

SUPREME COURT OF ARIZONA

In the Matter of ) Arizona Supreme Court  
 ) No. R-17-0015  
RULES 4.2, 5.1, 5.4, 7.2, 7.4, )  
26.12 and 27.8, RULES OF )  
CRIMINAL PROCEDURE ) **FILED 09/28/2017**  
 )  
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**ORDER**

**AMENDING RULES 4.2, 5.1, 5.4, 7.2, AND 7.4, ARIZONA RULES OF  
CRIMINAL PROCEDURE**

A petition having been filed proposing to amend Rules 4.2, 5.1, 5.4, 7.2, 7.4, 26.12, and 27.8, Rules of Criminal Procedure, and comments having been received; and Rules 26.12 and 27.8, Arizona Rules of Criminal Procedure, having been amended by the Court on August 31, 2017, effective January 1, 2018; and amendments to Rules 4.2, 5.1, 5.4, 7.2, and 7.4 having been circulated on August 31, 2017 for additional comment by September 25, 2017; and one comment having been received, upon consideration,

**IT IS ORDERED** that Rules 4.2, 5.1, 5.4, 7.2, and 7.4, Rules of Criminal Procedure, as restyled in R-17-0002, effective January 1, 2018, be amended in accordance with the attachment hereto, effective April 2, 2018.

DATED this 28th day of September, 2017.

\_\_\_\_\_  
/s/  
SCOTT BALES  
Chief Justice

TO:

Rule 28 Distribution

David K Byers

Elizabeth B Ortiz

David J Euchner

William G Montgomery

Kathleen E Brody

Andrea Woods

Michael A Breeze

Mark C Faull

**ATTACHMENT\***

(\*additions to the rules as amended in R-17-0002 are indicated by underscoring;  
deletions by ~~strikeouts~~)

**Rule 4.2. Initial Appearance**

**(a) Generally.** At an initial appearance, the magistrate must:

- (1) determine the defendant's true name and address and, if necessary, amend the formal charges to correct the name and instruct the person to promptly notify the court of any change of address;
- (2) inform the defendant of the charges and, if available, provide the person with a copy of the complaint, information, or indictment;
- (3) inform the defendant of the right to counsel and the right to remain silent;
- (4) determine whether there is probable cause for purposes of release from custody, and, if no probable cause is found, immediately release the person from custody;
- (5) appoint counsel if the defendant requests and is eligible for appointed counsel under Rule 6;
- (6) permit and consider any victim's oral or written comments concerning the defendant's possible release and conditions of release;
- (7) unless the magistrate determines under (a)(8) that release on bail is prohibited, determine the conditions of release under Rule 7.2(a) including whether the defendant is non bailable under article 2, section 22 of the Arizona Constitution and A.R.S. § 13-3961;
- (8) determine whether probable cause exists to believe:
  - (A) the defendant committed a capital offense, a sexual assault, or any felony offense committed while the person was on pretrial release for a separate felony charge; or
  - (B) the defendant committed a felony for which release on bail is prohibited because the defendant poses a substantial danger and no conditions of release will reasonably assure the safety of the victim, any other person, or the community based on the considerations provided in Rule 7.2(b)(3);
- (9) if the court determines that the defendant is not eligible for bail based on a determination under (a)(8)(A) or (B), schedule a bail eligibility hearing in superior court as required under Rule 7.2(b)(4);

**(810)** order a summoned defendant to be 10-print fingerprinted no later than 20 calendar days by the appropriate law enforcement agency at a designated time and place if:

(A) the defendant is charged with a felony offense, a violation of A.R.S. §§ 13-1401 et seq. or A.R.S. §§ 28-1301 et seq., or a domestic violence offense as defined in A.R.S. § 13-3601; and

(B) 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; and

**(911)** order the arresting agency to secure a sample of buccal cells or other bodily substances for DNA testing if:

(A) the defendant is in-custody and was arrested for an offense listed in A.R.S. § 13-610(O)(3); and

(B) the court has not received proof of compliance with A.R.S. § 13-610(K).

**(b) and (c) [No change]**

### **Rule 5.1. Right to a Preliminary Hearing; Waiver; Continuance**

**(a) Right to a Preliminary Hearing.** A defendant has a right to a preliminary hearing if charged in a complaint with a felony. A preliminary hearing must commence before a magistrate no later than 10 days after the defendant's initial appearance if the defendant is in custody, or no later than 20 days after the defendant's initial appearance if the defendant is not in custody, unless:

(1) the complaint is dismissed;

(2) the hearing is waived;

(3) the defendant has been transferred from the juvenile court for criminal prosecution on specified charges; ~~or~~

(4) the magistrate orders the hearing continued under (c) ~~;~~ or

(5) the court made a probable cause finding at a bail eligibility hearing under Rule 7.2(b)(4).

**(b) – (d) [No change]**

#### **Rule 5.4. Determining Probable Cause**

**(a) Holding a Defendant to Answer.** If a magistrate finds that there is probable cause to believe that an offense has been committed and that the defendant committed it, the magistrate must file a written order holding the defendant to answer for the offense before the superior court. Upon request, the magistrate may reconsider the conditions of release. This rule's requirements are satisfied if a probable cause finding was made at a bail eligibility hearing under Rule 7.2(b)(4).

**(b) - (d) [No change]**

#### **Rule 7.2. Right to Release**

**(a) [No change]**

**(b) Before Conviction: Defendants Charged with an Offense Not Eligible for Bail/Non-Bailable Offenses.** ~~The court must not release a defendant on bail if it finds the defendant is not bailable under applicable law.~~

**(1) Not Eligible Based on Commission of a Specified Felony or Any Felony While on Pretrial Release.** A defendant must not be released if the court finds the proof is evident or the presumption great that the defendant committed:

(A) a capital offense or a sexual assault; or

(B) any felony offense while the defendant was on pretrial release for a separate felony charge.

