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8 **IN THE SUPREME COURT**
9 **STATE OF ARIZONA**

10 In the Matter of:

Supreme Court No. R-15-0025

11 **PETITION TO MODIFY RULE**
12 **15.4(b), ARIZONA RULES OF**
13 **CRIMINAL PROCEDURE**

COMMENT OF
THE STATE BAR OF ARIZONA

14 **Introduction**

15 In light of the divergent views of two significant sets of stakeholders –
16 criminal law practitioners – the State Bar of Arizona takes no position on this
17 petition. The prosecution subcommittee of the State Bar’s Criminal Practice &
18 Procedure Committee proposed that the State Bar support the petition; the defense
19 subcommittee proposed that the State Bar oppose the petition. In this comment, the
20 State Bar presents both views for the Court’s consideration.

21 **Criminal Prosecution Subcommittee Position**

22 **A. Background of Petition**

23 A “free talk” is an agreement between a person charged with a crime and the
24 State whereby information is offered by the person about other criminal activity that
25 may lead to charges against a third person or assist in investigating an unsolved

1 crime. In Maricopa County, Superior Court judges have been split as to whether
2 Rule 15.1 requires the State to disclose to the defendant all “free talk” agreements,
3 even if the individual involved in the free talk has not signed a testimonial agreement
4 and the information itself is not exculpatory. Rule 15.1 does specify when the State
5 is required to disclose a “free talk” unless the material is exculpatory. The fact that
6 in practice some Superior Court judges are in disagreement over when a “free talk”
7 must be disclosed shows the confusion in the area and indicates a need to better
8 define when disclosure is necessary.

9 **B. Discussion/Analysis**

10 Rule 15.1(b)(2) requires the State to disclose “[a]ll statements of the defendant
11 and of any person who will be tried with the defendant.” Rule 15.4(b) provides that
12 the State need not disclose work product and, under certain circumstances, the
13 existence of a confidential informant. Rule 15.4(b)(2) states that one reason for not
14 disclosing confidential informants is to protect them from any substantial risk that
15 could result from the disclosure. This same protection for a confidential informant
16 should be extended to defendants who engage in “free talks” but who, for whatever
17 reason, are ultimately not noticed as a witness for the State. When a defendant agrees
18 to engage in a “free talk,” he puts his life at risk. Defendants who “snitch” or “flip”
19 are regarded as traitors by other accused persons and often must be housed in
20 protective custody and even be transported separately from other inmates to ensure
21 their safety.

22 If “free talk” results in a testimonial agreement for the inmate to testify against
23 a defendant or statements made in the “free talk” are exculpatory to a defendant, the
24 “free talk” must be disclosed and extra protection must be provided to that inmate.
25 On the other hand, often an inmate participates in a “free talk” but the information
the inmate knows is hearsay or too vague to be helpful to the State. Under these

1 situations, the State would not enter a testimonial agreement. Nonetheless, if the
2 State must still disclose the existence of a “free talk,” that inmate’s life could be in
3 danger even when he or she does not testify against a defendant and is not receiving
4 any type of benefit for participating in the “free talk.”

5 For these reasons, the proposed modification to Rule 15.4 (b) to specify when
6 a “free talk” must be disclosed will help alleviate any confusion and will protect
7 defendants who may want to speak to the State but who ultimately are not given any
8 type of deal for their information. The modified rule should contain a definition of
9 the phrase “free talk.”

10 **Criminal Defense Subcommittee Position**

11 Petitioner seeks to modify Rule 15.4(b) “to clarify that” statements by a co-
12 defendant given to prosecutors – and prosecutors alone – during a “free talk”
13 concerning the offense for which a defendant is on trial “are not discoverable unless
14 the statements are exculpatory [concerning other defendant(s)] or the person who
15 made the statements becomes a witness for the prosecution at trial.” [Petition at 1]

16 Petitioner acknowledges its practice of keeping the existence and content of
17 any “free talk” as “confidential information . . . not disclosed to anyone outside of
18 law enforcement,” justifying its conduct with the notion that Rule 15 “does not
19 specifically mention free talks or when they must be disclosed.” [Petition at 3-4]

20 The existing rules belie Petitioner’s assertions, and long-established
21 constitutional law prohibits Petitioner’s proposed modification.

