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IN THE SUPREME COURT
STATE OF ARIZONA

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| In the Matter of | Supreme Court No. R-21-0051 |
| PETITION TO AMEND RULES) | |
| 5.3, 6.1, 7.3, and 7.4,) | Reply to Comments |
| ARIZONA RULES OF CRIMINAL) | |
| PROCEDURE) | |
| _____) | |

Pursuant to Rule 28 of the Arizona Supreme Court, David K. Byers, Administrative Director, Administrative Office of the Courts, respectfully submits this reply to comments posted in this matter.

I. Need for the proposed rule changes.

The comment from the Arizona Prosecuting Attorneys' Advisory Council (APAAC) and the Maricopa County Attorney's Office asserts the proposed changes should be preceded by the collection of aggregate data concerning detention to avoid unnecessary additional burden on the criminal justice system. On the contrary, the proposed changes affect procedural due process for individual defendants rather than

public policy considerations or balancing of interests regarding use of bail for which such aggregate data would be useful. The proposed timelier review of detention, clarification of the state's burden of proof, and the right to counsel for detainees are fundamental to the fairness of the court system rather than burdens upon its operation.

Commenters Dianne Post and Laura Hudson note the inevitable catastrophic effects of pretrial detention on employment, housing, childcare, and ongoing medical care. Pretrial detention is a more sudden and pervasive loss of liberty that occurs on accusation of a crime than sentences on conviction of a crime. It also has a disproportionate impact on indigent defendants due to their inability to post bond. With these important liberty interests at stake, effective procedural due process is essential to provide fundamental fairness. This petition proposes modest, practical, and meaningful procedural changes produced by a committee of judges based upon their experience on matters that were deferred from the original petition in R-21-0022.

II. Whether, when, and how conditions of release are reviewed.

Commenter Arizona Attorneys for Criminal Justice (AACJ) supports the proposed amendment to Rule 7.4(f) that reduces the time for holding the existing mandatory review of conditions of release hearing in misdemeanor cases from

twenty to ten days after the initial appearance. The addition of Rule 5.3(c) simply makes the right to review conditions of release more available by specifically providing that it may be done at the preliminary hearing. Contrary to the claim of APAAC and the Maricopa County Attorney, petitioner does not propose any change that burdens the court system with new hearings. Unlike APAAC, AACJ recognizes that the proposed express authorization in rules 7.4(c)(1) and 7.4(f) for the judge to hold argument or a hearing when conditions of release are reviewed is a meaningful addition to the rules.

III. State has burden of proving conditions of release are reasonably necessary.

Commenters Amy Hudson, National Lawyers Guild, and AACJ recognize the importance of the state carrying the burden of proving that bond is necessary. The APAAC and Maricopa County Attorney comment overlooks the existing requirement of Rule 7.2(d) that the state carry the burden of proof concerning the need for conditions of release. Since 1973, Rule 7.2(d) has provided that “The State bears the burden of establishing factual issues” relevant to the right and method of release under Rule 7.2(a). Proposed Rule 7.4(g) reiterates and clarifies that this burden applies particularly when bond is reviewed under Rule 7.4. As stated in Rule 7.4(a)(3), this requires proof of facts concerning the defendant and the alleged crime that are listed in A.R.S. 13-3967(B). Under Rule 7.2(a) and the proposed Rule 7.4(g),

the state would meet its burden if the facts proven cause the court to conclude by a preponderance of the evidence that bond is reasonably necessary to assure future court appearance and protection from harm by the defendant. Additionally, Rule 7.3(c)(2) requires that the court conclude that all other potential conditions of release would be ineffective before a bond is imposed. This clarification of the state's burden of proof may prompt judges to schedule arguments and hearings when reviewing bond under Rule 7.4(f) and in response to defense motions under Rule 7.4(c) at which the state will be required to prove the reasonable necessity of continuation of bond in the amount set at the initial appearance.

The proposed Rule 7.4(g) expressly adds consideration of the public safety assessment (PSA) prepared by pretrial services. The APAAC and Maricopa County Attorney comment implies that the PSA is the only factor the court considers in deciding whether to impose conditions of release including a bond. Instead, the PSA is an actuarial assessment of risk not listed in A.R.S. 13-3967(B) that is required by court rule to be considered as one additional factor in determining the release conditions for an individual defendant. It does not relieve the state of its burden to prove facts that support the reasonable necessity of any conditions of release imposed based upon the characteristics and alleged offense of the defendant listed in A.R.S. 13-3967(B).

IV. Counsel provided for defendant detained at initial appearance.

The AACJ comment argues that by operation of Arizona law the right to counsel applies when a defendant is detained because any period of detention must be credited as time served at sentencing. However, this argument under the current rule is not universally accepted. The proposed addition of Rule 6.1(b)(1)(C) expressly provides for appointment of counsel as a matter of right due to the significance of the loss of liberty as described in section I above for persons detained due to a bond the defendant is unable to pay. APAAC and the Maricopa County Attorney assert appointment of counsel in this circumstance has not been shown to be a necessary burden. On the contrary, it appears self-evident that counsel is fundamental to the defendant's ability to contest state evidence and argument that bond is reasonably necessary based on the more than fifteen factors specifically identified for consideration by the court. The practical effect of this change is to provide misdemeanor defendants appointment of counsel at the initial appearance needed to prepare for the Rule 7.4(f) mandatory bond review hearing that this petition proposes to occur ten days after the initial appearance.

V. Conforming language of rule to statute.

AACJ argues that the words "reasonable and necessary" as currently used in Rule 7.3 should not be changed to "reasonably necessary" due to a significant

difference in meaning. No appellate court has addressed the meaning of these terms in Arizona bail statutes and rules. Petitioner has not considered the effect of changing these terms on what Rule 7 would require. Instead, petitioner agreed with APAAC and the Maricopa County Attorney that the rules should defer to and conform with the use of “reasonably necessary” in A.R.S. 13-3967(D)(6).

For the reasons stated, petitioner urges the Court to adopt the rule changes proposed in this petition.

RESPECTFULLY SUBMITTED this ____ day of May ____, 2022.

By /S/_____

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