



January 31, 2017

Arizona Supreme Court
1501 W. Washington St.
Phoenix, AZ 85007

R- 17-0030

The Honorable Scott Bales
Chief Justice

The Honorable Clint Bolick
Associate Justice

The Honorable John Pelander
Vice Chief Justice

The Honorable Andrew Gould
Associate Justice

The Honorable Ann Scott Timmer
Associate Justice

The Honorable John Lopez IV
Associate Justice

The Honorable Robert Brutinel
Associate Justice

Dear Chief Justice Bales, Vice Chief Justice Pelander, and Honorable Associate Justices:

Before the appointment of Kirstin Flores on November 29, 2016, the Task Force on Fair Justice for All ("Task Force") did not include a crime victim representative. As a result, many of the recommendations overlook crime victims—and their constitutional and statutory rights. The Office of the Arizona Attorney General, the Maricopa County Attorney's Office, and Arizona Voice for Crime Victims evaluated how each recommendation affects crime victims. Our objections follow below. We urge you to review them and consider that justice for all includes justice for crime victims.

Very truly yours,

Michael Bailey
Chief Deputy
Office of the Arizona Attorney General

Bill Montgomery
County Attorney
Maricopa County Attorney's Office

Colleen Clase
Senior Attorney
Arizona Voice for Crime Victims

Recommendation 1: Request legislative changes to authorize judges to mitigate mandatory minimum fines, fees, surcharges, and penalties for those defendants for whom imposing mandatory fines and full fees and surcharges¹ would cause unfair economic hardship.

The Task Force places this recommendation within the context of civil and criminal traffic violations that do not involve victims. *See, e.g., Report and Recommendation* at 13 (referring to driving without insurance and driving on a suspended license). In doing so, the Task Force seems to focus on eliminating the disproportionate effect that some mandatory minimum fines have on the poor. *Id.* at 14; *see also id.* at 13 (“If one assumes that a typical sanction for an offense is meant to deter the average-income person from breaking the law, then judges should be able to adjust the amount for low-income people to achieve a similar deterrent effect.”). Moreover, any legislative changes would not affect a victim’s right to full restitution. *See* A.R.S. § 13-805(B) (“A criminal restitution order does not affect any other monetary obligation imposed on the defendant pursuant to law.”); *see also id.* at § 13-805(E) (“A criminal restitution order does not expire until paid in full.”)

That said, mitigation should not apply to the \$2 Victims’ Rights Enforcement Assessment (“VR Assessment”) or any other surcharge that helps crime victims. 12.28% of the money collected by the Criminal Justice Enhancement Fund surcharge, for instance, directly benefits victims. *See* A.R.S. §§ 41-2401(D)(13)-(14) (requiring money to be deposited in the Victims’ Rights Fund and the Victim Compensation and Assistance Fund). Almost *all* of the money collected indirectly benefits victims by enhancing services provided to victims by law enforcement agencies, prosecuting agencies, and courts. *See, e.g.,* A.R.S. § 41-2401(D)(8) (allocating money to the Arizona Supreme Court to enhance the ability of the courts to process “any proceeding relating to domestic violence matters[.]”).² Before any reforms are enacted, there should be a study of the impact on victims’ rights enforcement. Data on the percentage of felony mandatory fines that is actually collected should also be taken into consideration before making any reforms. These steps would ensure that there truly is an issue here (*i.e.*, mandatory minimum fines are too onerous).

Finally, giving trial judges the discretion to mitigate mandatory minimum fines, fees, and surcharges would affect plea agreements. Most pleas stipulate to the mandatory fine and surcharges. If a court mitigates (or does not impose) the fine or surcharges, then the State can withdraw from the plea. The Recommendation, however, does not specify if the “legislative changes” would allow a court to mitigate fines or surcharges without the consent of the State. This issue must be considered before any reforms are enacted.

Recommendation 2: Provide courts with automated tools to assist with determining a defendant’s ability to pay assessments.

Using public database information and other documentation to determine if a defendant qualifies for indigent status seems like an improvement over the current method. *See* Ariz. R. Crim. P. 6.4(b) (requiring a defendant to “complete under oath a questionnaire concerning the defendant’s financial resources”). This might help prevent a defendant from wrongly claiming

¹ See appendix for summary of surcharges.

