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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of	)	
	)	
PETITION TO AMEND RULE 6.1	)	Supreme Court No. R-23_____
OF THE ARIZONA RULES OF	)	
CRIMINAL PROCEDURE	)	(Expedited Consideration
	)	and Emergency Adoption
	)	Requested)
_____	)	

Pursuant to Rule 28 of the Arizona Supreme Court, David K. Byers, Administrative Director, Administrative Office of the Courts (AOC), respectfully petitions this Court to amend Rule 6.1, Arizona Rules of Criminal Procedure. Due to the circumstances described below, Petitioner requests expedited consideration and emergency adoption of the proposed rule amendments at the December 2023 Rules Agenda with a comment period to follow, and consideration for permanent adoption at the August 2024 Rules Agenda.

I. Background and Purpose of the Proposed Rule Amendment.

In December 2016, the Supreme Court promulgated a number of rule

changes in response to a previous petition filed by the Petitioner. That petition followed through on the purpose of the Task Force for Fair Justice for All (“Task Force”), which was “recommending best practices for making release decisions that protect the public, but do not keep people in jail solely for the inability to pay bail” and the recommendations contained in the Task Force report. In its report, the Task Force reported that national and local statistics indicated a significant number of people incarcerated pretrial remain incarcerated *solely* because they cannot afford to pay a bond.

The purpose of this petition is to clarify the current Rule 6.1(b), Arizona Rules of Criminal Procedure, having to do with the appointment of counsel at initial appearance and the scope of that representation. The current Rule 6.1(b)(1) entitles an indigent defendant to court appointed counsel (A) in any criminal proceeding that may result in punishment involving a loss of liberty; (B) for the limited purpose of determining release conditions at or following the initial appearance, if the defendant is detained after a misdemeanor charge is filed; or (C) if the defendant is held on bond at the initial appearance. Courts and stakeholders have expressed confusion and differing interpretations regarding how (B) and (C) are to be applied as they relate to the duration and scope of the appointment, and whether (B) is subsumed in (C). The proposed rule amendment would combine 6.1(b)(1)(B)

and (C) and entitle an indigent person to counsel in a criminal proceeding if the person is detained because of a bond imposed at the initial appearance. The appointment would terminate upon the defendant's release from custody unless otherwise prohibited by law or ordered by the court.

Rule 6.1(b) has undergone a series of changes since 2017 as courts and criminal justice stakeholders look to interpret and implement the rule in line with practical operational processes. To provide a historical perspective, this petition reviews the previous relevant rule petitions and actions by this Court.

II. Prior Rule Amendments.

1. R-16-0041.

The 2016 amendment to Rule 6.1(b) was intended to assist defendants who find themselves in need of an advocate for modification of release conditions that were set at the initial appearance. An unrepresented indigent defendant may have been detained at the initial appearance and because neither the court nor the state had indicated a sentence of incarceration was being considered, the defendant was not provided with appointed counsel. In considering the Task Force report and recommendations of an ad hoc workgroup of superior court and limited jurisdiction court judges and AOC representatives, the Supreme Court amended Rule 6.1(b). The relevant

addition in the context of the rule in its entirety is below in italics. Rule 6.1(b), after the promulgated amendment, read as follows:

b. Right to Appointed Counsel. An indigent defendant is entitled to have an attorney appointed:

(1) *For the limited purpose of determining release conditions, if detained pretrial after misdemeanor criminal charges are filed;*

(2) In any criminal proceeding that may result in loss of liberty; and

(3) In any other criminal proceeding in which the court concludes that the interests of justice so require.

2. R-17-0002.

In August 2017 as part of the Criminal Rules Restyling, Rule 6.1(b) was amended effective January 1, 2018, in line with the restyling protocol to read as follows:

(b) Right to a Court-Appointed Attorney.

(1) ***As of Right.*** An indigent defendant is entitled to a court-appointed attorney:

(A) in any criminal proceeding that may result in punishment involving a loss of liberty; or

(B) for the limited purpose of determining release conditions at or following the initial appearance, if the defendant is detained after a misdemeanor charge is filed.

(2) Discretionary. In any other criminal proceeding, the court may appoint an attorney for an indigent defendant if required by the interests of justice.

(3) Definition of “Indigent.” For the purposes of this rule, “indigent” means a person who is not financially able to retain counsel.

The criminal rules restyling, as per the charge to the Task Force, did not recommend substantive changes.

3. R-21-0022.

In August 2021, R-21-0022 made what also can be described as restyling changes to Rule 6.1(b), effective January 1, 2022, as follows:

(b) Right to Appointment of an Attorney.

(1)-(2) [No change]

~~(3) Definition of “Indigent.” For the purposes of this rule, “indigent” means a person who is not financially able to retain counsel.~~¹

¹ The definition of “indigent” was moved to a new paragraph (g) with no change in wording.

Other changes to Rule 6 had to do with representation by a legal paraprofessional, unrelated to this petition.

4. R-21-0051.

Further discussions among superior court and limited jurisdiction court judges and a review by the AOC's Court Services Division, discovered a gap in the process of securing an attorney for an indigent defendant charged with a misdemeanor detained pending trial after the bail review hearing provided for by Rule 7.4 (f), Rules of Criminal Procedure.²

In the practical operation of Rule 6.1(b)(2), questions arose as to whether the appointment of the attorney survives the bail review hearing even if the defendant continues to be detained pending trial. An ad hoc committee consisting of superior court and limited jurisdiction court judges and the AOC's legal group and Court Services Division came to the conclusion that the process would benefit by clarifying what was understood, namely that a person detained pending trial is entitled to an advocate and to further advocate, where appropriate, for a modification of release conditions.

