process and Are Essential to Justice.**

The proposed amendments to **Rule 1.9, 15.1, 32.6, and 33.6** are a necessary clarification that will align the written text of the Criminal Rules with both long-standing judicial practice and the constitutional mandates of effective advocacy. By expressly authorizing *ex parte* discovery motions, this Court will provide a clear procedural roadmap that protects the integrity of defense investigations without violating ethical canons.

*Ex parte* proceedings, as circumscribed, are recognized as essential to justice when needed to protect confidential information. Our legal system acknowledges specific instances where such communications are essential to justice:

- **Judicial Ethics:** Canon 2.9(A)(5) explicitly provides that a judge may "initiate, permit, or consider any *ex parte* communication when **expressly authorized by law** to do so."
- **Attorney Conduct:** Similarly, ER 3.5(b) prohibits *ex parte* communication with a judge "unless authorized to do so by law or court order."

Currently, the text of the Criminal Rules does not explicitly articulate this authority. This silence creates an unnecessary tension between a lawyer's ethical obligations and their duty to provide a robust defense. It also restricts judges from exercising their judicial discretion.

## **II. A *Per Se* Ban on *Ex Parte* Discovery Motions Conflicts with the United States and Arizona Constitutions, and this Court's Precedent.**

A criminal defendant's right to a thorough investigation is a cornerstone of the Sixth Amendment. As noted in *Morehart v. Barton*, 226 Ariz. 510, ¶ 22 (2011), a defendant's need for an exhaustive investigation outweighs the prosecution's interest in monitoring the defense's strategy or investigative leads.

The necessity for *ex parte* proceedings is implicit when one considers the dual requirements of:

1. **Aggressive Investigation:** The duty to seek out all mitigating or exculpatory evidence.
2. **Privilege Protection:** The requirement to shield the work product and strategy of the defense until such information is legally required to be disclosed.

Without the ability to move the court *ex parte* for discovery resources or orders, a defendant is often forced to "tip their hand" to the State, effectively granting the prosecution a roadmap of the defense's mental impressions and investigative theories.

These changes would simply **codify what has always been the practice** in our courts—ensuring that the rules of procedure reflect the reality of constitutional criminal defense and provide much-needed clarity.

As a member of the capital defense bar for over 10 years who routinely works with and consults with other members of the capital defense bar, undersigned counsel can represent that *ex parte* discovery requests are both routine and constitutionally necessary. As part of the mandated mitigation investigation, counsel must secure sensitive records and

retain experts to administer psychological or medical evaluations. Records and evaluations often require court orders to proceed, and the criminal rules require disclosure of confidential information to obtain those orders. Ariz. R. Crim. P. 15.1(g) (requiring showings of “substantial need for the material or information to prepare the defendant’s case” and inability to obtain substantial equivalent without undue hardship); 32.6(b)(1). Counsel is duty-bound to protect the sanctity of this ongoing investigation; disclosing initial efforts would jeopardize the defense’s strategy, purpose, and function. Premature or piecemeal disclosure to the State would not only prejudice the defendant but would violate their due process rights under both the Arizona and United States Constitutions.

Furthermore, forced disclosure at this stage would infringe upon the confidential nature of the mitigation process. The Guidelines provide that the mitigation investigation must be performed independently and confidentially. *American Bar Association’s Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 4.1(B) and Guideline 10.15.1. Because the investigation reflects counsel’s preliminary opinions and theories, it is strictly protected by the work-product doctrine, as established in *Hickman v. Taylor*, 329 U.S. 495 (1947), and codified in Rule 15.4(b)(1) of the Arizona Rules of Criminal Procedure.

The written text of **Rules 1.9, 15.1, 32.6, and 33.6** must align with both long-standing judicial practice and the constitutional mandates of effective advocacy.

RESPECTFULLY SUBMITTED this 1st day of May 2026.

**Arizona Attorneys for Criminal Justice**

By: /s/ Sheena S. Chiang  
**Sheena S. Chiang**