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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of:	)	Supreme Court No. R-15-0011
	)	
PETITION TO AMEND	)	**PETITIONER'S**
RULES 15.5 and 39 OF THE	)	**CONSOLIDATED REPLY TO**
ARIZONA RULES OF	)	**COMMENTS OF APAAC, MCAO**
CRIMINAL PROCEDURE	)	**AND STATE BAR CRIMINAL**
	)	**PROSECUTION SUBCOMITTEE**

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the Maricopa County Public Defender's Office ("MCPD") respectfully submits this Consolidated Reply ("Consolidated Reply") to comments submitted by the Arizona Prosecuting Attorneys' Advisory Counsel ("APAAC"), the Maricopa County Attorney's Office ("MCAO") and the Criminal Prosecution Subcommittee of the Arizona State Bar (collectively, the "respondent prosecutors"). Many of the

arguments propounded by the respondent prosecutors overlap and are addressed by this Consolidated Reply.

I. Criminal Proceedings Are Entitled to the Same Level of Professionalism and Accuracy in Discovery as Civil Matters.

A recurring theme from the respondent prosecutors is that civil and criminal proceedings are vastly different and, therefore, civil discovery rules should not be imposed on discovery in criminal cases. *See, e.g.*, APAAC Response at 2. Petitioners agree that civil and criminal proceedings are different. However, because criminal proceedings involve a person's liberty interest (as opposed to a property or financial interest in civil matters), the stakes are much higher than in civil matters. Therefore, the level of professionalism and the adherence to rules of discovery in criminal matters should be *at least* equal to those in the civil realm. And, because liberty interests are affected at the outset of criminal proceedings (when a person may be incarcerated), it is even more important that disclosure of critical information not be withheld from the defendant and his counsel, which may occur through over-redaction of discovery.

A. Both Civil and Criminal Matters Must Enable the Opposing Party to Know What Has Been Redacted in order to Challenge the Redaction

Respondent APAAC argues that Civil Rule 26.1(f) "applies only to 'disclosure or discovery' that is withheld due to a claim of *privilege* or a claim that it is protected as *trial-preparation material*." APAAC Response at 3. Respondent

APAAC further argues that Petitioner's proposed modification to remove "trial-preparation materials" and replace with the language "subject to protection" highlights the differences between criminal and civil processes. *Id.* On this point, Petitioner and APAAC also agree: the proposed criminal rule is different from its civil counterpart to adapt to the intricacies of criminal proceedings and the additional redactions of discovery imposed by victim's rights. However, Petitioner's proposed criminal rule adheres strictly to the text, spirit and intent of the Civil Rule: to provide information sufficient to "enable the other parties to contest the claim [for withholding information from discovery]." Ariz. R. Civ. P. 26.1(f). Thus, APAAC's argument fails to address the principal reason why the Petitioner's rule change is necessary: a criminal defendant must know what has been redacted in order to challenge the redaction, just as the State must know what has been redacted from discovery provided by the defense in order to challenge that redaction.[1]

Consider the following example drawn from a real-life situation in Maricopa County:[2]

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[1] Petitioners' rule change would apply not only to prosecutors, but also to any party redacting discovery, including defense attorneys.

[2] The example here has been rewritten so that client confidentiality as well as any real-life victims, witnesses or locations are indiscernable. However, this example reflects, as best as Petitioner's capabilities could recreate, a page from a real-life police report that was subject to extensive litigation in Maricopa County. Petitioners made their best good faith effort to mimic the positioning and number

(Police report incorrectly over-redacted by MCAO):

ANYTOWN POLICE DEPARTMENT REPORT

ORIGINAL PAGE NUMBER: 26 RPT NUMBER: 2014-00000

WHICH WAS STILL PARKED OUT FRONT OF THE HOUSE AND ONE FEMALE WAS STILL IN THE GREEN VEHICLE. FURTHER, JONES INDICATED HE DID NOT BELIEVE THE HOME OWNER WHO LIVED AT [redacted] WAS HOME.

