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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the matter of PETITION TO AMEND ARIZONA RULES OF CRIMINAL PROCEDURE RULE 4.1	R-08-0005 **COMMENT ON PROPOSED AMENDMENT TO ARIZONA RULES OF CRIMINAL PROCEDURE 4.1**

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Robert J. Hirsh, the Pima County Public Defender, files this comment supporting the amendment of Rule 4.1.[1] to affirm that the presence of a defense attorney is required at the initial appearance. Rule 4.2(a)(5) provides that counsel shall be appointed at the initial appearance for those who are eligible. It does not indicate whether counsel is appointed before or after the decisions on release and on the preliminary hearing are made. This amendment will clarify that Rule 4.1 is consistent with Rule 6.1, which provides "[a] defendant shall be entitled to be represented by counsel in any criminal proceeding, except in those petty offenses

[1]All references to Rules are to the Arizona Rules of Criminal Procedure unless otherwise specified.

such as traffic violations where there is no prospect of imprisonment or confinement after a judgment of guilty." The comment to Rule 6.1 explains:

> This section entitles the defendant to the aid of counsel during all phases of the criminal process from an arrest or grand jury proceeding and **initial appearance** through a preliminary hearing and competency hearing, if any, trial or plea, sentencing hearing, sentencing, appeal, post conviction proceeding, and probation revocation.

(Emphasis added.) The proposed amendment is necessary to assure that arrestees are represented by counsel as required by Rule 6.1.

Several important things take place at the initial appearance. The arrestee is informed of the charges and his or her rights, and the magistrate determines probable cause for detention,[2] and whether the arrestee is eligible for release and, if so, the conditions of release. Rule 4.1(a)(2), (3), (4), (6) & (7); Rule 7.4(a). Most arrestees also have a chance to decide whether to waive or to demand a preliminary hearing. Rule 4.1(c); Rule 5.1(b) & (d). Rule 7.2(a) provides that "[a]ny person charged with an offense bailable as a matter or right **shall** be released pending or during trial on the person's own recognizance" unless the

[2]In practice, in Pima County there are two determinations of probable cause. Shortly before the initial appearance, a police officer is sworn and reads the interim complaints filled out by the arresting officer to the magistrate. The magistrate determines whether there is probable cause. This fulfills the requirement of Rule 2.4(a), that a magistrate determine probable cause for the complaint based on sworn testimony. The initial appearances are then held but the magistrate does not determine whether there was probable cause for detention as required by Rule 4.2(a)(4).

court determines that it will not assure the person's appearance. (Emphasis added.) The presence of a defense attorney insures that the magistrate has all of the necessary information to decide whether a person should be released, and if so, under what conditions. Furthermore, in some instances counsel has been able to point out that the alleged facts do not constitute an offense. In Pima County the presence of defense counsel at initial appearances has resulted in an increase in the number of people released, saving the county money and preventing major disruptions in many arrestees' lives. The presence of defense counsel also insures that the arrestees understand their right to remain silent, lessening the chance the admissibility of statements at the initial appearance will have to be litigated, and their right to a preliminary hearing.

The amendment is also consistent with the ABA Standards for Criminal Justice, Third Edition (2007), Pretrial Release, Standard 10-5.10(a)(i), which states that "[a]t any pretrial detention hearing, defendants should have a right to: (i) be present and be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed; . . . ."

The Impact of the Release Decision on the Person and the County.

The decision on whether the arrestee is eligible for release and, if so, the amount of bond, is of critical importance to both the arrestee and the county. If a person is not released at the initial appearance, Rule 7.4 provides for a review of the conditions for release. A second hearing increases costs; it is much more efficient to have the issue of release resolved at the initial appearance.

