

ARIZONA SUPREME COURT

NEKO ANTHONY WILSON,)	Arizona Supreme Court
)	No. CR-20-0254-PR
Petitioner,)	
)	Arizona Court of Appeals
v.)	Division One No.
)	CA-SA 20-0095
HON. ROBERT HIGGINS, JUDGE)	
OF THE NAVAJO COUNTY SUPERIOR)	Navajo County Superior Court
COURT,)	Case No. CR2005-518
)	
Respondent Judge,)	
)	
STATE OF ARIZONA, <i>ex rel.</i> BRAD)	
CARLYON, NAVAJO COUNTY)	
ATTORNEY,)	
)	
Defendant / Real Party in Interest.)	
)	

**BRIEF OF *AMICUS CURIAE*
ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE (AACJ)
IN SUPPORT OF PETITIONER**

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INTRODUCTION

The question in this case is whether this Court's approved amendment to [Arizona Rule of Criminal Procedure 27.7\(c\)](#) purposefully removed the bar against bondability previously included in the rule by reference to release determinations under [7.2\(c\)](#) for probationers facing revocation proceedings. The Court of Appeals' opinion in [Wilson v. Higgins, ___ Ariz. ___, 469 P.3d 481 \(App. 2020\)](#), correctly determined that [Rule 7.2\(c\)](#) no longer applies in a release determination for probationers under [Rule 27.7\(c\)](#). Rather, probationers are guaranteed a release determination under [Rule 27.7\(c\)](#) that comports with the standard due process rights afforded to all individuals arrested and charged with a new offense. The purposeful removal of the reference to [Rule 7.2\(c\)](#) related to probation violation initial appearances gives the trial court discretion to determine the appropriate release conditions after considering factors set forth in [A.R.S. § 13-3967\(B\)](#). The opinion below aligns with the growing movement across the nation to stop overincarceration, especially incarceration based on homelessness, addiction, and mental health. These are leading causes of probation violations and affect a disproportionate amount of the population.

Amicus curiae Arizona Attorneys for Criminal Justice (AACJ) asks this Court to affirm the Court of Appeals' analysis and overturn the trial court's strict bar against bondability for accused probation violators. Individuals facing probation

revocation proceedings should be treated like any other person facing accusations by the State, but before being adjudicated guilty of the accusations. This Court should provide guidance to the courts across Arizona on what the release determination hearing should look like for those facing probation revocation proceedings to ensure consistent application by the courts.

INTEREST OF *AMICUS CURIAE*

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 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.

Amicus offers this brief in support of Petitioner because the rights of the criminally convicted do not vanish upon being placed on probation, especially the right to release pending a final determination of whether a probationer has violated the terms of his probation. The probationer is presumed innocent of the accusations by the State in probation revocation proceedings until after a hearing comporting with due process is held. Arizona Rule of Criminal Procedure [Rule 27.7\(c\)](#), as

amended, allows for the trial court to use its discretion in setting appropriate release conditions for probationers facing revocation proceedings. This is consistent with the goals of the Arizona Rules of Criminal Procedure Task Force, as well as the Fair Justice Task Force. This is consistent with the purpose of probation revocation proceedings set forth in [*State v. Alfaro*, 127 Ariz. 578, 623 P.2d 8 \(1980\)](#). Likewise, a release determination for probationers should comport with due process. Wilson was not afforded a release determination that presumed his innocence on the alleged violation nor were any less onerous conditions of release considered. This Court should hold that release determinations for individuals facing probations revocation proceedings should require the same analysis as cases where a defendant is facing criminal accusations by the State upon arrest.

