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

|                                   |                                    |
|-----------------------------------|------------------------------------|
| In the Matter of:                 | ) No. R-                           |
|                                   | )                                  |
|                                   | ) <b>PETITION TO AMEND ARIZONA</b> |
| Petition to Amend Arizona Rule of | ) <b>RULE OF CRIMINAL</b>          |
| Criminal Procedure 15.8(a)        | ) <b>PROCEDURE 15.8(a)</b>         |
| _____                             | )                                  |

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) hereby submits the following petition to amend Arizona Rule of Criminal Procedure 15.8.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens’ rights, the criminal justice system, and the role of the defense lawyer.

## **Background**

In 2003, this Court adopted a new Rule 15.8 for the purpose of facilitating plea negotiations based on accurate discovery. The purpose of the Rule was to recognize that defendants who have a state-imposed deadline to decide on a plea offer extended by the prosecutor should also be in possession of the discovery mandated by Rule 15.1(b) when making that decision. *See* Rule 15.8, cmt. to 2003 amend. (repealed 2018).<sup>1</sup> In *Rivera-Longoria v. Slayton*, 228 Ariz. 156 (2011), this Court held that the 2003 version of the Rule applied only in cases where the prosecutor imposed a “plea deadline” and not in cases where the offer was open-ended with no deadline but subsequently withdrawn. This Court suggested that policy concerns are best addressed through the process of amending the Rule, *id.* at 160 ¶ 22. Subsequently, the State Bar of Arizona filed a Rule Change Petition, [R-13-0004](#), this Court appointed an *ad hoc* committee to consider the issue, and this Court then revised the Rule in 2014 and again in 2015. Because the Rule had so recently been scrutinized, the Criminal Rules Task Force made only stylistic changes to Rule 15.8 when overhauling the Arizona Rules of Criminal Procedure in 2016-2017.<sup>2</sup>

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<sup>1</sup> As part of the overhaul of the Arizona Rules of Criminal Procedure, the Criminal Rules Task Force deleted most of the rule comments that “are no longer accurate or have otherwise outlived their usefulness.” [R-17-0002](#) Petition, ep 10.

<sup>2</sup> [R-17-0002](#) Appendix B, ep 27.

Undersigned counsel was a member of both the Rule 15.8 *ad hoc* committee in 2013 and the Criminal Rules Task Force in 2016-2017, and has a strong recollection of the former and copious notes from the latter. The Rule 15.8 committee did not consider the applicability or impact of the rule on limited jurisdiction courts or on “early disposition courts.”<sup>3</sup> Instead, it solely focused on amending the Rule’s “plea deadline” terminology.

### **Proposed Rule**

Petitioner proposes a small deletion of a single phrase from Rule 15.8(a) in order to make the Rule applicable in all criminal cases. Currently, there are two classes of cases that are exempted from the Rule’s reach: 1) misdemeanors prosecuted in limited jurisdiction courts; and 2) felonies brought to superior court on a complaint and managed as an early disposition court. No principled reason exists for such an exemption.

The criminal rules apply almost identically to misdemeanors as to felony cases. The defendant must be arraigned unless the defendant seeks an exception as provided in Rule 14.2(c). The State must provide all of the disclosure listed in Rule 15.1(b) in both felony and misdemeanor cases. Limited jurisdiction courts must comply with Rule 17 to ensure that a guilty plea is knowing, intelligent, and

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<sup>3</sup> Petitioner is aware of four counties that use early resolution courts: Cochise, Maricopa, Pinal, and Yavapai.

voluntary. Although misdemeanor offenses are less serious than felonies, they can still carry significant consequences. *See State v. Nunez-Diaz*, 247 Ariz. 1, 4-5 ¶ 12 (2019) (conviction for drug paraphernalia subjects defendant to mandatory deportation); *Fushek v. State*, 218 Ariz. 285 (2008) (jury trial right for misdemeanor charges that involve an allegation of sexual motivation that, if proven, permits the judge to impose lifetime sex offender registration); *Spence v. Bacal*, 243 Ariz. 504 (App. 2018) (limited jurisdiction court may impose consecutive sentences exceeding six months in jail without violating right to jury trial). In any misdemeanor case where the State plans to request jail time upon a finding of guilt, the defendant is entitled to the appointment of counsel. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); Ariz. R. Crim. P. 6.1(b)(1)(A). Such defendants should be afforded the same protection under Rule 15.8 as those charged with the more serious felony offenses.