22 The Rules of Criminal Procedure are intended to “facilitate the exchange of
23 information between the State and accused in order to avoid surprise, delay, and to
24 sharpen and narrow the issues for trial.” *State ex. rel. Baumert v. Superior Court*,
25 133 Ariz. 371, 373, 651 P.2d 1196, 1198 (1982). The intent and design of the rules
could not be clearer: Both parties are obligated to produce the names and written or

1 recorded statements of all potential witnesses as soon as such information becomes
2 known and regardless whether the witness is actually called at trial.

3 The proposed modification is opposed because:

- 4
5 1) All statements of potential witnesses must be disclosed within the
6 time frames established by the rules to avoid constitutional defects
7 in the criminal process.

8 The Rules of Criminal Procedure require the disclosure of all statements by
9 any potential witness or co-defendant “30 days after arraignment” [Rule 15.1(b)] or
10 “seasonably” after the information is obtained [Rule 15.6(1)] regardless of whether
11 the witness is listed but not actually called to testify [Rule 15.4(c)]. “Statements,” as
12 used in the disclosure rules, mean “a writing signed or otherwise adopted or
13 approved by a person”; “a mechanical, electronic or other recording of a person’s
14 oral communication or a transcript thereof”; and “a writing containing a verbatim
15 record or a summary of a person’s oral communications.” [Rule 15.4(a)] Statements
16 by co-defendants made to prosecutors during “free talks” or otherwise concerning
17 the pending criminal case are not “confidential” and must be disclosed within 10
18 days of arraignment or seasonably after they are obtained.

19 As Petitioner acknowledges, disclosure of co-defendant statements given to
20 prosecutors or police concerning the offense at issue are crucial to whether co-
21 defendant trials must be severed pursuant to *Bruton v. United States*, 391 U.S. 123
22 (1968) (holding that co-defendant trials must be severed where one co-defendant has
23 inculcated another defendant in a statement given prior to trial, or may inculcate
24 another defendant should he choose to testify at trial). Were the State permitted to
25 completely withhold “free talk” statements inculcating other defendants, defense
counsel for the remaining defendant(s) would remain wholly unaware of the *Bruton*
grounds mandating severance – an outcome compelling a mistrial.

1 In *State v. Draper*, 162 Ariz. 433, 436, 784 P.2d 259 (1989), this Court
2 expressly recognized what should be obvious to any criminal practitioner: “[D]ue
3 process requires that a defendant be able to assess intelligently ‘the numerous factors
4 which bear upon his choice of whether to formally admit his guilt or to put the state
5 to its proof.’” Neither a lawyer nor a defendant may intelligently assess the strengths
6 and weaknesses of the state’s case in the utter absence of information possessed by
7 the government – particularly a “free talk” which, by definition, is given by a co-
8 defendant who possesses personal knowledge concerning the offenses alleged
9 against the remaining defendants. As written, the rules of procedure compel the
10 disclosure of the “free talk” before any defendant is required to decide whether to
11 plead or proceed to trial.

12 2) Disclosure may not be contingent on the date the prosecution
13 actually decides to call the cooperating co-defendant as a witness,
14 as that would always result in unnecessary delay of proceedings.

15 The Rules of Criminal Procedure are “intended to provide for the just, speedy
16 determination of every criminal proceeding. They shall be construed to secure
17 simplicity in procedure, fairness in administration, the elimination of unnecessary
18 delay and expense, and to protect the fundamental rights of the individual while
19 preserving the public welfare.” [Rule 1.2]

20 As this Court recognized long ago, “[t]he scope of Rule 15 is generally quite
21 broad. It is the underlying purpose of the discovery rules in criminal proceedings to
22 give full notification of each side’s case-in-chief so as to avoid unnecessary delay
23 and surprise at trial.” *State v. Dodds*, 112 Ariz. 100, 102, 537 P.2d 970 (1975).
24 Permitting the State to unilaterally decide when discoverable information will be
25 disclosed violates the letter, spirit and purpose of the rules. Withholding disclosure
of “free talks” beyond the time limits contained in the current rules can only result

1 in a delay of the proceedings in order to afford defense counsel time to investigate
2 the statements made and prepare to challenge them at trial.

