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8 IN THE SUPREME COURT OF THE STATE OF ARIZONA

9  
10 IN THE MATTER OF:

R-13-0004

11 PETITION TO AMEND RULE 15.8 OF THE  
12 ARIZONA RULES OF CRIMINAL  
PROCEDURE

MARICOPA COUNTY ATTORNEY'S COMMENT TO  
PETITION TO AMEND RULE 15.8 OF THE ARIZONA  
RULES OF CRIMINAL PROCEDURE AND CROSS-  
PETITION TO MODIFY RULE 15.8.

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14 The Maricopa County Attorney hereby responds to the Petition to Amend Rule 15.8 of the  
15 Arizona Rules of Criminal Procedure and asks this Court to deny the petition and to alternatively  
16 repeal Rule 15.8 in its entirety or to modify the Rule as requested herein.

17 Respectfully submitted this 16<sup>th</sup> day of May, 2013.

18  
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20 By   
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1 **I. Introduction**

2 The State Bar of Arizona has asked this Court to expand Rule 15.8 of the Arizona Rules of  
3 Criminal Procedure. The Maricopa County Attorney’s Office (MCAO) continues to assert that  
4 Rule 15.8 is a violation of Separation of Powers because it permits and directs the judicial branch to  
5 interfere in the Executive Branch’s decision to offer and subsequently withdraw a plea offer in a  
6 criminal case. The MCAO recognizes, however, that this Court has rejected these constitutional  
7 arguments. Rivera-Longoria v. Slayton, 228 Ariz. 156, 158, ¶ 11, 264 P.3d 866, 868 (2011).  
8 Constitutional arguments aside, Rule 15.8 is a poorly drafted rule and represents bad public policy  
9 which negatively impacts the efficient and fair resolution of criminal cases and the preservation of  
10 the State’s limited resources. Therefore, the MCAO asks this Court to deny the State Bar’s  
11 proposal to expand Rule 15.8.  
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13 **II. Discussion**

14 **A. The State Bar’s petition would expand Rule 15.8 to apply to virtually every  
15 felony case in Arizona.**

16 Rule 15.8 is a relatively new addition to the Arizona Rules of Criminal Procedure. Only  
17 added in 2003, the rule was part of a comprehensive overhaul of Rule 15. As currently written, the  
18 Rule only applies to a criminal case if the State makes a post-filing plea offer and a plea deadline  
19 has been set. In that one circumstance, if the State does not provide “material” disclosure that is  
20 listed in Rule 15.1(b) at least 30 days before the plea deadline then the court must consider the  
21 “impact of the failure to provide such disclosure on the defendant’s decision to accept or reject a  
22 plea offer.” ARIZ. R. CRIM. P. 15.8. The rule then provides that “If the court determines that the  
23 prosecutor’s failure to provide such disclosure materially impacted the defendant’s decision,” the  
24 presumptive minimum sanction is to preclude the material evidence from the trial unless the State  
25 re-offers the rejected plea agreement. Id. The State Bar now seeks to expand Rule 15.8 to cover  
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1 any case where the State makes a plea offer whether or not a plea deadline is imposed. This  
2 unconstitutional intrusion into prosecution case management would make Rule 15.8 applicable in  
3 virtually every felony case in Arizona.

4 **B. Rule 15.8 is poorly drafted and is a continual source of confusion for**  
5 **practitioners and the courts.**

6 As currently written and interpreted by this Court, Rule 15.8 is confusing and expanding it  
7 to apply to all felony cases will only add unnecessary litigation. First, as currently drafted, there is  
8 persistent confusion surrounding what the State must do to avoid Rule 15.8 sanctions. The  
9 discussion section of the State Bar’s Petition highlights a common misunderstanding of Rule 15.8.  
10 The Petition claims that Rule 15.8 sanctions apply if a prosecutor “fails to make material disclosure  
11 to the defense at least thirty days before the plea offer expires.” [Petition to Amend Rule 15.8 at 1].  
12 Additionally the Petition states, “Rule 15.8 contemplates that a defendant facing criminal charges in  
13 the Superior Court should have at least thirty days to evaluate the State’s disclosures before  
14 deciding whether to accept a plea offer.” [Petition to Amend Rule 15.8 at 2]. This Court has flatly  
15 rejected the idea that Rule 15.8 mandates a “30 day consideration period.” In Rivera-Longoria, this  
16 Court stated, “Nor must a prosecutor extend an outstanding offer’s deadline for another thirty days  
17 when, after Rule 15.1(b) disclosures have been timely provided, new information comes within the  
18 prosecutor’s ‘possession or control.’” 228. Ariz. at 159, ¶ 15, 264 P.3d at 869. Despite this  
19 Court’s clear pronouncement, litigation surrounding this issue continues based on mistaken  
20 arguments like those the State Bar now uses. Expanding the Rule as proposed will unnecessarily  
21 increase this type of litigation.

