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ARIZONA SUPREME COURT

**PETITION TO AMEND RULE 17.4
AND RULE 38 OF THE ARIZONA
RULES OF CRIMINAL
PROCEDURE**

R-24-0016

MARICOPA COUNTY ATTORNEY'S OFFICE
COMMENT IN OPPOSITION

The Maricopa County Attorney's Office (MCAO) is an enthusiastic supporter of alternatives to prosecution whenever appropriate. MCAO has continuously expanded diversion programs in both the adult and juvenile systems, including restorative justice programs, and is always amenable to discuss new ideas. The proposals raised in this Petition, however, are violative of both legal and practical processes and for those reasons, MCAO opposes this Petition.

**I. THIS COURT SHOULD DENY THE PETITION BECAUSE
PETITIONER SEEKS TO UNCONSTITUTIONALLY LEGISLATE
THROUGH THE RULES OF PROCEDURE**

Petitioner's request should be denied because Petitioner seeks to grant criminal defendants new substantive rights under the guise of a procedural change and this

Court does not have the constitutional power to reform and overhaul Arizona's criminal justice system as Petitioner requests. The Arizona Constitution creates separate and distinct departments of government with defined responsibilities. "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 department shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." Ariz. Const. art. III. The legislature, not the judiciary, has the authority to define crimes and their penalties. *State v. Casey*, 205 Ariz. 359, 362, ¶ 10, 71 P.3d 351, 354 (2003) (citing *State v. Jackson*, 186 Ariz. 490, 491, 924 P.2d 494, 495 (App. 1996)); *State v. Gill*, 235 Ariz. 418, 421, ¶ 14, 333 P.3d 36, 39 (App. 2014). The Arizona Constitution grants this Court the "power to make rules relative to all procedural matters in any court." Ariz. Const. art. VI, § 5. Procedural law provides for the method of enforcing rights; substantive law creates and defines rights. *State v. Fletcher*, 149 Ariz. 187, 191-92, 717 P.2d 866, 870-71 (1986). Procedural changes to court processes come from this Court, but changes in the substantive law must come from the constitution or the legislature. *Id.* "The executive branch has broad discretion to decide whether to charge a defendant with a crime and, unless restricted by the legislature, whether and how to proceed." *J.V. v. Blair (Morris)*, 104 Ariz. Cases Digest 19, ¶ 13, 536 P.3d 1223, 1226 (App. 2023).

Although the judiciary has the authority to determine how criminal cases are processed through the court system, and the power to impose consequences for a criminal conviction within the limits set by the legislature, neither the court nor the parties in a criminal case can create ways to resolve a case beyond the authority granted by the legislature. For example, in *State v. McClarity*, the defense and the state entered into a plea agreement where the defendant pled guilty to “theft of a motor vehicle, an open-end offense.” 27 Ariz.App. 571, 557 P.2d 170 (App. 1976). At that time, theft of a motor vehicle could be a misdemeanor or a felony depending on the offender’s intent. *Id.* at 573, 557 P.2d at 172. The law did not allow the court to treat this particular offense as an “open-ended” offense as contemplated by the plea agreement and permitted by the court at sentencing. *See id.* at 574-75, 557 P.2d at 173-74. In reversing the conviction, the court noted that “the prosecutor, the defendant, and the trial court sought to bypass” the legislative scheme for this crime. *Id.* In rejecting what the parties and the court did, the Court of Appeals noted that “[i]t is within the sole power of the Legislature to determine what acts constitute crime and to prescribe punishment for those acts.” *Id.* at 575, 557 P.2d at 174. The court further stated that the judiciary cannot “circumvent the legislative intent” by allowing what happened in this case and to do so would “give discretion to the trial court where the Legislature has determined there should be none.” *Id.*

In *State v. Bly*, this Court recognized that defining crimes and determining punishment was a function of legislative policy decisions. Specifically, this Court stated:

It is the public policy of this state, as reflected by the criminal code, to condemn, correct, or deter transgressions which harm either individual or public interests. Power resides with the legislature to define that conduct which will not be tolerated in an ordered society and to provide punishment for those who violate public policy.

Within perimeters set by our federal and state constitutions, the roles of the courts, penal institutions, and parole authorities are defined by the legislature. The legislature, having determined what punishment is appropriate for a given crime, leaves to the judiciary the exercise of a certain amount of discretion in fitting punishment to the circumstances of the particular crime and the individual defendant. Unless the punishment is so severe as to be disproportionate to the crime, the judiciary has discretion only to the extent provided by the legislature.

State v. Bly, 127 Ariz. 370, 371-72, 621 P.2d 279, 280-81 (1980) (cleaned up).