The requirement for notification of victims, A.R.S. § 13-4409, and busy court dockets mean that it is typically at least a week before conditions are modified. Detention can result in the arrestee's loss of employment. Many people live from paycheck to paycheck, and the loss of a job can lead to homelessness. Detention also destroys the ability to fulfill family responsibilities, such as care of children, the disabled, or the elderly. The disruptions caused by needless incarceration of the arrestee will lead to increased costs to the county or state in supporting the arrestee's dependants, and in aiding the arrestee to support himself and herself if he or she is released after a week or more of detention. It is therefore critical that a lawyer be present at the initial appearance to increase the chance that the magistrate makes a decision that does not need to be corrected later.

Detaining people who should be released also costs the county more because the county must house and feed more people in jail. In Pima County an assistant public defender has been present at all initial appearances since April 2006. The release rate was 35-36 % during the period from July to December 2005. It increased to 40.2 % for the period from July to December 2006. Based on the average daily cost of maintaining a person in jail, this has saved Pima County at least $2,604,000 in incarceration costs in only one year. These savings offset the comparatively low costs of providing counsel at initial appearances.

What Counsel Does at the Initial Appearance.

The aid of counsel is important at the initial appearance because a person who has just been arrested and who may have spent the night in jail is disoriented, afraid, frustrated, and perhaps angry, and therefore rarely able to present even the minimal arguments needed at an initial appearance. Even without the confusion resulting from arrest, many arrestees are impaired by mental disorders or intellectual deficits. Furthermore, the arrestee is not a trained attorney and will not understand the procedure or what to say. Indeed, he or she may believe admitting guilt is the best chance of getting on the right side of the magistrate or explaining why he or she should be held on less bail than

others. *See, e.g., Fenner v. State*, 846 A.2d 1020, 1023-24 (Md. 2004). Or the arrestee's statements may be rambling or incoherent. In contrast, a lawyer is aware of the information that is important for the determination of release and how to present it clearly. This means that more people are likely to be released, fulfilling the requirement of Rule 7.2(a) that arrestees shall be released on their own recognizance if it will assure their presence at future proceedings, and lessening the cost to the county or state caused by keeping the arrestee in jail and by providing aid to the arrestee's dependants if they cannot support themselves without the arrestee's aid.

In Pima County and some other Arizona counties, pretrial services ("PTS") evaluates the arrestee and recommends whether he or she should be released without having to post bond, as well as the appropriate conditions of release. A separate evaluation and input by a defense attorney increases the probability that all facts are discovered and properly evaluated. For example, community ties and length of time in the community are factors that must be considered in determining release. A.R.S. § 13-3967(B)(4) & (8). PTS meets with an arrestee once, sometimes late at night or early in the morning. Frequently PTS cannot contact employers, landlords, or family members because the person is not available at the time PTS calls either because of the early or late

hour or simply because they are not there. The attorney can call those people again. Sometimes the arrestees are hesitant to give information to anyone but a lawyer because they recognize some legal risk. The attorney can determine the best person to call to verify community ties. Housing and employment are important factors in decisions to release on the arrestee's recognizance or release to PTS because they demonstrate ties to the community. A.R.S. § 13-3967(B)(4). In some instances the attorney can convince the person contacted of the importance of continuing to provide the arrestee with housing or employment. All of these things save the county and state money by decreasing the number of people in jail and decreasing the number of dependant's who need state or county support. Furthermore, having the correct information at the initial appearance will save money by making it unnecessary to conduct a hearing to modify release conditions.

The mental health status of the arrestee is also an important issue in determining release. A.R.S. § 13-3967(B)(4). If an arrestee is living in a group home or assisted living, the attorney may be able to contact the person in charge and obtain information about the arrestee's cognitive and behavioral health issues and medication and care needs. The arrestee may be receiving care from a behavioral health provider in the community and the magistrate frequently

decides that the continuing treatment being provided justifies release. Such an arrestee may be receiving supplemental security income ("SSI") which will be cut off after 30 days incarceration. 42 U.S.C. § 1382(e)(1)(A). This would result in loss of housing, medication, and other things that the arrestee needs. When this information is brought to the attention of the magistrate, he or she may decide to release the client to PTS. In all of these cases a defense lawyer at the initial appearance can work to assure that the arrestee can continue to function in society. This is an obvious benefit to the arrestee, but it is also a benefit to the county and state, which may pay less to keep the arrestee functioning in the community that the cost of supporting the arrestee in jail.

