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IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF **PETITION TO AMEND RULE 7.6, ARIZONA RULE OF CRIMINAL PROCEDURE**	**Supreme Court R-12-0036** **ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL'S COMMENTS TO PETITION TO AMEND RULE 7.6, ARIZONA RULES OF CRIMINAL PROCEDURE**

Pursuant to Arizona Rules of the Supreme Court, Rule 28(C), the Arizona Prosecution Attorneys' Advisory Council ("APAAC") hereby submits its comments to the Petition to Amend Rule 7.6 of Arizona Rules of Criminal Procedure. APAAC respectfully recommends that the Supreme Court decline to adopt the proposed amendments for the reasons set forth below.

I. Policy Objections to Proposed Rule Changes

As explained below, the proposed rule changes do not bring the appearance bond system into the 21st century; rather, it is a move back to the old west when the

criminal justice system ground to a halt while "wanted" posters for a fugitive defendant faded in the desert sun. The proposals change the appearance bond rules from an incentivized system for defendants to timely appear, or risk the loss of the bond, to a system where timely appearance has no consideration and the court, through issuance of its warrant, merely nails up its "wanted" poster and waits.

Purpose of appearance bonds

"An 'appearance bond' is an undertaking, on a form approved by the Supreme Court, to pay to the clerk of the court a specified sum of money upon failure of a person released to comply with its conditions." Ariz. R. Crim. P. 7.1.(b). The form approved by the Arizona Supreme Court is Form 7 of the Arizona Rules of Criminal Procedure which states, in part, that the defendant and the defendant's surety promise to pay the amount of the bond in the event the defendant "fails to appear…or during the pendency of the case to appear to answer the charges or submit to the orders and process of the court…"

It has long been the law in Arizona that appearance bonds are meant to secure the timely appearance of a defendant. *State v. Garcia Bail Bonds*, 201 Ariz. 203, ¶19, 33 P.3d 537; 359 (App.2001); *In re Bond in Amount of $75,000*, 225 Ariz. 401, ¶7 & ¶13, 238 P.3d 1275, 1278 (App.2010); *State v. Bail Bonds USA*, 223 Ariz. 394, ¶9, 224 P.3d 210 (App.2010); *United Bonding Ins. Co. v. City Court*

of Tucson, 6 Ariz.App. 462, 464, 433 P.2d 642, 644 (1967); *State v. Nunez,* 173 Ariz.524, 526, 844 P.2d 1174, 1176 (App.1992)."

The Arizona Court of Appeals said it best in *State v. Donahoe ex rel. County of Maricopa,* 220 Ariz. 126, 130, ¶13, 203 P.3d 1186, 1189-1190 (Ariz.App. 2009):

> The primary purpose of bail is to secure the defendant's appearance at future court proceedings. Ariz. Const. art. 2, § 22; ****1190 *130** *see also Fragoso v. Fell,* 210 Ariz. 427, 434, ¶ 21, 111 P.3d 1027, 1034 (App.2005) ("the primary, if not paramount, purpose of bail under the Arizona Constitution is to guarantee a defendant's appearance in court...."). The underlying assumption is that cash or property posted as security for a bond is sufficiently valuable to the defendant that he or she will appear in court as required. *See, e.g., United States v. Szott,* 768 F.2d 159, 160 (7th Cir.1985) ("The purpose of bail is not served unless losing the sum would be a deeply-felt hurt to the defendant and his family; the hurt must be so severe that defendant will return for trial rather than flee.").

Per Rule 7.2(a), Ariz.R.Crim.P., the bond is set in the least onerous amount to reasonably assure the defendant's appearance. Arizona Revised Statutes § 13-3967(B) requires a judicial officer setting a bond to take into account such things as the views of the victim, the nature and circumstances of the offense charged, the weight of the evidence, the accused's family ties, employment, financial resources, character and mental condition, as well as residency in the community and the accused's record of appearance at court proceedings.

It is the risk of loss of the bond which provides the incentive for a defendant and the defendant's bond agent to make sure that a defendant timely appears in

court. Unless there is a legitimate risk of loss of the appearance bond, the bond will not provide an incentive for a defendant to timely appear.

Petitioner's proposed rule changes seek to eliminate or nearly eliminate the risk of loss for the bonding industry. A practical result of the elimination of the risk is that appearance bonds will no longer provide the intended incentive for a defendant to timely appear and failures to appear will increase. Moreover, the changes render meaningless the considerations the trial court makes in setting appearance bonds pursuant to A.R.S. § 13-3967(B) and Rule 7.2(a), Ariz.R.Crim.P., depriving courts of their exercise of judicial discretion.

