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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)	No.
)	
Amendment of Rules 4.2, 7.2, 7.4,)	Petition to amend Rules 4.2, 7.2,
27.7, and 31.6, Rules of Criminal)	7.4, 27.7, and 31.6, Rules of
Procedure)	Criminal Procedure
_____)	

As Director of the Administrative Office of the Courts, I petition the Court pursuant to Rule 28, Rules of the Supreme Court, to amend Rules 4.2, 7.2, 7.4, 27.7 and 31.6 of the Rules of Criminal Procedure relating to initial appearance as indicated in Exhibit A attached to this petition. I request an emergency adoption of this rule change under Rule 28(G), Rules of the Supreme Court. I recognize there may be divergent views on these issues and recommend the Court set a brief comment period until June 14 before adopting any changes.

Background

Proposition 100 (HCR 2028), approved by the voters in November 2006, amended Article II, § 22 of the Arizona Constitution to provide the following

exception to the constitutional presumption that all persons charged with crimes are eligible for bail:

For serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge.

The Legislature defined serious felony offenses and further clarified the exception in A.R.S. § 13-3961:

13-3961. Offenses not bailable; purpose; preconviction; exceptions.

A. A person who is in custody shall not be admitted to bail if the proof is evident or the presumption great that the person is guilty of the offense and the offense charged is either:

1. A capital offense.
2. Sexual assault.
3. Sexual conduct with a minor who is under fifteen years of age.
4. Molestation of a child who is under fifteen years of age.
5. A serious felony offense if the person has entered or remained in the United States illegally. For the purposes of this paragraph, "serious felony offense" means any class 1, 2, 3 or 4 felony or any violation of section 28-1383.

The amendment to § 13-3961A.5. raised questions concerning the procedures to be followed in determining whether bail should be allowed, the standard of proof applicable to evidence offered to determine whether the person has entered or remained in the United States illegally, and the roles and responsibilities of the various participants during the initial appearance hearing

and subsequent proceedings. In response to these concerns, the Chief Justice convened a series of meetings with presiding judges and superior court administrators and had staff observe initial appearance proceedings around the state.

To ensure that procedures followed in making decisions involving denial of bail for persons in custody are made in a uniform way and consistent with state and federal law, Chief Justice McGregor issued Administrative Order No. 2007-30 on April 3, 2007 adopting interim procedures for courts to follow in implementing A.R.S. § 13-3961. At the same time, the Chief Justice asked the Legislature to clarify the responsibility of law enforcement at the initial appearance and the standard of proof applicable to offenses charged under A.R.S. § 13-3961A. After several weeks' experience working under the administrative order, it appears some courts, especially the Superior Court in Maricopa County, are experiencing severe problems involving a large number of cases and considerable expenditure of resources. As of the date of this petition, legislation amending A.R.S. § 13-3961 has passed the House of Representatives and is pending a hearing in the Senate. For these reasons, I convened a statewide court group to make recommendations on Proposition 100 issues and conducted a meeting with the Maricopa County stakeholders (court, prosecution and defense). As a result of those meetings, I request that the Court consider

revisions to its rules of procedure regarding initial appearance hearings in the form of rule changes.

Proposed Changes

The attached changes to the Criminal Rules are designed to implement the Proposition 100 constitutional and statutory provisions, provide for early resolution of unlawful presence issues, resolve the confusion regarding the standard of proof applicable under A.R.S. § 13-3961A.5. and provide a fair and efficient procedure for making these determinations.

The language added to Rule 4.2 (a) (8) makes it clear that the determination of whether the defendant is non-bailable under A.R.S. § 13-3961 shall be made at the initial appearance.

New subsection (b) in Rule 7.2 distinguishes persons charged with a non-bailable offense from those charged with a bailable offense and further provides that the standard of proof for both commission of the offense and illegal status is the same (proof is evident, presumption great). This subsection would likely need to be revised if the Legislature changes the standard of proof in A.R.S. § 13-3961. Additional factors have also been added to current subsection (b) (2) (d) conforming that subsection to A.R.S. § 13-3967. Finally, current subsection

(c) has been revised to include the additional standard of proof and other conforming changes.

Rule 7.4 (b) is revised to permit any party to request a hearing to reexamine the conditions of release. If the motion involves whether the person shall be held without bail, the rule would require the hearing to be held on the record as early as practicable but not later than seven days after filing of the motion. This change would provide for an evidentiary hearing if requested and still ensure that the bail determination is made timely. Seven days appears necessary to allow for preparation by the parties, notice to the victim and transport of the defendant, if required.

