ADVANCING JUSTICE

Task Force on Fair Justice for All

Meeting Agenda

November 3, 2016 - 10:00 a.m. to 2:00 p.m.

State Courts Building ♦ 1501 West Washington ♦ Conference Room 101 ♦ Phoenix, Arizona

Fair Justice for All Task Force Webpage

Chair – Dave Byers Vice-Chair – Tom O'Connell

TIME	AGENDA ITEM	PRESENTER
10:00 a.m.	Welcome and opening remarks Approval of minutes from August 5, 2016 ☐ **Formal action or request**	*Dave Byers, Chair* *Tom O'Connell, Vice-chair*
10:05 a.m.	• Report on presentations made to October Leadership Conference, Supreme Court standing committees and other entities • Results from the Arizona Judicial Council and Presiding Judges' meetings	*Dave Byers* *Tom O'Connell*
10:20 a.m.	Update on recommendations in progress	*Dave Byers* *Tom O'Connell*
10:30 a.m.	Presentation from bail bond representatives	*Marc Adair* *Samantha DuMond*
11:00 a.m.	Discuss rule change petition comments (R-16-0041) and response to file ☐ **Formal action or request**	*Dave Byers* *Tom O'Connell*
11:40 a.m.	~Lunch Break~	
12:10 a.m.	Discuss legislative packet modifications ☐ **Formal action or request**	*Jerry Landau,* *Government Affairs Director, AOC*
12:45 p.m.	Discuss rules concerning not-bailable determinations (Simpson hearings) ☐ **Formal action or request**	*David Withey, Chief Counsel, AOC*
1:30 p.m.	Discuss clarification of sending notifications prior to incarceration for failure to pay fines • OSC and summons requirement - Bearden hearing ☐ **Formal action or request**	*Jeff Fine* *Jeremy Mussman* *Judge Don Taylor*
1:55 p.m.	Call to the public	
2:00 p.m.	Adjourn	

The Chair may call items on this Agenda, including the Call to the Public, out of the indicated order. Please contact Kathy Sekardi (602) 452-3253 or Susan Pickard (602) 452-3253 with any questions concerning this agenda. Persons with a disability may request reasonable accommodations by contacting Sabrina Nash at (602) 452-3849. Please make requests as early as possible to allow time to arrange accommodations.

Draft Minutes
August 5, 2016
State Courts Building ◈ 1501 West Washington St. ◈ Conference Room 101
Phoenix, Arizona

Present: Dave Byers, Chair, Tom O'Connell, Vice Chair, Kent Batty, Judge Maria Elena Cruz, India Davis, Jeffrey Fine, Ryan Glover, Judge John Hudson, Robert James, Paul Julien, Doug Kooi, Michael Kurtenbach, Judge Dorothy Little, Jeremy Mussman, Tony Penn, Dianne Post, Judge Antonio Riojas, Judge Lisa Roberts, Judge Thomas Robinson, Leonard Ruiz, MaryEllen Sheppard, Will Ganaugh (proxy for Alessandra Soler), Rebecca Steele, Judge Don Taylor, Kathy Waters
Absent: Judge Michael Bluff
Presenters/Guests: Mike Baumstark, Michael Breeze, Scott Davis, Ben Giles (Capitol Times), Jerry Landau, Heather Murphy, Judge Ron Reinstein, Karen Roush, David Withey, Jennifer Greene
Staff: Theresa Barrett, Kathy Sekardi, Susan Pickard, Sabrina Nash, Administrative Office of the Courts (AOC)

Call to Order
Dave Byers called the meeting of the Task Force on Fair Justice for All to order at 10:00 a.m.

Welcome and Opening Remarks
Mr. Byers welcomed the members back.

Jeff Fine introduced two new members of Maricopa County Justice Courts: Scott Davis, Communications Officer and Karen Roush, Management Assistant, who is spearheading reform and best practices in areas of enforcement.

Will Ganaugh announced his attendance as proxy for Alessandra Soler.

Approval of Minutes from June 9-10, 2016

> **Motion:** To approved the June 9-10, 2016, minutes as amended. Motion seconded.
> **Vote:** Passed unanimously.

Review of draft Task Force Report and Recommendations
Mr. Byers announced that the goal for this meeting is to adopt the recommendations and draft report so that the task force's work can be routed through the AJC Standing Committees and can then be considered on the Court's December Rules Agenda. The release of this report is timely as the Conference of State Courts Administrators is scheduled to release a white paper on this topic in September and the state Chief Justices' are looking forward to reviewing specific and detailed recommendations.

The members discussed and developed language for amendments as follows:

Page 10

- Courts are not ~~primarily~~ revenue-generating centers.
- ~~Not so~~ But in Arizona~~. The Arizona~~, the Supreme Court has administrative oversight over all state courts—appellate, superior, justice, and municipal courts.
- Such administrative authority has been exercised periodically in Arizona history. For example, in 2014 ~~the City of Maricopa~~ a combined justice and municipal court ~~in Pinal County~~ was placed under the control of the local county presiding judge. In this case, the municipal court judge was eventually removed from office.

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- While everyone should face consequences for violating the law, criminal fines and civil penalties should not themselves ~~cultivate~~ contribute to or further ~~a cycle of poverty~~ an individual's impoverishment by imposing excessive amounts or unduly restricting a person's ability to be gainfully employed.
- The task force also concludes that "justice for all" means just that—regardless of race, income, gender, culture, ~~and~~ ethnicity, or other factors, fair justice should apply to everyone.
- The purpose of a sanction is to ~~incentivize~~ hold a person ~~to comply~~ accountable and encourage future compliance with the law. Imposing a financial sanction on a low-income individual that is so high that it would be almost impossible for the person to pay ~~only~~ may promote ~~hopelessness~~ frustration, despair and disrespect for the justice system. Suspending the person's ~~driver's license~~ driving privilege as a result of an inability to pay the sanction further exacerbates the problem, fosters a cycle of poverty, and fills costly jail cells. Sanctions such as fees and fines should be imposed in a manner that is sustainable and promotes, rather than impedes, compliance with the law, economic opportunity, and family stability.

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- ~~Reclassifying~~ Additionally, reclassifying first-time offenses of some misdemeanors, such as littering, speeding, and expired out-of-state vehicle registrations, to civil charges will make it easier to process certain minor crimes. ~~Additionally, it would~~ It could also reduce the stigma associated with a criminal record and eliminates the potential for incarceration for these minor offenses.

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- 5. Seek legislation to reclassify certain criminal charges to civil violations for first-time offenses such as:
    - Driving on a suspended license
    - Driver license restriction violations (for example, corrective lens)
    - Littering
    - ~~Criminal speeding~~
    - Expired out-of-state registration
- Principle Two: Reasonable, convenient, time payment plans should be provided and based on a defendant's ability to pay.

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- ~~Currently in Arizona, more than $686 million is owed in restitution from felony cases.~~(Moved to Page 17.)

Page 17

- Currently in Arizona, more than $686 million is owed in restitution from felony cases. (Moved from Page 16.) Reasonable adjustments to fines and fees will enable defendants with limited financial means to devote more of their resources to victim restitution.
- Therefore, revising the requirement to read "has paid at least the minimum ordered restitution payment for the month" would help maintain the requirement to ~~pay~~ make restitution payments.
- ~~Upon completion of probation, unpaid~~ Unpaid balances on financial obligations to the state are converted to criminal restitution orders pursuant to A.R.S. § 13-805~~(E)~~ (Jurisdiction), which sets an annual interest rate of ten percent. This high interest rate is unrealistic in today's economy and should be reduced to a more appropriate amount, perhaps tied to market rates or eliminated altogether.
- 9. Request legislation similar to Arizona Revised Statutes (A.R.S.) § 12-288 (Removal of debts from accounting system) that would ~~authorize~~ grant courts discretion to close cases and write off fines and fees after a 20-year period if reasonable collection efforts have not been effective~~.~~
- Remaining narrative from principal four (Moved from Page 20.)

  Currently, most court informational websites do not indicate that time payments are an option. Courts should modify online citation information to indicate clearly that if a person is unable to pay the full amount due at that time, the person can come to court to arrange for a time payment or community restitution (service) plan.

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- 12. Modify court website information, bond cards, reminder letters, FARE letters, and instructions for online citation payment to explain in language appropriate to the defendant that if the defendant intends to plead guilty or responsible but cannot afford to pay the full amount of the court sanctions at the time of the hearing, the defendant may request a time payment plan. (Moved from Page 20)

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- Twenty–two percent (22%) of ~~those~~ individuals ~~who pleaded guilty or responsible~~ charged with certain traffic offenses resolved their cases by completing defensive driving courses in FY2014.9F[1]
- 13. Request amendment of A.R.S. § 13-603 (Authorized disposition of offenders) to authorize judges to impose a direct sentence ~~a defendant directly to~~ which may include community restitution (service), and education and treatment programs~~, curfew, or travel restrictions~~ as available sentencing options for misdemeanor offenses.

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- Principle Four: ~~Defendants~~ Courts should ~~appear~~ employ practices that promote a defendant's voluntary appearance in court~~.~~
- Regardless of how many options and reminders the court may provide, a person must take personal responsibility to avoid consequences that could escalate and include incarceration. Those who appear in court when first cited might have the case dismissed (15 percent) if there is a defense, have the fine reduced, be allowed to make time payments, or perform community service as an alternative to paying fines. Failure to appear, on the other hand, puts into motion consequences that can be devastating to an individual. (Moved from lower on the page.)

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- It would also be desirable to change the current classification of driving on a suspended license for the first time from a criminal offense to a civil ~~offense~~ violation.

- ~~30. Notify defendants about the opportunity to return to the court to establish a payment plan before issuing a warrant for failure to pay~~.

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- 30. Prior to or in lieu of issuing a warrant to bring a person to court for failure to pay, courts should employ proactive practices that promote voluntary compliance and appearance such as: notifying defendants of non-payment, consequences and resolution options; scheduling of an order to show cause hearing, or sentence review.

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- 32. Promote the use of restitution courts, status conferences, and probation review hearings ~~to ensure~~ in a manner that ensures due process and ~~consider~~ considers the wishes of the victim. ~~Establish criteria for referring defendants to restitution court~~ Provide judicial training on the appropriate use of Orders to Show Cause in lieu of warrants and ~~set standards for processes regarding willful contempt~~ appointment of counsel at hearings involving a defendant's loss of liberty.

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- 35. Bring together criminal, justice, and mental health stakeholders in larger jurisdictions to adopt protocols for addressing people with mental health issues who have been brought to court.

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- Some of the highest-risk individuals~~, such as members of gangs or drug cartels,~~ are likely to have access to money to post a cash surety.

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- 40. Clarify by rule or statute that small bonds ($5 - $100) are not required to ensure that the defendant gets credit for time served when defendant is also being held ~~on a second, more serious charge~~ in another case.
- 41. Authorize the court to ~~temporarily~~ release a "hold" from a limited jurisdiction court and order placement directly into a substance abuse treatment program upon recommendation of the probation department.

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- Principle Ten: ~~Cash~~ Money bond is not required to secure appearance of defendants.

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- When using risk assessment to make pretrial release decisions, generally judges should release low risk defendants with minimal or no conditions, release moderate risk defendants with interventions and services targeted to mitigate the risk and should detain the highest risk defendants in custody. In jurisdictions where evidence-based risk assessments are utilized, such as Washington, D.C., three primary release types are used:
    - low-risk defendants are released on their own recognizance or with a unsecured appearance bond,
    - moderate-risk defendants are released to Pretrial Services with specific release conditions imposed to mitigate the risks presented,
    - high-risk defendants are held in custody as preventive detention when no condition or combination of conditions of release can reasonably assure the appearance of the person or will endanger the safety of any person or the community.

  The task force believes that Arizona should strive to eliminate money for freedom and shift to a risk based system. Fully achieving this goal will require a constitutional amendment, rule changes, and a change in the current culture to substitute preventative detention for the current practice of imposing high dollar bonds. A high dollar bond may keep some individuals in

jail, the Arnold Foundation research showed in the jurisdictions they researched that 50% of individuals with high dollar bonds could post the bond and be released. The task force recognizes these changes will take some time to fully implement.
Court of Appeals case, Simpson v. Miller and Steinle, State of Arizona, Real Party in Interest. Nos. 1 CA-SA 15-0292, 1 CA-SA 15-0295 (Consolidated) now under appeal at the supreme court may have some impact on this subject.

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- While no issues have been found with the PSA instrument to date, some other assessments have been found to be problematic indicating that this is an area that requires careful and constant examination.
- Additionally, the task force discussed concerns that the PSA does not take into consideration ~~those defendants who are foreign-born~~ the immigration status of and recommend that additional research be conducted for this population. Finally the task force understands that no instrument can eliminate all bias that may creep into the justice system and therefore recommends that judges continue to receive training regarding avoiding implicit bias.
- 47. Eliminate the ~~requirement for~~ use of cash ~~surety~~ bond ~~to the greatest extent possible and instead impose reasonable conditions based on the individual's risk. When it must be used, the preference should be for the surety~~ bond ~~to be in actual cash deposited with the clerk of the court with the amount paid returned to the defendant if charges are not filed, the person is found innocent, or if no violations of the release conditions occur.~~ to secure a defendant's appearance.

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- 51. Request the Arnold Foundation to conduct research ~~to determine whether foreign-born defendants have a greater~~ on the impact of immigration status on the likelihood of not returning to court if released~~.~~ to ascertain whether it is good public policy to hold these defendants on cash bond.
- 58. Train judicial officers on ~~the~~ risk principle and methodology behind ~~the~~ risk assessment ~~tool~~ tools.

Motion: Move to adopt the report as amended. **Seconded**.
Vote: 22-1-0

The finalized report is attached to these minutes as Appendix A.

Discuss Proposed Changes to Rules
Working within the parameters of current law, Jerry Landau and David Withey discussed the recommended rule changes listed below. Once any proposed legislation is signed into law or constitutional amendment is ratified, the rules will be reviewed for any additional changes needed to further the task force's recommendations.

After spending some time discussing the details related to processes and procedures, the members agreed that the main impetus of the report is to eliminate money bonds. Understanding that rule, legislative, and constitutional changes have associated timelines, which inherently requires an incremented approach, there will be time to further examine the resources, processes, and procedures needed to implement the task force's recommendations fully.

Motion: Move to authorize AOC Legal Counsel to draft rules as discussed.
Second. Vote: Passed unanimously.

Discuss Proposed Statutory Amendments
Mr. Landau discussed his process, the draft proposals and the changes needed after listening to today's discussion. Members agreed to leave the statutes out of the adopted report to allow for additional changes. As the drafting process continues, members will be kept abreast of changes and are asked to send input to Mr. Landau via email. The final draft proposals will be presented to the task force on November 3rd for adoption. Mr. Landau noted that a delayed effective date of January 1, 2018 will be requested for the legislative changes.

Discuss Constitutional Amendment
Mr. Landau discussed the timeline for constitutional amendments. The Legislature traditionally considers constitutional amendments in the even number years of the second year of the term. If all goes as planned the amendment will not appear as a ballot referendum until 2018. Members re-emphasized the reasons for a person to be held non-bondable reasonably assuring: the safety of a person or the community, the appearance of the person at all court proceedings, and the propensity for new criminal behavior.

Next steps
Mr. Byers detailed the timeline for the rule change petition. Highlights included:

1. File when ready, requesting a 60-day comment period.
2. Present at the Court Leadership Conference on Wednesday, October 26.
3. Task force to reconvene on Thursday, November 3, 2016 to review and discuss comments to rule change petition and prepare a reply.
4. Submit reply to staff attorneys.
5. Request adoption of rules at December Rules Agenda.

Court Leadership Conference
Mr. Byers invited all task force members to attend the Court Leadership Conference on October 26. There will be a presentation from a national expert and a task force panel discussion.

The AJC will meeting the following day to consider among other items, the report as presented by Mr. Byers and select task force members.

Call to the Public – None.

Meeting adjourned at 3:46 p.m.

Next meeting: November 3, 2016

Commission on Victims in the Courts (COVIC) Response to the Recommendations of the Task Force on Fair Justice for All

COVIC met on October 21, 2016 and Tom O'Connell, Vice-Chair of the Task Force, gave a thorough presentation of its recommendations to the commission. COVIC voted to support the Task Force's recommendations with the understanding that the members have concerns that need to be addressed. They are as follows:

Representation

Membership on the task force should have included a crime victim, a victim advocate, or both.

Eliminate or reduce the imposition of the 10% annual interest rate on any Criminal Restitution Order. (Recommendation No. 11)

The interest rate should not be reduced or eliminated on Criminal Restitution Orders (CROs). CROs and liens are treated the same as a civil judgment and restitution liens should not be singled out from other civil judgments, making victims second class judgment creditors. Further, and perhaps most importantly, it is a constitutional right for a victim to receive "prompt restitution" but the reality is that often it is 7-8 years old in owing or never completely paid. The interest charged on the order has been used as an incentive to get the defendant to pay the full amount in a timely manner. There are cases in which small business owners who have been victimized with restitution owed must get financing at a high interest rate in order to keep their businesses going. This group suggests that perhaps it could be made discretionary with the victim's approval, or with interest postponed and not assessed if paid off by a certain time. More discussion is needed.

Promote the use of restitution courts… Provide judicial training on… appointment of counsel at hearings involving a defendant's loss of liberty. (Recommendation No. 32)

Restitution courts – COVIC's Restitution workgroup agrees that restitution courts are excellent tools for assuring payment of restitution. As such, the workgroup has drafted a white paper on Best Practices - Restitution Court. The commission's and workgroup's members stand ready to assist with subject matter expertise when/if this recommendation is advanced for implementation. Further, the group agrees that judicial training is needed, not just for restitution court but regarding restitution as a whole. COVIC also stands ready to assist with judicial training needs as well as training for probation personnel.

Appointment of counsel – COVIC members respectfully disagree among each other as to whether there should be representation at hearings involving a defendant's loss of liberty. There could be serious funding issues involving this and the implications could also bleed into family court. It needs further study.

Kick-off Summit (Recommendation No. 57)

A crime victim, a victim advocate, or both, should be included in the list of stakeholders who will be invited to this one day event.

In General

- The costs of fines and traffic school have become unreasonable with all the surcharges, etc. added on. However, surcharges, fees, assessments, etc. are used to fund various direct crime victim services in Arizona, which, if reduced, would hurt victims.
- There was an observation that trying to teach people to obey the law by jailing them doesn't work.
- The workgroup recognizes and agrees with the Task Force that data on how restitution is imposed, collected and enforced is not available. Workgroup members came up against this problem regularly during discussions. It is difficult to make improvements and/or recommendations to a system when there is no hard data to back up discussions and ideas.

Thank you for the opportunity to supplement our approval of the Task Force's Recommendations with these provisos.

Hon. Ron Reinstein (Ret.)

Chair, Commission on Victims in the Courts

Administrative Office of the Courts - Legal Services 602-452-3323 Revised 8/8/2016

Municipal Court Governance
Roles and Responsibilities

Contents

Introduction

In 1994, the Arizona Administrative Office of the Courts (AOC) developed the predecessor of this document, titled the Municipal Court Q&A, in response to questions posed by the Arizona League of Cities and Towns concerning the relationship between local governing bodies and their municipal courts. Since then, the AOC, Legal Services Office has received and responded to additional questions on this subject and produced additional versions of the Q&A that we provided to the League for comment and distribution to members. Recently, AOC staff worked with a committee of judges and court administrators to reformat and reorganize the Q&A to produce the current municipal court document.

This document is provided to help judges and court staff and city officials resolve the most common issues involving the relationship between the municipal court and other parts of the city or town government. It does not address all the issues that may arise and the answers given may not apply in every situation, but it is designed provide some clarification about respective roles and responsibilities concerning the operation of the municipal court. General and specific (where available) authority is provided for the content in the footnotes of this document.

A. Supervision and Management

1. *City or town obligation to maintain a municipal court.*

State law requires municipalities to maintain a court to adjudicate cases involving criminal, civil traffic, and ordinance violations committed within the city or town limits.[1] The municipality may establish its own court or enter an intergovernmental agreement with either a justice court with jurisdiction within the municipality or another municipal court within the same county to handle those cases.

2. *Coordination in consolidating a municipal court.*

A municipality is authorized to enter into an intergovernmental agreement[2] for performance of the services of its municipal court by either a justice of the peace court in whose jurisdiction the municipality is located or another municipal court within the same county.[3] While a consolidated court can operate under the supervision of one justice of the peace or municipal court judge in one court facility, case assignments, court records, including financial records, and statistical reporting must be managed separately for each of the jurisdictions operating under the same roof.

Notice of opening, closing, consolidating, collocating, or splitting of courts should be provided to the Administrative Office of the Courts and assistance will be provided upon request. To facilitate creating or changing the administration or operation of courts, Court Services has created a document, Guidelines for Courts: Opening, Closing, Consolidating, Co-locating and Splitting Courts, which provides checklists about governance, external agencies, automation, financial, forms, records management, and staffing.

3. *Legal status of municipal courts.*

In Winter v. Coor, 144 Ariz. 56, 695 P.2d 1094 (1985), the Arizona Supreme Court held that magistrate (municipal) courts are part of the integrated judicial department of this state, citing Article VI, § 1 of the Arizona Constitution. Consequently, municipal courts have authority and duties under the state constitution and statutes in addition to their duties as part of municipal government, must be administered as a separate branch of municipal government pursuant to A.R.S. Const. Art. 3, and are subject to the administrative authority of the Supreme Court pursuant to A.R.S. Const., Art. 6 § 3.

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[1] A.R.S. § 22-402.
[2] A.R.S. § 11-952.
[3] A.R.S. § 22-402(C).

4. *Relationship between the municipal court and city or town.*

In Winter v. Coor, the Supreme Court held that municipal judges are judicial officers, not officers or agents of the town. The Court further acknowledged the necessity of maintaining municipal courts as fair, independent, and impartial tribunals, and the importance of preserving the public's perception of these courts as impartial and unbiased. So, while the judge is selected in the manner set forth in the municipal charter or ordinances, and the judge's compensation is set by the governing body of the city or town, any other authority over the municipal court is limited by the need for the courts to operate in a fair, independent and impartial manner. Interference that impedes the court from carrying out the impartial administration of justice violates the distribution of powers provision of the Constitution of the State of Arizona, and the fundamental principles of our constitutional form of government. The municipal court, consistent with relevant constitutional provisions, statutes, and case law, must maintain its impartiality while fostering a cooperative relationship with the executive and legislative departments of municipal government. The court is not part of the city or town administration subject to the supervision of the manager.[4] Rather the court is the judicial department of municipal government and part of the judicial branch of state government subject only to the judicial appointments, reasonable policy-making, and appropriations authority of the council.

