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ARIZONA SUPREME COURT

PETITION TO AMEND ARIZONA RULE OF CRIMINAL PROCEDURE RULE 15.8(a)

R-22-0021_

COMMENT OF THE ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

The Arizona Prosecuting Attorneys' Advisory Council (APAAC) objects to the proposal of the Arizona Attorneys for Criminal Justice (AACJ) to expand Ariz.R.Crim.P. 15.8 to both felonies initiated in superior court and misdemeanor cases in limited-jurisdiction courts. The petition impinges upon the principle of separation of powers, ignores the reality of the criminal justice system, would have a practical result of leading to harsher plea offers across the board and increased pretrial incarceration for in-custody defendants, and ignores prosecutors' already existing ongoing disclosure obligations.

The majority of the petition focuses on felony cases, and the AACJ attempts to frame the practice of trying to resolve cases pre-arraignment as coercive, stating that prosecutors "threaten[] defendants with a harsher plea or no plea at all if the [sic] move past the early disposition courts." Petition, Page 7. In reality, the offices that make

use of an early disposition court in Arizona have made a policy decision to make more lenient plea offers to those defendants who accept responsibility for their actions prior to arraignment, when the bulk of the disclosure rules are triggered. Those defendants who are willing to take early responsibility for their actions receive a benefit, while the public benefits by the justice system's resources being focused on more serious cases, or those unlikely to resolve by plea. The AACJ wants to have their cake and eat it too. They would like to retain the more lenient plea offers afforded to defendants in an early disposition court, while simultaneously being afforded full disclosure rights.

The United States Supreme Court considered a similar argument in *United States v. Ruiz*, 536 U.S. 622 (2002). The defendant in that case entered a federal "fast track" plea bargain that offered considerable leniency in exchange for the defendant waiving indictment, trial and an appeal. The defendant then withdrew from the agreement, refusing to agree to waive the right to receive impeachment material. The Supreme Court noted that "this Court has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor." *Id.* at 630 (citations omitted). The Court noted that mandating full disclosure during a "fast track" process:

> [C]ould require the Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-

> bargaining process of its main resource-saving advantages. Or it could lead the Government instead to abandon its heavy reliance upon plea bargaining in a vast number—90% or more—of federal criminal cases.

Id. at 632. The *Ruiz* Court concluded that the, "Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." *Id.* at 633.

Regarding limited-jurisdiction courts, the AACJ makes the sweeping assertion that criminal cases in lower courts are procedurally similar to those in superior courts, and therefore the same rules should apply. The petition fails to recognize the differences between the nature of the cases such as the applicable statute of limitations and how the sentence exposure impacts plea negotiations. However, the issues with the proposal are equally applicable to limited-jurisdiction and superior courts.

The AACJ proposal disregards the reality of present-day disclosure faced in both limited jurisdiction and superior courts. They state that "[r]equests for additional evidence, such as interview recordings, 911 calls, or bodyworn camera footage are refused." Petition, Page 4. The "refusal" is not borne of malice, or a desire to keep information from the defense. Digital evidence is now ubiquitous. Even a simple drug possession case could have dozens of body worn camera videos, consisting of hours upon hours of footage. Disclosing such digital evidence is not as simple as just creating a copy and sending to the defense. For example, A.R.S. § 13-4434 requires that any victim's identifying and locating information be redacted prior to disclosure. Failure

to do so opens the prosecuting agency to damages pursuant to A.R.S. § 13-4437. These statutes mean that somebody needs to review every minute of body worn camera footage in a victim case to ensure that no identifying information is contained therein.

Even in non-victim cases, all body worn camera video must be reviewed before disclosure. A.R.S. § 41-1750(G) precludes the release of criminal history information, even in discovery under the criminal rules. As a result, prosecutors or their staff must review all body worn camera video to make sure that no criminal history information is displayed on a terminal in either an officer's vehicle or at a workstation. This information is routinely shown on multiple body worn cameras during the booking process.

Several prosecution offices have tried solutions to make faster disclosure while still complying with the limitations imposed by A.R.S. § 13-4434 and A.R.S. § 41-1750(G). One office made disclosure to the defense attorney under a protective order to not share identifying information with the defendant. That practice stopped when the legislature amended A.R.S. § 13-4434 in order to specifically prohibit that practice. Another office applies a light blur to all body worn camera video disclosed to prevent unlawful disclosure pursuant to A.R.S. § 41-1750(G)[1]. There is no rule, however, that allows this, and it is possible that this practice could invoke the imposition of sanctions

[1] The Maricopa County Attorney's Office is conducting a pilot project to do the same at pre-arraignment courts. However, even if the pilot is successful, such a practice would not strictly comply with Rule 15.2, and under the proposed change to Rule 15.8, disclosure of an altered video would most likely lead to a finding that the State had not complied with its full disclosure obligations, allowing the imposition of sanctions under Rule 15.8(b).

under Rule 15.8(b). The agency that applies the light blur gives a non-blurred, redacted version upon request in order to comply with the rules.

