

1 Somil Trivedi (*pro hac vice*)
2 American Civil Liberties Union Foundation
3 Criminal Law Reform Project
4 915 15th St., NW
5 Washington, DC 20005
6 Telephone: (202) 715-0802
7 strivedi@aclu.org

8 Jared G. Keenan (027068)
9 Victoria Lopez (330042)
10 American Civil Liberties Union Foundation of Arizona
11 3707 North 7th Street, Suite 235
12 Phoenix, Arizona 85014
13 Telephone: (602) 650-1854
14 jkeen@acluaz.org
15 vlopez@acluaz.org

16 *Attorneys for Plaintiffs*

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Samuel Luckey and Aaron Dromiack,
on behalf of themselves and those
similarly situated, and

Arizona Attorneys for Criminal Justice,
Plaintiffs,

v.
Allister Adel, in her official capacity as
County Attorney for Maricopa County

Defendant.

No. CV21-01168-PHX-GMS (ESW)

**FIRST AMENDED CLASS ACTION
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

JURY TRIAL DEMANDED

INTRODUCTION

1
2 1. In Maricopa County’s Early Disposition Courts (EDCs), prosecutors warn
3 every single person they charge that if the person requests a preliminary hearing—a right
4 under Arizona law—or rejects a plea offer in favor of a trial—a right under the U.S.
5 Constitution—the next plea offer will get “presumptively harsher” or even “substantially
6 harsher.”

7 2. In other words, as a matter of policy, the Maricopa County Attorney’s Office
8 (MCAO) punishes people simply for exercising their rights.

9 3. MCAO openly admits on its website that the purpose of the policy is speed,
10 not justice. MCAO’s stated goal in EDC cases is to mitigate case backlogs “by resolving
11 them as quickly as possible.”

12 4. To implement the policy, MCAO has often issued this threat at the top of its
13 first written plea offer:

14 ***THE OFFER IS WITHDRAWN IF THE WITNESS PRELIMINARY HEARING IS SET OR WAIVED.**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

18 5. Sometimes the deputy county attorney (DCA) issues a different form with a
19 similar threat or informs defense attorneys of the policy via email. In most cases, the DCA
20 reads the threat into the record, in front of a judge, at the EDC status conference.

21 6. It does not matter what the charges are or what the accused person’s criminal
22 history is, if any. It does not matter if the person simply wants more time to investigate
23 their case. It does not even matter if the person might be innocent. MCAO policy dictates
24 that DCAs will punish that person simply for exercising their rights.

25 7. In this matter, Plaintiffs will refer to this policy, practice, and custom as
26 MCAO’s Retaliation Policy.

27 8. The Retaliation Policy is not an empty threat. DCAs routinely follow through
28 in practice. Sometimes, people being prosecuted are granted continuances to consider their

1 initial offers. However, those offers still get presumptively harsher or even “substantially
2 harsher” if the person refuses to plead and instead requests a preliminary hearing—where,
3 among other things, police witnesses are examined and a judge could decide that MCAO
4 does not have probable cause to proceed.

5 9. In other words, rather than prosecute only those cases where probable cause
6 is clear, DCAs illegally coerce people to waive the probable cause determination entirely.

7 10. Indeed, if the accused person simply rejects the first offer, makes the DCA
8 expend any additional time or resources on the case, or asks the DCA to turn over any
9 discovery beyond a police report, the offer on the table is often pulled and replaced with a
10 harsher one.

11 11. EDC prosecutors are particularly averse to disclosing evidence. They
12 typically provide nothing more than a police report prior to the preliminary hearing, even
13 if they have other evidence on hand; they call this refusing to “open the file.” Therefore,
14 the people they prosecute must choose between accepting the initial plea offer with only
15 the police report as evidence and being hit with a harsher or substantially harsher plea offer
16 in exchange for additional discovery after the preliminary hearing. The harsher offer could
17 include years if not decades in prison and a lifetime of consequences, including being
18 barred from certain jobs and losing the right the vote.

19 12. Moreover, despite a plea policy that purports to require that “the assigned
20 DCA must consider all relevant facts and circumstances known about the offense,” DCAs
21 rarely, if ever, review all evidence available to them, including police body worn camera
22 footage, before making plea offers in the EDCs.

23 13. Recently, MCAO hired retired Judge Roland Steinle to conduct an internal
24 investigation into MCAO’s decision to falsely charge protesters as gang members. In his
25 report, Judge Steinle recommended that MCAO, “set forth a new policy: If Body Wear
26 [sic] Camera evidence is present in a case, no charges will be filed until the charging
27 attorney has had an opportunity to review the BWC videos.”¹ Such a recommendation is

28 ¹ REVIEW OF MARICOPA COUNTY ATTORNEY’S OFFICE’S POLICY, PROCEDURES, &

1 only necessary where, in practice, DCAs refuse to review all available evidence before
2 charging individuals with felony offenses and making plea offers in the EDCs.

3 14. This practice of not reviewing—let alone disclosing—the entire investigative
4 file and then threatening individuals with harsher sentences if they reject the initial plea
5 offers or assert their rights makes it far more difficult for EDC defense attorneys to
6 effectively represent their clients. The Retaliation Policy forces attorneys and their clients
7 to make hurried decisions without full access to information.

8 15. In addition, the Retaliation Policy effectively prevents people from securing
9 their pretrial release through an adversarial bail review hearing, which would also take
10 place at the preliminary hearing. This makes their situation inherently more coercive, being
11 separated from their families, unable to work, and hindered from being able to assist in
12 their own defense. Studies show that pretrial detention greatly increases the likelihood of
13 pleading out.²

14 16. It is no surprise, then, that many people succumb to the Retaliation Policy,
15 forego their rights, and plead out, rather than face a harsher or substantially harsher offer.

16 17. The plaintiffs in this case include people like Aaron Dromiack who are, at
17 this very moment, staring down the barrel of the Retaliation Policy. They have been
18 arrested, assigned to the EDCs by MCAO, and are currently considering an unconscionable
19 choice: assert their rights, or receive a harsher plea offer just for doing so.

20 18. Others, like Plaintiff Samuel Luckey, have already been coerced into
21 waiving their preliminary hearing. Mr. Luckey was arrested on drug and weapons charges
22 based on the word of certain witnesses, yet the DCA on his case initially refused to turn
23

24 ACTIONS INVOLVING THE PROTEST ARREST ON OCTOBER 17, 2020 69, Submitted by
25 Roland J. Steinle (Aug. 6, 2021), *available at*:
26 <https://www.maricopacountyattorney.org/DocumentCenter/View/2057/Final-MCAO-Report-8621>.

27 ² RAM SUBRAMANIAN ET AL., INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN
28 AMERICA 38 n. 121 (Vera Institute of Justice ed., 2015) (guilty pleas may be the fastest or
only way for defendants held on low-level charges to get out of jail).

1 over the identities of those witnesses—or any other evidence besides an initial, redacted
2 police report. Mr. Luckey, who missed the birth of his daughter while detained pretrial,
3 told MCAO and the judge that he felt “threatened” by the Retaliation Policy, and that all
4 he wanted was more evidence and to present his case. MCAO refused.

5 19. Eventually, Mr. Luckey succumbed to the pressure and waived his
6 preliminary hearing in order to receive the information MCAO had all along.

7 20. Plaintiffs also include Arizona Attorneys for Criminal Justice (AACJ),
8 representing criminal defense attorneys who are denied the time and information required
9 to meaningfully represent their clients.

