

1 WILLIAM G. MONTGOMERY  
2 MARICOPA COUNTY ATTORNEY  
(FIRM STATE BAR NO. 00032000)

3 MARK FAULL  
4 CHIEF DEPUTY  
5 301 WEST JEFFERSON STREET, SUITE 800  
6 PHOENIX, ARIZONA 85003  
7 TELEPHONE: (602) 506-3800  
(STATE BAR NUMBER 011474)

8 ARIZONA SUPREME COURT  
9

10 IN RE:  
11 PETITION TO AMEND RULES 6, 7,  
12 AND 41 OF THE ARIZONA RULES  
13 OF CRIMINAL PROCEDURE

R-16-0041

MARICOPA COUNTY ATTORNEY'S  
RESPONSE TO PETITION TO AMEND  
RULES 6, 7, AND 41 OF THE ARIZONA  
RULES OF CRIMINAL PROCEDURE

14  
15 The Maricopa County Attorney hereby responds to the Petition to Amend Rules  
16 6.1, 7.1, 7.2, 7.3, 7.4, 7.6, and 41, Arizona Rules of Criminal Procedure, Forms 6 and  
17 7 and to add Rule 7.7 to the Arizona Rules of Criminal Procedure and asks this Court  
18 to extend the comment period to the "normal" rule cycle next year or to deny or  
19 modify portions of the Petition as explained below.  
20

21 Respectfully submitted this 18<sup>th</sup> day of October, 2016.  
22

23 WILLIAM G. MONTGOMERY  
MARICOPA COUNTY ATTORNEY

24 By   
25 MARK FAULL  
26 CHIEF DEPUTY  
27  
28

1 **I. INTRODUCTION**

2 The Administrative Office of Courts (AOC) has petitioned this Court to amend  
3 Rules set forth above and creates a new Rule 7.7 on an expedited basis. MCAO's  
4 specific comments to requested rule changes are set forth below. Preliminarily,  
5 MCAO opposes the expedited consideration of the petition as currently approved by  
6 this Court because the Petition does not cite any compelling reason for such an  
7 abbreviated comment period. Given the scope of the proposed changes, the Petition  
8 should be opened for a "normal" comment period under the Rules of this Court for  
9 full consideration next year. Although the petition relies on the report of the Fair  
10 Justice for All Task Force ("the Report"), it is important to note that the specific  
11 language of the Petition and the requested amendments to the rules were not  
12 considered by the very task force which issued the Report. The requested changes  
13 concern rules which are crucial to protecting victims, the public and securing  
14 persons' appearance at trial. These rules should be carefully considered and the  
15 expedited process adopted to push these rules through without ample opportunity for  
16 victims, the public, and other stakeholders in the criminal justice system to  
17 thoroughly examine all issues attendant to the requested changes is not in the interests  
18 of the fair and orderly administration of the court or in the interests of justice.  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 **II. ARGUMENT**

2 **Rule 6.1**

3  
4 The Petition proposes an amendment to Rule 6.1 thereby creating a substantive  
5 right to counsel if a defendant is detained pretrial after criminal charges are filed.  
6 Presumably, the amendment is being sought to address concerns about misdemeanor  
7 matters since a right to appointed counsel already exists for felony criminal matters.  
8 *See State v. Bernal*, 13 Ariz. App. 145, 474 P.2d 864 (1970). It appears that the  
9 Petition seeks a right to appointed counsel for defendants who are “detained pretrial  
10 after criminal charges are filed”. The Petition does not address whether defendants  
11 who are released after filing of charges (and where there will be no loss of liberty  
12 upon conviction) are still entitled to appointed counsel. Because both the Report and  
13 the Petition rely on anecdotal evidence, it is difficult to assess the true magnitude of  
14 the problem this change seeks to address. Although the MCAO does not oppose  
15 appointment of counsel for indigent misdemeanor pretrial detainees, the petition and  
16 the proposed rule change should reflect that this rule change is meant to address  
17 concerns in misdemeanor as opposed to felony settings. If the proposed rule is to be  
18 adopted, MCAO suggests modifying proposed Rule 6.1(B)(1) to read “While  
19 detained pretrial after misdemeanor criminal charges are filed;” MCAO would further  
20 note that the concerns cited in both the report and the petition, exist because the  
21 courts have allowed them to exist. The courts decide which persons are released on  
22  
23  
24  
25  
26  
27  
28

1 their own recognizance and which are required to post bond. It does not require  
2 appointment of counsel for a judicial officer to reassess the release conditions of a  
3 misdemeanor who is in custody because of a court imposed bond. According to the  
4 Petition, one reason for these requests changes is that some courts are ignoring the  
5 rules. [Petition at 2. (“Although current rules direct appointment of counsel for  
6 indigent defendants at the Initial Appearance, the Task Force heard that some judges  
7 delay the appointment pending the filing of charges, or because a conviction of the  
8 charge will not necessarily call for incarceration and therefore does not require  
9 appointment of counsel.”)]. If courts are not following the current rules the solution  
10 is judicial education, not to re-write new rules that are equally subject to disregard.  
11

