

Rosemarie Pena-Lynch  
Bar No 023400  
Mcpa. Cnty. Ofc. of Public Defense Svc.  
620 W. Jackson, Suite 3076  
Phoenix, AZ 85003  
(602) 506-7228  
[Rosemarie.Pena-Lynch@maricopa.gov](mailto:Rosemarie.Pena-Lynch@maricopa.gov)

Gary Kula  
Bar No. 012507  
Mcpa. Cnty. Public Defenders Ofc.  
620 W. Jackson, Suite 4015  
Phoenix, AZ 85003  
(602) 506-7711  
[Gary.Kula@maricopa.gov](mailto:Gary.Kula@maricopa.gov)

Steve Koestner  
Bar No. 011566  
Mcpa. Cnty. Ofc. of Legal Advocate  
222 N. Central, Suite 154  
Phoenix, AZ 85004  
(602) 506-4111  
[Steve.Koestner@maricopa.gov](mailto:Steve.Koestner@maricopa.gov)

Shannon Burns  
Bar No. 015976  
Mcpa. Cnty. Ofc. of Public Advocate  
106 E. Baseline Rd.  
Mesa, AZ 85210  
(602) 372-2815  
[Shannon.Burns@maricopa.gov](mailto:Shannon.Burns@maricopa.gov)

Sherri McGuire Lawson  
Bar No. 013605  
Mcpa. Cnty. Ofc. of Legal Defender  
222 N. Central, Suite 8100  
Phoenix, AZ 85004  
(602) 506-8800  
[Sherri.Mcguire@maricopa.gov](mailto:Sherri.Mcguire@maricopa.gov)

## ARIZONA SUPREME COURT

In the matter of:

PETITION TO AMEND CRIMINAL  
RULE 1.5 AND JUVENILE RULE  
227 AND ADOPT CRIMINAL  
RULE 7.7 AND JUVENILE RULE  
228

Supreme Court No. R-22-0038

Joint Comment by the Directors of the  
Maricopa County Indigent Defense  
Agencies

The Indigent Defense Offices in Maricopa County appreciate the intent of this rule change petition, but we do not support the petition as currently written. Proposed Rule 228, implementing subsection E of the new A.R.S. § 8-305, is inadequate to protect the

rights of juveniles who are facing adult criminal charges. This comment outlines our concerns with that provision and suggests additional rules to effectuate A.R.S. § 8-305(E).

**1. The re-determination hearings provided for in A.R.S. § 8-305(E) and proposed Rule 228 are contrary to the purpose of the Juvenile Justice Delinquency Prevention Act.**

The recently enacted A.R.S. § 8-305(E) runs counter to at least one purpose of the Juvenile Justice Delinquency Prevention Act (“the Act”) it was designed to codify. One goal of the Act is to end or limit the practice of incarcerating juveniles in adult jails, and Arizona’s receipt of millions of dollars in federal grant funds is conditioned on compliance with the Act’s requirements.<sup>1</sup>

The Act permits an initial housing determination for arrested juveniles and calls for a re-determination of juveniles’ detention location only when a juvenile is initially held in an adult facility. Nothing in the Act creates a reverse process by which juveniles can be moved *to* adult facilities after the initial housing determination has been made. Nonetheless the legislature included a provision in SB1073 that permits such a transfer. Accordingly, this court should be mindful of ensuring that any rules implementing the re-determination provision of SB1073 promote fairness and basic due process protections for incarcerated juveniles.

---

<sup>1</sup> PL 93–415 (S 821), PL 93–415, September 7, 1974, 88 Stat 1109, As Amended Through P.L. 115-385, Enacted December 21, 2018 Sec 223.

