

# **Beyond *Bordenkircher's* Boundaries: Challenging Coercive Plea Bargaining in the Maricopa County Early Disposition Court System**

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## INTRODUCTION

In Maricopa County, Arizona—the fourth largest county in the U.S. and home to the nation’s third largest prosecuting agency, the Maricopa County Attorney’s Office (“MCAO”)—a third of all felony cases are routed through the Early Disposition Court (“EDC”) system. The purpose of the EDC system is speed, not justice. Indeed, MCAO’s stated goal on its website is to use the EDC system to “prevent a backlog” of criminal prosecutions by “resolving them as quickly as possible.”<sup>1</sup> While many negative aspects of the criminal legal system—pretrial detention, charge stacking, mandatory minimum sentencing, etc.—exert pressure on the accused to waive their constitutional right to a trial and accept a plea offer as quickly as possible, the primary tool MCAO employs to achieve fast and cheap guilty pleas in the EDC is to threaten those they charge with a crime that if they demand a preliminary hearing—a right under Arizona law—or reject a plea offer in favor of trial—a right under the United States and Arizona constitutions—the next plea offer will be “presumptively harsher” or even “substantially harsher.”<sup>2</sup> In other words, prosecutors in Maricopa County, as a matter of policy, perpetuate a system

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<sup>1</sup> MARICOPA COUNTY ATTORNEY’S OFFICE, ADULT CRIMINAL CASE PROCESS (2022), <https://www.maricopacountyattorney.org/189/Adult-Criminal-Trial-Process> [<https://perma.cc/66LD-34L7>].

<sup>2</sup> MCAO’s written policy on plea offers generally states, that “[i]f the defendant rejects a plea offer or if the offer expires, the presumption is that any future offer will be harsher....” MARICOPA CNTY. ATTORNEY’S OFF. POLICIES AND PROCEDURES § 7.1(J) (MARICOPA CNTY. ATTORNEY’S OFF. 2022). However, warnings included with every plea offer made in the EDC indicate that subsequent pleas will be “presumptively harsher” or “substantially harsher.” There are copies of plea offers made by MCAO that include this language. *E.g.*, First Amended Class Action Complaint for Declaratory and Injunctive Relief at 2, *Luckey v. Adel*, No. CV21-01168-PHX-GMS (ESW) (D. Ariz. Sept. 8, 2021).

of extracting assembly-line guilty pleas by punishing people simply for exercising their constitutional rights all while refusing to provide the accused with basic discovery.

Regardless of one's view of plea bargaining generally, MCAO's policy, which I will refer to as its "Retaliation Policy," is uniquely coercive and undermines foundational tenets of our criminal legal system. Indeed, as explained in Part IV, the ACLU and the ACLU of Arizona are currently engaged in litigation against MCAO over this policy, arguing that MCAO's Retaliation Policy violates the constitutional rights of the accused.

Unfortunately, however, the United States Supreme Court has signed off on many troubling aspects of plea bargaining, going so far as to describe plea bargaining as "not only an essential part but a highly desirable part"<sup>3</sup> of the criminal legal system while acknowledging that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system."<sup>4</sup> Since finding plea bargaining to be constitutional in 1970,<sup>5</sup> the Supreme Court has described the process as arms-length negotiations between two parties with equal bargaining power.<sup>6</sup> Yet countless experts, scholars, and practitioners have forcefully argued why such a view is inconsistent with plea bargaining in practice.<sup>7</sup>

In bringing a constitutional challenge against MCAO's Retaliation Policy, the Plaintiffs as well as their attorneys with the ACLU hope to establish a principled limit to the virtually boundless power prosecutors currently enjoy in plea bargaining.

#### I. A STORY ALL TOO COMMON IN MARICOPA COUNTY, ARIZONA.

Samuel Luckey was one of the many criminal defendants threatened by prosecutors in Maricopa County pursuant to their Retaliation Policy.<sup>8</sup> On January 28, 2021, Mr. Luckey, a then 34-year-old Black man, was arrested on drug and

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<sup>3</sup> Santobello v. New York, 404 U.S. 257, 261 (1971).

<sup>4</sup> Missouri v. Frye, 566 U.S. 134, 144 (2012) (citing Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1912 (1992) (emphasis in original)).

<sup>5</sup> Brady v. United States, 397 U.S. 742, 745–55 (1970).

<sup>6</sup> E.g. Bordenkircher v. Hayes, 434 U.S. 357, 362–63 (1978) (citing Parker v. North Carolina, 397 U.S. 790, 809 (1970) (opinion of Brennan, J.) (approving of "the give-and-take negotiation common in plea bargaining between prosecution and defense, which arguably possess relatively equal bargaining power"); Frye, 566 U.S. at 144 (describing plea bargaining as "horse trading between prosecutor and defense counsel") (cleaned up).

<sup>7</sup> E.g. CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL (Abrams Press 2021); Norman L. Reimer & Martin Antonio Sabelli, *The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End*, 31 Fed.Sent.R. 215 (2109) 2019 WL 2453385; 2023 PLEA BARGAINING TASK FORCE REPORT, AMER. BAR ASSOC. (CJS Plea Bargain Task Force Report (americanbar.org) 2023).

<sup>8</sup> The factual claims related to Samuel Luckey's case were taken from court documents and a video recording of his first EDC hearing held on February 2, 2021. They are also included in the filed complaint. First Amended Class Action Complaint for Declaratory and Injunctive Relief, Luckey v. Adel, No. CV21-01168-PHX-GMS (ESW) (D. Ariz. Sept. 8, 2021).

weapons possession charges after two witnesses implicated him during an unrelated traffic stop. Based solely on these accounts, MCAO charged Mr. Luckey with two counts of drug sales, one count of possession of drug paraphernalia, and unlawful possession of a firearm. Neither the police nor the witnesses ever personally viewed Mr. Luckey selling drugs or carrying a weapon. Despite the dearth of hard evidence, Mr. Luckey, like many people accused of committing a crime who lack access to money, was thrown in jail and held on \$10,000 bail he could not afford. Despite informing his initial appearance judge that he could not afford his bail, requesting alternative release conditions, and informing the court that if he was incarcerated pretrial he would miss the birth of his daughter, the judge stated he had “received a written recommendation from the state, with respect to this case, which the court had considered” and imposed a cash-only bail of \$10,000.

Mr. Luckey’s pretrial detention in a COVID-infected jail was just the start.<sup>9</sup> MCAO quickly pushed his case through the EDC and denied him any discovery except a redacted police report that failed to even identify the witnesses against him. MCAO offered Mr. Luckey a felony plea deal that would send him to prison for two and five years. Moreover, pursuant to its policy, MCAO threatened that any subsequent plea offer would be “hasher” if Mr. Luckey demanded to see or hear the evidence against him or if he demanded his right to a preliminary hearing (i.e. probable cause determination).

After several requests for additional, basic discovery were denied by MCAO, including requests for Mr. Luckey’s criminal history, which is necessary to properly advise someone of the potential sentencing outcomes in a criminal prosecution, Mr. Luckey appeared by video from the Maricopa County Jail for his EDC hearing. Also appearing on the video was a judge from the Maricopa County Superior Court, a prosecutor from MCAO, and Mr. Luckey’s attorney with the Maricopa County Office of the Public Defender. After calling the case, the judge began the hearing by asking Mr. Luckey if he wanted to waive his right to a preliminary hearing or probable cause determination. In response, Mr. Luckey asked the judge if he could say something. He then explained that his attorney “has done everything in her power to help, but it’s like, [the prosecutors] are not really giving her anything to help me to make a clear decision...” In response, Mr. Luckey’s attorney explained that she “tried to get additional discovery and it’s not going to be provided at this level [i.e. in the EDC] and if we go forward with the preliminary hearing ... the assigned prosecutor has confirmed that plea negotiations will end. So, we’re in a tough spot.”