3 The State must provide notice of all potential witnesses within the time frames
4 established by the rules – along with their written or recorded statements – but the
5 State is not bound to call the noticed witness at trial.

6 3) Mandatory disclosure is not limited to exculpatory statements.

7 In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court
8 held that the suppression by the prosecution of evidence favorable to an accused
9 violates due process where the evidence is material to guilt or to punishment.

10 *Giglio v. United States*, 405 U.S. 150 (1972), made clear that *Brady* includes
11 any evidence which tends to help the defense by either bolstering the defense’s case
12 or impeaching prosecution witnesses. In this vein, the impeachment value “free talk”
13 statements are not limited to impeachment of the testifying former co-defendant:
14 The statements may well serve to impeach other governmental witnesses. Exempting
15 such evidence from timely disclosure as set forth in the current disclosure rules – or
16 disclosure at all – violates both the letter and spirit of *Brady/Giglio*.

17 *Brady/Giglio* disclosure is not limited to “exculpatory” statements alone, nor
18 is such disclosure contingent upon the co-operating co-defendant actually
19 “becoming a witness for the prosecution at trial.” In the *Brady* context, “favorable”
20 evidence is that which relates to guilt or punishment and which tends to help the
21 defense by either bolstering the defense’s case or impeaching prosecution witnesses—
22 whether or not such evidence is directly admissible at trial. *United States v.*
23 *Kennedy*, 890 F.2d 1056, 1059 (9th Cir.1989) (holding suppression of inadmissible
24 evidence could create a due process violation if the suppressed inadmissible
25 evidence would have led to admissible evidence).

Last, both Arizona and federal courts have made clear that it is not within the

1 prosecuting attorney's prerogative to make a unilateral determination of what
2 evidence is useful to the defense. Neither the government nor the Court is aware of
3 the details of the defense strategy and therefore neither the government nor the Court
4 can accurately determine the import of co-defendant statements to the anticipated
5 defense strategy. *See State v. Schreiber*, 115 Ariz. 555, 566 P.2d 1031, 1034 (1977);
6 *Jencks v. United States*, 353 U.S. 657 (1957). Permitting the State to completely
7 withhold "free talk" statements unless the prosecutor determines the statements to
8 be "exculpatory" or the co-operating co-defendant becomes a prosecution witness
9 plainly runs afoul of *Brady* and its progeny, and consequently, the Due Process
10 Clause.

11 4) The "dangers" faced by cooperating co-defendants do not justify
12 Petitioner's proposed rule modification.

13 The defense bar is well aware of the practical dangers cooperating co-
14 defendants face. The dangers faced by a "snitch" witness do not end after his
15 testimony is presented in court. Yet Petitioner professes a desire only to protect such
16 individuals up until that time, rendering its true motive arguably transparent. The
17 truth is that all cooperating defendants are made aware of the potential dangers of
18 cooperation before the decision is made to approach the State for a cooperation
19 agreement – dangers existing before, during and after the trial itself.

20 The State possesses the discretion and power to dictate the extent of the
21 protection it may elect to afford. In this vein, State prosecutors have released
22 cooperating defendants from jail or prison; dismissed charges against cooperating
23 co-defendants; relocated cooperating defendants to an undisclosed location; entered
24 into plea agreements that guarantee no jail time; and worked with the Department of
25 Corrections to change the cooperating defendant's name, and secured imprisonment
outside of Arizona.

The State possesses the power and authority to ensure a cooperating

1 defendant's safety to the extent it chooses to do so. It also may offer the cooperating
2 co-defendant no assistance or guarantees at all. These decisions are independent of
3 the rights of the remaining defendants to the pretrial disclosure of all written or
4 recorded witness statements – whether such witnesses are actually called to testify
5 or not.