² The DNA Fund surcharge also helps victims by protecting their constitutional rights to justice and due process.

that he is unable to pay assessments. Using these tools might also help ensure that defendants are treated similarly—regardless of the judge.

There are cases, however, where defendants find the money to pay assessments when confronted with other consequences. The number of these cases should be quantified and tracked so that reforms are based on data. The automated tools should be robust enough to be reasonably thorough.

Recommendation 9: Request legislation similar to A.R.S. § 12-288 (Removal of debts from accounting system) that would grant courts discretion to close cases and write off fines and fees after a 20-year period if reasonable collection efforts have not been effective.

Unpaid fines and fees should be handed over to a collection agency after a specific period of default (such as two years.). The fine and/or fee should be written off only if the collection agency fails to collect.

Recommendation 10: Request amendments to A.R.S. § 13-924 (Probation; earned time credit; applicability) to allow probationers to receive earned time credit without consideration of financial assessments, other than restitution to victims.

This recommendation allows a defendant who has not paid all financial obligations (other than restitution) to be released early from probation. If a defendant does not have to be current on financial obligations to earn ETC, then there is less incentive to pay.

Recommendation 11: Request amendments to A.R.S. § 13-805(E) (Jurisdiction) to eliminate or reduce the 10 percent annual interest rate on any Criminal Restitution Order.

The undersigned strongly oppose this recommendation because it will negatively affect victims of crime. First, the undersigned do not agree that the “interest rate is unrealistic in today’s economy[.]” *Report and Recommendation* at 17. Credit card interest rates, for example, have historically been much higher than 10% and currently sit at an average of 12.51%. See Bd. of Governors of the Fed. Reserve Sys., *Commercial Bank Interest Rate on Credit Card Plans: All Accounts*, <https://fred.stlouisfed.org/series/TERMCBCCALLINS> (last visited Dec. 16, 2016).

Second, the interest rate is a valuable tool in enforcing a victim’s constitutional right to receive prompt restitution. It gives defendants a very real incentive to pay restitution.³ Defendants sometimes pay off significant restitution orders to avoid paying the additional interest.

Instead of eliminating the annual interest rate, the undersigned recommend that the legislature extend the 10% interest rate to any restitution lien filed under A.R.S. § 13-806 and to any judgment obtained in a civil suit under A.R.S. § 13-807.⁴ It further recommends that the legislature follow the example of credit card companies and add late fees if a defendant does not

³ In some ways, the interest rate acts like the additional fees imposed through the FARE program. See *Report and Recommendation* at 23 (describing program). The Taskforce argues that the fees “provide an incentive to pay.” *Id.*

⁴ Note that the legislature recently reduced the “interest on any judgment” from 10% per annum to the prime rate plus 1%. A.R.S. § 44-1201(B)

meet his minimum monthly payment. The reasonable time payment recommendation (Recommendation 12) would work in conjunction with this recommendation to ensure that crime victims are made whole without imposing unnecessary hardships on defendants.

Recommendation 13: Request amendment of A.R.S. § 13-603 (Authorized disposition of offenders) to authorize judges to impose a direct sentence that may include community restitution (service) and education and treatment programs as available sentencing options for misdemeanor offenses.

Education and treatment programs generally cost money. The Court should identify who is going to pay that cost. If it is the defendant, then that money should go towards unpaid fines and fees rather than the programs.

Recommendation 14: Request amendment of A.R.S. § 13-824 (Community restitution in lieu of fines, fees, assessments, or incarceration costs) to expand community restitution (service) to be applied to surcharges, as well as fines and fees imposed, and to include sentences imposed by superior courts.

Mitigation should not apply to the VR Assessment or any other surcharge that helps victims.

Recommendations 19-21: After a defendant fails to appear (FTA), notify the defendant that a warrant will be issued unless the defendant comes to court within five days; Allow pretrial services five days to re-engage defendants who FTA and delay the warrant for those who appear on the rescheduled dates; and Authorize the court to quash a warrant for FTA and reschedule a new court date for a defendant who voluntarily appears in court after a warrant has been issued.

