

**IN THE ARIZONA SUPREME COURT**

STATE OF ARIZONA, )  
 ) Arizona Supreme Court  
 ) No. CR-17-0221-PR  
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 )  
 ) Petitioner, )  
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 )  
 ) v. )  
 ) Arizona Court of Appeals Nos.  
 ) 1 CA-SA 17-0072 and  
 ) 1 CA-SA 17-0077 (cons.)  
 )  
 )  
 ) THE HONORABLE KEVIN B. WEIN, )  
 ) Commissioner of the SUPERIOR COURT )  
 ) OF THE STATE OF ARIZONA, in and for )  
 ) the County of MARICOPA, )  
 ) Maricopa County Superior  
 ) Court Nos.  
 ) CR 2017-108708-001  
 ) CR 2017-107553-001  
 )  
 ) Respondent Commissioner, )  
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 ) MARLIN BRYAN HENDERSON, )  
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 ) Real Party In Interest. )  
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 ) STATE OF ARIZONA, )  
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 ) Petitioner, )  
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 ) v. )  
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 ) THE HONORABLE KEVIN B. WEIN, )  
 ) Judge of the SUPERIOR COURT OF THE )  
 ) STATE OF ARIZONA, in and for the )  
 ) County of MARICOPA, )  
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 )  
 ) Respondent Judge, )  
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 ) GUY JAMES GOODMAN, )  
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 )  
 ) Real Party In Interest. )

**BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE AND PIMA COUNTY PUBLIC DEFENDER IN SUPPORT OF REAL PARTIES IN INTEREST**

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## INTRODUCTION

Recent amendments to the Arizona Constitution were predicated on the false premise that confining the criminally accused before trial is always necessary to protect the public. Until 2002, article II, §22(A)(1) permitted all offenses to be bailable as a matter of right except for capital offenses; but in that year, the voters expanded that list to include sexual assault, sexual conduct with a minor under fifteen, and molestation of a child. A similar expansion of article II, §22(A) was enacted in 2006 and was struck down in *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014), for violating the due process rights of pre-trial detainees.

Earlier this year, this Court properly held that the right of arrestees charged with sexual offenses against children to be bailable is fundamental and cannot be curtailed except in individual cases where public safety can only be protected by holding a defendant nonbailable. *Simpson v. Miller (Simpson II)*, 241 Ariz. 341 (2017). This Court's opinion included one passing phrase of dictum that left open the possibility of maintaining nonbondability for sexual assault charges, and the court of appeals seized upon that phrase for the crux of its holding that sexual assault should be nonbondable. *State v. Wein*, 242 Ariz. 352 (App. 2017). This Court needs to communicate in no uncertain language that *per se* nonbondability is reserved for capital offenses.

## **INTERESTS OF *AMICI CURIAE***

Arizona Attorneys for Criminal Justice (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 Pima County Public Defender's Office (PCPD) is the second largest indigent defense agency in Arizona tasked with defending those accused of felony offenses. Its eighty attorneys represent many thousands of clients every year on felony charges, both in Superior Court and in Juvenile Court. PCPD has a small appellate unit that represents clients in criminal cases before the Arizona Court of Appeals, the Arizona Supreme Court, and, on occasion, the Supreme Court of the United States. The appellate courts of this state publish opinions in several of PCPD's cases every year.

*Amici* offer this brief because the issue presented concerns the constitutional right of citizens to be bailable cannot be infringed unless the State can prove by clear

and convincing evidence that a particular detainee would be a threat to the community as a whole or the victim in particular. *Amici* have defended many sexual assault cases, in Pima County and across the state, and have broad experience with the spectrum of such defendants. There is no validity to the claim that a person charged with sexual assault is inherently dangerous to the community.

## ARGUMENTS

### **I. Proposition 103 was a solution in search of a problem; its only nonsuperfluous language serves to deny due process to those charged with certain serious offenses.**

In 2002, article II, §22 of the Arizona Constitution provided that all persons charged with crimes were bailable with three exceptions: 1) capital offenses; 2) felony offenses committed while admitted to bail for a separate felony charge; and 3) “felony offenses if the person charged poses a substantial danger to any other person or the community, if no conditions of release which may be imposed will reasonably assure the safety of the other person or the community...” With regard to all three categories, the State must demonstrate to the satisfaction of the court that the proof is evident and presumption great that the defendant committed the charged offense. *Simpson v. Owens (Simpson I)*, 207 Ariz. 261 (App. 2004). 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.” *United States v. Salerno*, 481 U.S. 739, 750 (1987). It is only because of this protection for the pre-trial detainee that such laws can satisfy due process. *Id.* at 751.

