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(STATE BAR NUMBER 003813)

8 IN THE SUPREME COURT OF THE STATE OF ARIZONA

9
10 IN THE MATTER OF:

R-07-0006

11 PETITION TO AMEND THE RULE 8.4 AND
12 ADD RULES 27.12 AND 40 OF THE
13 ARIZONA RULES OF CRIMINAL
14 PROCEDURE.

MARICOPA COUNTY ATTORNEY'S
COMMENTS TO PETITION TO AMEND
RULE 8.4 AND ADD RULES 27.12 AND 40
OF THE ARIZONA RULES OF CRIMINAL
PROCEDURE

15 The Maricopa County Attorney hereby comments to the Petition to Amend Rule 8.4 and add
16 Rules 27.12 and 40 of the Arizona Rules of Criminal Procedure.
17

18 Respectfully submitted this ____day of October, 2007.

19
20 ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY

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22 By: _____
23 PHILIP J. MACDONNELL
24 CHIEF DEPUTY
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 The Administrative Office of the Arizona Supreme Court has proposed several rule changes in
3 an effort to smoothly implement Senate Bill 1628, which went into effect on September 17, 2007.
4 Senate Bill 1628 contains several provisions related to the prosecution of juvenile sex offenders.
5 Namely, a juvenile sex offender can petition for periodic review of his probation, including sex
6 offender registration and community notification. In addition, a juvenile sex offender charged pursuant
7 to A.R.S. § 13-501 (B) can avoid prosecution in adult court and be transferred to the juvenile court if
8 the legislative factors are met. Senate Bill 1628 is silent on important procedural issues, and rule
9 changes are necessary to fill these gaps. But the Maricopa County Attorney’s Office has concerns with
10 several of the proposed changes.
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13 The first proposed change is to Rule 8.4, Arizona Rules of Criminal Procedure. The Maricopa
14 County Attorney’s Office agrees with the intent of this proposed rule change, but has proposed
15 alternative language in Rule 40 to more clearly define this intent. See Exhibit 1.
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17 The next proposed changes are to add Rule 27.12 to existing probation rules. The Maricopa
18 County Attorney’s Office agrees with the proposed language, but believes that additional language is
19 necessary. The current proposal does not give guidance to the court on what factors should be
20 considered in determining whether modification of probation or early termination is appropriate, nor
21 does it give guidance to the probation department on what a probation review report should include.
22 The Maricopa County Attorney’s Office offers an alternative proposal to rectify this void. See new
23 proposed subsection (e) to Rule 27.12 in Exhibit 1.
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25 The Maricopa County Attorney’s Office does not object to the requirement that the prosecutor
26 be responsible for notifying the victim of the review hearing, but sufficient time should be prescribed in
27 the rule. The addition of a requirement that the court notify the prosecutor seven court days in advance
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1 of the hearing in any victim case would accomplish that goal. See additions to (d) in Rule 27.12 in
2 Exhibit 1.

