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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

**PETITION TO AMEND THE
ARIZONA RULES OF CRIMINAL
PROCEDURE**

Supreme Court No. R-17-0002

**COMMENT OF THE
ARIZONA PROSECUTING
ATTORNEYS' ADVISORY
COUNCIL**

I. BACKGROUND OF PETITION

Pursuant to Supreme Court Administrative Order No. 2015-123, a Task Force on the Arizona Rules of Criminal Procedure ("Task Force") was established to review the Arizona Rules of Criminal Procedure and "identify possible changes to conform to modern usage and to clarify and simplify language." After working for nearly a year on this mission, the Task Force has proposed amendments to the Rules of Criminal Procedure which revise existing language, add new definitions, restyle and reorganize the rules, and make substantive changes to promote clarity.

The Arizona Prosecuting Attorneys' Advisory Council ("APAAC") has considered the proposed changes and commends this Task Force for the

1 extraordinary amount of time and work it put into revising the criminal rules. The
2 effort involved in reviewing each rule and subsection, proposing modifications, and
3 coming to consensus on revisions was exceptional. In an effort to improve and
4 further clarify the final rules, APAAC offers the following suggestions and
5 comments.
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7 **II. DISCUSSION/ANALYSIS**

8 **A. Amendments to Rule 2.3**

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10 The petition recommends adding a new subsection (c) "Notice to the Clerk".
11 The reference to Supreme Court Rule 123 needs a corrected subsection reference
12 to 123(g)(1)(D)(ii)(h).
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14 **B. Amendments to Rule 11.3**

15 The petition recommends an amendment to Rule 11.3 removing the
16 provision that the court can appoint two or more mental health experts "from its
17 approved list." APAAC recommends keeping the language "from its approved
18 list" and adding the words "if any." While APAAC understands the Task Force
19 proposed eliminating the "list" provision because some courts in the state do not
20 have such a list, many courts have prepared a list of experts based on current
21 statutory qualifications. Under the statute, a mental health expert has to be
22 physician or psychologist licensed pursuant to Title 32, be familiar with the state's
23 competency standard and statutes, be familiar with the treatment, training and
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1 restoration programs available in the state, and be certified by the court as meeting
2 court developed guidelines which include relevant experience, education and
3 training. A.R.S. § 13-4501(3); *see also* Rule 11.3(b). For those courts that have
4 already screened and vetted mental health experts for conducting competency
5 evaluations pursuant to the statute, allowing the court to choose from an approved
6 list of those qualified experts will expedite the appointment process, reduce delay,
7 and allow for qualified examinations of criminal defendants. Keeping the removed
8 language will not prevent a court from finding an expert, otherwise qualified under
9 current Rule 11.3(b), to deal with other unusual competency issues that may arise.

12 C. Amendments to Rule 15.1(b)(4)

13 The petition recommends an amendment to Rule 15.1(b)(4) adding, among
14 other things, a new requirement (C) that the State prepare and disclose a “summary”
15 written report for any expert expected to testify at trial that has not previously
16 prepared a report. This expanded requirement is also imposed on capital cases
17 under Rule 15.1(i)(3)(A)(ii) and on the defense in proposed Rules 15.2(c) and (h).
18 The Task Force has proposed this rule both in order to comport with the rules of
19 civil procedure and to allow for a meaningful interview of a “cold” expert prior to
20 trial.

21 This new requirement does not exist in the current rules. On the contrary,
22 Arizona courts have stated that the criminal discovery rules “do not require the state

1 to provide a word-by-word preview to defense counsel of the testimony of the
2 state's witnesses." *State v. Wallen*, 114 Ariz. 355, 361, 560 P.2d 1262, 1268 (App.
3 1977). Neither do the discovery rules require the state "to create or produce
4 evidence, specifically statements, which it must then disclose." *State v. O'Neil*,
5 172 Ariz. 180, 181, 836 P.2d 393, 394 (App. 1991). Currently, Rule 15.1(b)(1)
6 simply requires the state to disclose the names of all witnesses together with their
7 relevant *written or recorded* statements. Similarly, Rule 15.1(b)(4) requires the
8 state to disclose the names and addresses of experts who have *examined* a defendant
9 (or any evidence) along with the results of their physical examination or test results.
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12 The notion of requiring disclosure of the substance of an expert's opinion in
13 the absence of a written report is not new. In *State v. Roque*, 213 Ariz. 193, 141
14 P.3d 368 (2006), a case involving the insanity defense and testing results, the state
15 called an expert who had not written a report and whose testimony exceeded the
16 scope of what the state offered it to be. Although he was disclosed to testify merely
17 about the proper administration of the MMPI test, the expert exceeded that scope
18 and interpreted the results of the defendant's test. The defense asserted that the
19 state was obligated to disclose "an overview" or "outline" of the expert's opinion
20 or a "written report." The trial court disagreed. Although not requiring an
21 overview or outline, the Supreme Court concluded that the state was required to
22 disclose the substance of its expert's opinion, when that opinion was known, even
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1 though the expert had not written down the results of his examinations or tests.
2 Citing *State v. Armstrong*, 208 Ariz. 345, 353, ¶ 38, 94 P.3d 1061, 1069 (2004), the
3 Court reasoned that the disclosure rules were designed to give “full notification” of
4 each side’s case-in-chief and avoid “unnecessary delay and surprise at trial.” *State*
5 *v. Roque*, ¶ 32, 141 P.3d at 382.

