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11 **IN THE SUPREME COURT**
12 **STATE OF ARIZONA**

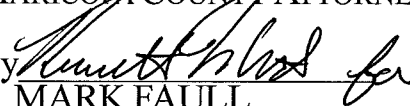
13 **PETITION TO MODIFY RULE**
14 **15.4(b), ARIZONA RULES OF**
15 **CRIMINAL PROCEDURE**

16 SUPREME COURT NO. R-15-_____

17 Petition to Modify Rule 15.4(b), Ariz. R.
18 Crim. P.

19 The Maricopa County Attorney, pursuant to Arizona Supreme Court Rule 28,
20 hereby petitions this Court to modify Rule 15.4(b) of the Arizona Rules of Criminal
21 Procedure to clarify that statements made pursuant to a “free talk” agreement are not
22 discoverable unless the statements are exculpatory or the person who made the
23 statement becomes a witness for the prosecution at trial.

24 Respectfully submitted this 12 day of January, 2014.

25 **WILLIAM G. MONTGOMERY**
26 **MARICOPA COUNTY ATTORNEY**
27 By 
28 **MARK FAULL**
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1 **INTRODUCTION AND DISCUSSION**

2 While law enforcement officers have numerous investigative techniques at
3 their disposal, some crimes can only be fully solved or understood by getting
4 information from those who actually participated in the offense. This ability to get
5 information about crimes and criminals from other criminals can be critical in the
6 investigation of a wide variety of crimes. This type of information may be gathered
7 prior to the filing of formal criminal charges, but it is also very common for law
8 enforcement officials to talk to defendants about crimes they and others have
9 committed. In most situations, these types of conversations are performed pursuant
10 to “free talk” agreements that are created between the prosecution, the defendant and
11 the defendant’s attorney. These “free talks” are usually initiated by a defendant’s
12 attorney by asking the prosecution if there is any interest in conducting such a talk
13 and usually the defense provides some proffer of the information that might come out
14 during the “free talk.” These talks may be directly related to the talking defendant’s
15 pending matter and may include evidence against other co-defendants. In some
16 circumstances, the information may be about completely unrelated and unsolved
17 crimes. Either way these conversations can provide much needed evidence to solve
18 crimes or to hold defendants fully accountable for their criminal behavior. The
19 talking defendant also benefits from these conversations because if a testimonial
20 agreement is later reached, the defendant will receive some reduction in his or her
21 sentencing exposure compared to the anticipated results after a trial.
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1 These “free talks” can present significant risks, however, for the defendant that
2 agrees to cooperate with law enforcement. The criminal who provides evidence
3 against his or her accomplices, friends, or co-conspirators will be seen as a “snitch”
4 within the criminal community and this fact alone will subject them to the very real
5 possibility of violent retaliation. Additionally, premature disclosure of the
6 information provided in these conversations can jeopardize ongoing investigations by
7 giving those responsible for the crimes the time to hide and destroy evidence if they
8 know what law enforcement knows about the case.
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11 For these reasons, the existence and content of any “free talk” is treated as
12 confidential information and it is not disclosed to anyone outside of law enforcement
13 subject to several specific situations that are fully described within the “free talk”
14 agreement. Under the terms of these agreements, the parties agree that nothing that is
15 said during the “free talk” will be used against the defendant or revealed to anyone
16 with certain exceptions. First, if a testimonial plea agreement is eventually reached
17 with the talking defendant that will require him or her to testify at trial against
18 another person, the recorded “free talk” statement will be disclosed to the defendant
19 in that case. Second, if the talking defendant provides information that is exculpatory
20 or mitigating regarding another defendant, that information must be disclosed to the
21 other defendant regardless of whether any testimonial agreement is reached pursuant
22 to *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. Third, if the talking
23 defendant should later testify in any proceeding in a way that is inconsistent with the
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1 recorded “free talk,” the “free talk” can be used for impeachment purposes.

