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**IN THE SUPREME COURT**  
**STATE OF ARIZONA**

In the Matter of:

Petition to Amend [Rule 9.1 of the Arizona Rules of Criminal Procedure](#)

Arizona Supreme Court No. R-23-\_\_\_\_\_

**[Petition to Amend Rule 9.1 of the Arizona Rules of Criminal Procedure](#)**

Pursuant to [Rule 28 of the Rules of the Arizona Supreme Court](#), Central Arizona National Lawyers Guild (“Central AZ NLG”) respectfully submits this petition to amend [Rule 9.1 of the Arizona Rules of Criminal Procedure](#). Central AZ NLG’s proposed amendment will end the controversial practice of permitting the state to try the accused of criminal offenses *in absentia*. The proposed amendment mirrors the requirements set forth by [Rule 43 of the Federal Rules of Criminal Procedure](#). Moreover, the proposed amendment aligns with the historical view that a criminal trial could not be conducted in the accused’s absence.

## **I. Interests of Petitioner**

The Central Arizona National Lawyers Guild is a local chapter of the National Lawyers Guild located in the greater Phoenix metropolitan area. The National Lawyers Guild (NLG) is the nation's oldest and largest progressive bar association and was the first one in the US to be racially integrated. Our aim is to bring together all those who recognize the importance of safeguarding and extending the rights of workers, women, LGBTQ people, farmers, people with disabilities and people of color, upon whom the welfare of the entire nation depends; who seek actively to eliminate racism; who work to maintain and protect our civil rights and liberties in the face of persistent attacks upon them; and who look upon the law as an instrument for the protection of the people, rather than for their repression.

The proposed amendment to [Rule 9.1](#) aligns with Central AZ NLG's mission by ending Arizona's long-standing practice of trying criminal defendants *in absentia* despite the historical fact that the presence of the accused at trial was likely deemed a constitutional requirement by the founders of the Arizona and United States Constitutions.

## II. Historical and Societal Reasons to Grant the Petition

The Sixth Amendment guarantees the accused’s right to trial. [U.S. Const. amend. VI](#).

The Confrontation Clause of the Sixth Amendment and the Due Process clauses of the Fifth and Fourteenth Amendments<sup>i</sup> guarantee the right to be present at one’s own criminal trial. *See Diaz v. United States*, 223 U.S. 442, 452 (1912) (finding that the constitutional right to be present may be waived if the defendant absconds after trial has started); *Illinois v. Allen*, 397 U.S. 337, 338 (1970).

The Arizona Constitution also guarantees, at a minimum, the same rights. *See State v. Mixton*, 250 Ariz. 282, 300, ¶ 81, *cert. denied*, 142 S.Ct. 184 (2021) (Bolick, J., dissenting) (explaining that federal constitution sets the baseline for state constitutional rights).

Although not yet recognized by this Court as an important distinction from the Sixth Amendment, the [Article II, Section 23 of the Arizona Constitution](#) establishes that “the right of trial by jury shall remain *inviolable*.” [Ariz. Const. art. II, § 23](#) (emphasis added); *see Derendal v. Griffith*, 209 Ariz. 416, 419-420 (2005) (declining to interpret “inviolable” as providing additional protections not required by the Sixth Amendment).

In interpreting this state constitutional right, this Court looks “to give terms the original public meaning understood by those who used and approved them.” *Matthews v. Indus. Comm'n of Arizona*, 520 P.3d 168, 174 (Ariz. 2022).

The same principles apply when the United States Supreme Court interprets language found in the United States Constitution. Thus, “[t]he interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.” *Khorrami v. Arizona*, 143 S. Ct. 22, 23 (2022) (Gorsuch, J., dissenting from denial of certiorari concerning constitutional challenge to criminal juries composed of less than twelve jurors under [Article 2, Section 23 of the Arizona Constitution](#)) (quoting *Smith v. Alabama*, 124 U.S. 465, 478 (1888)).

History establishes that the presence of the accused was a jurisdictional requirement for a criminal trial to commence under English common law. *See* F. Pollock & F. Maitland, *THE HISTORY OF ENGLISH LAW*, 594-95 (2d ed. 1923). And a criminal defendant could not waive this requirement. *Rex v. Streek* 2 Car. & P. 413 (1826). Justice John Marshall Harlan recognized this historical requirement in *Hopt v. People*, 110 U.S. 574 (1884). Justice Harlan, relying on historical consensus concerning the importance of the presence of the accused, explained, “For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial, where the indictment is for a felony, the trial commences at least

from the time when the work of impaneling the jury begins.” *Id.* at 578. Relying on Blackstone, Justice Harlan noted the public interest in the fairness of criminal proceedings deprived the individual of waiving the societal interest in the presence of the accused. *Id.* at 579 (citing 1 B. Comm. 133; 4 Bl. Comm. 11). Although not expressly rooted in the Sixth Amendment, *Hopt* provides ample reasons to question Arizona’s rule authorizing criminal trials to commence in the absence of the accused.<sup>1</sup>

The historical fact that Arizona did not authorize a criminal trial to *proceed in absentia* until more than a decade after the adoption of the Arizona Constitution suggests that the founders did not contemplate such a historical aberration. See A.R.S. § 44-1401 (1939) (shifting course from prior law requiring presence of accused); *State v. Ransom*, 62 Ariz. 1, 7 (1944) (describing statutory change and rejecting challenge without reference to *Hopt v. People*, 110 U.S. 574 (1884)).

