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7 **IN THE SUPREME COURT STATE OF ARIZONA**

8 In the Matter of PETITION)
9 TO AMEND RULES 15.8, 17.4) Supreme Court
10 Arizona Rules of Criminal Procedure,) No. R-_____
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29 **INTRODUCTION**

30 Pursuant to Rule 28 of the Rules of the Supreme Court, the Pima County Public
31 Defender's Office respectfully petitions the Arizona Supreme Court to amend Rules 15.8 and/or
32 17.4 (a) of the Arizona Rules of Criminal Procedure. The proposed change of Rule 15.8 would
33 delete language providing presumptive sanctions for the State's noncompliance with the
34 disclosure requirements of Rule 15.1. The proposed change of Rule 17.4(a) would add language
35 to Rule 17.4 that plea offers shall not be conditioned on the prosecutor's failure to provide
36 disclosure to criminal defendants as required by Rule 15.1.

37 **Summary of Proposed Changes**

38 Rule 15.8, Ariz. R. Crim. Proc., Vol. 16A, A.R.S. provides:

39 **Disclosure prior to a plea deadline; sanctions.**

40 If the prosecutor has imposed a plea deadline in a case in which an
41 indictment or information has been filed in Superior Court, but does not provide
42 the defense with material disclosure listed in Rule 15.1(b) at least 30 days prior to
43 the plea deadline, the court, upon motion of the defendant, shall consider the
44 impact of the failure to provide such disclosure on the defendant's decision to
45 accept or reject a plea offer. If the court determines that the prosecutor has

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1 provide such disclosure materially impacted the defendant's decision and the
2 prosecutor declines to reinstate the lapsed plea offer, the presumptive minimum
3 sanction shall be preclusion from admission at trial of any evidence not disclosed
at least 30 days prior to the deadline.

4 Defense counsel, pursuant to this rule, is at times placed in the untenable and unethical
5 position of having to advise a client whether to accept a proposed plea offer without having the
6 benefit of the State complying with the mandatory disclosure requirements of Rule 15.1(b). As
7 the comments to the Rule state, when the State engages in plea bargaining, constitutional
8 protections attach that allow the Court to ensure the process is fair. *State v. Donald*, 198 Ariz.
9 406, 413, 10 P.3d 1193, 1200 (App. 2000). This rule as written permits the State to avoid
10 compliance with Rule 15.1(b) and to condition plea offers on its non-compliance, as it may
11 choose to await a finding of "nonmateriality" and may also choose not to reoffer the plea and
12 suffer any sanction the court chooses. As such, it runs afoul of protecting a defendant's due
13 process right to make a knowing and intelligent decision regarding a plea offer, and of defense
14 counsel's duty to provide effective assistance in the decision whether to accept a proposed plea
15 offer. U.S.C. Amend. XIV, V, Ariz. Const. art. II, §4; *McCarthy v. U.S.*, 394 U.S. 459, 466
16 (1969); *State v. Draper*, 158 Ariz. 315, 317, 762 P.2d 602, 604 (App. 1988). Further, this rule
17 compromises defense counsel's duty to provide effective assistance in the decision whether to
18 accept a proposed plea offer. U.S. C. Amend., XIV, Vi, Ariz. Const. art. II, §24; *Draper* at 318.
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22 In addition, the rule accords acceptance of a prosecutor's decision not to reoffer a lapsed
23 plea, a result not in accordance with the United States Supreme Court's decision in *Santobello v.*
24 *New York*, 404 U.S. 257 (1971) where the court recognized a trial court's equitable authority to
25 order specific performance in situations similar to the instant situation.
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27 The rule also ill-advisedly places the determination of materiality (required prior to a
28 sanction being imposed) with the trial judge, who typically is poorly equipped to assess the

1 importance to the defense of any single item of disclosure, since he or she has no knowledge of
2 the defense theory, evidence, or the importance of defense evidentiary or legal issues.

3 The rule's effect of condoning (by not automatically sanctioning) prosecutors' failure to
4 disclose even minimal, basic information required by Rule 15.1(b) also presents an ethical
5 problem for prosecutors. Prosecutors are not required simply to prosecute zealously; they are
6 required to seek justice; justice can only be meted out where both sides have timely access to
7 basic discovery as set forth in Rule 15.1(b). As this rule permits non-compliance with Rule
8 15.1(b) disclosure requirements, it may encourage prosecutors to compromise their ethical
9 obligations to ensure justice is done by leaving loopholes for prosecutors who are too busy or are
10 otherwise unwilling to fulfill their obligations under Rule 15.1(b).

