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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:) No. R-14-0006
)
) COMMENT OF ARIZONA
Petition to Adopt Modified Rule 12.5,) ATTORNEYS FOR CRIMINAL
Ariz. R. Crim. P.) JUSTICE REGARDING PETITION
) TO ADOPT MODIFIED RULE 12.5,
) ARIZONA RULES OF CRIMINAL
) PROCEDURE
)
)

Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) submits the following comment to the above-referenced petition, asking that the proposed modification either be altered as requested herein, or alternatively rejected in its entirety.

AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature; promoting excellence in the practice of criminal law through education, training, and mutual assistance; and fostering public awareness of citizens’ rights, the criminal justice system, and

the role of the defense lawyer. AACJ is the Arizona state affiliate organization to the National Association of Criminal Defense Lawyers, with which it shares its pursuit of ensuring justice and due process for persons accused of crime, improving the integrity, independence and expertise of the criminal defense profession, and promoting the proper and fair administration of criminal justice.

I. Introduction

In Arizona, an accused has the ability to request that members of the grand jury be informed of her wish to testify before that body and the scope of the requested testimony.¹ The law mandates that grand jurors be informed of the request and its scope, and given the option to request to hear the accused's testimony.² In the wake of recent case law clarifying the requirement that grand jurors be advised of the scope of testimony, AACJ understands that requests by the grand jury to hear the testimony of a defendant have increased. Ordinarily, issues of courtroom security are left to the discretion of a trial judge;³ however, a judge is not present at the probable cause portion of a grand jury proceeding.

Without conceding that any individual inmate is either guilty of a crime or a risk of escape or violence, AACJ accepts and understands the need for consistent

¹ *Trebus v. Davis*, 189 Ariz. 621, 625, 944 P.2d 1235, 1239 (1997); A.R.S. § 21-412, Arizona Rule of Criminal Procedure 12.6.

² *Bashir v. Pineda*, 226 Ariz. 351, 355, 248 P.3d 199, 203 (App. 2011).

³ *State v. Cruz*, 218 Ariz. 149, 168, 181 P.3d 196, 215 (2008), citing *State v. Davolt*, 207 Ariz. 191, 211, ¶ 84, 84 P.3d 456, 476 (2004).

security of in-custody inmates. However, AACJ nevertheless fears that the application of the proposed rule would result in unconstitutional prejudice to an accused by effectively informing the grand jury of a defendant's custody status. Therefore, AACJ proposes that the proposed rule should be modified to require the presence of an officer during testimony of all non-law enforcement officer witnesses (including out-of-custody defendants). Such a modification would appropriately balance the need for security while neutralizing the prejudicial impact of the presence of the security officer.

II. Discussion

- a. Conveying the in-custody status of a defendant violates her right to a presumption of innocence.

“To implement the presumption [of innocence], courts must be alert to factors that may undermine the fairness of the fact-finding process.”⁴ It is considered error to convey to a trial jury, absent good cause, that a defendant is in custody or is otherwise considered a security risk. For this reason, case law establishes that if visible restraints are to be used on a defendant, there must be an individualized,

⁴ *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 1693 (1976).

case-specific determination made for the need for such restraint.⁵ Grand jurors may be advised to disregard this impact, and yet unable to do so.⁶

b. The presence of an officer conveys the in-custody status of a defendant

In *Holbrook v. Flynn*, the United States Supreme Court noted that “[t]o be sure, it is possible that the sight of a security force within the courtroom might under certain conditions “create the impression in the minds of the jury that the defendant is dangerous or untrustworthy.”⁷ The court largely distinguished the presence of guards from the presence of shackles, reasoning that in a trial, where the jury is convened for only that individual case, the jury may not associate the presence of guards as an indication of a concern about the status of the defendant, but rather to lend status and gravitas to the proceedings.

By contrast, it is unavoidable that grand jurors, who are convened for an extended period of time⁸ and who may hear hundreds of cases during that time, would be in a position where they would request testimony of an out-of-custody defendant and an in-custody defendant, and observe the difference when the security officer only accompanies the latter.