3 The final proposal is the addition of Rule 40 to the Arizona Rules of Criminal Procedure. This
4 proposed Rule would govern the Transfer Hearing process in adult court. There are several problems
5 with the proposed Rule. The proposed Rule allows the accused or the court forty days from
6 arraignment to request a transfer hearing. In Maricopa County at least, a felony case is well on the way
7 towards trial forty days after arraignment. There is no reason that an accused should need that length of
8 time, particularly as the Rule allows for a continuance if good cause is shown. If an accused has forty
9 days to request a hearing and the hearing is not set for another 45 days, the case is already four months
10 from filing when the hearing is held, assuming there were no continuances granted. In fact,
11 approximately half of all adult felony criminal cases in Maricopa County are resolved (including
12 sentencing) within 40 days of arraignment. Twenty days is a much more appropriate timeframe and
13 more in keeping with the speedy trial goals of Arizona courts.
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16 The proposed Rule 40 would also mandate that a probation report be prepared by the adult
17 probation department in every case. This proposal has simply taken portions of Rule 34 of the Arizona
18 Rules of Juvenile Procedure and placed them into the Rules of Criminal Procedure without regard to the
19 differences between adult and juvenile court. Juvenile Court is a rehabilitative setting where the focus
20 is on the juvenile and the juvenile's needs. The juvenile probation department is an arm of this court
21 and is charged with the responsibility to aid in the rehabilitation of these juveniles. Adult court is a
22 punitive setting where the focus is on the community and public safety. The voters spoke clearly in
23 1996 that juvenile offenders who commit serious and violent offenses should not be tried in the
24 rehabilitative setting of juvenile court, which was codified into A.R.S. § 13-501 (A). The Arizona
25 Legislature expanded the list of offenses appropriate for adult prosecution in 1997, leading to the
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1 enactment of A.R.S. § 13-501(B). It is within this category of offenses that the sex offenses possible
2 for transfer pursuant to Senate Bill 1628 fall. This is a very small number of the offenses eligible for
3 filing in adult court. Against this history and backdrop, it is incumbent on the defendant to prove that it
4 would be appropriate to send him to the rehabilitative setting of the juvenile system, where jurisdiction
5 will end upon his eighteenth birthday. Unlike in the juvenile court, the adult probation department
6 does not begin working with the defendant as soon as charges are filed. Unlike in the juvenile court,
7 the adult probation department does not become acquainted with the rest of the defendant's family.
8 This is not an area where the adult probation department is in a position to write a report to the court,
9 nor is it appropriate for them to do so in this pre-trial, pre-sentencing posture of the case.
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11 Finally, the Maricopa County Attorney's Office is proposing that if a court determines transfer
12 to juvenile court is appropriate, then the adult trial court can hold the advisory hearing, which is the first
13 hearing a juvenile has in juvenile court. This is wise for several reasons. First, Senate Bill 1628
14 requires via new A.R.S. § 13-501.01(C), that if transfer is granted, "the court shall order that the
15 juvenile be taken to a place of detention designated by the juvenile court or to that court or shall release
16 the juvenile to the custody of the juvenile's parent, guardian or other person legally responsible for the
17 juvenile." This language contemplates that the adult court judge will be making the release
18 determination, thus negating the need for a detained advisory hearing to be held by a juvenile court
19 judge. Second, the trial court is in a better position to make a release determination than a juvenile
20 court judicial officer would be. The trial court will have been assigned to the case for an extended
21 period of time and will have just concluded an extensive transfer hearing regarding the juvenile.
22 Moreover, as part of that hearing, the trial court will have considered the same issues that are to be
23 considered in determining release. The interests of justice are much better served if a judge already
24 familiar with the case makes the initial release determination, as contemplated by SB 1628, than if a
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1 judicial officer totally unfamiliar with the case makes this determination. The final reason is simply
2 logistical. It is very unlikely that all parties will have received the information from their adult court
3 counterparts that would be necessary to have a meaningful hearing in juvenile court within 24 hours.
4 The alternative proposal would hold the advisory hearing in adult court, but then set a status conference
5 in juvenile court within 10 days for in-custody defendants and 20 days for out-of-custody defendants.
6 This both ensures the due process rights contemplated by the juvenile rules, as well as keeping the case
7 on track and timely.
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9 Respectfully submitted this ____ of October, 2007.

10
11 ANDREW P. THOMAS
12 MARICOPA COUNTY ATTORNEY

13 BY: _____
14 PHILIP J. MACDONNELL
15 CHIEF DEPUTY

16
17 Copies of the forgoing mailed
18 this ___ day of October, 2007 to:

19 Clerk of the Court
20 Arizona Supreme Court

21 David K. Byers, Director
22 Administrative Office of the Courts
23 1501 West Washington
24 Phoenix, AZ 85007
25
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1
2 EXHIBIT 1
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4 **Rule 8.4. Excluded periods**

5 The following periods shall be excluded from the computation of the time limits set forth
6 in Rules 8.2 and 8.3:

7 a. Delays occasioned by or on behalf of the defendant, including, but not limited to,
8 delays caused by an examination and hearing to determine competency or mental
9 retardation, the defendant's absence or incompetence, or his or her inability to be arrested
10 or taken into custody in Arizona.

11 b. Delays resulting from a remand for new probable cause determination under Rules 5.5
12 or 12.9.X

13 c. Delays resulting from extension of the time for disclosure under Rule 15.6.

14 d. Delays necessitated by congestion of the trial calendar, but only when the congestion
15 is attributable to extraordinary circumstances, in which case the presiding judge shall
16 promptly apply to the Chief Justice of the Arizona Supreme Court for suspension of any
17 of the Rules of Criminal Procedure.

18 e. Delays resulting from continuances in accordance with Rule 8.5, but only for the time
19 periods prescribed therein.

20 f. Delays resulting from joinder for trial with another defendant as to whom the time
21 limits have not run when there is good cause for denying severance. In all other cases,
22 severance should be granted to preserve the applicable time limits.

23 g. Delays resulting from the setting of a transfer hearing pursuant to Rule 40 of these
24 rules AS DEFINED IN RULE 40(b).
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1 **Rule 27.12. Probation Review hearing**

2 **a. Right to Hearing.** On request of a probationer who is under twenty two years of age
3 and who is serving a term of probation for an offense that requires registration pursuant
4 to A.R.S. § 13-3821 and that was committed when the probationer was under eighteen
5 years of age, the court shall conduct a probation review hearing at least once a year. The
6 probationer shall be informed of the right to a hearing at the time a term of probation is
7 imposed.

