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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of

PETITION TO AMEND RULES 14.4
AND RULE 17.2 OF THE ARIZONA
RULES OF CRIMINAL
PROCEDURE

Supreme Court No. R-24-0025

REPLY TO COMMENTS

Pursuant to Rule 28, Rules of the Supreme Court of Arizona, the Task Force on Plea Bargaining, Sentencing and Dispositions (“The Task Force”) hereby submits the following reply to the comments filed in the above-captioned matter.

On January 9, 2023, undersigned on behalf of the Task Force appointed by Chief Justice Brutinel (AO 2021-84) filed a petition to amend Rules 14.4 and 17.2, Ariz R. Cr. Pr. Several comments were filed in response to the Petition. The comments were primarily directed at the proposed changes to Rule 17.2. These comments are discussed below.

A. Rule 17.2

For reference, the proposal to amend Rule 17.2, Arizona Rules of Criminal Procedure is as follows:

Rule 17.2. Advising of Rights and Consequences of a Guilty or No Contest Plea

(a) Generally. Except as provided in Rule 17.1(f)(2), before accepting a plea of guilty or no contest, the court must address the defendant personally, inform the defendant of the following, and determine that the defendant understands:

- (1) the nature of the charges to which the defendant will plead;
- (2) the range of possible sentences for the offenses to which the defendant is pleading, any special conditions regarding sentencing, parole, or commutation imposed by statute;
- (3) the constitutional rights that the defendant foregoes by pleading guilty or no contest, including the right to counsel if defendant is not represented by counsel;
- (4) the right to plead not guilty; and
- (5) in a noncapital case, the defendant's plea of guilty or no contest will waive the right to appellate court review of the proceedings on a direct appeal; and that the defendant may seek review only by filing a petition for post-conviction relief under Rule 33 and, if it is denied, a petition for review;

(b) ~~Immigration Advisement~~ Collateral Consequences.

(1) Civil Rights. The court must advise that a plea to a felony offense will affect the defendant's civil rights and specifically state: "If you are convicted of a felony offense, certain civil rights will be suspended. These rights include the right to:

1. Vote.

2. Serve as a juror.

3. Hold public office.

4. Possess a firearm".

~~(1) Advisement.~~ (2) Immigration. The court must advise that a plea may have immigration consequences and specifically state:

"If you are not a citizen of the United States, pleading guilty or no contest to a crime may affect your immigration status. Admitting guilt may result in deportation even if the charge is later dismissed. Your plea or admission of guilt could result in your deportation or removal, could prevent you from ever being able to get legal status in the United States, or could prevent you from becoming a United States citizen."

(3) Other Collateral Consequences. The court must advise that a plea may have other collateral consequences, depending on the nature of the case.

~~(2)~~ 4) Advisement Before Admission of Facts. A court also must give the advisement in (b) ~~(1)~~ before any admission of facts sufficient to warrant a finding of guilt, or before any submission on the record.

~~(3) Disclosure of Immigration Status.~~ **(c) Disclosure of Immigration Status.** A court may not require a defendant to disclose his or her legal status in the United States.

B. Comments

1. Judge Anna Huberman, Presiding Justice of the Peace, Maricopa County Justice Courts and Hon. Gerald Williams, Justice of the Peace, North Valley Justice Court (“The JPs”)

The JPs filed a comment suggesting a clarification of the proposed Rule 17.2(b)(1) to make it clear that the court in a misdemeanor case is not required to inform the defendant the plea will affect the defendant’s civil rights. The JPs propose the following language (upper case in blue denotes new language, strikeout in red denotes deleted language):

(1) Civil Rights. **WHEN ACCEPTING A CHANGE OF PLEA TO A FELONY**, the court must advise that a plea ~~to a felony offense~~ will affect the defendant’s civil rights and specifically state: “If you are convicted of a felony offense, certain civil rights will be suspended. These rights include the right to:

1. Vote.
2. Serve as a juror.
3. Hold public office.
4. Possess a firearm”.

While the JPs' suggestion does not change the ultimate meaning of the rule because the loss of civil rights is attached to a felony offense only, the petitioner understands the JPs' request to be that the rule be clear that it does not require the advisement in a misdemeanor case.

The Task Force adopts the JPs' suggestion, albeit with a slight modification: The Task Force proposes adoption of the following wording of Rule 17.2(b)(1),

(1) *Civil Rights*. [IN PLEADING TO A FELONY OFFENSE](#), the court must advise that a plea ~~to a felony offense~~ will affect the defendant's civil rights and specifically state: "If you are convicted of a felony offense, certain civil rights will be suspended. These rights include the right to:

1. Vote.
2. Serve as a juror.
3. Hold public office.
4. Possess a firearm".

2. Arizona Attorneys for Criminal Justice ("AACJ")

The AACJ recommends that Rule 17.2(b)(1) apply to misdemeanors as well as felonies. AACJ notes that justice and city courts handle misdemeanor charges such as Possession of Drug Paraphernalia, Domestic Violence, and Shoplifting all of which might have collateral consequences upon conviction. However, the proposed

Rule 17.2 (b)(1) by statute applies to felonies only (A.R.S. § 13-904 (A)). Therefore, AACJ's request to extend Rule 17.2 (b)(1) to misdemeanor cases is statutorily foreclosed.

