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IN THE SUPREME COURT

STATE OF ARIZONA

In the matter of: **PETITION TO AMEND RULE 17.4, RULES OF CRIMINAL PROCEDURE**	Supreme Court No. R-21-0030 **COMMENT OF THE PIMA COUNTY BAR ASSOCIATION IN OPPOSITION TO THE PROPOSED RULE CHANGE**

Pursuant to Rule 28, Ariz. R. Sup. Ct., the Pima County Bar Association respectfully submits the following comment in opposition to Petition R-21-0030 filed by the Administrative Office of the Courts ("Petitioner"). The Pima County Bar Association joins the thoughtful and well-reasoned comments submitted by the Arizona Prosecuting Attorneys' Advisory Council ("APAAC") and Arizona Attorneys for Criminal Justice ("AACJ"). That both sides of the criminal bar are united in their strong opposition to the proposed rule change speaks volumes, and it should send a clear message to this Court that the Petition proposes an answer to a question no one asked—and a bad answer at that. The Petition should be rejected.

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I. Introduction

There are multiple problems with allowing each county's presiding Superior Court judge to set their own deadlines for plea negotiations. The first and most basic is that it violates the separation of powers principle and impermissibly allows the judiciary to tread upon a core executive branch function. Second, there is no reason to accept the Petitioner's assumption that setting plea deadlines will reduce administrative costs. Exactly the opposite will likely be the case, as most criminal practitioners will avow. And finally, even granting the assumption that the rule change would increase the administrative efficiency of our courts, that is not a reason to undermine substantial justice for victims or the accused.

II. The Petition would undermine the vital separation between our judiciary and the executive branch.

The separation of powers is elemental to our constitutional order, both federal and state. The concept is at least as old as Aristotle and Polybius, but what we understand today comes to us largely from Montesquieu's *De l'esprit des lois*: a tripartite government divided into executive, legislative, and judicial departments whose functions are as much to carry out the business of the state as to provide structural restraints on one another to defend the people against infringements on their liberty. The framers of our state Constitution were unambiguous in separating the coordinate branches of government:

> The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

Ariz. Const. art. III. To be sure, our courts have not endorsed an absolute or needlessly formalistic separation of powers, for example, where one branch exercises the power of

another when such exercise is "merely auxiliary to and dependent upon the proper carrying out of the legitimate power of the department," *Udall v. Severn*, 52 Ariz. 65, 77 (1938), where an executive agency engages in rulemaking, *State v. Marana Plantations*, Inc., 75 Ariz. 111, 114 (1953), and indeed where this Court determines the procedural rules of our state courts, *Burney v. Lee*, 59 Ariz. 360, 364 (1942).[1] As a practical matter, these cases illustrate the reality of adapting Montesquieu's Enlightenment-era abstractions to the modern administrative state. But this Court has nonetheless reiterated its fidelity to the doctrine. *See, e.g.*, *State v. Jones*, 142 Ariz. 302, 304 (App. 1984) ("It is essential that sharp separation of powers be carefully preserved by courts"); *State v. Ramsey*, 171 Ariz. 409, 413 (App. 1992) ("The separation of powers doctrine is fundamental to constitutional government."); *State v. Arevalo*, 249 Ariz. 370, 379, ¶ 35 (2020) (BOLICK, J., concurring) ("Indeed, our constitutionally mandated separation of powers, proclaimed in article 3, is part of an overall constitutional scheme to protect individual rights.") (cleaned up). The pending rule petition would do violence both to this doctrine and to individual rights—not just in theory, but in practice.

In practice, the power to bring a criminal prosecution is a core function of the executive branch. "That function carries with it the discretion to proceed or not to proceed once an action has been commenced." *State v. Larson*, 159 Ariz. 14, 16 (App. 1988). *See also Jones*, *supra* at 305 ("[T]he power to divert a criminal prosecution is and

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1. Notably, this Court's opinion in *Burney* was cautious to invoke the limiting language of *Udall* and cabined its holding thus:

> Just how far the rule-making power lies exclusively within the control of the courts, and just how far the legislative authority may interfere therein, it is not necessary for us to decide in this case, and we expressly reserve that matter for consideration if the necessity does later arise.

Burney, 59 Ariz. at 364.

always has been an executive function.") As APAAC noted in its comment, this rule change would greatly curtail the ability of our state and local prosecutors from discharging this core function, for example, by forcing a trial where critical witnesses fail to appear or where changes in the law call the case into question. *APAAC Cmt*. at 6. This is doubly problematic considering that our Attorney General and County Attorneys are popularly elected in Arizona. Curtailing their discretion implicates not only the separation of powers, but also their accountability to the very people who put them in office—victims and the accused alike.