ARGUMENT

- I. The Court of Appeals correctly determined that the purposeful removal of the reference to Rule 7.2(c) from the modified Rule 27.7(c) was a logical step to ensure clarity in release determinations for probationers who have been charged with violating probation but have not been convicted of those violations.**

[Arizona Rule of Criminal Procedure 27.7\(c\)](#) was amended effective January 1, 2018. It purposefully removed language limiting release determinations for accused probation violators to those set forth under [Rule 7.2\(c\)](#). The only logical explanation for the removal of the language was to require courts to make release determinations for accused probation violators without regard to the conditions set forth in [Rule 7.2\(c\)](#) because the requirements of that rule do apply to probationers facing revocation proceedings. When language from a rule is deleted, the court infers that it was done purposefully with the intent that the deleted language no longer has effect. [Gravel Res. Of Ariz. v. Hills, 217 Ariz. 33, 37, ¶ 11, 170 P.3d 282, 286 \(App. 2007\)](#).

In December 2015, Chief Justice Bales established the Arizona Rules of Criminal Procedure Task Force (“Task Force”) to “restyle, simplify, and clarify the language of the existing rules, as well to make certain procedural and substantive changes to promote the just resolution of criminal cases.” [Administrative Order No. 2015-123 \(Dec. 16, 2015\)](#). This Task Force met extensively over two years to establish the proposed rule changes. It included judges, prosecutors, defense

attorneys, court staff, and a law professor. [Petition to Amend the Rules of Criminal Procedure No. R-17-0002 at 2 \(Jan. 8, 2017\)](#). The modified rules were the result of “thousands of hours” of the Task Force members’ times. [Petition to Amend at 4-5](#).

With respect to [Rule 7.2\(c\)](#), Appendix B sets forth the goal in modification as “mak[ing] it easier to follow.” Appendix B at 10-11. Appendix B does not specifically address the purpose behind removing the language from [Rule 27.7\(c\)](#) referring to [Rule 7.2\(c\)](#). However, the focus of the Task Force in simplifying and clarifying the language of the existing rules does indicate its purpose for removing the language. The only possible explanation for the removal is that the drafters intended the courts to make a release determination at the initial appearance of a probationer arrested on a petition to revoke probation without the restrictions imposed by [Rule 7.2\(c\)](#) because that rule applies to individuals *convicted* of an offense and not those *charged* with a probation violation. It logically follows that the accused in a probation violation matter should be given a release determination hearing that comports with due process while considering the factors set forth in [A.R.S. § 13-3967\(B\)](#). Prior to its amendment, [Rule 27.7\(c\)](#) led to inconsistent application and was routinely used to hold probationers charged with probation violations without bond, even though the probationers could later be proven not to have violated their probation or could be reinstated to probation.

[Rule 27.7\(c\)](#) applies to probationers who have been *charged* with violating their probation, but have not been *convicted* of a violation. At the initial appearance, there are no findings that a violation occurred and the evidence is not subject to challenge at that hearing. There is no dispute that the individual facing probation violation proceedings has been “convicted” of the offense for which probation was granted. However, the State’s argument that such underlying “conviction” is the basis for a nonbondable hold under [Rule 7.2\(c\)](#) is a misnomer. State’s Petition for Review at 8, State’s Supp. Brief at 6. It fails to consider the purpose in requiring the State prove probation violations by a preponderance of the evidence at a violation hearing. [Ariz. R. Crim. P. 27.8\(b\)\(3\)](#). A probationer facing revocations proceeding is not presumed to have committed the violation. Rather, the purpose behind the probation violation hearing is to “determine, by a preponderance of all reliable evidence, whether a probationer has violated the terms and conditions of probation.” [Alfaro, 127 Ariz. at 579, 623 P.2d at 9](#). “The purpose of such proceedings is to ascertain whether continued probation is still an effective means of rehabilitation and in the best interest of society.” *Id.* The State’s interpretation of [Rule 7.2\(c\)](#)’s application to probation initial appearances defeats the underlying purpose of holding a “revocation hearing” because it would require the court, at the time of the initial appearance and prior to any evidence, to make a determination whether the probationer is likely to be sentenced to prison. [Ariz. R. Crim. P. 7.2\(c\)\(1\)\(A\)](#) (“After

a defendant is convicted of an offense for which the defendant will, in all reasonable probability, receive a sentence of imprisonment...”).