3. Maricopa County Indigent Defense Offices

The four Maricopa County indigent defense offices and the coordinating office filed a comment supporting the petition with no suggested changes. The defense offices also recommend Rule 41, Ariz. R. Cr. Pr. Forms 18(a) and 18(b), the plea agreement forms be modified in a future petition to fully address the most significant loss of rights and collateral consequences associated with felony convictions.

4. Arizona Attorney General

The Task Force recommendation is an attempt to balance between advising a defendant of too few and too many collateral consequences. There are many collateral consequences, some specific to an individual case or an individual defendant depending on that person's circumstances. The Attorney General is concerned, however, that advising of four specific consequences as opposed to others would create more confusion. The Attorney General recognizes that providing even more consequences is not the answer. However, she comments that the specific advisements contemplated by the proposed rule change will ultimately cause more problems than they solve.

The Task Force recommendation is grounded in statute. The proposed rule, 17.2(b)(1), provides notice of the four collateral consequences listed in A.R.S. § 13-904(A). They are a constant, applicable to all cases and to all convicted felons. Informing the Defendant at the plea proceeding provides notice of loss of civil rights as required by statute, a statute that is applicable to all convicted felons despite their circumstances and one in which the defendant may not be familiar.

The Attorney General correctly notes that § 13-604 (A) states that a Class 6 undesignated offense is treated as a misdemeanor for all purposes until designated by the court. It is noted, however, that § 13-604 (B) contains a “notwithstanding clause” stating that the offense is treated as a felony for certain purposes.¹ She is concerned that a defendant pleading to a Class 6 undesignated offense may be misled into believing that their civil rights will be suspended. However, in virtually all cases there is not a final designation of the offense until the court actually enters an order designating the offense, usually when the defendant is discharged from probation or probation is revoked. The possibility of the offense being designated a felony exists. The nuances of § 13-604 can be explained to the defendant by the defense attorney. Since a felony designation is a possible outcome, the defendant should be advised of the potential loss of civil rights.

¹ The offense is treated as a felony for certain purposes. A.R.S. § 13-604(B). Loss of Civil Rights is not one of those listed purposes.

The Attorney General also correctly states that in some cases a person's civil rights are automatically restored pursuant to A.R.S. § 13-907. However, restoration of civil rights does not occur until absolute discharge. During the period from sentencing to discharge the person's civil rights are suspended. Therefore, the notice to the defendant is beneficial even for a first offender.

5. State Bar of Arizona

The State Bar in its comment agrees with the aim of the proposed rule to better inform criminal defendants about collateral consequences. The Bar believes that the proposed amendments to Rules 14.4(e)(7) and (8) and Rule 17.2(b)(1) accomplish that goal. The Bar expresses concern, however, with the proposed Rule 17.2(b)(3), the general advisement. The Bar comments that the proposed rule could confuse defendants, lead to delay, and invite unnecessary litigation. The Bar is concerned that the defendant will ask for clarity about additional consequences and may argue in post-conviction relief proceedings that the plea was not knowing, intelligent, and voluntary, thus inviting an ineffective assistance of counsel claim based on counsel's prejudicial failure to properly advise concerning collateral consequences.

Under the current rule there is no advisement concerning other potential collateral consequences, so the defendant is not put on notice that other consequences may follow a felony conviction. Using the Bar's analysis, no notice is preferable. There is broad agreement that the court cannot advise each defendant of every

potential collateral consequence. However, the general advisement in combination with the specific notice in Rule 17.2(b)(1) puts the defendant and defendant's counsel on notice of potential collateral consequences. The defense attorney can then conduct due diligence and discuss other potential collateral consequences with the defendant.

In an attempt to address the State Bar's concern the Task Force recommends one change to the proposed Rule 17.2(b)(3): removal of the dependent clause "depending on the nature of the case." This modification should eliminate any implication that the court must advise a defendant of specific collateral consequences attending that case. Instead, Rule 17.2(b)(3) is reasonably read to accomplish its intended purpose – to remind defense counsel and defendants to consider other potential collateral consequences when deciding whether to enter a felony plea. (The change to the proposed language is noted in red).

Rule 17.2(b)(3)

(3) Other Collateral Consequences. The court must advise that a plea may have other collateral consequences, ~~depending on the nature of the~~ case.

