Kate M. Bell
P.O. Box 17148
Phoenix, AZ 85011
TEL: (702) 551-9735
E-Mail: kmbell@acluaz.org
American Civil Liberties Union of Arizona

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	No. R-22-0021
	)	
	)	**PETITION TO AMEND ARIZONA**
Petition to Amend Arizona Rule of	)	**RULE OF CRIMINAL**
Criminal Procedure 15.8(a)	)	**PROCEDURE 15.8(a)**
	)	

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, the American Civil Liberties Union of Arizona ("ACLU of Arizona") hereby submits the following comment in support of the petition filed by Arizona Attorneys for Criminal Justice to amend Arizona Rule of Criminal Procedure 15.8. The ACLU of Arizona is a state-wide nonpartisan organization with over 20,000 members dedicated to protecting the constitutional principles of liberty and equality for all. Our Smart Justice Campaign advocates for safe and sensible reforms that put people, not prisons, first, and seeks to identify and address racial disparities in the criminal legal system. The ACLU of Arizona strongly supports this rule change petition as it will make the criminal justice system fairer and more equitable, reduce the instances of people feeling coerced to waive their constitutional rights, and reduce the number of wrongful convictions in Arizona.

I. Current Rule 15.8 Only Applies in Superior Court and Not the Early Disposition Courts, Regional Court Centers, Justice Courts, or City Courts.

"[B]y its own terms, Rule 15.8 applies only '[i]f the State has filed an indictment or information in superior court,' and therefore not to cases that are resolved prior to the filing of an indictment or information. *State v. Frank*, No. 1 CA-CR 19-0405 PRPC, 2020 WL 2086471, at *1 (Ariz. Ct. App. Apr. 30, 2020) (declining to read Rule 15.8 to apply to a "pre-information plea offer" in an early disposition court, "[b]ecause the meaning of Rule 15.8 is clear on its face."). This petition would remove the requirement that an indictment or information be filed, so that the rule would apply to all criminal cases and in all courts, including limited jurisdiction courts and "early disposition" courts.

II. The Important Protections of Rule 15.8 Should Extend to All Cases.

Rule 15.8 was created in 2003, "based on the recommendations of a committee that included judges, prosecutors, and defense attorneys." *Rivera-Longoria v. Slayton, ex rel. Cty. of Coconino*, 228 Ariz. 156, 159 (2011). "The 2003 amendments sought, among other things, to align the disclosure rules more closely 'with the realities of modern practice,' and to recognize 'the defense attorney's need for basic information early in the process in order to meaningfully confer with the client and make appropriate strategic decisions.'" *Id.* (*quoting* Ariz. R.Crim. P. 15.1, cmt. to 2003 amend.).

As the Supreme Court of Arizona explained in *Riveria-Longoria*:

> Rule 15.8 was adopted to ensure that, once charges have been filed in superior court, basic discovery will be provided to the defense sufficiently in advance of a plea deadline to allow an informed decision on the offer with effective assistance of counsel. . . . Rule 15.8 reflects the view that defendants should receive certain basic disclosures before having to decide on plea offers made early in the case.

Id. at 159-160 (citations omitted). Of course, *all* defendants have the right to effective assistance of counsel—including during plea negotiations. *State v. Donald*, 198 Ariz. 406, 411 (2000) ("the right to effective assistance of counsel extends to the decision to reject a plea offer"). This right applies to both felonies and misdemeanors "whenever a sentence of imprisonment is imposed." *E.g. United States v. Bryant*, 579 U.S. 140, 149 (2016). All defendants should be able to make an informed decision on a plea offer. *E.g.*, *Turner v. Calderon*, 281 F.3d 851, 880 (9th Cir. 2002) ("'[A] defendant has the right to make a reasonably informed decision whether to accept a plea offer.' *United States v. Day*, 969 F.2d 39, 43 (3d. Cir.1992) (*citing Lockhart*, 474 U.S. at 56–57, 106 S.Ct. 366 (holding that voluntariness of a guilty plea depends on the adequacy of counsel's legal advice)").

