

Christina M. Phillis
Arizona Bar Membership No. 014871
Attorney Manager
Office of the Maricopa County Public Defender
777 W. Southern Ave., Bldg. A, Ste. 101
Mesa, Arizona 85210
Telephone (602) 506-2033
Fax (602) 372-6888

IN THE ARIZONA SUPREME COURT

In the Matter of PETITION TO)	R-07-0006
AMEND RULE 8.4, ARIZONA)	
RULES OF CRIMINAL)	
PROCEDURE, AND ADDED RULE)	
27.12 AND 40, ARIZONA RULES)	
OF CRIMINAL PROCEDURE)	COMMENT ON PETITION
_____)	

On behalf of the Office of the Maricopa County Public Defender and for the reasons set forth below, the undersigned attorney disagrees with added Rule 27.12 and 40 Arizona Rules of Criminal Procedure as set forth in Petition No. R-07-0006.

Proposed Rule 27.12

The petition proposes creating Rule 27.12, Arizona Rules of Criminal Procedure, to establish criminal procedures for conducting probation review hearings for persons under twenty two years of age, who committed their sexual offense while a minor, and are required to register as sex offenders pursuant to A.R.S. § 13-3921. Upon the request of the probationer, the court will hold a hearing to consider (1) whether to continue, modify or terminate probation, (2) whether to continue to require, suspend or terminate the probationer's duty to

register as a sex offender and (3) whether to continue, defer, or terminate community notification. In preparation for the hearing the probation officer must author a probation review report. The court shall require a probation review report prior to probation review hearing. The report shall be delivered to the judge conducting the hearing at least two days prior to the date set for the hearing.” Proposed Rule 27.12(e), Arizona Rules of Criminal Procedure. Two days notice of the probation department’s position and supporting documentation denies the probationer due process. Counsel for the probationer will be unable to review and investigate the information contained in the report in two days. Further counsel for the probationer may need to obtain and present witnesses and other evidence to refute the allegations in the probation review report.

The proposed rule change does not provide the state or the probationer adequate time to prepare for the review hearing. Probation review hearings in criminal court are similar to the review of placement hearings held in juvenile court. Arizona Revised Statute § 8-341(C) mandates that the probation officer must file a report at least five days prior to a review of placement hearing. Review of placement hearings are held every sixty days in order to determine whether an adjudicated juvenile is ready to graduate from residential treatment. Probation review hearings carry more dire consequences and are held annually; therefore the parties should be given a minimum of fifteen days to prepare after receiving the probation report.

In the alternative, section “f. Pre-hearing” could precede the “Probation review report” that way the probation department’s submission of a report two days prior to the pre-hearing would not violate the defendant’s due process right. According to section “f”, “Prior to the probation review hearing the court may hold a pre-hearing.” All interested parties are given notice of the pre-hearing; therefore they would have access to the probation department’s position prior to the pre-hearing. Any party wishing to present evidence or contest the report would have ample time to prepare prior to the review hearing. However, this would require that the “Pre-hearing” rule be amended to read “the court shall hold a pre-hearing.” Otherwise, an addendum to the rule would be required stating that if a pre-hearing is not held, the probation report must be submitted to the court at least fifteen days prior to the hearing.

Further, the rule should provide that the probation department shall disclose all materials used to reach the recommendations in the probation report to the parties. The parties cannot adequately prepare for the review hearing without the underlying documentation that the probation officer used to determine if the youth was in need of probation services, continued registration and notification. Supporting documentation should be provided to all parties with the probation report, fifteen days in advance of the review hearing.

Lastly, Rule 27.12, Arizona Rules of Criminal Procedure, should contain a section regarding time limits. Section “d” of the rule states who the court must notify of the hearing date but does not specify a time period by which the hearing

must be held after a request is made. A specified time limit is essential to ensure the matter is heard timely. The only mention of time in the Rule 27.12, Arizona Rule of Criminal Procedure, is the yearly review. Thus the review hearing could be heard 364 days after the request, requiring the probationer to remain on probation, continue to register and be subjected to community notification for an additional year.

A practical solution would be to title Rule 27.12(d.), Arizona Rules of Criminal Procedure, "Time Limits", under which category the requirements for setting a hearing date would be set forth. The probation review hearing should be held within forty-five days from the time that the request for a hearing is filed. Forty-five days is amply time for the probation department to prepare a report and parties to prepare for the proceeding. Thus parties would have sufficient time to prepare and the probationer would receive a timely hearing.

Proposed Rule 40

The petition proposes creating Rule 40, Arizona Rules of Criminal Procedure, to establish criminal procedures for conducting transfer hearings pursuant to A.R.S. § 13-501.01 to determine whether a person under eighteen years of age and charged with as an adult pursuant to A.R.S. § 13-501(B) with a violation of an offense listed in Title 13, Chapter 14 or 35.1 should be tried as a juvenile. A juvenile who is eligible to have a case transferred to juvenile court pursuant to A.R.S. § 13-501.01 may initiate the process by filing a motion, or the court may initiate the process. Once the request for a transfer hearing has been

made, the court must hold the hearing within forty-five days. According to section “d(2), Hearing Date”, “the court may continue the hearing for good cause.” Proposed Rule 40, Arizona Rules of Criminal Procedure. Yet transfer hearings are time sensitive matters. The age of a juvenile weighs heavily in the court’s decision to transfer the youth to juvenile court. Therefore safeguards should be placed upon the number and length of continuances. Disposition hearings in juvenile court are time sensitive matters. Thus, Rule 30(B)(1)(c), Arizona Rules of Procedure for Juvenile Court, limits the number of continuances and duration of continues. Using the language in Rule 30(B)(1)(c) as a guide, the proposed rule should state the court may not continue a transfer hearing more than thirty days after the date initially set for transfer without the defendant’s consent in open court.

