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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of: JULY 3, 2007 ORDER AMENDING RULES 4.2, 7.2, 7.4, 27.7, AND 31.6, RULES OF CRIMINAL PROCEDURE	No. R-07-0003 **COMMENT REGARDING JULY 3, 2007 ORDER AMENDING RULES 4.2, 7.2, 7.4, 27.7, and 31.6 OF THE RULES OF CRIMINAL PROCEDURE**

This Court's July 3, 2007 Order amending the above-referenced rules (the "Order") provided that this matter would remain open for additional comments until August 10, 2007. The Arizona Public Defender Association (hereinafter, "APDA") appreciates the opportunity to supplement its June 14, 2007 comment to report on the manner in which the new rules have been implemented. As discussed below, the actions taken by several jurisdictions raise alarming concerns in the areas of access to counsel, due process and equal protection and have resulted in the trial courts exercising a *de facto* overruling of *Simpson v. Owens,* 207 Ariz.

261, 85 P.3d 478 (App. 2004) in direct contravention of ARS § 12-109 (procedural rules promulgated by the Supreme Court "…shall not abridge, enlarge or modify substantive rights of a litigant").

I. INITIAL APPEARANCE COURTS ARE ILL-EQUIPPED TO HANDLE THEIR NEW ROLE

The Order requires the initial appearance ("IA") Commissioner to determine whether a just-arrested defendant is "non-bailable" under Proposition 100 ("Prop. 100"). In other words, the IA Commissioner, without a hearing, and based solely on a Form 4[1], Pretrial Services Agency input and/or prosecutor avowals, can hold a defendant without bond by finding that the "proof is evident" or "presumption great" that the defendant committed a "serious" felony, and there is probable cause to believe that the defendant entered into or remains in the country illegally. Applying the new rules, assigned IA commissioners are holding defendants non-bondable under Prop. 100 in courts that are not "of record" and that do not, in most jurisdictions, have defense counsel present.[2]

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[1] Or its functional equivalent (e.g., an "interim complaint" is used for this purpose in Pima County).

[2] Other than Pima and Pinal Counties, none of the other jurisdictions have court-appointed counsel available for IAs at this time. Even when counsel is present, the courts have not enabled them to meet with defendants prior to their interviews with pretrial services agencies and have not permitted them to have an active role in preparing for or participating in hearings regarding Proposition 100 issues. Transcripts from Rule 7.4(b) hearings in two recent Maricopa County Superior Court cases, *State v. Tovar*, CR 2007-143752, and *State v. Segura*, CR 2007-145254, are attached hereto as Exhibits "1" and "2", respectively, and reflect the myriad of problems that are currently occurring in Maricopa County with regard to this issue. See, e.g. Exhibit 1, pp. 20 - 31 and Exhibit 2, pp. 26 - 30.

When the State seeks to hold a defendant without bond under Section 13-3961(A), procedural due process under the Arizona and United States Constitutions demands far more than this type of cursory process. It requires that a defendant "be provided a hearing … during which he must be given 'an opportunity to be heard at a meaningful time and in a meaningful manner.' [citation omitted]" *Simpson*, 207 Ariz. at 270. *See also*, Art. II, §4, Arizona Constitution; 14th Amendment, U.S. Constitution. At the hearing, the "parties *must* have the right to examine/cross-examine the witnesses and to review in advance those witnesses' prior statements that are written." *Simpson*, 207 Ariz. at 275-276 (emphasis added). Importantly, "[i]t is not sufficient … for the prosecutor to offer avowals of the State's evidence." *Id.*, at 276-277. Despite this, under the new rules, defendants have no hearing at the IA, much less the opportunity to cross-examine any witnesses.

The evidentiary footing upon which IA commissioners' findings rely is furthered compromised by the fact that in virtually all of the jurisdictions across our state, a precursor to the IA is the Superior Court's Pretrial Services Agency ("PSA") routine interviews of defendants regarding alienage and immigration status. The new rules promote this improper interrogation by incorporating a new Form 4(b), a form "Release Questionnaire" to be completed by defendant as part of the pretrial services function, which specifically directs the defendant to provide

information regarding present citizenship. Questions of this nature by the court and its staff violate both the Separation of Powers doctrine and a defendant's Fifth and Sixth Amendment rights because the "Judicial" Court impermissibly becomes an arm of the "Executive" State by asking a defendant to incriminate himself. *See, e.g.*, Art. III, Arizona Constitution ("The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; [which] … shall be separate and distinct, and no one … shall exercise the powers properly belonging to either of the others.")

