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ARIZONA SUPREME COURT

In the matter of:)
)
PETITION TO AMEND CRIMINAL) Supreme Court No. 23-_____
RULES 11.1, 11.3, 11.4, 11.5, 11.6, AND)
11.7)
)
)
_____)

Pursuant to Rule 28 of the Rules of the Supreme Court, Petitioner respectfully petitions the Court to amend Criminal Rules 11.1 and 11.3 through 11.7 as shown in Appendix A. The proposed amendments to Rules 11.1, 11.5, 11.6, and 11.7 are prompted by the enactment of Senate Bill (SB) 1310 from the 2022 Second Regular Session of the 55th Legislature as more particularly described below, which becomes effective on January 1, 2024. A copy of SB 1310 is attached as Appendix B. The proposed amendments to Rules 11.3 and 11.4 are technical amendments.

I. Grounds for Petition Approval.

SB 1310 creates a mechanism by which a defendant charged with a serious offense may be involuntarily committed to a secure state mental health facility if the defendant is found incompetent to stand trial, there is no substantial probability

that the defendant will become competent within the allowable timeframe, the proof is evident or the presumption great that the defendant committed the act that constitutes a serious offense, and the defendant is determined to be dangerous (defined).

Criminal Rule 11 sets forth the procedures for determining whether a defendant is competent to stand trial and if not, whether the person can be restored to competency within the allowable time limit.

Under A.R.S. § 13-4517(A), if a defendant is found incompetent to stand trial and there is no substantial probability that the defendant will regain competency within 21 months or within the defendant's maximum possible sentence, whichever is less, on request of the defendant or the State, the court can do one or more of the following: (1) remand the defendant to an evaluating agency approved and licensed under Title 36 to begin civil commitment proceedings; (2) order the appointment of a guardian ad litem to investigate whether the defendant is or may be in need of a guardian, a conservator or any other protective order; or (3) release the defendant from custody and dismiss the charges without prejudice.

SB 1310 adds a new subsection to A.R.S. § 13-4517(A) which provides that if the defendant is charged with a serious offense as defined in section 13-706, a party can request that the court order a trial to determine if the defendant is dangerous and should be involuntarily committed.

SB 1310 also creates A.R.S. § 13-4521, which sets forth the procedures for determining whether the defendant is dangerous and should be involuntarily committed. Specifically, if the court issues an order under A.R.S. § 13-4517(A)(4), the court must appoint counsel if the defendant is indigent and set a hearing within ten days to determine whether the proof is evident or presumption great that the defendant committed the act that constitutes a serious offense. If the court makes the requisite finding, the court must hold a trial within 120 days of the order issued under A.R.S. § 13-4517(A)(4) to determine whether the defendant is dangerous as defined in A.R.S. § 13-4501 and should be involuntarily committed. Either party may request a jury; otherwise, the trial will be before the court.

If the trier of fact determines that the defendant is not dangerous or should not be committed, the court must proceed under A.R.S. § 13-4517(A)(1), (2), or (3). However, if the trier of fact determines that the defendant is dangerous and should be involuntarily committed, the court must dismiss the charges without prejudice and order the defendant to be committed to a secure state mental health facility. All further proceedings will then be conducted under Title 36, Chapter 40, which is a new chapter of Title 36 also created by SB 1310.

Petitioner's proposed amendments make two technical changes to Rules 11.3 and 11.4 and amend Rules 11.1, 11.5, 11.6, and 11.7 to incorporate A.R.S. §§ 13-4517 and 13-4521.

II. Proposed Amendments

a. Amendment to Rule 11.1

SB 1310 creates A.R.S. § 13-4521 which allows a party to request that the court order a trial to determine if the defendant is dangerous and should be involuntarily committed if the defendant has been charged with a serious offense and has been found incompetent and not restorable. Petitioner therefore proposes amending Rule 11.1(b) to clarify that the rule does not bar a court from proceeding under A.R.S. §§ 36-3707(D) *or* 13-4521.

b. Technical Amendment to Rule 11.3

The proposed technical amendment to Rule 11.3(a)(1) changes the statutory references in the mental health expert definition from “32-1721 to -1730” (Chapter 16, Optometry) to “32-1821 to -1830” (Chapter 17, Osteopathic Physicians and Surgeons). This change aligns the definition of “mental health expert” in Rule 11.3(a)(1) with A.R.S. § 13-4501, which defines a mental health expert as “a physician who is licensed pursuant to title 32, chapter 13 or 17 or a psychologist who is licensed pursuant to title 32, chapter 19.1”

c. Technical Amendment to Rule 11.4

Rule 11.4(a)(1) addresses the deadline for the submission of an expert’s report and references an expert appointed under A.R.S. § 13-4517. However, A.R.S. § 13-4517 addresses the disposition of defendants who are found incompetent and

not restorable—it does not address the appointment of experts. Petitioner’s proposed technical amendment to Rule 11.4(a)(1) changes the statutory reference from A.R.S. § 13-4517 to A.R.S. § 13-4505, as A.R.S. § 13-4505 addresses the appointment of experts.

