

1 John A. Furlong, Bar No. 018356
2 General Counsel
3 STATE BAR OF ARIZONA
4 4201 N. 24th Street, Suite 200
5 Phoenix, AZ 85016-6288
6 (602) 252-4804

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

10 PETITION TO AMEND RULES 35.1
11 AND 35.4, ARIZONA RULES OF
12 CRIMINAL PROCEDURE

Supreme Court No. R-09-0036

**Comment of the State Bar of
Arizona on Petition to Amend
Rules 35.1 and 35.4, Arizona Rules
of Criminal Procedure**

13 The State Bar of Arizona opposes the changes to Rule 35, Ariz. R. Crim. P.,
14 proposed by Richard Coffinger in petition R-09-0036. Mr. Coffinger's petition
15 proposes amendments to Rules 35.1 and 35.4. Each will be addressed separately.

16 **Proposed Amendment to Rule 35.1**

17 In his petition, Mr. Coffinger recommends a change to Rule 35.1 replicating
18 the language of Rule 7.1, Ariz. R. Civ. P., which mandates a written response to a
19 motion. Instead of the current criminal rule, which states that a party "may" file and
20 serve responses to motions, Rule 35.1(a), Mr. Coffinger proposes language that
21 states a party "shall" file and serve a response. Under the proposal, the failure to file
22 a response bypasses oral argument and the failure "may be deemed a consent to the
23 granting of the motion, and the court may dispose of it summarily." The proposed
24 mandatory requirement of filing and serving a response to every criminal motion has
25 negative consequences for the practice of criminal prosecution and defense. It
26 potentially impacts defendants' and victims' rights under the United States and

1 Arizona Constitutions. In addition, it potentially creates a tremendous amount of
2 meaningless paperwork.

3 Criminal proceedings involve constitutional rights of both victims and
4 defendants. Rule 35.1(a) provides that the failure to file responsive pleadings within
5 the time allotted results in the matter being “submitted on the record before the
6 court.” Rule 35.1(a). Most courts will, under authority of Rule 35.4, not treat the
7 matter as submitted on the record because of the constitutional issues involved. “[A]
8 criminal trial is not a contest of wits and tactics between the prosecution and defense
9 counsel. ‘We believe justice dictates that the defendant be entitled to the benefit of
10 any reasonable opportunity to prepare his defense and to prove his innocence.’”
11 *State ex rel. Helm v. Superior Court* (Deddens), 90 Ariz. 133, 139, 367 P.2d 6, 10
12 (1961) (quoting *State ex rel. Mahoney v. Superior Court* (Stevens), 78 Ariz. 74, 79,
13 275 P.2d 887, 890 (1954)). Thus, a lawyer’s or *pro per* defendant’s failure to timely
14 file a responsive pleading, under the law, should not take precedence over the
15 substantive rights of a criminal defendant or the constitutional rights of crime
16 victims.

17 While it is always the best practice to respond to substantive motions, criminal
18 practice differs substantially from civil practice in that criminal practice has a large
19 number of indigent and *pro per* defendants and a much higher number of motions,
20 many of them *pro forma* and sometimes frivolous. Municipal courts, for example,
21 see hundreds of motions and requests to expunge records, to extend deadlines for
22 completing counseling programs, to grant additional time for making payment on
23 fines and other ministerial functions. These motions, especially frivolous ones such
24 as requiring a court to remove flags with gold fringe from the courtroom, are
25 handled almost exclusively by the court and require no response from the
26 prosecutor. A mandatory response to each of these motions, even a simple one-page
form response, would create an additional burden on already overburdened

1 prosecutors' offices, would be a waste of time, paper and court staff, and would be
2 unhelpful to the court. Nonetheless, the proposed rule change would force a written
3 response in each instance because a failure to respond would be deemed "consent to
4 the granting of the motion" such as removal of gold-fringed flags from a courtroom.
5 The proposed rule change elevates procedure over substance.

6 **Proposed Amendment to Rule 35.4**

7 The proposed rule amendment also includes a provision for enlargement of
8 time. While the Criminal Rules Prosecution and Defense Practice & Procedure
9 Committees have no specific comment on the enlargement proposal, a provision on
10 enlargement is unnecessary if Rule 35.1 is not changed. Rule 35 generally addresses
11 the form, content and service of motions and requests. Rule 35.4 allows the court to
12 waive or overlook a formal defect in the form or content of a motion or request. The
13 comment to Rule 35.4 specifically clarifies that the rule is informal and "should be
14 used primarily to allow handwritten documents to be submitted by indigents or
15 persons without counsel." The comment to Rule 35.4 continues that the rule "should
16 not be used to sanction deviations from the rule which affect an opposing party's
17 substantial rights." The proposed change to Rule 35.4 would drastically alter the
18 intent of the rule by providing that noncompliance with the formal requirements of
19 the rule would result in a "consent to the denial or granting of the motion," absent a
20 court *order* waiving the requirements. Such a change, however, is unnecessary and
21 inconsistent with the purpose of Rule 35.4. Like the proposal for modifying
22 Rule 35.1, this change would again elevate form over substance.

23 **CONCLUSION**

24 The proposed rule changes would create excellent opportunities for tactics and
25 wits to defeat or diminish the substantial rights of defendants and victims. It could
26 also create a flood of meaningless pleadings. The Criminal Rules Prosecution

1 Practice & Procedure Committee and the Criminal Rules Defense Practice &
2 Procedure Committee oppose the changes to Rule 35, Ariz. R. Crim. P., proposed by
3 Richard Coffinger in petition R-09-0036.

4 RESPECTFULLY SUBMITTED this 11th day of May, 2010.

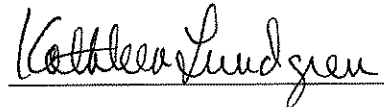
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7 
8 John A. Furlong
9 General Counsel

10 Electronic copy filed with the
11 Clerk of the Supreme Court of
12 Arizona this 11th day of May, 2010,

13 And a copy was mailed to:

14 Richard D. Coffinger
15 Attorney at Law
16 6838 North 58th Drive
17 Glendale, Arizona 85301

18 this 11th day of May, 2010.

19 By: 
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