

1 WILLIAM G. MONTGOMERY  
2 MARICOPA COUNTY ATTORNEY

3 MARK C. FAULL  
4 CHIEF DEPUTY  
5 (FIRM STATE BAR NO. 00032000)  
6 301 WEST JEFFERSON STREET, SUITE 800  
7 PHOENIX, ARIZONA 85003  
8 TELEPHONE: (602) 506-3800  
9 (STATE BAR NUMBER 011474)

10 **ARIZONA SUPREME COURT**

11 **PETITION TO MODIFY RULES 5.4,**  
12 **7.2, and 7.4, ARIZONA RULES OF**  
13 **CRIMINAL PROCEDURE**

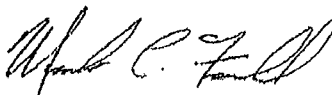
R-19-\_\_\_\_\_

MARICOPA COUNTY ATTORNEY'S  
PETITION TO MODIFY RULES 5.4, 7.2, AND  
7.4 ARIZONA RULES OF CRIMINAL  
PROCEDURE

14 The Maricopa County Attorney hereby asks this Court to modify Rule 5.4(a),  
15 7.2(b), and 7.4(b)(3) of the Arizona Rules of Criminal Procedure to permit appropriate  
16 findings at any bail eligibility hearing to satisfy the requirement of a probable cause  
17 determination and to permit necessary continuances. This request is further explained  
18 in the attach Memorandum of Points and Authorities.  
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20 Respectfully submitted this 18 day of January, 2019.

21 WILLIAM G. MONTGOMERY  
22 MARICOPA COUNTY ATTORNEY

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25 By \_\_\_\_\_  
26 MARK C. FAULL  
27 CHIEF DEPUTY  
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## MEMORDANUM OF POINTS AND AUTHORITIES

### I. Introduction

Last year this Court substantially modified several criminal rules effective April 2, 2018 based on a petition filed by the Task Force on Fair Justice for All. [Order, R-17-0015, filed 9/28/2017]. The change to Rule 7.2 requires courts to hold bail eligibility hearings within seven days of an initial appearance when a defendant is held without bail. ARIZ. R. CRIM. P. 7.2(b)(4)(B). Having worked with the new rules for eight months, it is apparent that the rules need some modifications to make the bail eligibility and preliminary hearing process more efficient while still accomplishing the goals of this Court's task force.

### II. Argument

#### **A. The criminal rules should be modified to eliminate the requirement for two separate probable cause determinations to hold a defendant to answer in superior court.**

When a defendant is charged with a felony by a complaint, the defendant has a right to a preliminary hearing within 10 days of the initial appearance if the defendant is held in custody. ARIZ. R. CRIM. P. 5.1(a). At the preliminary hearing, if a judicial officer does not find probable cause exists, the case will be dismissed. ARIZ. R. CRIM. P. 5.4(d). If the court finds probable cause to believe a crime was committed and the defendant committed it, the court must hold the defendant to answer for the offense in superior court. ARIZ. R. CRIM. P. 5.4(a).

1 In addition to the right to a preliminary hearing, if a court finds a defendant  
2 ineligible for bail at the initial appearance, that defendant has the right to a bail  
3 eligibility hearing within seven days. ARIZ. R. CRIM. P. 7.2(b)(4)(B). Both preliminary  
4 hearings and bail eligibility hearings are evidentiary hearings where the parties have  
5 the right to call witnesses, cross examine witnesses, and present relevant evidence.  
6 ARIZ. R. CRIM. P. 5.3, 7.4. Thus, if a defendant was on release for a felony when he or  
7 she committed a new felony offense, the court must conduct two evidentiary hearings  
8 to test the sufficiency of the evidence within just a few days of each other.  
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11 As currently written, Rule 5 and Rule 7.2 create significant inefficiencies due to  
12 the need to have multiple evidentiary hearings.<sup>1</sup> There are several problems with the  
13 new rules that create these illogical and inefficient results. First, the language of Rule  
14 7.2(b)(4)(C) is peculiar because it specifically references the “probable cause  
15 determination at the [bail eligibility] hearing,” but does not discuss the actual focus of  
16 the hearing which is determining whether there is proof evident or presumption great.  
17 In fact, the rule only directs a court to consider probable cause after the court has not  
18 found the proof evident or the presumption great. ARIZ. R. CRIM. P. 7.2(b)(4)(C). Rule  
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23 <sup>1</sup> The inefficiencies in having multiple judicial officers (or a grand jury in addition to  
24 a judicial officer) make probable cause determinations are significant considering the  
25 number of cases that need a bail eligibility hearing. From April 2, 2018 through  
26 December 2018, more than 1900 bail hearings have been set in Maricopa County in  
27 cases where felony charges were filed after the initial appearance and the defendants  
28 were held without bail because they were accused of committing the newly charged  
offense while on release for a felony offense.