While the prosecutor appearing on the video feed silently watched, the judge explained his powerlessness, informing Mr. Luckey that while he “understands his concerns that [Mr. Luckey] might not be getting all the police reports or everything [he] want[s], but that’s part of, I guess, the way that the case is being handled by the

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<sup>9</sup> Josh Kelety, *Maricopa County Jail is No Place to Be in a Pandemic*, PHOENIX NEW TIMES (July 9, 2020), <https://www.phoenixnewtimes.com/news/heres-what-its-like-to-get-covid-19-in-the-maricopa-county-jail-11479545> [<https://perma.cc/JT7B-EBM5>].

assigned [prosecutor]. I cannot force them to make plea offers, I can't force them to give you certain things [like basic discovery]" because that happens "after probable cause has been found or waived." Importantly, it also happens after MCAO's threat of harsher penalties kicks in.

In response, Mr. Luckey explained that it "doesn't seem fair" to force someone accused of a crime to "go in blind" without any meaningful discovery. Again, the judge refused to push the prosecutor to provide additional information and informed Mr. Luckey that he must make a decision based upon the very limited information he had—a mostly redacted police report. Mr. Luckey responded, "I want to take it to trial..." He then paused and quickly added, "I'll waive it. I'll waive it. There's nothing I can do, what can I do? It's damned if I do, damned if I don't. What can I do?"

The judge then quickly moved forward with Mr. Luckey's waiver of his right to a probable cause hearing, asking, "Has anyone threatened you in any way to get you to waive this right?" Mr. Luckey responded, "In a way that's threatening, that's what I'm trying to express. If I go along with it, they're going to take [away] a plea that they gave me and they're not giving me nothing. That sounds threatening to me in a way." The judge then explained that facing a much harsher sentence after trial—the "trial penalty"—or having a current plea offered pulled and replaced by a subsequently harsher offer does not constitute a threat.<sup>10</sup> And with that, the prosecutor extracted a waiver of Mr. Luckey's right to a probable cause determination.

## II. THE EDC IS A SYSTEM OF UNCONSTITUTIONALLY COERCIVE PLEA-BARGAINING THAT FUNCTIONS OUTSIDE THE RULES.

### A. *The Origins of EDC*

In Maricopa County, as in the rest of the country, the vast majority of prosecutions resolve in a guilty plea following the acceptance of a plea deal.<sup>11</sup> While all plea bargaining is coercive to some extent, it is acutely pernicious in Maricopa County and other Arizona jurisdictions—Cochise, Pinal, and Yavapai counties—that have adopted EDC systems.

The EDC was first developed in Maricopa County after Arizona voters passed Proposition 200 in 1996, which lowered penalties for drug possession, including prohibiting jail time for anyone charged with a first-time, possession-only drug

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<sup>10</sup> See *Brady v. United States*, 397 U.S. 742, 750–753 (1970).

<sup>11</sup> *Data Dashboard*, MARICOPA CNTY. ATTY'S OFF., <https://www.maricopacountyattorney.org/419/Data-Dashboard> [<https://perma.cc/F9ZT-9XYH>]; see also Ram Subramanian, Léon Digard, Melvin Washington II, & Stephanie Sorage, *In the Shadows: A Review of the Research on Plea Bargaining*, VERA INST. OF JUST. (Sept. 2020), available at: <https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf> [<https://perma.cc/J347-5U9N>].

crime.<sup>12</sup> In turn, Maricopa County created the “Expedited Drug Courts,” which initially went by several different names, but which now have been merged into a single system called the “Early Disposition Courts” or EDC. The original stated purpose of these courts was “to respond to the community’s desire to offer treatment to drug offenders.”<sup>13</sup> To this day, the Maricopa County Courts website claims that “[c]ases filed in EDC involve victimless charges of possession of illegal drugs for personal use and/or paraphernalia”<sup>14</sup> and until recently, claimed that “[m]ost of the cases resolved in EDC are diverted into a drug treatment program.”

If this was ever true, it certainly is not now. MCAO data obtained through a public records request by the ACLU and the ACLU of Arizona indicates that from January 2017 to January 2021, just 6.7 percent of felony cases resulted in diversion. More recent data shows an even lower rate: of the 48,760 felony cases referred to MCAO for prosecution in 2022, only 1,921—or 3.9 percent—were resolved through diversion during FY2022.<sup>15</sup> The low number of drug cases resulting in diversion in the EDC is likely due to what the directors of every indigent defense agency in Maricopa County recently described as a “massive expansion” of the EDC, which “has undermined due process and the protections afforded defendants by Arizona’s discovery rules.”<sup>16</sup> Indeed, these directors describe how “the practice in EDC has expanded over the past 20 years from prosecution of only proposition 200 drug cases, to prosecution of most low-level felony offenses, to prosecution of serious felonies of all types.”

The directors also explain that “[i]t is now common for class 2 and 3 felonies<sup>17</sup> to be set for status conferences in the [EDC] and for the State to make plea offers that require years in prison” with little discovery provided to the accused. This explosion in the use of the EDC now means that one third of the approximately 47,000 felony cases filed each year in Maricopa County are now pushed through the EDC by MCAO. This increased reliance on the EDC means more criminal defendants are forced to make uninformed, yet life-altering decisions about how to

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<sup>12</sup> See ARIZ.REV.STAT. ANN. §13-901.01 (2009).

<sup>13</sup> *Criminal Department Information*, JUD. BRANCH OF ARIZ. (June 30, 2022), <https://superiorcourt.maricopa.gov/criminal/departments-information/> [<https://perma.cc/ZV8Z-75VE>].

<sup>14</sup> *Id.*

<sup>15</sup> *Supra* note 6; *Data Dashboard*, MARICOPA CNTY. ATTORNEY’S OFF., <https://www.maricopacountyattorney.org/419/Data-Dashboard> [<https://perma.cc/F9ZT-9XYH>]; MARICOPA CNTY. ATT’Y, DEFERRED PROSECUTION PROGRAM ANNUAL REPORT FY 2022 (2022) <https://www.maricopacountyattorney.org/DocumentCenter/View/2054/MCAO-Deferred-Prosecution-Program-Annual-Report-FY-2022-PDF?bidId=> [<https://perma.cc/2A5G-ZWUM>].

<sup>16</sup> Joint Comment by the Directors of the Maricopa County Indigent Defense Agencies at 2, In the Matter of: Petition to Amend Rule 15.8(a) of the Ariz. Rules of Crim. Proc. (No. R-22-0021) <https://www.azcourts.gov/Rules-Forum/aft/1306> [<https://perma.cc/YMB2-RH6U>].

<sup>17</sup> In Arizona, class 2 and 3 felonies are the two most serious categories of felony offense outside of first-degree murder, the only class 1 felony in the state and the only offense eligible for the death penalty.

proceed in their criminal cases, while also allowing prosecutors to bring many more cases regardless of the strength of the evidence.<sup>18</sup>

*B. Arizona's Rules of Criminal Procedure Do Not Contemplate Pre-Arrestment Plea Agreements and the EDC System Exploits That Gap in Procedural Protections*

The Arizona Constitution grants sole rulemaking authority to the Arizona Supreme Court,<sup>19</sup> which uses that authority to promulgate the Rules of Criminal Procedure with the purpose of applying those rules to “all criminal proceedings in Arizona.”<sup>20</sup> Among the purposes of the Rules of Criminal Procedure is “to protect the fundamental rights of the individual while preserving the public welfare.”<sup>21</sup> Moreover, Superior Courts (felony trial courts) are prohibited from issuing local rules which are “inconsistent with the Supreme Court’s rules.”<sup>22</sup>

Yet in four Arizona counties, including Maricopa, elected County Attorneys and Superior Court judges operate EDC systems that ignore these principles. The apparent goal of doing so is to move cases quickly through the system from charging to guilty plea with little regard for the constitutional and statutory rights of the accused thrust into the EDC. Indeed, these EDC systems operate as Constitution-free zones, where prosecutors retain all their powers of investigation, charging, and conviction, but criminal defendants are effectively prohibited from asserting their rights under state or federal law. Judges in the EDC, at best, seem powerless to do anything about it and, at worst, are complicit in perpetuating a system that forces them to abdicate their duty to ensure constitutional due process protections to the accused.