The lawyer also knows the meaning of the charge and can point out when the facts alleged in the probable cause statement do not establish the elements of the charged offense. This would result in a dismissal of the charges and release of the arrestee. It is less costly to resolve the case early. A lawyer will know what information may prejudice the arrestee in later proceedings and can advise the arrestee of his or her Fifth Amendment right to remain silent. Many arrestees are willing to spend as much time as possible at the initial appearance believing that the more they talk, the more likely they will be released. The attorney can instruct them on what kind of statements are necessary and what

kind of statement will damage their case,[3] making it unnecessary to litigate the issue before trial, thus saving money.

Proposition 100.

The passage of Proposition 100 has made assistance of counsel at the initial appearance even more important. This comment incorporates the Arizona Public Defenders' Association Comment, filed on June 15, 2007, to the Petition to Amend Rules 4.2, 7.2, 7.4, 27.7 and 31.6, filed by David K. Byers as a result of Proposition 100 and subsequent enabling legislation. As Mr. Byers' petition demonstrates, Proposition 100 has changed the significance of the initial appearance. Proposition 100 amended Article 2 § 22(A) of the Arizona Constitution. Section 22(A) lists several situations in which bail may not be granted if "the proof is evident or the presumption great," including "serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally." Art. 2 § 22(A)(4). The prosecutor has the burden of establishing the factual issues to support the denial of release or bail, including whether the person charged has entered or remained in the United States illegally. Rule 7.2(d). Thus the prosecutor must appear at the initial appearance and present evidence to the magistrate. Arrestees need to be

[3]In Pima County a court reporter is not present, but audio and video recordings are made which could be used as evidence of the arrestee's admissions.

represented by counsel in order to meet the prosecution's arguments. Arrestees do not understand probable cause, much less the heightened burden of proof required by Proposition 100. They do not know that, when a grand jury issues an indictment, it only determines whether there is probable cause to believe an offense occurred, and that indictments therefore do not establish that "proof is evidence or the presumption great" that the offense occurred. Thus, without counsel detainees will remain in jail when they should have been released, increasing costs. Costs will also be increased because the issue of whether proof was evident or the presumption great will be litigated at a separate hearing.

A lay person is also unlikely to be able to address arguments that he or she has entered or remained in the country illegally. For example, an arrestee may not know that he or she has "derivative citizenship," which would defeat a finding that he or she "entered or remained illegally" in this country, even if he or she were born in Mexico. Derivative citizenship is present when one of the arrestee's parents was born in the United States. *See* 8 U.S.C. § 1401. Once again, this will result in the detention of people who should be released and increased costs both in housing the arrestees and in litigating the issue at a later date.

Preliminary Hearing.

Release conditions are not the only important decision made at the initial appearance; an arrestee may waive a preliminary hearing or demand one "as soon as practical." Rule 4.1(c); Rule 5.1(b) & (d).[4] The right to an early preliminary hearing was not implemented in Pima County until attorneys began to represent arrestees at the initial appearance. Rule 5.1(a) requires the magistrate to set a preliminary hearing for defendants in custody no later than 10 days after the initial appearance.[5] Before arrestees were represented by counsel,

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[4]The framers of the Arizona Constitution considered the preliminary hearing to be an important alternative to the grand jury. *See, e.g.*, Delegate Cunningham's statement at the Arizona Constitutional Convention:

