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IN THE SUPREME COURT OF THE STATE OF ARIZONA

AMENDED PETITION TO AMEND RULE 17.4, ARIZONA RULES OF CRIMINAL PROCEDURE	NO. R-18-0038

Comes now the Petitioner and hereby moves to amend the Petition to Amend Rule 17.4, Arizona Rules of Criminal Procedure based on discussions with the Maricopa County Superior Court. The Court made a number of suggestions which simplifies and clarifies the language without altering the intent of the proposed rule change. The body of the Petition remains the same, only the language of the proposed Rule is altered. The amendment is sought to facilitate settlement discussions and settlement conferences in capital cases.

1. Interest of Petitioner

The Maricopa County Office of the Legal Defender represents, among others, clients the State is seeking to have executed. At any given time, the Office represents between 12 and 15 individuals potentially subject to the death penalty.

The number of capital cases[1] pale in comparison to the number of other cases handled by the Office of the Legal Defender. In FY18, capital cases handled by the Office of the Legal Defender comprised 0.24 % of its annual felony case filing demand[2], but comprised 48.04% of the annual felony spending. The comparable share for the entirety of indigent defense in Maricopa County for FY18 is 0.16% of felony filing demand, and 32.88% of felony expenses.[3]

2. The Purpose of the Proposed Amendment

Prosecutors in Maricopa County[4] no longer engage in settlement negotiations in death penalty cases. Concerned that plea offers will be used against

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[1] Capital cases, as used here, include: 1) those in which the State has filed a Notice of Intent to Seek the Death Penalty, 2) those in which an Extension of Time to File Notice of Intent to Seek the Death Penalty has been filed, and 3) those cases in which the time to file a Notice of Intent to Seek the Death Penalty has not expired and in which informed information indicates that the case is likely to be considered a capital case by the State.

[2] Case filing demand represents the count of all cases of the indicated type that were assigned during the time period, minus cases of that type that were closed during the time period for the following reasons: no complaint filed, withdrawal due to workload or conflict, transfer to another indigent defense office, or private counsel retained.

[3] In FY18, the Legal Defender's total felony filing demand was 3,277 which includes 8 capital cases. In FY18, Maricopa County Indigent Defense felony filing demand was 27,003 which includes 44 capital cases.

[4] Maricopa County leads the State in seeking the death penalty, prosecuting over 80% of the capital cases in Arizona. As of August, 2017, there were fifty-seven (57) cases actively being pursued in Maricopa County. At the same time, there were twelve (12) in the rest of the State. *See* Interim Report of the Capital Case

them, a risk arising from a Ninth Circuit opinion, plea bargaining in Maricopa County capital cases has become extraordinarily difficult and unnecessarily expensive. A rule change will help ease the situation by removing the jeopardy that occurs when negotiations fail. No party should be penalized for good-faith efforts to resolve death penalty cases, and this Court, by adding language to Rule 17.4, can address the prosecution's apprehension and improve the climate in which litigators negotiate capital cases.

Accordingly, the proposed amendment is designed to facilitate settlement discussions and settlement conferences. The prosecution will not engage in any substantive dialog aimed at resolving a case based upon *Scott v. Shriro*, 567 F.3d 573 (9th Cir., 2009), where the Court found defense counsel ineffective for, *inter alia*, failing to introduce evidence of the State's plea offer at the penalty phase of the trial. It believes, based on that case, that anything they may say in connection with settlement discussions could then be used against them during the penalty phase of a capital trial.

Petitioner suggested a local rule in case this was only a Maricopa County issue, but the State and court seemed unwilling to advance a local rule change.

Oversight Committee, Dec. 14, 2017, p. 5, available at https://www.azcourts.gov/Portals/84/MeetingMaterials/2017/Dec/TAB_7_AJC_CapitalCaseOversight.pdf.

Hence, we are asking this Court to amend the Arizona Rules of Criminal Procedure in an effort to resolve more capital cases and resolve them sooner rather than later.

