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

10 In the Matter of:

11 **PETITION TO MODIFY RULES**
12 **15.1 AND 15.4 OF THE ARIZONA**
13 **RULES OF CRIMINAL**
14 **PROCEDURE**

Supreme Court No. R-17-0027

15 **COMMENT OF**
16 **THE STATE BAR OF ARIZONA**

17 The State Bar of Arizona (“State Bar”) opposes the Maricopa County
18 Attorney’s proposed Changes to Rules 15.1 and 15.4 of the Arizona Rules of
19 Criminal Procedure for the reasons that follow:

20 **INTRODUCTION**

21 Petition R-17-0027 proposes changing Rules 15.1 and 15.4 to allow the
22 prosecutorial agency to wait up to seven days before trial to turn over body camera
23 footage in discovery. This proposal contravenes Fifth and Sixth Amendment
24 principles. This proposal also will create delays and unnecessary continuances.
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DISCUSSION

The Petition cites “unsuccessful” efforts to limit disclosure of body camera footage to either defense counsel viewing it at the County Attorney’s Office or disclosure of unredacted body camera footage pursuant to protective orders that would prohibit defense counsel from sharing the footage with the accused. (Petition at 5-6). Petitioner asserts that lack of success with these efforts have resulted from objections filed by defense counsel. Those sustained objections underscore the Constitutional issues surrounding the late disclosure of such important evidence. Moreover, the State Bar submits that if a disclosure issue arises, such issue may be brought to the attention of and resolved by the court.

I. The Late Disclosure of This Evidence Contradicts the Sixth Amendment Right to Effective Assistance of Counsel at all Critical Stages of the Proceedings.

Early disclosure of body camera evidence may help resolve cases sooner and avoid unnecessary procedural motion practice.¹ Body camera footage may also

¹ The use of body camera evidence can result in a measurable decrease in complaints about officer misconduct. In one study, officer body cameras resulted in a 22.5% decrease in police misconduct reports, compared to a 10.6 percent increase in reports with the control group and a 45.1 percent overall increase in the Phoenix police department. See, *e.g.* Katz, Charles M., David E. Choate, Justin R.

1 hold critical exculpatory evidence and show additional witnesses to incidents. The
2 Petitioner's desire to designate this type of critical evidence for disclosure as late as
3 seven days before trial will prove to be unconstitutional and the cause of
4 considerable, unnecessary delays.
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6 The Sixth Amendment's protections apply to more proceedings than simply
7 a trial. *See, e.g., Montejo v. Montana*, 556 U.S. 778 (2009)(right to counsel exists
8 at all critical stages of the proceedings); *Iowa v. Tovar*, 541 U.S. 77 (2004). Plea
9 negotiations, including the decision to reject a plea offer and proceed to trial, are
10 protected by the Sixth Amendment's guaranteed of effective assistance of counsel.
11 The State's proposed changes to rules 15.1 and 15.4 would handicap a defense
12 attorney's ability to give full, accurate information to his or her client in the course
13 of those negotiations.
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20 Ready, & Lidia Nuño (2014), "Evaluating the Impact of Officer Worn Body
21 Cameras in the Phoenix Police Department," Phoenix, AZ: Center for Violence
22 Prevention & Community Safety, Arizona State University, available at
https://publicservice.asu.edu/sites/default/files/ppd_spi_feb_20_2015_final.pdf,
23 last visited April 9, 2017.
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1 *B. Brady Evidence Would be Withheld Until the Eve of Trial.*

2 Under the proposed rule changes, a prosecutorial agency could wait to
3 disclose *Brady* evidence until well after plea acceptance deadlines have passed. The
4 material contained on body camera footage can include exculpatory evidence, as
5 recognized under *Brady v. Maryland* and its progeny. For example, in a case where
6 the police seek conviction for assault on a police officer under A.R.S. 13-
7 1204(A)(8)(a), the body camera footage could show evidence that the defendant
8 was not the aggressor. The body camera footage further could show that the police
9 acted unreasonably, were not in a reasonable apprehension of harm, or that they
10 were not injured.

11 Under the Petitioner’s proposal, a prosecutorial agency could wait until seven
12 days before trial to turn over this evidence. If the defendant accepts a plea
13 agreement before then, this evidence would likely never see the light of day.

14 **II. Disclosure of Digital Evidence So Late in the Process Will**
15 **Prompt Unnecessary Trial Continuances.**

16 For those defendants who did not have the benefit of body camera evidence
17 at plea negotiations and who proceed to trial, the Petitioner’s proposed rule will,
18 across the board, create motions to continue filed a mere six days before trial.
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1 To effectively review the material, the Defense may have to bring in forensic
2 experts to ensure it has not been improperly manipulated. The late-disclosed
3 evidence will also prompt defense lawyers to move to continue to allow use of force
4 experts, field sobriety test experts, accident reconstruction experts, and foreign
5 language interpreters to analyze the evidence and prepare for trial.
6

7 Inherent in the constitutional right to effective assistance of defense counsel
8 is the need to conduct an adequate, effective investigation. The rule-change
9 proposal will allow prosecutorial agencies to hold on to body camera evidence until
10 after the Defense has interviewed witnesses. This delayed disclosure can
11 significantly hamper Defense Counsel's ability to question lay and law enforcement
12 witnesses in pretrial interviews. The proposal also hinders the Defense's ability to
13 predict what, if any, experts need to be hired to help analyze the evidence and
14 potentially testify at trial.
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17 **III. Late disclosure and Non-Disclosure Will Create Additional**
18 **Post-Conviction Litigation.**

19 The late disclosure of this evidence, if it is disclosed at all, could result in
20 avoidable post-conviction litigation. Questions regarding actual innocence and
21 police conduct, which could have been answered easily and quickly with the body
22 camera evidence, will become the subject of post-conviction motions.
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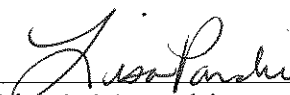
1 Defendants will assert – and rightfully so – that they did not receive effective
2 assistance at the plea stage of the proceedings, if their lawyers failed access to
3 potentially inculpatory evidence (in the case of rejected pleas) and exculpatory
4 evidence (in the case of entered pleas).
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6 The Petitioner’s intention to avoid delay and to increase efficiency is well
7 intended, but this proposal will have the opposite effect.
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9 **CONCLUSION**

10 For the foregoing reasons, the State Bar recommends that Petition R-17-0027
11 be denied.

12 RESPECTFULLY SUBMITTED this 22nd day of May, 2017.
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Lisa M. Panahi
General Counsel

17 Electronic copy filed with the
18 Clerk of the Arizona Supreme Court
19 this 22nd day of May, 2017.

20 by: 