Arizona Public Defender Association
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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of: AMENDMENT OF RULES 4.2, 7.2,7.4,27.7, AND 31.6, RULES OF CRIMINAL PROCEDURE	No. R07-0003 **COMMENT OPPOSING THE ADMINISTRATIVE OFFICE OF THE COURT'S PETITION TO AMEND RULES 4.2, 7.2, 7.4, 27.7, and 31.6 OF THE RULES OF CRIMINAL PROCEDURE**

The Arizona Public Defender Association (hereinafter "APDA") opposes the proposed amendment for reasons of confidentiality, due process, equal protection, professional responsibility and judicial economy.

The APDA is an Arizona non-profit corporation comprised of public defense offices and programs throughout the State of Arizona. The primary purposes of our organization include improving the quality of legal representation of poor people who face the loss of their liberty, safeguarding the constitutional rights of

indigent individuals, and resolving criminal matters effectively and fairly. Our offices defend the overwhelming majority of individuals who face criminal charges in Arizona, handling in excess of 50,000 felony cases a year.

Proposition 100 and its implementing legislation radically expanded the number of persons who can be held without bond. As recently argued by the Maricopa County Public Defender's Office in *Hernandez v. Superior Court*, 1 CA-SA 07-0092, this has converted a bond system into a punitive regimen. A simple rule change cannot rectify excessive, overly broad legislation that fails to comport with the United States and Arizona Constitutions. Moreover, we object to any rule change at this time because pending legislation and court rulings make it unclear whether a rule change is necessary. Any rule change at this juncture could very well be superseded shortly after it is approved.

Further, any rule change must be consistent with *Simpson v. Owens*, 207 Ariz. 261, 266-78, 85 P.3d 478, 483-95 (App. 2004), which provides the framework that should be followed for determining whether a person may be held without bond. As held by *Simpson*, liberty is a fundamental right independently guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Art. II, § 4 of the Arizona Constitution. Liberty is the norm, and detention prior to trial must be a carefully limited exception. *Id*. at 267, 269, P.3d at 484, 486. The right to bail is ultimately founded upon the presumption of individual innocence and

permissible pretrial detention is limited to crimes that involve inherent and continuing risks if bail is granted. *Id*. at 269, P.3d at 486.

The burden rests solely upon the state to show to that bond should be denied. The standard of proof that must be met is "proof is evident or the presumption great", a standard that exceeds probable cause. *Id.* at 274, P.3d at 491. The hearing at which the state must meet this burden is inherently similar to a preliminary hearing and should include the following safeguards:

- The court shall admit only evidence that is material to the question; *Id.* at 275, P.3d at 492.
- The accused is entitled to counsel; *Id.*
- The accused has the right to examine and cross-examine the witnesses; *Id.*
- The accused has a right to review in advance the prior written statements of the witnesses; *Id.*
- The court must make findings of fact and state on the record the analysis it employs in determining whether there is evident proof or a great presumption; *Id.*
- The charging document cannot be used to meet the state's burden of proof. *Id.* at 776, P.3d at 493.

In light of these standards, we submit that it is unrealistic to hold this type of

hearing at the initial appearance. Instead, the court should add a rule requiring the state to initiate proceedings by filing a motion whenever it believes that there is a reasonable likelihood of presenting admissible evidence demonstrating proof evident or presumption great that a specific defendant is non-bondable, and that any finding of nonbondability would occur only after the parties have engaged in the type of preparation and hearing needed to comport with the *Simpson* standards.

Barring the above rule, we support the existing proposed rule change to the extent that it requires the right to counsel to attach at the initial appearance and that the initial appearance becomes a full court of record. We oppose a rule that requires the nonbondability determination at the initial appearance when there is no guarantee of the complete right to counsel and cross examination. This right to counsel must include, at the very least, the right to privileged, confidential, and meaningful consultation with the defendant both prior to and during this initial appearance. If necessary, a court interpreter dedicated to assisting this communication must be present.

We agree that the standard of proof at a hearing regarding bondability should be proof evident or presumption great as to any factor giving rise to non-bondability. To provide further instruction regarding the standard of proof and procedures, we submit that any rule change should, at the very least, include the following:

- Specific reference to *Simpson v. Owens* since it is the seminal decision governing this area;
- A clarification that the court, either directly or through pretrial services, shall not inquire into the immigration status of defendants, as inquiries of this nature by the court violate separation of powers and defendants' rights against self-incrimination. Furthermore, such inquiries are inconsistent with Rule 17.2(f)'s directive that "(t)he defendant shall not be required to disclose his or her legal status in the United States to the court."
- Given the increased import of the initial appearance under this proposed rule change, initial appearance courts must be made courts of record. As with all courts of record, this must include public access, minute entries, and a record sufficient for any subsequent review. [1]
- Rule 4.1 should be amended to add a section (e) requiring each presiding judge to ensure that counsel is present at the initial

[1] As a corollary to this contemplated expanded role of initial appearance courts, R06-0016, the Pima County Attorney's pending Petition to Amend Rule 1.6 of the Arizona Rules of Criminal Procedure to allow all initial appearances to be conducted by video conferencing, should be rejected.

> appearance and that a procedure is in place pursuant to Rule 6 for the determination of eligibility for appointed counsel sufficiently in advance of the initial appearance to provide defendants meaningful access to counsel prior to any hearing**.**

If these rights are not guaranteed, then the entire proposal is constitutionally flawed in numerous ways. Among other things, it violates the Sixth Amendment to the United States Constitution because the initial appearance has now become an adversarial, critical proceeding where a real liberty interest is now at stake necessitating effective representation; it violates the Due Process clauses of the United States and Arizona Constitutions in that it shifts the burden to the defendant after a perfunctory initial appearance to assert his right to bond; and it violates the Due Process clauses of the United States and Arizona Constitutions exacerbates because the granting of a later hearing with access to fully prepared counsel is, apparently, discretionary with the court and not guaranteed to the accused.

The import of these procedural issues is underscored by the Maricopa County Attorney's argument before the Arizona Court of Appeals on May 22, 2007, in the *Hernanadez* special action, that even United States citizens can be held non-bondable based on the literal language of Proposition 100. This alleged broad reach of Proposition 100 heightens the need for the court to impose stringent evidentiary requirements and the full right to prepared, effective defense counsel at

the earliest possible moment.

For the reasons advanced herein, the Arizona Public Defender Association recommends that the Court deny the Administrative Office of the Court's Petition to Amend Rules 4.2, 7.2, 7.4, 27.7 and 31.6 of the Rules of Criminal Procedure.

RESPECTFULLY SUBMITTED this _____ day of June, 2007.

ARIZONA PUBLIC DEFENDER
ASSOCIATION

By_____
James J. Haas, Vice President

ORIGINAL and six copies
Filed with the Court this
_____ day of _____, 2007.

Copy mailed this ____ day
of _____, 2007, to:

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By_____