

# *Task Force on the Arizona Rules of Criminal Procedure*

## Meeting Agenda

**Friday, October 7, 2016**

9:30 AM to 4:30 PM

State Courts Building \* 1501 West Washington \* Conference Room 119 \* Phoenix, AZ

Conference call-in number: (602) 452-3288 Access code: 3141

Item no. 1	<b>Call to Order</b>  <b>Introductory comments</b>	<i>Hon. Kent Cattani, Acting Chair</i>
Item no. 2 Page 3	<b>Approval of the September 16, 2016 meeting minutes</b>	<i>Judge Cattani</i>
Item no. 3  Pages 15, 47, 51  Page 31  Pages 11, 41, 49	<b>Discussion of workgroup drafts</b>  - <b>Workgroup 1: Rule 15 (further review), Rules 20 and 26</b>  - <b>Workgroup 3: Rule 18 (new comment to Rule 18.1 only)</b>  - <b>Workgroup 4: Rule 14 (further review), Rules 19 and 21</b>	<i>Judge Duncan, Mr. Euchner</i>  <i>Judge Jeffery</i>  <i>Judge Tang, Mr. Hughes, Ms. Kalman</i>
Item no. 4	<b>Roadmap</b>  - <b>Future Task Force meeting dates:</b>  <b>October 21</b> <b>November 18</b> <b>December 9</b>	<i>Judge Cattani</i>
Item no. 5	<b>Call to the Public</b>  <b>Adjourn</b>	<i>Judge Cattani</i>

*The Chair may call items on this Agenda, including the Call to the Public, out of the indicated order.*

Please contact Mark Meltzer at (602) 452-3242 with any questions concerning this Agenda.

Persons with a disability may request reasonable accommodations by contacting Sabrina Nash at (602) 452-3849. Please make requests as early as possible to allow time to arrange accommodations.



## Task Force on the Arizona Rules of Criminal Procedure (“CRTF”)

State Courts Building, Phoenix

Meeting Minutes: September 16, 2016

**Members attending:** Hon. Joseph Welty (Chair), Paul Ahler, Timothy Eckstein, David Euchner by his proxy John Canby, Hon. Maria Felix, Hon. Richard Fields, Hon. Pamela Gates, Bill Hughes, Hon. Eric Jeffery, Kellie Johnson, Amy Kalman, Prof. Jason Kreag (by telephone), Hon. Mark Moran, Aaron Nash, Natman Schaye, Hon. Paul Tang, Kenneth Vick

**Absent:** Hon. Kent Cattani, Hon. Sally Duncan, Jerry Landau

**Staff:** John Rogers, Mark Meltzer, Julie Graber, Sabrina Nash, Theresa Barrett

**Guests:** John Belatti

### 1. Call to order, introductory comments, approval of the meeting minutes.

The Chair called the seventh Task Force meeting to order at 9:30 a.m. He informed the Task Force that he had addressed the Committee on Superior Court at its September 9 meeting concerning the work of the Task Force (Judge Jeffery and Judge Felix had made a similar address to the Committee on Limited Jurisdiction Courts on August 31), and those committees expressed appreciation for the work and progress of the Task Force. By the conclusion of today’s meeting, the Task Force will have been discussed 26 rules, and the Chair has assigned the remaining 15 rules to workgroups. The Chair then asked members to review the August 26, 2016 draft meeting minutes.

**Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. CRTF-007

2. Summary of pertinent petitions on the Court’s August rules agenda. The Chair invited Mr. Rogers to summarize the Court’s disposition of criminal rule petitions on its August rules agenda. Mr. Rogers first noted R-16-0007, which amends Rule 8.4. The amendments provide 30 days of excluded time after the conclusion of a Rule 11 restoration to allow parties to prepare for trial. R-16-0024 amends Rule 7.5 to conform to statutory changes. Pursuant to the amendments, a bond “must” (not “may”) be exonerated under specified circumstances. The Court declined to adopt R-16-0031, which proposed amendments to Rule 20 that would have disallowed a motion for a judgment of acquittal before submission of a case to the jury. R-16-0033 adopted a new Supreme Court Rule 28.1 that established a process for promulgating local rules; the implementation order abrogates, among other rules, Criminal Rule 36. Judge Tang observed that Rule 15 includes a reference to “local rules.” Mr. Rogers advised that by

virtue of R-16-0033, local rules would continue in existence; new Rule 28.1 only changes the process by which the Court approves local rules.

Mr. Rogers also noted a recently filed petition, R-16-0041, which proposes amendments to Criminal Rules 6, 7, and 41. The petition requests expedited consideration and the Court will consider the petition at its December 2016 rules agenda. Comments on this petition are due October 21, 2016.

The Chair noted that amendments to Rule 8.4 adopted by R-16-0007 were not restyled. He requested staff to restyle those amendments and submit them for review by Workgroup 3.

**3. Workgroup 3: Rule 12 (“the grand jury”).** Judge Jeffery presented this rule on behalf of the workgroup. He noted initially that the workgroup deferred presenting this rule until it had obtained input from a member of the Attorney General’s office, and for that purpose, Ms. Mary Harriss, an assistant attorney general who tends statewide grand juries, was present at the most recent Workgroup 3 meeting.

Judge Jeffery began by reviewing restyling changes in Rule 12.1 (“selecting and preparing grand jurors”). Current Rule 12.1(a) requires summoning and impaneling grand jurors “as provided by law.” The draft changed this to “as provided in A.R.S. tit. 21.” After discussion, the members agreed to revert to the current phrase, “as provided by law.” In Rule 12.2 (“grounds to disqualify a grand juror”), section (c), a member inquired whether “within the fourth degree” modified consanguinity and affinity, or only affinity. The members agreed that it should modify both terms, and at the direction of members, Ms. Graber changed the on-screen language to reflect this. Another member suggested adding the words “a victim” to this provision, and the members agreed to this addition. Other members questioned why draft Rule 12.2 was a single paragraph. After discussion, and at the members’ direction, Ms. Graber reorganized Rule 12.2 into subparts (a) through (d). A member asked why draft Rule 12.3 (“challenge to a grand jury or a grand juror”) omitted a phrase in current Rule 12.3(c): “in addition to any remedy granted under Rule 12.9....” One member thought the phrase added nothing of substance, and another believed that Rule 12.9 as currently phrased did not provide a remedy. The members agreed to revisit this issue during their discussion of Rule 12.9.

In Rule 12.4 (“grand jury foreperson”), the word “foreman” in the draft changed to the gender-neutral “foreperson,” but there were no substantive changes to this rule. The members agreed that in Rule 12.5 (“who may be present during grand jury sessions”), the persons who could be present should be in a list format and Ms. Graber made appropriate on-screen changes. Current Rule 12.6 (“appearance of persons under investigation”), which is currently a single paragraph, became sections (a) and (b) in the draft. The members agreed that although current Rule 12.6 states that the foreperson

“shall” expel a person who attempts to communicate with anyone other than their client, the members agreed that it would be more appropriate to use the word “may.” (One member gave an example of a defense attorney saying, “bless you,” to a grand juror after the juror sneezed; this should not require the attorney’s expulsion.) Draft Rule 12.7 (“indictment”), section (d), which derives from the second sentence in current Rule 12.7(a), would require the foreperson to report “no indictment” to the court “through the prosecutor.” In Rule 12.8 (“record of grand jury proceedings”), sections (b) and (c), in addition to making the transcript and the foreperson’s vote tally available to the State and the defendant, the court reporter may make these items available “to the court.” The members concurred with the changes to these rules.

When they considered Rule 12.9 (“challenge to grand jury proceedings”), the members resumed their discussion of Rule 12.3. One member asked whether an unqualified grand juror constitutes a denial of a substantial procedural right under Rule 12.9, or whether it is an issue cognizable under Rule 12.3. After further discussion, the members agreed that challenges under these two rules should be more proximately located than they are currently. Accordingly, the members agreed to renumber Rule 12.3 as Rule 12.8, and to move Rules 12.4 through 12.7 up one number. With regard to Rule 12.10 (“entering a not-guilty plea”), Mr. Hughes advised that Yavapai previously utilized the process described in that rule, and that it no longer does, although it may revert to the process in the future. Rather than deleting Rule 12.10 because no Arizona county currently uses the described process, the members decided that the substance of Rule 12.10 would be more appropriately located in Rule 14. They accordingly referred Rule 12.10 to Workgroup 4 for integration into Rule 14.

Judge Jeffery then turned to the provisions of Rule 12 on statewide grand juries. He noted that Ms. Harriss was particularly helpful with the workgroup’s understanding of Rule 12.22 (“selection and preparation of state grand jurors”) and the process of selecting statewide grand jurors. She explained that the process begins with a pool of about 1,000 potential jurors, composed proportionately and subsequently reduced to a smaller pool of about 100. The workgroup restyled Rule 12.22, but did not alter its substance, and judge members of the Task Force who had experience with statewide grand juries observed that the current Rule 12.22 process works well. The members revised Rule 12.23 (“size of state grand jury”), which currently directs that a statewide grand jury be composed of 16 persons, to “at least 12 but not more than 16 persons” so it is consistent with statutory requirements. Rule 12.24 (“location of state grand jury sessions”) had no substantive changes. The current title of Rule 12.25 (“preservation of state grand jury evidence”), section (b) is “restitution,” but after discussion, the members agreed to change this to “release or retention.” Members then considered whether Rule 12.26 (“return of indictment”) adequately described potential scenarios when the court must keep the indictment secret. They concluded it did not and made these changes:

“...until the defendant is in custody or ~~has given bail~~ served with a summons....” One member noted that most indicted defendants appear in court by summons rather than an arrest warrant. There were no substantive changes to Rule 12.27 (“disclosure of a lack of indictment”).

The members reorganized Rule 12.28 (“challenge to state grand jury, grand juror, or grand jury proceedings”) in a manner than corresponded to changes for rules regarding the county grand jury. Current Rule 12.28 implies that a defendant may challenge a statewide grand jury under Rule 12.9, but members added a new Rule 12.28(a)(3) that expressly states this. Members expressed concern with Rule 12.28(c), and how the court would know that it “must dismiss the case without prejudice” if the prosecutor did not take specified action following the grant of a Rule 12.9 motion. The members therefore agreed to add to Rule 12.28(c), and to Rule 12.9(c), the phrase “on motion or on its own.” Members declined to extend the provisions of Rule 12.29 (“expenses of prospective and selected state grand jurors”) to county grand juries because doing so would exceed the scope of the Task Force’s charge.

The members also discussed whether a grand jury transcript sealed after a “no bill” should be available to defense counsel in a subsequent proceeding. Some members contended the transcript might include prior testimony of a witness or other *Brady* materials, yet if the transcript was sealed and not disclosed, and especially if the prosecutor did not identify the individual who testified as a trial witness in the subsequent proceeding, the defendant could be unaware of this information. The Chair concluded that this issue might not fall within Rule 12, but he invited members expressing these concerns to propose language for Rule 15 when the Task Force revisits that rule.

4. **Workgroup 3: Rule 41 (“forms”).** Judge Jeffery noted that the workgroup’s review of this rule did not include review of the forms. With regard to the rule’s text, the workgroup changed the word “mandatory” to “required.” There were no other changes and the members approved Rule 41.

