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IN THE SUPREME COURT STATE OF ARIZONA

In the Matter of: Petition to Amend Rule 16.4 of the Arizona Rules of Criminal Procedure	Supreme Court No. R-15-0038 Comment of the Maricopa County Public Defender's Office

Pursuant to Rule 28, Arizona Rules of the Supreme Court, The Maricopa County Public Defender's Office ("MCPD") supports the modified petition that is pending before the Court.

I. There is a Need for The Rule Change

As stated in our Mission Statement, the MCPD strives to "provide quality legal representation to indigent individuals assigned to us by the court so that the

fundamental legal rights of each member of the community are safeguarded". To achieve this, we need to receive the discovery mandated by the Rules of Criminal Procedure in a timely manner. Critical decisions regarding plea agreements oftentimes must be made at early stages of proceedings and our attorneys need to have a full understanding of the essential aspects of the cases to which they are assigned if they are to provide the level of effective representation that our office expects and that the United States Supreme Court requires. *See, e.g*. "Plea Bargaining and Effective Assistance of Counsel After *Lafler* and *Frye*", Brennan Center for Justice, August 2012, http://www.brennancenter.org/analysis/plea-bargaining-and-effective-assistance-counsel-after-lafler-and-frye . Unfortunately, these efforts are stymied by incomplete discovery from the prosecution. Gaps in police reports can oftentimes be spotted – based on context, attorneys frequently can see what is missing and tailor follow-up requests. Missing *Brady* discovery, however, is far more difficult to detect.

As discussed in the Office of the Legal Defender's October 22, 2015 Petition, a series of reported Arizona decisions demonstrates that a problem with *Brady* discovery exists. Among the defendants referenced by the Legal Defender was Debra Milke. Ms. Milke was convicted of murdering her son in 1990. Evidence that was unquestionably required to be disclosed under *Brady* and *Giglio* was not provided to the defense until 2002, when the case made it to federal court. *Milke v.*

Ryan, 711 F.3d 998, 1007 (9th Cir. 2013). Even in 2013, "some evidence relevant to [the case agent in Milke's case]'s credibility hasn't been produced . . . ." Id. at 1000. In dismissing Ms. Milke's case, the Arizona Court of Appeals noted that "we are unable to conclude that the long course of *Brady/ Giglio* violations . . . are anything but a severe stain on the Arizona justice system." *Milke v. Mroz,* 236 Ariz. 276, 283, 339 P.3d 659, 666 (2014).

Despite this strong language from the Court, late or non-disclosure of *Brady* discovery continues to occur. *See, e.g. State v. Thrasher*, 2012 WL 1467468 ¶ 34 (Ct App 2012) (Memorandum decision wherein the State failed to make timely disclosure of *Brady* material; the Court denied relief noting that this particular evidence, a misdemeanor conviction, was not admissible for impeachment purpose); *State v. Martinez*, 2014 WL 2466285 ¶ 6 (Ct. App. 2014) (Memorandum decision wherein the trial court found that the State failed to inform the defense that an officer was on the Officer Integrity List which led to a mistrial). The stain on the Arizona justice system, caused by these cases and others like them remains.

More than ever, defendants in Arizona courts are dependent upon the State to ensure that they receive *Brady* material prior to trial. In 2013, the Arizona Supreme Court ruled that the State may not unilaterally redact a victim's date of birth from a record. Subsequently, the legislature amended Ariz. Rev. Stat. § 13-4434 to include a victim's date of birth as information that a law enforcement

agency and prosecuting agency shall redact. Laws 2014, Ch. 151, § 11. A victim's date of birth can be used to find information such as prior criminal history that must be disclosed by the State under *Brady* and *Giglio*. As the legislature has determined that defendants may not possess this information, defendants must rely on the State to abide by its Constitutional obligations and disclose it.

Failure to disclose *Brady/Giglio* materials not only leads to a lack of trust in the justice system, but to inefficiency. If unchecked by the Court at the discovery stage, the remedy for a violation of *Brady* is a new trial. Court oversight to promote the fulfillment of discovery obligations is important for two reasons: (1) *Brady* violations will decrease if addressed early on in the litigation process; and (2) discovery violations are very difficult to address at the trial stage.

Court oversight of the status of *Brady* discovery at a Rule 16.4 Prehearing Conference would address potential *Brady* violations early on in the process. Rule 15.1 was created to promote fairness and facilitate the "search for truth." *State v. Meza*, 203 Ariz. 50, 63 (2002). It loses its purpose, however, when parties consistently violate it without serious repercussion. Sanctions can often involve suppression of evidence, but suppressing relevant and admissible evidence hardly fulfills "the search for truth" as Rule 15.1 intended. See *State v. Meza*, 203 Ariz. 50, 57 (2002) (the court ordered suppression of evidence when the State acted with "gross negligence in failing to produce" evidence.) And suppression is not a viable

remedy if the information that is not disclosed is *Brady i*nformation which, by its nature, is presumably favorable to the defendant.

