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**IN THE SUPREME COURT**

**STATE OF ARIZONA**

In the Matter of:

Petition to Amend [Rule 9.1 of the Arizona Rules of Criminal Procedure](#)

Arizona Supreme Court No. R-23-0013

**Reply to Comments Re: Petition to Amend [Rule 9.1 of the Arizona Rules of Criminal Procedure](#)**

Pursuant to [Rule 28 of the Rules of the Arizona Supreme Court](#), the Central Arizona National Lawyers Guild (“Central AZ NLG”) respectfully submits this reply to the comments concerning its petition to amend [Rule 9.1 of the Arizona Rules of Criminal Procedure](#). This Court should adopt the proposal as written. Alternatively, this Court should consider the compromise solution offered by the State Bar of Arizona and Arizona Attorneys for Criminal Justice.

## **I. The Comments Reinforce the Need to Reform [Rule 9.1](#)**

The Central AZ NLG urges this Court to adopt the proposal as written. [Rule 43 of the Federal Rules of Criminal Procedure](#) is not novel. It is grounded in ancient concepts of fairness and justice. The comments in opposition do not establish otherwise. The presumption of innocence and the presence of the accused are essential components of reliable criminal trials.

The rights of victims are best afforded by reliable justice, not hasty and unjust procedures. But if this Court is not inclined to align Arizona's absentia trial procedures with history and the federal rule, it should consider the compromise proposal suggested by the State Bar of Arizona and Arizona Attorneys for Criminal Justice.

### **A. Trial in absentia under Arizona's current Rule is not compatible with the historical requirement that the accused be present.**

History has long required the presence of the accused at criminal trials. [Rule 43 of the Federal Rules of Criminal Procedure](#) has a proven track-record, the common-law origins of which predate Arizona statehood. Nothing offered by the opposing comments discounts this history. This Court should find the history compelling enough to adopt the proposal.

**1. Neither MCAO nor APAAC contest the historical consensus concerning the necessity for the presence of the accused at trial.**

Neither MCAO nor APAAC contest that the historical consensus leading to the adoption of the Sixth Amendment of the [United States Constitution and Article 2](#), Section 23 of the Arizona Constitution reflected the view that society expects the presence of the accused at the commencement of all criminal trials.

APAAC claims that Arizona’s “long history of permitting” absentia trials somehow establishes that the founders of the Arizona Constitution approved of the practice. APAAC Comment at 2. But APAAC does not explain how a law passed in 1939 reflects a valid interpretation of a constitutional provision adopted in 1912. Nor does it dispute the historical consensus that the founders would have undoubtedly considered when declaring that the right to trial must be “inviolable.” [Ariz. Const. art. II, § 23](#).

APAAC’s reliance on a [State v. Ransom, 62 Ariz. 1 \(1944\)](#) is also unavailing. APAAC Comment at 2-3. *Ransom* didn’t involve a constitutional challenge to the 1939 statute authorizing absentia trials upon the defendant’s voluntary absence. Rather, *Ransom* acknowledged that the court must approve of a defendant’s voluntary absence under the statute where defendant had requested leave from the court to be absent in that case. *Id.* at 624. *Ransom* hardly stands for the proposition that either the Sixth Amendment or [Article 2, Section 23](#) authorized trial courts to

infer the accused's absence at trial is voluntary and permit the trial to proceed in absentia.

The case that led to the erroneous conclusion that Arizona's absentia trial rule posed no constitutional problems is *State of Ariz. v. Hunt*, 408 F.2d 1086 (6th Cir. 1969). *Hunt* overturned a federal district court's order granting habeas corpus relief based on a finding that an Arizona absentia trial violated the Sixth Amendment. But the reasoning of the Sixth Circuit's decision was poor. *Hunt* rested on the faulty conclusion that there was little difference between Arizona's rule and the federal rule. *Id.* at 1095. "In other words, the court completely discounted the fact that the federal rule only allows for trial in absentia if the accused was present at the commencement of trial, which was not the case in *Hunt*." Major Sarah C. Sykes, "*Defense Counsel, Please Rise*": A Comparative Analysis of Trial in Absentia, 216 *Mil. L. Rev.* 170, 193 (2013).

Similarly, earlier decisions from this Court in *State v. Cumbo*, 96 Ariz. 385 (1964), and *State v. Taylor*, 104 Ariz. 264 (1969), failed to include any discussion on the historical view that the accused's presence at the commencement of trial is a constitutional requirement. Both decisions merely asserted that the accused's presence can be waived before the commencement of trial without explaining why Arizona could depart from the federal rule or history. *Cumbo*, 96 Ariz. at 387; *Taylor*, 104 Ariz. at 265.

