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ARIZONA SUPREME COURT

In the matter of:)
)
PETITION TO AMEND RULES 4.1,) Supreme Court No. 19-_____
7.6, 11.3, 26.10, 29.3, 29.7, and 41 OF THE) (expedited consideration
RULES OF CRIMINAL PROCEDURE) and emergency adoption
) requested)
)
_____)

Pursuant to Rule 28 of the Rules of the Supreme Court, David K. Byers, Administrative Director, Administrative Office of the Courts, respectfully petitions this Court to amend the rules specified above as proposed in Appendix A. The proposed amendments implement legislative enactments affecting the criminal rules from the 2021 legislative session as more particularly described below.

I. Purpose of the Proposed Rule Amendments.

A. HB 2066, Arrest procedures, magistrates (Laws 2021, Ch. 73)

The proposed amendments to Rule 4.1(b)&(c) resolve a conflict between the current rule and HB 2066, which expands the options for an arresting officer to take the arrestee either before the nearest or most accessible magistrate in the county in

which the arrest occurs or the county where the offense was committed. The current rule states the arrestee is to be taken to the magistrate in the county of arrest.

B. HB 2831, Failure; appear; surety; notice; rules (Laws 2021, Ch. 370)

This bill adds a requirement that the court notify a surety and bail bond agent responsible for defendant's appearance when a defendant fails to appear. The court is required to transmit the notice by email, if one has been provided by the surety and bail bond agent. Petitioner proposes to add this new requirement to Rule 7.6(c).

C. SB 1266, Competency evaluation; records; appointments (Laws 2021, Ch.139)

This bill reduced the number of mental health experts the court must appoint to evaluate a defendant's competency in misdemeanor cases from two to one. Petitioner proposes to revise Rule 11.3(a)(2) accordingly.

D. HB 2075, Sentencing; judgment of guilt; fingerprints (Laws 2021, Ch. 74)

This bill removed the statutory requirement that a court must obtain a defendant's fingerprint on the sentencing document in open court for specified offenders. The requirement currently appears in Rule 26.10(b), which petitioner is proposing to revise to comport with the statutory amendment.

E. HB 2067, Criminal conviction; set aside; applicability (Laws 2021, Ch. 159)

This bill requires the court to grant a "Certificate of Second Chance" when granting a set aside for eligible offenders. Petitioner proposes to include the statutory eligibility criteria in Rule 29.7 and to amend Rule 41 by adding the Certificate of

Second Chance to Criminal Form 31(b), the Order Regarding Application to Set Aside Conviction and Restore Gun Rights. The bill also reduces the amount of time that the State and a victim have to object to a set aside from 60 to 30 days. Petitioner has amended Rule 29.3 accordingly.

F. SB 1249, Convictions; set aside; traffic violations (Laws 2021, Ch. 209)

This bill expands the types of offenses for which a defendant may seek to set aside a conviction by including most criminal traffic violations. Petitioner proposes to implement this bill by amending Rule 41 to remove related language in the Order Regarding Application to Set Aside Conviction and Restore Gun Rights - Form 31(b).

II. Preliminary Comments.

This petition has not been sent to the court community for pre-filing comments because of its technical nature and due to the short period of time since the enactment of the new statutory provisions.

III. Request for Emergency Adoption.

All the legislation identified in this petition will become effective on the general effective date, which is likely to fall sometime in September, except for HB 2831, which will become effective on January 1, 2022. Therefore, as permitted by Supreme Court Rule 28(H), petitioner requests expedited consideration of all proposed rule and form amendments at the court's next Rules Agenda with a

comment period to follow, and emergency adoption of all proposed rule and form amendments other than the amendment to Rule 7.6(c), in time to meet the general effective date. Petitioner requests that the Court adopt the amendment to Rule 7.6(c) prior to January 1, 2022.

Respectfully submitted this 3rd day of June, 2021.

