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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of PETITION TO AMEND RULES 15.8, 17.4 OF THE ARIZONA RULES OF CRIMINAL PROCEDURE.	Supreme Court No. R-05-0035 COMMENT IN OPPOSITION TO THE PETITION TO AMEND RULES 15.8, 17.4

The Maricopa County Attorney hereby responds in opposition to the Petition to Amend Rule 15.8 & 17.4 of the Rules of Criminal Procedure.

Respectfully submitted this 22 day of May, 2006.

ANDREW P. THOMAS
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BY: Philip J. MacDonnell
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MEMORANDUM OF POINTS AND AUTHORITIES

The Pima County Public Defender's Office (hereinafter "PCPD") proposes three measures to expand the reach of the controversial provisions of the 2003 amendments to Rule 15.8.[1] First, a court would no longer have to find that recently disclosed evidence was material in order to trigger the remedial provisions of the rule. Second, late disclosure would automatically require the court to order the prosecutor to extend plea deadlines by at least 14 days; current Rule 15.8 purports to limit its provisions to discovery by punishing late disclosure with preclusion of the evidence unless the plea offer is extended. Third, PCPD proposes to amend Rule 17.4 to prohibit plea agreements from allowing a defendant to waive full discovery disclosure.

The Supreme Court should reject the petition of PRCD for several reasons. First, the approach advocated by PCPD is not supported by case law and the authorities cited by PCPD. Second, the proposal is unconstitutional under the Separation of Powers Clause of the Arizona Constitution. Third, the proposal would exacerbate the problems that the 2003 amendment is creating in limiting the availability of fast-track plea offers in indicted cases. Fourth, the proposed changes will increase the ability of defense counsel to engage in gamesmanship.

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1 Rule 15.8 of the Rules of Criminal Procedure provides:

If the prosecution has imposed a plea deadline in a case in which an indictment or information has been filed in Superior Court, but does not provide the defense with material disclosure listed in Rule 15.1(b) at least 30 days prior to the plea deadline, the court, upon motion of the defendant, shall consider the impact of the failure to provide such disclosure on the defendant's decision to accept or reject a plea offer. If the court determines that the prosecutor's failure to provide such disclosure materially impacted the defendant's decision and the prosecutor declines to reinstate the lapsed plea offer, the presumptive minimum sanction shall be preclusion from admission at trial of any evidence not disclosed at least 30 days prior to the deadline.

I. RULE 15.1 DISCLOSURE IS NOT NECESSARY FOR A GUILTY PLEA.

In its Petition, PCPD asserts that advising a defendant without the benefit of Rule 15.1 materials violates defendants' due process right to make a knowing and intelligent waiver of their trial rights and defendants' right to the effective assistance of counsel.[2] (Petition, at 2.) The United States Supreme Court has rejected that argument.

A. DEFENDANTS NEED ONLY BE APPRISED OF THEIR TRIAL RIGHTS AND THE DIRECT CONSEQUENCES OF THEIR GUILTY PLEA.

Under the United States Constitution, defendants need only be apprised of their trial rights, the charges against them, and the consequences of the plea in order to knowingly and intelligently waive a trial and plead guilty. *United States v. Ruiz*, 536 U.S. 622, 629 (2002); *Brady v. United States*, 397 U.S. 742, 748 n.6 (1970). In *Ruiz*, the Supreme Court examined a defendant's challenge to fast-track plea bargaining. Under that system, defendants waive an indictment, trial, appeal, and *Brady* impeachment evidence in exchange for a shortened sentence. *Id.* at 625. The government discloses to the defendant only evidence of factual innocence prior to the plea.[3] *Id.* at 624. The Court rejected the claim that evidence necessary for a fair trial is relevant to a defendant's decision to plead guilty. *Id.* at 629. The Court expressly held that waiver of a trial right requires only understanding "the nature of the right and how it would apply *in general*." *Id.* Under *Ruiz*, with the exception of evidence demonstrating factual innocence, no disclosure is necessary before a defendant waives his or her trial rights and pleads guilty.[4]

B. NO PRECEDENT IN THE PETITION STANDS FOR THE PROPOSITION FOR WHICH IT IS CITED.

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2 This assertion should tip off this Court that the Petition misstates the law. Most jurisdictions do not require disclosure equal to Arizona's Rule 15.1. According to PCPD's argument, therefore, these jurisdictions, including the federal criminal system, are all violating defendants' federal constitutional rights.