12  
13  
14 MCAO is also concerned that creating a right to counsel that is not  
15 constitutionally or statutorily required may violate separation of powers and will  
16 result in an unfunded mandate for cities and counties. The Petition does not address  
17 the potential new costs to cities and counties. Balancing the expansion of the right to  
18 counsel with the resulting costs and benefits is not the kind of decision that should be  
19 handled in a rushed and expedited fashion.  
20  
21

### 22 **Rule 7.1**

23  
24 Although, MCAO does not oppose the relabeling of “Appearance Bond” to  
25 “Unsecured Bond” as this is a more accurate description of this category of “bond” it  
26 is unclear that the change in definition accomplishes the purpose cited in the Petition.  
27  
28

1 The Petition claims that it is necessary to remove “appearance” because it does not  
2 describe every purpose of a bond, “The word ‘appearance’ has been deleted from the  
3 term ‘appearance bond’ in all rules and forms because it is misleading; release on  
4 bond is ordered not only to secure a defendant’s appearance in court, but also to  
5 ensure the safety of the community.” [Petition at 3]. It is difficult to understand how  
6 deleting the word “appearance” accomplishes the goal of being more descriptive of  
7 all of the purposes of a bond. Deleting the word “appearance” is merely cosmetic and  
8 does not make it more likely that interest of community safety is furthered by the  
9 requested amendment or that judges and practitioners will more readily understand  
10 that a bond must consider public safety.  
11

12  
13  
14 Other than confusion, it is unclear what is accomplished by the creation of  
15 “Cash Bond” and “Deposit Bond.” Regarding the proposed “Cash Bond,” it appears  
16 that this new bond would be essentially the same as the current “Secured Bond” with  
17 the exception that the “Cash Bond” is posted by someone other than a professional  
18 bondsman. Is this distinction necessary? MCAO is unaware of any current  
19 impediment to having a secured bond posted by someone other than professional  
20 bondsman and therefore, creating a new category for Cash Bonds appears  
21 unnecessary. With respect to “Deposit Bond,” if the court is willing accept a  
22 percentage of a bond amount, it makes more sense to set the percentage amount that  
23 the court is willing to accept as the amount of the bond in the first instance. It is  
24  
25  
26  
27  
28

1 misleading to victims and the public to have bonds set in one amount but to permit  
2 release upon the payment of a much lower amount. The Petition provides no  
3 justification for creating this confusing and completely unnecessary type of bond.  
4

5 **Rule 7.2(a)**

6 MCAO has three comments regarding the proposed amendment of Rule 7.2(a).  
7

8 The first is regarding the initial statement to the effect that all charged persons  
9 yet to be convicted are presumed to be innocent. Although this is a very basic  
10 statement of criminal law it is not a “rule” of criminal procedure. Who is the  
11 intended audience for this statement? Surely judicial officers making release  
12 decisions do not need to be informed that persons yet to be convicted are presumed  
13 innocent. It would make just as much sense to add this basic tenant of criminal law to  
14 the beginning of every rule dealing with every pretrial decision a court can make.  
15 There is zero justification for such a peculiar addition to Rules in the Petition. The  
16 statement is unnecessary and should not be added to the rule.  
17  
18  
19

20 Second, although MCAO applauds the effort to add language regarding  
21 conditions that are reasonable and necessary to protect other persons or the  
22 community from an actual risk posed by the person, the proposed addition of this  
23 language is flawed. When Rule 7.2(a), if amended as proposed, is read as a whole,  
24 protection of the other persons or the community becomes a consideration for the  
25 court only if “... the court determines, in it is (sic) discretion, that...” release on own  
26  
27  
28

1 recognizance with only the conditions of release required by Rule 7.3(a) will not  
2 reasonably assure the person's appearance as required. In other words, if the court  
3 determines that the conditions in Rule 7.3(a) will assure the person's appearance as  
4 required, it must release the person without considering conditions that are reasonable  
5 and necessary to protect other persons or the community. To the extent the proposed  
6 rule allows release on own recognizance without considering the factors set forth in  
7 ARS § 13-3967 it would be in conflict with the statute. If the proposed amendments  
8 are to be adopted, MCAO proposes an addition to the end of the second sentence of  
9 amended Rule 7.2(a) to read "...unless the court determines, in its discretion, that  
10 such release will not reasonably assure the person's appearance as required or protect  
11 other persons or the community from risk posed by the person."  
12  
13  
14  
15

