

Central Arizona National Lawyers Guild
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IN THE ARIZONA SUPREME COURT

**IN THE MATTER OF:
PETITION TO AMEND RULE
15.8(a) OF THE ARIZONA RULES
OF CRIMINAL PROCEDURE**

**Supreme Court No. R-22-0021
Comment of the Central Arizona
National Lawyers Guild**

Pursuant to Rule 28(e) of the Rules of the Supreme Court of Arizona, the Central Arizona National Lawyers Guild (Central AZ NLG) respectfully submits this comment concerning a proposed amendment to Rule 15.8(a) of the Arizona Rules of Criminal Procedure. This Court should consider the proposed amendment as an invitation to scrutinize whether early disposition courts operating outside the scope of Rule of Criminal Procedure should be permitted to exist. If the Court endorses the constitutionally questionable courts, this Court should adopt rules authorizing their use, including the proposed amendment to Rule 15.8(a).

I. Interests of the Central AZ NLG

The Central Arizona National Lawyers Guild (Central AZ NLG) is a local chapter of the National Lawyers Guild located in the greater Phoenix metropolitan area. The National Lawyers Guild is the nation's oldest and largest progressive bar association and was the first one in the US to be racially integrated. Our mission is to use law for the people, uniting lawyers, law students, legal workers, and jailhouse lawyers to function as an effective force in the service of the people by valuing human rights and the rights of ecosystems over property interests.

The Central AZ NLG submits this comment because the right to the effective assistance of counsel in criminal proceedings is a core constitutional right. Early disposition courts eviscerate this right. The proposal to amend Rule 15.8 is a valiant attempt to ameliorate the infirmities of early disposition courts. Even with the proposed reform, early disposition courts will still fail to live up to the constitutional safeguards required by the Sixth Amendment of the United States Constitution and Article 2, Section 24 of the Arizona Constitution. This Court should take independent action to ensure that the accused are not forced to make serious decisions concerning their liberty without the constitutional protections that the existing Rules of Criminal Procedure are designed to protect.

II. Early Disposition Courts Undermine Constitutional Rights and Elude the Procedural Safeguards Established by the Arizona Rule of Criminal Procedure.

The Central Arizona National Lawyers Guild urges this Court to scrutinize the operation of early disposition courts operating in some Arizona counties and find that the operation of such courts is inconsistent with the Arizona Rules of Criminal Procedure. This Court should require every criminal case in Arizona state courts to comply with the existing Rules of Criminal Procedure in order to ensure that the constitutional rights of the accused are protected.

A. Early Disposition Courts Conflict with the Arizona Rules of Criminal Procedure.

This Court, pursuant to its constitutional rule-making authority under Article 6, Section 5 of the Arizona Constitution, has promulgated the Arizona Rules of Criminal Procedure with the purpose of applying to “all criminal proceedings in Arizona.” Ariz. R. Crim. P. 1.1. Among the purposes of the Rules of Criminal Procedure is “to protect the fundamental rights of the individual while preserving the public welfare.” Ariz. R. Crim. P. 1.2.

Superior Courts are prohibited from issuing local rules which are “inconsistent with the Supreme Court’s rules.” *See Bergeron ex rel. Perez v. O’Neil*, 205 Ariz. 640, 649–50, ¶ 27 (App. 2003) (holding that inherent authority of Superior

Court did not authorize judge to require a party to explain reasoning in striking a judge under Ariz. Crim. P. 10.2).

As the Petitioner notes, although early disposition courts operate daily in four Arizona counties, “there is no local rule authorizing the practice.” Petition at 4.

Had one of the counties operating early disposition courts issued local rules to govern the practice, this Court would have been required to approve the local rule. *Bergeron* 205 Ariz. at 649–50, ¶ 27.

It is likely that if a county would submit proposed local rules authorizing early disposition courts to operate in Arizona, this Court would reject them because such practices are inconsistent with the Arizona Rules of Criminal Procedure.

In the few counties operating early disposition courts, the accused has no say in whether they are subjected to such proceedings. Rather, the decision to treat some individuals differently by subjecting them to early disposition courts is vested with the prosecuting agency. As the Petition notes, the proceedings are truncated and the options of the accused generally include the option to accept a plea offer on the truncated timeline or invoke the normal and established Rules of Criminal Procedure under a threat of harsher consequences. Petition at 6.

This truncated process occurs at a status conference invented by the counties operating early disposition courts. These status conferences appear nowhere in the Rules of Criminal Procedure. As written, this Court’s rules envision the accused

appearing at an initial appearance within 24 hours of arrest. Ariz. Crim. P. 4.1(a). The next hearing authorized by this Court is a preliminary hearing, which must occur within 10 days of the initial appearance if the accused is in custody or within 20 days if the accused is not in custody. Ariz. R. Crim. P. (a) (b).

Yet, it is within this timeframe, that between the initial appearance and preliminary hearings, which all early disposition courts operate. *See* Petition at 3-5.

It is evident that early disposition courts operate outside the Rules of Criminal Procedure. A closer examination compels the conclusion that early disposition courts also deprive the accused of constitutional rights which this Court's rules otherwise ensure are protected.

B. Early Disposition Courts Deprive the Accused of Prompt Probable Cause Hearings Conducted by Neutral Magistrates.

This Court's existing rules inherently reflect the importance of a second probable cause hearing conducted by a detached magistrate. Presumably, this Court chose not to conduct status conferences between the initial appearance and the preliminary hearing because of the constitutional safeguards afforded by prompt preliminary hearings.

Consider Justice Powell's explanation of the importance:

Under this practical compromise, a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify

dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. See R. Goldfarb, Ransom 32-91 (1965); L. Katz, Justice Is the Crime 51-62 (1972). Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty. See, e.g., 18 U.S.C. ss 3146(a)(2), (5). When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.