According to the petition, Petitioner represents an organization with a mission to reform existing responses to crime. Specifically, the organization seeks to implement what it refers to as “restorative justice practices” in lieu of the criminal consequences currently used in Arizona. [Petition at 2]. In other words, Petitioner

seeks to transform the criminal justice system the Arizona Legislature has authorized. In the current system, the executive branch decides whether to bring criminal charges and what specific charges to bring. Once filed, a criminal case follows the procedural rules established by this Court to ensure that the rights of the defendant and any victim are enforced. Upon conviction, the court imposes a sentence or suspends the imposition of sentence to allow for probation as permitted by the legislature. Petitioner wants to create a brand new system. In Petitioner's system, victims, defendants, and community members can fashion any resolution to any criminal matter they see fit, disregarding the consequences the legislature has mandated for that offense. As long as a prosecutor agrees with whatever plan this group creates, this resolution will end the criminal matter. Much like the improper attempt to resolve the criminal case in *McClarity*, this new criminal justice system seeks to bypass legislative intent by creating new rights and criminal consequences the legislature has not authorized.

The legislature has the power and discretion to modify the way crimes are resolved when it believes those modifications will serve the public interest. For example, the legislature has provided for a form of alternative criminal case resolution in A.R.S. § 13-3981. That statute allows dismissal of a case when a victim of a misdemeanor or petty offense appears before the court stating they have received satisfaction for their injury. The legislature has imposed limits on the types of cases

that can be resolved in this manner, permits some charges to be resolved this way only with prosecutorial agreement, and ultimately gives the discretion as to whether to dismiss a case following such a compromise to the court. The legislature further provided that, “No public offense shall be compromised or the prosecution or punishment upon a compromise dismissed or stayed except as provided by law.” A.R.S. § 13-3981(D). Thus, the legislature has provided for a type of restorative justice but under very limited circumstances.

The legislature has provided for another type of criminal case resolution that does not involve a criminal conviction in A.R.S. § 11-365. That statute grants to the county attorney the “sole discretion to divert or defer prosecution of an offender.” Municipal prosecutors have similar authority under A.R.S. § 9-500.22. As with the misdemeanor compromise statute, the legislature has imposed limits on when an offender can be diverted consistent with its policy decisions. This Court appropriately adopted Rule 38 of the Arizona Rules of Criminal Procedure, to create a procedure for moving cases into and out of an authorized diversion program to implement the legislature’s substantive law. But this Court did not, and indeed could not, create diversion as an option on its own or expand the accessibility of diversion beyond what the legislature has provided. To do so would violate the clear separation of powers mandated in Arizona’s Constitution.

Nevertheless, that is exactly what Petitioner has asked this Court to do—violate Arizona’s separation of powers by using procedural rules to completely redesign the criminal justice system without any legislative authorization whatsoever. Petitioner asks this Court to ignore the legislature’s constitutional power to define crimes and punishment by essentially expanding the misdemeanor compromise statute to apply to all crimes and in direct contradiction of the limitations the legislature imposed. Petitioner’s requested changes would create a right for criminal defendants to “restorative justice practices” if certain conditions are met. The creation of such a right under any circumstances is a substantive matter, not a procedural one. Granting the petition would not simply cross separation of powers boundaries, it would obliterate them.

In the conclusion, Petitioner appears to attempt to equate the current proposal to current features of the criminal system including allowing judges to participate in settlement conferences and the problem-solving courts. [Petition at 14]. But neither of these features of our current system create any new rights and neither are remotely comparable to what Petitioner seeks. A settlement conference seeks to resolve a criminal matter short of trial within the law and with the consequences the legislature has adopted. Judicial participation in settlement conferences does not fundamentally alter the punishment that can be imposed for a crime. Our problem-solving courts are post-conviction courts that work within the probation framework the legislature

has created. Problem-solving courts do not alter the sentencing possibilities for a crime. In contrast, Petitioner's criminal justice system would work completely outside the laws passed by the legislature to allow a criminal case to be resolved in any manner whatsoever. Comparisons to settlement conferences and problem-solving courts completely miss the mark.

The petition proclaims, "Justice is best achieved when those who are directly impacted by harm are consulted and involved in crafting resolutions that are designed to repair and restore." [Petition at 2]. Petitioner further claims that the proposed changes "will promote victims' rights, promote accountability, reduce recidivism, and make our communities safer." These bold statements and broad policy goals demonstrate that this petition does not seek procedural rules to implement existing rights. Instead, it seeks to create a new justice system with new rights to achieve Petitioner's organization's mission to overhaul Arizona's criminal justice system. Much of the petition is devoted to selling the merits of the proposed new criminal justice system. But whether the proposed system will achieve the stated goals is debatable, and that debate belongs in public at the legislature not in a closed conference room at the Supreme Court. The Arizona Constitution does not leave a policy question of this magnitude to the votes of four justices on the Supreme Court.

