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IN THE ARIZONA SUPREME COURT

IN THE MATTER OF:	)	Supreme Court Number
	)	13-0004
PETITION TO AMEND RULE 15.8,	)	
ARIZONA RULES OF CRIMINAL	)	Comment of the Pima County
PROCEDURE	)	Attorney
_____	)	

The Pima County Attorney urges this Court to reject the proposed change to Rule 15.8, Ariz. R. Crim. P. In addition to the analysis set below, the Pima County Attorney agrees with all of the arguments set forth in the Arizona Prosecuting Attorney Advisory Council's comment submitted to this Court.

The proposed amendment to Rule 15.8 converts the rule from a shield protecting a defendant against problematic practices of the past, to a sword ready to be wielded by a defendant against the State – and thereby against public safety and the rights of crime victims to restitution – in the event the State ever obtains evidence that improves its likelihood of convicting a defendant.

Under the proposed amendment, once the State has made a plea offer that is available for a limited time, a defendant has no incentive to accept that offer before the time period expires. The defendant can wait for further testing of forensic evidence or new witnesses to be found, because in the event the State improves its position for trial through the development of additional material evidence, the proposed rule allows defendant to take the previously offered plea, even if the deadline for acceptance of that plea offer has passed.

An example taken from a Pima County case helps illustrate the undesirable results of this proposal. In *State v. Ontiveros*, Pima County No. CR20103285, a defendant was charged with multiple dangerous-nature felonies resulting from a

gang-involved shooting. Early on in the case the State, recognizing weaknesses in the evidence, offered a probation-available plea. The defendant never accepted that plea but never rejected it. The State eventually withdrew the offer and prepared for trial. The defendant then gave notice that a witness would testify that the gun in question (which was found under the car seat in which the defendant sat) belonged to the witness and that the defendant did not know the gun was there. In response to this, the State requested laboratory work that had previously seemed unnecessary. DNA testing found the defendant's DNA on the gun, and the bullets recovered were matched to that same gun. In response to the State's additional investigation which had yielded new, compelling evidence incriminating the defendant, the defendant asked the trial court to preclude the new evidence or force the State to re-extend the previously withdrawn plea.

Under the problematic interpretation of Rule 15.8 then in effect, the State faced two choices – either re-offer the lapsed plea agreement, or go to trial without the highly probative evidence it now had available to rebut the defendant's story. Neither of these options came to pass because this Court then decided *Rivera-Longoria v. Slayton*, 228 Ariz. 156, 264 P.3d 866 (2011), which clarified that Rule 15.8 was properly interpreted as a shield but not a sword. If the proposed changes are adopted, however, the State will be in the same situation as it was prior to this Court's decision in *Rivera-Longoria*. This is bad public policy.

If new evidence arises that proves a defendant's guilt, there is no good reason to force the State to re-open a lenient plea offer that was offered only for a limited time when there was only weak evidence. And there is no good reason to keep a jury from hearing the new evidence that will help it in its decision-making. But that would be the effect of the proposed changes to the Rule.

One of the primary purposes of plea bargaining is to deal with uncertainty. No party ever knows all the information relevant to his/her case or defense. The State does not know what other inculpatory evidence may exist when it offers a plea. The defense does not know what other evidence may surface that would more clearly incriminate the defendant beyond what was first presented to the Grand Jury or at a Preliminary Hearing and whatever additional evidence had been developed at the time a plea was offered. That is one of the reasons that parties are incentivized to negotiate. This Court has recognized that such is the case.

> Plea bargaining springs from the mutual advantages it brings to both prosecutors and defendants. For the defendant, it can eliminate the exposure to a higher penalty and the burdens of a trial. It can shorten the period of pre-

> trial incarceration, create certainty as to the outcome of the criminal prosecution and bring quick imposition of release, rehabilitation or incarceration. For the prosecution, it can lead to prompt and early disposition of cases, savings of judicial, prosecutorial and penal resources and early incarceration of those who are a menace to the public, yet sparing those not a public nuisance the corrosive idleness of awaiting trial in jail.

State v. Morse, 127 Ariz. 25, 32, 617 P.2d 1141, 1148 (1980).

The proposed change attempts to eliminate uncertainty by giving defendants more time to accept a plea offer after new information becomes available. Obviously, the intent is to provide fairness to defendants. But this commendable intent to benefit defendants is not furthered by the proposed amendments to the rule. Rather, the proposed new rule would handicap the entire plea bargaining process and discourage negotiation to the detriment of defendants, the State, crime victims, and the public.

In every case, the parties know that the case may either get better for the State or worse for the State. There is never a guarantee that the evidence will stay the same. Some witnesses may disappear or die. Some may appear with unexpected exculpatory or inculpatory evidence. The parties understand that things change. That is one of the reasons that parties enter plea negotiations – to provide certainty and finality where there is none.

If the proposed change were adopted, the parties would know that new information will never be used to the detriment of the defendant. If new evidence of a defendant's guilt comes to light that makes the earlier plea offer inappropriate, it will have no effect. The defendant will have a right to re-institute the earlier plea offer for thirty days. Otherwise, the State will be unable to use that new evidence at trial. The earlier plea offer would become an insurance policy for the defendant, insulating him/her from evidence that further exposes his/her misdeeds and the harm caused to the victims. It effectively strips the State of many of the benefits of plea bargaining, thus making it much less likely to offer pleas. This cannot be the intent of the proposed change, but it is the inevitable result.

