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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

PETITION TO AMEND RULES 4.2, 5.1,
5.4, 7.2, 7.4, 26.12 AND 27.8 OF THE
ARIZONA RULES OF CRIMINAL
PROCEDURE

Supreme Court No. R-17-0015

JOINT COMMENT OF APDA AND
AACJ

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”) file this Comment supporting Appendix A and opposing Appendix B of the Administrative Office of the Court’s (“AOC”) Rules Petition.

I. STATEMENTS OF INTEREST

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.

II. DISCUSSION

The Petition has two separate and distinct appendices. Appendix A provides much needed, common sense modifications consistent with existing statutes and case law. These changes will provide the courts with improved procedures when dealing with convicted individuals who owe money. The APDA and AACJ support the proposed changes to Rules 26.12 and 27.8 of the Arizona Rules of Criminal Procedure contained within Appendix A.

Appendix B, however, proposes amending Rules 4.2, 5.1, 5.4, 7.2, and 7.4 of the Arizona Rules of Criminal Procedure to establish procedures for holding individuals nonbondable. The proposed changes depart from existing statutory requirements and affect areas of law that remain unsettled. The AOC recognized the unsettled state of the law at page 2 of its Petition:

The two proposals have been organized into two separate appendices because the bail eligibility rule proposal will likely be impacted by the success of the Task Force's pending legislative proposals and by this Court's resolution of the issues in *Simpson v. Miller*, Supreme Court No. CR-16-0227-PR (argued Nov. 8, 2016). Accordingly, the Court may prefer to resolve the bail eligibility rules on a different time frame.

The AOC was prescient. In fact, the proposed statutory changes that provided the foundation for the rule change have not come to fruition. Accordingly, it would be premature for the Court to implement a rule change that differs from the existing statute.

A court rule may not define or regulate a substantive right. *Patterson v. Mahoney*, 219 Ariz. 453, 456 ¶ 12 (App. 2008). Substantive rights arise from statutes or the constitution. *Id.* ¶ 13. With the recent *Simpson v. Miller* decision, the Arizona Supreme Court clarified that individuals charged with a crime have a “fundamental” right to bodily liberty. 241 Ariz. 341, ¶ 9 (2017). This right is substantive. *Id.* ¶ 21. This right entails that freedom from detention is “the norm” and detention is a “limited exception.” *Id.*

In light of *Simpson*, even the current statutory procedure, which makes detention the default situation, may be susceptible to constitutional challenge. The Legislature’s decision to remain quiet in light of *Simpson* shows an acceptance of the Court’s interpretation. *State v. Pennington*, 149 Ariz. 167, 168 (App. 1985) (“It is presumed the legislature is aware of existing case law when it passes a statute, and that it is aware of court decisions interpreting the language of the statute; and when it retains the language upon which those decisions are based, it approves the interpretations.”) (citation omitted). And the Legislature’s decision not to adopt the proposed changes expresses an intent not to further extend the time during which the courts ignore the “norm” of bodily freedom or, at least, potential freedom through bail. *Lancaster v. Arizona Bd. of Regents*, 143 Ariz. 451, 458, (App. 1984) (the legislature’s choice *not* to adopt a proposed change shows its intent not to change the law in the proposed manner). *See also Roberts v. Spray*,

71 Ariz. 60, 66 (1950) (same); *S. Pac. Co. v. Gila Cty.*, 56 Ariz. 499, 503 (1941) (code that is re-enacted is as valid as any other part of the code).

Additionally, a number of pending cases challenge the constitutionality of existing nonbondability provisions in Arizona statutes. *See, e.g., State v. Jariwala*, CR-17-1065-PR (pending petition with the Arizona Supreme Court challenging the categorical denial of bail to persons accused of sexual assault); *State v. Hon. Wein (Goodman)*, 1 CA-SA 17-0072 (special action in the Court of Appeals that will be petitioned to the Arizona Supreme Court on May 26, 2017, challenging the same law); *State v. Hon. Wein (Henderson)*, 1 CA-SA 17-0077 (same).

The unresolved legal issues surrounding nonbondability would be further complicated if a new rule was enacted midstream. This is particularly true here: if approved, the rule proposed by the AOC would likely lead to another round of litigation focused on the inconsistencies between the rule and the existing statute. For example, it is reasonable to contend that the proposed rule strips away critical statutory entry points limiting nonbondability, first by allowing the court to deny any bond without even a prosecutor's motion arguing that no bond is appropriate, and, second, by removing the time limitations required by ARS §13-3961. *Cf. Inzunza-Ortega v. Superior Court In & For Cty. of Maricopa*, 192 Ariz. 558, 192 ¶ 11 (App. 1998) (“We presume that the legislature did not intend to do a futile thing by including in a statute a provision that is inoperative or invalid.”).

Accordingly, the APDA and AACJ oppose the proposed rule changes contained within Appendix B of the petition.

III. CONCLUSION

The APDA and AACJ support the proposed changes to Rules 26.12 and 27.8 of the Arizona Rules of Criminal Procedure contained within Appendix A.

However, the APDA and AACJ oppose the proposed changes to Rules 4.2, 5.1, 5.4, 7.2, and 7.4 of the Arizona Rules of Criminal Procedure contained within Appendix B of the petition because the proposed changes directly contradict existing statutes granting accused individuals the right to a prompt determination of release conditions.

RESPECTFULLY SUBMITTED this 30th day of May, 2017.

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