In addition, violations of the *Brady* discovery required by Rule 15.1(b)(8) that would not result in appellate relief based on the narrower *Brady* violation standards applied at trial should not be overlooked by the Court. Rule 16.4 provides an excellent vehicle for the Court to oversee this critical *Brady* discovery. First, 15.1(b)(8) discovery may play a vital role in plea negotiations. *See, e.g., Weary v. Cain*, 577 U.S. 1002, 1004 (2016) (The United States Supreme Court reversed defendant's conviction based on *Brady* violations. After the jury convicted the defendant, undisclosed evidence came to light "that could have advanced [defendant's] plea.") . In addition, absent court oversight, these *Brady* discovery violations are often difficult to detect and may go unpunished. This, in effect, incentivizes the State to shirk its responsibilities in this critical area, resulting in the "stain" referenced by the *Milke* court, *infra* , page 3.

II. The Proposed Amendment is an Appropriate Means to Address this Need

A. The Proposed Language Tracks the Language in Existing Rules

The proposed amended petition uses the same language set forth in 15.1(b)(8) and 15.(1)(f) regarding the nature and scope of the prosecutors' *Brady* obligations during the discovery phase. The language in these two subparts of Rule 15 is well-

established. The proposed Rule change does not alter the State's discovery obligations regarding *Brady* materials. It simply focuses more attention on these already existing obligations by adding them to the list of items the Court shall inquire about at the mandatory prehearing conference.

B. The Court Engages in This Type of Oversight in Other Critical Areas

The oversight proposed by the petition is not novel. Courts engage in similar oversight in other areas. The Civil/Criminal Bench Book provided by the Administrative Office of the Courts ("Bench Book") provides for a number of ways that a judicial officer should ensure that Victim's Rights are complied with. In a sentencing outline, the Bench Book suggests the following:

> 8. [To Prosecutor] Anything to say on behalf of the State concerning sentence?
> 9. [To Prosecutor, unless there is no victim:] Are there any victims present?
> [If "Yes", give an opportunity to address the Court.]
> [If "No", ask prosecutor questions sufficient to establish State's compliance with Victims' Rights, e.g.,
> 1) Has someone from your office contacted the victim?
> 2) What efforts were made to do so?
> 3) Do you have any statement or sentencing recommendation from the victim?
> 4) Does the victim have notice of this hearing?
> 5) What efforts were made to give notice?]
> (Bench Book 10-16)

In the plea outline, the Bench Book's colloquy suggests that the Court ask:

> 42. Victims' Rights Compliance (A.R.S. §13-4423)
> Unless it is clearly a non-victim case, ask the prosecutor:
> Is the victim present? If the victim is present and wishes to be addressed by the court, ask whether the victim has been advised by the Prosecutor of their rights. If the victim has not been advised, recess the hearing for prosecutor to immediately comply with AZ.R.Cr.P 39(c)(1). AZ.R.Cr.P 39(f)(2) If the victim is not present, ask these questions:
> 1) Has someone from your office contacted the victim?
> 2) What efforts were made to do so?
> 3) Does the victim have notice of this hearing?
> 4) What efforts were made to give notice?
> 5) Does the victim support the plea agreement?]
> (Benchbook 10-8)

In practice, most judges in the Maricopa County Superior Court ask a prosecutor at both the change of plea and at the sentencing hearing whether Victims' Rights have been complied with. Judges also routinely ensure that both parties' discovery duties are complied with. In the Maricopa County Superior Court, the initial pretrial conference Commissioner will ask if Rules 15.1 and 15.2 of the Rules of Criminal Procedure have been complied with and if discovery is complete. A form provided to the Court after being prepared by both parties at the Comprehensive Pretrial Conference indicates whether discovery is complete.

Courts' inquiries extend further than to victims' rights and discovery. Courts also frequently ensure that a defendant's right to be advised of his trial consequences and plea offer prior to a plea offer's expiration is protected by

conducting *Donald* advisements. *See State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (Ct. App. 2000).

III. Additional Tools Can Be Employed to Assist with the Rule Change

Some comments have expressed concern regarding the type of process courts would follow to carry out the intended purpose of the rule change. We respectfully suggest that the Court has many tools at its disposal that will enable it to provide the clarity and simplicity required to apply this rule change in a fair, effective and efficient manner. For example, a comment to the Rule clarifying what the Court intends "ensure" to mean in this context can resolve the concerns raised by the Lower Jurisdiction Courts' Comment regarding the stringent interpretation that can be applied to that word. In addition, the Court can issue an Administrative Order clarifying the intent of the Rule change and encourage individual jurisdictions to issue their own Administrative Orders or Local Rules implementing processes and pretrial hearing questionnaires that best meet each jurisdictions' needs. Finally, although not binding, the guidance provided by the authors of the Judicial College of Arizona's Bench Book has proven to be very useful for individual courts, and it is anticipated that the Bench Book would be modified to add presumptive dialogue for courts to use in this area.

IV. Conclusion

When describing the underlying policies behind Arizona discovery rules, this Court has stated "…a criminal trial is not a contest of wits and tactics between the prosecution and defense counsel. 'We believe justice dictates that the defendant be entitled to the benefit of any reasonable opportunity to prepare his defense and to prove his innocence.'" *Roque*, 213 at 207 (quoting *State ex rel. Helm v. Superior Court of Cochise County,* 367 P.2d 6, 10 (1961). For Rule 15 to be effective, it "must be applied with equal force to both the prosecution and the defendant." *State v. Lawrence*, 112 Ariz. 20, 22 (1975). History has shown that defendants need the Courts' assistance if they are to obtain *Brady* discovery in a fair, just and consistent manner. The proposed rule amendment is a reasonable tool to promote this much needed goal.

RESPECTFULLY SUBMITTED this 20th day of May, 2016.

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