Historically, the presence of the accused at the commencement of trial was a jurisdictional requirement. *See* Central AZ NLG Petition to Amend [Rule 9.1 at 4](#) (citing F. Pollock & F. Maitland, *THE HISTORY OF ENGLISH LAW*, 594-95 (2d ed. 1923)). The opposing comments offered by APAA and MCAO do not refute this history. Nor do they provide a compelling reason for this Court to permit Arizona’s absentia trial rule to continue to be a historical aberration.

**2. APAAC misstates the reach of *Illinois v. Allen*, 397 U.S. 337 (1970).**

APAAC claims that the United States Supreme Court has disavowed the claim that the “Sixth Amendment or the underpinnings of the United States Constitution prohibit conducting *any* portion of the trial without the presence of the accused.” APAAC Comment at 5 (citing *Illinois v. Allen*, 397 U.S. 337, 342 (1970) (emphasis added)).

But APAAC misapprehends the reach of *Illinois v. Allen*, 397 U.S. 337 (1970). Nothing in that case stands for the proposition that the Sixth Amendment permits absentia trials when the accused is not present at the beginning of trial. Rather, the case addressed whether the Sixth Amendment is violated when the accused is removed from trial for engaging in seriously disruptive behavior. *Id.* at 347.

That the case even made it to the United States Supreme Court after the Seventh Circuit Court of Appeals found that trial courts may never remove disruptive defendants from their own trial because the right to be present is absolute only reinforces the historical view reflected in *Hopt v. People*, 110 U.S. 574 (1884), that the Sixth Amendment requires criminal trials to commence with the presence of the accused. See *U.S. ex rel Allen v. State of Ill.*, 413 F.2d 232, 235 (1969) (overruled by *Illinois v. Allen*, 397 U.S. 337 (1970)).

Nothing in the proposed rule contravenes *Illinois v. Allen*, 397 U.S. 337 (1970), or the ability of trial judges to remove seriously disruptive defendants from the courtroom following the commencement of trial.

**3. The federal rule reflects the constitutional minimum afforded by the 6th Amendment.**

The opposition comments emphasize that the United States Supreme Court has not expressly rooted [Rule 43 of the Federal Rules of Criminal Procedure](#) in the protections of the Sixth Amendment. APAAC Comment at 4-6; MCAO Comment at 2.

While this may be technically true, the United States Supreme Court has placed the right of the accused to be present at trial under the umbrella of due process. *Hopt* asserted that if the accused is “deprived of his life or liberty without being so present, such deprivation would be without that due process of law required

by the constitution.” *Hopt*, 110 U.S. at 579. Although *Crosby* disavowed taking a position one or another on the constitutionality of absentia trials, it noted that there are “practical reasons for distinguishing between flight before and flight during a trial.” *Crosby*, 506 U.S. at 261. Such distinguishing reasons favored a rule against absentia trials unless the accused’s absence occurs after the commencement of trial. *Id.*

More recently, Justice Sotomayor noted that “whether the Constitution permits the trial in absentia of a defendant who is not present at the start of trial is a serious question.” *Fairey v. Tucker*, 567 U.S. 924 (2012) (Sotomayor, J., dissenting from denial of certiorari). In doing so, Justice Sotomayor implied that the United States Supreme Court was inclined to extend its reasoning in *Crosby* to all cases within the ambit of the Sixth Amendment because if “a clear line is to be drawn marking the point at which the costs of delay are likely to outweigh the interests of the defendant and society in having the defendant present, the commencement of trial is at least a plausible place at which to draw the line.” *Id.* (quoting *Crosby*, 506 U.S. at 261).

History suggests that Arizona’s approach to absentia trials should be deemed unconstitutional. Therefore, this Court should adopt the proposal as written. Comments suggesting that the federal approach to absentia trials would conflict with other rule or the Victims’ Bill of Rights are similarly unavailing.

**B. The proposal’s conflict with [Rule 26.9 of the Arizona Rules of Criminal Procedure](#) only highlights the inadequacy of the current version of [Rule 9.1](#).**

MCAO aptly points out that the proposal to adopt the federal absentia rule would conflict with the absolute requirement that a defendant be present for sentencing under [Rule 26.9 of the Arizona Rules of Criminal Procedure](#). MCAO Comment at 2. But the conflict between the proposal and [Rule 26.9](#) only reinforces the conclusion that the existing absentia trial procedures are inadequate.

