ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

Presents

APAAC ANNUAL LEGAL ASSISTANT CONFERENCE

May 23, 2014
Prescott Resort & Conference Center
Prescott, Arizona

No Ordinary Job

Seeking Justice For Victims

APAAC 2014 Annual Conference

ETHICS FOR THE OFFICE

PARALEGALS, SECRETARIES, ASSISTANTS

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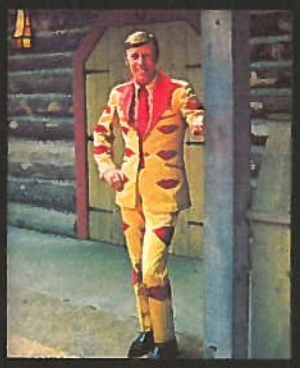
Flagstaff, Arizona 2014

"It has been frequently recognized...that paralegals are capable of carrying out may tasks, under the supervision of an attorney that might otherwise be performed by a lawyer...Such work might include, for example, factual investigation, including locating and interviewing witnesses, assistance with depositions, interrogatories, and document production; compilation of statistical and financial data; checking legal citations; and drafting correspondence. Such work lies in the gray area of tasks that might appropriately be performed either by an attorney or a paralegal."

- *Missouri v. Jenkins*, 491 U.S. 274, 288, footnote 10 (1988).

Could he have done it all on his own?

How about this dude?



Or this gal?

PRICELESS

The guys on the right made the guy on the left a hero.

PRICELESS

The band above made the girl on the left a superstar.

OUR TEAM

Can you name yours?

COMMON NON-LAWYER POSITIONS

- Secretary
- Receptionists
- Investigators
- Paralegals
- Law Student Interns
- Experts of the "Arts"
- Aids, Filing Clerks
- Victim Witness
- Others? Any position not named that may describe what *you* do?

COMMON TASKS

- Factual investigation
- Locating witnesses.
- Speaking to witness, officers, experts.
- Communicating with defense firms.
- Viewing photographs
- Compiling exhibits.
- Communicating with victims.
- Attending interviews.
- Preparing pleadings.
- Preparing letters.
- Checking citations.
- Communicating with judicial assistants, bailiffs, courts.
- Second-chairing trials.
- Post-trial advocacy.
- Many others: Yours?

EXPANDED ROLES – SAME DUTIES

- "The paramount guidelines for lawyers are that they supervise and control their paralegals and that

paralegals cannot engage in conduct that would be unethical if done by a lawyer." -

State Bar Ethics Opinion #98-08

ETHICAL RULE 5.3(B)

- "*A lawyer* having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;…"

ETHICAL RULE 5.3(C)

- "*A lawyer shall be responsible* for the conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
- (1) The lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
- (2) (If the lawyer)… knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

ETHICAL RULE 5.3 COMMENTS:

"*A lawyer must* give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, *particularly* regarding the obligation not to disclose information relating to representation of the client…"

LAWYER'S DUTY *OR* ASSISTANT'S PERSONAL LIABILITY?

- Non-lawyer assistants cannot be held to exactly the same professional standards as are lawyers. *G.Hazard & W. Rhodes, The Law of Lawyering, (1985).*
- The Ethical Rules are not designed to be a basis for civil liability. *Rule 42, Ariz.R.S.Ct. Preamble.*
- ER 5.3 does not place on the lawyer an "imputed liability" for the actions of the non-lawyer, but rather:
- ER 5.3 creates an independent duty of supervision.

-- *Smart Industries Corp. v. Superior Court, 179 Ariz. 141, 146 (1994).*

QUESTION:

Why, under the *Arizona Rules of Professional Conduct*, is the duty one that attaches to the lawyer and not the assistant?

ANSWER:

Because it is only the lawyer who is licensed to practice law and thus bound by the Ethical Rules.

BUT an assistant's breach of *any* ER is imputed back to the supervising lawyer who is bound and held responsible for the breach. The breach and the consequences belong to the lawyer. And they can:

1. Jeopardize the case.
2. Lead to disciplinary action against the lawyer.
3. Create malpractice liability concerns for the firm.

See: Smart Industries Corp. v. Superior Court, 179 Ariz.141 (1994), Samaritan Foundation v. Superior Court, 173 Ariz. 426 (1993); aff'd in part, reversed in part at: Samaritan Foundation v. Superior Court, 176 Ariz. 497 (1994); Rule 42, Ariz.R.S.Ct., Preamble (19).

CONFIDENTIALITY

Lawyers often communicate with clients through agents.

Lawyers may properly and efficiently act through paralegals.

The common law privilege traditionally extends to attorneys' representatives.

--Smart Foundation v. Superior Court, Id., 173 Ariz. at 432.

CONFIDENTIALITY E.R. 1.6

"A lawyer shall not reveal information relating to Representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation or the disclosure is permitted (subject to exceptions)."

-- *Ethical Rule 1.6(a)*

CONFIDENTIALITY

"An attorney's secretary, stenographer or clerk shall not, without the consent of his employer, be examined concerning any fact the knowledge of which was acquired in such capacity".

Ariz.Rev.Stat. §12-2234

CONFIDENTIALITY

A lawyer does not forfeit the attorney-client privilege by receiving otherwise privileged client communications through the conduit of a properly supervised paralegal employee.

However, the holding does not create an automatic "paralegal-client privilege".

--*Samaritan Foundation v. Superior Court*, 173 Ariz. at 433

CONFIDENTIALITY

The scope of the privilege depends upon the nature, purpose and context of the communication taken in the scope of employment and is made to assist the lawyer in assessing or responding to the legal consequences of the case.

-- *Samaritan Foundation v. Goddard*, 176 Ariz. 497, 507 (1993).

CONFIDENTIALITY

- Nature.
- Purpose.
- Context.

In the scope of employment

Made to assist the lawyer

In assessing or responding to the legal consequences

Of the case.

CONFIDENTIALITY IN THE PUBLIC CONTEXT – SPECIFIC INSTANCES

- Grand Jury Activities. Disclosure, unless directed by the prosecutor or court is a class 1 misdemeanor. A.R.S. 13-2812.
- Disclosure of Indictment, Information or Complaint before the accused is in custody or served with a summons, unless directed by the prosecutor or court is a class 1 misdemeanor. A.R.S. 13-2813.
- On-Going Investigations that may be impeded by impertinent release of information.
- Victim Information.
- Closed Cases.
- Others?

CONFIDENTIALITY – WORK PRODUCT

Attorney Work Product consists of two kinds of written material:

1. Documents prepared by lawyer or lawyers agents in anticipation of litigation.
2. Documents containing mental impressions, conclusions, opinions or legal theories of attorneys and their agents.

CONFIDENTIALITY – WORK PRODUCT

- Attorney Client Privilege

belongs to the client and is an absolute privilege unless waived by the client.

- Work Product Privilege

is conditional and can be over-ridden by a court when necessary.

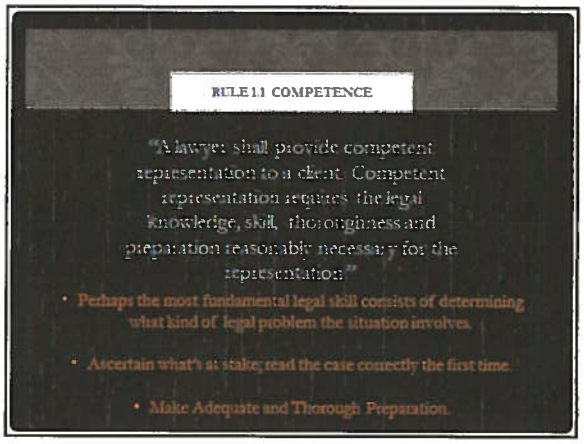
WHEN DISCLOSURE CAN OCCUR

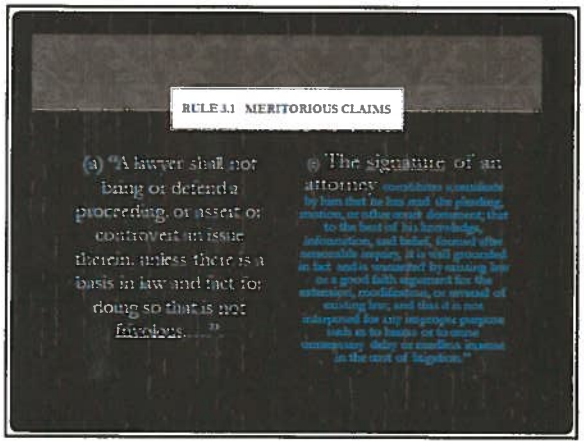
- Civil Disclosure

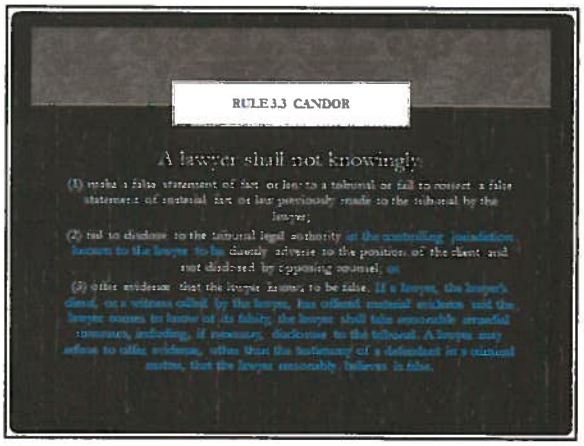
Rule 26.1, Ariz.R.Civ.P.
Continuing duty
Failure to disclose unfavorable information is sanctionable. Rule 37(d)

- Civil Discovery
Ariz.R.Civ.P. 27-36

- Criminal Disclosure
Rule 15.2, Ariz.R.Crim.P.
material and information in possession or prosecutor's and staff, law enforcement, and investigative agencies under prosecutor's direction and control
- Continuing duty, Rule 15.6
- Sanctions for failure to disclose at Rule 15.7
- E.R. 3.8 The Special conditions pertaining to Brady Disclosure


RULE 1.1 COMPETENCE
"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
• Perhaps the most fundamental legal skill consists of determining what kind of legal problem the situation involves.
• Ascertain what's at stake; read the case correctly the first time.
• Make Adequate and Thorough Preparation.


RULE 3.1 MERITORIOUS CLAIMS
(a) "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."
(c) The signature of an attorney constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."


RULE 3.3 CANDOR
A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

RULE 3.4 FAIRNESS TO OPPOSING COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue

RELATED ETHICAL PITFALLS

- Conflicts of interest. Close Friends, Friends of Friends, Family Members, Business.
- Being Victim or Party.
- Being cited or arrested. That nasty DUI, etc.
- Being a Witness to a Crime.
- Personal, Family or Business being subject to investigation.
- Relations with, or being Related to Defense Counsel.
- Relations with or being related to a Defendant, a Victim or a Witness.

RULE 32 POST CONVICTION APPEALS

- Contentions that the Prosecution behaved improperly, framed as a violation of the constitutional right to a fair trial.
- Consider when the conduct itself is imputed to the State by the actions of administrative staff under the lawyer's supervision. [for example, failure to disclose exculpatory or potentially exculpatory evidence].

RULE 32 POST CONVICTION APPEALS

- Even consider the odd case of "rolling her eyes".
- Rolling eyes and making facial expressions of disapproval either with a witness' testimony or the trial court's rulings *in the presence of the jury*. Sighing inappropriately. Smirking at questions. Head nodding.
  - *State v. Patterson, 230 Ariz. 270 (2012).*
  - *State v. Martinez, 230 Ariz. 208 (2012).*
  - *State v. Cloud, WL 645185 (2014)(not reported).*

NO EMOTICONS

face

body

PROFESSIONAL DRESS

For court: Men wear dress slacks and a jacket and tie. Women wear suit, dresses, skirts or slacks with a blouse sweater or jacket.

Fridays: Casual dress if no appearances.

"In all cases, dress must not allow the exposure of breast or posterior cleavage". *–Policy & Procedures Manual, Policy 2.9*

YOU GET THE IDEA

ETHICS IN THE OFFICE

Why:

- Administration of Justice and fairness.
- Recognition that our work is important.
- Framework for solving dilemmas.
- Public recognition that society can trust the results of the judicial system when done ethically and with integrity.

Arizona Rules of Criminal Procedure
Rule 15.1
Disclosure by State

a. Initial Disclosure in Felony Cases. Unless otherwise ordered by the court or provided by local rule, at the arraignment, or at the preliminary hearing, whichever occurs first, the prosecutor shall make available to the defendant all reports containing items listed in Rule 15.1(b)(3) and (4) that were in the possession of the attorney filing the charge at the time of the filing.

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

(1) The names and addresses of all persons whom the prosecutor intends to call as witnesses in the case-in-chief together with their relevant written or recorded statements,
(2) All statements of the defendant and of any person who will be tried with the defendant,
(3) All then existing original and supplemental reports prepared by a law enforcement agency in connection with the particular crime with which the defendant is charged,
(4) The names and addresses of experts who have personally examined a defendant or any evidence in the particular case, together with the results of physical examinations and of scientific tests, experiments or comparisons that have been completed,
(5) A list of all papers, documents, photographs or tangible objects that the prosecutor intends to use at trial or which were obtained from or purportedly belong to the defendant,
(6) A list of all prior felony convictions of the defendant which the prosecutor intends to use at trial,
(7) A list of all prior acts of the defendant which the prosecutor intends to use to prove motive, intent, or knowledge or otherwise use at trial
(8) All then existing material or information which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce the 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).

c. Time for Disclosure. Unless otherwise ordered by the court, the prosecutor shall disclose the materials and information listed in Rule 15.1(b) not later than:

(1) For cases in Superior Court, 30 days after arraignment.
(2) For Limited Jurisdiction Courts, at the first pre-trial conference.

d. Prior Felony Convictions

(1) In a felony case, at least thirty days prior to trial, or thirty days after a request from the defendant, whichever occurs first, the state shall make available to the defendant a list of the prior felony convictions of witnesses whom the prosecutor intends to call at trial.

