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IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF **PETITION TO AMEND RULE 15.8, ARIZONA RULES OF CRIMINAL PROCEDURE**	**R-13-0004** **ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL'S COMMENTS TO PETITION TO AMEND RULE 15.8, ARIZONA RULES OF EVIDENCE**

Pursuant to Arizona Rules of the Supreme Court, Rule 28(C), the Arizona Prosecution Attorneys' Advisory Council ("APAAC") hereby submits its comments in objection to the Petition to Amend Rule 15.8, Arizona Rules of Criminal Procedure. The proposed Rule change will fundamentally alter for the worse the very nature of Arizona's guilty plea system, and will have far reaching implications that may effectively end the practice of guilty pleas in the State of Arizona. Accordingly, APAAC respectfully asks this Court to deny the petition.

I. Preface

APAAC opposes the proposed change to Rule 15.8, Ariz. R. Crim. P. because it is unnecessary and will lead to gamesmanship that does not serve the interests of justice; and, as explained in the Amicus Brief filed by APAAC in *In re Rivera-Longoria*, violates the Separation of Powers Doctrine. (This Court previously rejected the Separation of Powers challenge to Rule 15.8. *Rivera-Longoria v. Slayton*, 228 Ariz. 156, 158, 264 P.3d 866, 868 (2011).)

Practically speaking, the proposed rule turns a blind eye toward the goal of ensuring justice and due process for defendants and victims of crime by encouraging defendants to engage in plea agreement and discovery "gamesmanship" that will lead to delays in the resolution of most criminal cases. Moreover, the proposed rule change will have far reaching implications, including the potential cessation of timely non-trial resolutions in most felony cases.

II. The Proposed Rule Change Will Lead to "Gamesmanship" & Delay

Currently, either party to a criminal case may propose a plea offer to resolve the matter. Rule 17.4, Ariz.R.Crim.P. Any proposed plea represents the offering party's assessment *at that point in time* of the strengths and weaknesses of his case and of the other side's case, and a judgment call as to what a fair and just resolution of the case would be in light of those strengths and weaknesses. Plea offers by the State also require an assessment by the Executive Branch (i.e. the

prosecuting authority) of what justice requires under the facts of the case. *See* e.g. comment to E.R. 3.8, Rule 42, Ariz.R.Sup.Ct.

Prior to the implementation of Rule 15.8, Ariz.R.Crim.P., a party receiving a plea offer would make a similar analysis to that made by the party proposing the plea offer. The receiving party would look to the known strengths and weaknesses of each party's case, and make a decision as to whether to accept or reject the offer. When plea agreements were made at least thirty days after arraignment, the State would have already disclosed witnesses, police reports, recorded statements by the defendant, and other evidence that it intended to use at trial. Rule 15.1(b), Ariz.R.Crim.P.

Rule 15.8 fundamentally changed the traditional analysis in cases where a plea deadline had been imposed. Because the defendant faces no sanctions under Rule 15.8 for disclosing evidence after the defendant makes a plea with a deadline, the change to the traditional plea process created by Rule 15.8 effectively applies only to plea offers made by the State, and therefore affects only the defendant's analysis of whether and when to accept a plea.

In order to save sparse Executive and Judicial resources, plea offers traditionally were made by the State relatively early in a criminal case, often before either side had fully completed investigations. In cases governed by current Rule 15.8, when the State extends a plea with a deadline, the defense will still engage in

the analysis (discussed above) of the strengths and weaknesses of the case, but is inherently encouraged to calculate into the plea equation what mathematicians might call the "delay quotient."

In cases under existing Rule 15.8, when a plea deadline has been made, a defendant is encouraged by the Rule to wait and see how much better or worse the case gets for the State. The defendant can rest assured that no matter how much stronger the case gets, the State will effectively be required to re-extend the plea offer.[1] Conversely, if the case gets worse for the State, the defendant will have new-found leverage to negotiate for a better offer. In either case, the defendant is encouraged to delay the proceedings, often until the moment of trial, before accepting a plea offer. The net effect of the "delay quotient" analysis by a defendant is to appreciably extend the length of time that it takes to resolve cases.

Because imposing a plea deadline now causes cases to take longer to resolve than cases without a deadline, the effect of Rule 15.8 (as interpreted by *Rivera-Longoria v. Slayton*, *supra*, 228 Ariz. 156, 158, 264 P.3d 866, 868) has been to reduce the number of cases where plea deadlines are imposed. In short, introducing the "delay quotient" into the plea process has, and will continue to have, a real effect on how cases are handled in Arizona. The proposed change to Rule 15.8 would implement the "delay quotient" into every felony case where the State has

[1] The State's only other option would be to go to trial without all of the evidence, which is not a rational choice, does not promote the judicial ideal of cases being tried on their merits, and in victim cases, would deny the victim the rights assured by Article 2, §2.1(A)(11).

made a plea offer. Accordingly, should the Rule be amended, defendants statewide will have the same incentive in every case to wait until the moment of trial to resolve a case.