5. **Workgroup 4: Rule 18 (“trial by jury; waiver; selection and preparation of jurors”).** Judge Tang presented Rule 18. Draft Rule 18.1 (“trial by jury”), section (a), substituted a statutory reference for the phrase “as provided by law.” However, and similar to Rule 12.1(a) that was discussed above, the members reverted to the original phrase in Rule 18.1(a). However, this was contingent on including the content of the current comment to Rule 18.1 as modified during the discussion and as shown on-screen. Judge Jeffery also agreed to provide additional language for the comment concerning the right to a jury trial in misdemeanor cases.

In Rule 18.2 (“additional jurors”), the members concurred with changing the phrase “regular jurors” in the current rule to “trial jurors.” They also agreed to delete the comment to Rule 18.2. The workgroup restyled Rule 18.3 (“jurors’ information”) and reorganized the current single paragraph into sections (a) and (b). It also changed the phrase “felony conviction status” to “prior felony conviction.” A member inquired whether the age of the prior felony is relevant. The members agreed that it was, however, the summons or the jury commissioner’s preliminary questionnaire might include this inquiry so it did not involve questioning by the trial judge during voir dire. The workgroup changed the word “jury commissioner” to “court” so it encompasses similar functions performed by other designated staff in courts that do not have a dedicated jury commissioner. The workgroup deleted the comments to current Rule 18.3. The members agreed with these changes.

A comment to current Rule 18.4 (“challenges”), section (a), instructs that a challenge to the panel must include a showing of prejudice. The workgroup included this requirement in the body of draft Rule 18.4(a). After discussion, the members agreed that a challenge to the panel must be in writing, as provided in current and draft Rule 18.4(a). However, to clarify that a party may challenge multiple jurors for cause under Rule 18.4(b), rather than only a single juror, the members added the words “or jurors.” The workgroup rephrased portions of Rule 18.4(c) in the active voice. Although the current comment to Rule 18.4 is lengthy, members believe it provides useful guidance, and they agreed to retain it.

Rule 18.5 (“procedure for jury selection”) utilizes the term “shall.” The members agreed to change this to “must.” Members changed a reference in Rule 18.5(b) from “court or clerk” to simply “court,” which allows the jury commissioner to perform the function of calling jurors. Draft Rule 18.5(c) provides that the court may allow the parties to present brief opening statements to the jury panel, “or the court may require the parties to do so.” The latter phrase derives from the current rule. However, the members agreed that the court cannot compel the defendant to make an opening statement or a “mini-opening statement,” and the members deleted this phrase. The workgroup divided Rules 18.5(h) and 18.5(i) into subparts. In subpart Rule 18.6(h)(2), which deals with the selection of alternates, members added the words “or court official” after the word “clerk,” and the words “or stipulation” after the words “by lot.” These revisions allow more flexibility in determining who the alternate jurors will be. The members also agreed to add in Rule 18.5(i)(1) a new sentence: “this rule governs their continued participation in the case.” This is implicit in the current rule, and it is now explicit.

Members discussed the numerous comments to current Rule 18.5. The workgroup recommended retaining a comment to current Rule 18.5(b), which distinguishes the “strike and replace” and “struck” methods of jury selection, with

modifications. The members agreed. The members agreed to combine two comments concerning Rule 18.5(d), with modifications as shown on-screen. The substance of the comment to current Rule 18.5(f) is now in the rule, and members deleted this comment.

Current Rule 18.6 (“jurors’ conduct”), section (a), contains an obscure reference to a juror’s handbook approved by the Supreme Court. After discussion and after consideration of the 1937 decision in *Knight v State*, which is cited in the current comment, members agreed to change this provision to provide, “the court may provide prospective jurors with orientation information about jury service.” Members then turned to the jurors’ oath, which is contained in Rule 18.6(b). This robust discussion included whether to include or exclude the words “so help you G-d,” that are in the current rule. One member suggested that the rule might be unconstitutional, and another suggested changing the trial jurors’ oath to mirror the one given to grand jurors. The words “or affirm” in the current trial jurors’ oath are in parentheses, and ultimately, the members agreed to place corresponding parentheses around the phrase “so help me G-d.” The members agreed that with this addition, the oath passes constitutional muster, and that judges must determine the manner of administration, i.e., whether to administer it as an oath or as an affirmation. In Rule 18.6(c), the members agreed to delete the current rule’s initial phrase, “immediately after the jury is sworn,” as well as the phrase “by individuals unfamiliar with the legal system.” The members agreed to retain in the draft rule the concept in the current rule that the court will destroy jurors’ note after the court discharges the jury. Rules 18.6(e) and 18.6(f) have no substantive variation from the current rules. One member suggested that Rule 18.6(e) limit a juror’s opportunity to ask a question of the witness to the time the witness is testifying. Other members noted that this is already included in a jury instruction as well as the comment to Rule 18.6(e), which the workgroup recommends retaining; and there are exceptional situations where the judge might recall a witness to answer a juror’s subsequent question. The members agreed to retain the comment and they made no further changes to Rule 18.6(e). They also agreed to retain a portion of the comment to Rule 18.6(d).

6. **Workgroup 4: Rule 25** (*currently: “procedure after verdict or finding of not guilty by reason of insanity”*). Ms. Kalman noted the workgroup’s changes to this short rule. To conform to statutory changes, the workgroup changed the title of the rule from what is shown in italics above to “procedure after a verdict or finding of guilty except insane.” The workgroup also changed “shall commit” to “must commit,” and deleted the comment to the 1993 amendment. The members had no further edits or questions concerning the workgroup’s changes.

7. **Roadmap; call to the public; adjourn.** The Chair advised that he will be unable to attend the meeting set for Friday, October 7, but he confirmed that the meeting would proceed with another member acting as chair in his absence. The remaining

meeting schedule is Friday, October 21; Friday, November 18; and Friday, December 9. These meetings are set from 9:30 a.m. until 4:30 p.m.

There was no response to a call to the public. The meeting adjourned at 1:58 p.m.



## Rule 14. Arraignment

### Rule 14.1. General Provisions

The purpose of an arraignment is to formally advise defendants of the charges against them and their legal rights, to assure they are provided counsel **if applicable**, to **enter a plea**, and to set a trial date or a later court date. At an arraignment, a magistrate informs defendants of the matters in Rule 14.4.

### Rule 14.2. When an Arraignment Is Held

(a) **Generally.** **An arraignment must be held:**

- (1) **for defendants in custody**, within 10 days after the filing of an indictment, information, or complaint; **and**
- (2) **for defendants not in custody**, within 30 days after the filing of an indictment, information, or complaint.

(b) **Exception for Special Situations.** If the court cannot hold the arraignment within the time specified in (a) because the defendant has not yet been arrested or summoned, or is in custody elsewhere, the court must hold the arraignment as soon as possible after those time periods.

(c) **Exceptions for Limited Jurisdiction Courts.** An arraignment is not necessary if:

- (1) the defense counsel has entered a plea of not guilty; or
- (2) the court permits a defendant to enter a not-guilty plea by mail and to receive **notice of** a court date by mail. Delivery of the notice is presumed if the notice is deposited in the U.S. mail, addressed to the defendant's last known address, and the notice is not returned to the court.

(d) **Exception for Superior Court.** The superior court is not required to conduct an arraignment after the filing of an indictment or information if the presiding judge issues an order that Rule 14 does not apply to superior court cases in that county.

(e) **Combined Proceedings.** If the defendant's first court appearance occurs after the state files a complaint, the court may hold the arraignment in conjunction with the initial appearance before the magistrate, if the initial appearance is held in the trial court. If the initial appearance is not held in the trial court, the court must order the defendant to appear for arraignment in the trial court within 10 days after the initial appearance, and a written notice of the arraignment date must be delivered to the defendant.

### **Rule 14.3. The Defendant's Presence**

- (a) **Personal Presence Required.** A defendant must be arraigned personally before the trial court or by an interactive video appearance under Rule 1.5.
- (b) **Personal Presence Not Required if Waived.** A defendant who personally appeared at an initial appearance may waive personal presence at an arraignment in superior court by filing a written waiver of two days before the arraignment date. The defendant and defense counsel must sign and notarize the waiver within 20 days after arraignment. A defendant must file the notarized affidavit within 20 days after arraignment the defendant is aware of all scheduled court appearances and understands that failure to appear at sentencing may result in losing the right to a direct appeal.

### **Rule 14.4. Proceedings at Arraignment**

At an arraignment, the court must:

- (a) enter the defendant's plea of not guilty, unless the defendant pleads guilty or no contest and the court accepts the plea;
- (b) decide motions concerning release conditions under Rule 7 if:
- (1) the arraignment is held with the defendant's initial appearance under Rule 4.2;
  - (2) the moving party provides 5 days' notice of a contested release motion; or
  - (3) all parties agree;
- (c) set the date for trial or a pretrial conference;
- (d) provide written notice of the dates of further proceedings and other important deadlines;
- (e) inform the defendant of the following:
- (1) the right to counsel and the right to court-appointed counsel if eligible;
  - (2) the right to jury trial, if applicable;
  - (3) the right to be present at all future proceedings;
  - (4) the failure to appear at future proceedings may result in the defendant being charged with a new offense and the court issuing an arrest warrant;
  - (5) all proceedings may be held in the defendant's absence, other than sentencing; and

(6) the defendant may lose the right to a direct appeal if the defendant's absence from sentencing causes sentencing to occur more than 90 days after any conviction.

(f) appoint counsel if applicable;

(g) order a summoned defendant to be 10-print fingerprinted within 20 calendar days by the appropriate law enforcement agency at a designated time and place if:

(1) the defendant is charged with a felony offense, a violation of A.R.S. § 13-1401, et seq. or A.R.S. § 28-1301, et seq., or a domestic violence offense as defined in A.R.S. § 13-3601; and

(2) the defendant does not present a completed mandatory fingerprint compliance form to the court, or if the court has not received the process control number.

**Notes:**

Draft Rule 14.1 derives from a comment preceding current Rule 14.1.

**Rule 14.5. Proceedings in Counties Where No Arraignment is Held**

In a county where an arraignment is not held as provided in Rule 14.2(d), a defendant must be brought before a magistrate within 10 days after the indictment is returned, and the magistrate must comply with Rule 14.4.



## **Rule 15. Disclosure**

### **Rule 15.1. The State's Disclosures**

**(a) Initial Disclosures in a Felony Case.** Unless a local rule provides or the court orders otherwise:

- (1)** the State must make available to the defendant all reports containing information identified in (b)(3) and (b)(4) that the charging attorney possessed when the charge was filed; and
- (2)** the State must make these reports available by the preliminary hearing or, if no preliminary hearing is held, the arraignment.