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25 Second, although this Court clearly rejected the notion of a “30 day consideration period,”  
26 the language of the Rule and the Rivera-Longoria opinion does not clearly explain when the Rule  
27 should apply. The simple language of the Rule suggests that it would only apply in a situation  
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1 where a prosecutor failed to comply with Rule 15.1(b) by not disclosing evidence that existed and  
2 was in the prosecutor's possession at least 30 days before a plea cutoff date. If the Rule was limited  
3 to this circumstance, the draconian sanction it demands may appear warranted because in that  
4 instance, the Court would have found that the State withheld material evidence that was in its  
5 possession and waited to "spring" it on the defense only after the plea offer expired.

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7 Indeed, there are portions of this Court's opinion in Rivera-Longoria that would support  
8 such a limited interpretation. This Court stated, "These provisions indicate that Rule 15.8  
9 disclosure obligations relate to Rule 15.1(b) evidence that is within the prosecutor's possession or  
10 control *when the offer lapses.*" Id. at 159, ¶ 14, 264 P.3d at 869 (emphasis added). This statement  
11 would imply that newly discovered evidence that comes into the prosecutor's possession after a plea  
12 offer lapses would not trigger Rule 15.8 because that information was not subject to disclosure  
13 under Rule 15.1(b) at the time the offer lapsed. This Court seems to support that conclusion in the  
14 next paragraph, stating:

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16 The state does not face Rule 15.8 sanctions if it declines to reinstate a lapsed  
17 offer after obtaining new information subject to disclosure under Rule 15.1(b) and  
18 Rule 15.6. Nor must a prosecutor extend an outstanding offer's deadline for another  
19 thirty days when, after Rule 15.1(b) disclosures have been timely provided, new  
20 information comes within the prosecutor's "possession or control."

21 Id. at ¶ 15. With such a limited interpretation, Rule 15.8, while still an encroachment into an  
22 Executive function, would cause few problems and would only apply when a prosecutor knowingly  
23 withheld material disclosures until the plea deadline ran.

24 Unfortunately, to these very clear pronouncements, this Court then adds the following:

25 In that situation, if the prosecutor promptly supplements the prior disclosures  
26 before the deadline lapses, the disclosures will be "seasonably" made under Rule  
27 15.6.

28 A prosecutor who wishes to avoid potential sanctions under Rule 15.8 need  
only provide the material disclosure identified in Rule 15.1(b) at least thirty days  
before a plea offer deadline *and* promptly disclose any additional information under  
Rule 15.6 *before the deadline lapses.*

1 Id. at ¶¶ 15-16 (emphasis added). What this Court does not explicitly state is what happens when  
2 the State has complied with Rule 15.1(b) and 15.6 at the time the offer lapsed but new evidence is  
3 later discovered and disclosed. Given this Court’s pronouncement that the way to avoid Rule 15.8  
4 sanctions is to disclose new evidence under Rule 15.6 *before* the plea deadline expires, it appears  
5 that despite this Court’s statement that “[t]he State does not face Rule 15.8 sanctions if it declines to  
6 reinstate a lapsed offer after obtaining new information,” the converse is actually true. Despite the  
7 confusion about when Rule 15.8 actually applies to a case, what is clear is that the Rule does not  
8 create a right to have 30 days to contemplate disclosures made under Rule 15.6. Nevertheless, how  
9 and when the Rule applies is unclear and this fact adds unneeded litigation to courts that are already  
10 handling too many cases and hearings.<sup>1</sup> Expanding the Rule as requested by the State Bar would  
11 simply make this bad situation worse.

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14 **C. Even as currently written, the application of Rule 15.8 encourages delay, is**  
15 **incompatible with the goals of Rule 15, and does not serve the interests of**  
16 **justice.**

17 Before considering expanding Rule 15.8 to apply in every felony case where the State offers  
18 a plea agreement, this Court should consider the realities of Rule 15.8 as it is currently drafted. The  
19 goals behind Rule 15.8 are understandable. Certainly no one would advocate for a system where a  
20 prosecutor would require a defendant to make the decision on whether to accept a plea offer without  
21 basic information about the case. In our current criminal justice system, within a few days or weeks  
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23 <sup>1</sup> A recent example in Maricopa County is illustrative. In that case, the defense filed a Rule 15.8  
24 motion *after conviction* at trial. The claim was that after the plea offer expired (in August 2012) the  
25 State filed certain sentencing enhancements. The defendant’s motion asserts that these sentencing  
26 enhancements fall within the scope of evidence described in Rule 15.8. The defendant’s motion  
27 was filed on May 1, 2013 two months after the case had been tried to a jury in February 2013. For a  
28 defendant who had absolutely refused any plea offer in the months preceding trial to claim that now  
he wants the original offer back two months after conviction and eight months after the event he  
claims triggered Rule 15.8 occurred shows how laughable Rule 15.8 claims can be. Unfortunately,  
having to spend time and resources to litigate such a claim and the uncertainty and stress such  
litigation causes victims is no laughing matter.