d. Amendments to Rule 11.5

Petitioner proposes amending Rule 11.5(b)(3)(A)(iv) to strike the existing verbiage, as the provisions of Rule 11.5(b)(3)(A)(iv) are addressed by Rule 11.5(b)(4). Petitioner therefore proposes replacing the verbiage in Rule 11.5(b)(3)(A)(iv) with verbiage that reflects the provisions of A.R.S. § 13-4517(A)(4). Specifically, Petitioner’s proposed verbiage for 11.5(b)(3)(A)(iv) provides that, if a defendant who has been charged with a serious offense is found incompetent to stand trial and there is no substantial probability that the defendant will regain competency within the allowable timeframe, on the request of either party, the court may order a trial to determine if the defendant is dangerous and should be involuntarily committed under A.R.S. § 13-4521.

SB 1310 also amends A.R.S. § 13-4517(C)-(E) to provide that the court may retain jurisdiction when it enters an order pursuant to A.R.S. § 13-4517(A)(4). Accordingly, Petitioner proposes an amendment to Rule 11.5(b)(4) to provide that if the court enters an order under (b)(3)(A)(iv), it may retain jurisdiction and enter further orders as provided in A.R.S. §§ 13-4517, 13-4518, and 13-4521. Petitioner’s

proposed verbiage necessarily adds a second sentence because if the court enters an order under (b)(3)(A)(i) or (ii), it will only enter orders as specified in A.R.S. §§ 13-4517 or 13-4518; whereas if the court enters an order under (b)(3)(A)(iv), it may enter orders as specified in A.R.S. §§ 13-4517, 13-4518, or 13-4521.

e. Amendments to Rule 11.6

Petitioner proposes amending Rule 11.6(d) to clarify that renewing and modifying a treatment order for no more than 180 days applies to treatment orders under Rule 11.5(b)(2). Petitioner believes this is necessary because the first sentence of the rule directs the court to proceed in accordance with Rules 11.5(b)(2) or (3) if the court finds that the defendant is still incompetent at later hearings. The second sentence related to renewing or modifying the treatment order for not more than 180 days is applicable only when the court proceeds under Rule 11.5(b)(2).

Petitioner also proposes adding verbiage to Rule 11.6(e) to include involuntary commitment proceedings as an exception to when the defendant must be released from custody if the charges are dismissed pursuant to A.R.S. § 13-4515(C). Specifically, if the court orders the charges dismissed under A.R.S. § 13-4515(C), the defendant must be released from custody unless the court finds that the defendant's mental condition warrants a civil commitment hearing under A.R.S. §§ 36-501 et seq. Petitioner's proposed amendment would add verbiage to require that the defendant be released from custody unless the court finds that the defendant's

mental condition warrants a civil commitment hearing *or involuntary commitment proceedings*. This amendment tracks the statutory amendments to A.R.S. § 13-4517(D).

f. Amendments to Rule 11.7

Petitioner proposes amending Rule 11.7(b)(3) to change “hearing” to “proceeding” and include “36-4001 et seq.” so that it reads “. . . a statement of the defendant obtained in a Rule 11 matter, or evidence resulting from that statement, may be used by any party in a proceeding to determine whether the defendant is eligible for court-ordered treatment under A.R.S. §§ 36-501 et seq. or 36-4001 et seq., or is a sexually violent person.” This amendment tracks the statutory amendments to A.R.S. § 13-4508(C).

Petitioner proposes amending Rule 11.7(c)(1) to remove the specific reference to A.R.S. § 13-4518, as it is included in the existing reference to 13-4501 et seq.

Petitioner proposes amending Rule 11.7(c)(2) to include trials conducted pursuant to A.R.S. § 13-4521 as a circumstance in which the court may grant access to an otherwise sealed mental health expert’s report. This amendment tracks the statutory amendments to A.R.S. § 13-4508(E)(1).

III. Conclusion

Petitioner requests that the Court open this petition for public comment and that the Court consider the petition and comments in the regular course provided by Supreme Court Rule 28.

RESPECTFULLY SUBMITTED this 9th day of January, 2023.