In August 2022, the Court amended Rule 6.1(b), effective January 1, 2023, by adding paragraph (1)(C) to read as follows:

² Rule 7.4(f) requires, no later than 10 days after the initial appearance, the court to determine whether to amend the conditions of release for any defendant held in custody on bond for a misdemeanor.

(b) Right to Appointment of an Attorney.

(1) *As of Right.* An indigent defendant is entitled to a court-appointed attorney:

(A) in any criminal proceeding that may result in punishment involving a loss of liberty; or

(B) for the limited purpose of determining release conditions at or following the initial appearance, if the defendant is detained after a misdemeanor charge is filed; or

(C) *if the defendant is held on bond at the initial appearance.*

(2) [No change]

III. Current Proposal

Subsequent to the enactment of paragraph (b)(1)(C) above, in implementing the rule, a question arose as to the interrelationship and interplay between paragraphs (b)(1)(B) and (b)(1)(C). Paragraph (B) applies to representation “for the limited purposes of determining release conditions.” However, paragraph (C) is broader, applying to anyone held on bond at the initial appearance. There are seemingly no limitations on the scope of representation. The Court Services Division fielded a number of inquiries as to the relationship and interpretation of the two paragraphs.

There are anecdotal stories, for instance, of attorneys not being appointed at weekend initial appearances if the initial appearance is for another court. In order to resolve the questions, a broader group than previously met, consisting of judges along with the AOC legal and Court Services Division, was convened. That group met twice and recommends a slight alteration to Criminal Rule 6.1(b)(1). The proposed amendment does not make a substantive change to the rule, but instead clarifies what the current rule is intended to accomplish. The proposed amendment is attached as Appendix A.

The first recommended change, moving the words “in any criminal proceeding” to paragraph (1) makes clear that the entire rule applies to criminal proceedings only. While it is believed the current rule is clear, questions have been raised as to the rule’s applicability to proceedings such as extradition and orders to show cause.

The second recommended change strikes (b)(1)(B) and simplifies current (b)(1)(C) regarding when an indigent defendant held on bond is entitled to court-appointed counsel. This change also eliminates existing confusion as to whether an attorney must be appointed prior to the initial appearance to be present at the initial appearance or is appointed at the initial appearance to then assume representation. This is a real concern

especially for rural and smaller courts faced with attorney availability and budget concerns. Larger courts have also raised the latter concern. The current rule has led to mixed interpretations by the courts. Experience also tells us that there is not a consistent statewide defense bar interpretation of the meaning of the rule.

The third recommended change clarifies what has been an open question, the length and scope of the appointment. At issue is the status of the appointment of counsel if the defendant who is initially detained at the initial appearance is released prior to trial. Does the appointment terminate or continue through disposition? The proposal clarifies, with two exceptions, that the appointment terminates upon the defendant's release. The two exceptions are (1) the law otherwise requires appointment of counsel because the criminal proceeding may result in punishment involving a loss of liberty, such as DUI, and (2) the court orders the appointment to continue in the interest of justice. Due to the status of the case and other factors the court might consider, the proposal provides a safety valve for the court to make a decision on the status of the appointed attorney.

IV. Comments

This petition has not been sent to the court community for pre-filing comments. It is the intent of the Petitioner to forward the proposal for

comment to the trial courts and other criminal justice stakeholders contemporaneously with filing.

V. Request for Expedited Consideration and Emergency Adoption

Petitioner is requesting expedited consideration and emergency adoption of the proposed rule amendments as set forth in Appendix A with a comment period to follow, for the reasons described in this petition.

Therefore, as permitted by Supreme Court Rule 28(h), Petitioner requests expedited consideration and emergency temporary adoption of the proposed rule amendments at the Court's December 2023 Rules Agenda with a comment period to follow and consideration for permanent adoption at the Court's August 2024 Rules Agenda. Additionally, Petitioner respectfully requests that this petition be open for preliminary comments until October 31, 2023, with a reply due by November 4, 2023, to provide an opportunity for the public to comment before this petition is considered at the Court's December 2023.

RESPECTFULLY SUBMITTED this 18th day of August 2023.

By _____
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APPENDIX A

Rule 6.1. Right to Counsel; Right to Appointment of an Attorney; Waiver of the Right to Counsel; Authority of a Legal Paraprofessional

(a) [No change]

(b) Right to Appointment of an Attorney.

(1) *As of Right.* An indigent defendant is entitled to a court-appointed attorney in any criminal proceeding:

(A) ~~in any criminal proceeding that may result in punishment involving a loss of liberty; or~~

~~(B) for the limited purpose of determining release conditions at or following the initial appearance, if the defendant is detained after a misdemeanor charge is filed; or~~

(C B) ~~if the defendant is held on~~ while incarcerated because of a bond imposed at the initial appearance. The appointment will terminate upon the defendant's release from incarceration unless continued appointment is otherwise required by law or ordered by the court.

(2) *Discretionary.* In any other criminal proceeding, the court may appoint an attorney for an indigent defendant if required by the interests of justice.

(c) through (g) [No change]