Gerstein v. Pugh, 420 U.S. 103, 113–14 (1975)

Early disposition courts prey on the anxieties of the accused by forcing them to quickly decide whether to resolve their case before the accused has ever learned whether the state's evidence against them is sufficient to bind them over to trial. Often, the accused is forced to choose between considering the plea offer given prior to the preliminary hearing and a timely preliminary hearing. Continuances occur routinely, and those unlucky defendants who are chosen for inclusion in early disposition courts in the few counties where they operate are forced to remain in custody longer than the 10 days required by Rule 5.1 (a).

The Joint Comment by the Directors of the Maricopa County Indigent Defense Agencies confirms that the accused are held in custody longer than envisioned by Rule 5.1 (a). *See* Joint Comment of the Directors of the Maricopa County Indigent Defense Agencies at 4-5. In practice, the accused are forced to delay preliminary hearings while also not benefitting from the protections of the speedy trial rights in Rule 8, discovery rights in Rule 15, and the ability to challenge the whether the state has lawfully obtained the evidence to be used under Rule 16. *Id.*

Early disposition courts are inconsistent with Rules 4 and 5 of the Arizona Rules of Criminal Procedure.

C. Early Disposition Courts Rely on the Coercive Effect of Pretrial Detention to Procure Guilty Pleas.

Central AZ NLG maintains that even the supposed “well intentioned” creation of early disposition courts to “provide incentives to early pleas and earlier treatment” relied upon the use of pretrial incarceration as leverage to force the accused into plea agreements at such an early stage of the proceedings. *Id.* at 2-3. This purpose speaks to the need for bail reform. Central AZ NLG supports a separate petition, R-21-0051, which will ensure that courts are not holding individuals in custody that should be released, including those accused with drug possession under 1996’s Voter Proposition 200.

It is widely known that pretrial detention is a coercive factor which puts unfair pressure of the accused to quickly enter into plea agreements with the government. *See* Samuel R. Wiseman, *Bail and Mass Incarceration*, 53 Ga. L. Rev. 235, 240–41 (2018). “Released defendants do not face the same pressures as detained defendants, and they are in a better position to resist unfavorable plea offers, file motions to suppress, seek dismissal, and, in rare cases, proceed to trial.” *Id.*

Where courts are created to operate out of this Court’s timelines for the purposes of incentivizing detained individuals to enter into plea agreements in cases where probation would be mandatory, this Court should be given a formal opportunity to decide whether such practices are consistent with this Court’s rules and constitutions of the State of Arizona and the United States Constitution.

D. Early Disposition Courts Deprive the Accused of the Effective Assistance of Counsel.

The accused have a constitutional right to the effective assistance of counsel during plea negotiations. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). Although the state has no obligation to extend plea offers or otherwise engage in plea negotiations with the accused, “when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution.” *Id.* at 168 (internal citation omitted).

In order to be effective, “counsel has a duty to engage in adequate investigation of possible defenses.” *State v. Denz*, 232 Ariz. 441, 445, ¶ 11 (App. 2013). The only exception to this duty is when counsel can make a “reasoned conclusion that [additional investigation] would not yield useful information.” *Id.*

The truncated timelines dictated by early disposition courts ensures that the accused are denied effective assistance of counsel. Attorneys appearing in early disposition courts often handle enormous caseloads. They lack time to interview witnesses, visit crime scenes, or develop evidence which could acquit the accused at trial. Rather than making reasoned decisions not to conduct additional investigations, counsel practicing in early disposition courts often conduct no investigation at all.

The result puts the accused in an untenable situation which is at odds with how this Court’s Rules of Criminal Procedure are designed to operate.

III. The Proposed Amendment to Rule 15.8 (a) is an Improvement to the Status Quo.

Petitioner notes the deficiencies of early disposition courts. Petition at 4-8. Petitioner also concedes that early disposition courts currently operate outside the rule of law established by this Court. Petition at 4. Yet, Petitioner asserts that early disposition courts could “still function” if Rule 15.8 (a) were amended to apply to all cases where the state has extended a plea offer. Petition at 10.

Central AZ NLG contests whether early disposition courts could ever function in a constitutional manner. However, Central AZ NLG recognizes that early disposition courts have been operating outside the Rules of Criminal Procedure for over 25 years in some jurisdictions.

It is true that the unlucky individuals subjected to the plea negotiations in early disposition courts do not enjoy the same protections offered under Rule 15.8 (a) as those whose cases proceed by process ordered by this Court. Those unlucky individuals are forced to make serious decisions concerning their cases without the benefit of disclosure that would otherwise be required by Rule 15.1(b) of the Arizona Rules of Criminal Procedure.

Therefore, Central AZ NLG supports the proposed amendment to Rule 15.8 offered by Petitioner to the extent that early disposition courts are permitted to continue to exist.

III. CONCLUSION

Central AZ NLG objects to the continued operation of early disposition courts in the few counties where they exist. However, the proposed amendment to Rule 15.8 (a) is a step in the right direction of ensuring the constitutional rights of the accused are protected in all criminal proceedings. Accordingly, Central AZ NLG supports the proposed amendment to Rule 15.8 of the Arizona Rules of Criminal Procedure.

In addition to approving the proposed amendment to Rule 15.8 (a), this Court should require the counties currently operating early disposition courts outside the confines of this Court's rules to submit proposed local rules so that this Court may exercise its constitutional rulemaking authority and decide whether to endorse a practice that has been openly operating in the shadows of this Court's rules for too long.

Respectfully submitted May 01, 2022.

CENTRAL ARIZONA NATIONAL LAWYERS GUILD

BY: /s/ Kevin D. Heade
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