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## ARIZONA SUPREME COURT

In the Matter of:

Petition to Amend Rule 17.4 and Rule  
38 of the Arizona Rules of Criminal  
Procedure

Supreme Court No. R-24-0016

Joint Comment by the Directors of the  
Maricopa County Indigent Defense  
Agencies

The indigent representation offices of Maricopa County (IR) collectively handle most cases filed in Maricopa County in which there has been a finding of indigency. The Office of Public Defense Services (OPDS) provides administrative and financial oversight to the staffed offices and the Office of Contract Counsel (OCC). The staffed offices are

comprised of the Office of the Public Defender (OPD), the Office of the Legal Advocate (OLA), the Office of the Legal Defender (OLD), and the Office of the Public Advocate (OPA). We jointly submit this comment in support of including “restorative justice” within the criminal justice process, but believe the proposed amendments to Rules 17.4, 38.2, and 38.3 of the Arizona Rules of Criminal Procedure need further refinement and clarification. Therefore, we advocate for the alternative request proffered in the Petition by the Arizona Restorative Justice Coalition (AZRJC) in Arizona Supreme Court No.: R-24-0016 (herein after referred to as the “Petition”), namely, a request for the Court to:

form a Task Force to study AZRJC’s proposal, explore alternatives, identify best practices and procedures for courts that adopt restorative justice policies, and suggest other pathways for our state’s judicial branch to integrate restorative justice practices into its conflict-resolution paradigm.

(AZRJC’s Pet. p. 15).

AZRJC’s efforts to incorporate “restorative justice principles” into the criminal justice process is commendable. However, the proposed amendments as written are fraught with challenges as many terms are undefined, the process and procedures are unclear, and the objectives are uncertain. While it is true that criminal case negotiations inevitably contain some element of uncertainty, the amendments proposed in the Petition raise concerns regarding how and whether the accused’s due process rights would be adversely affected. Accordingly, we oppose the amendments as written in the petition, but support the ongoing analysis and refinement a Task Force could bring.

**I. Restorative justice principles could play a role in needed reforms to Arizona’s criminal justice system.**

We agree with AZRJC that Arizona’s criminal justice system needs significant

reform. The United States leads the world in the number of people jailed or incarcerated.<sup>1</sup> Per capita, the U.S. has ranked at the top of incarceration rates compared to all other countries, only to recently fall to sixth place behind war-torn and/or third-world countries such as El Salvador, Cuba and Rwanda.<sup>2</sup> Also of concern is the disproportionate number of minorities that the United States incarcerates. For example, the incarceration rate for Black Americans is six times greater than that of white Americans.<sup>3</sup> On a local level, Arizona ranks 8<sup>th</sup> in incarceration rates compared to other States and if Arizona was considered a country, it would well exceed the incarceration rate of all other countries.<sup>4</sup> As for the disproportional incarceration rates of minorities, Arizona's population of Black Americans is only 4%, yet represent 15% of the population in Arizona prisons and 16% of the population in Arizona jails.<sup>5</sup> As a comparison, the white population in Arizona is 53% but represents 38% of the total prison population.<sup>6</sup>

Changes are needed in our current justice system. Further, IR agrees with the AZRJC's Petition that restorative justice polices could lead to more just outcomes, encourage accountability, and reduce recidivism, all of which will lead to safer communities. However, there must be a more comprehensive and robust set of Rules, Statutes, and other guidelines to ensure that the due process rights of the indigent accused

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<sup>1</sup> [https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field\\_region\\_taxonomy\\_tid=All](https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All) (Last accessed 3/12/24)

<sup>2</sup> [Incarceration Rates by Country 2024 \(worldpopulationreview.com\)](https://www.prisonpolicy.org/blog/2023/09/27/updated_race_data/) (last accessed 3/12/24)

<sup>3</sup> [https://www.prisonpolicy.org/blog/2023/09/27/updated\\_race\\_data/](https://www.prisonpolicy.org/blog/2023/09/27/updated_race_data/) (last accessed 3/12/24)

<sup>4</sup> <https://www.prisonpolicy.org/graphs/2021.html> (last accessed 3/12/24)

<sup>5</sup> <https://www.prisonpolicy.org/profiles/AZ.html> (last accessed 3/12/24)

<sup>6</sup> *Id.*

are not compromised.

**II. The proposed rules need further analysis and refinement to protect the rights of the indigent accused.**

As currently written, the proposed rules fail to define many of the terms they create. Undefined terms lead to ambiguity and uncertainty which in turn creates an actual or perceived bias in their application. Moreover, the representative nomination process does not address power and resource imbalances between the State, crime victims, and the indigent accused. Finally, the proposed rules need further refinement to ensure constitutional guarantees.

*a. Undefined or ambiguous terms.*

Ambiguous or undefined terms in the proposed rules create the potential for unintended consequences. Further analysis is needed to analyze and refine definitions.