The Court of Appeals correctly decided that [Rule 7.2\(c\)](#) applies to the release of a convicted defendant awaiting sentencing or appeal where the defendant is in all reasonable probability going to receive a term of imprisonment. [Wilson, 469 P.3d at 485 ¶ 15](#). See also [State v. Superior Court ex rel. Pima, 138 Ariz. 4, 672 P.2d 956 \(App. 1983\)](#) (Rule 7.2(c) applies to someone who has been proven to have committed the conduct that brought them before the court). That is contrary to [Rule 27.7\(c\)](#) which applies to a probationer facing revocation proceedings but not yet convicted of a violation who may be reinstated to probation or be sentence to a term of imprisonment after a hearing that comports with due process requirements. [Id.](#)

The Court of Appeals correctly determined that the removal of the reference to [Rule 7.2\(c\)](#) from the amended [Rule 27.7\(c\)](#) was done “purposefully, to make sure that the omitted phrase no longer has any effect.” [Wilson, 469 P.3d at 485 ¶ 14](#). A rule’s language is given its “ordinary meaning unless doing so creates an absurd result.” [State ex rel. Romley v. Superior Court In & For Cty. Of Maricopa, 168 Ariz. 167, 169, 812 P.2d 985, 986 \(1991\)](#). The State’s argument that the removal of the language was based on it being superfluous is wholly unsupported. The language of [Rule 27.7\(c\)](#), as modified, is not ambiguous. It requires the court make a release determination for someone *charged* with violating their probation. This release

determination is similar to one who has been *charged* with committing a criminal offense and should require the same level of due process and consideration of the same factors.

II. The Rules of Criminal Procedure should be harmonized to ensure consistent application by the courts while also serving the intended purpose of the rules.

The State incorrectly argues that the Court of Appeals failed to harmonize [Rules 27.7](#) and [7.2](#). The Court of Appeals harmonized [Rule 27.7\(c\)](#)'s release determination requirements with those applicable to other individuals facing initial appearance hearings under [Rule 7.2\(a\)](#), as well as allowing [Rule 7.2\(c\)](#)'s application in appropriate cases. It allows the court to make an appropriate determination of what provision of [Rule 7.2](#) applies to the given situation rather than requiring all decisions to fall under [Rule 7.2\(c\)](#). Court rules are interpreted in the same manner as statutes and “should be harmonized wherever possible and read in conjunction with each other.” [City of Phoenix v. Johnson, 220 Ariz. 189, 191 ¶ 9, 204 P.3d 447, 449 \(App. 2009\)](#). The removal of the reference to [Rule 7.2\(c\)](#) requires the courts to consider release conditions routinely used by the courts for defendants facing an initial appearance on a charged offense. In most cases, the probationers charged with probation violations would fall under [Rule 7.2\(a\)](#). That is not to say, however, that circumstances will never exist warranting a probationer to be held without bond.

Courts have at its disposal factors established to assist in release determinations. [Rule 7.2](#) guides those decisions, as do the requirements of [A.R.S. § 13-3967\(B\)](#). These release conditions take into account the specific characteristics of the offender while also considering the nature of the allegations against the accused. [A.R.S. § 13-3967\(B\)\(2\), \(6\)](#). They look at the dangerousness of the accused, the likelihood of future appearance, and the past conduct of the accused. [A.R.S. § 13-3967\(B\)\(4\), \(13\)](#). It also allows the accused to seek consideration of release determination based upon the potentially wrongful conduct of the State with respect to probation violations.

This change also harmonizes with [Rule 1.2](#), which states that the purpose of the rules is to provide for the “just, speedy determination of every criminal proceeding.” Further, [Rule 1.2](#) states the intention that the rules “be construed to secure simplicity in procedure, fairness in administration, the elimination of unnecessary delay and expense, and to protect the fundamental rights of the individual while preserving the public welfare.”

The word “must” in [Rule 27.7\(c\)](#) mandates the court to make a release determination at the probationer’s initial appearance. It would be absurd and illogical to presume that a probationer’s release determination must always be that he or she be held without bond simply because that’s the way it had always been done before [Rule 27.7\(c\)](#) was amended. This is particularly true where it fails to take

into consideration what the nature of the alleged probation violation is. There is a clear distinction between probationers facing revocation for being too poor to pay fees and fines from those probationers facing revocation due to committing new violent offenses while on probation. The State's reading of [Rule 27.7\(c\)](#) to require release determinations under [Rule 7.2\(c\)](#) puts all probation violations in the same box, making them non-bondable without the benefit of a true release determination hearing.

