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10 **ARIZONA SUPREME COURT**

11 IN RE:

R-14-0004

12 PETITION TO AMEND RULE 111,  
13 ARIZ. R. SUP. CRT., RULE 28,  
14 ARCAP, AND RULE 31.24 ARIZ. R.  
15 CRIM. P.

MARICOPA COUNTY ATTORNEY'S  
RESPONSE TO PETITION TO AMEND RULE  
111, ARIZ. R. SUP. CT., RULE 28,  
ARCAP, AND RULE 31.24, ARIZ. R. CRIM.  
P.

16 The Maricopa County Attorney hereby responds to the Petition to Amend  
17 Arizona's rules to permit citation of unpublished opinions. For the reasons explained  
18 below, the Maricopa County Attorney's Office (MCAO) asks this Court to deny the  
19 petition as to Rule 31.24, Ariz. R. Crim. P.

20 Respectfully submitted this 7th day of May, 2014.

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23 WILLIAM G. MONTGOMERY  
24 MARICOPA COUNTY ATTORNEY

25 By   
26 for MARK FAULL  
27 CHIEF DEPUTY  
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1 **I. INTRODUCTION**

2 Arizona Appellate Courts have long distinguished between “opinions” and  
3 “memorandum decisions.” ARIZ. SUP. CT. RULE 111. Opinions create binding  
4 precedent for lower courts while memorandum decisions have no precedential value  
5 and they only impact the litigants in that particular case. *Id.* The petition in this  
6 matter seeks to alter this well-established, time proven approach by changing the  
7 rules to permit citation to memorandum decisions as non-binding, persuasive  
8 authority. This change is unnecessary and, at least for criminal matters, it will be  
9 burdensome to courts and practitioners. Due to differences between the volume and  
10 speed demands of the criminal system versus the civil system the MCAO does not  
11 object to the change to the civil rules of procedure requested in the petition. Indeed,  
12 changing the civil rules first and studying the impact of that change for several years  
13 before altering the criminal rules may help avoid some of the negative impacts on the  
14 criminal system that are discussed below.

15 **II. DISCUSSION**

16 Throughout Arizona, the criminal justice system has increasingly fewer  
17 resources while the demands on the system either remain the same or increase. This  
18 reality is as true for our appellate court system as it is for the lower courts. From  
19 May 1, 2013 through May 1, 2014, Division One of the Arizona Court of Appeals  
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1 issued decisions in 448 criminal matters.<sup>1</sup> The court resolved over 94% of these cases  
2 with a memorandum decision. In civil matters,<sup>2</sup> the opinion rate was somewhat  
3 higher. During that same time period, Division One resolved 369 civil cases and just  
4 over 84% of those cases were resolved with memorandum decisions. In the vast  
5 majority of cases decided by Division One last year, the judges did not believe the  
6 case met the established criteria for publication. Of course, regardless of whether a  
7 case will be issued as an opinion or a memorandum decision, any panel of the Court  
8 of Appeals will always seek to properly apply the rules and law to the facts of that  
9 particular case to reach the correct outcome. In many ways, however, memorandum  
10 decisions, allow the court to resolve the matter more quickly because the court knows  
11 that case will not be cited in other courts so the court may gloss over some facts or  
12 choose not to fully analyze or distinguish some cases because they are not central to  
13 the holding in case at bar. Knowing that the memorandum decision is not creating  
14 precedent and it cannot be cited, the court can resolve cases without historical  
15 analysis or lengthy explanation regarding the development of the law which might be  
16 needed in a precedent creating opinion. In this way, memorandum decisions allow  
17 the court to maximize scarce judicial resources which is particularly important given  
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25 <sup>1</sup> This figure represents only those cases that were filed under a criminal case number. Additional  
26 criminal matters were handled as special actions and under juvenile cause numbers. Data can be  
27 located at <http://azcourts.gov/coal/SearchDecisions.aspx>.

28 <sup>2</sup> Like the criminal numbers, this data only refers to cases filed under “CV” cause numbers.  
Additional civil matters were handled under different types of cause numbers.

1 the volume of criminal cases the courts must handle.<sup>3</sup>

2         Attorneys practicing criminal law will also be burdened by this rule because it  
3 will require them the cull through all appellate opinions to properly present their  
4 cases. As Petitioner notes, memorandum decisions are accessible through electronic  
5 databases, but an attorney can choose to limit his or her research to only published  
6 opinions that are on the topic. If the rules are modified, attorneys will need to review  
7 all published and unpublished opinions to ensure that they are adequately and  
8 completely representing the State or the defendant. Petitioner’s rule change would  
9 note that there is no “duty” to cite to “unpublished” opinions, but that clause provides  
10 little comfort to an attorney who is advocating a position. Knowing that a court may  
11 review and be persuaded by memorandum decisions, the attorney must fully research  
12 every case – published or unpublished – that they can find on the topic so they will  
13 know how to distinguish those other holdings. Given the volume that criminal  
14 practitioners must handle, such a research task would be daunting and impractical for  
15 public lawyers on both sides of the aisle who are trying to manage high caseloads to  
16 achieve public safety and serve the interests of justice.

