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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	Supreme Court No. R-
PETITION TO AMEND RULES 9.1, 14.3, 26.11 AND 41, ARIZONA RULES OF CRIMINAL PROCEDURE	**PETITION**

Pursuant to Rule 28, Ariz. R. Sup. Ct., the State Bar of Arizona ("State Bar") hereby petitions this Court to amend the Arizona Rules of Criminal Procedure by changing Rules 9.1, 14.3, and 26.11, and Forms 6, 7, 23 and 29 under Rule 41, and adding a new Form 19(a) to Rule 41. The proposed changes would ensure that criminal defendants are given proper notice that under A.R.S. § 13-4033(C) they lose their right to directly appeal a guilty verdict if they prevent sentencing from occurring by voluntarily failing to appear for sentencing within ninety days after conviction at a trial.

I. BACKGROUND

A. THE PRESENCE OF THE DEFENDANT AT PRE-TRIAL HEARINGS AND TRIAL

Defendants must be present at their arraignment on any criminal charge, unless they were present at their initial appearance and file a waiver and affidavit acknowledging receipt of the information which would be provided at the arraignment. Rule 14.2, Ariz. R. Crim. P.

At arraignment, the court must advise defendants that they have a *right to be present* at subsequent proceedings and that proceedings may be held in their absence. Rule 14.3(e), Ariz. R. Crim. P.

"Some courts have regarded the defendant's presence at a felony trial as a jurisdictional requirement which cannot be waived, but from [previous Rule 231, Ariz. R. Crim. P., much of which is now Rule 9.1] it is obvious that the Arizona Court has not taken this position." *State v. Taylor,* 104 Ariz. 264, 266, 451 P.2d 312, 314 (1969); *see also State v. Cumbo*, 96 Ariz. 385, 396 P.2d 11 (1964).

"The United States Supreme Court has held that a defendant may, by consent or misconduct, give up the right to be present at this trial." *State v. Tacon*, 107 Ariz. 353, 354-55, 488 P.2d 973, 974-75 (1971), *cert. dismissed* 93 S.Ct. 998, 410 U.S. 351, 35 L.Ed.2d 346 (February 21, 1973); *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934); *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912).

Rules 9.1 and 9.2 set forth the procedures by which a court may determine that a defendant has voluntarily absented himself from a particular proceeding, and therefore the court can proceed without him present. Notably, a court may find that

a defendant has voluntarily absented himself "if the defendant had personal notice of the time of the proceeding, the right to be present at it and a warning that the proceeding would go forward in his or her absence should he or she fail to appear." Rule 9.1, Ariz. R. Crim. P.

"[A] trial may be conducted in the defendant's absence if his absence is voluntary. In order for a defendant to make a knowing and intelligent waiver of his right to be present at the trial, he must be aware that the trial will proceed without him if he fails to appear." *Tacon*, 107 Ariz. at 355, 488 P.2d at 975; *Arizona v. Hunt*, 408 F.2d 1086 (6th Cir. 1969); *State v. Taylor*, *supra*.

Rule 9 and Rule 14 are silent regarding any *obligation* for the defendant to be present at any hearing after the arraignment. Only one other rule mandates the defendant's presence at a post-arraignment proceeding when there is a trial: Rule 26.9, which provides that "[t]he defendant ... *shall be present* at sentencing."[1]

B. THE DEFENDANT'S PRESENCE AT SENTENCING

Prior to 1993, Rule 26.9 and its predecessors permitted sentencing to occur in absentia, in certain circumstances. Comment to Rule 26.9 (1973). However, "to comply with the Supreme Court decision prohibiting sentencing in absentia," a 1993 amendment deleted language permitting courts to sentence defendants in absentia. Committee comment to 1993 amendment of Rule 26.9; *see State v. Fettis*, 136 Ariz. 58, 664 P.2d 208 (1983).

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[1] Rule 17.1(A)(1), Ariz. R. Crim. P., states that in the Superior Court and in courts of limited jurisdiction, "a plea of guilty or no contest ... shall be accepted only when made by the defendant personally..." However, because individuals who enter guilty pleas waive their appeal rights under Rule 17(2)(e), this requirement is not pertinent to this petition.

The 1993 amendment also struck the following sentence, "The time for filing a notice of appeal shall run from the original entry of judgment and sentence." Rule 26.9 (Repealed Nov. 30, 1993).

Fettis did not mention appellate rights. In the opinion, the Court referenced the ABA Criminal Justice Standard addressing allocution, and declared that "[a] presentence report based upon personal interview, the defendant exercising his right of allocution, and a chance for the judge to personally question and observe the defendant are minimum requirements in most cases." *Id.* at 59, 664 P.2d at 209.

The ABA Criminal Justice Standard cited by the Court indirectly suggested that delaying sentencing would toll the time for a trial appeal. *Id.*, citing commentary to ABA Criminal Justice Standard 18-6.4, at 447-448 (1980).[2] *See also State v. Tapp*, 133 Ariz. 549, 552, 653 P.2d 6, 9 (1982) (Cameron, J., concurring).

Justice Cameron's concurring opinion explicitly suggested that "the time for appeal would start running at [the time of sentencing of an absconded defendant] rather than upon acceptance of the verdict by the trial court." *Id.* However, the applicable rules were not changed and the rules for an appeal under Rules 24.1 and 24.2 begin after the entry of verdict, not upon sentencing.

As such, it appears that, even in the wake of *Fettis* and the revisions to Rule 26.9, it is still valid law that appeal rights do not toll for a defendant who absconds and delays his sentencing.

"The defendant is not permitted to extend the time for taking an appeal by non-appearance at sentencing. Hence the time for filing a notice of appeal is to run

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[2] This Standard has been substantially re-written, and the salient portions appear now to be in Standards 18-5.17 and 18-5.19.

from the entry of judgment and sentence whether or not the defendant is present. A defendant who is absent at sentencing through no fault of his own may be entitled to a delayed appeal under Rule 32." Comment to Rule 26.9.

However, it would appear that the common practice in the wake of *Fettis* and the revisions to Rule 26.9 was to begin running the filing period from the sentencing, at the time the defendant was notified of his right to appeal.

