

**RACHEL H. MITCHELL**  
**MARICOPA COUNTY ATTORNEY**

Blaine Gadow, State Bar No. 015741  
Chief Deputy, Maricopa County Attorney's Office  
Firm State Bar Number 00032000  
225 West Madison Street, 4th Floor  
Phoenix, Arizona 85003  
gadow@mcao.maricopa.gov  
spldiv@mcao.maricopa.gov

**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 RE: PETITION TO  
AMEND ARIZONA RULES OF  
CRIMINAL PROCEDURE 1.9,  
15.1, 32.6 AND 33.6

Pursuant to Arizona Rule of the Supreme Court 28(c), the Maricopa County Attorney's Office ("MCAO") respectfully submits the following comments opposing Petition R-26-0024 ("Petition").

**I. Reason Proposed Rule Amendments Should Not Be Adopted**

Petitioner has not identified any material problem created by the current rules. Instead, the proposed changes would significantly undermine the need for transparency in criminal proceedings and should therefore be rejected.

**A. Proposed Ariz. R. Crim. P. 1.9(b):**

The proposal suggests that Rule 1.9(b) related to the “Scope, Purpose and Construction, and Other General Provisions” be modified to exclude ex parte motions from those pleadings required to be served on all other parties:

(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....

Proposed Ariz. R. Crim. P. 1.9 (b).<sup>1</sup> The value of a judicial proceeding is substantially diluted where the process is ex parte, because the court does not have available to it the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate. And while in our criminal adversary system ex parte motions have their place, they are disfavored.

**Ex Parte Communications Are Generally Prohibited and Presumptively Improper**

Ex parte communications are generally prohibited and presumptively improper. *See* Ariz. R. Sup. Ct. 81, Canon 2.9(A) (“A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter,” except in certain enumerated circumstances); Ariz. R. Sup. Ct.

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<sup>1</sup> MCAO will delineate the Petition’s proposed changes or additions in bold and underline throughout its Comment.

42, E.R. 3.5(b); *Morehart v. Barton*, 226 Ariz. 510, 515, ¶ 22 (2011) (“court proceedings generally must ‘be administered openly’”) (quoting Ariz. Const. art. 2, § 11).

The United States Supreme Court has stated that although ex parte motions have their place, “[i]n our adversary system, ex parte motions are disfavored.” *Ayestas v. Davis*, 584 U.S. 28, 40 (2018). “The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.” *Herring v. New York*, 422 U.S. 853, 862 (1975). The value of a judicial proceeding “is substantially diluted where the process is ex parte, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate.” *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 183 (1968). “Common sense tells us that secret decisions based on only one side of the story will prove inaccurate more often than those made after hearing from both sides.” *Kaley v. United States*, 571 U.S. 320, 355 (2014) (Roberts, C.J., dissenting).

Of notable concern is that “[a]t the very least, participation in ex parte communications will expose the judge to one-sided argumentation, which carries the attendant risk of an erroneous ruling on the law or facts. At worst, ex parte communication is an invitation to improper influence...” *San Carlos Apache Tribe*

*v. Bolton ex rel. Cnty. of Maricopa*, 194 Ariz. 68, 72, ¶ 8 (1999) (citation omitted). “Generally, the danger posed by an ex parte communication between a litigant and the court is that the court’s impartiality may be compromised by the communication itself and the other litigant’s inability to refute or clarify the substance of the communication.” *Kaufman v. Am. Fam. Mut. Ins. Co.*, 601 F.3d 1088, 1095 (10th Cir. 2010). One reason ex parte contacts are improper is that “no matter how pure the motive any ex parte contact may allow the judge to be improperly influenced or inaccurately informed.” *McElhanon v. Hing*, 151 Ariz. 403, 409 (1986) (citation omitted). In *McElhanon* the Court recognized that “justice must not only be done fairly but that it must be perceived as having been fairly done,” and that “[a]nything else tends to undermine public confidence in the judicial system.” 151 Ariz. at 412.

MCAO acknowledges that some ex parte motions are allowed in criminal proceedings. *See* Ariz. R. Crim. P. 6.7(b), related to the appointment of investigators and expert witnesses for indigent defendants: “(b) Ex Parte Proceeding. A defendant may not make an ex parte request under this rule without showing a need for confidentiality. The court must make a verbatim record of any ex parte proceeding, communication, or request, which must be available for appellate review.” The ex parte provision recognizes “the need to preserve the confidentiality of defense work product or attorney-client material during the investigation of mitigation evidence.” *Morehart*, 226 Ariz. at 513, ¶ 21. Rule 6.7’s substantially similar predecessor

(former Rule 15.9) was amended to include the ex parte provision because of “concerns that defense counsel might improperly be required to disclose privileged or work product material in seeking to obtain mitigation evidence.” *State v. Smith*, 585 P.3d 808, 813, ¶ 14 (Ariz. App. 2025) (citing *Morehart*, 226 Ariz. at 513, ¶ 11).

