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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

) No. R-21-0030

)

) **COMMENT OF ARIZONA**

Petition to Amend Rule 17.4, Rules of
Criminal Procedure.

) **ATTORNEYS FOR CRIMINAL**

) **JUSTICE OPPOSING PETITION**

)

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) hereby submits the following comment to the above-referenced petition.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public

awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ opposes the petition to amend Arizona Rule of Criminal Procedure 17.4 for several reasons. First, like a prior petition to repeal preemptory changes of judge, this petition asserts necessity based on the COVID-19 pandemic. Second, plea deadlines never work because inevitably they are arbitrarily imposed. Third, the petition exaggerates the impact on rural cases, but even in such cases where attorneys' dilatory conduct results in taxing the court system, the court can impose other sanctions and consequences. Finally, what is notably absent from the brief petition is a similar request to require civil cases to settle in advance of trial.

AACJ has reviewed the comment filed by the Arizona Prosecuting Attorneys' Advisory Council (APAAC). AACJ and APAAC are aligned in their opposition to this petition, for many of the same reasons. Specifically, AACJ fully agrees with APAAC's discussion of *Hare v. Superior Court*, 133 Ariz. 540 (1982), *Espinoza v. Martin*, 182 Ariz. 145 (1995), and *State v. Darelli*, 205 Ariz. 458 (App. 2003), and for that reason AACJ adopts APAAC's arguments and will avoid unnecessary repetition in this comment. It is apparent that APAAC and AACJ share the view that the petition is the wrong answer to any potential issue with delays in negotiating plea agreements. The right answer can only be achieved with stakeholder meetings and collecting evidence—something absent from this petition.

I. COVID-19 has nothing to do with plea deadlines.

Earlier this year, the Committee of Presiding Judges sought to repeal Arizona Rule of Criminal Procedure 10.2 and its counterpart in other sets of procedural rules, pointing to the COVID-19 pandemic as creating the need for such a change. That rule change petition provided no support for its claim. In similar fashion, this petition seeks to authorize plea deadlines in criminal cases because of the pandemic. Notably, in the case of both petitions, there has been no change to the procedural law (whether by case decision or by rule change) for two decades. Thus, using the pandemic to justify such petitions for permanent change is reminiscent of the Winston Churchill quote: “never let a good crisis go to waste.”

If anything, the issue of plea deadlines was sidelined by the COVID-19 pandemic. The Pima County Superior Court did not conduct a single felony jury trial for well over a year. Most if not all other courthouses similarly came to a screeching halt, having conducted only a smattering of trials during the pandemic. Trials are now starting up again but not yet at pre-pandemic levels.

If the petition was inspired by a concern for further spread of COVID-19 by bringing large numbers of jurors into a courthouse unnecessarily, then a plea deadline would accomplish the opposite of its stated goal. All of those people who could have been sent home would be compelled to sit in close proximity not only for

jury selection but for the trial, due to no other cause but a judge's adherence to a plea deadline rule. Thus, near- and mid-trial pleas actually reduce COVID-19 exposure.

This Court took drastic action to manage the crisis by suspending speedy trial rights under Rule 8 and the right to a peremptory change of judge under Rule 10.2, as well as limiting the number of peremptory jury strikes to two per side. This Court has now allowed the first two suspensions to expire and has eliminated peremptory jury strikes for wholly unrelated reasons. While it has empowered presiding judges to establish local procedures to ensure the safety of everyone in the courthouse, this Court has been quite clear that its response to the pandemic has been temporary, and in no way has it sought to turn these temporary measures as a beachhead toward permanent changes in the procedural rules.

COVID-19 provides no basis for changing a rule that has served us well for several decades. If for no other reason, the petition should be denied on this ground.

II. Plea deadlines are arbitrary and inevitably will be abused.

The reason for wanting a plea deadline is understandable. Many who have participated in a plea agreement being accepted as a hallway full of jurors wait to enter the courtroom have felt anger or remorse or empathy for those dozens of citizens who then leave the courthouse feeling like the system just wasted their day. Everyone agrees that this is a result that all parties should work to avoid.

With that said, a plea deadlines is a cure worse than the disease. Plea deadlines are arbitrary by their very nature because they not only fail but prohibit taking into account the circumstances of any particular case. Moreover, it is noteworthy that the petition did not suggest that any plea deadline should be limited to plea agreements negotiated on the same day as trial, as was the case in *Darelli*, 205 Ariz. at 459-60 ¶¶ 3-4.

