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ARIZONA SUPREME COURT

In the matter of:)
)
PETITION TO AMEND SUPREME) Supreme Court No. 23-_____
COURT RULE 123)
)
)
_____)

Pursuant to Rule 28 of the Rules of the Supreme Court, Petitioner respectfully petitions this Court to amend Supreme Court Rule 123 as shown in Appendix A, to establish provisions for public access to court records in cases filed under A.R.S. Title 36, Chapter 37 to determine sexually violent person status.

I. Introduction and Background

A.R.S. § 36-3701, et. seq., allows the State to petition the court to request further detainment of a person found guilty of a violent sexual act, or charged with such a crime but deemed incompetent to stand trial, if the person is serving a sentence or term of confinement or is receiving treatment, and the person also suffers from a mental disorder that makes them likely to engage in future acts of sexual

violence. A petition filed under A.R.S. § 36-3701, et. seq. initiates civil proceedings that are generally assigned an “MH” (Mental Health) case prefix.

Under A.R.S. § 36-3702, if the agency that has jurisdiction over the person determines that the person may be a sexually violent person, the agency must make a written request to the county attorney or the attorney general to file a petition with the court to determine whether the person is a sexually violent person. The agency must include with its request several supporting documents, many of which are likely to contain sensitive information, such as identifying victim information which may include minor victims’ names and dates of birth, and sensitive information about the details of the crime.

The documents provided by the agency to the county attorney or the attorney general under A.R.S. § 36-3702 are frequently filed with the petition and therefore become part of the judicial record. Such documents may include:

1. The complaint, information, judgment of conviction and commitment order for the sexually violent offense that forms the basis for the petition and detention orders or for any other conviction.

2. Records of evaluation and treatment, including presentence investigation reports, psychological and psychiatric tests and assessment reports and supporting information, group notes, autobiographical notes, progress notes, psychosocial reports or other materials that were prepared by or that relate to the person while the

person was in custody or receiving treatment from the submitting agency or any other agency.

3. Records of the person's version of the offenses for which the person has been convicted, including the notes and records of all interviews and discussions with the person while the person was in the care of the submitting agency or any other agency.

4. Records of convictions and acquittals regardless of whether those convictions were for sexually violent offenses.

5. Police reports that relate to any sexually violent offense that was committed by the person.

6. Institutional records that relate to the person's behavior and conduct while in custody.

7. Information indicating the dates of acceptance and rejection by the person of any recommended or court ordered psychotropic medication to control the person's mental disorder or of any recommended or court ordered psychological or psychiatric counseling for treatment of the person's mental disorder.

8. A final release or discharge report, together with any information on which the report is based, that is prepared in anticipation of either the person's release from incarceration or commitment, which will include:

- (a) A report of the person's condition that includes an opinion expressing that the person has a mental disorder and that, as a result of that mental disorder, the person is likely to engage in a sexually violent offense.
- (b) A list of the names of all treatment providers who have treated or worked with the person.
- (c) The curriculum vitae of each of the treating individuals that details each individual's education, training and experience.
- (d) The facility in which the person is located at the time of the referral and in which the person will be residing pending the filing of a petition.

Additionally, under A.R.S. § 36-3708, the psychiatrist, psychologist or other professional of the facility where the person is committed must annually examine the person and submit the examination report to the court. Under A.R.S. § 36-3712, the superintendent of the state hospital is prohibited from releasing any medical, expert and professional care and treatment reports to the public. However, there is no analogous provision for courts once the report is filed into the court case.

Additionally, although the confidentiality of adult criminal records under Supreme Court Rule 123(d)(2)(A) can be applied to many of the supporting documents under A.R.S. § 36-3702 that become part of the judicial record, no existing rule or law makes confidential other documents or police reports containing sensitive information that may become part of the judicial record if they are filed

with the petition or other pleadings. This becomes problematic because the police reports filed may include victim interviews with detailed recounts of the crime, as well as identifying victim information, including the names and dates of birth of minor victims. Other documents may contain treatment, evaluation, or other sensitive information.

II. Grounds for Approval

Although Arizona's judicial branch has historically maintained an open records policy, this Court has recognized that this policy does not prescribe unfettered access to judicial records. Rule 123(c)(1) provides:

Historically, this state has always favored open government and an informed citizenry. In the tradition, the records in all courts and administrative offices of the Judicial Department of the State of Arizona are presumed to be open to any member of the public for inspection or to obtain copies at all times during regular office hours at the office having custody of the records. *However, in view of the possible countervailing interests of confidentiality, privacy or the best interests of the state public access to some court records may be restricted or expanded in accordance with the provision of this rule, or other provisions of law.* (Emphasis added.)

