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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: Sua Sponte Petition to Amend Rule 41, Forms 18(a) and (b), Arizona Rules of Criminal Procedure	No. R-13-0032 **THE ARIZONA PUBLIC DEFENDER ASSOCIATION'S COMMENT REGARDING THE PETITION TO AMEND RULE 41, FORMS 18(a) AND (b), ARIZONA RULES OF CRIMINAL PROCEDURE**

Pursuant to Rule 28 of the Rules of the Supreme Court, the Arizona Public Defenders Association ("APDA") submits its comment regarding the Petition to Amend Rule 41 and Forms 18(a) and (b) of the Arizona Rules of Criminal Procedure, R-13-0032.

The APDA is an Arizona non-profit corporation comprised of public defense offices and programs throughout the State of Arizona. The primary purposes of our organization include improving the quality of legal representation of poor people who face the loss of their liberty, safeguarding the constitutional rights of indigent individuals, and resolving criminal matters effectively and fairly. Our offices defend the overwhelming majority of individuals who face criminal charges in Arizona, handling in excess of 50,000 felony cases a year.

Currently, plea agreements that follow Forms 18(a) and (b) require defense counsel to avow: that the plea and disposition are appropriate under the facts of the case; and that defense counsel concurs in the entry of the plea. This defense attorney avowal [hereinafter "avowal"] presents four problems. First, the avowal presents an ethical problem when defense counsel does not believe the plea agreement is appropriate, but is still tasked with getting the best possible resolution for his or her client. Second, the avowal confers standing upon the state to comment on whom may represent the defendant. Third, the avowal can be used to violate the client's right to counsel of choice. Fourth, the problems presented by the avowal are not remediated by a conflict of interest analysis. Each of these issues is discussed below.

A. The Avowal Can Impair Defense Counsel's Ability to Continue With the Representation, Due to the Duties of Candor to the Court and Loyalty to the Client.

The defense attorney avowal is ethically problematic when defense counsel does not believe the proposed resolution of the case is appropriate or fair. Nevertheless, it may

be better for the client to accept the offer and avoid the risk of conviction at trial, with its greater penalties. Defense counsel is presented with an untenable choice: avow to a false statement, which is perjury and a violation of the duty of candor to the court; withdraw and leave the client without counsel; or attempt special action litigation and invite the risk that the offer may expire, or that the State may withdraw the offer.

While these problems would be alleviated if defense counsel were able to strike the avowal, defense counsel is not free to simply remove the terms on a case by case basis. The State controls the offer. If defense counsel strikes the objectionable terms, the State can refuse to sign the plea agreement. As the avowal currently stands, the State may cite Form 18 (a) or (b) to show that the Court has recommended these terms in its forms. Ariz. R. Crim. P. 41.

The problematic terms within the defense attorney avowal appear in plea agreements for several counties in Arizona. Representatives from the public defender offices in Coconino County, Yavapai County and Navajo County have confirmed that plea agreements in their counties include a term requiring the defense attorney to indicate that the plea agreement is appropriate.[1]

If defense counsel will not make the avowal, then the change of plea cannot proceed. The objectionable terms can then prevent defense counsel from remaining on the case. Defense counsel may be required to withdraw from the representation, not for a

[1] Some attorneys reported that they or their associates have been permitted to strike the term when it is objectionable.

true conflict of interest as contemplated by the Rules of Professional Conduct, but because defense counsel does not believe the state's plea offer is fair or appropriate.

The client could choose to continue without counsel, in propria persona. If the client wants to utilize his or her right to counsel, the client would then have to retain, or the court would have to appoint, new counsel. The problem presented by the avowal can reoccur. New attorneys could appear in succession until the client retains a defense attorney who shares the state's outlook.

B. The Avowal Contravenes Precedent By Conferring Standing on the State to Object to the Particular Attorney Who Represents the Defendant.