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APPENDIX A

Arizona Rules of Criminal Procedure

(deletions shown with ~~strikethrough~~, new language is underlined)

RULE 11. INCOMPETENCE AND MENTAL EXAMINATIONS

Rule 11.1. Definitions, Effect of Incompetence, and Right to Counsel

(a) [No change]

(b) **Effect of Incompetence.** A defendant may not be tried, convicted, or sentenced while that defendant is incompetent. A defendant is not incompetent to stand trial merely because the defendant has a mental illness, defect, or disability. This rule does not bar a court from proceeding under A.R.S. §§ 36-3707(D) or 13-4521.

(c) [No change]

Rule 11.3. Appointment of Experts

(a) **Appointment of Experts.**

(1) *Definition of a “Mental Health Expert.”* “Mental health expert” means a physician licensed under A.R.S. §§ 32-1421 to -1437 or 32-~~1721~~1821 to ~~1730~~-1830; or a psychologist licensed under A.R.S. §§ 32-2071 to -2076.

(2) through (6) [No change]

(b) through (d) [No change]

Rule 11.4. Disclosure of Experts' Reports

(a) **Reports of Appointed Experts Under Rule 11.3.**

(1) *Deadline.* An expert appointed under Rule 11.3, or under A.R.S. § 13-~~4517~~4505, must submit a report to the court no later than 10 business days after the expert's examination is completed. The expert must inform the court if the report cannot be made available at least 7 days before the scheduled hearing.

(2) [No change]

(b) [No change]

Rule 11.5. Hearing and Orders

(a) [No change]

(b) **Orders.**

(1) and (2) [No change]

(3) *If Incompetent and Not Restorable.*

(A) Superior Court. If the superior court determines that the defendant is incompetent and that there is no substantial probability that the defendant will become competent within 21 months or within the defendant's maximum possible sentence as defined by A.R.S. § 13-4515, whichever is less, the court may on request of the examined defendant or the State do one or more of the following:

(i) through (iii) [No change]

(iv) ~~Retain jurisdiction and enter further orders as specified in A.R.S. §§ 13-4517 and 13-4518~~ If the defendant is charged with a serious offense as defined in A.R.S. § 13-706, order a trial to determine whether the defendant is dangerous and should be involuntarily committed under A.R.S. § 13-4521.

(B) [No change]

(4) *Additional Actions.* If the court enters an order under (b)(3)(A)(i) or (ii), it may retain jurisdiction and enter further orders as specified in A.R.S. §§ 13-4517 and 13-4518. If the court enters an order under (b)(3)(A)(iv), it may retain jurisdiction and enter further orders as provided in A.R.S. §§ 13-4517, 13-4518, and 13-4521.

(c) and (d) [No change]

Rule 11.6. Later Hearings

(a) and (c) [No change]

(d) **Finding of Continuing Incompetence.** If the court finds that the defendant is still incompetent, it must proceed in accordance with Rules 11.5(b)(2) or (3). If the court proceeds under Rule 11.5(b)(2) and determines that there is a substantial probability that the defendant will regain competence in the foreseeable future, then the court may renew and may modify the treatment order for no more than an additional 180 days or the time period provided for the defendant's maximum possible sentence by A.R.S. § 13-4515, whichever is less.

(e) **Dismissal of Charges.** At any time after providing notice and a hearing under A.R.S. § 13-4515(C), the court may order the dismissal of the charges against a defendant adjudged incompetent. The defendant must be released from custody upon dismissal of the charges unless the court finds that the defendant's mental condition warrants a civil commitment hearing under A.R.S. §§ 36-501 et seq. or involuntary commitment proceedings under A.R.S. § 13-4521.

Rule 11.7. Privilege and Confidentiality

(a) [No change]

(b) Privileged Statements of the Defendant.

(1) and (2) [No change]

(3) *In Title 36 Proceedings.* Notwithstanding (b)(1) and (b)(2), a statement of the defendant obtained in a Rule 11 matter, or evidence resulting from that statement, may be used by any party in a hearing proceeding to determine whether the defendant is eligible for court-ordered treatment under A.R.S. §§ 36-501 et seq. or 36-4001 et seq., or is a sexually violent person.

(c) Confidentiality of Reports.

(1) *Generally.* The court and counsel must treat reports of Rule 11 experts as confidential in all respects. They may, however, disclose other expert reports to mental health experts in proceedings related to A.R.S. §§ 13-4501 et seq., ~~§ 13-4518,~~ and §§ 36-501 et seq., or as otherwise excluded in A.R.S. §§ 13-4508 and 13-4516.

(2) *Sealing.* After the defendant is found competent or unable to regain competence, the court must order the mental health experts' reports sealed. By later order, the court may grant access to a report, but only for further competence or sanity evaluations, statistical study, the examined defendant's mitigation investigation, in a trial conducted pursuant to A.R.S. § 13-4521, or if necessary to assist in mental health treatment for restoration of competence or under A.R.S. § 13-502.