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IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO AMEND RULES 23)	Supreme Court No. R-08-0019
AND 28, RULES OF PROCEDURE)	Petitioner's Reply
FOR THE JUVENILE COURT; AND)	
TO AMEND RULES 7.3 AND 7.5,)	
ARIZONA RULES OF CRIMINAL)	
PROCEDURE)	
_____)	

Pursuant to Arizona Supreme Court Rule 28(D)(2), David K. Byers, Director, Administrative Office of the Courts, respectfully submits this reply to comments that were filed regarding Petition No. R-08-0019.

I. Introduction. These issues have been raised in the comments:

(A) Should these rules set out a process to assure that the summoned juvenile offender or adult defendant complied with the court's order to submit to DNA testing?

(B) What is the remedy when an in-custody defendant refuses to submit to DNA testing?

II. Discussion.

(A) A process to monitor compliance with the court's order. Compliance with the court's order to submit to DNA testing was an issue that was contemplated prior to the filing of the original rule petition in August, 2008. The solution adopted in the initial rule petition was that the court would advise the juvenile offender or adult defendant (both of who are referred to hereafter as "the defendant") when they were summoned to court of the existence of the DNA order and the consequence of failing to comply with the order. The court would then provide a copy of its order to the defendant, as well as to the arresting law enforcement agency and to the prosecutor. The intent of these provisions was that the arresting agency and the prosecutor would develop a process locally for ascertaining whether a defendant failed to comply with the order, and they would notify the court of any non-compliance.

An amended petition was thereafter filed that eliminated the court's responsibility to provide a copy of its order to the prosecutor and to the law enforcement agency. The belief was that the prosecutor who filed the charge 1) would know whether a DNA sample was required for the charged offense; and 2) would have requested that a summons should be issued for the defendant's appearance in court. Since the prosecutor would be fully "in the loop", the

presumption was that the prosecutor would be in the best position to monitor compliance.

In its comment, the Maricopa County Attorney asserts that the rule should instead “...simply require [the defendant to provide] proof of compliance at the next scheduled court hearing.” (Comment at page 2, line 25.) He notes that a similar type of enforcement would be utilized if pending legislation requiring ten-print fingerprints becomes law. See House Bill 2449.

Under House Bill 2449, when ten-print fingerprints are taken, the arresting agency must provide the person with a document indicating proof of fingerprinting and inform the person that this document must be presented to the court. The defendant would verify his or her compliance by presenting the document to the court. Senate Bill 1332, which enacted the DNA requirement that is the subject of the present rules, did not have a corresponding provision for establishing compliance.

An explicit mechanism to establish compliance with the DNA testing requirement would be salutary. Petitioner suggests an alternative that would involve the form of the summons provided by the County Attorney to the Clerk for issuance and for service on the defendant. The proposed summons would direct the defendant to proceed to the appropriate law enforcement agency for the DNA test prior to the advisory hearing or an initial court appearance. After the

defendant provided a DNA sample to the agency, the agency would then place an inked stamp on the summons to confirm that the defendant had submitted a sample. The defendant would promptly provide the stamped summons to the court at the advisory or initial appearance, to which the defendant had been originally summoned, as proof of compliance with the mandate of the summons.

This process deviates slightly from the statutory scheme. This alternative process would require the defendant to provide a DNA sample before the court appearance, rather than within five days thereafter. However, the proposed DNA process is similar to the one that is currently utilized to obtain fingerprints from a defendant who is summoned to court. The summons currently in use contains language directing the defendant to report to the sheriff's office prior to the initial court appearance for fingerprinting. (See Ariz. R. Crim. P., Rule 41, Form 3(a).) Under an existing procedure, a sheriff's deputy places an inked stamp on the summons to confirm for the court that fingerprints were taken. A parallel process could be used for obtaining a DNA sample from summoned juvenile offenders and adult defendants. The process would effectively and easily provide the court with proof of compliance. The responsibility of monitoring compliance with the court's order would be eliminated because the sample would be obtained prior to, rather than after, the initial court appearance. An amended Form 3(a), which includes the requirement of a DNA sample, is attached to this reply.

(B) Refusal of an in-custody defendant to provide a DNA sample. The Maricopa County Attorney has recommended that Rule 23(E) of the Rules of Procedure for the Juvenile Court and Rule 7.3 of the Rules of Criminal Procedure be extended to in-custody defendants who refuse to provide DNA samples.

Senate Bill 1332, which was discussed in the original rule petition, dealt with obtaining DNA samples from defendants who were summoned to court. The extension of Juvenile Rule 23(E) and Criminal Rule 7.3 to in-custody defendants that has been proposed by the County Attorney goes beyond the scope of SB 1332 and the rules which are the subject of this petition.