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18         Changing the rule will also invite additional PCR litigation which will further  
19 burden the court system and put convictions in doubt. Petitioner’s proposed rule

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<sup>3</sup> Wisconsin’s committee study following a similar rule change which is cited by Petitioner and discussed at length below, found no delay in the time it took the court to resolve cases following the rule change. As discussed below, however, this data is not a reliable predictor for Arizona because Wisconsin’s system still allows the courts to dispose of the overwhelming majority of their cases in ways that cannot be cited even under their new rule.

1 change states that there is “no duty or research or cite” to unpublished opinions. This  
2 caveat in the rule may prevent ethical complaints and possibly legal malpractice  
3 actions, but it will not prevent convicted defendants from challenging the  
4 effectiveness of their counsel if their counsel fails to cite to unpublished opinions that  
5 were on point to some critical issue in the case. The fact that the rule disclaims any  
6 “duty” to research and find unpublished opinions does not answer the constitutional  
7 question of whether a defense attorney’s failure to cite a potentially “dispositive”  
8 unpublished opinion fell below an objectively reasonable standard in a given case. At  
9 the very least, this rule change will open this new avenue of attack against defense  
10 counsel which will require litigation in the lower and appellate courts. The proposed  
11 rule change will add unnecessary additional burdens on an already strained judicial  
12 system.  
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17 Finally, the idea that memorandum decisions would be cited only for  
18 persuasive value is unrealistic. Would a judge of a lower court ignore a  
19 memorandum decision from a higher court that was directly on point to the contested  
20 issue? It is difficult to imagine a judge reaching a different conclusion in the face of  
21 a memorandum decision from a higher court that is directly on point. In practice,  
22 memorandum decisions will be treated as precedent by the lower courts. This reality  
23 will present a challenge for this Court as well because currently this Court can simply  
24 “depublish” an opinion of the Court of Appeals in cases where this Court does not  
25 believe the individual case warrants full review, but does not want the case to set  
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1 precedent. The effect of this rule change will, for all practical purposes, make  
2 depublication useless which may require this Court to review additional cases.  
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4 Likewise, if different panels or divisions of the Court of Appeals issue memorandum  
5 decisions that reach opposite results, currently this Court can wait to address that  
6 issue until it is presented in the best possible way for resolution because the  
7 memorandum decisions cannot be cited beyond those individual cases. If the rule is  
8 changed to allow those cases to be cited to lower courts, this Court will be forced to  
9 resolve the split sooner and possibly review cases where the facts or procedural  
10 history do not allow for a clear or complete resolution of the issue. In sum, this  
11 change will impact the way this Court chooses to exercise its discretionary review  
12 power.  
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16 Petitioner asserts several rationales to support this rule change. First, Petitioner  
17 asserts that changing the rule will promote “consistency, certainty, and equality.”  
18 While these are all laudable goals, Petitioner does not explain how the prohibition on  
19 citing memorandum decisions defeats these goals. To the contrary, the current rule  
20 provides clarity and consistency by narrowly defining the cases that serve as  
21 precedent. Opinions explain and advance the law; memorandum decisions do not.  
22 The fact that a memorandum decision might reach a result that has not yet been  
23 explored in an opinion, does not result in inconsistency or inequality. The current  
24 system is consistent, certain, and equal. Additionally, Petitioner does not explain  
25 how the rule change will advance these goals. If, as Petitioner’s proposed rule  
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1 asserts, memorandum decisions are only to be cited as persuasive, non-binding,  
2 authority, how does that promote consistency or certainty? Under the proposed rule  
3 change, a lower court is free to reject the memorandum decision which seems to lead  
4 to inconsistency and uncertainty. Furthermore, Petitioner cites to no examples where  
5 the current system has led to inconsistency, uncertainty, or inequality where the result  
6 would be different under the proposed change.  
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9 Second, Petitioner expresses concern that lawyers are faced with a “Hobson’s  
10 Choice” regarding whether to advance an argument contained in an unpublished  
11 opinion without citation and appear frivolous, or to cite it and run afoul of the rules of  
12 procedure and ethics. Petitioner provides no specific examples where such a choice  
13 actually exists. Under the current rules, an advocate is free to make an argument, and  
14 advocates make arguments to advance and expand the law all the time. The rules of  
15 procedure and ethics do not require that a lawyer be able to cite to a case directly on  
16 point to advance a particular position.<sup>4</sup> These types of arguments always draw on  
17 established law even if they do not cite to authority directly on point. Indeed the  
18 memorandum decision that cannot be cited undoubtedly explained how the  
19 conclusion in that case flowed from the established law. Using similar logic and  
20 reasoning is not plagiarizing from the memorandum opinion and it is certainly not  
21 advancing a frivolous argument (if it is based on existing law, logic and reason) and it  
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27 <sup>4</sup> Although the new rule disclaims any duty to cite unpublished opinions, it is not entirely clear what  
28 the lawyer’s duty would be in terms of candor to the tribunal if a lawyer knowingly did not cite a  
memorandum opinion that was directly contrary to the lawyer’s argument.