**2. The re-determination hearings provided for in A.R.S. § 8-305(E) and proposed Rule 228 allow juvenile detention facilities to avoid accountability in providing for the needs to detained youth.**

Detention is an inherently stressful environment that can create behavioral challenges for incarcerated persons. The re-determination provision in SB1073 allows the juvenile detention facility to use the criminal court in lieu of evidence-based custodial practices designed to de-escalate and modify disruptive inmate behavior. Contrary to evidence-based practice, the proposed language allows juvenile detention facilities to shift juveniles exhibiting the greatest mental, cognitive, or emotional needs to an adult facility less equipped to address the needs of the juvenile. This is a practice akin to the school to prison pipeline, whereby high performing schools expel children for behavioral issues, sending them to successively worse performing schools and down a path to court involvement. In fact, many of the behavioral issues Juvenile Detention in Maricopa County has already complained of and used as the basis for re-determination motions pursuant to A.R.S. 8-305(E), arose in the detention facility's school setting.

The re-determination provision also uses the same faulty logic that the United States Supreme Court has cautioned against—an over-emphasis on conduct as a barometer for predicting future behavior.<sup>2</sup> It does not consider the science behind juvenile brain development that shows most juveniles act in a state of transient immaturity, not by way of fixed character traits. When sending children to an adult facility, Juvenile Detention is taking the children who need the most help and supportive services and punishing them by

---

<sup>2</sup> See generally *Roper v. Simmons*, 543 U.S. 551 (2005).

transfer to an adult jail. This is also contrary to the express purposes of the Act that seeks to implement evidence-based, trauma informed services that reflect the science of adolescent development.<sup>3</sup>

### **3. The re-determination provision has the potential to affect case outcomes.**

The re-determination provision in A.R.S. § 8-305(E) does not explicitly require the proceedings be sealed, thus allowing otherwise confidential<sup>4</sup> juvenile records to be used against the juveniles in their criminal matters. The re-determination provision allows Juvenile Detention staff to discuss a juvenile’s administrative infractions in a public setting and on a public docket. Juvenile Detention will now be permitted, and has already started, to file motions containing details about a juvenile’s custodial behavior. What was once addressed administratively and confidentially, will now play a role in determining case outcomes.

These motions air grievances in front of the same court tasked with making decisions about the juvenile’s criminal case, and in front of prosecutors seeking the juvenile’s felony conviction. Prosecutors are making punitive case-related decisions such as plea offer terms and sentencing recommendations based, in part, on a juvenile’s behavioral issues arising from the stressful custodial setting. In fact, prosecutors in Maricopa County have already cited to information they learned during re-determination hearings as a reason for not offering a more lenient plea agreement.

---

<sup>3</sup> PL 93–415 (S 821), PL 93–415, September 7, 1974, 88 Stat 1109, As Amended Through P.L. 115-385, Enacted December 21, 2018, Sec. 102, p.3.

<sup>4</sup> Ariz. Rev. Stat. 8-208 (2022).

This practice does not routinely occur in adult jails. Certainly, there are behavioral issues that arise in adult jails, but that information is not typically shared with the court and prosecutors unless the behavior is referred for prosecution or is directly relevant to the pending criminal case. Thus, juveniles who have been initially housed in a juvenile detention facility and then sent to an adult jail under the re-determination provision of A.R.S. § 8-305(E) are at a disadvantage, particularly from a plea negotiation and sentencing standpoint, as compared to those who are incarcerated only in an adult jail.

The Act was designed as a shield to protect detained youth. Instead, the legislature's re-determination provision is a sword, used in a manner that ultimately harms the juveniles whom the Act was designed to protect.

#### **4. The re-determination provision is ripe for abuse, inconsistencies, and disparate impact.**

The re-determination provision allows a non-elected official—the Juvenile Court Services Director—to initiate a litigation process aimed at sending youth to adult jails based on undefined “conduct.” Providing such broad discretion to Juvenile Detention creates an environment ripe for abuse, inconsistent application, and disparate impact. Since the enactment of SB1073, the re-determination provision has already been used as a threat by the juvenile detention facility to attempt to control behavioral issues. For example, Juvenile Detention staff have threatened juveniles in their custody with the position that they will be sent to an adult facility if they create disruptions in classroom settings, citing to this new law. Juvenile Detention staff have also advised juveniles that if they contest the transfer, it will hurt their criminal cases—an apparent attempt to persuade these juveniles

to stipulate to a transfer. These practices run contrary to the therapeutic approach Juvenile Detention is expected to utilize for effective behavior modification of the youth in their custody.

