

1 **ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE**  
2 **2340 W. Ray Road, Suite 1**  
3 **Chandler, Ariz. 85224**  
4 **(480) 812-1700**  
5 **DAVID J. EUCHNER, SB#021768**  
6 **JOHN CANBY, SB#010574**

7 **IN THE SUPREME COURT OF THE STATE OF ARIZONA**

8 In the Matter of: ) No. R-08-0005  
9 )  
10 )  
11 ) **COMMENT TO PETITION TO**  
12 ) **AMEND RULE 4.1, ARIZONA**  
13 ) **RULES OF CRIMINAL**  
14 ) **PROCEDURE**  
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15 Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Arizona  
16 Attorneys for Criminal Justice (“AACJ”) hereby submits the following comment  
17 to the above-referenced petition. AACJ is a not-for-profit membership  
18 organization representing as its members over five hundred criminal defense  
19 lawyers licensed to practice in the State of Arizona, as well as law students and  
20 other associated professionals, who are dedicated to protecting the rights of the  
21 accused in the courts and in the legislature.

22 AACJ supports the above-referenced rule change petition because its  
23 implementation will result in improvement of the operation of the criminal justice  
24 system. The criminally-accused have a Constitutional right to counsel at every  
25 critical stage of the proceedings against them, and under Arizona law the initial  
26 appearance is where a magistrate makes decisions such as whether to find  
27 probable cause to bind an accused over for a preliminary hearing, whether to  
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1 schedule a preliminary hearing, and whether the accused will be released from, or  
2 held in custody.

3 Moreover, as described in greater detail in this comment, the experience in  
4 Pima County with providing defense counsel at the initial appearance shows that  
5 release rates are increased, leading to a substantial cost savings related to pre-trial  
6 incarceration.

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8 **I. The experience in Pima County proves that providing counsel at the**  
9 **initial appearance to all defendants arrested on felony charges saves**  
10 **money to the counties**

11 In Pima County, almost all defendants arrested on felony charges are  
12 booked into the main Pima County Jail and seen by a magistrate within twelve  
13 hours of booking.<sup>1</sup> The magistrate sees anywhere between three and thirty  
14 defendants in a session. A deputy county attorney is present at court and submits a  
15 “Pima County Attorney’s Office Initial Appearance Sheet” on which the  
16 prosecutor recommends a bond amount. That form also contains a series of  
17 checkboxes related to the defendant’s risk to reoffend, risk to the community,  
18 criminal record and flight risk, as well as suggested conditions of release, and the  
19 prosecutor checks all boxes that he or she believes apply in each case. Pre-Trial  
20 Services (“PTS”) interviews each defendant prior to court to obtain references by  
21 which PTS can confirm community ties. Based largely on community ties and  
22 criminal history, PTS makes a recommendation to the court that the defendant be:  
23 1) released on own recognizance; 2) released to the third-party supervision of  
24 PTS; or 3) held on bond (PTS makes no recommendations as to bond amount).

25 On April 10, 2006, the Pima County Public Defender’s Office began  
26 appearing at all initial appearances and representing all defendants arrested on

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28 <sup>1</sup> Those who are arrested within the jurisdiction of Pima County Justice Court Precinct #3 are brought instead to the Justice Court in Ajo for initial appearance. Those upon whom bond is imposed but who cannot post are later transported to the main Pima County Jail in Tucson.

1 felony charges.<sup>2</sup> Assistant public defenders meet with each defendant prior to  
2 court and then speak on the defendants' behalf during court. As an advocate for  
3 the defendants, the public defender attempts to secure more favorable release  
4 conditions wherever possible, and on occasion convinces the magistrate to dismiss  
5 charges for failure to allege facts sufficient to find probable cause for the listed  
6 offenses.

7 The public defender also delves deeper into defendants' community ties.  
8 PTS meets with the defendant only once to obtain references, and frequently those  
9 references remain unverified when court session is commencing. Furthermore,  
10 defendants' ability to communicate with the outside world is limited to the use of  
11 collect calling from pay phones (which are useless if attempting to call a cell  
12 phone), and all their personal property, including phone books or business cards,  
13 are taken from them during the booking process. The public defender is able to  
14 make calls to cell phones or to investigate telephone numbers and puts in the extra  
15 effort to find a reference who can verify community ties for PTS. As a result of  
16 these efforts, the public defenders are able to secure release for many people who  
17 would have been held in custody for reason that community ties were unverified.

18 In many borderline cases where the decision to release or hold on bond is a  
19 close call, the public defender learns a piece of information about the defendant  
20 that weighs in favor of release. A common example is a defendant who is the sole  
21 supporter of his/her family and incarceration for even a couple of days could mean  
22 the loss of employment. Many defendants are living paycheck to paycheck, and  
23 the loss of pay for even a very short period of time could mean the inability to pay  
24 the next month's rent. Sometimes, when incarceration occurs right before the rent  
25 check is due, incarceration causes the defendant to be unable to deliver the rent  
26 check. Even if all the charges are dismissed prior to the preliminary hearing and

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28 <sup>2</sup> A.R.S. §11-584(A)(1)(a) permits public defenders to provide representation "only for those offenses which by law require that counsel be provided." The Pima County Public Defender does not represent any misdemeanor defendants.

