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In the Matter of:

PETITION TO AMEND RULE 27.6 OF
THE ARIZONA RULES OF CRIMINAL
PROCEDURE

Supreme Court No. R-22-0003

Joint Comment by the Directors of the Maricopa
County Indigent Defense Agencies

The Maricopa County Indigent Defense Offices recognize that a rule change to conform Rule 27 of the Arizona Rules of Criminal Procedure to this Court's holding in *Wilson v. Higgins*, 251 Ariz. 282 (2021), is warranted. However, the proposed amendment in the petition may cause greater confusion and misapplication of this Rule, as it does not account for the procedural and legal differences between a sentencing hearing pursuant to

Rule 26 and a probation disposition hearing under Rule 27.8(c). To accommodate these distinctions, the amended rule should provide language that is consistent with Rule 27 (and with the holding in *Higgins*) rather than referring directly to Rule 7.2(c)(1)(a). It should also remain specific to the findings necessary to hold a person non-bondable when facing a petition to revoke probation. Additionally, the petition requests that Rule 27.6 be amended, but the *Higgins* decision applies to Rule 27.7, not 27.6.

To conform the Rules of Criminal Procedure to the holding in *Higgins*, the proposed rule change should be to Rule 27.7, not Rule 27.6

Wilson v. Higgins, 251 Ariz. 282 (2021), clarifies the appropriate procedure for determining release conditions when a probationer is arrested on a probation violation warrant pursuant to Rule 27.7.¹ Therefore, any clarification of the procedure to be used by the court in making these release determinations should be added to Rule 27.7(c), not Rule 27.6.

The postural differences between an original sentencing hearing and a sentencing following a determination that probation has been violated must be recognized in the procedural rules regarding release conditions.

This Court held that Rule 7.2(c)(1)(A) should apply in making the release determinations provided for in Rule 27.7(c) because Rule 7.2(c) addresses setting release conditions for defendants who are post-conviction but pre-sentence.² This Court

¹ See *Higgins* at 287 (“For the reasons stated above, Rule 7.2(c)(1)(A) applies to determining release conditions for a probationer pending a revocation proceeding under Rule 27.7(c).”)

² See Ariz. R. Crim. P. 7.2 (c) (1) (A), “before Sentencing. After a defendant is convicted of an offense for which the defendant will, in all reasonable probability, receive a sentence of imprisonment, the court may not release

recognized that probationers fall within this procedural posture because they have been convicted by either guilty plea or trial verdict and their sentence has been suspended.

Yet, as this Court noted in *Higgins*, even when release conditions are controlled by 7.2(c)(1)(A), “[t]he court still must consider whether in all reasonable probability it will impose a sentence of imprisonment if it finds a violation of probation.” This is an important distinction because, when Rule 7.2(c)(1)(A) is applied to defendants who are convicted and facing an “original” sentencing, it is readily apparent to the judicial officer whether the defendant is subject to a mandatory prison sentence, either because it is stipulated to in a plea agreement or is the only sentencing option legally available for the judge after a jury’s finding of guilt. In most cases, no intermediate hearings or judicial findings must occur when determining whether Rule 7.2(c)(1)(A) applies to defendants facing an original sentencing.

Probationers facing a petition to revoke probation, however, will not face a mandatory prison sentence in the probation violation matter unless also convicted of another felony offense in a separate proceeding—a proceeding which may occur months or years after the defendant is IA’d on a petition to revoke probation.³ Therefore, the

the defendant on bail or on the defendant's own recognizance unless: (i) the court finds that reasonable grounds exist to believe that the conviction may be set aside on a motion for new trial, judgment of acquittal, or other post-trial motion; or (ii) the parties stipulate otherwise and the court approves the stipulation.”

³ See A.R.S. 13-708(E), Offenses committed while released from confinement. (E)A sentence imposed pursuant to subsection A, B or C of this section shall revoke the convicted person's release if the person was on release and shall be consecutive to any other sentence from which the convicted person had been temporarily released or had escaped, unless the sentence from which the convicted person had been paroled or placed on probation was imposed by a jurisdiction other than this state.

likelihood of a prison sentence on a probation violation matter is far less discernable at the time of an IA on a petition to revoke probation.

Relatedly, in situations wherein a defendant is arrested on a new felony charge, and the allegation of committing that new offense is the basis for the petition to revoke probation, it is imperative that judicial officers do not intermingle the procedural standards for setting release conditions on the new criminal case and setting release conditions on the probation violation matter. The former is governed by Rule 7.2(a) or 7.2(b), and the latter is governed by the standards set forth in Rule 7.2(c).

Furthermore, unlike a defendant facing an original sentencing pursuant to Rule 26, which is a procedural certainty after a finding of guilt, probationers arrested on a petition to revoke probation are not facing a certainty of being sentenced at all. Probationers in this posture, unless convicted of a new felony offense pursuant to A.R.S. 13-708(E), will be sentenced only if: a) a violation is found by the court per Rule 27.9 or a hearing per Rule 27.8(c), and b) the probation term is revoked by the court as a result of the violation.

The concern, then, is that a direct reference to Rule 7.2(c)(1)(a) inserted into Rule 27 will result in confusion about the underlying findings that must be made to hold a probationer non-bondable, as those additional findings are not required to hold a defendant non-bondable pending an original sentencing hearing.

To ensure this Court's holding in *Higgins* translates as accurately as possible in a rule amendment, the distinctions referred to above should be explicitly accounted for in the

rule as follows:

The court may only hold a probationer non-bondable if a finding is made that in all reasonable likelihood the probationer's grant of probation will be revoked and a sentence of imprisonment imposed. The court must make a clear record of what facts were considered in making such a finding.

Conclusion

For the reasons stated above, the directors of the three indigent defense agencies of Maricopa County support the proposed amendment in principle but object to the proposed amendment as currently written.