The Court of Appeals' reading of [Rule 27.7\(c\)](#) as modified is easy to harmonize with [Rule 7.2](#). The words "probation" and "probationer" are conspicuously absent from [Rule 7.2\(c\)](#), which by its terms applies only to detained defendants who are awaiting sentencing or pending appeal. It simply does not provide a mechanism for a probationer to challenge his detention pending the resolution of his probation revocation proceeding. As written, [Rule 27.7\(c\)](#) provides discretion to the trial courts to make proper release determinations considering all the factors guiding them to ensure that a just and fair release determination is made.

III. Due process considerations under the federal and state constitutions require that a trial court conduct a pretrial release hearing when a probationer is incarcerated on a probation hold.

The touchstone of due process is fundamental fairness and that a defendant must be afforded a meaningful opportunity to present evidence and be heard. [State v. Melendez, 172 Ariz. 68, 71, 834 P.2d 154, 157 \(1992\)](#). [Rule 7.2\(c\)](#) fails to provide

any meaningful opportunity for a defendant to be heard on release. This directly contradicts the requirement under [Rule 27.7\(c\)](#):

(c) Procedure. At the initial appearance, the court must advise the probationer of the probationer's right to counsel under Rule 6, inform the probationer that any statement the probationer makes before the hearing may be used against the probationer, set the date of the revocation arraignment, and make a *release determination*.

There is no Arizona legal authority defining [Rule 7.2\(c\)\(1\)\(A\)\(i\)](#)'s requirement of "reasonable grounds" much less "reasonable grounds exist to believe that the conviction may be set aside on a motion for new trial, judgment of acquittal, or other post-trial motion." A trial judge trying to determine "reasonable grounds" has no guidance whatsoever in doing so. The only "guidance" given is believing that post-trial motions may set aside the conviction. Under Arizona law, there are no post-trial motions that may set aside a probationer's conviction or a probation revocation proceeding in the prehearing phase. [Rule 7.2\(c\)\(1\)\(A\)\(i\)](#) provides for an illusory hearing with a standard that is factually and legally impossible to fulfill. The probationer does not have any meaningful opportunity at all to contest being held without bond on a probation hold. [Rule 7.2\(c\)\(1\)\(A\)\(i\)](#) does not apply to probationers being held without bond since it violates the due process clauses of the federal and state constitutions by not providing a meaningful opportunity to contest being held without bond on a probation hold.

The Court of Appeals did not define “make a release determination” in [Rule 27.7\(c\)](#) other than to state that the release determination is left to the sound discretion of the trial court. *See* [Wilson, 469 P.3d at 485 ¶ 17](#). The language “make a release determination” implies that a trial court must conduct some type of hearing or suffer from the fatal lack of due process found in [Rule 7.2\(c\)\(1\)\(a\)\(i\)](#). “Release determination” also is not defined in any Arizona legal authority, but the courts are guided by factors set forth by statute. *See e.g.* [A.R.S. § 13-3967\(B\)](#).

Obvious concerns arise when release conditions are determined at an initial appearance where most defendants are unrepresented and, even for those that are, have no information relevant to the violation to address the veracity of the charges. Requiring a court to consider the enumerated factors pertinent to a particular defendant, such as those set forth in [A.R.S. § 13-3967\(B\)](#), affords the constitutionally required due process that is the foundation of our criminal justice system. It allows the Courts to consider the 15 factors that the trial court must take into account when determining the method of release for defendants being held on charges rather than requiring a one-size-fits-all nonbondable approach to even minor probation violations. The statute provides an excellent starting point for the court to consistently apply due process principles to probationers facing revocation proceedings while allowing the court to take into account nature and circumstances of the alleged probation violation.