> Of course the gentleman from Cochise also knows the abuse of the authority reposed in the lower courts as well as the higher, but I am in favor of the adoption of this proposition because it gives each person a hearing within a very short period of time without waiting the action of a grand jury and because that person, if he can secure protection at all, can do so before his district attorney. Again, it is a very great saving of time and expense to grant a prompt hearing to persons charged. In a court of this kind he can have his witnesses there for his defense and that is the quickest and least expensive hearing that a person can be given. It is a real preliminary hearing and he has a right to a preliminary hearing. The grand jury system of this territory is in great error under the present system. I am progressive enough to put such a law, such protection of law, into our constitution. I am ready, and I have already raised my voice in this hall in defense of the courts, but I feel that this is the safest, the best, the most certain and the least expensive method of granting the people a preliminary hearing, and an early hearing before our courts of justice.

The Records of the Arizona Constitutional Convention of 1910, p. 169 (no year, John S. Goff, ed.).

[5]The deadline is 20 days for defendants who are not in custody. *Id.*

the magistrates routinely set preliminary hearing for ten days after the initial appearance, or the first non-vacation day thereafter. Prosecutors usually present the case to the grand jury for indictment before the preliminary hearing, thus negating the arrestee's right to have a preliminary hearing if desired.

Defense Counsel is Necessary When a Prosecutor is Present at the Initial Appearance.

Defense counsel is especially important when a prosecutor is present to argue the state's case. A survey of all counties indicates that prosecutors are only present at all initial appearances in Maricopa and Pima Counties. In Navajo and Pinal Counties, prosecutors do not appear at initial appearances at all. In the remaining eleven counties prosecutors appear at initial appearances in high profile cases, where the state wishes to obtain high bail, or where the case involves special circumstances. Prosecutors are present in all counties when a person has been arrested on a warrant, when there is an initial appearance on a probation revocation, or where the initial appearance occurs at the same time as the arraignment. This indicates that county attorneys throughout Arizona believe that the state's interests at the initial appearance are best protected by the presence of counsel. That is true of indigents as well.

Except in Pima and Pinal counties, attorneys are not present at initial appearances for indigent arrestees. An attorney is appointed at the initial

appearance, Rule 4.2(a)(5), but is not there for the actual initial. Sometimes the notification of appointment is not received by the indigent defense agency or lawyer for several days. When the prosecutor does choose to make an appearance at the initial appearance for high profile or high bond cases no notification is given or provision is made for counsel for the person charged. Thus, the best way to assure that indigent arrestees are represented when prosecutors are present at the initial appearance is to have an attorney present at initial appearances for arrestees in all cases.

Sixth Amendment Right to Counsel.

There is also a right to counsel at the initial appearance under the Sixth Amendment to the United States Constitution and art. 2, § 24 of the Arizona Constitution. The question of whether the Sixth Amendment right to counsel attaches at the initial appearance is currently under consideration by the United States Supreme Court in *Rothgery v. Gillespie County*, No. 07-440. Oral Argument was held on March 17, 2008. The United States Supreme Court has long recognized that the average person untrained in the law cannot protect his or her rights without the aid of counsel. It has noted that even an intelligent and educated lay person "lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of

counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell v. State of Ala.*, 287 U.S. 45, 69, 53 S.Ct. 55, 64 (1932). The Sixth Amendment:

> embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer-to the untrained layman-may appear intricate, complex, and mysterious.

Johnson v. Zerbst, 304 U.S. 458, 462-63, 58 S.Ct. 1019, 1022 (1938). *See also Evitts v. Lucey*, 469 U.S. 387, 394 n.6, 105 S.Ct. 830, 835 (1985) ("counsel's role [is] that of expert professional whose assistance is necessary in a legal system governed by complex rules and procedures for the defendant to obtain a decision at all – much less a favorable decision – on the merits of the case."). The examples given above make it clear why counsel is needed to steer arrestees through the initial appearance process.