3 Evidence of *factual innocence* is only a minute fraction of *Brady* materials, given that *Brady* implicates materials that would tend to create a reasonable doubt, or *legal innocence*.

4 In 2005, this Court inexplicably depublished the only Arizona precedent correctly following the *Ruiz* holding. *State v. Secord*, 207 Ariz. 517, 88 P.3d 587 (2005), *depublished*, 210 Ariz. 232, 109 P.3d 571(2005).

PCPD incorrectly cites several decisions for the proposition that conditioning plea offers on a defense waiver of Rule 15.1(b) materials violates a defendant's due process right to make a knowing and intelligent trial waiver and of defense counsel's obligation to provide effective assistance of counsel. No citation in the Petition supports PCPD's argument.

PCPD cites the court of appeals' decision in *State v. Draper* (*Draper I*), 158 Ariz. 315, 762 P.2d 602 (App. 1988), invalidating an *Alford*[5] plea made contingent on defense waiver of a victim interview. This Court reversed that decision however. *State v. Draper* (*Draper II*), 162 Ariz. 433, 784 P.2d 259 (1989). In doing so, this Court expressly held "we cannot say that such a condition in the plea agreement would always affect the validity of any plea." *Id.* at 437, 784 P.2d at 263. Moreover, *Draper* dealt with a defendant's *Alford* plea, not a guilty plea. An *Alford* plea is different from a guilty plea because an *Alford* plea requires, according to *Draper II*, defendant's "knowledge of the strength of the state's case against him." *Id.* This Court's decision directly negates PCPD's claim. Moreover, because *Draper* analyzed an *Alford* plea and not a guilty plea, the analysis in *Draper* does not implicate the guilty plea process.

Second, PCPD cites *McCarthy v. United States*, 394 U.S. 459 (1969). The *McCarthy* Court made clear that it was not reaching any constitutional issue:

> This decision is based solely upon our construction of Rule 11 and is made pursuant to our supervisory power over the lower federal courts; we do not reach any of the constitutional arguments petitioner urges as additional grounds for reversal.

394 U.S. at 464. The *McCarthy* court found that due process requires only that a defendant understand the law in order to appreciate that the facts admitted in a plea satisfy the elements of the criminal charge. *Id.* at 466-67. And like the other citations in the Petition, there was no issue in *McCarthy* about disclosure prior to a plea. *McCarthy* involved only an inadequate plea colloquy.

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5 *North Carolina v. Alford*, 400 U.S. 25 (1970).

PCPD also wrongfully asserts that the current Rule 15.8 conflicts with the United States Supreme Court's decision in *Santobello v. New York*, 404 U.S. 257 (1971). PCPD argues that in that case, the Supreme Court "recognized a trial court's equitable authority to order specific performance in situations similar to the instant situation." (Petition, at 2.) The *Santobello* Court did not address the issue of disclosure or imply such a holding.

In *Santobello*, the defendant pleaded guilty and the trial court accepted the plea after the prosecutor agreed not to make a sentencing recommendation. *Id.* at 258. At sentencing, a new prosecutor recommended the maximum sentence. *Id.* at 259. The Court held that where the State induced a guilty plea based on a promise ("consideration"), that "promise must be fulfilled." *Id.* at 262. *Santobello* stands only for the proposition that contract law governs the State's promises used to induce a defendant's guilty plea *after the plea is entered and accepted by the trial court.* In contrast, the Court has held that a plea agreement is "a mere executory agreement" that is not specifically enforceable. *Mabry v. Johnson*, 467 U.S. 504, 505-07 (1984). Moreover, there is no discussion in *Santobello* of disclosure prior to a plea.

II. PCPD IS REQUESTING A RULE THAT VIOLATES THE SEPARATION OF POWERS CLAUSE OF THE ARTIZONA CONSTITUTION

Beyond the incorrect legal analysis in the Petition, the Maricopa County Attorney's Office is deeply concerned that PCPD has requested a rule change that would violate the Separation of Powers Clause in the Arizona Constitution. PCPD has requested that this Court annex the State's charging authority and place it with trial courts.