1 after a case is filed in Superior Court, the State provides the defense with discovery which in many  
2 cases includes items such as the police reports, witness statements (frequently digital recordings of  
3 these statements), search warrants, photographs, and surveillance videos – not the lists of such  
4 evidence as required by Rule 15.1(b) but the actual documents, photos, and videos. In Maricopa  
5 County, common practice is to, simultaneous with that disclosure or shortly thereafter, extend a plea  
6 offer that appropriately considers all the facts of the case known at that time, the victim’s views, and  
7 the resources expended on the case up to that point. Thus, the defendant receives a benefit for  
8 admitting guilt before additional judicial and law enforcement resources are expended.  
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10 As the comment to Rule 15.8 notes, one of the main purposes of making a plea offer is to  
11 “optimize scarce criminal justice resources.” ARIZ. R. CRIM. P. 15.8, cmt. A plea agreement saves  
12 resources when it resolves a case as early in the criminal process as possible. Knowing this, it is in  
13 the prosecutor’s best interest to disclose everything as quickly as possible so the defense can make  
14 an informed decision and resolve the case before unnecessary preparation is done. Rule 15.8 does  
15 not provide the motivation for rapid disclosure. Rule 15.1 and common sense case management  
16 practices accomplish that goal.  
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18 Although the comment to Rule 15.8 asserts that the rule balances the interests of the State in  
19 optimizing resources as well as the defendant’s rights, the reality is that Rule 15.8 provides a  
20 “trump card” for the defendant to effectively neutralize the resource benefits the State hoped to  
21 achieve in making a plea offer. Criminal cases are not static. The investigation is rarely complete  
22 the moment an arrest is made or a case is filed. Additional investigation is frequently performed as  
23 the case progresses and this often involves lab work by overburdened law enforcement agencies.  
24 The State recognizes minimal resource savings if the case must be completely worked up to the  
25 point that it is ready to go to trial before a plea offer expires or is withdrawn. The goal of plea  
26 negotiations is to attempt to resolve the case justly but without spending the full resources that  
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1 would be used to get the case “trial ready.” In exchange for not requiring the time and expense of  
2 this additional work, the State permits the defendant to plead guilty to a lesser offense or to a more  
3 favorable sentencing range than he or she would face following a conviction at trial. Thus, both  
4 sides benefit from this bargain. Rule 15.8, however, turns this process on its head because it  
5 effectively requires the State to expend all of the resources it would use to make a case trial ready  
6 *before* knowing if the defendant is going to accept an offer. The comment to Rule 15.8 specifically  
7 recognizes this reality in the context of lab work when it discusses such work as exactly the type of  
8 evidence that would not fall under Rule 15.1(b) because it would not be in the State’s possession  
9 until the tests were complete. Yet, the comment concludes (and Rivera-Longoria appears to support  
10 the conclusion) that Rule 15.8 requires the prosecutor to reinstate the lapsed plea or face the  
11 consequences.<sup>2</sup>

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14 As an example, consider a case where a prosecutor gives a defendant full Rule 15.1(b)  
15 disclosure and a plea offer, and sets a cutoff date 45 days in the future. Forty-five days later,  
16 following a full Donald<sup>3</sup> advisement, the defendant rejects that offer and demands a trial. In  
17 preparation for trial, the crime lab completes the work that it had not done in favor of spending its  
18 resources on other cases while the defendant decided whether to accept the plea in this case.  
19 Having rejected the plea, the lab work must be completed, and the lab discovers that the defendant

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22 <sup>2</sup>In Rivera-Longoria this Court dismissed the State’s concerns that “Rule 15.8, at least as interpreted  
23 by the court of appeals, may require it to keep an offer open indefinitely or face preclusion of  
24 evidence at trial” by telling us that “[t]his assertion misapprehends the Rule.” 228 Ariz. at 159, ¶  
25 14, 264 P.3d at 869. Unfortunately, as discussed in section B above, this Court then makes  
26 contradictory statements about how Rule 15.8 applies to newly discovered evidence after a plea  
27 offer expires. Ultimately, this Court states that to avoid Rule 15.8 sanctions, the State must make  
28 supplemental disclosures under Rule 15.6 before the deadline expires. Id. at ¶ 16. This  
pronouncement combined with the comment to Rule 15.8 regarding newly discovered evidence  
certainly leads to the conclusion that the State’s original concerns about having to keep offers open  
indefinitely are absolutely justified.

<sup>3</sup>See State v. Donald, 198 Ariz. 406, 10 P.3d 1193 (App. 2000).

1 left a fingerprint at the crime scene. Under Rule 15.6(a), and well before the seven day deadline  
2 imposed under Rule 15.6(c), the prosecutor discloses the just-completed lab report. Despite the fact  
3 that the defendant knowingly and intelligently rejected the plea offer, knowing lab work was not  
4 complete, the defense may demand that the court invoke the provisions of Rule 15.8.

