

1 Elizabeth Ortiz, Bar No. 012838
2 Executive Director
3 Arizona Prosecuting Attorneys'
4 Advisory Council
5 1951 West Camelback Road, Suite 202
6 Phoenix, AZ 85015-3407
7 (602) 542-7222 / FAX (602) 274-4215
8 Elizabeth.Ortiz@apaac.az.gov

9 **IN THE SUPREME COURT**
10 **STATE OF ARIZONA**

11 In the Matter of:

Supreme Court No. R-17-0015

12 **PETITION TO AMEND RULES**
13 **4.2, 5.1, 5.4, 7.2, 7.4, 26.12 AND 27.8**
14 **OF THE ARIZONA RULES OF**
15 **CRIMINAL PROCEDURE**

16 **COMMENT OF**
17 **THE ARIZONA PROSECUTING**
18 **ATTORNEYS' ADVISORY**
19 **COUNCIL**

20 **I. BACKGROUND OF PETITION**

21 In response to the Supreme Court task force report "Justice for All, Report
22 and Recommendations of the Task Force on Fair Justice for All: Court-Ordered
23 Fines, Penalties, Fees, and Pretrial Release Policies" ("Report"), the Administrative
24 Director of the Administrative Office of the Courts has filed a petition proposing
25 amendments to Rules 4.2, 5.1, 5.4, 7.2, 7.4, 26.12 and 27.8, *Arizona Rules of
Criminal Procedure*. The amendments comprise two components, organized as
Appendix A and Appendix B in the petition. Appendix A proposes changes to rules
26.12 ("Compliance with sentence") and 27.8 ("Revocation of probation") as those

1 rules relate to civil contempt proceedings under A.R.S. § 13-810. Appendix B
2 proposes changes to rules 4.2 (“Initial appearance”), 5 (“Preliminary Hearing”) and
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4 7 (“Release”) and introduces the concept of a “bail eligibility hearing.” The
5 amendments would revise language in the existing rules and add new provisions,
6 particularly those affecting how and when bail is to be determined.

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8 The Arizona Prosecuting Attorneys’ Advisory Council (“APAAC”) has
9 considered the proposed changes and generally supports them. Notably, however,
10 there are serious unanticipated problems that would occur with the creation of the
11 “bail eligibility hearing” as it is proposed in Rule 7 by the petition. APAAC will
12 address specific portions of the petition’s proposed changes with recommended
13 modifications.
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15 II. DISCUSSION/ANALYSIS

16 A. Rule 26.12(c)(5)

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18 The petition recommends adding a provision to Rule 26.12(c) addressing
19 incarceration of a defendant who is found in civil contempt for failing to pay a
20 monetary obligation. New Rule 26.12(c)(5) would require a court in the civil
21 contempt hearing to consider other “reasonable measures” in lieu of incarceration
22 and to create a “purge review hearing” to allow a defendant to cure the contempt
23 prior to any incarceration. APAAC suggests two modifications. First, the phrase
24 “purge review hearing” is nowhere defined in statute or criminal rules. APAAC
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1 suggests that petitioner craft a definition of that phrase to clearly set out what is
2 intended by petitioner and what is to be accomplished in the hearing. Second, the
3 second sentence of proposed Rule 26.12(c)(5) contains a potential ambiguity. It
4 could be read that the purge review hearing is required before taking a defendant
5 into custody on the warrant for a show cause hearing under Rule 26.12(c)(4).
6 APAAC suggests altering that sentence so that it modifies the prescription in the
7 first sentence of Rule 26.12(c)(5), as follows: “Before taking the defendant into
8 custody after finding that no reasonable measures other than incarceration are
9 adequate, the court must first set a purge review hearing . . .” This would remove
10 any uncertainty as to the stage at which a purge hearing should occur.
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14 B. Amendments to Rules 4.2, 5.1, 5.4, 7.2 and 7.4

15 The petition recommends several rule modifications all centering around a
16 “bail eligibility hearing” as that phrase is set forth in proposed new Rules 7.2(b)(4)
17 and 7.4(b). Under proposed Rule 7.2(b)(4), the bail eligibility hearing would take
18 place “as soon as practicable but not later than seven days after the initial
19 appearance unless the person detained moves for a continuance.” APAAC would
20 strongly urge that the proposed bail eligibility hearing not be a new separate rule
21 but instead become a component of the Preliminary Hearing under current Rule 5.
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23 There are several reasons for this.
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25 First, proposed Rule 7.4(b) essentially sets up a quasi-preliminary hearing,

