

1 **WILLIAM G. MONTGOMERY**
2 **MARICOPA COUNTY ATTORNEY**
3 **(FIRM STATE BAR NO. 00032000)**

4 **MARK FAULL**
5 **CHIEF DEPUTY**
6 **301 WEST JEFFERSON STREET, SUITE 800**
7 **PHOENIX, ARIZONA 85003**
8 **TELEPHONE: (602) 506-3800**
9 **(STATE BAR NUMBER 011474)**

10 **IN THE SUPREME COURT OF THE STATE OF ARIZONA**

11 **IN THE MATTER OF:**

12 **PETITION TO AMEND RULES 9.1,**
13 **14.3, 26.11, AND 41, ARIZONA**
14 **RULES OF CRIMINAL**
15 **PROCEDURE**

R-15-0017

MARICOPA COUNTY ATTORNEY'S
RESPONSE TO PETITION TO AMEND RULES
9.1, 14.3, 26.11 AND 41, ARIZ. R. CRIM. P.

16 The Maricopa County Attorney hereby responds to the Petition to Amend Rules
17 9.1, 14.3, 26.11 and 41 of the Arizona Rules of Criminal Procedure and asks this
18 Court to grant a modified version of the petition including additional changes to Rule
19 14.2 and Rule 26.3 which will more clearly accomplish the Petitioner's stated goals.

20
21 The Petitioner correctly notes the extreme prejudice the State can suffer when a
22 defendant does not appear for trial, is convicted, and then reappears and appeals
23 many years later. For those reasons, the legislature amended A.R.S. §13-4033 in
24 2008 to prevent direct appeals when defendants convicted at trial do not appear for
25 sentencing for more than 90 days. Petitioner also correctly notes that the current
26 rules of procedure do not require sufficient personal notice of the consequences of
27
28

1 delaying sentencing by failing to appear for the courts to enforce the law. The
2 Maricopa County Attorney agrees that a change to the rules is appropriate, but there
3 are several needed improvements to the Petition's requested changes.
4

5 **Requested Changes to Rule 9.1**

6 The proposed changes to Rule 9.1 may cause confusion because a defendant
7 does not have the right to voluntarily absent himself or herself from a sentencing
8 proceeding. The first sentence of the current rule misstates the law insofar as it can
9 be read to mean that a defendant may simply choose not to appear for sentencing.
10

11 Rule 9.1 should be modified as follows to accurately state the law:
12

13 Except as otherwise provided in these rules, a defendant may waive the right to
14 be present at any proceeding, **OTHER THAN SENTENCING**, by voluntarily
15 absencing himself or herself from it. The court may infer that an absence is
16 voluntary if the defendant has personal notice of the time of the proceeding, the
17 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.

18 The Petition's addition of the potential loss of the right to appeal does not make sense
19 in the context of this rule because the second sentence is only explaining the
20 circumstances where a court can infer that a defendant's absence was voluntary.
21

22 Under A.R.S. § 13-4033(C), the defendant bears the burden to establish by clear and
23 convincing evidence that his or her absence at sentencing was involuntary so no
24 inference is needed when the issue involves a defendant's absence at sentencing. The
25

26 Maricopa County Attorney also believes that the proposed comment to Rule 9.1 is
27 unnecessary and should not be added to the rule.
28

1 **Requested Changes to Rule 14.3**

2 Much like the difficulty with attempting to solve the notice problem by
3 amending Rule 9.1, the proposed modification to Rule 14.3(e) adds confusion by
4 suggesting that a defendant has the right to not appear at sentencing. To accomplish
5 the goals of the Petition without injecting this confusion, the Maricopa County
6 Attorney asks that Rule 14.3(e) be modified as follows:
7

8 Advise the defendant of the right to be present at all future proceedings, that
9 **ALL** proceedings, **OTHER THAN SENTENCING**, may be held in the
10 defendant's absence, or that defendant may be charged with an offense and a
11 warrant issued for defendant's arrest without further notice.