Neither the first category of nonbailable defendants (those charged with capital offenses) nor the second (those arrested for a felony arrest while admitted to bail for a separate felony offense) include language requiring the court to determine whether any release conditions could reasonably assure the public safety and secure attendance at future hearings. The second category is not at issue in these cases. By excluding such language regarding risk to the community in the first category, however, the Arizona Constitution implicitly presumes that no conditions of release could reasonably secure attendance at trial and assure public safety. Regardless of the absence of such language, however, Arizona courts must give a constitutional interpretation to the laws where possible. *State v. Thompson*, 204 Ariz. 471, 478 ¶27 (2003). In this case, such may be accomplished by reading *Salerno*’s due process requirements into article II, §22(A)(1).

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. This statute is uncontroversial; no

one challenges the duty of the judge to consider all relevant factors when deciding on release conditions. And cases in which judges' decisions are later reversed are truly few and far between. *But see Costa v. Mackey*, 227 Ariz. 565, 567 ¶1 (App. 2011) (setting \$75,000,000 cash bond was abuse of discretion). Consistent with *Salerno*, Arizona judges maintain the power to deny bail to those who pose such a threat to the community or for nonappearance.

Proposition 103 had two components. First, it expanded the list of nonbailable offenses to include sexual assault, sexual conduct with a minor under fifteen, and molestation of a child. Second, it added a new §22(B), which listed three purposes of bail and release conditions as including assuring appearance, protecting against witness intimidation, and protecting the safety of the victim and the community. But all three of these purposes existed in the 2002 version of §13-3967(B). Since the validity of these purposes of bail was never any doubt, it is evident that §22(B) misled the electorate into believing these purposes did not already exist.

This proposition ignored that persons charged with crimes are presumed innocent by law. Moreover, it assumed that, because judges cannot know when setting release conditions whether defendants will commit other predatory crimes or fail to appear, that it should err on the side of caution and hold the defendant without bond. This speculative future harm in some unforeseeable case, however, does not withstand constitutional scrutiny. As long as the concept of bail exists, there will

always be potential for a person admitted to bail to commit new offenses. Arizona law entrusts judges with the responsibility of applying the factors in §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.

This was not the only time that the Legislature stoked such fears in the electorate about dangerous criminals fleeing the jurisdiction to avoid justice. In 2006, the Legislature referred Proposition 100 to the voters that added an entirely new category of persons charged with crimes who would be denied bail: those who entered or remained in the United States unlawfully. This prohibition on bail that was based solely on national origin was found to violate the Due Process Clause of the Fourteenth Amendment in *Lopez-Valenzuela*. Although the class action plaintiffs in *Lopez-Valenzuela* were targeted not for the seriousness of their offenses<sup>1</sup> but for their place of birth, the problem in that case and *Simpson II* is the same: expanding the list of offenses for which the defendant may be denied bail without any concern for individualized considerations of the propriety of denial of bail in any particular case. That the target of Proposition 103 in 2002, people charged with rape or child

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<sup>1</sup> The definition of “serious offense” governing Proposition 100 was “any class 1, 2, 3 or 4 felony or any violation of §28-1383,” A.R.S. §13-3961(A)(5)(b) (Rev. 2006). This definition encompassed felonies involving drug possession for which probation was mandatory under §13-901.01.

molestation, lack political sympathy does not change the fact that each individual defendant is presumed innocent.

## **II. Sexual assault does not inherently predict future dangerousness.**

In *Simpson II*, this Court noted in dictum that one of the many reasons for rejecting a standard that sexual conduct with a minor is inherently dangerous is that the offense could be committed when the victim consents. 241 P.3d at 349 ¶27. It then offers a “Cf.” cite to A.R.S. §13-1406, defining sexual assault as including the element that the offense is without consent. *Id. See also State v. Kemper*, 229 Ariz. 105 (App. 2011) (requiring that the crime of sexual assault also requires proof that the defendant knew the act was without consent). It is readily apparent from the tone of *Simpson II* that it was using the phrase “without consent” in a manner that conjured an image of a stalker who subdues a person at gun- or knife-point and leaves the victim a bloody mess. The definition of “without consent” in §13-1401(A)(7) is not limited to the use or threatened use of force; it includes situations where “[t]he victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or should have reasonably been known to the defendant.”

