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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)	No. R-24-
)	
Petition to Amend Ariz. R. Crim. P.)	Petition to Amend Arizona Rule of
10.2(a).)	Criminal Procedure 10.2(a)
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_____)	

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Petitioner hereby submits the petition to amend Arizona Rule of Criminal Procedure 10.2(a), as specified in the Attachment. The purpose of this proposed change is to fix an anomaly in the Rule whereby the State’s exclusive control over dismissing and refiling a new case has given it unequal and unfair power to changes of judge as a matter of right.

Generally, procedural time limits begin anew when a new indictment is issued after a dismissal of a previous case even if the indictment is based on the same conduct. *Godoy v. Hantman*, 205 Ariz. 104, 106 ¶ 7 (2003). In *Godoy*, the defendant moved for a new finding of probable cause and the judge remanded the case; when the State failed to present the case to a new grand jury within 15 days, the judge

dismissed the case without prejudice. *Id.* at 105 ¶ 3. The State refiled the same charges at a later date and the new indictment was assigned to the same judge. *Id.* at 105-06 ¶ 4. The State filed for a change of judge, which was granted, over the defendant's objection. *Id.* at 106 ¶ 4. The notice's timeliness depended on whether the new indictment was essentially a continuation of the previous case or whether it constituted a new action, where procedural rights begin anew. *Id.* ¶ 6. This Court determined that since the previous case had been ordered dismissed without prejudice, the new indictment was not a continuation, but rather a new matter: "Participating in proceedings in a previous case does not waive a party's right to a change of judge in a new action." *Id.* at 106-07 ¶¶ 8-9.

Conversely, in *Woodington v. Browning*, a notice of change of judge was not permitted when the case was remanded to the grand jury for a redetermination of probable cause, pursuant to Rule 12.9, and a new indictment with the same cause number was issued. 240 Ariz. 288, 289 ¶ 2 (App. 2016). The notice of change of judge was not timely, because the remanded case was a continuation of the previous case, and unlike in *Godoy*, the case had not been dismissed. *Id.* at 292 ¶ 16.

This Court and the court of appeals have consistently held that the filing of a notice under Rule 10.2 is "summary and automatic," and although the party exercising the peremptory change of judge must make the avowals contained in the Rule, there is no recourse for abuse of the Rule except for professional discipline.

State v. City Court of City of Tucson, 150 Ariz. 99, 102 (1986); *Bergeron ex rel. Perez v. O'Neil*, 205 Ariz. 640, 647-48 ¶¶ 19-21 (App. 2003); *Gilbert Prosecutor's Office v. Foster*, 245 Ariz. 15, 18 ¶ 11 (App. 2018). Despite these cases and State Bar Ethics Opinion 93-13 stating that abuse of the rule is cause for discipline, attorneys and judges typically will not file a bar charge for misuse of Rule 10.2. Even if someone did file a bar charge, this practice does not readily fall within any of the prohibited purposes in Rule 10.2(b)(2), and thus it is doubtful that the State Bar would be able to find misconduct.

In criminal cases, this results in an imbalance between prosecutors and defendants. The State has complete control over the decision whether to dismiss and refile charges against a defendant, thus giving the State the choice whether it wishes to maintain the existing case number or file under a new case number. A prosecutor who has received adverse rulings in a case may decide to go back to the grand jury and seek a new indictment for the primary purpose of obtaining a new case number, a new arraignment, and a new opportunity to change the judge. Once there is a new case, the prior rulings have no force of law; the same judge would likely stand by the prior rulings, but a new judge would be obligated to consider all legal questions in the first instance without reference to the prior rulings. Furthermore, the prosecutor in this scenario takes no risk, because the prosecutor is not required to dismiss the existing case before seeking a new indictment; therefore, on the off

chance that the new grand jury does not return a true bill, the prosecutor can stick with the existing case.

Unlike other past petitions, this petition does not seek to throw out the baby with the bathwater and repeal Rule 10.2. *See* [R-21-0006](#) (petition of Committee of Presiding Judges, denied August 24, 2021). Nor does it seek altogether to strip prosecutors of the right. *See City Court of City of Tucson*, 150 Ariz. at 103-04 (“We could, for example, grant the defendant a right to peremptory challenge of a judge and not give that same right to the prosecutor. Indeed, some states do give this right to the defendant only and not to the state. We find no ethical, legal or constitutional problem in denying the right to peremptory challenge to the state while not applying it to the defense.” (citations omitted)). This change would not impact as many cases, presumably because most prosecutors, acting as ministers of justice, would not abuse the rule in such a manner.

In *State v. Morf*, Pima County Superior Court No. CR-20210842-001, as trial was set to commence, the prosecutor requested a continuance, over the objection of the defendant, for the purpose of amending the original indictment. The trial court denied the request, but the court granted the defendant’s request for a mistrial when the prosecutor untimely disclosed voluminous phone downloads. When the court and defendant wished to reschedule the new trial for the following week, the prosecutor balked because he intended to go back to the grand jury to obtain a new

indictment. Then, when he obtained the indictment under a new case number, No. CR-20232655-001, the prosecutor filed a notice of change of judge. Defense counsel objected, but the presiding judge, following *Gilbert Prosecutor's Office*, granted the change of judge. Had the prosecutor maintained the same case number, the change of judge would not have been possible. This is the kind of abuse that the Rule currently tolerates, but should not.

For these reasons, Petitioner requests that this Court adopt the proposed change to Rule 10.2 as specified in the Attachment.

DATED (electronically filed): January 10, 2024.

By: /s/ David J. Euchner
David J. Euchner

ATTACHMENT¹

Ariz. R. Crim. P. 10.2. Change of Judge as a Matter of Right.

(a) **Entitlement.**

1. *Generally.* Each side in a criminal case is entitled to one change of judge as a matter of right. If two or more parties on a side have adverse or hostile interests, the presiding judge or that judge's designee may allow additional changes of judge as a matter of right.
2. *Meaning of "Side."* Each case, including one that is consolidated, is treated as having only two sides.
3. *Per Party Limit.* A party exercising a change of judge as a matter of right is not entitled to another change of judge as a matter of right.
4. *Inapplicability to Certain Proceedings.* A party is not entitled to a change of judge as a matter of right:
 - A. in a remand for resentencing; **or**
 - B. when the State dismisses a prosecution and refiles a prosecution involving the same subject matter, in which case only the State is not entitled to a change of judge as a matter of right.**

(b)-(f) [No change]

¹ Changes or additions in rule text are indicated by **bold underscoring** and deletions from text are indicated by ~~strikeouts~~.