11 The consequence of this rule in Pima County is that defendants in criminal cases cannot
12 tolerate the risk of losing a proffered plea offer, without the concomitant guarantee that the plea
13 offer will be reinstated when and if the non-disclosed items are provided to the defense, and thus
14 accept the plea offer without the State supplying the basic required disclosure set out by Rule
15 15.1(b). Such actions guarantee that in some of these cases, counsel is acting in an unethical
16 manner by encouraging the acceptance of plea offers where counsel lacks enough information to
17 give adequately informed advice to the client regarding the efficacy of a proposed plea offer.
18 Arizona's ethical rules provide that a lawyer shall not: "unlawfully obstruct another party's
19 access to evidence ... or other material having evidentiary value." Ariz.Sup.Ct.Rules, Rule 42,
20 Rules of Professional Conduct, ER 3.4(a), Vol. 17A, A.R.S. Given the provisions of Rules
21 15.1(a), (b), 15.6, and 15.8, the prosecutor has an ongoing lawful duty to provide disclosure. In
22 addition, Arizona's ethical rule on the special responsibilities of the prosecutor states that: "the
23 prosecutor in a criminal case shall make timely disclosure to the defense of all evidence or
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1 information known to the prosecutor that tends to negate the guilty of the accused or mitigates
2 the offense." ER 3.8(d).

3 Two proposed, alternative changes are offered here. First, Rule 15.8 can be deleted, and
4 language can be added to Rule 17.4 such that plea offers shall not be conditioned on the defense
5 foregoing the receipt of mandatory disclosure required by Rule 15.1(b). Second, Rule 15.8 can
6 be amended to provide that plea offers shall not be conditioned on the State's noncompliance
7 with Rule 15.1(b), to include language that plea offers shall be reoffered in cases where the State
8 tardily complies with Rule 15.1(b), and to remove language requiring the trial judge to make a
9 materiality finding prior to imposing a sanction on the State for noncompliance.
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12 **Draft of Proposed Amended Rule 15.8:**

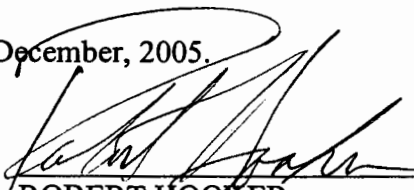
13 If the prosecutor has imposed a plea deadline in a case in which an
14 indictment or information has been filed in Superior Court, he or she shall
15 provide the defense with material disclosure listed in Rule 15.1(b) at least 30 days
16 prior to the plea deadline. If the prosecutor fails to make the disclosure available,
17 the court, upon motion of the defendant, shall order the prosecutor to reoffer the
18 plea offer for at least 14 days after the material is disclosed. In the event that no
19 disclosure can be made, the plea offer shall be reextended.
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22 **Draft of Proposed Amended Rule 17.4:**

23 a. **Plea Negotiations.** The parties may negotiate concerning, and reach an
24 agreement on, any aspect of the case; however, the prosecutor shall not condition
25 acceptance of a plea offer upon its noncompliance with its disclosure obligations under
26 Rule 15.1(b). At the request of either party, or sua sponte the court may, in its sole
27 discretion, participate in settlement discussions by directing counsel having the authority
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1 to settle to participate in a good faith discussion with the court regarding a non-trial or
2 non-jury trial resolution which conform to the interests of justice. Before such
3 discussions take place, the prosecutor shall afford the victim an opportunity to confer
4 with the prosecutor concerning a non-trial or non-jury trial resolution, if they have not
5 already conferred, and shall inform the court and counsel of any statement of position by
6 the victim. If the defendant is to be present at any such settlement discussion, the victim
7 shall also be afforded the opportunity to be present and to state his or her position with
8 respect to a non-trial or non-jury trial settlement. The trial judge shall only participate in
9 settlement discussion with the consent of the parties. In all other cases, the discussion
10 shall be before another judge or a settlement division. If settlement discussions do not
11 result in an agreement, the case shall be returned to the trial judge.
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14 DATED this 14th day of December, 2005.

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17 ROBERT HOOKER
18 Pima County Public Defender
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