(2) In a misdemeanor case, at least ten days prior to trial, the state shall make available to the defendant a list of the prior felony convictions of witnesses whom the prosecutor intends to call at trial.

(3) In a felony case, at least thirty days prior to trial, or thirty days after a request from the defendant, whichever occurs first, the state shall make available to the defendant a list of the prior felony convictions that the prosecutor intends to use to impeach a disclosed defense witness at trial.

(4) In a misdemeanor case, at least ten days prior to trial the state shall make available to the defendant a list of the prior felony convictions that the prosecutor intends to use to impeach a disclosed defense witness at trial.

e. Additional Disclosure upon Request and Specification. Unless otherwise ordered by the court, the prosecutor shall, within thirty days of a written request, make available to the defendant for examination, testing and reproduction the following:

(1) Any specified items contained in the list submitted under rule 15.1(b)(5).
(2) Any 911 calls existing at the time of the request that can reasonably be ascertained by the custodian of the record to be related to the case.
(3) Any completed written reports, statements and examination notes made by experts listed in subsections (b)(1) and (b)(4) of this rule in connection with the particular case.

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. The prosecutor's obligation under this rule extends to material and information in the possession or control of any of the following:
(1) The prosecutor, or members of the prosecutor's staff, or,
(2) Any law enforcement agency which has participated in the investigation of the case and that is under the prosecutor's direction or control, or,
(3) Any other person who has participated in the investigation or evaluation of the case and who his under the prosecutor's direction or control.

g. Disclosure by Order of the Court. Upon motion of the defendant showing that the defendant has substantial need in the preparation of the defendant's case for material or information not otherwise covered by Rule 15.1, and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means, the court in its discretion may order any person

to make it available to the defendant. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

h. Disclosure of Rebuttal Evidence. Upon receipt of the notice of defenses required from the defendant under Rule 15.2(b) the state shall disclose the names and addresses of all persons whom the prosecutor intends to call as rebuttal witnesses together with their relevant written or recorded statements.

j. Reproduction or Release for Inspection of Items Prohibited by Title 13, Chapter 35.1. 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. The prosecutor shall make such items reasonably available for inspection with such conditions as are necessary to protect the rights of victims. Upon a substantial showing by a defendant that reproduction or release for examination or testing of any particular item is required for the effective investigation or presentation of a defense, such as for expert analysis, the court may require reproduction or release for examination or testing of that item, subject to such terms and conditions as are necessary to protect the rights of victims, to document the chain of custody, and to protect physical evidence. Reproduction of or release for examination and testing of such items shall be subject, in addition to such other terms and conditions as are ordered by the court in any particular case, to the following restrictions: (1) the item shall not be further reproduced or distributed except as allowed in the court's order; (2) the item shall only be viewed or possessed by the persons listed in the court's order; (3) the item shall not be possessed by or viewed by the defendant outside the direct supervision of defense counsel, advisory counsel, or defense expert; (4) the item must first be delivered to defense counsel or advisory counsel, or if expressly permitted by order of the court, to a specified defense expert; (5) defense counsel or advisory counsel shall be accountable to the court for any violation of the court order or this Rule; and (6) the item shall be returned to the prosecutor by a deadline ordered by the court.

15.1 CASES

Construction and application

Rule of criminal procedure requiring that, as part of pretrial discovery, prosecutor shall supply to defendant the names and addresses of experts who have personally examined defendant or any evidence in particular case, together with results of physical examinations and of scientific tests, experiments or comparisons that have been completed, applies even if an expert has not written down the results of physical examinations and of scientific tests, experiments or comparisons, as long as such results are known to the state. *State v. Roque,* 213 Ariz. 193, 141 P.3d 368 (2006).

Due process

The test for due process violation when prosecution suppresses, after a defense request to disclose, evidence favorable to defendant which would have affected the jury's determination of guilt is whether the undisclosed material would have created a reasonable doubt had it been presented to the jury. *State v. Jessen*, 130 Ariz. 1, 633 P.2d 410 (1981).

City or police courts

Where defendant could not obtain trial de novo in superior court if she did not prevail in city court, as matter of fairness she was entitled to take officer's deposition concerning events underlying charges of driving while under the influence of alcohol and passing a vehicle within 100 feet of an intersection. *State ex rel. Baumert v. Superior Court of Maricopa County,* 133 Ariz. 371, 651 P.2d 1196 (1982).

Duty to obtain or disclose, generally

The state has an obligation under Rules of Criminal Procedure on disclosure of evidence to disclose material information not in its possession or under its control only if (1) the state has better access to the information; (2) the defense shows that it has made a good faith effort to obtain the information without success; and (3) the information has been specifically requested by the defendant. *State v. Bernini*, 220 Ariz. 536, 207 P.3d 789 (App. 2009).

Defendant was prejudiced by prosecution's failure to disclose crucial bite mark videotape produced by state's dental expert until day before trial and by trial court's denial of continuance to allow defendant to meet the tardily disclosed evidence. *State v. Krone,* 182 Ariz. 319, 897 P.2d 621 (1995).

Although criminal defendants have due process right to disclosure, this right only extends to disclosure of material evidence. Prosecutor's file containing letters from emotionally disturbed persons about defendant's case was not "material" evidence that due process required prosecutor to disclose. *State v. Atwood*, 171 Ariz. 576, 832 P.2d 593 (1992).

Relevant written or recorded statements of witnesses, all statements of defendant and any person who was to be tried with him, photographs which prosecutor planned to use at trial, and all material which tended to reduce or negate defendant's guilt or punishment were items which should have been made available to defendant prior to trial under the discovery rules, but failure to make them available was not prejudicial where items were either excluded from trial or, if admitted, were either exculpatory in nature or, if inculpatory, were found to have been previously disclosed to defendant in their substance. *State v. Bracy*, 145 Ariz. 520, 703 P.2d 464 (1985).

Where existence of witness and his likely testimony were known and discoverable by defendant acting on his own initiative with minimum amount of diligence, and prosecutor did nothing to prevent defendant from locating and calling witness, prosecution did not improperly conceal material defense witness. *State v. Moore*, 112 Ariz. 271, 540 P.2d 1252 (1975).

Prosecutor, information in control or possession

Barring willful ignorance or other bad faith, a prosecutor cannot reasonably be required to disclose in advance information the victim unexpectedly reveals for the first time during trial. State v. Marshall (App. Div.1 2000) 197 Ariz. 496, 4 P.3d 1039.

Where private investigator who testified in first-degree murder prosecution was in no way associated with state, and state was not in possession of notes taken by investigator as to his conversations with defendant, trial court did not err in not requiring state to disclose investigator's notes. *State v. McDaniel,* 136 Ariz. 188, 665 P.2d 70 (1983).

In failing to provide psychiatric records of principal prosecution witness to defendant, prosecution in no way could be said to have concealed information relating to guilt or innocence of accused, in that witness did not become agent of prosecutor's office by his cooperation. *State v. Kevil,* 111 Ariz. 240, 527 P.2d 285 (1974).

Manner of disclosure

Piecemeal revelation of items required to be disclosed by the prosecution is viewed with disfavor; the prosecutor has the duty to see that the information he has available and expects to use is marshaled and made available when required. *State v. Castaneda*, 111 Ariz. 264, 528 P.2d 608 (1974).

Scope of discovery request

Trial judge in passing on motion for production and inspection must determine reasonableness of request and that it is not merely a "fishing expedition" by the defense. *State ex rel. Corbin v. Superior Court In and For Maricopa County*, 103 Ariz. 465, 445 P.2d 441 (1968).

Defense has no right to go on a tour of investigation, in hope that they will find something to aid them, and if it appears that request for such inspection is merely "fishing expedition" to see what may turn up, it should be denied. *State v. Wallace*, 97 Ariz. 296, 399 P.2d 909 (1965).

Witnesses--In general

Victims' Bill of Rights does not give victim right to prevent prosecution from complying with requests for information within prosecutor's possession and control. *State ex rel. Romley v. Superior Court In and For County of Maricopa,* 172 Ariz. 232, 836 P.2d 445 (App. 1992).

To the extent that State records communications with victims or that the communications otherwise reveal information that is discoverable, the communications must be disclosed to defendant, notwithstanding Victims' Bill of Rights, and even if victims exercise their right not to be interviewed by defendant. *State v. O'Neil*, 172 Ariz. 180, 836 P.2d 393 (App. 1991).

Impeachment, witnesses

If defendant's need to effectively cross-examine and impeach victim to establish justification defense requires access to medical records before trial for her expert witness to review, then Victims' Bill of Rights must yield to Federal and State Constitutions' mandates of due process of law, so that defendant is able to present her theory of self-defense. *State ex rel. Romley v. Superior Court In and For County of Maricopa,* 172 Ariz. 232, 836 P.2d 445 (App. 1992).

If medical records have not been made available to prosecution, victim has right to refuse defendant's discovery request for medical records under the Victims' Bill of Rights, unless medical records are exculpatory and are essential to presentation of defendant's theory of case, or necessary for impeachment of victim. *State ex rel. Romley v. Superior Court In and For County of Maricopa,* 172 Ariz. 232, 836 P.2d 445 (App. 1992).

Identification, witnesses

Imposing sanctions for nondisclosure of witnesses is a matter to be resolved in sound discretion of trial judge, and that decision should not be disturbed absent clear abuse of discretion. *State v. Hill*, 174 Ariz. 313, 848 P.2d 1375 (1993).

Statements, witnesses

When the victim refuses to grant defendant an interview, State could not be ordered to record all statements of victims to the prosecutor, formal or otherwise, and to provide defense counsel with copies of the transcripts of those conversations; there was nothing in criminal discovery rules authorizing trial court to require State to create or produce evidence, and to require disclosure of State's conversations with the victims would run afoul of the Victims' Bill of Rights. *State v. O'Neil,* 172 Ariz. 180, 836 P.2d 393 (App. 1991).

Police reports

Test for determining whether police investigatory reports should be disclosed is whether release of record would have important and harmful effect upon official duties of official or agency. *Little v. Gilkinson*, 130 Ariz. 415, 636 P.2d 663 (App. 1981).

Fact that pretrial identification was material issue would not authorize granting defense motion for inspection of all police reports pertaining to investigation of defendant, thereby compelling discovery of records otherwise privileged as work product of state, and trial judge should have examined reports in camera and ordered that only those portions relevant to identification be inspected and copied by defendant. *State ex rel. Berger v. Superior Court In and For Maricopa County*, 105 Ariz. 473, 467 P.2d 61 (1970).

Confessions and statements of defendant--In general

Prosecution must disclose all of defendant's statements no later than ten days after arraignment; it is not required at such time to disclose which of defendant's statements will be used or whether any such statements will be introduced at trial. *State v. Alvarado,* 121 Ariz. 485, 591 P.2d 973 (1979).

Experts

State's failure in capital murder prosecution to fully and fairly disclose to defense the results of expert's assessment of defendant's mental health violated rule requiring prosecutor to supply to defendant names and addresses of experts who have personally examined defendant or any evidence, together with results of physical examinations and of scientific tests, experiments or comparisons that have been completed; expert analyzed defendant's scores from diagnostic tests, and expert's testimony and state's questions revealed that expert had completed his analysis before taking stand and that prosecutor knew of expert's scientific conclusions before trial. *State v. Roque,* 213 Ariz. 193, 141 P.3d 368 (2006).

Crime scene expert specializing in fingerprints, called by prosecution to testify about the frequency that plaster casts have been taken during his investigations of crime scenes, to combat defendant's claim that plaster casts of shoe prints should have been taken, was not an expert under rule requiring disclosure to defendant of names and addresses of experts who have personally examined defendant or any evidence in case. *State v. Hill,* 174 Ariz. 313, 848 P.2d 1375 (1993).

Scientific tests and experiments--In general

State's failure to disclose Alcohol Data Acquisition Management System (ADAMS) records violated discovery rules in assault trial, even if the defense had not requested and the court had not ordered disclosure of the records; state had duty to disclose information which tended to mitigate or negate defendant's guilt, and ADAMS records indicated that machine used to test defendant's breath for alcohol had failed calibration test. *State v. Meza,* 203 Ariz. 50, 50 P.3d 407 (App. 2002).

Trial court could not dismiss driving under the influence (DUI) charges against defendants for state's failure to disclose breath test data stored in intoxilyzer memory after defendants moved for disclosure under rule permitting additional disclosure by the state, given that rule did not, by its own terms, provide for dismissal, there was no prior order requiring additional disclosure in which the state failed to comply that would justify dismissal as a sanction, and the data had been overwritten by subsequent breath tests and no longer existed. *State v. O'Dell,* 202 Ariz. 453, 46 P.3d 1074 (App. 2002).

In case in which DNA evidence was offered by state, trial court did not abuse discretion in denying, on ground of burdensomeness and irrelevance, motion to compel discovery of all typing strip photos and amplification sheets for tests run in other cases in the same lab, despite contention that this material was necessary to fully evaluate possible contamination in the lab. *State v. Tankersley*, 191 Ariz. 359, 956 P.2d 486 (1998).