A particularly troubling aspect of proposed Rule 40 is section “f”, “Transfer Investigation.” According to the proposed rule, the probation department must conduct a transfer investigation and make a written report to the court prior to the transfer hearing. As outlined in § 13-501.01 (D), the report is to specifically address the seriousness of the offense, record and history of the juvenile, previous residential treatment, prior commitment to juvenile department of corrections, whether the offense was committed while juvenile was a ward of the juvenile department of corrections, whether the offense was committed in furtherance of a criminal gang, the degree of the juvenile’s participation in the offense, the juvenile’s mental and emotional condition, the likelihood of the juvenile’s

reasonable rehabilitation through use of juvenile court services and the views of the victim. The majority of information the probation officer is required to include in the report must be provided by the defendant. Only through conversations with the juvenile will the probation officer be able to assess the degree of the juvenile's participation in the offense, the juvenile's mental and emotional condition and the likelihood the juvenile would be rehabilitated through the use of juvenile services. The interview between the juvenile and the probation officer would be pre-trial. Any information the probation officer obtains or gathers from the juvenile could be used against him at trial. Should the juvenile elect to assert his constitutional right against self incrimination, the probation officer may conclude the juvenile would be unwilling to participate in treatment offered through juvenile court.

Defense counsel is the party best situated to prepare the written report to the court. By having defense counsel prepare the report, the defendant's constitutional right against self incrimination is protected while the factors outlined in § 13-501.01(D) are addressed for the court.

Further, a transfer hearing is an evidentiary hearing. The burden of demonstrating to the court by clear and convincing evidence that public safety and rehabilitation would be served by transferring prosecution to the juvenile court rests with the defense. Thus defense counsel should be responsible for providing the court with the information necessary to persuade the court to transfer the case to juvenile court for prosecution.

The deletion of section “f”, “Transfer Investigation”, of proposed Rule 40, Arizona Rules of Criminal Procedure, requires section “g”, “Prior Transfer”, to be amended. According to section “g”, “if the defendant has previously been transferred for juvenile prosecution by any court of this state, the court, in its discretion, may waive the provisions of sections “f” of this rule.” Clearly this sentence would need to be deleted from section “g”, if section “f” were deleted from Rule 40, Arizona Rules of Criminal Procedure.

Conclusion

The passing of A.R.S. § 13-3921 and A.R.S. § 13-501.01 has necessitated the creation of Criminal Rules to govern probation review proceedings and transfer hearings. The undersigned attorney requests that this court amend Proposed Rule 27.12 and 40 of the Arizona Rules of Criminal Procedure as set forth in the petition with the following exceptions: “(1) amend proposed Rule 27.12 to require that the probation report with all supporting documents be provided to the parties and the court fifteen days in advance of the review hearing, (2) the review hearing to be held within forty-five days of the filing of the motion for a review hearing, (3) amend proposed Rule 40 to by limiting continuances of the transfer hearing to one thirty day continuance, (4) delete the requirement that the probation department conduct a transfer investigation.” The attorney suggests that the additional subsection set forth in the alternative proposal attached to this comment as Appendix A be added.

RESPECTFULLY SUBMITTED this _____ day of October, 2007.

Christina M. Phillis
Manager of the Juvenile Division
Maricopa Public Defender's Office

Copies of this comment have been mailed
this _____ day of October, 2007.

Original and six copies to
Clerk of the Arizona Supreme Court
1501 W. Washington, Ste. 402
Phoenix, AZ 85007
Attn: RULE COMMENT

One copy to
David K. Byers
Court Administration
1501 W. Washington, Ste. 411
Phoenix, AZ 85007-3327

ALTERNATIVE PROPOSAL

[The alternative proposal is that this court adopt the language set forth in petition no. R-07-0006, with the following exceptions: (1) add section “d” and amended section “e” of Rule 27.12, (2) delete section “f”, and (3) amend section “g” of Rule 40 as set forth below.]

Rule 27.12 Probation Review hearing

d. Time Limits Right

1. Hearing Date. The review hearing shall be held within forty-five days of the filing of a motion for the review. The court may continue the hearing for good cause.

2. Notification of hearing date. The court shall notify the following people of the hearing:

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

(b) The attorney for the probationer.

e. Probation review report. The court shall require a probation review report prior to the probation review hearing. The report and supporting documentation shall be delivered to the judge and all parties at least fifteen days prior to the date set for the hearing.

Rule 40. Transfer for Juvenile Prosecution

f. Transfer Investigation – deleted

g. Prior Transfer. Any prior orders of transfer, probation reports or reports pertaining to physical, psychological or psychiatric evaluations introduced into evidence in a prior transfer proceeding shall be provided to the parties and counsel and may be considered by the court.