5. *Authority to administer the municipal court.*

Through Supreme Court Administrative Order No. 2005-32, the chief justice delegated Art. 6, § 3 administrative supervisory authority to the presiding superior court judge of each county and to the presiding judge of each municipal court. "Presiding judges shall be the Chief Judicial Executive Officers of their respective counties and shall exercise administrative supervision over the superior court including all of its divisions and judges thereof in their counties. "Presiding judges shall also exercise administrative supervision over the municipal courts in their counties." The presiding judge of the county delegates administrative duties to the presiding municipal court judges in the county.

Administrative Order 2005-32 specifically provides that presiding municipal court judges may appoint a court administrator according to local charter or ordinance provisions. The presiding municipal court judge supervises judges, judicial staff, and non-judicial staff while they are performing work for the court. Presiding municipal court judges are also specifically authorized to supervise the internal administrative functions of the court including personnel, training, facilities, procurement, finance, and court security. Presiding municipal court judges oversee court administrative operations including:

[4] "It is our conclusion that the magistrate courts are indeed part of the integrated judicial department of this state." Winter v. Coor, 144 Ariz. 56, 59 (1985).

- Preparing and submitting an annual budget for the court.
- Establishing and maintaining docketing, calendaring, case management policies and procedures, and court automation systems.
- Setting bond schedules.
- Reporting case activity statistics.
- Jury management.
- Records management.
- Compliance with the Minimum Accounting Standards adopted by the Supreme Court.

6. *Municipal court operational reviews and audits*

Court operations are reviewed periodically by the AOC as part of the Supreme Court's A.R.S. Const. Art. 6 § 3 supervisory duties. Operational review reports may be obtained upon request by city officials.

The city or town may conduct a separate audit of the municipal court in a manner that does not impair the ability of the court to conduct business as required by A.R.S. § 22-402(A) and court rules. Fiscal or management audits or an organizational review of a municipal court may proceed with the agreement of the presiding judge as to the timing, scope, and nature of the audit or review in order to minimize the disruption of judicial proceedings. This agreement should not be unreasonably withheld. Any audit or review must not target a judicial decision of a court.[5]

The presiding municipal judge should be given the results of any such audit or review to determine whether any responsive action is warranted. The court is required to "provide the presiding judge of the county and the AOC Court Services Division a copy of all final reports, findings and evaluations from any audit within seven business days of receipt." ACJA § 1-401(G)(3). If a municipal judge is suspected of misconduct or illegality, the presiding superior court judge and the AOC should be immediately notified due to the concurrent authority of the Commission on Judicial Conduct and the city or town council to address judicial misconduct.[6]

7. *Authority to set municipal court hours of operation.*

The city or town legislative body may set the days and hours of operation of the municipal court in the same manner as the hours of other municipal offices are established under a charter or ordinance. This could include closing the court some days of the week, requiring furlough days, and holding night sessions, in

[5] A.R.S. Const. Art. 3.

[6] Jett v. City of Tucson, 180 Ariz. 115, 882 P.2d 426 (1994); A.R.S. Const. Art. 6 § 3 and Art. 6.1.

addition to regular day time hours, if the city or town provides sufficient judicial and support staff for such sessions.[7] The presiding judge's recommendation regarding the optimal hours of court operation should be sought and given great deference.

Such hours must not conflict with hours of the municipal court set by other authority such as statutes, the Arizona Rules of Court, or the presiding judge of the county. The hours must not be set in such a manner as to unreasonably impede the public's access to justice or impair the court's ability to conduct its business consistent with the operation of the entire justice system in the county.[8] This includes effective arrangements for coverage of orders of protection, initial appearances, and any other matters required to be addressed over a weekend.

8. *Authority to require the judge to attend court every business day and use of attendance as a criterion for evaluating the judge's performance.*

Such an ordinance would be unreasonably intrusive upon the administration of the municipal court and is, therefore, inconsistent with distribution of powers principles. Due to illness and other necessary absence for personal reasons, no officer or employee can perform or reasonably be expected to perform assigned duties every day of the year except weekends and holidays. Leave policies are established for employees to provide for absence for personal reasons. Of course, a leave policy for judges could be adopted as well. However, a judge is expected to perform the established duties of the office for the established salary without regard for the time required. Leave policies and practices are matters of internal court administration appropriately within the authority of the presiding municipal judge to operate the court in a manner that best serves the administration of justice.[9]

Consistent with distribution of powers, an ordinance could require that the municipal court be open and appropriately staffed to conduct court business. This is also consistent with the approach to court hours taken in Art. 6, § 17 that requires the superior court be open except on non-judicial days, and the requirement in A.R.S. § 38-401 that requires all state offices be open at specified times. However, requiring that a judge be present during all hours that the court is open goes far beyond what is reasonably needed to assure that the

[7] A.R.S. § 22-402.

[8] A.R.S. § 22-402(A), A.R.S. Const. Art. 3.

[9] "Presiding municipal court judges shall supervise the administration of the judicial and internal administrative functions of the municipal court including: a. Determining judicial assignments for each judge and, within guidelines established by city or town council, establishing and maintaining standard working hours and times to effectively discharge those assignments." Administrative Order 2005-32(C)(3). A judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them. 17A A.R.S. Sup. Ct. Rules, Rule 81, Code of Jud. Conduct, Rule 2.12 (B).

court be open and operating effectively and, instead, intrudes upon the presiding municipal judge's discretion to manage the court in a manner that achieves this legitimate objective of municipal government.

Winter and Jett v. City of Tucson, 180 Ariz. 115, 882 P.2d 426 (1994), imply that the city or town council clearly has responsibility and authority to evaluate judges in order to determine whether a judge should be appointed for an additional term. However, it would not be reasonable to negatively evaluate a judge for not being present at the municipal court due to absence for legitimate personal reasons or to perform other professional duties as discussed above. While a judge's unscheduled absence or poor attendance at court could be an issue for evaluation, any real problem with court operations would be manifested by complaints from attorneys or parties, failure to meet deadlines and/or failure to carry a reasonable case load. For the reasons stated above, these are legitimate bases for evaluating judges rather than the number of days the judge sits in court.

B. Budget and Finances

1. *Responsibility for providing staff and other resources to ensure effective court operations.*

In Maricopa County v. Dann 758 P.2d 1298 (Ariz. 1988), the Supreme Court held that courts have a right to necessary personnel to carry out the court's constitutional and statutory duties, and that legislative bodies have the duty of approving personnel requests unless there is a clear showing that the judges acted unreasonably, arbitrarily, or capriciously in making the request. The case law is clear that municipal courts are part of the state's integrated judiciary (Winter v. Coor) and therefore the same, or at least similar, standards apply to municipal courts as to the superior court.[10] If the court follows the funding authority's policies and is still denied adequate staff or facilities, the court may, through its inherent powers, order the funding authority to provide for adequate staff or facilities.[11]

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[10] "The municipal court can only engender proper respect for the law and provide justice in the individual case if the court is provided with sufficient judges, support staff, legal resource materials such as the Arizona Revised Statutes, training opportunities for court personnel and physical facilities to assure prompt, fair and dignified administration of justice. The Presiding Municipal Court judge responsible for the administration of the Municipal Court should be mindful of the needs of the court, and seek the cooperation of the funding authority to provide the funds required to meet those needs." Standard 8, Standards for Municipal Courts Revised Administrative Order 83-11 (Jan 17, 1990).

[11] "Thus, while we recognize the inherent power of a justice court to require the providing of personnel in order to perform its necessary functions, this power should be exercised only when there is no established method for obtaining needed personnel or when a reasonable, good faith, diligent effort to utilize such methods has been attempted and has failed." Reinhold v. Board of Supervisors of Navajo County, 139 Ariz. 227, 232 (Ct.App. Div. 1, 1984).

2. *Preparation of the municipal court budget and requirement to follow city or town budget and finance procedures.*

The presiding judge of the municipal court and the court administrator, if any, must prepare a budget for the municipal court. [12] In doing so they must follow any budgeting and finance procedures established by the city or town.[13] The state judicial department budget is separate from the Governor's budget and is presented directly to the legislature. Likewise, the municipal court's budget may be presented with the manager's budget or directly to the council. The budget process must yield funding necessary for the proper operation of the court. The local government must defer to the judge's determination of the financial needs of the court and the advisability of implementing any recommendations, unless the judge's determination is arbitrary, capricious or unreasonable.[14]

The municipal court must follow city or town expenditure procedures unless the Procurement Code for the Judicial Branch (PCJB)[15] has been adopted by the Presiding Judge of the county to apply to the municipal court. Every court is required to follow a procurement procedure substantially equivalent to the PCJB.[16] The authority of the municipal judge to make individual expenditures within the court's budget should be equivalent to the authority of the manager and subordinates to make expenditures within executive agency budgets.

3. *Authority of the municipal judge to move funds between budget line items and to make fiscal-neutral staff reassignments.*

The authority of the presiding municipal judge over the court's budget is provided by the city or town council and Administrative Order 2005-32. In order to avoid distribution of powers conflicts between the presiding judge, the manager, and the council, the council should provide funding for the court in a manner that allows the presiding judge flexibility similar to the manager regarding how the monies are allocated. This avoids placing the manager in the role of approving court expenditures in a manner that intrudes upon the authority of the presiding judge to administer the court impartially pursuant to Administrative Order 2005-32 or that interferes with court operations. As noted below, the presiding judge already has independent authority under state statutes to manage and expend monies collected or granted pursuant to statute.

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[12] Administrative Order 2005-32, Presiding Judge – Municipal Court:

[13] Maricopa County v. Tinney, 183 Ariz. 412, 904 P.2d 1236 (1995), Maricopa County v. Dann, 157 Ariz. 396, 758 P.2d 1298 (1988).

[14] Reinhold v. Board of Supervisors of Navajo County, 139 Ariz. 227, 232 (Ct. of Appeals 1984) recognized the inherent power of a justice court "to require that personnel necessary for its function as a court be supplied by the board of supervisors unless such a request is arbitrary, capricious or unreasonable."

[15] ACJA § 1-402.

[16] ACJA § 1-402(B)(2).

4. *Authority to direct the expenditure of funds appropriated to the court through state statutes or municipal ordinances.*

If the monies at issue are state funds, such as judicial collection enhancement fund monies granted to the court under A.R.S. § 12-113 or time payment fees authorized to be expended under A.R.S. § 12-116, these monies must be spent only for the purposes stated in such grant or authorization. These funds are expressly provided for use "by the court" which means the presiding judge rather than the manager. Additionally, state statutes and the terms of grants typically prohibit use of state or grant funds to supplant or replace local funds for a particular court program or expenditure.[17] If the monies at issue are generated pursuant to a municipal ordinance, the ordinance should provide how expenditure of the monies is authorized. Such ordinances should respect distribution of powers principles by providing the presiding judge discretion over expenditure of monies dedicated to funding court operations.

5. *Responsibility for collection of court fine, sanction, restitution, and bond payments.*

Under the direction of the presiding judge, the court must collect all fine, sanction, restitution, and bond payments imposed by the court and deposit them with the city or town treasurer, as required by A.R.S. § 22-407 and A.R.S. § 41-2401. The authority to determine who receives such payments and deposits clearly rests with the municipal court judge, not the municipal financial officer. Winter v. Coor, 144 Ariz. 56, 695 P.2d 1094 (1985). The Supreme Court has adopted detailed minimum accounting standards to govern the handling of court payments by court personnel.[18]

Arizona Rules of Criminal Procedure Rule 26.12(b), provides that payment of a fine, restitution, or both, must be made to the clerk of the superior court unless the court expressly directs otherwise. A.R.S. § 22-423 extends this rule to municipal courts. Although A.R.S. § 22-404 provides for ultimate payment to the city or town treasurer of all fines and forfeitures collected, the statute clearly implies that the municipal court must collect the payments. Other statutes also require or imply that procedure. With regard to bail and civil sanction deposits, A.R.S. § 22-424 requires the judge to establish schedules for traffic offenses and violations that do not involve death or a felony and to permit receipt of bail bonds and provided for acceptance of deposits for civil traffic violations on behalf of the court.

Further, A.R.S. § 28-1559(A)(2) requires every judge, magistrate, or hearing officer to, "keep a record of each official action by the court" and the "amount of

[17] See, e.g., A.R.S. §§ 12-102.02(E)(state aid to the courts fund); 12-113(C) (judicial collection enhancement fund); and 12-135(D)(alternative dispute resolution fund).
[18] ACJA § 1-401.

the civil penalty, fine or forfeiture resulting from each traffic complaint deposited with or presented to the court..." Pursuant to the requirements of this section, it appears that fines and forfeitures should be collected by the court in order to ensure the accuracy of the records that the court is required to maintain. Consistent with judicial department Minimum Accounting Standards, the disposition of the funds received may be provided by ordinance or city policy to the extent it is not otherwise provided by law.

6. *Court collection of fees in addition to those expressly provided in A.R.S. § 22-404(B).*

A.R.S. § 22-404(E) provides that any city or town may establish and assess fees for court programs and services. Unless specifically prohibited by law, a particular fee is subject to deferral, reduction or waiver by the Judge in a case. Local fines and many local fees are subject to state surcharges.[19]

7. *Authority to resolve fines and civil sanctions that are determined to be uncollectible.*

There is currently no statutory authority that would allow courts to forgive outstanding obligations in total.[20] While the city or town may adopt procedures to "write-off" court obligations owed to the city or town, amounts to be transmitted to the state general fund or other state agencies may only be written off by the state or those agencies pursuant to state law.

8. *Disposition of interest earned on funds designated for use by the court.*

Unless otherwise provided, interest earned on an account must be deposited in that account to serve the purpose for which the account was established, ACJA § 5-107(C)(14) specifically provides "interest earned remains with the fund and may be used in support of the approved case processing plan."

C. Personnel

1. *Appointment and reappointment of municipal judges.*

The Winter case requires appointment to at least a two-year term from which a judge may not be removed without cause. Jett v. City of Tucson 180 Ariz. 115,

[19] Ariz. Atty. Gen. Op. I00-015 (June 22, 2000).

[20] A.R.S. § 13-824 authorizes a court to convert an order to pay fines, fees, assessments, or incarceration costs to community restitution, if the court finds the defendant is unable to pay.

882 P.2d 426 (1994) suggests "Under contemporary standards, a 4-year term seems appropriate." Additionally, a change in the number of judges may not affect removal of a judge during the judge's term. [21] Both cases imply that at the end of the term the judge may be removed without cause. However, a decision not to reappoint a judge may be held invalid for any reason that violates state or federal law or is contrary to public policy, such as judicial impartiality. Cities and towns have established judicial selection and performance review committees to make recommendations for appointment and reappointment of judges based upon merit. The recommendations of these committees should be given great weight by city and town councils in order to avoid invalid reappointment decisions.

2. *Obligation to pay judicial salaries.*

Municipal judge salaries may not be reduced during the term of office even if they are not set by charter or ordinance, and even in the event of budget reductions.[22]

3. *Judge's refusal/waiver of payment of the judge's salary.*

Since the constitution prohibits reduction of the current salary, however established, during a municipal judge's term, a judge cannot effectively waive part of the judge's salary during the term.[23] However, a municipal judge may voluntarily donate back to the city or town any part of the salary the judge has been paid.

4. *Authority of the city or town to conduct performance reviews of the presiding municipal judge.*

Another implication of the Winter and Jett cases is that since councils have discretion regarding renewal of a municipal judge's appointment, they must have the discretion to review the performance of that judge prior to renewal.[24] Of course, the review must be performed in a manner that does not interfere with performance of the judge's duties and carefully avoid criteria for non-renewal that conflict with federal or state law, court rules, the impartiality of the court, or any

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[21] See also A.R.S. Const. Art. 6 § 33

[22] A.R.S. Const. Art. 6 § 33

[23] Glavey v. United States, 182 U.S. 595, 609 (1901) (holding that a failure to demand a salary guaranteed by statute was not a waiver of the same).

[24] "In our opinion, an interpretation of the amendment [to Article VI.I, Section 5 of the Arizona Constitution] that accommodates parallel processes of removal furthers its underlying purpose, i.e., providing citizens with added protection against magistrates who engage in misconduct. By preserving a city's authority to remove its magistrates from office, such an interpretation places magistrates in the same position as all other judges in the state, who are subject to removal by means other than a disciplinary proceeding initiated by the Commission." Jett v. City of Tucson, 180 Ariz. 115, 121 (1994).

other ethical obligation of the judge. Municipalities may use the results of audits and reviews conducted by the city or town and any review conducted by the judiciary. Any city or town council wishing to establish a system for evaluating the performance of a municipal judge may seek assistance from the Administrative Office of the Courts.

5. *Requirements for appointing a part-time municipal judge.*

There is no statutory authority for appointing a pro tem judge in a municipal court as there is in justice court. However, a city whose charter provides for judges pro tempore may appoint them.[25] Additionally, the constitutional provision that permits non-lawyer judges pro tem in justice courts does not cover municipal courts.[26] Consequently, it appears that a pro tem municipal court judge would need to be an attorney.[27]

A municipality needing the services of a part-time judge may want to consider appointment of an "associate" or "special" magistrate instead of a pro tem judge. Under Winter v. Coor a magistrate must have at least a two year term. Therefore, an associate or special magistrate must be appointed for a two year term, rather than at the pleasure of the council or the judge, but could serve part time or "on call." The municipal ordinance would need to establish the qualifications and the process for the appointment. If it provides for the municipal court judge to make or recommend the appointment, § 1-305 of the Arizona Code of Judicial Administration applies. An elected justice of the peace whose precinct is located in a city or town is authorized by A.R.S. § 22-403(B) to serve as a municipal court judge for that city or town.

6. *Procedures for appointing "special judicial officers" such as associate magistrates.*

A municipality has the initial responsibility to determine who appoints a judge.[28] If the municipality gives the presiding judge responsibility to appoint or recommend appointment of other judicial officers, then the presiding judge must follow the requirements of ACJA § 1-305 of the Arizona Code of Judicial Administration in carrying out that responsibility. The presiding judge must

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[25] State v. Mercurio 153 Ariz. 336, 339, 736 P.2d 819, 822 (App. 1987).

[26] A.R.S. Const. Art. 6 § 31(A).

[27] "Qualifications**.** Persons applying for judicial office shall meet the minimum qualifications required by law and such special qualifications for the position as may be established by the chief justice, the chief judge, the presiding judge or the chief magistrate. Persons applying for judge pro tempore offices, except justice of the peace pro tempore, shall be at least 30 years of age, of good moral character, and admitted to the practice of law in and a resident of the State of Arizona for five years next preceding their taking office as required by article 6, § 31 of the Arizona constitution." ACJA § 1-305(C).

[28] A.R.S. § 22-403(A).

establish a selection process consistent with § 1-305 and with municipal charter and ordinance provisions. If the city or town council selects other judicial officers without the presiding judge's official involvement, ACJA § 1-305 does not apply. However, it is recommended the council follow a similar procedure.

7. *Authority to hire, supervise, discipline, and terminate municipal court employees.*

The appellate courts of this state have consistently held that the employees of courts within the state must be under the direct control and supervision of the presiding officer of each court.[29] While there are no cases that specifically address the issue of control over municipal court employees, Winter v. Coor made it clear that municipal courts are a part of the state's integrated judiciary. Court personnel who are directly connected with the operation of the court must be controlled by the court. Ethical Rule 2.12, require judges to supervise court officials and staff to assure conformance with the codes of conduct applicable to judges and other court employees.[30]

Therefore, the municipal court judge or appointee has exclusive authority to hire, supervise, discipline, and fire its employees under applicable policies and procedures, though the judge may consult and receive assistance from another department of the municipal government such as the human resources office. The city or town manager has a limited role or no role in court personnel matters depending upon the duties the council assigns to the manager. In order for the court to function as a co-equal branch of municipal and state government the personnel of the court must be subject to the exclusive control of the presiding judge.[31] This includes employee hiring, supervision, dismissal, and compensation consistent with reasonable personnel, job classification, and budget policies.[32] The manager has a role in these matters only if the manager also serves as the human resources director. Otherwise, the presiding judge looks to the human resources director for advice concerning court employees, just as the manager looks to the human resources director for advice concerning other municipal employees.

8. *Role of the city or town manager concerning the need for court personnel.*

Distribution of powers principles and the Supreme Court's administrative orders require that the presiding judge have the opportunity to make recommendations to

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[29] E.*g.* Broomfield v. Maricopa County, 112 Ariz. 565, 544 P.2d 1080 (1975); Winter v. Coor, 144 Ariz. 56, 59, 695 P.2d 1094, 1098 (1985).

[30] A.R.S. Sup.Ct.Rules, Rule 81, Code of Jud.Conduct, Rule 2.12.

[31] Administrative Order No. 2005-32(C)(1).

[32] Mann v. County of Maricopa, 104 Ariz. 561, 566, 456 P.2d 931, 936 (1969) ("The department of government which has the power of control of personnel directly connected with the operation of the Courts is the Judicial Department.").

the city or town council concerning the need for court positions.[33] The budgeting policies or ordinances adopted by the council should state what, if any, role the manager has in evaluating the need for court positions. Budget related decisions such as this must be made ultimately by the council with deference to the presiding judge's assessment of funding required to operate the court in the manner required by the constitution, statutes and court rules.

9. *Role of the city or town manager and finance department in approving travel arrangements for judges and court staff to attend compulsory educational conferences and meetings.*

The municipal court is part of the integrated judicial department of the state.[34] All Arizona courts and the judges of these courts are subject to the A.R.S. Const. Art. 6 § 3 administrative supervisory authority of the chief justice. Within their first year of taking the bench, all new judges must complete judicial orientation training approved by the Supreme Court's Committee on Judicial Education and Training.[35] All judges are required to obtain a minimum of 16 hours of judicial education each year and any additional judicial education required to maintain competence in the law. Similarly, all judicial branch employees are obligated to complete 16 hours of judicial education pertaining to their job duties, including at least six hours of live training. [36] The number of credit hours is pro-rated for part-time employees. The chief justice also issues an administrative order each year requiring every judge to attend the state judicial conference unless a judge is excused.[37] Requiring all judges to meet minimum judicial education requirements and to attend the annual judicial conference clearly fosters the integration of the judicial department contemplated by the Arizona Constitution by allowing consistent administrative direction and judicial education of all judges and court personnel. Judicial educational activities sometimes include hotel arrangements that place the judge in close proximity to education programs, meetings, and other judges. Attendance by judges and court staff at these events is a necessary cost of operating the municipal court and should be accommodated in the municipal travel policies and budget. Therefore, there should be no basis for the manager or the finance department to veto attendance at these events. Of course, the court must operate within reasonable budgetary limitations and reimbursement for travel should be governed by reasonable travel policies which apply equally to travel by council members, administrative employees, and municipal judges.