1 the defendant is released, many of these people have their lives turned completely  
2 upside down. The defendant is capable of relaying this information to the  
3 magistrate, but an attorney is able to craft the language in more compelling terms.

4 A large portion of arrestees are under care for mental illness. Frequently  
5 these arrestees are unable to participate in the PTS interview because they are  
6 delusional at the time PTS is ready for the interview, thus resulting in a  
7 recommendation against release. PTS has no authority to speak on behalf of  
8 defendants at court, and thus PTS cannot ask the judge to waive time and ask the  
9 judge to set the defendant to be seen at the next court session in twelve hours. The  
10 public defender can make a determination that the defendant is more likely to be  
11 released if the initial appearance is continued until the next court session and can  
12 assist the defendant in understanding the strategic benefits of a continuance. This  
13 then gives PTS another opportunity to conduct the interview and investigate if  
14 (and where) the defendant is receiving mental health services. Commonly, a  
15 mental health patient who is delusional at the time of arrest regains composure  
16 over the next twelve hours and provides information to PTS that in turn leads to a  
17 recommendation of release.

18 Finally, the public defender is able, in a very short period of time, to convey  
19 to the defendants the nature and substance of their right to remain silent and to an  
20 attorney, and to advise the defendants to speak about the case with no one but the  
21 appointed attorney. Regularly, defendants attempt to confess guilt to the judge in  
22 the hope that the judge will reconsider a decision to hold a defendant in custody.  
23 Attorneys who meet with the defendants prior to court can relate to the defendants  
24 that release conditions are not being set based on their guilt or innocence as to the  
25 charges, and by speaking about the charges in the audience of prosecutors, police,  
26 and jail staff, those statements can and will be used against them in later court  
27 proceedings. And, if nothing else, meeting with an attorney within twelve hours of  
28 being booked into jail helps the defendants understand what to expect in the

1 interim period until they have a chance to meet with their appointed counsel.  
2 Those held in custody are informed that the attorneys will come to the jail to meet  
3 with them soon. Those who are expected to be released are informed of their  
4 responsibility to stay in contact with their lawyer, thereby reducing the number of  
5 persons who fail to appear at the next court hearing.

6 As a direct result of the Pima County Public Defender providing this  
7 service to all defendants arrested on felony charges, the county saves  
8 approximately \$2.6 million per year on pre-trial incarceration costs.<sup>3</sup> This figure  
9 does not include savings to the county resulting from defendants who are able to  
10 post bond only because the magistrate agreed with the public defender's plea to  
11 set bond in the least onerous conditions. The cost of providing a public defender at  
12 the initial appearance is substantially less than the cost of filing motions to modify  
13 conditions of release pursuant to Rule 7.4 in every case where the defendant could  
14 otherwise have been released at the initial appearance.

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16 **II. Providing counsel at initial appearance to all defendants arrested on**  
17 **felony charges is practical in all jurisdictions in Arizona.**

18 It may be suggested that the success of the Pima County Public Defender in  
19 representing felony arrestees at their initial appearance cannot be duplicated in the  
20 rural counties. Five Arizona counties do not have a public defender office at all,  
21 and some public defender offices are populated by a handful of lawyers. In the  
22 rural counties, however, the presence of fewer lawyers correlates with fewer  
23 felony arrests.

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26 <sup>3</sup> This figure was calculated by Pre-Trial Services, based on comparing the release rate of 35 to 36% of defendants in  
27 the six-month period July-December 2005 (prior to the Public Defender representing defendants at initial  
28 appearances) and the release rate of 40.2% of defendants in the six-month period July-December 2006 (after the  
Public Defender began representing defendants at initial appearances). Assuming the conservative estimate of a  
4.2% differential in release rates that is directly tied to the Public Defender's representation, the number of  
defendants affected by that percentage multiplied by the daily cost of incarcerating a single defendant multiplied by  
144 days (Pima County's average duration of a felony case from initial appearance to sentencing) equals  
\$2,604,000.

1 Under Rule 4.1(a), all persons must be brought before a magistrate within  
2 24 hours of arrest, and under Rule 4.1(d), the presiding judge for each county is  
3 responsible for ensuring that a magistrate is available every day and that court is  
4 scheduled at a fixed time and coordinated with law enforcement. Under current  
5 rules, law enforcement and court staff are prepared to conduct initial appearance  
6 proceedings every day, including weekends and holidays. The proposed rule  
7 change adds only the presence of one other person, an attorney to represent the  
8 accused – and this attorney’s presence would be required only when the defendant  
9 is charged with an offense for which an attorney is guaranteed.