There is simply no principled reason why a rule designed to protect these critically important constitutional rights should be limited only to superior court, instead of applying to all criminal cases. Indeed, the *Rivera-Longoria* Court itself

indicated that amending the rule would be appropriate "to the extent the policy concerns motivating Rule 15.8 are implicated" in other situations like, as there, the withdrawal of open-ended offers or, as here, misdemeanors and cases in "early disposition" court.

In addition to protecting the constitutional right to effective assistance of counsel in plea bargains, Rule 15.8 has a practical benefit. It ensures that plea negotiations are fair, which helps reduce wrongful convictions. Innocent people do unfortunately sometimes plead guilty: "In nearly 11% of the nation's 349 DNA exoneration cases, innocent people entered guilty pleas." Innocence Project, *Innocence Project and Members of Innocence Network Launch Guilty Plea Campaign* (Jan. 23, 2017). That is likely to be an undercount, as DNA exonerations occur more frequently in very serious cases, such as rape and murder, where there is DNA evidence that has been collected and preserved and where the defendant was sentenced to a lengthy period of incarceration, as these challenges can take years. In somewhat less serious cases such as robbery and assault that depended solely on eyewitness identification, we have no way to know what the rate of false convictions is, but evidence that eyewitness identification is unreliable continues to mount. E.g., § 1:1. Dangers of eyewitness identification, *Eyewitness Identification: Legal & Practical Problems* 2d ("There is little doubt today that mistaken eyewitness identification is the primary cause of the conviction of

innocent people in the United States." (*quoting* G.L. Wells, *Eyewitness Identification Evidence: Science And Reform*, CHAMPION (April 2005)). Many people do not understand or cannot accurately weigh the life sentence of collateral consequences, particularly when given an offer that would allow a quick release from jail. *See* Edkins, V. A., & Dervan, L. E., *Freedom now or a future later: Pitting the lasting implications of collateral consequences against pretrial detention in decisions to plead guilty*, 24 PSYCH., PUBLIC POLICY, & LAW, 204–15 (2018) (finding that "while actual guilt mattered the most with regard to decisions to plead, pretrial detention also weighed heav[il]y. . . [while c]ollateral consequences did not have as large of an impact, especially if pretrial detention was involved.").

Innocent people may plead guilty for a few reasons, including the extreme gap between the potential sentencing range following a trial and the range in a plea offer, or, for those who are detained pretrial or cannot afford bail, because they are offered a "time served" deal and want to go home as quickly as possible. Examples of innocent people pleading guilty include the "Dallas sheetrock scandal," in which many people, some of whom were Mexican nationals, plead guilty to the possession for sale of "cocaine" that later turned out to be ground up sheetrock, the cases all based on a single lying informant. Megan K. Stack, *Drug Busts Gone Bad, Then Worse*, L.A. TIMES (April 5, 2002). By the time defense

attorneys uncovered what was happening, "[i]n some cases, it was too late," because people had already been deported based on their guilty pleas. *Id.* As one attorney explained, his client took a plea "because he didn't want to risk 15 years in prison with a trial." *Id.* The infamous Tulia, Texas case also illustrates the "trial penalty" that convinces many innocent people to plead guilty:

> [T]hirty-five innocent defendants were convicted of selling cocaine in 1999 and 2000 on the uncorroborated word of a single perjurious undercover narcotics agent. They were exonerated en masse in 2003. Eight of these defendants went to trial and were convicted; they were sentenced to prison for terms that ranged up to life, and averaged nearly forty-seven years. The remaining twenty-seven defendants pled guilty. One was not sentenced; eleven received combinations of probationary terms and fines; and fifteen were sentenced to prison terms ranging from three months to eighteen years, and averaging about seven years.