5  
6 Once that motion is filed, the pretrial litigation begins and the court must hold a hearing to  
7 first determine if the evidence was “material.” As the rule provides no definition for that term, and  
8 the comment simply directs the court to consider all the facts and circumstances of the case, the  
9 court will likely use materiality definitions found in other areas of criminal law such as in the  
10 context of a Brady analysis. To make this determination, the court must now be fully appraised of  
11 all of the facts of the criminal case, weigh the strength of the other evidence and then determine  
12 whether the fingerprint evidence really is material to the case and whether it was material to the  
13 defendant’s decision making process. This hearing may require the testimony of defendant’s  
14 counsel, who knows more about how and why the defendant rejected the plea than anyone. See  
15 State v. Cuffle, 171 Ariz. 49, 52, 828 P.2d 773, 776 (1992) (holding that attorney-client privilege is  
16 waived whenever a defendant attacks “the entire fact-finding process” of which his or her attorney  
17 holds potential information).

18  
19 At the end of this process, which may well necessitate the appointment of new counsel, the  
20 court will make a decision. In most situations where fingerprints, DNA, or other lab evidence is  
21 involved, the court is likely to present the Rule 15.8 dilemma to the prosecutor. The prosecutor  
22 must now decide whether to make the choice to re-extend an offer that was available months earlier,  
23 before the additional time and resources were spent on the case, or to have the crime lab’s time  
24 wasted anyway by having the evidence suppressed. With either choice, the result is the same – the  
25 entire purpose of using plea agreements as a way to properly manage the public’s resources and  
26 create efficiency in the criminal justice system has been thwarted. Taxpayer dollars are squandered,  
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1 victims are unnecessarily distressed, and lawyer and court time has been wasted. This typical  
2 example shows how Rule 15.8 usurps the plea agreement process instead of achieving the balance it  
3 claims to represent.

4           Lab work is only one area where Rule 15.8 frequently intrudes. Another, not discussed in  
5 the comment to the rule, involves follow up investigation based on defense disclosures. Again,  
6 criminal cases are not frozen in time the moment an arrest is made. Defendants and their attorneys  
7 disclose evidence as the case progresses – frequently very close to the trial date. Prosecutors and  
8 law enforcement attempt to investigate this new evidence, particularly, given prosecutorial  
9 responsibilities, if it is evidence that would exonerate the defendant. Sometimes these  
10 investigations uncover highly inculpatory evidence in the form of manufactured defenses, threats to  
11 witnesses, or other steps the defendant is taking to wrongfully avoid conviction at trial.<sup>4</sup> The  
12 prosecutor who now seeks to use this new-found evidence in the State’s case in chief may well be  
13 thwarted by Rule 15.8. If a plea offer has lapsed, the defense may well claim that the new found  
14 evidence of the defendant’s attempts to threaten a witness is “material” evidence and, because this  
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26 <sup>4</sup> Upon request, the MCAO can provide examples of letters from inmates awaiting trial and  
27 transcripts of their jail calls which detail some defendants’ efforts to intimate witnesses or otherwise  
28 illegally interfere with the State’s efforts to bring them to justice.

1 evidence will be powerful evidence of guilt, he or she is certainly correct.<sup>5</sup> Nothing in the language  
2 of Rule 15.8 would prevent a court from concluding that these new disclosures are material and that  
3 if they had been disclosed before the plea expired the defendant would have taken the plea. Now  
4 defendants can simply have their cake and eat it too – they can try to manipulate the system to  
5 manufacture an acquittal and if that attempt is discovered, they may very well get the original offer  
6 back or the new material evidence precluded. These are the types of pitfalls the State Bar’s petition  
7 would introduce into nearly every felony criminal case in Arizona.

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9 Rule 15.8 ensures that a defendant will have the most to gain by delaying trial. Delay in a  
10 case almost always benefits a defendant. As time passes, witness memories fade, witnesses move  
11 and become difficult to locate, witnesses lose interest in the case, etc. One way prosecutors attempt  
12 to keep cases moving through the system and prevent injustice simply because witnesses cannot be  
13 located is through plea management--plea cutoff deadlines or withdrawal of stale offers. With Rule  
14 15.8 as a trump card in their back pocket, defendants can now simply work to delay a case, ignore  
15 plea deadlines, reject pleas, and hope that the State’s case becomes progressively worse as time  
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18 <sup>5</sup> In a recent case in Maricopa County the defendant was charged with Unlawful Flight. While the  
19 case was pending, but before the plea deadline passed, the defendant pled guilty in city court to a  
20 misdemeanor driving infraction arising from the same incident. His defense in the felony case was  
21 that he was not the driver – a claim that was completely disproven by his admission in city court.  
22 Eventually, after the plea deadline passed, the State learned of this plea and disclosed the admission  
23 as one it intended to use in the defendant’s trial. Predictably, the defense claimed a Rule 15.8  
24 “violation” and argued first for dismissal and in the alternative for suppression if the now lapsed  
25 offer was not re-extended. In his email exchange with the prosecutor, defense counsel argued, “It’s  
26 not like we’re supposed to anticipate what information you’ve gathered and decide whether to take  
27 a plea based on what we guess you have.” This statement is a clear acknowledgement that the Rule  
28 has nothing to do with encouraging a truth-seeking process and everything to do with playing games  
because the defendant clearly hoped the State would not discover his city court plea which would  
allow him to try and dupe the jury at trial into believing that he was not driving. When the plan  
failed, the defense then turned to the courts to attempt to get relief that was clearly unwarranted.  
The defense attorney continued, “I am more than happy to litigate this if that’s what you want, but  
the reason I’m discussing it with you is because it doesn’t seem like a very close call – the plea  
expired without disclosing his admission to driving . . .” The defense argument that Rule 15.8  
mandated the offer or suppression because the State did not disclose the defendant’s own admission  
in open court highlights the kind of gamesmanship and wasted litigation the Rule has caused.