10 One would expect that attorneys who provide indigent defense services in  
11 any given jurisdiction will be assigned to be “on-call” on weekends and holidays  
12 in case there is going to be an initial appearance that requires the presence of  
13 counsel. Given that these attorneys would also be appointed to represent these  
14 defendants for future proceedings, the attorney who appears on behalf of a  
15 defendant at the initial appearance could then conduct the first client meeting  
16 while at the jail. If the magistrate determines that the defendant will be held in  
17 custody pending further proceedings, then the attorney would inevitably have  
18 been required to visit the new client at jail anyway. But as the experience in Pima  
19 County proves, the amount of time, energy and money spent in ensuring that  
20 defendants have representation at the initial appearance is far exceeded by the  
21 amount in savings to the county in incarceration costs because of the increased  
22 rate of release of defendants when there is representation.

23 Implementation of proposed Rule 4.1(e) would be left to the presiding  
24 judges of each county and there are always details that cannot be predicted outside  
25 of real-world circumstances. But the lack of perfect foresight into the future is  
26 never a reason either to avoid the implementation of rules that will better facilitate  
27 court procedures or to deny the fundamental right of access to counsel at a critical  
28 stage in the proceeding.

1 **III. Jail overcrowding is a systemic problem throughout the United States,**  
2 **and the proposed rule change would assist in alleviating this problem.**

3 It is common knowledge that the jails of America are overcrowded. The  
4 U.S. Department of Justice released a study<sup>4</sup> on the problem of jail overcrowding  
5 in 2000, and suggested as a solution that “jail administrators can help reduce the  
6 size of the jail population by improving inmates’ access to pretrial service, public  
7 defenders, mental health and substance abuse treatment providers, probation  
8 officers, and other service providers.” (*Id.* p.40.) Inherent in this statement is a  
9 recognition that many detainees in county jails are at the pre-trial, rather than post-  
10 trial, stage of proceedings. The goal is to devote expensive jail space to detain the  
11 most dangerous and serious defendants, while releasing back into the community  
12 those defendants who can remain safely in the community while their cases are  
13 pending.

14 Pima County’s experience in using attorneys at the initial appearance is  
15 similar to that in other parts of the country. For example, in Baltimore, nonviolent,  
16 lower-income offenders were two and a half times more likely to obtain release  
17 when represented by counsel as when unrepresented.<sup>5</sup> The Maryland public  
18 defender statute now guarantees representation at all stages of the proceedings,  
19 including the initial appearance. *See McCarter v. State*, 363 Md. 705, 715-16, 770  
20 A.2d 195, 200-01 (2001). The sections of Maryland law interpreted in *McCarter*  
21 is very similar to the “all proceedings” language in A.R.S. §11-584(A)(1)(a) and  
22 the “any proceeding” language in Ariz.R.Crim.P. 6.1(a).

23 Furthermore, the National Association of Pre-Trial Services Agencies  
24 recommends that counsel represent all defendants at the initial appearance stage of  
25 the proceeding so that more defendants who are of minimal risk to the community  
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27 <sup>4</sup> United States Department of Justice, Bureau of Justice Assistance, A Second Look at Alleviating Jail  
28 Overcrowding: A Systems Perspective, (October 2000):  
<http://www.ncjrs.gov/pdffiles1/bja/182507.pdf> (accessed May 16, 2008).

<sup>5</sup> Douglas Colbert et al., “Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail,” 23 *Cardozo L. Rev.* 1719, 1720 (May 2002).

1 and for failure to appear for court can be identified.<sup>6</sup> NAPSA’s Standard 2.2(d)  
2 states: “At the defendant’s first appearance, he or she should be represented by  
3 counsel. If the defendant does not have his or her own counsel at this stage, the  
4 judicial officer should appoint counsel for purposes of the first appearance  
5 proceedings, and should ensure that counsel has adequate opportunity to consult  
6 with the defendant prior to the first appearance.” (*Id.* p.27.)

7 There is a nationwide trend to provide counsel to defendants at the initial  
8 appearance, and Arizona has an opportunity, with the adoption of the proposed  
9 rule change to Rule 4.1, to join in a nationwide trend to reduce costs, alleviate jail  
10 overcrowding, and secure the fundamental rights of its criminally accused.

11  
12 **Conclusion**

13 The proposed change to Rule 4.1, which would ensure that counsel is  
14 present at the initial appearances of those who are eligible for and desire  
15 appointed counsel, is sound policy. This rule change not only helps to codify the  
16 Constitutional right of the defendants to have counsel at every critical stage of the  
17 proceedings, but the implementation of this rule would inevitably result in a cost  
18 savings to the counties that bear the added cost of jailing pre-trial detainees.

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20 DATED: May 20, 2008.

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22 ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

23  
24 By \_\_\_\_\_ By \_\_\_\_\_  
25 \_\_\_\_\_  
26 David J. Euchner John Canby  
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<sup>6</sup> National Association of Pre-Trial Services Agencies, Standards on Pre-Trial Release (3rd ed., October 2004):  
<http://www.napsa.org/publications/2004napsastandards.pdf> (accessed May 16, 2008).

1 This comment, and six (6) copies  
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3 Supreme Court of Arizona  
4 1501 West Jefferson  
5 Phoenix, Arizona 85007-3329

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9 David Byers  
10 Administrative Office of Court  
11 1501 West Washington Street  
12 Phoenix, Arizona 85007-3327

13 Dana Hlavac  
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