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IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO AMEND RULE 27.6,) No. R-22-
ARIZONA RULES OF)
CRIMINAL PROCEDURE)
_____)

Pursuant to Rule 28 of the Rules of the Supreme Court, Petitioner requests the Court to amend Rule 27.6 of the Arizona Rules of Criminal Procedure. The proposed amendments to Rule 27.6 are contained in an appendix to this petition.

The general subject matter of Criminal Rule 27 is probation and probation revocation. Rule 27.6 concerns a petition for probation revocation. Rule 27.6 also provides ways to obtain the alleged probationer violator's presence in court to respond to the revocation petition. There are two methods for obtaining the probationer's presence in court for a revocation proceeding: summoning the probationer or issuing a warrant for the probationer's arrest. Another rule, Rule 27.7, addresses the initial appearance of a probationer who is arrested on a warrant that is

issued pursuant to Rule 27.6. These two rules, and particularly Rule 27.7, were at the core of this Court’s opinion in [*Wilson v. Higgins*](#), CR-20-0254-PR, July 23, 2021.

(1) *Wilson v. Higgins*. Rule 27.7(c) directs the trial court to “make a release determination” after a probationer has been arrested on a probation revocation warrant. Another Criminal Rule, Rule 7.2(c), addresses a defendant’s right to release after a conviction but before sentencing. *Wilson v. Higgins* considered whether Rule 7.2(c) applies to the release determination required by Rule 27.7(c).

This issue in *Wilson* was largely precipitated by an amendment to Rule 27.7(c) that was proposed by the Court’s Criminal Rules Task Force in rule petition number R-17-0002. R-17-0002 was a global restyling of the Criminal Rules. R-17-0002’s proposed amendments, including the subject amendment to Rule 27.7, were subsequently adopted and became effective on January 1, 2018.

Before the amendment to Rule 27.7, Rule 27.7(c) expressly directed the court to “make a release determination under Rule 7.2(c).” The Task Force amendment to Rule 27.7 removed the cross-reference to Rule 7.2(c).

Rule 7.2(c) contains provisions concerning a defendant’s release after conviction. Under Rule 7.2(c), subpart (1)(A) (“superior court; before sentencing”), the court may not release a defendant who is “convicted of an offense for which the defendant will, in all reasonable probability, receive a sentence of imprisonment.”

Rule 7.2(c) does not otherwise specify how the court should make a release determination for a probationer arrested on a probation violation warrant.

The defendant in *Wilson v Higgins* contended, among other things, that by deleting the cross-reference to Rule 7.2(c) in Rule 27.7(c), the Task Force and this Court intended that Rule 7.2(c) could no longer be used as the basis for a release determination. Rather, the defendant argued that his release determination should be made under Rule 7.2(a), which governs the defendant's release before conviction. Rule 7.2(a) has a considerably more lenient standard than Rule 7.2(c). For example, Rule 7.2(a) presumes that the defendant is innocent, and if the defendant is charged with a bailable offense, the rule requires that the court release the defendant, either on the defendant's own recognizance or on the least onerous conditions of release provided in Rule 7.3(c).

A five-member majority of the Court in *Wilson v. Higgins* rejected the defendant's contention and concluded that Rule 7.2(c) continued to apply to this defendant's circumstance. The majority found that restyled Rule 27.7(c), like the previous provision, continued to direct trial courts to "make a release determination." It further found that in the absence of specific release guidance in Rule 27.7(c), the court should look to Rule 7.2, which addresses the right to release, to make the required determination. The opinion specifically said,

Given that each rule addresses the subject of release, and that the purpose of each rule is to determine release, Rules 27.7(c) and 7.2(c) can and should be read together. (Opinion, ¶ 11.)

The Court also found that “the amendment for Rule 27.7(c) has never been characterized as anything other than a stylistic change,” that is, neither the Task Force nor the Court intended to make a substantive change to Rule 27.7. The Court said:

Because Rules 7.2 and 27.7(c) can and should be read together and the deletion of the cross-reference to Rule 7.2(c) was only a stylistic change, we decline to give the amendment to Rule 27.7(c) any substantive meaning that would render Rule 7.2(c) inapplicable. (Opinion, ¶ 13.)

Two justices dissented. They concluded that “Rule 7.2(c)(1)(A) does not direct the release decision required by Rule 27.7 when a probationer is arrested on a petition to revoke probation.” (Opinion, ¶ 32.)

