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(FIRM STATE BAR NO. 0003200)

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IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF: AMENDMENT OF RULE 4.1 OF THE ARIZONA RULES OF CRIMINAL PROCEDURE	R-08-0005 MARICOPA COUNTY ATTORNEY'S COMMENTS TO THE PETITION TO AMEND RULE 4.1, RULES OF CRIMINAL PROCEDURE

The Maricopa County Attorney hereby responds to the Petition to Amend Rule 4.1 of the Rules of Criminal Procedure.

Respectfully submitted this 19th day of May, 2008.

ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY

BY: Philip J. MacDonnell
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MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS

In November 2006, Arizona voters approved Proposition 100, which amended Const. Art. 2 § 22 by providing that persons charged with crime shall be bailable except "[f]or serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge."

On May 25, 2007, the Administrative Office of the Courts filed petition R-07-0003 to amend Rules 4.2, 7.2, 7.4, 27.7 and 31.6, Ariz. R. Crim. P., regarding initial appearance to conform with Proposition 100. Those rules were approved on an emergency basis effective July 3, 2007, and included provisions for bail determination at the initial appearance. On June 15 and August 10, 2007, the Arizona Public Defender Association (APDA) filed comments opposing the rule changes. The APDA argued, among other things, that defendants had a right to counsel both before and during the initial appearance.

APDA has now filed a petition to amend Rule 4.1 by adding:

> (e) **Assurance of Availability of Counsel at the Initial Appearance.** Each presiding judge shall take steps to ensure that counsel is present at the initial appearance to represent persons appearing at the initial appearance who are eligible for and desire appointed counsel.

The petition alleges that Rules 4.2(a)(3) and 6.1(a) "indicate" that arrestees have the right to counsel at the initial appearance, while also conceding that only two Arizona counties provide defense attorneys at that time. In fact, nothing in the rules requires appointment of counsel prior to the initial appearance, nor is such appointment constitutionally required.

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II. LAW AND ARGUMENT

Rule 4.1, which petitioner seeks to amend, sets forth procedures to be followed upon arrest. This includes being taken before one of many magistrates without delay. However, the petition fails to explain how the proposed rule would be implemented at the time of arrest. For example, would each magistrate in every county throughout the state have a contingent of defense lawyers waiting in the wings? Such a procedure obviously would be very challenging.

Rule 4.2, on the other hand, already sets forth an orderly procedure for appointing counsel at the initial appearance. Under that rule, the magistrate performs numerous preliminary tasks, such as ascertaining the suspect's true name and address, informing the defendant of the charges, and determining the conditions of release. Rule 4.2(a)(3) states that the magistrate shall "[i]nform the defendant of the right to counsel and the right to remain silent." Rule 4.2(a)(5) states that the magistrate shall "[a]ppoint counsel if the suspect is eligible for and requests appointed counsel under Rule 6."

Contrary to petitioner's argument, Rule 6.1(a) confers only a general right to counsel and does not require appointment of counsel prior to the initial appearance. Rule 6.1(b) states broadly that an indigent defendant "shall be entitled to have an attorney appointed to represent him or her in any criminal proceeding which may result in punishment by loss of liberty and in any other criminal proceeding in which the court concludes that the interests of justice so require." Rule 6.2 states, in part, that "[t]he presiding judge of each county shall establish a procedure for appointment of counsel by the Superior Court, or by limited jurisdiction courts, for each indigent person entitled thereto." Therefore, the current rules effectively leave it up to each county to establish the appropriate procedures for appointing counsel.

The Arizona Supreme Court has held that a defendant has no right to counsel at the initial appearance. In *State v. Cook*, 150 Ariz. 470, 724 P.2d 556 (1986), defendant fatally shot a deputy and

wounded another man. He was arrested and had his initial appearance before a magistrate several hours later. On appeal, defendant argued that he was denied a right to counsel at the initial appearance. The court disagreed:

> In Arizona, an initial appearance is a proceeding at which a person is advised of his right to counsel and steps are taken toward obtaining counsel for subsequent proceedings. Rule 4.2. Hence, no right to an attorney exists at the initial appearance on the day of the arrest. Appellant's right to counsel, therefore, was not violated.

Id. at 475, 724 P.2d at 561.

The United States Supreme Court has addressed when the Sixth Amendment right to counsel attaches in various circumstances. In *Kirby v. Illinois*, 406 U.S. 682 (1972), the court declined to extend the right to counsel to "police station showups" that occurred after a defendant's arrest but before he was indicted or otherwise formally charged. The Court stated that "a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him," such as "by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 688-689.

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is at this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable.

Id. at 689-690. In *Powell v. Alabama*, 287 U.S. 45, 57 (1932), the Court held that defendants were entitled to counsel at arraignment. Later in *Coleman v. Alabama*, 399 U.S. 1, 10 (1970), the Court found that the preliminary hearing was a "critical stage" that required counsel.

In *State v. Rodriquez*, 110 Ariz. 57, 59, 514 P.2d 1245, 1247 (1973), the Arizona Supreme Court cited *Kirby* and *Powell* in holding that a defendant was not entitled to counsel at a pre-indictment

showup at a hospital. The Arizona Court of Appeals, however, has found that a bail hearing following the initial appearance is similar to a preliminary hearing, and the accused is entitled to counsel. *Simpson v. Owens*, 207 Ariz. 261, 275, 85 P.3d 478, 492 (App. 2004).

The United States Supreme Court has recognized that "the 'core purpose' of the counsel guarantee is to assure aid at trial," because that is when the accused is "confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States v. Gouveia*, 467 U.S. 180, 188-189 (1984).

