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ARIZONA SUPREME COURT

In the Matter of: PETITION TO AMEND RULE 13 OF THE ARIZONA RULES OF CRIMINAL PROCEDURE	Supreme Court No. R-22-0042 Joint Comment by the Directors of the Maricopa County Indigent Defense Agencies

The Directors of the indigent representation offices for Maricopa County jointly submit this comment against the proposed amendment to Rule 13 of the Arizona Rules of

Criminal Procedure. Together, these public defense agencies handle most of the indigent felony cases filed in Maricopa County.

I. The Proposed Rule implicates an individual's right to privacy under the Fourth Amendment to the United States Constitution and Article II § 8 of the Arizona Constitution. Therefore, it is substantive in nature and is beyond the scope of the Court's rulemaking power.

The separation of powers between the legislative, judicial, and executive branches is enshrined in Article III of the Arizona Constitution. The Arizona Constitution grants the Supreme Court the power to make rules relative to all procedural matters in any court. Ariz. Const. Art. VI § 5(5). Rules promulgated by the Court may address only procedural matters. Meanwhile, the legislature is charged with the responsibility for enacting substantive law that "creates, defines, and regulates rights." *State v. Birmingham*, 96 Ariz. 109, 110 (1964). Court rules may only address procedural matters and may not abridge, enlarge, or modify substantive rights of a litigant. A.R.S. § 12-109(B)(1); *In re Marriage of Waldren*, 217 Ariz. 17, 177 ¶ 20 (2007).

The subject of the proposed rule involves the substantive rights of defendants, as the taking and testing of bodily fluids implicates privacy rights of defendants under the Fourth Amendment to the United States Constitution and Article II § 8 of the Arizona Constitution. *See Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 613 (1989); *Schmerber v. California*, 384 U.S. 757, 767-68 (1966); *Petersen v. City of Mesa*, 207 Ariz. 35 (2004). What the Proposed Rule seeks to accomplish is matter for the legislature, not for the judicial branch.

II. Proposed Rule 13.6 cannot be harmonized with A.R.S. § 13-1415

Proposed Rule 13.6 would specifically require, upon request of a victim, that a prosecutor obtain an order for a defendant charged with certain offenses to submit to testing for HIV within 48 hours of the filing or service of an information or indictment.

A.R.S. § 13-1415, enacted by the Legislature in 1990 and amended as recently as 2021, also address the testing of defendants charged with certain offenses for HIV and other sexually transmitted diseases. The statute provides that a prosecutor, upon request of a victim or victim guardian, shall petition the court for a testing order. However, the court must first determine, within 10 days of the petition, whether "sufficient evidence exists to indicate that significant exposure occurred" or that the act committed was a sexual offense. If the court makes the required finding, then it must order testing.

The Proposed Rule would shorten the timeframe for issuing an order and conducting testing while also removing the requirement for a judicial finding prior to issuance of the testing order. The Proposed Rule would be a judicial amendment of A.R.S. § 13-1415 and cannot be harmonized with the substantive statute enacted by the Legislature. When a court determines that a statute conflicting with a court promulgated rule is "substantive," the statute must prevail. *Seisinger v. Siebel*, 220 Ariz. 85, 92 ¶ 26 (2009).

III. The Proposed Rule would authorize unreasonable searches of a defendant's bodily fluids, in violation of the Fourth Amendment.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches. The reasonableness permissibility of a search is judged by balancing the intrusion on the individuals Fourth Amendment interests against the promotion of

legitimate governmental interests. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *Schmerber v. California*, 384 U.S. 757, 758 (1966). Unquestionably, the extraction of bodily fluids for testing constitutes a search within the meaning of the Fourth Amendment.

The applicable definition of sexual contact in Proposed Rule 13.6 comes from A.R.S. § 13-1401 and includes indirect, non-consensual touching of the female breast by any part of the body or by any object. A person who engages in non-consensual touching of a female breast, over the clothes, with any sort of object, would have committed a sexual offense for purposes of Proposed Rule 13.6. Similarly, a fully clothed person who engaged in frottage or grinding with a fully clothed, non-consenting person would have committed an act of sexual intercourse for purposes of Proposed Rule 13.6. Neither of these scenarios involves the likelihood of significant exposure to any sexually transmitted disease.

However, under Proposed Rule 13.6 judicial officers would have no discretion to conduct an individualized, fact-specific inquiry into the reasonableness of a petition for testing prior to issuing a testing order.[1] The Proposed Rule would unreasonably compel the issuance of an order for the extraction of bodily fluids in circumstances where transmission of HIV was unlikely, if not impossible. It expedites the process while removing the significant step of a judicial officer engaging in a fact-specific inquiry to determine the appropriateness of this intrusion.

1 A.R.S. § 13-1415 presents similar constitutional concerns, as it also permits the search of a person's bodily fluids if the person is charged with a "sexual offense" without any required determination about the reasonableness of the search. However, the constitutionality of the statute has not been specifically addressed in a published opinion.

IV. The Proposed Rule Fails to Mirror the Federal Statute and would not resolve any potential loss of funding.

34 U.S.C. § 10461(d)(1)(A) provides that States or units of local government shall not be entitled to 5 percent of certain grant funds unless they are able to certify that they have certain laws, policies, or regulations. Specifically, they must be able to certify that there is a law, policy or regulation that requires: (1) at the request of a victim against a defendant against whom an information or indictment is presented; (2) testing for HIV not later than 48 hours after the presentation or service of the indictment or information, (3) if the defendant is charged with a crime in which by force or threat of force the victim is compelled to engage in sexual activity.

Sexual activity is not defined by any relevant federal statute. Meanwhile, Proposed Rule 13.6 relies on specific statutory definitions under Arizona law to limit offenses where testing could be ordered. There are certainly sexual acts and practices that could be considered "sexual activity" as used in the federal statute that would fall outside of the definition of "sexual offenses" used in the Proposed Rule. As such, Proposed Rule 13.6, if enacted, is unlikely to result in compliance with 34 U.S.C. § 10461(d)(1)(A).

Conclusion

Proposed Rule 13.6 is an effort to secure an additional 5 percent of grant funding for specific programs from the Office on Violence Against Women. While the proposal is certainly well intentioned, it has several shortcomings which violate the principle of Separation of Powers, exceed this Court's authority with regards to rule making, would potentially violate the reasonableness requirement of the Fourth Amendment, and is still

unlikely to place Arizona in compliance with 34 U.S.C. § 10461(d)(1)(A). For these reasons, this Court should not adopt Proposed Rule 13.6, as set forth in R-22-0042.

Respectfully submitted this 30th day of April, 2023.

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