10 21. The most important rule in the prosecutor’s code of professional ethics is “to
11 seek justice . . . not merely to convict.” MCAO’s Retaliation Policy is surgically designed
12 to do the opposite. Accordingly, Plaintiffs respectfully seek class certification and
13 injunctive relief to end it.

14 **JURISDICTION AND VENUE**

15 22. This Court has subject-matter jurisdiction over this action pursuant to 42
16 U.S.C. § 1983 (civil rights action) and 28 U.S.C. § 1331 (federal question).

17 23. This Court may grant relief under 28 U.S.C. §§ 2201-02 (declaratory relief);
18 Federal Rules of Civil Procedure 65 (injunctive relief) and 23 (class action); and the Sixth
19 and Fourteenth Amendments to the U.S. Constitution.

20 24. Venue is proper in the federal District of Arizona pursuant to 28 U.S.C. §
21 1391(b)(2) because a substantial part of the events or omissions giving rise to Plaintiffs
22 and class members’ claims occurred in this district.

23 **PARTIES**

24 25. Samuel Luckey is a 34-year-old Black man currently being prosecuted by
25 Defendant. His case began in the EDC, where the DCA denied Mr. Luckey any discovery
26 except a redacted police report and threatened him with a harsher plea offer if he exercised
27 his right to a preliminary hearing guaranteed under the Arizona Constitution and Arizona
28 law. He eventually succumbed to Defendant’s pressure, waived his preliminary hearing,

1 and is awaiting trial.

2 26. Mr. Luckey missed the birth of his daughter because he was in jail on this
3 arrest, unable to afford his \$10,000 bail.

4 27. Mr. Luckey lives in Phoenix, Arizona.

5 28. He is suing on behalf of himself and all current and future EDC defendants
6 subject to the Retaliation Policy who have already waived their preliminary hearings.

7 29. Aaron Dromiack is a 28-year-old Army veteran currently being prosecuted
8 by Defendant. Mr. Dromiack was severely beaten by police in his home, to the point that
9 had to be sent to the local Veteran's Affairs hospital with facial contusions and a herniated
10 disc in his neck. Because he resisted the beating, MCAO charged him with aggravated
11 assault. Mr. Dromiack asserts that he was merely defending himself and that body worn
12 camera footage will show this. Yet MCAO is refusing to produce the footage unless Mr.
13 Dromiack waives his preliminary hearing.

14 30. Mr. Dromiack lives in Phoenix, Arizona, with his fiancée.

15 31. He is suing on behalf of himself and all current and future EDC defendants
16 subject to the Retaliation Policy who must decide whether to waive their preliminary
17 hearing and/or reject their initial EDC plea offer.

18 32. Plaintiff Arizona Attorneys for Criminal Justice is a non-profit organization
19 of attorneys who represent criminal defendants across Arizona, including those subject to
20 the Maricopa County EDCs. The Retaliation Policy makes it difficult for AACJ's members
21 to provide adequate, ethical counsel to EDC clients. For example, the Retaliation Policy
22 causes AACJ's member attorneys to unnecessarily devote increased time and resources to
23 the initial investigation of the charges against their clients, and often to unnecessarily
24 duplicate those investigative efforts after receiving discovery to which they were earlier
25 entitled.

26 33. AACJ's mission has also been frustrated by the Retaliation Policy, and
27 AACJ has diverted time and resources to discuss, draft, and lobby for relevant rule changes
28 and train its members and other defense attorneys on navigating EDC cases and EDC-

1 related issues in light of the policy.

2 34. Defendant Allister Adel is the elected County Attorney for Maricopa
3 County, Arizona. She is the official policymaker for the Maricopa County Attorney's
4 Office and is sued in her official capacity.

5 FACTUAL ALLEGATIONS

6 *The EDCs Were Created to Help Defendants Avoid Convictions.*

7 *MCAO Uses Them to Coerce Convictions Instead.*

8 35. In 1996, Arizona passed Proposition 200, which lowered penalties for drug
9 possession, including prohibiting jail time for first-time, possession-only defendants. *See*
10 A.R.S. § 13-901.01 et seq. In turn, Maricopa County created the "Expedited Drug Courts,"
11 which initially went by several different names: Early Disposition Courts (EDC); Regional
12 Court Centers (RCC); and the Southeastern Facility (SEF). EDC focused on drug cases,
13 while RCC focused on lower-level felonies. SEF covered both types for the Mesa, Arizona
14 area. Now these courts have been merged into a single system called the EDCs.

15 36. The original stated purpose of these courts was to "provide incentives to
16 early pleas and earlier treatment."³ To this day, the Maricopa County Courts website claims
17 that "cases filed in EDC involve victimless charges of possession of illegal drugs for
18 personal use and/or paraphernalia. Most of the cases resolved in EDC are diverted into a
19 drug treatment program."⁴

20 37. This is false. Maricopa County Court data from October 2018, for example,
21 indicates that only 8% of EDC cases resulted in diversion. Plaintiffs' counsel's preliminary
22 review of MCAO's own data, collected via a public records request, indicates that, from
23

24 ³ Specialized Courts: Early Disposition Court, THE JUDICIAL BRANCH OF
25 ARIZONA, MARICOPA COUNTY,
26 [https://superiorcourt.maricopa.gov/criminal/specialized-](https://superiorcourt.maricopa.gov/criminal/specialized-courts/#:~:text=Early%20Disposition%20Court,to%20as%20Expedited%20Drug%20Court)
27 [courts/#:~:text=Early%20Disposition%20Court,to%20as%20Expedited%20Drug%20Co](https://superiorcourt.maricopa.gov/criminal/specialized-courts/#:~:text=Early%20Disposition%20Court,to%20as%20Expedited%20Drug%20Court)
28 [urt](https://superiorcourt.maricopa.gov/criminal/specialized-courts/#:~:text=Early%20Disposition%20Court,to%20as%20Expedited%20Drug%20Court) (last updated Aug. 2, 2019, 1:44 PM).

⁴ *Department Information: Early Disposition Court*, THE JUDICIAL BRANCH OF ARIZONA,
MARICOPA COUNTY, [https://superiorcourt.maricopa.gov/criminal/departments-](https://superiorcourt.maricopa.gov/criminal/departments-information/)
information/ (last updated July 9, 2019, 5:04 PM).

1 January 2017 to January 2021, the number was even lower: 6.7%.

2 38. MCAO is also filtering an increasing number and variety of cases through
3 the EDC system—presumably because the office has had success quickly pleading the
4 cases out and clinching easy, low-cost convictions. Indeed, during the COVID-19
5 pandemic, grand juries were closed and even more cases were subjected to EDC processes.

6 39. Counsel’s preliminary review of MCAO data indicates that MCAO sent
7 roughly 32,000 cases to the EDCs between January 2017 and January 2021. From 2019 to
8 2021, that represented roughly 40% of all criminal cases. And at least 30% of those cases
9 involved no drug-related charges whatsoever, much less only possession and paraphernalia
10 charges.

11 40. Curiously, as MCAO sends more and more cases through the EDCs—and
12 extracts more and more constitutionally suspect felony convictions—it takes pains to draw
13 attention away from that reality. In its 2016 Annual Report, MCAO mentions the EDCs
14 only once, vaguely describing it as a system that “*can include* pretrial resolutions and
15 preliminary hearings.” The report does not mention the Retaliation Policy, which punishes
16 people for seeking those very hearings.