C. CONSEQUENCES FOR DELAY IN SENTENCING:

2008'S SB 1068, LAWS 2008 CH. 25 § 1; CODIFIED AS A.R.S. § 13-4033 (C)

In 2008, the Arizona Legislature sought to curtail the criminal defendant's right of appeal in cases in which sentencing is delayed as a result of a defendant's own voluntary absence. This was done by way of a statute that only applies in a narrow circumstance: to be subject to the statute, the defendant had to have been convicted at a trial (not through plea agreement), have been released at the time sentencing was to occur, and have voluntarily absented himself from the sentencing proceeding such that he caused it to be delayed to a date at least 90 days after the date of conviction.

The legislative history includes testimony outlining the following disparity:

In case A, the defendant is arrested, tried and convicted for a crime with an identified victim. Upon conviction, the defendant lodges a timely appeal, which is then granted one year after the appeal is filed. The state then must bring the victim back to court for a second trial held a year and a half after the first trial.

In case B, the defendant is arrested and tried for the same victim offense. On the day the guilty verdict is handed down, the defendant absconds and is not seen for the next 12 years. The defendant is then re-arrested and sentenced. He then files an appeal, which is then granted one year after the appeal is filed. The state

then must bring the victim back to court for a second trial held thirteen and a half years after the first trial.

This defendant-caused delay in Case B put the state at a tremendous disadvantage in the appeal. The assigned prosecutors, investigators, and witnesses have likely changed jobs, careers, or addresses. Key individuals may have died, or memories faded. Moreover, this indefinite right to appeal removed any sense of finality for the victim.

The Legislature sought to address this by amending the statute that governs appeals, A.R.S. § 13-4033; a new subsection was added to the statute stating:

> (A) An appeal may be taken by the defendant only from:
> 1. A final judgment of conviction or verdict of guilty except insane.
> 2. An order denying a motion for a new trial.
> . . . .
> (C) **Defendant may not appeal under subsection A, paragraph 1 or 2 if the defendant's absence prevents sentencing from occurring within ninety days after conviction and the defendant fails to prove by clear and convincing evidence at the time of sentencing that the absence was involuntary.**

A.R.S. § 13-4033 (emphasis added).

This new statute deprives a defendant of the right to appeal a guilty verdict in the event of a lengthy voluntary absence, through which he is deemed to have waived his right to appeal. However, for that waiver to be valid, a court must have a sufficient record upon which to show that the decision to be absent was done with knowingly, intelligently and voluntarily with fair warning that absence could cost him his right to appeal.

D. COURTS HAVE HAD INSUFFICIENT RECORDS TO REACH THE WAIVER ISSUE

The state has attempted on two occasions to litigate the prohibition in A.R.S. § 13-4033(C) to block appeals from defendants who absconded and delayed their sentencing. Opinions filed in both cases held that a waiver of a defendant's right to appeal under A.R.S. § 13-4033(C) must be knowingly, voluntarily and intelligently made, and that no notice of this existed in either record. *State v. Bolding*, 227 Ariz. 82, ¶ 18 253 P.3d 279, 285 (App. 2011); *State v. Soto*, 223 Ariz. 407, 409-14 224 P.3d 223, 225-30 (App. 2010), *opinion vacated on other grounds,* 225 Ariz. 532, 241 P.3d 896 (2010).[3]

To be *voluntary*, an absence must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458 (1938). In *Soto*, the Court of Appeals relied on Rule 9.1, Ariz. R. Crim. P., to determine the "voluntary" standard for an A.R.S. § 13-4033 waiver. Under the rule:

> [A] defendant may *waive* the right to be present at any proceeding by voluntarily absenting himself or herself from it. The court may infer that an absence is voluntary if the defendant *had personal notice* of the time of the proceeding, the *right to present* at it, and a *warning* that the proceeding would go forward in his or her absence if he or she fails so appear.

Rule 9.1, Ariz. R. Crim. P. (emphasis added). The Court of Appeals reasoned that "because our supreme court has required that defendants receive 'personal notice' before such a waiver will be found in the analogous context of a defendant's right to presence at trial, we can apply no lesser standard to any purported waiver of a defendant's constitutional right to appear pursuant to § 13-4033." *Soto*, 223 Ariz.

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[3] While review was pending in the Arizona Supreme Court, the state conceded that the changes to A.R.S. § 13-4033(C) had not taken effect in time to apply to Soto's case. Recognizing that the issue was not properly before the court in the case at hand, the Arizona Supreme Court vacated the Court of Appeals opinion.

at 413, 224 P3d. at 229. Therefore, a defendant must have "personal notice" of A.R.S. § 13-4033(C) in order for an absence to be voluntary and constitute a waiver. *Id.* at 414, 224 P.3d at 230.

"Personal notice" of A.R.S. § 13-4033(B) is given through Rule 9.1, Rule 14.3 and certain Rule 41 forms.[4] The court may also infer such notice from statements made in open court during prior proceedings. *See State v. Sainz*, 186 Ariz. 470, 473, 924 P.2d 474, 477 (App. 1996) (court's chastising defendant for tardiness and stating that next time the trial would proceed without him was proper notice). Consequently, proper A.R.S. § 13-4033(C) "personal notice" could and should be given through the same avenues, plus Rule 26.11, which advises a defendant about the potential to lose his right to appeal. (See attachments).

There may potentially be affected individuals – those against whom the state would argue that their appeal has been waived – who wish to argue that the substance of the statutory change is unconstitutional. However, the Court has never reached the merits of whether one *can* waive one's right to an appeal by knowingly,

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[4] *See* Form 18(a), (b), Rule 41, Ariz. R. Crim. P. ("The defendant acknowledges by entering this agreement that he or she will have no right to direct appeal (A.R.S. § 13-4033) and that the only available review is pursuant to Rule 32, Rules of Criminal Procedure."); *State v. Tudgay*, 128 Ariz. 1, 2-3, 623 P.3d 360, 360-61 (1981) (signed release order could provide proper 9.1 notice); *see e.g,. State v. Vaughn*, 163 Ariz. 200, 204, 786 P.2d 1051, 1055 (App. 1989) (finding personal notice provided in written conditions of release sufficient for inference of voluntary absence when defendant had knowledge of trial date); Form 6, Rule 41, Ariz. R. Crim. P. (standardized release order stating: "You have the right to be present at your trial and at all other proceedings in your case. If you fail to appear the court may issue a warrant for your arrest and/or hold the trial or proceeding in your absence."); *see also* Rule 17.2(e), Ariz. R. Crim. P. (defendants must be informed of loss of right to direct appeal when entering plea agreement); Forms 19, 28 (Guily Plea/No Contest forms notify defendant of his or her losing right to direct appeal), Rule 41, Ariz. R. Crim. P.

intelligently and voluntarily absenting oneself from sentencing proceedings for at least ninety days after conviction. This is because of a procedural deficiency in the current Rules of Criminal Procedure – the current rules do not call for a defendant to receive notice that they could waive their right to appeal by delaying their sentencing. In the absence of notice to defendants, courts have now twice ruled that the statute cannot apply, never reaching an argument on its merits. Without relevant notice, it is totally ineffective.