Medical reports, scientific tests and experiments

Court of Appeals would accept special action jurisdiction to determine whether trial court abused its discretion by finding that state violated criminal procedural rule because analysis of BAC in DUI cases had not been disclosed within 30 days of defendants' arraignments, and precluding evidence of BAC in those cases; state lacked remedy on appeal, and the issue has occurred multiple times. *State v. Simon*, 229 Ariz. 60, 270 P.3d 887 (App. 2002).

Breath test equipment, scientific tests and experiments

Although the sufficiency of defendant's showing of "substantial need" under criminal discovery rule may vary from case to case, a court's application of the relevant standard is a legal issue, and questions of law are appropriately reviewed by special action. *State v. Bernini*, 222 Ariz. 607, 218 P.3d 1064 (App. 2009).

Defendants who were charged with driving with an alcohol concentration of .08 or more failed to establish "substantial need" for software for privately-manufactured breath test machine, and thus, State was under no obligation to disclose software; defendants failed to establish how, or even if, the alleged software deficiencies affected their test results, but instead sought disclosure merely with hopes that something would turn up. *State v. Bernini*, 222 Ariz. 607, 218 P.3d 1064 (App. 2009).

Tangible evidence

Alarm company's record with respect to alleged burglary, which prosecutor intended to use at trial to establish time alarm was set off, was item which this rule required the state to disclose before trial, and the state could not avoid the rule by arguing that the prosecutor was not himself in physical possession of the record; prosecutor has an affirmative duty to obtain materials appropriate for disclosure and to make information available to defendant as early and completely as possible. *State v. Campbell*, 115 Ariz. 65, 563 P.2d 320 (App. 1977).

Prior acts

Rules requiring state to disclose names of witnesses and prior bad acts to be used at trial did not require state to disclose intention to introduce prior bad acts through listed witness. *State v. Williams*, 183 Ariz. 368, 904 P.2d 437 (1995).

Exculpatory or mitigating information--In general

Defendant was not entitled to access to personnel records of arresting officers to learn whether they had been disciplined for "planting" evidence in other cases, in support of his allegation that officers had planted drugs in his car and pretended to discover them during search; defendant provided no facts or evidence to suggest that officers' files would contain any impeachment evidence. *State v. Acinelli*, 191 Ariz. 66, 952 P.2d 304 (App. 1997).

Failure to disclose, until trial, police officer's handwritten notes with regard to victim's description of her three assailants was not violative of disclosure requirement since notes were consistent with victim's trial testimony and, hence, were inculpatory. *State v. Bracy*, 145 Ariz. 520, 703 P.2d 464 (1985).
Prosecution's failure to reveal information concerning rumor that witness in prosecution for assault had committed robbery and then allowed another man to take the fall for him was mitigated where defense knew of witness's criminal propensity, defense counsel requested no continuance before trial to make further inquiry into rumor although rumor was revealed to him before trial testimony began, and it was unlikely that information would have been at all helpful to defense counsel for cross-examination. *State v. Trujillo*, 120 Ariz. 527, 587 P.2d 246 (1978).

Preservation of evidence, exculpatory or mitigating information

Evidence must possess exculpatory value that is apparent before it is destroyed, and state does not have a duty to seek out or preserve potentially exculpatory evidence for the defendant when they have developed sufficient evidence against him. *State v. Davis*, 205 Ariz. 174, 68 P.3d 127 (App. 2002).

Duty to disclose, exculpatory or mitigating information

The State does not have duty to seek out and gain possession of potentially exculpatory evidence for defense; nevertheless, it does have duty to preserve evidence that is obvious, material, and reasonably within its grasp. *State v. Walters,* 155 Ariz. 548, 748 P.2d 777 (App. 1987).

Prosecution must turn over to the defendant full information regarding any exculpatory evidence it possesses unless the defendant actually has knowledge of such evidence. *State v. Jones*, 120 Ariz. 556, 587 P.2d 742 (1978).

If a prosecutor is in doubt as to whether defendant knows of certain exculpatory evidence already known to the state, the prosecutor should reveal it. *State v. Jones*, 120 Ariz. 556, 587 P.2d 742 (1978).

Evidence favorable to defendant must be admissible at trial in order for court to recognize a duty on part of prosecution to disclose such evidence upon request. *State v. Wilder*, 22 Ariz.App. 541, 529 P.2d 253 (1974).

State is duty bound to disclose evidence which may be favorable to the defense and which may not be reasonably known to or discoverable by the defense whether or not it is requested. *State v. Salcido*, 109 Ariz. 380, 509 P.2d 1027 (1973).

Disclosure of evidence favorable to accused is not restricted to "discovery" rights, and there exists a broad duty on part of prosecution to reveal such evidence to accused. *State v. Maloney*, 105 Ariz. 348, 464 P.2d 793 (1970).

Necessity for request, exculpatory or mitigating information

Evidence favorable to defendant must be disclosed by the prosecution whether or not it is requested by the defendant. *State v. Jones*, 120 Ariz. 556, 587 P.2d 742 (1978).

In light of purpose of this rule requiring that discovery be made automatically, failure of defendant to guess that the prosecutor might be withholding relevant and exculpatory materials and to make a motion to compel discovery did not preclude reversal. *State v. Campbell*, 115 Ariz. 65, 563 P.2d 320 (App. 1977).

Requirement of a defense request for production of evidence in hands of prosecution favorable to defendant has not been eliminated, but where suppression is deliberate or nondisclosure shocks conscience of court, a defense request is not necessary. *State v. Wilder*, 22 Ariz.App. 541, 529 P.2d 253 (1974).

Prosecution is duty bound to disclose evidence favorable to defendant whether or not defendant requests it. *State v. Altman*, 107 Ariz. 93, 482 P.2d 460 (1971).

Materiality, exculpatory or mitigating information

Even if investigating officer was source of anonymous tip that defendant was the armed robber of convenience store, such evidence was not material, for purposes of state's duty to disclose "material evidence," where tip simply resulted in defendant's photograph being put into lineup and officer could have included photograph on a mere suspicion or hunch, with no tip at all. *State v. Cordova*, 198 Ariz. 242, 8 P.3d 1156 (App. 1999).
Names and addresses of all gang members nicknamed "Turtle" were not material, for purposes of state's duty to disclose "material evidence," where armed robbery victim's pretrial and in-court identifications were based on her recollection of the robber, not on his nickname. *State v. Cordova*, 198 Ariz. 242, 8 P.3d 1156 (App. 1999).

Lab report showing that urinalysis of undercover police officer indicated presence of drugs was not sufficiently material to require trial court to grant defendant's motion to examine officer's personnel file for *Brady* impeachment material, where urinalysis results could not be positively confirmed; accordingly, denial of motion did not violate defendant's due process rights to disclosure of exculpatory evidence. *State v. Robles*, 182 Ariz. 268, 895 P.2d 1031 (App. 1995).

State may not withhold evidence favorable to accused when requested to produce it, but nondisclosed evidence must be material to case. *State v. LaBarre*, 114 Ariz. 440, 561 P.2d 764 (App. 1977).

Test of materiality of evidence favorable to defendant which prosecution is required to disclose upon request is whether evidence might have led jury to entertain a reasonable doubt about defendant's guilt or whether nondisclosure prejudiced defense. *State v. Wilder*, 22 Ariz.App. 541, 529 P.2d 253 (1974).

Fingerprints, exculpatory or mitigating information

Absence of fingerprints on packet of heroin which defendant allegedly possessed would not eliminate him as a suspect so that State's failure to test heroin packet for fingerprints did not deny due process to defendant. *State v. Torres*, 162 Ariz. 70, 781 P.2d 47 (App. 1989).

Defendant was not entitled to fingerprinting of victim's maid and family members to assist claim that someone other than codefendant aided burglary, attempted second-degree murder, aggravated assaults, and theft; although codefendant's partial palm print was found at scene and other usable prints discovered at scene did not belong to defendant or codefendant, defendant could still have argued that someone other than himself aided codefendant, even if fingerprints were not taken of maid and family members. *State v. Alvarado*, 158 Ariz. 89, 761 P.2d 163 (App. 1988).

Disclosure at trial, exculpatory or mitigating information

Defendant failed to show that state improperly withheld *Brady* evidence that key government witness was planning to testify against other defendants and, in essence, had become "professional witness for the state"; there was no evidence in the record proving that witness was professional jailhouse informant or that prosecutors knew or should have known at time of trial that witness was to testify in four other cases and, even if evidence of witness's other informant commitments had been available for defendant's impeachment use, evidence most likely would not have affected outcome of trial, given that jury was told that witness had tried to obtain plea agreement on separate case involving multiple homicides. *Ortiz v. Stewart*, 149 F.3d 923 (C.A.9 Arizona 1998).

Rules requiring state to disclose names of witnesses and prior bad acts to be used at trial do not require state to explain how it intends to use each witness. *State v. Williams,* 183 Ariz. 368, 904 P.2d 437 (1995).

Suppression, until trial, of exculpatory information consisting of police reports regarding arrest of three men on night of murders and regarding financial benefits which the prosecution gave to a witness in exchange for her testimony did not amount to a violation of disclosure requirement as long as such information was revealed at trial. *State v. Bracy*, 145 Ariz. 520, 703 P.2d 464 (1985).

It was not misconduct on part of county attorney to fail to make favorable evidence available to defendant upon defendant's request where, although it could not be known what the further testimony of the witness would be, it appeared that defendant obtained, however belatedly, all evidence that the prosecution had concerning the witness, and where, even though contents of statement were not known until last day of trial, a report made available to defendant earlier in trial for purpose of cross-examination of two officers who testified for the State contained information concerning the witness and what he observed. *State v. Brannin*, 109 Ariz. 525, 514 P.2d 446 (1973).

Promises or benefits to witnesses, exculpatory or mitigating information

Prosecutor has duty of disclosure, and failure to disclose evidence of promise for witness's testimony can be grounds for new trial. *State v. Maddasion*, 130 Ariz. 306, 636 P.2d 84 (1981).

Felony convictions of witnesses, exculpatory or mitigating information

Prosecution is required to disclose any material exculpatory evidence to the defense, including all prior felony convictions of witnesses whom prosecutor expects to call at trial. *State v. Spears*, 184 Ariz. 277, 908 P.2d 1062 (1996).

Where defendant's unawareness of existence of rap sheet of state's witness was result of own lack of diligence and where defense was remiss in failing to inspect sheriff's records as directed by court and as they finally did after trial, and state was not put on notice of precisely what defendant was seeking and understandably believed that it had satisfied general request by turning over rap sheet, there was no denial of fair trial by failure to disclose such prior convictions, with respect to which charges, but not dispositions, were shown on rap sheet. *State v. Smith*, 123 Ariz. 231, 599 P.2d 187 (1979).

While defendant claimed that the state failed to disclose the felony conviction of one of its witnesses, there was no violation of this rule, since it was not until after defendant's burglary trial that the witness was convicted of a felony, and defendant used that fact to impeach the witness when he testified in defendant's second trial on charge of furnishing narcotics. *State v. Hunt*, 118 Ariz. 431, 577 P.2d 717 (1978).

Juvenile records of witnesses, exculpatory or mitigating information

Section 8-207 prohibiting discovery of juvenile court records, and § 31-221 requiring confidentiality of department of correction records may not be used to prevent discovery of juvenile records when necessary to a defendant's right to confront witnesses against him and to test the juvenile's credibility, and therefore it was reversible error to deny defendant right to discovery of juvenile state's witness file maintained by the department, as due process required that defendant be allowed to have access to relevant material to aid in cross-examining the witness about his inconsistent statements and other relevant information bearing on credibility. *State v. Morales*, 129 Ariz. 283, 630 P.2d 1015 (1981).

Since a fair trial requires that accused be able to cross-examine effectively witnesses against him, if withholding of prosecution witness's juvenile record makes it impossible for accused to cross-examine witness effectively, state's policy of protecting juvenile offenders by refusing to disclose their records except in juvenile proceedings must give way to accused's constitutional right to confront witnesses. *State v. Myers*, 117 Ariz. 79, 570 P.2d 1252 (1977).

Felony convictions of victim, exculpatory or mitigating information

Prosecution was not required to disclose prior arrest record of murder victim, under provision of this rule requiring prosecutor to produce information on "all prior felony convictions of witnesses whom the prosecutor expects to call at trial." *State v. Briggs*, 112 Ariz. 379, 542 P.2d 804 (1975).

Disclosure by court order--In general

There was no abuse of discretion in not allowing defendant's new attorney and investigator to visit murder crime scene, on the fourth day of trial and more than a year after the crime was committed, where original defense counsel and two investigators had visited the scene shortly after the crimes, original attorney was still primary counsel, original investigators were still available, and crime scene had been cleaned up. *State v. Murray*, 184 Ariz. 9, 906 P.2d 542 (1995).

Trial court's failure to order state to produce names of probationers whom defendant felt were trying to entrap him was not error where defendant did not rely upon an entrapment defense and there was no evidence, beyond defendant's assertion, that there were any incidents of attempted entrapment. *State v. Hall*, 18 Ariz.App. 593, 504 P.2d 534 (App. 1972).
Even though transactions constituting basis of convictions occurred in course of defendant's employment as salesman for automobile dealer, it was not an abuse of discretion to deny defendant's motion for an order directing dealer to furnish defendant with names and addresses of each and every person who had purchased vehicle from dealer during period from July to December 1968, in absence of minimal showing by defendant that inspection of such records could reasonably tend to lead to discovery of relevant evidence. *State v. Streett,* 11 Ariz.App. 211, 463 P.2d 106 (1969).