Specifically, courts perform their judicial function by declaring existing law, but *cannot* assume the executive function of enforcing those laws by, for example, extracting incriminating responses from an accused. *See*, *e.g*., *Chevron Chemical Co. v. Superior Court*, 131 Ariz. 431, 440 (1982) ("Under the doctrine of separation of powers, the judiciary has the exclusive power to declare 'existing law.'"); *Allen v. Wright*, 468 U.S. 737, 738-739 (1984) ("The Constitution assigns to the Executive Branch, not to the Judicial Branch, the duty to take care that the laws be faithfully executed.") *See also*, Ariz.R.Crim.P. Rules 17.2 (In pleading guilty, a "defendant shall not be required to disclose his or her legal status in the United States to the court."); Ariz. Const. Art. II, §10 ("No person shall be compelled in any criminal case to give evidence against himself …"). Thus, any attempt to perform an executive function exceeds the court's Constitutional

authority. *See*, *e.g.*, *State v. Murphy*, 113 Ariz. 416, 418 (1976) (Because the "duty and discretion to conduct prosecutions … rests with the county attorney," "the courts have no power to interfere with [that] discretion …").

In response to the new rules, however, pretrial service agencies across the state now routinely exceed the Court's powers and violate the Separation of Powers doctrine, because questions of any Prop. 100 defendant regarding alienage and immigration status are likely to elicit incriminating responses. First, any response that a defendant entered the country illegally, or is a citizen of another country and has no documentation to be in the United States, tends to incriminate the defendant under the federal illegal entry and re-entry criminal statutes. *See* 8 U.S.C. §§1321-1330. Second, in many cases admitting alienage or illegal entry tends to incriminate that defendant with respect to the crime charged. *See*, ARS § 13-2002 (forgery charges, which often arise from allegedly forged Mexican documentation, include "intent to defraud" as element of crime); ARS § 13-2319 (Human Smuggling statute, often charged on the grounds of "smuggling" or "transporting" oneself into the country illegally); ARS § 13-3102 (Misconduct involving weapons statute, under which "prohibited possessors," such as illegal immigrants, cannot lawfully possess deadly weapons).

The PSA interviews also violate defendants' rights against self-incrimination under both the Fifth Amendment to the Constitution, which is applicable to the

states via the Fourteenth Amendment, and the Arizona Constitution. *See*, Ariz. Const. Art. II, §10 ("No person shall be compelled in any criminal case to give evidence against himself …"). Under the Fifth Amendment, "a suspect must be apprised of his rights against compulsory self-incrimination and to consult with an attorney before authorities may conduct custodial interrogation." *Texas v. Cobb*, 532 U.S. 162, 171 (2001), *citing Miranda v. Arizona*, 384 U.S. 436, 479 (1966). Once *Miranda* applies, authorities violate one's Fifth Amendment rights by asking questions likely to elicit an incriminating response (unless there is a waiver). *State v. Montes*, 136 Ariz. 491, 493 (1983). Accordingly, absent the PSA's full *Miranda* warnings and a corresponding waiver, the PSA's custodial interrogation of a just-arrested defendant violates that defendant's Constitutional rights.

The PSA interviews also violate defendants' Sixth Amendment right to counsel, which applies to the States via the Fourteenth Amendment to the Constitution. Specifically, "an accused who faces incarceration [has] the right to counsel at all critical stages of the criminal process." *Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004). *Accord*, *State v. Hartford*, 133 Ariz. 328, 329 (1982). "A critical stage is any 'stage of a criminal proceeding where substantial rights of a criminal accused may be affected.'" *State v. Vallejo*, 215 Ariz. 193, 158 P.3d 916, 919 (App.Ariz. 2007) (Justice Howard, concurring), *citing Hovey v. Ayers,* 458 F.3d 892, 901 (9th Cir.2006), *quoting Mempa v. Rhay,* 389 U.S. 128, 134 (1967). Thus,

in determining whether the PSA interview of an accused is a "critical proceeding," courts may consider whether "'counsel could have advised his client on the benefits of the Fifth Amendment'" or whether counsel could have "'prevent[ed] the defendant … from falling into traps …'" *Cahill v. Rushen*, 678 F.2d 791, 794 (9th Cir. 1982). *See also*, *State v. Goff*, 99 Ariz. 79, 83 (1965) ("The assistance of counsel may not be denied after the accusatory stage has been reached.").