E. Conclusion: Amending the Rules Would Cause Trial Courts to Create Sufficient Record For An Appelate Court to Rule On Waiver

The Court of Appeals stated that "personal notice" would create a presumption that defendant's voluntary failure to appear would be knowing and voluntary. *Soto,* 223 Ariz. at 413-14, 224 P.3d at 229-30. The proposed amendments outlined below would provide "personal notice" of the effect of a voluntary failure to appear.

II. Proposal

A. Amend Rule 9.1 and Add New Comment

Rule 9.1 sets forth the procedure by which the defendant may waive his right to be present at a hearing by finding that he has voluntarily absented himself from that proceeding. The rule currently says, "The court may infer that an absence is voluntary if the defendant had personal notice of the time of the proceeding, the right to be present at it, and a warning that the proceeding would go forward in his or her absence should he or she fail to appear." Rule 9.1, Ariz. R. Crim. P.

As it is currently worded, Rule 9.1 fails to alert a defendant to the consequences laid out in A.R.S. §13-4033(C). The only admonishment to a defendant contained in the rule and its comments is that the trial will proceed in the defendant's absence; the rule is silent about the deprivation of the right to a direct appeal. As such the current Rule 9.1 does not provide "personal notice" of the potential loss of a right of appeal.

The proposed change simply adds a reference to appeals before the last clause:

> The court may infer that an absence is voluntary if the defendant had personal notice of the time of the proceeding, the right to be present at it, and a warning that the proceeding would go forward in his or her absence **OR HE OR SHE COULD LOSE THE RIGHT TO APPEAL** should he or she fail to appear.

A new comment accompanying this change would explain the effect of a waiver of appearance that delays sentencing beyond 90 days and the resulting loss of the right of appeal. This comment includes citations to A.R.S. § 13-4033, *Bolding* and *Soto*, to show the applicable standard of review, and to indicate that a Defendant could challenge a waiver claim by showing with clear and convincing evidence that the absence was involuntary.

The proposed comment reads as follows:

COMMENT TO 2014 REVISION

> The 2014 revisions to Rule 9.1 added language to recognize the addition of A.R.S. § 13-4033(C) which provides for the waiver of appeal rights for defendant whose absence prevents sentencing from occurring within ninety days after conviction. These defendants may not appeal from a final judgment of conviction, verdict of guilty except insane, or an order denying a motion for new trial unless the defendant fails to prove by clear and convincing evidence at the time of sentencing that the

> absence was involuntary. Because this waiver is contingent on a finding of that it was knowing, intelligent and voluntary, it is necessary for the defendant to be warned that "he could forfeit the right to appeal if he voluntarily delays his sentencing for more than ninety days." *State v. Bolding,* 227 Ariz. 82, ¶ 20, 253 P.3d 279, 285 (App. 2011); *State v. Soto*, 223 Ariz. 407, ¶ 17, 224 P.3d 223, 229 (App. 2010), *opinion vacated on other grounds,* 225 Ariz. 532, 241 P.3d 896 (2010). A special warning which specifically mentions the potential loss of the right to appeal should be given each time the defendant is notified that any proceeding may occur in his or her absence. *Soto*, 223 Ariz. at ¶¶ 18-19.

B. AMEND RULE 14.3

As mentioned above in the proposed new comment to Rule 9.1, the Court of Appeals' opinion in *Soto* suggests that the currently existing notices that proceedings may be held in a defendant's absence are not sufficient when attempting to determine whether a defendant has received "personal notice" of the potential to waive his right to appeal.

A defendant could be arraigned, abscond and then be convicted at trial; the notice given at arraignment would be sufficient to find that he has knowingly, intelligently and voluntarily waived his presence at trial. *State v. Bohn*, 116 Ariz. 500, 570 P.2d 187 (1977); *State v. Cook*, 118 Ariz. 154, 575 P.2d 353 (App. 1978). It is therefore essential that any notice of the potential loss of a right to appeal be given at the same time any warning is given about the potential for proceedings to occur in the defendant's absence.

The effect of the proposed amendment to Rule 14.3 would be to add an appeal-specific warning to the first place where a record would exist of a defendant

receiving personal notice of the potential for the matter to proceed to trial without their presence.

It is anticipated that counsel for the defendant or the court could address any questions which could arise from the court's oral notice, and that written notice would be contemporaneously provided (see revisions to Rule 41, below).

Rule 14.3(e) is proposed to be revised as follows:

> Advise the defendant of the right to be present at all future proceedings, that proceedings may be held in the defendant's absence **AND THAT ABSENCE COULD RESULT IN THE LOSS OF THE RIGHT TO APPEAL,** or that defendant may be charged with an offense and a warrant issued for defendant's arrest without further notice."

C. AMEND RULE 26.11

Rule 26.11 describes the duties of the Court when pronouncing judgment. As this would be the last opportunity to notify the Defendant of his potential to waive his right to appeal by voluntarily absenting himself and in so doing causing sentencing to occur more than 90 days later.

The proposed revision to Rule 26.11(a) is:

> After trial, the court shall, in pronouncing judgment and sentence:
>
> a. Inform the defendant of his or her right to appeal from the judgment, sentence or both and advise the defendant that ~~failure to file a timely appeal will result in the loss of the right to appeal~~ **HE OR SHE MAY LOSE THE RIGHT TO APPEAL IF EITHER THE DEFENDANT FAILS TO FILE A TIMELY NOTICE OF APPEAL OR, FOR APPEALS INVOLVING FINAL JUDGMENT OF CONVICTION AT TRIAL, A VERDICT OF GUILTY EXCEPT INSANE, OR AN ORDER DENYING A MOTION FOR A NEW TRIAL, THE DEFENDANT'S VOLUNTARY ABSENCE**

PREVENTS SENTENCING FROM OCCURRING WITHIN NINETY DAYS.

