

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: PETITION TO AMEND
11 CRIMINAL RULES 4.2, 5.1, 5.4, 7.2,
12 7.4, 26.12 AND 27.8

R-17-0015

MARICOPA COUNTY ATTORNEY'S
RESPONSE TO PETITION TO AMEND
CRIMINAL RULES 4.2, 5.1, 5.4, 7.2, 7.4,
26.12 AND 27.8

13
14
15 The Maricopa County Attorney hereby responds to the Petition submitted by the
16 Fair Justice Task Force and asks this Court to return this rule proposal to the Task
17 Force for reconsideration in light of the legislative decision regarding their proposed
18 statutory changes, and, if this Court is to adopt any of these proposed changes, that it
19 make substantial revisions to the proposed rules to comply with Arizona law.
20

21
22 Respectfully submitted this 22nd day of May, 2017.

23 WILLIAM G. MONTGOMERY
24 MARICOPA COUNTY ATTORNEY

25 By 
26 MARK FAULL
27 CHIEF DEPUTY
28

1 **I. Discussion**

2 **A. If this Court adopts the proposed changes substantial modifications**
3 **should be made to comply with Arizona law.**

4 As the Petition notes, some of the proposed rule changes conflict with current
5 Arizona law. Specifically the Petition notes,

6
7 These amendments contain procedural differences from the current
8 statutory language in that determination of whether the defendant is not
9 bailable is required to be initiated by the magistrate rather than solely by
10 the prosecutor, and a bail hearing is required to be set within seven days
11 rather than 24 hours after the Initial Appearance.

12 [Petition at 6]. The Petition further explains that conforming legislative changes
13 would be pursued in the 2017 legislative session. Those changes were introduced in
14 Senate Bill 1163 and they were not adopted. Thus some of the proposed rules cannot
15 be adopted because they violate Arizona law. Additionally, this Court's decision in
16 *Simpson v. Miller*, 241 Ariz. 341, 387 P.3d 1270 (2017) also requires modifications to
17 the requested rule changes. Although this comment will address both issues as if this
18 Court will adopt some changes to this rule, due to these legislative and legal
19 developments, the best course of action would be to deny the Petition at this time and
20 return it to the Task Force for further consideration and presentation in next year's
21 rules cycle.
22

23
24 Several portions of the Petition are inconsistent with Arizona statutory law.
25 Proposed Rule 7.2(b)(2)(C) adds a burden of proof that is not in the constitution or
26 the applicable statutes. Specifically, the proposed rule requires that the court must
27
28

1 find by “clear and convincing evidence” that no condition of release will assure the
2 safety of the community. Although the statute that implements the constitutional
3 provision, A.R.S. § 13-3961, includes the “clear and convincing” standard for the
4 finding that the person poses a substantial danger or engaged in a violent offense, the
5 clear and convincing standard is not part of the determination that no conditions will
6 reasonably assure the safety of others. SB 1163 sought to add that language to the
7 statute, but that bill did not pass.
8

9
10 Proposed Rule 7.2(b)(2)(B) is inconsistent with A.R.S. § 13-3961 in a way that
11 was not discussed in the Petition or included as a change in SB 1163. A.R.S. § 13-
12 3961(D) provides that person is nonbondable when charged with a felony offense and
13 the court finds by clear and convincing evidence that 1) the person poses a substantial
14 danger to others or 2) the person committed a violent offense. The “violent offense”
15 portion of the statute is omitted from the proposed rule. The Petition discusses why
16 “dangerousness” as defined in A.R.S. § 13-105 was included as a proposed
17 consideration under Rule 7.2(b)(3), but it does not discuss why this second basis for
18 denying bail in the statute was omitted. “Violent offense” is defined in A.R.S. § 13-
19 3961 as a dangerous crime against children or terrorism. This portion of the statute
20 has been completely omitted from the proposed rule. If any change to Rule 7.2 is
21 made, proposed Rule 7.2(b)(2) should be amended to read as follows:
22
23
24
25
26
27
28

1 (2) *Other Felonies Not Bailable*. A person charged with any other felony
2 offense must not be released on bail if the court finds all of the
3 following:

4 (A) Proof is evident or the presumption great that the person
5 committed a felony offense with which the person is charged;

6 (B) Clear and convincing evidence that EITHER the person poses a
7 substantial danger to another person or the community OR THE
8 PERSON ENGAGED IN CONDUCT CONSTITUTING A
9 DANGEROUS CRIME AGAINST CHILDREN OR
10 TERRORISM; and

11 (C) ~~Clear and convincing evidence that n~~ No condition or
12 combination of conditions of release will reasonably assure the
13 safety of any person or the community.