This turn of phrase in *Simpson II* is unfortunate, because sexual assault, like all crimes, may or may not be committed in a dangerous manner. Of course, sexual assault is always serious; for this reason, it is one of only a handful of offenses that

mandates a sentence of imprisonment even with no sentence enhancements established. A.R.S. §13-1406(B) (range of punishment is 5.25-7-14 years, with no eligibility for suspension of sentence or for early release under §41-1604.07). Yet, it is not a “dangerous offense” as that term is defined in §13-105(13). In fact, the range of punishment for class 2 offenses with a dangerous allegation proven (7-10.5-21 years) is 50% greater than that of sexual assault. Only if sexual assault is committed in a manner that involves intentional or knowing infliction of serious physical injury is it punishable by life imprisonment. §13-1406(D). Not even the intentional killing of another person is a nonbondable offense when it is charged as second-degree murder or manslaughter. Thus, the “seriousness” of the charged offense is of little value in assessing the constitutionality of this nonbondability provision.

Recent cases show that the lack of consent can be a very close question. In *State v. Causbie*, the court considered whether the definition of “without consent” as including “incapable of consent by reason of alcohol” was unconstitutionally vague absent a narrowing jury instruction. 241 Ariz. 173, 177 ¶¶14 (App. 2016). The facts of that case involve two intoxicated persons at a party, where the victim said she blacked out and did not realize the defendant was having sex with her, yet other evidence showed that she was capable of driving far enough to realize she was too drunk to drive, *id.* ¶¶2-5, thus calling into question whether the defendant “should have known” she lacked capacity. And in *State v. Inzunza*, 234 Ariz. 78, 81 ¶¶2-6

(App. 2014), the defendant was charged with sexual assault but ultimately convicted of sexual abuse because, while drunk himself, he engaged in sexual activity with a strange adult woman who, unbeknownst to him, was “moderately intellectually disabled.” And in *Kemper*, the court determined that a jury instruction that did not state the essential element that the defendant must know the act was without consent constituted fundamental, prejudicial error, because the defense was that he believed the accuser was responding positively to his sexual touching.<sup>2</sup>

In other cases, the offense occurred in the distant past. *E.g.*, *Taylor v. Cruikshank*, 214 Ariz. 40 (App. 2006); *State v. Gum*, 214 Ariz. 397 (App. 2007); *State v. Aguilar*, 218 Ariz. 25 (App. 2008). Petitioner Goodman’s alleged offense occurred approximately seven years before indictment, with no other felony criminal history in the interim. Petition for Review at 4.<sup>3</sup> Thus, the offense itself may be so separated in time that it tells a court very little about the offender.

### **III. Extrajurisdictional analysis shows that Arizona stands nearly alone in allowing those accused of sexual assault to be held without bond.**

A survey of extrajurisdictional authority reflects that Arizona stands nearly alone. Most state constitutions include a provision limiting nonbondability to capital

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<sup>2</sup> The facts of the case were stated in a separate memorandum decision. *State v. Kemper*, 1 CA-CR 09-0893, 2011 WL 2693517 (mem., July 12, 2011).

<sup>3</sup> Anandkumar Jariwala has similarly been determined to be a low risk to the community. *Jariwala v. Mikitish*, CR-17-0165-PR (petition for review pending). A motion to consolidate that matter with this was filed in this case on July 27, 2017.

offenses,<sup>4</sup> and the courts of those states interpret those constitutions in accordance with their plain language. *E.g.*, *Ex parte Colbert*, 805 So.2d 687, 688 (Ala. 2001) (art. I, §16 of state constitution “provid[es] an absolute right to bail in all noncapital cases”); *Duncan v. State*, 823 S.W.2d 886, 887 (Ark. 1992) (“Arkansas Const. art. 2, §8 confers an absolute right before conviction, except in capital cases, to a reasonable bail.”). Some states extend the *per se* nonbondability to offenses punishable by life imprisonment. *E.g.*, Fla. Const. art. I, §14; Ill. Const. art. I, §9. Many states, like Arizona, may deny bond where the accused is an imminent threat to the community or is likely to flee. *E.g.*, La. Const. art. I, §18.

