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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 AMENDMENT OF RULES 4.2, 7.2, 7.4, 27.7 AND 31.6, RULES OF CRIMINAL PROCEDURE**

Preliminary Statement

The Arizona Attorneys for Criminal Justice ("AACJ"), by and through its president, Christopher B. DuPont, files the following comment opposing the amendment of Rules 4.2, 7.2, 7.4, 27.7 and 31.6, Rules of Criminal Procedure ("Rules"). Formed in 1986, the 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, promoting excellence in the practice of criminal law, and fostering public awareness of citizens' rights, the criminal justice system and the role of the defense lawyer. A central mission of the AACJ is to protect and preserve, by rule of law, those individual rights guaranteed

by the Arizona and Federal Constitutions, and to resist all efforts to curtail such rights. It is with this mission in mind, that the AACJ respectfully provides this comment to the proposed Rule modifications.

The proposed Rule changes, now in effect on an emergency basis, should be rejected because they do not provide defendants with minimum procedural due process. *See United States v. Salerno*, 481 U.S. 739 (1987); *Simpson v. Owens*, 207 Ariz. 261, 85 P.3d 478 (Ct. App. 2004). The proposed amendments should also be rejected because they establish a procedure that results in (i) violation of the Separation of Powers doctrine by enlisting judicial employees to perform law enforcement functions; (ii) violation of the Fifth Amendment by permitting the custodial interrogation of defendants for the purpose of eliciting incriminating responses; and (iii) violation of the 6th amendment right to counsel by failing to provide counsel at Initial Appearance ("IA").

The AACJ recommends that any revisions to the Rules must (i) establish the procedural due process protections set forth in *Simpson* and *Salerno* for bail determinations; (ii) prohibit judicial employees from gathering evidence for use against the accused; and (iii) expressly limit the purposes for which PTS information can be used while otherwise guaranteeing the confidentiality of that information.

I. THE MINIMUM DUE PROCESS PROTECTIONS RECOGNIZED IN *SIMPSON V. OWENS* ARE EVISCERATED BY THE PROPOSED RULE CHANGES.

Simpson provides the framework that should serve as a model for any amendments to the Rules on procedures for determining whether a person may be held without bond. In *Simpson*, the Arizona Appellate Court found that before bail may be denied pursuant to A.R.S. § 13-3961(A), due process requires a full and adversarial evidentiary hearing to determine whether the proof is evident or presumption great that the accused committed the offense charged. *Simpson*, 207 Ariz. at 266, 85 P.3d at 483. The proposed amendments to the Rules turn *Simpson* on its head, gutting the evidentiary hearing required by due process, and effectively overruling the decision.

In reaching its decision, the *Simpson* panel was guided by *Salerno* in which the United States Supreme Court instructed that any scheme permitting pretrial detention without bail must comport with minimum requirements of procedural due process. *Salerno*, 481 U.S. at 750-51; *Simpson*, 207 Ariz. at 266, 85 P.3d at 483 n.5. (observing that *Salerno* "declared what is necessary for due process in the determination of bail."). The protections enumerated in *Salerno* include: (1) the right to counsel; (2) the opportunity to testify and present information; (3) the opportunity to cross-examine opposing witnesses; (4) the statutory factors governing the preventative-detention decision-making process; (5) the requirement of findings of fact and a statement of the reasons for the decision; (6) a requirement

that the government has the burden of establishing clear and convincing evidence. *Salerno*, 481 U.S. at 750-51.

Applying *Salerno*, the *Simpson* court concluded that under A.R.S. 13-3961(A), "[g]iven the presumption of innocence and the presumption in favor of bail, to afford the accused due process, he must be provided a hearing, during which he must be given an opportunity to be heard at a meaningful time and in a meaningful manner." *Simpson*, 207 Ariz. at 270, 85 P.3d at 487.