14 The most significant features of the proposed rules – the interplay between the
15 initial appearance, the new bail eligibility hearing, and the preliminary hearing – are
16 the most impacted by the legislature’s decision on SB 1163. Because creating the
17 bail eligibly hearing and combining it with the preliminary hearing is the main reason
18 for these changes, it would be much easier to have the Task Force take up their work
19 anew with the understanding that it must be consistent with Arizona law rather than
20 attempting to correct the current Petition during this rules cycle. But if that
21 recommendation is rejected, there are several changes that must be made.

22 Proposed Rule 4.2(A)(8) should be deleted in its entirety because under A.R.S.
23 § 13-3961(E), the court only considers the danger to the community issue on motion
24 of the State. Proposed Rule 7.2(4), requires a bail eligibility hearing to be held within
25 seven days after the initial appearance, but that directly contradicts A.R.S. § 13-
26
27
28

1 3961(E) which requires a hearing within 24 hours. Although there was general
2 consensus amongst criminal practitioners and courts that 24 hours is not realistic or
3 workable, the rule cannot expand a statutory 24 hour time period to seven days. The
4 reality of this compressed time period makes the new rule's attempt to intertwine the
5 bail eligibility hearing and the preliminary hearing under Rule 5.4 unreasonable.
6 Rule 5.4 gives the State 10 days to bring a preliminary hearing for the purposes of
7 determining probable cause for in-custody defendants. That time period cannot be
8 compressed to 24 hours. Thus, if this court is to adopt this proposed rule to create a
9 bail eligibility hearing, the portion of that rule requiring the court to find probable
10 cause under Rule 7.2(b)(4) should be removed. Additionally the proposed additional
11 language under Rule 5.1(4) and Rule 5.4(a) should be deleted as well as proposed
12 Rule 7.4(c) and (d).
13
14
15
16

17 To be consistent with this Court's decision in *Simpson*, if a change to Rule
18 7.2(b) is made, proposed Rule 7.2(b)(1) should read, ". . . the proof is evident or the
19 presumption great that the person committed a capital offense, a sexual assault, or any
20 felony offense committed while the person was on pretrial release¹ for a separate
21 felony offense." For consistency and clarity, the same change should be made to
22
23
24

25 ¹ Although the constitution uses the phrase "admitted to bail" in the context of a
26 person committing a new felony while on release, this Court has held that this phrase
27 includes everyone released pending trial. *Heath v. Kiger*, 217 Ariz. 492, 496-97, ¶¶
28 14-16, 176 P.3d 690, 694-95 (2008).

1 proposed Rule 4.2(a)(7)(A) to read, “The defendant committed a capital offense, a
2 sexual assault, or any felony offense committed while the person was on pretrial
3 release for a separate felony offense.”²
4

5 **B. Proposed Rule 7.4(d) contains an undefined standard of proof.**

6 Although proposed Rule 7.4(d) should not be adopted as explained above
7 because is it part of the attempt to blend bail eligibility hearings and preliminary
8 hearings which is unworkable given the 24 hour time limitations, if this Court adopts
9 Rule 7.4(d) in some form, it must be corrected. As currently proposed, the rule
10 requires discharge of the defendant if “there is not **substantial** evidence of probable
11 cause to believe that an offense has been committed and that the defendant committed
12 it . . .” (emphasis added). This rewording does not track the language of current Rule
13 5.4(d) which was presumably the basis for this proposed rule. Current Rule 5.4(d)
14 states, “If it appears from the evidence that there is not probable cause to believe that
15 an offense has been committed or that the defendant committed it, . . .”. The
16 proposed new rule adds the word “substantial” before probable cause creating a new,
17 undefined burden of proof. Under Rule 5.4(a), a defendant must be held to answer
18
19
20
21
22

23
24 ² Proposed Rule 4.2(a)(7)(b) would be clearer if the reference to the constitution was
25 omitted. There is no reason for it to be there because the rest of that sentence
26 describes the constitutional provision. It should simply read, “The defendant
27 committed a felony and the defendant poses a substantial danger to others, or the
28 defendant engaged in a dangerous crime against children or terrorism, and no
conditions of release will reasonably assure the safety of another person or the
community.”

1 based on probable cause – not “substantial” probable case. The addition of this word
2 in the proposed rule would cause confusion and was, presumably, simply an
3 oversight. Should this Court adopt any version of the proposed modified Rule 7.4,
4 this extraneous word must be removed.
5

6 **II. Conclusion**
7

8 Much of the current Petition was based on a legislative statutory change that
9 was not adopted. Given that fact, the best course of action would be to have the Task
10 Force reconsider their recommendations and present a new proposal, if necessary,
11 next January. However, if this Court seeks to adopt some of these changes it is
12 important that they be consistent with our statutes.
13

14
15 Respectfully submitted this 22nd day of May, 2017.

16 WILLIAM G. MONTGOMERY
17 MARICOPA COUNTY ATTORNEY

18 By 
19 MARK FAULL
20 CHIEF DEPUTY
21
22
23
24
25
26
27
28