D. AMEND RULE 41, FORMS 6, 7, 23 AND 29

Form 6 is used by courts when a defendant is given release conditions – typically at initial appearance, but also occasionally at arraignment or a subsequent hearing held pursuant to Rule 7. In its current form, it bears a warning stating "[i]f you fail to appear the court may … hold the trial or proceeding in your absence."

The revision to this form adds an additional warning below that which says, "IF CONVICTED, YOU WILL BE REQUIRED TO APPEAR FOR SENTENCING. IF YOU FAIL TO APPEAR, YOU MAY LOSE YOUR RIGHT TO A DIRECT APPEAL."

Form 7 is used by courts when a defendant is posting a bond to secure release. IN its current form, it bears a warning stating, "WARNING: IF YOU DO NOT APPEAR AS REQUIRED, THIS BOND MAY BE FORFEITED AND THE PROCEEDINGS BEGIN WITHOUT YOU."

The revision to this form adds an additional warning below that which says, "IF CONVICTED, YOU WILL BE REQUIRED TO APPEAR FOR SENTENCING. IF YOU FAIL TO APPEAR, YOU MAY LOSE YOUR RIGHT TO A DIRECT APPEAL."

Form 23 is used by courts at the time of sentencing, to provide a defendant with a written notice of their rights of direct appeal (Rule 24) and post-conviction review (Rule 32). A section of this form discusses when a defendant has no right to an appeal under Rule 24. It currently says,

> You have a right to appeal from a final judgment of conviction, from an order denying a post-trial motion, or from a sentence which is illegal or excessive. Arizona

> Constitution art. 2, sec. 24; A.R.S. § 13-4031. YOU DO NOT HAVE A RIGHT TO APPEAL IF YOU HAVE PLED GUILTY OR NO CONTEST OR HAVE ADMITTED A VIOLATION OF CONDITIONS OF PROBATION. IN THAT CASE, RELIEF MAY BE SOUGHT ONLY BY PETITION FOR POST-CONVICTION RELIEF. Rules 17.1, 17.2 and 27.8, Rules of Criminal Procedure, A.R.S. § 13-4033(B).

The revision to this form adds to the second sentence, detailing the additional circumstance when a defendant would have no right to a direct appeal. Also, the citation is changed to A.R.S. § 13-4033, dropping the reference only to subsection B.

> You have a right to appeal from a final judgment of conviction, from an order denying a post-trial motion, or from a sentence which is illegal or excessive. Arizona Constitution art. 2, sec. 24; A.R.S. § 13-4031. YOU DO NOT HAVE A RIGHT TO DIRECT APPEAL IF YOU HAVE PLED GUILTY OR NO CONTEST OR HAVE ADMITTED A VIOLATION OF CONDITIONS OF PROBATION <u>OR HAVE FAILED TO APPEAR AT SENTENCING CAUSING THE SENTENCING TO OCCUR MORE THAN 90 DAYS BEYOND THE DATE OF CONVICTION</u>. IN THAT CASE, RELIEF MAY BE SOUGHT ONLY BY PETITION FOR POST-CONVICTION RELIEF. Rules 17.1, 17.2 and 27.8, Rules of Criminal Procedure, A.R.S. § 13-4033~~(B)~~.

Form 29 is used at arraignment to provide written notice of rights and directives from the Court. It says in paragraph 3:

> The defendant is advised that the defendant has the right to be present at all future proceedings. If the defendant fails to appear for any proceeding, that proceeding may be held regardless of the defendant's absence, the defendant

> may be charged with an offense for failure to appear, and a bench warrant may be issued for the defendant's arrest. If the defendant fails to appear for trial, trial may be held in the defendant's absence and the defendant may be convicted and sentenced.

The revision to this form adds a new paragraph 4 (renumbering the current paragraph 4 and subsequent paragraphs) which follows up on the warning in paragraph 3:

> The Defendant is advised that, if convicted, the defendant will be required to appear for sentencing. If the defendant chooses not to appear, and the defendant's absence prevents the defendant from being sentenced within ninety days from the conviction, the defendant may lose the right to a direct appeal.

E. AMEND RULE 41 BY ADDING NEW FORM 19(a)

The current Form 19 – used during guilty plea proceedings to provide a written notice of the defendant's rights – would be re-numbered Form 19(b). A new Form 19(a) would be added which would provide a defendant with written notice of their right to appeal from a conviction, a verdict of guilty except insane, or a denial of a motion for a new trial.

RESPECTFULLY SUBMITTED this 6th day of January, 2015.

John Furlong
General Counsel

Electronic copy filed with the
Clerk of the Arizona Supreme Court
this 9th day of January, 2015.

by: _____

EXHIBIT 1

Amendment to Rule 9.1; New comment to Rule 9.1

Rule 9.1. Defendant's waiver of right to be present

Except as otherwise provided in these rules, a defendant may waive the right to be present at any proceeding by voluntarily absenting himself or herself from it. The court may infer that an absence is voluntary if the defendant had personal notice of the time of the proceeding, the right to be present at it, and a warning that the proceeding would go forward in his or her absence **OR HE OR SHE COULD LOSE THE RIGHT TO APPEAL** should he or she fail to appear.

COMMENT [AMENDED 2007]

The first sentence of Rule 9.1 retains the waiver by voluntary absence of the defendant contained in the 1956 Ariz.Rules of Criminal Procedure, as amended, Rule 231(B) and Federal Rules of Criminal Procedure 43. No major change in the law is intended. The Arizona rule was challenged and ultimately sustained in *In re Hunt*, 276 F.Supp. 112 (1967), vacated 408 F.2d 1086 (6th Cir.1969).