PCPD relies on a court of appeal's holding that a defendant who rejects a plea offer and proceeds to trial may state a claim that defense counsel was ineffective for failing to properly explain the differences between the sentence offered in the plea bargain and the possible sentence after trial. *Donald*, 198 Ariz. at 413, ¶ 14, 10 P.3d at 1200. The majority in *Donald* held that after

trial courts find a valid claim of ineffective assistance based on rejection of a plea bargain, they may, under the circumstances, order a remedy including reinstatement of the original plea offer or potentially a new trial. *Id.* at 418, ¶ 46, 10 P.3d at 1205. The majority made this holding over both the State's objection and then-Judge Berch's dissent that judicial reinstatement of a plea offer violated the Separation of Powers Clause in Article III of the Arizona Constitution. *Id.* at 416, ¶ 35, 10 P.3d at 1204; *id.* at 418-19, ¶ 48, 10 P.3d at 1205-06 (Berch, J., dissenting).

The Arizona Constitution strictly delineates separation of powers between the three branches of government.

> 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 departments 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. *See also, e.g., Ahearn v. Bailey*, 104 Ariz. 250, 252, 451 P.2d 30, 32 (1969) ("The concept of the separation of powers is fundamental to constitutional government as we know it."). Under this Court's separation of powers analysis, the proposed rule changes violate the Arizona Constitution.

This Court applies a four-part test to review claims that an act by one branch of government unconstitutionally usurps another branch's power:

1. The essential nature of the power exercised;
2. The degree of control one branch assumes in exercising the power of another;
3. The objective of the exercise by the other branch; and
4. The practical consequences of the action.

State ex rel. Woods v. Block, 189 Ariz. 269, 276, 942 P.2d 428, 435 (1997) (adopting *J.W. Hancock Enter's. v. Arizona State Registrar of Contractors*, 142 Ariz. 400, 405-06, 690 P.2d 119, 124-25 (App. 1984)).

The *Hancock* test requires striking down a branch's action if it usurps the power of another branch and creates conflict. *See, e.g., San Carlos Apache Tribe v. Superior Court* (*San Carlos III*), 193 Ariz. 195, 214, ¶ 48, 972 P.2d 179, 198 (1999) (upholding legislative evidentiary rules because they did not conflict with the judiciary's rules or power); *Block*, 189 Ariz. at 278, 942 P.2d at 437 (striking a legislative act that usurped an executive function and resulted in conflict). As this Court expressed in *Block*, the *Hancock* test is used "to determine if one branch of government is exercising the powers properly belonging to either of the others." 189 Ariz. at 276, 942 P.2d at 435 (internal quotation marks omitted); *see also Udall v. Severn*, 52 Ariz. 65, 73, 79 P.2d 347, 350 (1938) ("[Y]et the fact remains that the function of the act itself is either administrative or judicial, and there can in reality be no middle or halfway ground between them.").

Under this Court's holdings, a court rule authorizing a trial court to order the State to re-extend a plea offer or forbidding the State from conditioning a plea on waiving disclosure would violate the Separation of Powers Clause. "It is well settled that criminal defendants have no constitutional right to a plea agreement and the state is not required to offer one." *E.g., State v. McKinney*, 185 Ariz. 567, 575, 917 P.2d 1214, 1222 (1996); *State v. Morse*, 127 Ariz. 25, 31, 617 P.2d 1141, 1147 (1980). The decision whether to offer a plea bargain is exclusively an executive function. *State v. Larson*, 159 Ariz. 14, 17, 764 P.2d 749, 752 (App. 1988) ("[T]he power to divert the prosecution of a case is and always has been an executive function."). Further, the rule change would eliminate black letter law that a plea bargain "can be revoked by any party at any time prior to its acceptance by the court." *Morse*, 127 Ariz. at 32, 617 P.2d at 1148.

The other *Hancock* factors examine one question; does the exercise of a government function create conflict between the branches? The question of the degree of control is whether the encroaching branch's purpose is cooperation or coercion. *McDonald v. Thomas*, 202 Ariz. 35, 42, ¶15, 40 P.3d 819, 826 (2002). The key question about the objective in usurping power is whether

the objective is to cooperate with the other branch or to assert superiority in the exercise of that branch's power. *Block*, 189 Ariz. at 277, 942 P.2d at 436; *Citizens Clean Elections Com'n v. Myers*, 196 Ariz. 516, 524, ¶ 30, 1 P.3d 706, 714 (2000).