Moreover, because the EDC occurs prior to a probable cause finding, the system does an end run around Arizona’s otherwise robust discovery rules. To understand how, it is necessary to understand the process by which prosecutors can charge someone with a felony in Arizona. When a person is arrested and booked into jail in Arizona, they must be taken before a magistrate within twenty-four hours for an initial appearance from jail. Those not arrested are summoned for their initial appearance. When a person is arrested and held in custody on a bond or as non-bondable, the magistrate sets two dates: (1) a status conference about six days after the initial appearance, and (2) a preliminary hearing about nine days after the initial appearance. If the defendant is not held in custody, the status conference is set out

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<sup>18</sup> This is discussed in more detail *infra*, in section III.

<sup>19</sup> ARIZ. CONST. art. VI, § 5(5).

<sup>20</sup> ARIZ. R. CRIM. PROC. 1.1.

<sup>21</sup> ARIZ. R. CRIM. PROC. 1.2.

<sup>22</sup> See *Bergeron ex rel. Perez v. O’Neil*, 205 Ariz. 640, 649–50, ¶ 27 (Ariz. Ct. App. 2003) (holding that inherent authority of Superior Court did not authorize judge to require a party to explain reasoning in striking a judge under Ariz. Crim. Proc. 10.2).

approximately fourteen days, and the preliminary hearing date is set out approximately eighteen days.<sup>23</sup>

At the initial appearance, the magistrate also makes several critical determinations, including whether the accused qualifies for a public defender and whether the person should be released or detained pending trial. Detention can and often does result from unaffordable cash bail, as we saw in Mr. Luckey's case. Importantly, the magistrate makes the release decision with nothing more than a "probable cause statement" from the police—normally only a few paragraphs long and told only from the perspective of the police. While indigent people are informed they qualify for a public defender at the initial appearance, no attorney is actually present in Maricopa County to assist them in challenging the probable cause statement or to examine the officers who made it. The bond determinations made at an initial appearance so frequently lead to pretrial incarceration that prosecutors rarely appear at these hearings, often submitting bail requests in writing which the magistrates often adopt, as we saw in Mr. Luckey's case. Notably, a meaningful, adversarial bail review rarely, if ever, takes place at the initial appearance because those hearings are not structured to allow them. The preliminary hearing theoretically could include a constitutionally compliant bail review, but preliminary hearings usually never happen in cases pushed through the EDC because of MCAO's threat of harsher sanctions should the accused demand their right to a preliminary hearing.

Following the initial appearance, the prosecutor will send the accused a police report (often highly redacted, like in Mr. Luckey's case) and an initial plea offer, but nothing more. That initial plea offer usually includes language, in all caps, stating that "THIS OFFER IS INTENDED FOR EARLY DISPOSITION AND EXPIRES WHEN A FINDING OF PROBABLE CAUSE IS MADE OR WAIVED." The initial plea also threatens that should the initial plea not be accepted, any subsequent plea will be "SUBSTANTIALLY HARSHER":

**\*THE OFFER IS WITHDRAWN IF THE WITNESS PRELIMINARY HEARING IS SET OR WAIVED. THE OFFER MAY BE CHANGED OR REVOKED AT ANY TIME BEFORE THE COURT ACCEPTS THE PLEA. \*NOTE: COUNTY ATTORNEY POLICY DICTATES THAT IF THE DEFENDANT REJECTS THIS OFFER, ANY SUBSEQUENT OFFER TENDERED WILL BE SUBSTANTIALLY HARSHER.**

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<sup>23</sup> The timing of these settings is because, under Arizona Rule of Criminal Procedure 5.1, "[a] preliminary hearing must commence before a magistrate no later than 10 days after the defendant's initial appearance if the defendant is in custody, or no later than 20 days after the defendant's initial appearance if the defendant is not in custody." ARIZ. R. CRIM. PROC. 5.1.

Other initial plea offers threaten that any subsequent plea will be presumptively harsher:

**EDC PLEA OFFER**

**Defendant:** Scar Beelzebub Badguy

**Date:** August 3, 2021

**CR#:** CR2099-869815-003

**\*THIS PLEA IS INTENDED FOR EARLY DISPOSITION AND EXPIRES WHEN A FINDING OF PROBABLE CAUSE IS MADE OR WAIVED. THE OFFER MAY BE CHANGED OR REVOKED AT ANY TIME BEFORE THE COURT ACCEPTS THE PLEA. IF THE DEFENDANT REJECTS THE STATE'S PLEA OFFER, THERE MAY BE NO FURTHER PLEA OFFERS ABSENT A CHANGE IN CIRCUMSTANCES. SHOULD THE STATE ELECT TO MAKE ANOTHER PLEA OFFER AT SOME POINT BEFORE TRIAL, THE PRESUMPTION IS THAT IT WILL BE HARSHER.\***

Despite these threats and concomitant demand, the accused must quickly decide whether to accept or reject a plea offer. At the same time, MCAO prosecutors, by policy, refuse to provide accused persons and their attorneys with any additional information about their case, like witness statements, body camera footage, or drug test results. The refusal to provide basic discovery to the accused undermines Arizona's general position that "[d]isclosure, like all discovery, is not a game."<sup>24</sup>

For example, Rule 15.1 of the Arizona Rules of Criminal Procedure requires prosecutors to provide both "initial" and much more robust "supplemental" discovery to the accused and their attorneys. This supplemental discovery, found in Rule 15.1(b) includes the following:

- (1) the name and address of each person the State intends to call as a witness in the State's case-in-chief and any relevant written or recorded statement of the witness;
- (2) any statement of the defendant and any co-defendant;
- (3) all existing original and supplemental reports prepared by a law enforcement agency in connection with the charged offense;
- (4) for each expert who has examined a defendant or any evidence in the case, or who the State intends to call at trial:
  - (A) the expert's name, address, and qualifications;
  - (B) any report prepared by the expert and the results of any completed physical examination, scientific test, experiment, or comparison conducted by the expert; and
  - (C) if the expert will testify at trial without preparing a written report, a summary of the general subject matter and opinions on which the expert is expected to testify;
- (5) a list of all documents, photographs, other tangible objects, and electronically stored information the State intends to use at trial or that were obtained from or purportedly belong to the defendant;

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<sup>24</sup> Bryan v. Riddel, 875 P.2d 131, 136 (Ariz. 1994).



- (6) a list of the defendant's prior felony convictions the State intends to use at trial;
- (7) a list of the defendant's other acts the State intends to use at trial;
- (8) all existing material or information that tends to mitigate or negate the defendant's guilt or would tend to reduce the defendant's punishment;
- (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; and
- (11) whether the case involved an informant, and, if so, the informant's identity, subject to [restrictions].<sup>25</sup>

The information listed in this Rule is not only essential to a fair trial, but as the Arizona Supreme Court has recognized, necessary to meaningful plea negotiations.

In 2003, the Arizona Supreme Court adopted a new Rule 15.8 for the purpose of facilitating plea negotiations based on accurate discovery. The Rule recognizes that defendants who have a state-imposed deadline to decide on a plea offer extended by the prosecutor should also be in possession of the discovery mandated by Rule 15.1(b) when making that decision. The purpose of Rule 15.8 is to ensure that “basic discovery will be provided to the defense sufficiently in advance of a plea deadline to allow an informed decision on the offer with effective assistance of counsel” because the defense “should receive certain basic disclosures before having to decide on plea offers made early in the case.”<sup>26</sup> Yet, because Rule 15.8 applies only *after* a probable cause finding, prosecutors are able to do an end-run around the protections of that rule in the EDC.<sup>27</sup>

In those felony cases in which there has been a finding of probable cause (i.e. those not pushed through the EDC), Rule 15.8 requires that all of this material be provided prior to the expiration of any plea offer and imposes sanctions on prosecutors who fail to do so. Specifically, Rule 15.8 imposes significant consequences on prosecutors who withhold material evidence during plea negotiations. The Rule requires courts to preclude the withheld evidence if such evidence is not timely disclosed during plea negotiations and the evidence is material

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<sup>25</sup> ARIZ. R. CRIM. PROC. 15.1(b).

<sup>26</sup> In re Rivera-Longoria, 264 P.3d 866, 869–70, ¶¶ 13–21 (2011) (citing ARIZ. R. CRIM. PROC. 15.8, cmt. to 2003 amend.).