1 does not run afoul of the rules of procedure or the ethical rules. Memorandum  
2 decisions can provide roadmaps for arguments and new ideas just as any secondary  
3 source can. For decades the current citation rules have existed and throughout that  
4 time lawyers have always been able to argue for expansions and new interpretations  
5 of existing law without citation to memorandum decisions.  
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8 Third, the last two rationales Petitioner advances deal with the implementation  
9 of similar rules in other jurisdictions. In particular, Petitioner points to Wisconsin  
10 and that state's experience with a similar rule that was effective on July 1, 2009.  
11 Although the precise dates are unclear from the reports, it appears that a committee  
12 studied the impact of the rule change for a two year period from July 1, 2009 to June  
13 or July 2011.<sup>5</sup> Petitioner notes that the report states that "no cases were reported by  
14 court staff where ineffective assistance claims had been based on citation or research  
15 of unpublished opinions." [Petition at 8]. Wisconsin's experience with ineffective  
16 assistance claims provides little proof that this rule change will not lead to such  
17 claims because the study period was only two years long and most cases would not  
18 have reached a position for ineffective assistance claims in such a short time period.  
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20 Additionally, Appendix B to the report specifically states that no statistics were  
21 gathered on this issue so the statement in the report appears to be based on voluntary

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25 <sup>5</sup> The final report was issued "March 2012" but the report is not clear on the timeframe for the data  
26 collection in the report. Appendix A to the report indicates that most of the statistics in the report  
27 were gathered up to June 30, 2011. That report and the committee's initial interim report are  
28 available at [www.wicourts.gov/publications/reports/index.htm](http://www.wicourts.gov/publications/reports/index.htm) as "Citation to Unpublished  
Opinions Committee Interim Report" and "Citation to Unpublished Opinions Committee Final  
Report."

1 reporting at best.<sup>6</sup>

2           Additionally, Wisconsin’s experience is not comparable to Arizona because  
3 their courts still have several types of rulings which cannot be cited. WIS. STAT.  
4 RULE 809.23(3)(b). These rulings include a “per curiam opinion, memorandum  
5 opinion, summary disposition order, or other order... .” *Id.* In Wisconsin, a per  
6 curiam or memorandum opinion “may reduce or omit the statement of facts and give  
7 only the reasons for the decision with a minimal analysis of the reasoning.” WI. Ct.  
8 of App. Internal Operating Procedures, IOP VI(5). The committee’s final report  
9 shows that the per curiam opinion is widely used by Wisconsin courts. In the twelve  
10 months studied after the rule was changed, courts issued 577 unpublished per curiam  
11 opinions. [Final Report at 8]. An additional 955 cases were disposed by “summary  
12 disposition.”<sup>7</sup> *Id.* In the twelve months studied after the rule change in Wisconsin,  
13 2171 opinions were issued. *Id.* Just over 70% of those opinions could not be cited  
14 even *after the rule was changed*. Wisconsin’s rules and system are simply too  
15 different to provide any basis for a meaningful prediction on the impact of the citation  
16 rule change in Arizona. Petitioner’s discussion regarding the experience in the  
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24 <sup>6</sup> In Appendix B to the final report, the committee listed one of its goals for the report as follows:  
25 “8. Identify appellate decisions addressing ineffective assistance claims based on citation or  
26 research of unpublished opinions.” The final reports then notes, “Action taken: Staff advised that  
this statistic was difficult to collect accurately and consistently. No statistics were compiled.”  
[Final Report at 13].

27 <sup>7</sup> Summary disposition cases “are decided by the panel, upon review of the briefs and the record,  
28 following screening, and assigned to staff attorneys for preparation of an order implementing the  
court’s decision.” WI. Ct. of App. Internal Operating Procedures, IOP VI(1).

1 federal courts with a similar rule is likewise inapplicable because of the vast  
2 differences between the functions, volume, and procedures of that court system  
3 compared to Arizona's.  
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5 **III. Conclusion**

6 Petitioner has advanced no compelling reason to modify a rule that has worked  
7 well in Arizona for decades. There is no evidence of any real benefits to permitting  
8 citation to memorandum decisions as persuasive authority. The consequences of  
9 changing the rule are likely to have significant impacts on judicial and practitioner  
10 workloads without any discernable advantages. Indeed, if such a rule change were  
11 made, the courts would be just as well served by eliminating memorandum decisions  
12 and issuing only opinions because that will be the realistic, natural consequence of  
13 this rule change. However, MCAO does not object to the proposed changes if they  
14 are made only to the civil rules and data is gathered to help predict the impact of  
15 making such a rule change in criminal cases. For these reasons, the MCAO's asks  
16 this court to deny the petition as it relates to the criminal rules.  
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21 Respectfully submitted this 20th of May, 2014.  
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