8 **b. Request for Hearing.** A request for a hearing shall be filed by the probationer and a
9 copy provided to the county attorney. A REQUEST FOR HEARING MUST BE FILED NO
10 LATER THAN 30 DAYS BEFORE THE PROBATIONER REACHES THE AGE OF TWENTY TWO.

11 **c. Scope of Hearing.** The court, at the hearing shall consider the following:

12 (1) Whether to continue, modify or terminate probation;

13 (2) Whether to continue to require, suspend or terminate the probationer’s
14 registration pursuant to A.R.S. §13-3821;

15 (3) Whether to continue, defer or terminate community notification pursuant to
16 A.R.S. § 13-3825.

17 **d. Notification of hearing date.** The court shall notify the following people of the
18 hearing, AND IN ANY CASE INVOLVING A VICTIM, THE COURT SHALL
19 PROVIDE AT LEAST SEVEN (7) COURT DAYS NOTICE TO THE PROSECUTOR.

20 (1) The prosecutor, who in turn shall notify any victim or victim’s attorney
21 entitled to be present and heard pursuant to the constitution of this state, statute or court
22 rule;

23 (2) The attorney for the Probationer;

24 **e. FACTORS TO BE CONSIDERED. IN DETERMINING WHETHER IT IS APPROPRIATE TO**
25 **MODIFY OR TERMINATE THE PROBATIONER’S PROBATION, THE COURT SHALL CONSIDER**
26 **THE FOLLOWING FACTORS:**
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- 1 **(1) THE PROBATIONER’S RISK TO REOFFEND. THIS INCLUDES CONSIDERATION OF:**
2 **(a) THE NUMBER OF VICTIMS WHO REPORTED VICTIMIZATION BY THE**
3 **PROBATIONER;**
4 **(b) THE AGE OF THE VICTIMS;**
5 **(c) THE HARM TO THE VICTIMS; AND**
6 **(d) THE NUMBER OF INCIDENTS WITH EACH VICTIM.**
7 **(2) HOW LONG THE PROBATIONER HAS BEEN UNDER THE SUPERVISION OF THE**
8 **ADULT PROBATION DEPARTMENT;**
9 **(3) WHAT LEVEL OF SUPERVISION THE PROBATIONER IS CURRENTLY UNDER;**
10 **(4) THE RESULTS OF ANY PSYCHO-SEXUAL EXAMINATION PERFORMED BY AN**
11 **INDEPENDENT EXAMINER;**
12 **(5) WHETHER THE PROBATIONER HAS BEEN COMPLIANT WITH THE TERMS OF**
13 **PROBATION; AND**
14 **(6) WHETHER CONTINUED SUPERVISION WOULD BE IN THE BEST INTERESTS OF THE**
15 **COMMUNITY.**

16 **ef. Probation review report.** The court shall require a probation review report prior to
17 the probation review hearing. The report shall ADDRESS ALL FACTORS ENUMERATED IN
18 SUBSECTION (e) OF THIS SECTION. THE REPORT SHALL be delivered to the judge
19 conducting the hearing COURT AND THE PARTIES at least two TEN days prior to the date
20 set for the hearing.

21 **f. Pre-hearing.** ~~Prior to the probation review hearing the court may hold a pre-hearing.~~
22 ~~The persons present and the scope of the pre-hearing shall be as provided by law.~~

23 **g. THE HEARING MUST COMMENCE PRIOR TO THE PROBATIONER REACHING THE AGE OF**
24 **TWENTY TWO. THE DECISION OF THE COURT MAY NOT BE DEFERRED. IN THE EVENT A**
25 **HEARING IS CONTINUED, THE HEARING AND DECISION MUST BE MADE FINAL NO LATER**
26 **THAN 30 DAYS AFTER THE PROBATIONER HAS REACHED THE AGE OF TWENTY TWO.**
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3 **Rule 40. Transfer for Juvenile Prosecution**

4 **a. Scope.** ~~This rule shall apply to defendants who are eligible for transfer to juvenile~~
5 ~~court pursuant to A.R.S. 13-501.01.~~

6 **b. Initiation.** ~~A hearing to determine whether prosecution of a defendant shall be~~
7 ~~transferred to juvenile court shall be initiated as follows:~~

8 ~~1. Upon motion of the defendant, or~~

9 ~~2. Upon an order of the court stating that a transfer hearing is either being set in the~~
10 ~~court's discretion or is required by law.~~

11 **c. Contents of Motion and Court Order.** ~~The motion for transfer or the court order~~
12 ~~shall designate the offense or offenses that are the subject of the transfer hearing.~~

13 **da. Time Limits.**

14 **1. Request for Transfer.** ~~The motion for transfer or the court order setting a transfer~~
15 ~~hearing shall be filed within forty TWENTY days of the date of the arraignment.~~