These recommendations might infringe on a victim's rights to justice and due process, and to be treated with fairness respect, and dignity.⁵ These recommendations have the potential to allow defendants to control the calendar and allow defendants to appear whenever it is convenient to them. Meanwhile, victims often take time off work and rearrange their schedules to come to court on scheduled days (not to mention the emotional strain of simply going to court). If defendants are allowed to re-schedule their own hearings by failing to appear, victims will be forced to come to court more often—for the hearing(s) that the defendant FTA and again for the rescheduled hearing(s). Additionally, defendants are already given the opportunity to have their warrants quashed if they have a valid reason for missing court and the judge accepts the reason. If warrants are quashed every time a defendant voluntarily appears without an acceptable reason, the defendants are allowed to control the calendar to the detriment of victims. These recommendations might also infringe on a victim's right to be present at all proceedings and the opportunity to be heard on the defendant's release conditions. A judge might eventually revoke release if a defendant repeatedly fails to appear and works the calendar to his advantage.

⁵ The context of these recommendations suggests that they would only apply to failures to appear stemming from civil traffic violations. We would want to watch closely to see if these recommendations expanded beyond that.

At this point, the victim will not be present and heard because it will be an unscheduled, voluntary appearance in court on the defendant's terms.

Recommendation 26: Suspend a driver's license as a last resort, not a first step.

Suspension of a driver's license occurs when a "civil penalty is not paid or an installment payment is not made when due[.]" A.R.S. § 28-1601(A). If the effect of this recommendation is to weaken the incentive for offenders to pay assessments, it is likely to reduce resources for victims' rights enforcement. *See* A.R.S. § 12-116.09 (requiring courts to impose the VR Assessment on criminal fines and "any civil penalty imposed and collected for a civil traffic violation"). Some effort should be made to study the impact of this recommendation before it is implemented.

Recommendation 28: Provide courts with the ability to collect and use updated contact information, such as a database service, to find current location information before issuing a warrant or a reminder in aging cases.

Like Recommendation 20, we would want to ensure that this recommendation does not expand beyond failure to appear for civil traffic violations. The recommendation might cause further delays in a victim's case if it were expanded beyond civil traffic violations.

Recommendation 29: Authorize courts to impose restrictions on driving—such as "to and from work only"—as an alternative to suspending a driver's license altogether.

See comment to Recommendation 26.

Recommendation 30: Prior to or in lieu of issuing a warrant to bring a person to court for failure to pay, courts should employ proactive practices that promote voluntary compliance and appearance such as: notifying defendants of non-payment, consequences and resolution options; scheduling of an Order to Show Cause hearing, or sentence review.

If this recommendation weakens the incentives for offenders to pay fines, it is likely to reduce resources available for victims' rights enforcement. Some effort should be made to study the impact before it is implemented.

Recommendation 31: Support renewing efforts to encourage the Conference of Chief Justices and the Conference of State Court Administrators to approach Congress about extending the federal tax intercept program to include intercepting federal tax refunds to pay victim restitution awards, with an exception for those who are eligible for the earned income tax credit.

Since unpaid restitution would only be intercepted after federal income tax debts, child support debts, and federal non-tax debts are fully satisfied, victims will likely have very little chance of collecting unpaid restitution through this program. *See* 26 U.S.C. § 6402(e)(3).

Recommendation 32: Promote the use of restitution courts, status conferences, and probation review hearings that ensure due process and consider the wishes of the victim. Provide judicial

training on the appropriate use of Orders to Show Cause in lieu of warrants and appointment of counsel at hearings involving a defendant's loss of liberty.

The undersigned support the promotion of restitution courts. It believes, however, that providing training on the "appointment of counsel at [restitution] hearings involving a defendant's loss of liberty" is unnecessary. Courts have four remedies if a defendant defaults on restitution. *See* A.R.S. § 13-810(D). Two of these remedies—subsection (D)(1) and subsection (D)(2)—involve a loss of liberty.⁶

Subsection (D)(1) allows a court to jail a defendant for *civil* contempt. A.R.S. § 13-810(D)(1); *see also id.* at 810(B) ("In addition to any other remedy provided by law, including a writ of execution or other *civil* enforcement[.]" (emphasis added)).⁷ The undersigned have found no caselaw holding that a person subject to civil contempt is entitled to counsel.