17 41. By 2020, MCAO was sending significantly more cases to the EDCs, but the
18 Annual Report for that year does not mention the EDCs at all. In fact, in the report, MCAO
19 congratulates itself for putting certain of its plea policies online—yet they do not include
20 the Retaliation Policy.

21 42. The Retaliation Policy appears unique to the EDCs. On information and
22 belief, MCAO does not employ it outside of cases in the EDCs, at least not in this overt
23 manner. While MCAO places some of its policies online, including plea-related policies,
24 its website did not include anything about the Retaliation Policy at the time of the filing
25 of the original complaint in this action. Likewise, the website does not include samples of
26 EDC forms disclosing the “presumptively harsher” and “substantially harsher” threats.

27 43. In fact, the Retaliation Policy *contradicts* elements of MCAO’s more
28 generalized plea-bargaining policies. For example, Policy 7.1, titled Plea Agreements:

1 General Guidance, Timing of Offers, and Settlement Negotiations (effective August 13,
 2 2020), states that “each DCA is expected to critically weigh the circumstances of each case
 3 to determine the appropriate initial offer. DCAs should engage in meaningful negotiations
 4 which includes discussing the case with defense counsel to learn as much as possible about
 5 the defendant. . . . *[I]t is not possible to handle every charge or every circumstance*
 6 *identically.*”

7 44. The Retaliation Policy—including as reflected on EDC plea forms that post-
 8 date Policy 7.1—does precisely the opposite: it treats every case “identically,” forecloses
 9 “meaningful negotiation,” and worsens plea offers without regard to “the circumstances of
 10 each case,” all while DCAs learn next to nothing about the defendant.

11 *MCAO Uses its Retaliation Policy to Coerce Quick, Low-Cost Pleas in the EDCs.*

12 45. When a person is arrested and booked into jail in Maricopa County, they
 13 must be taken before a magistrate within twenty-four hours for an initial appearance from
 14 jail. Those not arrested are summonsed for their initial appearance.

15 46. When a person is arrested and held in custody on a bond or non-bondable,
 16 the magistrate sets two dates: (1) a status conference about six days after the initial
 17 appearance, and (2) a preliminary hearing about nine days after the initial appearance. If
 18 the defendant is not held in custody, the status conference is set out approximately fourteen
 19 days, and the preliminary hearing date is set out approximately eighteen days.⁵

20 47. At the initial appearance, the magistrate also makes several critical
 21 determinations, including whether the accused person qualifies for a public defender and
 22 whether the person should be released or detained pending trial. Detention can and often
 23 does result from unaffordable cash bail.

24 48. The magistrate makes the release decision with nothing more than a
 25

26 ⁵ The timing of these settings are because, under Ariz. R. Crim. Pro. 5.1, “[a] preliminary
 27 hearing must commence before a magistrate no later than 10 days after the defendant’s
 28 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.”

1 “probable cause statement” from the police—normally only a few paragraphs long, and
 2 told only from the police’s perspective. At the initial appearance, indigent people have not
 3 yet been appointed a public defender to challenge the probable cause statement or examine
 4 the officers who made it. DCAs do not attend.

5 49. Notably, a meaningful, adversarial bail review often does not take place. The
 6 initial appearance is not structured that way and the preliminary hearing, which could
 7 include a legally compliant bail review, often never happens because of the Retaliation
 8 Policy.

9 50. Avoiding an adversarial detention review while the Retaliation Policy hangs
 10 over a person’s head is a vital feature of how MCAO achieves quick pleas. Studies show
 11 that being detained without bail significantly increases the likelihood of pleading out, and
 12 pleading out quickly. Pretrial detention also makes it more difficult for someone to
 13 participate in their own defense.⁶

14 51. Following the initial appearance, those who cannot afford their own attorney
 15 are typically appointed a public defender the day before the status conference. At that time,
 16 the prosecutor typically sends the accused person the police report and an initial plea offer,
 17 and that is all.

18 52. The plea offer often has the following threat emblazoned on it:

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

24 _____
 25 ⁶ See Nick Petersen, *Do Detainees Plead Guilty Faster? A Survival Analysis of Pretrial*
 26 *Detention and the Timing of Guilty Pleas*, 31(7) CRIM. JUST. POL’Y REV. 1015, 1025
 27 (2019) (pretrial detainees plead out 2.86 times faster than released defendants); Will
 28 Dobbie, Jacob Goldin, & Crystal S. Yang, *The Effects of Pre-Trial Detention on*
Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges,
 108(2) AM. ECON. REV. 201, 203 (2018); SUBRAMANIAN ET AL., *supra* note 1, at 38 n.
 121.

53. Other forms contain a similar threat:

This offer is contingent upon victim input. This offer will be withdrawn and no longer available after today's hearing date. This offer is withdrawn if the preliminary hearing is affirmed 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.

EDC PLEA OFFER

Defendant: Gilberto Hernandez

Date: February 18, 2021

CR#: CR2021-104655-001

***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.**

54. More recently, MCAO created the following generic form, though Plaintiffs cannot confirm if it is being used or supersedes other forms. Regardless, it still creates an unconstitutional presumption of retaliation against people who assert their rights.

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.

55. DCAs also confirm the Retaliation Policy in emails to public defenders:

From: Patricia Grant <grantp@mcao.maricopa.gov>
Sent: Thursday, May 27, 2021 9:32 AM
To: Edie Lucero (OPD) <Edith.Lucero@maricopa.gov>
Subject: RE: State v. Maxine Lopez, CR2020-121573-001

Yes, that is our policy

From: Edie Lucero (OPD) <Edith.Lucero@maricopa.gov>
Sent: Thursday, May 27, 2021 8:48 AM
To: Patricia Grant <grantp@mcao.maricopa.gov>
Subject: RE: State v. Maxine Lopez, CR2020-121573-001

Patricia,

Will Maxine's plea be subject to MCAO "substantially harsher" policy for going forward on her PH?

Thanks, Edie

Edie Lucero (OPD)

From: Aaron Taylor <tayloa01@mcao.maricopa.gov>
Sent: Tuesday, June 22, 2021 7:42 AM
To: Edie Lucero (OPD)
Subject: RE: Offer: State v. Taryn Tjernagel, CR2021-103935-001

Hi Edie,

Yes, the policy will apply here as well.

Best,

Aaron Taylor
 Deputy County Attorney | East Phoenix / Scottsdale Bureau
 Maricopa County Attorney's Office
tayloa01@mcao.maricopa.gov

From: Edie Lucero (OPD) <Edith.Lucero@maricopa.gov>
Sent: Monday, June 21, 2021 4:35 PM
To: Aaron Taylor <tayloa01@mcao.maricopa.gov>
Subject: RE: Offer: State v. Taryn Tjernagel, CR2021-103935-001

Hello Aaron,

If Taryn affirms her PH, will she be subject to MCAO's policy that the next plea will be "substantially harsher," if she affirms?

Please let me know, thanks, Edie

1 56. In the days between the initial appearance and the first status conference,
2 prosecutors typically refuse to provide accused persons and their counsel any additional
3 information about the case, like witness statements, body camera footage, or drug test
4 results. This is true even if they have the information in their possession and even if that
5 information could exonerate the person, eliminate one or more charges, or mitigate the
6 sentence.