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[33] Maricopa v. Dann, 157 Ariz. 396, 401 (1988) ("The presiding judge of the superior court must follow the county procedure to request employment of necessary court personnel.").
[34] Ariz. Const. Art. 6 § 1.
[35] Arizona Code of Judicial Administration § 1-302(I)(5).
[36] "All full-time judges and court personnel governed by these standards shall complete at least sixteen credit hours of judicial education each year, including ethics training." ACJA § 1-302(H)(1).
[37] For example, Arizona Supreme Court Administrative Order No. 2001-28.

10. *Applicability of city or town personnel rules to employees of the municipal court.*

City or town personnel rules apply to municipal court employees unless these rules have been replaced by rules adopted for court personnel or they interfere with the operation of the court. The presiding judge of a county may adopt reasonable judicial personnel rules required for the court to operate effectively.[38] Separate judicial personnel rules that are inconsistent with city or town rules concerning some matters such as hiring, supervision, and dismissal of employees may be reasonable. On the other hand, separate rules concerning matters such as employee benefits may be unreasonable due to the imposition of additional cost on the city or town. The effect of rules on the ability of the court to operate must be considered. The Supreme Court has adopted administrative orders and administrative code provisions which set reasonable minimum standards for courts addressing sexual harassment allegations and the needs of persons with disabilities, for judges involved in appointing special judicial officers, and a Code of Conduct for Judicial Employees.[39]

As the chief executives of co-equal branches of government, the presiding municipal judge and the city or town manager should make every effort to reach agreement regarding which municipal personnel rules apply to court personnel, which rules need to be modified to recognize the authority of the presiding judge, and which personnel matters should be governed by separate rules covering court employees.[40] Rules that make the manager or a personnel board the ultimate authority over other municipal employees must not be applied to court employees. Instead, the presiding municipal judge stands in the place of the manager with respect to court employees. Where agreement cannot be reached, the reasonable judgment of the presiding municipal judge will prevail.

11. *Liability for court operations and employees.*

As provided by statute, municipal judges are officials of municipal government just as Supreme Court justices are officials of state government.[41] Any liability resulting from the official acts of these judges are liabilities of the municipalities and state respectively.[42] The degree of manager or council control over these acts does not affect this liability.

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[38] Administrative Order No. 2005-32.

[39] E.g. Administrative Order No. 2010–13; see also ACJA § 1-303: Code of Conduct for Judicial Employees.

[40] Ariz. Const. Art. 3.

[41] A.R.S. § 22-403(A).

[42] "Given our decision that justices of the peace are local officers, it follows that, pursuant to A.R.S. § 11–532, the county attorney is responsible for providing legal advice and representation to justices of the peace so requesting. Liability coverage for justices of the peace is the county's responsibility, as set forth in A.R.S. §§ 11–261 and –981." Collins v. Corbin, 160 Ariz. 165, 167, 771 P.2d 1380, 1382 (1989).

12. *Authority over employees assigned to the court on a part-time basis.*

A: The presiding municipal judge must have full authority over all court employees during the time they are performing court duties including part-time employees who perform other duties for the city or town.[43] For the portion of their employment during which part-time employees perform court duties, they must be governed by personnel and operational policies established by the court and supervision by the court. The court should not be required to hire and retain a part-time employee simply because that employee is performing other duties for the city or town. The principles of distribution of powers and conflict of interest preclude assigning an employee both court duties and duties related to the administration of justice in the executive branch of municipal government such as the police department or the prosecutor's office.[44]

D. Facilities

1. *Responsibility for providing facilities, staff, and other resources to ensure the safe and effective operation of the court.*

In Mann v. County of Maricopa 104 Ariz. 561, 456 P.2d 931 (1969), the Arizona Supreme Court held that courts of general jurisdiction have the right to quarters appropriate to the office and personnel adequate to perform their functions. The presiding judge is authorized to provide for court security, including implementation of reasonable security standards. Presiding municipal judges may establish court security policies and procedures to provide a safe work environment for judicial employees, litigants, and users of the court that meet established court security standards and are consistent with any direction provided by the Presiding Judge of the county, who exercises administrative supervision over municipal courts.[45] Court security may include procedures, technology, security personnel, or architectural features needed to provide a safe work environment. The presiding judge may control access, including prohibiting or regulating the possession of weapons or potential weapons in the area of any building in which the court is located.

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[43] "The department of government which has the power of control of personnel directly connected with the operation of the Courts is the Judicial Department." Mann v. County of Maricopa, 104 Ariz. 561, 566 (1969).

[44] "A judicial employee shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." ACJA § 1-303, Canon 1, Rule 1.2. See also Standard 3, Standards for Municipal Courts Revised Administrative Order No. 83-11 (Jan. 17, 1990). "No judge should be a member of an association, the purpose of which is to advance the interests of law enforcement officers, prosecutors or defense attorneys."

[45] Admin. Order No. 2005-32.

2. *Use of the courtroom by the city or town for non-judicial purposes.*

While the courtroom must be available as needed for court business and should not be used in a manner which conflicts or has the appearance of conflicting with the judicial function of the court, it is both a court and municipal facility.[46] When there is no conflict with court operations, there is no reason why these facilities cannot be made available for other governmental purposes. However, the court must ensure that any court records maintained in the area and the facility are secured from access by other than authorized court personnel.[47]

E. Records

1. *Responsibility for maintaining municipal court records.*

The court must maintain court records, A.R.S. § 22-428. A.R.S. § 39-121.01(B) provides that, "All officers and public bodies shall maintain all records reasonably necessary or appropriate to maintain an accurate knowledge of their official activities which are supported by funds from the state or any political subdivision thereof." As the officer in charge of the court, the presiding judge is charged with the responsibility of maintaining the records of the court. A.R.S. § 39-121.01(C) further provides that the officer responsible for maintaining records is also responsible for the "preservation, maintenance and care of that officer's public records" and must "secure, protect and preserve public records from deterioration, mutilation, loss or destruction…." Therefore, it is clear the presiding judge of the municipal court is the sole and proper custodian of all records relating to the court and its operations.

2. *Availability of court records to city or town personnel not employed by the court.*

Although access to most public records in Arizona is governed by state statute, the Supreme Court has chosen to exercise its administrative authority over all court records by the adoption of Rule 123, Rules of the Supreme Court. Access to records held by any court, including municipal courts, is governed by Rule 123.

The presiding judge of the municipal court has discretion, within limits, to determine what court records are available for inspection by the public, including city or town officials, and should establish procedures for the inspection of records to ensure their preservation.[48] Court files and pleadings must at all times

[46] A.R.S. § 22-402(A).
[47] Arizona Supreme Court Rule 123.
[48] Rule 123(c)(2).

remain in the care and custody of the judge and designated court staff unless a written order from the judge authorizes otherwise.[49] Likewise, all mail addressed to the court must be opened and read by authorized court staff.

Security measures should be implemented to secure court records in the municipal court during the hours the court is not open or in situations where court staff are out of the office.[50] For example, court files should be locked at night and at any time when the file room is left unattended. "The only individuals who should have keys to the court facility are the judge, court personnel so designated by the judge, and individuals responsible for building maintenance and security."[51] Use of this access must be limited to the authorized purposes.

[49] Rule 123(i)(1).
[50] Id.
[51] Recommendation 6, Bullhead City Report, Administrative Office of the Courts, October, 1988.

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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of PETITION TO AMEND RULES 6 7, AND 41 OF THE ARIZONA RULES OF CRIMINAL PROCEDURE	)	Supreme Court No. R-16____ (expedited adoption requested)

Pursuant to Rule 28 of the Arizona Supreme Court, David K. Byers, Administrative Director, Administrative Office of the Courts, and Chair of the Supreme Court Task Force on Fair Justice for All: Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies ("the Task Force") respectfully petitions this Court to amend Rules 6.1, 7.1, 7.2, 7.3, 7.4, 7.6, and 41, Forms 6 and 7, and to add Rule 7.7 to the Rules of Criminal Procedure, on an expedited basis. These changes are proposed to implement several of the Task Force's recommendations dated August 12, 2016.

I. Background and Purpose of the Proposed Rule Amendments. The proposed rule changes follow through on the Task Force for Fair Justice for All purpose of "recommending best practices for making release decisions that protect

the public, but do not keep people in jail solely for the inability to pay bail" and the recommendations contained in the Task Force report. National and local statistics reviewed by the Task Force indicate a significant number of people incarcerated pretrial are there *solely* because they cannot afford to pay a bond. The data also show that for some of these people, time spent in jail appears to foster further criminal behavior.[1] The proposed amendments will also facilitate a fundamental change in the professional culture of the Arizona criminal justice system – moving the system away from charge-based release decisions that rely upon money bail in presumptive amounts and toward conditional release based on an individualized assessment of a defendant's risk profile.

The amendments to Rules 6.1(b) and 7.4(e) require appointment of counsel to assist defendants who find themselves in need of an advocate for modification of release conditions set at the initial appearance when a defendant who is indigent is unrepresented. Although current rules direct appointment of counsel for indigent defendants at the Initial Appearance, the Task Force heard that some judges delay the appointment pending the filing of charges, or because a conviction of the charge will not necessarily call for incarceration and therefore does not require appointment of counsel. Consequently, an unrepresented indigent defendant may unnecessarily

[1] *Justice for All: Report and Recommendation of the Task Force on Fair Justice for All* (Arizona Supreme Court, August 16, 2016) at p. 27, available at: http://www.azcourts.gov/Portals/0/FairJusticeArizonaReport2016.pdf

languish in jail because the relevant information that would justify release on conditions the defendant can satisfy has not been presented to the court.

The amendments to Rules 7.1, 7.2, 7.3, and 7.6 are intended to promote the use of unsecured and cash bonds over secured bonds, in keeping with the statistical reports showing these types of bonds in lower amounts are equally effective as surety bonds in higher amounts in incentivizing people to meet their appearance obligations. A definition for the term "deposit bond" has been added to Rule 7.1, and the term has been added to the list of possible monetary conditions in 7.3(b); this type of bond allows a defendant to pay a percentage rather than the full amount of a cash bond. The word "appearance" has been deleted from the term "appearance bond" in all rules and forms because it is misleading; release on bond is ordered not only to secure a defendant's appearance in court, but also to ensure the safety of the community.

The changes to Rule 7.3(b) are designed to clarify the hierarchy of release conditions; to emphasize the judge's obligation to impose the least onerous conditions needed to ensure the defendant's appearance and the safety of the community; and to require imposition of non-monetary conditions rather than a secured appearance bond, unless such conditions are reasonable and necessary. The amendments also direct the judge to make an individualized determination of the defendant's risk of non-appearance, risk to the safety of the community, and finances

and prohibits use of a bond schedule that produces an unnecessarily high bond amount.

Corresponding changes to Forms 6 and 7 are also proposed. These forms have been substantially re-formatted, making it impractical to show the proposed revisions. Accordingly, the Appendix includes the current versions of the forms and the proposed new versions for purposes of comparison. Form 6 – Release Order - is used by courts when imposing conditions of release at initial appearance, or arraignment or after a subsequent hearing held pursuant to Rule 7. Form 7 – Appearance Bond - is used when a defendant is ordered to post a bond to secure release. The Task Force is recommending modification of Form 6 and Form 7 to clearly list the various release conditions and bond types available to the court. Additionally, these changes will clarify to the defendant the requirements of the release order and the type of bond imposed. The table contained in Form 6 was modified to include the complete list of release types and added the additional release type of "Pretrial supervision release" (PSR) and the bond type of "Deposit Bond" (DB). Condition 19 was added to read "Provide a current address and phone number to Pretrial Services immediately and notify of any changes." The warning of consequences of violating the release order was reformatted in bold text. Form 7 was revised to list the bond types in order of least restrictive to most restrictive. The warning of consequences of violating the appearance bond was reformatted in bold

text.

The addition of Rule 7.7 addresses a specific situation that arises when a felony probationer is prevented from receiving some type of court-ordered treatment because the probationer is in pretrial custody on a misdemeanor charge before a justice or municipal court and unable to make bail. The new rule will clarify the sentencing superior court's authority to modify conditions of release in the misdemeanor case to allow the probationer to participate in the superior court-ordered treatment program.

II. Preliminary Comments. While the Task Force included a very comprehensive cross-section of the criminal justice community and the proposed rule amendments were either specifically recommended or promote one or more Task Force recommendations, the specific language of this petition has not been circulated to the Task Force or to other criminal justice system stakeholders for comment before filing. Therefore, an opportunity for comment as part of the Court's expedited review is recommended.

III. Request for Expedited Consideration. Pursuant to Rule 28(G) of the Rules of the Supreme Court, petitioner requests expedited consideration of this Petition, including immediate publication of this Petition for comments through October 21, 2016, with petitioner's Reply to be filed by November 10. This will allow the Task Force to consider comments received at its next meeting, scheduled

for November 3, 2016, and to file a timely response to any comments requiring a response, before the Court's December rules agenda.

Wherefore, petitioner respectfully requests that the Court amend the Rules of Criminal Procedure as proposed in the Appendix included herewith.

RESPECTFULLY SUBMITTED this ____ day of ____, 2016.

By /s/_____
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APPENDIX

(language to be removed is shown in ~~strikethrough~~, new language is underlined)

Rule 6.1. Rights to counsel; waiver of rights to counsel

a. [no changes]

b. *Right to Appointed Counsel*. An indigent defendant ~~shall be~~ is entitled to have an attorney appointed: ~~to represent him or her in~~

(1) If detained pretrial after criminal charges are filed;

(2) In any criminal proceeding ~~which~~ that may result in loss of liberty; and

(3) In any other criminal proceeding in which the court concludes that the interests of justice so require.

c. through e. [no changes]

Rule 7.1. Definitions and applicability of rule

a. *Own recognizance.* "Own recognizance" means release ~~without any condition of an undertaking relating to, or deposit of, security~~ of a person without imposing any bond as a condition of release.

b. *Unsecured ~~Appearance~~ bond.* An "unsecured ~~appearance~~ bond" is an undertaking, on a form approved by the Supreme Court, to pay to the clerk of the court a specified sum of money upon failure of a person released to comply with ~~its~~ the conditions of the bond.

c. C*ash bond.* A “cash bond” is a secured bond consisting of actual cash deposited by the person released or someone on behalf of that person other than a professional bondsman.

d. *Deposit bond.* A “deposit bond” is a partially-secured bond in which the person, or someone on behalf of that person other than a professional bondsman, deposits a percentage of the full bond amount in cash.

~~c~~e. *Secured ~~Appearance~~ bond.* A "secured ~~appearance~~ bond" is ~~an appearance~~ a bond secured by deposit with the clerk of security equal to the full amount thereof.

~~d~~f. *Security.* "Security" is cash, a surety's undertaking, or any property of value, deposited with the clerk to secure ~~an appearance~~ a bond. The value of such property shall be determined by the clerk, or at the clerk's or a party's request, by the court.

~~e~~g. *Surety.* A "surety" is one, other than the person released, who executes ~~an~~

~~appearance~~ a bond and binds ~~himself or herself~~ the surety to pay its amount if the person released fails to comply with its conditions. A surety shall file with ~~an appearance~~ a bond an affidavit that he or she is not an attorney or person authorized to take bail, and that ~~he or she~~ the surety owns property in this state ~~(~~or is resident of this state owning property~~)~~ worth the amount of the ~~appearance~~ bond, exclusive of property exempt from execution and above and over all liabilities, including the amount of all outstanding ~~appearance~~ bonds entered into by ~~him or her~~ the surety, specifying such property, the exemptions and liabilities thereon, and the number and amount of such ~~appearance~~ bonds.

~~f~~**h.** *Professional Bondsman.* Any person who is surety simultaneously on more than four ~~appearance~~ bonds is a "professional bondsman." No person may be a professional bondsman unless the person annually certifies in writing under oath to the clerk of the Superior Court that ~~he or she~~ the person

(1) Is a resident of this state;

(2) Has sufficient financial net worth to satisfy reasonable obligations as a surety;

(3) Agrees to assume an affirmative duty to the court to remain in regular contact with any defendant released pursuant to ~~an appearance~~ a bond on which the person is a surety;

(4) Has not been convicted of a felony, except as otherwise provided by A.R.S. § 20-340.03;

(5) Has no judgments arising out of surety undertakings outstanding against him or her;

(6) Has not, within a period of two years, violated any provisions of these rules or any court order.

Capacity to act as a professional bondsman may be revoked or withheld by the clerk, or by the court, for violation of any provision of this rule.

~~g~~**j**. *Applicability.* This rule shall not apply to minor traffic offenses.

COMMENT [AMENDED 2007]

Rule 7.1 contains the definitions of the terms used in the rule and the requirements for "sureties" and "professional bondsmen" currently specified in the rules of criminal procedure.
Rule 7.1(a). See Form 6 for an order of release.
Rule 7.1(b). The rule substitutes for "bail bond" and "bail" the term "~~appearance~~ unsecured bond" which emphasizes the role of unsecured bonds. See Ariz.Rev.Stat.Ann. § 13-1577(E) (Supp.1972) [now § 13-3967] (noting propriety of conditions other than money bail). See Form 7.
Rule 7.1(~~c~~e). "Secured ~~appearance~~ bond" is used instead of "bail". See Form 7 for a secured

~~appearance~~ bond.
Rule 7.1(~~d~~f). "Security" is defined broadly enough to encompass anything of value.
Rule 7.1(eg). This definition includes the requirements of the 1956 Ariz.Rules of Criminal Procedure, as amended, Rules 46, 47, 48(A) and 49. Wherever standards are unclear under present rules, this definition chooses their most onerous interpretation. See Form 7 and Attachment A thereto for the form of the surety's undertaking and affidavit.
Rule 7.1(~~f~~h). The definition of "professional bondsman" is more limited than the 1956 Ariz.Rules of Criminal Procedure, as amended, Rules 50 and 51. The clerk is required to review a professional bondsman's qualifications annually.

Rule 7.2. Right to release

a. *Before Conviction; Persons Charged With an Offense Bailable as a Matter of Right.* All persons charged with a crime but not yet convicted are presumed to be innocent. Except as otherwise provided in these rules, ~~A~~any person charged with an offense bailable as a matter of right ~~shall~~ must be released pending or during trial on the person's own recognizance with only the conditions of release required by Rule 7.3(a), unless the court determines, in it is 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~~ that are reasonable and necessary to protect other persons or the community from an actual risk posed by the person or to secure the appearance of the person in court.

b. through d. [no changes]

COMMENT TO 2014 AMENDMENT TO RULE 7.2(B)

Rule 7(b) was amended in 2014 to comply with *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014), *cert. denied*, 135 S.Ct. 2046 (2015), which held unconstitutional A.R.S. Const. Art. 2, § 22(A)(4) and A.R.S. § 13-3961(A)(5) mandating that bail be denied to undocumented immigrants charged with a serious crime.

COMMENT

Rule 7.2(a). This section establishes a presumption for release on recognizance in most cases. Offenses "bailable as a matter of right" are defined in Ariz.Const. Art. 2, § 22 and Ariz.Rev.Stat.Ann. § 13-1571 (1956) [now § 13-3961] as all cases except "capital offenses when the proof is evident or the presumption great" and felonies committed while on bail (using the same "proof is evident or the presumption great" standard).
The presumption of an "own recognizance release" follows closely the ABA, Standards Relating to Pretrial Release, § 5.1 (Approved Draft, 1968), and the Federal Bail Reform Act, 18 U.S.C.A. § 3146 (1966). ~~This section of the rule differs only in emphasis from Ariz.Rev.Stat.Ann. § 13-1577(B).~~
Rule 7.2(b). See Rule 17, Rules of the Supreme Court, 17 Ariz.Rev.Stat.Ann.

COMMITTEE COMMENT TO 1993 AMENDMENT

The 1993 amendment renumbered as Rule 7.2(b)(1) former Rule 7.2(b), which provides for the custody of a person convicted of an offense for which that person in all probability will suffer a sentence of incarceration, and made it applicable only in superior court. It added Rule 7.2(b)(2), applicable in

limited jurisdiction courts, which represents a significant diversion from the parallel provision of Rule 7.2(b)(1). Rule 7.2(b)(2) provides that the person *shall* remain released on bail or own recognizance if these were conditions that existed prior to the person's conviction. A bond may still be required under Rule 6. Superior Court Rules of Appellate Procedure, in order to stay the execution of the remaining portion of the person's sentence.

Rule 7.3. Conditions of release

a. *Mandatory Conditions.* **[no changes]**

~~**b**. *Additional Conditions*. An order of release may include the first one or more of the following conditions reasonably necessary to secure a person's appearance:~~

~~(1) Execution of an unsecured appearance bond in an amount specified by the court;~~

~~(2) Placing the person in the custody of a designated person or organization agreeing to supervise him or her;~~

~~(3) Restrictions on the person's travel, associations, or place of abode during the period of release;~~

~~(4) Any other condition not included in (5) or (6) which the court deems reasonably necessary;~~

~~(5) Execution of a secured appearance bond; or~~

~~(6) Return to custody after specified hours.~~

b. *Discretionary Conditions in General.* The court may impose as a condition of release one or more of the following conditions, if the court finds the condition is reasonable and necessary to protect other persons or the community from an actual risk posed by the person or secure the person's appearance. In making this determination, the court must consider the results of an approved risk assessment, if provided.

(1) Non-monetary conditions:

(i) Place the person in the custody of a designated person or organization agreeing to provide supervision;

(ii) Restrict the person's travel, associations, or residence;

(iii) Prohibit the person from possessing any dangerous weapon or engaging in certain described activities or consuming intoxicating liquors or illegal drugs;

(iv) Require the person to report regularly to and remain under the supervision of an officer of the court;

(v) Return the person to custody after specified hours; or

(vi) Any other non-monetary condition that has a reasonable relationship to assuring the safety of other persons or the community from an actual risk posed by the person or securing the person's appearance.

