IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROBERT LOUIS HISKETT, Petitioner, v. THE HONORABLE RICK LAMBERT, Judge of the MOHAVE COUNTY SUPERIOR COURT OF THE STATE OF ARIZONA, Respondent Judge, STATE OF ARIZONA, Real Party In Interest.	))))))))))))))))	Arizona Court of Appeals No. 1 CA-SA 19-0119 Mohave County Superior Court No. CR-2018-01854

BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE (AACJ) AND ARIZONA PUBLIC DEFENDER ASSOCIATION (APDA) IN SUPPORT OF PETITIONER

David J. Euchner, No. 021768
Pima County Public Defender's Office
33 N. Stone Ave. #2100
Tucson, Arizona 85701
(520) 724-6800
David.Euchner@pima.gov
Attorney for AACJ

Sandra L.J. Diehl, No. 013567
Coconino County Public Defender
110 E. Cherry
Flagstaff, Arizona 86001
(928) 679-7700
sdiehl@coconino.az.gov
APDA President / Attorney for APDA

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INTRODUCTION

In recent years, legislative leaders have enacted new statutes and proposed multiple amendments to the Arizona Constitution, convincing voters that confining criminal defendants before their trial is a necessity to protect the public safety. In 2002 and 2006, voters were encouraged to expand the list of nonbailable offenses beyond capital offenses—and both resulting constitutional amendments were struck down by the Arizona Supreme Court and the Ninth Circuit in recent years for violating the due process rights of pretrial detainees. *Simpson v. Miller (Simpson II)*, 241 Ariz. 341 (2017); *State ex rel. Montgomery v. Wein*, 244 Ariz. 42 (2018); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014). Also in 2002, the Legislature enacted A.R.S. § 13-3967(E)(1), which requires a person charged with any sexual offense who is appropriate for release on recognizance to be placed on "electronic monitoring, where available." This court has given a narrowing interpretation to this statute and held that "where available" means that a court will not be required to follow that provision if that court cannot afford the cost of the service. *Haag v. Steinle*, 227 Ariz. 212, 215 ¶ 11 (App. 2011).

This case involves a defendant whom the Mohave County Superior Court had already determined was appropriate for release on his own recognizance. Implicit in this determination was a finding that his risk to the community was relatively low. According to that court, the only impediment to the defendant's pretrial release is

the inability of the defendant to comply with the requirement in section 13-3967(E)(1), because the current practice in Mohave County is to require defendants to pay the full cost of electronic monitoring or else hold them in pretrial detention on bond. This practice denies a fundamental right to liberty and punishes the accused based solely on indigence.

It is time for that practice to end. Our supreme court, recognizing the fundamental unfairness of a criminal justice system that punishes people merely because they are poor, assembled the Fair Justice For All Task Force that proposed a plethora of bail and sentencing reforms that have been adopted by the Court. This court has also recently reversed two similar orders from the Mohave County Superior Court, and only after being ordered to do so by the respondent judge in this case[1] did the Mohave County Attorney's Office respond to the petition for special action (and it did not accept this court's invitation to file a supplemental brief).

For the reasons stated in this brief, that statute is both facially unconstitutional and unconstitutional as applied to all indigent persons. That statute violates the

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[1] In *Hurles v. Superior Court*, 174 Ariz. 331, 333 (App. 1993), this court held that "it is proper for a judge named as a respondent in a special action to file a responsive pleading if the purpose of the response is to explain or defend an administrative practice, policy, or local rule, but that it is improper for a judge to respond merely to advocate the correctness of an individual ruling in a single case." Because the issue in this case involves a county-wide issue regarding budgeting for electronic monitoring, this is not of the "I ruled correctly" variety. Rather, it appears appropriate for the superior court to have a position.

Fourteenth Amendment's right to liberty and due process, as well as the Eighth Amendment's prohibition on excessive bail and fines, along with their state constitutional counterparts. After addressing serious constitutional concerns with the statute and its application to indigent defendants and discussing better methods for ensuring pretrial compliance with release conditions, this brief then proposes answers to the questions posed in this court's order dated June 7, 2019.

INTERESTS OF *AMICI CURIAE*

Arizona Attorneys for Criminal Justice, 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.

Arizona Public Defender Association (APDA) is a non-profit organization comprised of the county, city, federal, and tribal indigent representation offices and programs in the State of Arizona. Its mission is to safeguard the constitutional rights of indigent individuals, thereby protecting the rights of all members of the

community.