Under the proposed rule change, the degree of control by the judiciary is absolute. When a trial court orders an expired plea offer reinstated, it exercises absolute control over the executive function. And, judicial foreclosure of a plea conditioned upon waiver of subsequent disclosure conflicts with the State's power under *Ruiz* to insert a waiver provision in a plea agreement and of a defendant to agree to such a waiver when it is in his or her interest. This Court's authority to enact procedural enact rules does not diminish the separation of powers flaws in the proposed rule. *See generally, e.g., State ex rel. Napolitano v. Brown* (*Miles*), 194 Ariz. 340, 342, ¶¶ 5-6, 982 P.2d 815, 817 (1999) (holding that the Legislature has "plenary" power to consider any subject that does not conflict with the judiciary's function); *San Carlos III,* 193 Ariz. at 212, ¶ 40, 972 P.2d at 197 (striking a statute under Article III regardless of any legislative "laudatory objective").

In *State v. Wagstaff*, 164 Ariz. 485, 794 P.2d 118 (1990), this Court struck down a statute conferring in both the trial courts and the board of pardons and paroles discretion to set a parole term and its conditions for defendants convicted of dangerous crimes against children. *Id.* at 490, 794 P.2d at 122. This Court held that the statute violated the Separation of Powers Clause because it "create[d] an opportunity for the separate branches to contradict each other." *Id.* at 489, 794 P.2d at 121. The majority held that the separation of powers doctrine forbids concurrent authority. PCPD seeks concurrent authority over pleas between the executive and the judiciary. This Court's decision in *Wagstaff* forbids such a practice.

PCPD relies on the majority decision in *Donald* to argue for the proposed rule changes. The *Donald* majority's analysis was flawed in every respect. The *Donald* majority ignored the fact that plea bargaining is solely an executive function and erroneously upheld the constitutional violation

based on the trial courts' remedial power. Separation of powers analysis does not give weight to the power by which a branch usurps the functions of another branch. Additionally, the *Donald* majority incorrectly treated the *Hancock* test as a test for balancing the judiciary's interest in usurping the State's power.

III. THE PROPOSED AMENDMENTS WOULD EXACERBATE THE RECENT BADLY DESIGNED CHANGES TO THE RULES.

Even if the Separation of Powers Clause did not preclude the proposed rule changes, this Court should reject the them as founded on unsound policy. The proposed encroachment on the State's plea bargaining authority will reduce the State's interest in extending plea offers. Moreover, the changes directly conflict with this Court's stated interest in a speedy criminal justice system.

The proposed rule changes would eliminate fast-track plea bargaining for indicted cases. "Plea bargaining springs from the mutual advantages it brings to both prosecutors and defendants." *Morse*, 127 Ariz. at 32, 617 P.2d at 1148. Among the advantages to the State conferred by plea bargaining are the savings of office resources in avoiding the preparation for and conducting of a trial. As this Court recognized in *Morse*, as a criminal case proceeds, the State's interest in a plea bargain dissipates. *Id.* PCPD seeks to require the State to disclose all trial materials before withdrawing a plea offer. Yet, if the State must invest these resources in each case, the incentive to offer a plea is significantly lessened. As the Supreme Court commented about a much-less radical ruling on disclosure prior to pleas:

> It could require the Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages.

Ruiz, 536 U.S. at 632. Given the diminished incentive to offer pleas under the proposed rules, any plea offers will not be as favorable to a defendant as those under the current rules. The pleas will be later and later in the process.

In addition to the proposed rule changes, the Maricopa County Attorney's Office must point out the serious flaws in current Rule 15.8. The essence of the current rule is that the judiciary threatens to not admit at trial otherwise valid evidence in an effort to force the State to set plea deadlines after disclosure is complete. Rule 15.8 is a backdoor violation of the Separation of Powers Clause. (In contrast, the proposed rule changes are facially unconstitutional.) Additionally, the Committee Comment to Rule 15.8 contains the same unsupported premise as this Petition, "once the State engages in plea negotiations, certain constitutional protections attach that allow the Court to ensure the process is fair." This statement is an improper substantive alteration of a quotation from *Donald* not about fairness, but rather: "[O]nce the State engages in plea bargaining, the defendant has a Sixth Amendment right to be *adequately informed of the consequences* . . . " *Donald*, 198 Ariz. at 413, 10 P.3d at 1200. In *Donald*, the court only examined whether a defendant could allege ineffective assistance of counsel for counsel's failure to explain the terms of the plea.

