

Honorable Wendy A. Million
Tucson City Court
103 E. Alameda
Tucson, AZ 85701
Telephone (520) 791-3260
wmillion@courts.az.gov

**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:)
PETITION TO AMEND)
RULE 13 OF THE ARIZONA RULES) Supreme Court No. R-22-_____
OF CRIMINAL PROCEDURE)
_____)

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Magistrate Wendy Million, Tucson City Court, hereby submits the following petition to amend the Arizona Rules of Criminal Procedure, as reflected in the accompanying Appendix A, to be able to fully obtain and use U.S. Department of Justice grant funds and to prevent partial forfeiture. Petitioner seeks consideration pursuant to Rule 28, Rules of the Supreme Court.

Background and Purpose of the Proposed Rule Amendment. Petitioner seeks amendment of Rule 13, Rules of Criminal Procedure, by creating a new Rule 13.6 that authorizes a court to order a defendant who has been accused of a sexual offense that occurred by force or threat of force to complete testing for the immunodeficiency virus (HIV) either within 48 hours of the state filing an

information or obtaining a grand jury indictment if the defendant is in custody or within 48 hours of service of an information or indictment on a defendant who is not in custody. The purpose of this rule amendment is to assist Arizona courts and other grantees to avoid forfeiture of grant funds by complying with the U.S. Department of Justice's grant eligibility requirements. Additionally, this amendment will serve victims who will benefit from a court rule that will either alert them to medical concerns or give them peace of mind if they have been victims of crimes that warrant HIV testing.

The U.S. Department of Justice, Office of the Attorney General, Office on Violence Against Women (OVW), has authority under 34 U.S.C. § 10461 to distribute grants to states, Indian tribal governments, state and local courts (including juvenile courts), tribal courts, and units of local government to address domestic violence, dating violence, sexual assault, and stalking and to treat them as serious criminal law violations. These grants are part of the Improving Criminal Justice Responses (ICJR) program. Since 2017, OVW has awarded Arizona grantees more than \$2.5 million in grant funds under the program that has this requirement. All of these awards have been reduced by five percent. That is five percent in funding that is unavailable for the ultimate beneficiaries of these grant-funded projects—victims.

To be eligible for a full OVW grant under the ICJR program, a state or unit of local government that receives grant funds must certify that it has a law, policy, or

regulation that authorizes HIV testing when “an information or indictment is presented for a crime in which by force or threat of force the perpetrator compels the victim to engage in sexual activity.” 34 U.S.C. § 10461(d)(1)(A). At the victim’s request, the defendant must submit to HIV testing “not later than 48 hours after the date on which the information or indictment is presented and the defendant is in custody or has been served with the information or indictment.” *Id.* In addition, the victim or the parent or guardian of the victim and the defendant must be notified of the test results as soon as practicable, and there must be allowance for follow-up tests for HIV as medically appropriate, with provisions for notification of test results.

While Arizona has statutory authority for HIV testing, the law does not meet federal grant requirements. A.R.S. § 13-1415 allows for HIV testing of a defendant charged with a sexual offense upon the request of a prosecutor or a minor victim’s parent or guardian. But the statute also gives the court ten days to decide whether there is sufficient evidence of significant exposure to order the defendant to submit to HIV testing. In contrast, 34 U.S.C. § 10461 requires the defendant to submit to testing within 48 hours of the issuance of an information or indictment or within 48 hours of service of an information or indictment. To be clear, the defendant must submit to the testing within 48 hours of the issuance or service of the information or the indictment, but there is no requirement that the test results be delivered within 48 hours.

The absence of the 48-hour rule in the Arizona statute has resulted in the reduction of five percent of funds from ICJR grants awarded to state and local government agencies under 34 U.S.C. § 10461—and will continue to result in the five percent reduction for the foreseeable future. Ultimately, those most affected by the sacrifice of these grant funds are victims of sexual assault and domestic violence.

Tucson City Court is the recipient of a 2022 Firearms Technical Assistance Project (FTAP) award to address the issue of firearms and domestic violence; however, the court stands to lose a portion of the total grant funds because Arizona has no statute, rule, or regulation that meets the requirements of 34 U.S.C. § 10461. Tucson City Court was notified of the HIV testing requirement and was given an opportunity to ameliorate it by submitting either a certification of compliance and a copy of the relevant law, regulation, or policy or by providing assurance that compliance will be achieved by the end of the next legislative session from the date of application. Petitioner submits that the proposed process is ripe for court rule.

If the proposed rule is adopted, grant recipients statewide will be able to rely on this rule to certify Arizona's compliance, thereby avoiding forfeiture of any part of their funding and allowing them to support victims of domestic violence and sexual assault with improved services.

Contents of the Proposed Rule Amendment. A new Rule 13.6 is proposed that will meet the requirements of the federal law is provided in Appendix A. The

language has been reviewed by Department of Justice legal counsel and, in counsel's opinion, it will meet the requirements of the federal statute.

Pre-Petition Comments. The petition has not been circulated for pre-petition comments. However, versions have been shared with the Arizona Department of Health Services and the county attorneys through their affiliate group at the Arizona Association of Counties. A prior version was also circulated to those stakeholders, and their concerns have been addressed in the version being filed in this petition.

Public Comment Period. Petitioner respectfully requests that the Court open a period for public comment and that the Court consider the petition and any comments in the regular course provide by Rule 28, Rules of the Supreme Court.

Effective Date of the Proposed Rule Amendment. Petitioner respectfully requests that the proposed amendments be made effective on and after December 31, 2023, so the implementation date meets federal requirements.

RESPECTFULLY SUBMITTED this ____ day of _____, 2022.

/s/

Honorable Wendy A. Million
Magistrate, Tucson City Court

APPENDIX A

Proposed Amendment to Rule 13, Rules of Criminal Procedure

Rule 13.6. Human Immunodeficiency Virus Testing

- (a) **Victim Request.** When a defendant is charged by information or indictment with an offense committed by force or threat of force and that involves oral sexual contact, sexual contact or sexual intercourse as defined in A.R.S. § 13-1401, a victim may request that an HIV test be conducted on the defendant in accordance with A.R.S. § 13-1415.
- (b) **Testing.** If the victim requests the test, the prosecutor must obtain an order from the court requiring the defendant to be tested.
- (c) **Time for testing.** The test must be administered:
- (1) If the defendant is in custody, within forty-eight hours of filing the information or obtaining an indictment,
 - (2) If the defendant is not in custody, within forty-eight hours of the defendant being served with the information or indictment.
- (d) **Follow-up testing.** As a condition of release or if the defendant is in custody, the court may order follow-up tests for the human immunodeficiency virus as may be medically appropriate. The state has the burden to prove the follow-up tests are medically appropriate.

(e) Notification. Notification of the test results must be made as provided in A.R.S. § 13-1415(D) to the victim, or parent or guardian of the victim, and the defendant.