Court's power to order discovery

Defendant may not use subpoena power of court to circumvent rules of criminal procedure and thus obtain discovery without knowledge of state or consent of trial court. *Carpenter v. Superior Court In and For County of Maricopa*, 176 Ariz. 486, 862 P.2d 246 (App. 1993).

Disclosures authorized under criminal rules dealing with discovery are available in the trial court's discretion, and will not be modified on appeal in absence of clear abuse of discretion. *State v. Kevil*, 111 Ariz. 240, 527 P.2d 285 (1974).

Since motion to require production of defendant's statements that State would produce at trial was made after trial was in progress, it was matter for trial court's sound discretion. *State v. Aldridge*, 108 Ariz. 536, 502 P.2d 1355 (1972).

Internal affairs records of police department, disclosure by court order

City police department's internal affairs records of arresting officer were subject to in camera inspection and disclosure in criminal prosecution in order to inquire into defense contention that arresting officer had a well-known reputation for being less than truthful while testifying and in trying to justify unprofessional conduct while in the field. *State ex rel. Dean v. City Court of City of Tucson*, 140 Ariz. 75, 680 P.2d 211 (App. 1984).

In aggravated assault prosecution, trial court did not act in excess of its jurisdiction or abuse its discretion in entering pretrial order directing State to disclose to defendant any and all reports or complaints, departmental investigations and actions taken, if any, in connection with similar incidents involving those officers involved at the scene of the alleged offense. *State ex rel. Berger v. Superior Court In and For Maricopa County*, Ariz.App. 320, 519 P.2d 73 (App. 1974).

Requested in camera inspection by judge of internal affairs records of city police department concerning two specific police officers was not barred by fact that requested inspection was directed to records in possession of a third person rather than in possession of the prosecution in case involving charge of obstructing justice based upon defendant's alleged hitting of police officer. *State ex rel. DeConcini v. Superior Court In and For Pima County,* 20 Ariz.App. 33, 509 P.2d 1070 (1973).

Review, disclosure by court order

Trial court abused its discretion by ordering County Attorney's Office to disclose fingerprint and palm print analysis within 21 days as sanction for untimely disclosure, even though parties were not fully aware of status of disclosure or whether prints had been analyzed. *State ex rel. Thomas v. Newell*, 221 Ariz. 112, 210 P.3d 1283 (App. 2009).

Court of Appeals would accept special action jurisdiction over criminal defendant's petition challenging trial court's denial of motion to compel state to provide copies of materials seized from defendant and deemed by state to be child pornography; case presented an issue of law and a matter of first impression regarding interpretation of rules of procedure, and different divisions of superior court in county where case was pending had reached conflicting decisions on whether a court could order state to copy contraband. *Cervantes v. Cates,* 206 Ariz. 178, 76 P.3d 449 (App. 2003).

Appellate court reviews a trial court's failure to order the disclosure of the requested information or evidence for an abuse of discretion. *State v. Cordova*, 198 Ariz. 242, 8 P.3d 1156 (App. 1999).

Although a trial court is in the best position to rule on discovery requests, it abuses its discretion when it misapplies the law or predicates its decision upon irrational bases. *State v. Fields*, 196 Ariz. 580, 2 P.3d 670 (App. 1999).

In order for reviewing court to find abuse of discretion from nondisclosure, defendant must demonstrate that he suffered prejudice. *State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670 (1985).

Since disclosure authorized under this rule dealing with discovery is available in trial court's discretion, appellate courts do not interfere in the absence of a clear abuse of discretion. *State v. Birdsall*, 116 Ariz. 196, 568 P.2d 1094 (App. 1977).

Rebuttal evidence--In general

It is unreasonable to require the state to list in advance of trial and prior to the presentation of the defendant's case the names of all potential rebuttal witnesses because the state can rarely anticipate what course the defendant will pursue. *State v. Sullivan*, 130 Ariz. 213, 635 P.2d 501 (1981).

Stipulations

Any error of trial court, in finding that prosecution requested appropriate stipulation to chain of custody before releasing physical evidence to defendant for testing, and that defendant was not entitled to release of evidence because he would not make the stipulation, was harmless, at guilt phase of capital murder case; defendant never seriously contested that he killed the victims, and instead presented an insanity defense, and blood, DNA, and

handwriting samples, and ballistic evidence, did not bear on critical issue of insanity. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119 (2004).

Trial court is in best position to determine whether the stipulation requested by prosecutor, before physical evidence is released to defendant for testing, is appropriate, and appellate court will review its decision for abuse of discretion. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119 (2004).

Noticed defenses, rebuttal evidence

Provision of this rule requiring the state, upon receipt of the notice of defenses required for the defendant, to disclose names and addresses of all persons whom it intends to call as rebuttal witnesses together with their relevant written or recorded statements requires the disclosure of only those witnesses called to rebut defenses noticed by the defendant. *State v. Sullivan,* 130 Ariz. 213, 635 P.2d 501 (1981).

Where, in an attempt to rebut defendant's contention that he had been "framed," the state called a police officer to testify concerning the agreement he had entered into with the defendant, whose notice of defenses failed to put the state on notice that it was necessary to call the officer as a rebuttal witness, trial court did not err in overruling defendant's objection to the officer's testifying because the defendant had not received prior notice of the state's intention to call the officer as a rebuttal witness. *State v. Sullivan*, 130 Ariz. 213, 635 P.2d 501 (1981).

Where state's rebuttal witness was not called to rebut alibi defense, state was not required, as a matter of constitutional due process, to give advance notice of rebuttal witnesses even though defendant had been required to make prior disclosure of his alibi defense and alibi witnesses as well as all other witnesses whom he intended to call. *State v. LaBarre*, 115 Ariz. 444, 565 P.2d 1305(App. 1977).

Where, in drug prosecution, defendant did not disclose his defense of lack of knowledge and intent, prosecution was not required to disclose names and addresses of rebuttal witnesses. *State v. Shepherd*, 27 Ariz.App. 448, 555 P.2d 1136 (1976).

Adequacy of disclosure, rebuttal evidence

The listing of the names of witnesses for use in the state's case-in-chief is adequate notice to defendant to be prepared for their testimony at any time, and such testimony may be admitted on rebuttal. *State v. Walton*, 133 Ariz. 282, 650 P.2d 1264 (1982); *State v. Hatton*, 116 Ariz. 142, 568 P.2d 1040 (1977).
Where a letter filed with the superior court clerk advised defense counsel that the county attorney intended to call four rebuttal witnesses, and defense counsel was advised as to the testimony the witnesses would give if called, including testimony that defendant planned to travel with another person to California to participate in a "drug rip-off," such written notice to defendant's trial counsel constituted adequate disclosure under this rule. *State v. Linden*, 136 Ariz. 129, 664 P.2d 673 (App. 1983).

Fact that one individual was listed as a witness in the State's case-in-chief did not preclude the State from using such individual in rebuttal; fact that State intended to use such individual as witness was enough to put defendant on notice that his testimony would not be favorable and the State did not have to tell the defense that such individual would be a rebuttal witness. *State v. Dillon*, 26 Ariz.App. 220, 547 P.2d 491 (1976).

Time of notice of defenses, rebuttal evidence

Admission of rebuttal testimony by witnesses whose names were not disclosed to defendant prior to trial was not improper where witnesses were called to rebut certain testimony of defendant which was product of his last minute decision to take stand. *State v. Binford*, 120 Ariz. 86, 584 P.2d 67 (App. 1978).

Informants

Despite defendant's contention that confidential informant was material witness with evidence related to entrapment defense, trial court was not required to grant motion for disclosure of informant's identity, where motion was not

supported with sworn affidavits or any other evidence and record demonstrated that defendant knew the identity of the informant. *State v. Robles*, 182 Ariz. 268, 895 P.2d 1031 (App. 1995).

To overcome public policy at protecting identity of confidential informant, burden is on defendant to establish that informant could testify on merits of the case. *State v. Robles*, 182 Ariz. 268, 895 P.2d 1031 (App. 1995).

Where confidential informant was not shown to have been witness to criminal acts charged or to material facts on issue of guilt, trial court did not err in refusing to require disclosure of informant's identity. *State v. Bohn*, 116 Ariz. 500, 570 P.2d 187 (1977).

Where prosecutor revealed to defendant all information he possessed as to identity and whereabouts of informant, and where informant was no longer employed by police, so that there was no control over him, prosecutor had complied with applicable provisions of Rule 15.4 governing discovery of informant's identity. *State v. Demarbiex*, 111 Ariz. 441, 532 P.2d 503 (1975).

Motion for disclosure of informants did not require disclosure of material witness. *State v. Cox*, 110 Ariz. 603, 522 P.2d 29 (1974).

Production of evidence seized

Trial court did not abuse its discretion in ordering that copies of defendant's computer hard drives be made available to him, instead of the originals. *State v. Coghill*, 216 Ariz. 578, 169 P.3d 942 (App. 2007).

Loss or destruction of evidence

Duty of police to preserve potentially exculpatory evidence arises when evidence is "obviously material"; to be constitutionally material, evidence must both possess exculpatory value that was apparent before evidence was destroyed, and be of such nature that defendant would be unable to obtain comparable evidence by other reasonably available means. *State v. Tinajero*, 188 Ariz. 350, 935 P.2d 928 (App. 1997).

When state destroys material evidence, contents or quality of which are at issue in trial, jury may infer that the facts are against the state's interest. *State v. Murray*, 184 Ariz. 9, 906 P.2d 542 (1995).

"Bad faith" standard enunciated by Supreme Court's *Youngblood* decision, by which state's failure to preserve potentially useful evidence is not a denial of due process absent bad faith on the part of the state, applies to post-verdict as well as pretrial destruction of evidence. *State v. Vickers*, 180 Ariz. 521, 885 P.2d 1086 (1994).

In the absence of showing of bad faith on the part of state in destroying blood samples found on defendant's shirt, there was no denial of due process. *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993).

Absent bad faith on part of state, failure to preserve evidence that could have been subjected to test and was possibly exculpatory did not deprive defendant of due process under State Constitution. *State v. Youngblood,* 173 Ariz. 502, 844 P.2d 1152 (1993).

State's failure to preserve urine sample for independent retesting did not violate parolee's due process rights; parolee did not attack procedures and gave no indication of reason to believe that earlier tests were in error. *Mageary v. Arizona Bd. of Pardons and Paroles*, 171 Ariz. 193, 829 P.2d 1239 (App. 1992).

Defendant was not denied due process when slides from which State made phosphoglucomutase analysis were destroyed without photographic preservation of results of testing procedure; samples were frozen, retained, and delivered to defense expert for analysis, and thus, defendant had right to analyze sample but not necessarily the specific slides. *State v. Beaty*, 158 Ariz. 232, 762 P.2d 519 (1988).

Proof that evidence destroyed by the State would have conclusively established defense is not prerequisite to instruction concerning destruction of evidence; rather, defendant need only show that if evidence had not been destroyed, it might have tended to exonerate him. *State v. Walters*, 155 Ariz. 548, 748 P.2d 777 (App. 1987).

State did not violate this rule where police destroyed tree limb, removed from scene of crime, which police had suspected to have been hit by bullet, but on closer examination, police decided that limb had no evidentiary value. *State v. Chaney*, 141 Ariz. 295, 686 P.2d 1265 (1984).

Reproduction of documents

Procedural rules requiring that state provide to criminal defendant for examination, testing, and reproduction the materials that were obtained from or purportedly belong to defendant do not exempt contraband from being copied for use in defending criminal charges. *Cervantes v. Cates*, 206 Ariz. 178, 76 P.3d 449 (App. 2003).

Review, generally

Scope of disclosure required under rule of criminal procedure governing disclosure by state is a question of law that the Supreme Court reviews de novo, while it reviews the judge's assessment of the adequacy of disclosure for an abuse of discretion. *State v. Roque*, 213 Ariz. 193, 141 P.3d 368 (2006).

Rule 15.2—Disclosure by Defendant

a. Physical Evidence. At any time after the filing of an indictment, information or complaint, upon written request of the prosecutor, the defendant shall, in connection with the particular crime with which the defendant is charged:

(1) Appear in a line-up,
(2) Speak for identification by witnesses,
(3) Be fingerprinted, palm-printed, foot-printed or voice printed,
(4) Pose for photographs not involving re-enactment of an event,
(5) Try on clothing,
(6) Permit the taking of samples of his or her hair, blood, saliva, urine or other specified materials that involves no unreasonable intrusions of his or her body,
(7) Provide specimens of his or her handwriting,
(8) Submit to a reasonable physical or medical inspection of his or her body, provided such inspection does not include psychiatric or psychological examination.