6 5) The minute entry exhibit attached to the petition does not prove the
7 case for amending the rule.

8 Petitioner attaches a minute entry order from a court grappling with the
9 Petitioner's claim that it may permissibly withhold "free talks" unless and until the
10 State decides to call the cooperating co-defendant as a witness in the prosecution's
11 case. Petitioner fails, however, to mention that its own prosecutors have been
12 warned by the State Bar about its tactic of withholding "free talk" statements. In
13 one case, the prosecutor failed to disclose "free talk" statements that included clearly
14 exculpatory evidence concerning the non-cooperating defendant. [Attachment A]
15 The defense learned of the free talk and successfully compelled its disclosure prior
16 to trial. Petitioner's practice of withholding "free talk" statements unless and until
17 it decides whether to call the cooperating co-defendant at trial is simply untenable
18 under the existing rules and law.

19 Petitioner similarly fails to mention that currently before the Maricopa County
20 Superior Court – in a case concerning multiple capital and non-capital defendants –
21 it withheld a "free talk" taken by it some three years previous, yet failed to disclose
22 it until shortly before trial(s) were scheduled. The Court had no trouble ordering
23 "that any statements by any co-defendant . . . be immediately produced by the State
24 under the same parameters as previously ordered for disclosure of statements by co-
25 defendants in this case." [Attachment B] Although the case has been pending since
2010, trials have been delayed due to the State's employment of its self-created free-
talk disclosure policy – a policy that violates the letter of the Rules of Criminal

1 Procedure. The court is currently considering the appropriate sanctions to be
2 imposed due to the State's misconduct. In the meantime, Petitioner seeks a rule
3 modification.

4 6) Cooperating Co-Defendants Are Not "Confidential Informants."

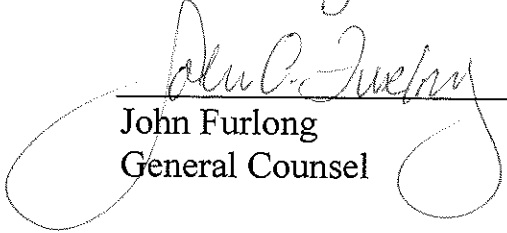
5 Rule 15.4(b) – the rule Petitioner seeks to modify – exempts from disclosure
6 only work product and “the existence of an informant or of the identity of an
7 informant who will not be called to testify . . . provided the failure to disclose will
8 not infringe the constitutional rights of the accused.” Informants are used by police
9 several times over, and police have an interest in insuring that one's identity as an
10 informant is not revealed – otherwise the informant will thereafter be useless to law
11 enforcement. Informants who engage in illegal conduct violate and void their
12 Informant Agreement with police. Last, confidential informants who become
13 percipient witnesses due to their material involvement in the crime must be disclosed
14 to the defense prior to trial. *Roviaro v. United States*, 353 U.S. 53 (1957) (defense
15 entitled to know identity of informant because the informant was an active
16 participant in the illegal activity charged); *compare State v. Superior Court*, 114
17 Ariz. 610, 562 P.2d 1108 (App.1977) (identity of informant who was neither a
18 participant in nor an observer of the crime remained confidential)

19 Co-defendants are not confidential informants and do not operate undercover
20 to assist law enforcement in uncovering crime. They are criminally accused
21 individuals involved in the same criminal activity as their fellow co-defendants,
22 looking to mitigate or nullify the penalties they face if convicted. They are, by
23 definition, percipient witnesses to the crimes at issue. Like every other potential
24 witness, co-defendant statements made to police and prosecutors must be disclosed
25 prior to trial within the time frames established, regardless whether the State decides
to call to actually call the co-defendant as a witness.

1 **Conclusion**

2 As the above shows, the State Bar's prosecution and defense groups that focus
3 on criminal rules have two differing and compelling positions. To reiterate, the State
4 Bar as an organization does not take a single position on this proposed rule change.
5 Instead, the State Bar offers both perspectives to the Court.