Petitioner suggests that proposed new Rule 2.6 of the Arizona Rules of Criminal Procedure, dealing with an arrested person's refusal to be fingerprinted, would be a more appropriate model for the court order sought by the County Attorney. See Supreme Court No. R-08-0026. Petitioner recommends adoption of a new Rule 2.7 to establish a similar process relating to the DNA sample as follows:

[proposed in R-08-0026] Rule 2.6. Refusal to be Fingerprinted. Upon petition of an arresting authority or custodial agency, submitted under penalty of perjury, stating that a person was arrested for an offense listed in A.R.S. section 41-1750(C) and that the arrested person refused to provide fingerprints in a legible form, the court shall order that the person appear at a designated time and place for fingerprinting. The arresting authority or custodial agency shall provide to the person a copy of the court order prior to or at the time of fingerprinting. [No change.]

Rule 2.7. Refusal to provide DNA sample. Upon petition of an arresting authority or custodial agency, submitted under penalty of perjury, stating that a person was arrested for an offense listed in A.R.S. 13-610(O)(3), and that the arrested person refused to provide a buccal cell sample, the court shall order that the person appear at a designated time and place and permit the taking of samples of buccal cells or other bodily substances for DNA testing. The arresting authority or custodial agency shall provide to the person a copy of the court order prior to or at the time of taking samples. [New.]

There is no correlative Juvenile Court rule for a fingerprinting order. However, should a recalcitrant juvenile offender refuse to provide a DNA sample, a similar requirement for obtaining a court order could be included within the text of Rule 23(B), (D), or (E) of the Juvenile Rules.

IV. Conclusion. The rules which are the subject of this petition should be permanently adopted, with the addition of Rule 41, Form 3(a).

RESPECTFULLY SUBMITTED this 25th day of June, 2009.

By _____
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Electronic copy filed with the
Clerk of the Supreme Court
this 25th day of June, 2009.

Rule 41. Forms

Form 3(a). Summons: Fingerprint and/or DNA Sample Required

_____ COURT _____ County, Arizona

STATE OF ARIZONA Plaintiff [CASE/COMPLAINT NO.] SUMMONS
-vs-

_____ (Fingerprint and/or DNA Sample Required)
Defendant (FIRST, MI, LAST)

TO: _____

YOU ARE ORDERED to appear at [name of entity and address] _____
(Required for all felonies) _____ between the hours of _____ a.m./ p.m. at an
y time prior to your court appearance date to be photographed and fingerprinted.

YOU ARE ORDERED to appear at [name of entity and address] _____
(required pursuant to A.R.S. §13-610(O)(3)) between the hours of _____ a.m./p.m. at any time prior
to your court appearance date to provide a sample of buccal cells or other bodily substances for DNA
testing.

YOU ARE SUMMONED to appear before this court for the following reason:

[(List reason for summons; e.g., filing of indictment, information or complaint
(list charges or other reasons)].

YOU ARE ORDERED TO REPORT on _____, 20__ at ___ a.m./p.m.

LOCATED AT: _____

**IMPORTANT. YOU ARE REQUIRED TO BRING THIS SUMMONS TO THE LAW
ENFORCEMENT ENTITY AT THE TIME YOU APPEAR FOR FINGERPRINTS AND/OR A DNA
SAMPLE. YOU MUST ALSO BRING THIS SUMMONS TO YOUR COURT APPEARANCE TO
PROVE THAT YOU HAVE PROVIDED FINGERPRINTS AND/OR A DNA SAMPLE, AS
ORDERED ABOVE.**

IF YOU FAIL TO APPEAR AS ORDERED, A WARRANT MAY BE ISSUED FOR YOUR ARREST.

Date: _____
_____ Judicial Officer

Requests for reasonable accommodation for persons with disabilities must be made to the court by parties least 3 working days in advance of a scheduled court proceeding.

CERTIFICATE OF PERSONAL SERVICE

I swear that I personally served this summons as follows:

Date Received: _____ Date Served: _____ Time Served: _____
Person Served: _____
Location Where Served: _____
_____ County.

Officer Serving Summons

CERTIFICATE OF SERVICE BY MAILING

I certify that a copy of this document was sent by Registered or Certified mail, return receipt requested, to the defendant at the above-listed address.

Dated: _____
_____ CLERK

SPACE FOR THE LAW ENFORCEMENT AGENCY'S INKED STAMP(S) TO CONFIRM THAT THE DEFENDANT PROVIDED FINGERPRINTS AND/OR A DNA SAMPLE.

STAMP BEARING THE NAME OF THE LAW ENFORCEMENT AGENCY
By: _____ [Badge Number]
Date: _____
Time: _____
<input type="checkbox"/> Fingerprints taken
<input type="checkbox"/> DNA sample obtained