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IN THE SUPREME COURT OF THE STATE OF ARIZONA

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

Pursuant to Rule 28(e)(5) of the Rules of the Supreme Court of Arizona, Arizona Attorneys for Criminal Justice (“AACJ”) hereby submit the following Reply to the comments submitted in response to AACJ’s Petition to Amend Arizona Rule of Criminal Procedure 15.8(a). This Reply also includes a correction to an assertion made in the Petition.

I. The Comments in Opposition Reinforce the Need to Adopt this Proposed Rule Change

The Maricopa County Attorney’s Office (“MCAO”) and the Arizona Prosecuting Attorneys’ Advisory Council (“APAAC”) oppose this rule change petition because they want prosecutors in Arizona to continue to be able “to make an end-run around” around the protections afforded by Arizona’s Rules of Criminal Procedure. Joint Comment by the Directors of the Maricopa County Indigent Defense Agencies (“Indigent Defense Comment”) at 5. Such a position only

reinforces the need for this Court to adopt AACJ's proposed rule change. In fact, the arguments made by APAAC and MCAO fly in the face of the purpose of Rule 15.8, which, as this Court explained, is to ensure that "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" because the defense "should receive certain basic disclosures before having to decide on plea offers made early in the case." *Rivera-Longoria v. Slayton, ex rel. Cty. Of Coconino*, 228 Ariz. 156, 159-60, ¶¶ 13-21 (2011) (citing Ariz. R.Crim. P. 15.8, cmt. to 2003 amend.). Because prosecuting agencies, like MCAO, unilaterally decide which criminal cases to prosecute through the Early Disposition Courts ("EDC"), they have created a separate and unequal system of justice where those who are proffered a plea agreement after a probable cause finding are afforded all the procedural protections found in our Rules of Criminal Procedure and those who are proffered a plea agreement prior to a probable cause finding are not. Such a system, existing outside of the Rules of Criminal Procedure, cannot exist if our courts are to ensure equal justice for all.

Nowhere in either of their comments in opposition do APAAC or MCAO provide a compelling reason why a rule designed to promote fairness and transparency in plea bargaining should be limited to only certain cases and certain defendants. Indeed, providing the protections of Rule 15.8 to all cases is particularly

important where the accused has no say in whether their case will proceed by Information or Indictment, with all of the discovery requirements of Arizona’s Rules of Criminal Procedure, or whether they will be stripped of those procedural protections based solely on the decision of a prosecuting agency to process their case through EDC.

While APAAC claims that a prosecutor’s decision to refuse to provide disclosure material required by Rule 15.1 “is not borne of malice, or a desire to keep information from the defense,” Comment of the Arizona Prosecuting Advisory Council (“APAAC Comment”) at 3, the practical effect of Rule 15.8 as currently written is that prosecutors routinely keep information from the defense while forcing defendants to make “high-stakes plea decisions without the protections of a probable cause hearing or discovery rights.” Indigent Defense Comment at 4.

Moreover, both APAAC and MCAO quibble over semantics, claiming EDC allows prosecutors to offer more “lenient” pleas to defendants rather than making later pleas harsher. APAAC Comment at 2; Maricopa County Attorney’s Comment in Opposition (“MCAO Comment”) at 3. Such a claim, however, is belied by MCAO’s own policy, which states that should a plea offer made in EDC be rejected, “the presumption is that any future offer *will be harsher....*”¹ Additionally, any claim

¹ Maricopa County Attorney’s Office Policies and Procedures, Procedure 7.1(J) (emphasis added), *available at*: <https://www.maricopacountyattorney.org/DocumentCenter/View/1676/MCAO->

that the EDC system is designed to benefit the accused is at odds with the view of every indigent defense agency in Maricopa County, none of which share the view of APAAC and MCAO that adopting this rule change petition would disadvantage their clients.² *See* Indigent Defense Comment.

[Prosecution-Policies-and-Procedures-71](#). The statistics cited by APAAC about how many cases are resolved in the EDC, APAAC Comment at 5, do not necessarily demonstrate that these pleas benefit the defendant or further the interests of justice; they may simply indicate that the prosecutor’s threats to make a subsequent offer harsher are effective in extracting pleas. Or they may reflect a preference by some defendants to resolve their cases early in the process, perhaps because they are offered a “time served” plea or perhaps they simply want certainty. *See* Jeanette Hussemann & Jonah Siegel, *Pleading Guilty: Indigent Defendant Perceptions of Plea Process*, 13 TENN. J. LAW & POLICY 2, 467 (Winter 2019) (“uncertainty avoidance” is one of the major reasons that defendants plead guilty). The APAAC Comment offers no comparisons regarding the speed of case resolution between counties that have a functioning criminal justice system that operates within the Rules of Criminal Procedure.

² Any suggestion by APAAC and MCAO that they prosecute cases through EDC to benefit the accused is also belied by their opposition to the Petition to Amend Rules 5.3, 6.1, 7.3, and 7.4, Arizona Rules of Criminal Procedure (“AOC Petition”) submitted by the Administrative Office of the Courts. One reason so many cases plead out in EDC is because so many defendants are locked in jail pretrial simply because they are unable to afford bail. *See* AOC Petition at 4 (acknowledging that people are often detained pretrial “due to the defendant’s indigence”); *see* Carissa Byrne Hessick, *Punishment Without Trial: Why Plea Bargaining is a Bad Deal* 61-84 (Abrams Press 2021) (explaining how pretrial detention creates intense pressure for defendants—even innocent ones—to quickly plead guilty). Despite the findings of the Fair Justice For All Task Force, that too many people are detained pretrial due to a lack of access to money and that even short periods of pretrial detention cause significant harm, APAAC and MCAO claim that these problems in our criminal justice system “may not exist” and dismiss this Court’s efforts to protect the liberty interests of everyone accused of a crime as “a ‘feel good’ measure.” Such comments show a disregard for the rights of the accused in Arizona and undermines their claim that EDC is in the interest of the accused.