In Arizona, the Sixth Amendment right to counsel attaches at the IA, where the court, *inter alia*, appoints counsel for an indigent defendant. *State v. Rodriguez*, 145 Ariz. 157, 172 (App. 1985), *rejected on other grounds*, *State v. Ives*, 187 Ariz. 102, 106 (1996). *Accord*, Ariz.R.Crim.P. Rules 4.2(a)(5) and 6.1. *See also*, *United States v. Charley*, 396 F.3d 1074, 1083 (9th Cir. 2005) (IA triggers Sixth Amendment right to counsel).

Consequently, defendants' Sixth Amendment rights should attach when they are booked on the pending charges and a Form 4 is submitted by the arresting officer. Indeed, the Form 4s reveal the class of felony on which one is booked, and whether the police believe that a defendant entered into or remains in the country illegally. Hence, the Form 4 notifies the PSA that a defendant may be non-bondable under Prop. 100, and that answers to immigration questions are likely to elicit incriminating responses. Thus, upon determining indigency for appointment of counsel purposes, the PSA should cease questioning because the proceedings

against this class of defendants have reached an adversarial "critical stage." *Ibid*. At that point, "even a brief consultation with his attorney would have corrected" any impression that admissions as to alienage or immigration status "could have no adverse consequences." *Cahill*, 678 F.2d at 794. Thus, because the right to counsel has attached, the Sixth Amendment should prohibit the PSA from eliciting incriminating statements from defendants in the absence of counsel. *Massiah v. United States*, 377 U.S. 201, 206 (1964).[3]

II. DEFENDANTS ARE BEING DENIED EVIDENTIARY HEARINGS ON REEXAMINATION OF RELEASE CONDITIONS IN DIRECT VIOLATION OF *SIMPSON v. OWENS*

Under revised Rule 7.4(b), a non-bondable Prop. 100 defendant is entitled to a hearing on his or her motion "for reexamination of [these] conditions of release" if the "motion alleges the existence of material facts not previously presented to the court." Rule 7.4(b). By requiring a defendant to allege new material facts before being allowed to challenge one's non-bondability, revised rule 7.4(b)

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[3] In order to effectuate competent representation by counsel at the IA, we propose that Rule 4.1 be amended as follows, with the caveat that contract counsel may be in the best position to fill this type of role due to the numerous conflicts that staffed office would encounter with co-defendants, etc., were they to represent all individuals at initial appearances:

> (e) Assurance of Availability of Counsel at Initial Appearances. Each presiding judge shall take steps to ensure that counsel is present at the initial appearance to represent defendants who are eligible for and desire appointed counsel. Such appointment shall occur sufficiently in advance of any court appearances to enable counsel to be present with defendant at any interviews by court personnel that could result in inculpatory statements from a defendant and to allow counsel adequate time to prepare for any court proceedings concerning a defendant's liberty interests.

impermissibly shifts the burden of proof regarding bail to the accused. Specifically, because "liberty is a fundamental right independently guaranteed" by the United States Constitution, and "given the presumption of innocence and the presumption in favor of bail," it is well settled that the "burden of proving an exception to bail lies with the State." *Simpson v. Owens*, 207 Ariz. 261, 267, 270 (App. 2004). And, "the State is in a position superior to that of the accused to produce evidence during a hearing because it already will have presented evidence in the process of charging the person. Otherwise, 'placing the burden on the accused is, in effect, forcing him to prove a negative.' [citation omitted]." *Id.*, at 270. In sum, placing the burden on the State is the only way to effectuate a defendant's procedural due process rights, as explained by the United States Supreme Court in *Salerno*, upon which *Simpson* heavily relies. *See*, *United States v. Salerno*, 481 U.S. 739, 755 (1987) ("[L]iberty is the norm, and detention prior to trial … is the carefully limited exception.")

