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8 ARIZONA SUPREME COURT

9 PETITION TO MODIFY RULE 15.1  
10 AND RULE 15.4, ARIZONA RULES  
11 OF CRIMINAL PROCEDURE

R-17-\_\_\_\_\_

MARICOPA COUNTY ATTORNEY'S  
PETITION TO MODIFY RULE 15.1 AND  
RULE 15.4, ARIZONA RULES OF CRIMINAL  
PROCEDURE

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14 The Maricopa County Attorney hereby petitions this Court to modify Rule 15.1  
15 and Rule 15.4, Arizona Rules of Criminal Procedure to provide for a reasonable  
16 procedure for the disclosure of video from officer worn body cameras. This type of  
17 evidence presents special challenges that require additional time for disclosure and  
18 more protections from public dissemination when victim identifying and locating  
19 information is inadvertently disclosed in a criminal case.  
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22 Respectfully submitted this 14th day of January, 2017.

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25  
26 By   
27 MARK FAULL  
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1 **I. Introduction**

2 Over the last two years, law enforcement agencies across Arizona have placed  
3 officer worn body cameras into the field in staggering numbers. In Maricopa County  
4 alone the various law enforcement agencies currently have approximately 1100 body  
5 worn cameras in use and many departments are still working toward full deployment.  
6 While the technology has great potential for advancements in law enforcement and  
7 public safety in general, it creates a new type of evidence that presents new  
8 challenges that are not adequately addressed in the current rules of disclosure. For  
9 this reason, it is necessary to reexamine our disclosure rules and recognize that we  
10 must handle this type of evidence differently if we are to maintain an efficient  
11 criminal justice system that properly balances the use of public resources, the privacy  
12 of victims, and the rights of defendants.

13 **II. Argument**

14 **A. Arizona's rules for criminal discovery should provide additional time**  
15 **for the disclosure of officer body worn camera videos.**

16 As relevant to this discussion, Rule 15.1 requires the State to "make available to  
17 the defendant . . . a list of all papers, documents, photographs or tangible objects that  
18 the prosecutor intends to use at trial " within 30 days after arraignment for Superior  
19 Court cases or at the first pretrial conference in limited jurisdiction courts. ARIZ. R.  
20 CRIM. P. 15.1(b)(5), (c). In addition to the list, the rules also require the State to make  
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1 these items available to the defendant for “examination, testing and reproduction”  
2 within 30 days of a written request. ARIZ. R. CRIM. P. 15.1(e).  
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4 While the rules appear to contemplate two separate 30 day deadlines, common  
5 defense practice, at least in Maricopa County Superior Court, is to submit written  
6 requests under Rule 15.1(e) shortly after arraignment. The result is that in most cases  
7 in Maricopa County Superior Court, the State must disclose copies of documents,  
8 photographs, recorded interviews, and videos roughly 45 days after arraignment.<sup>1</sup>  
9

10 The State is also required to protect victims’ rights when disclosing items to the  
11 defense. A.R.S. § 13-4434(B) requires prosecutors to redact victim locating and  
12 identifying information before disclosing material to the defense. This requirement is  
13 an important safeguard in protecting a victim’s safety and privacy. For the types of  
14 evidence that existed when Rule 15 was adopted (mostly paper documents and  
15 photographs) these redaction duties can be burdensome but they can generally be  
16 accomplished within the timeframes required by the rules. The proliferation of other  
17 types of evidence, such as recorded interviews of victims, witnesses and defendants,  
18 has increased the time it takes to create redacted copies because those items must be  
19 listened to in real time and then redacted. Nevertheless, the additional time it takes to  
20 redact this type of evidence is manageable because many of these items need no  
21 review or only a cursory review to determine that there is nothing to redact. A  
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27 <sup>1</sup> Although Rule 15.1(e) only mandates that items be made available for reproduction,  
28 common practice is for the State to provide copies of the evidence to the defense.