(2) Monetary conditions. In deciding whether to impose a monetary condition of release and what amount to impose, the court must make an individualized determination of the person's risk of non-appearance, risk to the community, and financial circumstances rather than rely on a schedule of charge-based bond amounts. The court must not impose a monetary condition that results in unnecessary pretrial incarceration solely because the person is unable to pay the bond. If the court determines a monetary condition is necessary, the court must impose the least onerous of the types of bonds listed below in the lowest amount necessary to protect other persons or the community from an actual risk posed by the person or to secure the person's appearance. Monetary conditions include:

(i) Unsecured bond;
(ii) Deposit bond;
(iii) Cash bond; or
(iv) Other type of secured bond.

COMMENT [AMENDED 2007]

Rule 7.3(a). This section replaces the 1956 Ariz.Rules of Criminal Procedure, as amended, Rules 48 and 68 (forms of undertaking), specifying the matters which must be included in every order of release. The rule adds the requirement of good behavior from Ariz.Rev.Stat.Ann. § 13-1578(B) [now § 13-3968]. Also, following Ill.Ann.Stat. Ch. 38, § 110-10(a)(3) and (b)(3) (Smith-Hurd 1970), the prohibition against out-of-state travel without leave of the court is mandated for every case. The diligent prosecution of an appeal is also taken from the Illinois statute. (See the provision in Rule 7.2(b) for mandatory revocation upon violation of this requirement.) The surety's undertaking to surrender the person in the event of a supervening felony charge is deleted. See generally Form 6.

~~**Rule 7.3(b).** This section sets forth the additional conditions which a court may impose under the standard of Rules 7.2(a) or (b), and the order of priority in their imposition--*e.g.*, the court may not properly impose (b)(6) unless it finds (b)(5) inadequate. See Form 6, which lists these conditions in the same order.~~
~~Subsection (1) calls for an unsecured appearance bond as defined in Rule 7.1. This condition is closely related to Release on Own Recognizance and is used interchangeably with it in the Federal Bail Reform Act, 18 U.S.C.A. § 3146 (1966).~~
~~Subsection (2) is taken from the statute. If a person willfully fails to produce a defendant released in his custody, the court may hold him in contempt. Subsection (3) and (4) are taken verbatim from § 13-1577(E)(2) and (6) [now § 13-3967]. Subsection (4) would also encompass the additional possibilities mentioned in the statute: prohibition against possessing weapons, engaging in certain activities or indulging in drugs or intoxicating liquors [§ 13-1577(E)(4)] and requiring the defendant to report to and remain under the supervision of an officer of the court [§ 13-1577(E)(5)].~~
~~Subsection (5), a fully secured bond, is included within the language of § 13-1577(E)(3), and is listed as the second least desirable condition. Part-time incarceration, authorized by § 13-1577(E)(6), is the harshest permissible condition.~~

Rule 7.4. Procedure

a. through d. [no changes]

e. *Appointment of Counsel.* The court must appoint counsel in any case in which the defendant is eligible for appointment of counsel under Rule 6.1(b).

Rule 7.6. Transfer and disposition of bond

a. through c. [no changes]

d. *Exoneration*

(1) At any time before violation that the court finds that there is no further need for ~~an appearance~~ a bond, ~~it shall~~ the court must exonerate the ~~appearance~~ bond and order the return of any security deposited.

(2) When a deposit bond or cash bond is exonerated, the court must order the return of the entire amount deposited.

(~~2~~3) If the surety, in compliance with the requirements of A.R.S. § 13-3974, surrenders the defendant to the sheriff of the county in which the prosecution is pending, or delivers an affidavit to the sheriff stating that the defendant is incarcerated in this or another jurisdiction, and the sheriff reports the surrender or status to the court, the court may exonerate the bond.

(~~3~~4) In all other instances, the decision whether or not to exonerate a bond shall be within the sound discretion of the court.

e. [no changes]

Rule 7.7. Temporary modification of conditions of release

If a felony probationer has been detained for failure to post a secured bond in a misdemeanor case, a superior court judge may temporarily modify the conditions for release imposed in the misdemeanor case to permit release of the probationer to participate in treatment ordered in the felony case. If such modification occurs, the Clerk must provide the associated order to the court that imposed the conditions of release in the misdemeanor case.

[CURRENT] **Form 6. Release Order**

_____ **COURT** _____ **County, Arizona**

STATE OF ARIZONA, Plaintiff -vs- _____ _____ _____ Defendant (FIRST, MI, LAST) Booking Number Date of Birth	**RELEASE ORDER**

LINE #	COMPLAINT NO.	VIOLATION CODE	NF	OR	3P	BOND	BA	U	S	C	NB
1						$					
2						$					
3						$					
4						$					
5						$					

(**NF** = charge not filed; **OR** = own recognizance release; **3P** = 3rd party custody; **BA**= bond applies; **U** = unsecured app.bond; **S** = secured app.bond; **C** = cash only; **NB** = non-bondable)

BOND: If you cannot post a bond of $ _____ you will remain in custody until your next court hearing on _____. If you are released from jail, you must follow all release conditions and appear at court as indicated below:

MANDATORY AND STANDARD CONDITIONS OF RELEASE:

[x] 1. Appear at _____ Court on:
_____.
Court name, and address or see attached sheet for Court location at _____ a.m. / p.m., Courtroom: _____ for _____ and attend all future court hearings.

[x] 2. Violate no federal, state or local criminal law.

[x] 3. Not leave the state of Arizona without written permission from the court.
[ ] Defendant may leave the state of Arizona provided defendant returns for court dates.

[x] 4. Diligently pursue any appeal if released from custody after judgment and sentence have been imposed.

[ ] 5. Maintain contact with your attorney.

[ ] 6. Provide a current address and phone number to the Court and to your attorney and immediately notify both of any changes.

[ ] 7. Not threaten or initiate any type of contact with the alleged victim(s).

[ ] 8. Not drive a motor vehicle without a valid driver's license in your possession.

OTHER CONDITIONS OF RELEASE:

[ ] 9. Not threaten or initiate any type of contact with any person as specified here: _____.

[ ] 10. Not possess weapons as specified here: _____.

[ ] 11. Not consume any alcoholic beverages.

12. [ ] Not go to scene of the alleged crime:
[ ] Not go to locations as specified here: _____.

[ ] 13. Comply with the assigned pretrial supervision program as specified here: _____.

[ ] 14. Comply with 3rd party custody release conditions as specified here: _____.
[ ] 15. Contact probation or parole officer. See 3rd party obligations on back
[ ] 16. Electronic monitoring, if available, (Mandatory if charged with a felony offense under Chapters 14 or 35.1 of Title 13)
[ ] 17. Other:_____.

CONSEQUENCES OF VIOLATING THIS ORDER: You have the right to be present at your trial and at all other proceedings in your case. If you fail to appear the court may issue a warrant for your arrest and/or hold the trial or proceeding in your absence.
IF CONVICTED, YOU WILL BE REQUIRED TO APPEAR FOR SENTENCING. IF YOU FAIL TO APPEAR, YOU MAY LOSE YOUR RIGHT TO A DIRECT APPEAL.

If you violate any condition of an appearance bond, the court may order the bond and any related security deposit forfeited to the State of Arizona. In addition, the court may issue a warrant for your arrest upon learning of any violation of the conditions of release. After a hearing, if the court finds that you have not complied with the release conditions, the court may modify the conditions or revoke the release altogether.

If you are released on a felony charge, and the court finds the proof evident or the presumption great that you committed a felony during the period of release, the court must revoke your release. You may also be subject to an additional criminal charge, and upon conviction you could be punished by imprisonment in addition to the punishment which would otherwise be imposable for the crime committed during the period of release. Upon finding that you violated conditions of release, the court may also find you in contempt of court and sentence you to a term of imprisonment, a fine, or both.

ACKNOWLEDGEMENT: I fully understand and will comply with all release conditions indicated above and further understand the consequences should I violate any part of this order.

_____	_____
Current address where you live Apt. No.	Address where you receive mail if different from current address
_____ (___)_____	_____ (___)_____
Phone No.	Phone No.

X_____ X_____

Defendant Signature Date Judicial Officer Date

DISTRIBUTION: WHITE--COURT YELLOW--SIMS OPERATOR PINK--DEFENDANT

THIRD PARTY OBLIGATIONS

YOU MUST comply with the following obligations if the defendant has been placed in your custody while the case is pending in court.

A. Supervise the defendant in accordance with all of the release conditions.
B. Make every effort to assure that the defendant is present for all scheduled court hearings.
C. Make every effort to assure that the defendant will contact Indigent Defense Services to determine indigency status.
D. Notify the court immediately in the event the defendant violates any conditions of release or disappears.

As Third Party Custodian appointed by the Court, I understand and accept these obligations.

_____ (_____)_____

Third Party Custodian Signature e Date Phone No.

_____

Address

_____

City State Zip

WARNING

IF YOU WILLFULLY VIOLATE ANY OF THESE OBLIGATIONS, THE COURT MAY HOLD YOU IN CONTEMPT AND IMPOSE A JAIL SENTENCE, FINE OR BOTH, AND YOU MAY LOSE YOUR RIGHT TO APPEAL.

[**CURRENT**] **Form 7. Appearance Bond**

_____ **COURT** _____ **County, Arizona**

STATE OF ARIZONA, Plaintiff [CASE/COMPLAINT NO.] -vs- _____ Defendant (FIRST, MI, LAST)	**APPEARANCE** **BOND**

In accordance with the terms of a release order or warrant issued on _____(month/day) 20_____, by Judicial Officer of the _____ court, of _____(city, justice, or county), State of Arizona, the defendant, _____ and the defendant's surety _____(If none, so state) hereby promise to pay the State of Arizona the sum of dollars ($_____), in the event the defendant fails to appear at _____ at _____ a.m./p.m. on _____(month/day) 20___, or during the pendency of the case to appear to answer the charges or to submit to the orders and process of the court having jurisdiction of the case.

SECURED APPEARANCE BOND

[ ] The defendant hereby deposits with the court cash or property of value in the full amount of this bond, the same to be forfeited in the event the defendant fails to comply with its conditions.

Depositor:

_____

Address:

_____

Phone Number:

_____

OR

[ ] _____ (Name, Address)

surety for the defendant, hereby swears (or affirms)that the surety is not an attorney or person authorized to take bail, and that the surety owns property in this state (or is a resident of this state owning property) worth the amount of this bond, exclusive of property exempt from execution and above and over all liabilities, as detailed in Attachment A.

WARNING: IF YOU DO NOT APPEAR AS REQUIRED, THIS BOND MAY BE FORFEITED AND THE PROCEEDINGS BEGIN WITHOUT YOU.

IF CONVICTED, YOU WILL BE REQUIRED TO APPEAR FOR SENTENCING. IF YOU FAIL TO APPEAR, YOU MAY LOSE YOUR RIGHT TO A DIRECT APPEAL.

ACKNOWLEDGEMENTS

_____	_____
Date	Defendant
State of Arizona)	Subscribed and sworn to before me on
)	
ss.	
County of)	_____
_____	
	_____
My Commission Expires _____	Notary Public

Approved:

_____	_____
Date	Surety or Authorized Agent

Form 7 Attachment A
[Intentionally Omitted]

Proposed FORM 6

_____ COURT _____ County, Arizona

STATE OF ARIZONA Plaintiff -vs- _____ _____ _____ Defendant (FIRST, MI, LAST) Booking Number Date of Birth	RELEASE ORDER

LINE #	COMPLAINT NO.	VIOLATION CODE	NF	ORR	PSR	3PR	BOND	BA	UB	DB	CB	SB	NB
1							$						
2							$						
3							$						
4							$						
5							$						

(NF=Charge not filed; ORR=Own recognizance release; PSR=Pretrial supervision release; 3PR=Third party release bond; Bond=Amount of bond; BA=Bond applies; UB=Unsecured bond; DB=Deposit Bond; CB=Cash; SB=Secured bond; NB=Non-bondable)

If you are released from jail, you must follow all release conditions and appear at court as indicated below:

MANDATORY AND STANDARD CONDITIONS OF YOUR RELEASE:

[X] 1. Appear at _____ court on: _____ at _____ a.m. / p.m., Courtroom: _
(Court name and address) (Date) (Time)
for _____ and attend all future court hearings.

[X] 2. Violate no federal, state or local criminal laws.

[X] 3. Not leave the state of Arizona without written permission from the court.
[ ] Defendant may leave the state of Arizona provided defendant returns for court dates.

[X] 4. Diligently pursue any appeal if released from custody after judgment and sentence have been imposed.

[ ] 5. Maintain contact with your attorney.

[ ] 6. Provide a current address and phone number to the court and to your attorney and immediately notify both of any changes.

[ ] 7. Not threaten or initiate any type of contact with the alleged victim(s).

[ ] 8. Not drive a motor vehicle without a valid driver's license in your possession.

[ ] 9. Not threaten or initiate any type of contact with any person as specified here: _____.

[ ]10. Not possess weapons as specified here: _____.

[ ]11. Not consume any alcoholic beverages.

[ ]12. Not go to scene of the alleged crime.

[ ]13. Not go to locations as specified here: _____.

[ ]14. Comply with 3rd party custody release conditions as specified here: _____.

[ ]15. Contact probation or parole officer. (See 3rd party obligations in this document.)

[ ]16. Electronic monitoring, if available, (mandatory if charged with a felony offense under Chapters 14 or 35.1 of Title 13)

[ ]17. Other: _____.

ADDITIONAL CONDITIONS FOR YOUR PRETRIAL SUPERVISION RELEASE (PSR):

[ ]18. Comply with the assigned pretrial supervision program as specified here: _____.

[ ]19. Provide a current address and phone number to Pretrial Services immediately and notify of any changes.

FINANCIAL CONDITIONS OF RELEASE: If you cannot post a bond of $ _____ you will remain in custody until your next court hearing on _____.

IF YOU VIOLATE THIS ORDER: You have the right to be present at your trial and at all other proceedings in your case. IF YOU FAIL TO APPEAR THE COURT MAY ISSUE A WARRANT FOR YOUR ARREST AND/OR HOLD THE TRIAL OR PROCEEDING IN YOUR ABSENCE. IF CONVICTED, YOU WILL BE REQUIRED TO APPEAR FOR SENTENCING. IF YOU FAIL TO APPEAR, YOU MAY LOSE YOUR RIGHT TO A DIRECT APPEAL.

If you violate any condition of a bond, the court may order the bond and any related security deposit forfeited to the State of Arizona. In addition, the court may issue a warrant for your arrest upon learning of any violation of the conditions of release. After a hearing, if the court finds that you have not complied with the release conditions, the court may modify the conditions or revoke the release altogether.

If you are released on a felony charge, and the court finds the proof evident or the presumption great that you committed a felony during the period of release, the court must revoke your release. You may also be subject to an additional criminal charge, and upon conviction you could be punished by imprisonment in addition to the punishment which would otherwise be imposable for the crime committed during the period of release. Upon finding that you violated conditions of release, the court may also find you in contempt of court and sentence you to a term of imprisonment, a fine, or both.

ACKNOWLEDGEMENT: I fully understand and will comply with all release conditions indicated above and further understand the consequences should I violate any part of this order.

_____

Current Address where you live Apt. No.

_____

Address where you receive mail if different from current address

( ) _____ ( ) _____

Phone No. Phone No.

X _____ X _____

Defendant Signature Date Judicial Officer Date

DISTRIBUTION: WHITE – COURT YELLOW – SIMS OPERATOR PINK – DEFENDANT

Proposed FORM 7

_____ COURT _____ County, Arizona

STATE OF ARIZONA Plaintiff -vs- _____ _____ _____ Defendant (FIRST, MI, LAST) Booking Number Date of Birth	**BOND**

TYPE OF BOND YOU HAVE

[ ] **UNSECURED BOND:** In accordance with the terms of a release order or warrant issued on _____, 20_____, by Judicial Officer of the _____ _____ court, of _____, State of Arizona, the defendant _____ _____ and the defendant's surety _____ (If none, so state) hereby promise to pay the State of Arizona the sum of $_____ in the event the defendant fails to appear at _____ at _____ a.m./p.m. on _____, 20_____ and at any other hearing during the pendency of the case, unless excused by the judicial officer.

[ ] **DEPOSIT BOND:** The defendant will deposit with the Clerk of the Court _____% of the total sum of $_____, with the remainder of $_____ as an unsecured bond. The deposited amount of the case appearance bond will be returned to the defendant, if defendant appears at _____ at _____ a.m./p.m. on _____, 20 _____ and at any other hearing during the pendency of the case to appear and answer the charges or submit to the orders and process of the court having jurisdiction of the case. In the event the defendant fails to appear at the hearing or during the pendency of the case, defendant will forfeit the cash bond to the State of Arizona.

[ ] **CASH BOND:** The defendant will deposit with the Clerk of the Court the total sum of $_____. The total amount of the cash bond will be returned to defendant if defendant appears at _____ ____ at _____ a.m./p.m. on _____, 20_____ and at any other hearing during the pendency of the case to appear and answer the charges or submit to the orders and process of the court having jurisdiction of the case. In the event the defendant fails to appear at the hearing or during the pendency of the case, defendant will forfeit the cash bond to the State of Arizona.

[ ] **SECURED BOND—without a surety:** The defendant hereby deposits with the court cash or property of value in the full amount of this bond, the same to be forfeited in the event the defendant fails to comply with its conditions.

Depositor: _____

Email address: _____

Address: _____

Phone number: _____

[ ] **SECURED BOND—with a surety:** _____. Surety for the defendant, hereby swears (or affirms) that the surety is not an attorney or person authorized to take bail, and that the surety owns property in this state (or is a resident of this state owning property) worth the amount of this bond, exclusive of property exempt from execution and above and over all liabilities, as detailed in Attachment A.

WARNING: IF YOU DO NOT APPEAR AS REQUIRED, THIS BOND MAY BE FORFEITED AND THE PROCEEDINGS BEGUN WITHOUT YOU. IF CONVICTED, YOU WILL BE REQUIRED TO APPEAR FOR SENTENCING. IF YOU FAIL TO APPEAR, YOU MAY LOSE YOUR RIGHT TO A DIRECT APPEAL.

Proposed FORM 7

ACKNOWLEDGEMENTS

_____ _____

Date Defendant

State of Arizona)
) ss.
County of _____) Subscribed and sworn to before me on

_____

_____

My Commission Expires _____ Notary Public

Approved:

_____ _____

Date Surety or Authorized Agent

Form 7 Attachment A
[No changes]

Fair Justice For All Task Force
Maricopa County Adult Probation Feedback
Petition to Amend the Arizona Rules of Criminal Procedures
Rules 6, 7 and 41

The Maricopa County Adult Probation Department (MCAPD) appreciates the opportunity to provide feedback on the proposed Rule changes.

We are looking forward to the changes taking effect, and only have a few comments.

1. **General Comment**:
   The current practice in Rule 3.2.a of how and when bonds are set, when issuing a warrant, (Grand Jury warrants, Superior Court FTA) does not utilize risk-based decision making, because the information allowing for risk-based decision making is not available when the amount of bond is established. Currently, when a warrant is issued, the judicial officer signing the warrant makes an individual determination regarding the amount of a secured appearance bond if the individual is bailable as a matter of right (Rule 3.2.a) and it is generally affirmed by subsequent judicial officers. Judicial officers tend to honor previous decisions made regarding bond amounts, even if new information is available such as the results of a risk assessment that predicts the defendant's likelihood of appearing in court and staying crime free while their case is pending. This existing practice is not consistent with the goals of the Task Force and low risk people that are indigent are not able to be released because of secured bond determined without relevant information. We are recommending a change be made to Rule 3.2.a to delete the ability for the judicial officer issuing the warrant to state the amount of the secured appearance bond and instead, that release decisions will be made at the IA hearing, or any hearing subsequent to arrest, where risk-based decision making tools are available to allow the judicial officer to make an informed decision. This process should exclude probation violation warrants.

   Recommended verbiage:
   Rule 3.2. Content of warrant or summons
   a. Warrant. The warrant shall be signed by the issuing magistrate and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall state the offense with which the defendant is charged and whether the offense is one to which victims' rights provisions apply. It shall command that the defendant be arrested and brought before the issuing magistrate or, if the issuing magistrate is absent or unable to act, the nearest or most accessible magistrate in the same county. If the defendant is bailable as a matter of right, ~~it shall state the amount of a secured appearance bond~~ decisions regarding release shall be made by a magistrate at the time of arrest, when a risk-assessment is available to inform the decision.

2. **General Comment:**
   From our experience, there is confusion between the definitions of "bailable" and "bondable". We propose adding clarifying definitions as to the meanings.

3. **Proposed changes to Rule 6.1:**
   There is come confusion as to the intent, and when the counsel will be present. The way the proposed changes read, it sounds like the appointment of counsel occurs after the IA hearing. If so, what about grand jury cases or any case where charges are already filed? Does this mean that counsel will be present at the IA hearing for these cases?

   We believe the appointment of counsel should occur at the IA hearing, as it is a key juncture in a person's life, who is presumed innocent. Very consequential decisions will be made at the IA hearing and one of the goals of the Task Force is to recommend best practices for making release decisions that protect the public but do not keep people in jail solely for the inability to pay bail.

   Providing legal counsel at the IA hearing is a best practice and it will be a good check and balance to help support the Task Force's goals and practices for Arizona Courts of people not

being jailed pending the disposition of charges merely because they are poor. Having legal counsel present at the IA hearing will help support and individual's release on OR, or to Pretrial Services for low to moderate risk individuals, while not increasing risk to public safety.

There is research indicating that when low risk individuals are detained in a pretrial status for 2-3 or more days, they are more likely to commit new crimes and fail to appear in Court and more likely to commit a new crime within two (2) years of post- disposition.

As an alternative to having counsel present at the IA hearing, the Court could require a second review hearing within 72 hours of being detained to re-evaluate moderate and low-risk offenders, prioritizing the low risk.

Relating to victims' rights—the victims in victim-related matters could be advised at the IA hearing that there will be a second review hearing subsequent to the IA hearing where custody orders will be determined.

Recommended verbiage:
"An indigent defendant shall be entitled to have an attorney appointed for any criminal proceeding which may result in punishment by loss of liberty.
Or:
"The Court should require a second review hearing within 72 hours of being detained to re-evaluate low-risk and moderate risk offenders."