7 57. Although Arizona's ethical guidelines require prosecutors to make "timely
8 disclosure to the defense of all evidence or information known to the prosecutor that tends
9 to negate the guilt of the accused or mitigates the offense, and, in connection with
10 sentencing, disclose to the defense and to the tribunal all unprivileged mitigating
11 information known to the prosecutor," it is MCAO's common practice to refuse to provide
12 any discovery at all, other than a single police report, until after the criminal defendant has
13 made a decision on the EDC offer, and sometimes longer.

14 58. And because Arizona's criminal discovery rules require discovery to be
15 provided at the preliminary hearing or arraignment in Superior Court, pressuring
16 defendants to waive the preliminary hearing and plead guilty allows the prosecutor to claim
17 they need not provide any discovery at all.

18 59. As a result, AACJ members practicing in the EDC's frequently are obligated
19 to devote scarce investigation time and resources to the early investigation of their clients'
20 charges due to the MCAO's refusal to provide initial discovery and to quickly gather
21 mitigation material. This often includes locating and retrieving medical records, which is
22 difficult to accomplish within the fast-paced EDC timelines MCAO enforces, as well as
23 tracking down and interviewing witnesses, who are often not identified in the paltry
24 disclosure MCAO provides in the EDCs. Sometimes, AACJ members are later required to
25 unnecessarily duplicate their early investigation efforts after eventually receiving the tardy
26 discovery to which their clients were earlier entitled.

27 60. By pressuring people to plead guilty in the EDCs, MCAO also does an end-
28 run around Arizona Rule of Criminal Procedure 15.8, which requires DCAs to provide

1 discovery at the time a plea offer is made in Superior Court. It also provides for sanctions
2 under certain circumstances if DCAs do not give a person 30 days after the offer is made
3 to consider it, or if they do not make the required discovery disclosures when an offer is
4 made.⁷ But because hearings in the EDC occur prior to the filing of “an indictment or
5 information in the superior court,” Rule 15.8’s protections do not apply to EDC.

6 61. Upon information and belief, the distinction that MCAO makes between
7 EDC and the Superior Court is largely illusory, particularly to the defendant and defense
8 attorney. EDC appearances still take place in courtrooms (or, during the pandemic, over
9 video). Magistrate judges still make binding decisions. And, most importantly, a coerced
10 plea still ends the case, most often resulting in a felony conviction.

11 62. However, there are no statutes or Arizona Rules of Criminal Procedure that
12 create, govern, or even reference the EDCs, nor, to Plaintiffs’ counsel’s knowledge, are
13 there any references to the EDCs in any published cases in the Arizona courts. MCAO
14 therefore operates the EDCs as a Constitution-free zone, where prosecutors retain all their
15 powers of investigation and conviction, but criminal defendants are effectively prohibited
16 from asserting their rights under state and federal law.

17 63. Given the lack of time to prepare for the status conference, the DCAs’ refusal
18 to provide discovery, defense attorneys’ own constitutional and ethical obligations to
19 provide effective assistance, and, most importantly, the Retaliation Policy looming over
20 their clients’ heads, criminal defendants and their attorneys are often forced to make an
21 exceptionally difficult and unnecessary choice: accept a virtually blind plea deal or seek a
22 continuance that delays their case. For those who are detained, this extends their time
23 behind bars.

24 64. According to Karen Emerson,⁸ public defenders in most cases seek to

25 ⁷ Ariz. R. Crim. P. 15.8 (“If the court finds that the State’s failure to provide a required
26 disclosure materially affected the defendant’s decision and if the State declines to reinstate
27 the lapsed or withdrawn plea offer, the court--as a presumptive minimum sanction--must
28 preclude the admission at trial of any evidence not disclosed as required . . .”).

⁸ Karen Emerson is an Attorney Manager in the Maricopa County Public Defender’s

1 continue the status conference and preliminary hearing for purposes of case investigation,
2 plea negotiation, additional attorney-client discussions, or other case-specific needs. These
3 continuances are sought because of the high-stakes nature of the EDC process. Defendants
4 typically have two options: plead guilty under the terms of the proffered plea agreement
5 without the protections afforded by a probable cause hearing, liberal pretrial discovery,
6 and pretrial suppression hearings, or reject the plea agreement and face a “presumptively
7 harsher” or even “substantially harsher” plea offer after probable cause is found at the
8 preliminary hearing or through a grand jury proceeding.

9 65. If and when the parties appear at the status conference, sometimes after one
10 or more continuances, this is typically the latest date the DCA will allow the criminal
11 defendant to waive their right to a preliminary hearing. Waiver could result in an
12 acceptance of the plea at the status conference itself or continuation toward trial while
13 negotiations continue under the then-current plea offer.

14 66. If the preliminary hearing is not waived—colloquially called “affirming the
15 prelim”—the DCA then typically makes what it calls a *Donald* advisement on the record
16 at the status conference. The *Donald* advisement is named after an Arizona case that
17 requires notice to the criminal defendant of the maximum possible prison sentence.⁹
18 However, MCAO also uses the *Donald* advisement to repeat the Retaliation Policy: that
19 the criminal defendant has chosen not to waive their right to a preliminary hearing, and
20 therefore MCAO will pull the current offer and any subsequent offer will be substantially
21 harsher.

22
23
24
25
26 Office. Within the Public Defender’s Office, she manages five divisions with
27 approximately 90 public defenders. She has been a public defender in Maricopa County
28 for 17 years and handled over a thousand cases in the Maricopa County Superior Court,
including hundreds in the EDCs.

⁹ *State v. Donald*, 10 P.3d 1193 (Ariz. App. 1st Div. 2000).

67. MCAO openly acknowledges that the Retaliation Policy exists to process cases as quickly as possible and spare DCAs the inconvenience of working up cases. As one DCA phrased it in an email: “The purpose of EDC is to facilitate speedy resolutions . . . because once the case leaves EDC, MCAO must expend significant resources for trial preparations.”

From: Aaron Taylor <tayloa01@mcao.maricopa.gov>
Sent: Monday, May 24, 2021 9:36 AM
To: Edie Lucero (OPD) <Edith.Lucero@maricopa.gov>
Subject: RE: Offer: State v. Taryn Tjernagel, CR2021-103935-001

Hi Edie,

The purpose of EDC is to facilitate speedy resolutions. An EDC plea is the most lenient offer a defendant will get because once the case leaves EDC, MCAO must expend significant resources for trial preparations.

Best,

Aaron Taylor
 Deputy County Attorney | East Phoenix / Scottsdale Bureau
 Maricopa County Attorney's Office
tayloa01@mcao.maricopa.gov

68. In another email exchange, the DCA explains that providing body worn camera footage—to which the DCA clearly has access—is “inconsistent with the goal of EDC.”

From: David Hanselman <hanselmd@mcao.maricopa.gov>
Sent: Tuesday, May 4, 2021 3:03 PM
To: Edie Lucero (OPD) <Edith.Lucero@maricopa.gov>
Subject: RE: State v. Maxine Lopez, CR2020-121573-001

Edie,

I see we have a status conference in this case tomorrow and recall that I did not yet respond to your email below. Providing BWC is inconsistent with the goal of EDC, which is to promote the early resolution of felony cases. If we had to collect, review, and produce BWC in every case, or even the 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. Plus, it makes no sense to engage in discovery where the State has offered the Defendant diversion. We've sent you the motion to suspend packet. If the Defendant would like to avail herself of the diversion option, you can return that paperwork to our diversion department. If not, the alternative offer in EDC would be to PDP 6 open and a stipulation to supervised probation, or she can straight waive or affirm.