1 passes. If the State does anything during this delay to try and make the criminal case better through  
2 additional investigation or lab work, the defense knows they can simply get the original offer back  
3 or the evidence suppressed under Rule 15.8. This nonsensical process provides no incentive for a  
4 defendant to resolve a case expeditiously. It provides a disincentive for the State to attempt to  
5 improve a case that may be weakening merely from the defendant's delay. In this way, Rule 15.8  
6 runs counter to the very purpose of the Arizona Rules of Criminal Procedure as stated in Rule 1.2,  
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8 These rules are intended to provide for the just, speedy determination of every  
9 criminal proceeding. They shall be construed to secure simplicity in procedure,  
10 fairness in administration, the elimination of unnecessary delay and expense, and to  
11 protect the fundamental rights of the individual while preserving the public welfare.

12 ARIZ. R. CRIM. P. 1.2. Rule 15.8 undermines nearly all of these goals.

13 Rule 15.8 is also incompatible with the goals and other provisions of Rule 15. First,  
14 sanctions should be imposed when a rule is violated or a duty ignored. Rule 15.7 covers sanctions  
15 that can be imposed when a party fails to comply with disclosure requirements. Rule 15.8 imposes  
16 sanctions but there is nothing in the Rule that requires any finding of a violation of Rule 15.  
17 Indeed, the comment to the rule recognizes, as Rivera-Longoria does, that the failure of the State to  
18 disclose evidence that is not in its possession is not a violation of Rule 15 as long as the material is  
19 disclosed "seasonably" and before seven days before trial. See ARIZ. R. CRIM. P. 15.8, 15.1(b),  
20 15.6; Rivera-Longoria, 228 Ariz. at 159, ¶ 14, 264 P.3d at 869. Thus, despite the fact that a  
21 prosecutor fully complied with the mandates of Rule 15, Rule 15.8 requires a "presumptive  
22 minimum sanction." Imposing a sanction without the necessity of finding any violation is illogical  
23 and inconsistent with all of the other Rules of Criminal Procedure.

24 Second, the nature of the presumptive sanction in Rule 15.8 is particularly stunning  
25 considering the overall goals of Rule 15 and the fact that the State did nothing wrong under the  
26 Rules. Arizona courts have consistently instructed that even when a party *violates* the rule, a court  
27 "should seek to apply sanctions that affect the evidence at trial and the merits of the case as little as  
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1 possible since the Rules of Criminal Procedure are designed to implement, not to impede, the fair  
2 and speedy determination of cases.” State v. Roque, 213 Ariz. 193, 210, ¶ 50, 141 P.3d 368, 386  
3 (2006) (quoting State v. Fisher, 141 Ariz. 227, 246, 686 P.2d 750, 769 (1984)). In this light, Rule  
4 15.8’s presumptive sanction of preclusion of material evidence when no violation has occurred is a  
5 significant detrimental impact on any truth-seeking goal. This end result is not only surprising, it is  
6 also so inconsistent with the stated goals and policies of Rule 15 and the other rules of procedure  
7 that one wonders how the rule was ever adopted in the first instance.<sup>6</sup>

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9 Rule 15.8 undermines Arizona’s justice system and any remaining pretense that the criminal  
10 system is a truth seeking process because Rule 15.8 is *only* invoked by admittedly *guilty* defendants.  
11 An innocent defendant would never invoke Rule 15.8 because an innocent person would not be  
12 seeking to plead guilty to the crime. The entire purpose of the sanction provisions of Rule 15.8 is to  
13 force the State to re-extend the expired plea offer. Obviously, a defendant is not going to ask for a  
14 hearing and ruling under the Rule unless he or she wants to admit guilt. This fact is significant  
15 because it highlights the real game behind the rule. A defendant using Rule 15.8, who must be  
16 guilty, has refused to accept responsibility for the crime and has hoped to somehow beat the  
17 criminal justice system by delaying the case until the State’s case weakens or, in some  
18 circumstances, by manufacturing evidence or threatening witnesses. When the State prevents these  
19 efforts through additional lab work or additional investigative work and the results of that additional  
20 work are disclosed, the guilty defendant, now realizing that his or her attempts to trick the system  
21 into an unjust acquittal will most likely fail, suddenly wants the favorable plea offer that was  
22 available before all the additional work was completed. Rule 15.8 gives these guilty defendants  
23 every incentive to try to game the system into a wrongful acquittal or unjust dismissal with the  
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27 <sup>6</sup> Because the intent of Rule 15.8 is to give the Judicial Branch the power to force the Executive  
28 Branch to do something it clearly does not want to do – return an expired plea agreement – the  
sanction had to be severe or the Executive might ignore the Judiciary’s demands.

