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IN THE ARIZONA SUPREME COURT

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	No. R-17-0015 JOINT COMMENT OF APDA AND AACJ RESPONDING TO AUGUST 31, 2017 ORDER

Pursuant to this Court's August 31, 2017 Order, the Arizona Public Defender Association ("APDA") and Arizona Attorneys for Criminal Justice ("AACJ") file this Comment opposing the Court's proposed amendments to Criminal Rule 7.2.

The Court's order of August 31, 2017, expresses an intention to adopt the gist of the AOC's January 19, 2017, proposal to modify Rule 7.2 in a manner that is substantively inconsistent with existing legislation. If approved, this change would

ignore the concerns raised at pages 4-5 of the APDA and AACJ comment filed on May 19, 2017. The Court should not change a rule in a manner that creates a substantive change to an existing statute, particularly after a legislative session where the same language in the proposed rule change was rejected by the legislature in the proposed legislation.

Similar concerns were raised by the Maricopa County Attorney's Office and the ACLU in their comments, both filed on May 22, 2017. MCAO stated at page 2 of its comment:

> The Petition further explains that conforming legislative changes would be pursued in the 2017 legislative session. Those changes were introduced in Senate Bill 1163 and they were not adopted. Thus some of the proposed rules cannot be adopted because they violate Arizona law.

The ACLU echoed these same warnings at page 2 of its comment:

> …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.

The AOC tried to allay these concerns in its reply of July 7, 2017, by contending that its proposed amendments to the rules were merely procedural and in no way inconsistent with the substantive intent of A.R.S. § 13-3961. This ignores the fact that the backbone of the AOC's proposal is a substantive departure from the current legislative structure requiring nonbondability allegations to be initiated by the

prosecution and be set for a hearing in 24 hours (*see* § 13-3961(D)(E)). In effect, the AOC is contending that these well-established statutory requirements can be ignored if a court chooses to initiate the preventive detention allegations on its own.

By so doing, the AOC rationalizes that these "procedural changes" are needed because it is too difficult to meet the statute's current requirements. AOC Reply at page 5. This position, however, undermines the recognition of the importance of "limited entry points" for preventive detention nonbondable determinations, discussed by the AOC in its initial filing on this issue:

> In formulating its proposal, the Task Force considered the Preventive Detention section (pp 24-29) of a recent report entitled "Moving Beyond Money: A Primer on Bail Reform" from the Harvard Law School Criminal Justice Policy Program, particularly the discussion of the importance of limited points of entry to preventive pretrial detention.

Petition at 6-7. The AOC's proposal, however, ignores the need to limit entry points by creating a new road for nonbondability determinations. And the creation of this new road to nonbondability cannot be sloughed off as being merely procedural. This is made clear by juxtaposing the proposal for amendments to Rule 7.2(b) submitted by the AOC with petition (filed at a time when it assumed that the legislature would enact legislation consistent with its proposed rule change) with the proposal submitted by the AOC with its Reply (after the Legislature rejected the proposed changes). The proposal for Rule 7.2(b)(4) set forth at Appendix B-4 of the AOC's petition stripped away the statute's 24-hour time frame, providing:

> (4) *Bail Eligibility Hearing.* For a person held not bailable pursuant to (b)(2), the superior court must hold a hearing to determine whether the person is not bailable under subsection (b)(1) or (b)(2). The person may waive this hearing. The hearing must be held as soon as practicable but not later than seven days after the initial appearance unless the person detained moves for a continuance. If the court does not find the proof evident or the presumption great under (b)(2)(A), the court must determine probable cause on each charge as provided in Rule 5.4(a) unless the defendant has been indicted for the offenses charged. The court's findings must be made on the record.

However, once the AOC realized that the Legislature would not modify § 13-3961 to make these substantive changes, the AOC modified this proposal, recognizing that the 24-hour hearing requirement was a substantive necessity that could not be ignored as a nonsubstantive minor change in procedure.

The new proposed Rule 7.2(b)(4) attached to the AOC's Reply (and which forms the basis for this Court's proposed amendments) is convoluted and is an inconsistent amalgam of the old and the new. It is internally inconsistent: why should there be a radically different track for handling cases where a motion is made versus cases where no motion is made? And it will be prone to misuse: if a court does not want to deal with the time limits in the statute, will the court actively discourage the State from filing a motion? These questions are left unanswered but such absurd results are not merely possible but inevitable.

As this Court is well aware and as discussed in all the previously filed comments, § 13-3961 and the other nonbondability provisions of Arizona's current statutory scheme are the subject of a number of pending matters, any one of which

could significantly alter the substantive rights of an individual being held without bond on charges for which he is presumed to be innocent.[1] Arizona courts have recognized that when statutes "are part of a cohesive overall scheme, we must interpret each statute to avoid rendering 'any of its language mere surplusage, and instead give meaning to each word, phrase, clause, and sentence so that no part of the statute will be void, inert, redundant, or trivial.'" *Helvetica Servicing, Inc. v. Giraudo*, 241 Ariz. 498, 502 ¶ 14 (App. 2017) (citation omitted).

The AOC's proposed rule amendments would tinker with the existing statutory scheme in a manner is inconsistent with the statute's current language and, if allowed, would lead to significant substantive changes in the manner in which nonbondability determinations would be handled.

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[1] This Court has recently granted review in *Morreno v. Brickner*, Sup. Ct. No. CV-17-0193-PR, with oral argument scheduled for October 4, 2017. Other cases in which petitions for review are pending include *State v. Wein (Henderson/Goodman)*, No. CR-17-0221-PR (petition filed May 25, 2017), and *Jariwala v. Mikitish*, No. CR-17-0165-PR (petition filed May 25, 2017), and AACJ has filed an *amicus curiae* brief in each of those cases.

Accordingly, APDA and AACJ respectfully request the Court to reject the changes set forth in Appendix B of its Order of August 31, 2017. Alternatively, the Court should continue consideration of Appendix B until the Court has a chance to decide pending cases on the merits.

RESPECTFULLY SUBMITTED this 25th day of September, 2017.

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