<sup>27</sup> Cases pushed through the EDC are brought by way of a complaint in the Superior Court, yet by its own terms, Rule 15.8’s protections apply only “[i]f the State has filed an indictment of information in superior court and extends a plea offer to a defendant, the State must disclose to the defendant when it makes the offer the items listed in Rule 15.1(b) to the extent...the extent that it possesses the required information and has not previously made such a disclosure.” (emphasis added).

to the defendant's decision to reject a plea offer. Prosecutors can avoid preclusion only by disclosing the evidence and re-extending the rejected plea offer.<sup>28</sup>

As currently operated, however, the EDC system allows prosecutors to withhold vital discovery from the defense without fear of Rule 15.8 sanctions. Yet the importance of discovery cannot be overstated. As the Arizona Supreme Court recently noted, "the very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts."<sup>29</sup> In several Arizona counties, including Maricopa, the EDC system not only skirts Arizona's otherwise robust discovery rules, but fundamentally undermines the ethical rules that are meant to uphold the integrity of and ensure a fair system of justice in the state.

### III. THE EDC DEPRIVES DEFENDANTS OF THEIR SIXTH AMENDMENT RIGHTS, ALLOWS PROSECUTORS TO SKIRT THEIR ETHICAL DUTIES, AND PREVENTS JUDICIAL SCRUTINY OF POLICE MISCONDUCT.

Because the EDC functions outside of Arizona's discovery rules, it forces the accused to make high-stakes decisions with little information or evidence in their case. This system allows for fast, cheap guilty pleas by quickly moving cases through the system, thus clearing off court dockets and prosecutors' desks. But the system has costs in addition to the stripping of statutory rights of the accused. Such a system also deprives the accused of effective assistance of counsel despite the Supreme Court's holding that the Sixth Amendment right to counsel extends to the plea-bargaining process.<sup>30</sup> Arizona has also recognized the importance of the right to counsel in plea bargaining: "[O]nce the State engages in plea bargaining, the defendant has a Sixth Amendment right to be adequately informed of the consequences before deciding whether to accept or reject the offer."<sup>31</sup>

Additionally, the Sixth Amendment right to effective assistance of counsel in plea negotiations is reflected in the American Bar Association's Minimum Standards for Criminal Justice which require criminal defendants and their attorneys to be given adequate time to consider plea offers.<sup>32</sup> The ABA also recognizes the right to

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<sup>28</sup> ARIZ. R. CRIM. PROC. 15.8. ("[O]n a defendant's motion alleging a violation of this rule, the court must consider the impact of any violation ... on the defendant's decision to accept or reject a plea offer. If the court finds that the State's failure to provide a required disclosure materially affected the defendant's decision and if the State declines to reinstate the lapsed or withdrawn plea offer, the court—as a presumptive minimum sanction—must preclude the admission at trial of any evidence not disclosed as required....")

<sup>29</sup> *Crime Victims R.S. v. Thompson*, 485 P.3d 1068, 1074, ¶16 (Ariz. 2021).

<sup>30</sup> *Lafler v. Cooper*, 566 U.S. 156, 162 (2012).

<sup>31</sup> *State v. Donald*, 10 P.3d 1193, 1200 (Ariz. 2000).

<sup>32</sup> *Standards Relating to Pleas of Guilty*, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, Standard 14-1.3. Aid of counsel; time for deliberation, (a) A defendant should not be called upon to plead until an opportunity to retain counsel has been afforded or, if eligible for appointment of counsel, until counsel has been appointed or waived. A defendant with counsel should

effective assistance of counsel in plea negotiations through the promulgation of ethical rules for defense attorneys, including the requirement that defense lawyers “be well informed regarding the legal options and developments that can affect a client’s interests during criminal representation.”<sup>33</sup>

Yet the EDC system is designed to obtain waivers of important constitutional rights, including the right to trial. The EDC also ensures that defense counsel and their client are insufficiently aware of the relevant circumstances of the alleged offense because prosecutors provide very little discovery. As we have seen, in some cases this limited discovery can include just a highly redacted police report and even refusals to identify crucial witnesses.

As one Deputy County Attorney with MCAO explained in an email responding to a defense attorney’s request for police body camera evidence: “providing BWC [body-worn camera evidence] is inconsistent with the goal of EDC, which is to promote the early resolution of felony cases [i.e. promote the acceptance of guilty pleas]. If we had to collect, review, and produce BWC in every case, or even a subset of cases where the Defendant thought there was a legal or factual defense, given the high volume of cases in EDC, it would bog the entire system down and swamp the law enforcement agencies.”<sup>34</sup>

Such conduct by prosecutors not only makes it nearly impossible for a defense attorney to be well-informed, but it also hinders the attorney’s ability to fulfill their “duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.”<sup>35</sup> Again, as Mr. Luckey’s attorney explained to the EDC judge in Mr. Luckey’s case, she “tried to get additional discovery and it’s not going to be provided at this level and if we go forward with the preliminary hearing ... the assigned prosecutor has confirmed that plea negotiations will end. So, we’re in a tough spot.”

Moreover, while minimal continuances are theoretically allowed in the EDC, many cases resolve through a guilty plea at the first court hearing in the EDC, meaning many people meet their attorney for the first time and plead guilty that very same day. Even in cases where a continuance is sought, the highly truncated timeframe of the EDC makes it difficult for attorneys to fully investigate their cases. And while “[d]efense counsel should determine whether the client’s interests would be served by engaging fact investigators, forensic, accounting or other experts, or

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not be required to enter a plea in counsel makes a reasonable request for additional time to represent the defendant’s interests.

<sup>33</sup> CRIMINAL JUST. STANDARDS FOR THE DEFENSE FUNCTION § 4-1.3(e) (A.B.A. 2017).

<sup>34</sup> Email from Deputy Maricopa County Attorney David Hanselman to Deputy Maricopa County Public Defender Edie Lucero, May 4, 2021. This email is embedded in a case filing. First Amended Class Action Complaint for Declaratory and Injunctive Relief, Luckey v. Adel, No. CV21-01168-PHX-GMS (ESW) (D. Ariz. Sept. 8, 2021).

<sup>35</sup> CRIMINAL JUST. STANDARDS FOR THE DEF. FUNCTION § 4-4.1(a) (A.B.A. 2017).

other professional witnesses...[.]”<sup>36</sup> engaging such experts is impossible given the fast-track process that is the EDC.

At the same time that the EDC undermines and hinders criminal defense attorneys’ ability to provide effective assistance, prosecutors use the EDC to skirt their own ethical obligations and “primary duty ... to seek justice within the bounds of the law, not merely to convict.”<sup>37</sup> While all plea bargaining is in some ways coercive, MCAO’s explicit threat of harsher penalties should an accused refuse to accept a plea offer in the EDC adds additional and unnecessary coercive pressure to plead guilty. As such, the EDC system is very effective at extracting guilty pleas with very little effort on the part of prosecutors. Not only do prosecutors refuse to provide discovery evidence to the defense, they also often refuse to review it themselves before charging and prosecuting people and demanding they plead guilty on threat of harsher penalties should they refuse. The email from the MCAO prosecutor complained not only about the collection and production of police body-worn cameras, but also about reviewing those recordings themselves.<sup>38</sup> It is shocking that prosecutors in Maricopa County are unwilling to review video and other evidence themselves before charging and demanding guilty pleas from the accused.<sup>39</sup>

This email is not the only proof of prosecutors’ unwillingness to review key evidence before bringing criminal charges. In 2020, prosecutors with the Maricopa County Attorney’s Office falsely charged peaceful protesters for Black Lives as

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<sup>36</sup> CRIMINAL JUST. STANDARDS FOR THE DEF. FUNCTION § 4-4.1(d) (A.B.A. 2017).

<sup>37</sup> CRIMINAL JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (A.B.A. 2017); Comment 1 to ARIZ. R. SUP. CT. ER 3.8 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons”); *Connick v. Thompson*, 563 U.S. 51, 65–66 (2011) (“Prosecutors have a special ‘duty to seek justice, not merely to convict.’”) (citing LSBA, Articles of Incorporation, Art. 16, EC 7–13 (1971)); ABA STANDARDS FOR CRIMINAL JUST. § 3-1.1(c) (2d ed.1980)).

