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

In the Matter of:

Supreme Court No. R

**PETITION TO AMEND THE
ARIZONA RULES OF CRIMINAL
PROCEDURE**

**Comment to Petition to Amend
Rule 12.9, Arizona Rules of
Criminal Procedure**

Pursuant to Rule 28(D), Rules of the Supreme Court, The Maricopa County Public Defender (“MCPD”) respectfully submits the following Comment (the “Comment”) to Petition R17-0002 Petition to Amend the Arizona Rules of Criminal Procedure (all) (the “Petition”).

MCPD is the largest indigent defense firm in the State of Arizona with over 200 deputy public defenders providing indigent legal services in the Maricopa County Justice and Superior Courts. During the past fiscal year, the MCPD handled almost 36,000 criminal cases.

This Comment is supported by the following Memorandum.

MEMORANDUM

Respondent requests this common-sense change be made to the Rules in order to better accommodate the rights of a defendant to challenge grand jury proceedings and balance this right with the needs for the state to have a reasonable time frame to disclose evidence. This change would also support judicial economy and, in keeping with the mission of the Criminal Rules Task Force, is not a substantive change.

I. Reasons Proposed Rule Amendment Should Be Adopted

Pursuant to Rule 12.9, Arizona Rules of Criminal Procedure, a motion to challenge a grand jury's finding of probable cause must be filed no later than 25 days after arraignment or after the certified transcript is filed with the court, whichever is later. MCPD recommends expanding the 25 day time limit to 45 days from arraignment or after the certified transcript is filed, whichever is later. See Exhibit A. Failure to file a Motion to Remand within the specified timeframe is a complete bar to challenging the grand jury proceedings. *State v. Mulligan*, 142 Ariz. 210, 213 (1980).

At the arraignment pursuant to Rule 15.1(a) Ariz. R. Crim., the State is required to make available all law enforcement reports and contact information for any experts who examined a defendant or other evidence, including the results of completed examinations or tests. A review of the State's discovery is necessary to determine if a challenge to the grand jury proceeding is appropriate. Often the State does not provide more than a cursory police report at the arraignment. Typically, in cases charged by the Maricopa County Attorney's Office, significant discovery, including the results of tests conducted

by experts, is not provided until after the 25 day deadline. It is not possible to determine if the grand jury presentation was fair and impartial if discovery is not provided. An unintentional mischaracterization of an expert's opinion is a basis for remand. *Korzep v. Superior Court of State of Ariz. In & For Yuma Cty.*, 155 Ariz. 303, 306 (Ct. App. 1987). However, without a copy of the report or test results within the 25 day time limit, the defense cannot determine if accurate information was provided to the grand jury. Officer body worn camera footage and other recordings of defendant, witnesses, and victim interviews must also be reviewed to determine if the grand jury witness fairly and accurately described these statements to grand jurors. The actual discovery must be reviewed to determine if a Motion to Remand under Rule 12.9 is appropriate.

A Motion to Extend Time can be filed but often, these are not ruled on by the court in Maricopa County until the Initial Pre-Trial Conference (IPTC), which is typically scheduled 30-45 days after arraignment—well after the 25 day deadline has expired. The court has no authority to grant an extension that is filed after the 25 day time limit. *Maule v. Arizona Superior Court for Maricopa Cty.*, 142 Ariz. 512, 515 (Ct. App. 1984). In a majority of cases prosecuted by the Maricopa County Attorney's Office, the current 25 day time limit compels the defense to file a Motion to Extend Time to preserve any potential remand issues, which must then be ruled upon prior to the IPTC. Expanding the time limit promotes judicial economy by reducing the number of Motions to Extend Time filed.

In light of pending R-17-0027 Maricopa County Attorney's Petition to Modify Rules 15.1 and 15.4 to extend the State's time to provide body worn camera or

surveillance footage discovery, it is appropriate to concurrently expand a defendant's time to review discovery and determine if a challenge to the grand jury proceeding is appropriate.

II. Proposed Rule Amendment is Not Substantive

Extending the time under Rule 12.9 to 45 days is not a substantive change. The current proposed changes to the Rules of Criminal Procedure have expanded and reduced time requirements without making substantive changes to the rule. Specifically, current Rule 3.2(c) lists no time requirement and the proposed new Rule 3.2(c) states fingerprints shall be taken “not later than 20 days.” Current Rule 7.2(c)(2)(C) includes no time limit to set a hearing and proposed Rule 7.2(c)(2)(C)(ii) states the “court must hear a motion under this rule no later than 3 days.” Current Rule 11.4(a) states an edited report must be “returned to court staff within 24 hours.” Proposed Rule 11.4(a)(2) offers that an edited report be “made available to the state no later than 3 days.” Current Rule 27.12(e)(1) does not list a timeframe for the prosecutor to notify the victim of a hearing. Proposed rule 27.11(d)(B)—renumbering current Rule 27.12(e)(1)—suggests including language that “the court must give the State at least 7 calendar days’ notice of the date of the hearing.” Finally, current Rule 28.2(e) provides notice of “at least 10 days prior to disposing” of evidence; and the proposed new rule renumbered 28.2(2)(9) expands notice to 20 days.

Clearly, when minor changes are made to deadlines, the Committee has not considered them to be substantive. In concordance with the Committee's findings in the

above five rule changes, the proposed change to Rule 12.9 does not impact the substance of the Rule.

III. Conclusion

Expanding the time limit in Rule 12.9 to 45 days fosters judicial economy; and promotes a defendant's right to a fair and impartial grand jury proceeding, particularly in light of the Maricopa County Attorney's Office's Petition R-17-0027 to expand the State's time to provide certain types of discovery, which are fundamentally part of the law enforcement report.

RESPECTFULLY SUBMITTED this _____ day of May, 2017.

MARICOPA COUNTY PUBLIC DEFENDER

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This comment e-filed this
22nd day of May, 2017, with:

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Exhibit A

16A A.R.S. Rules Crim.Proc., Rule 12.9
Rule 12.9. Challenge to grand jury proceedings

- (a) Grounds.** A defendant may challenge a grand jury proceeding only by filing a motion for a new finding of probable cause alleging that the defendant was denied a substantial procedural right or that an insufficient number of qualified grand jurors concurred in the indictment.
- (a) Timing.** A defendant must file a motion under (a) no later than ~~25~~ **45** days after the certified transcript and minutes of the grand jury proceedings are filed or no later than ~~25~~ **45** days after the defendant's arraignment, whichever is later.
- (b) Relief.** If the court grants a motion for a new finding of probable cause, the State may proceed with the prosecution of the case by filing a complaint under Rule 2 or by resubmitting the matter to the same or another grand jury. On motion or on its own, the court must dismiss the case without prejudice unless a complaint is filed, or a grand jury's consideration begins, no later than 15 days after entry of the order granting the motion for a new finding of probable cause.