The defendant shall be entitled to the presence of counsel at the taking of such evidence. This rule shall supplement and not limit any other procedures established by law.

b. Notice of Defenses. Within the time specified in Rule 15.2(d), the defendant shall provide a written notice to the prosecutor specifying all defenses as to which the defendant intends to introduce evidence at trial, including, but not limited to, alibi, insanity, self-defense, defense of others, entrapment, impotency, marriage, insufficiency of a prior conviction, mistaken identity, and good character. The notice shall specify for each listed defense the persons, including the defendant, whom the defendant intends to call as witnesses at trial in support of each listed defense. It may be signed by either the defendant or defendant's counsel, and shall be filed with the court

c. Disclosure by Defendant; Scope. Simultaneously with the notice of defenses submitted under Rule 15.2(b), the defendant shall make available to the prosecutor for examination and

reproduction the following material and information known to the defendant to be in the possession or control of the defendant:

(1) The names and addresses of all persons, other than that of the defendant, whom the defendant intends to call as witnesses at trial, together with their relevant written or recorded statements;
(2) The names and addresses of experts whom the defendant intends to call at trial, together with the results of the defendant's physical examinations and of scientific tests, experiments or comparisons that have been completed; and
(3) A list of all papers, documents, photographs and other tangible objects that the defendant intends to use at trial.

d. Time for Disclosure. Unless otherwise ordered by the court, the defendant shall disclose the materials and information listed in Rules 15.2(b) and 15.2(c) not later than:

(1) For cases in Superior Court, 40 days after arraignment or within 10 days after the prosecutor's disclosure pursuant to Rule 15.1(b), whichever occurs first.
(2) For cases in limited jurisdiction courts, 20 days after the prosecutor's disclosure pursuant to Rule 15.1(b).

e. Additional Disclosure upon Request and Specification. Unless otherwise ordered by the court, the defendant, within 30 days of a written request, shall make available to the prosecutor for examination, testing, and reproduction the following:

(1) Any specified items contained in the list submitted under Rule 15.2(c)(3).
(2) Any completed written reports, statements and examination notes made by experts listed in Rule 15.2(c) (1) and (2) of this rule in connection with the particular case.

The defendant may impose reasonable conditions, including an appropriate stipulation concerning chain of custody, to protect the physical evidence produced under this section or to allow time to complete any examination or testing of such items.

f. Scope of Disclosure. The defendant's obligation under this rule extends to material and information within the possession or control of the defendant, the defendant's attorneys, staff, agents, investigators or any other persons who have participated in the investigation or evaluation of the case and who are under the defendant's direction or control.

g. Disclosure by Order of the Court. Upon motion of the prosecutor showing that the prosecutor has substantial need in the preparation of his or her case for material or information not otherwise covered by Rule 15.2, that the prosecutor is unable without undue hardship to obtain the substantial equivalent by other means, and that disclosure thereof will not violate the defendant's constitutional rights, the court in its discretion may order any person to make such material or information available to the prosecutor. The court may, upon request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

CASES

Validity

Provision of this rule which required defendant to disclose names and addresses of all persons whom he intended to call as witnesses at trial did not violate defendant's right against self-incrimination. *State v. Fendler*, 127 Ariz. 464, 622 P.2d 23 (App. 1980).

Construction and application

A defendant need not provide the prosecutor or the court with a preview of his case or arguments, nor need he provide the prosecutor advance notice of the weaknesses in the state's case or identify evidence that the state should present to sustain its burden of proof. *State v. Marshall,* 197 Ariz. 496, 4 P.3d 1039 (App. 2000).

Catch-all for additional disclosure not otherwise covered by this rule has no application to an interview of a defendant who has already testified in his own behalf. *State v. Betham*, 122 Ariz. 136, 593 P.2d 690 (App. 1979).

Purpose

Underlying principle of criminal rules 15.1 to 15.8 providing for discovery is adequate notification to opposition of one's case-in-chief in return for reciprocal discovery so that undue delay and surprise may be avoided at trial by both sides. *State v. Stewart*, 139 Ariz. 50, 676 P.2d 1108 (1984).

Underlying principle of criminal rule providing for discovery is adequate notification to opposition of one's case in chief in return for reciprocal discovery so undue delay in surprise may be avoided at trial by both sides. *State v. Williams*, 121 Ariz. 218, 589 P.2d 461 (App. 1978).

Purpose of former 1956 Rules Cr.Proc., Rule 192 (see, now, this rule) which required that defendant who would assert an alibi could give notice of his intention to do so, listing the witnesses who shall testify to establish the alibi, was to guard against wrongful use of alibi evidence and to give prosecution time and information to investigate the sources of this evidence. *State v. Hess*, 9 Ariz.App. 29, 449 P.2d 46 (1969).

Purpose of 1956 Rules Cr.Proc., Rule 192 (see, now, this rule) was to prevent presentation of alibi defenses without giving state opportunity to ascertain facts as to credibility of witnesses or to obtain rebuttal testimony. *State v. Dodd*, 101 Ariz. 234, 418 P.2d 571 (1966).

Statutes providing for defense of alibi are intended to erect safeguards against its wrongful use and give prosecution time and information to investigate the merits of the defense. *State v. Martin,* 2 Ariz.App. 510, 410 P.2d 132 (1966).

Identification at trial

Rule 15.2, concerning pretrial discovery, was inapplicable to State's request at trial to have defendant roll up his sleeves to reveal tattoo by which robbery victim had identified him. *State v. Rosthenhausler*, 147 Ariz. 486, 711 P.2d 625 (App. 1985).

Physical evidence--In general

Trial court did not err in requiring codefendants to display tattoos on their bodies in order to explain why they went to great lengths to cover their bodies during robbery, where there was no showing that tattoos might give rise to prejudicial association in minds of jurors. *State v. Smith*, 170 Ariz. 481, 826 P.2d 344 (App. 1992).

Failure of State to comply with this rule governing introduction of physical evidence before introducing evidence of defendant's refusal to provide a hand-writing sample or pose for a photograph was error and, since it could not be said beyond a reasonable doubt that it did not contribute to guilty verdict, error was harmful and required reversal. *State v. Asbury*, 124 Ariz. 170, 602 P.2d 838 (App. 1979).

Psychiatric reports, physical evidence

Disclosure order should not have required disclosure of statements made by defendant to mental health experts, retained in anticipation of insanity defense, regarding charged offenses; there was no basis for disparate treatment of

statements made to court-appointed expert, which were not subject to disclosure, and those made to expert retained by defendant, and there was no justification for requiring disclosure since statements could not be used at trial. *Austin v. Alfred*, 163 Ariz. 397, 788 P.2d 130 (App. 1990).

State was not entitled to pretrial discovery of psychiatric reports in possession of defendant. *Moore v. State*, 105 Ariz. 510, 467 P.2d 904 (1970).

Presence of counsel, physical evidence

Rule pertaining to disclosures required of a defendant requires presence of counsel at a lineup only after filing of the indictment or information. *State v. Rodriquez,* 145 Ariz. 157, 700 P.2d 855 (App. 1984).

Witnesses

Mere possibility that prior statements may be used and may be inaccurate or taken out of context does not justify blanket order requiring pretrial disclosure by defendant of all statements not otherwise covered by this rule permitting discovery of criminal defense materials. *Osborne v. Superior Court In and For Pinal County*, 157 Ariz. 2, 754 P.2d 331 (App. 1988).

Fact that counsel came into case at a late date and never realized that prior counsel had not revealed to the prosecutor the names of two witnesses who could have given testimony relevant to defense of intoxication was not a valid excuse for failure to disclose such witnesses' existence to the prosecution; trial court did not abuse its discretion in precluding testimony of such witnesses. *State v. Scott,* 24 Ariz.App. 203, 537 P.2d 40 (1975).

Documents and tangible objects

This rule mandating disclosure of certain defense materials to prosecution places no obligation on defense counsel to provide tapes or transcripts of witness statements taken in presence of prosecutor where State has chosen not to record such interviews. *Osborne v. Superior Court In and For Pinal County*, 157 Ariz. 2, 754 P.2d 331 (App. 1988).

Defendant was not responsible for his witness's refusal to tender to prosecutor documents, or copies thereof, to be used at trial to substantiate witness's testimony that defendant was with her at time of alleged narcotics sale with which defendant was charged, since witness did not become agent of party simply by her cooperation with that party. *State v. Stoglin,* 116 Ariz. 91, 567 P.2d 1220 (App. 1977).
Provision of this rule does not require defense counsel to tender copies of all evidence that he will present at trial, but rather only requires that he supply prosecutor with a "list" of all papers, documents, photographs and other tangible objects to be used at trial. *State v. Stoglin,* 116 Ariz. 91, 567 P.2d 1220 (App. 1977).

Attorney-client privilege

Defendant's attack on trial counsel's competency waived attorney-client privilege as to those specific contentions asserted; however, waiver was not basis for ordering disclosure of attorney's case files pursuant to state request, even though trial court attempted to keep contents of files from being disseminated to general public by prohibiting prosecutor from disclosing information to any other attorney and by requiring withdrawal of county attorney's office; state would have access to information it could use in other proceedings in addition to information it could use in the event that new trial was granted. *Waitkus v. Mauet*, 157 Ariz. 339, 757 P.2d 615 (App. 1988).

Discretion

Appropriateness of relief for violation of 15.2 governing disclosure of witnesses is for the trial court's discretion; in exercising such discretion the court should consider the reasons why disclosure was not made, extent of any prejudice to the opposing party, feasibility of rectifying such prejudice by continuance and any other relevant circumstances. *State v. Scott*, 24 Ariz.App. 203, 537 P.2d 40 (App. 1975).

Rule 15.3—Depositions

a. Availability. Upon motion of any party or a witness, the court may in its discretion order the examination of any person except the defendant and those excluded by Rule 39(b) upon oral deposition under the following circumstances:

(1) A party shows that the person's testimony is material to the case and that there is a substantial likelihood that the person will not be available at the time of trial, or

(2) A party shows that the person's testimony is material to the case or necessary adequately to prepare a defense or investigate the offense, that the person was not a witness at the preliminary hearing or at the probable cause phase of the juvenile transfer hearing, and that the person will not cooperate in granting a personal interview, or

(3) A witness is incarcerated for failure to give satisfactory security that the witness will appear to testify at a trial or hearing.

b. Subsequent Examination. In the event that testimony at a preliminary hearing or probable cause phase of a juvenile transfer hearing is limited by the magistrate pursuant to Rule 5.3, the court may order a follow up examination of any witness who testified at the hearing if the witness will not cooperate in granting a personal interview.

c. Motion for Taking Deposition; Notice; Service. A motion for deposition shall specify the time and place for taking the deposition and the name and address of each person to be examined, together with designated papers, documents, photographs or other tangible objects, not privileged, to be produced at the same time and place. The court may change such terms and specify any additional conditions governing the conduct of the proceeding. The moving party shall notice the deposition in the manner provided for in civil actions and serve a subpoena upon the deponent, specifying the terms and conditions set forth in the court's order granting the deposition, and give notice of the deposition in writing to every other party to the action.

d. Manner of Taking. Except as otherwise provided herein or by order of the court, depositions shall be taken in the manner provided in civil actions. With the consent of the parties, the court may order that a deposition be taken on written interrogatories in the manner provided in civil actions. Any statement of the witness being deposed which is in the possession of any party shall be made available for examination and use at the taking of the deposition to any party who would be entitled thereto at trial. A deposition may be recorded by other than a certified court reporter. If a deposition is recorded by other than a certified court reporter, the party taking the deposition shall provide the opposing party with a copy of the recording within 14 days after the taking of the deposition or not less than 10 days before trial, whichever is earlier. The parties may stipulate, or the court may order, that a deposition be taken by telephone, consistent with the provision of Rule 15.3(d).

e. Presence of Defendant. A defendant shall have the right to be present at any examination under Rule 15.3(a)(1) and (a)(3). If a defendant is in custody, the officer having custody shall be notified by the moving party of the time and place set for the examination and shall, unless the defendant waives, in writing, the right to be present, produce the defendant at the examination and remain with him or her during it.

f. Use. Depositions may be used in the manner provided for prior recorded testimony in Rule 19.3(c).

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Access to witnesses

Witness is not uncooperative, so as to authorize court to order oral deposition, simply because he places reasonable conditions on interview with defense counsel; to be deemed uncooperative, conditions must tend to frustrate discovery. *State ex rel. McDougall v. Municipal Court of City of Phoenix*, 155 Ariz. 186, 745 P.2d 634 (App. 1987).

Police officer is presumptively cooperative with defense counsel, so that there is no basis for ordering oral deposition, if officer is willing to be interviewed by defense counsel between the hours of 8:00 a.m. and 6:00 p.m., Monday through Friday. *State ex rel. McDougall v. Municipal Court of City of Phoenix*, 155 Ariz. 186, 745 P.2d 634 (App. 1987).

Police officer who consented to interview with defense counsel only at 7:30 p.m. at police substation was uncooperative and was properly directed to submit to oral deposition. *State ex rel. McDougall v. Municipal Court of City of Phoenix*, 155 Ariz. 186, 745 P.2d 634 (App. 1987).

Although witness may refuse to be interviewed by defense counsel, prosecution has no right to interfere with or prevent defendant's access to witness, absent any overriding interest in security. *Mota v. Buchanan*, 26 Ariz.App. 246, 547 P.2d 517 (1976).

Grant of interview

Prosecution witness need not grant interview to defense counsel unless witness chooses to do so. *Mota v. Buchanan*, 26 Ariz.App. 246, 547 P.2d 517 (1976).

Uncooperative witnesses

Prosecution witness's refusal to allow defendant to interview him prior to his testifying did not warrant reversal of defendant's conviction for murder; notice of discovery filed almost two years before trial provided defendant with ample opportunity to arrange interview, defendant never requested order to require witness to submit to interview, and defendant's inability to interview witness was through no fault of state. *State v. Paxton*, 186 Ariz. 580, 925 P.2d 721 (App. 1996).

Superior court did not abuse its discretion in finding that officer, who agreed to participate in interview about events underlying charges of driving while under the influence of alcohol but refused to allow interview to be tape recorded on ground of his desire not to be impeached at trial, was being noncooperative, and therefore decision directing city court to exercise its discretion in ordering deposition of officer would be affirmed. *State ex rel. Baumert v. Superior Court of Maricopa County,* 133 Ariz. 371, 651 P.2d 1196 (1982).