PRIOR TO THIS 911 CALL, OFFICERS RESPONDED TO ANOTHER 911 CALL OF A RESIDENTIAL BURGLARY (AT 0530 HOURS) WHERE THE SUSPECTS, ON THAT PRIOR CALL, FIT THE DESCRIPTION OF THE SUSPECTS WHO WERE NOW KICKING IN TH DOOR OF [redacted]. FOR DETAILS ON THE PRIOR RESIDENTIAL BURGLARY SEE ANYTOWN POLICE DEPARTMENTAL REPORT 2014-99999.

OFFICERS ARRIVED AT [redacted] AND DISCOVERED A GREEN FORD PARKED DIRECTLY ACROSS THE STREET FROM [redacted] BEARING ARIZONA LICENSE PLATE [redacted]. OFFICERS RELAYED THE LICENSE PLATE TO RADIO COMMUNICATIONS AND RADIO RESPONDED TO THE OFFICERS SAYING THE FORD CAME BACK AS STOLEN. OFFICERS OBSERVED A FEMALE SITTING IN THE PASSENGER SEAT OF THE FORD. OFFICER SMITH 8888 AND OFFICER BROWN 7777 CONTACTED AND DETAINED THE PASSENGER IN THE FORD. THE PASSENGER IN THE FORD WAS LATER IDENTIFIED AS SHEILA JOHNSON.

OFFICER LOPEZ 3333 AND OTHER OFFICERS APPROACHED THE DOOR TO [redacted] AND DETERMINED THE DOOR, IN FACT, HAD BEEN KICKED IN. OFFICER LOPEZ REQUESTED OFFICERS RESPOND TO THE READ OF THE RESIDENCE (ALLEY-EAST SIDE OF RESIDENCE) AND I, OFFICER WALKER 2345 RESPONDED THERE IN A MARKED PATROL CAR.

UPON ENTERING THE ALLEY, FROM WEST CYPRESS AVENUE (I WAS FACING NORTH IN THE ALLEY), I OBSERVED A WHITE MALE SUBJECT DRESSED IN TAUPE SHORTS AND A YELLOW SHIRT, THAT HAD SOME SORT OF BLACK DESIGN ON IT, JUMP OVER THE FENCE LOCATED AT [redacted]. THE SUBJECT, LATER IDENTIFIED AS JOHN TANNEN, SAW ME AND THEN JUMPED BACK OVER A FENCE LOCATED AT [redacted] AND [redacted]. I TURNED AROUND AND DROVE BACK TO [redacted] AND OBSERVED TANNEN RUN FROM BETWEEN THE HOUSES AND THEN RUN NORTH. TANNEN SAW ME AGAIN AND TURNED BACK EAST AND JUMP BACK OVER A FENCE LOCATED NEAR [redacted]. AGAIN, I TURNED AROUND IN THE POLICE CAR AND DROVE TO THE ALLEY. WHEN I GOT TO THE ALLEY I SAW TANNEN ON TOP OF THE FENCE LOCATED AT [redacted]. IN RETURN, TANNEN SAW ME IN THE PATROL CAR AND DISAPPEARED BACK OVER THE FENCE. I IN TURN, TURNED AROUND AGAIN AND HEARD OFFICER LOPEZ ADVISED HE HAD TANNEN PRONED OUT AND AT GUN POINT IN THE BACK YARD OF [redacted] OFFICER MCELY 9333 AND OFFICER WELLS 3339 HAD JUMPED THE FENCE LOCATED AT [redacted] (ALLEY SIDE) AND ASSITED OFFICER LOPEZ IN TAKING TANNEN INTO CUSTODY.

(Remainder of page omitted)

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of redactions in the original report to accurately reflect the subject police report. Upon request by the Arizona Supreme Court, Petitioners are willing to file under seal the source police reports used as a basis for the examples on pages 4, 6 and 8 of this Consolidated Reply.