The problems presented by the defense attorney avowal are not mere hypotheticals. The Office of the Public Defender for Maricopa County has had to litigate this issue in both the trial and appellate courts. Essentially, this avowal allows the state to obtain what precedent has denied them: standing to be heard about who represents the defendant.

The state does not have standing to object to who will represent the defendant. *Knapp v. Hardy*, 111 Ariz. 107, 112, 523 P.2d 1308, 1313 (1974). If the court were to confer standing on the state to object to defendant's counsel, it would "strike at the very heart of the adversary system." *Id*. "[F]or the prosecution to participate in the selection or rejection of its opposing counsel is unseemly if for no other reason than the distasteful impression which could be conveyed." *State v. Madrid*, 105 Ariz. 534, 535, 468 P.2d 561, 562 (1970).

C. The Avowal Can Deny The Defendant's Right to Counsel of Choice.

When the state uses the avowal to deprive a client of retained counsel, the state violates the client's right to counsel of choice. U.S. Const. Amend. 6; Ariz. Const. Art. 2 § 24. A violation of the right to counsel of choice is structural error. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006).

The Sixth Amendment guarantees a defendant the right to present a defense. *Robinson*, 211 Ariz. at 168-69 ¶¶ 12-13, 118 P.3d at 1132-33. If the court erroneously substitutes private counsel with appointed counsel, then the court has jeopardized the defendant's ability to defend against the charges. "Unless the accused has acquiesced in [representation by appointed counsel], the defense presented is not the defense guaranteed to him by the Constitution, for, in a very real sense, it is not his defense." *Id*. at ¶ 13, 118 P.3d at 1133 (quoting *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525 (1975)). It is only by upholding a defendant's right to choose to proceed with private counsel, rather than court-appointed counsel, that the court safeguards a defendant's Sixth Amendment right to present a defense. *Id*.

Thus, the Sixth Amendment provides a defendant with the right to counsel of choice. *Gonzalez-Lopez*, 548 U.S. at 144; *Powell v. Alabama*, 287 U.S. 45, 53, 53 S. Ct 55 (1932) ("[A] defendant should be afforded a fair opportunity to secure counsel of his own choice."); *Robinson*, 211 Ariz. at 169, ¶ 16, 118 P.3d at 1133 (holding that the Sixth Amendment and Article 2, Section 24 of Arizona's Constitution give indigent criminal defendants the right to choose non-publicly funded private counsel unless the effective administration of justice outweighs that right); *JV-132324 v. Superior Court*, 181 Ariz.

337, 345, 890 P.2d 632, 640 (App. 1995) ("[T]he right to waive counsel and the right to retain counsel of choice are constituent parts of the fundamental right to counsel established by the United States and Arizona Constitutions"). The right to counsel of choice is an essential component of the Sixth Amendment's guarantees because:

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. **And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial.** In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds,"—or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings."

Gonzalez-Lopez, 548 U.S. at 150 (emphasis added) (quoting *Fulminante* at 310, 111 S. Ct. 1246).

If the trial court errs in withdrawing defendant's counsel of choice, then that is structural error. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). "Structural error deprive[s] defendants of basic protections without which a criminal trial cannot reasonably serve its function as a vehicle for a determination of guilt or innocence." *State v. Valverde*, 220 Ariz. 582 ¶ 10, 208 P.3d 233, 235 (2009) (quoting *State v. Ring*, 204 Ariz. 534, ¶ 45, 65 P.3d 915, 933 (2003)). The Court reviews structural error

whether or not a timely objection was made in the lower court. *Valverde*, 220 Ariz. 582 ¶ 10. "If error is structural, prejudice is presumed" and reversal is required. *Id*.[2]

The trial court is tasked with maintaining the balance between the right to counsel of choice and "the needs of fairness." *Id*. at 152. Specifically, "courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat*, 486 U.S. at 160. The court may deny the defendant's right to counsel of choice if that right is outweighed by the "public need for the efficient and effective administration of justice." *Robinson*, 211 Ariz. at 169, ¶ 14, 118 P.3d at 1133. For example, if defendant's counsel of choice is incompetent, has a serious potential or actual conflict of interest, or whose adequate preparation would cause unreasonable delay, then the court may deny the defendant's right to choose his counsel. *Id*. (internal citations omitted).

