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ARIZONA SUPREME COURT

**PETITION TO AMEND Rule 9.1,
ARIZONA RULES OF CRIMINAL
PROCEDURE**

R-23-0013

MARICOPA COUNTY ATTORNEY'S OFFICE
COMMENT IN OPPOSITION

The Maricopa County Attorney's Office (MCAO) strongly opposes this Petition for the reasons set forth below.

The Central Arizona National Lawyers Guild ("Central AZ NLG") has submitted a petition to amend Rule 9.1 of the Arizona Rules of Criminal Procedure. This Petition purports to "end the controversial practice of permitting the state to try the accused of criminal offenses in absentia." It was a surprise to learn that this practice, long accepted in Arizona, is "controversial." It also allows criminally accused individuals to be rewarded for failing to appear.

Petitioners opine that Arizona should mirror the federal system and allow trials in absentia only if a defendant appears for trial, then absents him or herself after trial has started. Petitioners are clearly picking and choosing which federal processes to

follow. If Arizona mirrored all federal trial processes then criminal proceedings would be different in every aspect, including in jury selection and the discovery process. But Arizona does not mirror federal processes in most respects, including trials in absentia. This is evident in the very different rules between the jurisdictions. Federal Rule of Criminal Procedure 43(a)(2) states that a defendant must be present at “every trial stage, including jury impanelment and the return of the verdict.” Rule 43(c) states that a defendant waives his or her presence under these circumstances:

(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 that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

Crosby v. United States, 506 U.S. 255 (1993) interpreted this Rule to mean that if a defendant is present at the start of trial and voluntarily absents himself then trial can proceed but if the defendant is not present at the start of trial then trial cannot proceed without him. This is based on language in the rule that the defendant waives his or her right to be present if he or she voluntarily leaves the trial after it has commenced. Arizona has no such law. Rather, under Rule 9.1, Arizona Rules of Criminal Procedure:

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 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.

Arizona courts have repeatedly upheld the validity of this Rule. See *Thomas v. Blakey*, 211 Ariz. 124 (2005); *State, ex rel. Romley v. Superior Court*, 183 Ariz. 139 (1995); *State v. Tudgay*, 128 Ariz. 1 (1981).

Not only do Petitioners suggest ignoring established Arizona rule and precedent regarding trials in absentia, they also propose allowing sentencing to proceed in non-capital cases in a defendant's absence. They propose new language in Rule 9.1, Arizona Rules of Criminal Procedure, that would allow this. However, this would conflict with Rule 26.3(1)(C) and Rule 26.9, Arizona Rules of Criminal Procedure, which disallows sentencing from occurring in a defendant's absence. It would also undermine Arizona's current statutory scheme under which a defendant whose absence prevents sentencing from occurring within 90 days of conviction forfeits the right to appeal. A.R.S. §13-4033(C); *State v. Superior Court (Johnson)*, CV-21-0174-SA (March 24, 2023).

Another important distinction between the Arizona and federal systems is the Arizona Victims' Bill of Rights, found in Article 2 Section 2.1 of the Arizona Constitution. Among those rights is the victim's right to a speedy trial. Ariz. Const. art. 2, §2.1(A)(10). Conversely, a trial in absentia does not violate a defendant's constitutional rights. See *State v. Sainz*, 186 Ariz. 470, 472-73 (App. 1996) (Rule 9.1 permits the inference that a defendant is voluntarily absent from a proceeding and thereby waives his or her constitutional rights); *Brewer v. Raines*, 670 F.2d 117, 120 (9th Cir. 1982) (Rule 9.1 is not unconstitutional since the rule provides for a

knowing and intelligent waiver by requiring the defendant be made aware of his right to attend and adverse consequences that would follow should the defendant fail to do so before an inference of voluntariness attaches). A system wherein a defendant can voluntarily absent him or herself and therefore put a trial on hold indefinitely is the antithesis of a speedy trial for the victim.

As Petitioners undoubtedly know, cases do not get stronger with time. The passage of time can weaken memories, dilute evidence, or result in lost witnesses. Furthermore, in the crush of more recent cases, those where a defendant absented himself or herself from the process will naturally fall to the back of the line and could result in lack of prosecution due to workload and resource issues or could result in findings of post-indictment delay. Prosecutors have affirmative responsibilities, no matter how unrealistic, that can unintentionally lead to findings of post-indictment delay, thus letting defendants escape prosecution altogether. “[T]he standard is constant: whether the state took reasonable steps to locate the accused based upon all of the information that it possessed. Characteristic of cases of inadequate diligence is the state's failure to pursue significant leads.” *State v. Armstrong*, 160 Ariz. 159, 160, 771; P.2d 889, 890 (App. 1989); *Humble v. Superior Court*, 179 Ariz. 409 (1993).

Some recent cases in Maricopa County illustrate the importance of trials in absentia. In a 2018 case tried in September of 2022, the defendant was charged with aggravated DUI. He drove into oncoming traffic on the 202 while under the influence of methamphetamine while his license was suspended for a prior DUI. The defendant had previously failed to appear until a warrant was issued and he was picked up on the warrant. The State agreed to a reduction in bond so that the

defendant could participate in substance abuse treatment. He checked himself out of that treatment and absented himself from trial.

In a 2020 case tried in 2022, the defendant, a prohibited possessor, pointed a gun at his mother and pulled the trigger. Fortunately, the gun did not fire. The defendant's father was a necessary but uncooperative witness. Law enforcement was able to serve him and secure his appearance at trial, which the defendant initially failed to appear for. If trial hadn't proceeded when it did, it is unlikely that this witness's attendance would have been secured at a later date.

Similarly, in a 2022 case, the State was proceeding with a trial in absentia in a dangerous kidnapping and aggravated assault case where the victim and witnesses were reluctant to cooperate in the prosecution, which is common in domestic violence cases. After five months of investigative work and successful service of subpoenas, the State finally secured their attendance. The defendant ultimately appeared and the case proceeded. Had the State been precluded from proceeding in absentia, it is very unlikely that the victim and witnesses would have appeared at a later date, in which case a dangerous individual would have escaped accountability.

These few examples represent a tiny fraction of the tens of thousands of cases that go through Maricopa County Superior Court each year, but they illustrate the importance of allowing trials in absentia to proceed when necessary.

Petitioners' proposal creates a system where defendants can fail to appear and hope that their cases go away, either because the prosecution doesn't have sufficient resources to pursue older cases, or because witnesses or evidence do not remain viable. This would be an injustice to both public safety and victims. Such a system

would defy common sense and would allow the accused to control the process, rather than the court. For these reasons, MCAO strongly opposes Rule Petition R-23-0013.

Respectfully submitted this _____ of April, 2023.

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BY _____
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