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

In the Matter Of:

Petition to Modify Rules 11.2, 11.3, 11.5 and  
11.7 of Arizona Rules of Criminal Procedure

Supreme Court No. R-17-0041

**COMMENT IN OPPOSITION IN PART TO THE  
PETITION TO AMEND RULES 11.2, 11.3, 11.5  
AND 11.7 OF THE ARIZONA RULES OF  
CRIMINAL PROCEDURE**

The Maricopa County Public Defender (“MCPD”) respectfully submits the following Comment in Opposition (the “Comment”) to Petition R-17-0041, The Administrative Office of the Court’s Petition to Modify Rules 11.2, 11.3, 11.5 and 11.7 of the Arizona Rules of Criminal Procedure (the “Petition”). On August 9, 2017, the Supreme Court expedited the adoption of the petition. The comment period remains open.

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

MCPD opposes the Petition in part. MCPD objects to the proposed modifications of Rule 11.5(b)(2) and Rule 11.7(b). This objection is based on Article II, Section 4, Section 10, Section 11 and Section 24 of Arizona Constitution, and the 5th, 6th, and 14th Amendments to the United States Constitution. The Petitioner's proposed rule change is an effort to bring the Arizona Rules of Criminal Procedure in conformity with Arizona law recently passed in HB2239. Arizona lawmakers created this new law without adequate safeguards for an individual's due process rights, and this Court should not change its rules to follow. The proposed changes will violate an incompetent defendant's constitutional rights to due process, privilege against self-incrimination, and right to counsel. On these grounds, MCPD objects to the proposed changes.

## SUMMARY OF RULE 11

Rule 11 is the Arizona Rule of Criminal Procedure generally related to a defendant's competency to stand trial. A defendant in a criminal case must be competent to be "tried, convicted, sentenced or punished for a public offense". Ariz. R. Crim. P. 11.1. If, after the evaluation or restoration process is completed, a trial court makes a finding that the defendant is "incompetent and there is no substantial probability that the defendant will become competent within 21months", the court has several options currently available. *Id.* at 11.5(b)(2). Those options include:

- (i) Remand defendant to Department of Health Services to begin civil commitment proceedings pursuant to Title 36, Chapter 5;
- (ii) Order appointment of a guardian pursuant to Title 14, Chapter 5;
- (iii) Release the defendant from custody and dismiss the charges without prejudice.

Ariz. R. Crim. P. 11.5. Currently, when the trial court orders parts (i) or (ii), the case is dismissed without prejudice and the court does not retain jurisdiction over the case.

**A. The Petition to Change Rule 11.5(b), Which Would Allow the Criminal Court to Retain Jurisdiction is a Violation of an Incompetent Defendant's Right to Due Process and Speedy Trial.**

The Petitioner's proposed change to Rule 11.5(b) would add an additional subsection that would allow the trial court to retain jurisdiction while the defendant is petitioned for a Civil Commitment or screening for Guardianship. Such a change constitutes a Due Process Violation pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Article 2, Sections 4, 11 and 24 of the Arizona Constitution. It is also a violation of the Sixth Amendment of the United States Constitution and Rule 8 of the Arizona Rules of Criminal Procedure.

When the court retains jurisdiction, the criminal case remains open, and thus all of the incompetent defendant's constitutional rights under the criminal case must be protected during the civil commitment or guardianship proceedings. It is unclear why the criminal court will have jurisdiction over the case during this time period. Because the defendant is currently incompetent, there is nothing that the defendant can do during that time to move his criminal case forward. However, during this time an incompetent defendant may be held in custody without progress towards the goal of restoration, may be held without consideration of the right to a speedy trial, is subjected to an impermissible parallel proceeding, and may be compelled to make statements that could be adverse to the open criminal case. MCPD will address these concerns in turn.

**i. If the Petition is Adopted, the Incompetent Defendant May be Held on an Open Criminal Case Without Making Progress on That Case in Violation of the Right to Due Process.**

The Fifth and Fourteenth Amendments to the United States Constitution and Article 2, Sections 4, 11 and 24 of the Arizona Constitution protect a person's rights to procedural and substantive due process. Due process guarantees that no person shall be deprived of life, liberty, or property without due process of law. Incapacitated criminal defendants not only have a due process interest in freedom from incarceration, but also "in receiving restorative treatment." *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1121 (9th Cir. 2003).

The United States Supreme Court has held that incarceration for the purposes of restoring a defendant to competency becomes unlawful when the person being detained is either not receiving treatment or not progressing toward the goal of competency. *Jackson v. Indiana*, *Jackson v. Indiana*, 406 U.S. 715(1972). Thus, when a defendant is incarcerated *after* he has been deemed incompetent, any further detention must be justified by progress toward regaining competency. *Id.* Without progress towards restoration, the defendant's due process rights are violated. In Arizona, the lack of progress during this timeframe will occur, because the treatment order for restoration is only valid up until the restoration treatment facility submits a report, stating that there is no substantial probability that the defendant will be restored within 21 months. *See* A.R.S. § 13-4512(I). Therefore, in every one of these cases, restoration treatment will not be provided while the court retains jurisdiction.