Defendants must be allowed to challenge the State's allegations by cross-examination or otherwise, in an evidentiary hearing, without having to provide new "material facts." Otherwise, the Court will have placed the burden on the defendants to prove bondability, in violation of their procedural due process rights. Art. II, §4, Arizona Constitution; 14th Amendment, U.S. Constitution.

Despite this, not only are courts shifting the burden to defendants, they are routinely refusing to allow defendants to have evidentiary hearings of any type to reexamine nonbondable findings, even when such hearings are requested by written motions alleging the existence of material facts not previously presented to the court. Transcripts from two recent cases evidencing this practice in Maricopa County are attached hereto as exhibits "1" and "2". In both of these cases, the State, through a Form 4 or otherwise, made representations to the IA Commissioner regarding the defendants' alleged criminal offense and alleged illegal presence or entry into the United States. Based on that information, the IA Commissioner held the defendant without bond under Prop. 100. *See* Rule 7.2(b).

Defendants were not represented by counsel at the IAs. Where a Court has made a factual determination depriving an *unrepresented* defendant of a fundamental liberty interest, we submit that it is a "material fact" under rule 7.4(b) when a defendant is represented by counsel for the first time and seeking a review of the initial determination. Furthermore, in holding a defendant non-bondable under Prop. 100, the IA Commissioner is required to find that, based on the Form 4 or other information presented, the proof was evident or presumption great that the defendant committed a "serious" felony and that there was probable cause to believe that Defendant entered or remained in the U.S. illegally. Rules 7.2(b) and 7.4(a). In making that determination, however, the IA Commissioners are not

holding any kind of hearing, nor is any record made. Hence, not only are defendants denied a way of challenging the State's factual assertions, but no record shows what "facts" the IA Commissioners are relying upon in finding defendants non-bondable.

The fact that a Form 4 statement is submitted to the IA Commissioners does not rectify this lack of a record. As noted above, a defendant cannot be held without bond under Prop. 100 unless the Court determines, *inter alia*, that the "proof is evident or presumption great" that he or she committed a "serious" felony. The Form 4 statements submitted to IA Commissioners, however, routinely contain merely a "Probable Cause Statement" as to an officer's conclusion that a defendant committed the underlying offense. This statement as to *probable cause* is a *lower* standard of proof and therefore insufficient to hold a defendant non-bondable under Prop. 100.

In addition, at most IAs, only the County Attorney and the IA Commissioner are provided with the Form 4 that purports to describe a defendant's involvement in the alleged criminal offense. Thus, defendants are unable to challenge any of those assertions. Defendants, when later represented by counsel, have access to both the Form 4 statements and the police reports. Despite this, defendants are routinely being denied Rule 7.4(b) evidentiary hearings. As discussed in detail in the APDA's June 14, 2007 Comment, if the Court chooses to follow this type of

procedure, IA courts must become courts of record and have significantly more resources, including effective defense counsel, since initial appearances have now become critical events in the criminal justice system.,

III. CONCLUSION

APDA's June 14, 2007 Comment anticipated that serious problems would occur if this Court allowed Proposition 100 to remain in place despite its constitutional infirmities. These problems have been compounded by shifting Proposition 100 findings to IA courts. We appreciate that the Court is continuing to evaluate the appropriateness of the significant changes ushered in by its July 3rd Order. If the Court chooses to continue down this path, we urge the Court to modify current procedures by formalizing stringent safeguards affirming that the standards and right to evidentiary hearing set forth in *Simpson v. Owens* will be followed, making the IAs courts of record with defense counsel present, and precluding PSAs from seeking to elicit inculpatory statements from defendants in the absence of defense counsel.

RESPECTFULLY SUBMITTED this 10th day of August, 2007.

ARIZONA PUBLIC DEFENDER ASSOCIATION

By____
Dana Hlavac, President

Electronically Filed with the Arizona Supreme Court Rules Forum this 10th day of August, 2007 by Jeremy D. Mussman