For example, the term “third-party facilitator familiar with restorative justice mediation principles” proposed in Rule 17.4(a)(3)(i) is undefined. There is no indication as to what training a person must have to be a facilitator or what standard ensures their neutrality. We are left wanting additional information or framework that would lead to some sort of consensus as to who a “third-party facilitator” could be and what training one would have to become “familiar with restorative justice mediation principles.” It is unclear whether this definition attempts to reference civil mediation principles, or whether it imputes meaning from established restorative justice research and scholarship that may risk being interpreted differently in practical settings. The civil rules may provide a basic model for case mediations, but the unique constitutional dimensions of the criminal process

demand a definition that ensures fairness to the accused.

A second example of an undefined term is “circle dialogue” in 17.4(a)(3)(vi)(cc). Again, it is unclear whether this term is meant colloquially, or whether the proposed rule imputes additional special meaning to it. Only those most familiar with the restorative justice process may know what the term means. Again, the practical application of a “circle dialogue” may differ from the principles intended in the proposed rule.

A third example of an undefined term is “Restorative agreement” in Rule 17.4(a)(3)(vii). It refers to case dismissal, deferred prosecution, and traditional plea agreements, but has no clear definition of what it may or must encompass. It is unclear how this would interact with authorized case dispositions under A.R.S. § 13-603 and other law governing plea agreements. To the extent a “restorative agreement” could be construed as a different class of plea agreement, it is unclear how or whether it would be voided or otherwise held invalid, especially on collateral attack.

*b. The State’s “veto power.”*

Even after lengthy multilateral negotiations, the State has the ultimate authority to reject a restorative agreement under proposed Rule 17.4(a)(3)(viii). This calls into question the incentives the accused and crime victims would have to participate in the process suggested in the proposed rules. This is especially true of the accused, who has no assurance of the inadmissibility of statements made during victim-defendant settlement conferences. While the proposed Rule attempts to alleviate those concerns with confidentiality restrictions, a more encompassing protection to establish that all communications will be privileged would provide a more comprehensive protection for all

involved.<sup>7</sup>

*c. Avoiding improper outside advocacy and ensuring clear objectives.*

It is also unclear who would be appropriate as a representative chosen by the victim, defendant, and facilitator. There are no rules or criteria set forth for choosing a representative, nor is there a way to disqualify a representative. The potential for improper outside influences to commandeer important and delicate case negotiations cannot be underestimated and must be addressed by procedural safeguards. As currently worded, the proposed rules potentially open the conference to members of the press, adversarial interest groups, or advocates with improper agendas. This could also lead to non-victim witnesses becoming a part of the procedure and could cause concerns or issues of influencing witnesses if an agreement is not reached.

The wording of these proposed Rules becomes especially problematic where objectives and procedural controls are concerned. As currently drafted, there are few references to the actual objectives of the “Victim-Defendant Settlement Conference.” There is potential for these proceedings to become uniquely adversarial; therefore, any proposed rule should be clear on the objectives meant to be achieved. Likewise, it is unclear how the proposed Rules would interact with Arizona’s Victims’ Bill of Rights. Further procedural controls are needed to establish time limits, alternatives for exchange of written statements in lieu of oral presentation, allocating authority to draft the restorative

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<sup>7</sup> Young, Abigale *PROTECTING RESTORATIVE JUSTICE PARTICIPANTS: THE IMPLICATIONS OF IMPLEMENTING RESTORATIVE JUSTICE PRACTICES WITHOUT PROPER SAFEGUARDS FOR PARTICIPANTS*, 13 *U. Miami Race & Soc. Just. L. Rev.* 89, (Spring 2023).

agreement, and requirements for form and format of such agreements.

*d. Constitutional protections: inculpatory and exculpatory evidence.*

The language of proposed Rule 17.4(a)(3)(ix) & (x) appears ambiguous concerning the admissibility of evidence coming from the accused or the accused's representatives. Likewise, there is no exception for exculpatory evidence obtained throughout the proceedings to be provided to the defense if an agreement is not reached. There is no mechanism for the accused to be able to call a representative as a witness if that representative possesses exculpatory evidence relating to either guilt or punishment. Also, the language is ambiguous to the point where it would indicate the prosecution can use the evidence obtained in the process against the accused if a restorative agreement is established and yet not reached pursuant to Rule 17.4(a)(3)(ix).

Finally, there is a risk of prejudice to the case caused by ex parte communications with the trial judge. Rule 17.4(a)(3)(i) cites back to Rule 17.4(a)(2) which allows the assigned trial judge to participate with the consent of the parties. In this scenario, the trial judge would then act as facilitator and would have to meet with the accused and counsel without the state present. The trial judge could also meet with the victim, the victim's counsel or the prosecutor without the defense present. This would allow ex parte communications which could potentially prejudice the outcome of the case.

**III. Conclusion.**

While well-intentioned, the currently proposed amendment to Rule 15.4 would likely cause unintended complications and obstacles for the indigent accused. IR opposes the proposed amendment to Rule 17.4 and Rule 38 of the Arizona Rules of Criminal

Procedure. Instead, we endorse the alternative in the Petition for the Court to set up a Task Force to explore alternatives, identify best practices and procedures, endorse the creation of agencies to train and administer the process, and suggest other pathways for our state’s judicial branch to integrate restorative justice practices into its conflict-resolution paradigm.

Respectfully submitted this 28th day of April, 2024.

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