

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

) No. R-24-0005

)

Petition to Amend Ariz. R. Crim. P. 1.5,
17.1, 17.2, and 17.3.

) **Comment of Arizona Attorneys for**
) **Criminal Justice regarding Petition to**
) **Amend Arizona Rules of Criminal**
) **Procedure 1.5, 17.1, 17.2, and 17.3**

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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 Rules of Criminal Procedure 1.5, 17.1, 17.2, and 17.3.

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 agrees with the Petition in part. AACJ agrees that sometimes it is better for the misdemeanor sentencing or disposition to occur as an interactive audiovisual proceeding. A classic example is an inmate in a distant prison who does not wish to be transported because it would create a substantial disruption to the inmate's prison life, such as loss of employment or opportunities to enroll in classes or obtain medical treatment. Occasionally, prison officials throw out inmates' belongings while they are out to court—even their legal files. A defendant should have the opportunity to waive the right to be physically present in court for proceedings. The silver lining to the COVID-19 pandemic is the courts adapted to the need to conduct more proceedings remotely with inmates, so the interactive audiovisual systems are in place far more than they were before.

The Petition's fundamental flaw is it ignores entirely that every person charged with a crime—no matter if it is a felony or a misdemeanor—has a right to be physically present in court at every critical stage of the proceeding. This right is protected by the Sixth and Fourteenth Amendments to the U.S. Constitution and article 2, section 24 of the Arizona Constitution. *United States v. Gagnon*, 470 U.S. 522, 525-26 (1985); *State v. Garcia-Contreras*, 191 Ariz. 144, 146 ¶ 8 (1998). This right extends to probation revocation proceedings and dispositional hearings. *State*

v. Forte, 222 Ariz. 389, 392 ¶ 7 (App. 2009) (citing *State v. Bly*, 120 Ariz. 410, 413 (1978); *State v. Stone*, 111 Ariz. 62, 64 (1974)). Courts cannot take away this fundamental constitutional right by a rule change. *Id.* at 393-94 ¶ 13 (“Because the record demonstrates neither extraordinary circumstances necessitating a deviation from the requirements of Rule 26.9 ... nor the defendant’s personal waiver of the right to physical presence at sentencing, we conclude the trial court sentenced Forte in violation of the requirements of the Arizona Rules of Criminal Procedure *and the United States Constitution.*”) (emphasis added).

Because the Constitution does not allow the court to conduct sentencings and probation dispositions by video without the defendant’s consent, this Court must reject the proposed changes to Rule 1.5(c)(1).¹ For the same reason, the language in proposed Rule 17.1(f)(1) is also unconstitutional; but it can be fixed by adding the words “with the defendant’s consent” either before or after the proposed text.

AACJ takes no issue with the technical changes proposed by the Petition except for one. The Petition proposes deletion of the phrase “in open court” from Rule 17.3(a). This phrase is important because it emphasizes the solemnity of the process of taking a change of plea from a defendant. The fact that the proceeding

¹ AACJ agrees with the technical change of “videoconference” to “interactive audiovisual proceeding” in the heading of Rule 1.5(c) and in the text of Rule 1.5(c)(4).

may be done over interactive audiovisual technology does not mean it is not occurring “in open court.” The purpose of this requirement is ensuring that the record reflects that the defendant’s plea was entered knowingly, intelligently, and voluntarily. *See State v. Hagerty*, 255 Ariz. 112, 114 ¶ 4 (App. 2023) (“To ensure compliance with this prerequisite, Rule 17.1(b) requires the trial court to ‘use the procedures in Rules 17.2, 17.3, and 17.4.’”).

For these reasons, AACJ asks this Court to reject those parts of the proposal that substantively change what proceedings are eligible to be conducted without the defendant’s physical presence and without the defendant’s consent. AACJ agrees with many of the technical changes, with the exception that “in open court” must remain in Rule 17.3(a).

DATED (electronically filed): May 1, 2024.

By: /s/ David J. Euchner
David J. Euchner

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