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IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND RULES 35.1 AND 35.4, ARIZONA RULES OF CRIMINAL PROCEDURE	)	NO. R-09-0036
	)	REPLY TO COMMENTS

Petitioner, RICHARD D. COFFINGER, hereby replies to the three comments to his Petition to Amend Rules 35.1 and35.4, Ariz.R.Crim.P. (the Petition). The first comment was submitted by John Furlong, General Counsel for the State Bar of Arizona (the SBA Comment). The second comment was submitted by John A. Canby and David J. Euchner of the Arizona Attorneys for Criminal Justice (the AACJ Comment). The third comment was submitted by Hon. Barbara Rodriguez-Mundell (Judge Rodriguez-Mundell Comment), former Presiding Judge of Superior Court of Arizona in and for Maricopa County (Maricopa County Superior Court). Petitioner replies herein collectively to these comments which are referred to as the Comments.

I The Proposal Would Discourage the Currently Allowed Substandard Practice Engaged in by Some Prosecutors and Defense Attorneys of Presenting Oral Argument in Opposition to an Opposing Party's Written Motion, in Spite of Their Failure to File a Timely Written Response to the Motion

The SBA's initial argument in opposition states on pages 1 and 2,

> Under the proposal, the failure to file a response bypasses oral argument, and the failure "may be deemed a consent" to the granting of the motion, and the court may dispose of it summarily. ... In addition, it potentially creates a tremendous amount of meaningless paperwork. ... Thus, a lawyer's or *pro per* defendant's failure to timely file a responsive pleading, under the law, should not take precedence over the substantive rights of a criminal defendant or the constitutional rights of crime victims. [Emphasis supplied]

The SBA's argument emphasizes its alarming acceptance of the *status quo* of current criminal motion practice in our state trial courts, and the urgent need for the proposed rule change. The purpose of oral argument on a criminal motion in a trial court is the same as for civil motions in a trial court and for appeals and other proceedings in appellate courts-- to assist the court in reaching the best reasoned decision on the issues presented after the court has had the opportunity to read the parties written arguments previously presented and served upon opposing counsel. The SBA's approval of the current criminal motion practice of allowing a party that neglects to file a timely response to an opposing party's motion the opportunity to present arguments for the first time at oral argument, not only (1) denies the moving party the right to file a reply, but also (2) prevents or impedes the court

from critically considering the party's respective written argument prior to oral argument, and thus gaining the most benefit from the parties' oral argument in support of their respective memoranda.

Rule 35.2, Ariz.R.Crim.P. entitled, "Hearings; oral argument," provides in part, "The court may limit or deny oral argument on any motion." The Comment to this rule states:

> The hearing and oral argument requirements are intended to give the court maximum discretion in deciding what procedures, in addition to the written motion and memoranda, will be most helpful to it in reaching a reasoned and expeditious decision on each issue. It eliminates either party's absolute right to oral argument on a motion. Local rules of court may provide additional standards or procedures with respect to setting motions for hearing. [Emphasis supplied]

Rules 31.14, Ariz.R.Crim.P. and Rule 18, Ariz.R.Civ.App.P. both include the following identical provision relating to an appellate court's similar discretion to deny oral argument if the court determines that it would not be beneficial:

> An appeal may be considered and decided without oral argument if the appellate court determines that (1) the appeal is frivolous; (2) the dispositive issue or set of issues presented has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.... [Emphasis supplied]

No Arizona appellate court sets oral argument until after all parties have submitted their written briefs. Not only would such policy be contrary to applicable appellate rules, it would defeat the purpose of oral argument. Likewise trial courts should

not schedule oral argument prior to receiving a response from the opposing party served with a motion, however if it does, it should vacate oral argument if no response is filed. Numerous Arizona appellate court decisions have held that an appellate court will not consider attempts to raise an oral argument issues not properly asserted in the briefs. *Jones v. Burk*, 164 Ariz. 595, 795 P.2d 238 (App. 1990); *Wasserman v. Low*, 143 Ariz. 4, 691 P.2d 716 (App. 1984); *Henningson, Durham & Richardson v. Prochnow*, 13 Ariz. App. 411, 477 P.2d 285 (Div. 1, 1970) reh.den. rev. den. None of the Comments have presented any convincing argument that a different standard should apply at oral argument in trial courts on motions in criminal cases.