Disclosure in the modern era, then, is onerous, requiring hours of review to disclose almost any form of digital evidence. The proposed amendment would, in many cases, create a nearly impossible, narrow time frame for defendants to resolve their case quickly. This not only hurts those defendants wishing to begin their rehabilitative efforts on probation but adds to the congestion and backlog already plaguing the judicial system. The positive impact for both defendants and the criminal justice system of a structure which allows for the opportunity to resolve cases quickly can be seen in both municipal and superior courts across the state. For example, of the 3475 defendants who had initial appearance hearings in the Phoenix Municipal Court between October 2021 and March 2022, 840 cases resulted in pleas or diversion. Additionally, during that same timeframe 230 of the 531 defendants choose to enter a plea at arraignment. Similarly, of the 1740 cases charged by the Pinal County Attorney's Office between July 1, 2021, and April 1, 2022, 609 cases pled and 777 were sentenced in early disposition court. Further, the Yavapai County early disposition court heard 1969 cases in 2021, and resolved 699, or 64%.

Focusing on felony cases in superior court, the AACJ states "the only option in these cases is often to reject the initial plea offer in order to move and [sic] the case out of the early disposition courts and obtain sufficient evidence to evaluate the case and

any subsequent plea offer." Petition, Page 6. This statement is not supported by the facts. For example, a review of cases from the Maricopa County Attorney's Office showed that of the cases that left early disposition court (EDC) since July 1, 2021[2], 73% were resolved, with only 27% getting set for trial[3]. When considering these numbers, one must also keep in mind that during that timeframe grand jury panels in Maricopa County were greatly reduced, meaning cases that normally would not have been sent to EDC were sent there, undoubtedly leading to a lower resolution rate than would have otherwise occurred. Yet, since July 1, 2021, the EDC in Maricopa County saw 6,395 cases reach a resolution in EDC[4]. That is 6,395 felony cases that did not progress through the full criminal court system – a system that is already stretched thin.

While the AACJ only proposes to delete 10 words from Rule 15.8, the effect of that deletion would be to completely change the nature of Rule 15.1 as well. The new wording of Rule 15.8(a) would require the State to make full disclosure of all material listed in Rule 15.1(b) in its possession (and by extension, in the possession of law enforcement), at the time a plea offer is made. Rule 15.1(b) is a fairly exhaustive list of disclosure and covers the vast majority of discoverable material. Rule 15.1(c)(1) gives the State 30 days after arraignment to make such disclosures.

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[2] "Left EDC" combines cases that were dismissed, resolved by plea or diversion with the cases that had a preliminary hearing and those where the preliminary hearing was waived by the defense.

[3] This calculation was done by adding cases that had a preliminary hearing and those where the preliminary hearing was waived by the defense, and dividing by the total number of cases that "left EDC." Because some cases are sent to grand jury when the defense rejects a plea agreement, the actual number is probably closer to 30% of cases in EDC in the relevant timeframe were arraigned and set for trial.

[4] This includes 814 dismissals, 91 misdemeanor pleas, 5,432 felony pleas and 58 defendants entering diversion.

The pre-arraignment timeframe, though, is much shorter than that in Rule 15.1. An in-custody defendant in superior court must have a preliminary hearing within 10 days of the initial appearance. Ariz.R.Crim.P. 5.1. Given the time to receive and review a case, this may be only seven days after the case has been charged. An out of custody defendant must have a preliminary hearing within 20 days of their initial appearance. *Id.* If the State wished to make a plea offer pre-arraignment under the proposed Rule 15.8(a), they would have far less time to make *full* disclosure than they would if the case proceeded by way of indictment. It would be irresponsible for any prosecution office to agree to shorten the length of time to make disclosure in order to make a plea offer that it could not, by rule, put a deadline on.

An examination of Rule 15.8(b) illustrates how AACJ's proposal is incompatible with Arizona's thoughtfully constructed system of disclosure rules. Rule 15.8(b), left unchanged by the AACJ proposal, allows sanctions if the State does not make disclosures more than 30 days before the offer expires. Therefore, it would be impossible for the State to comply with Rule 15.8 if it made an offer that expired in an early disposition court. Consider a defendant who commits a crime on January 1st, and has their initial appearance the same day. Assume they are released on their own recognizance with a preliminary hearing set for January 21st, the 20th day. Also assume the State wishes to make a plea offer to resolve the case that expires at the preliminary hearing. Under Rule 15.8(b), the State would be subject to sanctions unless it made

complete disclosure on December 22nd, more than a week *before* the crime occurred. If the defendant remained in custody, disclosure would have to be made almost three weeks *before* the defendant committed the crime in order to avoid sanctions.