[2] "Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed." *Gonzalez- Lopez*, 548 U.S. at 148.

The avowal can cause a lawyer who is competent, prepared and proceeding ethically, to be withdrawn from the representation. A lawyer who disagrees with the avowal does not have a conflict of interest. That is, the lawyer does not have an outside interest or competing duty that compromised either his or her independent judgment or his or her duty of loyalty to the client. Instead, because the lawyer exercised his or her professional judgment on the client's behalf, the lawyer can conclude that the state's offer is inappropriate. Thus, the lawyer's loyalty to his or her client makes it impossible for him or her to sign off on a statement that the plea was appropriate. This scenario does not match any precedent where the need for the fair and effective administration of justice outweighs the defendant's right to counsel of choice. In fact, withdrawing counsel in the circumstances presented by this case does not protect the integrity of the system; instead it erodes the standards of the profession and the justice system's appearance of fairness.

If a defense attorney does not endorse his or her adversary's resolution of a case, the defense attorney cannot sign the defense attorney avowal. The lawyer cannot lie and commit a fraud upon the court. So his or her only choice is to be truthful. The lawyer should know that by doing so, he or she leaves the client without the protection of counsel, because the court will relieve counsel of the representation. If the next lawyer feels the plea is inappropriate and will not sign the agreement, then presumably that lawyer will also be taken off of the case as well. Apparently, new attorneys would be appointed in succession until the court finds one that is either less conscientious or who thinks like a prosecutor.

D. **The Problems Presented By The Defense Attorney Avowal Are Not Remediated By A Conflict of Interest Analysis.**

A review of the ethical rules reveals why the issues posed by the defense attorney avowal do not present a conflict of interest problem. "[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest." 17A A.R.S. Ariz. R. Sup. Ct. R 42, E.R. 1.7(a), Conflict of Interest: Current Clients. A concurrent conflict of interest exists where "there is a significant risk that the representation of . . . [a client] will be materially limited by . . . a personal interest of the lawyer." Id. at (a)(2). This ethical rule recognizes that "loyalty and independent judgment are essential elements in the lawyer's relationship to a client." E.R. 1.7, cmt. 1.

When defense counsel cannot sign the defense attorney avowal, it is precisely because the lawyer is exercising his loyalty to his or her client and independent judgment. A lawyer who cannot sign the avowal does not believe that the plea agreement was "an appropriate disposition" under the facts of the case. The conflict of interest rules do not seek to inhibit independent judgment, they protect it. If some person, entity, or other interest restricts defense counsel's independent judgment, then that scenario presents a conflict of interest. None of those situations exist when defense counsel cannot sign the avowal. Instead, the state impairs the lawyer's independent judgment by requiring the objectionable terms. The conscientious lawyer can either agree with the State or remain loyal to his or her client.

If there is a significant risk that **other responsibilities or interests** will materially limit a lawyer's ability to recommend, consider or carry out an appropriate course of action for the client, then there is a conflict of interest. E.R. 1.7, cmt. 8 (emphasis added). "The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives **or foreclose courses of action that reasonably should be pursued on behalf of the client**." E.R. 1.7 cmt. 8 (emphasis added).

There are no "other responsibilities or interests" at issue here, only the lawyer's expression of loyalty to the client. The lawyer does not believe the plea agreement is appropriate. "An attorney's loyalty to his [or her] client is not just a casual obligation to be turned on or off as the dictates of the moment indicate or particular employment may demand." *Matter of Evans*, 113 Ariz. 458, 556 P.2d 792 (1976). There is not even a difference in interests between the lawyer and the client. Both of them want to obtain the best possible resolution. The lawyer is not foreclosing any action that reasonably should be pursued for the client. Entering the plea agreement with the objectionable terms is not reasonable. The State's insistence upon these terms presents a false choice between fraud or deprivation of his or her client's Sixth Amendment rights. The State does not have the power to compel a defense attorney to commit a fraud upon the Court. The State does

not have the power to include a term that divests a defendant of his right to counsel of choice. The avowal is unreasonable.[3]

