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**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

**PETITION TO AMEND  
ARIZONA RULES OF CRIMINAL  
PROCEDURE RULE 9.1**

**In Re: R-23-0013**

**ARIZONA PROSECUTING  
ATTORNEYS' ADVISORY  
COUNCIL COMMENT IN  
OPPOSITION**

The Arizona Prosecuting Attorneys' Advisory Council (APAAC) herein respectfully submits its comments in opposition to rule change petition R-23-0013 submitted by the Central Arizona National Lawyers Guild (Petitioner) to fundamentally alter Rule 9.1, Arizona Rules of Criminal Procedure. In addition to the basis articulated below for APAAC's opposition to the proposed rule amendment, we acknowledge and support

the opposing comment filed by the Maricopa County Attorney's Office (MCAO).

The proposed rule change effectively all-but-eliminates criminal trials *in absentia*, except where the defendant voluntarily absents himself after the trial has commenced or where a defendant's repeated disruptions force the trial court to remove the defendant from the courtroom.

Petitioner asserts that such a drastic change is necessary because (1) the Arizona's Rules of Criminal Procedure should more closely mirror the Federal Rules of Criminal Procedure, and (2) the rules should align with what Petitioner deems as the "historical view that a criminal trial could not be conducted in the accused absence." *See* Petition at p. 1.

Petitioner jumps to the conclusion that the Arizona Constitution founders intended to prohibit criminal trials *in absentia* on the basis that the first such trial occurred in the state 10 years after the adoption of the Constitution. This assumption ignores Arizona's long history of permitting criminal trials to proceed *in absentia*, including those where a defendant is voluntarily absent for the entirety of trial. For example, in *State v. Ransom*, 62 Ariz. 1, 152 P.2d 621 (1944), the Arizona Supreme Court upheld the conviction of a defendant who was absent during courtroom argument. The

Court recognized that Arizona law specifically allowed for the case to proceed outside the defendant's presence:

Section 44-1401, A.C.A. 1939, reads as follows:

Presence of defendant when prosecution for felony.—In a prosecution for a felony the defendant shall be present:

- (a) At arraignment.
- (b) When a plea of guilty is made.
- (c) At the calling, examination, challenging, impanelling and swearing of the jury.
- (d) At all proceedings before the court when the jury is present.
- (e) When evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury.
- (f) At a view by the jury.
- (g) At the rendition of the verdict.

*If the defendant is voluntarily absent the proceedings mentioned above except those in clauses (a) and (b) may be had in his absence if the court so orders.*

*Id.*, 62 Ariz. at 6-7, 152 P.2d at 623 (emphasis added). Arizona has continued to maintain its legal position of permitting trials *in absentia*, with Rule 9.1, Arizona Rules of Criminal Procedure now providing:

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.

Further, Petitioner's reliance on *Hopt v. People of the Territory of Utah*, 110 U.S. 574, 4 S.Ct. 202 (1884), and *Crosby v. U.S.* 506 U.S. 255, 113 S. Ct. 748 (1993), is misplaced. Neither of these cases support the Petitioner's position that criminal trials conducted *in absentia*, including those where the defendant has voluntarily absented himself from the entirety of the trial after proper notification by the court that trial can proceed in his absence, violates the Sixth Amendment or is otherwise contrary to historical underpinnings of the United States and Arizona constitutions.

In *Hopt*, the United States Supreme Court considered whether it was error for the defendant to be excluded from a portion of trial without his express personal waiver. *Id.* at 577-578, 4 S.Ct. at 203-204. Contrary to Petitioner's assertion, *Hoyt* does not hold, nor does it suggest, that the right of a defendant to be present at his trial cannot be waived by voluntary absenting himself from the trial. Rather, the Court's holding was based entirely on the verbiage of a then-existing territorial code.

The United States Supreme Court has subsequently recognized that language purporting to suggest that the Sixth Amendment or the

underpinnings of the U.S. Constitution prohibit conducting any portion of the trial without the physical presence of the accused is dicta and not precedence. *See Illinois v. Allen*, 397 U.S. 337, 342, 90 S. Ct. 1057, 1060 (1970) (“The broad dicta in *Hopt v. Utah*, *supra*, and *Lewis v. United States*, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892), that a trial can never continue in the defendant's absence have been expressly rejected.”); *see also U.S. v. Reyes*, 764 F.3d 1184, fn. (9<sup>th</sup> Cir. 2014).

Similarly, the *Crosby* Court focused on the specific language of the jurisdiction’s criminal rules of procedure in addressing whether a federal trial court erred in permitting trial to proceed *in absentia*. *Supra*. There, Federal Rule of Criminal Procedure 43, provided in applicable part:

- (a) PRESENCE REQUIRED. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
- (b) CONTINUED PRESENCE NOT REQUIRED. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,
  - (1) is voluntarily absent after the trial has commenced . . .

*Id.* at 258, 113 S.Ct. at 751. Finding the plain language of Rule 43 dispositive, the Court reversed the conviction. *Id.* a 262, 113 S.Ct. at 753.

Therefore, Petitioner has failed to justify this radical change on the basis of either the United States or Arizona Constitutions.

Finally, elimination of trials *in absentia* would be extremely detrimental to a fair criminal justice system. Justice suffers in cases where prosecution becomes no longer feasible, not because of the merits of the case, but because the duly indicted and arraigned defendant chose to flee or otherwise intentionally disregard the orders of the court. When proper findings are made by the trial court regarding a defendant's voluntary absence, trials *in absentia* do not violate a defendant's right to confront his accusers.

Accordingly, for the reasons stated above and those contained in the MCAO opposing comment, APAAC respectfully requests that the petition be denied in its entirety.

Respectfully submitted this 1<sup>st</sup> day of May, 2023,

By Elizabeth Burton Ortiz  
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APAAC