The second sentence of Rule 9.1 embodies the rule of the District of Columbia Circuit Court of Appeals, which has held that "voluntary" in the phrase "voluntary absence" must be construed to mean "an intentional relinquishment or abandonment of a known right or privilege," *Johnson v. Zerbst*, 58 S.Ct. 1019, 304 U.S. 458, 82 L.Ed. 1461 (1938), and has therefore reversed convictions in which the defendant was not informed of his right to be present throughout the entire trial and warned that the trial would continue even in his absence. See *United States v. McPherson*, 421 F.2d 1127, 137 U.S.App.D.C. 192 (D.C.Cir.1969). The adoption of this standard in Arizona has the implied approval of the supreme court, *State v. Tacon*, 107 Ariz. 353, 355, 488 P.2d 973, 975 (1971), certiorari dismissed 93 S.Ct. 998, 410 U.S. 351, 35 L.Ed.2d 346 (February 21, 1973):

In order for a defendant to make a knowing and intelligent waiver of his right to be present at the trial, he must be aware that the trial will proceed without him if he fails to appear. 107 Ariz. at 355, 488 P.2d at 975.

It is quite practical to add the warning required by the rule to the release order received by the defendant after he posts bond or is released on his own recognizance. See Form 6.

The word "infer" is used in Rule 9.1 to indicate that the presumption of voluntariness is rebuttable. Obviously, a defendant who has received the required warnings might still be involuntarily absent and should be permitted to prove that fact.

COMMENT TO 2014 REVISION:

THE 2014 REVISIONS TO RULE 9.1 ADDED LANGUAGE TO RECOGNIZE THE ADDITION OF A.R.S. 13-4033(C) WHICH PROVIDES FOR THE WAIVER OF APPEAL RIGHTS FOR DEFENDANT WHOSE ABSENCE PREVENTS SENTENCING FROM OCCURRING WITHIN NINETY DAYS AFTER CONVICTION. THESE DEFENDANTS MAY NOT APPEAL FROM A FINAL JUDGMENT OF CONVICTION, VERDICT OF GUILTY EXCEPT INSANE, OR AN ORDER DENYING A MOTION FOR NEW TRIAL UNLESS THE DEFENDANT FAILS TO PROVE BY CLEAR AND CONVINCING EVIDENCE AT THE TIME OF SENTENCING THAT THE ABSENCE WAS INVOLUNTARY. BECAUSE THIS WAIVER IS CONTINGENT ON A FINDING OF THAT IT WAS KNOWING, INTELLIGENT AND VOLUNTARY, IT IS NECESSARY FOR THE DEFENDANT TO BE WARNED THAT "HE COULD FORFEIT THE RIGHT TO APPEAL IF HE VOLUNTARILY DELAYS HIS SENTENCING FOR MORE THAN NINETY DAYS." *STATE V. BOLDING*, 227 ARIZ. 82, ¶ 20, 253 P.3D 279, 285 (APP. 2011); *STATE V. SOTO*, 223 ARIZ. 407, ¶ 17, 224 P.3D 223, 229 (APP. 2010), OPINION VACATED ON OTHER GROUNDS, 225 ARIZ. 532, 241 P.3D 896 (2010). A SPECIAL WARNING WHICH SPECIFICALLY MENTIONS THE POTENTIAL LOSS OF THE RIGHT TO APPEAL SHOULD BE GIVEN EACH TIME THE DEFENDANT IS NOTIFIED THAT ANY PROCEEDING MAY OCCUR IN HIS OR HER ABSENCE. *SOTO*, 223 ARIZ. AT ¶¶ 18-19.

Exhibit 2

Amendment to Rule 14.3

Rule 14.3. Proceedings at Arraignment

The court shall:

a. Ascertain the defendant's plea of not guilty, guilty, or no contest. Unless the defendant pleads guilty or no contest, the court shall enter a plea of not guilty.

b. Hear and decide motions concerning the conditions of release under Rule 7. Unless the arraignment is held in conjunction with the defendant's initial appearance before a magistrate under Rule 4.2, a contested release motion shall be heard upon at least 5 days prior notice, unless such time is waived by all parties.

c. Set the date for trial or pretrial conference.

d. Advise the parties in writing of the dates set for further proceedings and other important deadlines.

e. Advise the defendant of the right to be present at all future proceedings, that proceedings may be held in the defendant's absence **AND THAT ABSENCE COULD RESULT IN THE LOSS OF THE RIGHT TO APPEAL,** or that defendant may be charged with an offense and a warrant issued for defendant's arrest without further notice.

f. Advise the defendant of the right to jury trial, if applicable.

g. For misdemeanors, inform the defendant of the right to counsel and the right to court-appointed counsel if eligible. As necessary, the court shall appoint counsel.

h. For summoned defendants charged with a felony offense, a violation of Title 13, Chapter 14, or Title 28, Chapter 4[1], or a domestic violence offense as defined in § 13-3601, if the defendant does not present a completed mandatory fingerprint compliance form to the court, or if the court has not received the process control number, the court shall order that within twenty calendar days, the defendant be ten-print fingerprinted at a designated time and place by the appropriate law enforcement agency.

COMMENT

This rule is basically a checklist for court and counsel in conducting an arraignment. Many of the items traditionally covered at the arraignment are included in the initial appearance, Rule 4.2. They need not be repeated.

Rule 14.3(a). This provision limits the pleas which may be entered at the arraignment to guilty, no contest and not guilty. *Cf.* the 1956 Arizona Rules of Criminal Procedure, Rule 178. The arraignment occurs too early in the proposed pretrial process to require specification of particular defenses. The detailed form of plea in the 1956 Arizona Rules of Criminal Procedure, Rule 179 is not necessary. Gone also from the arraignment is the plea to an allegation of a prior

conviction; this matter is also more appropriately handled by the notice of defenses required by Rule 15.2(b), the stipulations and omnibus hearing of Rule 16, and the guilty plea provisions of Rule 17.6. The last phrase retains the substance of the 1956 Arizona Rules of Criminal Procedure, Rule 167 on mute defendants and unintelligible pleas.

The inclusion of a no contest plea is discussed in the comments to Rule 17.1.

Rule 14.3(b). The conditions of release will have been set at the initial appearance, Rule 4.2(a)(5). However, under Rule 7.4(b) the defendant may raise the issue again upon transfer of the case to the superior court. In order to preserve the prosecutor's right to respond, a contested release matter may be heard on the day of arraignment only if 5 days' notice has been given. Such hearings will be deferred until after the regular arraignment calendar is completed, to avoid wasting the time of the parties in other cases.