1 7.2 is completely silent as to how a finding of proof evident or presumption great  
2 impacts probable cause under Rule 5. Presumably, because proof evident or  
3 presumption great is a higher burden of proof than probable cause,<sup>2</sup> if a court finds the  
4 higher standard that finding is treated the same as the probable cause referenced in the  
5 rules, but that interpretation is not clear in the current text.  
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7 Second, under Rule 7.2, a probable cause or, presumably, a proof evident or  
8 presumption great determination at a bail hearing only satisfies the probable cause  
9 determination required in Rule 5 if the parties stipulated to that procedure before the  
10 hearing. *Id.* Rule 5.4(a) states that if a probable cause determination is made at a bail  
11 hearing, that finding satisfies the requirements of Rule 5.<sup>3</sup> Although Rule 5.4(a) does  
12 not specifically mention a stipulation, reading the two rules together suggests that the  
13 probable cause determination at a bail hearing only satisfies the requirements of Rule  
14 5 if there was a stipulation. But such a stipulation is completely unnecessary. Bail  
15 eligibility hearings, like preliminary hearings, are evidentiary hearings with the same  
16 rights to present evidence and cross examine witnesses. A court's finding of probable  
17 cause (or the higher proof evident or presumption great standard) after a bail eligibility  
18 hearing should have the same force as it does after a preliminary hearing.  
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25 <sup>2</sup> *Simpson v. Owens*, 207 Ariz. 261, 271-72, ¶ 31, 85 P.3d 478, 488-89 (App. 2004)

26 <sup>3</sup> Note that Rule 5.4(a) is also silent as to the effect of a proof evident or presumption  
27 great finding. But, again, because probable cause is a lower standard one would assume  
28 that the higher finding would be treated the same because any other reading would be  
nonsensical.

1 Experience in Maricopa County has shown that defendants have little incentive to  
2 stipulate that a bail eligibility hearing will serve as a probable cause hearing and few  
3 do. The result is a needless waste of time and resources for the State, the witnesses,  
4 and the courts. While clogging court calendars and spending a prosecutor's time to re-  
5 prove probable cause a second time is bad enough, it is even worse for the witnesses  
6 who are almost always police officers. Requiring a second evidentiary hearing pulls  
7 police officers away from their public safety duties to have them sit in courtrooms  
8 waiting for hearings on congested calendars. If they are attending hearings to seek  
9 justice for a victim or to uphold a defendant's substantive rights, that is time well spent.  
10 But when they are using that time to have a judge or grand jury find what has already  
11 been proven a few days before, they are wasting time that should be spent performing  
12 their important role in the community. If a court finds that the State has shown proof  
13 evident or presumption great or probable cause that a defendant committed an offense  
14 at a bail eligibility hearing, the defendant should be held to answer on that charge  
15 without the need for a second hearing before another judicial officer to make the same  
16 (or lesser) finding.