Specifically, the *Simpson* court instructed that "in Arizona, a hearing regarding whether the proof is evident or the presumption great that the accused committed one of the crimes enumerated in A.R.S. § 13-3961(A) is inherently similar to a preliminary hearing." *Id.* at 275-76, 492-93. At this hearing, minimum due process requires that:

- the "State has the burden to demonstrate that the proof is evident or the presumption great that the accused committed the offense at issue." *Id.* at 276, 493;
- "[t]he court should admit only such evidence as is material to the question." *Id.* at 275-76, 492-93;
- "[t]he accused is entitled to counsel." *Id.*;

- "[t]he parties must have the right to examine/cross-examine witnesses and to review in advance those witnesses' prior statements that are written." *Id.*;
- "[t]he court must make a determination on the record whether there is evident proof or great presumption that the accused committed one of the statutory charges, including the facts it finds and the analysis it employs." *Id.*

The proposed amendments to the Rules do not provide these protections before bail is denied. *Id.* at 278, 495. Proposed Rule 7.2(b) instructs that an accused may be found non-bailable only if the court finds, *inter alia*, "that the proof is evident or the presumption great that the person committed a serious offense." But proposed Rule 4.2(7) scraps the evidentiary hearing demanded by due process. In its place, the Rule requires a determination by a judicial officer at IA based solely on Form 4 and/or prosecutorial avowals – the precise procedure that *Simpson* rejected.

As a result, the standard of proof required by A.R.S. § 13-3961(A) is rendered a mere proxy for probable cause. *Simpson*, 207 Ariz. at 271-72, 85 P.3d 488-89. ("[W]e think it clear from the language itself that 'proof is evident or the presumption great' means something more than probable cause for if it were to be read in such a manner, the guarantee would add nothing to the accused's right,

since a suspect may not be held without a showing of probable cause in any instance.").

Finally, proposed Rule 7.4(b) only allows for the *possibility* of the constitutionally mandated *Simpson* bail hearing, and only upon written motion where the accused "alleges the existence of material facts not previously presented to the court." By requiring a defendant to allege "new material facts" before he or she is entitled to challenge a finding of non-bondability, revised Rule 7.4(b) impermissibly shifts the burden of proof from the State to the accused. *See Salerno*, 481 U.S. at 741 (instructing that procedural due process requires the government to prove by clear and convincing evidence that no release conditions will assure the safety of the community); *Simpson* at 270, 487 ("The burden of proving an exception to bail lies with the State") (citations omitted).

This is not a mere theoretical concern. Today in Arizona, courts are applying this standard to deny defendants *any* opportunity to challenge a nonbondability finding made at IA. The result is a catch-22. At IA, the unrepresented accused can not contest the prosecutor's avowals and Form 4 representations, but on application for a "rehearing," the accused is denied an opportunity to challenge this evidence because the prosecution has already met it burden.

There is no justification for these modifications in the Rules. Until July 3,

2007, cases falling under Proposition 100 and A.R.S. § 13-961(A)(5) were governed by Administrative Order ("AO") 2007-30 issued by Supreme Court Chief Justice, Ruth V. McGregor. The AO adopted, in large part, the procedure set forth in *Simpson.* [*See* April 3, 2007 McGregor letter to Timothy S. Bee and Jim Weiers; Administrative Order of the Supreme Court 2007-30] Under the AO, judicial officers were directed to make a determination at IA of whether probable cause existed that (i) the defendant committed the charged offense; (ii) that proof is evident or the presumption great that the defendant committed the charged serious felony; and (iii) that the defendant entered or remained in the country illegally. [*Id.*] Upon finding probable cause, judicial officers were required to schedule an evidentiary bail hearing to determine whether the State "has established, under the standard defined in *Simpson v. Owens* . . . that the defendant falls within Proposition 100 and A.R.S. § 13-961(A)." [April 3, 2007 McGregor letter to Timothy S. Bee and Jim Weiers]

The *Simpson* hearing process should not be cast aside – indeed, cannot be without violating procedural due process – simply because the legislature has now clarified that the State need only establish probable cause that an accused entered or remained in the United States illegally. That showing is only one component of the State's burden under A.R.S. § 13-961(A)(5).[1] As with all other charges