Policy Considerations Concerning Proposed Changes

The proposed rule changes, as suggested by Petitioner, are not a leap into the 21st century, but rather a throwback to the old west. Today's bonding agents[1] can use a multitude of high tech devices to monitor not only the status of the defendant, but the status of the defendant's court case. Devices and software readily available to the bonding agents include GPS ankle monitoring, voice-recognition software for verifying identification during phone check-ins, caller-ID, video-chat and conferencing, facial recognition software, cell-phone GPS tracking, etc. Now more than ever before, access to information regarding the defendant's pending criminal

[1] Bonding agents typically post appearance bonds underwritten by an insurance company or surety. As the interests of the two are the same, "bonding agent" and "surety" are used interchangeably throughout this Comment.

case is readily available, often 24 hours a day, 7 days a week through online court websites.

Additionally, many courts allow access to electronic copies of court files which makes the process of reviewing a multitude of cases quicker and easier. The proliferation of inexpensive cell phones, which now almost always include a camera, make it an easy decision for bonding agents to require their bonded defendants, as a contractual term of their release on bond, to send to the bondsman a snapshot of court minute entries setting the defendant's next court date. Any related costs involved with these procedures can typically be charged back to the defendant through the bonding agreement.

In the 21st century, it is far easier for the bondsmen to know where their defendants are and when they need to appear in court. The problem, as demonstrated by the rule change petition, is that the bonding community does not want to be responsible for monitoring the defendant and the defendant's court dates. Furthermore, the industry seeks to minimize its responsibility for getting a defendant to timely appear for court. Through the proposed rule change, the bonding industry is essentially asking the Supreme Court to forget and ignore the essential purpose of the bond – to ensure timely appearance of a defendant - by restricting the discretion of trial courts to the issue of whether a defendant

eventually appears, or is incarcerated in another jurisdiction, after failing to appear for one or more court dates.

The proposed changes make the trial courts, not the bonding agents, primarily responsible for monitoring the defendant's appearance. This is evident by the portions of the proposed rules that place greater burdens and additional requirements on the trial courts to give notification to a surety when a defendant fails to appear. *The net effect of these changes is the creation of technical defenses for bonding agents when the court fails to do the monitoring that the surety should be doing in the first place.* The court should not be made the surety's surety. Petitioner seeks to make the bond process like a deposit on a Coke bottle; if and when the bottle or defendant is ever returned, you get your deposit back.

Timely appearance leads to the efficient administration of justice

In evaluating the proposed changes, it is essential to focus on the underlying purpose of the appearance bond. Timely appearance by a defendant leads to the efficient administration of justice. Failures to appear are costly and burdensome to the criminal justice system in many different and incalculable ways. Parties affected by a failure to appear include not only the courts and legal counsel, but also victims, law enforcement, jurors and witnesses. Delay created by untimely appearance can be damaging to the evidence of a case as witnesses' memories fade or they no longer are available through relocation or death.

The system proposed by the Petition is a costly and inefficient administration of justice that works to the benefit of only the defendant and the bonding industry by insulating them from the very risk they voluntarily purport to undertake. The proposed rule change, intentionally or not, creates a system where the calendar of a case is set by the defendant, not the court. If the rule change is approved, it won't take long for criminal defendants to realize that they can deliberately and tactically fail to appear for court, and be absent for many months, knowing that upon their return the only repercussion to their bond, whether a $1,000 bond or a $1,000,000 bond, is a loss of $150. It is not inconceivable that this is a price a criminal defendant would eagerly pay. If the price for failing to appear is reduced to a token amount, failures to appear will increase and the very purpose of posting an appearance bond will be thwarted.

II. Proposed Rule 7.6(c)(1)

The proposed changes to this rule have two components. The first component is that when a defendant out on bond fails to appear, the court shall issue a warrant and simultaneously set a bond forfeiture hearing sending notice of both to the surety within ten days. It appears from this Petition that the bonding industry is operating under the grave misconception that when a warrant is issued because a defendant failed to appear, the failure to appear is perfectly acceptable to

the court if the court does not also simultaneously set a bond forfeiture hearing. If the issuance of a warrant for a defendant's failure to appear in court is not already a huge red flag for the bonding community, it is unclear how requiring the simultaneous setting of a bond hearing will rectify such a blatant lack of vigilance. The change appears to be solely for the purpose of creating technical defenses for the bonding industry by abandoning any expectation that the bonding agents take responsibility for monitoring their defendants.