1 understanding that if new evidence makes their plan fall apart they can use the courts to get the  
2 original offer back.

3 Thus, the reality of Rule 15.8 is that it does not encourage any faster discovery than is  
4 already mandated by the rules and is already in the prosecutor's own best interests. The idea that  
5 prosecutors are imposing unduly restrictive plea deadlines or hoarding discoverable evidence to  
6 spring on a defendant moments after rejecting a plea is completely unfounded and nonsensical  
7 given the prosecutor's desire to resolve the case with a fair plea to effectively manage the State's  
8 limited resources. Even worse, the rule encourages the use of gamesmanship and encourages guilty  
9 defendants to further delay trials knowing there will likely be no negative consequences from doing  
10 so. While the goals of Rule 15.8 may seem reasonable at face value, the reality of the rule can have  
11 profoundly negative impacts on the criminal justice system with no identifiable benefits.  
12 Expanding this flawed rule to apply to every felony case in Arizona is simply poor public policy.  
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15 **D. Expanding Rule 15.8 may result in offers not being extended.**

16 As currently written, Rule 15.8 allows prosecutors to avoid judicial entanglement in the  
17 resolution of cases by plea agreement and all of the problems discussed above. If the State does not  
18 impose a plea deadline, the provisions of Rule 15.8 do not apply to the case. Rivera-Longoria, 228  
19 Ariz. at 160, ¶ 20, 264 P.3d at 870. Whether or not the State uses a plea deadline, the State is still  
20 permitted to withdraw the offer at any time before the offer is entered and accepted by the court.  
21 ARIZ. R. CRIM. P. 17.4(b). When no plea deadline is set, the State and defense can exchange  
22 discovery and the defendant can be given a reasonable amount of time to consider the offer, but  
23 when it becomes obvious that the State is using limited resources on the case or after the defendant  
24 makes clear that he or she is not interested in pleading guilty under the terms offered, the State can  
25 withdraw the offer and spend its time and energy preparing for trial. Likewise, should the State  
26 discover that the defendant is threatening witnesses or otherwise engaging in nefarious behavior, the  
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1 State can simply withdraw the plea offer. Should new evidence be discovered and properly  
2 disclosed in accordance with Rule 15.6, the State, at its discretion, may choose to extend a new  
3 offer or the State may choose to proceed to trial. Thus, the prosecution determines when, how, and  
4 whether to resolve a criminal case before trial, as is the Executive's constitutional prerogative. See  
5 Rivera-Longoria, 228 Ariz. at 158, ¶ 10, 264 P.3d at 868, (citing State v. Morse, 127 Ariz. 25, 31-  
6 32, 617 P.2d 1141, 1147-48 (1980)).  
7

8 The State Bar's petition now seeks to remove this last remnant of Executive control over  
9 the timing of plea offers. Contrary to the State Bar's discussion of their proposal, treating cases  
10 with plea deadlines differently from those without deadlines is not inconsistent. Cases without plea  
11 deadlines provide more flexibility for the parties to negotiate, conduct settlement conferences, and  
12 perform Donald advisements. Plea deadlines can compress the time for these functions and could  
13 conceivably make it difficult for the parties to get all of the necessary work done in by the deadline.  
14 Furthermore, the court has the ability to sanction actual violations of Rule 15 under Rule 15.7 to  
15 control the discovery process regardless of whether or not a plea deadline has been imposed.  
16 Additionally, as discussed above, treating these offers differently gives the Executive some ability  
17 to avoid the pitfalls inherent in Rule 15.8 by choosing not to use plea deadlines.  
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19 If Rule 15.8 is expanded to apply to every criminal case, the State will have little reason to  
20 engage in plea negotiations at the beginning of a case. This reality will have a profound impact on  
21 the State's and the court's ability to efficiently manage the criminal dockets across the state. As  
22 discussed above, one of the main reasons that the State makes plea offers is to efficiently use  
23 taxpayer resources. If prosecutors will be under threat that the original offer will simply be  
24 reinstated if additional evidence is discovered, a prosecutor has three reasonable options. One, the  
25 prosecutor can simply make no offer until the case is ready to be tried. At that point the State would  
26 have very little incentive to resolve the case short of trial, so the offer is unlikely to be as appealing  
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1 to the defendant as an offer extended early in the case. Two, the prosecutor can make an offer at the  
2 beginning of the case that anticipates the work necessary to prepare for trial, with the understanding  
3 that a court may force the State to reinstate a lapsed or withdrawn plea offer. Offers made in this  
4 circumstance would be no better than those made just before trial and would resolve few cases short  
5 of trial. Three, the prosecutor can simply make no offer at all and prepare the case for trial. The  
6 prosecutor would be free to discuss settlement with the defense, but the actual offer would have to  
7 come from the defense, not the State. While these are all possible options, none of them represent a  
8 well-functioning, efficient criminal justice system.  
9