Even in instances where an ex parte pleading may be appropriate under Rule 6.7, it is critical that the opposing party be given notice of lodging of the ex parte pleading. This allows for an accurate record as to the number, frequency and date that the ex parte matters were considered.

**B. Proposed Ariz. R. Crim. P. 15.1(g)(3):**

The proposal suggests that Rule 15.1(g) related to “Disclosure by Court Order” be modified to include the following subsection:

(1) Disclosure Order. On the defendant’s motion, a court may order any person to make available to the defendant material or information not included in this rule if the court finds:

...

**(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.**

Proposed Ariz. R. Crim. P. 15.1(g)(3).

The Petition’s proposal explicitly allowing for ex parte motions under Rule 15 would improperly bring disfavored ex parte motions into the discovery process.

(See Petition at 2: “...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.”) Ex parte motions for discovery under Rule 15 should be disallowed. Where ex parte motions may be necessary—for example for purposes of mitigation investigation—such a procedure is explicitly provided for under Rule 6.7(b).

The concern expressed by the *Kaufman* court is even more pronounced in discovery proceedings: “Generally, the danger posed by an ex parte communication between a litigant and the court is that the court’s impartiality may be compromised by the communication itself and the other litigant’s inability to refute or clarify the substance of the communication.” *Kaufman*, 601 F.3d at 1095. This Court has stated in the context of a pretrial disclosure order: “One reason such contacts are improper is that no matter how pure the motive any ex parte contact may allow the judge to be improperly influenced or inaccurately informed.” *Draper v. Gentry*, 255 Ariz. 417, 423, ¶ 21 (2023). MCAO opposes any rule change that explicitly provides for ex parte pleadings under Rule 15 because not only are such pleadings disfavored, they create a risk of erroneous or unjust rulings based on the opposing litigant’s inability to refute or clarify the substance of the communication, and because ex parte communications give the appearance of judicial bias and favoritism.

There is no general constitutional right to discovery in a criminal case. *See*

*Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Instead, discovery in criminal cases is largely governed by court rules. *State v. Fish in & for Cnty. of Maricopa*, 259 Ariz. 27, ¶ 9 (App. 2024). The underlying principle of Arizona’s criminal disclosure rules is the avoidance of undue delay or surprise. *State v. Rienhardt*, 190 Ariz. 579, 586 (1997). “To that end, ‘[t]he object of discovery is to assist the search for truth by providing the parties with all the evidence possible so that the crucial facts may be presented at trial and a just decision made.’” *Wells v. Fell*, 231 Ariz. 525, 528, ¶ 13 (2013) (citing *State v. Helmick*, 112 Ariz. 166, 168 (1975)).

Disclosure, like all discovery, “is not a game.” *Wells*, 231 Ariz. at 529, ¶ 13 (quoting *Bryan v. Riddel*, 178 Ariz. 472, 477 (1994)). “In the criminal context, as well as the civil, our disclosure process should allow the parties to exchange information openly and to make decisions as to how to proceed on that basis.” *Id.* at 529, ¶ 16. Also material to this issue is *Carpenter v. Superior Court*, 176 Ariz. 486 (App. 1993), wherein the defendant attempted to subpoena the police custodian of records without notifying the prosecutor’s office. The appellate court upheld the trial court’s quashing of the subpoena, concluding “that a criminal defendant cannot use the subpoena power of the court to circumvent the rules of criminal procedure and thereby obtain discovery without the knowledge of the state or consent of the trial court.” 176 Ariz. at 490.

An additional concern is that Proposed Rule 15.1(g)(3) may allow the defense

to circumvent the requirements of Rule 15.1 whereby they must make a showing of substantial need for discovery requests outside the normal course of materials in the State's possession. *See* Rule 15.1(g)(1)(A) and (B): "On the defendant's motion, a court may order any person to make available to the defendant material or information not included in this rule if the court finds: (A) the defendant has a substantial need for the material or information to prepare the defendant's case; and (B) the defendant cannot obtain the substantial equivalent by other means without undue hardship." A specific provision allowing for ex parte pleadings under Rule 15 would serve to obviate the requirements of Rule 15.1(g) as set forth above. This is particularly inappropriate given that the "underlying principle of Rule 15 is adequate notification to the opposition of one's case-in-chief in return for reciprocal discovery so that undue delay and surprise may be avoided at trial by both sides," and the rule, "to be effective, must be applied with equal force to both the prosecution and the defendant." *State v. Lawrence*, 112 Ariz. 20, 22 (1975).