Early disposition courts are a peculiar animal. Despite their longtime existence in any of the above-mentioned four counties, there is no local rule authorizing the practice. In early disposition court, a defendant is provided with an initial police report only and a form plea offer. Requests for additional evidence, such as interview recordings, 911 calls, or bodyworn camera footage are refused. The defendant is instructed he/she must decide on the plea offer provided without any evidence beyond the initial summary of the alleged offense and that if the plea offer is rejected, either there will be no further plea offers or any further plea offer

will be harsher. Therefore, a defendant must make a decision regarding waiving all of his/her constitutional rights, including that of a probable cause determination, without the benefit of having any evidence but an officer summary of the investigation. Additionally, attorney's representing the defendant are tasked with advising a defendant as to a plea without sufficient evidence to do so effectively in many cases.

Early disposition courts do not only handle simple cases such as drug possession and do not simply involve offers to probation. Instead, the types of cases routed through the early disposition courts involve serious and complex offenses, including but not limited to: aggravated assaults, fraud schemes, and illegal control of an enterprise. They also involved cases with allegations of prior historical felony convictions, significantly raising both the seriousness of potential sentences and the need to investigate the basis of such allegations. Many offers made in early disposition courts on such cases stipulate to a lengthy prison sentence. It is impossible in these cases for a defendant to evaluate such a plea with a significant sentence based only on an initial police report that amounts to a short summary of the alleged offense. Similarly, it is often impossible for an attorney to effectively advise the defendant of his/her options and any legal issues that may affect the case outcome.

As such, the only option in these cases is often to reject the initial plea offer in order to move the case out of the early disposition courts and obtain sufficient evidence to evaluate the case and any subsequent plea offer. In doing so, however, the defendant is told in a court hearing by both the State and a judge that rejecting the initial plea offer means there will be no other offer or, if one is made, it will be harsher, adding undue pressure on a defendant to make a decision without access to all of the discovery otherwise required to be disclosed by the Arizona Rules of Criminal Procedure.

Despite the stated goal of the early disposition courts “to alleviate the backlog of trials in the Criminal Division and to respond to the community’s desire to offer treatment to drug offenders,”<sup>4</sup> these goals are often not met. First, as discussed above, county attorney offices are routing ever more serious cases through the early disposition courts with drug possession cases making up only a small percentage of cases prosecuted in these courts. For example, a review of data from the Maricopa County Attorney’s Office (MCAO) conducted by the ACLU of Arizona showed that almost a third of all cases routed through the early disposition courts involved no drug-related offenses whatsoever, much less only possession and paraphernalia

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<sup>4</sup> *Department Information: Early Disposition Court*, THE JUDICIAL BRANCH OF ARIZONA,

MARICOPA COUNTY, *available at*:

<https://superiorcourt.maricopa.gov/criminal/departmentsinformation/>

charges. Moreover, between January 2017 and January 2021, only 6.7% of all cases routed through the early disposition courts in Maricopa County resulted in placement in a drug diversion program. Second, because the lack of discovery prevents an appropriate review of the case to effectively evaluate a plea offer, many cases must move out of the early disposition courts completely, further undermining the stated purpose of early disposition courts.