[1] There are also grave doubts whether a probable cause finding is sufficient to permit denial of bail under the minimum due process requirements set forth in *Salerno*. *See Simpson*, 207 Ariz. at 279, 85

enumerated in A.R.S. § 13-961(A), the State must also establish that "proof is evident or the presumption great" that the accused committed a "serious felony" before bail may be denied pursuant to the statute. *Id.* Thus, cases falling under Proposition 100 do not differ in any material respect from those analyzed in *Simpson.* Accordingly, the *Simpson* court's finding that, before bond may be denied, due process requires a full and adversarial evidentiary hearing to determine whether the proof is evident or the presumption great that the accused committed the charged offense, remains controlling.

Nor should the *Simpson* hearings be discarded as the Maricopa County Attorney, Andrew P. Thomas, argues because Proposition 100 "did not justify this radical new hearing practice." [Maricopa County Attorney's Comments to the Petition to Amend Rules at 6] What the County Attorney describes as an "experiment that has not worked well," the United States Supreme Court and the Arizona Court of Appeals recognize as a constitutional imperative. [*Id.* at 5]

The AACJ is mindful that the procedure for adjudicating Proposition 100 cases required by procedural due process is costly, time consuming, and imposes logistical problems for the parties and the courts. Amendments to the Rules may help in coping with some of these difficulties. For example, under the AO, evidentiary bail hearings had to be scheduled within 24 hours of the IA following a

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P.3d at 496 (noting that "*United States v. Salerno* imposed a constitutional due process floor of 'clear and convincing evidence' when bail is denied"). (Foreman, J. Pro. Tem., *specially concurring*).

probable cause determination. Although a "speedy process" is required under Arizona law and the Rules, the 24 hour timeline established by the AO is not mandatory. Rather, as the *Simpson* court noted, a defendant may be held in custody upon a finding of probable cause of non-bondability "for such time as is [reasonably] necessary to enable parties to prepare for a full bail hearing." *Simpson*, 207 Ariz. at 277-78, 85 P.3d at 494-95. Combining the *Simpson* hearing with the Preliminary Hearing, which must be held within 10 days of the IA under Ariz. R. Crim. P. 5.1, may afford an opportunity to minimize the strain on resources and time. Any solution to these problems, however, must comply with the minimum procedural due process requirements set forth in *Simpson* and *Salerno*. Because the present proposed amendments to the Rules are antithetical to those requirements, they should be rejected.

II. QUESTIONING OF DEFENDANTS ABOUT THEIR IMMIGRATION STATUS BY JUDICIAL EMPLOYEES TO DETERMINE BONDABILITY VIOLATES THE SEPARATION OF POWERS DOCTRINE.

Prior to a defendant's IA in Maricopa, Pima and other Arizona counties, superior court employees from pretrial services ("PTS") routinely interview defendants for the purpose of providing IA judicial officers with information relevant to determining release conditions and bondability. During these interviews, it is commonplace for PTS personnel to inquire about a defendant's alienage and immigration status. [*See* April 3, 2007 McGregor letter to Timothy S.

Bee and Jim Weiers] Asking these questions violate the Separation of Powers doctrine of the United States and Arizona constitutions by co-opting employees of the judicial branch to serve the executive branch function of law enforcement. *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; and . . . such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."); *Yes on Prop. 200 v. Napolitano*, No. 1 CV-05-235, 2007 WL 1840767 at *4 (Ct. App. June 28, 2007) ("Our system of government prohibits one branch of government from exercising the powers granted to another branch of government.").

The exclusive function of the judiciary is to declare existing law. *See, e.g., United States v. Nixon,* 418 U.S. 683, 703 (1974) (quoting *Marbury v. Madison*, 2 L.Ed. 60, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *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."). Conversely, the duty of the Executive branch "is to enforce the policies and purposes declared by the legislature." *State ex. Rel. Woods v. Block*, 189 Ariz. 269, 275, 942 P.2d 428, 434 (1997); *see also Allen v. Wright*, 468 U.S. 737, 738-39 (1984) ("The Constitution

assigns to the Executive branch, not the Judicial Branch, the duty to take care that the laws be faithfully executed.").