That the defendant was involved in a foot pursuit by police may be understandable in the example above, *see supra* page 4, but what is not clear is how many addresses were involved and what route the foot pursuit followed. On the report above on page 4, defense counsel could not adequately advise his client about other crimes that could potentially be charged out of this report without at least having a placeholder to distinguish how many properties and potential victims were involved. This confusing police report also hampered a defense investigation, as it would be impossible to recreate the route of foot chase without an interview of the police officer right at the outset of the case.[3] In the above example, after months of litigation, the MCAO finally produced a correctly redacted police report that revealed that many of the original redactions had no legal basis for redaction. In fact, the amount of improper redactions exceeded what the defense believed to be improperly redacted:

(Image on Next Page)

[3] For a variety of reasons (innocence, lack of knowledge of where specific officer was, mental health, injury, intoxication, etc), a criminal defendant may not be able to assist his attorney with understanding the redacted portions of the police report.

(Police report after MCAO reviewed and removed incorrect redactions):

ANYTOWN POLICE DEPARTMENT REPORT

ORIGINAL PAGE NUMBER: 26 RPT NUMBER: 2014-00000

WHICH WAS STILL PARKED OUT FRONT OF THE HOUSE AND ONE FEMALE WAS STILL IN THE GREEN VEHICLE. FURTHER, JONES INDICATED HE DID NOT BELIEVE THE HOME OWNER WHO LIVED AT [redacted] WAS HOME.

PRIOR TO THIS 911 CALL, OFFICERS RESPONDED TO ANOTHER 911 CALL OF A RESIDENTIAL BURGLARY (AT 0530 HOURS) WHERE THE SUSPECTS, ON THAT PRIOR CALL, FIT THE DESCRIPTION OF THE SUSPECTS WHO WERE NOW KICKING IN TH DOOR OF [redacted]. FOR DETAILS ON THE PRIOR RESIDENTIAL BURGLARY SEE ANYTOWN POLICE DEPARTMENTAL REPORT 2014-99999.

OFFICERS ARRIVED AT [redacted] AND DISCOVERED A GREEN FORD PARKED DIRECTLY ACROSS THE STREET FROM [redacted] BEARING ARIZONA LICENSE PLATE [redacted]. OFFICERS RELAYED THE LICENSE PLATE TO RADIO COMMUNICATIONS AND RADIO RESPONDED TO THE OFFICERS SAYING THE FORD CAME BACK AS STOLEN. OFFICERS OBSERVED A FEMALE SITTING IN THE PASSENGER SEAT OF THE FORD. OFFICER SMITH 8888 AND OFFICER BROWN 7777 CONTACTED AND DETAINED THE PASSENGER IN THE FORD. THE PASSENGER IN THE FORD WAS LATER IDENTIFIED AS SHEILA JOHNSON.

OFFICER LOPEZ 3333 AND OTHER OFFICERS APPROACHED THE DOOR TO [redacted] AND DETERMINED THE DOOR, IN FACT, HAD BEEN KICKED IN. OFFICER LOPEZ REQUESTED OFFICERS RESPOND TO THE READ OF THE RESIDENCE (ALLEY-EAST SIDE OF RESIDENCE) AND I, OFFICER WALKER 2345 RESPONDED THERE IN A MARKED PATROL CAR.