Amici offer this brief because the issue presented concerns the constitutional right of accused individuals to be free from excessive bail or fines and to be released from custody pending trial unless there is a compelling government interest demanding the imposition of pretrial incarceration. *Amici*'s member attorneys and indigent defense organizations have defended many thousands of cases involving sexual offenses and have broad experience with the spectrum of such defendants and the management of release conditions pending trial.

ARGUMENTS

I. An indigent defendant may not be held on bond merely because he is without the financial means to pay for electronic monitoring. A bond that is too high for a defendant to be able to post amounts to a denial of bail and violates the Eighth Amendment, article 2, section 15 of the Arizona Constitution, and Rule 7 of the Arizona Rules of Criminal Procedure.

Both the Eighth Amendment to the U.S. Constitution and article 2, section 15 of the Arizona Constitution state that "excessive bail shall not be required, nor excessive fines imposed…" The Due Process Clause of the Fourteenth Amendment similarly protects the right to liberty from unwarranted pretrial detention. "In our society liberty is the norm, and detention prior to trial … is the carefully limited exception." *Simpson II*, 241 Ariz. at 345 ¶ 9 (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)). Our supreme court recently explained that the right to be released prior to trial has roots older than the founding of the nation. *Simpson II*, 241

Ariz. at 345 ¶ 11 (quoting *Stack v. Boyle*, 342 U.S. 1, 4 (1951)) ("This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction."); *see also Simpson v. Owens (Simpson I)*, 207 Ariz. 261, 267-68 ¶¶ 18-21 (App. 2004) (describing history of English common law from which the American colonial right to pretrial release derived).

In order for bail to be denied, the defendant must be afforded "a full-blown adversary hearing, [and] the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Salerno*, 481 U.S. at 750. It is only because of this protection for the pretrial detainee that such laws can satisfy due process. *Id*. at 751. This court stated the entitlement to, and procedure for, such a hearing in *Simpson I*, 207 Ariz. at 278 ¶ 56.

Article 2, section 22 of the Arizona Constitution further guarantees that "all persons charged with crime shall be bailable by sufficient sureties," and that "the purposes of bail and any conditions of release that are set by a judicial officer include: assuring the appearance of the accused[;] protecting against the intimidation of witness[; and] protecting the safety of the victim, any other person or the community." This provision was codified into statute. A.R.S. § 13-3961(B). Section 13-3967 and Rule 7 of the Arizona Rules of Criminal Procedure provide the manner

in which judicial officers consider and impose conditions of release, including bail or release on recognizance, a term defined by our rules as "release of a defendant without requiring the posting of a bond as a condition of release." Ariz. R. Crim. P. 7.1(a). Rule 7.2(a)(2) states that "[e]xcept as these rules otherwise provide, any defendant charged with an offense bailable as a matter of right must be released pending and during trial on the defendant's own recognizance with only the mandatory conditions of release required under Rule 7.3(a)," as well as the condition to not contact the victim in Rule 7.3(c).

The Arizona Supreme Court recently adopted a significant overhaul to this Rule based on the work of the Fair Justice For All Task Force. One important proposal relevant to this issue was "Arizona should move ahead to implement a risk-based release decision system and eliminate money for freedom to the greatest extent possible … instead of the more common practice of setting a high-dollar bond as a substitute for trying to keep a high-risk individual in jail." Report and Recommendations of the Task Force on Fair Justice for All: Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies, at 38. Among those reforms were writing into Rule 7.3(c)(2)(A) that monetary conditions "must be based on an individualized determination" and "court[s] may not rely on a schedule of charge-based bond amounts." Further, courts "must not impose a monetary condition that results in unnecessary pretrial incarceration." *Id.* To the extent a court imposes a

monetary condition of release, however, "it must impose the least onerous type of condition in the lowest amount necessary to secure the defendant's appearance or protect other persons or the community from risk of harm by the defendant." Rule 7.3(c)(2)(B).

Despite such clarity of language, some courts continue to violate this directive. In Pima County, for example, most persons charged with first-degree murder are not held without bond, because such a decision would require a hearing where the State must show, consistent with article 2, section 22(A) of the Arizona Constitution, that "the proof is evident or the presumption great" that the defendant committed the offense. Instead, Pima County judges routinely impose a bond of $1,000,000—in effect, imposing a bond schedule based on the charge, in flagrant violation of Rule 7.3. Nor has binding case law dissuaded such actions. *See Costa v. Mackey*, 227 Ariz. 565, 570 ¶ 10 (App. 2011) (where State failed to prove the strength of its evidence to allow defendant to be held without bond, trial judge abused her discretion in imposing a $75,000,000 cash bond because "the oppressive requirements she imposed effectively constituted a denial of bail"). This is also a common experience in Maricopa County.