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22 This petition seeks to correct these problems by giving the State the option to apply  
23 a court's proof evident or presumption great or probable cause finding at a bail  
24 eligibility hearing to the probable cause requirement in Rule 5.4. Giving the State the  
25 option of applying these findings is more efficient and reasonable than the current  
26 stipulation requirement.  
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1 Giving the State the option to apply the findings from a bail eligibility hearing to  
2 Rule 5 rather than just making it mandatory is necessary to prevent unintended  
3 problems. In some complex cases with many counts, the State elects to only prove  
4 proof evident or presumption great on a few counts at the bail eligibility hearing to save  
5 the court time on calendars that usually have many bail hearings set in one morning or  
6 afternoon session. Having to present all the evidence needed to show proof evident or  
7 presumption great for the entire case in these situations would be extremely inefficient.  
8  
9 If the rules required a court to hold the defendant to answer under Rule 5.4(a) whenever  
10 the necessary findings were made in a Rule 7 hearing, in these complex cases the  
11 defendant would be held to answer on only a few charges requiring a grand jury  
12 indictment or preliminary hearing on the rest of the charges. This would result in  
13 confusion with case numbers and the need to eventually either consolidate the two  
14 cases or to dismiss one and proceed on the other. This needless confusion can be  
15 avoided if the rule simply gives the State the option to have the defendant held to  
16 answer after a successful bail eligibility hearing. In those cases where the State has  
17 presented sufficient evidence on all the charges, the defendant will be held to answer;  
18 in more complex cases the State can elect to expedite the bail hearing by only focusing  
19 on a few charges and later seek a probable cause determination on all the charges  
20 through a different method.  
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26 The proposed changes will continue to allow the State to obtain a probable cause  
27 determination within the full time limits of Rule 5 following an unsuccessful bail  
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1 eligibility hearing. In some rare situations, the State may not be able to present the  
2 right witness or the right evidence within the shorter seven day time limit required for  
3 a bail eligibility hearing. In those situations, the State should still have the full time  
4 permitted under Rule 5 to establish probable cause which, in this situation, would be  
5 20 days from the initial appearance because the defendant will be released from  
6 custody. *See* Ariz. R. Crim. P. 5.1(a). The proposed rule change will require a  
7 defendant's release if probable cause is not established at the bail eligibility hearing  
8 but will still permit the State to request a preliminary hearing under Rule 5. This  
9 procedure will avoid unnecessary delays associated with refiling cases.  
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12 In addition to these substantive changes, the petition also recommends some  
13 stylistic changes to Rule 7.2(b)(4)(C) to break up the large text block and make the rule  
14 easier to follow. The petition also requests a minor modification to Rule 7.4 to conform  
15 that rule to the proposed Rule 7.2.  
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18 **B. The bail eligibility rules must permit a court to grant a continuance for**  
19 **extraordinary circumstances.**

20 While A.R.S. § 13-3961(E) explains the timing for bail hearings that are requested  
21 by the State within 24 hours of the initial appearance, Rule 7.2(b)(4)(B) controls the  
22 timing of all other bail eligibility hearings. As noted above, that rule requires a bail  
23 eligibility hearing within seven days of the initial appearance unless an earlier hearing  
24 is practicable. ARIZ. R. CRIM. P. 7.2(b)(4)(B). Given the volume of these hearings due  
25 to allegations that defendants have committed new felony offenses while on release for  
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1 a felony, courts, at least in Maricopa County, can only set these hearings on or very  
2 near the seventh day.

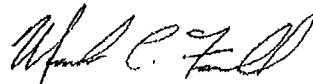
3 The current rule seems to allow a continuance only when the defendant requests  
4 one. *Id.* Yet, in practice, there have been situations where unexpected events, outside  
5 the prosecutor's control, prevent a hearing by the deadline. In Maricopa County, for  
6 example, there have been several cases where the defendant, due to errors by the court  
7 or the jail, has not been transported to court for the hearing. In at least one case, a  
8 defendant was not medically able to be transported to court. In these circumstances,  
9 the defense attorney is in no position to waive the defendant's presence for the  
10 evidentiary hearing and they have no incentive to ask for a continuance. In these  
11 situations, some courts read the rule as requiring them to set a bond because the hearing  
12 did not occur by the deadline even though the prosecution had nothing to do with the  
13 delay. Thus, a potentially dangerous individual can be released into the community on  
14 what amounts to a technical glitch in the system. This result threatens public safety  
15 with little justification. Like the other criminal rules, the bail eligibility rule should  
16 allow a court to exercise its discretion to continue a hearing when extraordinary  
17 circumstances exist. In most situations, this will require a one-day delay although it  
18 could as many as three days if the seventh day falls on a Friday before a Monday  
19 holiday. The rule must allow for flexibility so courts can address unexpected situations  
20 in a way that balances a defendant's rights with the safety of the community.  
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**III. Conclusion**

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2 The requested modifications to the current rules will not change or reduce a  
3 defendant's substantive rights. A defendant will continue to have the right to an  
4 expedited bail eligibility hearing and they will have the right to have an independent  
5 determination of probable cause. These changes will only make the overall process  
6 more efficient by eliminating a redundant evidentiary hearing and giving the court  
7 flexibility to deal with unexpected circumstances fairly. For all these reasons, the  
8 Maricopa County Attorney asks this Court to grant this petition to modify Rules 5.4,  
9 7.2, and 7.4 as proposed below.