Further, the Petitioner's proposed rule change does not include a time limit for the length of time the criminal case will remain open after the trial court makes a determination of incompetency. A Civil Petition under Title 36 or a Guardianship

petition under Title 14 can take weeks to months to complete. During this time, the incompetent defendant could remain incarcerated or under the jurisdiction of the criminal court without any progress being made on the case. This is not a *de minimus* violation of the incompetent defendant's due process rights. Any additional days in custody after a determination of incompetence and unrestorability is a due process violation, as there would be no progress towards restoring that person to competency in the criminal setting.

**ii. If the Petition is Adopted, the Incompetent Defendant May be Held on an Open Criminal Case in Violation of the Right to a Speedy Trial.**

All criminal defendants are guaranteed a right to speedy trial through the Sixth Amendment of the United States Constitution and Rule 8 of the Arizona Rules of Criminal Procedure. A defendant's "Rule 8" time is excluded when the delay is "caused by the examination and hearing to determine competency [...]." But the Petition does not contemplate what will happen when a defendant is determined to be not restorable within the statutory timeframe, and the case remains open. The only logical outcome would be that Rule 8 time must begin and continue to run on the criminal case, even though the client's incompetence prevents further substantive work on the criminal case. The retention of jurisdiction thus creates an inherent conflict in which either Rule 8 time runs, but the parties are not able to substantively work on the case due to the client's incompetence, or Rule 8 time does not run, which will be a violation of due process.

**iii. The Proposed Rule Change Would Violate the Defendant's Rights Pursuant to the Fifth, and Fourteenth Amendments and Would Constitute an Impermissible Parallel Proceeding.**

As an initial matter, it should be noted that defendants are compelled to participate in Rule 11 proceedings when ordered by a judge, and do not have the option to refuse participation. In Rule 11 generally, defendants are able to speak openly about their lives and their situation, including about the current offense, and the defense attorney has the ability to redact those statements pursuant to Rule 11.4(a). Any statement about the current offense is further protected by a privilege granted in Rule 11.7. This is designed to allow the doctors to access to all the information available to assess competency to stand trial while still protecting the defendant's Fifth Amendment right against privilege against self-incrimination.

When an incompetent defendant is compelled to participate in a Title 36 Civil Commitment or Title 14 Guardianship petition, the defendant is moved out of the criminal justice system and into a civil realm. There, the incompetent defendant may be questioned about the open criminal case. In both settings, written records and reports are commonly generated and contain statements made by the incompetent defendant during either process.

After these civil evaluations, no rule permits the defense attorney representing the incompetent defendant on the open criminal case to redact any potentially incriminating statements made to examiners during the civil proceedings, unlike during the Rule 11 process. Furthermore, the Fifth Amendment privilege against self-incrimination does not apply during the civil process.

This new scheme places the incompetent defendant in a precarious situation where he is forced to participate in a process where he must make statements and answer questions, but his attorney cannot protect him from statements he makes about the current offense. Any statement he makes is not protected by a privilege and is not able to be redacted from a

written report. Although historically the criminal courts and state have not had regular access to these records, recent changes to Title 36 now permit the state access. Pursuant to A.R.S. § 36-531(E), the patient's records shall be provided to the criminal court and prosecuting agency within 24 hours of a defendant's release from the hospital.

The Court should consider the chilling impact this new scheme will have on evaluations for Civil Commitment in Title 36 or for Guardianship in Title 14. If an incompetent defendant is going to be compelled to participate in a process while a criminal case is ongoing, and the defense attorney has no ability to redact incriminating statements, the incompetent defendant may be correctly advised to not participate in any evaluation. This might be the only way for the defense attorney to protect the incompetent defendant from making non-privileged, incriminating statements during an open criminal case in a forum where counsel has no ability to redact the statements.

Alternatively, the process could grind to a halt if the incompetent defendant were to request his criminal counsel be present during the civil petition or guardianship application. Because the criminal case is still open, the incompetent defendant would still have a Fifth Amendment right against self-incrimination. The defendant could refuse to answer questions about the charged offense, even if it was relevant to the civil petition or to the guardianship application. A defendant would likely be advised to refuse to answer any questions without the presence of counsel, since frequently the criminal case is discussed during this process, which would cause scheduling and other delays. For example, currently an evaluation of an incompetent defendant referred for a civil petition must occur within 72 hours. A.R.S. § 36-530(B). However, if the defendant refused to talk to those doctors without an attorney present,

those doctors may not be able to complete the evaluation within the time limit, may be forced to have an incomplete petition, or the petition may be dismissed for lack of evidence to support or order for treatment.

