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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of:	)	
	)	
PETITION TO AMEND RULES 4.2	)	Supreme Court No. R-18-_____
AND 7.2, ARIZONA RULES OF	)	(expedited consideration
CRIMINAL PROCEDURE	)	requested)
_____	)	

Pursuant to Rule 28 of the Rules of the Supreme Court, David K. Byers, Administrative Director, Administrative Office of the Courts, respectfully petitions this Court to amend Rules 4.2 and 7.2 of the Arizona Rules of Criminal Procedure as proposed in Appendix A. These amendments would implement this Court's decision in *State v. Hon. Wein/Goodman*, No. CR-17-0221-PR, 2018 WL 2374047, filed May 25, 2018. This petition also provides for consideration of but does not recommend additional amendments in Appendix B to implement [Laws 2018, Chapter 115, HB 2245](#), which amended the bail statute, A.R.S. § 13-3961(A)(3)&(4).

I. Background and Purpose of the Proposed Rule Amendments. Last year the Court adopted amendments to Rules 4.2 and 7.2 of the Rules of Criminal Procedure that selectively implemented the bail provisions of Az Const. Art. 2§ 22. Those amendments included the § 22(A)(1) exception to the right to bail of defendants charged with sexual assault, which had been upheld by the Arizona Court of Appeals in *State v. Wein*, 242 Ariz. 352 (App. 2017). The 2017 rule amendments intentionally omitted provisions of § 22(A)(1) concerning sexual conduct with a minor and child molestation under fifteen years of age because prior decisions of this Court and the Court of Appeals had held that defendants charged with these offenses may not be denied bail without individualized judicial determinations as provided in § 22 (A)(3).¹

In *Wein/Goodman* this Court reached the same conclusion concerning the subsection(A)(1) categorical denial of the right to bail of defendants charged with sexual assault.² The Court clarified that the focus of the constitutional analysis of a categorical denial of the right to bail must be on whether the charge inherently predicts that the defendant will commit a dangerous offense while on pre-trial release rather than whether the offense charged is “dangerous.”

¹ *Simpson v. Miller*, 241 Ariz. 341, 387 P.3d 1270, 1278 ¶31 (2017); *Chantry v. Astrowsky*, 242 Ariz. 355 (App. 2017).

² *State v. Hon. Wein/Goodman* No. CR-17-0221-PR ¶ 37

We should have immediately explained that just as commission of sexual conduct with a minor under fifteen years of age is not always dangerous, it does not inherently demonstrate future dangerousness pending trial. See *Simpson II*, 241 Ariz. at 349 ¶ 27. We made that point later in the opinion. See *id.* ¶ 30 (“[T]he state may deny bail categorically for crimes that inherently demonstrate future dangerousness” when the proof is evident or the presumption great, but “[w]hat it may not do, consistent with due process, is deny bail categorically for those accused of crimes that do not inherently predict future dangerousness.”); see also *Morreno v. Hon. Brickner/State*, 790 Ariz. Adv. Rep. 24 ¶ 21 (May 2, 2018) (“The mere charge itself [in *Simpson II*] was not a convincing proxy for future dangerousness, and therefore not narrowly focused, because it swept in situations that are not predictive of future dangerousness.”).³

Therefore, petitioner proposes that the Court remove references to sexual assault from the bail rules to implement the *Wein/Goodman* decision.

[Laws 2018, Chapter 115, HB 2245](#) amends the provisions in A.R.S. § 13-3961 concerning the right to bail for defendants charged with sexual conduct with a minor and child molestation determined to be unconstitutional in *Simpson II* and *Chantry*. These 2018 statutory amendments narrow the exception to the right to bail by basing the exceptions on the relative ages of the defendant and the victim rather than the offense alone. They define classes of defendants designed to be limited to

³ Wein/Goodman ¶ 31

those who present an inherent risk of future dangerousness consistent with *Simpson II*.⁴

Arguably, the HB 2245 amendments fall short of the rigorous requirements outlined in *Wein/Goodman* for a categorical denial of the right to bail. No procedures are provided to determine whether the particular defendant would pose a danger to the community while on release.⁵ Demonstrating that any category of crime is “‘a convincing proxy’ for future dangerousness” is a “difficult undertaking,”⁶ and there is a paucity of relevant data.⁷ Ariz. Const. Art. 2, § 22(A)(3) and A.R.S. § 13-3961(D) provide a readily available alternative to categorical denial of the right to bail “that would serve the state’s objective equally well at less cost to individual liberty.” *Simpson II*, 241 Ariz. at 349 ¶ 28.⁸

The Court may choose not to implement HB 2245 at this time through rule amendments. Though the current versions of Rules 4.2 and 7.2 would not require the categorical treatment of the classes of defendants defined by the HB 2245 amendments, prosecutors may request denial of bail based on the new statutory

⁴ Video of [Senate Judiciary Committee 03/15/2018, HB2245 - prohibited bail; sexual conduct; molestation](#)