*Parker v. Roth*, 278 N.W.2d 106, 114 (Neb. 1979), the only case upholding a constitutional provision making sexual assault nonbondable, “conclude[d] that the right to bail is not a fundamental right guaranteed under the Constitution.” That case was sharply criticized by the Eighth Circuit in *Hunt v. Roth*, 648 F.2d 1148 (8th Cir. 1981), which was in turn vacated *sub nom. Murphy v. Hunt*, 455 U.S. 478 (1982), on purely procedural grounds. The court of appeals sparred over the significance of this case. *Simpson v. Miller*, 240 Ariz. 208, 214 ¶¶18-19 & n.10 (majority), 219 ¶¶44-45 (Gould, J., dissenting). Although *Simpson II* did not squarely address those

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<sup>4</sup> States that have eliminated the death penalty diverge whether first-degree murder is nonbondable. *Compare* 15 Maine Rev. Stat. Ann. §1027 (referring to “formerly capital offense”) *with State v. Pett*, 92 N.W.2d 205, 207-08 (Minn. 1958) (Minn. Const. art. I, §7 only allows nonbondability for capital offenses; abolition of capital punishment requires that all offenses be bondable).

competing interpretations directly, it did recognize, contrary to Nebraska authority, that the right to be bailable is “fundamental” and thus some “heightened scrutiny” should be applied. *Simpson II*, 241 Ariz. at 347-48 ¶22. Thus, Arizona has already severed its allegiance with Nebraska’s constitutionally infirm views on bail.

**IV. 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, including in Maricopa and Pima Counties, the magistrate presiding over initial appearances has the benefit of a Pre-Trial Services report. The risk assessment instruments used for these reports 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).<sup>5</sup> These factors reflect evidence-based practices and 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, it is permissibly considered in determining appropriate release conditions.

Additional factors are considered when the offense involves a family member or roommate. 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

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<sup>5</sup> In 2005, the Legislature added whether the charged offenses involve methamphetamine, but not any other illegal drugs. §13-3967(B)(10) (Rev. 2016).

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, use of article II, §22(A)(1) to hold an accused without bond is extremely rare. Pima County complies with *Salerno*: using the risk assessment tools described above in setting the least onerous conditions that would reasonably assure the accused's appearance at future court dates while protecting the victim and community. Persons charged with first-degree murder are regularly required to post a \$1,000,000 bond.<sup>6</sup> As for those charged with sexual assault, the initial appearance judge recognizes that being accused of a serious crime does not equate with posing an imminent threat to the community while the case is pending. And, when the defendant's release conditions need to be revisited because new information comes to light about the defendant's risk to the community, prosecutors and Pre-Trial Services may bring this to the court's attention and have arrest warrants issued. Ariz. R. Crim. P. 7.5.

In 2015, Pima County was one of twenty jurisdictions nationwide that received a grant from the MacArthur Foundation to study ways to reduce

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<sup>6</sup> "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. Pima County is in the process of implementing these reforms.

incarceration and the negative collateral effects of that incarceration. As part of that initiative, Pre-Trial Services now has added use of a metric called “New Violent Criminal Activity.” It is too early to know what effects these changes will have; but it reflects good-faith attempts to address issues of safety and justice in our community—as opposed to the “one size fits all” club used against the accused in Maricopa County. Determining release conditions should be very individualized—something Division One’s opinion in *Wein* does not permit.

### CONCLUSION

Despite the unmistakable clarity of the holding in *Simpson II* and the foundational premise that “in our society liberty is the norm, and detention prior to trial ... is the carefully limited exception,” 241 Ariz. at 345 ¶10 (quoting *Salerno*, 481 U.S. at 755) (alteration in original), the lower court opted to end-run that reasoning by grasping onto a fleeting statement of dictum and transforming it into the core holding. For these reasons, *amici* ask this Court to grant review of the petition and reaffirm that only capital offenses may be nonbondable.

RESPECTFULLY SUBMITTED this 16th day of August, 2017.

By /s/ David J. Euchner

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