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ARIZONA SUPREME COURT

In the matter of:)
)
PETITION TO AMEND SUPREME) Supreme Court No. 23-_____
COURT RULE 123(d)(7)) (expedited consideration and
) emergency adoption requested)
)
)
_____)

Pursuant to Rule 28 of the Rules of the Supreme Court, Petitioner respectfully petitions this Court to amend Supreme Court Rule 123(d)(7) as shown in Appendix A to establish provisions for public access to court records in proceedings conducted under A.R.S. Title 36, Chapter 40 related to defendants who have been involuntarily committed after a finding of incompetence and dangerous under A.R.S. § 13-4521.

The proposed amendments are prompted by the enactment of Senate Bill (SB) 1310 from the 2022 Second Regular Session of the 55th Legislature as more particularly described below, which becomes effective on January 1, 2024. Accordingly, Petitioner seeks expedited consideration of this petition and emergency adoption of the proposed amendments as set forth in Appendix A. A copy of SB 1310 is attached as Appendix B.

I. Introduction and Background

SB 1310 creates a mechanism by which a defendant charged with a serious offense as defined in A.R.S. § 13-706 may be involuntarily committed to a secure state mental health facility if the defendant is found incompetent to stand trial, there is no substantial probability that the defendant will become competent within the allowable timeframe, the proof is evident or the presumption great that the defendant committed the act that constitutes a serious offense, and the defendant is determined to be dangerous (defined).

Under A.R.S. § 13-4517(A), if a defendant is found incompetent to stand trial and there is no substantial probability that the defendant will regain competency within 21 months or within the defendant's maximum possible sentence, whichever is less, on request of the defendant or the State, the court can do one or more of the following: (1) remand the defendant to an evaluating agency approved and licensed under Title 36 to begin civil commitment proceedings; (2) order the appointment of a guardian ad litem to investigate whether the defendant is or may be in need of a guardian, a conservator or any other protective order; or (3) release the defendant from custody and dismiss the charges without prejudice. SB 1310 adds a new subsection to A.R.S. § 13-4517(A) which provides that if the defendant is charged with a serious offense as defined in section 13-706, a party can request that the court

order a trial to determine if the defendant is dangerous and should be involuntarily committed.

SB 1310 also creates A.R.S. § 13-4521, which sets forth the procedures for determining whether the defendant is dangerous and should be involuntarily committed. If the trier of fact determines that the defendant is dangerous and should be involuntarily committed, the court must dismiss the charges without prejudice and order the defendant to be committed to a secure state mental health facility. All further proceedings will then be conducted under Title 36, Chapter 40, which is a new chapter of Title 36 also created by SB 1310.

“Additional proceedings” under Title 36, Chapter 40 will include biannual examination reports from a psychiatrist, psychologist, or other competent professional of the secure state mental health facility related to the treatment and education the committed defendant has received, a prognosis for that person’s restoration to competency, and whether that person remains dangerous. There may also be proceedings related to petitions for discharge and petitions for conditional release to a less restrictive alternative and revocation of the same, which would likely have similar evaluation and diagnostic reports filed that should not be subject to public inspection.

II. Grounds for Approval

Although Arizona’s judicial branch has historically maintained an open records policy, this Court has recognized that this policy does not prescribe unfettered access to judicial records. Rule 123(c)(1) provides:

Historically, this state has always favored open government and an informed citizenry. In the tradition, the records in all courts and administrative offices of the Judicial Department of the State of Arizona are presumed to be open to any member of the public for inspection or to obtain copies at all times during regular office hours at the office having custody of the records. *However, in view of the possible countervailing interests of confidentiality, privacy or the best interests of the state public access to some court records may be restricted or expanded in accordance with the provision of this rule, or other provisions of law.* (Emphasis added.)

In *London v. Broderick*, this Court explained that the open records rule implements the public’s interests in seeing that courts operate efficiently and effectively. 206 Ariz. 490, 493, 80 P.3d 769, 772 (2003) At times, however, “the benefits of public disclosure must yield to the burden imposed on private individuals or the government itself by disclosure.” *Id.* Accordingly, limitations on public disclosure become necessary to protect privacy interests, confidential information, and certain governmental interests. *Id.*

This Court recently adopted Supreme Court Rule 123(d)(7) to address documents filed into A.R.S. Title 36, Chapter 37 cases that should not be open to public inspection. It is Petitioner’s position that the rationale for adopting the new section 7 of Supreme Court Rule 123(d) parallels the rationale for adopting

Petitioner's proposed amendments related to certain documents filed into a case initiated under A.R.S. Title 36, Chapter 40.