1 defendant's or a witness' recorded interview, for example, is very unlikely to contain  
2 a victim's identifying or locating information so it can be disclosed with very little  
3 review. The vast majority of surveillance videos can likewise be disclosed with little  
4 detailed review. The overall result is that even as the types of evidence being  
5 disclosed evolved from paper to electronic forms, the timelines in the current  
6 discovery rules were still manageable.  
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9 Redaction obligations for officer body worn camera videos have significantly  
10 changed the State's ability to comply with the timelines under the current rule. As the  
11 use of body cameras continues to rise, it is becoming increasingly difficult for  
12 prosecutors to timely meet their disclosure obligations. Redaction of this particular  
13 type of evidence is extremely time consuming and, to date, there are no useful  
14 technological answers to this challenge. Unlike other types of evidence, unless the  
15 case does not involve a victim, someone must review every minute of video footage  
16 created in a case because victim information can appear in video footage in  
17 unexpected ways. Body worn cameras are running and recording everything – video  
18 and audio – during an active police investigation. Officers give and receive victim  
19 identifying information over their radios which is captured by the camera the officer  
20 is wearing and on every camera running when the information comes over the radio;  
21 officers review victim identifying information on computer displays that are legibly  
22 captured by the cameras; officers in a victim's home may inadvertently film  
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1 paperwork or mail with victim identifying information on it; officers may look at a  
2 victim's identification card and all of that information is legibly captured on the  
3 video; house numbers and street names are frequently filmed in the background as  
4 multiple officers work a given scene. Officer body worn cameras capture a  
5 significant amount of victim identifying information and the only way to reliably  
6 protect a victim's rights is for someone to review that video, minute by minute, to  
7 first find what needs to be redacted and then to actually obscure the information from  
8 the recording. Before disclosure, these redactions must be reviewed and verified to  
9 ensure that nothing was missed and nothing that should be in the recording was  
10 inadvertently removed.

14 MCAO recently began collecting specific data in an effort to better define the  
15 problem. In just a two month period, October through November 2016, MCAO  
16 employees spent over 500 hours on redaction activities related to body worn camera  
17 videos for the present limited deployment of body worn cameras throughout  
18 Maricopa County. And most of these cases are "routine" types of investigations.  
19 Complex investigations may include many officers and many hours of investigation  
20 time which makes reviewing and redacting all of that video within the deadlines of  
21 the current rules extremely difficult or impossible.

25 MCAO has attempted to use other means to allow defense counsel to review  
26 unredacted video to save resources without delaying the case. One method MCAO  
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1 has tried is to invite the defense attorney to view the videos in our office and only  
2 provide a redacted copy later if the case is not resolved. Another approach has been  
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4 to seek a protective order to allow the State to disclose an unredacted video and to  
5 limit the viewing of that video to the defense attorney. Neither method has been  
6 particularly successful because defense counsel frequently object to both approaches  
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8 on various grounds leading to additional litigation and delays in those cases.

9       The proposed change to Rule 15.1 would balance the competing interests in  
10 preserving the State's resources while adequately protecting a defendant's and a  
11 victim's rights. First, the modification only applies to officer body worn camera  
12 video so the scope of the change is limited. Second, the rule would not necessarily  
13 extend the disclosure time for this type of evidence in all cases. The State could still  
14 disclose body worn camera videos within 30 days of request in cases where it is  
15 practical to do so.  
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18       Under the proposed rule changes, when a case includes body worn camera  
19 video, the State must specifically list which officers recorded video during the  
20 investigation. This information should allow defense counsel to decide which  
21 officers' videos are critical to view early in the case as disclosed written police reports  
22 indicate. The rule would require the State to make arrangements for defense counsel  
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1 to view unredacted copies of whichever videos they wished to view.<sup>2</sup> The rule would  
2 then give the State 90 days from request (which would likely come shortly after  
3 arraignment) or 7 days before the actual trial date, consistent with Rule 15.6(c), to  
4 disclose copies of the redacted videos if the case did not resolve.  
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6 **B. Rule 15.4 should ensure protection for victims when victim identifying**  
7 **information is inadvertently disclosed.**

8 As discussed above, officer body worn cameras can capture victim identifying  
9 information in a variety of unusual ways. Given the number of videos being created  
10 during investigations<sup>3</sup> and the difficulty in catching every instance of victim  
11 identifying information in every video, the rules of disclosure need clearer guidelines  
12 regarding the use of materials disclosed under Rule 15. The proposed additions to  
13 Rule 15.4 would prevent the public from obtaining victim identifying information  
14 when it was mistakenly disclosed and it would provide clear direction to counsel who  
15 inadvertently received that information. The additions to the rule simply reiterate the  
16 current restriction on the use of disclosed materials but they provide additional detail  
17 regarding the internet and social media. Additionally, the proposed change will add a  
18 requirement for anyone who inadvertently receives confidential information or victim  
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24 <sup>2</sup> Self-represented defendants would have the videos reviewed by advisory counsel or  
25 an investigator.

