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ARIZONA SUPREME COURT

In the matter of:)
)
PETITION TO AMEND RULE 49(d)(1),) Supreme Court No. R-24-0026
RULES OF CIVIL PROCEDURE AND)
RULE 18.1, RULES OF CRIMINAL) REPLY
PROCEDURE)
)
_____)

David K. Byers, Administrative Director, Administrative Office of the Courts, and Petitioner in this matter, hereby replies pursuant to Rule 28(e)(5), Rules of the Supreme Court of Arizona and this Court’s Order dated January 17, 2024.

I. Procedural History

On January 10, 2024, Petitioner filed a petition to amend Rule 49(d)(1), Rules of Civil Procedure, and Rule 18.1, Rules of Criminal Procedure, to address a conflict regarding jury verdict unanimity requirements for jury trials held under A.R.S. § 13-4521 and provide guidance for jury size and verdict requirements for the same. Proposed amendments were prompted by Senate Bill (SB) 1310 from the 2022 Second Regular Session of the 55th Legislature, which became effective on January

1, 2024 and amended A.R.S. § 13-4517(A) to create a new subsection (4) providing that if a defendant charged with a serious offense as defined in A.R.S. § 13-706 is found by the court to be incompetent to stand trial with no substantial probability of regaining competency within the allowable timeframe, any party may request that the court order a trial to determine if the defendant is dangerous (defined) and should be involuntarily committed pursuant to A.R.S. § 13-4521. Pursuant to A.R.S. § 13-4521(C), the Arizona Rules of Civil Procedure apply to A.R.S. § 13-4521 trials.

Petitioner files this reply to address the comments received during the comment period.

II. Discussion

This petition received three comments: a comment from the Arizona Attorneys for Criminal Justice supporting Petitioner’s proposed rule amendments; a joint comment from the Directors of the Maricopa County Indigent Defense Agencies opposing the rule amendments as proposed; and a comment from the State Bar of Arizona opposing Petitioner’s proposed rule amendments. Petitioner will reply to each comment in turn.

A. Arizona Attorneys for Criminal Justice

The comment from the Arizona Attorneys for Criminal Justice (hereinafter, “AACJ”) supports the petition. The AACJ takes the position that a trial on the defendant’s dangerousness requires a unanimous jury. As such, AACJ agrees with

Petitioner’s language reasoning and proposed verbiage related to the amendments to Civil Rule 49(d)(1) and Criminal Rule 18.1. The AACJ requests in its comment that this Court adopt Petitioner’s proposed rule amendments.

B. Directors of the Maricopa County Indigent Defense Agencies

The Directors of the Maricopa County Indigent Defense Agencies agree that the criminal law’s requirement of juror unanimity should apply here, but oppose Petitioner’s proposed amendments to Civil Rule 49(d)(1) and Criminal Rule 18.1 for two stated reasons: (1) the proposed amendments “do not resolve the unconstitutional infirmities present in [A.R.S. § 13-4521]” and (2) a 12-person jury rather than an eight-person jury should be required.

The comment correctly states that under Arizona state law, a person accused of a felony for which the person faces the potential of incarceration for 30 years or more is entitled to a 12-person jury. Ariz. Const. Art. 2, Sec. 23; A.R.S. § 21-102(A).

The comment goes on to state that under A.R.S. § 13-4521, the duration of potential involuntary commitment contains no limit—it can exceed 30 years and accordingly, a 12-member jury should be required as provided by Arizona law. However, A.R.S. § 13-4521(H) does impose a limit on how long a person can be involuntarily committed. Specifically, the time for involuntary commitment cannot exceed the presumptive sentence the defendant could have received for the highest charged offense, pursuant to A.R.S. § 13-4521(H), which reads:

A commitment order issued pursuant to this section may not be in effect for more than the presumptive sentence the defendant could have received for the highest charged offense pursuant to section 13-702 or 13-703, section 13-704, subsection A, B, C, D or E, section 13-705, section 13-706, subsection A, section 13-708, subsection D or section 13-751 or any section for which a specific sentence is authorized. In making this determination, the court may not consider the sentence enhancements under section 13-703 or 13-704 for prior convictions. The court shall consider all time a defendant has been in custody, including pretrial detention and custody under title 36.

Accordingly, it is possible that the maximum time a person is permitted to be involuntarily committed under A.R.S. § 13-4521 could be less than 30 years, invoking A.R.S. § 21-102(B) and permitting a jury of less than 12.

The comment points out the jury size requirements under federal law and in a majority of other states (a jury of 12 members if the person faces the potential of incarceration for six months or more) and asks this Court to adopt the same requirement. However, the purpose of Petitioner's proposed rule amendments is to resolve the conflict in the civil rules that would otherwise allow for a nonunanimous verdict and to clarify that the current requirements of the Arizona Constitution, criminal rules, and statutes govern and determine the jury size and unanimity requirements for A.R.S. § 13-4521 trials since they will occur in the criminal case. Petitioner's proposed rule amendments are not intended to create a unique carve out related to jury size for A.R.S. § 13-4521 trials.

