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

10 In the Matter of:

Supreme Court No. R-16-0035

11 **PETITION TO AMEND RULE**  
12 **15.1(j) OF THE ARIZONA RULES**  
13 **OF CRIMINAL PROCEDURE**

**COMMENT OF**  
**THE STATE BAR OF ARIZONA**

14 **Introduction**

15 In light of the diametrically opposing positions from two significant sets of  
16 stakeholders—the two subcommittees of the State Bar’s Criminal Practice &  
17 Procedure Committee (Prosecution and Defense)—the State Bar of Arizona takes  
18 no position on the Petition. Explained further below, the Prosecution Subcommittee  
19 supports the amended language to Rule 15.1(j), Ariz. R. Crim. P.; the Criminal  
20 Defense Subcommittee opposes the amendment to Rule 15.1(j). Through this  
21 Comment, the State Bar presents both views for the Court’s consideration.

22 **A. Background of Petition**

23  
24 On April 19, 2016, David K. Byers, Administrative Director of the Courts,  
25

1 filed the Petition requesting amendments to Rule 15.1(j), Ariz. R. Crim. P., on an  
2 emergency basis. The Petition was predicated upon the 2016 amendment to A.R.S.  
3 § 13-1425, amended by the passage of HB2001. As set forth on Page 3 of the  
4 Petition, this law prohibits the intentional unauthorized disclosure of explicit images  
5 of another person—such as nudity or engaging in sexual acts—if the person has a  
6 reasonable expectation of privacy and the disclosure is with the intent to harm,  
7 harass, intimidate, threaten or coerce the person. The Petition asserts that because  
8 amended A.R.S § 13-1425 prohibits sexual exploitation and unauthorized exposure  
9 in the same vein as statutes prohibiting sexual exploitation of a minor, the discovery  
10 process should be treated in the same manner by the prosecution and defense under  
11 Rule 15.1(j). Amended Rule 15.1(j) now addresses images that give rise to a  
12 prosecution under A.R.S. § 13-1425.

13  
14  
15  
16 On May 11, 2016, this Court amended, on an emergency basis, Rule 15.1(j)  
17 as proposed in the Petition. The Court, however, opened the matter for comment,  
18 with comments due on September 23, 2016.

19  
20 **B. Discussion/Analysis**

21 The Prosecution Subcommittee supports the amended language to Rule 15.1(j)  
22 with a minor amendment. The Defense Subcommittee opposes the amendment to  
23 Rule 15.1(j). The State Bar's Board of Governors' Rules Review Committee  
24 considered both Subcommittees' positions and voted in favor of supporting the  
25

1 Criminal Defense Subcommittee's position to oppose the amendments to Rule  
2 15.1(j). However, the State Bar of Arizona remains neutral, takes no position on the  
3 Petition, and offers both positions to the Court for the Court's consideration.  
4

5 **Criminal Defense Subcommittee Position**

6 The Criminal Defense Subcommittee's opposition to the amendment is set forth  
7 in Appendix A.  
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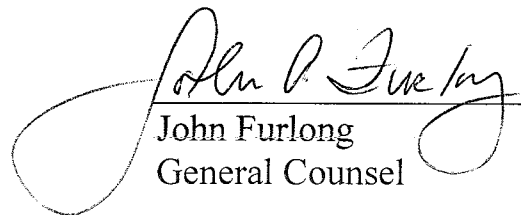
9 **Prosecution Subcommittee Position**

10 The Prosecution Subcommittee's position in support of the amendment is set  
11 forth in Appendix. B.  
12

13 **Conclusion**

14 The State Bar respectfully offers to this Court the positions of the Criminal  
15 Defense Subcommittee and the Prosecution Subcommittee of the State Bar's  
16 Criminal Practice & Procedures Committee.  
17

18 RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of September, 2016.

19  
20   
21 John Furlong  
General Counsel

22 Electronic copy filed with the  
23 Clerk of the Arizona Supreme Court  
24 This 21<sup>st</sup> day of September,  
25 2016.

## **APPENDIX A**



**Submission by Criminal Practice and Procedure Committee – Defense  
(As submitted to the Board of Governor’s Rules Review Committee by  
the Chair of the Defense Subcommittee)**

David K. Byers, Administrative Director of the Administrative Office of the Courts, has proposed an amendment to Rule 15.1(j), *Arizona Rules of Criminal Procedure*, on an emergency basis. The Petition states that Rule 15.1(j) was designed to protect victims of child sexual exploitation from unnecessary exposure during a criminal prosecution, and because A.R.S. 13-1425 involves persons in a state of nudity or engaged in specific sexual activity, Rule 15.1(j) should now apply to 13-1425 images. (*See*, Petition at 2).