The second component of the proposed change to Rule 7.6(c)(1) is meant to delay the setting of a bond forfeiture hearing to a minimum of 60 days to no more than 120 days. As explained below, the practical effect of this change will be an increase in failures to appear as sureties place less focus on timely appearance in reliance on this extended delay of the bond hearing.

As previously stated, it is essential for an expedient and effective criminal justice system that the appearance bond provides the incentive for timely appearance at the scheduled court date. Consider this example: a defendant appears for court on June 1. At that hearing, after discussion with the parties, the court sets the case for a change of plea approximately 45 days later on July 15. The defendant, knowing that his change of plea on July 15 will likely result in a sentence of prison, decides to abscond on June 2. If the emphasis of the appearance bond matter is on timely appearance, the surety has a powerful incentive to keep

himself informed of the defendant's whereabouts and his July 15 court date. A diligent surety in such a case would soon discover the defendant has absconded and have over a month to locate and surrender the defendant before the defendant misses his July 15 court date. Such a surrender would eliminate any liability on the bond under the current Rule 7.6(d).

With a delayed bond forfeiture hearing, the incentive for a surety to track a defendant and timely surrender him is diminished. Instead of putting resources into timely appearance, it is far easier and cheaper for the surety to wait for the court to notify it that one of its defendants has failed to appear and put its resources into dealing with just that particular defendant. Because many fugitive defendants are often quickly apprehended by law enforcement, the postponement of a bond forfeiture hearing for sixty days further encourages a surety's inaction. A surety could very well wait out the first 30 to 45 days before undertaking any serious recovery action in the hope that law enforcement locates and surrenders the defendant during that time.[2]

[2] Initially one may be inclined to believe that the potential loss of the bond would provide incentive for a surety to act with haste. The reality is that it is not uncommon for sureties to require, in addition to their 10% premium, collateral from the defendant or a third party in an amount at least equal to the bond amount. Even before the defendant hits the street, the surety has made his money in the form of a premium and has transferred 100% of the risk on the bond to someone else. Little economic incentive remains for the surety to incur out-of-pocket expenses to locate and surrender a defendant to avoid a loss that ultimately will be borne by someone other than the surety.

The end result is that there will be more failures to appear and law enforcement will essentially subsidize many sureties by locating and apprehending fugitives who are only out of custody because the surety posted an appearance bond promising timely appearance. Even if a defendant fails to appear under the watch of a diligent surety who is tracking the defendant and his court dates, the surety still has incentive under the existing rule to seek out and surrender the defendant. Part of the incentive to locate the fugitive defendant is that the defendant's presence may be needed to provide an explanation or excuse for the defendant's failure to appear.

Another incentive is demonstrated in *State v.Woodward*, Yavapai Superior Court cause CR2011-80098, a case that illustrates that surrender can be used by the surety to argue for mitigation of the forfeiture.[3] In *Woodward*, the surety was rewarded for his efforts when $7,500 of a $20,000 bond was exonerated solely upon the surety's surrender of the defendant after he failed to appear. The remainder of the bond was properly forfeited in recognition that the purpose of the bond was to ensure timely appearance and that the defendant presented no excuse or explanation for his failure to appear.

[3] *N.B.* A surety does not meet its obligations pursuant to Rule 7.6 merely by surrendering a fugitive defendant prior to entry of a judgment forfeiting the appearance bond. *State v. Old West Bonding*, 203 Ariz. 468, ¶18, 56 P.3d 42 (App.2002).

It should be noted here that while the Petition laments the outcomes of various trial court decisions, the Arizona Court of Appeals has reviewed those decisions and found that the trial courts are not abusing their discretion with respect to bond forfeitures. Trial courts appropriately exercising their discretion is not a situation that cries out for reform.

Finally, the Petition's claims that counties suffer from "bond fever" and seek to forfeit appearance bonds as a source of revenue are baseless. At its core, the appearance bond process under Rule 7.6 is a "carrot and stick" system. The "carrot" is that the appearance bond does not get forfeited if the defendant timely appears. The "stick" is obviously forfeiture of the appearance bond if the defendant doesn't do as he is supposed to do. There is no other remedy under the rules to make this process work unless there is a very real and legitimate risk of forfeiture. The forfeiture is meant to bring about the desired behavior, not to generate revenue.