UPON ENTERING THE ALLEY, FROM WEST CYPRESS AVENUE (I WAS FACING NORTH IN THE ALLEY), I OBSERVED A WHITE MALE SUBJECT DRESSED IN TAUPE SHORTS AND A YELLOW SHIRT, THAT HAD SOME SORT OF BLACK DESIGN ON IT, JUMP OVER THE FENCE LOCATED AT [redacted]. THE SUBJECT, LATER IDENTIFIED AS JOHN TANNEN, SAW ME AND THEN JUMPED BACK OVER A FENCE LOCATED AT 1235 NORTH ELM AVENUE AND 1231 NORTH ELM AVENUE. I TURNED AROUND AND DROVE BACK TO NORTH ELM AVENUE AND OBSERVED TANNEN RUN FROM BETWEEN THE HOUSES AND THEN RUN NORTH. TANNEN SAW ME AGAIN AND TURNED BACK EAST AND JUMP BACK OVER A FENCE LOCATED NEAR 1235-1239 NORTH ELM AVENUE. AGAIN, I TURNED AROUND IN THE POLICE CAR AND DROVE TO THE ALLEY. WHEN I GOT TO THE ALLEY I SAW TANNEN ON TOP OF THE FENCE LOCATED AT 1235 NORTH ELM AVENUE. IN RETURN, TANNEN SAW ME IN THE PATROL CAR AND DISAPPEARED BACK OVER THE FENCE. I IN TURN, TURNED AROUND AGAIN AND HEARD OFFICER LOPEZ ADVISED HE HAD TANNEN PRONED OUT AND AT GUN POINT IN THE BACK YARD OF 1235 NORTH ELM AVENUE. OFFICER MCELY 9333 AND OFFICER WELLS 3339 HAD JUMPED THE FENCE LOCATED AT 1235 NORTH ELM AVANUE (ALLEY SIDE) AND ASSITED OFFICER LOPEZ IN TAKING TANNEN INTO CUSTODY.

(Remainder of page omitted)

The correctly redacted version on page 6 above demonstrates that the MCAO had initially improperly redacted not only at least three addresses (and a range of addresses, 1235-1239) of non-victims, but also the name of a street (with no address) onto which the reporting officer drove his car. *Compare* page 4 with page 6, *supra*. The proposed solution by Petitioners would have made it clear how many victim addresses were involved (to advise client of other possible charges) and the order in which each location was visited, even if the exact address of each location was not revealed to the defense. Second, the redaction log would have allowed Defense counsel to know the legal basis the State relied upon when making each redaction and whether the Defense had a basis to challenge some of those redactions.

As to cases that do not involve multiple victim addresses as in the case above, the State Bar Criminal Prosecution Subcommittee argues that the "vast majority of redactions make self-evident what has been redacted and are not in need of additional description." State Bar/Criminal Subcommittee Response at 5–6. The State Bar Criminal Prosecution Subcommittee is flatly wrong, as demonstrated below:[4]

[4] Like the first example above, *see supra* note 2 and pages 4 & 6, this second example has been rewritten so that client confidentiality as well as any real-life victims, witnesses or locations are indiscernable. This second example reflects, as

(Example of blanket redactions in MCAO police reports):

ANYTOWN POLICE DEPARTMENT REPORT

ORIGINAL PAGE NUMBER: 2 RPT NUMBER: 2014-000002

OCCUPATION: STUDENT

VICTIM REQUESTS NOTIFICATION

LAWFUL REPRESENTATIVE: SMITH, BARBARA
MAILING ADDRESS: [redacted]
CITY:
HOME PHONE:

**** NEXT OF KIN INFORMATION ****

NEXT OF KIN -01:
NAME: JONES, WILLIAM

SPEAKING: ENGLISH

RACE: W SEX: M AGE: 13 DOB: [redacted] HT: 405 WT: 055
HAIR: BRO EYES: BRO SSN: 0000000000
[redacted]

**** PARENT/GUARDIAN INFORMATION ****

PARENT/GUARDIAN -01:
NAME: SMITH, BARBARA

SPEAKING: ENGLISH

RACE: W SEX: f AGE: 32 DOB: [redacted] HT: 508 WT: 200
HAIR: BRO EYES: BRO SSN: [redacted]
[redacted]

**** NARRATIVE ****

SERIOAL NUMBER: 9999

LOCATION OF OCCURRENCE: 123 MAIN STREET, APT 321, ANYTOWN, USA 99999

INVOLVED PARTIES:

2014-000002 Continued.

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best as Petitioner's capabilities could recreate, a page from the underlying police report as redacted by MCAO. *See supra* note 2.

