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ARIZONA SUPREME COURT

In the matter of:

PETITION TO AMEND RULE)	Supreme Court No. R21-_____
17.4, RULES OF CRIMINAL)	
PROCEDURE)	(Expedited Consideration and
)	Emergency Adoption
)	Requested)
_____)	

Pursuant to Rule 28 of the Rules of the Supreme Court, Petitioner respectfully petitions the Court to adopt a new rule of criminal procedure, as shown in Appendix A, to authorize the presiding superior court judge to approve a deadline for plea negotiations. Petitioner seeks expedited consideration of this petition and emergency adoption of the rule due to the jury trial backlog that has developed during the COVID-19 pandemic.

GROUND FOR APPROVAL OF THE PETITION

The COVID-19 health crisis has posed numerous challenges for the trial courts, particularly in the area of jury trials and summoning of prospective jurors. They have employed various screening strategies to ensure in advance of the day of trial that those who are summoned will meet certain health protocols, and do not have other issues with jury service due to the health crisis. Extra resources and time

are expended for this process. For some counties, the burden is greater, because, even pre-COVID, the Jury Commissioner or a staff person personally calls all prospective jurors.¹

In the case of criminal jury trials in the pre-COVID era, and continuing to the present, it is not unusual for the State and the defendant to reach a plea agreement on the eve or day of trial, or even during the trial itself, rather than coming to the agreement further in advance of trial. The various reasons parties may delay are numerous. A defendant may have reason to believe that he can obtain a better deal by waiting to the eve of trial because the prosecutor, for some reason, does not want to go to trial (such as to not expose a confidential informant). It may also occur because a defendant just will not make the decision to take the plea until the last possible moment. Prosecutors know that having a case ready to present to a jury can incentivize a defendant to take the offer they have extended once the defendant sees the reality of what is about to happen on the day of trial. Sometimes, the parties just want to see the demographics of the individual prospective jurors who appear on the first day of trial before they decide what to do.

¹ The Jury Commissioner of Santa Cruz County calls all prospective jurors to ensure that those who appear have sufficient English language skills, and because many who appear in person on the day of trial try to avoid service claiming they do not have those skills, at which time the Commissioner informs the trial judge that the prospective juror exhibited English language skills during the personal contact.

In Apache, Gila, Graham, Greenlee, La Paz, Santa Cruz, and Yavapai Counties, jurors are summoned on a per trial basis, generally one to three weeks in advance of the trial. In virtually every criminal case, discovery, witness interviews, motions, etc., have all been accomplished and a plea bargain negotiated, before the summoning and screening process begins. The time and resources expended for that process are wasted when the parties delay their plea negotiations until after jurors arrive at the courthouse. The prospective jurors who are called in to court, only to be excused on day one because the parties pled the case that morning, are often upset. Many have arranged childcare or taken time off from work to appear for jury service. They understandably feel that their time and resources were not respected. And they blame “the Court” not appreciating that the judge cannot control the result.

Even more important than the unnecessary use of court resources for this process is the unnecessary risk during the current health crisis resulting to those prospective jurors who, having been screened, are directed to come to court on the first day of trial for final jury selection. Depending upon the nature and duration of the trial, between 40-100 persons can come to court for final jury selection, perhaps all at once, or in stages, depending upon the court’s facilities and practices. While health protocols can be strictly followed for this final selection process, the circumstances are not risk-free. Exposing those persons to risk of COVID infection

for criminal trials that could have been resolved in advance of trial should be avoided if possible.

During the pandemic, in the Superior Court in Santa Cruz County, for example, the jury deliberation rooms are not large enough to permit social distancing. Consequently, a second courtroom is blocked off to be used as the jury deliberation room for the anticipated duration of the trial. When the case pleads on the day of trial, those two courtrooms remain mostly unused on the days for which they had been blocked, because it is impossible to call other parties into court on such short notice. This results in a big waste of courtroom resources.

Due to the pandemic, the court has been allowing prospective jurors to appear through Zoom. This adds another significant layer of work for the jury commissioner, in that he must qualify prospective Zoom jurors to be sure they have adequate equipment (computer with camera and microphone, strong and consistent WIFI, and sufficient technological expertise). On the morning before jury selection, the commissioner has a run through with all prospective Zoom jurors to qualify them. The amount of work involved is greater.

This problem could be avoided if criminal trial courts had the legal authority to set reasonable plea deadlines. In Arizona, however, an individual trial judge does not currently have such authority. State v. Darelli, 205 Ariz. 458, 72 P.3d 1277 (App. Div. 1, 2003) *rev. den.* (Dec. 4, 2003). The Darelli court's holding was that

the trial court judge had no rule-making authority to amend rule 17.4. The impediment, therefore, can be removed by this Court amending the rule. See also Hare v. Superior Court, In & For Pima County, 133 Ariz. 540, 652 P.2d 1387 (1982). As noted in Darelli, there is no constitutional right to a plea bargain. In fact, other state and federal trial courts have established plea deadlines relating to jury service.²

Due to differences in the way jurors are screened and summoned in each county, the proposed amendment to Rule 17.4 would give the presiding superior court judge authority to establish a plea deadline policy for the county that is functionally and rationally related to the timing of juror summoning and screening.

REQUEST FOR EXPEDITED CONSIDERATION AND EMERGENCY ADOPTION

Pursuant to Supreme Court Rule 28(h)(1)&(2), petitioner believes that expedited consideration and emergency adoption of the proposed rule are warranted in this matter because of the case backlog for criminal jury trials that presently exists as the result of the pandemic.

² See, e.g., Local Rule 11.1, U.S. District Court for the District of New Mexico; Rule 552(4), Local Court Rule for Crawford County, PA; Local Court Rule 606, La Crosse County, WI; and Local Rule 4500, Porter County, IN.

This Court, in 1987, approved Santa Cruz County Local Rule 12 that allows the court to set a deadline for plea negotiations. The rule was last amended just prior to the Darelli decision. This Court has also approved other local rules that permit jury fees or other sanctions to be imposed in criminal cases when the case settles prior to trial and after the jury has been brought into court, see, Apache County Rule 22; Mohave County Rule AD-18(C); Pinal County Rule 3.7; and Yavapai County Rule 11(A).

Wherefore, petitioner requests the Court adopt the proposed rule in Appendix

A.

Respectfully submitted this ____ day of May, 2021.

By: /S/_____

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**APPENDIX A
RULES OF CRIMINAL PROCEDURE**

Rule 17.4. Plea Negotiations and Agreements

(a) through (g) [no changes]

(h) Advising Court of a Plea Agreement. The presiding judge of the county may approve a county-wide policy that requires the parties to advise the trial judge of a plea agreement sufficiently in advance of trial to avoid assembling a jury panel unnecessarily, except for good cause shown.