Both current Rule 15.8 and the proposed rule changes are contrary to this Court's most recent policy statements about the criminal justice system. In this Court's recently released *A Strategic Agenda for Arizona's Court 2005-2010*, this Court set a goal of "protecting the rights of victims, and speeding up the wheels of justice." This Court elaborated on the desired speed by setting a goal of disposing "of 90 percent of felony cases within 100 days." Under current Rule 15.8 and the proposed rule changes, the criminal system will not dispose of ninety percent of cases within one-hundred days. [6]

Approximately 18-19,000 felony cases are subject to Rule 15.8 in Maricopa County Superior Court per year. The effect of the current rule is to require the first deadline for any plea offer to be approximately on the 60th day following arraignment. This is because Rule 15.1 discovery takes about 30 days, and Rule 15.8 requires the plea to be open for 30 days.

6 PCPD suggests that the State is willing to gamble with plea bargain deadlines despite not finishing all disclosure. This Office cannot fathom why a prosecutor would risk losing trial evidence as PCPD suggests.

In contrast in preliminary hearing cases, approximately 14,000 felony cases are resolved through a fast track system in which pleas have a one or two day deadline. These cases are resolved on approximately the 10th day after initial appearance for in-custody defendants and on the 20th day for out-of-custody defendants. These cases are not subject to the delaying effect of Rule 15.8.

The proposed PCPD amendments would preclude any experimentation with fast track offers conditional on waiver of Rule 15.1 in the 18-19,000 felony cases now subject to Rule 15.8. The current rule precludes shorter deadlines in cases in which there has been 15.1 disclosure. The net effect of current and proposed Rule 15.8 is to delay resolution of cases and preclude pilot programs to seek speedier resolution of cases. Current Rule 15.8 and the proposed PCPD amendment thwart this court's efforts to speed resolution of cases in Superior Court.

IV. GAMESMANSHIP IS NOT JUSTICE.

The proposed rule changes and the 2003 amendment to Rule 15.8 promote exaggerated claims by defendants. Rule 15.8 creates defense incentive to exaggerate the importance of any item not disclosed. The proposed rule changes would exacerbate this mistake by giving defendants a potential binding ace in the hole should they reject plea offers and later make claims that any item of evidence impacted their decision to reject a plea. *See Kinman v. Grousky*, 46 Ariz. 191, 193, 49 P.2d 624, 625 (1935) (commenting that allowing parties the opportunity to reserve alleged errors as an "ace in the hole" was "not in furtherance of justice"). This would create routine situations in which defendants feign ignorance with no rebuttal evidence available to the State.

There is nothing in the Rule to protect the State's or victim's interests. The *Donald* majority at least affirmatively required trial courts to balance the State's interests in opposing a prior plea before deciding whether to order a plea offer re-extended. *Donald*, 198 Ariz. at 417-18, ¶ 43, 10 P.3d at 1204-05. PCPD has proposed one "sanction," with no trial court discretion, reoffering the original plea offer. This ignores the reality that a prosecutor may in good faith come to view the

charges more seriously after the plea deadline. *See Mabry*, 467 U.S. at 510 ("Prosecutors often come to view an offense more seriously during the course of pretrial investigation . . . .").

Moreover, this promotes bad faith by defendants. For instance, under Rule 15.1(b), the State must disclose to defendants their prior felony convictions intended to be used at trial. Under the proposed Rule change, a defendant may hope that the State does not become aware of a prior conviction and gamble with a trial. If the State belatedly discovers the prior conviction, the defendant may no longer be willing to gamble on a trial. Yet, the State would probably not be interested in the prior plea offer because it was extended while the State had incomplete information about the defendant's character. Under PCPD's proposed Rule change, the State's interest is irrelevant and the trial court would have to order the plea offer re-extended. The suggested practice is a game, not justice.

The disclosure rules were not designed to maximize defendant's knowledge and leverage in plea bargaining, and the United States Supreme Court has expressly rejected this notion as constitutionally required.

> The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action.

Brady v. United States, 397 U.S. at 757.

This Court should reject the proposed rule changes. [7]

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7 In addition to rejecting the proposed changes, this Court should reexamine the current Rule 15.8. As the comment to Rule 15.8 makes clear, the committee based its adoption on the same flawed analysis that PCPD relies on in the Petition.

Respectfully submitted this 22 day of May, 2006.

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BY: _____
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Copies of the forgoing hand delivered
this 22 day of May, 2006 to:

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