Since it is Petitioner’s position that A.R.S. § 13-4521 jury trials are a trial “in a criminal case,” it is Petitioner’s position that they are subject to and should track the requirements of state law and only require a 12-member jury in criminal cases in which a sentence of death or imprisonment for 30 or more years is authorized by law. Ariz. Const. Art. 2, Sec. 23; A.R.S. § 21-102(A) and (B).

Therefore, Petitioner maintains that the current criminal rules and statutes that apply to the number of jurors and unanimity requirements for jury trials in criminal cases should be applied in the same manner to A.R.S. § 13-4521 jury trials. Petitioner recommends that this Court decline to adopt a requirement for a 12-person jury in all A.R.S. § 13-4521 jury trials and instead adopt a requirement that the jury size and unanimity requirements for criminal cases under current law govern and determine the jury size and unanimity requirements for A.R.S. § 13-4521 jury trials.

C. The State Bar of Arizona

The State Bar of Arizona (“State Bar”) filed a comment opposing Petitioner’s proposed rule amendments, positing that the proposed rule amendments contradict the language of the newly enacted statute and that it is not clear whether the new proceeding authorized by A.R.S. § 13-4521 falls within the definition of “criminal case” to which the guarantees of the Arizona Constitution and A.R.S. § 21-102 apply. The comment further states that the Petition rests on the assumption that a § 13-4521 proceeding *is* a criminal case. However, Petitioner’s position is not that a §

13-4521 proceeding *is* a criminal case but rather that the § 13-4521 trial occurs *in* the criminal case, since the charges are still pending, and the legislature has created no other mechanism for handling the § 13-4521 jury trial, other than *in* the criminal case. (Compare with sexually violent person (SVP) determination proceedings, in which a separate case is created through a petition filed pursuant to Title 36.) Accordingly, the unanimity and size requirements of Article 2, Section 23 of the Arizona Constitution are invoked:

The right of trial by jury shall remain inviolate. ***Juries in criminal cases*** in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. ***In all criminal cases*** the unanimous consent of the jurors shall be necessary to render a verdict. In all other cases, the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law. [emphasis added]

The State Bar points out that while the new statute is placed within Title 13, “that might not necessarily be dispositive as to whether a § 13-4521 proceeding is a ‘criminal case.’” Petitioner agrees but again points out that whether the provisions of Article 2, Section 23 of the Arizona Constitution and A.R.S. § 21-102 apply to § 13-4521 proceedings does not hinge on whether a § 13-4521 proceeding *is* a criminal case, but rather that it occurs *in* a criminal case.

The State Bar analogizes A.R.S. § 13-4521 to proceedings to determine SVP status under A.R.S. §§ 36-3701, et seq. It is long-established that SVP proceedings are civil in nature and therefore a unanimous verdict is not required, and a verdict

of six of eight is sufficient to justify commitment. *See State ex. Rel. Romley v. Superior Court*, 198 Ariz. 164 (2000); *Martin v. Reinstein*, 195 Ariz. 293 (1999).

The State Bar acknowledges, and Petitioner agrees, that the language and procedure set forth in A.R.S. § 13-4521 is similar, but not identical, to the statutes governing SVP proceedings. A significant difference between these proceedings is that the legislature has created a mechanism by which SVP proceedings, including the jury trial, are to be handled by creating a civil case under Title 36 that is separate and apart from the criminal case. See A.R.S. §§ 13-4518 and 36-3706. In contrast, the A.R.S. § 13-4521 trial will occur in the criminal case, while the criminal charges are still pending. See A.R.S. § 13-4521(F). It is only when there is a determination that the defendant is dangerous and is involuntarily committed that the criminal charges will be dismissed and further proceedings will be conducted pursuant to Title 36. See A.R.S. § 13-4521(F) and (G).

The State Bar points out that the issue of whether A.R.S. § 13-4521 trials are criminal or civil in nature may very well come before this Court. Petitioner acknowledges and agrees, but Petitioner's proposed rule changes do not operate as a determination as to whether A.R.S. § 13-4521 jury trials are criminal or civil in nature, nor is he asking this Court to decide that issue through his petition.

Moreover, Petitioner acknowledges that having a civil procedural rule refer to the Rules of Criminal Procedure is highly unusual, but the purpose for doing so

is to provide clarification to judicial officers and practitioners regarding the jury size and unanimity requirements for A.R.S. § 13-4521 proceedings, since these proceedings, regardless of whether they are criminal in nature or civil in nature, will occur in the criminal case. As demonstrated by the comments received on this petition, this clarification is necessary. Petitioner's proposed rule changes merely reconcile the jury unanimity and size requirements under the applicable law with the procedure the legislature has laid out for A.R.S. § 13-4521 proceedings.

III. Conclusion

Petitioner appreciates the comments stakeholders submitted during the comment period and deems it important to file this Reply to address the concerns reflected in the comments. Based on the foregoing responses, Petitioner respectfully requests that the Court adopt at its August 2024 Rules Agenda the proposed rule amendments as set forth in the Appendix to the petition filed on January 10, 2024.

Respectfully submitted this 31st day of May, 2024.

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