In *London v. Broderick*, this Court explained that the open records rule implements the public's interests in seeing that courts operate efficiently and effectively. 206 Ariz. 490, 493, 80 P.3d 769, 772 (2003) At times, however, "the benefits of public disclosure must yield to the burden imposed on private individuals or the government itself by disclosure." *Id.* Accordingly, limitations on public

disclosure become necessary to protect privacy interests, confidential information, and certain governmental interests. *Id.*

Further, the Arizona legislature has enacted several statutes that would support a decision to withhold many of the documents listed in A.R.S. § 36-3702(D) from public disclosure in judicial records to protect the privacy of victims and prohibit disclosure of mental health information. Examples are:

- A.R.S. § 13-4434 which affords certain protections to crime victims related to their privacy interests.
- Reports submitted pursuant to A.R.S. § 13-4508 must be sealed after a plea of guilty or guilty except insane or the trial or after the defendant is found to be unable to be restored to competence.
- A.R.S. § 36-509.01 which prohibits the release of certain mental health proceeding records.
- A.R.S. §§ 36-3712 and 36-4007 (effective Jan. 1, 2024) which prohibit the superintendent of the state hospital and medical director of a secure behavioral health residential facility from releasing any medical, expert and professional care and treatment reports to the public.
- A.R.S. § 39-123.01 which provides, with exceptions, that the personal identifying information of a witness to a crime contained in a record that is

created or received by a law enforcement or prosecution agency and that is related to a criminal investigation or prosecution not be disclosed.

Therefore, Petitioner proposes amending Supreme Court Rule 123 to establish provisions for closing to the public certain documents in cases filed under A.R.S. Title 36, Chapter 37.

III. Proposed Amendments

Petitioner proposes amending Supreme Court Rule 123(d) to add a new subsection (7), titled *Sexually Violent Person Case Records*. Petitioner's proposed amendments largely track the provisions of Administrative Order 2022-142 issued on November 8, 2022 to clarify which documents in a case filed under A.R.S. Title 36, Chapter 37 are closed to the public. Petitioner's proposed amendments are as follows:

- Proposed section (7)(A) provides that any document closed under Rule 123(d)(2)(A), is also closed under Rule 123(d)(7). Accordingly, if a document is open under Rule 123(d)(2)(A), for example a presentence report that is open to the public because it was not segregated and identified as closed or confidential, the document would be open to the public in the A.R.S. Title 36, Chapter 37 case. This section also provides that any document listed in A.R.S. § 36-3702(D)(2)(a), (b), or (3) through (9) is also closed. Petitioner intentionally did not include A.R.S. § 36-3702(D)(2)(c) to

avoid a potential conflict when the presentence report is open under Rule 123(d)(2)(A).

- Proposed section (7)(B) establishes requirements for the filer regarding the identification and submission of confidential documents so that they do not inadvertently become part of the case file that is otherwise open to the public. The procedures and verbiage in this subsection mirror Probate Rule 8(c). However, the proposed verbiage differs slightly by removing the specific reference to “paper” filings because cases filed under A.R.S. Title 36, Chapter 37 cannot be e-filed, so it is presumed that petitions and supporting documents will be filed in paper.
- Proposed section (7)(C) provides that all other information maintained by the clerk of the court is open to the public, unless prohibited by law or sealed by court order, which mirrors Rule 123(d)(2)(C) applicable to adult criminal cases.

Lastly, although cases filed under A.R.S. Title 36, Chapter 37 are civil proceedings, these cases are generally assigned an “MH” case number. To make clear that A.R.S. Title 36, Chapter 37 cases are not included where the term “mental health proceeding” is used in Rule 123, Petitioner proposes moving the definition of “mental health proceeding” from Rule 123(d)(6)(A) to Rule 123(b) to make clear

that the definition of “mental health proceeding” applies to the entirety of Rule 123 and not just section (d)(6).

IV. 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 10th day of January, 2023.

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APPENDIX A

Rules of the Supreme Court of Arizona

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

Rule 123. Access to Judicial Records of the State of Arizona

(a) [No change]

(b) Definitions

(1) through (13) [No change]

(14) Mental Health Proceeding. “Mental health proceeding” means a proceeding brought under ARS Title 36, Chapter 5, Article 4 or 5.

~~(14)-(15)~~ [No change in text]

~~(15)-(16)~~ [No change in text]

~~(16)-(17)~~ [No change in text]

~~(17)-(18)~~ [No change in text]

~~(18)-(19)~~ [No change in text]

~~(19)-(20)~~ [No change in text]

~~(20)-(21)~~ [No change in text]

(c) [No Change]

(d) **Access to Case Records.** All case records are open to the public except as may be closed by law or as provided in this rule. The court must state the reason for closing any record and include a reference to any statute, case, rule or administrative order on which the court relied.

(1) through (5) [No change]

(6) *Mental Health Case Records.*

(A) Except as otherwise provided by this rule or law, the case records and information of mental health proceedings are closed to public access or inspection. ~~“Mental health proceeding” means a proceeding brought under ARS Title 36, Chapter 5, Article 4 or 5.~~

(B) through (F)

(7) Sexually Violent Person Case Records.

(A) Any document that is closed under (d)(2)(A) or is listed in ARS § 36-3702(D)(2)(a), (b), or (3) through (9) is closed in cases filed under ARS Title 36, Chapter 37.

(B) A party filing a document that is closed under this section must separate and identify the document as “confidential,” by placing it in an envelope marked with the case name, the case number, the name of the document being filed, the name of the party filing the document, and the words “Confidential Document.” A confidential document

referenced in a pleading or motion as an exhibit, attachment, or appendix must state on the envelope the title of that pleading or motion and identify the exhibit, attachment, or appendix number. A party must use a separate envelope for each confidential document. The clerk is not required to review a document to determine whether it is a confidential document.

(C) All other documents in ARS Title 36, Chapter 37 case files maintained by the clerk of the court are open to the public, unless prohibited by law or sealed by court order.

(e) through (j) [No change]