12 To provide the legally necessary personal notice of the consequences of not appearing
13 at sentencing, the Maricopa County Attorney recommends adding a new subsection
14 (f) and renumbering the current (f), (g) and (h) accordingly. The new subsection (f)
15 would read as follows:
16

17
18 **F. ADVISE THE DEFENDANT THAT IF THE DEFENDANT'S**
19 **ABSENCE PREVENTS SENTENCING FROM OCCURRING WITHIN 90**
20 **DAYS FOLLOWING CONVICTION, THAT THE DEFENDANT MAY**
21 **LOSE HIS OR HER RIGHTS TO HAVE AN APPELLATE COURT**
REVIEW THE PROCEEDING BY WAY OF A DIRECT APPEAL.

22 Additionally, Rule 14.2 should be modified to require any defendant who waives
23 arraignment to specifically include their understanding that failing to appear for
24 sentencing could waive their direct appellate rights. The last sentence of Rule 14.2
25 should be amended as follows:
26

1 An affidavit signed by the defendant and notarized must be filed with the
2 superior court within twenty (20) days after arraignment, stating that defendant
3 has knowledge of all scheduled court appearances in this matter, **AND A**
4 **STATEMENT THAT THE DEFENDANT UNDERSTANDS THE**
5 **FAILURE TO APPEAR AT SENTENCING MAY RESULT IN THE LOSS**
6 **OF HIS OR HER RIGHTS TO A DIRECT APPEAL.**

7 **Requested Changes to Rule 26.11**

8 The requested changes to Rule 26.11 will not advance the notice goals of the
9 Petition because Rule 26.11 does not apply until sentence is pronounced. Rule 26.11
10 is titled, "Duty of the court after pronouncing sentence." By the time the court
11 applies this rule, sentencing has already occurred. Therefore, if the defendant's
12 absence has already delayed sentencing for more than 90 days it is too late to provide
13 notice to the defendant of the consequences of that delay. The delay and
14 consequence will have already occurred at that point.

17 Assuming proper notification was made at arraignment, there is no requirement
18 for any additional notifications. However, if some additional notification is
19 mandated, it must occur before the time set for sentencing. Therefore, the Maricopa
20 County Attorney recommends adding the following additional sentences to Rule
21 26.3(a)(1):
22
23

24 **WHEN THE COURT SETS A DATE FOR SENTENCING, THE COURT**
25 **SHALL NOTIFY THE DEFENDANT THAT THE DEFENDANT MUST**
26 **BE PRESENT FOR SENTENCING AND IF THE DEFENDANT FAILS**
27 **TO APPEAR FOR SENTENCING A WARRANT WILL BE ISSUED FOR**
28 **HIS OR HER ARREST. ADDITIONALLY, FOLLOWING A**
CONVICTION BASED ON A TRIAL, THE COURT SHALL NOTIFY

1 THE DEFENDANT THAT IF THE DEFENDANT'S ABSENCE
2 PREVENTS THE SENTENCING FROM OCCURRING WITHIN 90
3 DAYS, THE DEFENDANT WILL WAIVE HIS OR HER RIGHTS TO
4 HAVE AN APELLATE COURT REVIEW THE PROCEEDINGS BY
5 WAY OF A DIRECT APPEAL.

6 Requested Changes to Forms Under Rule 41

7 With the exception of the addition of new form 19(a), the Maricopa County
8 Attorney supports all of the requested forms changes. In addition to the requested
9 changes, this Court should also modify Form 29 to be clear that sentencing will not
10 occur in the defendant's absence. Failing to do so will give defendants the ability to
11 argue that they were unaware that their absence from sentencing would delay
12 sentencing. In addition to the modifications requested in the Petition, the Maricopa
13 County Attorney also recommends that paragraph 3 of Form 29 be modified as
14 follows:
15
16

17 The defendant is advised that the defendant has the right to be present at all future
18 proceedings. If the defendant fails to appear for any proceeding, **OTHER**
19 **THAN SENTENCING,** that proceeding may be held regardless of the
20 defendant's absence, the defendant may be charged with an offense for failure to
21 appear, and a bench warrant may be issued for the defendant's arrest. If the
22 defendant fails to appear for trial, trial may be held in the defendant's absence
23 and the defendant may be convicted ~~and sentenced.~~

24 Petitioner's request for a new form – Form 19(a) – is unnecessary. If the rules
25 are modified as requested in the Petition and this comment, Defendants will be
26 adequately advised of the consequences of not appearing for sentencing. Adding a
27 new form for courts to use upon conviction simply adds an additional administrative
28