In 1995, [Rule 43 of the Federal Rules of Criminal Procedure](#) was amended to “make clear that a defendant who, initially present at trial ... but who voluntarily flees before sentencing, may nonetheless be sentenced in absentia.” *See* Comment to 1995 Amendments, [Rule 43 Fed. R. Crim. P.](#) Prior to the 1995 amendment, federal courts had concluded that a defendant could not waive his presence at sentencing by fleeing before sentencing. *See United States v. Turner*, 532 F. Supp. 913, 916 (N.D. Cal. 1982); *United States v. Brown*, 456 F.2d 1112 (5th Cir. 1972), *cert. denied*, 415 U.S. 960 (1974). However, there is no such misapprehension following the 1995 amendment. *See, e.g., United States v. Ornelas*, 828 F.3d 1018, 1021 (9th Cir. 2016) (finding that defendant voluntarily waived presence at sentencing while also assuming that “due process and [Rule 43](#) are coextensive.”).

In *State v. Fettis*, 136 Ariz. 58, 59 (1983), this Court acknowledged that there is not a constitutional prohibition on conducting sentencing proceedings in absentia where the defendant's absence is voluntary. This Court, however, emphasized that the requirement that defendant be present at sentencing was based on its own rules. In doing so, *Fettis* pointed to the ABA Criminal Justice Standards for the proposition that the "ancient origins" of the assertion of the right of allocution at sentencing are requirements for a "reasonable and rational sentencing" where the judge can "personally question and observe the defendant." *Fettis*, 136 Ariz. at 59.

The need to observe defendants in criminal jury trials is no less important for juries than for a judge at sentencing.

But since *Fettis*, the constitutional considerations from the defendant's perspective have shifted. Now, a defendant can forfeit his constitutional right to appeal if his absence delays the sentencing from occurring within ninety days of the conviction. See *State v. Brearcliffe*, 525 P.3d 1085, 1089 (Ariz. 2023) (upholding A.R.S. § 13-4033(C) despite Article 2, Section 24's constitutional guarantee of the right to appeal in *all* cases.) Now, the procedural protections *Fettis* recognized serve as a mechanism to deprive defendants of the constitutional right to appeal.

If this Court follows the federal model, it can easily amend Rule 26.9 to read: "The defendant has a right to be present at presentencing and sentencing hearings." The result would protect the right to appeal and the right to be present at trial while

adopting a logically consistent framework for absentia trials and sentencing hearings.

**C. The proposal does not conflict with the Victims Bill of Rights.**

MCAO, the State Bar of Arizona, and Arizona Attorneys for Criminal Justice (“AACJ”) suggest that the adoption of the proposal may conflict with the right to a “speedy trial” in [Article 2, Section 2.1 of the Arizona Constitution](#). MCAO Comment at 3; State Bar Comment at 2; AACJ Comment at 3.

The State Bar of Arizona correctly notes that federal constitutional rights of criminal defendants must prevail when there is a conflict with victims’ rights. State Bar Comment at 2 (citing *State ex. Rel. Romley v. Superior Court*, 172 Ariz. 232 (App. 1992)). If the historical view of jury trials matter, then the concern about victims’ rights to speedy trials is likely subordinate to the Sixth Amendment of the United States Constitution or [Article 2, Section 23 of the Arizona Constitution](#).

But such a determination need not arise because there is not a conflict between this proposal and the right of victims to a speedy trial. Victims’ rights are not absolute. *See, e.g., R.S. v. Thompson in & for Cnty. of Maricopa*, 251 Ariz. 111, 115, ¶ 1 (2021) (victims’ rights to refuse discovery requests are not absolute). And victims are not a party to a case; nor may victims usurp the role of the prosecution. *State v. Lamberton*, 183 Ariz. 47, 51 (1995). Recently, a divided portion of this Court recognized that the right to be heard on the right to prompt and final resolution does

not create a victim right that trumps the defendant’s procedural right to delayed post-conviction proceedings. *Fay v. Fox in & for Cnty. of Maricopa*, 251 Ariz. 537, 540, ¶ 17 (2021).

Strikingly absent from any of the comments expressing concerns about the longstanding federal rule in light of Arizona’s constitutional scheme for victims is the importance of the presence of the accused to just and reliable outcomes. Implicit within the right to a “speedy trial” is the right to a constitutionally reliable determination of guilt. Victims are not protected when the innocent are convicted and the guilty run free because the jury was encouraged to convict an empty chair.

A basic but ancient and inextricable connection between the presumption of innocence and the requirement that the accused be present at trial was explicitly recognized in *Coffin v. U.S.*, 156 U.S. 432, 454 (1895) (“The noble (divus) Trajan wrote to Julius Frontonus that no man should be condemned on a criminal charge in his absence, because it was better to let the crime of a guilty person go unpunished than to condemn the innocent.”) (internal citation omitted). In *Coffin*, the United States Supreme Court reaffirmed the ancient principle demanding the application of the presumption of innocence in criminal trials. *Id.* at 459-460. History dating back to Roman era supports the conclusion that the presumption of innocence is undermined by absentia trials. *Id.* at 454.