For purposes of this rule petition, this sentence in the dissent is notable:

None of the other criminal rules of procedure governing release apparently apply to the Rule 27.7 release decision, and this Court would best serve trial courts and litigants by promulgating a new rule. (Opinion, ¶ 32.)

Footnote 4 of the majority opinion also said,

We nonetheless agree with our dissenting colleagues’ observation that a rule change to specifically address release decisions in Rule 27, Probation and Probation Revocation, would best serve future parties and trial courts. *Infra* ¶ 32.

This rule petition is a result of those observations.

(2) Proposed Amendments to Rule 27.6. As noted above, before the 2018 Criminal Rules restyling, Rule 27.7 cross-referenced Rule 7.2(c). The most direct way of addressing the issue raised in *Wilson v. Higgins* would be to again add to Rule 27.7 the omitted reference to Rule 7.2(c). Petitioner, however, does not believe that this would be an adequate solution, and therefore proposes amendments to Rule 27.6.

(A) The proposed amendments would apply to summonsed as well as arrested probationers. *Wilson v. Higgins* involved a probationer who was arrested on a probation violation warrant, and an amendment to Rule 27.7(c) would apply only to arrested probationers. Under Rule 27.6, however, a probationer also can be summonsed into court on a petition to revoke probation. These different methods of securing the probationer's presence on a petition to revoke can have an anomalous consequence. As noted in the *Wilson* dissent:

...under the majority's view, we are left with the peculiar circumstance that probationers who are directed to appear at a revocation hearing but who are not arrested will remain released, even if a reasonable probability exists that a prison sentence will be imposed, while arrested probationers in the same circumstance will be detained. (Dissent, ¶ 31.)

To help ensure parity in the treatment of summonsed and arrested probationers, this petition proposes adding a new section (b) to Rule 27.6. This new section begins:

(b) Release Determination. When the probationer appears in court under Rule 27.7 or Rule 27.8, the court must make a release determination as follows:

The proposed introductory clause of Rule 27.6 applies to any probationer who appears on a petition to revoke probation, regardless of whether the probationer appears before the court by virtue of a summons or an arrest warrant. The proposed amendment to Rule 27.6 would require the court to make a release determination in both circumstances.¹

(B) The proposed amendments would also apply to limited jurisdiction courts. Petitioner's initial draft of the proposed amendment applied only to superior court proceedings. Subsequent vetting indicated that although some limited jurisdiction courts do not utilize probation, others do, and there is therefore a need for a provision applicable to limited jurisdiction courts. Petitioner proposes that new section (b) have two subparts, one for the superior court and the other for limited jurisdiction courts.

Superior Court. Subpart (b)(1), the provision that would apply to the superior court, would require the court to make a release determination under Rule 7.2(c)(1)(A). The proposed reference to Rule 7.2(c)(1)(A) is more specific than the former reference to Rule 7.2(c). The proposed reference directs the reader to

¹ Alternative amendments that would add references to Rule 7 in both Rules 27.7 and 27.8 could obtain a similar result. However, Petitioner believes that adding the cross-reference solely to Rule 27.6 is simpler and equally instructive.

subparts (c)(1) (“superior court”) and (c)(1)(A) (“before sentencing.”)² This is the subpart that applied to the probationer in *Wilson v. Higgins*; see ¶ 16 of the opinion: “Thus, we hold that Rule 7.2(c)(1)(A) directly applies to Wilson.” Notwithstanding the authorities cited in the *Wilson v. Higgins* dissent, the proposed amendment contemplates that a probationer has not been sentenced, but rather, that the imposition of sentence had been suspended upon entry of the judgment of conviction. (See further Criminal Rule 26.10(b)(3), which requires the court to “explain to the defendant the terms of the sentence or probation.” The disjunctive phrase “sentence or probation” suggests that probation is not the equivalent of a sentence.)³

² Rule 7.2(c)(1)(B) governs release “after a sentence involving imprisonment,” and accordingly, subpart (c)(1)(B) is not applicable to probationers such as Mr. Wilson, who had not been sentenced. Rule 7.2(c)(1)(C) (“protecting safety”) is pertinent because it applies to a release under subparts (c)(1)(A) and (c)(1)(B), but Petitioner does not believe it is necessary to include a reference in Rule 27.6(b) to Rule 7.2(c)(1)(C), or, for that matter, to Rule 7.2(c), subparts (1)(D) or (1)(E).