The Arizona Court of Appeals recently issued its opinion related to ex parte proceedings in post-conviction proceedings, holding "that the law does not authorize ex parte proceedings for the discovery of third-party records in PCR matters under Rule 32." *Smith*, 585 P.3d at 816, ¶ 25. Petitioner asserts that this holding in *Smith* "legally ends ex parte proceedings in pretrial litigation and post-conviction litigation," and also "by its reasoning, applies to arrest warrants and search warrants

because such proceedings are also not expressly authorized by Arizona law. (Petition at 3.) Petitioner further asserts that 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,” but would “also invalidate search warrants and arrest warrants.” (Petition at 7.) MCAO disagrees with these assertions as they relate to the ramifications of *Smith*. There the court’s holding was precise and limited: “We conclude that the law does not authorize ex parte proceedings for the discovery of third-party records in PCR matters under Rule 32.” *Smith*, 585 P.3d at 816, ¶ 25. This limited holding has no impact on discovery matters pursuant to Rule 15.

In contrast to the discovery rules which relate to ongoing criminal prosecutions, applications for search warrants are not adversarial. *United States v. U.S. Dist. Ct. for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 321 (1972) (“a warrant application involves no public or adversary proceedings: it is an ex parte request before a magistrate or judge”); *United States v. Harris*, 403 U.S. 573, 584 (1971) (“The Confrontation Clause is inapplicable to ex parte applications for search warrants, which occur prior to the commencement of criminal prosecutions.”). *See also Draper*, 255 Ariz. at 423, ¶ 21 (“Unlike an ex parte warrant, which requires a probable cause showing, *see* U.S. Const. amend. IV, a motion for disclosure puts all parties on notice and allows the party from whom disclosure is sought to argue why the order should not be granted.”). Importantly, unlike an ex parte pleading under

Rule 15, a defendant may challenge a search warrant based upon a claim of false or incomplete information. *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978).

### **Specific Concerns Related to Ex Parte Communications**

One area of concern is that the ex parte process has arguably been utilized in an overbroad manner in Maricopa County. For instance, in one capital proceeding a signed ex parte order included language “limiting the dissemination of records to the prosecution or other law enforcement agencies.” (Attachment at 001.) MCAO only learned of the breadth of the ex parte order when a third-party agency (Maricopa County Sheriff’s Office) refused to comply with MCAO’s subpoena for records, on the grounds that it was prevented from complying due to an existing court order. After subsequent litigation initiated by MCAO, a reviewing superior court judge found the ex parte order was overbroad and appeared to be “a restriction without qualification [that] would hamper the State’s lawful acquisition of responsive evidence.” (*Id.*) In this instance, but for MCAO being informed by the Maricopa County Sheriff’s Office that it could not comply with the State’s request for inmate records due to an ex parte order previously entered in the case, the State would have remained unaware of the improper order.

Yet another concern is that the ex parte process has arguably been overused in certain cases. In one capital matter not scheduled for trial until 2027, the number of ex parte pleadings already exceeds 30 filed ex parte pleadings. (Attachment at

003.) This volume of ex parte practice raises the concern that the amount of information—likely favorable to the defendant or potentially inaccurate—may impact the judicial officer’s objectivity in subsequent rulings. *See Draper*, 255 Ariz. at 423, ¶ 21 (“One reason such contacts are improper is that no matter how pure the motive any ex parte contact may allow the judge to be improperly influenced or inaccurately informed.”).

Regarding the current ex parte motion practice occurring in the Maricopa County Superior Court, some members of the defense bar provide notice to the State by filing a “Notice of Lodging” related to their ex parte pleading. However, many defense counsel do not file any type of notice and the State’s only notification that some type of sealed document has been filed is by review of the superior court’s docket pages for that particular case. Some Maricopa County Superior Court judges have ordered that if defense counsel will be filing an ex parte motion, they are also required to file a Notice of Lodging regarding the motion and provide that notice to the State, and the victim if the victim is represented by counsel. (Attachment at 005.) Other divisions of the court do not require such notice. Given the current inconsistency within the Maricopa County Superior Court, expansion of ex parte proceedings to the discovery process would likely serve to create further problems, especially given that there is no transparency with ex parte matters.