There is a clear movement across the United States to stop mass incarceration. In Arizona, there is a monthly average of over 85,000 people on probation.¹ A requirement that every individual commits a violation of probation, regardless of the individualized facts and circumstances of that violation, should be held non-bondable under [Rule 7.2\(c\)](#) serves little purpose than to further mass incarceration at taxpayer expense and to punish low income and minority populations and incarcerate addiction and mental health. Interpreting this rule change to not apply to probationers would countermand the purpose of the Fair Justice for All Task Force established by [Administrative Order No. 2016-16 \(Mar. 3, 2016\)](#). The Fair Justice for All Task Force was created to under the ideal that “justice for all” meant that “people should not be disparately punished because they are poor.” [Administrative Order No. 2016-16 at 1](#). Part of the goals promoted through the Fair Justice Task Force is that “[p]eople should not be jailed pending the disposition of charges merely because they are poor. Release decision and conditions should protect public safety and ensure the defendant’s appearance at future proceedings. [Id.](#)

The Court of Appeals properly puts the discretion with the trial court to make the proper release determination without a presumption of non-bondability and without the court making determinations of the likely outcome of a probation

¹ FY 2020 Adult Probation Population Report, https://www.azcourts.gov/Portals/25/Stats/StatsFY2020/SW_POP_FY2020.pdf?ver=2020-07-13-145906-443 (last visited 9/20/2020).

violation proceeding before receiving any evidence to support it. It would lead to more consistent results across Arizona and would afford both the State and defendants a right to be heard on release determinations.

IV. *State v. Arnold* does not apply to these circumstances and should be overruled to the extent it does.

APAAC's amicus brief urges the Court to uphold [*State v. Arnold*, 24 Ariz. App. 529, 540 P.2d 148 \(App. 1975\)](#). In *Arnold*, the Court of Appeals held that the trial court abused its discretion when it ordered a probationer held without bond on a probation hold be released on bail pending his probation revocation hearing:

The mandate of the rule [7.2(c)] is clear, i.e., no release on bail unless certain requirements are met. Norman had the burden of establishing that he satisfied those requirements. Rule 7.2(c). This he did not do and therefore the respondent court could not ignore the mandate of the rule. Therefore, Norman should not have been released on bail. [*Id.* at 530, 540 P.2d at 150](#).

The Court merely referred to [Rules 27.6 \(now 27.7\)](#), [7.2\(b\)](#), and [7.2\(c\)](#); it did not engage in any reasoning or analysis before holding that [Rule 7.2\(c\)](#) applied. It should not blindly be followed as precedent for this reason alone. Moreover, [Rule 27.7\(c\)](#), the current version of Rule 27.6, no longer provides that a release determination under [Rule 7.2\(b\)](#) shall be made, just that a release determination must be made. *Arnold* thus no longer applies to release determinations on probation holds.

CONCLUSION

The Court of Appeals' determination in the application of [Rule 27.7\(c\)](#) is consistent with affording defendants due process rights when charged with probation violations, but not yet having been convicted of those violations. There are circumstances that warrant a probationer be held non-bondable pending revocation proceedings. There are likewise circumstances where a probationer should *not* be held without bond pending revocation proceedings. The prior reading of [Rule 27.7\(c\)](#) in referencing [Rule 7.2\(c\)](#) created a one-size-fits-all approach to probation violations that was unmanageable, fundamentally unfair, and failed to consider the nature and circumstances of a probation violation. In amending [Rule 27.7\(c\)](#) to remove that reference, it purposefully gave the trial court the discretion to judge each probationer individually and independently when making release determinations. This Court should affirm the Court of Appeals decision to ensure due process and fairness to probationers. It is consistent with the modification made to [Rule 27.7\(c\)](#) and the purpose and intent of reworking the Rules of Criminal Procedure to clarify and simplify the rules. Trial courts will be afforded the opportunity to consider all the relevant factors to ensure release determinations are made based upon the need to incarceration rather than the directive to incarcerate all probations facing revocation proceedings.

RESPECTFULLY SUBMITTED this 21st day of September, 2020.

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JUSTICE

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