Capital cases can take three to five years, or more, to resolve in the Superior Court. Many cases settle without trial after years of pre-trial preparation. Prior to the case resolving, defense counsel expends vast resources to properly represent the accused and prepare for a trial, not knowing whether the case will resolve or even has a chance of resolving. As of the end of FY18, capital cases in Maricopa County, with complete expense data available, averaged 4.2 years to resolve by trial and they cost an average of $669,391 in defense expenses. By comparison, noticed capital cases resolved by plea averaged 3.35 years and cost an average of $288,463 in defense expenses.

In Maricopa County, plea offers are always entertained by the prosecution, but the office will not make an offer, presumably based upon *Scott v. Schriro, supra*. Generally defense counsel makes a plea offer and a one word response is received – yes or no. There is no counter-offer. There is no continued discussion. There is, generally, no give and take. The State usually will not provide any insight into their view of the case, whether a non-death disposition could be likely, and if so, what kind of resolution might be acceptable and/or what additional

information they would like to consider before making a decision. This is, quite frankly, unworkable.[5]

To exemplify the magnitude of the problem, in one case, the prosecutor stated that if the defendant wanted to make an offer, the State would consider it. It was later learned, after all offers were rejected, that the State was never willing to settle that particular case. Resources were expended working on a plea proposal along with the justification for a plea which could have been better spent preparing the case for trial. In another case, the defense offered to stipulate to a natural life sentence in exchange for withdrawing the Notice of Intent to Seek the Death Penalty. After rejecting the offer, the State expressed a willingness to consider another offer. This system of non-negotiation is untenable.

3. The Proposed Amendment

The proposed amendment seeks to facilitate settlement discussions as well as settlement conferences. The proposal would vest the Superior Court with discretion to issue its Order providing the protections the State needs from *Scott*, *supra*., by specifically providing that no statements made in connection with settlement discussions and settlement conferences are admissible at any phase of

[5] To be sure, there are cases that resolve, but there is no real communication between the parties. From time to time there are 'hints' but no real dialog. Often times, defense counsel is left to guess whether the prosecutor is serious about resolving the case or not and what kind of offer the prosecutor is looking for.

the trial. Further the Order makes clear that any information disclosed during the discussions or conference are confidential.

4. Conclusion

This proposal should lead to more cases being resolved and sooner. Business is better conducted when parties communicate.[6] That is generally not happening in the context of capital cases in Maricopa County. There may be ways to resolve a case but because the parties do not communicate, one side or the other is unaware that the case could be resolved. The proposed amendment should facilitate that communication.

Dated this 4th day of January, 2019.

MARTY LIEBERMAN
Office of the Legal Defender

By /s/
Marty Lieberman
Legal Defender

Original of the foregoing
efiled this 4th day of
January, 2019.

By /s/

[6] Indeed, settling disputes as painlessly as possible requires good communication. *See, e.g.*, Allison, Five Ways to Keep Disputes Out of Court, Harvard Business Review, Jan/Feb, 1990 (available at https://hbr.org/1990/01/five-ways-to-keep-disputes-out-of-court).

PROPOSED AMENDMENT TO RULE 17.4, ARIZONA RULES OF CRIMINAL PROCEDURE

Add: Rule 17.4(a)(4):

(4) Settlement Discussions in Capital Cases

a. *Settlement Discussions*. In cases where the State is seeking the imposition of the death penalty, on motion of any party or by stipulation, and where defense counsel avers that the decision to engage in settlement discussions is a strategic decision, the Court may impose an order that broadens the protections afforded by Rule 410, Ariz. R. Evid. by prohibiting the admission of statements made during settlement discussions against the defendant and the State. The order shall provide for the following:

   1. No statements made by the State, the defendant, defense counsel, any judicial officer, or anyone else who properly participates in connection with the settlement discussions is admissible in any phase of the trial;

   2. The provisions of Rule 410, Arizona Rules of Evidence, shall apply equally to statements made by the defendant, the defendant's attorney(s), the State, any judicial officer and anyone else who properly participates in the settlement discussions.

   3. Absent agreement of the parties, any information disclosed as part of the settlement discussions shall not be disclosed to any other person or entity, or used for further investigation.

   4. Any plea proposal extended by the State shall be considered to be part of settlement discussions.

b. Upon issuance of the Order, the Court may order the parties to participate in settlement discussions pursuant to the provisions of Rule 17.4(a).