In misdemeanor prosecution in city court, magistrate abused his discretion in ordering deposition of witness who was willing to grant personal interview but objected to tape-recording of that interview. *State ex rel. Dean v. City Court of City of Tucson*, 129 Ariz. 132, 629 P.2d 99 (App. 1981).

Where victim of offenses charged against defendant agreed to pretrial interview by defense counsel which lasted for almost two hours, victim was not uncooperative within meaning of this rule granting court discretion to order an oral deposition of any uncooperative witness, and court abused its discretion in ordering such deposition, despite fact that prosecutor was present during interview, victim refused to have interview tape recorded, and prosecutor would not permit defendant to be present during interview, as a witness is not required to grant such requests in order to cooperate within meaning of rule. *State v. DeRose*, 128 Ariz. 299, 625 P.2d 362 (App. 1981).

Under provision of this rule permitting defense counsel to seek order to depose prosecution witnesses, lack of cooperation on part of witness is not necessarily to be equated with outright refusal to answer questions propounded by defense counsel, but, where witness attaches such conditions to interview that it makes situation untenable for defense counsel to discover needed material, witness is being uncooperative within meaning of rule. *Kirkendall v. Fisher, In and For Pima County*, 27 Ariz.App. 210, 553 P.2d 243 (1976).

Right to refuse to answer questions during private interview does not foreclose defense counsel from obtaining discovery from uncooperative witness. *Mota v. Buchanan*, 26 Ariz.App. 246, 547 P.2d 517 (1976).

Material testimony

Defendants indicted in same grand jury proceeding whose trials were later severed and who would likely be witnesses at each other's trials were not defendants within meaning of this rule allowing court to compel deposition of person whose testimony is material to case but excluding defendant from those whose deposition may be compelled. *State v. Carruth (Luzanilla)*, 160 Ariz. 573, 774 P.2d 1363 (App. 1988).

Even had trial court exercised its discretion correctly, it should have denied defendant's motions to depose three defense witnesses in Mexico, in that defendant failed to make showing of materiality of witnesses or that witnesses' testimony might result in exonerating defendant. *State v. Fuller*, 143 Ariz. 571, 694 P.2d 1185 (1985).

In order to depose prosecutor under this rule, defendant must show the materiality of the witness, and make at least a preliminary showing that the prosecutor's testimony might result in exonerating the defendant to establish materiality. *State v. Jessen*, 134 Ariz. 458, 657 P.2d 871 (1982).

Pretrial order granting defense motion, in aggravated assault prosecution, to compel examination by deposition of police officers and investigator, all of whom actively participated in the investigation of the case and some of whom were endorsed by the State as witnesses, was not an abuse of discretion, but defendants failed to establish their right to compel examination by deposition of police chief, who had no personal knowledge of the events in the case and who did not participate in its investigation. *State ex rel. Berger v. Superior Court In and For Maricopa County*, 21 Ariz.App. 320, 519 P.2d 73 (1974).

Witness at prior trial

Trial court did not abuse its discretion in refusing to allow defendant to depose several of state's witnesses, despite contention that denial deprived him of his rights of effective assistance of counsel and confrontation of witnesses, since he did receive copies of all statements that witnesses made to police and prosecutor and had transcript of direct and cross-examination testimony given by witnesses at defendant's first trial. *State v. Jessen,* 134 Ariz. 458, 657 P.2d 871 (1982).

Manner of taking

Precluding a defense expert's videotaped deposition and requiring live testimony was not an abuse of discretion, even though the ruling was a seemingly abrupt reversal of position; judge ordered the live testimony simply out of concern that the expert would be "all cleaned up on a video" and that this would deprive the jury of a live appearance, deemed preferential, if not essential, on the facts of the case. *State v. Talmadge,* 196 Ariz. 436, 999 P.2d 192 (2000).

Trial court did not err in denying defense counsel's motion for interview of prosecution witnesses and instead directing that witnesses be available to her one hour prior to trial for unlawful possession of heroin for sale and conspiracy to sell heroin, where counsel had not availed herself of opportunity of prior interview of prosecution witnesses, as had other two defense attorneys. *Mota v. Buchanan*, 26 Ariz.App. 246, 547 P.2d 517 (1976).

Presence of defendant

Rule requiring state to notify officer having custody of defendant about deposition of state's witness and requiring written waiver of in-custody defendant's right to be present at deposition did not include qualification that defendant's presence at deposition be reasonably necessary. *State v. Grannis*, 183 Ariz. 52, 900 P.2d 1 (1995).

Admission of Mexican resident's deposition that was taken in absence of incarcerated defendant, but in presence of defendant's attorney, violated confrontation clause, where defendant did not waive right to be present at deposition. *State v. Alvarado,* 158 Ariz. 89, 761 P.2d 163 (App. 1988).

Presence of others at interview--In general

Nothing in Criminal Rule 15.3 allowing the deposition of a witness prohibits a witness from having someone present to provide sympathy and moral support; indeed, especially in cases involving crimes against the person, presence of a sympathetic person to support the witness may well help produce more complete information than if the witness were questioned alone in a hostile, frightening environment. *Murphy v. Superior Court In and For Maricopa County*, 142 Ariz. 273, 689 P.2d 532 (1984).

Prior to trial for unlawful possession of heroin for sale and conspiracy to sell heroin, trial court properly refused to direct that no one, other than witnesses and defense counsel, be present at interview requested by defense counsel of two prosecution witnesses since choice belonged to witnesses. *Mota v. Buchanan*, 26 Ariz.App. 246, 547 P.2d 517 (1976).

Provision of this rule permitting court to exercise its discretion in ordering depositions to obtain discovery from uncooperative witnesses does not require that deposition interview be private. *State v. Deddens*, 26 Ariz.App. 241, 547 P.2d 512 (1976).

Prosecutor, presence of others at interview

Presence of a prosecutor at a witness's interview by defense counsel does not make a witness uncooperative because a personal interview under the Rule 15.3 does not mean a private interview; in general, however, the decision as to whether the interview will be private is neither for the prosecutor nor the defense counsel but rests with the witness. *Murphy v. Superior Court In and For Maricopa County*, 142 Ariz. 273, 689 P.2d 532 (1984).

Trial court erred in directing that interview of prosecution witnesses by defense counsel take place in presence of prosecutor. *Mota v. Buchanan*, 26 Ariz.App. 246, 547 P.2d 517 (1976).

Where codefendant and informer were cooperative during prior discovery interview conducted by defendant in pending criminal action, fact that prosecutor was present at both interviews did not require that defendant be granted opportunity for additional discovery with prosecutor absent. *State v. Deddens*, 26 Ariz.App. 241, 547 P.2d 512 (1976).

Counsel, presence of others at interview

Witness's insistence on presence of his counsel during interview does not amount to lack of cooperation and does not warrant order to depose that witness. *Kirkendall v. Fisher, In and For Pima County*, 27 Ariz.App. 210, 553 P.2d 243 (1976).

Parents and guardians, presence of others at interview

Trial court did not abuse its discretion in allowing mother of allegedly sexually abused child to attend deposition of child, despite contention that child's recollection of alleged abuse differed when she talked to her mother, where trial court restricted mother's activities during deposition, restraining her from coaching, gesturing, or passing signals to her ten-year-old daughter. *Arcaris v. Superior Court In and For County of Maricopa*, 160 Ariz. 533, 774 P.2d 837 (App. 1989).

Victim assistance caseworker, presence of others at interview

Presence of victim assistance caseworker or victim/witness advocate at a victim-witness interview by defense counsel does not amount to noncooperation within meaning of Rule 15.3 relating to depositions, if the caseworker's role is confined to moral support and does not include comment on the substantive matters of the interview. *Murphy v. Superior Court In and For Maricopa County*, 142 Ariz. 273, 689 P.2d 532 (1984).

Privilege against self-incrimination

Where original codefendant had not yet pled to charges with which he and defendant were jointly charged, trial court could not force codefendant to divulge any information regarding the alleged rapes by way of deposition for use at defendant's severed trial, despite codefendant's refusal to be informally interviewed by defendant's counsel. *State v. Moncayo*, 115 Ariz. 274, 564 P.2d 1241 (1977).

Defendant was entitled after original codefendant had pled and waived his privilege against self-incrimination, to question original codefendant in post-conviction hearing to determine whether original codefendant had information exculpating defendant. *State v. Moncayo*, 115 Ariz. 274, 564 P.2d 1241 (1977).

Prosecutor as deponent

Trial court's failure to order prosecutor's deposition and attendance as a witness was not a constitutional violation requiring reversal of defendant's conviction, even though prosecutor was present, along with two police officers, at time statements were made, and there were inconsistencies between accounts given by defendant and officers at first trial, where testimony of officers was basically consistent and defendant did not suggest how prosecutor's deposition might clarify the matter, as by impeaching the officer's testimony. *State v. Jessen*, 134 Ariz. 458, 657 P.2d 871 (1982).

Victim assistance caseworker as deponent

In prosecution for sexual assault and attempted sexual assault, victim assistance caseworker was a proper subject for deposition by defense counsel, and trial court abused its discretion in denying defense counsel's motion to depose caseworker. *Murphy v. Superior Court In and For Maricopa County*, 142 Ariz. 273, 689 P.2d 532 (1984).

As regards a victim-witness interview under this rule, defense counsel can avoid problems in discovering impeachment material, in situations in which the victim assistance caseworker not only attends the interview but also is himself the subject of an interview, by conducting the interview or deposition of the caseworker without the presence of the victim and before the interview with the victim. *Murphy v. Superior Court In and For Maricopa County*, 142 Ariz. 273, 689 P.2d 532 (1984).

Officers

Trial court abused discretion by not compelling depositions of probation officers in probation revocation case; depositions were necessary in order for probationer to establish that probation officers had acted inappropriately and their decision was based on misleading, inaccurate or false information, and was also needed to explain why certain excisions were made in copy of his file which he received in response to his subpoena. *Kanuck v. Meehan*, 165 Ariz. 282, 798 P.2d 420 (App. 1990).

Municipal court proceedings

In misdemeanor prosecution in city court, magistrate should be guided by provisions of this rule governing discovery depositions in determining whether deposition should be ordered; that rule provides that unless other special circumstances exist, witness who will cooperate in granting personal interview may not be deposed. *State ex rel. Dean v. City Court of City of Tucson*, 129 Ariz. 132, 629 P.2d 99 (App. 1981).

Rule 15 providing for discovery depositions under certain circumstances and conditions does not apply to criminal case in city court. *State ex rel. Dean v. City Court of City of Tucson*, 129 Ariz. 132, 629 P.2d 99 (App. 1981).

Power of court

Application of Victim's Bill of Rights, which precludes trial court from ordering deposition of victim who has indicated unwillingness to be interviewed, does not abrogate Rule of Criminal Procedure which permits trial judge to exercise discretion to order deposition of material witness in certain circumstances. *Day v. Superior Court In and For County of Maricopa*, 170 Ariz. 215, 823 P.2d 82 (App. 1991).

Trial court had power to order a deposition in Mexico. *State v. Fuller*, 143 Ariz. 571, 694 P.2d 1185 (1985).

Ordering of depositions under Rule 15.3 is discretionary with trial court. *State v. Schoonover*, 128 Ariz. 411, 626 P.2d 141 (App. 1981).

Rule 15.4—General Standards

In all disclosure under this rule the following shall apply:

a. Statements.

(1) *Definition.* Whenever it appears in Rule 15 the term "statement" shall mean:

(i) A writing signed or otherwise adopted or approved by a person;

(ii) A mechanical, electronic or other recording of a person's oral communications or a transcript thereof, and

(iii)A writing containing a verbatim record or a summary of a person's oral communications.

(2) *Superseded Notes.* Handwritten notes that have been substantially incorporated into a document or report within twenty working days of the notes being created, or that have been otherwise preserved electronically, mechanically or by verbatim dictation, shall no longer themselves be considered a statement.

b. Materials Not Subject to Disclosure.

(1) *Work Product.* Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecutor, members of the prosecutor's legal or investigative staff or law enforcement officers, or of defense counsel or defense counsel's legal or investigative staff.

(2) *Informants.* Disclosure of the existence of an informant or of the identity of an informant who will not be called to testify shall not be required where disclosure would result in substantial risk to the informant or to the informant's operational effectiveness, provided the failure to disclose will not infringe the constitutional rights of the accused.

c. Failure To Call a Witness or Raise a Defense. The fact that a witness' name is on a list furnished under this rule, or that a matter contained in the notice of defenses is not raised, shall not be commented upon at the trial, unless the court on motion of a party, allows such comment after finding that the inclusion of the witness' name or defense constituted an abuse of the applicable disclosure rule.

d. Use of Materials. Any materials furnished to an attorney pursuant to this rule shall not be disclosed to the public but only to others to the extent necessary for the proper conduct of the case.

e. Requests for Disclosure. All requests for disclosure required pursuant to Rules 15.1a, 15.1b and 15.2c shall be made to the opposing party.

f. Filing of Papers; Exception for Misdemeanors and Petty Offenses Filed in Limited Jurisdiction Courts. For misdemeanor and petty offenses triable in limited jurisdiction courts, materials disclosed by the parties pursuant to Rule 15.1 and Rule 15.2, or notices of their service, shall not be filed with the court unless they are filed as attachments or exhibits to other documents when relevant to the determination of an issue before the court. On motion of a party, victim, or on the court's own motion, for good cause, the court may order the general standard shall not apply and that discovery papers shall be filed with the court to the extent helpful or necessary to maintain efficient and appropriate case management.