³ A.R.S. §§ 13-603(B) and 13-901(A) also provide that a term of probation suspends the imposition of sentence. § 13-603(b) provides in part, “If a person is convicted of an offense, the court, if authorized by chapter 9 of this title, may suspend the imposition or execution of sentence and grant such person a period of probation except as otherwise provided by law.” § 13-901(A) further provides, “If a person who has been convicted of an offense is eligible for probation, the court may suspend the imposition or execution of sentence and, if so, shall without delay place the person on intensive probation supervision pursuant to section 13-913 or supervised or unsupervised probation on such terms and conditions as the law requires and the court deems appropriate ...”

Limited Jurisdiction Courts. Unlike Rule 7.2(c)(1), which specifically applies to a convicted defendant before sentencing in the superior court, Rule 7.2(c)(2), which applies to limited jurisdiction courts, only addresses the defendant's release pending an appeal of a misdemeanor conviction. Rule 7.2(c)(2) does not otherwise provide for release of a misdemeanant after conviction but before sentencing. Accordingly, Rule 7.2(c)(2) appears to have no application to the release issue raised in *Wilson v. Higgins*.

Petitioner therefore proposes that Rule 27.6 include the following text, which would provide direction to limited jurisdiction courts when making a release determination concerning a misdemeanor probationer who appears on a petition to revoke probation:

... by ordering release conditions under Rule 7.3(a) and (c) that will reasonably assure the probationer's appearance and protect the victim, any other person, or the community. If the court determines that the probationer in all reasonable probability will receive a sentence of incarceration, or if additional conditions under Rule 7.3(c) will not assure the probationer's appearance or protect the victim, another person, or the community, the court may order that the probationer be held in custody.

The amendment therefore allows the magistrate to release these probationers under Rule 7.3(a) ("mandatory conditions") or Rule 7.3(c) ("additional conditions"), that is, on conditions that will reasonably secure the probationer's appearance and protect a person or the community from risk of harm. Conversely, a limited jurisdiction court may hold the probationer in custody if release conditions would not reasonably

assure the probationer's appearance or protect that person or the community. The proposed amendment also contains a provision that corresponds to Rule 7.2(c)(1)(A), which is applicable in the superior court, allowing a limited jurisdiction court to deny the probationer's release if it is reasonably probable that the probationer will receive a sentence of incarceration.

(C) *Formatting.* To stylistically accommodate the addition of new Rule 27.6(b), the content of current Rule 27.6 would be redesignated as Rule 27.6(a) and have the section title "generally." For emphasis, the words "release determination" would be added to the title of Rule 27.6. These changes are shown in the appendix.

(3) Pre-filing Vetting. An earlier draft of the amendments proposed by this petition, which applied only to superior court proceedings, were reviewed by the presiding criminal judges in Maricopa and Pima Counties. Both judges supported the amendments. Petitioner has not yet vetted the proposed amendments with limited jurisdiction courts but intends to do so during the comment period.

(4) Conclusion. Petitioner requests the Court to adopt the proposed amendments to Rule 27.6. Because *Wilson v. Higgins* has addressed the issue at hand and provides interim direction to stakeholders, Petitioner sees no need to ask for expedited consideration or emergency adoption of the proposed amendments. Petitioner requests the Court to adopt these amendments in the regular course of the 2022 rules cycle.

RESPECTFULLY SUBMITTED this 4th day of January 2022.

/s/
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Appendix

Additions are shown with underline.

Rule 27.6. Petition to Revoke Probation and Securing the Probationer's Presence; Release Determination

(a) Generally. The probation officer or the State may petition the court to revoke probation if there is reasonable cause to believe that a probationer has violated a written condition or regulation of probation. After a petition to revoke is filed, the court may issue a summons directing the probationer to appear on a specified date for a revocation hearing, or it may issue a warrant for the probationer's arrest.

(b) Release Determination. When the probationer appears in court under Rule 27.7 or Rule 27.8, the court must make a release determination as follows:

(1) in the superior court, under Rule 7.2(c)(1)(A).

(2) in a limited jurisdiction court, by ordering release conditions under Rule 7.3(a) and (c) that will reasonably assure the probationer's appearance and protect the victim, any other person, or the community. If the court determines that the probationer in all reasonable probability will receive a sentence of incarceration, or if additional conditions under Rule 7.3(c) will not assure the probationer's appearance or protect the victim, another person, or the community, the court may order that the probationer be held in custody.