Logically, just as the current version of Rule 15.8 has affected the Executive Branch's handling of cases by reducing the number of cases in which a plea deadline is made, implementation of the proposed change to Rule 15.8 will also alter how the Executive Branch makes plea offers statewide in the wake of the proposed Rule change. At the very least, implementation of the proposed change to Rule 15.8 will encourage prosecutors to wait until discovery is complete before making an initial plea offer, thereby thwarting the Executive Branch's legitimate goal of saving sparse Executive and Judicial resources in appropriate cases. Prosecutors waiting until the eve of trial to make plea offers will cause unimaginable congestion on trial calendars, will stretch the already thin resources of law enforcement agencies who will now be asked to do all possible investigation into every aspect of virtually every felony case, will overburden prosecutors' offices and public defender offices with cases that would otherwise have been amicably been resolved early on, and will congest our State's crime labs.

III. The Proposed Change May Lead to the End of Most Plea Offers

The Executive Branch has a constitutional obligation to utilize its discretion in enforcing the laws of the State of Arizona. In fulfillment of its obligation to

enforce the laws, the Executive Branch will only resolve a case by plea offer if it believes it achieves justice under the facts of each case. If Rule 15.8 is amended, the Executive Branch will be forced to make a Hobson's choice: 1) make no plea offer at all, and allow felony cases to resolve at trial or at some undetermined time in the future when the defense makes an offer[2]; *or* 2) make a plea offer only to have its hands tied if the offer is rejected and it later becomes apparent the offer is no longer appropriate due to newfound inculpatory information about a defendant or a case. Given the Executive Branch's constitutional obligation to appropriately enforce the laws, the only constitutionally rational choice is to not make plea offers until all conceivable discovery is finished.

Traditionally, most felony cases are resolved in Arizona by a plea offer tendered by the State. In many cases, the terms of those offers are negotiated between the parties, either before the offer is made, or before the offer is accepted. Should implementation of the proposed amendment to Rule 15.8 occur, and the Executive Branch refrains from making offers, the onus of making offers in most felony cases will effectively devolve to the defense, since Rule 15.8 does not apply to defense offers. Only two results can occur: (1) The defense may wish to simply resolve the case early on, and will make a plea offer within the same time frame

[2] Conceivably, the Executive might still make plea offers once all conceivable discovery is over. However, since the primary motivation to make a plea offer is to avoid a unnecessary expenditure of resources, that incentive will be all but gone by the time the Executive finds itself in a position to make an offer, and any such offer would almost certainly be less favorable than a defendant might have received under our current system of plea offers.

that most cases have traditionally pled in Arizona. For the State to accept the offer, the offer's terms will likely be the same as what the State would have drafted. In such cases, nothing has been gained for either party by the proposed change to Rule 15.8. (2) The only other result of the Hobson's choice dilemma will be plea offers that are made close to trial, when both sides have fully investigated the case. This will lead to the calendar clogging and needless expenditure of finite resources discussed above. Under neither scenario will the people of Arizona benefit from the proposed Rule change.

IV. The Proposed Rule Change Is Not Necessary

The Petition indicates the purpose of the proposed amendment to Rule 15.8 is to allow a defendant to make an informed decision on whether to accept or reject a plea offer. APAAC absolutely agrees in the goal of ensuring both sides to any contract are able to make an informed decision. In pursuit of that goal, however, the proposed amendment to Rule 15.8 seeks to radically reshape the entire process of how and when pleas are offered and accepted. The price that will be paid for that goal will be delay, congestion or gridlock of trial calendars, additional police resources expended in most cases, and congestion and delay at prosecutors' and defense counsel offices and the crime labs. The proposed amendment neither effectively achieves its stated goal nor does the price warrant the change.

Under the current Rule 15.8, the parties are positioned to make an informed decision on whether to accept a plea offer. Defendants are ensured timely disclosure of exculpatory evidence under Rule 15.1 and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). Even without Rule 15.8, the State is obligated to disclose its witnesses and evidence early on in a case, and by action of the discovery rules is discouraged if not outright prevented from sitting on inculpatory evidence for the purpose of "springing on the defense" if a plea is not accepted. Rule 15.1, Ariz.R.Crim.P. Likewise, without Rule 15.8, courts already possess the power to address discovery and *Brady* violations. Rule 15.7, Ariz.R.Crim.P. If exculpatory evidence arises after a plea is entered, upon a showing of manifest injustice, the courts can set the plea aside. Rule 17.5, Ariz.R.Crim.P. Finally, defendants may have their convictions set aside if exculpatory evidence is discovered after conviction. Rule 32.1, Ariz.R.Evid.

Even without Rule 15.8, defendants and their counsel are free to negotiate with the State on an even playing field, where both sides have disclosed under Rule 15 what they then know about a case, and where both sides are capable of making an informed decision. When both sides agree to proceed with a plea, it is under the foregoing Rules of Criminal Procedure that protect innocent defendants and are designed to ensure justice. If exculpatory evidence is uncovered after a plea is

accepted or a defendant is sentenced, the defendant can use the existing Rules of Criminal Procedure to seek redress.[3]

V. Conclusion

APAAC strongly opposes the proposed amendment to Rule 15.8. The proposed Rule change will fundamentally alter for the worse the very nature of Arizona's guilty plea system, and may have far reaching implications that effectively end the present practice of guilty pleas in the State of Arizona. Accordingly, for all of the reasons discussed above, the amendment should be denied.

Respectfully submitted this 21st day of May, 2013.

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[3] Conversely, if additional inculpatory evidence is discovered after sentencing, or the State later learns a defendant has a more extensive record, the judgment will remain final, and the defendant will have benefited.