Despite these failings in murder cases, Pima County has a strong record of honoring the right to release. Indeed, prior to our supreme court holding that all sexual offenses are bondable in *Simpson II* and *Wein*, Pima County's failure to

conduct *Simpson I* hearings meant that all defendants were required to be bondable, and Pima County judges routinely released sexual offenders without having to post a bond so long as the risk assessment demonstrated such was appropriate. *See* **Argument III**, *infra*. Such defendants are still released when appropriate.

In Mohave County, on the other hand, it appears that those charged with sexual offenses are incarcerated prior to trial based primarily on the defendants' inability to pay for electronic monitoring, since this issue has now arisen in at least three cases where the ACLU has appeared. In *Haag*, this court clearly considered the responsibility for covering the cost of monitoring as a government responsibility, not that of the individual; and *Haag* also gives the superior court to find that electronic monitoring is not "available" in places where the local government cannot afford such costs. 227 Ariz. at 215 ¶¶ 11-12.

The cost of electronic monitoring does not qualify as "bond" because it is not "deposited with the clerk" in a manner described in Rule 7.1. Instead, it is more appropriately described as a fee that a defendant must pay, not unlike attorney fees which a defendant may be required to pay in part in accordance with Rule 6.4(c). But, just as defendants may not be denied the Sixth Amendment right to counsel if they cannot afford to contribute to the cost of counsel, neither may they be denied their Eighth and Fourteenth Amendment rights to liberty and to be free from unwarranted pretrial detention.

The petition for special action and the petitioner's supplemental brief appropriately analogize this situation to *Bearden v. Georgia*, 461 U.S. 660 (1983), where the Supreme Court held that jailing probationers based on their inability to pay fines and fees violated the Fourteenth Amendment's due process and equal protection clauses. At least in *Bearden*, however, the person threatened with incarceration is convicted of a crime. In this case, however, Mr. Hiskett stands before the court as an innocent man, making the threat of incarceration all the more odious.

Where the defendant is bailable, the standards for determining appropriate release conditions are set forth in A.R.S. §13-3967(B); in 2002, the list of factors to consider was a list of nine, and it has since been expanded to fifteen. Judges have always been permitted to consider other factors not enumerated; the statute merely directs the judge to consider these at a minimum. *See* Rule 7.3(c)(1)(G) (allowing the court to impose "any other non-monetary condition that is reasonably related to securing the defendant's appearance or protecting others or the community from risk of harm by the defendant."). These provisions are uncontroversial; no one challenges the duty of the judge to consider all relevant factors when deciding on release conditions. Arizona law entrusts judges with the responsibility of applying the factors in section 13-3967(B) in a manner that maximizes the likelihood of maintaining the community's safety while also ensuring that the law is being applied fairly.

II. A.R.S. § 13-3967(E) is facially unconstitutional because its requirements apply to all defendants charged with sexual offenses without individualized considerations of release conditions and it is not narrowly tailored toward the governmental interests in ensuring public safety and appearance of the defendant at trial.

"In a facial constitutional challenge, the party challenging the law must establish that it 'is unconstitutional in all of its applications,' a standard the U.S. Supreme Court characterizes as 'exacting.'" *Simpson II*, 241 Ariz. at 344-45 ¶ 7 (quoting *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015)). Even where statutes are facially constitutional, however, courts have a duty to ensure that they not applied in an unconstitutional manner. "An 'as-applied' challenge assumes the standard is otherwise constitutionally valid and enforceable, but argues it has been applied in an unconstitutional manner to a particular party." *Korwin v. Cotton*, 234 Ariz. 549, 559 ¶ 32 (App. 2014) (citing *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)). Because section 13-3967(E) infringes a fundamental right to pretrial release, heightened scrutiny is appropriate. *Simpson II*, 241 Ariz. at 348 ¶ 23 (citing *Lopez-Valenzuela*, 770 F.3d at 780, and *Salerno*, 481 U.S. at 750).