**(b) Supplemental Disclosure.** Except as provided in Rule 39(b), the State must make available to the defendant the following material and information within the State's possession or control:

- (1)** the name and address of each person the State intends to call as a witness in the State's case-in-chief and any relevant written or recorded statement of the witness;
- (2)** any statement of the defendant and any co-defendant;
- (3)** all existing original and supplemental reports prepared by a law enforcement agency in connection with the charged offense;
- (4)** for each expert who has examined a defendant or any evidence in the case or who the State intends to call at trial:
  - (A)** the expert's name and address;
  - (B)** any report prepared by the expert and the results of any completed physical examination, scientific test, experiment, or comparison conducted by the expert; and
  - (C)** if the expert will testify at trial and has not prepared a written report:
    - (i)** the subject matter on which the expert is expected to present evidence under Arizona Rules of Evidence 702, 703, or 705; and
    - (ii)** a summary of the facts and opinions to which the witness is expected to testify; and
- (5)** a list of all documents, photographs, and other tangible objects the State intends to use at trial or that were obtained from or purportedly belong to the defendant;

- (6) a list of the defendant's prior felony convictions the State intends to use at trial;
- (7) a list of the defendant's other acts the State intends to use at trial;
- (8) all existing material or information that tends to mitigate or negate the defendant's guilt or would tend to reduce the defendant's punishment;
- (9) whether there has been any electronic surveillance of any conversations to which the defendant was a party, or of the defendant's business or residence;
- (10) whether a search warrant has been executed in connection with the case; and
- (11) whether the case involved an informant, and, if so, the informant's identity, subject to the restrictions under Rule 15.4(b)(2).

(c) **Time for Supplemental Disclosures.** Unless the court orders otherwise, the State must disclose the material and information listed in (b) no later than:

- (1) in the superior court, 30 days after arraignment.
- (2) in a limited jurisdiction court, the first pre-trial conference, or 20 days after arraignment, whichever occurs first.

**(d) Prior Felony Convictions.** The State must make available to a defendant a list of prior felony convictions of each witness the State intends to call at trial and a list of the prior felony convictions the State intends to use to impeach a disclosed defense witness at trial:

- (1) in a felony case, at least 30 days before trial or 30 days after the defendant's request, whichever occurs first; and
- (2) in a misdemeanor case, at least 10 days before trial.

(e) **Disclosures upon Request.**

- (1) **Generally.** Unless the court orders otherwise, the State must make the following items available to the defendant for examination, testing, and reproduction within 30 days of a defendant's written request:
  - (A) any of the items specified in the list submitted under (b)(5);
  - (B) any 911 calls existing at the time of the request that the record's custodian can reasonably ascertain are related to the case; and
  - (C) any completed written report, statement, and examination notes made by an expert listed in (b)(1) and (b)(4) related to the case.

(2) **Conditions.** The State may impose reasonable conditions, including an appropriate stipulation concerning chain of custody to protect physical evidence or to allow time for the examination or testing of any items.

(f) **Scope of the State's Disclosure Obligation.** The State's disclosure obligation extends to material and information in the possession or control of any of the following:

- (1) the prosecutor, other attorneys in the prosecutor's office, and members of the prosecutor's staff; or
- (2) any state, county, or municipal law enforcement agency that has participated in the investigation of the case; and
- (3) any other person who is under the prosecutor's direction or control and participated in the investigation or evaluation of the case.

(g) **Disclosure by Court Order.**

(1) **Disclosure Order.** On defendant's motion, a court may order any person to make available to the defendant material or information not included in this rule if the court finds:

- (A) the defendant has a substantial need for the material or information to prepare the defendant's case; and
- (B) the defendant cannot obtain the substantial equivalent by other means without undue hardship.

(2) **Modifying or Vacating Order.** On the request of any person affected by the order, the court may vacate or modify an order if the court determines that compliance would be unreasonable or oppressive.

(h) **Disclosure of Rebuttal Evidence.** Upon receiving the defendant's notice of defenses under Rule 15.2(b), the State must disclose the name and address of each person the State intends to call as a rebuttal witness, and any relevant written or recorded statement of the witness.

(i) **Additional Disclosures in a Capital Case.**

(1) **Notice of Intent to Seek the Death Penalty.**

- (A) **Generally.** No later than 60 days after a defendant's arraignment in superior court on a charge of first-degree murder, the State must provide notice to the defendant of whether the State intends to seek the death penalty.

**(B) *Time Extensions.*** The court may extend the State’s deadline for providing notice by an additional 60 days if the parties file a written stipulation agreeing to the extension. If the court approves the extension, the case is considered a capital case for all administrative purposes including, but not limited to, scheduling, appointment of counsel under Rule 6.8, and the assignment of a mitigation specialist. The court may grant additional extensions if the parties file written stipulations agreeing to them.

**(C) *Victim Notification.*** If the victim has requested notice under A.R.S. § 13-4405, the prosecutor must confer with the victim before agreeing to extend the deadline

**(2) *Aggravating Circumstances.*** If the State files a notice of intent to seek the death penalty, the State must, at the same time, provide the defendant with a list of aggravating circumstances that the State intends to prove in the aggravation phase of the trial.

**(3) *Initial Disclosures.***

**(A) *Generally.*** No later than 30 days after filing a notice to seek the death penalty, the State must disclose the following to the defendant:

**(i)** the name and address of each person the State intends to call as a witness at the aggravation hearing to support each alleged aggravating circumstance, and any written or recorded statement of the witness;

**(ii)** the name and address of each expert the State intends to call at the aggravation hearing to support each alleged aggravating circumstance, and any written or recorded statement of the expert or other disclosure as required in (b)(4);

**(iii)** a list of all documents, photographs or other tangible objects the State intends to use to support each identified aggravating circumstance at the aggravation hearing; and

**(iv)** all material or information that might mitigate or negate the finding of an aggravating circumstance or mitigate the defendant’s culpability.

**(B) *Time Extensions.*** The court may extend the deadline for the State’s initial disclosures under (i)(3) or allow the State to amend those disclosures only if the State shows good cause or the parties stipulate.

- (4) ***Rebuttal and Penalty Phase Disclosures.*** Within 60 days of receiving the defendant's disclosure under Rule 15.2(h)(1), the State must disclose the following to the defendant:
- (A) the name and address of each person the State intends to call as a rebuttal witness on each identified aggravating circumstance, and any written or recorded statement of the witness;
  - (B) the name and address of each person the State intends to call as a witness at the penalty hearing, and any written or recorded statement of the witness;
  - (C) the names and address of each expert the State intends to call at the penalty hearing, and any report the expert has prepared or other disclosure as required in (b)(4); and
  - (D) a list of all documents, photographs or other tangible objects the State intends to use during the aggravation and penalty hearings.

**(j) Items Prohibited by A.R.S. § 13-3551, et seq.**

- (1) ***Scope.*** This rule applies to an item that cannot be produced or possessed under A.R.S. § 13-3551 et seq., but is included in the list disclosed under (b)(5).
- (2) ***Disclosure Obligation.*** The State is not required to reproduce the item or release it to the defendant for testing or examination except as provided by (j)(3) and (j)(4). The State must make the item reasonably available for inspection by the defendant, but only under such terms and conditions necessary to protect a victim's rights.
- (3) ***Court-Ordered Disclosure for Examination or Testing.***
  - (A) ***Generally.*** The court may order the item's reproduction or its release to the defendant for examination or testing if the defendant makes a substantial showing that it is necessary for the effective investigation or presentation of a defense, including an expert's analysis.
  - (B) ***Conditions.*** A court must issue any order necessary to protect a victim's rights, document the chain of custody, or protect physical evidence.
- (4) ***General Restrictions.*** In addition to any court order issued, the following restrictions apply to the reproduction or release of any item to the defendant for examination or testing:
  - (A) the item must not be further reproduced or distributed except as the court order allows;

- (B) the item may be viewed or possessed only by the persons authorized by the court order;
- (C) the item must not be possessed or viewed by the defendant outside the direct supervision of defense counsel, advisory counsel, or a defense expert;
- (D) the item must be delivered to defense counsel or advisory counsel, or if expressly permitted by court order, to a specified defense expert; and
- (E) the item must be returned to the State by a deadline set by the court.

## **Rule 15.2. The Defendant's Disclosures**

### **(a) Physical Evidence.**

- (1) *Generally.* At any time after the filing of an indictment, information or complaint, and upon the State's written request, the defendant must, in connection with the particular offense with which the defendant is charged:
  - (A) appear in a line-up;
  - (B) speak for identification by one or more witnesses;
  - (C) be fingerprinted, palm-printed, foot-printed, or voice printed;
  - (D) pose for photographs not involving a re-enactment of an event;
  - (E) try on clothing;
  - (F) permit the taking of samples of hair, blood, saliva, urine, or other specified materials that does not involve an unreasonable intrusion of the defendant's body;
  - (G) provide handwriting specimens; and
  - (H) submit to a reasonable physical or medical inspection of the defendant's body, but such an inspection may not include a psychiatric or psychological examination.
- (2) *Presence of Counsel.* The defendant is entitled to have counsel present when the State takes evidence under this rule.
- (3) *Other Procedures.* This rule supplements and does not limit any other procedures established by law.

### **(b) Notice of Defenses.**

- (1) **Generally.** By the deadline specified in (d), the defendant must provide written notice to the State specifying all defenses the defendant intends to assert at trial, including, but not limited to, alibi, insanity, self-defense, defense of others, entrapment, impotency, marriage, insufficiency of a prior conviction, mistaken identity, and good character.
- (2) **Witnesses.** For each listed defense, the notice must specify each person, other than the defendant, that the defendant intends to call as a witness at trial in support of the defense.
- (3) **Signature and Filing.** Defense counsel—or if the defendant is self-represented, the defendant—must sign the notice and file it with the court.

(c) **Content of Disclosure.** At the same time the defendant files a notice of defenses under (b), the defendant must provide the following information:

- (1) the name and address of each person, other than the defendant, the defendant intends to call as a witness at trial, and any written or recorded statement of the witness;
- (2) for each expert the defendant intends to call at trial:
  - (A) the expert's name and address;
  - (B) any report prepared by the expert and the results of any completed physical examination, scientific test, experiment, or comparison conducted by the expert; and
  - (C) if the expert has not prepared a written report:
    - (i) the subject matter on which the expert is expected to present evidence under Arizona Rules of Evidence 702,703, or 705; and
    - (ii) a summary of the facts and opinions to which the witness is expected to testify; and
- (3) a list of all documents, photographs, and other tangible objects the defendant intends to use at trial.

(d) **Time for Disclosures.** Unless the court orders otherwise, the defendant must disclose the material and information listed in (b) and (c) no later than:

- (1) in superior court, 40 days after arraignment, or within 10 days after the State's disclosure under Rule 15.1(b), whichever occurs first;

- (2) in a limited jurisdiction court, 20 days after the State's disclosure under Rule 15.1(b).

**(e) Additional Disclosures upon Request.**

- (1) **Generally.** Unless the court orders otherwise, the defendant must make the following items available to the State for examination, testing, and reproduction within 30 days of the State's written request:

- (A) any of the items specified in the list submitted under (c)(3); and

- (B) any completed written report, statement, and examination notes made by an expert listed in (c)(2) in connection with the particular case.

- (2) **Conditions.** The defendant may impose reasonable conditions, including an appropriate stipulation concerning chain of custody to protect physical evidence or to allow time for the examination or testing of any items.

**(f) Scope of Disclosure.** A defendant's disclosure obligation extends to material and information within the possession or control of the defendant, defense counsel, staff, agents, investigators, or any other persons who have participated in the investigation or evaluation of the case and who are under the defendant's direction or control.

**(g) Disclosure by Court Order.**

- (1) **Disclosure Order.** On the State's motion, a court may order any person to make available to the State material or information not included in this rule if the court finds:

- (A) the State has a substantial need for the material or information for the preparation of the State's case;

- (B) the State cannot obtain the substantial equivalent by other means without undue hardship; and

- (C) the disclosure of the material or information would not violate the defendant's constitutional rights.