By /S/
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APPENDIX A

Arizona Rules of Criminal Procedure

(deletions shown with ~~strike through~~, new language is underlined)

Rule 4. INITIAL APPEARANCE

Rule 4.1. Procedure upon Arrest

(a) Prompt Appearance Before a Magistrate. An arrested person must be promptly taken before a magistrate for an initial appearance. At the initial appearance, the magistrate will advise the arrested person of those matters set forth in Rule 4.2. If the initial appearance does not occur within 24 hours after arrest, the arrested person must be immediately released from custody. If a misdemeanor warrant states the amount of a deposit, cash, unsecured, or secured appearance bond as provided in Rule 3.2(a)(3), and the arrested person has posted the bond prior to the initial appearance, the arrested person must be promptly released from custody.

(b) On Arrest Without a Warrant. A person arrested without a warrant must be taken before the nearest or most accessible magistrate either in the county of arrest or in the county where the offense was committed. A complaint, if not already filed, must be promptly prepared and filed. If a complaint is not filed within 48 hours after the initial appearance before the magistrate, the arrested person must be immediately released from custody and any pending preliminary hearing dates must be vacated.

(c) On Arrest with a Warrant.

(1) *Arrest in the County of Issuance.* A person arrested in the county where the warrant was issued must be taken before the magistrate who issued the warrant for an initial appearance. If the magistrate is absent or unable to act, the arrested person must be taken to the nearest or most accessible magistrate in the same county.

(2) *Arrest in Another County.* If a person is arrested in a county other than the one where the warrant was issued, the person must be taken before the nearest or most accessible magistrate in the county of arrest or in the county where the offense was committed. If eligible for release as a matter of right, the person must then be released under Rule 7.2. If not released immediately, the

arrested person must be taken to the issuing magistrate in the county where the warrant originated, or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the county where the warrant originated.

(d) and (e) [no changes]

Rule 7. RELEASE

Rule 7.6. Transfer and Disposition of Bond

(a) and (b) [no changes]

(c) Forfeiture Procedure.

(1) *Arrest Warrant and Notice to Surety.* If the court is informed that the defendant has violated a condition of an appearance bond, it may issue a warrant for the defendant's arrest. No later than 10 days after the warrant's issuance, the court must notify the surety, in writing or electronically that the warrant was issued.

(2) *Defendant's Failure to Appear.* If the court is informed that the defendant who is released on an appearance bond failed to appear for a required court appearance and the court issues a warrant for the defendant's arrest, the court, no later than 10 days after the warrant's issuance must notify the surety and the bail bond agent who is responsible for the defendant's appearance. Notice must be by email if the surety or bail bond agent provided an email, or to the physical address that is included in the undertaking of bail if no email was provided.

~~(2-3)~~ *Hearing and Notice.* After issuing the arrest warrant, the court must set a hearing within a reasonable time, no later than 120 days after it issued the warrant, requiring the parties and any surety to show cause why the bond should not be forfeited. The court must notify the parties and any surety of the hearing in writing or electronically. The forfeiture hearing may be combined with a Rule 7.5(d) hearing.

~~(3-4)~~ *Forfeiture.* If the court finds that the violation is not excused, it may enter an order forfeiting all or part of the bond amount, and the State may enforce that order as a civil judgment. The order must comply with Arizona Rule of Civil Procedure 58(a).

(d) Exoneration. [no changes]

Rule 11. INCOMPETENCE AND MENTAL EXAMINATIONS

Rule 11.3. Appointment of Experts

(a) Appointment of Experts.

(1) *Definition of a “Mental Health Expert.”* “Mental health expert” means a physician licensed under A.R.S. §§ 32-1421 to -1437 or 32-1721 to -1730; or a psychologist licensed under A.R.S. §§ 32-2071 to--2076.