Interrogation of custodial defendants about their immigration status by pretrial service employees does not assist the courts in interpreting the law, nor does it serve any legitimate administrative purpose of the courts. Rather, the questions serve the function of attempting to gather evidence to enforce A.R.S. § 13-3961(A)(5) and, potentially, other laws as well. Permitting judicial employees to make inquiries about a defendant's immigration status exceeds the constitutional authority of the court and results in violation of the Separation of Powers doctrine.

Gathering evidence, and presenting it to the court, is the province and exclusive responsibility of executive branch entities – law enforcement and prosecutors. [*See* April 3, 2007 McGregor letter to Timothy S. Bee and Jim Weiers (stating that it is the job of "prosecutors or law enforcement to check with ICE or otherwise gather evidence to present as to the defendant's immigration status and the likelihood of guilt").] Indeed, in other contexts, the Rules expressly prohibit the courts from requiring defendants to disclose their immigration status. *See* Ariz. R. Crim. P. 17.2 (In connection with pleas, a "defendant shall not be required to disclose his or her legal status in the United States to the court"). The Rules should be amended to further prohibit judicial employees from attempting to

elicit information from defendants about their immigration status in any context.

III. THE COURT SHOULD NOT PARTICIPATE IN THE SYSTEMATIC VIOLATION OF THE RIGHT AGAINST SELF-INCRIMINATION.

The questioning by PTS employees of detained defendants regarding their alienage and immigration status also violates the right against self-incrimination guaranteed by the Fifth Amendment of the Constitution and Art. II, § 10 of the Arizona Constitution. Under the Fifth Amendment, "a suspect must be appraised of his rights against compulsory self-incrimination and to consult with an attorney before authorities may conduct custodial interrogation." *Texas v. Cobb*, 533 U.S. 162, 171 (2001) (citing *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

The interviews of in-custody defendants conducted by PTS personnel constitute custodial interrogation. Custodial interrogation occurs whenever a person in custody is subjected to either express questioning or its functional equivalent "that the police should know [is] reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 466 U.S. 291, 300-01 (1980). "The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990). Thus, even routine booking questions regarding a defendant's name, address, and height, qualify as custodial interrogation, although such questions fall within a recognized exception to *Miranda*. *Id.*

Moreover, the requirement for *Miranda* warnings is not limited to

interrogations by police or to the reason why an individual is in custody. *Mathis v. United States*, 391 U.S. 1, 4-5 (1968) (finding that Fifth Amendment privilege is not offense specific and holding that in-custody questioning by IRS agent required *Miranda* warnings); *In the Matter of Appeal in Navajo County Juvenile Action*, 183 Ariz. 204, 206, 901 P.2d 1247, 1249 (Ct. App. 1995) ("[A] government employee who is not a law enforcement officer, such as a school principal, may be bound by *Miranda* when acting as an instrument . . . [or] agent of the police."); *In re Carter*, 848 A.3d 281, 295-300 (Vt. 2004) (finding that pre-sentencing interview conducted by probation department employee constituted custodial interrogation).

As noted above, there is no administrative purpose of the court that is served by asking a detainee to state his or her alienage or immigration status. The only function is to provide the court with information for use against the defendant in a judicial proceeding, a role properly fulfilled by law enforcement. Consequently, without providing *Miranda* warnings before conducting interviews, PTS employees violate defendants' constitutional rights.

The Court appears to be aware of this problem, but has determined that "at least when the information is sought solely for the purpose of determining release conditions, [PTS] employees may make that inquiry." [April 3, 2007 McGregor letter to Timothy S. Bee and Jim Weiers] Limiting the use of information obtained by PTS, however, does not eliminate the constitutional violation that occurs at the

moment that information is elicited.[2] It is one thing to permit, as the Rules do, the use of illegally obtained evidence at IA; it is another for the courts to sanction the involvement of judicial agents in illegally *obtaining* evidence for use in this proceeding.