<sup>38</sup> “If we had to collect, *review*, and produce BWC in every case ... it would bog the entire system down....” First Amended Class Action Complaint for Declaratory and Injunctive Relief, *supra* note 24 (emphasis added).

<sup>39</sup> MCAO’s concern that providing basic discovery to the accused would “bog the entire system down” is unconvincing as MCAO is willing and able to comply with Arizona’s extensive “Victims’ Bill of Rights” (“VBR”) enshrined in the state constitution during the EDC process. Ariz. Const. art. II, sec. 2.1. These rights include the right to be informed of “when the accused or convicted person is released from custody or has escaped,” Ariz. Const. art. II, sec. 2.1(A)(2), and to further be informed “of all criminal proceedings where the defendant has the right to be present.” Ariz. Const. art. II, sec. 2.1(A)(3). These rights also include the right to “confer with the prosecution, after the crime against the victim has been charged, before trial or before disposition of the case and to be informed of the disposition.” Ariz. Const. art. II, sec. 2.1(A)(6). Complying with the rights enshrined in Arizona’s VBR is likely difficult considering the EDC’s significant time constraints, yet MCAO complies with its duties under them, averring at every EDC proceeding that victims’ rights have been complied with.

gang members by creating a fictitious gang: “the ACAB Gang.”<sup>40</sup> Only through sustained public and media pressure did MCAO back down and dismiss the charges.<sup>41</sup> Following this scandal, MCAO hired retired Maricopa County Superior Court Judge Roland Steinle to investigate MCAO’s “failed process” that led to MCAO’s decision to falsely charge protesters and others with serious felony offenses.<sup>42</sup> In his report, Judge Steinle recommended that MCAO “set forth a new policy: If Body Wear [sic] Camera evidence is present in a case, no charges will be filed until the charging attorney has had an opportunity to review the BWC videos.”<sup>43</sup> Such a recommendation is only necessary where, in practice, prosecutors refuse to review all available evidence before charging individuals with felony offenses and making take-it-or-leave-it plea offers in the EDC under threat of harsher penalties should someone refuse.

While prosecutors refusing to review evidence and refusing to turn it over to the accused is an affront to notions of fairness and justice, such practices—routine in the EDC—can also lead to innocent people being wrongfully convicted. This is precisely what almost happened to Levonta Barker.<sup>44</sup> In 2020, Mr. Barker was minding his business at a 7-Eleven in Phoenix when police suddenly drove up to him in the parking lot, threw him to the ground, and arrested him. He had no idea why. At some point, the police brought two people who said they had been robbed to the parking lot for a one-person lineup. All the witnesses could confirm was that their assailant was wearing a bandana, and so was Mr. Barker.

Based on these “identifications,” MCAO charged Mr. Barker with two counts each of aggravated assault and kidnapping. The assigned prosecutor sent him a plea offer of seven and a half years in prison, followed by probation under “gang terms.” Under MCAO’s EDC policy, that offer would get harsher if Mr. Barker rejected it and/or affirmed his preliminary hearing. But, MCAO had not even investigated the case yet. Luckily, Mr. Barker’s attorney had done some investigation while working under the limited time constraints imposed by MCAO in the EDC. In doing so, he

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<sup>40</sup> A.C.A.B. stands for “All Cops Are Bastards” and is a common phrase with a long history of being used in protest movements around the world. See Colin Groundwater, *A Brief History of ACAB: The Story Behind a Charged Acronym*, GQ (June 10, 2020), <https://www.gq.com/story/history-of-acab> [<https://perma.cc/FZC8-G3FV>].

<sup>41</sup> Dave Biscobing, *C15 Special Report Reveals Depth of Phoenix, MCAO Corruption in Protest Cases*, ABC15 (last updated Sept. 14, 2021), <https://www.abc15.com/news/local-news/investigations/protest-arrests/abc15-special-report-reveals-depth-of-phoenix-mcao-corruption-in-protest-cases> [<https://perma.cc/JK22-5595>].

<sup>42</sup> Roland J. Steinle, REVIEW OF MARICOPA COUNTY ATTORNEY’S OFFICE’S POLICY, PROCEDURES & ACTIONS INVOLVING THE PROTEST ARREST ON OCTOBER 17, 2020 (Aug. 6, 2021), <https://www.maricopacountyattorney.org/DocumentCenter/View/2057/Final-MCAO-Report-8621> [<https://perma.cc/DEL9-HFBW>].

<sup>43</sup> *Id.* at 69.

<sup>44</sup> The factual claims related to Levonta Barker’s case were taken from court documents and discussions with Mr. Barker and his criminal defense attorney. They are also included in a filed case complaint. First Amended Class Action Complaint for Declaratory and Injunctive Relief at 23–24, *Luckey v. Adel*, (D. Ariz. Sept. 8, 2021) (No. CV21-01168-PHX-GMS (ESW)).

uncovered that Mr. Barker had been wearing a purple shirt at the time of his arrest; one of the police reports indicated the perpetrator was wearing a black one.

Eventually, MCAO dropped the charges against Mr. Barker, but not before he had spent roughly a month in a COVID-ridden jail, lost his job, lost an opportunity to rent an apartment, missed his oldest son's birthday, and missed Christmas with his family. Had Mr. Barker been able to exercise his right to a Preliminary Hearing, this dismissal might have occurred within ten days as required by Arizona's Rules of Criminal Procedure.<sup>45</sup> Instead, MCAO chose to prosecute Mr. Barker in the EDC, causing an innocent man to spend well over ten days in jail. Worse yet, MCAO was clearly willing to convict an innocent man before doing any investigation to ensure that they were prosecuting the right person.<sup>46</sup> If Mr. Barker had not waited it out in jail—and many people cannot—MCAO would have secured his wrongful conviction.

Yet another problem with plea bargaining generally that is exacerbated by the EDC is the power it provides prosecutors to shield police misconduct from judicial scrutiny. Typically, if police engage in unlawful or unconstitutional conduct in gathering evidence or eliciting incriminating statements, the accused can ask the court to suppress such evidence. When successful, such motions lead courts to suppress, or preclude, the unlawfully obtained evidence from trial and, in theory, send a message to police and prosecutors that the courts will not allow them to benefit from their unlawful conduct. Plea bargaining, however, allows prosecutors to limit or even cut off one's ability to file a motion to suppress. Importantly, prosecutors are not obliged to offer plea deals and can set deadlines and other limits on those they do offer. As such, prosecutors can structure an offer or create a deadline for the acceptance of the offer prior to the time the accused is able to file a motion to suppress unlawfully obtained evidence. Indeed, many prosecutors will explicitly inform an accused person or their attorney that any outstanding plea offer is immediately withdrawn or that plea negotiations will immediately end should the accused challenge the police conduct by, for example, filing a motion to suppress evidence in their case.

In EDC systems, such a threat is implicit in every plea offer made by MCAO. This is because, as discussed in Section III, court hearings in the EDC occur prior to a probable cause finding and, therefore, prior to a criminal case being formally filed in the Superior Court (where felony cases are heard in Arizona). This functionally prevents the filing of a motion to suppress, a motion to dismiss the prosecution, and many other motions the accused or their attorney believes is justified in their case. For anyone prosecuted in the EDC who wishes to seek judicial scrutiny of the police conduct in their case, they must demand their right to a preliminary hearing, which

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<sup>45</sup> ARIZ. R. CRIM. PROC. 5.1.

<sup>46</sup> Importantly, where prosecutors with MCAO fail to review all available evidence prior to charging people with felony offenses, holding preliminary hearings where a probable cause determination is made become a more vital protection for anyone accused of a crime in Maricopa County.

triggers MCAO's threat of harsher penalties in the future. In this way, MCAO can completely shield police misconduct from judicial scrutiny by simply prosecuting cases with possible misconduct in the EDC. The use of this power not only prevents the accused from vindicating their constitutional rights but can also erode the public's trust in the outcomes of criminal prosecutions in counties that operate EDC systems, like Maricopa.