⁵ *State v. Dixon*, 226 Ariz. 545, 551, 250 P.3d 1174, 1180 (2011), citing *Deck v. Missouri*, 544 U.S. at 633, 125 S.Ct. 2007

⁶ *Holbrook v. Flynn*, 475 U.S. 560, 570, 106 S. Ct. 1340, 1346 (1986) (“Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused.”).

⁷ *Holbrook* at 569, 1346.

⁸ 120-180 days. A.R.S. § 21-403.

Moreover, as the rule-change petition concedes, grand jurors would be advised of this rule and permitted to take it into account when deciding whether to grant a request to testify.⁹ The proposed modified rule would explicitly state that it applies only to in-custody defendants. Therefore, it would not only imply but directly advise the grand jurors that the accused, the person who is the subject of their probable cause determination, is in custody for the offense.

c. This practice risks violation of the Equal Protection Clause

Defendants accused of most offenses in Arizona are bond-eligible. Exceptions include a limited number of offenses such as capital murder, sexual assault, and certain dangerous crimes against children, and certain offenses involving those accused of being in the country illegally. A defendant without the financial means to post bond would be at an inherent disadvantage because of the need to appear in front of the grand jury with a deputy present, broadcasting to the grand jury that he is in custody.

It is for this reason that in-custody defendants are not required to wear prison attire during trials.¹⁰ Because similar risks apply when a law enforcement officer

⁹ Petition, Page 3.

¹⁰ *Estelle v. Williams*, 425 U.S. 501, 504, 96 S. Ct. 1691, 1693, (1976). (“Similarly troubling is the fact that compelling the accused to stand trial in jail garb operates usually against only those who cannot post bail prior to trial. Persons who can secure release are not subjected to this condition. To impose the condition on one category of defendants, over objection, would be repugnant to the concept of equal justice embodied in the Fourteenth Amendment.”)

appears for some defendants and not others, the change would possibly violate the Fourteenth Amendment of the United States Constitution, as well as Article 2, § 24 of the Arizona Constitution.

- d. This practice risks chilling a accused's exercise of her right to request to testify.

While an accused does not have an unfettered right to testify before the grand jury in the same way that a defendant has the right to testify at trial, the right to request to testify is clear.¹¹ The proposed modification compromises the accused's due process right to make such a request by creating a situation where the accused must choose between requesting to testify and risking the prejudicial impact of the grand jury knowing that she is in custody, and forgoing her right to testify in order to avoid that impact.

III. Proposal

AACJ agrees that it would be impractical for an accused who is in custody to be present in the jury room with no security. Because a consistent rule is preferred so as to avoid unnecessary prejudice to an in-custody accused, AACJ recommends that the modified language read: "IF A WITNESS UNDER EXAMINATION BY THE GRAND JURY IS NOT A LAW ENFORCEMENT OFFICER, A LAW ENFORCEMENT OFFICER OR DETENTION OFFICER

¹¹ *Trebus v. Davis*, 189 Ariz. 621, 625, 944 P.2d 1235, 1239 (1997), ARS § 21-412, Arizona Rule of Criminal Procedure 12.6

MAY BE PRESENT DURING THE GRAND JURY SESSION FOR THE PURPOSE OF MAINTAINING SECURITY OF THE PROCEEDINGS WHILE THE WITNESS TESTIFIES. A LAW ENFORCEMENT OFFICER OR DETENTION OFFICER MAINTAINING SECURITY OF THE GRAND JURY PROCEEDINGS WHILE A WITNESS TESTIFIES SHALL BE ADMONISHED CONSISTENT WITH A.R.S. §§ 13-2812, 12-2813. MEMBERS OF THE GRAND JURY SHALL BE ADVISED OF THIS RULE BEFORE THEIR FIRST PROBABLE CAUSE PRESENTATION.”

Under the modified proposed rule, a deputy would be present any time a non-law enforcement officer testifies and, as such, the grand jury’s information would be only that the officer is provided in all circumstances that a non-officer is a witness before them. Reading the above language as an admonition to the grand jury would be an appropriate additional step to ensure that there is no impermissible inference drawn from the presence of the officer.

In the alternative, this proposed rule should be rejected in its entirety for the reasons stated above.

DATED: May 16, 2014.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By /s/ _____

Amy Kalman

This comment e-filed this date with:

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