Releasing copies of contraband child pornography, even for the purposes of a criminal action, violates A.R.S. § 13-3553. In 2003, when a defendant appealed a trial court order denying disclosure of contraband images, the Arizona Court of Appeals reversed the trial court and held that Rule 15 of the Arizona Rules of Criminal Procedure provides no exception for contraband. *Cervantes v. Cates*, 206 Ariz. 178, 182-83, ¶¶ 16, 21, 76 P.3d 449, 453-54 (App. 2003). Following *Cervantes*, Rule 15.1 of the Arizona Rules of Criminal Procedure was rewritten to add Rule 15.1(j), specifically dealing with the disclosure of child pornography in criminal cases.

On March 11, 2016, A.R.S. 13-1425 became effective. The relevant part of

A.R.S. 13-1425 provides as follows:

- A.** It is unlawful for a person to intentionally disclose an image of another person who is identifiable from the image itself or from information displayed in connection with the image if all of the following apply:
  1. The person in the image is depicted in a state of nudity or is engaged in specific sexual activities;
  2. The depicted person has a reasonable expectation of privacy. Evidence that a person has sent an image to another person using an electronic device does not, on its own, remove the person’s reasonable expectation of privacy for that image.
  3. The image is disclosed with the intent to harm, harass, intimidate, threaten or coerce the depicted person.
- B.** This section does not apply to any of the following:
  1. The reporting of unlawful conduct.
  2. Lawful and common practices of law enforcement, criminal reporting, legal proceedings or medical treatment.
  3. Images involving voluntary exposure in a public or commercial setting.

4. An interactive computer service, as defined in 47 United States Code section 230(f)(2), or an information service, as defined in 47 United States Code section 153, with regard to content wholly provided by another party.
5. Any disclosure that is made with the consent of the person who is depicted in the image.

As can be seen from the above, the focus of A.R.S. 13-1425 is distribution of images, not possession. Moreover, A.R.S. 13-1425 does not concern child pornography. There is no reason to place materials covered by 13-1425 on the same level as child pornography. Concerns about protecting child victims of sexual exploitation are far more compelling than shielding adult victims who ostensibly consented to the recording of the images at issue. Adult victims differ markedly from the vulnerable child victims who are, without exception, being sexually abused in child pornography.

There is a rule of criminal procedure already in existence that may be applied to 13-1425 violations that restricts disclosure, i.e., distribution. Pursuant to Rule 15.4(d), A.R.C.P., “Any materials furnished [pursuant to Rule 15] shall not be disclosed to the public but only to others to the extent necessary for the proper conduct of the case.” Further, Rule 15.5(b), A.R.C.P. provides a mechanism for the State to obtain additional restrictions when such restrictions are necessary. Further, Rule 15.5(b) provides a mechanism to restrict disclosure should a situation arise that truly merits a protective order.

The Fifth Amendment requires that “[no] person . . . shall be deprived of life, liberty, or property, without due process of law.” The Arizona Constitution also contains a due process clause. *Ariz. Const. Art. 2, Sec. 4*. The proposed change to Rule 15.1(j) will prevent an accused from independently developing a case under 13-1425 sans the involvement of the State. Because 13-1425 violations are being shoehorned into a rule that does not address the individualized to the needs of a 13-1425 violation, the proposed amendment encroaches upon an accused’s right to a fundamentally fair proceeding. Under the proposed rule change, access to the materials that form the basis of the violation must be accessed through litigation. Further, under the amended rule the accused must disclose the identity of any experts the accused may be consulting with in defense of the case. All of this will needlessly result in delay resulting in harm to both the victim and the accused.

Also, consider this: Under the amended rule, the images will still be viewed by the same individuals – the prosecutors, defense attorneys, experts, judge, and jury – as would view them otherwise. Consequently, the proposed amendment to Rule 15.1(j) adds no real protection for victims. What the proposed amendment will do is add delay and impede the rights of the accused.

## **APPENDIX B**



**Submission by Criminal Practice and Procedure Committee – Prosecution  
(As submitted to the Board of Governor’s Rules Review Committee by  
the Chair of the Prosecution Subcommittee)**

The proposed rule governs disclosure of images based upon a prosecution under Arizona Revised Statute 13-1425.

The Criminal Practice and Procedure Committee - Prosecution supports the proposed amendment generally, but proposes the following amendment:

Except as provided below, nothing in this rule shall be construed to require the prosecutor to reproduce or release for testing or examination any items listed in Rule 15.1(b)(5) if the production or possession of the items is otherwise prohibited by Title 13, Chapter 35.1 or ~~Images that Gave Rise to~~ *is related to an image that is the subject of a prosecution under A.R.S. § 13-1424.*

The purpose of the proposed amendment is to protect the victim from further harm by disclosing images that may not be the particular images subject to the charged crime but further related images of the victim.

Commonly in areas of the criminal law where images are involved, prosecutors will select representative images to prosecute out of potentially many images that may meet the statutory elements. The proposed rule modification allows for the uncharged but related images to be protected also. It also allows for appropriate court orders, if needed, to arrange for the defendant to prepare a defense.