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**IN THE SUPREME
COURT STATE OF
ARIZONA**

In the Matter of:) Supreme Court No. R-24-0010
)
PETITION TO AMEND RULE 10.2(a),) **COMMENT IN OPPOSITION TO**
ARIZONA RULES OF CRIMINAL) **PETITION TO AMEND RULE 10.2(a),**
PROCEDURE) **ARIZONA RULES OF CRIMINAL**
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Pursuant to Arizona Rule of the Supreme Court 28, the Arizona Prosecuting Attorneys’ Advisory Council (“APAAC”) respectfully submits the following comment opposing Petition R-24-0010 (“Petition”). For the reasons set forth below, the proposed rule addresses concerns that are speculative or otherwise already addressed by existing law, it will have effects that sweep beyond its stated purpose, and invites litigation. Thus, the Petition should be rejected.

I. Introduction

For approximately 85 years, Arizona has recognized that both the State and the Defense in a criminal case should be entitled to substantively equivalent peremptory change-of-judge rights. *See, e.g.*, Ariz. Code Ann. §§ 44-1202 to -1205 (1939); Ariz. R. Crim. P. 196–200 (1956); Ariz. R. Crim. P. 10.2(a) (2024). The principles underlying this practice have even older roots:

It is the policy of our system that every litigant, no matter in what form his application may be presented to the court, shall have his rights adjudicated by a judge who is not interested in the result. It cannot be doubted for an instant that it would be perversion of justice for a judge to sit in any proceeding in the event of which he has an interest Nor should he be allowed to sit, when he is laboring under bias or prejudice toward one or more of the parties litigant.

Stephens v. Stephens, 17 Ariz. 306, 312 (1915) (quoting *State v. Dist. Ct. of Lewis and Clark Cty.*, 82 P. 789, 790 (Mont. 1905)); *see also State v. Barnes*, 118 Ariz. 200, 203 (App. 1978) (“[T]he State has an equal right with appellant to an impartial court.”). The Petition’s proposed changes to Rule 10.2(a) would undermine this long-standing balance whenever the State dismisses and refiles a prosecution, regardless of the circumstances surrounding the dismissal or the stage of criminal proceedings at which it occurred.

II. The Petition’s Primary Concerns Are Speculative and Already Addressed by Existing Law.

The Petition’s central justification for eliminating the State’s right to a

change of judge when a prosecution is dismissed and refiled is that the State's "exclusive control over dismissing and refileing a new case has given it unequal and unfair power to changes of judge as a matter right." The Petition posits that a prosecutor who has received adverse rulings from the assigned judicial officer in a pending case may decide to seek a new indictment for the "primary purpose" of refreshing their right to a change of judge, thereby enabling the prosecution to gain a tactical advantage in the new case.

At the outset, the Petition's assertions are almost entirely based on speculation as to the State's motives when dismissing a prosecution. Furthermore, the Petition points to a single case where the proposed rule would arguably apply. Permanently removing a prosecutor's right to exercise a peremptory change of judge whenever a prosecution is refiled should be based on more than mere suspicion that the right is being abused.

Furthermore, a party has other recourse if there is reason to believe anything improper occurs. Specifically, in addressing any dismissal, the superior court may dismiss a case with or without prejudice, provided the court finds that a dismissal with prejudice is required by the interests of justice. Ariz. R. Crim. P. 16.4(d); *State v. Gilbert*, 172 Ariz. 402, 404 (App. 1991). Arizona courts have repeatedly held that these provisions vest the superior court with the sole discretion to decide whether to dismiss a pending criminal prosecution,

including whether the dismissal should be with or without prejudice. *State v. Johnson*, 122 Ariz. 260, 265 (1979); *State v. West*, 173 Ariz. 602, 611–12 (App. 1992); *Application of Parham*, 6 Ariz. App. 191, 193 (1967).