To the extent one might assert that a facial challenge to section 13-3967(E) must fail because some defendants charged with sex crimes are substantially wealthy enough to afford the electronic monitoring, such an assertion would ignore the U.S. Supreme Court's explanation of the nature of a facial challenge. In *Patel*, it explained that a municipal code provision requiring hotel operators to provide police officers

with specified information concerning guests on demand, without a search warrant, was facially unconstitutional even if there are exigent circumstances or if the subject of a search has consented, because in such circumstances "[s]tatutes … do no work." 135 S. Ct. at 2451. It relied on its analysis where a facial challenge was sustained to a spousal notification requirement even though "most women voluntarily notify their husbands about a planned abortion," because "'[t]he proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.'" *Id.* (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 894 (1992)). Most notably, *Patel* put to rest the longstanding belief that facial challenges are "especially disfavored." *Id.* at 2449.

Moreover, in the last five years, all of the 2002 and 2006 amendments to article 2, section 22(A) of the Arizona Constitution have been struck down as facially unconstitutional because those nonbondability provisions violated the due process rights of pretrial detainees to have individualized consideration of their eligibility for release. *Lopez-Valenzuela*, 770 F.3d at 789; *Simpson II*, 241 Ariz. at 349-50 ¶ 31; *Wein*, 244 Ariz. at 24 ¶ 2. In *Lopez-Valenzuela*, ineligibility was based on immigration status, whereas in *Simpson II* and *Wein*, it was based on the offense charged. The common thread among all these cases is that categorical rules will fail to pass constitutional muster unless the rule "'would serve as a convincing proxy for unmanageable flight risk or dangerousness.'" *Simpson II*, 241 Ariz. at 348-49 ¶ 26

(quoting *Lopez-Valenzuela*, 770 F.3d at 786); *see also Wein*, 244 Ariz. at 28 ¶ 24. *Cf. Morreno v. Brickner*, 243 Ariz. 543, 550-51 ¶¶ 29-31 (2018) (distinguishing *Simpson II* and upholding nonbondability provision in Ariz. Const. art. 2, § 22(A)(2) because defendant's violation of conditions of release by committing new offense "evidences repeated lawlessness that society need not tolerate").

The requirement for all persons charged with a sexual offense to be placed on electronic monitoring suffers from the same fatal flaws as the constitutional nonbondability provisions.[2] First, it is beyond question that "'[t]he government's interest in preventing crime by arrestees is both legitimate and compelling.'" *Simpson II*, 241 Ariz. at 348 ¶ 24 (quoting *Salerno*, 481 U.S. at 749). But the second step requires consideration of whether "the restriction is 'narrowly focuse[d] on a particularly acute problem.'" *Wein*, 244 Ariz. at 26 ¶ 13 (quoting *Salerno*, 481 U.S. at 749-50). As with the nonbondability cases, section 13-3967(E) imposes a "one

[2] Section 13-3967(E)(2) also requires "a condition prohibiting the person from having any contact with the victim." This is entirely superfluous to other provisions of law. See Ariz. Const. art. 2, § 2.1(1), (2), (4) (right to be free from harassment or intimidation by defendant and right to be present at and to be heard at hearings affecting defendant's release conditions); Ariz. R. Crim. P. 7.3(c) ("The court must order the defendant not to contact a victim if such an order is reasonable and necessary to protect a victim from physical harm, harassment, intimidation, or abuse."). That the Legislature imposed a statutory requirement for the court to prohibit victim contact only on those charged with sexual offenses would suggest that the Legislature lacked such concern for homicide survivors or other victims of serious crimes—a truly absurd result.

size fits all” approach to determination of release conditions for those charged with sexual offenses, and such fails for the following reasons.

First, although sexual offenses are serious (as are all felony offenses), they are not equally serious, nor is each crime charged as a particular offense of equal seriousness. For example, under A.R.S. § 13-1405, sexual conduct with a minor is a class 6 felony if the minor is between 15-17 years old and the adult is not a position of trust; and as a class 6 felony, it is eligible for misdemeanor designation at sentencing pursuant to A.R.S. § 13-604(A). Not all Chapter 14 offenses require sex offender registration upon conviction. *See* A.R.S. § 13-3821(A)(3) (registration only required if sexual abuse committed against minor); § 13-3821(A)(16) (public sexual indecency involving a minor under age 15, a class 5 felony, requires registration only for a second or subsequent conviction); § 13-3821(A)(17) (indecent exposure to a minor under age 15, a class 6 felony, requires registration only for a third or subsequent conviction).