6 RESPECTFULLY SUBMITTED this 19th day of May, 2015.

7
8 
9 John Furlong
General Counsel

10 Electronic copy filed with the
11 Clerk of the Arizona Supreme Court
12 this 19th day of May, 2015.

13 by: 
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Appendix A



Assistant's Direct Line: (602) 340-7272

██████████ 2010

FILED
██████████ 2010
STATE BAR OF ARIZONA
BY *T. L. Saldana*

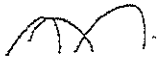
Re: File No. 09-██████████
██████████, Respondent
██████████, Complainant

Dear Mr.

Pursuant to Rule 54(b), Ariz. R. Sup. Ct., the charges filed against your client by ██████████
██████████ have been investigated and, upon review by bar counsel, have been dismissed
with the following comment, which should be conveyed to Ms. ██████████

You were prosecuting ██████████ for aggravated assault. In his "free talk", Mr. ██████████ stated
that Mr. ██████████ did not participate in the victim's assault. That statement tended to
exculpate Mr. ██████████ and you were obligated to disclose it to the defense. While it is
troubling that you do not believe you were obligated to disclose this exculpatory
information, you did voluntarily disclose it well in advance of trial. In the future, we
recommend that you be more circumspect in your judgment about what materials are
subject to compulsory disclosure under applicable criminal and ethical rules.

Pursuant to Rule 52(b)(2), Ariz. R. Sup. Ct., the Complainant may appeal this decision
within ten (10) days of receipt of the dismissal letter. Any such appeal will be referred to
the Probable Cause Panelist for a decision. You will be notified if an appeal is filed.

Sincerely, 

Senior Bar Counsel

DLS/ddc

cc: ██████████, Complainant

Appendix B

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2010-007912-008 DT

02/23/2015

HONORABLE JOSEPH C. WELTY

CLERK OF THE COURT
E. Gonzales
Deputy

STATE OF ARIZONA

KIRSTEN VALENZUELA

v.

ANTHONY JEROME WRIGHT (008)

REGINALD L COOKE

CAPITAL CASE MANAGER
JUDGE MAHONEY

MINUTE ENTRY

10:32 a.m

Courtroom SCT 5A

State's Attorney: Kirsten Valenzuela
Defendant's Attorney: Reginald Cooke
Defendant: Present

Court Reporter, Lisa Bradley, is present.

A record of the proceeding is also made by audio and/or videotape.

This is the time set for Oral Argument/Extend Last Day.

THE COURT NOTES that it has received from Mr. Cockhearn's counsel and joined by Mr. Royalty's counsel a Notice of Impending Expiration Last Day in a non-capital matter indicating their desire to have their case set for trial prior to the Last Day. Last Day is currently February 27, 2015.

Docket Code 005

Form R000D

Page 1

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2010-007912-008 DT

02/23/2015

THE COURT FURTHER NOTES that it has received on behalf of Mr. Wright a Motion to Continue Trial or in the Alternative to go forward with Trial and preclude Mr. Gittens from Testifying, and has received from the State an Emergency Motion to Set Trial prior to the Last Day.

THE COURT FURTHER NOTES that it has reviewed the minute entry in the overall matter, dated July 18, 2014, in which Judge Mahoney had broken the six remaining defendants into 3 trial groups. The first group being Mr. Cockhearn, Mr. Royalty and Mr. Wright; the second being Mr. Singleton and Mr. Webber; and the third being Mr. Jackson.

Discussion is held regarding trial schedule.

THE COURT NOTES that counsel for Mr. Wright has a pending Motion to Continue, but it is an old Motion contingent upon a Motion to Dismiss which is before Judge Kreamer. Judge Kreamer will be ruling on that Motion prior the Thursday Trial Date of February 26, 2015.

Mr. Raynak advises the Court Mr. Royalty's counsel is not prepared to start trial on February 26th that the Motion to Dismiss has been pending for a significant period of time. When the Motion to Preclude Mr. Gittens, the State had held onto recordings of Mr. Gittens, one was for over 3 years without disclosing and the other recording was for at least a year.