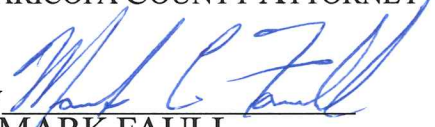
1 obligation on the courts with no resulting benefit to defendants or the system.
2 Therefore, the Maricopa County Attorney asks that the request to add Form 19(a) be
3 denied.
4

5 **Conclusion**

6
7 Petitioner accurately notes that changes to the Rules of Criminal Procedure are
8 necessary to give A.R.S. §13-4033 full force and effect. The goals of the Petition can
9 be better and more clearly accomplished, however, by making the modifications and
10 changes requested in this comment.
11

12 Respectfully submitted this 20th day of May, 2015.
13

14 WILLIAM G. MONTGOMERY
15 MARICOPA COUNTY ATTORNEY

16 By 
17 MARK FAULL
18 CHIEF DEPUTY
19
20
21
22
23
24
25
26
27
28

1 EXHIBIT 1

2 **Proposed Changes to the Current Rule 9.1 and Petitioner’s Requested Changes**

3
4 Proposed Changes to Rule 9.1 (including the current rule and Petitioner’s
5 requested changes)

6 Rule 9.1 Defendant’s waiver of right to be present

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

14 COMMENT [AMENDED 2007]

15 The first sentence of Rule 9.1 retains the waiver by voluntary absence of the
16 defendant contained in the 1956 Ariz. Rules of Criminal Procedure, as amended, Rule
17 231(B) and Federal Rules of Criminal Procedure 43. No major change in the law is
18 intended. The Arizona rule was challenged and ultimately sustained in *In re Hunt*,
19 276 F.Supp. 112 (1967), vacated 408 F.2d 1086 (6th Cir.1969).

20 The second sentence of Rule 9.1 embodies the rule of the District of Columbia
21 Circuit Court of Appeals, which has held that “voluntary” in the phrase “voluntary
22 absence” must be construed to mean “an intentional relinquishment or abandonment
23 of a known right or privilege,” *Johnson v. Zerbst*, 58 S.Ct. 1019, 304 U.S. 458, 82
24 L.Ed. 1461 (1938), and has therefore reversed convictions in which the defendant
25 was not informed of his right to be present throughout the entire trial and warned that
26 the trial would continue even in his absence. See *United States v. McPherson*, 421
27 F.2d 1127, 137 U.S.App.D.C. 192 (D.C.Cir.1969). The adoption of this standard in
28 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):

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

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

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

6 **COMMENT TO 2014 REVISION:**

7 ~~The 2014 revisions to Rule 9.1 added language to recognize the addition of~~
8 ~~A.R.S. 13-4033(C) which provides for the waiver of appeal rights for defendant~~
9 ~~whose absence prevents sentencing from occurring within ninety days after~~
10 ~~conviction. These defendants may not appeal from a final judgment of~~
11 ~~conviction, verdict of guilty except insane, or an order denying a motion for new~~
12 ~~trial unless the defendant fails to prove by clear and convincing evidence at the~~
13 ~~time of sentencing that the absence was involuntary. Because this waiver is~~
14 ~~contingent on a finding of that it was knowing, intelligent and voluntary, it is~~
15 ~~necessary for the defendant to be warned that “he could forfeit the right to~~
16 ~~appeal if he voluntarily delays his sentencing for more than ninety days.”~~ *State*
17 ~~*v. Bolding*, 227 Ariz. 82, ¶ 20, 253 P.3d 279, 285 (App. 2011); *State v. Soto*, 223~~
18 ~~Ariz. 407, ¶ 17, 224 P.3d 223, 229 (App. 2010), opinion vacated on other grounds,~~
19 ~~225 Ariz. 532, 241 P.3d 896 (2010). A special warning which specifically~~
20 ~~mentions the potential loss of the right to appeal should be given each time the~~
21 ~~defendant is notified that any proceeding may occur in his or her absence. *Soto*,~~
22 ~~223 Ariz. at ¶¶ 18-19.~~