Although it would appear that the information redacted on the image on page 8 pertains to a victim and his parent/guardian, the blanket redaction of multiple full lines of text (beneath the physical characteristics line of the next of kin and parent/guardian) provides no indication of what precisely has been redacted, in contrast to the simplistic hypothetical example provided in Petitioner's example on page 4 of the Petition. Thus, while Petitioner's example may have made it self-evident what was redacted, the real life application by the State—as demonstrated above on page 8—does not.

B. The Proposed Rule Change Will Reduce Redaction Errors through the Institution of Best Practices on the Non-Attorneys Who Perform Redactions

According to the respondent prosecutors, redactions "are performed not by attorneys but by legal secretaries, paralegals and police officers." State Bar/Criminal Prosecution Subcommittee Response at 4. This statement alone is the strongest argument for requiring a redaction log, as non-attorneys are tasked with applying legal principles to discovery in matters involving the liberty interests of defendants. Petitioners posit that many or all of the errant redactions would not have occurred with a redaction log because the procedures of creating a redaction log would have alerted the redacting party—non-attorneys in the State's case—that, for example, not only did the other addresses in the first example above not relate to known victims, but also the name of a street on which an officer drove his

car does not fit into any of the categories of information subject to redaction. Accordingly, the use of a redaction log will institute best practices by requiring the redacting party—non-attorneys in the State's case—to methodically identify the legal basis underlying the redaction, thereby instituting best practices rather than relying upon haphazard bulk redaction.

II. Arizona Voters Chose to Absorb Certain Costs When they Approved the VBR.

The respondent prosecutors argue that the proposed Petition will result in significant costs and burdens to prosecution agencies. *See* APAAC Response at 5–7, MCAO Response at 4–5. Whether or not this is true, Arizona voters were aware of potential additional costs and chose to absorb those potential costs when they approved the victim's bill of rights ("VBR") in 1990.[5] Accordingly, Arizona voters made the conscious choice to accept additional costs (including burdens to the criminal justice system) when they approved the VBR.

Petitioners argue, however, that proper redactions at the outset will actually reduce the cost to Arizona taxpayers through 1) fewer errors during initial redaction through institution of best practices on non-attorneys, *see supra* Part II.B; and 2) reduced litigation of discovery redactions as discussed below, s*ee infra* Part V. Accordingly, the respondent prosecutors' complaints about potential costs and

[5] *See* Arizona Secretary of State, Arizona Publicity Pamphlet, Propositions to be presented to the qualified electors of the State of Arizona of the General Election November 6, 1990 at 33–44.

burdens either are unfounded or are merely nominal incremental costs that are part of the larger costs of the VBR that Arizona voters contemplated when they first approved the VBR.

III. Contrary to the Respondent Prosecutors' Claims, the Nature of Early Disposition Courts Provides Strong Arguments in Favor of Petitioner's Proposed Rule Change

Respondent APAAC argues that Petitioner's request will severely and negatively impact the early disposition courts ("EDC" and "RCC"). What APAAC omitted from its argument is that EDC—which by APAAC's count carried 11,500 cases in FY2012 compared to RCC's 7,500—is primarily for the resolution of drug offenses, *in which there is typically no victim*, and therefore, nothing to redact. Ironically, the respondent prosecutors' argument that Petitioner's proposal will severely and negatively impact early disposition courts contradicts their argument that Petitioner's proposal will apply in only a limited number of cases where there are multiple victims. *See* APAAC Response at 7. APAAC essentially concedes that it is only the most redacted and complicated reports—the ones that most require a redaction log in order to be understood—that will require measurable time to redact and create a log, while the vast majority of cases will require minimal effort to provide a redaction log.

Second, the early disposition process is precisely where meaningful discovery is the most important for a defense attorney to advise his client, as this is

typically the only discovery he or she has at this stage of the proceedings. Imagine defense counsel trying to advise his client on the highly redacted example provided above, *supra* page 4. A redaction log in cases where there are heavy redactions as in the above example would likely make the difference between being able to adequately advise a client during the early disposition phase, or taking a trial posture to litigate disclosure of redacted discovery.