#### IV. A FIRST-OF-ITS-KIND LAWSUIT CHALLENGING COERCIVE PLEA BARGAINING.

In late 2021, the ACLU's Criminal Law Reform Project, the ACLU of Arizona, and attorneys with a prominent multinational law firm filed a first-of-its-kind civil rights lawsuit challenging the plea tactics that MCAO prosecutors have used virtually unchecked in the EDC for decades.<sup>47</sup> The class action lawsuit was brought on behalf of two individual plaintiffs accused of crimes and prosecuted through the EDC and an organizational plaintiff.<sup>48</sup>

In addition to the named plaintiffs, the lawsuit seeks relief on behalf of two proposed classes: (1) all those prosecuted in the EDC who have yet to succumb to MCAO's threat of harsher penalties by waiving their right to a preliminary hearing (i.e. probable cause determination) or by accepting a plea offer (the "Pre-Waiver Class"), and (2) all those prosecuted in the EDC who have either waived their preliminary hearing or rejected their initial plea offer (the "Post-Waiver Class").

The lawsuit makes three claims as to why MCAO's policy of threatening those accused of crimes and prosecuted through the EDC violates the Constitution. The first claim alleges prosecutorial vindictiveness in violation of the Due Process Clause of the Fourteenth Amendment, which prohibits prosecutors from acting vindictively toward those accused of crimes. The lawsuit argues MCAO's policy of punishing those who exercise their right to a preliminary hearing and/or their right to trial with harsher plea offers is actually vindictive and expresses hostility and is a threat to criminal defendants whose cases are pushed through the EDC.

The second claim alleges that MCAO's policy of threatening harsher pleas imposes an excessive burden on the right to trial in violation of the Sixth Amendment. Simply put, the government cannot promulgate policies that impose harsher penalties for asserting trial rights and lower penalties for pleading guilty. While plea bargaining generally leads to lower penalties for those who plead guilty than for those who go to trial, the Supreme Court is clear that it is "patently unconstitutional" for prosecutors to create a policy that has "no other purpose or

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<sup>47</sup> Court documents filed in *Luckey v. Adel*, CV21-01168-PHX-GMS (ESW), can be found at: <https://www.acluaz.org/en/cases/luckey-v-adel> [<https://perma.cc/DB2B-CYDM>].

<sup>48</sup> Arizona Attorneys for Criminal Justice (AACJ), a statewide not-for-profit membership organization of Criminal Defense Lawyers and others, dedicated to protecting the rights of the accused and the state affiliate of the National Association of Criminal Defense Lawyers (NACDL). See *Who We Are*, ARIZ. ATTORNEYS CRIM. JUST. (2016), <https://www.aacj.org/about> [<https://perma.cc/X82G-E2UD>].

effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them.”<sup>49</sup>

The final claim alleges that MCAO’s policy deprives a state-created liberty interest in violation of the Due Process Clause of the Fourteenth Amendment, which prohibits the government from depriving individuals of “life, liberty, and property” without due process of law. Importantly, liberty interests protected by the Fourteenth Amendment include interests that are created by state law.<sup>50</sup> Here, Article 2, section 30 of the Arizona Constitution mandates that a person who is prosecuted for a felony offense is entitled to a preliminary hearing. Arizona Rule of Criminal Procedure 5.1 implements this mandate by stating that a person has a “right” to a preliminary hearing. Further, Arizona Rule of Criminal Procedure 5.3 requires that the magistrate at the preliminary hearing “must determine and state for the record whether the State’s case established probable cause.” The lawsuit argues that by using mandatory language and restraining prosecutorial discretion in this way, Arizona state law creates a federally protected liberty interest in a person’s right to a preliminary hearing, including a probable cause determination. MCAO’s policy of threatening harsher penalties for those who demand their right to a preliminary hearing and probable cause determination illegally coerces those accused of crimes that are prosecuted through the EDC out of this protected liberty interest.

In response to this lawsuit, MCAO filed a Motion to Dismiss arguing that (1) the individual Plaintiffs’ claims should be barred under the doctrine of *Younger* abstention,<sup>51</sup> (2) the organizational Plaintiff lacks standing, and (3) the lawsuit fails as a matter of law. This final argument rests on the notion that prosecutors have broad discretion in plea negotiations<sup>52</sup> and the fact that the United States Supreme Court has concluded that criminal defendants have no constitutional right to a plea offer and the state is not required to offer one.<sup>53</sup>

More recently, in response to a petition submitted by AACJ to amend Arizona Rule of Criminal Procedure 15.8 to make it apply to all criminal prosecutions, including misdemeanor prosecutions and those in the EDC,<sup>54</sup> MCAO argued that its EDC policy actually *benefits* the accused, claiming the EDC allows prosecutors to offer more “lenient” pleas to defendants rather than making later pleas harsher.<sup>55</sup>

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<sup>49</sup> United States v. Jackson, 390 U.S. 570, 581 (1968).

<sup>50</sup> Hewitt v. Helms, 459 U.S. 460 (1983).

<sup>51</sup> See *Younger v. Harris*, 401 U.S. 37 (1971). When applicable, the *Younger* Abstention Doctrine requires federal courts to abstain from asserting jurisdiction over federal constitutional claims that interfere with ongoing state proceedings.

<sup>52</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

<sup>53</sup> *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977).

<sup>54</sup> Ariz. Attorneys for Crim. Just., Petition to Amend Arizona Rule of Criminal Procedure 15.8, R-22-0021 (2022), <https://www.azcourts.gov/Rules-Forum/aft/1306> [<https://perma.cc/4YQ6-JXFU>].

<sup>55</sup> Maricopa Cnty. Att’y, Comment in Opposition to Proposed Amendment to Arizona Rule of Criminal Procedure 15.8, R-22-0021 (May 2, 2022), <https://www.azcourts.gov/Rules-Forum/aft/1306> [<https://perma.cc/4YQ6-JXFU>].



Such a claim, however, is belied by MCAO's own policy, which states that should a plea offer made in EDC be rejected, "the presumption is that any future offer *will be harsher...*"<sup>56</sup> Additionally, any claim that the EDC system is designed to benefit the accused is at odds with the view of every indigent defense agency in Maricopa County, none of which share the view of MCAO that EDC benefits their clients.<sup>57</sup>

Additionally, any suggestion by MCAO that they prosecute cases through EDC to benefit the accused is also belied by their opposition to another rule change petition in Arizona. This petition, submitted by Arizona's Administrative Office of the Courts, amended several rules of criminal procedure to decrease the number of people held pretrial on unaffordable bail.<sup>58</sup> One reason so many cases plead out in the EDC is because so many accused persons are locked in jail pretrial—despite being presumed innocent—simply because they are unable to afford bail.<sup>59</sup> Rather than acknowledge this troubling fact, MCAO denies this problem exists and dismisses the efforts to protect the liberty interests of everyone accused of a crime (i.e. bail reform) as "a 'feel good' measure."<sup>60</sup> Such comments by MCAO show a disregard for the rights of the accused in Arizona. They also further undermine MCAO's claim that the EDC is in the interest of the accused, while supporting the argument that MCAO's retaliation policy in the EDC is vindictive.

Unfortunately, MCAO has a long and troubling history of dehumanizing and even mocking the individuals it prosecutes, further undermining any claim that it operates the EDC to benefit the criminally accused in Maricopa County. For example, in response to the legal challenge against the EDC, MCAO created a model EDC plea offer for a hypothetical criminal defendant that MCAO named "Scar Beezelbub Badguy."<sup>61</sup> Tellingly, this suggestion—that everyone accused of a crime is literally the devil—was not something MCAO attempted to hide. Instead, it was proudly part of an exhibit MCAO believes supports its claim that its policy of retaliating against anyone who demands their rights in the EDC, is nonetheless constitutional.

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<sup>56</sup> MARICOPA CNTY. ATTORNEY'S OFF. POLICIES AND PROCEDURES § 7.1(J) (MARICOPA CNTY. ATTORNEY'S OFF. 2022).

<sup>57</sup> Maricopa Public Defense Offices, Joint Comment in Support of R-22-0021 Petition to Amend Arizona Rule of Criminal Procedure 15.8, <https://www.azcourts.gov/Rules-Forum/aft/1306> [<https://perma.cc/YMB2-RH6U>].

<sup>58</sup> Ariz. Jud. Branch, R-21-0051 Crim. Pro. Rules 5.3, 6.1, 7.3, and 7.4, Bail Petition, <https://www.azcourts.gov/Rules-Forum/aft/1283> [<https://perma.cc/VEW6-DCEC>].