2 Rule 15 of the Arizona Rules of Criminal Procedure does not specifically
3 mention free talks or when they must be disclosed. The committee that drafted the
4 2003 amendments to Rule 15 contained both defense attorneys and prosecutors who
5 were undoubtedly aware of the common practice and use of free talks as described in
6 the attached “free talk” agreement. Nothing in any of the comments to any section of
7 Rule 15 nor any of the rules themselves evidenced any intention to change these
8 longstanding practices.
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11 Without any specific reference to “free talks,” the committee recommended
12 and this court adopted Rule 15.1(b)(2) which requires the prosecution to disclose
13 “[a]ll statements of the defendant and of any person who will be tried with the
14 defendant.” ARIZ. R. CRIM. P. 15.1(b)(2). The 2003 committee did not comment on
15 Rule 15.1(b)(2), but the committee did note that “[t]he 2003 changes to Rule 15.1 are
16 designed to redefine the scope and timing of disclosure by the State in criminal cases,
17 in order to bring the disclosure rules more closely into alignment with the realities of
18 modern practice.” ARIZ. R. CRIM. P. 15.1 cmt. 2003 Committee. The comment was
19 amended in 2007 to specifically note that the disclosure requirement of Rule
20 15.1(b)(2) “rests on the need to make severance motions under *Bruton v. United*
21 *States*, 88 S.Ct. 1620, 391 U.S. 123, 20 L.Ed.2d 476 (1968) . . . at the earliest possible
22 time.” ARIZ. R. CRIM. P. 15.1 cmt. The fact that the 2003 committee sought to draft
23 the rules to reflect modern practice, the fact that the committee was well aware of the
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1 longstanding practice of only disclosing “free talks” in specific limited
2 circumstances, and the fact that Rule 15.1(b)(2) was specifically intended to permit
3 early resolution of *Bruton* issues, all prove that there was no desire or intention to
4 change how “free talks” were disclosed when this Court adopted the current rules of
5 discovery for criminal cases.
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8 Nevertheless, despite these facts, at least two courts in Maricopa County alone
9 have recently wrestled with the language of Rule 15.1(b)(2) and its application to
10 “free talks.” The relevant portion of a minute entry from one of these cases is
11 attached at Attachment A. The difficulty in reconciling the plain language of Rule
12 15.1(b)(2) with the practical realities of “free talks” and longstanding practice is
13 readily understandable. Rule 15 does not specifically address “free talks” and the
14 language of Rule 15.1(b)(2) is plain enough – unless co-defendants are severed for
15 trial, any statements about the offense that any codefendant has made must be
16 disclosed to all other defendants. While the current language may be clear enough, as
17 discussed above, there was never any intention to include “free talks” in the
18 disclosure requirements of Rule 15.1(b)(2) and doing so would be extremely poor
19 public policy for several reasons.
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24 First, applying the rule to “free talks” would discourage defendants from
25 offering to provide information regarding their co-defendant’s conduct. Currently,
26 defendants offer to participate in “free talks” because their cooperation may lead to a
27 more favorable plea agreement in their own case. However, even if such an
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1 agreement is not reached, the defendant knows that his or her statements will be kept
2 in confidence absent the narrow exceptions described above. Thus, some defendants
3 are willing to cooperate with law enforcement in this way because there is little risk
4 to them. If they reach an agreement, they know there are risks, but at that point their
5 case has resolved more favorably for them. If no agreement is reached no one will
6 know they provided information. If the prosecution is required to disclose “free
7 talks” to all consolidated co-defendants it will have a significant chilling effect on
8 defendants and few will be willing to provide information to law enforcement. While
9 relying on a co-defendant or another criminal is never desirable for law enforcement,
10 the reality is that there are many cases that cannot be solved or adequately prosecuted
11 without help from others who were there during the commission of the crime. Often
12 this includes the most serious crimes where the other witnesses to the event have been
13 killed and the only witnesses are those who committed the crime. Premature and
14 unnecessary disclosure of “free talks” would significantly impact law enforcement’s
15 ability to investigate, solve, and fully prosecute some very significant crimes.

21 Second, applying Rule 15.1(b)(2) to “free talks” will waste scarce judicial
22 resources and require unnecessary multiple trials. If Rule 15.1(b)(2) applies to “free
23 talks,” the prosecution will be forced to sever co-defendants in many consolidated
24 cases to avoid having to disclose the “free talk” statements in cases where no
25 agreements are reached. Because Rule 15.1(b)(2) only mandates disclosure of
26 statements made by a person who will be tried with a defendant, severing co-
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1 defendants would allow the “free talk” to remain confidential but it would
2 unnecessarily increase the number of trials and resources needed to resolve cases in a
3 system that is already stretched beyond its capacity. Additionally, defendants would
4 quickly realize what was happening when the State moved to sever defendants. All
5 of the remaining defendants would likely conclude – correctly or incorrectly – that
6 the severed co-defendant “snitched” in some way and cooperated with law
7 enforcement. This realization would create a dangerous situation for the talking co-
8 defendant and would further reduce law enforcement’s ability to use “free talks” as a
9 crime fighting tool.
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13 **CONCLUSION**

14 To resolve the conflict between the stated purpose of Rule 15.1(b)(2) and its
15 potential unintended application to “free talks,” the Maricopa County Attorney
16 requests that this court modify Rule 15.4 as proposed below to definitively state that
17 statements made pursuant to “free talk” agreements are not discoverable under Rule
18 15.1(b)(2). This change will reflect longstanding practice around the State, it will
19 allow law enforcement and defendants to continue to use “free talks” to their mutual
20 benefit, it will prevent future litigation over the application of the Rule to “free talks,”
21 and it will not infringe on any defendants’ rights to appropriate discovery.
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1 Respectfully submitted this 12 day of January, 2014.

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3 WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

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5 By 
6 MARK FAULL
CHIEF DEPUTY

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1 **MODIFIED RULE 15.4, ARIZONA RULES OF CRIMINAL PROCEDURE**

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3 **Rule 15.4. General standards**

4 In all disclosure under this rule the following shall apply:

5 **a. Statements**

6 [No Change].

7 **b. Materials Not Subject to Disclosure**

8 (1) *Work Product.* [No Change].

9 (2) *Informants.* [No Change].

10 (3) FREE TALK AGREEMENTS AND STATEMENTS BY
11 COOPERATING CO-DEFENDANTS. DISCLOSURE OF A FREE
12 TALK AGREEMENT AND ANY STATEMENT MADE BY A CO-
13 DEFENDANT COOPERATING WITH THE PROSECUTION OR A
14 LAW ENFORCEMENT AGENCY AS A RESULT OF A FREE TALK
15 AGREEMENT SHALL NOT BE REQUIRED TO BE DISCLOSED
16 UNTIL SUCH TIME AS IT IS DETERMINED THAT THE
17 COOPERATING CO-DEFENDANT WILL BE A WITNESS FOR THE
18 PROSECUTION AT TRIAL, UNLESS THE STATEMENT
19 CONTAINS INFORMATION THAT TENDS TO MITIGATE THE
20 DEFENDANT'S GUILT AS TO THE OFFENSE CHARGED, OR
21 WHICH WOULD TEND TO REDUCE THE DEFENDANT'S
22 PUNISHMENT THEREFOR.

23 **c. Failure to Call a Witness or Raise a Defense.**

24 [No Change].

25 **d. Use of Materials.**

26 [No Change].

27 **e. Requests for Disclosure.**

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[No Change].

f. Filing of Papers; Exception for Misdemeanors and Petty Offenses Filed in Limited Jurisdiction Courts.

[No Change].