EXHIBIT 2

Proposed Changes to Current Rule 14.2

Rule 14.2. Presence of the defendant

The defendant shall be arraigned personally before the trial court or by video telephone, provided that, in the event the defendant has personally appeared at an initial appearance, the defendant may waive appearance at the arraignment by filing a written waiver of personal appearance at arraignment at least two (2) days prior to the date of the arraignment with the clerk of the court and the arraignment court. An affidavit signed by the defendant and notarized must be filed with the superior court within twenty (20) days after arraignment, stating that defendant has knowledge of all scheduled court appearances in this matter, **AND A STATEMENT THAT THE DEFENDANT UNDERSTANDS THE FAILURE TO APPEAR AT SENTENCING MAY RESULT IN THE LOSS OF HIS OR HER RIGHTS TO A DIRECT APPEAL.**

1 **EXHIBIT 3**

2 **Proposed Changes to the Current Rule 14.3 and Petitioner’s Requested Changes**

3
4 **Proposed Changes to Rule 14.3 (including the current rule and Petitioner’s**
5 **requested changes)**

6 Rule 14.3 Proceedings at Arraignment

7 The court shall:

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

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

14 c. Set the date for trial or pretrial conference.

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

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

22 **F. ADVISE THE DEFENDANT THAT IF THE DEFENDANT’S ABSENCE**
23 **PREVENTS SENTENCING FROM OCCURRING WITHIN 90 DAYS**
24 **FOLLOWING CONVICTION, THAT THE DEFENDANT MAY LOSE HIS OR**
25 **HER RIGHTS TO HAVE AN APPELLATE COURT REVIEW THE**
26 **PROCEEDING BY WAY OF A DIRECT APPEAL.**

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

28 g. H. 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. I. For summoned defendants charged with a felony offense, a violation of Title 13,
Chapter 14, or Title 28, Chapter 4¹, 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.

1 EXHIBIT 4

2 **Proposed Changes to Petitioner's Requested Modification to Rule 26.11**

3
4 Proposed changes to Petitioner's Modified Rule 26.11

5
6 Rule 26.11. Duty of the court after pronouncing sentence

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

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

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

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

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

22 c. Hand the defendant a written notice of these rights and the procedures the
23 defendant must follow to exercise them, receipt of which shall be shown affirmatively
24 in the record.
25
26
27
28

1 EXHIBIT 5

2 **Proposed Changes to Rule 26.3**

3 Rule 26.3. Date of Sentencing; extension

4
5 a. Date of Sentencing

6 (1) *Superior Court*. Upon a determination of guilt, the court shall set a date for
7 sentencing. Sentence shall be pronounced not less than 15 nor more than 30 days
8 after the determination of guilt unless the court, after advising the defendant his or
9 her right to a presentence report, grants his or her request that sentence be
10 pronounced earlier. **WHEN THE COURT SETS A DATE FOR SENTENCING,**
11 **THE COURT SHALL NOTIFY THE DEFENDANT THAT THE DEFENDANT**
12 **MUST BE PRESENT FOR SENTENCING AND IF THE DEFENDANT FAILS**
13 **TO APPEAR FOR SENTENCING A WARRANT WILL BE ISSUED FOR HIS**
14 **OR HER ARREST. ADDITIONALLY, FOLLOWING A CONVICTION**
15 **BASED ON A TRIAL, THE COURT SHALL NOTIFY THE DEFENDANT**
16 **THAT IF THE DEFENDANT'S ABSENCE PREVENTS THE SENTENCING**
17 **FROM OCCURRING WITHIN 90 DAYS, THE DEFENDANT WILL WAIVE**
18 **HIS OR HER RIGHTS TO HAVE AN APELLATE COURT REVIEW THE**
19 **PROCEEDINGS BY WAY OF A DIRECT APPEAL.**

20 (2) [No Change]

21 b. Extension of Time

22 [No Change]

EXHIBIT 6

Proposed Changes to Petitioner's Request to Modify Form 29

Proposed changes to Form 29 (including the current form and Petitioner's requested modifications).

Form 29. Entry of Not Guilty and Advisements

_____ COURT _____ County, Arizona

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, **OTHER THAN SENTENCING**, 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 in rule 15.1, Rules of Criminal Procedure.
- 6.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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.