As an alternative to adopting the proposed rules, Petitioner suggests that this Court form a task force to study ways for courts to adopt “restorative justice policies” to find other pathways to “integrate restorative justice practices into its conflict-resolution paradigm.” [Petition at 15]. For the same reasons the proposed rule change should be rejected, the alternative should be rejected as well. The rules of procedure do not create a “conflict-resolution paradigm” for criminal cases. The rules implement the criminal laws adopted by the legislature. The Arizona Constitution does not give this Court the power to create new paradigms for resolving criminal cases. Whether and to what extent the current criminal justice system should be modified are matters for the legislature. For reasons left unstated in the petition, Petitioner’s organization is making their pitch to the wrong branch of government. Any further study of Petitioner’s new criminal justice system should be a legislative study because that is the only branch of government that has the power to do as Petitioner requests.

Petitioner has dressed legislation in procedural clothing in the hopes of sneaking into law what the legislature has plainly not authorized. Our democracy does not work that way. Petitioner asks this Court to sit as a legislative body in adopting this “rule” and that is something our constitution clearly does not allow. For this reason alone, Petitioner’s request should be denied in its entirety.

II. THE COURT SHOULD DENY THE PETITION BECAUSE IT HAS A SUBSTANTIAL LIKELIHOOD OF CAUSING FURTHER HARM TO VICTIMS

Especially in cases of domestic violence, there is the potential of great harm to victims should this proposal be adopted. As the name implies, victims of domestic violence either live with the offender, have had a sexual relationship with the perpetrator, or have a child in common with the offender. These victims often still care about the person who hurt them and, while they want the abuse to stop, are conflicted about prosecution. The victim may rely on the offender for financial support, childcare or other life support. In these situations, the victim quickly experiences financial or other stressors when the offender is being prosecuted.

The cycle of domestic violence is predictable, as all those familiar with the criminal justice system have observed. After the offense and reporting to law enforcement, the offender may be removed from the home or ordered to have no contact with the victim. The stressors on the victim as a result of their offender being gone are usually increasing at the same time that the offender promises to stop the abusive behavior and to seek help. It is human nature to believe a loved one's promises, especially when the fulfilled promise would alleviate so many stressors. This often leads to victims seeking to get charges dropped or mitigated, even to the point of recantation. As case after case shows, however, while there may be a "honeymoon" period, the abuse is likely to continue and many times continues until

it becomes so serious that either the victim can't forgive it or the victim is no longer here to do so.

This predictable cycle has changed how law enforcement and prosecutors, and even the courts, approach domestic violence offenses. Rather than treating domestic violence as something that should be handled without government intervention, it is now recognized that these victims need help and that they are often manipulated into protecting the very person who hurt them. This realization has resulted in law enforcement and prosecutors moving forward with domestic violence offenses even when a victim has indicated they do not want to participate. The hope is that the pressure of prosecuting an offender will be taken off of the victim and put onto the government.

The Petition seeks to return to a time where that pressure will again be felt most heavily by the victim, as they would be given responsibility for the possible outcome of the case. For victims who desire prosecution, they would be placed in the position of either agreeing with a proposal suggested by the offender or disagreeing and running the risk of angering the offender. It may also be for the victim's financial benefit or benefit of the family to agree with the offender on what the proper resolution to the case may be, even if that is not in the victim's overall best interest or in society's best interest. For victims who do not desire prosecution, this provides another opportunity to seek dismissal of the case. The Petition has a

real potential to provide domestic violence offenders with further opportunities to manipulate their victims and make it even more difficult to prosecute these types of cases.

Similar to domestic violence offenses, victims of sexual offenses will also be vulnerable to harmful manipulation if the Petition is adopted. Most victims of sexual assault know their attacker. Like domestic violence victims, sexual assault victims will often have conflicted feelings about what should happen to the offender. Some offenders seek to capitalize on these feelings and try to manipulate victims into asking for leniency on their behalf. Others will use that same relationship to try and put a halt to the prosecution altogether.

Most vulnerable in this process will be the children who are victims of sexual abuse. Experience shows that the family member acting as the child victim's representative doesn't always act in the child's best interests. The Petition would give these individuals an opportunity to further align with the offender and to seek to undermine the prosecution.

All of these victims have something in common. They are vulnerable and more easily subject to manipulation by those who know them best. There need to be fewer opportunities throughout the criminal justice process to place more pressure on these vulnerable victims, not more opportunities. Yet the Petition would do the opposite and should be denied in the interest of protecting victims alone.

CONCLUSION

This Petition runs afoul of both the law and common sense. It steps on the toes of system partners and it is very bad public policy. While there is certainly a place for restorative justice in the criminal justice system, this proposal is a bridge too far and should be denied for all of the reasons stated above.

Respectfully submitted this _____ of April, 2024.

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