Samuel R. Gross, *Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, NYLS 56 LAW REV. 1009, 1015-16 (footnotes omitted).

Amending Rule 15.8 to ensure that both sides have accurate information about the case early on can help address this problem in two ways. First, more cases against innocent people will be dismissed (*nolle prosequi*). One recent example from Maricopa County involved a person who spent a month in jail for an assault at a convenience store and—although the case was later dismissed—was pressured to accept a plea deal that would have sent him to prison for over seven years. *State v. Barker*, CR2020-147236-001 (Maricopa County Sup. Ct. Jan. 14,

2021). Had the prosecutor bothered to watch the store's security camera footage, it would have been obvious that the person accused and locked up in jail did not match the description of the person who committed the assault. Requiring that this video evidence be turned over for evaluation when a defendant considers a plea will help to avoid this scenario. Second, the provision of discovery early in the process may make it clear that a case is complex and therefore not a good candidate for "early disposition" court resolution. Once a case moves to superior court, the defendant can have a bail hearing and may no longer be subject to the additional pressure caused by pretrial detention. Studies have shown that spending more than three days in pretrial detention increases the likelihood of conviction 13-24%. *See* Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, Vera Institute of Justice 3 (April 2019).

In New York, a diverse 70-member task force spent a year analyzing plea bargaining, including the problem of innocent people pleading guilty. *See* NYCLA Justice Center Task Force, *NYCLA Justice Center Task Force: Solving the Problem of Innocent People Pleading Guilty*, 40 PACE L. REV. 1, 3 (2020). It "identified several factors that can powerfully influence an innocent person's decision to plead guilty," including "systemic pressure for speed and efficiency of case processing." They noted that the recent improvements in the state's discovery rules would improve the situation, because:

> More transparent discovery practices ensure that defendants are better informed about the facts of their cases . . . [and] have access to the prosecution's discoverable material before accepting a plea offer. This will help close the information gap between prosecutors and defendants, which previously led some defendants to feel coerced into accepting a plea deal without an understanding of the government's case.

Id. at 12 (footnote omitted). That is exactly what an expansion of Rule 15.8 would do here—ensure that defendants have the information that they need to make an informed decision, hopefully reducing the number of innocent people who feel pressured to plead guilty, in some cases due to the speed at which their cases are forced through the system.

It should be noted that in cases where the evidence of guilt is overwhelming, the defendant is likely to be aware of that fact themselves. For example, if the defendant repeatedly sold drugs to an undercover officer and then confessed to the police, they are likely aware that the officers will testify, will introduce the cash seized from them, and that there will be laboratory tests of the drugs. It is the weakest cases, and cases against innocent people, for example where the defendant was picked out of a suggestive lineup by a robbery victim and there is no other evidence against them, that having quick access to discovery matters the most and where wrongful convictions are most likely to occur. *See* Michael P. Toglia & Garrett L. Berman, *Convicted by Memory, Exonerated by Science*, ASS'N PSYCH.

SCI. (Aug. 30, 2021) (eyewitness misidentification an issue in 68% of wrongful convictions where the person was later exonerated by DNA evidence).

III. Amending Rule 15.8 Will Have a Limited Impact on the State

There are few appellate cases involving the application of Rule 15.8, and most of those are unpublished. Because Rule 15.8 is a trial sanction, it only applies if the defendant chooses to proceed to trial, and only where the evidence that the state failed to disclose is unfavorable to the defendant—because otherwise the defendant cannot show that the evidence "materially impacted the defendant's decision" on whether to accept or reject the offer. That's because if the evidence showed that the defendant was guilty, it would have made him want to accept the offer that he instead rejected. If the newly-disclosed evidence was favorable to the defendant, on the other hand, he should theoretically be getting a more favorable plea than the prior rejected offer. Finally, if the defendant accepts the initial offer, the case is over and there are no more disclosure obligations. In that situation, the only remedy would be for a *Brady* violation, if any comes to light. Presumably, in many cases in which the defense attorney does raise the Rule 15.8 issue, the plea is reinstated or the parties otherwise reach some agreement.