(2) *Generally.* If the court finds that reasonable grounds exist for a competence examination, it must appoint one or more qualified mental health experts for a defendant charged with only a misdemeanor, or two or more qualified mental health experts for a defendant charged with a felony to:

(A) examine the defendant;

(B) report to the court in writing no later than 10 business days after examining the defendant;
and

(C) testify, if necessary, about the defendant's competence.

(3) *Psychiatry Background.* A party may request or the court may order that at least one of the mental health experts be a physician specializing in psychiatry.

(4) *Stipulation for Only One Examiner.* With the court's approval, the State and the defendant may stipulate to the appointment of only one expert.

(5) *Examiner Qualifications.* A mental health expert must be:

(A) familiar with Arizona's standards and statutes for competence and criminal and involuntary commitment statutes;

(B) familiar with the treatment, training, and restoration programs that are available in Arizona;
and

(C) approved by the court as meeting court-developed guidelines, including demonstrated experience in forensics matters, required attendance at a court-approved training program of not less than 16 hours and any court-required continuing forensic education programs, and annual review criteria.

(6) *Replacement.* If the appointed expert is unable to examine the defendant within the time allotted, the expert must immediately inform the court, and the court may appoint a different expert to perform the examination.

(b) through (d) [no changes]

Rule 26. JUDGMENT, PRESENTENCE REPORT, PRESENTENCE HEARING, SENTENCE

Rule 26.10. Pronouncement of Judgment and Sentence

(a) Judgment. In pronouncing judgment on any noncapital count, the court must indicate whether the defendant's conviction is pursuant to a plea or trial, the offense for which the defendant was convicted, and whether the offense falls in the categories of dangerous, non-dangerous, repetitive, or non-repetitive offenses.

(b) Sentence. When the court pronounces sentence, it must:

- (1) give the defendant an opportunity to address the court;
- (2) state that it has considered the time the defendant has spent in custody on the present charge;
- (3) explain to the defendant the terms of the sentence or probation;
- (4) specify the beginning date for the term of imprisonment and the amount of time to be credited against the sentence as required by law;
- (5) for any felony offense or a violation of §§ 13-1802, 13-1805, 28-1381, or 28-1382, permanently affix the defendant's right index fingerprint to the ~~sentencing~~ judgment of guilt and sentence document or minute order, or obtain the defendant's two fingerprint biometric-based identifier and record it in the court case file; and
- (6) if the court sentences the defendant to a prison term, the court must send, or direct the clerk to send, to the Department of Corrections the sentencing order and copies of all presentence reports, probation violation reports, and medical and mental health reports prepared for, or relating to, the defendant.

Rule 29. SETTING ASIDE A CONVICTION

Rule 29.2. Application

(a) through (c) [no changes]

(d) Victim Notification. The victim has the right to be present and be heard at any proceeding in which the defendant has filed an application to have a judgment of conviction set aside. If the victim requested postconviction notice, the prosecuting agency must provide the victim with notice of the defendant's application, whether the defendant is eligible for a certificate of second chance, and of the rights provided to the victim. The prosecuting agency must provide notice to the victim of the opportunity to be heard if the victim requested post-conviction notification.

Rule 29.3. State's Response

No later than ~~60~~ 30 days after the application is filed, the State and victim may file a written response stating their reasons for opposing the application, if any. The State must send a copy of the response to the applicant's attorney or the applicant, if unrepresented.

* * *

29.7. Certificate of Second Chance.

(a) If the court grants an application to set aside the judgment of guilt, the court's order must include a certificate of second chance if the defendant has not previously received a certificate of second chance and

(1) the defendant was convicted of a misdemeanor;

(2) the defendant was convicted of a class 4, 5 or 6 felony and at least two years have elapsed since the defendant fulfilled the conditions of probation or sentence; or

(3) the defendant was convicted of a class 2 or 3 felony and at least five years have elapsed since the defendant fulfilled the conditions of probation or sentence.