Subsection (D)(2) allows a court to revoke a defendant's probation or community supervision. A.R.S. § 13-810(D)(2). Unlike subsection (D)(1), this is a criminal proceeding/remedy. The section, however, is written in the disjunctive. If a court decides to proceed under subsection (D)(2), it must refer the matter for proceedings under Rule 27.6, which requires a prosecutor or probation officer to file a written petition to revoke a defendant's probation. At this point—sometime *after* the hearing under § 13-810(D)—a defendant is entitled to counsel.

Because the appointment of counsel is not required under any scenario involving restitution court, the undersigned believe that providing training on the topic is unnecessary.

Recommendation 34: Revise mental health competency statutes for expediting mental competency proceedings for misdemeanor cases.

Any statutory changes should ensure that sufficient notice is provided to enforce a victim's right to be present and heard.

Recommendation 35: Bring together criminal justice and mental health stakeholders in larger jurisdictions to adopt protocols for addressing people with mental health issues who have been brought to court.

A victims' rights representative should be included as a stakeholder.

Recommendation 40: Clarify by rule that small bonds are not required to ensure that the defendant gets credit for time served when defendant is also being held in another case.

Knowing exactly how much credit a defendant has earned on each particular case is a

⁶ Under the best practices protocol in the Maricopa County Restitution Court, judges first issue a summons to a defendant. Issuance of a warrant is a last resort.

⁷ The Maricopa County Restitution Court has found the mere threat of jail to be an effective tool in collecting unpaid restitution. *See* Roland J. Steinle, III, *Restitution Enforcement Court: A Practical Approach to Assure Restitution to Victims*, in *Making Restitution Real: Five Case Studies on Improving Restitution Collection*, 70-71 (Nat'l Ctr. for Victims of Crime ed., 2011). Civil contempt has also proven to be an effective remedy in other contexts, such as family court.

very important factor for victims when considering, conferring with the prosecution, and being heard in court regarding plea offers and sentencing. As long as the record is clear as to what case(s) the defendant is earning credit, there may not be victims' rights implications. However, calculating time in custody can be hard when there are multiple cases or jurisdictions involved. There should be some mechanism to make a clear record of the credit being earned so that victims are properly advised and can exercise their rights based on solid information.

Recommendation 41: Authorize the court to temporarily release a “hold” from a limited jurisdiction court and order placement directly into a substance abuse treatment program upon recommendation from the probation department.

This recommendation could impact victims' rights. The charge placing the hold in the limited jurisdiction court could potentially be a victim crime. That victim has the right to be informed about the defendant's release conditions. That victim should also be given the opportunity to be heard regarding the release conditions or placement of the defendant. For example, if the defendant is placed in the treatment program under a superior court case after a hold is lifted on a justice court case, the order will likely not include “no victim contact” with the justice court victim. The limited jurisdiction victim also has a right to a speedy trial, which could be impacted by a lengthy treatment program.

Recommendation 43: Request amendment of A.R.S. § 13-3961(D) and (E) (Offenses not bailable; purpose; preconviction; exceptions) to authorize the court, on its own motion, to set a hearing to determine whether a defendant should be held without bail.

This recommendation could impact a victim's right to be present and heard at proceedings involving a post-arrest release decision. Ariz. Const. art. 2, § 2.1(A)(4). Victims might not receive notification in time if the hearing is set on a court's own motion. Any amendment should comply with A.R.S. § 13-4409 (A) (requiring courts to “provide notice of criminal proceedings . . . to the prosecutor's office at least five days before a scheduled proceeding to allow the prosecutor's office to provide notice to the victim.”).

The change to Rule 4.2(a)(8) proposed by AOC poses a similar problem. The change would require IA courts to “schedule a bail hearing as required by Rule 7.2(b)(4).” Few victims attend IAs. Without input from the victim at the time of scheduling, IA courts will not be able to ensure that the victim can enforce his/her right to be present and heard at the bail hearing.