4. **Proposed changes to Rule 7.7:**
It is unclear what "temporarily" modifies means in this Rule. Once a Superior Court Judge modifies the conditions of release, and notifies the originating lower-jurisdiction of the release order, how does this become a "temporary" situation? We believe the word "temporarily" should be removed from the proposed verbiage.

Also, we believe there is a potential gap in this Rule proposal. If a probationer is released to treatment under this Rule, and subsequently absconds, a probation violation warrant would likely be filed. However, how would the lower-level Court be made aware of this circumstance? We believe there to be a responsibility to communicate the status of the probationer while on release under the provisions of this Rule. We would like to see the Court also provide a copy of the release order to the probation department so that appropriate follow up can take place and the probationer can be directed to return to the lower-jurisdiction Court to address the misdemeanor matter when back in the community.

Recommended verbiage:
A superior court judge may modify the conditions of release that were imposed in a misdemeanor case of a probationer who is detained due to failure to post a secured bond in that case in order to permit release of the probationer to participate in a treatment program. The court shall provide instructions to the probationer as to how to handle the misdemeanor matter, and the clerk must provide the order to the court that imposed the conditions of release in the misdemeanor case as well as to the probation department. Further, the probation department shall notify the court of any change to the probationer's status if the probationer leaves the treatment program prior to successful completion or a probation violation warrant is issued, so that the court may then notify the lower-jurisdiction court of the change in status.

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ARIZONA SUPREME COURT

IN RE:
PETITION TO AMEND RULES 6, 7, AND 41 OF THE ARIZONA RULES OF CRIMINAL PROCEDURE

R-16-0041

MARICOPA COUNTY ATTORNEY'S RESPONSE TO PETITION TO AMEND RULES 6, 7, AND 41 OF THE ARIZONA RULES OF CRIMINAL PROCEDURE

The Maricopa County Attorney hereby responds to the Petition to Amend Rules 6.1, 7.1, 7.2, 7.3, 7.4, 7.6, and 41, Arizona Rules of Criminal Procedure, Forms 6 and 7 and to add Rule 7.7 to the Arizona Rules of Criminal Procedure and asks this Court to extend the comment period to the "normal" rule cycle next year or to deny or modify portions of the Petition as explained below.

Respectfully submitted this 18* day of October, 2016.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

By _____
MARK FAULL
CHIEF DEPUTY

I. INTRODUCTION

The Administrative Office of Courts (AOC) has petitioned this Court to amend Rules set forth above and creates a new Rule 7.7 on an expedited basis. MCAO's specific comments to requested rule changes are set forth below. Preliminarily, MCAO opposes the expedited consideration of the petition as currently approved by this Court because the Petition does not cite any compelling reason for such an abbreviated comment period. Given the scope of the proposed changes, the Petition should be opened for a "normal" comment period under the Rules of this Court for full consideration next year. Although the petition relies on the report of the Fair Justice for All Task Force ("the Report"), it is important to note that the specific language of the Petition and the requested amendments to the rules were not considered by the very task force which issued the Report. The requested changes concern rules which are crucial to protecting victims, the public and securing persons' appearance at trial. These rules should be carefully considered and the expedited process adopted to push these rules through without ample opportunity for victims, the public, and other stakeholders in the criminal justice system to thoroughly examine all issues attendant to the requested changes is not in the interests of the fair and orderly administration of the court or in the interests of justice.

II. ARGUMENT

Rule 6.1

The Petition proposes an amendment to Rule 6.1 thereby creating a substantive right to counsel if a defendant is detained pretrial after criminal charges are filed. Presumably, the amendment is being sought to address concerns about misdemeanor matters since a right to appointed counsel already exists for felony criminal matters. *See State v. Bernal*, 13 Ariz. App. 145, 474 P.2d 864 (1970). It appears that the Petition seeks a right to appointed counsel for defendants who are "detained pretrial after criminal charges are filed". The Petition does not address whether defendants who are released after filing of charges (and where there will be no loss of liberty upon conviction) are still entitled to appointed counsel. Because both the Report and the Petition rely on anecdotal evidence, it is difficult to assess the true magnitude of the problem this change seeks to address. Although the MCAO does not oppose appointment of counsel for indigent misdemeanor pretrial detainees, the petition and the proposed rule change should reflect that this rule change is meant to address concerns in misdemeanor as opposed to felony settings. If the proposed rule is to be adopted, MCAO suggests modifying proposed Rule 6.1(B)(1) to read "<u>While</u> detained pretrial after <u>misdemeanor</u> criminal charges are filed;" MCAO would further note that the concerns cited in both the report and the petition, exist because the courts have allowed them to exist. The courts decide which persons are released on

their own recognizance and which are required to post bond. It does not require appointment of counsel for a judicial officer to reassess the release conditions of a misdemeanant who is in custody because of a court imposed bond. According to the Petition, one reason for these requests changes is that some courts are ignoring the rules. [Petition at 2. ("Although current rules direct appointment of counsel for indigent defendants at the Initial Appearance, the Task Force heard that some judges delay the appointment pending the filing of charges, or because a conviction of the charge will not necessarily call for incarceration and therefore does not require appointment of counsel.")]. If courts are not following the current rules the solution is judicial education, not to re-write new rules that are equally subject to disregard.

MCAO is also concerned that creating a right to counsel that is not constitutionally or statutorily required may violate separation of powers and will result in an unfunded mandate for cities and counties. The Petition does not address the potential new costs to cities and counties. Balancing the expansion of the right to counsel with the resulting costs and benefits is not the kind of decision that should be handled in a rushed and expedited fashion.

Rule 7.1

Although, MCAO does not oppose the relabeling of "Appearance Bond" to "Unsecured Bond" as this is a more accurate description of this category of "bond" it is unclear that the change in definition accomplishes the purpose cited in the Petition.

The Petition claims that it is necessary to remove "appearance" because it does not describe every purpose of a bond, "The word 'appearance' has been deleted from the term 'appearance bond' in all rules and forms because it is misleading; release on bond is ordered not only to secure a defendant's appearance in court, but also to ensure the safety of the community." [Petition at 3]. It is difficult to understand how deleting the word "appearance" accomplishes the goal of being more descriptive of all of the purposes of a bond. Deleting the word "appearance" is merely cosmetic and does not make it more likely that interest of community safety is furthered by the requested amendment or that judges and practitioners will more readily understand that a bond must consider public safety.

Other than confusion, it is unclear what is accomplished by the creation of "Cash Bond" and "Deposit Bond." Regarding the proposed "Cash Bond," it appears that this new bond would be essentially the same as the current "Secured Bond" with the exception that the "Cash Bond" is posted by someone other than a professional bondsman. Is this distinction necessary? MCAO is unaware of any current impediment to having a secured bond posted by someone other than professional bondsman and therefore, creating a new category for Cash Bonds appears unnecessary. With respect to "Deposit Bond," if the court is willing accept a percentage of a bond amount, it makes more sense to set the percentage amount that the court is willing to accept as the amount of the bond in the first instance. It is

misleading to victims and the public to have bonds set in one amount but to permit release upon the payment of a much lower amount. The Petition provides no justification for creating this confusing and completely unnecessary type of bond.

Rule 7.2(a)

MCAO has three comments regarding the proposed amendment of Rule 7.2(a).

The first is regarding the initial statement to the effect that all charged persons yet to be convicted are presumed to be innocent. Although this is a very basic statement of criminal law it is not a "rule" of criminal procedure. Who is the intended audience for this statement? Surely judicial officers making release decisions do not need to be informed that persons yet to be convicted are presumed innocent. It would make just as much sense to add this basic tenant of criminal law to the beginning of every rule dealing with every pretrial decision a court can make. There is zero justification for such a peculiar addition to Rules in the Petition. The statement is unnecessary and should not be added to the rule.

Second, although MCAO applauds the effort to add language regarding conditions that are reasonable and necessary to protect other persons or the community from an actual risk posed by the person, the proposed addition of this language is flawed. When Rule 7.2(a), if amended as proposed, is read as a whole, protection of the other persons or the community becomes a consideration for the court only if "... the court determines, in it is (sic) discretion, that..." release on own

recognizance with only the conditions of release required by Rule 7.3(a) will not reasonably assure the person's appearance as required. In other words, if the court determines that the conditions in Rule 7.3(a) will assure the person's appearance as required, it must release the person without considering conditions that are reasonable and necessary to protect other persons or the community. To the extent the proposed rule allows release on own recognizance without considering the factors set forth in ARS § 13-3967 it would be in conflict with the statute. If the proposed amendments are to be adopted, MCAO proposes an addition to the end of the second sentence of amended Rule 7.2(a) to read "...unless the court determines, in its discretion, that such release will not reasonably assure the person's appearance as required or protect other persons or the community from risk posed by the person."

Finally, MCAO opposes the inclusion of the requirement that the court find an "actual" risk posed by the person. The term "actual" implies that the court needs absolute certainty as to the risk posed by the person. ARS § 13-3967(B)(4) does not impose an "actual" risk requirement as it relates to danger to others in the community, rather it requires the court to take into account "evidence that the accused poses a danger to others in the community." The rules of procedure should not impose requirements that are in conflict with a statute on this matter. Inclusion of the word "actual" would be in conflict with the statute and should be deleted.

The complex issues and balancing of interests in setting conditions of release deserve a more clear articulation that mirrors the language in Arizona Revised Statutes and applicable case law. This is further evidence that a regular comment and discussion period be allowed.

Rule 7.3(b)

The Petition proposes a complete rewrite of Rule 7.3(b). Among the requested changes is an ambiguous requirement that in imposing conditions of release a court "must consider results of an approved risk assessment, if provided." ARS § 13-3967(B)(5) refers to a "risk or lethality assessment in a domestic violence charge." It is unclear whether "risk assessment" in the proposed amendment refers to the risk assessment described in § 13-3967 or some other form of risk assessment such as the tool evaluation by the Courts. If the intent is to formalize the consideration of risk assessments set forth in statute, MCAO supports this effort but notes that while there is an effort to create a uniform domestic violence risk or lethality assessment, currently many jurisdictions have not adopted one. However, as written the proposed amendment does not make it clear what risk assessment must be considered, who is responsible for conducting the assessment, who approves an assessment tool, how such a tool will be approved, or who is responsible ensuring that the tool is achieving the desired results.

Subsection (1) of the proposed rule sets forth non-monetary conditions which may be worthy of consideration as conditions of release. However, as previously discussed, the inclusion of "actual" under subsection (vi) makes the rule contrary to ARS § 13-3967. Additionally, the proposed amendment fails to specifically list a condition of release prohibiting contact with the victim in the case. At a minimum, no contact with the victim should be a discretionary non-monetary condition under this section.

In Subsection (2), the sentence "the court must not impose a monetary condition that results in unnecessary pretrial incarceration solely because the person is unable to pay the bond" is unhelpful and should be deleted. Based on the other parts of subsection (2) a court "...must make an individualized determination of the person's risk of non-appearance, risk to the community and financial circumstances..." in deciding whether to impose a monetary condition. Clearly, if a court determines that a monetary condition is necessary because of the risk of non-appearance or risk to the community, any pretrial detention is because of the risk posed by the person and not because they are unable to pay the bond. When read as a whole, this sentence is unnecessary and confusing. It suggests that some part of the judiciary would impose a bond in a punitive manner, an action already prohibited by case law.

Rule 7.7

The proposed new rule allows a superior court judge to temporarily modify conditions of release imposed in a misdemeanor case to permit release of a felony probationer to participate in treatment programs. The rule does not provide for notice to victims. As proposed, this section permits the court to violate a victim's constitutional and statutory rights to notice and the right to be heard before any modification of release conditions. *See* AZ CONST Art. 2 § 2.1; ARS §13-4422. Additionally, the new rule is not explicit as to which misdemeanor may be impacted by the superior court's release order. Does the rule contemplate that a superior court in one county could ignore the release orders of a judicial officer outside of its jurisdiction such as justice courts, municipal courts or superior courts in other counties? MCAO suggests that if it is to be adopted, the new rule set limit the jurisdiction of a superior court to misdemeanors in its own county.

III. CONCLUSION

Although the petition requests consideration on an expedited basis, it does not cite compelling reasons for doing so. On the other hand, the proposed amendments to Rule 7 raise significant issues regarding victim's rights and public safety. It is of the utmost importance all stakeholders have ample opportunity to thoroughly consider

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the proposed amendments and the possible ramifications. MCAO requests that this court expand the comment period to May 2017 or deny the Petition.

Respectfully submitted this 18 day of October, 2016.

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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: **PETITION TO AMEND RULES 6, 7 AND 41 OF THE ARIZONA RULES OF CRIMINAL PROCEDURE**	Supreme Court No. R-16-0041 **COMMENT OF THE ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL**

I. BACKGROUND OF PETITION

In conjunction with the Supreme Court task force report "Justice for All, Report and Recommendations of the Task Force on Fair Justice for All: Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies" ("Report"), the Administrative Director of the Administrative Office of the Courts has proposed amendments to Rules 6, 7 and 41, *Arizona Rules of Criminal Procedure*. The amendments would revise existing language in the rules, add new provisions and definitions related to appointment of counsel, bail, bonds, and conditions of release, and modify existing forms related to bond and release.

The Arizona Prosecuting Attorneys' Advisory Council ("APAAC") has considered the proposed changes and makes two initial observations. First, it notes the task force report must be filed with the Arizona Judicial Council ("AJC") by October 31, 2016. Report, p. 2. To date, the recommendations themselves have not been considered, approved or adopted by the AJC. Therefore, the rule petition appears premature. Second, the Supreme Court granted petitioner's request for an expedited consideration of its petition outside the annual rule processing cycle. Arizona Supreme Court No. R-16-0041, Order, August 29, 2016. Since the recommendations in the Report have not yet been adopted, it is unknown why this petition is being considered on an expedited basis. Considering the scope of the changes in the proposed amendments, APAAC believes additional time should be granted for circulating the proposed amendments among interested stakeholders for comment.

With these initial comments, APAAC will address specific portions of the petition's proposed rule changes with recommended modifications.

II. DISCUSSION/ANALYSIS

A. Amendments to Rules 6.1(b) and 7.4

The petition recommends an amendment to Rule 6.1(b) to add a right to counsel if an indigent defendant is "detained pretrial after criminal charges are filed." An appointment of counsel is made *mandatory* for pretrial detainees under

petitioner's proposed rule change to Rule 7.4, adding a new subsection (e). APAAC notes that this proposal could have a tremendous financial impact on cities, towns and counties throughout Arizona. For example, in fiscal year 2015 alone, municipal courts in Arizona saw total filings of 311,717 criminal traffic and misdemeanor cases. Arizona Judicial Branch, 2015 Data Report, Municipal Courts, Narrative Summary.[1] Justice courts saw total filings of 154,106 criminal traffic and misdemeanor cases (excluding FTA). Justice of the Peace Courts, Narrative Summary. Appointing counsel for every misdemeanor defendant who is detained pretrial could seriously burden state and local jurisdictions with unfunded costs.

After considering the proposal and the policy implications behind it, APAAC opposes the amendments to Rules 6.1(b) and 7.4. First, there is no empirical data showing that unrepresented indigent defendants "languish" in jail due to a lack of appointed counsel advocating for release conditions to an extent justifying the rule change. On its face, the proposal appears to be a solution searching for a problem. Second, if there is a problem, many jurisdictions are already addressing it in their own ways. For example, Pima County appoints public defenders on felony matters

[1] http://www.azcourts.gov/statistics/Annual-Data-Reports/2015-Data-Report

at the Initial Appearance. Yavapai County adopted and utilizes a public safety assessment tool ("PSA") which is written and available to the court in most cases at the Initial Appearance. Mesa Municipal Court, as part of a pilot project through the John and Laura Arnold Foundation, implemented a pretrial risk assessment tool for considering conditions of release. Creating mandatory appointment of counsel for every defendant (particularly misdemeanants) detained pretrial, however, is simply unworkable and unnecessary. Third, at such an early stage in the process it is unclear what relevant information appointed counsel could possibly have bearing on release conditions for every criminal defendant detained pretrial. Finally, the sheer cost to counties, cities and towns of implementing this proposal makes it unfeasible.

B. Amendments to Rule 7.1 and 7.6(d)(2)

The petition recommends amendments to Rule 7.1 which remove the specification that a bond is meant to assure the defendant's "appearance" and add new bond definitions for "cash bond" and "deposit bond." The Arizona Constitution provides three purposes of bail and conditions of release, the first of which is the defendant's appearance: 1) assuring the appearance of the accused; 2) protecting against the intimidation of witnesses; and 3) protecting the safety of the victim, any other person or the community. Ariz. Const. art. II, § 22.

APAAC does not support the proposed change to Rule 7.1 and the

elimination of the reference to "appearance bond." First, APAAC expresses concern regarding the likely confusion the proposed removal of the references to the defendant's "appearance" will cause. Historically, the public understands that a bond is to ensure a defendant's appearance in court. The current clear expression of this expectation is accepted by the courts of Arizona, which have observed that the "primary purpose of an appearance bond is to ensure that the defendant appears at court proceedings." *State v. Int'l Fid. Ins. Co.*, 238 Ariz. 22 ¶ 8, 355 P.3d 624, 627 (App. 2015). Although it may be that courts are setting bonds too high or when they are not necessary, if a judge does determine that a bond is among the conditions to be imposed on a defendant's release, then it is entirely appropriate to make the primary purpose of the bond clear in the Rule, as it is clear now. APAAC recommends not removing references to the essential nature of the bond, ensuring the defendant's "appearance," from the Rules guiding courts in setting bonds.

APAAC also requests clarification from petitioner as to what is meant to be accomplished by a "deposit bond." As stated by petitioner, the intent of a "deposit bond" is to allow a defendant to post only a percentage of the full amount of a cash bond set. However, there is no provision for collection of the balance of that bond in the event of a forfeiture; in particular, the entity responsible for collection, the effects of bankruptcy before or after a forfeiture, or the limitations on supplemental proceedings while a defendant has a pending criminal case. In the event a

defendant fails to appear, if the balance of the full amount of a cash bond set is uncollectible, then having a bond category of "deposit bond" is a fiction. As it exists, the language of the proposed definition of "deposit bond" is unclear.

Finally, along this same line the addition of Rule 7.6(d)(2) also creates confusion; it does not seem to allow for the circumstance when a court might have reasons to partially forfeit and partially exonerate a bond. At a bond forfeiture hearing, a court may order forfeiture of "all or part of the amount of the bond". Rule 7.6(c)(2). Rule 7.6(d) as currently written can accommodate any of the other proposed changes and therefore it need not be amended.

C. Amendments to Rule 7.2(a)

The petition recommends several amendments to Rule 7.2(a). APAAC has comment on two. First, the proposed amendment adds a new opening sentence on the presumption of innocence. While the statement is a correct principle of law, it seems gratuitous and unconnected to the substance of the rule which is release for offenses bailable as a matter of right.

Second, the petition recommends that in imposing conditions of release the court should consider the protection of "other persons or the community from an actual risk posed by the person." APAAC commends the petitioner for recognizing risk to victims and the community when setting release conditions. However, use of the word "actual" in defining risk in the proposed amendment is ambiguous, and

APAAC recommends removal of that word. This would be consistent with A.R.S. § 13-3967, which requires the court, when determining release, to take into account "[e]vidence that the accused poses a danger to others in the community." A.R.S. § 13-3967(B)(4). The statute requires no showing of an "actual" danger.

The term "risk," by definition, indicates there is not a certainty that harm will be perpetrated, but that such harm is likely or possible. Whether a risk is highly likely or merely possible can never be known with certainty. What is considered serious risk by one person may only be considered a potential risk by another. For the latter, in setting release conditions would the court be constrained from considering risk if it felt there was only a potential risk to a person or the community? What level of showing would be required before a court found "actual" risk? Would the parties have to litigate whether a risk was actual as opposed to merely potential? Using the term "actual" to define "risk" in the proposed criminal rule is unhelpful to the court and has an ambiguous meaning when defining risk. APAAC recommends eliminating that word.

D. Amendments to Rule 7.3(b)

The petition creates an entirely new Rule 7.3(b), eliminating the old subsection (b). APAAC generally concurs with the principles behind the amendment of Rule 7.3(b), but would reiterate that the change in the priority for considering imposing an appearance bond does not require any changes in the

current appearance bond options. The new subsection 7.3(b) creates a new category of discretionary conditions of release, and allows the court to impose both non-monetary and monetary conditions. It also requires the court to consider the results of an approved risk assessment, if any. APAAC again commends the petitioner for requiring the consideration of a risk assessment tool, similar to what is required in release decisions under A.R.S. § 13-3967(B)(5) (court shall take into account the results of a risk or lethality assessment in a domestic violence charge).

The proposed non-monetary conditions allow imposition of a number of restrictions on a person, and APAAC recommends two additions. First, while under the proposal a court can restrict the person from "consuming intoxicating liquors or illegal drugs," if Proposition 205 passes, the rule should make clear that even though legal a court may still restrict a person's use of recreational marijuana as a condition of release. Second, APAAC recommends adding to the list an *explicit* non-monetary condition that prohibits the person from having contact with the victim of the crime.

The petition contains another addition in Rule 7.3(b)(2) which provides that when setting monetary conditions, the court must not impose a condition "that results in unnecessary pretrial incarceration solely because the person is unable to pay the bond." This directive should not be a rule of criminal procedure. APAAC understands that the Task Force Report is the genesis for this addition, but the

language itself is ambiguous. Must a court first impose the monetary condition and then determine if it has an unnecessary result? How is the court to determine a person's inability to pay a bond at the time that monetary condition is set? What makes pretrial incarceration "unnecessary"? It is not uncommon in a misdemeanor trespass case that a bond of $50 is set for a homeless or transient defendant because that is the only means to assure their appearance in court. Does that result in unnecessary pretrial incarceration because that defendant cannot pay the bond? If there is no alternative means established by which to ensure the defendant's appearance, is a bond permissible for someone who is indigent and penniless? This is unclear. It appears this procedural rule is being amended to address substantive law.

E. NEW Rule 7.7

The petition recommends a new rule of criminal procedure 7.7 which would allow a Superior Court to unilaterally modify conditions of release set on lower court jurisdiction misdemeanor cases. The intent of the new rule is to allow a felon - who is on Superior Court probation but has a misdemeanor hold - to participate in treatment.

