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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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STATE OF ARIZONA ex rel.,  
WILLIAM G. MONTGOMERY, Maricopa County Attorney,  
*Petitioner,*

*v.*

THE HONORABLE JOSE PADILLA, Judge of the SUPERIOR COURT OF  
THE STATE OF ARIZONA, in and for the County of MARICOPA,  
*Respondent Judge,*

MANUEL ALEJANDRO MENDOZA ARMENTA,  
*Real Party in Interest.*

No. 1 CA-SA 17-0237  
FILED 10-24-2017

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Petition for Special Action from the Superior Court in Maricopa County  
No. CR 2016-140663-001 DT  
The Honorable Jose Padilla, Judge

**JURISDICTION ACCEPTED; RELIEF GRANTED**

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COUNSEL

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By Daniel Strange  
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By Brent E. Graham  
*Co-Counsel for Real Party in Interest*

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*Co-Counsel for Real Party in Interest*

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## MEMORANDUM DECISION

Presiding Judge Paul J. McMurdie delivered the decision of the Court, in which Judge Peter B. Swann and Judge Kent E. Cattani joined.

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**M c M U R D I E**, Judge:

¶1 The State seeks special action relief from the superior court's order granting Manuel Alejandro Mendoza Armenta's ("Armenta") motion to produce discovery. For the following reasons, we accept jurisdiction, grant relief, and remand for further proceedings.

### FACTS AND PROCEDURAL BACKGROUND

¶2 On August 23, 2016, Armenta allegedly set up a heroin deal with a confidential informant ("Informant") for the sale of approximately 2.3 kilos of heroin. The Gilbert Police Department arrested Armenta and a co-defendant upon Informant's bust signal. Armenta asserted mere presence and mistake of fact as his defense. As Informant was the only eye witness to the drug transaction, he is a key witness in the prosecution of Armenta.

¶3 In February 2017, Armenta moved to compel discovery of *all* cooperation agreements and confidential informant packets related to Informant, in addition to the Gilbert Police Department packet already produced by the State. Armenta sought discovery of confidential informant packets from Immigration and Customs Enforcement ("ICE"), the Mesa

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Police Department, and Informant's S-Visa application.<sup>1</sup> The S-Visa request was later amended to a request for Informant's parole card, as Informant did not have an S-Visa. The court granted Armenta's motion in April 2017, and the State partially complied with the order by producing the parole card along with the Mesa Police Department's confidential informant packet.

¶4 At a subsequent hearing in June, the court ordered the State to obtain a release from Informant regarding Informant's ICE packet, as well as his "SB" file, "A" file, and immigration packet. Informant refused to consent to the release of those documents. Nonetheless, the State contacted the ICE agent overseeing Informant's cooperation with ICE ("handler") and requested ICE produce the information. The Informant's handler advised the State that although the final decision rested with ICE headquarters, he would not release Informant's confidential materials even if Informant consented to the release. On July 27, 2017, the State received a letter from the Office of the Chief Counsel for ICE in Arizona stating the documents would not be released.

¶5 In August 2017, despite knowing that ICE refused to provide the information to the State with or without Informant's consent to the release, the court ordered the State to provide the information to the defense within 30 days or face sanctions. As the State was unable to comply, the court excluded the Informant from testifying as a witness at trial because the materials "could be in [Informant's] possession," and "he's not cooperating with this Court." The State filed this special action seeking review of the superior court's ruling.

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<sup>1</sup> After his initial request, Armenta expanded his motion to include Informant's: (1) cooperation agreement with Homeland Security Investigations [the investigative arm of the Department of Homeland Security]; (2) immigration file, including a copy of the file for each family member who received legal status in the United States as a result of Informant's work; (3) cooperation agreement with any other law enforcement agency; (4) receipts for monies paid to Informant by each of the law enforcement agencies; and (5) signed release or consent necessary to effectuate Armenta's discovery requests to the agencies.

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**SPECIAL ACTION JURISDICTION**

¶6 Special action jurisdiction is discretionary, but appropriate when no “equally plain, speedy, and adequate remedy by appeal” exists. Ariz. R.P. Spec. Act. 1(a). A court order regarding discovery issues may be considered by special action because a discovery order is not appealable. *Green v. Nygaard*, 213 Ariz. 460, 462, ¶ 6 (App. 2006). Precluding the State from calling the key witness cannot be remedied by appeal. *See State v. Bejarano*, 219 Ariz. 518, 520, ¶ 4 (App. 2008) (a superior court’s order for sanctions precluding the State’s witness from testifying was not an appealable order).

¶7 Thus, in the exercise of our discretion, we accept special action jurisdiction pursuant to the Arizona Revised Statutes § 12-120.21(A)(4) and Arizona Rule of Procedure for Special Action 1(a).

**DISCUSSION**

¶8 The State contends it fully complied with the disclosures ordered to the extent it could do so. The State asserts the superior court abused its discretion by ruling the Informant could possess the additional requested materials, a ruling the State argues is not supported by the record.

¶9 We review rulings on disclosure and discovery matters for abuse of discretion, *Marquez v. Ortega*, 231 Ariz. 437, 441, ¶ 14 (App. 2013), which we recognize when no facts support the decision or when the court misapplied the law. *Cervantes v. Cates*, 206 Ariz. 178, 181, ¶ 11 (App. 2003), *superseded on other grounds by* Ariz. R. Crim. P. 15(1)(j).

¶10 The State’s mandatory disclosure obligations set forth in Arizona Rule of Criminal Procedure 15.1(f)(3) extend to “material and information in the possession or control of . . . [a]ny other person who has participated in the investigation or evaluation of the case and who [i]s under the prosecutor’s direction or control.” Here, the superior court ordered Informant to disclose confidential materials because it “could be in his possession.” The record, however, does not reflect any evidence the Informant possessed the confidential materials. Because the court’s order was not based in evidence, the court abused its discretion. *See Cervantes*, 206 Ariz. at 181, ¶ 11.