10 The end result is that removing the Executive branch's only means for avoiding Rule 15.8  
11 sanctions will result in fewer cases resolved by plea and the resulting use of the State's resources to  
12 fully prepare a case for trial. This problem will cause crime labs to back up as they are forced to  
13 prepare all cases for trial and that will cause additional delays in the administration of the justice  
14 system. The courts will likewise have to spend more resources as more jury trials will be conducted  
15 in cases that could have been fairly, efficiently, and justly resolved but for the problems caused by  
16 Rule 15.8.  
17

18 The MCAO anticipates that in response to this comment, some may point out that the  
19 MCAO has continued to use plea cutoff dates in the vast majority of its cases since Rule 15.8  
20 became effective in December 2003. While it is true that the MCAO has continued to use plea  
21 cutoff deadlines, the conclusion that expanding Rule 15.8 to apply to all criminal cases in Superior  
22 Court will not significantly impact the efficiency of the criminal justice system does not necessarily  
23 follow. There are several reasons why Rule 15.8 has not yet caused the MCAO to abandon plea  
24 deadlines.  
25

26 First, before this Court's decision in Rivera-Longoria in late 2011, the State could  
27 reasonably raise constitutional challenges to the imposition of Rule 15.8 in a given case. These  
28

1 arguments may have made some courts unwilling to force the prosecution to re-extend a plea offer.  
2 With this Court's decision in Rivera-Longoria, those arguments are no longer persuasive in lower  
3 courts. Second, there were occasions where the State chose to simply reinstate a lapsed offer after  
4 disclosing new evidence to avoid the litigation delay and resource drain inherent in fighting Rule  
5 15.8 challenges. To the extent that these choices have emboldened defendants to file requests for  
6 sanctions under Rule 15.8 and have made it difficult to preserve limited resources, the State may be  
7 forced to reconsider whether using plea deadlines, or plea offers at all, has any worthwhile benefits.  
8 The fact that these discussions have not yet lead to changes does not mean that Rule 15.8 has not  
9 had negative consequences for efficient case management practices within the office. Third, with  
10 the current Rule, the State has the option, when necessary, to decline to set a plea deadline to avoid  
11 the problems with Rule 15.8 discussed above. If the State Bar's petition is adopted, the State will  
12 no longer have any mechanism to avoid Rule 15.8, other than refusing to extend any plea offer.  
13 For these reasons, the fact that MCAO currently uses plea deadlines does not undermine the reality  
14 that expanding Rule 15.8 will have negative consequences throughout Arizona, as discussed above.

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17 Adopting the State Bar's petition to apply Rule 15.8 to every criminal case in the Superior  
18 Court is unnecessary and inefficient. The proposed changes would further infringe on Executive  
19 powers and would put an even greater strain on a criminal justice system that is already struggling  
20 to handle its workload with limited resources. Prosecutors are mindful of their ethical and legal  
21 responsibilities. They are also mindful of the need to protect the public by holding offenders  
22 accountable and seeking justice for crimes victims. If those goals are going to be thwarted by  
23 gamesmanship or unfair application of rules then it behooves the prosecution to not extend an offer.

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1 **III. Suggested Rule Change**

2 As explained throughout, the MCAO believes Rule 15.8 is an unconstitutional violation of  
3 separation of powers, represents poor public policy, hinders the efficient and effective  
4 administration of the criminal justice system with no resulting benefits, and should be eliminated in  
5 its entirety. However, given this Court’s rejection of the constitutional arguments in Rivera-  
6 Longoria, if this Court is not inclined to repeal the Rule, the State recommends the following  
7 changes to Rule 15.8 to clearly narrow its application to only those situations where the State has  
8 knowingly withheld material evidence that was in its possession at the time the plea offer was  
9 extended. These changes will ensure that Rule 15.8 is only used when a violation of Rule 15 has  
10 actually occurred and a plea cutoff date has passed or the offer has been withdrawn. These changes  
11 make the Rule consistent with the purposes of Rule 15 and the sanction provisions of Rule 15.7.  
12