**(2) Not Eligible Based on Commission of any Felony and Other Factors.** Under article 2, section 22(A)(3) of the Arizona Constitution, the court may not release any defendant charged with a felony if the court finds all of the following:

(A) the proof is evident or the presumption great that the defendant committed one or more of the charged felony offenses;

(B) clear and convincing evidence that the defendant poses a substantial danger to the victim, any other person, or the community or, on certification by motion of the state, the defendant engaged in conduct constituting a dangerous crime against children or terrorism; and

(C) no condition or combination of conditions of release will reasonably assure the safety of the victim, any other person, or the community.

**(3) Bail Eligibility Considerations.** In making the determinations required by (b)(2)(B) and (b)(2)(C), the court must consider:

- (A) the nature and circumstances of the offense charged, including whether the offense is a “dangerous offense” as defined in A.R.S. § 13-105;
- (B) the weight of the evidence against the defendant;
- (C) the history and characteristics of the defendant, including the defendant’s character, physical and mental condition, past conduct including membership in a criminal street gang, history relating to drug or alcohol abuse, and criminal history;
- (D) the nature and seriousness of the danger to the victim, any other person, or the community that would be posed by releasing the defendant on bail, including any threat to a victim or other participants in the judicial process;
- (E) the recommendation of the pretrial services program based on an appropriate risk assessment instrument;
- (F) any victim statement about the offense and release on bail; and
- (G) any other factor relevant to the determination required under (b)(2)(B) and (b)(2)(C).

**(4) Bail Eligibility Hearing.**

- (A) Generally. The superior court must hold a hearing to determine whether a defendant held in custody under Rule 4.2(a)(8) is not eligible for bail as required under (b)(1) or (b)(2), unless the defendant waives this hearing.
- (B) Timing. If the State makes an oral motion under A.R.S. § 13-3961(E), the court must hold this hearing within 24 hours of the initial appearance, subject to continuances as provided in A.R.S. § 13-3961. If this motion is not made, the hearing must be held as soon as practicable, but no later than 7 days after the initial appearance unless the detained defendant moves for a continuance.
- (C) Determination of Probable Cause and Release Conditions. If the court does not find the proof evident or the presumption great under (b)(1) or (b)(2)(A), the court must determine whether there is probable cause to believe that an offense was committed and that the defendant committed it. If the court finds probable cause, the court must determine release conditions under (a). If the court does not find probable cause, the defendant must be released from custody. The parties may stipulate before the bail eligibility hearing that the probable cause determination at the hearing satisfies the requirements of Rule 5. If the parties so stipulate and the court does not find probable cause, the court must dismiss the complaint and discharge the defendant. If the parties have not so stipulated, the court must schedule a preliminary hearing as provided in Rule 5.1(a).

(D) Findings on the Record. The court's findings must be on the record.

(c) – (d) [No change]

#### **Rule 7.4. Procedure**

(a) **Initial Appearance.** At an initial appearance, the court must determine bail eligibility and the conditions for release. If the court decides that the defendant is eligible for release, the court must issue an order containing the conditions of release. The order must inform the defendant of the conditions and possible consequences for violating a condition, and that the court may immediately issue a warrant for the defendant's arrest if there is a violation.

#### **(b) Bail Eligibility Hearing.**

(1) Right to Secure Witnesses, Cross-Examine, and Review Witness Statements. At a bail eligibility hearing, each party has the right to secure the attendance of witnesses, cross-examine any witness who testifies, and to review any previous written statement by the witness before cross-examination.

(2) Victims. Notwithstanding the time limits of Rule 39(g)(1), a victim must be afforded the rights provided in Rule 39(g).

(3) Admissibility. Evidence is admissible at the hearing only if it is material to whether, and under what conditions, to release the defendant on bail and, subject to the parties' stipulation under Rule 7.2(b)(4)(C), whether probable cause exists to hold the defendant for trial on each charge. Rules or objections calling for the exclusion of evidence are inapplicable at a bail eligibility hearing.

#### **(bc) Later Review of Conditions.**

(1) **Generally.** On motion or on its own, a court may reexamine bail eligibility or the conditions of release if the case is transferred to a different court or a motion alleges the existence of material facts not previously presented to the court.

(2) **Motion Requirements and Hearing.** The court may modify the conditions of release only after giving the parties an opportunity to respond to the proposed modification. A motion to reexamine the conditions of release must comply with victims' rights requirements provided in Rule 39.

(3) **~~Non-Bailable Offenses~~ Eligibility for Bail.** If the motion is by the State and involves whether the defendant should be held without bail a defendant previously held eligible for bail at the initial appearance, it need not allege new material facts. The court must hold a hearing on the record as soon as practicable, but no later than 7 days after the motion's filing.

**(ed) Evidence.** A court may base a release determination under this rule on evidence that is not admissible under the Arizona Rules of Evidence.

**(e) Defendant's Bail Status.** If the court makes the findings required under Rule 7.2(b)(1) or (b)(2) to deny bail, the court must order the defendant held without bail until further order. If not, the court must order the defendant released on bail under Rule 7.2(a).

**(df) Review of Conditions of Release for Misdemeanors.** No later than 10 days after arraignment, the court must determine whether to amend the conditions of release for any defendant held in custody on bond for a misdemeanor.

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