

IN THE SUPREME COURT OF THE STATE OF ARIZONA

---

In the Matter of: )  
)  
IMPLEMENTATION OF AMENDMENTS ) Administrative Order  
TO AZ. CONST. ART. II, § 22 AND ) No. 2007- 30  
A.R.S. § 13-3961.A )  
)  
\_\_\_\_\_ )

Proposition 100 (HCR 2028), approved by the voters in November 2006, amended Article II, § 22 of the Arizona Constitution by adding the following exception to the constitutional presumption that all persons charged with crimes are eligible for bail:

For serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge.

The Legislature defined serious felony offenses and further clarified this exception in A.R.S. § 39-3961:

13-3961. Offenses not bailable; purpose; preconviction; exceptions.

A. A person who is in custody shall not be admitted to bail if the proof is evident or the presumption great that the person is guilty of the offense and the offense charged is either:

1. A capital offense.
2. Sexual assault.
3. Sexual conduct with a minor who is under fifteen years of age.
4. Molestation of a child who is under fifteen years of age.
5. A serious felony offense if the person has entered or remained in the United States illegally. For the purposes of this paragraph, "serious felony offense" means any class 1, 2, 3 or 4 felony or any violation of section 28-1383.

Since the effective date of the amendments, questions have arisen concerning the procedures to be followed in making a determination whether bail should be allowed, the standard of proof applicable to evidence offered to show that the person has entered or remained in the United States illegally, and the roles of the various participants during the Initial Appearance (IA) hearing and subsequent proceedings. The following requirements are designed to ensure decisions involving denial of bail

for persons in custody are made in a uniform way and consistent with state and federal law.

Now, therefore, pursuant to Article VI, Section 3, of the Arizona Constitution,

IT IS ORDERED that judicial officers conducting IA hearings involving the offenses listed in A.R.S. § 13-3961.A shall utilize the following procedure:

1. Based on information presented at the initial appearance, the court shall initially determine whether probable cause exists to find that the defendant committed the charged offense(s).

2. If the allegation involves A.R.S. § 13-3961.A.5, the Court shall then determine whether probable cause exists to believe that the defendant entered or remained in the United States illegally and that the proof is evident or the presumption great that the defendant committed the charged serious felony.

3. If the court finds probable cause under paragraphs 1 and 2 above, the court shall order an evidentiary hearing on the question of whether bail should be denied. Such hearing may be held immediately or scheduled for a time within twenty-four hours of the initial appearance, excluding weekends and holidays, unless the defendant or the state moves for a continuance. A continuance that is granted on the motion of the defendant shall not exceed five calendar days unless there are extenuating circumstances. A continuance on the motion of the state shall be granted on good cause shown and shall not exceed twenty-four hours.<sup>1</sup> The defendant may be detained pending the hearing. The defendant is entitled to representation by counsel, and to present evidence, testimony, and witnesses, by proffer or otherwise, to provide evidence on the defendant's behalf. Testimony of the defendant that is given during the hearing shall not be admissible on the issue of guilt in any subsequent judicial proceeding, except for the purposes of impeachment or as it might relate to the defendant's compliance with or violation of any condition of release subsequently imposed or the imposition of appropriate sentence.

4. At the conclusion of the evidentiary hearing, the court shall determine whether proof is evident or the presumption great that the defendant is guilty of one or more of the offenses listed in § 13-3961.A.<sup>1</sup> If the allegation involves § 13-3961.A.5, the court shall determine whether the

---

<sup>1</sup> In *Simpson v. Owens*, the court explained this standard:

We conclude that the phrase "proof is evident, or presumption great" provides its own standard: The State's burden is met if all of the evidence, fully considered by the court, makes it plain and clear to the understanding, and satisfactory and apparent to the well-guarded, dispassionate judgment of the court that the accused committed one of the offenses enumerated in A.R.S. § 13-3961(A). In that case, bail must be denied. The proof must be substantial, but it need not rise to proof beyond a reasonable doubt.

207 Ariz. 261, 274 ¶ 40, 85 P.3d 478, 491 (App. 2004).

defendant entered or remained in the United States illegally, using the same standard.

IT IS FURTHER ORDERED that Form 4, Arizona Rules of Criminal Procedure, or its substantial equivalent, shall be revised to require the following information as part of the Probable Cause Statement:

Is the alleged offense a class 1, 2, 3, or 4 felony or a violation of A.R.S. § 28-1383?  
\_\_\_ Yes \_\_\_ No

If yes, as to guilt, proof is evident or presumption is great for the following reasons. Explain in detail (e.g., arresting officer or other law enforcement officers witnessed offense, physical evidence directly connects defendant to offense, multiple eye-witnesses, defendant admissions, victim statements, nature of injuries, incriminating photographic, audio, visual, or computer evidence, defendant attempted to flee or resist arrest).

[leave space for response]

Has the person entered or remained in the United States illegally? \_\_\_ Yes \_\_\_ No

If yes, probable cause is established for the following reasons. Explain in detail (e.g., admission of the person, statements of co-defendants at the time of arrest, verification of illegal presence, information provided at the issuance of a warrant in conjunction with a direct complaint or grand jury proceeding establishes illegal presence).

[leave space for response]

Each court shall add these inquiries to the law enforcement portion of the release questionnaire form currently in use.

IT IS FURTHER ORDERED that the Presiding Judge in each county shall provide training for judges, court staff, and others involved in conducting IA hearings and coordinate with local law enforcement, prosecutors, and defense attorneys concerning the implementation of these requirements.

IT IS FURTHER ORDERED that the Presiding Judge in each county shall implement these procedures as soon as possible, but in any event no later than May 7, 2007.

Dated this 3rd day of April, 2007.

---

RUTH V. MCGREGOR  
Chief Justice

*Lopez-Valenzuela v. County of Maricopa, No. 11-16487 archived on June 24, 2013*