

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:) No. R-21-0051
)
) COMMENT OF ARIZONA
Petition to Amend Arizona Rules of) ATTORNEYS FOR CRIMINAL
Criminal Procedure 5.3, 6.1, 7.3, 7.4) JUSTICE (AACJ) IN SUPPORT OF
) PETITION TO AMEND ARIZONA
) RULES OF CRIMINAL
<hr/>) PROCEDURE 5.3, 6.1, 7.3, 7.4

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) hereby submits the following comment on the petition to amend Arizona Rules of Criminal Procedure 5.3, 6.1, 7.3, and 7.4.

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.

AACJ generally supports the proposal of the Administrative Office of the Courts because it gives effect to the work of the Fair Justice for All Task Force by reducing the use of monetary bonds to keep indigent defendants incarcerated when such bonds are unnecessary to ensure either the appearance of the accused in court or the safety of the community, and by ensuring that persons who are held in custody on bond have legal representation. As to the specific proposals in the petition, AACJ's position is as follows:

Addition of Rule 5.3(c): AACJ supports allowing the magistrate to review release conditions at a preliminary hearing. The reference to Rule 39 is appropriate because victims have a constitutional right to be heard at any proceeding where the defendant's release conditions are being considered. *See* Rule 39(b)(7)(B). But in cases where there is no victim or where victims do not invoke their rights, allowing the magistrate to consider release conditions as a matter of course can obviate the need for a formal motion (which adds to the cost of litigation). Furthermore, the magistrate who presided over the preliminary hearing is in a much better position to assess the facts of the case and the strength of the evidence against the defendant (as opposed to taking counsel's word for it, which is what typically happens in hearings on motions to modify conditions of release). Although preliminary hearings in

Arizona are relatively uncommon, it is helpful to provide the opportunity to raise release conditions at the early stages of the case.

Addition of Rule 6.1(b)(1)(C): AACJ supports the right to appointment of counsel for all indigent defendants who are held on bond at the initial appearance. The U.S. Supreme Court has extended the right to counsel to all persons charged with misdemeanor offenses where the government intends to seek a sentence of incarceration upon a finding of guilt. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). If the defendant is held on bond at the initial appearance, then the defendant is ultimately receiving a sentence of incarceration, since A.R.S. § 13-712(B) requires the defendant to receive pre-sentence incarceration credit for all time served in jail prior to sentencing. It is well known that many misdemeanor defendants are driven to plead guilty because that may be the price of being released from jail. *See* Shima Barandaran Baughman, “The History of Misdemeanor Bail,” 98 BOSTON U. L. REV. 837, 872-73 (discussing “detrimental and often life-altering” impact of pretrial detention for misdemeanors). Obtaining uncounseled guilty pleas from defendants in custody is bad enough; but it is unconscionable when coupled with the fact that many guilty pleas are entered over video or by telephone. By providing counsel to those detained on bond, there will be less incentive for limited jurisdiction courts to hold such persons in custody and then accept guilty pleas.

“Technical amendments” to Rule 7.3(c): AACJ opposes this change. Far from being “technical amendments,” this proposed amendment changes the nature of the finding the court must make when imposing release conditions. The current rule uses the phrase “reasonable and necessary,” which requires proof of two things. “Reasonably necessary,” however, eliminates the need for the condition to be reasonable and reduces the level of necessity to “reasonably necessary,” which is a watered-down standard. “Reasonably necessary” means that one can make a reasonable argument that a particular order is necessary. For example, in Rule 6.7(a), experts can be appointed by the court if “reasonably necessary” to investigation of a defense at trial or sentencing, but the defendant need not prove that the expert is “necessary.” *See also Jones v. Sterling*, 210 Ariz. 308, 314 ¶ 27 (2005) (interpreting the use of “reasonably necessary” in predecessor to Rule 6.7(a) as something that may be helpful to investigation of a potential defense). “Reasonably necessary” looks a lot like the “rational basis test” for determining the constitutionality of regulatory laws; as long as some hypothetical reason can be conceived why a particular release condition might be necessary, it would withstand scrutiny. In this regard, Rule 7.3(c) is not broken, and therefore there is nothing for this Court to fix.

Amendments to Rules 7.4(c)(1) & 7.4(f) and addition of Rule 7.4(g): AACJ supports all of these changes. First, it is preferable for a limited jurisdiction court to review release determinations early in the case, and thus changing the deadline for

reviewing release conditions for persons held in custody to 10 days after the initial appearance would serve that purpose. It is probably unnecessary to add language that “[t]he court may hold oral argument or an evidentiary hearing,” but there is no harm in adding these ten words to ensure clarity in the procedures. Finally, the addition of Rule 7.4(g) is necessary to clarify the state’s burden when the court imposes additional conditions of release.

Rule 7.4(g) contains the term “reasonably necessary,” which AACJ disapproves for the reasons stated above. This Court should omit the word “reasonably” from that sentence. Proposed Rule 7.4(g) also needs a comma after “Rule 7.3(c)” in order to be grammatically correct.

Conclusion

For these reasons, AACJ requests this Court grant the petition insofar as it amends Rules 5.3, 6.1, and 7.4, but AACJ asks this Court to deny the proposed amendment to Rule 7.3.

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