III. Proposed Rule 7.6(d)(2)(a)

The proposed change to Rule 7.6(d)(2)(a) seeks to completely remove the court's discretion regarding forfeiture of an appearance bond by limiting such forfeitures to the arbitrary amount of $150 when a surety surrenders a defendant to the sheriff of any Arizona county. This proposed change makes a farce of the

currently established procedures for setting bonds under A.R.S. § 13-3967 and Rule 7.2(A), Ariz. R. Crim. P., which, as previously mentioned, require the bond to be set in the least onerous amount and the courts to consider many factors about the victims, the accused and the nature of the crime. All these considerations are thrown out the window when liability on the bond is arbitrarily reduced to $150. Moreover, a potential loss of $150 hardly produces an incentive for a defendant to timely appear that is equal to the incentive produced by a potential loss of a bond that originally may have been set at $1,500, $15,000 or $150,000.

The change also eliminates the delivery of the surrender affidavit to the sheriff as required under the previous rule. The affidavit serves two important purposes. First, it alerts the sheriff that the defendant is in custody of another jurisdiction so that a hold may be placed on the defendant. Second, it allows the sheriff to verify the veracity of the details of the surrender as claimed in the affidavit. These two things cannot be accomplished if the affidavit is just provided directly to the court.

IV. Proposed Rule 7.6(d)(2)(b)

The proposed change to Rule 7.6(d)(2)(b) is an attempt to change an appearance bond from a performance bond, incentivizing the performance of timely appearance, into a cost bond. This change, like the others before it, removes

timely appearance from any consideration by the trial court and makes the speculative extradition and transportation costs of a defendant, who could be incarcerated in a jail anywhere in the world, as the only considerations.

Initially, it should be noted that there is no requirement under the proposed rule that the surety is to have had any involvement in the defendant's apprehension and incarceration outside of Arizona. Under the proposal, a defendant, who is out on a surety's bond, could deliberately engage in illegal acts in another jurisdiction which results in law enforcement apprehending and incarcerating the defendant. For such behavior, the defendant and the surety unfathomably would be rewarded by having their liability on an appearance bond reduced to the costs of extradition and transportation.

The proposal is also unworkable on a number of other levels. First, the court and the state will be forced to expend considerable time and resources determining what are appropriate costs of extradition and transportation. Many jails use interstate agreements with other jails and exchange housing and transportation services in extraditing defendants for many jurisdictions. These costs can be difficult, if not impossible, to quantify. Additionally, the State may have constitutional and public safety concerns which call for greater costs. The sureties, on the other hand, would argue the costs are much lower as demonstrated by

quotes from "recovery agents" whose recovery methods are not bound by the same restrictions on the state.

Second, even if the court were able to ascertain extradition costs, there is no statutory mechanism which would allow the court to divert such funds to reimburse the agencies who actually incurred those costs. For example, county attorneys typically have a set amount budgeted for each fiscal year for extradition costs. In a surrender situation under the proposed rule, the county attorney would have to expend resources from its limited budget to pay to extradite a defendant. The rule does not give the court authority to reimburse the county attorney's budget for those costs. This is especially true if part of the costs of extradition and transportation are incurred by an agency outside of the county or the State of Arizona.

Finally, prepayment of costs of extradition from a jurisdiction does not mean a defendant will ever actually be extradited from such a jurisdiction. For extradition within the United States, it is possible that a governor's warrant cannot be obtained or the defendant, due to a trial or incarceration in the other jurisdiction, may not be available for extradition for months or even years. A defendant could be held in a foreign country which refuses to extradite the defendant to the United States. In such a case it would make no sense for a defendant's liability on his appearance bond to be reduced to costs for extradition which will never occur.

V. Conclusion

The proposed rule changes are not in the best interests of the criminal justice system. Rather than encourage timely appearance, which is the primary purpose of an appearance bond, the proposed changes undermine that purpose by removing the discretion of the trial courts to even consider timely appearance. Instead, the proposed changes are a self-serving attempt by the bonding industry to limit the risk of the defendant and surety who have failed to live up to their promise to the court that the posting of an appearance bond will ensure the defendant will appear during the pendency of the case to answer the charges and to submit to the orders of the court. The Petition to change Rule 7.6 should be rejected.

Respectfully submitted this 20th day of May, 2013.

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