Rule 14.3(d). This provision is an innovation for most superior courts, though it is common practice for some non-record courts to notify the parties in writing of the date for trial, together with appropriate instructions and warnings.

COMMITTEE COMMENT TO 1993 AMENDMENT

The 1993 amendment added subsections (e) and (f) to Rule 14.3 to expand the duties of the magistrate at the arraignment to include a duty to advise the defendant (1) of the right to be present at all proceedings, (2) that a proceeding may be held regardless of the defendant's absence, (3) that defendant may be charged with an offense and a warrant issued for defendant's arrest in the event of his or her non-appearance and (4) of the right to a jury trial, if applicable. Rule 14.3(c) was also amended to provide that either a trial date or a pretrial conference date may be set at the arraignment.

Exhibit 3

Amendment to Rule 26.11

Rule 26.11. Duty of the court after pronouncing sentence

After trial, the court shall, in pronouncing judgment and sentence:

a. Inform the defendant of his or her right to appeal from the judgment, sentence or both and advise the defendant that ~~failure to file a timely appeal will result in the loss of the right to appeal~~ **HE OR SHE MAY LOSE THE RIGHT TO APPEAL IF EITHER THE DEFENDANT FAILS TO FILE A TIMELY NOTICE OF APPEAL OR, FOR APPEALS INVOLVING FINAL JUDGMENT OF CONVICTION AT TRIAL, A VERDICT OF GUILTY EXCEPT INSANE, OR AN ORDER DENYING A MOTION FOR A NEW TRIAL, THE DEFENDANT'S VOLUNTARY ABSENCE PREVENTS SENTENCING FROM OCCURRING WITHIN NINETY DAYS.**

b. If he or she is entitled thereto, advise the defendant that:

(1) If the defendant is indigent, as defined in Rule 6.4(a), the court will appoint counsel to represent him or her on appeal; and

(2) If the defendant is unable to pay for a certified copy of the record on appeal and the certified transcript, they will be provided by the county.

c. Hand the defendant a written notice of these rights and the procedures the defendant must follow to exercise them, receipt of which shall be shown affirmatively in the record.

COMMENT [AMENDED 2007]

This section is drawn primarily from current practice but adds certain elements from ABA, Standards Relating to Criminal Appeals (Approved Draft, 1970); ABA, Standards Relating to Sentencing Alternatives and Procedures (Approved Draft, 1968); and Rules 6, 31 and 32. The language of the rule is broad enough to cover procedures both in record and non-record courts.

In superior court the procedures of paragraphs (a) and (b) are already part of present practice. Notice of appeal forms, Form 23 and indigency questionnaires, Form 5(a), should be available at sentencing. The warning in (a) will include alerting the defendant to the preclusion in Rule 32.2. The statements required in subparagraphs (b)(1) and (2) are drawn from Rules 31.5 and 6.4.

The defendant's trial counsel, whether private or appointed, has a duty under Rule 6.3(b) to advise his client whether or not an appeal would be beneficial and to continue representing the defendant if an appeal is taken, unless he shows good cause why he should be allowed to withdraw. Form 23 should be used to notify the defendant of his rights to appeal and to counsel on appeal.

In non-record courts, the defendant will be informed of his right to *de novo* appeal under Rule 30, and his right to counsel, if any, under Rule 6.1(b).

Exhibit 4

Revisions to Rule 41, Forms 6, 7, 23 and 29

Form 6. Release Order

_____ **COURT** _____ **County, Arizona**

STATE OF ARIZONA, Plaintiff -vs- _____ _____ _____ Defendant (FIRST, MI, LAST) Booking Number Date of Birth	**RELEASE ORDER**

LINE #	COMPLAINT NO.	VIOLATION CODE	NF	OR	3P	BOND	BA	U	S	C	NB
1						$					
2						$					
3						$					
4						$					
5						$					

(**NF** = charge not filed; **OR** = own recognizance release; **3P** = 3rd party custody; **BA**= bond applies; **U** = unsecured app.bond; **S** = secured app.bond; **C** = cash only; **NB** = non-bondable)

BOND: If you cannot post a bond of $ _____ you will remain in custody until your next court hearing on _____. If you are released from jail, you must follow all release conditions and appear at court as indicated below:

MANDATORY AND STANDARD CONDITIONS OF RELEASE:

[x] 1. Appear at _____ Court on: _____.
Court name, and address or see attached sheet for Court location at _____ a.m. / p.m., Courtroom: _____ for _____ and attend all future court hearings.

[x] 2. Violate no federal, state or local criminal law.

[x] 3. Not leave the state of Arizona without written permission from the court.
[ ] Defendant may leave the state of Arizona provided defendant returns for court dates.

[x] 4. Diligently pursue any appeal if released from custody after judgment and sentence have been imposed.

[ ] 5. Maintain contact with your attorney.

[ ] 6. Provide a current address and phone number to the Court and to your attorney and immediately notify both of any changes.

[ ] 7. Not threaten or initiate any type of contact with the alleged victim(s).

[ ] 8. Not drive a motor vehicle without a valid driver's license in your possession.

OTHER CONDITIONS OF RELEASE:

[ ] 9. Not threaten or initiate any type of contact with any person as specified here: _____.

[ ] 10. Not possess weapons as specified here: _____.

[ ] 11. Not consume any alcoholic beverages.

12. [ ] Not go to scene of the alleged crime:
[ ] Not go to locations as specified here: _____.

[ ] 13. Comply with the assigned pretrial supervision program as specified here: _____.

[ ] 14. Comply with 3rd party custody release conditions as specified here: _____.
[ ] 15. Contact probation or parole officer. See 3rd party obligations on back
[ ] 16. Electronic monitoring, if available, (Mandatory if charged with a felony offense under Chapters 14 or 35.1 of Title 13)
[ ] 17. Other: _____.

CONSEQUENCES OF VIOLATING THIS ORDER: You have the right to be present at your trial and at all other proceedings in your case. If you fail to appear the court may issue a warrant for your arrest and/or hold the trial or proceeding in your absence.

IF CONVICTED, YOU WILL BE REQUIRED TO APPEAR FOR SENTENCING. IF YOU FAIL TO APPEAR, YOU MAY LOSE YOUR RIGHT TO A DIRECT APPEAL.