Mr. Raynak further advises that he and Mr. Cook had asked that any free talks be given over to counsel and that did not occur. Judge Kreamer's original ruling was that Ms. Valenzuela made a mistake and it wasn't intentional. Counsel then filed a Motion for Reconsideration with Judge Kreamer. Mr. Raynak advises that they will need a continuance of 90 days for trial.

Ms. Gray, counsel for Mr. Cockhearn, advises the Court that she would not be ready to go to trial on February 26, 2015.

Counsel for the State advises that the State does not object to the continuance of 90 days.

THE COURT FINDS that good cause to continue the February 26, 2015 trial date, specifically that there are witness interviews that still need to be accomplished on the 404(b) Motion. In addition, the parties are awaiting a ruling which may require additional appellate work.

THE COURT MAKES NO FINDING as to whether or not a stay would be appropriate from the Superior Court to accomplish that work. There is clearly work to be done on both sides to get the matter prepared for trial. In addition, this matter has been bifurcated into 3 trials.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2010-007912-008 DT

02/23/2015

THE COURT FINDS extraordinary circumstances exist to continue the trial date.

IT IS ORDERED continuing trial in this matter to June 2, 2015 before Judge Mahoney.

IT IS ORDERED excluding all time from February 26, 2015 through June 2, 2015.

NEW LAST DAY: JUNE 3, 2015 for Defendants 3, 7 and 8

10:53 a.m. Matter concludes.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>.
Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2010-007912-005 DT

02/03/2014

HONORABLE JOSEPH KREAMER

CLERK OF THE COURT
S. Yoder
Deputy

STATE OF ARIZONA

KIRSTEN VALENZUELA
HILARY L WEINBERG

v.

JOHN HOWARD WEBBER (005)

JOHN HOWARD WEBBER
P682923
4TH AVENUE JAIL
MCSO - INMATE MAIL - 00000
ULISES FERRAGUT JR.

INMATE LEGAL SERVICES

CONTINUING ORAL ARGUMENT

10:10 a.m. This is the time set for continuing Oral Argument from January 24, 2014.
The following parties are present:

- Counsel Kirsten Valenzuela and Hilary L. Weinberg on behalf of the State;
- Defendant Jerry Wayne Cockhearn, Jr. (003) with counsel, Lisa Gray;
- Defendant Thandika Taweh Singleton (004) with counsel, Kenneth S. Countryman;
- Defendant John Howard Webber (005) appearing *pro per* with advisory counsel, Ulises Ferragut, Jr.;
- Defendant Corey Royalty (007) with counsel, David J. Kephart;
- Defendant Anthony Jerome Wright (008) with counsel, Reginald L. Cooke, and *Knapp* counsel, Daniel R. Raynak.

Court Reporter, Laura Ashbrook, is present.

Docket Code 005

Form R000A

Page 1

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2010-007912-005 DT

02/03/2014

A record of the proceeding is also made by audio and/or videotape.

Argument continues on Defendant Wright's Motion to Dismiss, alternatively to Preclude Co-Defendant from Testifying, which has been joined by the other defendants.

The Court has considered the transcript of an FTR recording from a prior hearing and considered the argument of counsel. For the reasons stated on the record,

IT IS ORDERED denying the Motion to Dismiss, alternatively to Preclude Co-Defendant from Testifying.

Mr. Raynak makes an oral Motion for Stay based on the denial of the Motion to Dismiss.

IT IS ORDERED denying the Motion for Stay.

Upon request of defense counsel,

IT IS ORDERED that any statements by any co-defendant, including Mr. Singleton, be immediately produced by the State under the same parameters as previously ordered for disclosure of statements by co-defendants in this case.

IT IS FURTHER ORDERED setting a Status/Scheduling Conference on February 6, 2014 at 10:30 a.m. in this Division.

IT IS FURTHER ORDERED affirming the following dates:

- Oral Argument on February 14, 2014 at 10:30 a.m. in this Division
- Firm Trial Date on August 25, 2014 at 10:30 a.m. in this Division

IT IS FURTHER ORDERED affirming prior custody orders.

CURRENT LAST DAY: October 1, 2014.

11:25 a.m. Matter concludes.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.