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Notes

Rough notes of an interview with the defendant need not be preserved by the police if substantially incorporated into a written report. *State v. Axley*, 132 Ariz. 383, 646 P.2d 268 (1982).

Evidence in prosecution for armed robbery was sufficient to support determination that police officer's notes taken during interrogation of defendant, which he used to refresh his memory while preparing departmental report, were substantially incorporated into departmental report, and, thus, that interrogating officer, who destroyed notes after departmental report was prepared, had complied with this court rule providing that handwritten notes which are substantially incorporated into formal report "shall no longer themselves be considered statement." *State v. Brooks*, 127 Ariz. 130, 618 P.2d 624 (App. 1980).

In proceeding in which defendants were convicted of obstructing criminal investigation, destruction of detective's rough notes taken during initial interview of a victim was not reversible error where, though detective testified that "* * * a lot of things * * * weren't reflected" in his written final report, there was no indication of bad faith, there was no showing of prejudice and defendants had opportunity to cross-examine detective and another officer concerning any facts which would support defendant's defenses or theories. *State v. Johnson*, 122 Ariz. 260, 594 P.2d 514 (1979).

Failure of prosecution to furnish defense counsel with scratch notes made by officer during interview of defendant was not error, where officer testified at trial that the notes had been substantially incorporated into his department reports which had been fully disclosed to defense counsel. *State v. Woods*, 121 Ariz. 187, 589 P.2d 430 (1979).

Trial court did not err in refusing to allow defendant's requested jury instruction regarding destruction of original notes made by arresting officer after they were incorporated into his written arrest report, on theory that destruction of that evidence entitled defendant to instruction that jury might infer that true facts evidenced by those documents were against state's interest, inasmuch as notes were not evidence whose nature, quality, or destruction were at issue in case. *State v. Winters,* 27 Ariz.App. 508, 556 P.2d 809 (1976).

In prosecution for murder, trial court did not err in refusing defendant's requested instructions concerning unfavorable inference to be drawn from police officer's destruction of his notes after incorporating their substance into his official police report. *State v. Travis*, 26 Ariz.App. 24, 545 P.2d 986 (1976).

Work product

Allowing State to call defendant's fingerprint expert was not abuse of discretion despite claim that doing so implicated work product. *State v. Schaaf,* 169 Ariz. 323, 819 P.2d 909 (1991).

Work product principle did not bar disclosure of names and reports of non-testifying mental health experts retained by defendant in anticipation of insanity defense, even in absence of waiver, balancing competing interest presented, and in view of protection to be afforded defendant's statements to experts concerning offenses charged. *Austin v. Alfred*, 163 Ariz. 397, 788 P.2d 130 (App. 1990).

Report on hazardous chemicals present on property of grand jury target that was prepared by expert retained by target's counsel was within work product exception to discovery rule; expert was part of counsel's investigative staff, report contained opinions and conclusions, and information contained in report was equally available to prosecution. *State ex rel. Corbin v. Ybarra*, 161 Ariz. 188, 777 P.2d 686 (1989).

Report prepared by expert that was protected from discovery by work product exception would no longer be protected if expert was called to testify. *State ex rel. Corbin v. Ybarra*, 161 Ariz. 188, 777 P.2d 686 (1989).

Notes taken by prosecuting attorney when speaking with witness did not meet "work product" exception to disclosure since notes were not "theories, opinions and conclusions" of parties or their agents and were thus subject to disclosure. *State v. Nunez,* 23 Ariz.App. 462, 534 P.2d 270 (1975).

Compelling and exceptional circumstances so as to entitle defendant to examine work product of law enforcement authorities can be shown where the material sought to be examined bears on defendant's guilt or innocence and would be crucial to a fair trial for defendant, yet could not, with any degree of diligence, be obtained from sources other than prosecution. *State ex rel. Corbin v. Superior Court In and For Maricopa County*, 103 Ariz. 465, 445 P.2d 441 (1968).

The impressions, observations, and opinions which an attorney has recorded and transferred to his file as a product of his investigation of a case in preparation for trial are truly his "work product", and therefore are granted protection from discovery processes. *State ex rel. Polley v. Superior Court of Santa Cruz County*, 81 Ariz. 127, 302 P.2d 263 (1956).

Prosecuting attorney's use of part of defendant's statement as evidence at first trial, and the indication that he intended to use it in some manner as surprise evidence in forthcoming trial, which arose from his vigorous resistance to court's order of inspection, operated to remove statement from full protection accorded "work product." *State ex rel. Polley v. Superior Court of Santa Cruz County*, 81 Ariz. 127, 302 P.2d 263 (1956).

Attorney-client privilege

Statements that were made by defendant who was charged with vehicular manslaughter to a claims adjuster for defendant's automobile liability insurer were not within the scope of the attorney-client privilege even though the claims adjuster had agreed to cooperate with the attorney who was representing defendant in connection with the criminal charge and to maintain the confidentiality of the communications. *State v. Superior Court, In and For Pima County,* 120 Ariz. 501, 586 P.2d 1313 (App. 1978).

Informants--In general

State was not required to reveal identity of confidential informant where informant did not testify at trial and defendant alleged no facts to show that disclosure was necessary to protect constitutional rights. *State v. Herrera*, 183 Ariz. 642, 905 P.2d 1377 (App. 1995).

Defendant waived any claim of error due to State's failure to disclose identity of police informant who introduced undercover officers to defendant, where defendant knew identity of informant from very beginning and was aware of informant's whereabouts at time he was initially arrested, and defendant made no effort to seek State's assistance in locating informant in year between occurrence of offense and defendant's trial. *State v. Williams*, 156 Ariz. 232, 751 P.2d 548 (App. 1987).

Where informant was involved in other pending cases and may have been only incidentally involved in case against defendant charged with sale of heroin, informant privilege was applicable. *State v. Gutierrez*, 121 Ariz. 176, 589 P.2d 50 (App. 1978).

Where disclosure of informant's identity is relevant and helpful to defense or is essential to fair determination of cause, privilege protecting name of confidential reliable informant must give way; thus, it may be necessary to disclose informant's name to show defendant's innocence or assure defendant of fair trial. *State v. Gutierrez*, 121 Ariz. 176, 589 P.2d 50 (App. 1978).

State may withhold from disclosure the identity of persons who furnish information of violations of laws to law enforcement officers in furtherance of public interest in effective law enforcement, but if disclosure of informant's identity is relevant and helpful to the defense or is essential to a fair determination of a case, the privilege of protecting name of a confidential, reliable informant must give way. *State v. Tuell*, 112 Ariz. 340, 541 P.2d 1142 (1975).

Public policy, informants

Policy of informant's privilege is in protecting police informants and in maintaining steady supply of information to law enforcement agencies; such policy may apply where informant has become involved in another case involving neighbors or acquaintances of persons against whom informant has been working. *State v. Gutierrez*, 121 Ariz. 176, 589 P.2d 50 (App. 1978).

State may withhold disclosure of identity of persons who furnish information of violations of law to law enforcement officers in furtherance of public interest in effective law enforcement. *State v. Celaya,* 27 Ariz.App. 564, 556 P.2d 1167 (App. 1976).

Material witness, informants

Disclosure of identity of confidential informant was not necessary for defendants to build defense in prosecution for transportation and possession of marijuana where informant was not present in vehicle from which marijuana was seized and was not a party to criminal acts alleged. *State v. Superior Court*, 147 Ariz. 615, 712 P.2d 462 (App. 1985).

Trial court abused its discretion in ordering state to reveal informant's name and address to defense counsel, in that, despite defendant's contention, informant could provide no testimony for defense of justification and would contribute nothing to establishing defendant's connection to marijuana found in his home. *State ex rel. Collins v. Riddel*, 133 Ariz. 376, 651 P.2d 1201 (1982).

Where informant was neither participant in nor observer of transaction in which heroin was found after arrest of defendants but merely pointed the finger of suspicion at defendants, disclosure of identity of the informant was not required on the ground that he was a material witness needed to establish guilt or innocence. *State v. Superior Court of State of Ariz., In and For Pima County*, 114 Ariz. 610, 562 P.2d 1108 (App. 1977).

Trial court did not err in refusing to order disclosure to defense of name of informant, where only foundation in motion for disclosure was defendants' beliefs that informant witnessed some of incidents involved in case and it did not appear that disclosure of informant was essential to fair determination of issues. *State v. Celaya*, 27 Ariz.App. 564, 556 P.2d 1167 (App. 1976).

Mere fact that informant was witness to incidents involved in crime does not require disclosure of name of informant to defense, where his evidence is not necessary to obtain conviction. *State v. Celaya*, 27 Ariz.App. 564, 556 P.2d 1167 (App. 1976).

Assertion that informant, who supplied information which police used in securing warrant to search house belonging to defendant's brother, might, if called as a witness, testify that the brother's illegal activity was the only activity of which the informer had knowledge did not justify disclosure of identity of the informant, who was not a participant in the illegal activity charged; speculation as to informant's knowledge of peripheral aspects of the case was not sufficient to bring it within an exception to basic policy of protecting an identity. *State ex rel. Berger v. Superior Court In and For Maricopa County*, 111 Ariz. 429, 531 P.2d 1136 (1975).

Where informant was not one making a buy or in some other way being involved as a material witness to the offense of transporting of marijuana, the State was not required to reveal the name of the informant to the defendant. *State v. Smith*, 110 Ariz. 221, 517 P.2d 83 (1973).

Where validity of search warrant based on informant's tip was unchallenged, there were at least four other persons in house at time arrests were made, so that informant did not constitute the sole material witness, the informant was not in house at time of arrest and there was evidence of a very real danger to informant's well-being should his identity be revealed, defendant, who was arrested during raid and subsequently convicted of possession of marijuana for sale based on marijuana seized during the raid, failed to demonstrate a reasonable possibility that confidential informant could have given material evidence on issue of defendant's guilt or innocence, and trial court's refusal to require state to disclose identity was not error. *State v. De La Cruz*, 19 Ariz.App. 166, 505 P.2d 1057 (App. 1973).

Fact that informant, who gave police officer information as to two burglaries with which defendant was later charged, was shown to have had information that stolen articles in question came from certain part of city, did not establish that informant was likely to have evidence bearing on case, and thus defendant was not entitled to disclosure of identity of such informant. *State ex rel. Berger v. Superior Court In and For Maricopa County*, 106 Ariz. 470, 478 P.2d 94 (1970).

Identification of defendant, informants

Even though informant might have witnessed nothing material to defense of defendant charged with sale of heroin, defendant must be afforded opportunity to personally interrogate informant and make such determination where there was possibility that informant might have information on crucial issue of whether purchase of heroin was made from defendant. *State v. Gutierrez,* 121 Ariz. 176, 589 P.2d 50 (App. 1978).

In proceeding in which accused was convicted of unlawful sale of narcotics and in which accuse"s sole defense was misidentification, refusal to order State to provide name of unidentified informer, who could have identified accused as either the seller or an innocent party, was error. *State v. Tuell*, 112 Ariz. 340, 541 P.2d 1142 (1975).

Probable cause for arrest and search, informants

Where police report concerning details of "tip" and corroboration of details by officers' independent observation established informant's reliability, officers' arrival at probable cause for arrest and search was based on more than a tip by a confidential informant, and disclosure of identity was not required. *State v. Superior Court of State of Ariz., In and For Pima County*, 114 Ariz. 610, 562 P.2d 1108 (App. 1977).

Sentencing of defendant, informants

Identity of confidential informant could not be disclosed to defendants for the purpose of eliciting information pertinent to sentencing in prosecution for transportation and possession of marijuana. *State v. Superior Court*, 147 Ariz. 615, 712 P.2d 462 (App. 1985).

Burden of proof, informants

In order to overcome public policy protecting government's privilege against disclosing identity of confidential informant, burden is on defendant to establish that informant could testify on merits of case. *State v. Grounds*, 128 Ariz. 14, 623 P.2d 803 (1981).

Defendant seeking to overcome policy of protecting informant's identity has burden of proving that such informant is likely to have evidence bearing on merits of case; however, defendant need not prove that informant would give testimony favorable to defense in order to compel disclosure of identity nor need defendant prove that informant was participant or even eyewitness to crime; defendant need only show that informant would be material witness on issue of guilt whose evidence might result in exoneration and that nondisclosure of identity would deprive defendant of fair trial. *State v. Gutierrez*, 121 Ariz. 176, 589 P.2d 50 (App. 1978).

Failure to call witness

Where both defendant and his codefendant testified in prosecution for armed robbery to the existence and identity of babysitter who had purportedly taken care of codefendant's children on night of alleged robbery, prosecutor's questions of defendant as to whether babysitter was present at trial and whether she would testify did not constitute impermissible comment on failure to call a witness, despite fact that babysitter was never called to testify, as this rule of criminal procedure relating to comment on failure to call witness was not intended to prevent party from commenting on his opponent's failure to produce a material witness in his control. *State v. Cozad*, 113 Ariz. 437, 556 P.2d 312 (1976).

Failure to offer all disclosed evidence

State's failure to offer at trial all the evidence it had disclosed from tapes of defendant's jailhouse telephone conversations was not disclosure violation. *State v. Wooten*, 193 Ariz. 357, 972 P.2d 993 (App. 1998).