6. Arizona Prosecuting Attorney's Advisory Counsel and Maricopa County Attorney's Office.

The Executive Director of the Arizona Prosecuting Attorney's Advisory Counsel informed undersigned that the comment was drafted by the Maricopa County

Attorney's Office (MCAO). Therefore, the comment will be referred to as the MCAO comment.

MCAO argues that, while the proposed amendments are well intended, the general warning is vague. The Task Force weighed that argument at the outset and believes that the warning is important and necessary. In other words, the risks associated with the general warning are outweighed by the benefits of placing the defendant on notice of potential collateral consequences.

MCAO is also concerned that enumerating certain rights in the rule implicates the *expression unis est exclusion alterius* interpretative canon, thus opening the door to defendants contesting the guilty plea if the defendant is subject to an unenumerated collateral consequence. But, as stated above, the four listed enumerated rights are the defined civil rights stated in statute.² Moreover, the general advisement puts every defendant on notice that other potential collateral consequences may follow their felony plea.

MCAO is also concerned that the general advisement places a burden on the defense attorney to inform the client of potential collateral consequences. Specifically, MCAO cautions that unknown collateral consequences may be outside

² There is actually a fifth right stated in statute. "During any period of imprisonment any other civil rights the suspension of which is reasonably necessary for the security of the institution in which the person sentenced is confined or for the reasonable protection of the public." § 13-904(A)(4). The Task force did not see the need to include this paragraph in the proposed rule in that it is internal to the Department of Corrections, Reentry and Rehabilitation.

a criminal defense attorney's area of expertise. However, no defense attorney on the Task Force or commentor shared this concern. Although MCAO raises the specter that inviting a defense attorney to discuss theoretical collateral consequences may invite error, the Task Force concludes that the defendant should be informed that certain civil rights are statutorily suspended upon a felony conviction and that other potential collateral consequences may follow. It is sound public policy and advances the interests of justice to adequately inform defendants of the consequences of a felony conviction before they enter a felony plea.

MCAO objects to the entire petition.

C. Modification of Rule 17.2(b)

A working group of the Task Force reviewed and discussed the comments. The Task Force is aware of the fluid nature of the law concerning the collateral consequences of a felony conviction. The Task Force is also cognizant of the concerns expressed by the various stakeholders and appreciates their input. However, the Task Force is keenly aware of the effect of collateral consequences associated with a guilty plea. After exhaustive discussion and deliberation, the Task Force is steadfast in its conclusion that defendants should be provided additional information on collateral consequences before they enter a felony plea.

The Task Force has addressed the concerns of the stakeholders by recommending two changes to the proposed Rule 17.2(b), as stated below and in Attachment I.

First, clarification that loss of the statutory listed civil rights applies only to those convicted of a felony in the proposed Rule 17.2(b)(1). Second, by removing the dependent clause “depending on the nature of the case” in the proposed Rule 17.2(b)(3). The latter modification should eliminate any implication that the court must advise a defendant of specific collateral consequences attending that case. Instead, Rule 17.2(b)(3) is reasonably read to accomplish its intended purpose—to remind defense counsel and defendants to consider other potential collateral consequences when deciding whether to enter a felony plea.

The proposed changes from the original petition are delineated in upper case and in red as applicable.

(b) ~~Immigration Advisement~~ Collateral Consequences.

(1) *Civil Rights*. ~~WHEN ACCEPTING A CHANGE OF PLEA TO A FELONY~~, the court must advise that a plea ~~to a felony offense~~ will affect the defendant’s civil rights and specifically state: “If you are convicted of a felony offense, certain civil rights will be suspended.

These rights include the right to:

1. Vote.

2. Serve as a juror.

3. Hold public office.

4. Possess a firearm”.

~~(1) *Advisement.*~~ (2) *Immigration.* The court must advise that a plea may have immigration consequences and specifically state:

“If you are not a citizen of the United States, pleading guilty or no contest to a crime may affect your immigration status. Admitting guilt may result in deportation even if the charge is later dismissed. Your plea or admission of guilt could result in your deportation or removal, could prevent you from ever being able to get legal status in the United States, or could prevent you from becoming a United States citizen.”

(3) *Other Collateral Consequences.* The court must advise that a plea may have other collateral consequences, ~~depending on the nature of the~~
~~ease.~~

~~(2~~ 4) *Advisement Before Admission of Facts.* A court also must give the advisement in (b) ~~(1)~~ before any admission of facts sufficient to warrant a finding of guilt, or before any submission on the record.

~~(3) *Disclosure of Immigration Status.*~~ **(c) Disclosure of Immigration Status.** A court may not require a defendant to disclose his or her legal status in the United States.