Second, there is no evidence that mandatory electronic monitoring of all persons charged with sex offenses is narrowly tailored to ensuring the safety of the community. The sponsors and proponents of section 13-3967(E)(1) made claims about sex offenders running amok in the community, just as they proposed the constitutional amendment in 2002 that *Simpson II* and *Wein* in combination struck down. Such claims might be sufficient to withstand a facial challenge under the

rational basis test; but under the heightened scrutiny applied to pretrial bail and release conditions, such statements by legislators are irrelevant. *See Lopez-Valenzuela*, 770 F.3d at 791 ("assuming that Proposition 100 was adopted for the permissible regulatory purpose of managing flight risk, 'the punitive/regulatory distinction turns on whether' Proposition 100 'appears excessive in relation to the alternative purpose assigned to it.'") (quoting *Salerno*, 481 U.S. at 747).[3]

Furthermore, the facts of any particular case will reflect that some cases are more egregious than others. For example, in *State v. Davis*, 206 Ariz. 377 (2003), the Arizona Supreme Court reviewed the sentences imposed on a 19-year-old defendant who was convicted of four counts of sexual conduct with a minor for having sexual intercourse with two post-pubescent females who initiated the contact and were willing participants. As dangerous crimes against children, the trial court was statutorily obligated to impose a mandatory minimum cumulative sentence of

[3] Section 13-3967(E)(1) was added as part Laws 2002, 45th Leg., 2nd Reg. Sess. It is noteworthy that the sponsor of the law, Sen. Dean Martin, supported Proposition 103 that same year; his voter guide argument supporting that proposition referred to "slick defense lawyers" who put "predators back on the street for just a few hundred dollars." Ariz. Sec'y of State, 2002 Gen. Election Ballot Prop. Guide, Prop. 103, p.16, http://apps.azsos.gov/election/2002/Info/pubpamphlet/english/prop103.pdf, (last visited July 19, 2019). Gubernatorial candidate and former Congressman Matt Salmon testified before the Senate Judiciary Committee and called out the Maricopa County judiciary for their bad rulings and named a Judge of the Maricopa County Superior Court. *Minutes of the Senate Judiciary Committee*, 45th Leg., 2nd Reg. Sess. (Feb. 12, 2002). Salmon's gubernatorial campaign also submitted a ballot argument in the voter guide containing the same attacks on the judiciary.

52 years. *See* A.R.S. § 13-705(C). Nevertheless, the Court recognized that the cumulative sentence was so grossly disproportionate based on the individual circumstances that "this case crie[d] out for departure" from mandatory consecutive sentences. *Id*. at 387 ¶ 47.

Yet another complicating factor impacting this issue is the prosecution of juveniles in adult court. Under A.R.S. § 13-501(B)(2), prosecuting attorneys have unfettered discretion to transfer juvenile cases involving sexual offenses that are class 2 felonies to superior court for prosecution as adults, at which time the juvenile defendant becomes subject to section 13-3967(E). Section 13-504 now allows for superior court judges to transfer such cases back to the juvenile court's jurisdiction, but not before the juvenile may have spent many months incarcerated without any reason but for the inability to pay for electronic monitoring.

And, of course, the presumption of innocence is not just some pie-in-the-sky platitude. Since sexual charges are often brought on no greater evidence than the word of the accuser, it is not surprising that such cases often result in acquittals. If a jury hears the testimony of both the accuser and the accused, and does not know who to believe, the jury has reasonable doubt and thus will acquit. Unlike the nonbondability cases, all of which involved an assumption that the State could show, at an evidentiary hearing by the "proof evident / presumption great" standard, that

the defendant committed the charged offense, section 13-3967(E) does not require any such evidence.

In Mohave County, such acquittals are not rare occasions. Local media has noted the remarkable success of Deputy Mohave County Public Defender Robin Puchek, who has obtained thirteen acquittals or dismissals of sex charges in the last three years.[4] According to Mr. Puchek, a member of AACJ's Board of Governors, each and every one of these defendants was held in custody during the pendency of the charges, and some undoubtedly would otherwise have qualified for release but for their indigent status. Thus, those defendants lost a year or more of their lives languishing in county jail for what turned out to be unwarranted pretrial punishment.