We anticipate the counterargument that the law already permits judges to reject pleas when the interests of justice demand it, whether it be because the plea is too harsh or too lenient. There is some surface-level appeal to this argument, but it is a feint. To the extent judges reject a plea for being too lenient, the state maintains the ultimate power to bypass that decision and dismiss the prosecution altogether. This is therefore no fetter at all. It is when judges reject a plea for being too harsh that the state is meaningfully restrained, but such a restraint is an acceptable and circumscribed exception that provides a valuable check on executive power for the benefit of the accused. The same cannot seriously be said about the proposed rule change and a judge's categorical rejection of pleas past an arbitrary deadline. There is no structural purpose to it, and the Petition does not pretend otherwise. It is solely to save money.[2]

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2. There is a halfhearted argument by the Petitioner that their proposed rule change will save hassle for prospective jurors, but it is hard to believe that one would rather be seated for a weeks-long felony trial than be dismissed before opening statements, especially in a case that could have been resolved by plea agreement. We agree entirely with AACJ's argument on this point. *See AACJ Cmt.* at 5-6.

III. The Petitioner assumes without warrant that the proposed rule change will promote efficiency in our courts.

As one lawyer put it, "the underlying assumption that arbitrary deadlines promote efficiency is a baffling one that fails to withstand even basic testing." Michael D. Cicchini, *Under the Gun: Plea Bargains and the Arbitrary Deadline*. 93 TEMPLE L. REV. ___ (forthcoming, 2021). The article cites a West Virginia case in which the parties reached a plea agreement on the eve of trial but were rebuffed by a judge who had set an earlier deadline. *State v. Sears*, 542 S.E.2d 863, 866 (W. Va. 2000). The trial judge there insisted that the rule helped the court control its docket, yet this is hard to square with the reality that the venire and anticipated witnesses could easily have been called off with time to spare. As Mr. Cicchini persuasively argues, even if the parties had reached an agreement on the morning of trial with the venire and witnesses assembled, it still would not have made economic sense to force a trial. This is a textbook example of the sunk cost fallacy in which someone continues a course of action simply because they have already expended resources toward it. Cicchini at 9. Or, more simply, it is a matter of throwing good money after bad. Regardless of how one describes it, it is illogical.

The Petitioner speaks of conserving court resources yet makes no mention of the fact that plea agreements entail waivers of substantive appellate rights. Pleas therefore conserve not only the resources of our trial courts but those of our courts of appeal as well. Forcing trials instead of allowing last-minute pleas gives every one of those defendants an appeal as a matter of right, thereby foisting an enormous burden onto our appellate bench and appellate prosecutors, who now have to litigate those cases. This does not apparently factor into the Petitioner's argument at all. This is sufficiently obvious a point that we cannot help but agree with AACJ's characterization that the Petitioner did not apparently discuss their proposed rule change with anyone who actually has a stake in the outcome. *See AACJ Cmt.* at 10. This alone is a reason to reject the Petition.

IV. Even if the Petitioner could justify its assumption that the rule change will promote efficient outcomes for the Superior Court, administrative efficiency is not an equal counterweight to substantive justice.

This is far from the first time that the Petitioner has held up efficiency as a primary value in our legal system when proposing sweeping rule changes. True enough, our courts should do their level best to ensure speedy justice, and our Administrative Office of the Courts is charged to see it done. No less a luminary than Francis Bacon remarked as the newly elevated Lord Chancellor of England, "Swift justice is the sweetest." But efficiency is not a talisman that transmogrifies bad ideas into good ones. Far from it, it is the last rhetorical refuge of yet another proposed rule change by the Administrative Office of the Courts that the bar doesn't want and didn't ask for. APAAC and AACJ made the points well in their comments in opposition: this rule change, even if it were demonstrated to be efficient for the courts, would undermine the constitutional rights of victims and the accused alike. *See APAAC Cmt.* at 8-9; *AACJ Cmt.* at 8. Forcing a victim of domestic violence to endure a trial in lieu of a plea and guaranteed conviction of their abuser is, frankly, cruel. The same is true in the case of a defendant who, upon seeing the state and its uniformed witnesses arrayed against them in the courtroom, finally comes to terms with the gravity of their situation and wants to accept a plea. These are not mere hypotheticals; they are common experiences for many criminal lawyers.

CONCLUSION

Many of the attorneys who comprise APAAC have spent their lives and careers advocating for victims and working to vigorously and ethically prosecute crimes in our communities. Many of the attorneys who comprise AACJ have spent their lives and careers advocating for the rights of the accused and ensuring for all of us that our most cherished constitutional rights have real teeth. It is not a coincidence that these two institutional adversaries have come together to strongly oppose this Petition. Rather, it is

because the proposed rule change would not only work to the detriment of prosecutors and victims, but to the detriment of criminal defense attorneys, their clients, and indeed the courts as well. When the Hatfields and the McCoys can set aside their differences and agree that something is a bad idea, we should listen to them. This Petition should be rejected.

RESPECTFULLY SUBMITTED this 1st day of October 2021.

PIMA COUNTY BAR ASSOCIATION

By *s/James W. Rappaport*
James W. Rappaport
Rules Committee Chair

By *s/Reagen Kulseth*
Reagen Kulseth
President