Just let me know how she'd like to proceed.

Sincerely yours,

David L. Hanselman
 Deputy County Attorney
 Maricopa County Attorney's Office

1 69. The prosecutor goes on: “[i]f we had to collect, review, and produce BWC
2 in every case, *or even the subset of cases where the Defendant thought there was a legal*
3 *or factual defense*, given the high volume of cases in EDC, it would bog the entire system
4 down and swamp the law enforcement agencies.”¹⁰

5 70. This is precisely what is happening to Plaintiff Aaron Dromiack. He is
6 asserting to MCAO that police attacked him first, and that any contact with them was in
7 self-defense. Body worn camera footage would help support that defense, and yet the DCA
8 in Mr. Dromiack’s case is refusing to review or provide it as a matter of policy.

9 *Losing the Right to a Preliminary Hearing is Significant for EDC Defendants.*

10 71. The Arizona Constitution makes preliminary hearings mandatory in felony
11 cases that proceed by information, like those in EDC. Article 2, section 30, states that: “No
12 person shall be prosecuted for a felony by information without having had a preliminary
13 examination before a magistrate or having waived such preliminary examination.”

14 72. Arizona Rule of Criminal Procedure 5.1 implements this mandate: “A
15 defendant has a right to a preliminary hearing if charged in a complaint with a felony.”¹¹

16 73. Arizona Rule of Criminal Procedure 5.3 further requires that the magistrate
17 at the preliminary hearing “must determine and state for the record whether the State’s case
18 establishes probable cause.”

19 74. In addition, the Arizona Supreme Court has held that, because an initial
20 appearance “provides no opportunity for a defendant to present evidence or make any
21 argument regarding the law or evidence,” it is “ill-suited to support conclusive findings
22

23 ¹⁰ Moreover, despite this DCA’s assertion that “it makes no sense to engage in discovery where
24 the State has offered the Defendant diversion,” refusal to engage in even limited discovery in
25 these circumstances can lead to innocent people being pressured into onerous diversion
26 requirements—with a felony conviction looming for even technical violations—when instead
27 they should simply be walking free.

28 ¹¹ Waiver of a preliminary hearing requires several factors to be met. The waiver must be
in writing and it must be signed by the defendant, defense counsel, and the State. Ariz. R.
Crim. P. Rule 5.1. Only after these substantive requirements are met can the prosecution
continue their case against a defendant who has not been afforded a preliminary hearing.

1 affecting a defendant's liberty," and instead "serve[s] the limited function of providing
2 some check on the ability of the state to hold a defendant . . . [but only] until either a
3 preliminary hearing or grand jury proceeding is convened."¹²

4 75. The Arizona Supreme Court has also held that the framers likely intended
5 the preliminary hearing to act as "a shield to the citizen against the unwarranted zeal of
6 prosecuting officers."¹³

7 76. Therefore, more than a century of Arizona law makes clear that a person
8 charged with a felony by information or complaint is entitled to a preliminary hearing, and
9 for good reason. Yet MCAO makes it a matter of policy to deprive EDC defendants of that
10 right.

11 77. As noted above, the primary purpose of the preliminary hearing is to
12 determine whether the state has probable cause to continue prosecuting someone, given
13 that a grand jury has not served that function. If the magistrate at the preliminary hearing
14 finds that MCAO has not established probable cause, the case is over.

15 78. And even if MCAO establishes probable cause, the preliminary hearing can
16 reveal police misconduct, unreliable testimony, or infirmities in the evidence-gathering
17 process, which could lead to a later suppression motion.

18 79. Further—and perhaps most importantly—after a preliminary hearing, when
19 the case is bound over to Superior Court for trial, MCAO is required to begin providing
20 more evidence to the defense. On information and belief, MCAO calls this being forced to
21 "open the file." As indicated by the DCA emails above, MCAO is generally loathe to do
22 so.

23 80. In sum, the preliminary hearing is an essential protection for people facing
24 criminal prosecution. It can end or undermine MCAO's case, or at least force DCAs to turn
25 over discovery and endure the work of preparing for trial. Yet, rather than respect the
26

27 ¹² *Segura v. Cunanan*, 219 Ariz. 228, 238–39, 196 P.3d 831, 841–42 (Ct. App. 2008).

28 ¹³ *Quen Guey v. State*, 20 Ariz. 363, 365 (1919).

1 preliminary hearing, MCAO strictly enforces the Retaliation Policy in order to coerce pleas
2 and prevent cases from ever getting to that stage—much less all the way to trial.

3 *EDC Defendants and Their Attorneys Confirm that this Unconstitutional Retaliation*
4 *Actually Occurs—and it Harms Them.*

5 81. MCAO’s Retaliation Policy harms real people. The following are a handful
6 of examples, including the plaintiffs in this case.

7 82. *Plaintiff Samuel Luckey.* Mr. Luckey is a 34-year-old Black man who
8 recently welcomed the birth of his daughter. Police arrested him for drug and weapons
9 charges after two witnesses implicated him during an unrelated traffic stop.

10 83. Based on these two hearsay accounts, MCAO charged Mr. Luckey with two
11 counts of sale, one count for possession of drug paraphernalia, and one count for possession
12 of a firearm. Neither the police nor the witnesses ever personally viewed him selling drugs
13 or carrying a weapon.

14 84. According to Mr. Luckey’s former defense attorney, Edith Lucero,¹⁴ at Mr.
15 Luckey’s initial appearance after his arrest, the magistrate imposed a \$10,000 bond. Mr.
16 Luckey made clear that he could not afford that amount and requested alternative
17 conditions of release. Mr. Luckey also told the judge that, if incarcerated pretrial, he would
18 miss the birth of his daughter. The magistrate stated that he had “received a written
19 recommendation from the state, with respect to this case, which the court had considered.”
20 The magistrate then imposed a \$10,000 cash-only bond.

21 85. MCAO pushed Mr. Luckey’s case quickly through the EDCs and denied any
22 discovery except a redacted police report. MCAO offered only a plea deal including felony
23 convictions and a prison term from two to five years. Per its Retaliation Policy, MCAO

24 ¹⁴ Edith Lucero is a public defender in the Maricopa County Public Defender’s Office,
25 where she has handled hundreds of cases. She previously represented Mr. Luckey. She has
26 been at the office for approximately 1.5 years, following her recent return. She previously
27 spent 11 years at the office: approximately five years in the Trial Group and approximately
28 six years in the Appeals Division. She subsequently worked as an administrative law judge
for the Arizona Department of Transportation, and then for the U.S. Department of
Homeland Security as an Immigration and Customs Enforcement attorney.

1 also threatened Mr. Luckey with a harsher plea offer if he rejected the deal and affirmed
2 his right to a preliminary hearing.

3 86. During his status conference, Mr. Luckey told the EDC prosecutor and judge
4 that he felt “threatened” by the Retaliation Policy. He said he “had no choice” but to waive
5 his preliminary hearing because prosecutors were not disclosing any additional evidence
6 for him to make an informed decision. He said he was “damned if I do, damned if I don’t.”

7 87. Despite these distressed statements, the DCA covering the hearing said
8 nothing. The judge accepted the waiver.

