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IN THE SUPREME COURT

STATE OF ARIZONA

In the matter of:	Supreme Court No. R-21-0022
PETITION TO AMEND RULES 4.2, 6.1, 6.5, 6.6, 7.2, and 7.4 ARIZONA RULES OF CRIMINAL PROCEDURE	**COMMENT OF THE PIMA COUNTY BAR ASSOCIATION IN SUPPORT OF THE PROPOSED RULE CHANGES**

Pursuant to Rule 28, Ariz. R. Sup. Ct., the Pima County Bar Association respectfully submits the following comment in support of Petition R-21-0022 filed by David K. Byers, Director of the Administrative Office of the Courts. ("Petitioner"). These changes are long overdue, and they are a welcome departure from the status quo. This Petition should be granted.[1]

[1] A prosecutor raised a potential issue with the Pima County Bar Association Rules Committee, viz., that the proposed amendment to Ariz. R. Crim. P. 7.4 gives too little time to misdemeanor prosecutors, particularly in smaller jurisdictions with only one attorney. This is not an unreasonable concern. As such, the Pima County Bar Association recommends that bail review hearings in misdemeanors be required within seven days and not five as recommended by the Petitioner.

Our system of cash bail exposes one of the more threadbare fictions in our legal system, namely that we all stand as perfect equals before the law. At best this promise is aspirational; at worst it is illusory. In either case, it remains unfulfilled for a great many of us, and cash bail remains a major impediment.

As the Petitioner notes, the practice of setting high bail amounts to prevent release is contrary to the letter and spirit of our criminal law. *See*, *e.g.*, Ariz. Const. art. II, § 22 (establishing the general rule that all persons charged with a crime are entitled to bail); A.R.S. §§ 13-3961 (outlining the exceptions to the right to bail) and 13-3967 (enumerating the factors to be considered by judges when setting bail). The relevant inquiry should not be one's ability to pay, but rather whether their incarceration is necessary to protect the community or ensure the accused's presence at trial. The public interest is not at all served, for example, by imposing a $500 bond on an indigent defendant who does not otherwise present a danger to the community or a risk of flight. The proposed rule changes are an appropriate response to this kind of legal end-run whereby a high bond is functionally the same as no bond. "Whether the magistrate sets bail at $1 billion or refuses to set bail at all, the consequences are indistinguishable. It would be mere sophistry to suggest that the Eighth Amendment protects against the former decision, and not the latter." *United States v. Salerno*, 481 U.S. 739, 760-61 (1987) (Marshall, J., dissenting). So it is with virtually any bond amount for accused persons who happen to be poor.

The Petitioner rightly cites the axiom in our criminal law that liberty should be the norm and pretrial detention the "carefully limited exception." *Salerno*, 481 U.S. at 755. These rule changes help ensure that those words are not reduced to "mere sophistry" in practice. If adopted, these changes would afford accused persons the right to counsel at bail review hearings and impose a high burden on the state to justify a monetary bond. In our view, these are necessary bulwarks given the stakes at such a hearing—liberty itself. When the accused's liberty is in jeopardy, particularly before conviction and while he or she is

presumed innocent, there is every reason to subject the state's evidence to robust cross-examination. Centuries of experience reveal the effectiveness of the adversarial process, and we believe that justice requires it in bond review hearings.[2] We also believe that the proposed burden on the state is consistent with the Supreme Court's gloss on pretrial detention: if it is to be the "carefully limited exception" to the general rule of liberty, then the state should be required to show that imposing a bond is less onerous, for example, than setting particular conditions of release. The state should be required to show, at bottom, that imposing a cash bond furthers the public interest. These rule changes would accomplish just that, and we recommend that they be adopted.

Finally, we support the Petition on economic grounds. The cost of pre-trial detention in cases where the accused presents no appreciable danger to the community or flight risk is a cost without a benefit. By that fact alone, it is unacceptably expensive.

CONCLUSION

We have personified justice in many ways throughout our history. She was known to the denizens of the Egyptian Old Kingdom as Ma'at, accoutered with an ostrich feather representing divine truth and a pair of familiar-looking scales. Across the Mediterranean (and almost two millennia later), she appears in Hesiod as Dike, daughter of Zeus and Themis. Marcus Aurelius would have known her as we do today: Iustitia—or in modern English, Lady Justice. It was not until after the Protestant Reformation that Lady Justice acquired perhaps her most distinctive symbol that endures to the present: a blindfold to remind us that we are all equal before the law.

[2] One of fiction's great closing arguments captures the essence of adversarial justice: "Your honor, a courtroom is a crucible. In it we burn away irrelevancies until we are left with a pure product: the truth for all time."

Except we aren't. Some of us have money to burn on costly and complicated motions practice. Some of us can afford lengthy appeals. Some of us, as it were, are more equal than others. It makes no moral or logical sense for the law to reinforce this distinction, least of all when a person's liberty is at stake. This Petition is a meaningful step toward fulfilling the promise that we all enjoy equal justice under law. It should be granted.

RESPECTFULLY SUBMITTED this 26th day of April 2021.

PIMA COUNTY BAR ASSOCIATION

By *s/James W. Rappaport*
James W. Rappaport
Rules Committee Chair

By *s/ Abbe M. Goncharsky*
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