- (2) **Modifying or Vacating Order.** The court may vacate or modify an order if the court determines that compliance would be unreasonable or oppressive.

**(h) Additional Disclosures in a Capital Case.**

- (1) **Initial Disclosures.**

- (A) **Generally.** Within 180 days after receiving the State's initial disclosure under Rule 15.1(i)(3), the defendant must disclose the following to the State:

- (i) a list of all mitigating circumstances the defendant intends to prove;
  - (ii) the name and address of each person, other than the defendant, the defendant intends to call as a witness during the aggravation and penalty hearings, and any written or recorded statement of the witness;
  - (iii) the name and address of each expert the defendant intends to call during the aggravation and penalty hearings, and any written or recorded statements of the expert or other disclosure as required in (c)(2), excluding any portions containing statements by the defendant; and
  - (iv) a list of all documents, photographs, or other tangible objects the defendant intends to use during the aggravation and penalty hearings.
- (B) *Time Extensions.* The court may extend the deadline for the defendant's initial disclosures under (h)(1) or allow the defendant to amend those disclosures only if the defendant shows good cause or if the parties stipulate.
- (2) *Later Disclosures.* Within 60 days of receiving the State's supplemental disclosure under Rule 15.1(i)(4), the defendant must disclose the following to the State:
- (A) the name and address of each person the defendant intends to call as a rebuttal witness, and any written or recorded statement of the witness; and
  - (B) the name and address of each expert the defendant intends to call as a witness at the penalty hearing, and any report the expert has prepared.

### **Rule 15.3. Depositions**

- (a) **Availability.** A party or a witness may file a motion requesting the court to order the examination of any person, except the defendant and those excluded by Rule 39(b), by oral deposition under the following circumstances:
- (1) a party shows that the person's testimony is material to the case and that there is a substantial likelihood that the person will not be available at the time of trial; or
  - (2) a party shows that the person's testimony is material to the case or necessary to adequately prepare a defense or investigate the offense, that the person was not a witness at the preliminary hearing or at the probable cause phase of the juvenile transfer hearing, and that the person will not cooperate in granting a personal interview; or
  - (3) a witness is incarcerated for failing to give satisfactory security that the witness will appear and testify at a trial or hearing.

**(b) Follow-up Examination.** If a witness testifies at a preliminary hearing or probable cause phase of a juvenile transfer hearing, the court may order the person to attend and give testimony at a follow-up deposition if:

- (1) the magistrate limited the person's previous testimony under Rule 5.3; and
- (2) the person will not cooperate in granting a personal interview.

**(c) Motion for Taking Deposition; Notice; Service.**

(1) ***Motion's Requirements.*** A motion to take a deposition must:

- (A) state the name and address of the person to be deposed;
- (B) show that a deposition may be ordered under (a) or (b);
- (C) specify the time and place for taking the deposition; and
- (D) designate any non-privileged documents, photographs, or other tangible objects that the person must produce at the deposition.

(2) ***Order.*** If the court grants the motion, it may modify any of the moving party's proposed terms and specify additional conditions governing how the deposition will be conducted.

(3) ***Notice and Subpoena.*** If the court grants the motion, the moving party must notice the deposition in the manner provided in Arizona Rule of Civil Procedure 30(b). The notice must specify the terms and conditions in the court's order granting the deposition. The moving party also must serve a subpoena on the deponent in the manner provided in A.R.S. § 13-4072.

**(d) Manner of Taking.**

(1) ***Generally.*** Unless this rule provides or the court orders otherwise, the parties must conduct a deposition as provided in Rules 28(a) and 30 of the Arizona Rules of Civil Procedure.

(2) ***Deposition by Written Questions.*** If the parties consent, the court may order that a deposition be taken on written interrogatories as provided in Rule 31 of the Arizona Rules of Civil Procedure.

(3) ***Deponent Statement.*** Before the deposition, a party who possesses a statement of a deponent must make it available to any other party who would be entitled to the statement at trial.

(4) ***Recording.*** A deposition may be recorded by other than a certified court reporter. If someone other than a certified court reporter records the deposition,

the party taking the deposition must provide every other party with a copy of the recording within 14 days after the deposition, or no less than 10 days before trial, whichever is earlier.

(5) **Remote Means.** The parties may agree or the court may order that the parties conduct the deposition by telephone or other remote means.

(e) **The Defendant's Right to Be Present.** A defendant has the right to be present at any deposition ordered under (a)(1) or (a)(3). If a defendant is in custody, the moving party must notify the custodial officer of the deposition's time and place. Unless the defendant waives in writing the right to be present, the officer must produce the defendant at the deposition and remain with defendant until it is completed.

(f) **Use.** A party may use a deposition in the same manner as former testimony under Rule 19.3(c).

#### **Rule 15.4. Disclosure Standards**

##### **(a) Statements.**

(1) **Definition of a "Statement."** In Rule 15, the term "statement" includes:

(A) a writing prepared, signed or otherwise adopted or approved by a person;

(B) a recording of a person's oral communications or a transcript of the communication; or

(C) a written record or summary of a person's oral communications.

(2) **Definition of a "Writing."** A "writing" consists of words or their equivalent in physical, electronic, or other form.

(3) **Exclusion of Superseded Notes.** Handwritten notes are not a statement if they were substantially incorporated into a document or report within 30 calendar days of their creation, or were preserved electronically, mechanically, or by verbatim dictation.

##### **(b) Materials Not Subject to Disclosure.**

(1) **Work Product.** A party is not required to disclose legal research or records, correspondence, reports, or memoranda to the extent they contain the opinions, theories, or conclusions of the prosecutor or defense counsel, members of their respective legal or investigative staff, or law enforcement officers.

(2) **Informants.** A party is not required to disclose the existence or identity of an informant who will not be called to testify if:

- (A) disclosure would result in substantial risk to the informant or to the informant's operational effectiveness; and
  - (B) a failure to disclose will not infringe on the defendant's constitutional rights.
- (c) **Failure to Call a Witness or Raise a Defense.** At trial, a party may not comment on the fact that a witness's name or a defense is on a list furnished under Rule 15, yet not called or raised, unless the court allows the comment after finding that inclusion of the witness's name or the defense constituted an abuse of the applicable disclosure rule.
- (d) **Use of Materials.** Any materials furnished to a party or counsel under Rule 15 must not be disclosed to the public, and may only be disclosed to the extent necessary for the proper conduct of the case.
- (e) **Requests for Disclosure.** All requests for disclosure must be made to the opposing party.
- (f) **Filing of Papers; Exception for Misdemeanors and Petty Offenses Filed in Limited Jurisdiction Courts.** For misdemeanor and petty offenses triable in limited jurisdiction courts, parties must not file materials disclosed under Rules 15.1 and 15.2, or notices of their service, unless the court orders otherwise or they are filed as attachments or exhibits to other documents relevant to the determination of an issue before the court.

## COMMENT

**Rule 15.4(a).** It is intended that an attorney's actual trial notes, such as his outline of questions to ask a witness will be encompassed within the work product exception of Rule 15.4(b)(1), even though they fall within the definition of statement.

## Rule 15.5. Excision and Protective Orders

### (a) A Court's Discretion to Deny, Defer or Regulate Disclosure.

- (1) **Witness Identity.** For good cause, a court may grant a request to defer disclosing a witness's identity for a reasonable period of time, but no later than 5 days before trial.
- (2) **Other Matters.** A court may order that other disclosures required by Rule 15 be denied, deferred, or regulated if it finds that:
  - (A) disclosure would result in a risk or harm outweighing any usefulness of the disclosure to any party; and

(B) the risk cannot be eliminated by a less substantial restriction of discovery rights.

(b) **A Court's Discretion to Authorize Excision.** If the court finds that only a portion of material or other information is subject to disclosure under Rule 15, it may enter an order authorizing the disclosing party to excise the portion that is not subject to disclosure.

(c) **Protective and Excision Order Proceedings.** If a party files a motion seeking a protective or excision order or requesting the court to determine whether any material or other information is subject to disclosure, the court may conduct an in camera inspection of the material. Counsel for all parties have the right to be heard on the matter before any in camera inspection is conducted.

(d) **Preserving the Record.** If the court orders that any portion of any material or information is not subject to disclosure under Rule 15, the entire text of the material or information must be sealed and preserved in the record for appeal.

(e) **Claims of Privilege or Protection.** A party who redacts a portion of a disclosed document must clearly identify the redaction and state the legal basis, if it is not clear from the context.

#### **Rule 15.6. Continuing Duty to Disclose; Final Disclosure Deadline; Extension**

(a) **Continuing Duties.** The parties' duties under Rule 15 are continuing duties without awaiting a specific request from any other party.

(b) **Additional Disclosures.** Any party who anticipates a need to provide additional disclosure within 30 days before trial must immediately notify both the court and all other parties of the circumstances and when the party will make the additional disclosure.

(c) **Final Deadline for Disclosure.** Unless otherwise permitted, all disclosure required by Rule 15 must be completed at least 7 days before trial.

#### **(d) Disclosure After the Final Deadline.**

(1) **Motion to Extend Disclosure.** If a party seeks to use material or information that was disclosed less than 7 days before trial, the party must file a motion to extend the disclosure deadline and to use the material or information. The moving party also must file a supporting affidavit setting forth facts justifying an extension.

(2) **Order Granting Motion.** The court must extend the disclosure deadline and allow the use of the material or information if it finds the material or information:

(A) could not have been discovered or disclosed earlier with due diligence; and

(B) was disclosed immediately upon its discovery.

(3) ***Order Denying Motion or Granting Continuance; Sanctions.*** If the court finds that the moving party has failed to establish facts sufficient to justify an extension under (d)(2), it may:

(A) deny the motion to extend the disclosure deadline and deny the use of the material or information; or

(B) extend the disclosure deadline and allow the use of the material or information and, if it extends the deadline, the court may impose any sanction listed in Rule 15.7 except preclusion or dismissal.

**(e) Extension of Time for Completion of Testing.**

(1) ***Motion.*** Before the final disclosure deadline in (c), a party may move to extend the deadline to permit the completion of scientific or other testing. The motion must be supported by an affidavit from a crime laboratory representative or other scientific expert stating that additional time is needed to complete the testing or a report based on the testing. The affidavit must specify how much additional time is needed.

(2) ***Order.*** If a motion is filed under (e)(1), the court must grant reasonable time to complete disclosure unless the court finds that the need for the extension resulted from dilatory conduct or neglect, or that the request is being made for an improper reason by the moving party or a person listed in Rule 15.1(f) or 15.2(f).

(3) ***Extending Time.*** If the court grants a motion under (e)(2), the court may extend other disclosure deadlines as necessary.

**Rule 15.7. Disclosure Violations and Sanctions**

(a) ***Motion.*** Any party may move to compel disclosure or request an appropriate sanction for a disclosure violation of Rule 15 or both. Any motion to compel disclosure or for sanctions must include a separate statement that the moving party has personally consulted with opposing counsel and has made good faith efforts to resolve the matter. Any motion filed without the separate statement will not be heard or scheduled for a hearing.

(b) ***Order.*** If the court finds that a party violated a disclosure obligation under Rule 15, it must order disclosure as necessary and impose an appropriate sanction, unless the court finds that:

- (1) the failure to comply was harmless; or
- (2) the party could not have disclosed the information earlier with due diligence and the party disclosed the information immediately upon its discovery.