Recommendation 44: Encourage the presence of court-appointed counsel and prosecutors at initial appearance hearings to assist the court in determining appropriate release conditions and to resolve misdemeanor cases.

It is highly unlikely that a case can be resolved at the initial appearance because unless a defendant is appearing on a citation a charging decision has not been made yet. Furthermore, resolving a case at the initial appearance might prevent victims from being present at (and heard) on plea offers and sentencing. Unless the judge holds restitution open, it also leaves little time for a victim to make a restitution claim. A violation of these rights would also infringe on a victim's rights to justice and due process, and to be treated with fairness, respect, and dignity.

Recommendation 46: Eliminate the requirement for cash surety to the greatest extent possible and instead impose reasonable conditions based on the individual's risk. When it must be used, the preference should be for the bond to be in actual cash deposited with the clerk of the court with the amount paid returned to the defendant if charges are not filed, the person is found innocent, or if no violations of the release conditions occur.

This recommendation will likely affect victims' rights if it results in more FTAs. A victim's right to justice and due process is violated whenever a defendant is unable to be held accountable. The Court should thus be required to publish the risk assessment tool, the results of initial appearance decisions made, and all data kept that shows the results (*i.e.*, FTAs). Victims and the public have a right to know the outcomes of decisions being made and possible impacts to public safety.

Furthermore, bondsmen can actually help defendants that can't afford a case deposit with the clerk/court. Absent preventative detention, all defendants would remain out of jail pending trial. Surety bonds can be effective tools, especially if cash bonds are eliminated (*see* Recommendation 47). Bondsmen perform a valid service. For a 10% premium, a defendant can get out of jail pending the outcome of the trial. Many times the bondsman imposes electronic monitoring as a condition of the bond, which can help the bondsman find the defendant if he does not appear in court. Surety bonds are a valid alternative to cash bonds or personal appearance bonds.

Recommendation 47: Eliminate the use of a cash bond to secure a defendant's appearance.

The intent of Recommendations 46 and 47 is to move to a model that releases more defendants OR to pretrial service agencies. This may result in lower jail populations. But cash bonds are—and should always be—an alternative for a judge when preventative detention is not appropriate. Any attempt to eliminate cash bonds should be rejected.

Recommendation 57: Host a one-day kick-off summit inviting all stakeholders (law enforcement, prosecutors, county attorneys, public defenders, city council and county board members, the League of Towns and Cities, criminal justice commissions, legislature, and presiding judges) to educate and inform about recommendations of the task force and provide direction for leadership to initiate culture change.

The kick-off summit should include victims, victim advocates, and victims' rights attorneys.

Recommendation 60: Educate judges about available community restitution (service) programs and the types of services each offers so that courts may order services that "fit the crime."

This should not be done as a substitute for current consequences.

APPENDIX

SURCHARGES:

Applicable to criminal and civil fines/penalties and civil traffic violations

- 47% Criminal Justice Enhancement Fund
- 13% Medical Services Enhancement Fund
- 10% Clean Elections Fund
- 7% Fill the Gap Fund
- 6% DNA Fund
- \$20 Probation Assessment
- \$13 2011 Additional Assessment
- \$2 Victims' Rights Enforcement Assessment

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Dear Chief Justice Bales, Vice Chief Justice Pelander, and Honorable Associate Justices:

On December 14, 2016, this Court issued an order amending Rule 7, abrogating Form 6, Rule 41, Rules of Criminal Procedure, and substituting a new Form 6 in its place. The amendments take effect on April 3, 2017.

The Office of the Arizona Attorney General, the Maricopa County Attorney's Office, and Arizona Voice for Crime Victims believe that the changes made to Rule 7.3 weaken protections for crime victims. Attached to this letter is a petition to amend Rule 7.3, which explains our position more fully. We intend to file the petition during the next petition cycle, but we hope that this Court will consider it before the current amendments take effect in April.

Very truly yours,

Dominic Draye
Solicitor General
Office of the Arizona Attorney General

Bill Montgomery
County Attorney
Maricopa County Attorney's Office

Colleen Clase
Senior Attorney
Arizona Voice for Crime Victims