

ARIZONA SUPREME COURT

In the Matter of:) Supreme Court No. R-24-0016
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PETITION TO AMEND RULE 17.4)
AND RULE 38 OF THE ARIZONA)
RULES OF CRIMINAL PROCEDURE)
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**Comment of American Civil Liberties Union Foundation of Arizona
and Arizona Attorneys for Criminal Justice**

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Pursuant to Rule 28(D), Rules of the Arizona Supreme Court, the American Civil Liberties Union Foundation of Arizona (ACLU of Arizona) and Arizona Attorneys for Criminal Justice (AACJ) respectfully submit this Comment in support of the Petition to Amend Rules 17.4 and Rule 38 of the Arizona Rules of Criminal Procedure to Incorporate Limited Restorative Justice Principles.

I. Introduction: The Problem of Mass Incarceration

The United States has the highest incarceration rate in the world,¹ with more than 1.2 million prisoners as of December 31, 2022.² The United States also has some of the harshest sentencing in the world. We are one of only 20% of countries who issues sentences of life without parole—even for single nonviolent offenses—and one of only nine countries with both life sentences and capital punishment.³ At the same time, our harsh criminal system routinely fails at convicting the guilty. Studies estimate that—at the very least—almost 24,000 innocent people are convicted and imprisoned each year.⁴

Arizona’s criminal sentencing scheme is similarly harsh. In the 2015 State of Our State Conference, researchers and legal officials from different perspectives published a series of papers for the Morrison Institute for Public Policy to advance

¹ Baz Dreisinger, *Incarceration Nations: A Journey to Justice in Prisons Around the World* 8 (2016).

² Bureau of Justice Statistics, U.S. Department of Justice, NCJ 307411, *Prisons Report Series: Preliminary Data Release* (2023).

³ R.L. Gottsfield et al., *Fixing Arizona’s Mass Incarceration Dilemma* 3 (2017).

⁴ Leon Friedman, *The Problem of Convicting Innocent Persons: How Often Does It Occur and How Can It Be Prevented*, 56 N.Y. L. SCH. L. REV. 1053 (2011).

discourse on criminal justice in the state. In one paper, the authors stated that since 1992, the prison population had far outgrown the state population, with the former increasing by 171% while the latter had increased by only 75%.⁵ These authors concluded Arizona was the “sixth highest in incarceration rates in the nation,” imprisoning almost 50% higher than other states.⁶ Simply, Arizona has a mass incarceration problem.

While supporters of this system have attempted to justify such statistics by claiming those incarcerated in our prisons are “dangerous and violent criminals,” the authors noted not only that prisons in Arizona are predominantly composed of “non-violent, low-level offenders,” but also that Arizona is experiencing a reduction in violent crime.⁷ Moreover, relying on mass incarceration to achieve public safety is not only ineffective, but counterproductive. A recent meta-analysis of 116 studies on the criminogenic effect of incarceration concluded that “custodial sanctions have no effect on reoffending or *slightly increase it* when compared with the effects of noncustodial sanctions such as probation.”⁸

Even considering violent crime, when one contemplates the individual factors that lead to violence, it is unsurprising that prison sentences do not rehabilitate an

⁵ See Gottsfield et al. *supra* note 17 at 4.

⁶ See Gottsfield et al. *supra* note 17 at 4.

⁷ *Id.* at 4-6.

⁸ Damon M. Petrich, Travis C. Pratt, Cheryl Lero Jonson, & Francis T. Cullen, *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, 50 *Crime and Justice: A Review of Research*, 353, 401 (2021) (emphasis added).

offender or prevent future harm. The four key drivers of violence are “shame, isolation, exposure to violence, and a diminished ability to meet one’s economic needs.”⁹ Prisoners’ experience while incarcerated are characterized by these same four factors.¹⁰

Importantly, those who have been harmed by crime, including violent crime, widely support alternatives to incarceration and a criminal justice system that focuses on rehabilitation.¹¹ In a national survey, the Alliance for Safety and justice found that “by a margin of nearly 3 to 1, victims believe that prison is more likely to make people commit crimes than to rehabilitate them.”¹² Those victims who do participate in the mainstream criminal justice system report secondary victimization, re-traumatization, stress, and confusion.¹³

Such findings, which clarify that incarceration does not decrease recidivism, and that current non-restorative criminal justice practices may further harm victims of crime, support the adoption of a rule change in Arizona to incorporate limited restorative justice principles into our system of justice.