7 While APAAC is not opposed to the concept of a summary report for “cold”
8 experts, it has concern over the contents of the report and potential dispute over its
9 substance. While the proposed language of the new requirement states that the
10 summary shall be “of the general subject matter of which the expert is expected to
11 testify,” some additional specificity from the Task Force as to contents of the
12 summary would provide useful guidance for APAAC in deciding whether to
13 support or oppose the new requirement. Rule 26.1(a)(3), R. Civ. P., requires a party
14 to disclose in writing the name, address, and telephone number of each witness
15 whom the disclosing party expects to call at trial, “and a description of the
16 substance--and not merely the subject matter--of the testimony sufficient to fairly
17 inform the other parties of each witness’ expected testimony[.]” Similarly, Rule
18 26.1(a)(6), R. Civ. P., provides that a party must disclose in writing a statement
19 setting forth “the subject matter on which the expert is expected to testify, the
20 substance of the facts and opinions to which the expert is expected to testify, a
21 summary of the grounds for each opinion, [and] the expert’s qualifications...”
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1 While the civil rules require more specificity than would seem necessary, some
2 additional clarity in the proposed criminal rule regarding the contents of the
3 summary report of a “cold” expert would be beneficial.
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5 D. Amendments to Rule 15.1(f)

6 The petition recommends an amendment to Rule 15.1(f) which would
7 expand the scope of the prosecutor’s disclosure obligations to material and
8 information in the possession or control of other attorneys in the prosecutor’s office
9 and of any state, county or municipal (i.e. non-federal) law enforcement agency
10 that participated in the investigation of a case, *without regard* to its being under the
11 prosecutor’s direction or control. While there is no opposition to expanding the
12 disclosure requirement to other attorneys in the prosecutor’s office, APAAC has
13 serious concerns with expanding the disclosure requirement to law enforcement
14 agencies that are not under the prosecutor’s direction or control.
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17 First, the state generally “cannot be held to disclose material that it does not
18 possess.” *State v. Bernini*, 220 Ariz. 536, 538, ¶ 9, 207 P.3d 789, 791 (App. 2009),
19 *quoting State v. Armstrong*, 208 Ariz. at ¶ 55, 93 P.3d at 1072. Requiring a
20 prosecutor to disclose materials not in its possession from a law enforcement
21 agency not associated with that office or under its direction or control is a
22 fundamental change in the law and could create serious compliance issues and
23 possible sanctions against the state. A prosecutor in the Town of Marana, for
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1 example, would not be able to compel production of material or information
2 possessed by the Department of Public Safety simply because that department may
3 have participated, however small, in an investigation involving a charged case.
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5 Our Supreme Court has been clear as to the prosecutor's disclosure
6 obligations:

7 [T]he prosecutor's duty to obtain material extends to information in the
8 possession or control of members of her staff and of any other persons
9 who have participated in the investigation or evaluation of the case and
10 **who are under the prosecutor's control.** We have held that a
11 witness's cooperation does not render her an agent of the prosecutor's
12 office. *State v. Kevil*, 111 Ariz. 240, 243, 527 P.2d 285, 288 (1974).
13 Nor does the fact that the prosecution is in a better position to secure a
14 witness's cooperation mean that the witness is under the prosecution's
15 control. *See State v. Briggs*, 112 Ariz. 379, 383, 542 P.2d 804, 808
16 (1975) (holding that FBI materials were not within the "control" of the
17 prosecutor). Finally, we have held that the state has an obligation under
18 Rule 15.1 to disclose material information not in its possession or under
19 its control **only if** (1) the state has better access to the information; (2)
20 the defense shows that it has made a good faith effort to obtain the
21 information without success; and (3) the information has been
22 specifically requested by the defense. *State v. Smith*, 123 Ariz. 231,
23 239, 599 P.2d 187, 195 (1979). Emphasis added.

24 *State v. Rienhardt*, 190 Ariz. 579, 585-86, 951 P.2d 454, 460-61 (1997).

25 Oftentimes, police agencies work together on task forces or joint operations, such
as DUI patrols or drug enforcement operations. Under the proposed rule, a
prosecutor now would be required to produce material and information in the
possession or control of any of those agencies, even though the prosecutor has no
access to the information or ability to control or compel its production. Will a

1 prosecutor be subject to sanctions if an agency, not under the prosecutor's control,
2 fails or refuses to turn over information in its possession? Will prosecutors have to
3 compel officers to write in their reports if other agencies were present and how they
4 "participated" in the case? If a law enforcement agency is not identified in an
5 existing report as having been present during an investigation, is the prosecutor in
6 violation of the proposed rule and subject to sanctions for failing to disclose that
7 agency?
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10 Without some language in the proposed rule that the law enforcement agency
11 has some connection to the prosecuting agency or be under its direction and control,
12 compliance with the new requirement would be very difficult to achieve. The new
13 requirement proposed by the Task Force fundamentally alters existing case law and
14 burdens prosecutors with potentially unattainable disclosure obligations. APAAC
15 recommends that the current language of Rule 15.1(f) be maintained unchanged.
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17 E. Amendments to Rule 15.4

