

David K. Byers, Administrative Director
Administrative Office of the Courts
1501 W. Washington St.
Phoenix, AZ 85007

IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO AMEND RULE 27.6,) No. R-22-0003
ARIZONA RULES OF)
CRIMINAL PROCEDURE) REPLY
_____)

The Directors of the Maricopa County Indigent Defense Agencies filed the only comment to this rule petition. This is a reply to that comment.

Points of Agreement. The comment agrees with Petitioner on at least three significant points.

(1) A change to Rule 27 is warranted in light of *Wilson v Higgins* (See the comment at page 1.)

(2) *Wilson v Higgins* held that Rule 7.2(c)(1)(A) should apply in making the release determination required by Rule 27.7(c). (See the comment at page 3.)

(3) In making the release determination required by *Wilson v Higgins*, the court must consider whether the defendant is “convicted of an offense for which the

defendant will, in all reasonable probability, receive a sentence of imprisonment.”
(See the comment at page 3; see further *Wilson v. Higgins*, ¶ 21.)

Petitioner and the comment also have points of disagreement. At pages 2-3, the comment says, “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).” Petitioner submits that paragraphs 17 through 21 of *Wilson v. Higgins* have already addressed this contention. Other points of disagreement follow.

A.R.S. § 13-708(E) is not controlling. The comment (at pages 3-4) cites to A.R.S. § 13-708(E) for the proposition that a probationer accused of a probation violation “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 [sic] on a petition to revoke probation.

First, the reference to § 13-708(E) poses a faulty premise: that a prison sentence for a probation violation can occur *only* if the probationer is convicted on a new felony offense. There is no limitation that a court can revoke probation and sentence the probationer to imprisonment *only* when the probationer has been convicted of a new offense. The phrase “convicted of an offense for which the

defendant will, in all reasonable probability, receive a sentence of imprisonment” in Rule 7.2(c)(1)(A) refers to the offense for which the defendant was convicted, not a future one. Furthermore, A.R.S. § 13-901(C) provides:

The court, in its discretion, may issue a warrant for the rearrest of the defendant and may modify or add to the conditions or, if the defendant commits an additional offense or violates a condition, may revoke probation in accordance with the rules of criminal procedure at any time before the expiration or termination of the period of probation. [Emphasis added.]

Although an allegation that the probationer committed a new offense might be the most egregious probation violation, it is not as a matter of law the only allegation that can justify a revocation of probation.¹

Second, Rule 7.2(c)(1)(A) does not contain the word “mandatory,” nor does it include a requirement that the probationer be subject to a mandatory sentence. The rule says that the defendant “will in all probability” receive a sentence of imprisonment, that is, that imprisonment is likely, but it is not necessarily mandatory.

Third, the court must hold a probation violation hearing under Rule 27.8(b) “no less than 7 and no more than 20 days after the revocation arraignment, unless the probationer in writing or on the record requests, and the court agrees, to set the hearing on another date.” (Under Rule 27.8(a), the revocation arraignment must be

¹ See further *Wilson v. Higgins*, ¶ 19: “An allegation of a probation violation is thus not a new criminal charge leading to a trial where a probationer faces possible conviction of a probation violation.”

held no later than 7 days after service of a summons or an initial appearance under Rule 27.7.) In other words, the rules permit the violation hearing to occur within weeks of the Rule 27.7 initial appearance rather than months or years.

Fourth, the burden of proof at the trial of any underlying new offense is proof beyond a reasonable doubt. Under Rule 27.8(b)(3), the burden of establishing a probation violation is the lower standard of a preponderance of the evidence. Evidence that could be inadequate to support a conviction for a new offense might therefore be sufficient to establish a probation violation. Contrary to what the comment contends, a conviction following a trial on a new offense is not a prerequisite for finding a probation violation.

The amendment proposed by the comment has flaws. As noted on page 1 of this reply, the comment and Petitioner agree that *Wilson v Higgins* held that Rule 7.2(c)(1)(A) applies in making the release determination required by Rule 27.7(c). Yet the comment's proposed amendment to Rule 27.7(c) (see comment at page 5) does not include a reference to Rule 7.2(c)(1)(A). Rather, it attempts to paraphrase the text of the Rule 7 provision. Rules that apply to a single circumstance should not contain different text; those differences can become fertile ground for motions and appeals. Petitioner's proposed amendment to Rule 27.6(b)(1) contains a simple cross-reference to Rule 7.2(c)(1)(A), which eliminates any discrepancy in the text.

Petitioner believes that Rule 7.2(c)(1)(A) provides appropriate guidance to superior court judicial officers. If it appears to a judicial officer at the initial appearance that an alleged probation violator will “in all reasonable probability receive a sentence of imprisonment,” the court may not release the probationer on bond. If that reasonable probability does not exist, the court may release the probationer on bail or on the probationer’s own recognizance. Rule 7.2(c)(1)(A) also permits the parties to “stipulate otherwise” with court approval.

Additionally, the comment requests that any change to Rule 27 pursuant to the *Wilson v. Higgins* decision be to Rule 27.7, not Rule 27.6. Petitioner addressed this topic at length in his January filing. See the petition at pages 5 to 9. The comment’s proposed amendment to Rule 27.7 would only address probationers who were arrested on a probation violation warrant. The comment’s proposed amendment would not address release conditions for probationers who were summonsed to court, a notable omission because the arraignment judge should have authority to make release determinations for summonsed as well as arrested probationers. The comment’s proposed amendment to Rule 27.7(c) also could be construed to apply only to probationers in the superior court. It might not deal with

probationers who appear in limited jurisdiction courts.² By comparison, petitioner's proposed amendments to Rule 27.6 deal with these various scenarios.

Conclusion. Petitioner appreciates the comment from the Indigent Defender Agencies but does not believe the comment requires any modification to the rule amendments proposed by this petition. Petitioner therefore requests the Court to adopt the proposed amendments to Rule 27.6 as shown in the Appendix to the petition, and as duplicated in the Appendix to this reply.

RESPECTFULLY SUBMITTED this 27th day of May 2022.

/s/
David K. Byers, Administrative Director
by Marcus Reinkensmeyer, Deputy Director
Administrative Office of the Courts

Copy emailed this 27th day
of May 2022 to:

Joint Comment by Maricopa Public Defense Offices
Lina.Garcia@maricopa.gov

² Proposed Rule 27.6(b)(2) has no corresponding provision in the current Criminal Rules. Petitioner therefore notes the need for educating limited jurisdiction court judges on the application of this new provision.

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.