¶11 The State’s mandatory disclosure obligations of Rule 15.1(f)(2) also include “material and information in the possession or control of . . . [a]ny law enforcement agency which has participated in the investigation

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of the case and that is under the prosecutor's direction or control . . . ." A federal agency is not under the State's direction or control. *See State v. Forde*, 233 Ariz. 543, 558, ¶ 41 (2014) (the FBI is not an agency within the State prosecutor's control); *State v. Briggs*, 112 Ariz. 379, 383 (1975) (the superior court properly ruled the State prosecution was not required to procure materials from the FBI).

¶12 In addition to the already-produced Gilbert Police Department packet, the parole card, and the Mesa Police Department packet, the court ordered the State to procure Informant's ICE confidential informant packet, "SB" file, "A" file, and immigration packet from ICE, an agency operating under the Department of Homeland Security ("DHS").<sup>2</sup> According to DHS's federal regulations, DHS has certain discretion in providing the requested materials,<sup>3</sup> even with respect to orders of state judicial authority,<sup>4</sup> and DHS refused to comply with the superior court orders. Informant's consent to the release, if given, was irrelevant to DHS's decision to withhold the confidential information. Because the superior court subsequently ordered the State to produce the now federally protected materials, and because ICE was not under the control of the State, the court's order conflicted with federal regulation. *See Hernandez-Gomez v. Volkswagen of Am., Inc.*, 201 Ariz. 141, 142-43, ¶ 3 (App. 2001) ("Federal law preempts state law under the Supremacy Clause when . . . state law actually conflicts with federal law . . . [which] occurs when it is impossible to comply

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<sup>2</sup> A list of major operational components of the DHS is available at <https://www.dhs.gov/dhs-component-websites>.

<sup>3</sup> A DHS officer may be authorized to provide testimony or documents if: (1) the federal agency involved has no objection; (2) the information sought is appropriate under the rules of procedure governing the case and under the relevant substantive law concerning privilege; and (3) the testimony sought would not violate a statute or regulation, reveal classified information, confidential sources, or trade secrets, or otherwise interfere with law enforcement investigations or proceedings. *See* 6 C.F.R. § 5.48.

<sup>4</sup> Section 5.41 sets forth procedures "to be followed with respect to . . . orders . . . of . . . state judicial . . . authority . . . or in response to requests for . . . document production . . . including pursuant to . . . applicable state [procedural] rules . . . of any material contained in the files of the Department . . . or any information acquired while the subject of the demand or request is or was employed by the Department." 6 C.F.R. § 5.41(a)(2).

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with both state and federal law . . .”). Therefore, the superior court abused its discretion when it disregarded the conflict between its order compelling production and ICE’s renouncement of it, making it impossible for the State to comply. See *State v. Turner*, 175 Ariz. 256, 259 (App. 1993) (the court was required to consider whether state statute conflicted with federal regulations, making it impossible to comply with both sets of requirements).

¶13 Armenta argues, however, the State was required to procure the ICE confidential materials, because it has a “constitutional and ethical obligation to disclose material exculpatory evidence” under *Brady v. Maryland*, 373 U.S. 83 (1963). Under *Brady*, “due process is violated when the prosecution suppresses, after a defense request to disclose, evidence favorable to the defendant which would have affected the jury’s determination of guilt.” *State v. Jessen*, 130 Ariz. 1, 4 (1981); see also *Canion v. Cole*, 210 Ariz. 598, 599, ¶ 8 (2005) (*Brady* requires the State to disclose “clearly exculpatory material”). Impeachment evidence is exculpatory evidence within the meaning of *Brady*. See *Giglio v. United States*, 405 U.S. 150, 154 (1972) (“When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule.”) (internal quotation omitted); *United States v. Bagley*, 473 U.S. 667, 676 (1985) (“Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule.”).

¶14 However, the mandatory disclosure required by Rule 15.1 “is broader than the requirements of *Brady*.” *Jessen*, 130 Ariz. at 4 (emphasis added). And “neither Rule 15.1 nor *Brady* require[s] the state to disclose evidence outside its possession or control.” *Forde*, 233 Ariz. at 558, ¶ 41 (the FBI is not an agency within the State prosecutor’s control and the superior court properly denied defendant’s motion for disclosure of FBI “source files”). The court thus abused its discretion when it required the State to

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provide Armenta with Informant's ICE packet, "SB" file, "A" file, and ICE immigration packet, materials outside of the State's possession or control.<sup>5</sup>

CONCLUSION

¶15 We accept jurisdiction of the petition for special action, and grant relief. With this decision, we lift the stay previously entered by this court. We vacate the superior court's order precluding Informant from testifying at trial, as the State complied with its disclosure obligations, and remand for further proceedings consistent with this decision.



AMY M. WOOD • Clerk of the Court  
FILED: AA

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<sup>5</sup> Armenta supports his position by arguing *United States v. Blanco*, 392 F.3d 382, 385 (9th Cir. 2004) is dispositive. Although the federal government wrongly suppressed impeachment information about a confidential informant in *Blanco*, the defendant was prosecuted in federal court for violation of federal statutes, and the informant was employed only by a federal agency, the Drug Enforcement Administration ("DEA"). *See id.* The federal court in *Blanco* held that one federal agency (DEA) failed to disclose impeachment material available to another federal agency, the Immigration and Naturalization Service ("INS"), even though the DEA "was well aware of [informant's] immigration status and the special treatment he was receiving from the INS in return for his work for the DEA." *Id.* at 392. Because *Blanco* does not address issues related to cooperation between state and federal law enforcement agencies, it is not controlling here.