The comments to the rule continue, adding "The lawyer's own interests should not be permitted to have an adverse effect on the representation of a client." E.R. 1.7 cmt. 10. This is a core tenet of what it means to be a professional. The State's term is problematic precisely because it invites the lawyer's personal beliefs into the representation. The mandatory term's invitation can have an adverse effect on the representation; it can terminate the attorney-client relationship.

Further, requiring defense counsel to endorse or advance his adversary's philosophy, ethos, or view itself creates a conflict of interest. E.R. 1.7 cmt. 22 ("Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent"); *Id*. at cmt. 27 ("[A] lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other"). This is yet another reason why the term is objectionable. It requires defense counsel to endorse the state's position even as he or she is tasked with getting the best possible resolution and sentence for his client. The term facilitates the state's trespass into the attorney-client relationship.

[3] Signing an avowal with the objectionable term in it could mean that the lawyer contradicts himself. Hypothetically, a lawyer may have told his client that while the plea offer is quite unreasonable, it still provides a better resolution of the matter than what the client could face after a trial. After several conversations like that, the lawyer then publicly signs an agreement that the plea offer is appropriate. If he does not sign, the client is abandoned. If he signs, he has contradicted himself and the client-lawyer relationship is weakened.

The objectionable term and the surrounding paragraph also present a problematic prospective limitation on the client's ability to bring a malpractice suit, or to file a Rule 32 petition against the lawyer, or to report the lawyer to the State Bar. See E.R. 1.8 (h) (prohibiting prospective limitations on the client's ability to do either of these things). Should the client sue, petition, or file a complaint, one of the obstacles the client will face is the defense attorney's avowal in the plea agreement. That avowal indicates the plea agreement was fully explained to the client, that the lawyer reviewed all defenses and constitutional rights with the client. With that statement, the lawyer takes a position that is adverse to almost any complaint the client may have. Further, the lawyer occupies that position before the client has even filed a formal complaint. The exception to the rule of confidentiality, which allows a lawyer to defend against a claim, is not activated until the client formally files an allegation or complaint. See E.R. 1.6 (d)(4). This paragraph functions to limit the lawyer's liability and to dilute the strength of a client's complaint against his lawyer.

The final line of the defense avowal requires defense counsel to concur in the entry of the plea. In a footnote, the State Bar's Ethics Committee questioned the propriety of requiring defense counsel to concur in the entry of the plea.

> The more subtle issue is whether the state's solicitation of a defense attorney's concurrence in writing in the entry of a plea is appropriate. E.R. 1.2(a) requires a lawyer to consult with his client regarding the plea to be entered. The decision to accept the plea is the client's, not the lawyer's. Other than confirming that the lawyer has fully consulted with his client regarding the ramifications and consequences of the plea, the defense lawyer would appear to be under no obligation to "concur" in the entry of the plea, at least to the extent that the

> lawyer's concurrence is deemed to be the equivalent of vouching for the defendant.

Arizona State Bar, Ethics Committee, Opinion 00-02 "Confidentiality; Candor Toward Tribunals; Criminal Representation; Perjury" (3/2000) at 7, n.6.

E. Conclusion

The Court should adopt the proposed amendments to Forms 18(a) and (b) to resolve the ethical issues presented by the current avowal. The Court will protect the rights of the accused, most particularly the defendant's Sixth Amendment right to counsel of choice. With these amendments, the Court will ensure that the state can no longer deny a defendant of his or her right to counsel of choice, solely because of his or her counsel's beliefs. For the reasons discussed above, the Office of the Public Defender for Maricopa County respectfully requests the Court grant the petition to amend.

RESPECTFULLY SUBMITTED this 20th day of June, 2013.

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