IV. As Practiced, the State Exercises Broad Discretion in Redacting Victim Information

The respondent prosecutors also argue that withholding information on claims of privilege within the civil context "requires far more discretion by a party to a civil dispute" than would be the case in redacting victim identifying information from criminal discovery. *See* State Bar/Prosecution Subcommittee Response at 5. Petitioners beg to differ. The State's own actions in the above-referenced litigation demonstrated that, in practice, prosecutors exercise significant and substantial discretion in picking and choosing what to redact.

In the example case cited above on pages 4 & 6, other portions of the same police report were peppered with redactions for which the Defense argues there is no statutory basis.[6] When asked why VIN and/or license plate information was redacted when it is not specifically enumerated under A.R.S. § 13-4434(D), the

[6] Some of those contested redactions included redactions of non-victim identifying and locating information. The State conceded that those non-victim redactions were in error.

State[7] explained that its position is that the word "includes" in A.R.S. § 13-4434(D)(1) & (2) is non-exhaustive list. Thus, according to the State, victim identifying and/or locating information is not limited to the specifically enumerated items in A.R.S. §13-4434(D)(1) & (2), but includes other items that the State, in its discretion, deems to be identifying or locating information. Thus, again, it is critical to know what item the State redacted in order to determine whether, in its self-granted broad discretion, it had a legal basis to do so.

A. The State's "Discretion" Also Involves Redaction of Non-Victim Information Beyond its Statutory Authority

Moreover, the State's redactions go beyond its statutory authority founded in victim's rights, and, upon information and belief, in the case of the MCAO, appear to be based on an internal "policy" to redact information that includes non-victim witness information such as driver license numbers, among other things.[8] For example, to date, the MCAO has not provided a legal basis for ongoing redactions of non-victim information in a variety of cases. Respondent prosecutors' argument that there is less discretion in making redactions to discovery is belied by their ongoing practice to essentially redact "at will" and without a stated legal basis.

[7]The specific prosecutor who propounded an expansive interpretation of the word "includes" in A.R.S. § 13-4434(D) has been at the forefront of the victim's rights issues at the MCAO, and thus, would presumably represent the MCAO's position on this interpretation.

[8] It is unclear if the MCAO's redaction policy is a formal written procedural policy or an informal set of instructions.

Accordingly, the high level of discretion exercised by prosecution agencies in performing redactions—likely beyond their legal authority—warrants a redaction log (which would include an identification of the basis for the for the redaction) so that disputed redactions can be identified and contested as appropriate.

V. Proper Redaction on the Front End Will Hopefully Reduce Litigation Later in a Criminal Proceeding

Both Respondents MCAO and APAAC suggest that any lack of clarity could be resolved by "simple conversation with the prosecutor." MCAO Response at 2; APAAC Response at 4. The Defense agrees that, in theory, this should be the case, but there are a number of cases where the State's answer to such a question has been "let's just litigate it." In fact, the first example "Anytown" police report above on page 4 is one example of multiple e-mail and in-person requests to the prosecutor to correct the improperly redacted report that ultimately resulted in extensive litigation spanning several months, involving a more-than-90-minute oral argument, followed by the court's order for supplemental briefing before ruling on Defendant's motion to compel. The court in that matter ultimately ordered the State to review the entire police report and provide a correctly redacted copy to defense counsel, but that correctly redacted report (which defense counsel needed to adequately advise his client) did not arrive until almost five (5) months after the defendant's arraignment.

The goal of this proposed rule change is to promote proper redaction on the front end of a criminal proceeding, thereby eliminating the need for resource intensive litigation later in the criminal proceeding.

III. Conclusion

Petitioner's proposed rule change will institute best practices for discovery redactions for all parties. By providing meaningful discovery up front, there will not be a need for resource intensive litigation later, which ultimately conserves judicial, state and defense resources.

RESPECTFULLY SUBMITTED this 30 day of June, 2015.

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