While the intent of the proposed rule is laudable, there are negative consequences that have not been anticipated in the proposed rule. First, if the misdemeanor hold is on a victim case, there is no provision for providing notice to

the victim or an opportunity to be heard before the Superior Court modifies the release conditions. This could be a violation of existing law. Ariz. Const. art. II, § 2.1(4); Ariz. R. Crim. P. 7.4(b), 39(b)(6), (7); A.R.S. § 13-3967(G). Second, there is no provision for communication between the Superior and lower jurisdiction court (the proposal requires the Superior Court clerk only to provide a copy of its order) or the affected prosecuting agencies. In most instances it is not the same prosecuting office handling the felony and misdemeanor cases, and the prosecutor would not know of modification of release conditions. Finally, there is no provision for how the lower court jurisdiction would reacquire the defendant so that disposition can occur on the misdemeanor case. Defendants must either be able to sign for their court date or be given notice of their date. New rule 7.7 is unworkable as proposed.

F. Rule 41, Form 7

Finally, the proposed modifications to Rule 41, Form 7, could be better drafted to implement the Petition's intended changes. The Petition presents the twin needs of ensuring future court appearance and the public's safety. However, proposed Form 7 only makes reference to the defendant's obligation to appear for court, and not to any of the other conditions of release. Particularly if the new categories and definitions of release and bonds are adopted, then Form 7 ought to be clear regarding the greater obligation that the defendant or surety is undertaking

and that the bond is subject to forfeiture for a violation of those obligations beyond appearance. On this point, the Petition fails to recognize the substantial increase in risk this new requirement would place on those persons who post bond, particularly the bail bond industry. It is unknown what effect this increased risk would have on the bonding industry's willingness to post bonds.

Modified Form 7 as written also omits specification of any performance requirement at all – even appearance – upon a Secured Bond without a surety and a Secured Bond with a surety. The proposed language for a "Deposit Bond" contemplates a portion of the bond being cash and a portion being unsecured, but ambiguously provides that a defendant "will forfeit the cash bond." Presumably the unsecured portion of the bond is subject to forfeiture, but the "cash" reference makes that unclear. Finally, the Petition states that Form 7 lists the bond types in order of least restrictive to most restrictive but provides no explanation for that order. Often a secured bond through a surety is easier for a defendant to post than a cash bond. Bonds secured by a deposit of property are rare and often create delay in release while the value of the property is determined. Should the proposed changes to Rule 7.1 be adopted, APAAC urges that the proposed Form 7 be subject to further review.

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III. CONCLUSION

The Arizona Prosecuting Attorneys' Advisory Council understands the intent of the petition in expediting the appointment of counsel for indigent defendants and clarifying the use of conditions of release so that defendants are not detained pretrial simply because they cannot post bail. These are admirable goals. However, the rule changes contained in the petition as drafted are far-reaching and fundamentally alter the current practice in Arizona. APAAC respectfully requests that the Arizona Supreme Court allow for additional time for affected stakeholders to consider the proposed rule changes requested in petition R-16-0041. In the alternative, APAAC respectfully requests that the Arizona Supreme Court adopt the modifications suggested in this comment.

RESPECTFULLY SUBMITTED this 19 day of October, 2016.

/s/ Elizabeth Ortiz
Elizabeth Ortiz, #012838
Executive Director
Arizona Prosecuting Attorneys'
Advisory Council

Electronic copy filed with the
Clerk of the Arizona Supreme Court
this 19 day of October, 2016.

by: Diana Cooney

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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of: PETITION TO AMEND RULES 6, 7, AND 41 OF THE ARIZONA RULES OF CRIMINAL PROCEDURE	No. R-16-0041 JOINT COMMENT OF APDA AND AACJ IN SUPPORT OF PETITION

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the Arizona Public Defender Association ("APDA") and the Arizona Attorneys for Criminal Justice ("AACJ") support the proposed amendments submitted by the Administrative Office of the Courts.

APDA is an Arizona non-profit corporation comprised of public defense offices and programs throughout the State of Arizona. The primary purposes of

the APDA include improving the quality of legal representation of poor people who face the loss of their liberty, safeguarding the constitutional rights of indigent individuals, and resolving criminal matters effectively and fairly.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer. The offices and individuals affiliated with the APDA and AACJ defend the overwhelming majority of individuals facing criminal charges in Arizona.

In its Petition, the AOC explains that its proposed amendments are part of an overall effort to follow through on recommendations contained in the Fair Justice for All Task Force Report. Significantly, the Fair Justice for All Task Force Report was created in response to this Court's Administrative Order of March 3, 2016, *see* AO 2016-16, which states in part:

> Our ideal of "justice for all" means that people should not be disparately punished because they are poor. While everyone should

face consequences for violating the law, criminal fines and civil penalties should not themselves promote a cycle of poverty by imposing excessive amounts or unduly restricting people's ability to be gainfully employed.

To promote these goals, practices in Arizona's courts should reflect these principles:

1. People should not be jailed pending the disposition of charges merely because they are poor. Release decisions and conditions should protect public safety and ensure the defendant's appearance at future proceedings.

2. Article 2, Section 18 of Arizona's Constitution provides that "There shall be no imprisonment for debt, except in cases of fraud." Consistent with this constitutional provision, people should not be jailed for failing to pay fines or other court-assessed financial sanctions for reasons beyond their control.

3. Court practices should help people comply with their court-imposed obligations, for example, by effectively alerting people to appearance dates, allowing deferred payment of fines, and allowing community service as an alternative to financial sanctions.

4. Sanctions such as fees and fines should be imposed in a manner that promotes, rather than impedes, compliance with the law, economic opportunity, and family stability.

The AOC's Petition is a welcome first step toward implementing part of these goals within the narrow context of the current language of Rules 6, 7, and 41. For purposes of clarification, we suggest that a comment to be added to the amendments to Rule 6.1(b) clarifying that this change is intended to broaden the circumstances under which counsel will be appointed to indigent defendants. Prior to this amendment, courts were required to appoint counsel at initial appearances in

criminal proceedings that "may result in punishment by loss of liberty". Based on the work of the Fair Justice for All Task Force, it was recognized that some defendants facing misdemeanor charges were not appointed counsel under this standard because the prosecution stipulated that they would not be seeking any jail time. Some of these defendants, however, remained in custody on low bonds. The Task Force concluded that since these defendants were in custody on misdemeanor charges that they should be entitled to have the assistance of court appointed counsel to, among other things, advocate for their release. Hence, the new category of court appointed counsel needed to be added to this Rule.

Clearly, much more work remains to be done. Consequently, the APDA and AACJ will comment on other potential areas of improvement as proposals in those areas arise. The APDA and AACJ appreciate the efforts that the Court and AOC have undertaken in this vital area and look forward to working with other stakeholders to make the four principles set forth by this Court in its March 3, 2016, Administrative Order a reality.

RESPECTFULLY SUBMITTED this 19th day of October, 2016.

By: /s/ David Euchner
DAVID J. EUCHNER
ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

/s/ Michael A. Breeze
MICHAEL A. BREEZE
ARIZONA PUBLIC DEFENDER'S ASSOCIATION

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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of PETITION TO AMEND RULES 6 7, AND 41 OF THE ARIZONA RULES OF CRIMINAL PROCEDURE	)))))	Supreme Court No. R-16____ **Petitioner's Reply**

Petitioner is grateful for the many useful and insightful, comments provided by defense, prosecution, and probation stakeholders. Petitioner provides the following explanation for those comments with which petitioner agrees or disagrees, in whole or in part. Appendix A attached hereto shows modifications to Petitioner's original proposal in response to the comment received.

- **Rule 6.1**
    - Change to Proposal Based on Comments:

Petitioner has revised its amendment to section 6.1(b)(1) based on the recommendation of the Maricopa County Attorney's Office (MCAO). The revision clarifies the Task Force's objective in modifying this rule to target low-level misdemeanants who need representation by counsel to ensure they are not held on

bond unnecessarily due only to their inability to pay the amount set and to seek modification of conditions to permit release, if appropriate. Felony defendants are already routinely provided with counsel at the IA. Petitioner has also added language limiting the scope of representation for misdemeanants to determination of release conditions. This language is proposed in response to concerns expressed by MCAO and by the Arizona Prosecuting Attorneys Advisory Council (APAAC) in order to provide counsel for indigent detainees without incurring the cost for indigent representation to defend the charges in criminal cases for which appointed counsel is not required by law. The proposed addition to Rule 6.1(b) identifies a specific circumstance in which appointment of counsel for an indigent defendant not otherwise required is in the interest of justice, already a listed basis for appointment of counsel.

- Comments Not Requiring Change:

Petitioner declines to add to the rule the comment suggested by the Arizona Attorneys for Criminal Justice and Arizona Public Defender Association (AACJ), because the criminal rules restyling project currently underway will eliminate most if not all comments, and the suggested addition is unnecessary to an understanding of the rule.

The Maricopa County Probation Department (MCAPD) suggestion to add a provision for a second hearing on release conditions within 72 hours of detention

will be of little value to unrepresented defendants, because, based on information provided to the Task Force, judges would be unlikely to change their decisions only upon reconsideration without advocacy by counsel.

- **Rule 7.1**
    - Change to Proposal Based on Comment:

Petitioner agrees the word "appearance" in the term "appearance bond" should not be deleted as suggested by APAAC. It is a common term and removal could lead to confusion.

    - Comments Not Requiring Change:

While Petitioner agrees the terms "bail" and "bond" are confused by many, definitions for "bailable" and "bondable," suggested by the MCAPD, are not needed. The term "bondable" does not appear anywhere in the pertinent statutes or the rules of criminal procedure, other than Release Form 6. Accordingly, the Form has been revised to use the term "non-bailable" rather than "non-bondable."

Task Force recommendation number 46 (Final Report at p. 33) encourages use of unsecured or actual cash bonds in lieu of surety bonds, where monetary conditions are appropriate, in order to avoid the extra expense of a surety bond. Therefore Petitioner rejects the suggestion from MCAO that the definition of "cash bond" is unnecessary. For the same reason, Petitioner rejects suggestions from MCAO and APAAC that "deposit bonds" are confusing or not needed. Studies

presented to the Task Force have shown unsecured, deposit, and cash bonds are as effective as surety bonds at securing appearances. Judges need more options to order release conditions that fit each defendant's particular level of risk. Furthermore, the judiciary has a proven statewide collections program to assist with collections following forfeiture of unsecured bonds when necessary. The suggestion by APAAC that a mechanism is needed to collect on an unsecured bond does not require further revisions to Petitioner's proposal.

- **Rule 7.2**
  - Change to Proposal Based on Comments:

Petitioner has added language recommended by MCAO to section 7.2(a) as a more complete statement of the factors to be considered by the court in setting release conditions. Petitioner also agrees its use of the word "actual" in the phrase "actual risk" is not consistent with A.R.S. § 13-3967(B)(4), and therefore has removed it from both Rules 7.2 and 7.3.

  - Comments Not Requiring Change:

The MCAO and APAAC both suggested the first sentence in 7.2(a), the presumption of innocence, should be removed as unnecessary or "gratuitous." This statement is intended to remind judges not to lose sight of this fundamental principal in the often high-volume rush of defendants who appear for initial appearances and arraignments. It serves a purpose similar to the victim's rights statement required by

A.R.S. § 13-4438, which reminds all participants in criminal proceedings that victims matter. The sentence is, in addition, similar to the introductory phrase of A.R.S. § 13-4437, Standing to invoke rights.

- **Rule 7.3**
  - Change to Proposal Based on Comments:

Petitioner agrees with MCAO that the risk assessment tool required by 7.3(b) should be more clearly identified and has added language in response. Petitioner also agrees with APAAC that if Prop 205 passes, it could entail the need to restrict recreational use of marijuana in some cases, accordingly Petitioner has modified 7.3(b)(1)(iii) to address that concern. Petitioner has also added prohibition of contact with a victim to 7.3(b)(1)(iv) as recommended by APAAC. In addition, Petitioner has changed the order in which the rule lists the types of bonds to reflect the fact that a cash bond can be more onerous than a surety bond to an impoverished defendant. This same change has been made to Form 7.

  - Comments Not Requiring Change:

Petitioner opposes removal of the second sentence in 7.3(b)(2), which is a correct statement of the law, pursuant to the U.S. Supreme Court's opinion in *Stack v. Boyle*, 342 U.S. 1, 5; 72 S.Ct. 1, 3 (1951)(" [T]he modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount

reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment."); *U.S. v. Salerno*, 481 U.S. 739, 754-55 (1987)(bail is excessive if set at amount higher than amount necessary to ensure protection of government interest such as safety of individuals or community); Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 775 (9th Cir. 2014). The sentence at issue emphasizes the importance of assuring the necessity of any monetary bond imposed and the need to reconsider a bond amount intended to secure the defendant's appearance in court following release rather than prevent the defendant's release.

- **Rule 7.4**

No comments addressed the proposed change to this rule.

- **Rule 7.6**
  - Change to Proposal Based on Comments:

Petitioner agrees with APAAC that the proposed amendment may cause confusion at exoneration, especially in the case of a deposit bond. Therefore, a reference to subsection 7.6(c)(2), which governs forfeitures, has been added to clarify that the court may partially exonerate or forfeit any deposit or cash bond.

- **Rule 7.7**
  - Change to Proposal Based on Comments:

Petitioner is withdrawing its proposal for a new Rule 7.7 based on further review by the Petitioner, the logistical concerns raised by MCAPD, APAAC, and

MCAO as well as the need to resolve how the rule can accommodate victims' rights.

- Comments Not Requiring Change:

For the reasons stated above, Petitioner has rejected the recommended revision proposed by MCAPD. Petitioner will undertake further study before proposing a solution to the problem this rule proposal was intended to address.

- **Form 6**

The only change made to this Form is the change from "non-bondable" to "non-bailable," for the reason explained under Rule 7.1 supra.

- **Form 7**

- Change to Proposal Based on Comments:

Petitioner agrees with APAAC that the proposed Form 7 needed some re-wording to better notify defendants and sureties of the fact that not only failure to appear, but also failure to comply with other release conditions could result in forfeiture. The Form has been substantially revised to emphasize the warning to these parties. Also, the order of bond types has been changed for the reason given under Rule 7.3. The version of the Form 7 in Appendix A does not reflect changes from the version appearing in the initial petition due to changes made to the formatting.

- Comments Not Requiring Change:

Petitioner disagrees with the APAAC suggestion that Form 7 amendments

need to await adoption of the changes to Rule 7.1.

- **Other Comment for Change to Rule 3.2**

MCAPD recommended a modification to Rule 3.2, which requires the court to set a secured appearance bond when issuing an initial arrest warrant in some cases. Rule 3.2 was not part of the original petition in the instant matter, therefore, Petitioner does not believe he can ask the Court to consider it at this point. However, the Task Force will consider whether to include this proposal in a new Rule 28 petition that Petitioner expects to file later this year.

Wherefore, petitioner respectfully requests that the Court amend the Rules of Criminal Procedure as proposed in the Appendix A included herewith.

RESPECTFULLY SUBMITTED this ____ day of ____, 2016.

By _____
David K. Byers, Administrative Director
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APPENDIX A
to
PETITIONER'S REPLY

showing proposed changes to Petitioner's original proposal
(language to be removed is shown in ~~strikethrough~~, new language is underlined)

Rule 6.1. Rights to counsel; waiver of rights to counsel

a. [no changes]

b. *Right to Appointed Counsel*. An indigent defendant is entitled to have an attorney appointed:

(1) If detained pretrial after misdemeanor criminal charges are filed for the limited purpose of determining release conditions;

(2) In any criminal proceeding that may result in loss of liberty; and

(3) In any other criminal proceeding in which the court concludes that the interests of justice so require.

c. through e. [no changes]

Rule 7.1. Definitions and applicability of rule

a. *Own recognizance.* "Own recognizance" means release of a person without imposing any bond as a condition of release.

b. *Unsecured appearance bond.* An "unsecured appearance bond" is an undertaking, on a form approved by the Supreme Court, to pay to the clerk of the court a specified sum of money upon failure of a person released to comply with the conditions of the bond.

c. C*ash bond.* A "cash bond" is a secured appearance bond consisting of actual cash deposited by the person released or someone on behalf of that person other than a professional bondsman.

d. *Deposit bond.* A "deposit bond" is a partially-secured appearance bond in which the person, or someone on behalf of that person other than a professional bondsman, deposits a percentage of the full bond amount in cash.

e. *Secured appearance bond.* A "secured appearance bond" is ~~a~~an appearance bond secured by deposit with the clerk of security equal to the full amount thereof.

f. *Security.* "Security" is cash, a surety's undertaking, or any property of value,

deposited with the clerk to secure ~~a~~ an appearance bond. The value of such property shall be determined by the clerk, or at the clerk's or a party's request, by the court.

g. *Surety.* A "surety" is one, other than the person released, who executes an appearance ~~a~~ bond and binds the surety to pay its amount if the person released fails to comply with its conditions. A surety shall file with ~~a~~ an appearance bond an affidavit that he or she is not an attorney or person authorized to take bail, and that the surety owns property in this state (or is resident of this state owning property) worth the amount of the appearance bond, exclusive of property exempt from execution and above and over all liabilities, including the amount of all outstanding appearance bonds entered into by the surety, specifying such property, the exemptions and liabilities thereon, and the number and amount of such appearance bonds.

h. *Professional Bondsman.* Any person who is surety simultaneously on more than four appearance bonds is a "professional bondsman." No person may be a professional bondsman unless the person annually certifies in writing under oath to the clerk of the Superior Court that the person

(1) Is a resident of this state;

(2) Has sufficient financial net worth to satisfy reasonable obligations as a surety;

(3) Agrees to assume an affirmative duty to the court to remain in regular contact with any defendant released pursuant to ~~a~~ an appearance bond on which the person is a surety;

(4) Has not been convicted of a felony, except as otherwise provided by A.R.S. § 20-340.03;

(5) Has no judgments arising out of surety undertakings outstanding against him or her;

(6) Has not, within a period of two years, violated any provisions of these rules or any court order.

Capacity to act as a professional bondsman may be revoked or withheld by the clerk, or by the court, for violation of any provision of this rule.

j. *Applicability.* This rule shall not apply to minor traffic offenses.

COMMENT [AMENDED 2007]

Rule 7.1 contains the definitions of the terms used in the rule and the requirements for "sureties" and "professional bondsmen" currently specified in the rules of criminal procedure.
Rule 7.1(a). See Form 6 for an order of release.
Rule 7.1(b). The rule substitutes for "bail bond" and "bail" the term "unsecured appearance

bond" which emphasizes the role of unsecured bonds. See Ariz.Rev.Stat.Ann. § 13-1577(E) (Supp.1972) [now § 13-3967] (noting propriety of conditions other than money bail). See Form 7.

Rule 7.1(e). "Secured appearance bond" is used instead of "bail". See Form 7 for a secured appearance bond.

Rule 7.1(f). "Security" is defined broadly enough to encompass anything of value.

Rule 7.1(g). This definition includes the requirements of the 1956 Ariz.Rules of Criminal Procedure, as amended, Rules 46, 47, 48(A) and 49. Wherever standards are unclear under present rules, this definition chooses their most onerous interpretation. See Form 7 and Attachment A thereto for the form of the surety's undertaking and affidavit.

Rule 7.1(h). The definition of "professional bondsman" is more limited than the 1956 Ariz.Rules of Criminal Procedure, as amended, Rules 50 and 51. The clerk is required to review a professional bondsman's qualifications annually.

Rule 7.2. Right to release

a. *Before Conviction; Persons Charged With an Offense Bailable as a Matter of Right.* All persons charged with a crime but not yet convicted are presumed to be innocent. Except as otherwise provided in these rules, any person charged with an offense bailable as a matter of right must be released pending or during trial on the person's own recognizance with only the conditions of release required by Rule 7.3(a), unless the court determines, in its discretion, that such a release will not reasonably assure the person's appearance as required or protect other persons or the community from risk posed by the person. If such a determination is made, the court may impose the least onerous condition or conditions contained in rule 7.3(b) that are reasonable and necessary to protect other persons or the community from ~~an actual~~ risk posed by the person or to secure the appearance of the person in court.

b. through d. [no changes]

COMMENT TO 2014 AMENDMENT TO RULE 7.2(B)

Rule 7(b) was amended in 2014 to comply with *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014), *cert. denied*, 135 S.Ct. 2046 (2015), which held unconstitutional A.R.S. Const. Art. 2, § 22(A)(4) and A.R.S. § 13-3961(A)(5) mandating that bail be denied to undocumented immigrants charged with a serious crime.

COMMENT

Rule 7.2(a). This section establishes a presumption for release on recognizance in most cases. Offenses "bailable as a matter of right" are defined in Ariz.Const. Art. 2, § 22 and Ariz.Rev.Stat.Ann. § 13-1571 (1956) [now § 13-3961] as all cases except "capital offenses when the proof is evident or the presumption great" and felonies committed while on bail (using the same "proof is evident or the presumption great" standard).

The presumption of an "own recognizance release" follows closely the ABA, Standards Relating to Pretrial Release, § 5.1 (Approved Draft, 1968), and the Federal Bail Reform Act, 18 U.S.C.A. § 3146 (1966).

Rule 7.2(b). See Rule 17, Rules of the Supreme Court, 17 Ariz.Rev.Stat.Ann.

COMMITTEE COMMENT TO 1993 AMENDMENT

The 1993 amendment renumbered as Rule 7.2(b)(1) former Rule 7.2(b), which provides for the custody of a person convicted of an offense for which that person in all probability will suffer a sentence of incarceration, and made it applicable only in superior court. It added Rule 7.2(b)(2), applicable in limited jurisdiction courts, which represents a significant diversion from the parallel provision of Rule 7.2(b)(1). Rule 7.2(b)(2) provides that the person *shall* remain released on bail or own recognizance if these were conditions that existed prior to the person's conviction. A bond may still be required under Rule 6. Superior Court Rules of Appellate Procedure, in order to stay the execution of the remaining portion of the person's sentence.

Rule 7.3. Conditions of release

a. *Mandatory Conditions.* **[no changes]**

b. *Discretionary Conditions in General.* The court may impose as a condition of release one or more of the following conditions, if the court finds the condition is reasonable and necessary to protect other persons or the community from ~~an actual~~ risk posed by the person or secure the person's appearance. In making this determination, the court must consider the results of ~~an approved~~ a risk assessment approved by the supreme court or a lethality assessment provided by law enforcement, if provided.