Rule 15.5—Excision and Protective Orders

a. Discretion of the Court to Deny, Defer or Regulate Disclosure. Upon motion of any party showing good cause, the court may at any time order that disclosure of the identity of any witness be deferred for any reasonable period of time not to extend beyond five days prior to the date set for trial, or that any other disclosures required by this rule be denied, deferred or regulated when it finds:

(1) That the disclosure would result in a risk or harm outweighing any usefulness of the disclosure to any party; and

(2) That the risk cannot be eliminated by a less substantial restriction of discovery rights.

b. Discretion of the Court to Authorize Excision. Whenever the court finds, on motion of any party, that only a portion of a document, material or other information is subject to disclosure under these rules, it may authorize the party disclosing it to excise that portion of the material that is not subject to disclosure and to disclose the remainder.

c. Protective and Excision Order Proceedings. On motion of the party seeking a protective or excision order, or submitting to the court for a determination as to whether any document, material or other information is subject to disclosure, the court may permit the party to present the material or information for the inspection of the judge alone. Counsel for all other parties shall be entitled to be present when such presentation is made.

d. Preservation of Record. If the court enters an order that any material, or any portion thereof, is not subject to disclosure under this rule, the entire text of the material shall be sealed and preserved in the record to be made available to the appellate court in the event of an appeal.

CASES

Addresses of witnesses

Failure of prosecutor to follow preferred procedure of first obtaining protective order before excising addresses of state witnesses disclosed to defendant does not deprive trial court of power to subsequently enter order regulating such discovery if trial court finds circumstances of case warrant it. *State v. McMurtrey*, 136 Ariz. 93, 664 P.2d 637 (1983).

Where disclosure of state witnesses's addresses would have exposed them to some risk of harm, intimidation, or harassment, and prosecutor was ordered to make witnesses available for interviews at defense counsel's convenience, trial court did not abuse its discretion in withholding addresses of state witnesses from defense in first-degree murder prosecution, especially where trial court left open possibility of disclosure of addresses if defense counsel found them to be important. *State v. McMurtrey*, 136 Ariz. 93, 664 P.2d 637 (1983).

Claims adjusters

Where defendant in pending vehicular manslaughter prosecution did not establish that material sought by the state was protected from disclosure, trial court should not have granted her motion for a protective order to preclude the state from taking the deposition of a claims adjuster for defendant's automobile liability insurer. *State v. Superior Court, In and For Pima County,* 120 Ariz. 501, 586 P.2d 1313 (App. 1978).

County attorneys

In homicide prosecution, trial court acted properly in granting the state's motion for a protective order prohibiting the defense from calling a member of the county attorney's office as a witness where no compelling need for the attorney's testimony was shown and the record did not support defendant's claim that the attorney had attempted to alter the testimony of witnesses to fit his theory of the case. *State v. Tuzon*, 118 Ariz. 205, 575 P.2d 1231 (1978).

Undercover agents

Trial court's inspection order was not meant to apply to investigative reports by undercover narcotics agent. *State v. Doty,* 110 Ariz. 348, 519 P.2d 47 (1974).

Information in private

When court is receiving information which deals directly with substantive rights of the parties, that is, guilt or innocence, length of sentence, and type of sentence, right to receive such information in private may be severely limited; however, right of court to receive information in private so that it can intelligently assess its adjudicatory function and rule on nonsubstantive issues may not be so limited. *Phoenix Newspapers, Inc. v. Superior Court of Maricopa County,* 140 Ariz. 30, 680 P.2d 166 (App. 1983).

Rule 15.6—Continuing Duty to Disclose; Final Disclosure Deadline; Extension

a. Continuing Duties. The duties prescribed in this rule shall be continuing duties and each party shall make additional disclosure, seasonably, whenever new or different information subject to disclosure is discovered.

b. Additional Disclosure. Any party that determines additional disclosure may be forthcoming within 30 days of trial shall immediately notify both the court and the other parties of the circumstances and when the disclosure will be available.

c. Final Deadline for Disclosure. Unless otherwise permitted, all disclosure required by this rule shall be completed at least seven days prior to trial.

d. Disclosure After the Final Deadline. A party seeking to use material and information not disclosed at least seven days prior to trial shall obtain leave of court by motion, supported by affidavit, to extend the time for disclosure and use the material or information. If the court finds

that the material or information could not have been discovered or disclosed earlier even with due diligence and the material or information was disclosed immediately upon its discovery, the court shall grant a reasonable extension to complete the disclosure and grant leave to use the material or information. Absent such a finding, the court may either deny leave or grant a reasonable extension to complete the disclosure and leave to use the material or information, and

if granted the court may impose any sanction other than preclusion or dismissal listed in Rule 15.7.

e. Extension of Time for Scientific Evidence. Upon a motion filed prior to the final deadline for disclosure in Rule 15.6(c), supported by affidavit from a crime laboratory representative or other scientific expert that additional time is needed to complete scientific or other testing, or reports based thereon, and specifying the additional time needed, the Court shall, unless it finds that the request for extension resulted from dilatory conduct, neglect, or other improper reason on the part of the moving party or person listed in Rule 15.1(f) or 15.2(f), grant a reasonable extension in which to complete the disclosure. The period of time of the extension shall be excluded by the court from all time periods prescribed in Rules 15.1(c) 15.1(e), 15.2 (d), 15.2(e), 15.6(b) and 15.6(c).

CASE

In prosecution for possession of marijuana for sale, no reversible error resulted from allegation by defendants, who were furnished with copies of police officers' reports, that they were taken by surprise by "material additions to the testimony of witnesses," namely police officers, and that state thus violated its continuing duty to disclose. *State v. Guerrero*, 119 Ariz. 273, 580 P.2d 734 (App. 1978).

Rule 15.7—Sanctions

a. Failure to Make Disclosure. If a party fails to make a disclosure required by Rule 15 any other party may move to compel disclosure and for appropriate sanctions. The court shall order disclosure and shall impose any sanction it finds appropriate, unless the court finds that the failure to comply was harmless or that the information could not have been disclosed earlier even with due diligence and the information was disclosed immediately upon its discovery. All orders imposing sanctions shall take into account the significance of the information not timely disclosed, the impact of the sanction on the party and the victim and the stage of the proceedings at which the disclosure is ultimately made. Available sanctions include, but are not limited to:

(1) Precluding or limiting the calling of a witness, use of evidence or argument in support of or in opposition to a charge or defense, or
(2) Dismissing the case with or without prejudice, or
(3) Granting a continuance or declaring a mistrial when necessary in the interests of justice, or
(4) Holding a witness, party, person acting under the direction or control of a party, or counsel in contempt, or
(5) Imposing costs of continuing the proceedings, or
(6) Any other appropriate sanction.

b. Motion for Sanctions. No motion brought under Rule 15.7(a) will be considered or scheduled unless a separate statement of moving counsel is attached certifying that, after personal

consultation and good faith efforts to do so, counsel have been unable to satisfactorily resolve the matter.

c. Failure to Comply. If a party fails to comply with Rule 15.1 or 15.2 the other party is not required to make any further disclosure except material or information which tends to mitigate or negate the defendant's guilt as to the offense charged as set forth in Rule 15.1(b)(8) or as ordered by the court.

CASES

Discretion of court--In general

Imposition and choice of sanction in criminal case are within discretion of trial court. *State v. Jackson*, 186 Ariz. 20, 918 P.2d 1038 (1996).

Denial of defendant's motion for mistrial or a continuance when victim on direct examination testified to matters previously undisclosed to defense counsel was not an abuse of discretion where the state otherwise complied with discovery rules. *State v. Wallen*, 114 Ariz. 355, 560 P.2d 1262 (App. 1977).

Considerations, discretion of court

In selecting the appropriate sanction for non-compliance with the rules of discovery, a trial court should seek to apply sanctions that affect the evidence at trial and the merits of the case as little as possible since the Rules of Criminal Procedure are designed to implement, not to impede, the fair and speedy determination of cases; prohibiting the calling of the witness should be invoked only in those cases where other less stringent sanctions are not applicable to effect the ends of justice. *State v. Roque*, 213 Ariz. 193, 141 P.3d 368 (2006).

Before suppressing evidence as a discovery sanction, a court should consider, among other relevant factors, the vitality of the evidence to the proponent's case, the degree to which the evidence or the sanctionable conduct has been prejudicial to the opposing party, whether the sanctionable conduct was willful or motivated by bad faith, and whether a less stringent sanction would suffice. *State v. Meza,* 203 Ariz. 50, 50 P.3d 407 (App. 2002).

Before a court imposes a sanction for discovery violation that restricts the evidence at trial or affects the merits of the case, the court must inquire whether a less stringent sanction would suffice. *State v. Meza,* 203 Ariz. 50, 50 P.3d 407 (App. 2002).

Before sanctioning prosecution for failing to timely disclose material evidence, trial court should consider importance of evidence to prosecutor's case, surprise or prejudice to defendant, prosecutorial bad faith, and other relevant circumstances. *State v. Towery,* 186 Ariz. 168, 920 P.2d 290 (1996).

Prejudice to defendant

Denial of sanction by trial court for failure to timely disclose evidence is generally not abuse of discretion if trial court believes defendant will not be prejudiced. *State v. Towery,* 186 Ariz. 168, 920 P.2d 290 (1996).

Late disclosure of evidence during penalty phase of capital murder trial that defendant's aunt may have sexually abused him and of copies of his father's criminal convictions for sexual offenses, none of which involved defendant, did not violate *Brady* and did not prejudice defendant, who did not object to late disclosure, request a continuance, or show how evidence was mitigating. *State v. Walden*, 183 Ariz. 595, 905 P.2d 974 (1995).

Trial court did not abuse its discretion in allowing undisclosed state witness to testify as to operability of gun, where operability was not at issue until defendant's motion after both parties had rested, and defendant suffered no prejudice. *State v. Littles*, 156 Ariz. 5, 749 P.2d 914 (1988).

Such prejudice as defendant must demonstrate that he suffered from nondisclosure in order to establish abuse of discretion with regard to trial court's failure to impose sanctions relates to issue of surprise or delay under discovery rules. *State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670 (1985).

In second-degree murder prosecution, in which State did not comply with order requiring it to deliver list of prior acts to defense counsel and in which trial court ruled that State would be precluded from calling certain person and that testimony as to prior acts would be limited to testimony given by previously disclosed witnesses and to incidents occurring between accused and victim within 16 days of discovery of her body, failure to exclude all testimony concerning prior acts was not an abuse of discretion, absent any showing of prejudice to accused. *State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670 (1985).

Imposition of sanctions, under provision of Criminal Rule 15.7 governing discovery in criminal proceedings, for failure of state to disclose matters relating to guilt, innocence or punishment is within sound discretion of trial court; absent showing of prejudice, court of appeals will not find abuse of discretion. *State v. Floyd*, 120 Ariz. 358, 586 P.2d 203 (App. 1978).

Imposition of sanctions pursuant to provision of this rule which authorizes imposition of certain sanctions for failure to comply with discovery order is a matter within discretion of trial court and, absent a showing of prejudice to accused, Supreme Court will not find an abuse of discretion. *State v. Clark*, 112 Ariz. 493, 543 P.2d 1122 (1975).

Defendant's bare assertion that evidence which was helpful to him must have been withheld because prosecutor made no voluntary disclosures after September 13, 1971, did not show any prejudice to defendant due to alleged failure of prosecutor to disclose evidence helpful to defendant. *State v. Taylor*, 112 Ariz. 68, 537 P.2d 938 (1975), certiorari denied 96 S.Ct. 1127, 424 U.S. 921, 47 L.Ed.2d 328.

Timely disclosure

Trial court did not clearly abuse discretion, in not precluding testimony of rebuttal witness on basis that State had violated discovery rule in not disclosing identity of witness until two days before trial, where court ruled that there was sufficient time for defendant to interview witness and that discovery sanctions would not be appropriate. *State v. Tyler,* 149 Ariz. 312, 718 P.2d 214 (App. 1986).

Allowing a state's witness to testify when witness was disclosed only two days before trial was not error, even assuming that disclosure rules were violated, where defense counsel, who were provided with an opportunity to interview witness and were invited to make whatever motions regarding his testimony they felt necessary, were not prejudiced because they still could have requested a continuance if they had felt it was necessary. *State v. Zuck*, 134 Ariz. 509, 658 P.2d 162 (1982).

Where prosecutor informed defense counsel of the existence of the statement shortly after the prosecutor himself learned of it and personally arranged for defense counsel to interview witnesses who heard the statement, defense counsel interviewed those witnesses three days prior to trial, and defendant did not request a continuance, trial court was not required to order any sanction stricter than a continuance for the state's alleged failure to make timely disclosure that defendant had told robbery victim that he was sorry he had not killed the victim while he had the chance. *State v. Zuck*, 134 Ariz. 509, 658 P.2d 162 (1982).

Where counsel for defendant did not disclose that mother of informant would be called as witness until day trial commenced, and defense counsel, although he told court that he had no way of knowing that mother would have any information regarding case until she telephoned counsel the morning before trial was to begin, made no statement or offer of proof as to material facts to which mother could testify, defendant was not denied fair trial by trial court ruling precluding mother's testimony. *State v. Dorow*, 116 Ariz. 294, 569 P.2d 236 (1977).

Provisions of this rule for sanctions where party has failed to comply with rules relative to discovery did not apply where witness first disclosed to prosecutor alleged inculpatory statement of defendant on the afternoon of the second day of trial, despite contention that it was incumbent on prosecutor to effectively interview prospective state witnesses well in advance of trial so as to be able to make available to defense information as to prosecution witnesses and statements by defendant. *State v. Torres*, 27 Ariz.App. 556, 556 P.2d 1159 (1976).