26 <sup>3</sup> From October through November 2016, MCAO redacted 329 cases with officer  
27 body worn camera videos. On average, there were just over 7 videos created per case  
28 for well over 2000 individual videos that had to be reviewed for redaction.

1 identifying information to return that discovery and not use or share any item  
2 containing that information until the opposing party can provide a properly redacted  
3 version. This addition to the rule is consistent with a lawyer's ethical duties under ER  
4 4.4(b) which requires the return of information or documents that are inadvertently  
5 received.  
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8 **III. Conclusion**

9 The rules of discovery in criminal cases must reflect the reality that the types of  
10 evidence used in criminal cases has changed significantly in just the last few years.  
11 These changes require a reexamination of our rules to find appropriate ways for the  
12 State to reasonably comply with discovery obligations while protecting the rights and  
13 safety of victims and providing defendants with sufficient information to fairly assess  
14 the case against them and prepare for trial. MCAO submits these proposed rule  
15 changes as one possible solution to the problem with the hope that commenters and  
16 this Court may propose additional solutions. Whatever the exact solutions are, it is  
17 clear that a change is needed to address the use of this unique evidence that will  
18 continue to increase in the coming months and years.  
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22 Respectfully submitted this 10th day of January, 2017.  
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1 **PROPOSED MODIFICATIONS TO RULE 15.1 AND RULE 15.4, ARIZONA**  
2 **RULES OF CRIMINAL PROCEDURE**

3 Rule 15.1. Disclosure by state  
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5 **a. Initial Disclosure in Felony Cases. (No Change)**

6 **b. Supplemental Disclosure; Scope.** Except as provided by Rule 39(b), the  
7 prosecutor shall make available to the defendant the following material and  
8 information within the prosecutor's possession or control:

9 (1) The names and addresses of all persons whom the prosecutor intends to call as  
10 witnesses in the case-in-chief together with their relevant written or recorded  
11 statements,

12 (2) All statements of the defendant and of any person who will be tried with the  
13 defendant,

14 (3) All then existing original and supplemental reports prepared by a law enforcement  
15 agency in connection with the particular crime with which the defendant is charged,

16 (4) The names and addresses of experts who have personally examined a defendant or  
17 any evidence in the particular case, together with the results of physical examinations  
18 and of scientific tests, experiments or comparisons that have been completed,

19 (5) A list of all papers, documents, photographs or tangible objects that the prosecutor  
20 intends to use at trial or which were obtained from or purportedly belong to the  
21 defendant,

22 (6) A list of all prior felony convictions of the defendant which the prosecutor intends  
23 to use at trial,

24 (7) A list of all prior acts of the defendant which the prosecutor intends to use to  
25 prove motive, intent, or knowledge or otherwise use at trial

26 (8) All then existing material or information which tends to mitigate or negate the  
27 defendant's guilt as to the offense charged, or which would tend to reduce the  
28 defendant's punishment therefor.

(9) Whether there has been any electronic surveillance of any conversations to which  
the defendant was a party, or of the defendant's business or residence;

(10) Whether a search warrant has been executed in connection with the case;

(11) Whether the case has involved an informant, and, if so, the informant's identity,  
if the defendant is entitled to know either or both of these facts under Rule 15.4(b)

(2).

**(12) A LIST OF ALL POLICE OFFICERS WHO CREATED ANY BODY WORN  
CAMERA VIDEO DURING THE INVESTIGATION OF THE CASE.**

1 **c. Time for Disclosure.** (No Change)

2 **d. Prior Felony Convictions** (No Change)

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4 **e. Additional Disclosure upon Request and Specification.**

5 (1) DISCLOSURE WITHIN 30 DAYS. Unless otherwise ordered by the  
6 court, the prosecutor shall, within thirty days of a written request, make  
7 available to the defendant for examination, testing and reproduction the  
8 following:

9 (1i) Any specified items contained in the list submitted under rule  
10 15.1(b) (5).