While Rule 15.8 issues are infrequently litigated, the mere existence of the rule should encourage adequate discovery disclosures by the state. However, the state is already supposed to be acting in good faith, because plea bargaining is

essentially a contract negotiation, and all parties to a contract are expected to act in good faith. *See, e.g.*, *United States v. Krasn*, 614 F.2d 1229, 1233-34 (9th Cir. 1980) ("Although plea bargaining is a matter of criminal jurisprudence, a plea bargain itself is contractual in nature and subject to contract-law standards. . . . [including] a duty of good faith that we require of our prosecutors" (citation and quotation marks omitted)). Providing information in the state's possession so that the defendant can evaluate the benefit of the plea offer is consistent with that contractual duty of good faith. *See* Restatement (Second) of Contracts § 205, Good Faith and Fair Dealing (1981) (citing cases in which withholding information was found to be a breach of the duty of good faith); *id.* at § 208, Unconscionable Contract or Term (a contract may be unconscionable if there is "gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party," and one factor the court considers is "knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of . . . ignorance"). *But cf. Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that exculpatory evidence must be disclosed to comport with the standards of justice, "irrespective of the good faith or bad faith of the prosecution.").

Expanding Rule 15.8 to all cases would not only help the defendant evaluate plea offers, but also would be in the interests of justice, which the prosecution is supposed to be serving. *E.g.*, *Berger v. United States*, 295 U.S. 78, 88 (1935) (a

prosecutor's "interest, therefore . . . is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer."); *see also* A.R.S. Sup. Ct. Rules, Rule 42, R.s Prof. Conduct, ER 3.8 (Special Responsibilities of a Prosecutor).

Unfortunately, this is not always the case. A prosecutor from the Maricopa County Attorney's Office (MCAO) conspired with a Phoenix Police officer to lie to the grand jury and invent a fictitious gang in order to bring very serious charges against people protesting police misconduct. The charges were dismissed after extensive press coverage and community outrage[1], and MCAO commissioned an investigation and report by retired Judge Steinle. Roland J. Steinle, *Review of Maricopa County Attorney's Office's Policy, Procedures & Actions Involving the Protest Arrest on October 17, 2020* at 69. One of his recommendations was that prosecutors needed to view the body camera videos of an incident prior to making a charging decision. *See id.* ("If Body Wear Camera [sic] evidence is present in a case, no charges will be filed until the charging attorney has had an opportunity to review the BWC videos."). If the Report's recommendations had been in place, one individual who was not even part of the protest and was simply taking photos

[1] *See* Dave Biscobing, *Politically Charged*, ABC15, *available at* https://www.abc15.com/news/local-news/investigations/protest-arrests.

in the area would never have been charged. *See id.* at 70 ("Ryder Collin's arrest and prosecution was [a] miscarriage of justice" due to the prosecutor's "fail[ure] to do even a minimal investigation . . . [despite having] access to the BWC video evidence"). And if he had been charged, his defense counsel obtaining quick access to the video would have resulted in the charges being dismissed right away. Unfortunately, in many cases today prosecutors are not only making charging decisions but also presenting plea offers—and telling the defendant the next offer will be harsher—without having viewed this critical evidence. Requiring the state to turn over key discovery, such as the videos of the incident, will help ensure that evidence of innocence is brought to light quickly, which serves the interests of justice. In other cases where there is strong evidence against the defendant, disclosure may encourage the defendant to take a quick plea, which benefits the state as they still obtain a conviction with minimal effort. But the disclosure has the added benefit of helping to ensure that the defendant feels they were treated fairly because they were able to make an informed decision, which may improve public safety by reducing recidivism. *See* Danielle Wallace *et al.*, *Desistance and Legitimacy: The Impact of Offender Notification Meetings on Recidivism among High Risk Offenders*, JUSTICE QUARTERLY (Sept. 2015) ("Although further research is clearly needed, our results suggest that offenders—just like the general

citizenry—are more likely to comply with the law when they are treated fairly and perceive the agents of the law as acting fairly.").