In cases dealing with police questioning, the Court has held that the right to counsel attaches at the "arraignment on the warrant," which is equivalent to an initial appearance *Brewer v. Williams*, 430 U.S. 387, 398, 97 S.Ct. 1232, 1239

(1977); *Michigan v. Jackson*, 475 U.S. 625, 629, 106 S.Ct. 1404, 1407 (1986).[6] In *United States v. Gouveia*, 467 U.S. 180, 187-89, 104 S.Ct. 2292, 2297-98 (1984), the Court concluded that "given the plain language of the Amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary, our conclusion that the right to counsel attaches at the initiation of adversary judicial criminal proceedings 'is far from a mere formalism.'" (*Quoting Kirby v. Illinois*, 406 U.S.682, 689, 92 S.Ct. 1877, 1882 (1972).) Criminal felony proceedings are initiated by the filing of a complaint. Rule 2.2(b). In Pima County the complaint is sworn before the initial appearance. Thus, the right to counsel has attached. Furthermore, as described in an earlier section, prosecutors are present at all initial appearances in Pima and Maricopa counties and at selected initial appearances in other counties. This is therefore a "confrontation[] with his adversary" and the adversary is represented by counsel. Finally, a majority of the United States Supreme Court has agreed that the determination of bail is a "critical stage" in the proceedings. *Coleman v. Alabama*, 399 U.S. 1, 9-10, 90 S.Ct. 1999, 2003 (1970) (plurality); 399 U.S. at 12, 90 S.Ct. at 2005 (concurrence by Justice Black). As described in a previous

[6]Arraignment on the warrant is the equivalent of the initial appearance. 1 LaFave et al., Criminal Procedure § 1.3(k) at 113 n. 176, § 1.3(o) at 124-25(2ed. 1999); 1A Gillespie, Michigan Criminal Law and Procedure § 16.1 (2007).

section, the fact that release conditions can be reconsidered under Rule 7.4 does not prevent unnecessary harm to the arrestee and unnecessary expense to the county.

The United States Supreme Court may very well make it clear that the Sixth Amendment requires the presence of defense counsel at initial appearances. However, whichever way it rules, Arizona law, as reflected in Rule 6.1, requires the presence of counsel at initial appearances independent of any requirement of the Sixth Amendment. Indeed, the United States Supreme Court has itself adopted a rule requiring counsel for arrestees at initial appearances, independent of any constitutional right. *See*, Fed. R. Crim. P. 44(a).

Procedure for Implementing Representation.

All Arizona counties do not have Public Defender's Offices. For those that do, the statute specifying the powers of the public defender's office authorizes representation by the public defender at the initial appearance. A.R.S. § 11-584(A) provides that:

> 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.

(Emphasis added.) As this Court has held "the law requires only that a court order the appearance and the matter to be heard involves an offense of a type 'triable' in superior court, not that the specific matter actually be heard there. Nor does the statute limit the public defenders' appearance to trial proceedings, appeal proceedings, or state habeas corpus proceedings." *Smith v. Lewis*, 157 Ariz. 510, 513-14, 759 P.2d 1314, 1317-18 (1988). The initial appearance is clearly a "stage in the proceedings," and the public defender therefore has a statutory duty to represent arrestees when appointed by the court. When the statute says "all stages" it means all stages, including the initial appearance. Thus, this Court can require the appointment of the public defender's office at the initial appearances without exceeding the limitations put on the public defender's office by the Legislature, provided an initial determination of indigency is made. However, an initial determination of indigency must be made at the initial appearance since the magistrate must appoint counsel for those who qualify. Rule 4.2(a)(5). Arguably, the time constraints of the initial appearance permit a less thorough determination of indigency than is required at later proceedings. *See Office of Public Defender v. State*, 714 So.2d 1083, 1086-87 &

n. 16 (Fla.App. 1998) (Sorondo, J., specially concurring). In fact Pima County collects less information about the arrestee's financial condition at initial appearances than it does before the subsequent arraignment. In Pima County a single public defender attends initial appearances and serves as counsel for all indigent arrestees.

Conclusion

The proposed amendment should be adopted because it will save county government money and protect the rights of arrestees.

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