In addition, Juvenile Detention has complained of staffing shortages, and recently opposed housing several juveniles within their facility citing to a lack of available staff. The re-determination provision appears to be a mechanism by which Juvenile Detention can decrease the number of juveniles in their custody, and thus an indirect means of addressing staffing shortages. This practice is likely to result in arbitrary enforcement by creating a sliding scale of behaviors, deemed by Juvenile Detention to trigger a re-determination motion, that depends upon the current occupancy capabilities of the facility.

Finally, any provision of the Rules that allows Juvenile Detention to make discretionary decisions about which juveniles should be subjected to a redetermination hearing could lead to disparate impacts on minority incarcerated youth. Like the school to prison pipeline, minority communities are most affected by discretionary, punitive practices.<sup>5</sup> Juvenile Detention's use of the re-determination provision is susceptible to the same implicit biases that affect other discretionary discipline policies.

---

<sup>5</sup> See Losen, D. J., & Martinez, P. (2020). Lost opportunities: How disparate school discipline continues to drive differences in the opportunity to learn. Palo Alto, CA/Los Angeles, CA: Learning Policy Institute; Center for Civil Rights Remedies at the Civil Rights Project, UCLA <http://www.schooldisciplinedata.org/ccrr/docs/Lost%20Opportunities%20-%20REPORT%20-%20v17.pdf> (for example, noting one study that, “[a]lthough districts typically have a districtwide student code of conduct, in many districts, the individual school leaders have the autonomy to respond to student behavior according to their own beliefs and attitudes. A study by Dr. Russ Skiba that surveyed principals from every school in Indiana found that a principal’s attitude on school discipline was not only the most powerful predictor of whether suspension rates were high or low but was also the strongest predictor of whether racial disparities were large or small (after controlling for poverty and several other factors).”).

**5. The re-determination provision of A.R.S. § 8-305(E) should not be implemented by this Court without provision that ensure confidentiality and due process for the detained juveniles.**

Should this Court adopt the re-determination provision contained in A.R.S. § 8-305, the Court should include protections in implementing rules that alleviate the concerns described above. Because SB1073 was enacted only to comply with a federal law that determines detained juveniles' housing locations, it should not be implemented by the Courts in a manner that furthers the prosecution of detained juveniles. To mitigate the prosecutorial impact, the Court should consider additional rules as described below.

First, the re-determination hearings should be handled by a different judicial officer than the case management and trial judges.

Second, the agency prosecuting the criminal case (almost always is the County Attorney's Office) should be excluded from any litigation brought pursuant to A.R.S. § 8-305(E). The State of Arizona is represented at the re-determination hearings by the Attorney General's office, as that office represents the juvenile probation department, and there is no compelling reason for the prosecuting agency to also participate in the proceedings. Unlike motions to modify release conditions, motions brought pursuant to the re-determination provision should be collateral to, and separate from, the criminal prosecution because the re-determination litigation will often necessitate discussion of protected juvenile records and educational records.

Third, the Court should require re-determination proceedings be sealed, including all hearings, motions, and other filed documents.

Further, the Court should order that any information obtained or disclosed for purposes of re-determination hearings not be used against the juveniles in their criminal matters.

**I. Conclusion**

For the reasons explained above, the Indigent Defense Offices in Maricopa County recommend the Court reject or modify the re-determination provision contained in proposed Rule 228.

Respectfully submitted October 31, 2022.

By /s/ Rosemarie Pena-Lynch  
Rosemarie Pena-Lynch, Director  
Mcpa. Cnty. Ofc. of Public Defense Svc.

By /s/ Gary Kula  
Gary Kula, Director  
Mcpa. Cnty. Public Defenders Ofc.

By /s/ Steve Koestner  
Steve Koestner, Director  
Mcpa. Cnty. Ofc. of Legal Advocate

By /s/ Shannon Burns  
Shannon Burns, Director  
Mcpa. Cnty. Ofc. of Public Advocate

By /s/ Sherri McGuire Lawson  
Sherri McGuire Lawson, Director  
Mcpa. Cnty. Ofc. of Legal Defender