1 so there is no need to create identical procedures in a separate rule that currently
2 exist in the rule(s) on Preliminary Hearings. Identical to the proposed new rule,
3 existing Rule 5.3(a) (“Nature of the preliminary hearing”), gives all parties at the
4 preliminary hearing the right to cross-examine the witnesses testifying personally
5 against them, and to review their previous written statements prior to such cross-
6 examination. Identical to the proposed new rule, Rule 5.3(a) requires the
7 magistrate to consider only evidence material to whether probable cause exists to
8 hold the defendant for trial. Identical to the proposed new rule, Rule 5.3(b)
9 (“Inapplicability of suppression motions”) states that rules or objections calling for
10 the exclusion of evidence on grounds it was obtained unlawfully are inapplicable.
11 Identical to the proposed new rule, Rule 5.4(c) (“Evidence”) states that
12 determinations of probable may include hearsay in whole or in part in the forms of
13 expert witness reports, documentary evidence without foundation, and testimony
14 of witnesses concerning the declarations of others. Finally, the proposed new rule
15 also contains identical language to Rules 5.4(b) (“Amendment of complaint”) and
16 5.4(d) (Discharge of the defendant”). These similarities militate against creating
17 two virtually identical procedures in separate rules and instead keeping the
18 concepts together in one rule. The fact that the substance of the new proposed rules
19 is nearly identical to corresponding provisions in the preliminary hearing rules
20 underscores the argument that separate rules are not needed.
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1 Next, the timing of the bail eligibility hearing under proposed Rule 7.4(b) is
2 unworkable in many jurisdictions. Proposed new Rule 4.2(a)(8) would require the
3 court to set a bail eligibility hearing within seven days of the initial appearance for
4 those defendants held not bailable as prohibited by the Ariz. Const. Art. 2, §§
5 22(A)(2) or (A)(3). While the timing of this hearing may work in some
6 jurisdictions, other jurisdictions, such as Coconino County, could not
7 accommodate this timing. Grand Jury proceedings are conducted only once a week
8 in some of these jurisdictions. The ability to hold bail eligibility hearings within
9 the time frames outlined by the new rule could not be done.

12 Next, the bail eligibility hearing under proposed Rule 7.4(b) does not take
13 into consideration a process for securing the attendance of witnesses who would
14 testify at the hearing and does not provide for a verbatim record of proceedings as
15 does Rule 5.2 (“Summoning of witnesses and record of proceedings”). Those are
16 essential for an effective and fair bail hearing. Neither does the bail eligibility
17 hearing as proposed in Rule 7 account for the mandatory victims’ rights notification
18 as required by the Arizona Constitution and related laws. Ariz. Const. art. II, §
19 2.1(4); A.R.S. § 13-4406; Rule 7.4(b) (current); Rule 39(b)(6), (7).

22 For all these reasons, APAAC opposes the new bail eligibility hearing as
23 proposed in Rule 7. In the alternative, if it is not to be eliminated, APAAC strongly
24 recommends that the bail eligibility hearing requirements be incorporated into the
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1 Preliminary Hearing process of Rule 5. This would avoid the problems and
2 potential repercussions that would occur with a new and separate rule.

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4 C. Proposed new Rules Rule 7.4(c) and 7.4(d)

5 Rule 7, Ariz. R. Crim. P., pertains to release determinations. The petition
6 recommends the addition of new rules 7.4(c) and 7.4(d). Proposed new Rule 7.4(c)
7 contains language nearly identical to the preliminary hearing Rule 5.4(b)
8 (“Determination of probable cause”) and would, at the time release determinations
9 are being made, allow the complaint to be amended to conform to the evidence but
10 prohibit the defendant from being held to answer for a crime different from that
11 “charged in the original complaint.” APAAC opposes this language in Rule 7. The
12 issue is already addressed in the preliminary hearing Rule 5.4(c) and in Rule 13.5
13 (“Amendment of the charges; defects in the charging documents”). It would appear
14 that the proposed new rule would alter the State’s ability to bring new or different
15 charges after a release determination had been made.
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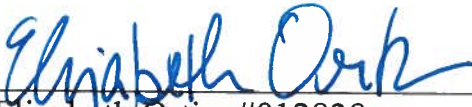
19 Similarly, proposed new Rule 7.4(d) mirrors the language of preliminary
20 hearing Rule 5.4(d) (“Discharge of the defendant”) but adds a word that appears
21 nowhere else in the rules or law. New Rule 7.4(d) provides that a court shall
22 dismiss a complaint and discharge a defendant when, among other things, there is
23 not “*substantial* evidence of probable cause.” The word “substantial” does not
24 appear in Rule 5.4(d) and is not a requirement in any other rule or law. APAAC
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1 opposes the insertion of the word “substantial” as modifying the level of probable
2 cause evidence needed to hold a defendant. This addition places a new burden on
3 the state and law enforcement and creates a new legal concept that has before never
4 been required.
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6 **III. CONCLUSION**

7 The Arizona Prosecuting Attorneys’ Advisory Council urges the Court to
8 adopt the modifications proposed in this Comment. While APAAC understands the
9 intent of the petition under proposed Rule 7 in expediting release determinations for
10 indigent defendants, the proposed “bail eligibility hearing” as drafted fundamentally
11 alters the current practice in Arizona and creates unanticipated problems. APAAC
12 respectfully requests that the Arizona Supreme Court not adopt the procedures for a
13 bail eligibility hearing as set forth in the petition. In the alternative, APAAC
14 respectfully requests that the Arizona Supreme Court incorporate those procedures
15 into the rules on preliminary hearings.
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19 RESPECTFULLY SUBMITTED this 24th day of April, 2017.

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22 _____
23 Elizabeth Ortiz, #012838
24 Executive Director
25 Arizona Prosecuting Attorneys’
Advisory Council

1 Electronic copy filed with the
2 Clerk of the Arizona Supreme Court
3 this 24 day of April, 2017.

4 by: Mooney
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