By amending Arizona's absentia trial rules to come into line with a federal practice older than Arizona itself, victims will be afforded more reliable and final dispositions.

This Court should adopt the proposal as written.

But if the federal experience and history are not enough to convince this Court to depart from Arizona's troubled experiment with absentia trials, a modest reform would be better than the status quo.

**D. The compromise position offered by the State Bar and Arizona Attorneys for Criminal Justice is preferable to the status quo.**

The State Bar of Arizona and AACJ<sup>1</sup> both propose that this Court consider a middle-ground approach to reforming Rule 9.1 by requiring trial courts to balance the constitutional rights of the accused and the victim(s) in deciding whether to permit the state to proceed with a trial in absentia. State Bar Comment at 3-4; AACJ Comment at 3-4.

Prior to *Crosby*, a balancing test articulated by the Second Circuit in *U.S. v. Tortora*, 464 F.2d 1202 (1972) took hold in the federal courts to govern when the government could try a case in absentia if the defendant absconded before jury selection. See Eugene L. Shapiro, *Examining an Underdeveloped Constitutional*

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<sup>1</sup> AACJ also supports the proposal as written. AACJ Comment at 2. AACJ's recommendation for a compromise solution appears to be offered in the context of this Court rejecting the proposal as written. *Id.* at 3-4.

*Standard: Trial in Absentia and the Relinquishment of A Criminal Defendant's Right to Be Present*, 96 Marq. L. Rev. 591, 608-613 (2012).

The *Tortora* balancing test required trial courts to authorize absentia trials only in “extraordinary” circumstance if the “public interests clearly outweighs that of the voluntarily absent defendant.” *Tortora*, 464 F.2d at 1210 (2d Cir. 1972), *abrogated by Crosby v. United States*, 506 U.S. 255 (1993). The trial court would assess the likelihood that the trial would soon proceed with the defendant, the difficulty of rescheduling, and problems posed for the government’s witnesses by more than one trial occasioned by the defendant’s absence. *Id.*

The adoption of a *Tortora* compromise would mitigate much of the harm caused by the existing absentia trial procedures. Although some prosecutors exercise their discretion in favor of protecting the rights of the accused, the Petitioner has become aware through anecdotal accounts that MCAO may now have a policy of demanding absentia trials in all cases where Rule 9.1 may conceivably apply. The result is that absentia trials are pursued as a means to more easily obtain convictions.

If adopted, a *Tortora* compromise would also address the concerns with the current proposal outlined by MCAO, APAAC, and the State Bar of Arizona. A *Tortora* compromise would also allow criminal defendants to pursue their constitutional claims concerning the validity of absentia trials to a higher court. *See*,

e.g., *Tacon v. Arizona*, 410 U.S. 351 (1973) (dismissing a challenge to Arizona’s absentia rule as improvidently granted due to vehicle issues).

Accordingly, Petitioner respectfully offers the following language in addition to the proposal outlined in the Petition to address the controversy surrounding Arizona’ absentia trial regime:

**Rule 9.1. The Defendant's Waiver of the Right to Be Present**

- A.** Except for sentencing or as these rules otherwise provide, a defendant's voluntary absence **may** 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.
- B.** **A trial may be conducted in the defendant’s voluntary absence if the trial court balances the following factors and determines that extraordinary circumstances exist to warrant an *absentia* trial:**
- 1. The constitutional rights of the defendant to be present at trial;**
  - 2. The constitutional rights of the victim(s) to a speedy trial;**
  - 3. The likelihood that the trial may soon proceed with the defendant’s presence;**
  - 4. Any prejudice to a party’s ability to present its case caused by a delay in the trial date**

## **II. Conclusion**

This Court should adopt the proposal as outlined in the Petition. The federal approach to limiting absentia trials is consistent with history, ancient views of fundamental rights, and the rights recognized in the constitutions of the United States and the State of Arizona.

But if this Court is not inclined to bring Arizona's absentia trial practice in line with the federal practice and historical consensus, then this Court should consider a compromise position that requires trial courts to balance the varying interests of defendants, victims, and society to a just resolution in criminal cases before authorizing criminal trials to proceed despite the absence of the accused.

**Respectfully submitted May 31<sup>st</sup>, 2023**

**Central Arizona National Lawyers Guild**

By \_\_\_\_\_ /s/

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**Executive Committee Member**