⁹ Danielle Sered, *Until We Reckon: Violence, Mass Incarceration, and the Road to Repair* 67 (2019).

¹⁰ *Id.*

¹¹ Alliance for Safety and Justice, *Crime Survivors Speak: the First-Ever National Survey of Victims’ Views on Safety and Justice* (2016), 15-20 <https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf>.

¹² *Id.* at 14.

¹³ Jim Parsons and Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims’ Mental Health*, 23 *J. Traumatic Stress* 182-88 (2010); Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 *Social Justice Research* 313-25 (2002).

II. The Purpose of a Restorative Justice System

Restorative justice is a set of principles and practices that create a different approach to dealing with crime and its impact, particularly for victims of crime.¹⁴ Restorative justice looks beyond the current goals of punishment as deterrence, and instead seeks to repair the harms caused to the victim and the community, to hold offenders accountable, and to address the needs that prevent recidivism and promote reintegration.¹⁵ Programs adhering to these principles have proven successful and current research is producing encouraging results, including reduced rates of recidivism not only for minor offenses, but specifically for violent crimes.¹⁶

This success stems from restorative justice's focus on rehabilitation. Restorative justice principles do not ignore the harm caused by a criminal offense, but rather scrutinize all harms that can occur because of the commission of a crime. These principles reframe the process of obtaining justice by requiring the participation of every party—crime victim and perpetrator themselves—to “explore the impact on themselves and others and work together towards resolution and healing.”¹⁷ While the commission of a crime may rob a victim of their sense of worth and membership in the

¹⁴ See *About Restorative Justice*, Univ. Wisconsin-Madison L. Sch., <https://law.wisc.edu/fjr/rjp/justice.html#:~:text=Restorative%20justice%20seeks%20to%20examine,to%20repair%20the%20harm%20done> (last visited April 29, 2024).

¹⁵ Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 *Buffalo L. Rev.* 635, 640 (2021).

¹⁶ Heather Strang et al. *Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review*, 9 *Campbell Systematic Revs.*, 26-27 (2013).

¹⁷ Pete Wallis, *Understanding Restorative Justice: How Empathy Can Close the Gap Created by Crime 2* (2014).

community, giving them the status of a key stakeholder in accountability and repair can revive that sense of worth and belonging, which, according to criminology experts, “rarely is restored by the present process of justice.”¹⁸ Restorative justice is not a new idea. Much of what we understand of restorative justice today is derived from the traditional conflict resolution practices of indigenous peoples around the world.¹⁹ In recent times, restorative justice principles have proven successful throughout the world. For example, through the practice of Sulha, Palestinian communities successfully engage in mediation and reconciliation for crimes as serious as murder.²⁰ South Africa’s Truth and Reconciliation Commission investigated and adjudicated the effects of apartheid on the community,²¹ and had the power to grant clemency to those who truthfully admitted their guilt.²² Restorative justice was even practiced following the genocides in Rwanda through the Gacaca community courts,²³ where judges could issue more forgiving sentences if the person at trial “was repentant and sought

¹⁸ Mary Achilles & Howard Zehr, *Restorative Justice for Crime Victims* in 91 *Restorative Community Justice: Repairing Harm and Transforming Communities* (Gordon Bazemore & Mara Shiff eds., 2001).

¹⁹ Justin Blake Richland & Sarah Deer, *Introduction to Tribal Legal Studies* 347 (2009); John Pratt, *Colonization, Power, and Silence: A History of Indigenous Justice in New Zealand Society*, in 137 *Restorative Justice: International Perspectives* (Burt Galway & Joe Hudson, eds., 1995).

²⁰ *Id.* at 3; see also *Sulha*, Wi’am: The Palestinian Conflict Transformation Center, <https://www.alaslah.org/sulha/> (last visited April 29, 2024).

