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

IN THE MATTER OF

**PETITION TO AMEND RULE 4.1
OF THE ARIZONA RULES OF
CRIMINAL PROCEDURE**

SUPREME COURT NO. R-08-0005

**COMMENT ON PROPOSED
AMENDMENT TO RULE 4.1,
ARIZONA RULES OF CRIMINAL
PROCEDURE**

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, the Arizona Prosecuting Attorneys' Advisory Council (APAAC), by and through Edwin M. Cook, its Executive Director, files this Comment in opposition to the Arizona Public Defender Association's Petition to Amend Rule 4.1 of the Arizona Rules of Criminal Procedure. APAAC opposes the Petition for the reasons set forth in the attached Memorandum.

Respectfully submitted this 6th day of June, 2008.

Edwin M. Cook
Executive Director

MEMORANDUM

The Petition is an overreaction to the change to Arizona law when the voters modified Art. II, Sec. 22 of the Arizona Constitution (related to the non-bondable status of those that are in the country illegally that commit serious crimes); the conforming legislative changes to A.R.S. Section 13-3961; and this Court's rule changes that dealt with the procedural implications of those changes. Ultimately, the changes requested in the Petition are legally unnecessary, unworkable in the real world, and add an expensive and unnecessary burden to the taxpayers.

The Petition is based upon a misunderstanding of the law related to the appointment of counsel for purposes of the initial appearance proceeding. For instance, the Petition incorrectly declares:

Arizona Rules of Criminal Procedure 4.2(a)(3) and 6.1(a) indicate that arrestees shall be advised of the right to counsel and that they have a right to counsel at initial appearance. Rule 16.1(a) [sic] has made initial appearances in Arizona a critical stage in criminal proceedings requiring the assistance of counsel.

Petition, p. 1. Petitioner's reliance upon the Comment to Rule 6.1(a) to support this declaration is misplaced.

It is well established law that a defendant is not entitled to an appointed attorney at his initial appearance. State v. Cook, 150 Ariz. 470, 724 P.2d 556 (1986). In that decision, this Court declared:

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.

Id. at 475, 725 P.2d at 561 (emphasis added). The relevant portions of this Rule have not changed since this decision, nor does it appear that the Comments to Rule 6.1 have changed.

Rule 6.1 does not “require” an attorney at the initial appearance, as has been stated in the Petition. That statement is then “supported” by reference to the Comment to that Rule. The Comment to Rule 6.1(a) must be taken out of context to support the Petitioner and its proposed rule change. That Comment provides:

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, plea, sentencing hearing, sentencing, appeal, post conviction proceeding, and probation revocation.

(emphasis added.)

Clearly, the inclusion of the term “initial appearance” is a reference to the right to have an attorney present, if the accused already has an attorney, but not the right to have one appointed by the court for that proceeding. To read it as a right conferred for that proceeding is to make the Comment too expansive, especially in light of the fact that the term “arrest” is also included in the areas where there is a right to counsel. In other words, a defendant has no more right to **appointed** counsel at an initial appearance than he does to an **appointed** counsel at his arrest. The entire Comment must be read in context to understand its meaning. Failure to

do so will lead to the incorrect interpretation, as evidenced by the Petition.

As stated in the Cook decision, the initial appearance held pursuant to Rule 4 is the very proceeding at which it is determined whether or not an appointment is appropriate given that defendant's particular financial circumstances. The Petition implies that this determination should be made, then, if an appointment is made, that a defense lawyer be present to conduct the initial appearance. This would require that defense lawyers be available, even before it is determined that a defendant is in fact financially eligible.

In rural Arizona, some courts can go days without a felony initial appearance, and some of these courts are in very remote locations. For these and other courts to be required to have defense attorneys present at all initial appearances is ultimately an unnecessary waste of taxpayer money. It has been suggested that one attorney could handle all defendants in one court. However, this doesn't take into account potential conflicts of interest in multi-defendant cases (i.e., two or more persons transporting drugs on highway), or cases in which multiple persons are charged with completely conflicting interests (i.e., bar fight, etc.). Rural courts would be responsible for having more than one defense counsel available, but the exact number could be unknown in many circumstances in sufficient time to make the necessary arrangements.

Additionally, although the Petition is not limited to felony cases, clearly the

issues identified herein relate to misdemeanor cases, too. Most initial appearance courts handle far more misdemeanor cases than they do felony cases. In some courts, defense counsel is not appointed on misdemeanor cases unless the charge would mandate jail time or the prosecutor notifies the court that the state will be requesting jail time upon conviction. This saves a considerable amount of money that will be lost under the current proposal. Therefore, the cost will be exponentially higher in order to add misdemeanor cases, especially in those courts that refrain from unnecessary appointments.

Conclusion

Nothing in either the state or federal constitutions requires appointed counsel during the initial appearance, nor do the Rules of Criminal Procedure. Any assertions to the contrary citing rules or comments to rules are incorrect. Simply declaring it so does not change well established law.

In general, the vast majority of defendants' cases are unaffected by the recent changes to A.R.S. Section 13-3961 and Art. II, Sec. 22 of the Arizona Constitution. To make a rule change that unnecessarily affects tens of thousands of felony and misdemeanor defendants to address these relatively few cases is clearly inappropriate.¹

¹ However, if the Court feels that there is merit to the Petitioner's stance on appointed counsel and Rule 4.1, then APAAC requests that any modification minimize the financial impact upon the counties and their taxpayers, especially in

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Copies of the foregoing Comment have been
delivered this 6th day of June, 2008 to:

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these fiscally trying times. For instance, because there is no constitutional right to an initial appearance within 24 hours, the Court could consider modifying Rule 4.1(a) to allow for more than 24 hours in the event the initial appearance court rules that defendant is to be held non-bondable. This will allow all courts, no matter their access to resources, to arrange for a defense attorney for the continued initial appearance, as well as the presence of a prosecutor and witnesses.