(1) Non-monetary conditions:

(i) Place the person in the custody of a designated person or organization agreeing to provide supervision;

(ii) Restrict the person's travel, associations, or residence;

(iii) Prohibit the person from possessing any dangerous weapon or engaging in certain described activities or consuming intoxicating liquors or ~~illegal~~ certain drugs, unless validly prescribed;

(iv) Prohibit the person from contacting the victim;

(~~iv~~v) Require the person to report regularly to and remain under the supervision of an officer of the court;

(~~v~~vi) Return the person to custody after specified hours; or

(~~vi~~vii) Any other non-monetary condition that has a reasonable relationship to assuring the safety of other persons or the community from ~~an actual~~ risk posed by the person or securing the person's appearance.

(2) Monetary conditions. In deciding whether to impose a monetary condition of release and what amount to impose, the court must make an individualized determination of the person's risk of non-appearance, risk to the community, and financial circumstances rather than rely on a schedule of charge-based bond amounts. The court must not impose a monetary condition that results in unnecessary pretrial incarceration solely because the person is unable to pay the bond. If the court determines a monetary condition is necessary, the court must impose the least onerous of the types of bonds listed below in the lowest amount necessary to protect other persons or the community

from ~~an actual~~ risk posed by the person or to secure the person's appearance. Monetary conditions include:

(i) Unsecured bond;
(ii) Deposit bond;
(iii) ~~Cash bond~~ Other type of secured bond; or
(iv) ~~Other type of secured bond~~Cash bond

COMMENT [AMENDED 2007]

Rule 7.3(a). This section replaces the 1956 Ariz.Rules of Criminal Procedure, as amended, Rules 48 and 68 (forms of undertaking), specifying the matters which must be included in every order of release. The rule adds the requirement of good behavior from Ariz.Rev.Stat.Ann. § 13-1578(B) [now § 13-3968]. Also, following Ill.Ann.Stat. Ch. 38, § 110-10(a)(3) and (b)(3) (Smith-Hurd 1970), the prohibition against out-of-state travel without leave of the court is mandated for every case. The diligent prosecution of an appeal is also taken from the Illinois statute. (See the provision in Rule 7.2(b) for mandatory revocation upon violation of this requirement.) The surety's undertaking to surrender the person in the event of a supervening felony charge is deleted. See generally Form 6.

Rule 7.4. Procedure

[No changes to Petitioner's original proposal]

Rule 7.6. Transfer and disposition of bond

a. through c. [no changes]

d. *Exoneration*

(1) At any time before violation that the court finds that there is no further need for ~~a~~ an appearance bond, the court must exonerate the appearance bond and order the return of any security deposited.

(2) When a deposit bond or cash bond is exonerated, the court must order the return of the entire amount deposited, unless forfeited pursuant to rule 7.6(c)(2).

(3) If the surety, in compliance with the requirements of A.R.S. § 13-3974, surrenders the defendant to the sheriff of the county in which the prosecution is pending, or delivers an affidavit to the sheriff stating that the defendant is incarcerated in this or another jurisdiction, and the sheriff reports the surrender or status to the court, the court may exonerate the bond.

(4) In all other instances, the decision whether or not to exonerate a bond shall be within the sound discretion of the court.

e. [no changes]

Rule 7.7. Temporary modification of conditions of release

[Petitioner withdraws this proposed new rule]

Proposed FORM 6

_____ COURT _____ County, Arizona

STATE OF ARIZONA Plaintiff -vs- _____ _____ _____ Defendant (FIRST, MI, LAST) Booking Number Date of Birth	RELEASE ORDER

LINE #	COMPLAINT NO.	VIOLATION CODE	NF	ORR	PSR	3PR	BOND	BA	UB	DB	CB	SB	NB
1							$						
2							$						
3							$						
4							$						
5							$						

(NF=Charge not filed; ORR=Own recognizance release; PSR=Pretrial supervision release; 3PR=Third party release bond; Bond=Amount of bond; BA=Bond applies; UB=Unsecured bond; DB=Deposit Bond; CB=Cash; SB=Secured bond; NB=Non-~~bondable~~bailable)

If you are released from jail, you must follow all release conditions and appear at court as indicated below:

MANDATORY AND STANDARD CONDITIONS OF YOUR RELEASE:

[X] 1. Appear at _____ court on: _____ at _____ a.m. / p.m., Courtroom: _
(Court name and address) (Date) (Time)
for _____ and attend all future court hearings.

[X] 2. Violate no federal, state or local criminal laws.

[X] 3. Not leave the state of Arizona without written permission from the court.
[ ] Defendant may leave the state of Arizona provided defendant returns for court dates.

[X] 4. Diligently pursue any appeal if released from custody after judgment and sentence have been imposed.

[ ] 5. Maintain contact with your attorney.

[ ] 6. Provide a current address and phone number to the court and to your attorney and immediately notify both of any changes.

[ ] 7. Not threaten or initiate any type of contact with the alleged victim(s).

[ ] 8. Not drive a motor vehicle without a valid driver's license in your possession.

[ ] 9. Not threaten or initiate any type of contact with any person as specified here: _____.

[ ]10. Not possess weapons as specified here: _____.

[ ]11. Not consume any alcoholic beverages.

[ ]12. Not go to scene of the alleged crime.

[ ]13. Not go to locations as specified here: _____.

[ ]14. Comply with 3rd party custody release conditions as specified here: _____.

[ ]15. Contact probation or parole officer. (See 3rd party obligations in this document.)

[ ]16. Electronic monitoring, if available, (mandatory if charged with a felony offense under Chapters 14 or 35.1 of Title 13)

[ ]17. Other: _____.

ADDITIONAL CONDITIONS FOR YOUR PRETRIAL SUPERVISION RELEASE (PSR):

[ ]18. Comply with the assigned pretrial supervision program as specified here: _____.

[ ]19. Provide a current address and phone number to Pretrial Services immediately and notify of any changes.

FINANCIAL CONDITIONS OF RELEASE: If you cannot post an appearance bond of $ _____ you will remain in custody until your next court hearing on _____.

IF YOU VIOLATE THIS ORDER: You have the right to be present at your trial and at all other proceedings in your case. IF YOU FAIL TO APPEAR THE COURT MAY ISSUE A WARRANT FOR YOUR ARREST AND/OR HOLD THE TRIAL OR PROCEEDING IN YOUR ABSENCE. IF CONVICTED, YOU WILL BE REQUIRED TO APPEAR FOR SENTENCING. IF YOU FAIL TO APPEAR, YOU MAY LOSE YOUR RIGHT TO A DIRECT APPEAL.

If you violate any condition of a bond, the court may order the bond and any related security deposit forfeited to the State of Arizona. In addition, the court may issue a warrant for your arrest upon learning of any violation of the conditions of release. After a hearing, if the court finds that you have not complied with the release conditions, the court may modify the conditions or revoke the release altogether.

If you are released on a felony charge, and the court finds the proof evident or the presumption great that you committed a felony during the period of release, the court must revoke your release. You may also be subject to an additional criminal charge, and upon conviction you could be punished by imprisonment in addition to the punishment which would otherwise be imposable for the crime committed during the period of release. Upon finding that you violated conditions of release, the court may also find you in contempt of court and sentence you to a term of imprisonment, a fine, or both.

ACKNOWLEDGEMENT: I fully understand and will comply with all release conditions indicated above and further understand the consequences should I violate any part of this order.

_____

Current Address where you live Apt. No.

_____

Address where you receive mail if different from current address

( ) _____ ( ) _____

Phone No. Phone No.

X _____ X _____

Defendant Signature Date Judicial Officer Date

DISTRIBUTION: WHITE – COURT YELLOW – SIMS OPERATOR PINK – DEFENDANT

Proposed FORM 7

_____ COURT _____ County, Arizona

STATE OF ARIZONA Plaintiff -vs- _____ _____ _____ Defendant (FIRST, MI, LAST) Booking Number Date of Birth	**APPEARANCE BOND**

WARNING TO DEFENDANT AND DEFENDANT'S SURETY (if any)

If defendant fails to appear at _____ at _____ a.m./p.m. on _____ ___, 20_____ and at any other hearing, or fails to follow any other court-ordered condition of release during the pendency of the case, THIS BOND MAY BE FORFEITED and the proceedings begun without defendant. If convicted, defendant will be required to appear for sentencing. If defendant fails to appear at sentencing, defendant may lose the right to a direct appeal.

AMOUNT OF APPEARANCE BOND ORDERED: $_____

TYPE OF APPEARANCE BOND ORDERED:

[ ] **UNSECURED APPEARANCE BOND:** Defendant and defendant's surety, _____ (if none, so state) hereby promise to pay the State of Arizona the amount of the bond ordered if defendant fails to comply with any condition of release.

[ ] **DEPOSIT BOND:** Defendant will deposit with the Clerk of the Court _____% of the total amount of the bond, with the remainder of $_____ as an unsecured appearance bond. Defendant and defendant's surety, _____ (if none, so state) hereby promise to pay the State of Arizona the full amount of the bond ordered if defendant fails to comply with any condition of release. The deposited amount of the bond will be returned to the defendant, if defendant complies with all conditions of release.

[ ] **SECURED APPEARANCE BOND:** Defendant will deposit with the Clerk of the Court cash or property having a value equal to or greater than the full amount of the bond.

Depositor or Professional Bondsman: _____

Email address: _____

Address: _____

Phone number: _____

Avowal of non-professional surety (if applicable): _____, surety for the defendant, hereby swears (or affirms) that the surety is not an attorney or person authorized to take bail, and that the surety owns property in this state (or is a resident of this state owning property) worth the amount of this bond, exclusive of property exempt from execution and above and over all liabilities, as detailed in Attachment A.

[ ] **CASH BOND:** Defendant will deposit cash equal to the full amount of the bond with the Clerk of the Court. The cash deposited will be returned to defendant, if defendant complies with all conditions of release.

Proposed FORM 7

ACKNOWLEDGEMENTS

_____	_____
Date	Defendant
State of Arizona)	Subscribed and sworn to before me on
) ss.	
County of _____)	_____
	_____
My Commission Expires _____	Notary Public

Approved:

_____	_____
Date	Surety or Authorized Agent

Form 7 Attachment A
[No changes]

Proposed Rule Changes to Rule 3.2
and
Rules 4.2 & 7.2
(Determination of Defendants Not Eligible for Bail)

Rule 3.2. Content of warrant or summons

a. Warrant. The warrant shall be signed by the issuing magistrate and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall state the offense with which the defendant is charged and whether the offense is one to which victims' rights provisions apply. It shall command that the defendant be arrested and brought before the issuing magistrate or, if the issuing magistrate is absent or unable to act, the nearest or most accessible magistrate in the same county. If the defendant is bailable as a matter of right, it ~~shall~~ may state the amount of a secured appearance bond.

b. and c. [no changes]

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 to comment orally or in writing, on the issue of the suspect's release;

(7) Determine whether probable cause exists to believe:

(A) The defendant committed an offense for which bail is prohibited by Ariz. Const. Art. 2, Sec. 22 (1) or (2);

(B) The defendant committed a felony for which bail is prohibited by Ariz. Const. Art. 2, Sec. 22 (3) because the defendant poses a substantial danger to another person or the community; or

(C) The defendant must be released with or without conditions pursuant to Rule 7.2(a).

(8) Determine whether the defendant has the right to a bail hearing pursuant to Rule 7.2(b) (3). If so, inform the defendant of this right and set the time for the hearing, unless waived by the defendant.

~~(8)~~(9) For summoned defendants charged with a felony offense, a violation of Title 13, Chapter 14, or Title 28, Chapter 4[1], or a domestic violence offense as defined in § 13-3601, if the defendant does not present a completed mandatory fingerprint compliance form to the court, or if the court has not received the process control number, the court shall order that within twenty calendar days, the defendant be ten-print fingerprinted at a designated time and place by the appropriate law enforcement agency; and

~~(9)~~ (10) For an in-custody defendant who was arrested for an offense listed in A.R.S. Section 13-610(O)(3), if the court has not received proof of compliance with A.R.S. Section 13-610(K), the court shall order the arresting agency to secure a sample of buccal cells or other bodily substances for DNA testing.

b. and c. [no changes]

Rule 7.2. Right to release.

a. [no change]

b. *Before Conviction; Persons Charged With an Offense not Bailable as a Matter of Right.*

(1) A person must not be released on bail if the court finds the proof is evident or the presumption great that the person ~~is~~ committed an offense not bailable pursuant to ~~law~~ Ariz. Const. Art. 2, Sec 22 (1) or (2).

(2) A person charged with any other felony offense must not be released on bail if the court finds all of the following:

(A) Proof is evident or the presumption great that the person committed a felony offense with which the person is charged;

(B) Clear and convincing evidence that the person poses a substantial danger to another person or the community; and

(C) Clear and convincing evidence that no conditions of release that may be imposed will reasonably assure the safety of any person or the community.

(3) For a person held not bailable pursuant to Rule 4.2 (a)(7)(A) or (B), the court must hold a hearing to determine whether the person is not bailable under subsection (b)(1) or (b)(2). The person may waive this hearing. The hearing must be held as soon as practicable but not later than five days after the initial appearance, unless the person detained or the state moves for a continuance. The court's determination must be on the record and include the court's reason. A continuance may be granted only on a showing of extraordinary circumstances.

c. and d. [no changes]

To: Jeremy Mussman
From: John Yankovich
Re: Right to Counsel During 13-810(C) Hearings
Date: 9/20/16

I. ISSUES PRESENTED:

1.) Under the United States and Arizona Constitutions, are defendants entitled to appointed counsel during A.R.S. 13 § 810(a), civil contempt hearings?

II. SHORT ANSWERS:

1.) Yes, counsel should be appointed for indigent defendants or A.R.S. § 13-810 would violate a defendant's Sixth Amendment and Fifth Amendment rights.

First, under Supreme Court precedent, appointed counsel is required during a combination probation revocation and sentencing hearing. Under A.R.S. § 13-810(D), the court may choose to revoke a defendant's probation and sentence him during the hearing itself. Thus, A.R.S. § 13-810 may itself be a probation revocation/sentencing hearing and counsel would be necessary under *Mempa v. Rhay*, 389 U.S. 128, 88 S. Ct. 254 (1967), and the Sixth Amendment.

Second, under *Mempa v. Rhay*, counsel is required during any stage in the criminal process where substantial rights may be affected. Very few procedural rights are afforded to defendants during A.R.S. § 13-810(C) hearings: they are not warned that their testimony may be used against them in subsequent proceedings and are not guaranteed the right to cross-examine adverse witnesses. An uncounseled defendant may not know that their testimony may be used against them or that he could contest adverse testimony/evidence himself. This situation is ripe for an uncounseled defendant's rights to be unfairly disadvantaged if counsel is not provided to aid him in preparing his defense. Thus, during these hearings a defendant's substantial rights may be affected and appointed counsel is necessary under *Mempa v. Rhay*.

Third, under *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593 (1972), a defendant is guaranteed certain procedures during probation revocation proceedings to protect his due process rights. A.R.S. § 13-810(C) hearings do not provide the same minimum due process guarantees. Thus, a court may decide to bypass all of the procedural safeguards provided in Rule 27 of the Arizona Rules of Procedure by revoking a defendant's probation and sentencing them during the A.R.S. § 13-810(C) hearing. Even if the court decides not to revoke probation at the hearing itself, a court's finding that the defendant willfully failed to pay his restitution will be almost dispositive evidence of violation during a subsequent probation violation hearing. This would allow the courts to sidestep the preliminary procedural safeguards of Rule 27 by choosing to make this finding during an A.R.S. § 13-810(C) hearing instead of referring the defendant for a probation violation hearing. Either way, allowing a court to bypass any of the procedural safeguards guaranteed by due process violates the defendant's Constitutional rights and counsel should be provided to aid in protecting said rights.

Finally, during A.R.S. § 13-810 proceedings a criminal defendant on probation is subject to much harsher deprivations of liberty than the purely civil defendants in child support cases. Given this increased severity, the same justifications against appointment of counsel do not apply. In fact, this increased severity weighs in favor of providing counsel for indigent defendants to protect against undue deprivations, distinguishing this situation from *Turner v. Rogers*, 564 U.S. 431, 448, 131 S. Ct. 2507, 2520 (2011). Thus, counsel should be provided for criminal defendants during A.R.S. § 13-810 proceedings.

III. DISCUSSION:

A. Counsel Must be Appointed During A.R.S. § 13-810(C) Hearings Because These Hearings May be Used as Probation Revocation Hearings Combined with Sentencings

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Supreme Court has held that the Sixth Amendment guarantees indigent criminal defendants the right to appointed counsel if they cannot afford a lawyer. *Gideon v. Wainwright*, 372 U.S. 335, 344–45, 83 S. Ct. 792, 796–97 (1963). This right is not confined to trials, instead this right includes any stage in the criminal process where a defendant's rights will be affected if counsel is not present. *Mempa v. Rhay*, 389 U.S. 128, 134, 88 S. Ct. 254, 257 (1967). Thus, the Court has found that counsel is required during sentencing, when entering a guilty plea and, in certain circumstances, during arraignment. *See Townsend v. Burke*, 334 U.S. 736, 68 S.Ct. 1252 (1948); *Moore v. State of Michigan*, 355 U.S. 155, 78 S.Ct. 191 (1957); *Hamilton v. State of Alabama*, 368 U.S. 52, 82 S.Ct. 157 (1961).

In *Mempa v. Rhay*, the Supreme Court extended its holding in *Gideon* to apply to combined probation revocation and sentencing hearings. 389 U.S. 128, 137, 88 S. Ct. 254, 258 (1967). There, an unrepresented defendant told the court during a probation revocation hearing that the allegations against him were true and the court sentenced him to 10 years in prison. *Id.* The Supreme Court analyzed *Townsend*, *Moore* and *Hamilton* in detail and found that they "clearly st[ood] for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Id.* at 134, at 257. Since the probation revocation was combined with a sentencing, the defendant's rights to contest facts, offer mitigating evidence and preserve appealable issues were affected by his lack of legal knowledge. *Id.* at 135-36, at 257-58. Thus, the Court found that appointed counsel was required during probation revocation hearings that are combined with sentencings. *Id.* Arizona Courts have also, independently, held that "the accused is entitled to counsel at a hearing on revocation of probation and sentencing." *State v. Walter*, 12 Ariz. App. 282, 284, 469 P.2d 848, 850 (1970) (citing *Leonard v. State*, 101 Ariz. 42, 415 P.2d 570 (1966)); *see also Pina v. State*, 100 Ariz. 47, 48, 410 P.2d 658, 658 (1966); *State v. Jackson*, 16 Ariz. App. 476, 478, 494 P.2d 376, 378 (1972).

Six years after *Mempa* was decided, the Supreme Court in *Gagnon v. Scarpelli* addressed whether counsel was required during probation revocation hearings by themselves. 411 U.S. 778, 783, 93 S. Ct. 1756, 1760 (1973). In *Gagnon*, the defendant's probation was revoked without a hearing on September 1, and then subsequently sentenced three days later to 15 years. *Id.* at 780,

at 1758–59. The Supreme Court refrained from creating a rigid rule requiring appointed counsel at every probation revocation hearing. *Id.* at 787–88, at 1762. Instead, the Court found that this determination should be made on a "case-by-case bases in the exercise of a sound discretion by the state authority" in charge of probation. *Id.* at 790, at 1763. However, the Court did specify that counsel should presumptively be provided when the defendant either: (i) makes a claim that "he has not committed the alleged violation. . . ; or (ii) . . . there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present." *Id.* at 790, at 1764.

Under A.R.S. § 13-810(a), when a defendant defaults on their restitution, a court may require the defendant "to show cause why the defendant's default should not be treated as contempt and may issue a summons or warrant of arrest for the defendant's appearance." Ariz. Rev. Stat. Ann. § 13-810(B). During the subsequent contempt hearing, "the prosecuting attorney . . . may examine the defendant under oath concerning the defendant's financial condition, employment and assets or on any other matter relating to the defendant's ability to pay restitution." *Id.* at § 13-810(C). If the court finds that the defendant has either willfully failed to pay or refused to make a good faith effort to obtain money to pay, the court may: (1) order the defendant incarcerated until the whole fine or part of the fine is paid; (2) "[r]evoke the defendant's probation, parole or community supervision and sentence the defendant to prison pursuant to law"; (3) garnish the defendant's wages; or (4) order the defendant to do community service. *Id.* at § 13-810(D)(1) – (4).

Here, a judge may use an A.R.S. § 13-810(C) hearing as a probation revocation combined with a sentencing. Under § 13-810(D)(2), the court may summarily decide to revoke a defendant's probation and sentence them if the court finds the defendant is willfully failing to pay restitution. *See Id.* at § 13-810(D)(2). Because the statute allows for both probation revocation and sentencing at one hearing, *Mempa*, and not *Gagnon* applies. Thus, "whether the procedure is labeled a revocation of probation[,] deferred sentencing," or even a civil contempt hearing, counsel must also be appointed because the substance of the hearing may be the same as *Mempa*: a probation revocation combined with sentencing. *Walter*, 12 Ariz. App. at 284, 469 P.2d at 850 (quoting *Mempa*, 389 U.S. at 137, 88 S. Ct. at 258).

Additionally, even if these hearings were not considered combined probation revocation and sentencing hearings, almost all cases would still satisfy both prongs of *Gagnon* and require appointed counsel. Defendants who owe restitution are required to make payments as part of their probation terms. When a defendant willingly fails to make payments they have violated a term of their probation and may have their probation revoked. A.R.S. § 13-810(C) hearings essentially allow a judge, and potentially a victim or prosecutor, to examine an uncounseled defendant and force him to admit he violated his probation terms in a forum where his probation may be summarily revoked. *See* Ariz. Rev. Stat. § 13-810(D)(2). The courts subsequent finding that the defendant willfully failed to pay restitution may then be used in a subsequent probation revocation hearing as almost dispositive proof that the defendant violated probation. Thus, this hearing would essentially function as a probation violation hearing, where it is decided whether a defendant actually violated probation or not. In most cases, defendants would argue they have not violated their probation terms willingly, satisfying the first *Gagnon* prong. Second, in most cases where a defendant only failed to pay restitution, the mere failure to pay restitution should not be sufficient to warrant revocation and mitigating factors should be examined and presented. This would necessitate the appointment of a defense lawyer to assist the defendant. Thus, even if *Gagnon* applied, counsel would presumptively need to be appointed in almost all § 13-810(C)

hearings. *See Gagnon*, 411 U.S. at 790, 93 S. Ct. at 1764. Thus, counsel should be appointed for a defendant regardless of whether a judge decides to revoke his probation and sentence a defendant during the A.R.S. § 13-810(C) hearing or not.