(b) If the court does not issue an order that includes a certificate of second chance when the defendant's conviction is set aside, the defendant may apply to the court for a certificate of second chance after meeting the requirements prescribed in A.R.S. §13-905(K). The provisions of Rule 29.2 shall apply to such application.

29.7, 29.8. Special Provisions for Sex Trafficking Victims [renumber]

Form 31(b) Order Regarding Application to Set Aside Conviction and Restore Firearm Rights

_____ Court _____ County, Arizona

STATE OF ARIZONA, Plaintiff -vs- <hr/> Defendant (FIRST, MI, LAST) <hr/> Date of Birth	CASE NUMBER: <p style="text-align: center;">ORDER REGARDING APPLICATION TO SET ASIDE CONVICTION AND RESTORATION OF FIREARM RIGHTS</p> <p style="text-align: center;">A.R.S. §§ 13-905 & 13-910</p>
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Based upon the information presented to the Court, **THE COURT FINDS THAT:** (only those items marked)

The prosecutor has received a copy of the Application to Set Aside Conviction.

The defendant **has met** all statutory requirements for ~~the application~~ setting aside the conviction;
~~OR~~ AND

The defendant **has met** all statutory requirements for a Certificate of Second Chance

The defendant **has not met** all statutory requirements for a Certificate of Second Chance

OR

The defendant **has not met** all statutory requirements for ~~the application~~ setting aside the conviction.

The defendant was convicted of a criminal offense not eligible to be set aside due to:

a dangerous offense.

an offense for which the person is required or ordered by the court to register pursuant to A.R.S. § 13-3821.

an offense for which there has been a finding of sexual motivation pursuant to A.R.S. § 13-118.

a felony offense in which the victim is a minor under fifteen years of age.

~~an offense in violation of section 28-3473, any local ordinance relating to stopping, standing, or operation of a vehicle, or title 28, chapter 3, except a violation of section 28-693 or any local ordinance relating to the same subject matter as section 28-693.~~

IT IS ORDERED:

DENYING the application to set aside conviction for the following reasons:

The defendant **has not met** all statutory requirements for the application.

The defendant was convicted of a criminal offense **not eligible** for a conviction to be set aside.

Other reasons:

GRANTING the application setting aside the judgment of guilt, dismissing the complaint, information, or indictment, and that the applicant be released from all penalties and disabilities resulting from the conviction **except those imposed by:**

a. The **Department of Transportation** pursuant to A.R.S. §§ 28-3304, 28-3305, 28- 3306, 28-3307, 28-3308, 28-3312, and 28-3319.

b. The **Game and Fish Commission** pursuant to A.R.S. §§ 17-314 or 17-340.

The applicant's right to possess a firearm is also **restored**.
OR

The applicant's right to possess a gun or firearm is **DENIED** due to the applicant's conviction for a serious offense as defined in section 13-706.

CERTIFICATE OF SECOND CHANCE

IT IS FURTHER ORDERED:

DENYING a certificate of second chance.

OR

GRANTING a certificate of second chance, and accordingly, pursuant to A.R.S. § 13-905(K):

1. Unless specifically excluded by A.R.S. § 13-905(K), the defendant is released from all barriers and disabilities in obtaining an occupational license issued under title 32 that resulted from the conviction if the defendant is otherwise qualified;

2. An employer of the defendant is provided with all of the protections that are provided pursuant to section A.R.S. § 12-558.03;

3. Another person or an entity that provides housing to the defendant is provided with all of the protections limiting the introduction of evidence that are provided to an employer pursuant to A.R.S. § 12-558.03, subsection b; and

4. This certificate of second chance is not a recommendation or sponsorship for or a promotion of the defendant when applying for an occupational license, employment or housing.

~~**DENYING** the application to set aside conviction for the following reasons:~~

~~The defendant **has not met** all statutory requirements for the application.~~

~~The defendant was convicted of a criminal offense **not eligible** for a conviction to be set aside.~~

~~Other reasons:~~

DATED this _____ day of _____, _____.

Judicial Officer