The logic of *Simpson II* applies equally to all release conditions: individualized consideration is required except insofar as a particular condition (e.g., no unwanted contact with the victim, obey all laws, do not return to the incident location, etc.) is so universal as to be appropriate in every case. Because section 13-3967(E) is not narrowly tailored to serve the governmental interest of ensuring public safety, it is facially unconstitutional.

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[4] *See* https://kdminer.com/news/2019/mar/14/innocent-until-proven-guilty/ (last visited July 19, 2019) (describing a string of twelve acquittals or dismissals over a two year period); http://www.mohavedailynews.com/news/jury-acquits-man-of-sex-abuse-charges/article_26e104fe-9b00-11e9-b25f-e3637cfcf699.html (last visited July 19, 2019) (describing acquittal last month of all charges against man for sexually abusing his two daughters).

III. Risk assessment instruments used by Pre-Trial Services reflect evidence-based practices and serve Arizona courts well.

In almost all cases of felony arrests in Arizona, the magistrate presiding over initial appearances has the benefit of a Pre-Trial Services report. The risk assessment instruments used for these reports are standardized and reflect evidence-based practices, and the case workers writing the reports delve into the following information about the arrestee:

- age at time of arrest;
- residential stability and proximity to courthouse to which the arrestee will report;
- employment status and stability;
- support of and responsibility for family and friends;
- whether the current offense is violent;
- prior felony and misdemeanor arrests and convictions, nature of those offenses, and time spent in prison;
- prior warrants for failure to appear;
- holds placed on the arrestee by any law enforcement agencies
- if the arrestee is addicted to drugs, amenability to treatment;
- if the arrestee has mental health issues, whether the arrestee is currently enrolled with a service provider or receiving other treatment; and

- whether the arrestee is suffering from suicidal ideation or is otherwise an immediate threat to self or others.

This list encompasses almost all of the factors listed in A.R.S. § 13-3967(B).[5] These factors help the court to determine whether the accused would appear for trial without committing new offenses or threatening any victims. For example, although an arrestee's unlawful presence in the country cannot alone cause a person to be held without bond after *Lopez-Valenzuela*, it is an appropriate factor to consider in determining release conditions because it might impact the person's ability to appear for future court hearings.

Additional factors are considered when the offense is intrafamilial. Especially in cases involving sexual offenses or domestic violence, there are concerns of continuing harm to a victim who lives in the same abode as the accused. If the accused is released with standard conditions that the accused should not return to the incident location or have contact with the victim, this means that the accused cannot go home (assuming the victim has not moved first) and is effectively evicted by court order. If the accused has another place to live while the case is pending, however, the accused may still be released.

In Pima County, with few exceptions, all persons released on their own

[5] In 2005, the Legislature added subsection 13-3967(B)(10) to the list. Judges are now instructed to consider whether the charged offenses involve methamphetamine, but not any other illegal drugs.

recognizance are required, as a condition of release, to be supervised by the Pre-Trial Services department. *See* Rule 7.3(c)(1)(A). For this reason, Pima County does not refer to this form of release as "on recognizance," but rather "release to the third-party supervision of Pre-Trial Services." This supervision is a much more effective manner of monitoring a person than an electronic monitor, which tells the court the person's daily movements[6] but nothing else. For example, electronic monitoring will not inform the court whether a defendant is using the telephone or social media or other technology to harass a victim. An experienced case worker, however, can get a much better sense of the accused's compliance with release conditions through regular check-ins and conversations. In those cases where the defendant's release conditions need to be revisited because new information has to come to light about the risk the defendant now poses to the community, Rule 7.5 gives the authority to both the prosecutor and Pre-Trial Services to bring this to the court's attention and to ask for an arrest warrant to issue. Electronic monitoring, on the other hand, will not tell anyone whether a release condition is violated except for those cases where

[6] Both the United States Supreme Court and the Arizona Supreme Court have noted the important privacy concerns related to constant monitoring of a person's movements by global positioning system device. *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J. concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."); *State v. Jean*, 243 Ariz. 331, 340 ¶ 34 (2018) (citing concurrences by Justices Sotomayor and Alito for same).

the defendant is prohibited from returning to the incident location. Mohave County does not make such use of a pretrial services department, but it does not have to be that way; it could use its probation department for pretrial services supervision.