16 Finally, MCAO opposes the inclusion of the requirement that the court find an  
17 "actual" risk posed by the person. The term "actual" implies that the court needs  
18 absolute certainty as to the risk posed by the person. ARS § 13-3967(B)(4) does not  
19 impose an "actual" risk requirement as it relates to danger to others in the  
20 community, rather it requires the court to take into account "evidence that the accused  
21 poses a danger to others in the community." The rules of procedure should not  
22 impose requirements that are in conflict with a statute on this matter. Inclusion of the  
23 word "actual" would be in conflict with the statute and should be deleted.  
24  
25  
26  
27  
28

1 The complex issues and balancing of interests in setting conditions of release  
2 deserve a more clear articulation that mirrors the language in Arizona Revised  
3 Statutes and applicable case law. This is further evidence that a regular comment and  
4 discussion period be allowed.  
5

6 **Rule 7.3(b)**  
7

8 The Petition proposes a complete rewrite of Rule 7.3(b). Among the requested  
9 changes is an ambiguous requirement that in imposing conditions of release a court  
10 “must consider results of an approved risk assessment, if provided.” ARS § 13-  
11 3967(B)(5) refers to a “risk or lethality assessment in a domestic violence charge.” It  
12 is unclear whether “risk assessment” in the proposed amendment refers to the risk  
13 assessment described in § 13-3967 or some other form of risk assessment such as the  
14 tool evaluation by the Courts. If the intent is to formalize the consideration of risk  
15 assessments set forth in statute, MCAO supports this effort but notes that while there  
16 is an effort to create a uniform domestic violence risk or lethality assessment,  
17 currently many jurisdictions have not adopted one. However, as written the proposed  
18 amendment does not make it clear what risk assessment must be considered, who is  
19 responsible for conducting the assessment, who approves an assessment tool, how  
20 such a tool will be approved, or who is responsible ensuring that the tool is achieving  
21 the desired results.  
22  
23  
24  
25  
26  
27  
28

1 Subsection (1) of the proposed rule sets forth non-monetary conditions which  
2 may be worthy of consideration as conditions of release. However, as previously  
3 discussed, the inclusion of “actual” under subsection (vi) makes the rule contrary to  
4 ARS § 13-3967. Additionally, the proposed amendment fails to specifically list a  
5 condition of release prohibiting contact with the victim in the case. At a minimum,  
6 no contact with the victim should be a discretionary non-monetary condition under  
7 this section.  
8

9  
10 In Subsection (2), the sentence “the court must not impose a monetary  
11 condition that results in unnecessary pretrial incarceration solely because the person  
12 is unable to pay the bond” is unhelpful and should be deleted. Based on the other  
13 parts of subsection (2) a court “...must make an individualized determination of the  
14 person’s risk of non-appearance, risk to the community and financial  
15 circumstances...” in deciding whether to impose a monetary condition. Clearly, if a  
16 court determines that a monetary condition is necessary because of the risk of non-  
17 appearance or risk to the community, any pretrial detention is because of the risk  
18 posed by the person and not because they are unable to pay the bond. When read as a  
19 whole, this sentence is unnecessary and confusing. It suggests that some part of the  
20 judiciary would impose a bond in a punitive manner, an action already prohibited by  
21 case law.  
22  
23  
24  
25  
26  
27  
28

1           **Rule 7.7**

2           The proposed new rule allows a superior court judge to temporarily modify  
3 conditions of release imposed in a misdemeanor case to permit release of a felony  
4 probationer to participate in treatment programs. The rule does not provide for notice  
5 to victims. As proposed, this section permits the court to violate a victim's  
6 constitutional and statutory rights to notice and the right to be heard before any  
7 modification of release conditions. *See* AZ CONST Art. 2 § 2.1; ARS §13-4422.  
8 Additionally, the new rule is not explicit as to which misdemeanor may be impacted  
9 by the superior court's release order. Does the rule contemplate that a superior court  
10 in one county could ignore the release orders of a judicial officer outside of its  
11 jurisdiction such as justice courts, municipal courts or superior courts in other  
12 counties? MCAO suggests that if it is to be adopted, the new rule set limit the  
13 jurisdiction of a superior court to misdemeanors in its own county.

14  
15  
16  
17  
18           **III. CONCLUSION**

19           Although the petition requests consideration on an expedited basis, it does not  
20 cite compelling reasons for doing so. On the other hand, the proposed amendments to  
21 Rule 7 raise significant issues regarding victim's rights and public safety. It is of the  
22 utmost importance all stakeholders have ample opportunity to thoroughly consider  
23


24  
25       ///

26       ///  
27  
28

1 the proposed amendments and the possible ramifications. MCAO requests that this  
2 court expand the comment period to May 2017 or deny the Petition.  
3

4 Respectfully submitted this 18 day of October, 2016.

5 WILLIAM G. MONTGOMERY  
6 MARICOPA COUNTY ATTORNEY

7 By   
8 MARK FAULL  
9 CHIEF DEPUTY  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28