**(c) Sanctions.** In considering an appropriate sanction for nondisclosure or untimely disclosure, a court must determine the significance of the information not timely disclosed, the violation's impact on the overall administration of the case, the sanction's impact on the party and the victim, and the stage of the proceedings when the party ultimately made the disclosure. Available sanctions include, but are not limited to:

- (1) precluding or limiting a witness, the use of evidence, or an argument supporting or opposing a charge or defense;
- (2) dismissing the case with or without prejudice;
- (3) granting a continuance or declaring a mistrial if necessary in the interests of justice;
- (4) holding in contempt a witness, a party, or a person acting under the direction or control of a party;
- (5) imposing costs of continuing the proceeding; or
- (6) any other appropriate sanction.

**Rule 15.8. Disclosure Before a Plea Agreement Expires or Is Withdrawn; Sanctions**

**(a) Disclosure Obligation.** If the State has filed an indictment or information in superior court and extends a plea offer to a defendant, the State must disclose to the defendant when it makes the offer the items listed in Rule 15.1(b) to the extent that it possesses the required information and has not previously made such a disclosure.

**(b) Violation.** If the State makes the disclosure less than 30 days before the offer expires or is withdrawn, a court may sanction the State under (c) unless the State shows that the prosecutor reasonably believed, based on newly discovered information, that an offer should be withdrawn because it was contrary to the interests of justice.

**(c) Effect on Other Required Disclosures.** This rule does not affect any disclosure obligation otherwise imposed by law. While a plea offer is pending, the prosecutor must continue to comply with Rule 15.6, but additional disclosures under that rule do not extend the 30-day period specified in (b). Disclosure of evidence after the offer expires or is withdrawn, including the results of any scientific testing, does not violate

this rule if the evidence did not exist, or the State was not aware of it, when the State extended the offer.

**(d) Sanctions.** On a defendant’s motion alleging a violation of this rule, the court must consider the impact of any violation of (a) on the defendant’s decision to accept or reject a plea offer. If the court finds that the State’s failure to provide a required disclosure materially affected the defendant’s decision and if the State declines to reinstate the lapsed or withdrawn plea offer, the court—as a presumptive minimum sanction—must preclude the admission at trial of any evidence not disclosed as required by (a).

### **Rule 15.9. Appointment of Investigators and Expert Witnesses for Indigent Defendants**

**(a) Appointment.** On application, if the court finds that such assistance is reasonably necessary to adequately present a defense at trial or at sentencing, the court may appoint an investigator, expert witnesses, and/or mitigation specialist for an indigent defendant at county or city expense.

**(b) Ex Parte Proceeding.** A defendant may not make an ex parte request under this rule without showing a need for confidentiality. The court must make a verbatim record of any ex parte proceeding, communication, or request, which must be available for appellate review.

**(c) Mitigation Specialist.** As used in this rule, a “mitigation specialist” is a person qualified by knowledge, skill, experience, or other training as a mental health or sociology professional to investigate, evaluate, and present psycho-social and other mitigation evidence.

**(d) Capital Case.** In a capital case, a defendant should make any motion for an expert or mitigation specialist no later than 60 days after the State makes its disclosure under Rule 15.1(i)(3).

## Rule 18. Trial by Jury; Waiver; Selection and Preparation of Jurors

### Rule 18.1. Trial by Jury

(a) **By Jury.** The number of jurors required to try a case and render a verdict is specified as provided by law in A.R.S. § 21-102.

(b) **Waiver.**

- (1) **Generally.** The defendant may waive the right to a trial by jury if the State and the court consent. If the State and the court agree, a defendant also may waive the right to have a jury determine aggravation or the penalty in a capital case.
- (2) **Voluntariness.** Before accepting a defendant's waiver of a jury trial, the court must address the defendant personally, inform the defendant of the defendant's right to a jury trial, and determine that the defendant's waiver is knowing, voluntary, and intelligent.
- (3) **Form of Waiver.** A defendant's waiver of a jury trial must be in writing or on the record in open court.
- (4) **Withdrawal of Waiver.** With the court's permission, a defendant may withdraw a waiver of jury trial, but a defendant may not withdraw a waiver after the court begins taking evidence.

**Note:** Consider keeping portions of the 2007 comments to Rule 18.1(a).

~~COMMENT [AMENDED 2007]~~ **SEND BACK TO WORKGROUP to add a comment back in**

**Right to Jury.** A defendant's right to trial by jury in Arizona can be summarized briefly:

(1) A defendant has a right to a jury trial when charged with a serious offense (*i.e.*, an offense which carries a sentence more severe than 6 months in jail and a \$300 fine, or conviction of which connotes an unusual degree of "moral turpitude"). Ariz. Const. Art. 2, § 23; Rothweiler v. Superior Court of Pima County, 100 Ariz. 37, 410 P.2d 479, 16 A.L.R. 1362 (1966); O'Neill v. Mangum, 103 Ariz. 484, 445 P.2d 843 (1968).

(2) A defendant has a statutory right to a jury trial upon demand when charged with a low misdemeanor in justice courts, but the right is deemed waived if not seasonably asserted. Ariz. Rev. Stat. Ann. § 22-320 (1956).

(3) A defendant has a statutory right to jury in a municipal court only when charged with violation of a state statute triable before a jury under common law, Ariz. Rev. Stat. Ann. § 22-425 (1956); State ex rel. DeConcini v. City Court of Tucson, Pima County, 9

~~Ariz.App. 522, 454 P.2d 192 (1969), unless the offense is sufficiently serious to be constitutionally cognizable. Rothweiler v. Superior Court of Pima County, supra.~~

**Rule 18.1(a).** ~~By proclamation of the Governor the following Constitutional Amendments relating to juries became effective on December 1, 1972: article 2, section 23, Constitution of Arizona; Section 23.~~ The right of trial by jury shall remain inviolate. Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict. In all other cases the number of jurors (not less than six) and the number required to render a verdict shall be specified by law.

See Constitution of Arizona article 2, section 23; Ariz.Rev.Stat. Ann. § 21-102 (Supp.1972); Williams v. Florida, 90 S.Ct. 1893, 399 U.S. 78, 26 L.Ed.2d 446 (1970).

The right to a jury trial for misdemeanor offenses extends to charges where the statutory offense has a common law antecedent that guaranteed the right to jury trial at the time of statehood, or where the offense qualifies as a “serious” offense with “additional severe, direct and uniformly applied statutory consequences.” Derendal v. Griffith, 209 Ariz. 416, 423 ¶ 26 (2005). Statutory offenses with six months or less of possible incarceration are presumptively not “serious offenses” unless the “additional grave consequences” of the misdemeanor conviction indicate the legislative determination that the offense is “serious” and mandates a jury. Id. at 422 ¶ 21. [This is a new comment prepared by Judge Jeffery and Mr. Eckstein.]

**Rule 18.1(b).** Rule 18.1(b) states the conditions on defendant's waiver of jury contained in Ariz.Const. Art. 6, § 17 (Supp.1971) consent of the court and the State. ~~This is also the formulation of Federal Rules of Criminal Procedure, Rule 23(a).~~

See State v. Crowley, 111 Ariz. 308, 528 P.2d 834 (1974).

See Form 20.

## **Rule 18.2. Additional Jurors**

As deemed necessary, the court may empanel jurors in excess of the number required to render a verdict as it deems necessary. All jurors are deemed trial jurors until alternate jurors are designated under Rule 18.5(h).

## **Rule 18.3. Jurors' Information**

**(a) Information Provided to the Parties.** Before conducting voir dire examination, the court must furnish each party with a list of the names of the prospective jurors on the panel called for the case. The list must include each prospective juror's zip code,

employment status, occupation, employer, residency status, education level, prior jury duty experience, and any prior felony conviction within a specified time established by the jury commissioner or the court.

- (b) **Confidentiality.** The court must obtain and maintain juror information in a manner and form approved by the Supreme Court, and this information may be used only for the purpose of jury selection. The court must keep all jurors' home and business telephone numbers and addresses confidential and may not disclose them unless good cause is shown.

#### **Rule 18.4. Challenges**

- (a) **Challenge to the Panel.** Any party may challenge the panel on the ground that its selection involved a material departure from the requirements of law. Challenges to the panel on this ground must be in writing, specify the factual basis for the challenge, and make a showing of prejudice to the party. A party must make, and the court must decide, a challenge to a panel before the examination of any individual prospective juror.

- (b) **Challenge for Cause.** On motion or on its own, the court must excuse a prospective juror **or jurors** from service in the case if there is a reasonable ground to believe that the juror **or jurors** cannot render a fair and impartial verdict. A challenge for cause may be made at any time, but the court may deny a challenge if the party was not diligent in making it.

#### **(c) Peremptory Challenges.**

- (1) **Generally.** The court must allow both parties the following number of peremptory challenges:
- (A) 10, if the offense charged is punishable by death;
  - (B) 6, in all other cases tried in superior court; and
  - (C) two, in all cases tried in limited jurisdiction courts.
- (2) ***If Several Defendants Are Tried Jointly.*** If there is more than one defendant, each defendant is allowed one-half the number of peremptory challenges allowed to one defendant. The State is not entitled to any additional peremptory challenges.
- (3) ***Agreement Between the Parties.*** The parties may agree to exercise fewer than the allowable number of peremptory challenges.

## COMMENT

**Rule 18.4(b).** This section replaces the catalog of fifteen grounds in the 1956 Arizona Rules of Criminal Procedure, Rule 219. The omission of the list is intended to direct the attention of attorneys and judges to the essential question--whether a juror can try a case fairly. A challenge for cause can be based on a showing of facts from which an ordinary person would imply a likelihood of predisposition in favor of one of the parties.

In addition, a juror may be challenged who:

- (1) has been convicted of a felony;
- (2) lacks any of the qualifications prescribed by law to render a person a competent juror;
- (3) is of such unsound mind or body as to render him incapable of performing the duties of a juror;
- (4) is related by consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant;
- (5) stands in the relationship of guardian and ward, attorney and client, master and servant, or landlord and tenant, or is an employee of or member of the family of the defendant, or of the person alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;
- (6) has been a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution;
- (7) has served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information;
- (8) has served on the trial jury which has tried another person for the offense charged in the indictment or information;
- (9) has been a member of the jury formerly sworn to try the same charge and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it;
- (10) has served as a juror in a civil action brought against the defendant for the act charged as an offense;
- (11) is on the bond of the defendant or engaged in business with the defendant or with the person alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;

(12) is a witness on the part of the prosecution or defendant or has been served with a subpoena or bound by an undertaking as such;

(13) has a state of mind in reference to the action or to the defendant or to the person alleged to have been injured by the offense charged or on whose complaint the prosecution was instituted, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party;

(14) if the offense charged is punishable by death, entertains conscientious opinions which would preclude his finding the defendant guilty, in which case he shall neither be permitted nor compelled to serve as a juror; or

(15) does not understand the English language sufficiently well to comprehend the testimony offered at the trial.

This section also permits a challenge for cause to be made whenever the cause appears. Under Rule 18.4(b), the trial court may deny the challenge if not seasonably made, but there is no absolute time limitation imposed by rule. Once the trial has commenced the prosecutor may be unable, because of double jeopardy, to invoke the right to challenge, unless there are sufficient alternate jurors to enable the trial to continue with one less juror.

