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ARIZONA SUPREME COURT

In the Matter of:

PETITION TO AMEND RULE 17.4,
RULES OF CRIMINAL
PROCEDURE

Supreme Court No. R-21-0030

Comment by the Directors of
Maricopa County Indigent Defense
Agencies

We are the directors of the three public defender agencies that handle most of the indigent felony cases filed in Maricopa County. We submit this comment in opposition to the proposal to amend Rule 17.4, Ariz.R.Crim.Pro. In our collective judgement, we do

not believe that a court-imposed plea negotiation deadline will mitigate COVID-19 exposure, reduce trial backlog, or lessen the inconvenience of jury service. To the contrary, these challenges will be further increased while also adversely impacting the clients and the involved parties.

I. Defense Attorneys have been Impacted by the Pandemic

The Petitioner describes the burdens placed upon certain superior courts exacerbated by the COVID-19 pandemic. We as defenders have experienced our own increased workloads and exposure to the virus. We have been on the front lines during the pandemic, often alone in court while judges and prosecutors appear virtually. We go to the jails, review discovery with our clients, and prepare them for the plea colloquy. We do this under plea expiration deadlines imposed by the prosecution. We are mindful of the warnings from prosecutors that offers presumptively become harsher if rejected.

The attorneys in our offices are also mindful of limited judicial resources. As a matter of professionalism and courtesy, we think it is appropriate to inform the court as soon as practicable that a case is going to settle. We, like the court, have limited means.

We appreciate the administrative costs associated with summoning and seating jurors, but we ask that the court, in turn, appreciate pressures imposed on us by the pandemic. There are complexities associated with plea bargaining that will not be lessened by a court-imposed deadline. There are also reasons that cases plead late in the process that will not be fixed by such a deadline.

II. Settlements at or Near the Trial Setting Happen for a Variety of Reasons

In Maricopa County, most cases settle long before the summoning and seating of a jury. A large number of cases are resolved by plea agreement in the early-disposition courts. Cases that are set for trial also usually result in a plea in accordance with a plea-offer expiration date set by the prosecution well in advance of trial. A much smaller number of cases remain unresolved by the time it is necessary to summons a jury.

There are a variety of reasons why a case does not resolve by plea agreement prior to a trial date. First, it is important to note that defendants in criminal cases do not control when a plea agreement is offered, what its terms are, or when it expires. Those are all decisions made by the prosecution. Arizona's harsh mandatory sentencing provisions, in conjunction with the State's near unilateral control over the terms and timing of plea agreements, means that a defendant's acceptance or rejection of a plea offer is often an extraordinarily high-stakes decision. A defendant may not be ready or able to enter into a plea agreement until certain disclosures have been made or specific factual and legal issues addressed through case investigation or litigation. A defendant may also reject a proffered agreement under its current terms but remain willing to resolve the case by plea agreement should the State be willing to modify those terms.

Some prosecutors may not become sufficiently familiar with weaknesses in their case until the eve of trial, at which time they may be willing to offer a plea resolution that

more closely aligns with terms acceptable to a defendant. Even the most diligent prosecutor may be faced with unexpected obstacles in the days leading up to trial, thus resulting in a plea offer that is more lenient than what they would have considered reasonable earlier in the proceedings. Events such as court rulings on motions, unexpectedly unavailable witnesses, recanting victims, or simply a reassessment of the evidence can impact, for both parties, the desire for plea negotiations on the eve of trial. A court-imposed deadline is unlikely to impact these occurrences. Eliminating the ability to settle a case on the eve of trial will rarely serve the interests of justice for either party. Such a rule would force trials that neither party desires.

III. A Court Imposed Plea Deadline Will Not Reduce Juror Numbers or Court Costs

If the remedy for failing to accept a plea by a date set by the court is to require a trial, then the goal of reducing juror numbers will fail. Jurors who would have been dismissed after a single day of service will be required to serve the guilt phase of the trial and the extra time necessary to prove or disprove aggravating circumstances. In a capital case, the three-phase trial may last for months. In other cases, days or weeks. Each day would mean more exposure to COVID-19. If convicted, the case would proceed through post-conviction and appellate phases, imposing more costs on the court, the prosecution, and the defense.

IV. It Is Unclear, and therefore Objectionable, as to What the Petitioner Seeks

The Petition requests adoption of a rule authorizing the presiding judge to approve a *deadline* for plea negotiations. The Appendix does not seem to impose a deadline. The

Appendix requires the parties to *advise* the court of a plea agreement sufficiently in advance of trial. Additionally, the Appendix does not outline the consequences of failing to meet any deadlines.

If the Petitioner is asking for remedy that precludes a plea agreement reached after a deadline, then we strenuously object to this addition to Rule 17.4. Declining to accept a plea because a deadline is breached is punitive. It forces an unfair result stemming from the court's impatience. It would be unreasonable for a judge to take away a plea, beneficial to one of our clients and reached after hard work, simply because a deadline had passed. If the state and the defense agree that probation is appropriate, the court should not insist on a trial that could result in mandatory prison based on a broken timeline. The lawyers are often better able to assess the appropriateness of a sentence than the sentencing judge. *Espinoza v. Martin*, 182 Ariz. 145, 151-52, 894 P.2d 688, 694-95 (1995) (Feldman, J. concurring). Lawyers "live and breathe" these cases for months. *Id.* at 152. Judges often have limited knowledge about the case and the backgrounds of our clients. *Id.* Judges should not deprive our clients of a negotiated plea because of unanticipated delay.

V. Solutions Other than Court-Imposed Deadlines Should be Considered

In Maricopa County, meetings attended by judges, defenders and prosecutors frequently occur. Judges inform counsel about the number of cases in trial, the number of courts available, and the number of cases that were removed from the trial list because of COVID, plea, mistrial, or dismissal. Judges monitor cases close to trial. Attorneys are

asked about COVID-19 issues, plea bargaining, and other contingencies that might jeopardize jury selection. For less complex cases, the court schedules two trial-ready cases per available courtroom and jury, recognizing that cases may fall out of the queue for any number of reasons including settlement and virus exposure. Although not a perfect solution, the adjustments have mitigated exposure and lessened the inconvenience associated with events that sideline trials.

Courts can also place greater emphasis on the parties' compliance with current procedural rules, such as Rule 15 disclosure deadlines, to better manage the strained resources. Where a written plea offer is extended after the State timely complied with its disclosure obligations, the parties are better equipped to engage in constructive efforts to negotiate resolution further in advance of the trial. Though last-minute resolutions will remain unavoidable in some cases, the shift lessens the congestion as cases near a trial date.

VI. Conclusion

For these reasons, the directors of the three indigent defense agencies of Maricopa County oppose the proposed amendment to Rule 17.4. A court-imposed plea agreement deadline would be unfair to our clients and would not address the problems it seeks to mitigate. There are better ways to ameliorate the harm caused by late plea agreements, and they start with good bench and bar communications.

DATED this 30th day of September 2021.

//s// Gary Kula

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//s// Rosemarie Pena-Lynch

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A copy of this comment has been submitted
This 30th day of Sept., 2021, to:

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By /s/