9 88. In addition to being coerced out of his rights, Mr. Luckey has already spent
10 three long months in pretrial detention during a pandemic, missed the birth of his daughter,
11 and lost both his food stamps and unemployment insurance.

12 89. *Plaintiff Aaron Dromiack*. Aaron Dromiack is a 28-year-old veteran of the
13 U.S. Army. He lives in Phoenix with his new fiancée, and he also struggles with alcohol
14 abuse disorder. In June 2021, he suffered a relapse and, while drunk, locked his fiancée out
15 of the house. Mr. Dromiack’s fiancée called Phoenix police to get her back in and remove
16 Mr. Dromiack. She did not want to press any criminal charges.

17 90. When police arrived, Mr. Dromiack answered the door voluntarily. Then,
18 rather than deescalating the situation, police tackled and beat Mr. Dromiack. They punched
19 him several times in the head even after he was subdued on the ground. He was admitted
20 to the VA hospital that night with facial contusions, a neck contusion, a cervical disc
21 herniation, bruises, swelling, and severe pain.

22 91. In the struggle, Mr. Dromiack also admits that he resisted, in an attempt to
23 save himself from the beating. Therefore, despite that police were the aggressors in the
24 situation, they arrested Mr. Dromiack, and MCAO charged him with aggravated assault, a
25 felony. MCAO assigned Mr. Dromiack to the EDCs and only are offering him 1.5 years in
26 prison. Despite MCAO’s public proclamation that the EDCs exist to divert people with
27 substance abuse disorders like Mr. Dromiack away from the criminal justice system, they
28 are not offering him any diversionary or treatment options.

1 92. And despite Mr. Dromiack's claims of self-defense, the DCA on his case
2 refuses to provide body worn camera footage that could exonerate Mr. Dromiack entirely,
3 or at least shed additional light on the case. The DCA emailed Mr. Dromiack's attorney,
4 Roland Rillos, the following explanation: "Most defendants want to view BWC [body
5 worn camera], but EDC is a court of limited discovery and the BWC is generally
6 unavailable at this stage."

7 93. The DCA could easily obtain and disclose the footage, along with pictures
8 and other evidence in the possession of the police. Instead, the DCA is making Mr.
9 Dromiack pay for it. The price: his preliminary hearing.

10 94. The DCA recently confirmed to Mr. Dromiack's attorney that if Mr.
11 Dromiack affirms his preliminary hearing in an effort to receive more discovery, the next
12 plea offer will be "presumptively harsher."

13 95. *Michael Calhoun.* Michael Calhoun is a 61-year-old Black man with
14 substance use disorder. He has a long history of drug convictions, mostly for possession of
15 drugs and paraphernalia. He has never been convicted of or even arrested for a violent
16 offense. He is also an artist and a father who has lived in the Phoenix area for decades.

17 96. In September 2019, Mr. Calhoun was arrested for selling \$20 worth of
18 methamphetamine to an undercover officer. Mr. Calhoun was arrested, released, and heard
19 nothing from the courts for roughly eighteen months.

20 97. In April 2021, MCAO decided to not only revive the case in the EDCs, but
21 offer Mr. Calhoun nothing lower than 9.25 years in prison for his \$20 drug sale. Moreover,
22 the new DCA on the case confirmed that, if Mr. Calhoun affirmed his preliminary hearing
23 and proceeded toward trial instead of taking that draconian deal, the next offer would get
24 substantially harsher.

25 98. Despite MCAO's public proclamations that it uses the EDCs to divert drug
26 offenders away from incarceration and towards treatment, and despite the fact that Mr.
27 Calhoun is clearly a candidate for such treatment, MCAO has not offered diversion in this
28 case. Instead, it is using prior drug convictions—charges for which MCAO did not offer

1 diversion or treatment either—to justify its current prison-only offer.

2 99. Mr. Calhoun is currently deciding whether to assert his right to a preliminary
3 hearing and trial, or whether to take a nine-year sentence for selling \$20 worth of drugs. In
4 either case, he is vividly confronted with the fear of dying in prison. There is currently a
5 bench warrant for his arrest for failing to appear for a court appearance.

6 100. *Deniece Pierce*. Deniece Pierce is a 51-year-old woman who had no criminal
7 record before finding herself in the EDCs. She stole roughly \$2,000 from her father by
8 writing a series of false checks out of his account. When arrested, she admitted to it and,
9 through her lawyer, simply asked for time to find a job to pay back the money.

10 101. Instead, MCAO pushed her case quickly through EDC, offering a plea that
11 required a felony conviction. They also ratcheted up the stakes by charging each check as
12 a separate offense, many of which contained separate mandatory minimum sentences, even
13 though it was clear that Ms. Pierce’s wrongdoing was all part of a single misguided scheme.
14 This stacking of charges created an extreme “trial penalty”—the difference between her
15 exposure at trial (71.25 years in prison) and the comparatively “lenient” plea offer from
16 MCAO (four years of probation and lifetime felony conviction on her record).¹⁵

17 102. Ms. Pierce did not understand why MCAO was pushing the case so quickly
18 and aggressively. She was deeply afraid of a potentially decades-long prison sentence, as
19 well as receiving a substantially harsher offer if she asserted her rights. At one point, her
20 attorney had to continue a case setting because she had a panic attack outside the
21 courthouse.

22 103. Her attorney, Chris Simonds,¹⁶ told her the offer was unfair and she could
23 affirm her preliminary hearing while continuing to try to pay back the money. Mr. Simonds
24

25 ¹⁵ The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and
26 How to Save It, NAT’L ASS’N OF CRIM. DEF. LAW. (July 10, 2018),
27 <https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct>.

28 ¹⁶ Chris Simonds currently owns and operates a private practice focusing on family law in
Peoria, Arizona. He was previously employed as a public defender in Maricopa County,
Arizona, from December 2017 through April 2021.

1 reported that Deniece weighed the costs and benefits of the plea and ended up pleading
2 guilty to two charges, one felony and one misdemeanor, as offered by the DCA. Both
3 attorney and client agreed it was unfair and punitive, and that the prosecutors had
4 essentially pressured her into doing it.

5 104. As a result, Ms. Pierce succumbed to the Retaliation Policy and took the deal.

6 105. Since her conviction, Ms. Pierce has started her own cleaning company. She
7 says she loses many potential clients because her felony conviction appears on background
8 checks.

9 106. *Levonta Barker*. Last year, Levonta Barker was minding his own business at
10 a 7-Eleven in Phoenix when police suddenly drove up to him in the parking lot, threw him
11 to the ground, and arrested him. He had no idea why. At some point, the police brought
12 two people who said they had been robbed to the parking lot for a one-person lineup. All
13 the victims could confirm was that their assailant was wearing a bandana, and so was Mr.
14 Barker.

15 107. Based on these “identifications,” MCAO charged Mr. Barker with two
16 counts each of aggravated assault and kidnapping. The DCA sent him a plea offer of 7.5
17 years in prison, followed by probation under “gang terms.” Under the Retaliation Policy,
18 that offer would get substantially harsher if Mr. Barker rejected the offer and/or affirmed
19 his preliminary hearing.

20 108. But MCAO had not even investigated the case yet. Luckily, Mr. Barker’s
21 attorney, Chris Simonds, had done so while working under the limited time constraints
22 imposed by MCAO in the EDCs. Because of the severe limitations imposed by design in
23 the EDC system, Mr. Simonds expended his own resources, and independently found Mr.
24 Barker’s booking photo. In doing so, he uncovered that Mr. Barker had been wearing a
25 purple shirt at the time of his arrest; one of the police reports indicated the perpetrator was
26 wearing a black one.