The circumstances presented in *State v. Aragon*, 221 Ariz. 88 (App. 2009), are instructive here. In *Aragon*, the defendant sought to substitute retained counsel for an appointed attorney less than one week prior to trial. Despite the fact that it was a first trial date, it was a driving under the influence case where all witnesses were associated with law enforcement, and the defendant invoked his Sixth Amendment right to counsel of choice, the trial court refused to allow for a continuance because of an “unreasoning and arbitrary” adherence to Rule 8 deadlines. *Id.* at 91 ¶ 9. Although *Aragon* involved Rule 8, there is no reason to believe that judges would enforce a plea deadline any differently.

Imposing a plea deadline would do nothing to avoid wasting the jurors’ and the court’s time. In fact, it would exacerbate the problem. Take, for example, the “60 or 70 people being assembled” for the trial in *Darelli*. 205 Ariz. at 460 ¶ 4. If the case pled out before they had a chance to go through the jury selection process, it is almost certain that they would feel put out. But what if those 60-70 people sat around

for several extra hours because the trial judge enforced a plea deadline, and then 12 plus alternates sat on a week-long trial, and then were told after they rendered their verdict that no one wanted this trial to happen except for the judge? It is equally certain that those jurors would feel even more put out. This Court should not countenance such a monumental waste of jurors' time (not to mention court and attorney resources) just to prove a point to allegedly dilatory lawyers.

The petition suggests that day-of-trial pleas happen because defendants become incentivized only "once the defendant sees the reality of what is about to happen on the day of trial." Petition at 2. No doubt this has happened at some point, but it is not the norm. In almost all cases where the prosecution has prepared a strong case and the defendant did not accept a favorable plea agreement because of some unwise gamble, the prosecutor does not keep that offer open on the morning of trial. One of the purposes of plea bargaining is to save the State's resources, and the State understandably does not view such defense tactics favorably.

In most cases that plead out on the eve of trial, there was a changed circumstance that led either party or both parties to reassess their chances at trial. One reason is that discovery is often ongoing not just up to the trial date but even during trial. The petitioner is plainly wrong in making the claim that "[i]n virtually every criminal case, discovery, witness interviews, motions, etc., have all been accomplished and a plea bargain negotiated, before the summoning and screening

process begins.” Petition at 3. Rule 15.6 does not require discovery to be completed until 7 days prior to trial, but in many cases, discovery continues even while trial is ongoing. Judges often instruct the lawyers to interview a new witness during a lunch break or after recessing for the evening. If the parties are prohibited from negotiating a plea agreement under these circumstances, then they may need to request a mistrial in order to start anew (and then they can enter a plea agreement).

Of course, sometimes discovery issues occur because of dilatory conduct by one (or both) of the parties. But that is not the norm. Sometimes a victim testifies in a way that undermines important parts of the State’s case, and the parties could not know that would happen because the victim invoked the right to refuse a defense interview. Sometimes a subpoenaed witness does not appear for trial. Sometimes a new witness comes forward.

The courts must also be cognizant of the fact that all prosecutors and most defense attorneys carry extremely high caseloads and they must move these cases along rapid timetables. It is for this reason that Rule 16.1(b) sets a motions deadline at 20 days before trial. When a motion that is filed on the last day to be considered timely, and the responding party takes 10 days to file a response and the moving party takes 3 days to file a reply, *see* Rule 1.9(b), the trial court then must hear evidence and rule on the motion on the literal eve of trial. Such rulings often impact how the parties assess the case.

None of this is new; on the contrary, criminal practitioners have followed these procedures and practices for as long as the criminal procedure rules have been in place. Far from a systemic failure, AACJ's experience is that such eve-of-trial pleas occur only when necessary.

Regardless of the reason for a near- or mid-trial plea agreement, the fact would remain that both parties recognized that a plea agreement was preferable to a jury verdict and was in the interests of justice. The judge is rarely if ever more informed about the case than the parties as to the impact on the defendant, victim, and community. Allowing a judge to reject a plea based solely on a plea deadline would result in the kind of abuse of discretion discussed in *Hare*, *Espinoza*, and *Darelli* because the judge would necessarily be abdicating the duty to assess the case and the merits of the plea agreement in favor of an arbitrary deadline.

The petition is a solution in search of a problem, and it should be denied.

III. Courts should explore other options to deter attorneys from waiting until the eve of trial to begin plea negotiations.

The fact that *Espinoza* and *Darelli* were decided 26 years ago and 18 years ago respectively, and that there has been no attempt to authorize plea deadlines in this time, strongly suggests that there is not a global problem that needs to be addressed with a rule change. To the extent that there is an issue with a case here and there, presiding judges are not entirely powerless to do anything about this.