### **Rule 18.5. Procedure for Jury Selection**

**(a) Swearing the Jury Panel.** All members of the jury panel must swear or affirm that they will truthfully answer all questions concerning their qualifications.

**(b) Calling Jurors for Examination.** The court may then call to the jury box a number of prospective jurors equal to the number to serve plus the number of alternates plus the number of peremptory challenges that the parties are permitted. Alternatively, and at the court's discretion, all members of the panel may be examined.

**(c) Inquiry by the Court; Brief Opening Statements.** Before examining the prospective jurors, the court must identify the parties and their counsel, briefly outline the nature of the case, and explain the purpose of the examination. The court must then ask any necessary questions about the prospective jurors' qualifications to serve in the case. With the court's permission and before voir dire examination, the parties may present brief opening statements to the entire jury panel ~~or the court may require the parties to do so.~~

**(d) Voir Dire Examination.** In courts of record, voir dire examination must be conducted on the record. The court must conduct a thorough oral examination of the prospective jurors and control the voir dire examination. Upon request, the court may allow the parties a reasonable time, with other reasonable limitations, to conduct a

further oral examination of the prospective jurors. However, the court may limit or terminate the parties' voir dire on grounds of abuse. Nothing in this rule precludes submitting written questionnaires to the prospective jurors **or examining individual prospective jurors outside the presence of other prospective jurors.**

- (e) **Scope of Examination.** The court must ensure the reasonable protection of the prospective jurors' privacy. Questioning must be limited to inquiries designed to elicit information relevant to asserting a possible challenge for cause or enabling a party to intelligently exercise the party's peremptory challenges.
- (f) **Challenge for Cause.** Challenges for cause must be on the record and made out of the hearing of the prospective jurors. If the court grants a challenge for cause, it must excuse the affected prospective juror. If insufficient prospective jurors remain on the list, the court must add a prospective juror from a new panel. All challenges for cause must be made and decided before the court may call on the parties to exercise their peremptory challenges.
- (g) **Exercise of Peremptory Challenges.** After examining the prospective jurors and completing all challenges for cause, the parties must exercise their peremptory challenges on the list of prospective jurors by alternating strikes, beginning with the State, until the peremptory challenges are exhausted or a party elects not to exercise further challenges. Failure of a party to exercise a challenge in turn operates as a waiver of the party's remaining challenges, but it does not deprive the other party of that party's full number of challenges. If the parties fail to exercise the full number of allowed challenges, the court will strike the jurors on the bottom of the list of prospective jurors until only the number to serve, plus alternates, remain.
- (h) **Selection of Jury; Alternate Jurors.**
  - (1) **Trial Jurors.** After the completion of the procedures in (g), the prospective jurors remaining in the jury box or on the list of prospective jurors constitute the trial jurors.
  - (2) **Selection of Alternates and Instruction.** Just before the jury retires to begin deliberations, the clerk **or court official** must determine the alternate juror or jurors **by lot or stipulation**. When the jury retires to deliberate, the alternate or alternates may not participate, but the court must instruct the alternate juror or jurors to continue to observe the admonitions to jurors until the court informs them that a verdict has been returned or the jury has been discharged.
  - (3) **Replacing a Deliberating Juror.** If the court excuses a deliberating juror due to the juror's inability or disqualification to perform the required duties, the court may substitute an alternate juror to join the deliberations, choosing the alternate

from among the qualified alternates in the order previously designated. If an alternate joins the deliberations, the court must instruct the jury to begin its deliberations anew.

**(i) Deliberations in a Capital Case.**

- (1) *Retaining Alternates.*** In a capital case, alternate jurors not selected to participate in the guilt phase deliberations must not be excused if the jury returns a guilty verdict of first-degree murder. This rule governs their continued participation in the case.

  - (A) *Aggravation Phase.*** During the aggravation phase, the alternate jurors must listen to the evidence and argument presented to the jury. When the jury retires to deliberate on aggravation, the alternate or alternates may not participate, but the court must instruct the alternates to continue to observe the admonitions to jurors until the court informs the alternates that they are discharged.
  - (B) *Penalty Phase.*** If the jury returns a verdict finding one or more aggravating factors, the alternate jurors must listen to the evidence and argument presented at the penalty phase. When the jury retires to deliberate on the penalty, the alternate or alternates may not participate, but the court must instruct the alternates to continue to observe the admonitions to jurors until the court informs the alternates that they are discharged.
- (2) *Replacing a Deliberating Juror.***

  - (A) *Generally.*** If a deliberating juror is excused during either the aggravation or penalty phases due to the juror's inability or disqualification to perform required duties, the court may substitute an alternate juror to join the deliberations, choosing from among the qualified alternates in the order previously designated.
  - (B) *Scope of Deliberations.*** If an alternate or alternates are substituted during the aggravation or penalty deliberations, the jurors must begin their deliberations anew only for the phase that they are currently deliberating. The jurors may not deliberate anew a verdict already reached and entered.

**Note: Consider retaining the RULE 18.5(B), COMMENT TO 1995 AMENDMENT shown below, which distinguishes the ‘strike and replace’ and ‘struck’ methods of juror selection.**

**COMMENT**  
**Rule 18.5(b)**

Prior to a 1995 amendment, Rule 18.5(b) was read to require trial judges to use the traditional “strike and replace” method of jury selection, where only a portion of the jury panel is examined, the remaining jurors being called upon to participate in jury selection only upon excusal for cause of a juror in the initial group. A juror excused for cause leaves the courtroom, after which the excused juror's position is filled by a panel member who responds to all previous and future questions of the potential jurors.

As currently drafted, the trial judge is allowed to use the “struck” method of selection if the judge chooses. This procedure is thought by some to offer more advantages than the “strike and replace” method. See T. Munsterman, R. Strand and J. Hart, *The Best Method of Selecting Jurors*, *The Judges' Journal* 9 (Summer 1990); A.B.A. *Standards Relating to Juror Use and Management*, Standard 7, at 68-74 (1983); and “The Jury Project,” Report to the Chief Judge of the State of New York 58-60 (1994).

The “struck” method calls for all of the jury panel members to participate in voir dire examination by the judge and counsel. Following disposition of the for cause challenges, the juror list is given to counsel for the exercise of their peremptory strikes. When all the peremptory strikes have been taken and all issues under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and other legal issues arising therefrom have been resolved, the clerk calls the first eight or twelve names, as the law may require, remaining on the list, plus the number of alternate jurors thought necessary by the judge, who shall be the trial jury.

**Rules 18.5(d).** The court should instruct counsel that voir dire is permitted to enable counsel to ask questions seeking relevant information from jurors, but not to ask questions intended to raise arguments to the jurors. The court should be particularly sensitive to the prejudice that can arise from voir dire by an unrepresented defendant.

~~**Rule 18.5(f).** The court should consider challenges for cause outside jurors' hearing to minimize any resentment or bias.~~

### **Rule 18.6. Jurors' Conduct**

(a) **Information.** The court may provide prospective jurors with orientation information about jury service.

(b) **Oath.** Each juror must take the following oath:

“Do you swear (or affirm) that you will give careful attention to the proceedings, follow the court's instructions, including the admonition, and render a verdict in accordance with the law and evidence presented to you, (so help you God)?”

If a juror affirms, the clause “so help you God” must be omitted. In justice court cases, the court should give jurors the oath prescribed by A.R.S. § 22-322.

(c) **Preliminary Instructions.** After the jury is sworn, the court must instruct the jury concerning its duties, its conduct, the order of proceedings, the procedure for submitting written questions to witnesses or the court as set forth in (e), and legal principles that will govern the proceeding. Instructions should be as readily understandable as possible by individuals unfamiliar with the legal system.

**(d) Juror Note Taking and Notebooks.**

(1) **Juror Note Taking.** The court must instruct the jurors that they may take notes. The court must provide materials suitable for this purpose.

(2) **Juror Notebooks.** To aid the jurors in performing their duties, the court may authorize the parties to provide the jurors with notebooks containing documents and exhibits.

(3) **Juror Access.** Jurors must have access to their notes and notebooks during recesses and deliberations. In a capital case, the jurors must have access to their notes from the trial and all phases of the proceeding until the jury renders a penalty verdict or is dismissed.

(4) **Disposal of Juror Notes.** When the jury is discharged, all juror notes, including deliberation notes, must be promptly collected and destroyed.

(e) **Juror Questions.** Jurors must be instructed that they are permitted to submit to the court written questions directed to witnesses or to the court and that the court will give the parties an opportunity to object to those questions outside the jury's presence. Despite this general rule, the court may prohibit or limit the submission of questions to witnesses for good cause.

(f) **Additional Communications.** During the course of the trial, the court must provide additional instructions to the jury as necessary. All communications between the judge and members of the jury panel must be in writing or on the record.

## COMMENTS

**Rule 18.6(d).** In trials of unusual duration or involving complex issues, juror notebooks are a significant aid to juror comprehension and recall of evidence. Notebooks may contain: (1) a copy of the preliminary jury instructions, (2) jurors' notes, (3) witnesses' names, photographs and/or biographies, (4) copies of key documents and an index of all exhibits, (5) a glossary of technical terms, and (6) a copy of the court's final instructions.

**Rule 18.6(e).** The court should instruct that any questions directed to witnesses or the court must be in writing, unsigned and given to a designated court officer. The court should further instruct that, if a juror has a question for a witness, or the court, the juror should hand it to the bailiff during a recess, or if the witness is about to leave the witness

stand, the juror should signal to the bailiff. The court should also instruct the jury that they are not to discuss the questions among themselves but rather each juror must decide independently any question he or she may have for a witness. If the court determines that the juror's question calls for admissible evidence, the question should be asked by court or counsel in the court's discretion. Such question may be answered by stipulation or other appropriate means, including but not limited to additional testimony upon such terms and limitations as the court prescribes. If the court determines that the juror's question calls for inadmissible evidence, the question shall not be read or answered. If a juror's question is rejected, the jury should be told that trial rules do not permit some questions to be asked and that the jurors should not attach any significance to the failure of having their question asked.

## **Rule 19. Trial**

### **Rule 19.1. Conduct of Trial**

#### **(a) Generally.**

- (1) **Application.** This rule applies to non-jury as well as to jury trials, but portions of this rule may not apply in a non-jury trial.
- (2) **Modification.** With permission of the court, the parties may agree to a different method of proceeding than described in this rule.

#### **(b) Order of Proceedings.** A trial proceeds in the following order unless the court directs otherwise:

- (1) the court reads the indictment, information or complaint to the jury and states the defendant's plea;
- (2) the State may make an opening statement;
- (3) the defendant may then make or defer an opening statement;
- (4) the State must then offer the evidence in support of the charge;
- (5) the defendant may then make an opening statement if it was deferred, and offer evidence in his or her defense;
- (6) the parties may then offer evidence in rebuttal unless the court, for good cause, allows a party's case-in-chief to be reopened;
- (7) the parties may then present arguments, with the State having an opening and a closing argument; and
- (8) the court must then instruct the jury.