27 109. Eventually, MCAO dropped the charges against Mr. Barker, but not before
28 he had spent roughly a month in a COVID-infested jail, lost his job, lost an apartment he

1 was hoping to begin renting, missed his oldest son's birthday, and missed Christmas with
2 his family.

3 110. Worse yet, MCAO was clearly willing to convict an innocent man before
4 doing any investigation. Indeed, they were pressuring him to take a plea deal or face a
5 harsher offer if he asserted his rights. If Mr. Barker had not waited it out in jail—and many
6 people cannot—MCAO would have secured the wrongful conviction, and Mr. Barker
7 would still be behind bars today.

8 111. *AACJ and Maricopa County Public Defenders*. Defense attorneys in
9 Maricopa County confirm that this is a systemic problem. The Retaliation Policy has
10 significantly hindered these attorneys' ability to represent their clients.

11 112. Plaintiff AACJ is a non-profit membership organization whose mission
12 includes supporting criminal defense attorneys and, by extension, their clients.
13 Specifically, the organization is committed to “protect[ing] and insur[ing] by rule of law
14 those individual rights guaranteed to all people, rich and poor alike, by the Arizona and
15 Federal Constitutions, and to resist all efforts made to curtail such rights.”¹⁷ Its members
16 represent clients in the EDCs every day. AACJ is deeply concerned that MCAO's
17 Retaliation Policy places its members in compromising ethical positions by forcing them
18 to advise clients without the necessary time or discovery. In fact, AACJ has sponsored at
19 least three trainings on practicing in the EDCs, diverting its limited funds to address this
20 problem. One of those trainings was titled, “Effective and Ethical Representation in Early
21 Disposition Courts,” which, in part, discussed the ethical dilemma imposed on criminal
22 defense attorneys, including AACJ members, practicing in the EDCs.

23 113. For example, according to Louis Fidel, President of the AACJ, in 2017 and
24 2018, the organization used its funds to co-sponsor CLE presentations entitled, “The Use
25 of Subpoenas in Early Resolution Courts to Compel Discovery,” that instructed on how
26 criminal defense attorneys, including AACJ members, could use the subpoena power of
27 the court to investigate their cases without meaningful discovery in EDC due to the

28 ¹⁷ AACJ Mission Statement, available at <https://www.aacj.org/about>.

1 MCAO's policy.

2 114. AACJ has also devoted time to discussing and pushing for legislative and
3 policy changes directly relevant to the Retaliation Policy, including discussions to amend
4 Rule 15.8 to prevent prosecutor agencies from withholding discovery prior to the filing of
5 an information or indictment, which allows MCAO to impose its Retaliation Policy
6 without running afoul of the letter (but not spirit) of the rule, and drafting and pushing
7 comprehensive legislation in 2021 that would require more transparency around MCAO
8 plea bargaining tactics.

9 115. The Retaliation Policy also causes AACJ's member attorneys to
10 unnecessarily devote increased time and resources to the initial investigation of the charges
11 against their clients, and often to unnecessarily duplicate those investigation efforts after
12 eventually receiving discovery to which they were earlier entitled, because MCAO
13 prosecutors refuse to provide prompt discovery as part of their EDC practices.

14 116. Edith Lucero is a Maricopa County deputy public defender (DPD) and a
15 former Arizona administrative law judge and federal Department of Homeland Security
16 official. She has spent 11 years in the Public Defender's Office between the trial and
17 appellate groups. She represents Michael Calhoun, represented Plaintiff Samuel Luckey
18 before he moved to the trial court, and has represented hundreds of other people in the
19 EDCs. She believes the Retaliation Policy, in combination with MCAO's refusal to provide
20 discovery while her clients are considering it, coerces her clients and leaves them believing
21 the system is unfair. This harms her clients and her attorney-client relationship with them.

22 117. Hugo Polanco is a DPD in the Maricopa County Public Defender's Office,
23 who is currently assigned to handle cases in the EDCs and who has represented hundreds
24 of indigent clients. Mr. Polanco confirms that his clients have been threatened by the
25 MCAO's Retaliation Policy and that his clients have heard that threat read into the record
26 during their *Donald* advisements. Mr. Polanco believes that the policy is coercive and
27 retaliatory, threatens his clients simply for invoking their rights, and makes it extremely
28 difficult for him to carry out his duties as a public defender.

1 118. Chris Simonds represented Deniece Pierce, Levonta Barker, and thousands
 2 of other people in the EDCs. Mr. Simonds believes that the Retaliation Policy is cruel,
 3 vindictive, and makes it difficult to ethically represent his clients. He recently left the
 4 Maricopa County Public Defender in part because of the policy.

5 119. Gary Kula, the head of the Office of Public Defender, confirms that EDC
 6 cases are swallowing a greater and greater portion of his office's resources. He now devotes
 7 34 full-time deputy public defenders and 12 support staff to these courts. At any given
 8 time, there are approximately 3,500 active cases pending there. Over the past 11 months,
 9 42 percent of the total cases resolved were resolved by plea in EDC.

10 120. Coercing felony pleas via the Retaliation Policy has serious consequences.
 11 In Arizona, a felony conviction bars people from public housing and can cost them their
 12 driver's license and professional credentials—all of which makes it harder to earn a living
 13 and contribute taxes post-conviction. A felony conviction also bars people from jury
 14 service and negates their right to vote for *four years*—and, for anyone with more than one
 15 felony conviction, restoration of rights is extraordinarily difficult.

16 121. In short, MCAO's Retaliation Policy may be a way for the office to secure
 17 quick, painless convictions. But for the thousands of people on the other side of these cases,
 18 the pain is real, and it can last a lifetime.

19 **CLASS ACTION ALLEGATIONS**

20 122. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil
 21 Procedure on behalf of themselves and classes of similarly situated individuals.

22 123. The action contains two proposed classes:

- 23 (1) All current and future people whom the MCAO has charged and assigned
 24 to the EDCs and who are subject to MCAO's blanket policy, practice, or
 25 custom of making or threatening to make plea offers harsher in response
 26 to people exercising their right to a preliminary hearing and/or trial, but
 27 who have not yet made the decision to affirm or waive their preliminary
 28 hearing, or reject or accept their initial plea offer (the "Pre-Waiver Class");

1 and

2 (2) All current and future people whom the MCAO has charged and assigned
3 to the EDCs and who are subject to MCAO's blanket policy, practice, or
4 custom of making or threatening to make plea offers harsher in response
5 to people exercising their right to a preliminary hearing and/or trial, but
6 who have waived their preliminary and/or rejected their initial plea offer
7 (the "Post-Waiver Class").

8 124. Plaintiff Aaron Dromiack seeks to represent the Pre-Waiver Class. Plaintiff
9 Sam Luckey seeks to represent the Post-Waiver Class.

10 125. This action has been brought, and may properly be maintained, as a class
11 action under federal law. Both classes independently satisfy the numerosity, commonality,
12 typicality, and adequacy requirements for maintaining a class action under Federal Rule of
13 Civil Procedure 23(a), and both independently satisfy the requirements for certification
14 under Rule 23(b)(2) or, in the alternative, 23(b)(1).