Other conforming and minor “clean-up” changes to the rules are also included.

Recently, the Limited Jurisdiction Courts Committee filed comments on rule petition No. R-03-0029 addressing Criminal Form 4. The Supreme Court Criminal Rules Review Committee and representatives of the Committee on Superior Court also reviewed the proposed changes to Form 4. The Administrative Office of the Courts supports the comments on Form 4 dealing with the additional information necessary to make a determination under A.R.S. § 13-3961 and § 13-3967. I request the Court consider approving revisions to

Form 4 consistent with the rules proposed herein as part of this petition instead of waiting for the disposition of R-03-0029.

If this rule change is adopted, Administrative Order No. 2007-30 is no longer necessary and should be rescinded.

Respectfully submitted this 25th day of May, 2007.

David K. Byers, Director
Administrative Office of the Courts

EXHIBIT A

ARIZONA RULES OF CRIMINAL PROCEDURE

Rule 4. Initial Appearance and Arraignment

Rule 4.2. Initial appearance

a. In General. At the suspect's initial appearance, the magistrate shall:

(1) Ascertain the suspect's true name and address and, if necessary, amend the formal charges to reflect it, and instruct the suspect to notify the court promptly of any change of address;

(2) Inform the defendant of the charges;

(3) Inform the defendant of the right to counsel and the right to remain silent;

(4) Determine whether probable cause exists for the purpose of release from custody. If no probable cause is found, the defendant shall immediately be released from custody;

(5) Appoint counsel if the suspect is eligible for and requests appointed counsel under Rule 6;

(6) Consider comments offered by the victim concerning the conditions of release. The magistrate shall permit the victim comments, orally or in writing, on the issue of the suspect's release;

(7) Determine the conditions of release in accordance with Rule 7.2 including a determination of whether the defendant is non-bailable pursuant to A.R.S. § 13-3961; and

(8) For summoned defendants charged with a felony offense, a violation of Title 13, Chapter 14, or Title 28, Chapter 4, or a domestic violence offense as defined in § 13-3601 the court shall order that the defendant be fingerprinted at a designated time and place if it appears that the defendant was not previously fingerprinted.

b. **Misdemeanors: Felonies Charged by Indictment.** When a suspect charged with a misdemeanor or indicted for a felony is brought before a magistrate for defendant's initial appearance, defendant may, in addition to the procedures set forth in Section (a), be arraigned in the manner prescribed by Rule 14, if counsel is present or waived. If the appearance is before a magistrate without jurisdiction to try the offense, the magistrate shall transfer the case to the proper court for arraignment. If the court finds that delay of the arraignment is indispensable to the interests of justice, the court shall provide sufficient time for notice pursuant to Rule 39 (b) (2) when setting a date and time for the continued arraignment.

c. **Felonies Charged by Complaint.** When a suspect is charged in a complaint, the magistrate shall, in addition to the procedures required by Section (a);

(1) Inform the suspect of the right to a preliminary hearing and the procedures by which that right may be waived; and

(2) Unless waived, set the time for a preliminary hearing in accordance with Rule 5.1.

Rule 7. Release

Rule 7.2. Right to release

a. Before Conviction; Persons Charged With an Offense Bailable as a Matter of Right. Any person charged with an offense bailable as a matter of right shall be released pending or during trial on the person's own recognizance, unless the court determines, in its discretion, that such a release will not reasonably assure the person's appearance as required. If such a determination is made, the court may impose the least onerous condition or conditions contained in Rule 7.3 (b) which will reasonably assure the person's appearance.

b. Before Conviction; Persons Charged With an Offense Not Bailable as a Matter of Right. A person shall not be released on bail if the court finds the person is not bailable pursuant to A.R.S. § 13-3961. If the allegation involves A.R.S. § 13-3961 (A) (5), the person shall not be considered bailable if the court finds that the proof is evident or the presumption great that the person committed a serious offense and that the proof is evident or the presumption great that the person entered or remained in the United States illegally.

Comment

This subsection may need to be revised if legislation is adopted changing the standard of proof in A.R.S. § 13-3961.

b c. After Conviction

(1) Superior Court. After a person has been convicted of any offense for which the person will in all reasonable probability suffer a sentence of imprisonment, the person shall not be released on bail or on ~~his or her~~ the person's own recognizance unless it is established that there are reasonable grounds to believe that the conviction may be set aside on a motion for new trial, reversed on appeal, or vacated in any post-conviction proceeding. The release of a person pending appeal shall be revoked if the person fails to prosecute the appeal diligently.

(2) Limited Jurisdiction Courts.

