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(FIRM STATE BAR NO. 00032000)**

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(STATE BAR NUMBER 005379)**

ARIZONA SUPREME COURT

**PETITION TO AMEND Rule 13,
ARIZONA RULES OF CRIMINAL
PROCEDURE**

R-22-0042

MARICOPA COUNTY ATTORNEY'S OFFICE
COMMENT IN OPPOSITION

Petitioner seeks to create a new Rule 13.6 to provide a mechanism for victims to request expedited immunodeficiency virus (HIV) testing of a defendant. The reason behind the Petition is the loss of partial grant funding by the United States Department of Justice unless such a rule is in place.

According to the Petition, Arizona has received over 2.5 million in grant funding since 2017—funding that was reduced by 5% by not having such a rule. While the additional funding would certainly be desirable, there must be consideration given to whether there is actually a need for the rule in light of existing Arizona law, and whether that need would warrant the additional time and resources needed to effectuate the processes in the proposed rule.

The Maricopa County Attorney's Office (MCAO) certainly agrees with the intent behind the Petition and with optimizing service to victims. We do, however, have several concerns with the proposed new rule. The language of the rule raises legal, logistical and financial issues. Moreover, the processes being proposed are already available under existing Arizona law. These issues should be examined further before a new rule is contemplated.

First, the rule applies to offenses "committed by force or threat of force" that involve "oral sexual contact, sexual contact or sexual intercourse." "[C]ommitted by force or threat of force" is not defined in Arizona law. The closest definition is "forcible sexual assault" in A.R.S. §13-501(H)(3), regarding offenses for which juveniles can be charged as adults. While that definition could potentially suffice for the offense of sexual assault mentioned in the Petition's proposed new rule, the other sexual offenses would remain without reference for what "committed by force or threat of force" would entail. All of the conduct mentioned in the proposed rule can be committed without actual force or threat or force. Whether "force" was used can be very subjective. Is the act itself considered to be committed by force when a victim is unable to consent by law, for example? The lack of definition raises real issues that can lead to unnecessary litigation if a new process is mandated without further guidance.

Next, the proposed rule raises several logistical issues. If a victim requests testing, the prosecution must obtain a court order to have the defendant tested. The testing itself must then be conducted within 48 hours of the filing of the information or indictment if the defendant is in custody and within 48 hours of the defendant being served if the defendant is out of custody (the proposal doesn't mention whether the 48 hours are actual hours or business hours.) The proposed rule is setting up a timeframe that is difficult or impossible to meet, at least in a jurisdiction as large as Maricopa County. To know that a defendant has been served, get the request from the victim, file something with the court, get it assigned to a specific judge, get the order issued, get the notice to the defendant (and presumably the defendant's attorney if one has even be appointed yet) and get the defendant tested in such a short timeframe poses a burden on the prosecution, the jails, the testing facilities and the court.

The proposed expedited processes would result in additional time and resources for all involved. Prosecutors, the court, the jail, the laboratories and the defense would all need to stop whatever other work they are doing to ensure testing gets done in this very short timeframe. All of these processes would need to be developed amongst system partners. As with all new processes, especially in larger jurisdictions, any significant volume translates to actual costs. Whether those costs

would exceed the additional funding Arizona might receive by creating this new process is unknown.

Finally, and most importantly, Arizona already has a statute that addresses the Petitioner's concerns. A.R.S. §13-1415 provides a procedure for HIV testing and is actually much broader than the proposed rule.¹ The statute allows testing for HIV and sexually transmitted diseases for any sexual offense, or any other offense involving significant exposure, upon a victim's request. Sexual offense is defined as oral sexual contact, sexual contact and sexual intercourse, which is a more comprehensive application than the proposed rule, which limits testing to sexual offenses "committed by force or threats of force." The statute actually provides for testing earlier than the proposed rule, as it allows for testing as soon as there is any criminal filing, whereas the proposed rule triggers testing only after an information or indictment is filed. In many sex crimes cases, a complaint is filed prior to an information or indictment. Moreover, there are often situations where an indictment is obtained but not served because a defendant's whereabouts are unknown. The statute allows testing to occur in these situations whereas the proposed rule would not. Thus, the service to victims that the proposed rule is intended to provide is already available, and in fact is enhanced, under the current statute, but without the

¹ Another Arizona statute, A.R.S. §13-1210 provides a similar testing process if the victim is a hospital or public safety employee or volunteer.

very stringent timeline to get the testing completed. This is offset, however, by the statute's ability to begin the testing process earlier in the prosecution timeline and to request it in a greater number of cases.

The ability to facilitate testing under the statute would seem to fulfill the requirements of the federal grant. However, if it is determined that the specific language in the proposed rule is necessary to allow additional grant funding and if it is determined that the additional grant funding--which like most or all grant funding is undoubtedly transient--outweighs the concerns raised by the proposed rule, then consideration should be given to how the existing statute could best be revised to meet the federal requirements, to be feasible for all system partners, and to define the terms that are currently undefined in Arizona law. Enacting a rule for one, needlessly onerous, testing process and a statute for the same process in a broader context is unnecessary and would lead to preventable confusion and would seem to add no benefit for victims.

For all of these reasons MCAO opposes this Petition.

Respectfully submitted this ____ of April, 2023.

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