The petition cites the example of the Santa Cruz County jury commissioner calling all prospective jurors to test their English proficiency. Petition at 2 n.1. If those jurors, after being tested for English proficiency, no longer need to serve as jurors in the trial for which they were summoned, the jury commissioner still has a record of their English proficiency for the next time they are summoned. Most adults do not acquire or lose English language skills within a few years; a person who speaks English today will also speak English 10 years from now. In any event, the jury commissioner's wasted time in making 40-100 phone calls is a drop in the bucket compared to hauling those jurors into court and then making more than a dozen sit through a trial just because of an arbitrary plea deadline.

Instead, such issues may be better resolved through discussions at the management level. Every county has a presiding judge and an elected county attorney. Two-thirds of the counties have at least one public defender office. Most of these counties have periodically scheduled meetings so that leadership can address issues such as conserving scarce court resources. The stakeholders may implement procedures and take actions that can help avoid the distasteful result of a case pleading out on the eve of trial.

These stakeholders already are incentivized to avoid such a result. All county attorneys are elected, and all superior court judges are elected in 11 of 15 counties (including all 7 counties described in the petition as summoning jurors on a per-trial

basis). They answer to the voters. In those counties that have a public defender, legal defender, legal advocate, and/or office of public defense services director,¹ those officials serve at the pleasure of the county's board of supervisors. If there was evidence that any or all of these officials are poor stewards of taxpayer monies, the voters or the board of supervisors could remove those officials. If rural counties without a public defense agency need to hear the voice from the defense side, then those counties should ask AACJ for a representative to attend leadership meetings.

In individual cases where attorneys are dilatory, the court may hold a hearing, and where appropriate it may order sanctions. Even a public rebuke by the judge to the attorneys would sufficiently injure the attorneys' professional reputation; other than professional discipline, there is no greater consequence that an attorney may suffer.

The petition supplies no evidence that there actually is a problem in any county. What makes the petition fail, however, is the absence of any evidence that local courts have attempted to ameliorate any supposed problems. Those courts did not contact any prosecutors or defense lawyers prior to the filing of this petition to attempt to resolve any issues. Even if there is a problem somewhere, the appropriate tool is a scalpel, not a machete. This Court should reject the petition.

¹ Apache, Gila, Graham, Greenlee, and Santa Cruz Counties have no public defense office.

IV. The petition singles out criminal cases and does not request any similar rule change for civil cases, without supplying any basis for treating the two case types differently.

It is well known among criminal practitioners that civil cases have a far higher rate of settling on the eve of trial or during trial than do criminal cases. Yet, inexplicably, the petition does not request any similar rule change that would deny civil litigants the ability to negotiate a settlement on the eve of trial or during trial. The petition's claim that discovery is complete and motions are resolved weeks in advance of trial was incorrect as to criminal cases, but it is a true statement as to civil cases. Thus, one must wonder why the petition does not request any such change to the rules of civil procedure.

Of course, the civil rules do not require the terms of settlement to be presented directly to the trial judge, whereas a judge in a criminal case must review the plea agreement, conduct a colloquy with the defendant, and decide whether to accept or reject the plea based on the interests of justice. But that is an immaterial distinction. When there is a plea deadline, the court does not even look at the plea agreement before rejecting it as untimely. In civil cases, the plaintiff's motion to dismiss is accompanied by a proposed order that the judge must sign in order to dismiss the case. Thus, the court could conceivably refuse to dismiss a case that settles on the eve of trial or during trial.

AACJ is not suggesting that this is a good idea—far from it. AACJ only points out that there is no reason to treat civil cases differently from criminal cases when it comes to plea deadlines. Any change that applies to one case type should equally apply to the other.

One consequence of excluding civil cases from this rule change petition is reducing the awareness of the issue among communities and organizations that would weigh in on such a change. For example, R-21-0006, which sought to abrogate peremptory challenges of judge, drew opposition not only from AACJ and APAAC but also from American College of Trial Lawyers, American Academy of Matrimonial Lawyers, Southern Arizona Legal Aid, the Pima County Bar Association, and many individual practitioners.² Such organizations will likely not weigh in on the present petition because it only impacts criminal cases, thus depriving this Court of additional insights that AACJ and APAAC might overlook.

CONCLUSION

AACJ does not make light of the economic impact that a rural county may feel when jurors are summoned to court and then immediately told to go home. But

² In addition, Snell & Wilmer law firm filed a comment opposing the petition on behalf of the Arizona Medical Association, Arizona Osteopathic Medical Association, and the Arizona Chamber of Commerce and Industry.

not only does this petition fail to substantiate its hypothetical problem, but its proposed solution would actually make the problem worse. If rural counties are searching for ways to avoid unnecessary waste of jurors' time and court resources, then they should work with the local prosecutors and defense lawyers to find real solutions.

This Court should reject the petition.

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By /s/ David J. Euchner
David J. Euchner

This comment e-filed this date with the Court and electronically served to:

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