<sup>59</sup> See *id.* at 4 (acknowledging that people are often detained pretrial "due to the defendant's indigence"); see Hessick, *supra* note 7, at 61–84 (explaining how pretrial detention creates intense pressure for defendants—even innocent ones—to quickly plead guilty).

<sup>60</sup> Ariz. Prosecuting Attorneys' Advisory Council and the Maricopa Cnty. Attorney's Off., Joint Comment in Opposition to Arizona Administrative Office of the Courts Petition to Amend Arizona Rules of Criminal Procedure 5.3, 6.1, 7.3, and 7.4, <https://www.azcourts.gov/Rules-Forum/aft/1283> [<https://perma.cc/V8YU-APNT>].

<sup>61</sup> See p. 10, *supra*.

This is not the first time MCAO engaged in behavior mocking those it prosecutes. In 2019, the ACLU and the ACLU of Arizona sued MCAO for refusing to comply with a public records request. This successful lawsuit led to the disclosure of internal training materials that mocked people with mental health conditions.<sup>62</sup> These training materials show that MCAO prosecutors referred to the people they prosecute with the slur “crazy” and painted people with psychiatric disabilities as liars and obstacles to winning a conviction—not as human beings worthy of respect. One training presentation explains Rule 11, a court-ordered process to determine if an accused person is competent to understand court proceedings and the charges against them. It begins with a slide reading “Rule 11 OR exactly how crazy do I need to act to get out of here?” Another training material on mental health in homicide cases is titled: “Mental Health: *Look at me, I’m CRAZY!*” Not only do these training materials show how MCAO prosecutors view some of the most vulnerable people they prosecute, but the training materials also show a pattern of dehumanization that suggests MCAO cares only about winning convictions and not upholding their professional and ethical duty to protect the interests and constitutional rights of the accused. While these training materials are not part of the lawsuit challenging the EDC, they are important indicators of the vindictive culture within the third largest prosecuting agency in the nation.

#### V. COURTS TURN A BLIND-EYE TO THE PROBLEMS OF COERCIVE PLEA BARGAINING IN MARICOPA COUNTY

On August 16, 2022, the Judicial Branch of Arizona in Maricopa County began a policy by which the judges overseeing the EDC “will be limiting MTCs [Motions to Continue] to 0-1 at most.”<sup>63</sup> This change significantly exacerbates the problems with the EDC by further truncating the time available for criminal defense attorneys to meet with their clients and build a rapport, conduct independent factual investigations, or gather mitigation material before MCAO’s threat of harsher penalties kicks in. Granting zero continuances in the EDC means many more people will have to make life-altering decisions about their criminal case on the same day that they meet their attorney. Such a change coming from the judiciary is especially troubling as it further undermines the due process rights of those accused and allows for even more steamrolled guilty pleas in Maricopa County.

This is precisely what happened to Molina Lewis. On April 26, 2023, Ms. Lewis, who is a 38-year-old Native American woman, appeared before Judge J.

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<sup>62</sup> See Hannah Critchfield, *Prosecutors’ Mental Health Training Said People ‘Act Crazy’ to Avoid Charges*, PHOENIX NEW TIMES (Sept. 26, 2019), <https://www.phoenixnewtimes.com/news/maricopa-county-prosecutors-mental-health-training-aclu-crazy-11364786> [https://perma.cc/84UK-FYKZ].

<sup>63</sup> Email from Angel Montano with the Jud. Branch of Ariz. in Maricopa Cnty. to lawyers with cases pending in the EDC, Aug. 15, 2022.

Justin McGuire for her first EDC Status Conference.<sup>64</sup> Ms. Lewis, who had met her assigned public defender for the first time earlier that day, was presented with a plea offer by MCAO that required her to plead guilty to a felony Aggravated DUI offense. While the plea allowed for a sentence of probation, it included six months of up-front prison time as a condition of that probation. Given that the prison time was mandatory under the terms of the plea offer and that any subsequent plea would be “harsher” pursuant to MCAO’s Retaliation Policy, Ms. Lewis’ attorney asked for a continuance so “she may consider her options.” While the assigned prosecutor did not object to a continuance, so long as Ms. Lewis waived the time by which a Preliminary Hearing would need to be conducted, Judge McGuire denied the request for a single continuance because he did not find “an extraordinary circumstance” justifying the request.

In response, her attorney explained that Ms. Lewis “has 11 children ranging in age from seven to 16 and then there are a couple that are over 21. She is currently working and she has some information that I would like to obtain from her regarding essentially working on this offer for a deviation request as well.” Despite this additional information, Judge McGuire explained he “never keep[s] cases in EDC court for deviation purposes” and again denied the request for a continuance. In so doing, Judge McGuire eliminated the possibility of “the give-and-take negotiation common in plea bargaining between the prosecution and defense” that the Supreme Court viewed as necessary to a constitutional plea-bargaining regime.<sup>65</sup>

After a short break, Ms. Lewis’ attorney then explained to the court that Ms. Lewis “has had an opportunity to speak with her husband about the offer in this case. And at this time they’re asking for a continuance to retain private counsel.” Judge McGuire, while acknowledging Ms. Lewis’ Sixth Amendment right to hire an attorney, nonetheless stated, “you have the right to hire an attorney but if that was something you wanted to do, you needed to do that before today. I don’t delay the case for you to go find another attorney. So the motion to continue is denied.”

After another short break, Ms. Lewis accepted the plea offer rather than face “harsher” penalties under MCAO’s Retaliation Policy and in the face of a judge who showed no regard for her constitutional rights that guarantee that the acceptance of a plea offer must be knowingly and intelligently made and free from coercion.

On July 7, 2023, Ms. Lewis returned to court for sentencing with an attorney she hired and moved to withdraw from the plea offer.<sup>66</sup> The attorney explained that when Ms. Lewis accepted her plea offer “it was the first status conference that Ms. Lewis appeared for” and she “did not have an opportunity to evaluate” even the

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<sup>64</sup> The following descriptions and quotations are taken from *State of Arizona v. Molina Lewis*, No. CR2023-110161-001 DT, Transcript of Proceedings Before Commissioner J. Justin McGuire (Apr. 26, 2023).

<sup>65</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (citing *Parker v. North Carolina*, 397 U.S. 790, 809 (1970) (opinion of Brennan, J.)).

<sup>66</sup> The following descriptions and quotations are taken from *State of Arizona v. Molina Lewis*, No. CR2023-110161-001 DT, Transcript of Proceedings Before Commissioner J. Justin McGuire (July 7, 2023).

limited discovery she received from MCAO. Moreover, Ms. Lewis “did not have an opportunity to have an expert determine whether or not the blood testing that was completed in this case was valid, devoid of any sort of error whatsoever. She was given eight hours.” Ms. Lewis’ attorney further explained that to be effective, “her attorney also needs to have an opportunity to be able to evaluate the case against her. She needs to be able to look at the [blood testing] report, look at the blood work, maybe even consult with an expert and the State.” The attorney concluded that “under the circumstances [Ms. Lewis’ previous] attorney was forced to deal with, it was impossible for that attorney to be effective.”

Judge McGuire was unpersuaded. Despite being aware of the explicit threat of harsher penalties under MCAO’s Retaliation Policy in the EDC, Judge McGuire stated, “[a]t the time the plea was taken, the Defendant indicated that there was no force, threat or coercion of any kind.” Not only did Judge McGuire turn a blind-eye to the very real threat imposed by the Retaliation Policy, he minimized the problem created by the Retaliation Policy and how it operates in the EDC by stating:

I would note that if I were to follow the reasoning offered by counsel for Ms. Lewis we would have to shut down the entire EDC because it would not be possible for anybody to make a knowing, voluntary, intelligent plea entry until they’ve had full trial-level discovery and interviewed all the witnesses and I guess maybe even perhaps pick the jury so you could find out what your . . . risks really are.