The historical requirement that the accused be present is reflected in Rule 43 of the Federal Rules of Criminal Procedure. In *Crosby v. United States*, Justice Blackmun, writing for a unanimous court, echoed the history delineated in *Hopt* by noting that:

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<sup>1</sup> *Diaz v. United States*, 223 U.S. 442 (1912) (later authorized a trial to proceed in the absence of the accused only where the absence occurred after the initiation of trial.)

The right generally was considered unwaivable in felony cases. This canon was premised on the notion that a fair trial could take place only if the jurors met the defendant face-to-face and only if those testifying against the defendant did so in his presence.

506 U.S. 255, 259 (1993) (internal citations omitted).

Thus, *Crosby* held that [Rule 43 of the Federal Rules of Criminal Procedure](#) required the presence of the accused in order for a criminal trial to commence. *Id.* at 262.

That the federal courts have required the presence of the accused to commence all criminal trials establishes that the requirement is workable and not an impediment to the administration of justice.

Given the historical tradition and societal interests in the fairness and accuracy of criminal trials, this Court should amend [Rule 9.1 of the Arizona Rules of Criminal Procedure](#) to provide the same protections as [Rule 43 of the Federal Rules of Criminal Procedure](#) by forbidding the commencement of a criminal trial in the absence of the accused.

### III. Proposed Amendment

Central AZ NLG proposes that this Court abandon [Rule 9.1](#) as currently written and instead adopt a new rule that is substantially identical to [Rule 43 of the Federal Rules of Criminal Procedure](#).

The only intended differences between the proposed rule and [Rule 43 of the Federal Rules of Criminal Procedure](#) are found in subsection (a), the omission of portions of the federal rule authorizing the accused's absence at sentencing proceedings under [Rule 43\(b\)\(4\)](#) and [Rule 43\(c\)\(2\)](#), and a conforming edit to [Rule 43\(c\)\(1\)\(C\)](#).

Rather than reference the applicable Arizona Rules of Criminal Procedure that may provide otherwise as [Rule 43](#) does concerning [Rule 5 and Rule 10 of the Federal Rules of Criminal Procedure](#), the proposed [Rule 9.1\(a\)](#) generally exempts its application as allowable by references to "this or other rules." This difference is suggested to ensure harmonization with the rules by not inadvertently excluding an applicable provision.

Because Arizona courts generally require the presence of the accused sentencing proceedings (*See Ariz. R. Crim. P. 26.9*), the proposed rule omits the provisions authorizing the absence of the accused at some sentencing proceedings

found under [Rule 43\(b\)\(4\)](#) and following waiver of the right to be present under [Rule 43\(c\)\(2\)](#).

Lastly, the proposed Rule edits [Rule 43\(c\)\(1\)\(C\)](#) by replacing the language referencing the court's authority to remove the accused due to disruptive behavior with an explicit reference to [Rule 9.2 of the Arizona Rules of Criminal Procedure](#). [Rule 9.2](#) provides more explicit guidance to trial courts than its federal counterpart and should be retained.

Otherwise, the proposed rule is intended to be identical to [Rule 43 of the Federal Rules of Criminal Procedure](#).

#### **IV. Conclusion**

Society has an obligation to ensure that justice is fair. History has long counseled that the presence of the accused is a necessary component to ensure accuracy and fairness in criminal proceedings. Arizona has absconded from this historical consensus and the result has undermined the fairness of our justice system. This Court should correct this wrong by adopting the standard employed by federal courts. [Rule 43 of the Federal Rules of Criminal Procedure](#) is not a novelty. Rather, it has a long record of proven workability.

Therefore, Central Arizona National Lawyers Guild respectfully recommends that this Court amend [Rule 9.1 of the Arizona Rules of Criminal Procedure](#) to reflect the requirement of the presence of the accused prior to the commencement of a criminal trial found in [Rule 43 of the Federal Rules of Criminal Procedure](#).

**Respectfully submitted January 08, 2023**

**Central Arizona National Lawyers Guild**

By \_\_\_\_\_ /s/

**KEVIN D. HEADE**

**Executive Committee Member**

## Proposed Amendment to Rule 9.1

### Rule 9.1. The Defendant's Waiver of the Right to Be Present

~~Except for sentencing or as these rules otherwise provide, a defendant's voluntary absence waives the right to be present at any proceeding. The court may infer that a defendant's absence is voluntary if the defendant had actual notice of the date and time of the proceeding, notice of the right to be present, and notice that the proceeding would go forward in the defendant's absence.~~

**(a) When Required.** Unless provided by this or other rules, the defendant must be present at:

- (1) the initial appearance, the initial arraignment, and the plea;
- (2) every trial stage, including jury impanelment and the return of the verdict; and
- (3) sentencing.

**(b) When Not Required.** A defendant need not be present under any of the following circumstances:

- (1) Organizational Defendant.** The defendant is an organization represented by counsel who is present.
- (2) Misdemeanor Offense.** The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence.
- (3) Conference or Hearing on a Legal Question.** The proceeding involves only a conference or hearing on a question of law.

**(c) Waiving Continued Presence.**

**(1) In General.** A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

(C) when the court warns the defendant forfeits the right due to disruptive conduct as provided in [Rule 9.2](#).

**(2) Waiver's Effect.** If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return, during the defendant's absence.

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