In *Henningson, et al,* supra, 13 Ariz.App. at 415, in the unanimous opinion by former Judge Enio Jacobson with late Judge William Eubank and former Judge Ray Haire concurring, the court emphasized the lack of merit of the SBA argument that a party that failed to file a timely response to an opposing party's motion should be allowed to present its argument for the first time at oral argument, stating:

> While appellant's counsel is given great latitude on oral argument to present matters to the court in a different manner and with different emphasis than these matters are presented in their briefs, we believe that the introduction of new theories of error at the time of oral argument to which appellee has not had an opportunity to reply must be disregarded. *See Quila v. Estate of Schafer*, 7 Ariz.App. 301, 438 P.2d 770 (1968). We therefore will confine our decision to those

questions raised in the briefs. [Emphasis supplied]

Judge Rodriguez-Mundell's Comment argues:

> The petition fails to identify any problem with the current motion process employed by the criminal divisions of the Superior Court. ... The petition cites no examples and the Court is unaware of any specific issues in this area. ... Moreover, the concern over inconsistent rulings is inapplicable of the Superior Court in Maricopa County. In July, 2009, the Superior Court in Maricopa [sic][County] implemented a master calendar system for criminal cases [sic][under] which all motions are heard by motion judges. Because all of the motions are heard by a limited number of judges, the concern about inconsistent handling is not an issue in the Superior Court of Maricopa County. [Emphasis supplied]

On June 7, 2010, Judge Rodriguez-Mundell, who was the presiding judge in the Maricopa County Superior Court at the time she filed her comment was succeeded in that position by current Presiding Judge Norm Davis. When Judge Rodriguez-Mundell filed her comment, she apparently was unaware that in the Maricopa County Superior Court, it is common that judges schedule oral argument on criminal motions before the opposing party has filed a response, and if no response is filed, the court proceeds with oral argument, and allows the non-responding party to present argument orally for the first time at oral argument.

On page 2 of the AACJ's Comment, Attorney's Canby and Euchner recognized this practice, which they state, "needs to be corrected," stating:

> Undoubtedly, this rule change petition was intended to force prosecutors to respond in writing to motions. Defense lawyers are indeed frustrated by the routine practice of prosecutors who fail to timely respond to motions, or

> even respond at all, but who appear for oral argument on the motion and make generalized citations to "the case law" without even citing a case. This practice needs to be corrected. [Emphasis supplied]

This practice undermines and defeats the purpose of oral argument, which is to allow the parties to clarify and emphasize their arguments in their respective previously filed and served written memoranda.

Petitioner is counsel of record in an aggravated DUI felony criminal prosecution now pending in the Maricopa County Superior Court, entitled, *State of Arizona v. Erin Espinosa*, case CR2009-126740-001, which has not been assigned to the master calendar because DUI cases in that court are normally assigned to one of three DUI courts rather than the master calendar.

The court's docket, in the *Espinosa* case, shows that although the State filed a motion for enlargement of time to file a response to defendant's Rule 12.9 motion for a new finding of probable cause based upon a denial of a substantial procedural right during the grand jury proceedings, the State failed to file a response prior to the date set for oral argument which had been set by the assigned judge, Commissioner Carolyn Passamonte, after the court received defendant's motion (Exhibit 1). On December 3, 2009, in spite of the fact that the State had failed to file a response, Comm. Passamonte allowed the State to present oral argument (Exhibit 2). Petitioner is counsel of record in numerous felony criminal prosecutions now pending in Maricopa County Superior Court that are assigned to

the Master Calendar, in which the motion judges have scheduled oral argument after receiving defendant's motion, but prior to receiving the State's response.[1]

It is noteworthy that no member of the judiciary other than Judge Rodriguez-Mundell filed a comment either in support of or in opposition to the petition. Surely members of the Arizona criminal trial bench prefer or require a written response to an opposing party's written motion in order to (1) assist the court in making the proper ruling, and (2) achieve judicial economy. The proposed petition for rule change addresses the core issue that should be considered: Should Rule 35.1 be modified to state (1) a party "shall" rather than "may" file a response to an opposing party's motion, and (2) if a party fails to file a timely response to an opposing party's motion, should it state that the court "may" rather than "shall" deem the matter submitted on the record before it and further provide that party suffer the consequence of acquiescence?