#### **(c) Proceedings if the Defendant Is Charged with Prior Convictions or Noncapital Sentencing Allegations.**

- (1) **During Determination of Guilt or Innocence.** If a prior conviction or noncapital sentencing allegation must be found following a guilty verdict, the trial must proceed initially as though there were no prior conviction or sentencing allegations, unless the conviction or sentencing allegation is an element of the charged crime.
  - (A) When the court reads the indictment, information or complaint, it must omit all references to prior conviction or sentencing allegations.

(B) During trial, the court must not instruct, refer to, or admit evidence concerning a prior conviction or noncapital sentencing allegation, except as permitted by the Arizona Rules of Evidence.

(2) *After a Guilty Verdict.* If the jury renders a guilty verdict:

(A) the jury then must find the existence of any noncapital sentencing allegation, unless the defendant has admitted to the allegation; and

(B) the court, and not the jury, must then find the existence of a prior conviction allegation.

(d) **Aggravation Phase in a Capital Case.** If a defendant is convicted of first-degree murder and the State has filed a notice of intent to seek the death penalty, the aggravation phase must proceed as follows:

(1) the court must read the alleged aggravators to the jury;

(2) the State may make an opening statement;

(3) the defendant may then make or defer an opening statement;

(4) the State must then offer evidence in support of the alleged aggravating circumstances;

(5) the defendant may then make an opening statement if it was deferred, and offer evidence in defense of the alleged aggravating circumstances;

(6) the parties may then offer evidence in rebuttal unless the court, for good cause, allows a party's case-in-chief to be reopened;

(7) the parties may then present arguments, with the State having an opening and a closing argument; and

(8) the court must then instruct the jury.

(e) **Penalty Phase in a Capital Case.** If a jury finds one or more aggravating circumstances, the penalty phase must proceed as follows:

(1) the defendant may make an opening statement;

(2) the State may then make or defer an opening statement;

(3) the victim's survivors may make a statement relating to the victim's characteristics and the crime's impact on the victim's family, but they may not offer any opinion or recommendation about an appropriate sentence;

(4) the defendant may then offer evidence in support of mitigation;

- (5) the State may then make an opening statement if it was deferred, and offer any evidence relevant to mitigation;
- (6) the defendant may then offer evidence in rebuttal, unless the court, for good cause, allows a party's case-in-chief to be reopened;
- (7) the defendant may present statements of allocution to the jury;
- (8) the parties may present argument, with the defendant having the opening and closing arguments; and
- (9) the court must then instruct the jury.

## COMMENT

### COMMENT TO RULE 19.1

The Court has discretion to give final instructions to the jury before closing arguments of counsel instead of after, in order to enhance jurors' ability to apply the applicable law to the facts. In that event, the court may wish to withhold giving the necessary procedural and housekeeping instructions until after closing arguments, in order to offset the impact of the last counsel's argument.

### Rule 19.2. Presence of the Defendant at Trial

A defendant in a felony or misdemeanor trial has the right to be present at every stage of the trial, including, if applicable, the impaneling of the jury, the giving of additional instructions under Rule 22, and the return of the verdict. This right may be waived pursuant to Rule 9.

### Rule 19.3. Evidence

(a) **Generally.** Except as provided in this rule, the Arizona Rules of Evidence govern all evidentiary issues in criminal proceedings.

(b) **Prior Inconsistent Statements.** A prior statement of a witness may be admitted for impeachment only if it varies materially from the witness' testimony at trial.

(c) **Prior Recorded Testimony.**

(1) **Admissibility.** Statements made under oath by a party or witness during a previous judicial proceeding or at a deposition under Rule 15.3 are admissible in evidence if:

(A) the party against whom the former testimony is offered:

- (i) was a party to the action or proceeding during which a statement was given;

- (ii) the party had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party now has;
  - (iii) a person who was unrepresented by counsel at the proceeding during which a statement was made is deemed not to have had the right and opportunity to cross-examine the declarant, unless the person waived representation by counsel); and
- (B) the declarant is unavailable as a witness, or is present and subject to cross-examination.

(2) **Limitations and Objections.** The admissibility of former testimony under this rule is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that the former testimony offered under this rule is not subject to:

- (A) objections to the form of the question that were not made at the time the prior testimony was given; or
- (B) objections based on competency or privilege that did not exist at the time the former testimony was given.

## COMMENT

**Rule 19.3(c).** Rule 19.3(c) contains as broad an exception to the hearsay rule for prior recorded testimony as meets with the confrontation clause of the Sixth Amendment. It allows the use of prior recorded testimony not merely for impeachment, but to prove the truth of the matters asserted therein, whenever the defendant was present at the time the testimony was recorded, was represented by counsel, had an opportunity to cross-examine with an interest and motive similar to that which he has at trial, and the witness is either unavoidably absent, or is present at trial.

## Rule 19.4. Admonitions

The court must admonish jurors not to:

- (a) converse among themselves or with anyone else on any subject connected with the trial until instructed to deliberate;
- (b) permit themselves to be exposed to news accounts about the proceeding;
- (c) form or express any opinion about the case until it is finally submitted to them;
- (d) view in person or through technological means the place where the offense allegedly was committed; or

(e) conduct any independent research, investigation, experiments, or otherwise consult any outside source about any issue in the case.

**Rule 19.5. A Judge’s Death, Illness or Other Incapacity**

If the judge who is hearing or trying a criminal proceeding becomes ill or is otherwise incapacitated, any other judge of the same court may replace the judge. If no other judge is available, the clerk or bailiff must recess the court and notify the Presiding Judge or, if unavailable, the Chief Justice, who must enter an order continuing the trial until the appointment of another judge to resume the proceeding. If, after reviewing the record, the new judge believes that continuing the proceeding would be prejudicial to either party, the judge must order a new trial or proceeding.

**COMMENT**

The substitute judge need not be another trial judge; but may serve on the court of appeals or be a judge *pro tempore*. The court reporter need not transcribe notes if the new judge has an alternative method of reviewing the record.

**Rule 19.6. Presence of a Representative of a Minor or Incapacitated Victim**

If a representative of a minor victim or an incapacitated victim wishes to be recognized during trial, the representative must notify the prosecutor, who must then inform the court out of the presence of the jury. Any communications between the representative and the court during trial must be conducted in the presence of the parties or their counsel, and outside the jury’s presence.

**Rule 19.7. Sequestration**

The court may permit jurors to separate or, on motion or on its own, may sequester jurors under the charge of a proper officer whenever they leave the jury box.



## **Rule 20. Judgment of Acquittal or Unproven Aggravator**

### **(a) Before Verdict.**

- (1) *Acquittal.*** After the close of evidence on either side, and on motion or on its own, the court must enter a judgment of acquittal on any offense charged in an indictment, information, or complaint if there is no substantial evidence to support a conviction.
- (2) *Aggravation.*** After the close of evidence on either side in an aggravation phase, and on motion or on its own, the court must enter a judgment that an aggravating circumstance or other sentence enhancement was not proven if there is no substantial evidence to support the allegation.
- (3) *Timing.*** The court must rule on the defendant's motion with all possible speed. Until the motion is decided, the defendant is not required to proceed.

**(b) After Verdict.** A defendant [who made a motion for judgment of acquittal or unproven aggravator before the verdict (~~delete?~~)] may bring a motion for judgment of acquittal or unproven aggravator on any conviction or allegation within 10 days after any verdict is returned.



## **Rule 21. Instructions**

### **Rule 21.1. Applicable Law**

Except as otherwise provided, the procedures in Arizona Rule of Civil Procedure 51 apply in criminal proceedings.

### **Rule 21.2. Requests for Instructions and Verdict Forms**

At a time the court directs, but no later than the close of the evidence, the parties must submit to the court written requests for instructions and may submit to the court proposed verdict forms. Requested instructions and proposed verdict forms must be provided to the other parties, including co-defendants.

### **Rule 21.3. Rulings on Instructions and Verdict Forms**

- (a) Conference.** The court must confer with the parties before closing argument and inform them of its proposed action on requested instructions. The court also must allow counsel at that time to review the verdict forms.
- (b) Source of the Instructions.** The court must not inform the jury which of its instructions, if any, were requested by a particular party.
- (c) Record of Objections.** No party may assign as error on appeal the court's giving or failing to give any instruction or a portion of an instruction or to the submission or the failure to submit a form of verdict, unless the party objected before the jury retired to consider its verdict. Any objection must be on the record and must distinctly state the matter to which the party objects and the grounds for the objection. If a party does not make a proper objection, appellate review of jury instructions will be for fundamental error.
- (d) Jurors' Copies.** The court's preliminary and final instructions must be in writing, and the court must furnish a copy of the instructions to each juror before the court reads them. In limited jurisdiction courts, the court may audio record jury instructions and provide these recorded instructions to jurors for their use during deliberations.

[Note: Is there an issue with LJ courts providing written instructions rather than an audiotape?]



## **Rule 26. Judgment, Presentence Report, Presentencing Hearing, Sentence**

### **Rule 26.1. Definitions; Scope**

- (a) **Determination of Guilt.** “Determination of guilt” means the court’s acceptance of a guilty or no contest plea, a jury verdict of guilty, or the court’s finding of guilt following a bench trial. [8/18-Revisit re whether a court may render a “verdict”; alternative: “the court’s acceptance of a guilty or no contest plea or a guilty verdict by a jury or the court”]
- (b) **Judgment.** “Judgment” means the court’s adjudication that the defendant is guilty or not guilty based on the jury’s verdict, the defendant’s plea, or its own finding following a bench trial. [8/18-Revisit; alternative: “based on the jury’s or the court’s verdict, or the defendant’s plea”]
- (c) **Sentence.** “Sentence” means the court’s pronouncement of the penalty imposed on the defendant after a judgment of guilty.
- (d) **Scope.** Rule 26 does not apply to minor traffic offenses. Rules 26.4, 26.5, 26.6, 26.7, 26.8, and 26.15 apply only to the superior court.

### **Rule 26.2. Time to Render Judgment**

- (a) **Upon Acquittal.** If a defendant is found not guilty of any charge or any count of any charge, the court must immediately enter judgment pertaining to that count or charge.
- (b) **Upon Conviction.** Upon a determination of guilt on any charge or on any count of any charge, the court must enter judgment and pronounce sentence pertaining to that count or charge.
- (c) **Upon a Death Verdict.** Upon a death verdict, the court must immediately enter the judgment and sentence. The court must direct the clerk to send to the Department of Corrections the sentencing order and copies of all medical and mental health reports prepared for, or relating to, the defendant.
- (d) **Factual Determination.** If the court did not affirmatively make a finding of a factual basis for a plea under Rule 17.3, the court must make that determination before entering a judgment of guilty. The court may consider one or more of the following sources when finding a factual basis: the defendant’s statements; police reports; certified transcripts of grand jury proceedings; or other satisfactory information. [8/18-Refer rule to Workgroup #3 to see if the rule is needed (does this situation ever come up?). If deleted here, Rule 17.3 also would need to be deleted or changed. Other possibility is to move the rule to Rule 17.3.]