Moreover, because the dismissal of the criminal charges will prompt the closure of the criminal case, courts will need to open a new civil case to conduct further proceedings related to the person's involuntary commitment to a secure state mental health facility. These additional proceedings may result in otherwise confidential documents being filed into the new civil case, such as psychological or psychiatric reports, diagnostic examinations, etc. Such documents would be closed to the public under Supreme Court Rule 123(d)(2)(A) and the new 123(d)(7) if they were filed into a criminal case or an A.R.S. Title 36, Chapter 37 case, so they should be similarly closed to the public when they are filed into a civil case opened under A.R.S. Title 36, Chapter 40.

III. Proposed Amendments

Petitioner proposes amending Supreme Court Rule 123(d)(7) so that the provisions of Supreme Court Rule 123(d)(7) apply to cases opened for purposes of holding A.R.S. Title 36, Chapter 40 proceedings as follows:

- Amending the title of Rule 123(d)(7) to include "Dangerous and Incompetent Person"
- Amending Rule 123(d)(7)(A) to include cases filed under A.R.S. Title 36, Chapter 40 and documents listed in A.R.S. § 36-4002

- Amending Rule 123(d)(7)(B) that establishes who may have access to otherwise closed documents to include:
 - the committed defendant,
 - the committed defendant’s attorney,
 - the attorneys who represent the state or the secure state mental health facility where the defendant is committed,
 - lawful representatives of the secure state mental health facility where the defendant is committed,
 - lawful representatives of a service provider designated by the court to provide inpatient or outpatient treatment or to monitor or supervise any other terms and conditions of a person’s placement in a less restrictive alternative under A.R.S. § 36-4005, and
 - a retained or appointed competent professional under A.R.S. § 36-4002.

- Amending Rule 123(d)(7)(E) to include A.R.S. Title 36, Chapter 40

IV. Request for Expedited Consideration and Emergency Adoption

SB 1310 becomes effective on January 1, 2024. Therefore, as permitted by Supreme Court Rule 28(h), Petitioner requests expedited consideration and emergency temporary adoption of the proposed rule amendments at the Court’s December 2023 Rules Agenda with a comment period to follow and consideration

for permanent adoption at the Court's August 2024 Rules Agenda. Additionally, Petitioner respectfully requests that this petition be open for preliminary comments until October 27, 2023, with a reply due by November 6, 2023, to provide an opportunity for the public to comment before this petition is considered at the Court's December 2023 Rules Agenda.

RESPECTFULLY SUBMITTED this 1st day of September, 2023.

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APPENDIX A

Rules of the Supreme Court of Arizona

(deletions shown with ~~strikethrough~~, new language is underlined)

Rule 123. Access to Judicial Records of the State of Arizona

(a) through (c) [No Change]

(d) **Access to Case Records.** All case records are open to the public except as may be closed by law or as provided in this rule. The court must state the reason for closing any record and include a reference to any statute, case, rule or administrative order on which the court relied.

(1) through (6) [No change]

(7) Sexually Violent Person or Dangerous and Incompetent Person Case Records.

(A) Except as otherwise provided by this rule or law, in cases filed under ARS Title 36, Chapters 37 or 40, any document that is closed under (d)(2)(A) or is listed in ARS §§ 36-3702(D)(2)(a), (b), or (D)(3) through (D)(9), or 36-4002 is closed to the public.

(B) Documents described in 7(A) that are filed in an ARS Title 36, Chapter 37 or 40 case are open to the following:

(i) the county attorney who is entitled to initiate the case under ARS § 36-3704(A) or is representing the state in an ARS Title 36, Chapter 40 proceeding and any deputy county attorney in that office who is assigned to the case;

(ii) the Arizona attorney general and any assistant attorney general who is assigned to represent ~~either~~ the Arizona state hospital or a licensed facility under the supervision of the superintendent of the Arizona state hospital that provides treatment under ARS Title 36, Chapter 37 or the secure state mental health facility where the defendant is committed;

(iii) the respondent or the committed defendant;

(iv) the respondent's or the committed defendant's attorney;

(v) a lawful representative of the Arizona state hospital or of a licensed facility under the supervision of the superintendent of the Arizona state hospital that provides treatment under ARS Title 36, Chapter 37 or the secure state mental health facility where the defendant is committed;

(vi) a lawful representative of a service provider designated by the court to provide inpatient or outpatient treatment or to monitor or supervise any other terms and conditions of a person's

placement in a less restrictive alternative under ARS §§ 36-3710 or 36-4005; ~~and~~

(vii) a retained or appointed competent professional under ARS § 36-4002; and

(viii) upon a showing of good cause and after notice to the parties to the case, any other person the judge presiding over the case has authorized to access the document.

(C) and (D) [No change]

(E) All other documents in ARS Title 36, Chapters 37 and 40 case files maintained by the clerk of the court are open to the public, unless prohibited by law or sealed by court order.

(e) through (j) [No change]