If you violate any condition of an appearance bond, the court may order the bond and any related security deposit forfeited to the State of Arizona. In addition, the court may issue a warrant for your arrest upon learning of any violation of the conditions of release. After a hearing, if the court finds that you have not complied with the release conditions, the court may modify the conditions or revoke the release altogether.

If you are released on a felony charge, and the court finds the proof evident or the presumption great that you committed a felony during the period of release, the court must revoke your release. You may also be subject to an additional criminal charge, and upon conviction you could be punished by imprisonment in addition to the punishment which would otherwise be imposable for the crime committed during the period of release. Upon finding that you violated conditions of release, the court may also find you in contempt of court and sentence you to a term of imprisonment, a fine, or both.

ACKNOWLEDGEMENT: I fully understand and will comply with all release conditions indicated above and further understand the consequences should I violate any part of this order.

_____	_____
Current address where you live Apt. No.	Address where you receive mail if different from current address
_____ ( )_____	_____ ( )_____
Phone No.	Phone No.
X	X
Defendant Signature Date	Judicial Officer Date

DISTRIBUTION: WHITE--COURT YELLOW--SIMS OPERATOR PINK--DEFENDANT

THIRD PARTY OBLIGATIONS

YOU MUST comply with the following obligations if the defendant has been placed in your custody while the case is pending in court.

A. Supervise the defendant in accordance with all of the release conditions.
B. Make every effort to assure that the defendant is present for all scheduled court hearings.
C. Make every effort to assure that the defendant will contact Indigent Defense Services to determine indigency status.
D. Notify the court immediately in the event the defendant violates any conditions of release or disappears.

As Third Party Custodian appointed by the Court, I understand and accept these obligations.

_____ (___)_____

Third Party Custodian Signature Date Phone No.

_____

Address

_____

City State Zip

WARNING

IF YOU WILLFULLY VIOLATE ANY OF THESE OBLIGATIONS, THE COURT MAY HOLD YOU IN CONTEMPT AND IMPOSE A JAIL SENTENCE, FINE OR BOTH, AND YOU MAY LOSE YOUR RIGHT TO APPEAL.

Form 7. Appearance Bond

_____ _____ **County, Arizona**
COURT

STATE OF ARIZONA, Plaintiff -vs- Defendant (FIRST, MI, LAST)	[CASE/COMPLAINT NO.]	**APPEARANCE BOND**

In accordance with the terms of a release order or warrant issued on _____(month/day) 20_____, by Judicial Officer of the _____ court, of _____(city, justice, or county), State of Arizona, the defendant, _____ and the defendant's surety _____(If none, so state) hereby promise to pay the State of Arizona the sum of dollars ($_____), in the event the defendant fails to appear at _____ at _____ a.m./p.m. on _____(month/day) 20___, or during the pendency of the case to appear to answer the charges or to submit to the orders and process of the court having jurisdiction of the case.

SECURED APPEARANCE BOND

[ ] The defendant hereby deposits with the court cash or property of value in the full amount of this bond, the same to be forfeited in the event the defendant fails to comply with its conditions.
Depositor:
_____
Address:
_____
Phone Number:
_____

OR
[ ] _____ (Name, Address)
surety for the defendant, hereby swears (or affirms)that the surety is not an attorney or person authorized to take bail, and that the surety owns property in this state (or is a resident of this state owning property) worth the amount of this bond, exclusive of property exempt from execution and above and over all liabilities, as detailed in Attachment A.

WARNING: IF YOU DO NOT APPEAR AS REQUIRED, THIS BOND MAY BE FORFEITED AND THE PROCEEDINGS BEGIN WITHOUT YOU.

IF CONVICTED, YOU WILL BE REQUIRED TO APPEAR FOR SENTENCING. IF YOU FAIL TO APPEAR, YOU MAY LOSE YOUR RIGHT TO A DIRECT APPEAL.

ACKNOWLEDGEMENTS

_____ _____

Date Defendant

State of Arizona)
)
ss.
County of) Subscribed and sworn to before me on

_____ _____

My Commission Expires _____ Notary Public

Approved:

_____ _____

Date Surety or Authorized Agent

Form 23. Notice of Rights of Review after Conviction in Superior Court

_____ _____ **County, Arizona**
COURT

STATE OF ARIZONA, Plaintiff -vs- Defendant (FIRST, MI, LAST)	[CASE/COMPLAINT NO.]	**NOTICE OF RIGHTS OF REVIEW AFTER CONVICTION IN SUPERIOR COURT * (Capital & Non-Capital)**

*In limited jurisdiction cases, see Superior Court Rules of Appellate Procedure--Criminal Form 1

RIGHT TO APPEAL (CAPITAL)

If you are a capital defendant and sentenced to death the clerk shall file a notice of appeal at the time of entry of judgment and sentence. This notice shall be sufficient as a notice of appeal with respect to all judgments entered and sentences imposed in this case (Rule 31.2b, Rules of Criminal Procedure).

RIGHT TO APPEAL (NON-CAPITAL)

You have a right to appeal from a final judgment of conviction, from an order denying a post-trial motion, or from a sentence which is illegal or excessive. Arizona Constitution art. 2, sec. 24; A.R.S. § 13-4031. YOU DO NOT HAVE A RIGHT TO DIRECT APPEAL IF YOU HAVE PLED GUILTY OR NO CONTEST OR HAVE ADMITTED A VIOLATION OF CONDITIONS OF PROBATION **OR HAVE FAILED TO APPEAR AT SENTENCING CAUSING THE SENTENCING TO OCCUR MORE THAN 90 DAYS BEYOND THE DATE OF CONVICTION**. IN THAT CASE, RELIEF MAY BE SOUGHT ONLY BY PETITION FOR POST-CONVICTION RELIEF. Rules 17.1, 17.2 and 27.8, Rules of Criminal Procedure, A.R.S. § 13-4033~~(B)~~.

IN ORDER TO EXERCISE YOUR RIGHT TO APPEAL;

1. You must file a NOTICE OF APPEAL (Form 24(a)) within 20 days of the entry of judgment and sentence. If you do not file a notice of appeal within 20 days you will lose your right to appeal. The entry of judgment and sentence occurs at the time of sentencing.

