

THOMAS C. HORNE  
Attorney General  
Firm State Bar No. 14000

Robert L. Ellman  
Solicitor General  
State Bar No. 014410  
1275 W. Washington  
Phoenix, Arizona 85007  
Telephone: (602) 542-3333  
Fax: (602) 542-8608  
[solicitorgeneral@azag.gov](mailto:solicitorgeneral@azag.gov)

**ARIZONA SUPREME COURT**

In the Matter of

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

**No. R-13-0004**

**ARIZONA ATTORNEY  
GENERAL'S COMMENTS TO  
PETITION TO AMEND RULE  
15.8 OF THE ARIZONA RULES  
OF CRIMINAL PROCEDURE**

Pursuant to Rule 28(C) of the Rules of the Arizona Supreme Court and this Court's Order dated November 13, 2013, the Arizona Attorney General submits the following comments in opposition to the Petition to Amend Rule 15.8, Arizona Rules of Criminal Procedure.

Rule 15.8, which this court adopted in 2003, imposed significant limitations on the State's ability to efficiently process criminal cases. Then-Attorney General

Janet Napolitano opposed adoption of Rule 15.8. The pending petition proposes to *broaden* Rule 15.8, further unbalancing the already uneven playing field and lending the criminal justice system to potential gamesmanship<sup>1</sup> by indicted defendants. Accordingly, Attorney General Horne opposes expansion of Rule 15.8 and urges this Court to deny the petition.

The Attorney General endorses the comments filed by the Arizona Prosecuting Attorneys' Advisory Council (APAAC Comment), the Pima County Attorney (PCAO Comment), and the Maricopa County Attorney (MCAO Comment), all of which provide sound and compelling reasons to limit Rule 15.8 rather than expand it. They demonstrate forcefully that adopting the amendment will exacerbate the gamesmanship and injustice that the Rule has already engendered, will strip the plea negotiating process of its remaining usefulness to the State and the trial courts, and may render plea negotiations altogether untenable. No one will benefit from that result.

Eleven years of practice under Rule 15.8 has confirmed the validity of the concerns that the Attorney General's Office expressed in opposition to the rule's

---

<sup>1</sup> Both the Arizona Prosecuting Attorneys Advisory Council (APAAC) and the Maricopa County Attorney use the term "gamesmanship" to describe what the rule encourages. *See* APAAC Comment at 2; MCAO Comment at 10, n. 5. Examples in the PCAO and MCAO Comments prove the aptness of the term in some cases and demonstrate that Rule 15.8's potential to thwart justice is not merely theoretical. *See* PCAO Comment at 1-2, 4; MCAO Comment at 5 n. 1, 10 n. 5.

adoption in the first place. *Compare* Motion to Reconsider Amendments to Rule 15, Arizona Rules of Criminal Procedure, Supreme Court No. R-00-0003 (filed Aug. 27, 2002) at 7 (citing “Hobson’s choice” that Rule 15.8 (then Rule 15.7(e)) will create in plea deadline cases where additional inculpatory evidence comes to light, forcing prosecutor to either revive an offer that is no longer fair to the State, or proceed without all of the evidence) *with* APAAC Comment at 4, n. 1 (under Rule 15.8 as adopted in 2002, when the state receives additional evidence that strengthens its case while a plea offer is pending, it must extend the acceptance deadline or exercise its “only other option” which “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).”). Accordingly, the Attorney General endorses the Maricopa County Attorney’s proposal to eliminate Rule 15.8 altogether or to limit it to instances in which the State knowingly withholds material evidence in its possession at the time it extends a plea offer. *See* MCAO Comment at 17-18.

At the most fundamental level, both the current version of the rule and its proposed expansion rest on the flawed premise that the rule “enable[s] a defendant to make an informed decision when deciding whether to accept a plea offer”

(Petition at 2), as if the prosecutor *and* the defendant are only aware of the information the prosecutor discovers prior to trial. Disclosure unquestionably facilitates the plea process by enabling a defendant to assess the strength of the State's case at the time it extends the offer. But that is a collateral effect of disclosure, not its purpose.

The prosecutor's pretrial disclosure requirements under Rule 15.1 exist so that a defendant can prepare for a fair trial where he can squarely challenge the State's evidence and avoid unfair surprise. *State v. Armstrong*, 208 Ariz. 345, 353, ¶ 38, 93 P.3d 1061, 1069 (2004). Rule 15.1 says nothing about plea agreements. Yet Rule 15.8 improperly imports the avoidance-of-surprise precept into a plea bargaining process in which prosecutors need not extend any plea offers and, when they do, they need not meet any burden of proof. There is no such thing as plea by ambush, yet that is what Rule 15.8 and the proposed amendments seem designed to prevent. A prosecutor should be able to exercise discretion to rescind a plea offer when the circumstances warrant it. The petition falsely presumes that a prosecutor's disclosure obligation exists to ensure that defendants get the best possible plea offer.

To be clear, the Attorney General has no interest in lessening a prosecutor's obligations to make full and timely disclosures, and no interest in eliminating the

requirement to disclose all inculpatory information in the State's possession at the time a plea offer is made. But the continuing obligation to disclose additional inculpatory evidence has no role in defining or extending the terms of the offer.

In a scenario where the defendant knows all the circumstances of the crime but the prosecutor knows only what he can discover, no injustice can result from the expiration or rescission of the prosecutor's plea offer before he discovers and discloses later-acquired evidence of guilt. Only guilty defendants enter guilty pleas. But injustice *does* result when defendants invoke the rule. The real-life example at footnote 5 of the MCAO Comment illustrates this point eloquently: the defendant invoked Rule 15.8 to revive a lapsed plea offer because the State had not discovered and disclosed the defendant's own inculpatory admission.

As that example demonstrates, Rule 15.8 already creates injustice. It should be rescinded, not expanded. Accordingly, the Attorney General supports Maricopa County's cross-petition to modify Rule 15.8 to embrace a procedure in which a defendant who rejects or defers a plea offer assumes the risk that the State will soon discover what he already knows.

For the reasons set forth above, the reasons set forth in the APAAC, PCAO and MCAO comments, and the reasons set forth in the Attorney General's

comments to Petition No. R-00-0003 (submitted on Aug. 27, 2002), the Attorney General remains opposed to any version of Rule 15.8.

DATED this 16th day of May, 2014.

THOMAS C. HORNE  
Arizona Attorney General

/s/ Robert L. Ellman  
By: ROBERT L. ELLMAN  
Solicitor General