An additional issue with ex parte proceedings is the potential effect the

secrecy of the proceedings will have on the victims and the public at large. Court proceedings generally must be administered openly. *Morehart*, 226 Ariz. at 515 (citing Ariz. Const. art. 2, § 11: “Justice in all cases shall be administered openly...”); *see also Press-Enter. Co. v. Superior Ct. of California for Riverside Cnty.*, 478 U.S. 1, 13 (1986) (“Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.”) (citation omitted); *Williams v. Pennsylvania*, 579 U.S. 1, 16 (2016) (in judicial recusal matter Court stated that “[b]oth the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.”).

In the criminal context, the disclosure process should allow the parties to exchange information openly and to make decisions on that basis. Accordingly, ex parte motions should not be brought into the discovery process.

**C. Proposed Ariz. R. Crim. P. 32.6(b)(3):**

The proposal suggests that Rule 32.6(b)) related to “Post-Conviction Relief for Defendants Sentenced Following a Trial or a Contested Probation Violation Hearing” be modified to include a subsection (b)(3) with the same language as that proposed for Ariz. R. Crim. P. 15.1(g)(3) as set forth above.<sup>2</sup>

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<sup>2</sup> The proposal also suggests that Rule 33.6(b)(3) be modified just as the proposed modification to Rule 32.6(b). MCAO’s position and arguments related to Proposed Rule 32.6(b)(3) are applicable to Proposed Rule 33.6(b)(3) as well.

Post-conviction proceedings are governed by Rule 32, Arizona Rule of Criminal Procedure 32. *See also* A.R.S. § 13–4231 *et. seq.* (governing post-conviction relief proceedings). Although Rule 32 serves as a safeguard, “it may not be abused,” and in “all cases, civil or criminal, there must be an end to litigation.” *State v. Carriger*, 143 Ariz. 142, 145–46 (1984). Rule 32 is not intended to provide a second appeal, or “to unnecessarily delay the renditions of justice or add a third day in court when fewer days are sufficient to do substantial justice.” *Id.* at 145; *see also State v. McFord*, 132 Ariz. 132, 133 (App. 1982) (“Rule 32 does not destroy the basic principle of finality in criminal proceedings.”).

It is important to note that there is no constitutional right to a post-conviction proceeding. *Carriger*, 143 Ariz. at 145. Limiting authorization for ex parte requests in post-conviction review matters is particularly compelling as these proceedings are designed to “accommodate the unusual situation where justice ran its course and yet went awry.” *State v. Smith*, 585 P.3d at 815, ¶ 21 (citing *Carriger*, 143 Ariz. at 146).

Ariz. R. Crim. P. 32.5 (c) provides for the appointment of investigators, expert witnesses, and mitigation specialists “[o]n application and if the trial court finds that such assistance is reasonably necessary for an indigent defendant,” pursuant to Rule 6.7. *Smith*, 585 P.3d at 813, ¶13. Rule 6.7(b) contemplates that requests “under this rule” may be ex parte if the defendant “show[s] a need for confidentiality.” *Id.*

Rule 6.7’s “substantially similar predecessor (former Rule 15.9) was amended

to include the ex parte provision because of ‘concerns that defense counsel might improperly be required to disclose privileged or work product material in seeking to obtain mitigation evidence.’” *Smith*, 585 P.3d at 813, ¶ 14 (citing *Morehart*, 226 Ariz. at 513, ¶ 11.). In addressing whether a defendant may discover third-party records ex parte under Rule 6.7 in a post-conviction proceeding, the *Smith* court held he may not, because the ex parte authorization is directly tied to requests under Rule 6.7, “which addresses appointments, not discovery.” *Id.* at 814, ¶ 19. Permitting a defendant to secure *assistance* ex parte upon a showing of a need for confidentiality under Rules 32.5(c) and 6.7 is justified because such authorization protects against the disclosure of privileged material. *Id.* at 814, ¶ 22. However, *discovery* does not encompass the same concerns and “Rule 32.6(b) makes clear that all parties are on an equal footing when requesting discovery in PCR matters.” *Id.* at 814, ¶ 23.

The court’s analysis in *Smith* makes clear that if ex parte proceedings in the post-conviction review arena are necessary to protect a criminal defendant against the wrongful disclosure of privileged material, that protection is currently available under Rules 32.5 and 6.7. However, for the reasons listed above, ex parte proceedings should not be extended to the post-conviction discovery process.

## **II. CONCLUSION**

As discussed above, MCAO requests that this Court deny Proposed Rule Changes to Rules 1.9, 15.1, 32.6 and 33.6 in their entirety.

Respectfully submitted May 1st, 2026.

RACHEL H. MITCHELL  
MARICOPA COUNTY ATTORNEY

BY: /s/ Blaine Gadow  
Chief Deputy  
Maricopa County Attorney's Office