> Although we have extended an accused's right to counsel to certain "critical" pretrial proceedings, *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), we have done so recognizing that at those proceedings, "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both," *United States v. Ash, supra,* 413 U.S., at 310, 93 S.Ct., at 2574, in a situation where the results of the confrontation "might well settle the accused's fate and reduce the trial itself to a mere formality." *United States v. Wade, supra*, 388 U.S., at 224, 87 S.Ct., at 1930.

Id. at 189. The court further held in *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991), that the Sixth Amendment right to counsel was "offense specific":

> It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, "'at or after the initiation of adversary judicial criminal proceedings — whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *United States v. Gouveia*, . . . quoting *Kirby v. Illinois*. . . . [citations omitted.]

Although the Court apparently has not addressed initial appearances, the proceeding set forth in Rule 4.2 is not the type of "adversarial" proceeding or "critical stage" where the advice of counsel is necessary. The State is not putting on its case at the initial appearance, and defendant is not required to have any expertise in the law or procedure at that point in the process. There must be a starting point at which the magistrate makes decisions such as whether a person is eligible for appointed counsel. "Essentially the initial appearance is designed to inform the defendant of why he has been arrested, when he must next appear, and to release him if possible. Indeed, the complaint itself need not be filed

until 48 hours after the initial appearance. . . ." *State v. Van Dyke*, 127 Ariz. 335, 338, 621 P.2d 22, 25 (1980).

Although a bail decision is made at the initial appearance, "the accused's fate" is not determined there. In addition, Rule 7.4 permits subsequent review of the magistrate's initial decision regarding bail. Therefore, once defendant obtains counsel, the opportunity exists for counsel to file a motion to modify the conditions of release. Defendants charged with relatively minor offenses may be released on modest bail or on their own recognizance. The majority of initial appearances are concluded without any need for a defendant to obtain legal advice while the magistrate conducts routine duties.

Arizona statutes and case law set forth when the public defender may be appointed. A.R.S. § 11-584(A)(1)(a) states:

> A. The public defender shall perform the following duties:
>
> 1. Upon order of the court, defend, advise and counsel without expense to the defendant, subject to subsection B of this section, any person who is not financially able to employ counsel in the following proceedings and circumstances:
>
> (a) Offenses triable in the superior court or justice courts at all stages of the proceedings, including the preliminary examination, but only for those offenses which by law require that counsel be provided.

Pursuant to that statute, duties to a defendant do not begin until an order of the court is issued, which occurs during the initial appearance. The statute also indicates that proceedings begin with the preliminary examination, which is consistent with the United States Supreme Court case law.

In *Shepherd v. Fahringer*, 158 Ariz. 266, 762 P.2d 553 (1988), defendant was arrested for DUI. The court found defendant indigent at his initial appearance and appointed the public defender to represent him. The complaint was subsequently dismissed on state's motion. Several months later, the grand jury indicted defendant for two felonies involving DUI on a suspended or revoked license. A public defender was appointed at his arraignment. Defendant argued on appeal that he was prejudiced

by not having appointed counsel between the dismissal and the arraignment. The court disagreed:

> The public defender, by statute, is required to represent and defend indigent criminal defendants, A.R.S. § 11-584, Rule 6, Ariz.R.Crim.P., 17 A.R.S. The public defender, however, is not required to defend a potential defendant. Nowhere is it provided that the public defender must represent a person against whom no charges are pending. In the instant case, there was no certainty that the defendant would be indicted after the charges had been dismissed. Under these circumstances, it would have been inappropriate for the public defender to have been appointed to represent the defendant. It was only after the defendant was indicted that he was entitled to the services of the public defender.

Id. at 270, 762 P.2d at 557. Likewise, the public defender should not represent a defendant before the initial appearance if the defendant has not yet been charged.

In *Coconino County Public Defender v. Adams*, 184 Ariz. 273, 908 P.2d 489 (App. 1995), the trial court appointed the public defender to represent a defendant before the Psychiatric Security Review Board, which was not included at the time in matters handled by the public defender under § 11-584(A)(1). The Court of Appeals granted relief and declined to "expansively interpret the statutory list of types of proceedings in which public defenders may appear." *Id.* at 276, 908 P.2d at 492. A.R.S. § 11-584(A)(1) does not specifically permit the public defender to represent clients before or during the initial appearance.

A rule requiring defense counsel to be present would turn the initial appearance into a burdensome and costly proceeding. First, some type of "pre-"initial appearance would be necessary to determine whether a defendant was in fact indigent. Then, one or more defense attorneys would have to wait in the hallways until they were needed. If an attorney wanted a lengthy consultation with his or her client, initial appearances could be unnecessarily delayed. The presence of prosecutors also would be required, because the proposed rule potentially transforms the non-adversarial initial appearance into an adversarial proceeding.

Such a rule is especially unfair to small counties with limited resources. Even in Maricopa County, money should not be wasted by having public defenders and prosecutors waiting at IA court during the routine processing of thousands of defendants. The current rules provide an efficient system that also adequately protects a defendant's Sixth Amendment rights.

III. CONCLUSION

The initial appearance conducted pursuant to Rule 4.2 is a non-adversarial proceeding during which the magistrate informs a defendant of the right to counsel and appoints counsel in appropriate circumstances. The appearance itself is not a "critical stage" in pretrial proceedings that necessitates the presence of defense counsel. In most cases, no contested matters are raised, but conditions of release can subsequently be modified if appropriate. Petitioner's proposed Rule 4.1(e) is burdensome, costly and unnecessary. The Maricopa County Attorney's Office therefore opposes the petition to amend Rule 4.1.

Respectfully submitted this 19th of May, 2008.

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Copies of the forgoing mailed
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