### **Rule 26.3. Sentencing Date and Time Extensions**

#### **(a) Sentencing Date.**

##### **(1) *Superior Court.***

- (A) *Generally.*** Upon a determination of guilt, the court must set a date for pronouncing sentence.
  - (B) *Deadline for Sentencing.*** The court must pronounce sentence no less than 15 nor more than 30 days after the determination of guilt unless the court, after informing the defendant of the right to a presentence report, grants the defendant's request that the court pronounce sentence earlier.
  - (C) *The Defendant's Presence or Absence.*** When setting a sentencing date, the court must order the defendant to be present for sentencing and, if the defendant fails to appear, issue a warrant for the defendant's arrest. Additionally, following a conviction based on a trial, the court must notify the defendant that if the defendant's absence prevents the court from sentencing the defendant within 90 days after the determination of guilt, the defendant will lose the right to have an appellate court review the trial proceedings by direct appeal.
- (2) *Limited Jurisdiction Courts.*** A limited jurisdiction court may pronounce sentence immediately upon determining guilt unless the court orders, on its own or on a party's or a victim's request, that the court will pronounce sentence at a later date that is not more than 30 days after the determination of guilt.

**(b) Time Extension.** If a presentencing hearing is requested under Rule 26.7 or for good cause, the court may reset the sentencing date, but the new date should not be no later than 60 days after the determination of guilt.

### **Rule 26.4. Presentence Report**

**(a) When Required.** The court must order a presentence report in every case in which it has discretion over the penalty. However, a presentence report is optional if:

- (1)** the defendant may only be sentenced to imprisonment for less than one year;
- (2)** the court granted a request under Rule 26.3(a)(1); or
- (3)** a presentence report concerning the defendant is already available.

**(b) When Prepared.** A presentence report may not be prepared until after the court makes a determination of guilt or the defendant enters a plea of guilty or no contest.

(c) **When Due.** Unless the court grants a request under Rule 26.3(a)(1) for an earlier sentencing, the presentence report must be delivered to the sentencing judge and to all counsel at least two days before the date set for sentencing.

(d) **Inadmissibility.** Neither a presentence report nor any statement made in connection with its preparation is admissible as evidence in any proceeding bearing on the issue of guilt.

### **Rule 26.5. Diagnostic Evaluation and Mental Health Examination**

At any time before the court pronounces sentence, it may order the defendant to undergo a mental health examination or diagnostic evaluation. Unless the court orders otherwise, any report concerning such an examination or evaluation is due at the same time as the presentence report.

### **Rule 26.6. Court Disclosure of Reports Before Sentencing**

(a) **Disclosure to the Parties.** The court must permit the State, defense counsel, and a self-represented defendant to review all presentence, diagnostic, and mental health reports concerning the defendant. If the court makes a portion of any report unavailable to one party, it must not make that portion available to any other party.

(b) **Disclosure to a Victim.** The court must permit the victim to review the presentence report after it makes the report available to the defendant, excluding any portions the court excises or that are confidential by law.

(c) **Date of Disclosure.** A report prepared under Rule 26.7(c) must be available to the parties no more than two days after it is delivered to the court and no less than two days before a presentencing hearing, unless the parties agree otherwise.

#### **(d) Excision.**

(1) **Generally.** The court may excise from copies of presentence, diagnostic and mental health reports disclosed to the parties:

(A) diagnostic opinions that might seriously disrupt a program of rehabilitation;

(B) sources of information obtained on a promise of confidentiality; and

(C) information that would disrupt an ongoing law enforcement investigation.

(2) **Disclosure.** The court must inform the parties if a portion of a report is not disclosed, and must state on the record its reasons for not disclosing it.

#### **(e) Court Disclosure of Reports After Sentencing**

(1) **Disclosure to Personnel Responsible for the Defendant.** After sentencing, the court must furnish to persons having direct responsibility for the defendant's custody, rehabilitation, treatment, or release all diagnostic, mental health, and presentence reports, except for portions excised under (d)(1)(B) and (C).

(2) **Disclosure to Courts.** The court must make an unexcised version of any report listed in (e)(1) available to:

(A) a reviewing court when a relevant issue has been raised; and

(B) a court sentencing the defendant after a later conviction.

(f) **Public Disclosure of Reports.** A report prepared under Rules 26.4, 26.5, or 26.7(c) is a public record unless the court orders otherwise or it is confidential by law.

### **Rule 26.7. Presentencing Hearing; Prehearing Conference**

(a) **Request for a Presentencing Hearing.** If the court has discretion concerning the imposition of a penalty, it may—and, on any party's request, must—hold a presentencing hearing before sentencing.

#### **(b) Timing and Conduct of a Presentencing Hearing.**

(1) **Timing.** The court may not hold a presentencing hearing until the parties have had an opportunity to review all reports concerning the defendant prepared under Rules 26.4 and 26.5.

(2) **Presenting Evidence.** At the hearing, any party may introduce any reliable, relevant evidence, including hearsay, to show aggravating or mitigating circumstances, to show why the court should not impose a particular sentence, or to correct or amplify the presentence, diagnostic, or mental health reports.

(3) **Record.** A presentencing hearing must be held in open court, and the court must make a complete record of the proceedings.

#### **(c) Prehearing Conference.**

(1) **Generally.** On motion or on its own, the court may hold a prehearing conference to determine what matters are in dispute, and to limit or otherwise expedite a presentencing hearing.

(2) **Attendance of Probation Officer.** The court may order the probation officer who prepared the presentence report to attend a prehearing conference.

(3) **Postponing Sentencing and Presentencing Hearing.** At the conference, the court may postpone the date of sentencing for no more than 10 days beyond the maximum extension permitted by Rule 26.3(b), and may delay the presentencing

hearing accordingly, to allow the probation officer to investigate any matter the court specifies, or to refer the defendant for mental health examinations or diagnostic tests.

### **Rule 26.8. The State's Disclosure Duty; Objections and Corrections to a Presentence Report**

- (a) **The State's Disclosure Duty.** The State must disclose any information in its possession or control it has not already disclosed that would tend to reduce the defendant's punishment.
- (b) **Notice of Objections.** At least one day before the presentencing hearing, each party must notify the court and other parties of the party's objections, if any, to the contents of any report prepared under Rules 26.4, 26.5 or 26.7(c).
- (c) **Corrections to a Presentence Report.** If the court sustains any objection to a presentence report's contents, it may take appropriate action, including but not limited to:
- (1) excising portions of the report, including any objectionable language;
  - (2) ordering a new presentence report to be prepared with specific instructions and directions;
  - (3) directing that a different probation officer prepare a new presentence report; or
  - (4) ordering the presentence report sealed.

### **Rule 26.9. The Defendant's Presence**

The defendant has a right to be present at a presentencing hearing and must be present at sentencing.

### **Rule 26.10. Pronouncing Judgment and Sentence**

- (a) **Pronouncing 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) **Pronouncing 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 A.R.S. §§ 13-1802, 12-1805, 28-1381, or 28-1382, permanently affix the defendant's right index fingerprint to the sentencing document or order; and
- (6) if the court sentences the defendant to a prison term, direct the clerk to send to the Department of Corrections, along with the sentencing order, copies of all presentence reports, probation violation reports, and medical and mental health reports prepared for, or relating to, the defendant.

### **Rule 26.11. A Court's Duty After Pronouncing Sentence**

**(a) Disclosures.** After pronouncing judgment and sentence, the court must:

- (1) inform the defendant of the right to appeal the judgment, sentence, or both, and advise the defendant that failure to file a timely notice of appeal will result in the loss of the right to appeal;
- (2) advise that:
  - (A) if the defendant is indigent, as defined in Rule 6.4(a), the court will appoint counsel to represent the defendant on appeal; and
  - (B) if the defendant is unable to pay for certified copies of the record on appeal and a certified transcript, the county will provide them; and
- (3) advise the defendant of the right to waive the right to appellate counsel by filing a written notice no later than 30 days after filing the notice of appeal.

**(b) Written Notice.** After making the disclosures in (a), the court must provide the defendant with a written notice of the rights set forth in (a) and the procedures the defendant must follow to exercise them. The record must show affirmatively the defendant's receipt of the notice.

### **COMMENT**

The defendant's trial counsel has a duty under Rule 6.3(b) to advise the client whether or not an appeal would be beneficial and to continue representing the defendant if an appeal is taken, unless counsel shows good cause why counsel should be allowed to withdraw. Form 23 should be used to notify the defendant of the rights to appeal and to counsel on appeal.

In non-record courts, the defendant will be informed of the right to *de novo* appeal under Rule 30, and the right to counsel, if any, under Rule 6.1(b).

### **Rule 26.12. Defendant's Compliance with Monetary Terms of a Sentence**

- (a) **Method of Payment—Installments.** The court may permit the defendant to pay any fine, restitution, or other monetary obligation within a specified period of time or in specified installments. The defendant must pay restitution as promptly as possible, given the defendant's ability to pay.
- (b) **Method of Payment—to Whom.** The defendant must pay a fine, restitution, or other monetary obligations to the court, unless the court orders otherwise. The court must apply defendant's payments first to satisfy the restitution order and the payment of any restitution in arrears. The court must forward restitution payments to the victim as promptly as practicable.
- (c) **Failure to Pay a Monetary Obligation.**
- (1) ***Defendants Not on Supervised Probation.*** If a defendant who is not on supervised probation fails to pay a fine, restitution, or other monetary obligation, the court must promptly notify the State.
  - (2) ***Defendants on Supervised Probation.*** If a defendant who is on supervised probation fails to pay a fine, restitution, or other monetary obligation, the court must promptly notify the defendant's probation officer.
  - (3) ***Court Action upon Failure of Defendant to Pay a Fine, Restitution, or Other Monetary Obligation or to Comply with Court Orders.*** If the defendant fails to timely pay a fine, restitution, or other monetary obligation, the court may issue an arrest warrant or a summons and require the defendant to show cause why he or she should not be held in contempt for nonpayment.

### **Rule 26.13. Consecutive Sentences**

If the court imposes separate sentences of imprisonment on a defendant for two or more offenses, the sentences run consecutively unless the judge expressly directs otherwise or unless consecutive sentences would be illegal. This rule applies even if the offenses are not charged in the same indictment or information.

### **Rule 26.14. Resentencing**

If a judgment or sentence, or both, have been set aside—either on appeal, by collateral attack, or on a post-trial motion—the court may not impose a sentence for the same offense, or a different offense based on the same conduct, which is more severe than the earlier sentence unless the court determines:

- (a) the earlier sentence is no longer appropriate based on evidence about the defendant's conduct occurring after the court pronounced the earlier sentence;

- (b) the earlier sentence was unlawful and it is corrected so the court may impose a lawful sentence; or
- (c) other circumstances exist and there is no reasonable likelihood that an increase in the sentence is the product of actual vindictiveness by the sentencing judge.

**Rule 26.15. Special Procedures Upon Imposing a Death Sentence**

After imposing a sentence of death, the court must order the clerk to file a notice of appeal from the judgment and sentence.

**Rule 26.16. Entry of Judgment and Sentence; Warrant of Authority to Execute Sentence**

(a) **Entry of Judgment and Sentence.** The judgment of conviction and sentencing on the judgment are complete and valid at the time the court orally pronounces them in open court.

(b) **Warrant of Authority.**

- (1) *Entry of Judgment and Sentence.* The court must enter the exact terms of the judgment and sentence in the court's minutes.
- (2) *Notice to Appropriate Officer.* The court must furnish a certified copy of the minute entry, signed by the sentencing judge, to the appropriate officer and no other authority is necessary to execute any sentence the court imposes. If the sentence is for death or imprisonment, the appropriate officer must receive the defendant for execution of the sentence upon delivery to him or her of a signed, certified copy of the minute entry in the court's docket.