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IN THE SUPREME COURT STATE OF ARIZONA

In the Matter of)	
PETITION TO AMEND RULE 15.8,)	Supreme Court
ARIZONA RULES OF CRIMINAL)	No. R-13-0004
PROCEDURE)	
)	Comment of the
)	Maricopa County
)	Public Defender
)	

In 2003, this Court adopted Rule 15.8 “to ensure that, once charges have been filed in superior court, basic discovery will be provided to the defense sufficiently in advance of a plea deadline to allow an informed decision on the offer with effective assistance of counsel.” *Rivera-Longoria v. Slayton*, 228 Ariz. 156, 158 (2011). The Court was prescient in this regard, as the United States Supreme Court recently underscored the importance of effective assistance of defense counsel during the plea-bargaining process, making Rule 15.8 more pertinent than ever. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Missouri v. Frye*, 132 S. Ct. 1399 (2012). See also *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486

(2010); *McMann v. Richardson*, 397 U.S. 759, 771 (1970). “During plea negotiations, defendants are ‘entitled to the effective assistance of competent counsel.’” *Lafler*, 132 S. Ct. at 1384 (quoting *Richardson*, 397 U.S. at 771 (1970)). “Anything less might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him.” *Frye*, 132 S. Ct. at 1408 (internal citations and quotations omitted). “The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.”¹ *Frye*, 132 S. Ct. at 1407 (internal quotations omitted) (citing *Lafler*, 132 S.Ct at 1388). “In today’s criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.” *Frye*, 132 S. Ct. at 1407.

As recognized by this Court in *Rivera-Longoria*, the comment to Rule 15.8 “reflects the view that defendants should receive certain basic disclosures before having to decide on plea offers made early in the case.” *Rivera-Longoria*, 228 Ariz at 160 (citing Ariz.R.Crim.P. 15.8, cmt. to 2003 amend.) Further, the Court

¹ “Because ours is for the most part a system of pleas, not a system of trials, it is insufficient to simply point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.” *Missouri v. Frye*, 132 S. Ct.

suggested that “to the extent the policy concerns motivating Rule 15.8 are implicated by the withdrawal of open-ended offers, we think the better approach is to consider amending the rule rather than construing the ‘imposi[tion] [of] a plea deadline’ to mean the withdrawal of an offer without a deadline”. *Id.* (quoting Ariz.R.Crim.P. 15.8). The State Bar’s Petition does just that.

Contrary to the concerns raised by the prosecutors in their comments, the proposed rule change will not dramatically alter prosecutors’ current obligations and will not cause all plea offers to remain open and subject to Rule 15.8’s sanction of preclusion. The existing constraints of Rule 15.8, upheld by this Court in *Rivera-Longoria*, will remain in place. Rule 15.8 “does not ‘subordinate the prosecutor’s plea bargaining authority to the discretion of the courts.’” *Id.* at 158 (quoting *State v. Donald*, 198 Ariz. 406, 417, ¶ 42 (App. 2000)). The State retains the power to determine whether to extend an offer, and the terms of the offer. Furthermore, the Rule’s practical scope will continue to be narrow. First, it will only apply to a plea offer made in a case in which an indictment or information has been filed in Superior Court. Second, the prosecutor must fail to provide the defense with material disclosure listed in Rule 15.1(b) at least 30 days prior to the withdrawal of the plea offer. Third, the prosecutor must disclose information

1399, 1407 (2012) (internal quotations omitted) (citing *Lafler*, 132 S.Ct at 1388).

within the scope of Rule 15.1(b) after it has withdrawn the plea offer. Fourth, the defendant must file a motion alleging that the information disclosed after the plea offer was withdrawn impacted the defendant's decision to accept or reject a plea offer. Fifth, the court must make a finding 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”. Ariz.R.Crim.P. 15.8 Then and only then will a presumptive minimum sanction of preclusion from admission at trial of the late-disclosed evidence be considered by a court.

In 2003, when proposed Rule 15.8 was being considered, prosecutors filed numerous comments maintaining that it was unworkable, unconstitutional and would wreak havoc on the criminal justice system. None of that happened. Based on the language of Rule 15.8 and its comment, it reasonably can be concluded that the drafters of Rule 15.8 did not anticipate that prosecutors would use open-ended plea offers to circumvent Rule 15.8. If they had, the proposed language in the State Bar’s Petition would, in all likelihood, have been the original language of Rule 15.8. We urge the Court to close this loophole and adopt the changes proposed in R-13-0004.

RESPECTFULLY SUBMITTED this 21st day of May, 2013

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