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ARIZONA SUPREME COURT

In the Matter of:

PETITION TO AMEND RULE 49(d)(1)
RULES OF CIVIL PROCEDURE AND
RULE 18.1, RULES OF CRIMINAL
PROCEDURE

Supreme Court No. R-24-0026

Joint Comment by the Directors of the
Maricopa County Indigent Defense
Agencies

The indigent representation offices of Maricopa County (IR) collectively handle most cases filed in Maricopa County in which there has been a finding of indigency. The Office of Public Defense Services (OPDS) provides administrative and financial oversight to the staffed offices and the Office of Contract Counsel (OCC). The staffed offices are

comprised of the Office of the Public Defender (OPD), the Office of the Legal Advocate (OLA), the Office of the Legal Defender (OLD), and the Office of the Public Advocate (OPA). We jointly submit this comment in opposition to the proposal to amend Rule 49(d)(1) *Ariz. R. Civ. P.* and Rule 18.1 *Ariz. R. Crim. P.* We believe that the amendments, as written, should not be adopted by the Arizona Supreme Court.

First, while the proposal to amend civil rule 49(d)(1) and criminal rule 18.1 may intend to resolve some of the unworkable elements of such proceedings pursuant to A.R.S. §13-4521, it does not resolve the unconstitutional infirmities present in the statute.

Second, despite the inherent constitutional difficulties in the underlying statute that the proposed Rule Petition addresses, the IR offices also object to the proposed use of eight-member juries. (Petition to Amend at 3 and 5.)

As the Rule Petition correctly recognizes, the criminal law's requirement of juror unanimity should apply here. (*Id.* at 4-5.) But the proposal for empaneling juries of eight is problematic under state and federal law.

Under Arizona state law, a person accused of a felony is entitled to a twelve-member jury if the accused faces the potential of incarceration for thirty years or more. (*Id.* at 3 (citing *Ariz. Const. Art. 2, Sec. 23*.)

Under the statute that the Rule Petition addresses (A.R.S. §§ 13-4517(A)(4) and 13-4521), the duration of potential involuntary commitment contains no limit—it can exceed thirty years. Purely as a matter of Arizona state law, a twelve-member jury should be required.

Under federal law—that is, for a federal defendant, and even for a state defendant in 44 other states—a person accused of a felony is entitled to a twelve-member jury if the person faces the potential of incarceration for six months or more. *See Codispoti v. Pennsylvania*, 418 U.S. 506, 512 n.4 (1976) (interpreting *Baldwin v. New York*, 399 U.S. 66, 69 n.6 (1970) (plurality opinion)).

Nonetheless, as the pending Rule Petition correctly documents, the Supreme Court of the United States issued a decision in 1970 that allows the States to reduce the size of what would otherwise be the twelve-member jury down to as little as a six-member jury. *See Williams v. Florida*, 399 U.S. 78, 86-103 (1970).

As Justice Gorsuch contends, *Williams v. Florida* is wrongly decided. *See Khorrami v. Arizona*, 598 U.S. ___, 143 S.Ct. 22, 23-27 (Nov. 7, 2022) (Gorsuch, J., dissenting from the denial of certiorari) (opining that the decision “contravened the Sixth Amendment’s original meaning and hundreds of years of precedent in both common-law courts and this one”).

Although the Court in *Williams* identified a primary function of the criminal right to a jury trial as preventing oppression and arbitrary law enforcement by interposing the jurors as a neutral institutional body in between the Government and the people, the *Williams* Court held that the actual *size* of the jury was not related to that primary *function*. *See Williams*, 399 U.S. at 99-103.

But this was mistaken.

It is the criminal jury’s twelve-member size that contributes to that very function. *Cf. Khorrami*, 143 S.Ct. at 26-27. The criminal jury’s twelve-member size is integral to

holding the State to its burden of proof. For the State to obtain a conviction or a finding: it is easier to persuade eight out of eight people than it is to persuade twelve out twelve people. *Cf. id.*

And the greater the jury size, the more likely that the jury will represent a fair cross-section of the community through more diverse racial composition of the jurors. *See id.* at 27.

Although the *Williams* Court permitted the States to reduce the criminal jury's size from twelve to as low as six, the *Williams* Court did not *require* it. *See Williams*, 399 U.S. at 103 (“We do not mean to intimate that legislatures can never have good reasons for concluding that the 12-man jury is preferable to the smaller jury, or that such conclusions—reflected in the provisions of most States and in our federal system—are in any sense unwise. . . . Our holding does no more than leave these considerations to Congress and the States, unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury.”).

Under the logic of Arizona state law, and in the absence of a federal requirement to establish an eight-member jury in this context, this Court is respectfully asked to establish a unanimous verdict of twelve jurors for these proceedings.

While well-intentioned, the currently proposed amendment to Civil Rule 49(d)(1) and Criminal Rule 18.1 would likely cause unintended complications and obstacles for defendants and indigent criminal defense attorneys. Consequently, the directors of the indigent representation agencies of Maricopa County oppose the proposed amendment to Rule 15.4, *Ariz. R. Crim. P.*

Respectfully submitted this 28th day of April, 2024.

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