While amending Rule 15.8 will not remove the unequal bargaining power between the government and the accused during plea negotiations,³ it will at least create a fairer system that allows everyone accused of a crime in Arizona access to critical information required by our Rules so that they can make “an informed decision on [a plea offer] with effective assistance of counsel.” *Rivera-Longoria*, 228 Ariz. at 159, ¶ 13. As such, AACJ urges this Court to adopt its proposed rule change.

II. United States v. Ruiz is Inapplicable

Reliance on *United States v. Ruiz*, 536 U.S. 622 (2002), by MCAO and APAAC is misplaced as that case is inapplicable to AACJ’s Petition to Amend Rule 15.8. While it is true that a “criminal defendant does not ... have a constitutional due process right to all available discovery before deciding whether to accept a plea offer,” MCAO Comment at 1-2, the opponents’ argument conflates constitutional protections with procedural ones. All states, including Arizona, are free to provide greater procedural protections than those required by the federal constitution. *E.g.*, *California v. Ramos*, 463 U.S. 992, 1013-14 (1983) (“It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires.”).

³ See Hessick, *supra* note 2 at 49-50 (discussing unequal bargaining power in plea negotiations and the coerciveness of the plea-bargaining process).

While the Federal Rules of Criminal Procedure contain few discovery obligations, Arizona has adopted more robust ones. Arizona adopted Rule 15.8 recognizing “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.” *Rivera-Longoria*, 228 Ariz. at 158-59, ¶ 6. While the federal constitution does not require such disclosure, our Rules do and those Rules should apply equally to everyone accused of a crime, not discriminatorily based on whether your plea is offered before or after a probable cause determination or whether you are charged with a misdemeanor rather than a felony offense.

III. The Proposed Rule Change Does Not Violate the Separation of Powers

Doctrine

APAAC’s separation of powers argument—that because prosecutors have discretion over plea bargaining, any procedural rule that touches upon plea bargaining violates the separation of powers—also fails. First, APAAC is unable to explain how Rule 15.8 would violate the separation of powers if it applied equally to all criminal prosecutions, even though this Court has found that it does not violate the separation of powers now.

Moreover, APAAC’s argument ignores the fact that the EDC operates entirely outside of the Rules of Criminal Procedure. Thus, if anything violates the separation of powers it is the EDC itself, not an amended Rule 15.8. As the comment by the

National Lawyers Guild correctly points out, the Arizona Supreme Court possesses rule-making authority under Article 6, Section 5 of the Arizona Constitution, and this Court has never sanctioned a system of criminal prosecutions that exists outside of those rules which apply to “all criminal proceedings in Arizona.” Ariz. R.Crim. P. 1.1. Additionally, the purpose of our Rules is “to protect the fundamental rights of the individual while preserving the public welfare.” Ariz. R.Crim. P. 1.2. Amending Rule 15.8 vindicates the purpose of Arizona’s Rules of Criminal Procedure, comports with the separation of powers doctrine, and will make for a fairer, more equal criminal justice system in our state.

APAAC also argues that extending Rule 15.8 to all cases will somehow limit the ability of prosecutors to make, and defendants to accept, plea offers early in the procedural history of a case. That is simply incorrect; nothing in the proposed rule would limit a prosecutor’s ability to make an offer prior to arraignment. The prosecutor would simply be unable to put a deadline on that offer that was prior to arraignment and force the defendant to make a decision with virtually no discovery. APAAC’s argument that prosecutors could not put any deadline on an early offer is also incorrect; that deadline simply could not be less than 30 days after the disclosure was made. This is because, even though Rule 15.8(a) requires disclosures to be made at the same time the offer is made, no sanctions will be imposed under 15.8(d) unless “the State makes the disclosure less than 30 days before the offer expires or is

withdrawn.” *Id.* Thus, a prosecutor could make an offer as early as they wished, even if they had not yet disclosed all the evidence in their possession. Contrary to APAAC’s argument, there are still likely to be many cases where a defendant would accept the offer very early in the case, prior to receiving all disclosures—the same cases APAAC believes should be resolved early, such as straightforward drug cases where the plea offer allows the defendant to enter treatment right away. *See* APAAC Comment at 5 (claiming that some “defendants wishing to begin their rehabilitative efforts on probation” benefit from accepting an early plea). APAAC also ignores the fact that getting out of jail is an extremely strong motivator to take an early plea, even where discovery has not yet been provided. *See* Hessick, *supra* at 61-84.

IV. Correction

Due to an editing error, the Petition mistakenly asserts that “[u]ndersigned counsel was a member of both the Rule 15.8 *ad hoc* committee in 2013 and the Criminal Rules Task Force in 2016-2017 and has a strong recollection of the former and copious notes from the latter.” Petition to Amend Arizona Rule of Criminal Procedure 15.8(a) at 3. In fact, undersigned counsel was not a member of the Rule 15.8 *ad hoc* committee in 2013, nor was he a member of the Criminal Rules Task Force in 2016-2017. It was another AACJ member who assisted on the Petition who was in those roles. Undersigned counsel and AACJ apologize for the error.

V. Conclusion

For the reasons in its Petition and this Reply, AACJ requests this Court grant the petition to amend Rule 15.8(a).

DATED (electronically filed): June 1, 2022

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By: /s/ Jared G. Keenan
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