The proposed change will also increase disposition times. If a plea agreement is offered, the defense will not accept it until the last minute, knowing that any change in the evidence will only work to its benefit. Defendants will wait. They will wait while the State expends its resources preparing for trial and while victims suffer through waiting for trial, uncertain with respect to whether they will

receive restitution, and uncertain with respect to whether they will have to testify. Only at the very last moment will it make any rational sense for a defendant to accept a plea agreement.

Defendants will be disadvantaged because plea agreements will be less appealing. The State will be disadvantaged because it will have to expend far more resources preparing for trial as a result of defendants being less willing to take offers until later. Victims will be disadvantaged because they will have to remain involved in the criminal justice process longer, prolonging anxieties and fears. The courts will be disadvantaged because cases will linger on their dockets much longer. The proposed change might interfere with early case resolution programs that are operating in several counties and proposed in Pima County. The public will be disadvantaged because justice will take longer to be carried out and will be more costly, and because sanctions will not be as swift and therefore not as impactful. In sum, the policy disadvantages of this proposal are great and outweigh whatever theoretical benefit defendants may reap.

There would be a particularly devastating effect on DUI prosecutions. Currently, many defendants are offered pleas to the lowest-level DUI charge before their blood is tested by the crime lab. This is because the State faces uncertainty with respect to what the lab results will reveal. This confers many of the benefits to the defendants, the State, crime labs, and the courts mentioned above in *Morse*. The proposed change would eliminate those plea offers. This is because defendants would have no incentive to take the offer within the time limits, because they could wait for the blood to be tested and the results to be released before deciding whether the plea was advantageous. The State would then have no incentive to offer the early plea at all. Our crime laboratories are already overburdened and short-staffed. As it is, it takes them up to 100 days to provide lab results in some DUI cases. Under the proposed rule change, these labs would see significant increases in their workloads. Judicial caseloads will grow, because cases will plead, if at all, only after spending many more months on the docket.

Next, besides being bad policy, the proposed amendment to the Rule is unconstitutional because it would violate the separation of powers doctrine. It would have the judicial branch strip away the authority of the executive branch to limit the time for a plea offer or to withdraw a plea offer based upon a change of circumstances in a case.

Article 3 of the Arizona Constitution provides that the three departments of our state government "shall be separate and distinct, and no one of such

departments shall exercise the powers properly belonging to either of the others." Our courts recognize that "[i]t is essential that sharp separation of powers be carefully preserved by courts so that one branch of government not be permitted unconstitutionally to encroach upon the functions properly belonging to another." *State v. Jones*, 142 Ariz. 302, 304, 689 P.2d 561, 563 (App. 1984), citing *Giss v. Jordan*, 82 Ariz. 152, 309 P.2d 779 (1957). To determine whether an unconstitutional usurpation of power exists, a court must consider four factors: (1) the essential nature of the power being exercised; (2) the degree of control being exercised; (3) the objective sought by the court – whether it is cooperative or coercive; and (4) the practical result of the blending of powers. *State ex rel. Woods v. Block*, 189 Ariz. 269, 276, 942 P.2d 428, 435 (1997).

First, plea bargaining is an executive function. "Discretion over plea bargaining is a core prosecutorial power." *State v. Donald*, 198 Ariz. 406, 417, ¶39, 10 P.3d 1193, 1204 (App. 2000). There is no right to a plea bargain, and prosecutors have broad discretion in whether to offer plea agreements and the contents of those offers. *See Morse*, 127 Ariz. at 32, 617 P.2d at 1148.

Second, the proposed change would allow the judiciary to exercise a great degree of control over this executive power. The judiciary already claims a good deal of authority over plea bargaining under *Donald*, but the proposal expands that authority even further. Under the proposed change, trial courts can either force the State to leave open specific plea agreements that are no longer appropriate or to preclude important evidence. This is especially significant when we remember that there is no constitutional right to either discovery or a plea agreement. *See Donald*, 198 Ariz. at 413, ¶ 14, 10 P.3d at 1200 ("We recognize that a criminal defendant has no constitutional right to plea bargain."); *State v. Connor*, 215 Ariz. 553, 561, ¶ 21, 161 P.3d 596, 604 (App. 2007) ("[T]he defendant has no general right to pre-trial discovery in a criminal case.").

Third, preclusion under Rule 15.8 would be coercive. The question of 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). By requiring a prosecutor to keep open a specific plea offer or face preclusion as a minimum sanction, the rule is coercive.

A branch of government violates Article 3 when it "unreasonably limits or hampers" another branch in performing its function. *State v. Prentiss*, 163 Ariz. 81, 84, 786 P.2d 932, 935 (1989). The proposed change would hamper the executive in significant ways. It would hamper the ability to control plea bargaining by not

allowing prosecutors to withdraw plea offers when they are no longer appropriate or when too much time has passed. It also would hamper the search for the truth by suppressing important evidence. The State's duty "is not that it shall win a case, but that justice shall be done;" . . . "that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88 (1935). By creating a perverse incentive to cease investigation after a plea is offered, the proposed change harms the interests of both the State (and the public and victims whom it serves) as well as the defendant.

For all the foregoing reasons, this Court is urged to reject the petition proposing to amend Rule 15.8, Ariz. R. Crim. P.

Respectfully submitted this 17th day of May 2013

By: /s/
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