(A) Conditions of Release Upon Appeal. After a defendant has been convicted of any offense for which a sentence of incarceration has been imposed, upon filing of a timely notice of appeal, the defendant shall remain, pending appeal, under the same release conditions imposed at or subsequent to the time of the defendant's initial appearance or arraignment, except as provided in this subsection ~~(b)~~ (c) (2). The release of the defendant pending appeal shall be revoked if the defendant fails to prosecute the appeal diligently. A defendant held in custody pending appeal shall be released in the event the defendant's sentence is completed before the appeal has been decided.

(B) Motion to Amend Conditions of Release. Upon the filing of a timely notice of appeal, the state, or the court on its own motion, may move to amend the conditions of release when it appears there is a substantial risk that:

(i) the defendant presents a danger to any person or the community; or

(ii) the defendant is unlikely to return to court if subsequently ordered to appear on the particular matter.

(C) Hearing. The court shall set a hearing on such an application within three days of the filing of the motion. Such hearing may be continued for good cause

shown. The defendant may be detained pending the hearing. At the hearing, which shall be on the record, the defendant is entitled to representation by counsel. Any testimony of the defendant shall not be admissible in other proceedings except as it may relate to compliance with prior conditions of release, perjury, or impeachment.

(D) Findings. Based on findings stated on the record, the court may amend the conditions of release in accordance with Rule 7.3. In determining the method of release or the amount of bail, the judicial officer shall, on the basis of available information, consider the nature and circumstances of the offense, family or local ties, employment, financial resources, character and mental condition, the length of residence in the community, the record of arrests, convictions, and appearances at court proceedings, views of the victim, weight of the evidence, results of any drug tests, whether the accused has entered or remained in the United States illegally, whether the accused's residence is in this state, in another state or outside the United States, and any other factor provided by law.

(E) Superior Court Review. If the trial court enters an order setting a bond or requiring incarceration while the appeal is taken, the defendant may petition the superior court, at any time after such order is entered, to stay the execution of sentence and to allow the defendant to be released without bond or to require a lower bond.

e d. Burden of Proof. Issues under Rules 7.2 (a) and ~~(b)~~ (c) shall be determined by the preponderance of the evidence. Issues under Rule 7.2 (b) shall be determined by the burden of proof set forth in that paragraph. The prosecutor shall bear the burden of establishing factual issues under Rule 7.2 (a), (b) and ~~(b)~~ (c) (2), ~~†~~The defendant shall bear the burden of establishing factual issues under Rule 7.2 ~~(b)~~ (c) (1).

Rule 7.4. Procedure

a. Initial Decision. At the initial appearance before a magistrate, a determination of the conditions of release shall be made. The court shall issue an order containing the conditions of release and shall inform the accused of the conditions, the possible consequences of their violation, and that a warrant for his or her arrest may be issued immediately upon report of a violation.

b. Subsequent Review of Conditions. Any ~~person remaining in custody party~~

may in writing move for reexamination of the conditions of release whenever the ~~person's~~ case is transferred to a different court or the motion alleges the existence of material facts not previously presented to the court. The court may, on motion of the ~~defendant~~ party, or on its own initiative, reexamine or modify the conditions of release after giving the parties an opportunity to respond to the proposed modification. The motion shall comply with the requirements of this rule, Rule 35 and Rule 39. If the motion involves whether the person shall be held without bail, a hearing on the motion shall be held on the record before a magistrate as soon as practicable but no later than seven days after filing of the motion.

c. Evidence. Release determinations under this rule may be based on evidence not admissible under the rules of evidence.

d. Review of Bond. The court before which a misdemeanor is pending shall, no more than 10 days after arraignment, review the case file concerning the conditions of release of any defendant held in custody on bond for the purpose of determining the propriety of amending the conditions of release.

Rule 27.7. Initial appearance after arrest

When a probationer is arrested on a warrant issued under Rule 27.5 (b), his or her probation officer, if any, shall be notified immediately, and the probationer shall be taken without unreasonable delay before the court from which the warrant was issued, who shall advise the probationer of his or her rights to counsel under Rule 6, inform the probationer that any statement he or she makes prior to the hearing may be used against him or her, set the date of the revocation hearing, and make a release determination under Rule 7.2 ~~(b)~~ (c).

Rule 31.6. Stay of execution of sentence and credit pending appeal

A sentence of imprisonment shall be stayed pending appeal when the defendant is released in accordance with Rule 7.2 ~~(b)~~ (c). A defendant who remains in custody during the pendency of an appeal shall receive the same benefits as if no appeal has been taken.

A sentence to pay a fine or restitution shall be stayed pending appeal.