15 126. *Numerosity.* Upon information and belief, there are at least 40 current people
16 in both classes. Counsel's preliminary review of MCAO's own data, collected via a public
17 records request, indicates that MCAO sent roughly 32,000 cases to the EDCs between
18 January 2017 and January 2021. The head of the Maricopa County Office of Public
19 Defender estimates there are roughly 3,500 active cases pending in EDC on any given day.

20 127. Joinder is impracticable for both classes because (1) the class members are
21 numerous, (2) delay will cause serious harms, including continued coerced convictions;
22 (3) the classes are inherently transitory and include future members, (4) many of the class
23 members are incarcerated, limiting their ability to communicate with counsel and institute
24 individual lawsuits, and (5) the very nature of the Retaliation Policy makes the strength-
25 in-numbers associated with class certification appropriate.

26 128. *Commonality.* Certain common questions of law and fact exist across both
27 of the proposed classes. Common questions of fact include whether MCAO indeed
28 maintains the Retaliation Policy and how the office carries it out. A common question of

1 law is whether the Retaliation Policy violates people's Sixth and Fourteenth Amendment
2 rights. These common questions of law and fact are amenable to common answers,
3 including that eliminating the Retaliation Policy will cure the constitutional violations.

4 129. For the Pre-Waiver Class, common questions include how the Retaliation
5 Policy coerces people into foregoing their rights. For the Post-Waiver Class, common
6 questions include if and when MCAO delivers discovery even after a preliminary hearing
7 waiver.

8 130. *Typicality*. Plaintiffs' claims in both classes are typical of and reasonably co-
9 extensive with their respective class members' claims.

10 131. *Adequacy*. Plaintiffs in both classes have the requisite personal interest in the
11 outcome of this action and will fairly and adequately protect the interests of their respective
12 classes.

13 132. Plaintiffs in both classes have no interests adverse to the interests of the
14 proposed respective classes.

15 133. Plaintiffs in both classes retained pro bono counsel with experience and
16 success in the prosecution of civil rights litigation, including class action litigation and
17 litigation alleging violations of trial rights.

18 134. Counsel for Plaintiffs know of no conflicts among proposed class members
19 or between counsel and proposed class members.

20 135. *Rule 23(b)(2)*. Defendants have acted on grounds generally applicable to all
21 proposed class members, and this action seeks declaratory and injunctive relief. Plaintiffs
22 therefore seek class certification under Rule 23(b)(2).

23 136. *Rule 23(b)(1)*. In the alternative, Rule 23(b)(1) is satisfied because pursuing
24 separate actions would create a risk of inconsistent or varying adjudications with respect
25 to individual class members in both classes that would establish incompatible standards of
26 conduct for the party opposing the proposed classes.

CLAIMS FOR RELIEF

Claim One

Prosecutorial Vindictiveness

in Violation of the Fourteenth Amendment to the United States Constitution

137. The Due Process Clause of the Fourteenth Amendment prohibits prosecutors from acting with vindictiveness toward people accused of crimes.

138. Prosecutors act with prohibited vindictiveness when they punish people in retaliation for exercising their basic trial rights.

139. Defendant maintains and executes an official, blanket policy, practice, or custom of making plea offers in the EDCs harsher in response to people exercising their right to a preliminary hearing and/or trial (hereafter, “Retaliation Policy”).

140. Defendant expresses the Retaliation Policy on EDC plea offer forms, in emails with defense attorneys, and on the record during status conferences.

141. Defendant routinely carries out the Retaliation Policy, punishing people for exercising their basic trial rights.

142. The Retaliation Policy is actually vindictive because the Retaliation Policy’s existence and execution is direct evidence of an expressed hostility or threat to criminal defendants in EDC for exercising their statutory, procedural, or constitutional rights.

143. The Retaliation Policy is also presumptively vindictive because it poses a realistic likelihood of vindictiveness.

144. Through its Retaliation Policy, Defendant has caused and will continue to cause the violation of Plaintiffs’ and putative class members’ Fourteenth Amendment rights.

145. Through its Retaliation Policy, Defendant has caused and will continue to cause irreparable harm to Plaintiffs and putative class members.

Claim Two

Excessive Burden on the Right to Trial

in Violation of the Sixth Amendment to the United States Constitution

146. The government may not promulgate a blanket criminal policy that contains higher penalties for asserting trial rights and lower penalties for pleading guilty.

147. Whatever the government's goals in creating such a policy, those goals cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. If a criminal policy has "no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them," the Supreme Court has made clear that the policy is "patently unconstitutional."

148. Defendant maintains and executes such a policy: the Retaliation Policy.

149. Defendant admits that the purpose and intended effect of the Retaliation Policy is to penalize those who choose to exercise their trial rights.

150. Therefore, whatever Defendant's stated goals for the Retaliation Policy, it is patently unconstitutional. Specifically, it violates the Sixth Amendment.

151. Through its Retaliation Policy, Defendant has caused and will continue to cause the violation of Plaintiffs' and putative class members' Sixth Amendment rights.

152. Through its Retaliation Policy, Defendant has caused and will continue to cause irreparable harm to Plaintiffs and putative class members.

Claim Three

Deprivation of a State-Created Liberty Interest

in Violation of the Fourteenth Amendment to the United States Constitution

153. The Due Process Clause of the Fourteenth Amendment prohibits the government from depriving individuals of "life, liberty, or property" without due process of the law. Liberty interests protected by the Fourteenth Amendment include interests that are created by state law.

154. Article 2, section 30, of the Arizona State Constitution mandates that a person who is prosecuted by information for a felony is entitled to a preliminary hearing.

1 164. As to both the Pre-Waiver Class and the Post-Waiver Class, issue a
 2 permanent injunction prohibiting Defendant from making or threatening to make plea
 3 offers in the EDCs harsher in response to people exercising their right to a preliminary
 4 hearing and/or trial;

5 165. As to the Post-Waiver Class, issue a permanent injunction prohibiting
 6 Defendant from (1) asserting the preliminary-hearing waiver or plea agreement itself as a
 7 basis for opposing any class member's attempt to withdraw their preliminary-hearing
 8 waiver or plea because it was coerced by Defendant's policy, practice, or custom of making
 9 or threatening to make plea offers in the EDCs harsher in response to people exercising
 10 their right to a preliminary hearing and/or trial, and (2) retaliating against any class member
 11 for seeking or winning such a withdrawal;

12 166. Grant Plaintiffs their reasonable attorneys' fees and expenses pursuant to 28
 13 U.S.C. § 2412, 42 U.S.C. §§ 1988, and other applicable law; and

14 167. Grant all further relief as this Court deems just and proper.

15 DATED: September 8, 2021

Respectfully submitted,

16 /s/ Jared G. Keenan

17 Jared G. Keenan (027068)

18 Victoria Lopez (330042)

American Civil Liberties Union

Foundation of Arizona

3707 North 7th Street, Suite 235

Phoenix, Arizona 85014

Telephone: (602) 650-1854

19 jkeenanacluaz.org

20 vlopez@acluaz.org

21 Somil Trivedi (*pro hac vice*)

22 American Civil Liberties Union

Foundation

23 Criminal Law Reform Project

915 15th St., NW

24 Washington, DC 20005

25 Telephone: (202) 715-0802

26 strivedi@aclu.org

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2021 I electronically transmitted the attached document to the Clerk's office using the CM/ECF system for filing. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Jared G. Keenan
Jared G. Keenan