Finally, the fact that courts choose not to enforce A.R.S. § 13-810 proceedings the way the statute is written should have no effect on the constitutional analysis of the statute. Courts interpret statutes in order to "fulfill the intent of the legislature that wrote it." *State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993). The first step to determine intent is to look at the language of the statute itself. *Bilke v. State*, 206 Ariz. 462, 464, 80 P.3d 269, 271 (2003). If the language is clear, and does not lead to impossible or absurd results, the court must then apply it. *Id.* (citing *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 268, 872 P.2d 668, 672 (1994); *Marquez v. Rapid Harvest Co.*, 89 Ariz. 62, 64, 358 P.2d 168, 170 (1960)). "It is fundamental that statutes are not interpreted piecemeal." *Adams v. Bolin*, 77 Ariz. 316, 320, 271 P.2d 472, 474 (1954). Finally, if it is possible, courts will "construe a statute so as to avoid rendering it unconstitutional, resolving any doubts in favor of its constitutionality." *Ramirez v. Health Partners of S. Arizona*, 193 Ariz. 325, 330, 972 P.2d 658, 663 (Ct. App. 1998).

Under the plain meaning of A.R.S. § 13-810, judges have the discretion to detain a defendant temporarily, revoke his probation, garnish his wages or impose community service during contempt hearings. Ariz. Rev. Stat. § 13-810(D). This meaning is taken from the unambiguous language in the statute that explicitly gives the judge these options, including the option to summarily revoke a defendant's probation and sentence them to prison. *Id.* at § 13-810(D)(2). Any other reading would exclude whole sections of the statute, which would be contrary to the legislators' intent and the normal rules statutory interpretation. *Mempa* prohibits courts from revoking probation and sentencing a defendant without first appointing him an attorney. 389 U.S. at 137, 88 S. Ct. at 258. Thus, under this plain reading of the statute, the only way for an A.R.S. § 13-801(C) hearing to be done constitutionally would be to provide a defendant with appointed counsel. Therefore, regardless of how courts choose to enforce A.R.S. § 13-810(C), a defendant must be appointed counsel because there is a real possibility that a defendant's probation will be revoked under the plain wording of the statute.

B. Appointed Counsel is Required During A.R.S. § 13-810(C) Hearings Because a Defendant's Substantial Rights may be Affected

In *Mempa*, the Supreme Court stated "*Townsend*, *Moore*, and *Hamilton* . . . clearly stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." 389 U.S. at 134, 88 S. Ct. at 256–57. In *Townsend v. Burke*, the Supreme Court found that counsel must be appointed during sentencing in certain circumstances to protect a defendant's rights. 334 U.S. 736, 741, 68 S. Ct. 1252, 1255 (1948). There, the trial court made several mistakes regarding the defendant's past criminal history and increased his sentence according to those mistakes. *Id.* The Supreme Court found that had counsel been present at these hearings, he would have had a duty to "prevent the court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted." *Id.* Thus, in *Townsend*, counsel was necessary to protect against mistakes or misrepresentations, while also offering mitigating evidence on the defendant's behalf. *Id.*

In *Moore v. State of Michigan*, the Supreme Court similarly found appointed counsel was

necessary when a defendant entered into a plea agreement. 355 U.S. 155, 160, 78 S.Ct. 191, 194 (1957). Specifically, the Court found that the uneducated defendant did not understand the possible defenses he could have asserted had he gone to trial or that he was waiving his rights to testify, offer mitigating evidence and cross examine adverse witnesses during trial. *Id.* at 159–60, at 194. The Court found that the defendant could not fairly protect his rights without an understanding of this information and thus counsel was necessary to help him protect his rights. *Id.* at 160, at 194.

In *Mempa*, the Supreme Court found that counsel was necessary during combined probation revocation/sentencing hearings to aid in "marshaling facts, introducing evidence of mitigating circumstances and in [] aiding and assisting the defendant to present his case." *Id.* The Court found that an uncounseled defendant might not realize that he was waiving hi rights to appeal his sentence, contest facts, offer mitigating evidence and to make a motion to withdraw his plea if he made admissions during the combined proceeding. *Id.* at 135-36, at 257-58. Thus, the Court found that these substantial rights were implicated and "a lawyer must be afforded at this hearing whether it be labeled a revocation of probation or a deferred sentencing." *Id.* at 137, at 258. Furthermore, although the Washington parole board made the final decision on sentencing length, the Court found that the board gave considerable weight to the trial court's recommendation and a defense attorney would still be necessary to assist the defendant persuade the trial court in making its persuasive recommendation. *Id.* at 160, at 194.

Here, a defendant's substantial rights may be subject to the same dangers that the Supreme Court found necessitated appointment of counsel in *Townsend*, *Moore* and *Mempa*. At A.R.S. § 13-810(C) hearings, a defendant is usually questioned by the court itself. However, under the statute, the prosecuting attorney or the person entitled to restitution may examine the defendant about any matter relating to the defendant's ability to pay restitution. Ariz. Rev. Stat. § 13-810(C). The court may then use its examination, or the examination of anyone entitled to question the defendant, to make a finding that the defendant has willfully failed to pay their restitution and decide the punishment for the defendant's willful contempt. *Id.* at § 13-810(D). There is no requirement in A.R.S. § 13-810(C) that the defendant be allowed to present witnesses in his favor or cross-examine witnesses against him during these hearings. Like *Townsend*, in this situation, there is a great danger that false or misleading information will be presented to the court. An uncounseled defendant, standing alone against the court, would likely fail to correct mistakes or offer sufficient mitigating evidence without the assistance of an attorney. There is a strong danger in this situation that the court may then make an erroneous decision regarding his ability to pay. *See Volk v. Brame*, 235 Ariz. 462, 470, 333 P.3d 789, 797 (Ct. App. 2014).

Additionally, an uncounseled defendant may not know his testimony may be used against him in a later probation revocation proceeding or even that he could have his probation revoked immediately at the A.R.S. § 13-810(C) hearing itself. An uncounseled defendant may then testify without knowing the full consequences of their testimony, like the defendant in *Moore*. Worse, most defendant's in this situation would actually feel compelled to incriminate himself. A defendant in this situation may then disclose their full earnings without disclosing their full required expenditures to the court, not knowing that their testimony may be perceived as willful failure to pay. The court's finding may then be used against the defendant to revoke his probation there or during a subsequent hearing. Appointed counsel is necessary in this situation to make sure that the defendant knew his rights and the severity of his situation in order for an uncounseled defendant to vigorously gather mitigating evidence.

Finally, even if a defendant's testimony is not used to immediately revoke probation

during the A.R.S. § 13-810(C) hearing itself, the court's finding would be almost dispositive during the defendant's subsequent probation violation hearings. This situation is similar to *Mempa*, where the defendant was sentenced by the judge but the judge's determination of sentence time was not controlling. The Supreme Court still found a defendant's substantial rights would be affected in this situation. Likewise, even when the court decides not to revoke a defendant's probation at the A.R.S. § 13-810(C) itself, the court's finding that the defendant willfully failed to pay restitution would hold almost dispositive weight during the defendant's subsequent probation violation hearing. Thus, the fact that a court may choose not to revoke probation during the hearing does not mean substantial interests are not involved.

The fact that a defendant is not warned of the dangers of testifying, is subject to an unprotected examination and may not be allowed to examine evidence against him, means that a defendant's substantial rights are highly likely to be affected during an A.R.S.§13-810(C) hearing. Thus, as in *Mempa*, *Townsend*, and *Hamilton*, counsel must be appointed for indigent defendants during these hearings to aid the defendant in protecting his rights.

C. By Using A.R.S. § 13-810(C) Hearings Instead of Probation Revocation Hearings the State and the Courts are Bypassing the Enumerated Procedural Safeguards Guaranteed by Due Process

The Fifth Amendment of the United States Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. Due process requires procedural protections when an individual stands to "suffer [a] grievous loss." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600 (1972) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168, 71 S. Ct. 624, 646 (1951)). Whether due process is due depends on both the weight of the interest and whether its nature is one contemplated by the "'liberty and property' language of the Fourteenth Amendment." *Morrissey*, 408 U.S. at 481, 92 S. Ct. at 2600. The extent of the procedures due is based on a balancing of the government function involved against the private interest of the individual. *Id.*

The Supreme Court has found that probation revocations implicate the Due Process Clause because a probationer's liberty, although limited, "includes many of the core values of unqualified liberty and termination inflicts a grievous loss on the parolee." *Id.* at 482, at 2601. Thus, the Court has found two procedural steps are necessary to revoke a defendant's probation, "(1) a retrospective factual question whether the probationer has violated a condition of probation; and (2) a discretionary determination by the sentencing authority whether violation of a condition warrants revocation of probation." *Black v. Romano*, 471 U.S. 606, 611, 105 S. Ct. 2254, 2258 (1985). The defendant is also entitled to the minimum requirements of due process, including:

(a) written notice of the claimed violations;
(b) disclosure of evidence against him;
(c) opportunity to be heard in person and to present witnesses and documentary evidence;
(d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
(e) a 'neutral and detached' hearing body; and
(f) a written statement as to the evidence relied on and reasons for revoking parole.

Morrissey, 408 U.S. at 488–89, 92 S. Ct. at 2604.

The Arizona Rules of Criminal Procedure, in accordance with Supreme Court precedent, also afford defendants certain rights during probation revocation proceedings. Under Rule 27.7, a defendant is entitled to an initial appearance where he is appraised of his rights, including the right to appointed counsel, and that any statement may be used against him. Ariz. R. Crim. P. 27.7. The defendant is then entitled to an arraignment where he must admit or deny allegations against them. *Id.* at 27.8(a). If no admission is made, then a probation violation hearing is scheduled where the defendant may present evidence and cross examine the state's witnesses. *Id.* at 27.8(b). If a violation is found, a probation revocation and sentencing hearing is held where the court decides whether to revoke and sentence the defendant or modify his probation. *Id.* at 27.8(c). Finally, if a defendant does admit to a probation violation, the court must determine whether the defendant knows he will waive his rights to counsel, presenting and cross examining witnesses, and that his admission may be used against him in further proceedings. *Id.* at 27.9

In contrast, proceedings under A.R.S. § 13-810(C) carry almost no procedural safeguards. Under A.R.S. § 13-810(C), the prosecutor or any person entitled to restitution may examine the defendant under oath and the court then uses that examination to decide whether the defendant willfully failed to pay their restitution. Ariz. Rev. Stat. § 13-810(C), (D). Under A.R.S. § 13-810(D)(2) the court may then summarily revoke the defendant's probation and sentence them to prison. *Id.* at § 13-810(D)(2). Essentially, a defendant is guaranteed none of the same procedural safeguards guaranteed under Rule 27 in A.R.S. § 13-810(C) hearings. However, the result may still be the same: probation revocation and sentencing. By allowing a judge to summarily revoke a defendant's probation and sentence him, A.R.S. § 13-810 allows judges to completely bypass all of the Rule 27 procedures for revoking probation and a defendant's guaranteed, minimum rights under due process.

Even if a judge does not revoke probation during the A.R.S. § 13-810(C) hearing itself, the defendant's testimony and financial records are still presented on the record and may be used against the defendant in an actual probation revocation hearing. During a defendant's initial appearance for a probation violation, before a violation is found, the court must advise the defendant that his statements may be used against him. Ariz. R. Crim. P. 27.7. However, under A.R.S. § 13-810, the court is not required to inform the defendant of any of his rights. This warning would be extremely important in this context because if the court finds the defendant willfully failed to pay restitution, it is finding that defendant willfully violated a condition of his probation. This finding, the defendant's testimony, and his financial records may then be used against the defendant in a subsequent probation revocation hearing as nearly dispositive proof that a defendant violated his probation. The fact that the court is allowed to surprise a defendant in order to ferret out probation violations without any warning of the defendant's rights violates the fundamental fairness required by due process. *See State v. Tash*, 23 Ariz. App. 299, 300–01, 532 P.2d 874, 875–76 (1975) (finding court's failure to inform probationer of the consequences of his admissions, that admissions could be used against him at subsequent criminal trial, that any statement could be used against him during the probation hearing itself or make a determination of his voluntariness necessitated reversal for failure to comply with due process).

This statute also denies the defendant the right to cross examine guaranteed under Rule 27.8. There, a defendant may cross examine witnesses against him during a probation violation hearing. Ariz. R. Crim. P. 27.8(b)(3). Whereas A.R.S. § 13-810(C) only allows the court, prosecutor or person(s) entitled to restitution to question the defendant during a hearing, with no

guarantee that the defendant may present witnesses themselves or cross-examine witnesses against them. Ariz. Rev. Stat. § 13-810(C). Most defendants in this situation would not be able to gather sufficient mitigating evidence to present a case for themselves, especially if they were not informed at the outset of the far ranging consequences of the hearing they were attending. *See Volk*, 235 Ariz. at 470, 333 P.3d at 797 (emphasizing importance of ability to contest adverse testimony for accuracy of ability to pay determination). Thus, due process is violated by the procedures set out in in A.R.S. § 13-810, regardless of whether a judge revokes a defendant's probation at the hearing or his probation is revoked later. This statute allows a judge to sidestep the preliminary constitutional, procedural guarantees of Rule 27 and still find a defendant has violated his probation. In this situation, only the appointment of counsel would adequately protect a defendant's rights by guaranteeing that the defendant is informed of his rights and is allowed to exercise them fully.

D. A.R.S. § 13-810(C) Hearings Subject a Criminal Defendant to Increased Deprivations of Liberty than a Purely Civil Defendant Making Civil Child Support Law Inapplicable

Contempt may be divided into two major categories: civil and criminal. *Pace v. Pace*, 128 Ariz. 455, 456, 626 P.2d 619, 620 (Ct. App. 1981). "An unconditional penalty is criminal in nature because it is solely and exclusively punitive in character." *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 633–34, 108 S. Ct. 1423, 1430–31 (1988) (quoting *Penfield Co. v. SEC,* 330 U.S. 585, 593, 67 S.Ct. 918, 922 (1947)). Whereas a conditional penalty, that is purged when a defendant satisfies that condition, is civil because it is designed to compel a defendant to act. *Korman v. Strick*, 133 Ariz. 471, 474, 652 P.2d 544, 547 (1982). Appointed counsel is generally required for criminal contempt but not for civil contempt. *Id.*

In *Turner v. Rogers*, the United States Supreme Court affirmed its prior holdings that appointed counsel is generally not required during civil contempt proceedings for failure to pay child support. 564 U.S. 431, 448, 131 S. Ct. 2507, 2520 (2011). In so finding, the court weighed the factors required to make civil proceedings fundamentally fair: "(1) the nature of the private interest that will be affected; (2) the comparative risk of an erroneous deprivation of that interest without . . . procedural safeguards, and (3) the nature and magnitude of any countervailing interest in not providing [those] procedural safeguards." *Id.* at 444–45, at 2517–18. First, the Court found that the private interest, freedom from incarceration, "argue[d] strongly for the right to counsel" and it was "obviously important to assure accurate decision-making in respect to the key ability to pay question." *Id.* at 445, at 2518. The Court found that inaccurate decisions might lead to imprisonment of indigent parties and thus essentially constitute criminal contempt without due process procedures. *Id.*

However, the Court found three factors weighed more heavily against appointed counsel. *Id.* at 447, at 2519. First, the Court found that with the right procedures in place, a defendant's indigence may be sufficiently easy to determine prior to providing counsel. *Id.* Second, in these proceedings, the person opposing the party is not the government represented by counsel but another unrepresented party. *Id.* In this situation the balance would shift against the unrepresented party when the defending party was appointed counsel and thus make the hearings less fair. *Id.* Finally, the Court found that the procedures set forth in these proceedings (notice, evidence of financial information, opportunity to be heard and an express finding) were enough

to protect due process. *Id.*

In contrast to child support contempt proceedings, the interests for probationer/defendants is much higher. "[W]hen a court suspends a sentence, it retains jurisdiction over that individual's punishment until the probationary term is completed or a prison sentence subsequently imposed." *State v. Holguin*, 177 Ariz. 589, 591–92, 870 P.2d 407, 409–10 (Ct. App. 1993). A defendant's failure to comply with probation could then subject the defendant to "termination and a prison term within the statutory range provided for the criminal offense of which he was convicted." *Id.* A defendant/probationer's liberty includes many core values of unqualified liberty implicated by the Due Process Clause, and thus termination "inflicts a grievous loss on the parolee." *Morrissey*, 408 U.S. at 482, 92 S. Ct. at 2601.

Unlike purely civil defendants in contempt proceedings, criminal defendants on probation "may face a potential of substantial imprisonment" if their probation is revoked. *Id.* at 480, at 2600. As argued above, A.R.S. § 13-810 hearings may function as either probation revocation/sentencing hearings outright, or as vehicles for a court to bypass probation violation hearings in order to find dispositive probation violations. Thus, in addition to serving time for contempt of court like the purely civil defendant might, the criminal defendant may then be subject to probation revocation proceedings and his entire criminal sentence. Thus, the criminal defendant's interest is much higher than a civil defendant's because his exposure to punishment is much more severe. Therefore, the first factor weighs even more heavily in favor of appointing counsel for criminal defendants than it did for the civil defendant in *Turner*.

Additionally, the three factors that the Supreme Court found weighed so heavily against appointed counsel in *Turner* are not present in A.R.S. § 13-810(C) hearings. First, every defendant with this office has already been found indigent. Because of this, this factor should inherently weigh in favor of providing appointed counsel in restitution cases given the defendant's indigence.

Second, there is never an unrepresented party that is presenting evidence against the defendant in A.R.S. § 13-810(C) hearings. Usually the trial court questions the defendant itself, although the statute allows either the prosecutor or a person entitled to restitution to question the defendant. Ariz. Rev. Stat. §13-810(C). However, even if the person entitle to restitution did question the defendant, that person would not be offering new evidence. Restitution is calculated during sentencing or at another hearing, thus the person entitled to restitution would not be offering new evidence like a custodial parent might be in a civil contempt hearing. There, the party would offer evidence that the other party did not pay them. Here, all payments are made to a third party vendor and the person entitled to restitution does not need to provide evidence of nonpayment. The only fact at issue in these hearings is the defendant's ability and willingness to pay, something the person entitled to restitution would not have evidence for or against.

A.R.S. § 13-810(C) also allows for the possibility that a prosecutor may question the defendant. This is the exact opposite situation that the Supreme Court assumed would not happen in *Turner*. Unlike the situation in *Turner*, if an uncounseled defendant was ever questioned by a prosecutor, fairness would require a defense attorney be provided to prevent erroneous decisions. A prosecutor would have no interest in questioning a defendant about mitigating evidence. Thus, the court would hear only one side the evidence. However, these two situations rarely occur, since the trial court is usually the one questioning the defendant. In this situation, no unrepresented party is being affected and thus the second factor would not weigh against representation. Because the defendant will not be opposing an unrepresented party, or may even be opposed by the State, this factor is irrelevant or could itself weigh in favor of appointed

representation.

Finally, given the far reaching consequences of an A.R.S. § 13-810(C) hearing on a defendant's probation, the minimal procedural safeguards in *Turner* would not be sufficient to protect a defendant from an undue deprivation of his liberty. A defendant may have his probation revoked and be sentenced to prison at an A.R.S. § 13-810(C) hearing or at a subsequent probation revocation. In *Morrissey*, the Supreme Court laid out the proper procedures to protect a defendant's liberty interests in probation revocations. 408 U.S. at 488–89, 92 S. Ct. at 2604. Thus, the procedures in *Morrissey* should be used, given the potential for an increased deprivation of liberty for criminal defendants during A.R.S. § 13-810(C) hearings as compared to the purely civil defendants in *Turner*. Because the appropriate procedures are not in place, this factor is not present and does not weigh against appointment of counsel.

Given the more severe liberty deprivation at issue in A.R.S. § 13-810 proceedings for criminal defendants and the absence of any of the mitigating factors found by the Supreme Court in *Turner*, counsel should be provided for defendants at a § 13-810(C) hearing to protect against undue deprivations of liberty.

IV. CONCLUSION

Counsel must be provide to a defendant during an A.R.S. 13-810(C) hearing because this hearing may be used as a probation revocation/sentencing hearing, because his substantial rights may be affected without the aid of counsel and because this process may allow a court to sidestep procedures that guarantee a defendant due process. Under *Mempa*, appointed counsel is required during probation revocation hearings combined with sentencings. Because A.R.S. §13-810(D) allows a judge to summarily revoke probation and sentence a defendant, these hearings are essentially probation revocation/sentencing hearings and counsel must then be appointed.

Under *Mempa*, counsel must be appointed at any stage where the defendant's substantial rights may be affected. During an A.R.S. § 13-810 hearing, an uncounseled defendant is not told that his testimony may be used to subsequently revoke probation or even revoke probation at the hearing itself. Additionally, there is no requirement that he be allowed to cross-examine witnesses against him. Thus, an uncounseled defendant in that position stands to have his substantial rights affected if he is not aided by counsel.

Additionally, whether a defendant's probation is revoked at the A.R.S. 13-810(C) hearing itself or later in a probation revocation hearing, his procedural rights guaranteed under due process will be violated by the court's decision to pursue contempt proceedings. Because a defendant is not told his testimony may be used against him during the hearing or later in subsequent proceedings and is not allowed to cross-examine witnesses against him, he is essentially denied the rights due to him under Rule 27 when the court decides to pursue an A.R.S. § 13-810(C) hearing instead. If the court makes a finding that he defendant willfully violated a term of his probation, this finding will be used later as dispositive evidence against him. Thus, allowing the court to bypass the initial procedural safeguards guaranteed under Rule 27 of the Arizona Rules of Criminal Procedure. Appointment of counsel would be necessary to protect a defendant's rights in this situation.

Finally, during A.R.S. § 13-810 proceedings a criminal defendant on probation is subject

to much harsher deprivations of liberty than the purely civil defendants in child support cases. Given this increased severity, the same justifications against appointment of counsel do not apply. Thus, counsel should be provided for criminal defendants during A.R.S. § 13-810 proceedings.