The Rules should not permit such a procedure and should be amended to require PTS employees to provide detainees with *Miranda* warnings before initiating interviews. The Rules should also be amended to restrict the use of any information legally obtained by PTS to bail determinations while otherwise protecting confidentiality. *See* 18 U.S.C. § 3153(c)(1) (stating that "information obtained in the course of performing pretrial service functions in relation to a particular accused shall be used only for the purposes of a bail determination and shall otherwise be confidential").

IV. UNDER THE PROPOSED RULES, THE IA IS A CRITICAL STAGE OF THE PROSECUTION.

The Sixth Amendment right to counsel attaches when the court is required to find that proof is evident or presumption great that the accused committed a crime. *Simpson*, 207 Ariz. at 275-76, 85 P.3d at 492-93. This conclusion flows from the nature of that determination as well as its consequences.

Gerstein v. Pugh, 420 U.S. 103 (1975) established that proceedings to

[2] Form 4(b) provides little confidence that information obtained by PTS may be restricted to use at IA. The last sentence of the instructions reads: "Any information you give may be used against you in this or in any other matter."

determine probable cause as required by the Fourth Amendment are not adversarial and therefore do not constitute "a critical stage in the prosecution that would require appointed counsel." *Id.* at 122. However, the Court concluded that the use of an informal procedure without adversarial safeguards was justified because *probable cause* "does not require the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance of the evidence standard demands." *Id.*

Simpson concluded that the standard required by A.R.S. 13-3961(A) is more onerous than probable cause, requiring careful evaluation of the evidence:

> We conclude that the phrase "proof is evident, or presumption great" provides its own standard: The State's burden is met if all of the evidence, *fully considered by the court*, makes it plain and clear to the understanding, and satisfactory and apparent to the well-guarded, dispassionate judgment of the court that the accused committed one of the offenses enumerated in A.R.S. § 13-3961(A). . . . The proof must be substantial, but it need not rise to proof beyond a reasonable doubt.

Simpson, 207 Ariz. at 274, 85 P.3d at 491. Thus, the *Simpson* court recognized that the proceeding in which it is determined that this standard is met constitutes a critical stage of the prosecution, triggering the Sixth Amendment's right to counsel. *Id.* at 275-76, at 492-93. Finding that it was impractical to conduct the necessary inquiry at IA, *Simpson* concluded that a bail hearing must be held as soon as reasonably possible after IA. *Id.* at 277-78, at 494-95.

The AACJ submits that this remains the proper procedure to guarantee that due process is afforded defendants charged with non-bailable offenses. The

proposed amendments, however, demand that bondability and proof is evident or presumption great be determined at IA. Therefore, if these Rule changes are adopted, they necessarily transform the IA into a critical stage of the prosecution.[3] Accordingly, Rule XX should also be amended to provide defendants with counsel at the IA.

Conclusion

The Supreme Court has instructed that procedural due process requires adversarial safeguards be afforded defendants before bail can be denied by statutory authority. *Simpson* applied this rule to Arizona, requiring a full and adversarial evidentiary hearing before bail is denied under A.R.S. § 13-3-961(A). The proposed amendments to the Rules are contrary to these holdings. Therefore, they must be rejected.

Moreover, any Rule changes that are adopted, must address the separation of powers and Fifth Amendment violations that result from PTS interviews with in-custody defendants. Finally, if the proposed Rules are adopted over these constitutional defects, defendants must be provided with counsel at IA.

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[3] Adoption of the proposed Rules, therefore, would require the Court to revisit *State v. Cook*, 150 Ariz. 470, 475, 724 P.2d 556, 561 (1986) which held that "no right to an attorney exists at the initial appearance." *Cook*, however, is now obsolete in light of the recent changes to Arizona law concerning nonbailable offense and the "proof is evident or presumption great" standard. Under these changes the IA is a critical proceeding at which there is a constitutional right to counsel.

RESPECTFULLY SUBMITTED this 10th day of August, 2007.

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