

**ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE**  
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**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

In the Matter of: ) No. R-23-0013  
)  
) **COMMENT OF ARIZONA**  
Petition to Amend Arizona Rule of ) **ATTORNEYS FOR CRIMINAL**  
Criminal Procedure 9.1 ) **JUSTICE (AACJ) IN SUPPORT OF**  
) **PETITION TO AMEND ARIZONA**  
) **RULE OF CRIMINAL**  
\_\_\_\_\_) **PROCEDURE 9.1**

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) hereby submits the following comment on the petition to amend Arizona Rule of Criminal Procedure 9.1.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public

awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ supports the proposal to amend Rule 9.1. Petitioner correctly states the legal and historical analysis related to the right to a jury trial, the right to be present for trial, and the federal rule and case law holding that the defendant must be present for the commencement of trial, so AACJ will not rehash the Petition. Instead, AACJ will focus its attention on two specific points.

First, prosecutors have frequently abused Rule 9.1 by pushing mundane cases to trial that involve no victims (for example, DUI or drug prosecutions) where a defendant had not appeared in court since a case management conference or even arraignment.<sup>1</sup> Such defendants are rarely evading justice purposefully, rather they simply miss court because they are homeless, have cognitive or mental health issues, or lost paperwork. Other defendants were deported unbeknownst to their lawyers or the prosecutors, and in a couple of cases, counsel was unaware at the time of the trial *in absentia* that the client had died. Not only are such trials *in absentia* manifestly unjust, but they are a waste of scarce judicial resources.

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<sup>1</sup> As a result of the COVID-19 pandemic, prosecutors were forced to reassess priorities as to which cases proceeded to trial because courts had to reduce the number of cases that proceeded to a jury trial (including a full shutdown of jury trials in Pima County for more than one year).

Second, A.R.S. § 13-4033(C) deprives defendants of their right to appeal convictions if their absence causes sentencing to be delayed by ninety days or more. Although the State must prove that the absence from trial was knowing, intelligent, and voluntary, this Court held in *State v. Brearcliffe*, 525 P.3d 1085, 1090 ¶¶ 15-17 (2023), that the State makes a *prima facie* case for such a waiver merely by producing the defendant's signature on a form that contains fine print concerning possible consequences of the defendant's absence. In cases where a defendant faces a significant loss of liberty, depriving a person of the right to appeal creates too high a risk of innocent persons being convicted and errors remaining uncorrected. Any justification for proceeding with trial *in absentia* should be at least as important as the defendant's interest in a fair trial and fair appeal.

The only justification that would meet this standard is a case where a victim has invoked the right to a speedy trial under article 2, § 2.1(A) of the Arizona Constitution. Of course, not every victim case is the same; committing credit card fraud against a bank is not the same as a rape or attempted murder. Also, merely having a victim fill out a prosecutor's postcard checking off boxes for which rights to invoke is not the same as having a victim or victim representative attend court and explain why trial should proceed in a defendant's absence. In such cases where victims invoke the right to a speedy trial, the State should file a motion to proceed to trial *in absentia*, and the trial court should hold a hearing and make findings of

fact that support proceeding to trial. The trial court should make findings on the record that reflect the significance of the constitutional rights at stake.

**Conclusion**

For these reasons, AACJ requests this Court grant the petition to amend Rule 9.1. AACJ is amenable to amendments that would make exceptions for cases involving victims who invoke the right to a speedy trial.

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ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

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