2. To file a Notice of Appeal you should contact your lawyer, by letter, telephone or in person, telling him or her that you want to appeal. You can file the notice of appeal before you leave the courtroom on the day you are sentenced if you wish.

3. If you do not have a lawyer, get copies of Form 5, Defendant's Financial Statement and Request for Appointment of Counsel and Form 24 (a), Notice of Appeal, either from the clerk of the court, jail, or the prison, fill them both out and file or send them to the clerk of the superior court in the

county where you were tried and sentenced. They must arrive at the clerk's office within 20 days after you were sentenced.

4. You should have a lawyer handle your appeal.
You must file a NOTICE OF APPEAL (Form 24(a)) within 20 days of the entry of judgment and sentence. If you do not file a notice of appeal within 20 days you will lose your right to appeal. The entry of judgment and sentence occurs at the time of sentencing.

RIGHT TO POST-CONVICTION RELIEF (CAPITAL)

If you are a capital defendant and sentenced to death, the clerk of the Supreme Court shall file a notice of Post Conviction Relief with the Trial Court upon the issuance of a mandate affirming your conviction and sentence on direct appeal. If your death sentence is reduced to life on direct appeal, it is your responsibility to file your own Notice of Post Conviction Relief. (Please see Right to Post-Conviction Relief (Non-Capital) section below).

RIGHT TO POST-CONVICTION RELIEF (NON-CAPITAL)

You also have a right to petition the Superior Court for Post-Conviction Relief. Rule 32, Rules of Criminal Procedure.

In order to exercise your Post-Conviction Relief right;

1. You must file a NOTICE OF POST-CONVICTION RELIEF (Form 24(c)) within 90 days of the entry of judgment and sentence if you do not file, or you do not have the right to file, a Notice of Appeal. If you do appeal, the time you have to file a Notice of Post-Conviction Relief extends from the entry of judgment and sentence to 30 days after the issuance of the order and mandate affirming the judgment and sentence on direct appeal.

NOTE: If you do not timely file a Notice of Post-Conviction Relief, you may never have another opportunity to have any errors made in your case corrected.

2. To seek post-conviction relief, you must obtain a copy of Form 24(c) (Notice of Post-Conviction Relief), either from your attorney, the clerk of the court, or the jail or prison, fill it out and file or send it to the clerk of the Superior Court of the county where you were sentenced. The notice must arrive at the clerk's office within 90 days after you were sentenced or within 30 days after the issuance of the order and mandate affirming the judgment and sentence on direct appeal.

3. If you cannot afford to hire an attorney, you should execute the Affidavit of Indigency contained in the Notice of Post-Conviction Relief and request that an attorney be appointed to represent you.

If you want a full copy of the rules governing appeals and post- conviction relief, the clerk of the court in the county where you were convicted will send you one upon request.

RECEIPT BY DEFENDANT

I have received a copy of this notice explaining my right to appeal, my right to seek post-conviction relief and the procedures I must follow to exercise these rights.

_____ _____

Date Defendant

Form 29. Entry of Not Guilty and Advisements

_____ _____ **County, Arizona**
COURT

STATE OF ARIZONA, Plaintiff -vs- Defendant (FIRST, MI, LAST)	[CASE/COMPLAINT NO.]	**ENTRY OF NOT GUILTY PLEA AND ADVISEMENTS**

1. A plea of not guilty is hereby entered on the defendant's behalf to the following charge(s):
_____
_____
_____
_____
_____

2. The parties are notified that the next court appearance in this matter is for _____, on _____, 20 ___, at ___ a.m., before Judge _____, located at _____, Arizona.

3. The defendant is advised that the defendant has the right to be present at all future proceedings. If the defendant fails to appear for any proceeding, that proceeding may be held regardless of the defendant's absence, the defendant may be charged with an offense for failure to appear, and a bench warrant may be issued for the defendant's arrest. If the defendant fails to appear for trial, trial may be held in the defendant's absence and the defendant may be convicted and sentenced.

4. The Defendant is advised that, if convicted, the defendant will be required to appear for sentencing. If the defendant chooses not to appear, and the defendant's absence prevents the defendant from being sentenced within ninety days from the conviction, the defendant may lose the right to a direct appeal.

~~4~~ The defendant is further advised of the right to (jury) trial in this matter.
5.

~~5~~ The defendant is further advised that discovery is available from the Prosecutor's office, as provided
6. in rule 15.1, Rules of Criminal Procedure.

~~6~~ The defendant is directed to contact his/her attorney within 72 hours of service of this notice.
7.

~~7~~ The defendant has requested an interpreter: [ ] Spanish [ ] Other Language _____
8.

I acknowledge that I have received a copy of this document.

Dated: _____

_____
Defendant

_____
Address

_____

(___)_____
Telephone Number

Dated: _____

_____
Defense Attorney Bar No.

Exhibit 5

Revisions to Rule 41, Addition of New Form 19(a)
(Existing Form 19 to be renumbered Form 19(b))

Form 19(a). Notice of Rights to Appeal; Conviction, Denial of Motion for New Trial

_____ _____ **County, Arizona**
COURT

STATE OF ARIZONA, Plaintiff -vs- Defendant (FIRST, MI, LAST)	[CASE/COMPLAINT NO.]	**NOTICE OF RIGHTS TO APPEAL AFTER CONVICTION OR DENIAL OF MOTION FOR NEW TRIAL**

NOTICE:
IF YOU VOLUNTARILY FAIL TO APPEAR AT YOUR SENTENCING, YOU MAY WAIVE YOUR RIGHT TO APPEAL

[ ] RIGHT TO APPEAL FROM CONVICTION

You have been convicted of an offense, or have been found to been found guilty except insane. You may not appeal this judgment if your voluntary absence prevents sentencing from occurring within ninety days of the conviction.

[ ] RIGHT TO APPEAL FROM DENIAL OF MOTION FOR NEW TRIAL

Your motion for a new trial has been denied. You may not appeal this ruling if your voluntary absence prevents sentencing from occurring within ninety days of the conviction.

RECEIPT BY DEFENDANT

I have received a copy of this notice explaining my right to appeal.

_____ _____
Date Defendant

NOTICE:
IF YOU FAIL TO APPEAR AT YOUR SENTENCING, YOU MAY LOSE YOUR RIGHT TO APPEAL