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9 (STATE BAR NUMBER 011474)

10 IN THE SUPREME COURT OF THE STATE OF ARIZONA

11 IN RE:

R-12-0016

12 PETITION TO AMEND RULES 38.1 AND
13 38.2 OF THE ARIZONA RULES OF
14 CRIMINAL PROCEDURE

COMMENT IN SUPPORT PETITION TO
AMEND RULES 38.1 AND 38.2 OF THE
ARIZONA RULES OF CRIMINAL
PROCEDURE, WITH ADDITIONAL
AMENDMENT SUGGESTED

15 The Maricopa County Attorney hereby comments to the Petition to Amend Rules 38.1 and 38.2 of
16 the Arizona Rules of Criminal Procedure.

17 Respectfully submitted this 18th day of May, 2012.

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20 WILLIAM G. MONTGOMERY
21 Maricopa County Attorney

22 BY: 

23 Mark C. Faull
24 Chief Deputy
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2 The Maricopa County Attorney respectfully petitions this Court to adopt the proposed
3 amendments to Rule 38, Arizona Rules of Criminal Procedure as set forth in Rule Petition 12-0016,
4 with additional amendment, as explained below and in Appendix A.

5 As the Arizona Supreme Court's Petition explains, Rule 38, Arizona Rules of Criminal Procedure
6 sets forth the procedure that prosecutors and the courts must follow to implement diversion in any
7 particular case. The current language does not accurately reflect the reality of how cases are handled,
8 however, as motions are required to be filed in superior court, even if the case is being handled in justice
9 court.
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11 The proposed amendments in Petition 12-0016 remedy most of the current difficulties in the Rule
12 and the Maricopa County Attorney's Office respectfully urges this Court to adopt those recommended
13 changes.
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15 To further facilitate the deferred prosecution process, we also recommend that the language of
16 Rule 38.1(c) be modified to be consistent with Arizona law. Currently, the rule provides that after the
17 prosecutor files a motion to suspend prosecution for a deferred prosecution program, "the court may
18 order that further proceedings be suspended for two years." The wording of this rule could be
19 interpreted to mean that the court has discretion to decide whether or not to allow diversion in a
20 particular case.
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22 To the extent that such an interpretation is possible, it is inconsistent with Arizona law. A.R.S.
23 §11-365 clearly provides that "[t]he county attorney has sole discretion to decide whether to divert or
24 defer prosecution of an offender." *See also Cranmer v. State*, 204 Ariz. 299, 63 P.3d 1036 (App. 2003)
25 (noting that the county attorney's sole discretion to resume prosecution stems from the county attorney's
26 sole discretion to divert or defer offenders).
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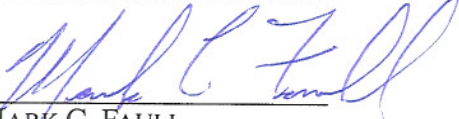
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To avoid confusion with the current permissive language of the rule, the Maricopa County Attorney hereby requests a modification that would require the prosecution to be suspended and would reinforce that the maximum time limit for a suspended prosecution is two years. There are many cases where a two year suspension is too long, particularly for the types of misdemeanors that are diverted in the justice courts so the proposal also allows the prosecutor to set a shorter timeframe for the diversion program to be successfully completed.

For the foregoing reasons, the Maricopa County Attorney's Office respectfully petitions this Court to adopt the amendments in Petition 12-0016 and to further amend Rule 38.1(c), Arizona Rules of Criminal Procedure as set forth in Appendix A.

Respectfully submitted this 18th day of May, 2012.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

By 
MARK C. FAULL
CHIEF DEPUTY

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2 APPENDIX A¹

3 Rule 38.1. Application for suspension order

4 a. Whenever after the filing of a complaint, indictment or information, but prior to a plea of
5 guilty or trial, the prosecutor determines that it would serve the ends of justice to suspend
6 further prosecution of a defendant so that he or she could participate in a deferred prosecution
7 program, the prosecutor, with the consent of the defendant, may, by written motion, apply to the
8 court for suspension of prosecution.

9 b. The motion of the prosecutor shall set forth facts showing that the defendant is a person
10 legally eligible for participation in the deferred prosecution program, and a written consent
11 signed by the defendant and his or her counsel, if any, agreeing to the participation by the
12 defendant in the program shall be filed with the motion.

13 c. After the filing of a motion by the prosecutor as provided in this rule, the court ~~may~~ shall
14 order that further proceedings be suspended for the period of time specified in the motion up to
15 two years. If the defendant is in custody, the court may order him or her released.

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1 Additions to text are indicated by underscoring and deletions are indicated by ~~striketrough~~.