11 (2ii) Any 911 calls existing at the time of the request that can reasonably  
12 be ascertained by the custodian of the record to be related to the case.

13 (3iii) Any completed written reports, statements and examination notes  
14 made by experts listed in subsections (b)(1) and (b)(4) of this rule in  
15 connection with the particular case.

16 (2) OFFICER BODY WORN CAMERA VIDEO. FOR VIDEOS LISTED  
17 UNDER RULE 15.1(B)(12), UNLESS REDACTED COPIES OF THE  
18 VIDEOS ARE PROVIDED TO THE DEFENSE SOONER, WITHIN 30  
19 DAYS OF A WRITTEN REQUEST, THE PROSECUTOR SHALL MAKE  
20 ARRANGEMENTS FOR DEFENSE COUNSEL, ADVISORY COUNSEL,  
21 OR A DEFENSE INVESTIGATOR TO VIEW UNREDACTED VERSIONS  
22 OF THE VIDEOS. VICTIM IDENTIFYING INFORMATION PROTECTED  
23 UNDER RULE 39 AND A.R.S. § 13-4434 MUST NOT BE  
24 MEMORIALIZED IN ANY FORM DURING THE VIEWING. WITHIN 90  
25 DAYS OF A WRITTEN REQUEST AND NO MORE THAN 7 DAYS  
26 BEFORE TRIAL, WHICHEVER IS SOONER, THE PROSECUTOR SHALL  
27 PROVIDE REDACTED COPIES OF THE VIDEOS TO THE DEFENSE.

28 (3) LIMITATIONS. The prosecutor may impose reasonable conditions,  
including an appropriate stipulation concerning chain of custody to protect  
physical evidence produced under this section or to allow time to complete any  
examination of such items.

**f. Disclosure by Prosecutor.** (No Change)

**g. Disclosure by Order of the Court.** (No Change)

**h. Disclosure of Rebuttal Evidence.** (No Change)

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2 **i. Additional Disclosure in a Capital Case.** (No Change)

3 **j. Reproduction or Release for Inspection of Items Prohibited by Title 13,**  
4 **Chapter 35.1.** (No Change)

5 Rule 15.4. General standards

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

8 **a. Statements.** (No Change)

9 **b. Materials Not Subject to Disclosure.** (No Change)

10 **c. Failure To Call a Witness or Raise a Defense.** (No Change)

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12 **d. Use of Materials.** Any materials furnished to an attorney pursuant to this rule shall  
13 not be disclosed to the public but only to others to the extent necessary for the proper  
14 conduct of the case. ALL COUNSEL AND PARTIES ARE RESPONSIBLE FOR  
15 ENSURING THAT MATERIAL DISCLOSED UNDER THIS RULE IS USED  
16 ONLY FOR THE LITIGATION OF THE CRIMINAL CASE AND IS NOT  
17 DISTRUBUTED IN ANY FORUM, INCLUDING ANY SOCIAL MEDIA AND/OR  
18 ANY INTERNET WEBSITE OR MADE AVAILABLE FOR ANY OTHER  
19 DISSEMINATION OR DISTRIBUTION UNLESS THE COURT ORDERS  
20 OTHERWISE. IF ANY PARTY RECEIVES INFORMATION UNDER RULE 15  
21 THAT IS CONFIDENTIAL OR OTHERWISE PROTECTED, SUCH AS VICTIM  
22 IDENTIFYING INFORMATION UNDER RULE 39 AND A.R.S. § 13-4434, THE  
23 PARTY RECEIVING THE INFORMATION SHALL IMMEDIATELY NOTIFY  
24 OPPOSING COUNSEL AND RETURN THE DISCLOSURE. THE PARTY  
25 RECEIVING THE CONFIDENTIAL OR PROTECTED INFORMATION MUST  
26 NOT MEMORIALIZE, COPY, OR DISTRIBUTE THE INFORMATION IN ANY  
27 MANNER UNLESS THE COURT ORDERS OTHERWISE.

28 **e. Requests for Disclosure.** (No Change)

**f. Filing of Papers; Exception for Misdemeanors and Petty Offenses Filed in**  
**Limited Jurisdiction Courts.** (No Change)