²¹ *Id.*

²² *Truth Commission: South Africa*, United States Institute of Peace (Dec. 1, 1995), <https://www.usip.org/publications/1995/12/truth-commission-south-africa>.

²³ See Wallis *supra* note 42 at 3.

reconciliation with the community.”²⁴

III. Why Restorative Justice Works

When a crime is committed, a relationship is formed between the person harmed, the person responsible, and possibly the community.²⁵ Ordinarily, this relationship is, and remains, self-centered: each party is immediately and almost exclusively concerned for themselves.²⁶ For those responsible for committing the crime, the immediate concern is in being able to avoid consequences, or at the very least minimize them.²⁷ For the person harmed by the crime, feelings typically tend to follow a chain of shock, denial, and anger.²⁸

In this critical moment, there is a vast “gap” between the person harmed and the person responsible.²⁹ Restorative justice (and this Rule Change Petition) aims to heal this gap through a voluntary process where everyone’s stories and needs are heard and which culminates in the finding of a solution together.³⁰ Restorative justice gives all parties the opportunity to ask questions about the crime, express their feelings, and

²⁴ *The Justice and Reconciliation Process in Rwanda*, United Nations Dep’t of Pub. Info.2 (March 2014), <https://www.un.org/en/preventgenocide/rwanda/assets/pdf/Backgrounder%20Justice%202014.pdf>.

²⁵ See Wallis *supra* note 42 at 1.

²⁶ *Id.* at 25.

²⁷ *Id.*

²⁸ *Id.* at 28.

²⁹ *Id.* at 33.

³⁰ *Id.* at 2.

have these feelings acknowledged and accepted.³¹ Rather than assuming each person’s interests will remain unchanged, restorative justice encourages parties to understand the other, thus pushing those responsible to face and own up to the harms they caused.³² Importantly, empirical research suggests restorative justice does more to rehabilitate and heal than does the standard criminal justice system. Researchers typically find their successes in “rates of participation, the nature and extent of engagement, participant satisfaction, restoration and the impact upon recidivism rates.”³³

The main driver of the success of restorative justice is that it empowers both the person harmed and the person responsible in different ways. The person harmed can “express their feelings to the offender and ask questions of them in a safe environment [rather than] be sidelined as evidentiary cannon fodder.”³⁴ The person responsible in turn is empowered to “take more concrete steps for the broader impacts of the [offense] and assist victims in the recovery process.”³⁵

IV. The Maricopa County Attorney’s Office Provides No Meaningful Reason to Oppose This Rule Change Petition

Despite its claim that the Maricopa County Attorney’s Office (“MCAO”) “is always amendable [sic] to discuss new ideas,” their Comment in Opposition follows

³¹ See Lanni *supra* note 39 at 642.

³² *Id.*

³³ Jonathan Doak and David O’Mahony, *Routledge International Handbook of Restorative Justice* 213 (Theo Gavrielides ed., 2019).

³⁴ *Id.*

³⁵ *Id.* at 215.

MCAO’s predicable opposition to even the most modest efforts to reform Arizona criminal legal system, while offering no meaningful reason to oppose this Rule Change Petition. Contrary to the claim made by the Maricopa County Attorney’s Office in their Comment in Opposition, this proposal does not create a new system. Nor does it violate the Separation of Powers as MCAO claims. Rather, this modest proposal simply provides an additional route toward justice, but only when the accused and the victim agree to participate. Moreover, MCAO’s claim, without any cited authority, that this proposal “has a substantial likelihood of causing further harm to victims” is belied by the voluminous research cited here and in the Rule Change Petition showing how victims benefit from restorative justice principals.

V. Conclusion

The proposed rule change submitted by the Arizona Restorative Justice Coalition, developed after months of research and discussion by a broad and diverse group of stakeholders, is a modest proposal and should be adopted by this Court. Alternatively, as the Directors of the Maricopa County Indigent Defense Agencies suggest, this Court should establish a Restorative Justice Task Force to “explore alternatives” and “identify best practices and procedures” for integrating restorative justice principles into Arizona’s criminal legal system.

Respectfully submitted, this 1st day of May 2024.

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