Finally, the open parallel criminal case and civil evaluation violates due process for the incompetent defendant. Such a violation could entitle the defendant to a remedy in the criminal matter, if the government's investigation is conducted in "bad faith." *United States v. Stringer*, 535 F.3d 929, 936 (9th Cir. 2008). The *Stringer* Court cited to examples of bad faith, including when "the [g]overnment has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution; ... [or] any other special circumstances ... might suggest the unconstitutionality or even the impropriety of this criminal prosecution. *Id.* at 937 (quoting *United States v. Kordel*, 397 U.S. 12-13(1970). Here, the bad faith would be compelling an incompetent defendant to make statements while the criminal case remains open without the ability to redact those statements. Additionally, the "special circumstances" definition of bad faith also applies here. The simple fact that the criminal prosecution remains open after a finding that the defendant is incompetent to stand trial and is not making any progress towards restoration "might suggest the unconstitutionality or even impropriety of this criminal prosecution." *Id.*

**B. Petitioner's Proposed Change to Rule 11.7 Would Allow Statements Gathered During Competency Proceedings to be Used By Any Party in a Hearing to Determine Whether the Incompetent Defendant is a Sexually Violent Person.**

The Petitioner proposes to amend Rule 11.7(b) to include section (3) as it relates to Sexual Violent Persons (SVP) petitions. SVP law is a unique area of law. It applies a criminal

burden of proof, the Civil Rules of Procedure, and is managed by the Probate Court. However, the most notable element of SVP law is that a commitment as a SVP restricts a person's liberty. Commitment as an SVP requires forced confinement at the Arizona State Hospital (ASH). Once committed, there is no guarantee the committed person will ever be released from ASH. To be released, the court must find that the person no longer meets the criteria for SVP, usually due to substantial progress in sex offender treatment.

Rule 11.7 discusses privileged statements of the defendant. Normally, statements made while in the Rule 11 proceeding to the experts are privileged, sealed by the court, and cannot be used in the criminal case or in any other setting. These statements are not admissible against the defendant at trial in a criminal matter. There are exceptions to this, set out in A.R.S. § 13-4508(E), but those exceptions do not include an exception for the use of these statements during a SVP petition.

The Petitioner's proposed rule change would allow statements made by the incompetent defendant during the Rule 11 evaluation process to be used against the defendant in evaluations as a SVP.

This is problematic for a number of reasons. First, defense counsel historically has not been present during the Rule 11 evaluations. Counsel did not demand to be present during these evaluations because admissions and statements made during the Rule 11 evaluation could be redacted, and were not used in the criminal case against the defendant. However, if the Court adopts this rule change, the statements could be used against the same defendant in the SVP setting. Counsel may and should demand to be present during Rule 11 evaluations to prevent the defendant from making statements that would be against their interest in the civil

SVP setting, as these statements would not be privileged or subject to redaction. Further, because the county prosecutor on the criminal case is also the entity that requests and pursues the SVP, we would no longer be able to effectively redact the statements for purposes of the criminal case, because both the redacted and unredacted report would go to the same entity.

It becomes quite clear why using a person's statements from the Rule 11 proceeding against the defendant in the quasi-civil setting of the SVP hearing would force the defendant to choose between two important rights: his right to be competent to stand trial or his right against self-incrimination in the SVP screening phase. A defendant is compelled to participate in the Rule 11 process. They do not elect to participate; it is a decision made by the judge and often at the request of defense counsel. The defendant has no ability to control their entrance into the process. In no other setting would a criminal defendant be compelled to provide statements that could impact their liberty, without certain restrictions on those statements. In the criminal setting, such statements are subject to defense counsel's ability to redact admissions to the offense and the reports themselves are sealed. If a defendant chooses not to participate in the Rule 11 evaluations, despite the restrictions on the use of those statements in their criminal case, they are most often deemed competent for their failure to participate. Thus, if a defendant chooses not to make statements during the Rule 11 process because of their concern regarding the impact to an SVP proceeding, they will likely be giving up the ability to provide valuable information regarding the nature and degree of incompetence.

In order for counsel to effectively advise a client in this situation as to which questions to answer, counsel may and should request to be present during all evaluations, and the client may invoke as to statements that could potentially be used in the SVP setting. Again, this has

the potential of drastically delaying the Rule 11 process for any defendant where the State might request the SVP screening on the case, and the presence of counsel during an evaluation could turn the evaluation process into more of a legal proceeding as opposed to a true mental health evaluation.

### CONCLUSION

The Petition proposed and temporarily adopted by the Court represents numerous legal and practical challenges to competency proceedings. All proposed changes impact criminal defendants determined to be incompetent to stand trial, which is among the most vulnerable in the criminal justice system. Creating a rule change in line with the petition would serve to violate the incompetent defendant's right to Due Process, a speedy trial, and would potentially subject them to parallel proceedings. For these reasons, this Court should not adopt the Petition in whole.

RESPECTFULLY SUBMITTED this 11 day of October, 2017.

MARICOPA COUNTY PUBLIC DEFENDER

By: /s/ Ashley Blum  
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Deputy Public Defender

/s/ Jennifer S. Rock  
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This comment e-filed this  
11 day of October, 2017, with:

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