⁵ *Wein/Goodman* ¶ 23

⁶ *Wein/Goodman* ¶ 24

⁷ *Wein/Goodman* ¶ 25

⁸ *Wein/Goodman* ¶ 29.

provisions. On the other hand, if the Court adopts the amendments shown in Appendix B, Rule 4.2 would direct magistrates at initial appearances to categorically deny bail based on the new statutory criteria, and Rule 7.2 would limit the issues for bail eligibility hearings to whether the proof is evident or the presumption is great in sexual conduct with a minor and child molestation cases in which defendants and victims meet the new statutory criteria. Therefore, until the constitutionality of the amendments enacted by HB 2245 is clarified, petitioner recommends the Court adopt only the amendments deleting sexual assault proposed in Appendix A to implement the *Wein/Goodman* decision.

II. Preliminary Comments. This petition has not been sent to the court community for pre-filing comments because of its technical nature and due to the short period of time since the enactment of the new statutory provisions and the issuance of the *Wein/Goodman* decision.

III. Request for Emergency Adoption. The change in the categorical treatment of sexual assault cases should be made immediately effective based on the *Wein/Goodman* decision. HB 2245 becomes effective on August 3, 2018. If the Court chooses to adopt the rule amendments implementing those changes,

petitioner recommends expedited adoption before the effective date with a formal comment period to follow, as permitted by Supreme Court Rule 28(G).

RESPECTFULLY SUBMITTED this ____ day of _____, 2018.

By _____
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Appendix A

Arizona Rules of Criminal Procedure

Rule 4.2. Initial Appearance

(a) Generally. At an initial appearance, the magistrate must:

(1) - (7) [No change]

(8) determine whether probable cause exists to believe:

(A) the defendant committed a capital offense, ~~a sexual assault~~, or any felony offense committed while the person was on pretrial release for a separate felony charge; or

(B) [No change]

(9) - (11) [No change]

Rule 7.2. Right to Release

(a) [No change]

(b) Before Conviction: Defendants Charged with an Offense Not Eligible for Bail.

(1) *Not Eligible Based on Commission of a Specified Felony or Any Felony While on Pretrial Release.* A defendant must not be released if the court finds the proof is evident or the presumption great that the defendant committed:

(A) a capital offense; ~~or a sexual assault; or~~

(B) [No change]

(2) - (4) [No change]

(c) - (d) [No change]

Appendix B

Arizona Rules of Criminal Procedure

Rule 4.2. Initial Appearance

(a) **Generally.** At an initial appearance, the magistrate must:

(1) - (7) [No change]

(8) determine whether probable cause exists to believe: ~~(A)~~ the defendant committed:

(A) a capital offense; ~~a sexual assault; or~~

(B) any felony offense committed while the person was on pretrial release for a separate felony charge.;

(C) sexual conduct with a minor under either of the following circumstances:

(i) at the time of the offense, the person was at least eighteen years of age and the victim was under thirteen years of age.

(ii) at the time of the offense, the victim was thirteen or fourteen years of age and the person was at least ten years older than the victim;

(D) molestation of a child under either of the following circumstances:

(i) at the time of the offense, the person was at least eighteen years of age and the victim was under thirteen years of age.

(ii) at the time of the offense, the victim was thirteen or fourteen years of age and the person was at least ten years older than the victim; or

~~(B)(E) the defendant committed~~ a felony for which release on bail is prohibited because the defendant poses a substantial danger and no conditions of release will reasonably assure the safety of the victim, any other person, or the community based on the considerations provided in Rule 7.2(b)(3);

(9) if the court determines that the defendant is not eligible for bail based on a determination under (a)(8)~~(A) or (B)~~, schedule a bail eligibility hearing in superior court as required under Rule 7.2(b)(4).

(10 and 11) [No change]

(b) and (c) [No change]

Rule 7.2. Right to Release

(a) [No change]

(b) Before Conviction: Defendants Charged with an Offense Not Eligible for Bail.

(1) *Not Eligible Based on Commission of a Specified Felony or Any Felony While on Pretrial Release.* A defendant must not be released if the court finds the proof is evident or the presumption great that the defendant committed:

(A) a capital offense; ~~or a sexual assault; or~~

(B) any felony offense while the defendant was on pretrial release for a separate felony charge;

(C) sexual conduct with a minor under either of the following circumstances:

(i) at the time of the offense, the person was at least eighteen years of age and the victim was under thirteen years of age.

(ii) at the time of the offense, the victim was thirteen or fourteen years of age and the person was at least ten years older than the victim; or

(D) molestation of a child under either of the following circumstances:

(i) at the time of the offense, the person was at least eighteen years of age and the victim was under thirteen years of age.

(ii) at the time of the offense, the victim was thirteen or fourteen years of age and the person was at least ten years older than the victim.

(2) - (4) [No change]

(c) – (d) [No change]