D. Conclusion

WHEREFORE, the Task Force on Plea Bargaining requests this court to adopt the proposed changes to Rules 14.4 and 17.2, Arizona Rules of Civil Procedure as proposed in Attachment I.

Respectfully submitted this 31st day of May 2024.

By ___/s/_____

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ATTACHMENT I

Rule 14.4. Proceedings at Arraignment

At an arraignment, the court must:

- (a)** enter the defendant's plea of not guilty, unless the defendant pleads guilty or no contest and the court accepts the plea;
- (b)** decide motions concerning release conditions under Rule 7 if:
 - (1) the arraignment is held with the defendant's initial appearance under Rule 4.2;
 - (2) the moving party provides 5 days' notice of a contested release motion; or
 - (3) all parties agree;
- (c)** set the date for trial or a pretrial conference;
- (d)** provide written notice of the dates of further proceedings and other important deadlines;
- (e)** inform the defendant of the following:
 - (1) the right to counsel and the right to court-appointed counsel if eligible;
 - (2) the right to jury trial, if applicable;
 - (3) the right to be present at all future proceedings;
 - (4) the failure to appear at future proceedings may result in the defendant being charged with a new offense and the court issuing an arrest warrant;
 - (5) all proceedings may be held in the defendant's absence, other than sentencing; ~~and~~
 - (6) the defendant may lose the right to a direct appeal if the defendant's absence from sentencing causes sentencing to occur more than 90 days after any conviction;
 - (7) conviction of a crime may have collateral consequences, including but not limited to immigration consequences; and
 - (8) conviction of a felony offense will result in certain civil rights being suspended.
- (f)** appoint counsel if applicable;

(g) order a summoned defendant to be 10-print fingerprinted no later than 20 calendar days by the appropriate law enforcement agency at a designated time and place if:

(1) the defendant is charged with a felony offense; a violation of an offense listed in Title 13, Chapters 12, 14, 15 except A.R.S. § 13-1509, 18, 20 through 23, 32, 34, or 34.1; a domestic violence offense as defined in A.R.S. § 13-3601; a violation of A.R.S. §§ 13-1604, 13-2406, 13-2904, 13-2907 to 13-2907.05, 13-2910, 13-2916, 13-3102, 13-3103, 13-3513, 13-3555, 13-3558, 13-3613, 13-3619, 13-3623, 13-3704, or 46-215; or a violation of an offense listed in Title 28, Chapter 4; and

(2) the defendant does not present a completed mandatory fingerprint compliance form to the court, or if the court has not received the process control number.

(v) Victims' Rights. If the court under (b) decides a release motion at the defendant's arraignment, a victim has the rights provided in Rule 7.2(v).

Rule 17.2. Advising of Rights and Consequences of a Guilty or No Contest Plea

(a) Generally. Except as provided in Rule 17.1(f)(2), before accepting a plea of guilty or no contest, the court must address the defendant personally, inform the defendant of the following, and determine that the defendant understands:

- (1) the nature of the charges to which the defendant will plead;
- (2) the range of possible sentences for the offenses to which the defendant is pleading, any special conditions regarding sentencing, parole, or commutation imposed by statute;
- (3) the constitutional rights that the defendant foregoes by pleading guilty or no contest, including the right to counsel if defendant is not represented by counsel;
- (4) the right to plead not guilty; and
- (5) in a noncapital case, the defendant's plea of guilty or no contest will waive the right to appellate court review of the proceedings on a direct appeal; and that the defendant may seek review only by filing a petition for post-conviction relief under Rule 33 and, if it is denied, a petition for review;

(b) ~~Immigration Advisement~~ Collateral Consequences.

(1) Civil Rights. When accepting a change of plea to a felony, the court must advise that a plea will affect the defendant's civil rights and specifically state: "If you are convicted of a felony offense, certain civil rights will be suspended. These rights include the right to:

1. Vote.
2. Serve as a juror.
3. Hold public office.
4. Possess a firearm".

~~(1) Advisement.~~ (2) Immigration. The court must advise that a plea may have immigration consequences and specifically state:

“If you are not a citizen of the United States, pleading guilty or no contest to a crime may affect your immigration status. Admitting guilt may result in deportation even if the charge is later dismissed. Your plea or admission of guilt could result in your deportation or removal, could prevent you from ever being able to get legal status in the United States, or could prevent you from becoming a United States citizen.”

(3) Other Collateral Consequences. The court must advise that a plea may have other collateral consequences.

(2 4) *Advisement Before Admission of Facts.* A court also must give the advisement in (b) ~~(4)~~ before any admission of facts sufficient to warrant a finding of guilt, or before any submission on the record.

~~(3) Disclosure of Immigration Status.~~ **(c) Disclosure of Immigration Status.** A court may not require a defendant to disclose his or her legal status in the United States.