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19 The petition recommends an amendment to Rule 15.4 (renamed "Disclosure
20 standards") which would add a new definition of a "writing" to be "words or their
21 equivalent in physical, electronic, or other form." The Task Force believed this
22 new definition was implied through the many definitions of "Statements" that
23 currently exist in the Rule. APAAC has concern that this new definition is too far-
24 reaching. Currently, the definition of a "statement" means a writing (adopted or
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1 approved by a person), a mechanical, electronic or other recording of a person's
2 oral communications or transcript thereof, or a writing containing a verbatim record
3 or summary of a person's oral communications. Traditionally, that means
4 something tangible and recorded. "Rule 15.4(a) seems to encompass only those
5 statements which are recorded in some manner." *State v. Pavao*, 23 Aria. App. 65,
6 67, 530 P.2d 911, 913 (App. 1975). Defining a "writing" to include words "in any
7 form," in addition to physical and electronic forms, expands the traditional
8 understanding of a writing from a physical object (piece of paper, compact disk,
9 audio tape, etc.) to something more intangible and subjective. Would a witness's
10 memory of what a defendant said during an incident, although not written down or
11 recorded in a physical sense, now become subject to disclosure because that
12 memory is words "in any form"? APAAC would recommend that the new
13 definition of "writing" be eliminated from the proposed rule 15.4.

14 F. Amendments to Rule 20

15 The petition recommends a new Rule 20(b), which would allow a defendant
16 to make a new Rule 20 motion after verdict, even if the motion had not been made
17 before the close of evidence. Because the Maricopa County Attorney's Office has
18 filed a petition (R-17-0028) to delete Rule 20, APAAC will reserve its comments
19 herein to support that petition.

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1 G. Amendments to Rule 32.4

2 The petition reorganizes in an amendment to Rule 32.4(e)(4) the former rule
3 on transcript preparation costs for indigent defendants filing a petition for post-
4 conviction relief. APAAC recommends changing the words “at county expense”
5 in the rule to “at court expense.” Post-conviction relief petitions are filed at both
6 the county and municipal court levels. There should be clarity in the rule as to who
7 is responsible for payment of transcription costs for those petitions filed by indigent
8 defendants in municipal courts.
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11 H. Amendments to Rule 39(b)

12 The petition proposes removing from Rule 39(b) (Victims’ Rights) the
13 current subsection 39(b)(5) requiring notice to the victim “of any escape of the
14 defendant.” APAAC recommends keeping that notice provision because,
15 regardless of who is responsible for enforcing it, that is a specific constitutional
16 right provided in the Victims’ Bill of Rights in the Arizona Constitution. Ariz.
17 Const. art. II, § 2.1(2).
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20 I. Amendments to Rule 39(c)

21 The petition proposes a revision to current Rule 39(c)(3) eliminating the
22 prosecutor’s responsibility to direct the victim to “the appropriate legal referral,
23 legal assistance, or legal aid agency” if a conflict arises between the actions of the
24 state and the wishes of the victim. The Task Force recommends alternative
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1 language in proposed Rule 39(d)(3) that the prosecutor provide contact information
2 “to the appropriate state or local bar association for referral to a lawyer.” APAAC
3 recommends retaining the current language with the addition of the state or local
4 bar referral language. Prosecutors routinely refer victims to members of the
5 Victims’ Rights Enforcement program, which includes agencies such as Arizona
6 Voice for Crime Victims, Arizona Coalition to End Sexual and Domestic Violence
7 (ACESDV), Never Again Foundation, and Crime Victims’ Law Group. The ability
8 for prosecutors to refer to these agencies should not be removed or eliminated.
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11 In addition, the petition adds proposed language to current Rule 39(c)(4)
12 concerning when a victim may present evidence and argument to court, consistent
13 with A.R.S. § 13-4437(E). If that language is added in proposed Rule 39(d)(4),
14 APAAC suggests expanding the language to include that counsel for the victim
15 “shall be included in all bench conferences and in chambers meetings and sessions
16 with the trial court”, consistent with A.R.S. § 13-4437(D).
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19 **III. CONCLUSION**

20 The Arizona Prosecuting Attorneys’ Advisory Council recognizes and
21 commends the Task Force on its tremendous effort in restyling the Rules of Criminal
22 Procedure. The suggestions and observations in this Comment are intended to
23 enhance and strengthen the proposed changes as set forth in the petition.
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1 RESPECTFULLY SUBMITTED this 3rd day of March, 2017.
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5 Elizabeth Ortiz, #012838
6 Executive Director
7 Arizona Prosecuting Attorneys'
Advisory Council

8 Electronic copy filed with the
9 Clerk of the Arizona Supreme Court
this 3rd day of March, 2017.

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