

Kathleen E. Brody (SBA 026331)
**American Civil Liberties Union Foundation
of Arizona**
3707 N. 7th St., Suite 235
Phoenix, AZ 85014
(602) 650-1854
kbrody@acluaz.org

Andrea Woods
American Civil Liberties Union Foundation
Criminal Law Reform Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2528
awoods@aclu.org

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

PETITION TO AMEND RULES 4.2, 5.1,
5.4, 7.2, 7.4, 26.12 AND 27.8 OF THE
ARIZONA RULES OF CRIMINAL
PROCEDURE

Supreme Court No. R-17-0015

COMMENT OF AMERICAN CIVIL
LIBERTIES UNION OF ARIZONA
AND AMERICAN CIVIL LIBERTIES
UNION

The American Civil Liberties Union of Arizona and the American Civil Liberties Union (collectively, “ACLU”) oppose the proposed changes to Rules 4.2, 5.1, 5.4, 7.2, and 7.4 as set forth in Appendix B. The changes would establish expanded procedures to determine individuals non-bailable, often by a judge *sua*

sponte without a motion from the State, as well as authorize a significant period of detention before an accused person has been afforded the assistance of counsel.

These proposed rule changes, initially filed in January 2017, are today both premature and backwards-facing. First, given the failure of the anticipated legislative action this session on the proposed changes that would have resulted in statutes conforming to the proposals in Appendix B, and the possibility that the legislature will instead weigh in on and change those same statutes in a future session, the proposed rule changes are premature. *See Justice for All: Report and Recommendations*, p. 2–6 (setting forth legislative proposals).

Second, the proposed rule changes are also backwards-facing in light of this Court’s recent decision in *Simpson v. Miller*, 241 Ariz. 341, 387 P.3d 1270 (Feb. 9, 2017). The proposed rule changes anticipated the *Simpson* decision, which—now issued—contradicts their approach. In *Simpson*, this Court emphasized the liberty interests of individuals facing pretrial detention. Government action that infringes on this liberty interest must satisfy substantive due process. *Simpson*, 387 P.3d at 1276 (“the constitutionality of a pretrial detention scheme turns on whether particular procedures satisfy substantive due process standards”). A state may satisfy the substantive due process requirement by granting an accused person an individualized “full-blown adversary hearing,” with the assistance of counsel, in which the Government must prove his dangerousness by clear and convincing

evidence. *Unites States v. Salerno*, 481 U.S. 739, 750–51 (1987). The ACLU advocates for this approach. See *Amicus Curiae Brief of the ACLU and NACDL*, available at www.nacdl.org/simpson_v_arizona. As this Court has held, however, if a state does not provide such individualized hearings to determine dangerousness, its practices may pass constitutional muster if they “serve as a convincing proxy for unmanageable . . . dangerousness.” *Simpson*, 387 P.3d at 1277.

The proposed rule changes rely in part on the notion that being charged with certain serious crimes serves as a convincing proxy for unmanageable dangerousness. See Appendix B, Proposed Rule 7.2(b)(3)(A). Yet, in *Simpson*, the Court held that a specific, serious charge—sexual conduct with a minor—is not always inherently predictive of future dangerousness such that due process requirements are satisfied and, therefore, that charge cannot be used as a basis for a categorical denial of bail. 387 P.3d at 1278. This goes against the logic of the rule changes proposed in Appendix B.

Moreover, the proposed rule changes do not ensure an accused person has access to counsel during the critical stage at which he is deemed non-bailable. See Proposed Rule 4.2 (providing that at initial appearance, an accused may have counsel appointed, but also may be deemed non-bailable before having an opportunity to meet with counsel). Under the proposed rules, an individual may be detained for a week before having had his liberty interests represented in the “full-blown adversary

hearing” contemplated by *Salerno*. See Proposed Rule 7.2(b)(4) (providing that a bail eligibility hearing for persons previously held non-bailable will occur within seven days). This Court referred to the “proof evident or presumption great” hearings—used to determine bail eligibility under the preexisting system—as “robust” in part thanks to the availability of counsel and the accused’s opportunity to cross-examine witnesses. *Simpson*, 387 P.3d at 1275.

In light of the Arizona Legislature’s failure to address pretrial reform, this Court’s decision in *Simpson v. Miller*, and the failure of the proposed rules to provide counsel for a bail eligibility determination, the ACLU opposes the proposed changes set forth in Appendix B and urges the resolution of these issues at a later time.

RESPECTFULLY SUBMITTED this 22nd day of May, 2017.

By: /s/ Kathleen E. Brody
Kathleen E. Brody
**AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF ARIZONA**

/s/ Andrea Woods
Andrea Woods
**AMERICAN CIVIL LIBERTIES UNION
FOUNDATION**