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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	) Supreme Court No. R-24-0025
	)
Petition to Amend Rule 14.4 and Rule	) Comment by Arizona Attorneys for
17.2 of the Arizona Rules of Criminal	) Criminal Justice Supporting the
Procedure	) Petition to Amend Rule 14.4 and Rule
	) 17.2 of the Arizona Rules of Criminal
	) Procedure
_____	)

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) hereby submits the following comment on the petition to amend Rule 14.4 and Rule 17.2 of the Arizona Rules of Criminal Procedure.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the

accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ strongly supports the two related proposed rule changes combined into R-24-0025; they will meaningfully improve transparency in the criminal justice process and will cost virtually nothing to implement. As the task force correctly identified, advisement about the collateral consequences of criminal convictions is critical to ensuring that defendants have notice as to what the real impact of a criminal plea agreement will be. As one scholar put it, “[f]or many people convicted of crimes, the most severe and long-lasting effect of conviction is not imprisonment or fine. Rather, it is being subjected to collateral consequences involving the actual or potential loss of civil rights, parental rights, public benefits, and employment opportunities.”¹ Another noted that collateral consequences “are frequently the most important result of a criminal conviction.”²

¹ Danielle R. Jones, *When the Fallout of A Criminal Conviction Goes Too Far: Challenging Collateral Consequences*, 11 Stan. J. Civ. Rts. & Civ. Liberties 237, 241–42 (2015).

² Paul T. Crane, *Incorporating Collateral Consequences into Criminal Procedure*, 54 Wake Forest L. Rev. 1, 3 (2019).

Regrettably, despite the well-documented importance of collateral consequences, they are also often the least understood part of a criminal conviction—by defendants, courts, and prosecutors, alike. This is because “[t]he depth and breadth of collateral consequences ‘tend to be unknown’ even to those working within the criminal justice system ‘often because they are scattered throughout different bodies of law.’”³ For instance, although the loss of civil rights and immigration rights are better known, the occupational hazards of a criminal conviction are far reaching in Arizona and are strewn the Arizona Revised Statutes. *See, e.g.*, A.R.S. § 32-3208(A) (requiring *all* healthcare professionals to report to their respective licensing agencies any charge for a misdemeanor involving conduct that may affect patient safety); A.R.S. § 32-854.01 (making it an act of unprofessional conduct for a podiatrist to commit a felony or to commit a misdemeanor involving moral turpitude); A.R.S. § 32-2232 (same, for veterinarians); A.R.S. § 32-4253 (similar, for massage therapists). In fact, most of the self-regulating professional licensing agencies in Arizona require self-reporting when a criminal charge is filed (and then an update when a resolution is reached), and then will open a disciplinary investigation based on the report. Disciplinary proceedings can then result in restrictions on a professional license, or bar eligibility completely. However, a young criminal defendant might not be

³ Jones, *supra*, at 242.

thinking, at their change of plea hearing, about what they want to be when they grow up and whether an admission of guilt will pose a barrier to their future career goals.

The comment submitted by the Arizona Prosecuting Attorney's Advisory Council and Maricopa County Attorney's Office highlights the lack of understanding about how collateral consequences work, generally. To be sure, it is virtually impossible to advise any particular criminal defendant about the full scope of the collateral consequences they might encounter, but this is not because defense counsel cannot predict them. It is because those consequences will necessarily change based on unfixed variables like where the defendant lives in the future and/or what profession they pursue in that jurisdiction. However, contrary to the APAAC and MCAO's dubious claim that "[e]ncouraging criminal defense attorneys to discuss theoretical collateral consequences with defendants would invite error to the extent that it leads to the provision of incorrect legal advice[,]” the reality is that *any* advisement about the potential for collateral consequences is still better than none. When criminal defendants are made aware that collateral consequences exist, they are empowered to seek out more information about what collateral consequences might entail.

Although the AACJ, which represents the defense bar, appreciates the prosecution's purported concern about our inability to properly advise our clients,

this is a red herring argument. The mere inclusion of an advisory about collateral consequences that already exist will not impact defense counsel's ethical responsibility or ability to provide competent counsel. Nor does the fact that certain collateral consequences "may be outside a criminal defense attorney's area of expertise" mean that the defendant should not be put on notice about the collateral consequences. As is common practice in all areas of law, sometimes competent counsel means advising a client that they need legal advice of a different nature and finding an appropriate referral to provide that advice. Further, to the extent prosecutors are concerned about drawing an *expressio unius est exclusio alterius* argument in some challenge, this can be easily resolved by including language in plea agreements that expressly confirm that not all collateral consequences have been enumerated. As the drafter of those agreements, the prosecutor, not the court nor the defense, has the unique ability to proactively guard against this concern.

The proposed rule changes are especially important insofar as they serve to protect all *pro per* defendants who do not have the benefit of assistance of counsel, and do not recognize they may need it. As the defense bar knows too well, many criminal defendants—especially first-time offenders, or those facing "mere" misdemeanor charges—prefer to forgo fighting charges on the merits, or raising available defenses, for the purpose of "getting it over with" or because they believe

that an expedited resolution will save them money and continued duress. When employment and immigration collateral consequences are on the line, this is often a false expectation. Too often, the full weight of a guilty plea is not evident to criminal defendants until they confront, in real time, the collateral consequences of their conviction. “Like apparitions lying in wait, collateral consequences emerge from the shadows the instant an ex-offender attempts to reintegrate into the community after sustaining a conviction.”⁴

Finally, these rules should be implemented without the restriction proposed by Mr. Williams in his comment submitted on behalf of the Justice of the Peace Bench in Maricopa County. This comment, too, highlights the lack of clarity about how collateral consequences impact criminal defendants regardless of where the charge is brought. Justice and city courts routinely handle misdemeanor charges relating to drug paraphernalia, domestic violence, and shoplifting—all of which invite heavy-handed and long-lasting immigration consequences. For example, a noncitizen’s Temporary Protected Status (“TPS,”) may be terminated by any two misdemeanors. Deferred Action for Childhood Arrivals (“DACA”), similarly, may be unavailable to anyone with any significant misdemeanor or any three misdemeanors. A noncitizen convicted of a domestic violence misdemeanor, or who is the subject of a court order finding certain types of violations of a domestic

⁴ Id. at 241–42.

violence protective order, is deportable under 8 USC § 1227(a)(2)(E). Also, domestic violence offenses usually have serious occupational repercussions for licensed professionals in Arizona, regardless of their classification as a felony or a misdemeanor. Accordingly, because collateral consequences are in no way limited to felony convictions, the proposed rule changes should be applied uniformly to all courts in which the Rules of Criminal Procedure apply.

For these reasons, AACJ requests that this Court adopt the proposed rule changes for Rule 14.4 and Rule 17.2 of the Arizona Rules of Criminal Procedure.

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