On its face, the AAJC proposal posits a pre-arraignment court where defendants have full discovery before they have to make a decision on whether to accept a plea agreement offered by the State. As the above situation demonstrates, though, that court cannot exist. Faced with a disclosure deadline that we could not possibly meet, and the likelihood of sanctions, including the preclusion of evidence under Rule 15.8(d), prosecutors would likely stop making more lenient plea offers pre-arraignment. Since those offers could not be withdrawn there would be no incentive to try to resolve the case early. As a result, since the offer would have to remain open well after arraignment, offers would be akin to a trial offer, rather than making a more lenient offer early in an attempt to resolve the case. Faced with no likelihood of resolving a case early, some prosecutors may choose to make no offer prior to arraignment so as to be able to make disclosure within the normal timeframe instead of the expedited timeframe required under the proposed rule. Others will just send cases through the grand jury.

The implications for defendants under these scenarios are that they will not be able to quickly resolve their cases. Currently, in EDC in Maricopa County, an in-custody defendant has a status conference within 7 days of their initial appearance.

They get a plea offer and a chance to resolve their case, most of the time for a more lenient sentence than they would receive in an offer post-arraignment. If they do not receive a plea offer at EDC, or if their case goes through the grand jury, their first substantive court date is an Initial Pretrial Conference about 45 days after arraignment. That defendant, then, has to wait almost an additional two months just for the chance to enter into a plea agreement.

As the United States Supreme Court noted in *Ruiz, supra*, severe limitation of a "fast track" program would deprive "the plea-bargaining process of its main resource-saving advantages." 536 U.S. at 632. While *Ruiz* dealt with impeachment material, the Court noted that "the added burden imposed upon the Government by requiring its provision well in advance of trial (often before trial preparation begins) can be serious, thereby significantly interfering with the administration of the plea-bargaining process." *Id.*, at 633.

Further, the AACJ proposal would violate the separation of powers doctrine. Article 3 of the Arizona Constitution states:

> The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

In considering separation of powers issues, the Court in *State v. Donald,* 198 Ariz. 406, 416-17, 10 P.3d 1193, 1203-04 (App. 2000), noted:

> In a series of cases beginning with *Hancock*, the Arizona courts have repeated and refined a group of factors to be considered in reviewing a claim that an act by one department would usurp the powers of another. These factors, our supreme court has commented, "provide[ ] the necessary flexibility yet still maintain[ ] the goal of the separation of powers doctrine." The four factors to be considered are "(1) the essential nature of the power exercised; (2) the ... degree of control [that one branch assumes] in exercising the power [of another]; (3) the ... objective [of the exercise]; (4) the practical consequences of the action."

(Internal citations omitted).

Additionally, the *Donald* Court recognized both that discretion over plea bargaining is a core prosecutorial power, and that the power has constraints. *Id.* Cases addressing those constraints have focused on facts and circumstances specific to a particular case. For example, the Arizona Supreme Court in *State v. Martin*, 139 Ariz. 466, 481, 679 P.2d 489, 504 (1984) held that a prosecutor may not refuse to offer a plea solely because a defendant chose a particular attorney. In *Donald*, the Court of Appeals held that a court "may order the prosecution to reinstate a plea offer if, after conducting a hearing and permitting the State to present all relevant considerations, the court finds reinstatement necessary to remedy a deprivation of effective counsel." 198 Ariz. at 418.

Finally, the AACJ proposal fails to recognize that prosecutors have an ongoing disclosure obligation, even after disposal of a case. Arizona Rules of Professional Conduct 3.8(g) provide:

(g) When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to the court in which the defendant was convicted and to the corresponding prosecutorial authority, and to defendant's counsel or, if defendant is not represented, the defendant and the indigent defense appointing authority in the jurisdiction, and
(2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority, make reasonable efforts to inquire into the matter or to refer the matter to the appropriate law enforcement or prosecutorial agency for its investigation into the matter.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall take appropriate steps, including giving notice to the victim, to set aside the conviction.

The proposed amendment to Rule 15.8(a) is neither case specific nor remedial. The practical consequence of the rule would be to overturn the legitimate prosecutorial policy of offering a benefit to a defendant to plead guilty in limited-jurisdiction court or before a preliminary hearing in superior court. The proposal would also render it impossible to make disclosure within 30 days of a hearing set 10 or 20 days after arrest. The petition violates separation of powers, is impossible to comply with and has the potential to harm defendants who seek to resolve their cases quickly. The petition should be denied.

Respectfully submitted this 2nd day of May 2022.

By *Elizabeth Burton Ortiz*

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ELECTRONIC COPY FILED WITH THE
CLERK OF THE ARIZONA SUPREME COURT
THIS 2ND DAY OF MAY, 2022:

BY: *Diana Cooney*