Importantly, Ms. Lewis asked for none of those things. Rather, Ms. Lewis asked for a single continuance to hire an attorney of her choice, evaluate the evidence against her, and have an opportunity to engage in plea negotiations with MCAO. Yet, in denying this simple request, Judge McGuire—like many other judges who preside over the EDC—showed he was more interested in allowing MCAO to quickly coerce guilty pleas than in upholding his duty to ensure the constitutional rights of those accused of a crime.

Equally as troubling, the Arizona Supreme Court decided on August 23, 2022 to deny AACJ’s Petition to Amend Rule 15.8 to provide equal protection to everyone accused of a crime in Arizona, including those prosecuted in the EDC, by ensuring that “basic discovery will be provided to the defense sufficiently in advance of a plea deadline to allow an informed decision on the offer with effective assistance of counsel.”<sup>67</sup> Despite very recently finding that “the very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts,”<sup>68</sup> the Arizona Supreme Court denied the petition without comment, allowing a separate and unequal system of justice to continue to exist in Arizona.<sup>69</sup>

Finally, on September 7, 2022, U.S. District Court Judge G. Murray Snow granted, in part, MCAO’s Motion to Dismiss the lawsuit challenging MCAO’s plea

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<sup>67</sup> In re Rivera-Longoria, 264 P.3d at 869–70, ¶¶ 13–21 (2011) (citing Ariz. R.Crim. Proc. 15.8, cmt. to 2003 amend.).

<sup>68</sup> Crime Victims R.S. v. Thompson, 485 P.3d at 1074, ¶ 16 (Ariz. 2021).

<sup>69</sup> ARIZ. R. CRIM. PROC. 15.8, Ariz. Supreme Court Minute Letter, Aug. 23, 2022.

policy in the EDC. In his Order, Judge Snow first concludes that *Younger* abstention is not required and denied MCAO's Motion to Dismiss on that ground.<sup>70</sup> Here, the court reasoned that the fourth prong of the *Younger* abstention criteria—that the requested relief seeks to enjoin or has the practical effect of enjoining ongoing state criminal proceedings—is not met because “Plaintiffs’ requested relief is limited to pre-indictment and pre-trial plea negotiations and potential plea withdrawals, [and] would not ‘prejudice the conduct of the trial on the merits.’”<sup>71</sup> Moreover, the court concluded that those prosecuted in the EDC do not have “an adequate opportunity to seek relief in their state court proceedings” because “Plaintiffs are subjected to [MCAO’s] allegedly retaliatory plea policies...before having any meaningful opportunity to raise their constitutional claims and have them addressed” by a state court.<sup>72</sup>

Nonetheless, the court then granted MCAO's Motion to Dismiss for failure to state a claim under both the Fourteenth and Sixth Amendments, relying almost exclusively on *Bordenkircher v. Hayes*, which “recognized that ‘the guilty plea and ... plea bargain[ing] are important components of this country’s criminal justice system’ and that, when ‘properly administered,’ plea bargaining can benefit both the prosecution and the defendant.”<sup>73</sup> Ultimately, the court reasoned that “there is no constitutional violation in a plea bargain in which the criminal defendant is asked to give up a constitutional or statutory right ‘so long as the accused is free to accept or reject the prosecution’s offer.’”<sup>74</sup>

Perhaps the most troubling aspect of the ruling, however, is its brief, one-page rejection of Plaintiffs’ contention that MCAO's Retaliation Policy in the EDC unconstitutionally infringes upon their Fourteenth Amendment right to a state-created liberty interest—the right to a preliminary hearing (i.e. probable cause determination)—which is guaranteed to everyone charged with a felony by Arizona law.<sup>75</sup> Here, the court failed to grapple with the importance of a preliminary hearing or probable cause determination under Arizona law, instead relying solely on its previous holding, finding “[t]his claim necessarily fails for the same reason Plaintiffs’ Fourteenth Amendment due process and Sixth Amendment claim fail.” By doing so the court unfortunately failed to grasp the importance of a preliminary hearing under Arizona law, which, as we saw in Section II, is a prerequisite to a host of other pretrial rights for those charged with a felony offense in Arizona, including the right to access vital discovery information from the state.<sup>76</sup>

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<sup>70</sup> Order, *Luckey v. Adel*, No. CV21-01168-PHX-GMS (ESW) (D. Ariz. Sept. 7, 2022) at 9–10, 17–18 (citing *Younger v. Harris*, 401 U.S. 37 (1971)).

<sup>71</sup> *Id.* at 14 (citing *Gerstein v. Pugh*, 420 U.S. 103, 107 n.9 (1975)).

<sup>72</sup> *Id.* at 18.

<sup>73</sup> *Id.* at 19 (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 361 (1978)).

<sup>74</sup> *Id.* at 25–26 (citing *Bordenkircher*, 434 U.S. at 363).

<sup>75</sup> ARIZ. CONST. art. II, § 30; ARIZ. R. CRIM. P. 5.1.

<sup>76</sup> See e.g. ARIZ. R. CRIM. P. 15.1; 15.8.

On January 26, 2023, after filing a Notice of Appeal, Plaintiffs filed their Opening Brief in the Ninth Circuit Court of Appeals. On February 2, 2023, two *amicus curiae* briefs were filed in support of Plaintiffs on appeal. One, submitted by the CATO Institute, elaborates “on how the Retaliation policy is an especially aggressive example of coercive plea bargaining, a practice that has eviscerated the right to trial itself.”<sup>77</sup> The brief notes that “by forcing defendants to plead guilty before they have had any meaningful opportunity to investigate the government’s case against them, Maricopa County’s Retaliation Policy undermines a central pillar of criminal justice in our constitutional order”—the right to trial.<sup>78</sup> The brief then argues that “the conditions under which Maricopa County requires defendants to decide whether to accept a plea preclude any such decision from being ‘voluntary and intelligent.’”<sup>79</sup>

The other *amicus curiae* brief, submitted by the Constitution Project at the Project on Government Oversight, argues that MCAO’s “Retaliation Policy violates due process and cannot be upheld as merely a form of permissible plea bargaining.”<sup>80</sup> In support of this argument, the brief points out that “[a] critical premise of *Bordenkircher* was the defendant’s ability to make an informed choice” where “‘prosecution and defense ... arguably possess relatively equal bargaining power.’”<sup>81</sup> The brief concludes “the Retaliation Policy eliminates that fundamental premise” because “[n]ot only is the defendant given little opportunity to consult with counsel, but he is invariably required to accept or reject a plea offer without a critical component of an informed plea: any exculpatory information to which he is entitled under *Brady v. Maryland*, let alone the broader discovery Arizona ordinarily requires at the time of a plea offer.”<sup>82</sup>

On March 29, 2023, MCAO filed its Answering Brief. Unsurprisingly, the brief opens with a well-worn quote from *Bordenkircher* pointing out that plea bargaining is generally constitutional.

On May 19, 2023, Plaintiffs filed their Reply brief. Oral argument before a three-judge panel of the Ninth Circuit Court of Appeals was held on September 11, 2023.

### CONCLUSION

The United States Supreme Court has signed off on many aspects of plea bargaining and the lawsuit filed by the ACLU does not challenge plea bargaining

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<sup>77</sup> Brief of the CATO Institute as *Amicus Curiae* In Support of Plaintiffs-Appellants at 3.

<sup>78</sup> *Id.* at 7.

<sup>79</sup> *Id.*

<sup>80</sup> Brief of *Amicus Curiae* the Constitution Project at the Project on Government Oversight at 2.

<sup>81</sup> *Id.* at 2–3 (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978)).

<sup>82</sup> *Id.* at 3 (citing *Brady v. Maryland*, 373 U.S. 83 (1963); *Ariz. R. Crim. P.* 15.8) (internal citations omitted).

generally. Instead, the lawsuit only challenges MCAO's Retaliation Policy as uniquely coercive. Indeed, MCAO's policy of threatening harsher penalties for those who demand their right to a preliminary hearing does nothing to further those aspects of plea bargaining the Supreme Court finds constitutional, let alone desirable. Rather, this policy undermines all the constitutional protections that are supposed to ensure fairness in our criminal legal system by placing unfair coercive pressure on those accused of a crime—innocent and guilty alike—to accept a plea deal without any information or ability to do so knowingly, intelligently, and voluntarily. Policies, like MCAO's Retaliation Policy, must be challenged and should be held unconstitutional.