IV. AACJ and APDA's answers to the questions posed by the court.

In its order of June 7, 2019, this court asked the parties, and any interested amici, to address the following questions:

> 1. If the State/County utilizes electronic monitoring to augment an own-recognizance ("OR") release, may the court require an accused to pay in advance or on a weekly or monthly basis some fee for the cost of providing such service? If so, is there a limit on the fee? Must any such fee be deferred or waived in the case of an indigent defendant?
>
> 2. If an accused is otherwise eligible for an OR release with electronic monitoring, but the electronic monitoring fee charged by the State/County causes a provable financial hardship, may the court require a defendant to post a bond instead?
>
> 3. Under A.R.S. § 13-3967, did the court's order of May 16 sufficiently document a legally cognizable change in circumstances justifying the change in petitioner's release status from OR release with monitoring to requiring a bond for release from custody?
>
> 4. Under the facts of this case, is the trial court's May 16 pre-trial detention order consistent with due process principles?

Based on the analysis in the previous sections, *amici* AACJ and APDA answer the court's questions accordingly:

First, even if A.R.S. § 13-3967(E)(1) is facially unconstitutional, there may be appropriate cases where electronic monitoring is reasonably necessary and thus permitted under Rule 7.3(c)(1)(G). Assuming that a court finds the condition

appropriate, the court may require that the defendant contribute to the cost of such a service. Before doing so, however, the court must first make a determination of the defendant's ability to pay, and the court should use the financial questionnaire submitted in accordance with Rule 6.4(a) in making this determination. A finding of indigency is *prima facie* evidence that the defendant is unable to contribute to the cost of electronic monitoring. As with attorney fees, the court must not impose any cost upon the defendant that would cause the defendant to incur substantial hardship. And, just as Rule 6.4(c)(2) prohibits the court from punishing the defendant in any way for failing to contribute toward attorney fees but instead allows "the county [to] enforce an order under (c)(1) as a civil judgment," so the court should not penalize the defendant for failure to make a contribution toward the cost of electronic monitoring but instead must defer to the county to seek a civil judgment.

Second, section 13-3967(E)(1) only requires the court to impose the condition of electronic monitoring "where available." If the cost of electronic monitoring is so prohibitively high that neither the county nor the defendant can afford it, then a common sense reading of the statute would require the court to determine that electronic monitoring is not available. Thus, under the plain language of the statute, if it is not available, then the condition need not be imposed. This is consistent with this court's earlier decision in *Haag*. In any event, the court may not require an otherwise suitable candidate for release on recognizance to post a bond merely

because the defendant is indigent, because such would be punishing the defendant for being poor.

Third, the respondent judge in this case did not identify any change in circumstances that justified altering the release conditions from release on recognizance to posting any bond, let alone $100,000. The respondent was aware of a systemic issue giving rise to two earlier cases and had legitimate reasons for wanting that issue addressed more globally than just a case-by-case basis. But under such circumstances, the respondent easily could have stayed his order pending the outcome of the special action that he knew for a fact was coming (because he was aware of the two prior cases where this court reversed similar orders). Instead, he modified the conditions of release when no request was before the court. Such was a clear abuse of discretion. And finally, for all of the above reasons, the respondent's order violated all due process protections.

AACJ and APDA suggest that this court take the following action. First, this court should issue a new order that asks the parties to address the question of the facial constitutionality of section 13-3967(E)(1). If the statute is in fact unconstitutional in every application, then it behooves the court to recognize that as soon as possible. Second, if the court does not strike down the statute, then it should hold, consistently with the Eighth and Fourteenth Amendments, the body of case law discussed above, and Rule 7 of the Arizona Rules of Criminal Procedure, that

an indigent defendant may not be subjected to unnecessary pretrial incarceration merely because he is poor, and thus imposition of the cost of the service under threat of such incarceration is an unconstitutional condition of release. Finally, this court should hold that section 13-3967(E)(1) does not apply in jurisdictions where the county has determined that it cannot afford to pay for electronic monitoring for indigent defendants, because in such places, the service is not "available."

CONCLUSION

This court should hold that a person who is bondable as a matter of right and is entitled to release on recognizance should not be held in custody based on the defendant's inability to pay for electronic monitoring. This court should strike down A.R.S. § 13-3967(E) as unconstitutional, because courts already have authority to require electronic monitoring in appropriate cases. Mohave County has unexplored options for ensuring public safety and the appearance at court of the accused; it need not resort to unconstitutional restrictions such as what was imposed in this case.

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By /s/ David J. Euchner

David J. Euchner
Sandra L.J. Diehl
Attorneys for *amici curiae*
Arizona Attorneys for Criminal Justice and
Arizona Public Defender Association