As a result, a defendant may argue that the motion to dismiss should be with prejudice, or move to dismiss the successive prosecution on grounds that going forward constitutes a violation of the defendant’s due-process rights.¹ *See, e.g., Gilbert*, 172 Ariz. at 404–05 (reversing dismissal with prejudice, in part, because defendant “did not assert that the state was acting in bad faith or with the motive of simply harassing her” by seeking dismissal without prejudice); *State v. Garcia*, 170 Ariz. 245, 247 (App. 1991) (noting, in appeal from State’s contested motion to dismiss, that proof that the State sought dismissal to gain a tactical advantage “by delaying in the hope that a critical witness would become unavailable” would justify dismissal with prejudice); *State v. Huffman*, 222 Ariz. 416, 420, ¶¶ 9–15 (App. 2009) (recognizing defendants’ right to seek dismissal of successive prosecution on due-process grounds).

As for the Petition’s claim that professional discipline is an inadequate

¹ Critically, such challenges would not be directed to the State’s actual exercise of its peremptory change-of-judge right under Rule 10.2(a), which is summary and automatic, but to the prosecutor’s reasons for dismissing and refiling a prosecution.

remedy for its allegations of prosecutors' abuse of Rule 10.2(a), such reasoning has been rejected in case law addressing attempts to inject court review into the peremptory change-of-judge process. As aptly stated by a majority of the Arizona Court of Appeals,

The dissent further suggests that Rule 10.2(b) is "relegated to an empty and ineffectual exercise" unless trial judges may question attorneys about their reasons for exercising their right to a change of judge. But that assumes attorneys will not honestly execute the avowals now required under Rule 10.2(b) and that judges will be unable or unwilling to report abuses of the rule to the State Bar, as the comments to the 2001 amendments to Rule 10.2 and ER 8.4(g) contemplate. We cannot accept those assumptions. Although respondents may not view the avowal requirement coupled with the State Bar enforcement mechanism as a perfect or adequate remedy for alleged violations of Rule 10.2(b), it is the remedy our supreme court has chosen. . . . We can reasonably assume that, in interpreting the 2001 amendments to Rule 10.2, the supreme court placed some measure of confidence in both the integrity of this state's trial lawyers (to submit honest avowals) and the vigilance of its trial courts (to refer the rare violator to the State Bar for potential discipline).

Bergeron ex rel. Perez v. O'Neil, 205 Ariz. 640, 651–52, ¶¶ 35–36 (App. 2003) (citations omitted). Simply put, the Petition offers no compelling explanation for why the type of abuse it alleges should not and cannot be addressed via discipline by the Arizona State Bar.

III. The Petition's Proposed Changes Reach Far Beyond Its Asserted Purpose.

Finally, the Petition's proposed amendments to Rule 10.2(a) should not be adopted because they would deprive the State of its right to a change of judge

in circumstances that have nothing to do with the Petition's asserted purpose. Under the Petition's proposed rule, the State would lose its right to a peremptory change of judge whenever a prosecution is dismissed and refiled, no matter the circumstances surrounding the dismissal or its timing.

Thus, for purposes of Rule 10.2(a), the Petition treats a dismissal sought shortly after a defendant is arraigned the same as a dismissal sought on the eve of trial, even though these situations are vastly different from a due-process perspective. And the Petition's proposed changes do not recognize that a prosecutor may wish to exercise their right to a change of judge for reasons that, although arising from the prior proceedings, are totally independent from the prosecutor's motive for dismissing and refileing the prosecution.

Furthermore, the language of the proposed rule invites additional litigation, which is not the intent of the rule. Specifically, whether a case involves "the same subject matter" could be subject to argument.

Ultimately, the Petition appears to be premised on the idea that the alleged abusive practice it has identified is so prejudicial to the administration and fundamental fairness of our justice system that it must be eliminated, even if legitimate conduct is swept away in the process. But as discussed above, the Petition offers little, if any, actual evidence to show that this alleged practice presents such a threat. And it is telling that the Petition would leave the

defense's entitlement to a change of judge as a matter of right intact, even though defense counsel may also be motivated to take advantage of their refreshed peremptory change-of-judge right and eliminate the judicial officer who presided over the prior proceedings.

IV. Conclusion

For the reasons outlined above, the APAAC opposes Petition R-24-0010, and requests this Court deny the Petition.

Respectfully submitted this 1st day of May, 2024.

/s/ Elizabeth Burton Ortiz
Elizabeth Burton Ortiz