When cases move out of the early disposition courts because of the lack of discovery, some prosecutors will agree that punishing a defendant by either not offering a plea or by offering a harsher plea is not in the interest of justice and will re-issue the same plea after rapid disclosure and review of the evidence the defendant could not obtain in the early disposition courts. In cases where the discovery illuminates an issue that necessitates a better plea than what was initially offered, this simply demonstrates that the concept of withholding discovery when offering a plea in the early disposition courts, while simultaneously threatening defendants with a harsher plea or no plea at all if they move past the early disposition courts to obtain discovery, creates a significant risk of unjust results.

Indeed, such unjust results are even more likely when prosecutors themselves fail to review the available evidence prior to making a take-it-or-leave-it plea offer as occurs in Maricopa County. Recently, MCAO hired retired Judge Roland Steinle to conduct an internal investigation into MCAO's decision to falsely charge

protesters as gang members. In his report, Judge Steinle recommended that MCAO, “set forth a new policy: If Body Wear [sic] Camera evidence is present in a case, no charges will be filed until the charging attorney has had an opportunity to review the BWC videos.”<sup>5</sup> Such a recommendation is only necessary where, in practice, prosecutors refuse to review all available evidence before charging individuals with felony offenses and making plea offers in the early disposition courts.

Importantly, early disposition courts can still function, and function better, with the requirement that discovery necessary to evaluate the plea, as required in Rule 15.8, is disclosed. The State and court system will still avoid the cost and congestion caused by a probable cause determination in every case. The resolution time of criminal cases can still be shortened. However, defendants would be able to properly evaluate their case prior to waiving all of their constitutional rights. An attorney will be able to properly advise his/her client about the plea offer. The risk of unjust resolutions due to pressure to accept a plea offer while not fully informed of available discovery will no longer exist.

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<sup>5</sup> REVIEW OF MARICOPA COUNTY ATTORNEY’S OFFICE’S POLICY, PROCEDURES, & ACTIONS INVOLVING THE PROTEST ARREST ON OCTOBER 17, 2020 69, Submitted by Roland J. Steinle (Aug. 6, 2021), *available at*: <https://www.maricopacountyattorney.org/DocumentCenter/View/2057/Final-MCAOReport-8621>.



## **Conclusion**

For these reasons, AACJ requests this Court grant the petition to amend Rule 15.8(a).

DATED (electronically filed): January 11, 2022.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By: /s/ Jared G. Keenan  
Jared G. Keenan

Rule 15.8 - Disclosure Before a Plea Agreement Expires or is Withdrawn;  
Sanctions

**(a)Disclosure Obligation.** If the State ~~has filed an indictment or information in Superior Court and~~ extends a plea offer to a defendant, the State must disclose to the defendant when it makes the offer the items listed in Rule 15.1(b) to the extent that it possesses the required information and has not previously made such a disclosure.

**(b)Violation.** If the State makes the disclosure less than 30 days before the offer expires or is withdrawn, a court may sanction the State under (d) unless the State shows that the prosecutor reasonably believed, based on newly discovered information, that an offer should be withdrawn because it was contrary to the interests of justice.

**(c)Effect on Other Required Disclosures.** This rule does not affect any disclosure obligation otherwise imposed by law. While a plea offer is pending, the prosecutor must continue to comply with Rule 15.6, but additional disclosures under that rule do not extend the 30-day period specified in (b). Disclosure of evidence after the offer expires or is withdrawn, including the results of any scientific testing, does not violate this rule if the evidence did not exist, or the State was not aware of it, when the State extended the offer.

**(d)Sanctions.** On a defendant's motion alleging a violation of this rule, the court must consider the impact of any violation of (a) on the defendant's decision to accept or reject a plea offer. If the court finds that the State's failure to provide a required disclosure materially affected the defendant's decision and if the State declines to reinstate the lapsed or withdrawn plea offer, the court--as a presumptive minimum sanction--must preclude the admission at trial of any evidence not disclosed as required by (a).

*Ariz. R. Crim. P. 15.8*