Although there are obvious benefits of expanding Rule 15.8 to all cases, it is important to note the Rule's limits as well. Because the Rule only applies to evidence in the possession of the state, it does not apply to evidence that a third party has that the defendant might be entitled to obtain, *see State ex rel. Montgomery v. Garcia ex rel. Cty. of Maricopa*, No. 1 CA-SA 13-0247, 2013 WL 6200100, at *3 (Ariz. Ct. App. Nov. 26, 2013), nor does it generally apply to confirmatory lab results, which are often not available when plea bargaining begins. *See State v. Cruz*, No. 2 CA-CR 2011-0350, 2012 WL 4478761, at *3 (Ariz. Ct. App. Sept. 28, 2012). In addition, because of the separation of powers, there are limits on the oversight that courts can provide to plea bargaining. In *Rivera-Longoria*, the Arizona Supreme Court held that the rule does not violate the separation of powers because a prosecutor "retains discretion to determine whether to make a plea offer, the terms of any offer, the length of time an offer will remain open, and the other particulars." *Rivera-Longoria*, 228 Ariz. at 159. In addition, the state can decline to reinstate a lapsed offer or extend a deadline after obtaining new information subject to disclosure, as long as the prior disclosure is supplemented promptly. *See id*. And, as noted above, Rule 15.8 does not apply when an open-ended offer is withdrawn, only when a deadline is set by the state.

For all of these reasons, while this rule change would serve the interests of justice by encouraging the state to provide discovery sooner, the prosecution would retain full control over what sort of plea agreement to offer and when.

IV. Misdemeanor Cases Have a Significant Impact on People's Lives

While misdemeanor cases in justice or municipal courts are obviously less serious than felonies, a misdemeanor criminal record still carries serious collateral consequences and can impact a person's ability to find a job or a place to live, get an occupational license, or their immigration status. One database catalogued 341 collateral consequences of a misdemeanor conviction in Arizona under state and federal law. National Inventory of Collateral Consequences of Conviction, *Collateral Consequences Inventory*, at https://niccc.nationalreentry resourcecenter.org/consequences, *last accessed* April 29, 2022. Misdemeanors also carry a potential sentence of up to six months in jail, and even a few days in jail can upend a person's life, causing them to lose their job, apartment, and even custody of their children. *Justice Denied*, *supra*, at 4 ("Studies on pretrial detention have found that even a small number of days in custody awaiting trial can have many negative effects, increasing the likelihood that people will be found guilty, harming their housing stability and employment status and, ultimately, increasing the chances that they will be convicted on new charges in the future."); Will Dobbie & Crystal S. Yang, *The Economic Costs of Pretrial Detention*, Cato

(Jan. 19, 2022) ("Extrapolating these [economic] effects over a person's working-age life cycle implies that individuals lose an average of $29,000 when detained in jail for just three days while awaiting the resolution of their criminal cases.") Because of these serious consequences, it is important that the system get it right. An accused person and their attorney need to understand the case in order to make an informed decision on the plea bargain in a misdemeanor case just as they do in a felony case. Providing meaningful discovery ensures that exculpatory evidence is uncovered and disclosed before a person must make the life altering decision of whether to accept or reject a plea.

For these reasons, ACLU of Arizona urges this Court to adopt the petition to amend Rule 15.8(a).

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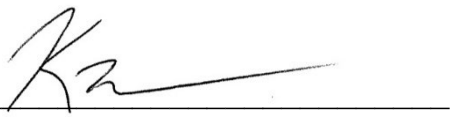
AMERICAN CIVIL LIBERTIES UNION OF ARIZONA

By: 

Kate M. Bell
(AZ bar admission pending)