16 **2. Hearing Date.** ~~The transfer hearing shall be held within forty-five days of the filing~~
17 ~~of the motion for transfer or of the ORDER OF THE court order. THIS TIME SHALL BE~~
18 ~~EXCLUDED FROM THE RULE 8.4 COMPUTATION. The court may continue the hearing for~~
19 ~~good cause. GOOD CAUSE INCLUDES THE TIME NEEDED FOR EITHER PARTY TO SECURE~~
20 ~~THE SERVICES OF AN EXPERT PURSUANT TO SUBSECTION (c) OF THIS SECTION.~~

21 **3. Disclosure.** ~~The filing of a motion to transfer or the setting of a transfer hearing shall~~
22 ~~not serve to suspend any requirement pursuant to Rule 15 of these rules.~~

23 **f. Transfer Investigation.** ~~Upon receipt of an order setting a transfer hearing the court~~
24 ~~shall order the adult probation department to conduct a transfer investigation and make a~~
25 ~~written report specifically addressing those issues that the court considers in~~
26 ~~determining whether to transfer the defendant. The adult and juvenile probation~~
27 ~~departments may confer as necessary to complete the investigation. A copy of the~~
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1 report shall be given to all parties not less than five days prior to the transfer hearing
2 unless the time is waived by the parties.

3 **b. Evaluation of Defendant. THE DEFENDANT OR THE STATE MAY RETAIN AN EXPERT**
4 **TO RENDER AN OPINION ABOUT THE DEFENDANT'S RISK TO REOFFEND AND/OR**
5 **LIKELIHOOD OF REHABILITATION. QUESTIONS REGARDING THE DEFENDANT'S**
6 **COMPETENCY MUST BE ADDRESSED PURSUANT TO RULE 11, ET SEQ. ANY TESTIMONY**
7 **OR REPORT OFFERED BY THE DEFENDANT'S EXPERT WILL NOT BE ADMISSIBLE IF THE**
8 **DEFENDANT HAS REFUSED TO SUBMIT TO AN EXAMINATION BY THE STATE'S EXPERT.**
9 **STATEMENTS MADE TO AN EXPERT PURSUANT TO THIS RULE SHALL NOT BE REDACTED**
10 **BY EITHER PARTY AND SHALL NOT BE ADMISSIBLE AT ANY PROCEEDING TO DETERMINE**
11 **GUILT OR INNOCENCE UNLESS THE DEFENDANT PRESENTS EVIDENCE TO REBUT THE**
12 **PRESUMPTION OF SANITY.**

13 **g. Prior Transfer.** If the defendant has previously been transferred for juvenile
14 prosecution by any court of this state, the court, in its discretion, may waive the
15 provisions of section f of this rule. Any prior orders of transfer, probation reports or
16 reports pertaining to physical, psychological or psychiatric evaluations introduced into
17 evidence in a prior transfer proceedings shall be provided to the parties and counsel and
18 may be considered by the court.

19 **h.c. Transfer Hearing.** The transfer hearing shall include a determination whether
20 **COURT SHALL NOT TRANSFER THE DEFENDANT UNLESS** the defendant has shown by
21 clear and convincing evidence that public safety and the rehabilitation of the defendant,
22 if adjudicated delinquent in juvenile court would be best served by transferring the
23 prosecution to juvenile court. The court shall consider those factors provided by statute.
24 i.d. if the defendant testifies at the transfer hearing, the defendant does not by so
25 testifying waive the right to remain silent during the trial. If the defendant testifies at
26 the transfer hearing, neither this fact nor the defendant's testimony at the hearing shall
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1 be mentioned to the jury unless the defendant testifies at the trial concerning the same
2 matters.

3 **je. Order of Transfer.** At the conclusion of the hearing the court shall determine
4 whether the defendant shall be transferred to juvenile court. The court shall state its
5 reasons in writing in the form of a minute entry or order and shall not defer the decision.

6 **kf. Commencement of Juvenile Proceedings.** If the court orders the defendant to be
7 transferred for juvenile prosecution the indictment or information shall serve as the
8 juvenile petition. **THE COURT WILL HOLD AN ADVISORY HEARING PURSUANT TO RULE**
9 **28(C), RULES OF JUVENILE PROCEDURE. THE COURT WILL SET A STATUS CONFERENCE**
10 **BEFORE THE ASSIGNED JUVENILE COURT JUDGE WITHIN TEN DAYS IF THE DEFENDANT**
11 **IS IN CUSTODY, AND WITHIN TWENTY DAYS IF THE DEFENDANT IS OUT OF CUSTODY.**
12 **THE TIME BETWEEN THE ADVISORY HEARING AND THE STATUS CONFERENCE SHALL BE**
13 **EXCLUDED FROM THE CALCULATION OF TIME IN RULE 29, RULES OF JUVENILE**
14 **PROCEDURE.** The Clerk of the Court shall, within forty-eight hours of the order
15 transferring prosecution, file a copy of the indictment or information in the juvenile
16 court.