The proposed rule change does not require the judge to grant an unopposed motion-- it merely states the court **may** deem the failure to file a response a consent to the granting of the relief requested. The court would retain the power to order the non-responding party to file a written response by a specific date beyond the original 10 day time limit and further allow the court to infer that if no response is filed, the non-responding party may have consented to the relief requested in the

1 *State v. Daniel John McGill*, case CR2010-111279-001 DT (Exhibit 3); *State v. Vanessa Pilban*, case CR2010-116791-001 DT (Exhibit 4); *State v. James Kelley Godinez*, case CR2009-007142-001 DT (Exhibit 5 and 6)

motion.

II. The Vast Majority of Other Arizona Rules Relating to Motion Practice and Local Federal District Court Rules Parallel the Provisions of Rule 7B, Ariz.R.Civ.P. and Conflict with the Current Provision of Rule 35.1, Ariz.R.Crim.P

In 1973, the Arizona Supreme Court abrogated the former Arizona Rules of Criminal Procedure of 1956, and adopted the current rules of criminal procedure. Rule 35.1 has not undergone any significant restyling since its adoption over 37 years ago. The Comments do not cite any rule or reported appellate court case approving either (1) the current distinction in motion practice between the civil and criminal rules of procedure, or (2) the practice of allowing a non-responding party in a criminal case to present an oral argument at a hearing on a motion scheduled by the court.

This court has previously determined that occasionally it is appropriate for the court to revisit specific rules of procedure and substantive law from time to time when it has determined that reconsideration appropriate. Sometime the restyling is ordered based on the filing of a rule change petition, and sometime it is ordered by the court *sua sponte.* For example, on March 24, 2010, Arizona Supreme Court Chief Justice Rebecca White Berch, in Administrative Order No. 2010-42 established by the Ad Hoc Committee on the Rules of Evidence with the stated purpose:

> The Committee shall compare the *Arizona Rules of Evidence* to the proposed restyled *Federal Rules of Evidence*, identify differences, and provide input to the Supreme Court regarding conforming changes.

Petitioner relies on the argument presented in his petition in footnote 1 on page 2 in support of his argument that now is the time for the court to restyle Rule 35.1 and 35.4 in light of the variance of its provisions from other more recently restyled state and federal rules relating to motion practice.

The United States District Court for the District of Arizona has adopted local civil and criminal rules of procedure. The applicable local criminal rule, LRCrim12.1 entitled, "Forms of Papers and Motions," states, "With regard to Forms of Papers and Motions, see Rules 7.1 and 7.2 of the Local Rules of Civil Procedure."

The pertinent provisions in LRCiv 7.2(c) and (I), entitled, "Motions," which are consistent with both Federal Rule of Civil Procedure 7.2 and Arizona Rule of Civil Procedure 7.2, states :

> (c) Responsive Memorandum. The opposing party shall, unless otherwise ordered by the Court and except as otherwise provided by Rule 56 of the Federal Rules of Civil Procedure and Rules 12.1, 54.2(b), and 56.1, Local Rules of Civil Procedure have fourteen (14) days after service in a civil or criminal case within which to serve and file a responsive memorandum.
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> * * *
>
> (I) Briefs or Memoranda of Law; Effect of Non-Compliance. If a motion does not conform in all substantial respects with the requirements of this Local Rule, or if the opposing party does not serve and file the required answering memoranda, or if counsel for

> any party fails to appear at the time and place assigned for oral argument, such non-compliance may be deemed a consent to the denial or granting of the motion and the Court may dispose of the motion summarily. [Emphasis supplied]

These provisions also parallel the motion provisions of the U.S. District Court's local Arizona Federal Rules of Procedure of the Judicial Panel for Multidistrict Litigation provided in 7.2(c), which states:

> (c) Within twenty days after filing of a motion, all other parties shall file a response thereto. Failure of a party to respond to a motion shall be treated as that party's acquiescence to the action requested in the motion. [Emphasis supplied]

The Arizona Rules of Family Law Procedure include Rule 35(A)(3), which states in part:

> Any party opposing the motion shall file any answering memorandum within ten (10 days thereafter....[Emphasis supplied]

Rule 35 B entitled, "Effect of Non-Compliance," states in part:

> ...[I]f the opposing party does not serve and file the required response... such non-compliance may be deemed a consent to the denial or granting of the motion, and the court may dispose of the motion summarily. [Emphasis supplied]

Rule 18 of Rules of Probate Procedure entitled, "Motions," states in part in the Comments:

> ...The Arizona Rules of Civil Procedure govern the procedure relating to motions including (I) the time of filing response and reply memoranda... In this regard, motions generally should meet the requirements of Rules 7.1(a) and 10(d), Arizona Rules of Civil Procedure.... [Emphasis supplied]

Rules of procedure are intended to promote fairness, efficiency and just results in the resolution of legal disputes. Either the current provision in the criminal rule, that an opposing party **may** file a response, and if none is filed the court **shall** deem the matter submitted on the record is superior to the current provisions in the Arizona Rules of Civil Procedure and federal and local district court rules of civil and criminal procedure providing the converse-- or it is not.

Whether or not defense counsels and prosecutors are overburdened, the process advocated by the opponents is not "due process" and it only undermines the proper procedure that should be adhered to in state court criminal motion practice.

The current discretion of a lawyer to file a response to an opposing party's written motion with no sanction for failure to do so, erodes the client/lawyer relationship. The Rules of Professional Conduct adopted in Supreme Court Rule 42includes ER1.1 entitled,"Competence," which states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The comment includes the following under the heading, "Thoroughness and Preparation":

> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures, meeting the standards of competent

> practitioners. It also includes adequate preparation. [Emphasis supplied]

The Comments argue that the proposal would require a party's mandatory response to every frivolous motion filed in criminal cases. The SBA argues that it could "create a flood of meaningless pleadings and would "create excellent opportunities for tactics and wits to defeat or diminish the substantial rights of defendants and victims."

In petitioner's 38 years of criminal practice as both a prosecutor and defense attorney, no trial nor appellate court has ever characterized any motion, response or reply that he has filed or been served with by opposing counsel as "frivolous." The Comments' argument about the frequency of frivolous motions or responses being filed in criminal cases is vastly overstated. Prosecutors' concerns about the proposed rule change requiring them to file a response to frivolous motions filed by a *pro per* defendant (such as to remove gold edged flags from the court), are the exception rather than the rule, and the provisions of Rule 35.1 should not be tailored to deal with such motions. Clearly, if the proposed rule change is adopted, prosecutors could still file a standardized response to every such frivolous motion filed by a *pro per* party, or refrain from filing a response and rely on the trial court's sound discretion in denying such an obviously frivolous motion without receiving a response from the State.

The Arizona Rules of Professional Conduct currently provide a sufficient

sanction against a lawyer in a criminal case who files a frivolous motion, response or reply. The Rules of Professional Conduct adopted in Rule 42, Ariz.Supr.Ct.R., includes ER 3.1 entitled, "Meritorious Claims and Contentions," which states;

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a good faith basis in law and fact for doing so that is not frivolous, which may include a good faith and nonfrivolous argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established. [Emphasis supplied]

The comment to the 2003 amendment to ER 3.1 states in part:

> (3) Although this Rule does not preclude a lawyer for a defendant in a criminal matter from defending the proceeding so as to require that every element of the case be established, the defense attorney must not file frivolous motions. [Emphasis supplied]

III. An Express Provision in Rules of Criminal Procedure for Enlargement of Time Relating to Motion Practice Should be Included

Contrary to the concerns of the SBA and the AACJ, both prosecutors and criminal defense attorneys, especially court-appointed attorneys, would benefit from the proposed changes to Rule 35.1, relating to motion practice. Likewise the benefit to the judiciary and the public, clearly out weigh any slight additional burden on the criminal trial bar that would result from the rule change. These comments fail to identify any cogent reason justifying the current distinction between the criminal rule and the civil rule relating to motion practice.

The pertinent provisions in United States District Court for the District of Arizona Local Civil Rules, LRCiv 7.3 entitled, "Motions/Stipulations for Extension of Time," parallels the Federal and Arizona Civil Rule 6(B) relating to enlargement of time in motion practice.

Petitioner submits that the procedure advocated by opponents as optional–non-responding parties "should be allowed to argue their position orally"– does not comply with the "use of methods and procedures meeting the standards of competent practitioners" required in the comment to ER 1.1.

RESPECTFULLY SUBMITTED this _30th_ day of June, 2010.

/s/ Richard D. Coffinger_____

RICHARD D. COFFINGER

ORIGINAL e-filed with the Clerk of the Arizona
Supreme Court this _30th_ day of June, 2010.

____/s/ Richard D. Coffinger___