13 Proposed Rule Change:

14  
15 A. If the prosecution has imposed a plea deadline extended a plea offer in a case in  
16 which an indictment or information has been filed in Superior Court, and the court  
17 finds that that the prosecution has knowingly failed to comply with Rule 15.1(b) at  
18 least 30 days before any plea offer deadline or before the offer was withdrawn, but  
19 does not provide the defense with material disclosure listed in Rule 15.1(b) at least  
20 30 days prior to the plea deadline, the court, upon motion of the defendant, shall  
21 consider the whether the evidence not disclosed properly under Rule 15.1(b) is  
22 material to the case based on all the facts and circumstances, and the impact of the  
23 failure to provide such disclosure on the defendant's decision to accept or reject a the  
24 plea offer. If the court determines that the prosecutor's failure to provide such  
25 disclosure materially impacted the defendant's decision and the prosecutor declines  
26 to reinstate the lapsed plea offer, the presumptive minimum sanction shall be  
27 preclusion from admission at trial of the any material evidence not timely disclosed  
28 under Rule 15.1(b). at least 30 days prior to the deadline.

B. This rule shall only apply to material evidence listed in Rule 15.1(b) that existed  
and was in the prosecutor’s possession or control at the time the plea offer was  
extended.

In addition to this change the comment to Rule 15.8 should be modified accordingly:

Although there is no constitutional right to a plea bargain, see United States v. Osif,  
789 F.2d 1404, 1405 (9<sup>th</sup> Cir. 1986); State v. McKinney, 185 Ariz. 567, 575, 917

1 P.2d 1214, 1222 (1996), once the State engages in plea negotiations, certain  
2 constitutional protections attach that allow the Court to ensure the process is fair. See  
3 State v. Donald, 198 Ariz. 406, 413, 10 P.3d 1193, 1200 (App. 2000).

4 It has become common, especially in high volume jurisdictions, for a prosecutor to  
5 impose a deadline by which a defendant must accept a plea offer. Such deadlines are  
6 imposed in order to optimize scarce criminal justice resources and minimize impact  
7 to victims. However, when the plea deadline occurs before material discovery is  
8 provided to the defense, such deadlines may impact a defendant's constitutional  
9 rights. Defense counsel may not have adequate information about the prosecution's  
10 case to provide effective assistance to the defendant in making the decision whether  
11 to accept a plea offer or proceed to trial, resulting in a plea not knowingly and  
12 intelligently made.

13 New Rule 15.8 balances these interests by requiring that all material discovery listed  
14 in Rule 15.1(b) be provided to the defense well enough in advance of any plea  
15 deadline to enable the defendant to make an informed decision on the plea offer with  
16 the effective assistance of counsel.

17 Sanctions under Rule 15.8 do not apply if, after the prosecutor makes the disclosures  
18 required by Rule 15.1(b), the defendant has at least 30 days to consider the plea offer  
19 before the offer expires or is withdrawn. Evidence which is discovered and timely  
20 disclosed under Rule 15.6 after a plea offer has expired or been withdrawn does not  
21 trigger the sanctions under Rule 15.8 unless that evidence existed and was in the  
22 prosecutor's possession or control at the time the plea offer was extended. If new  
23 evidence is discovered and disclosed under Rule 15.6 after the offer is extended but  
24 before the plea expires or is withdrawn, this Rule does not require a new 30 day  
25 period as long as the defendant had 30 days to consider the offer after the prosecutor  
26 complied with Rule 15.1(b).

27 Rule 15.8 is not triggered by a failure to comply with Rule 15.1(b) but by the failure  
28 to provide the materials or information listed under Rule 15.1(b) at least 30 days  
prior to the plea deadline. For example, a lab result may be material to the  
defendant's decision whether to accept or reject a plea offer. Under Rule 15.1(b), the  
prosecution does not have to provide the result to the defendant until it is "then  
existing" and may not even order the report until after the plea deadline. This would  
not violate Rule 15.1(b). However, under Rule 15.8, the court, upon motion by the  
defendant, would consider the impact of the failure to provide the lab report on the  
defendant's decision to reject the plea offer, and impose a sanction, if appropriate.

Rule 15.8 does not automatically preclude evidence that is disclosed within thirty  
days of the plea deadline. It Rule 15.8 only applies only to discovery that the court  
finds is material to the case and to the defendant's decision whether to accept or  
reject a plea offer. Evidence is material to the case if it the evidence might affect the  
outcome at trial. Whether discovery evidence is material or not must be determined  
by the court after considering all of the circumstances of the case.

1 **IV. Conclusion**

2 As currently written, Rule 15.8 is a confusing, unnecessary rule that hampers the  
3 prosecution's ability to efficiently and effectively hold offenders accountable. Instead of  
4 expanding this broken rule to apply to more criminal cases, the MCAO asks this Court to deny the  
5 State Bar's Petition to Modify Rule 15.8 and instead either eliminate the Rule in its entirety or  
6 modify it as recommended above.  
7

8 Respectfully submitted this 16<sup>th</sup> of May, 2013.

9  
10 WILLIAM G. MONTGOMERY  
MARICOPA COUNTY ATTORNEY

11 By   
12 MARK FAULL  
13 CHIEF DEPUTY  
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