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11 Respectfully submitted this 10 day of January, 2019.

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14 WILLIAM G. MONTGOMERY  
15 MARICOPA COUNTY ATTORNEY

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17 By \_\_\_\_\_  
18 MARK C. FAULL  
19 CHIEF DEPUTY

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**PROPOSED MODIFICATIONS TO RULES 5.4(a), 7.2(b), and 7.4(b)(3),**  
**ARIZONA RULES OF CRIMINAL PROCEDURE**

**RULE 5.4**

- (a) **Holding a Defendant to Answer.** If a magistrate finds that there is probable cause to believe that an offense has been committed and that the defendant committed it, the magistrate must file a written order holding the defendant to answer for the offense before the superior court. Upon request, the magistrate may reconsider the conditions of release. UPON THE STATE'S REQUEST, ¶this rule's requirements are satisfied if a probable cause OR PROOF EVIDENT OR PRESUMPTION GREAT finding was made at a bail eligibility hearing under Rule 7.2(b)(4).
- (b) [No Change]  
(c) [No Change]  
(d) [No Change]

**RULE 7.2**

- (a) [No Change]
- (b) **Before Conviction: Defendants Charged with an Offense Not Eligible for Bail**
- (1) [No Change]  
(2) [No Change]  
(3) [No Change]  
(4) *Bail Eligibility Hearing*  
(A) [No Change]  
(B) **Timing.** If the State makes an oral motion under A.R.S. § 13-3961(E), the court must hold this hearing within 24 hours of the initial appearance, subject to continuances as provided in A.R.S. § 13-3961. If this motion is not made, the hearing must be held as soon as practicable, but no later than 7 days after the initial appearance unless the detained defendant moves for a continuance OR THE COURT FINDS THAT EXTRAORDINARY CIRCUMSTANCES EXIST.  
(C) **Determination of Probable Cause and Release Conditions.** If the court does not find the proof evident or the presumption great under (b)(1) or (b)(2)(A), the court must determine whether there is probable cause to believe that an offense was committed and that the defendant committed it.

1 (i) PROBABLE CAUSE FOUND. If the court finds probable cause,  
the court must determine release conditions under (a).

2 (ii) NO PROBABLE CAUSE FOUND. If the court does not find  
3 probable cause, the defendant must be released from custody.  
4 ~~The parties may stipulate before the bail eligibility hearing that~~  
5 ~~the probable cause determination at the hearing satisfies the~~  
6 ~~requirements of Rule 5. If the parties so stipulate and the court~~  
7 ~~does not find probable cause, the court must dismiss the~~  
8 ~~complaint and discharge the defendant. If the parties have not so~~  
9 ~~stipulated, UPON THE STATE'S REQUEST, the court must~~  
10 ~~schedule a preliminary hearing as provided in Rule 5.1(a). IF~~  
11 ~~THE STATE DOES NOT REQUEST A PRELIMINARY~~  
12 ~~HEARING, THE COURT MUST DISMISS THE COMPLAINT~~  
13 ~~AND DISCHARGE THE DEFENDANT.~~

14 (D) EFFECT OF FINDINGS. UPON THE STATE'S REQUEST, THE  
15 COURT MUST COMPLY WITH RULE 5.4(a) FOR ALL CRIMES  
16 WHERE THE COURT HAS FOUND THE PROOF EVIDENT OR  
17 THE PRESUMPTION GREAT, OR PROBABLE CAUSE, THAT  
18 THE DEFENDANT COMMITTED THE OFFENSE.

19 (E) [Renumbered from (D) to (E). No change to text]

20 (c) [No Change]

21 (d) [No Change]

## 22 RULE 7.4

23 (a) [No Change]

### 24 (b) **Bail Eligibility Hearing**

25 (1) [No Change]

26 (2) [No Change]

27 (3) *Admissibility*. Evidence is admissible at the hearing only if it is material  
28 to whether, and under what conditions, to release the defendant on bail  
and, ~~subject to the parties' stipulation under Rule 7.2(b)(4)(C),~~ whether  
probable cause exists to hold the defendant for trial on each charge. Rules  
or objections calling for the exclusion of evidence are inapplicable at a  
bail eligibility hearing.

(c) [No Change]

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(d) [No Change]  
(e) [No Change]  
(f) [No Change]  
(g) [No Change]