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6 **IN THE SUPREME COURT OF THE STATE OF ARIZONA**

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9 In the Matter of:

ASC No. R-24-0010

10 **PETITION TO AMEND ARIZONA**
11 **RULE OF CRIMINAL PROCEDURE**
12 **10.2(a)**

COMMENT OF ARIZONA
ATTORNEYS FOR CRIMINAL
JUSTICE IN SUPPORT OF RULE
CHANGE PETITION

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15 Pursuant to Arizona Rule of the Supreme Court 28(e), the Arizona Attorneys for
16 Criminal Justice (“AACJ”) submit the following comment **in support of** the above-
17 referenced rule change petition.

18 AACJ, the Arizona state affiliate of the National Association of Criminal Defense
19 Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally
20 accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit
21 membership organization of criminal defense lawyers, law students, and associated
22 professionals dedicated to protecting the rights of the accused in the courts and in the
23 legislature, promoting excellence in the practice of criminal law through education,
24 training and mutual assistance, and fostering public awareness of citizens’ rights, the
25 criminal justice system, and the role of the defense lawyer.

26 The proposed rule change petition identifies a procedural imbalance that has arisen
27 in the application of the rule. Under the current version of the rule, each party is entitled
28 to “one change of judge as a matter of right.” Ariz. R. Crim. P. 10.2(a). However, the

1 exercise of this rule is limited – for example, it may not be used to facilitate certain
2 improper purposes, such as “for the purpose of delay” or “to remove a judge for reasons
3 of race, gender or religious affiliation.” Ariz. R. Crim. P. 10.2(b)(2). Similarly, it must be
4 exercised within a sharply limited timeframe – generally no later than 10 days after a
5 particular judge’s assignment. Ariz. R. Crim. P. 10.2(c).

6 But clever prosecutors can get around the time limitations that purportedly apply to
7 both parties. This is so because this Court has held that obtaining a new indictment from
8 the grand jury, and a new CR number, effectively restarts the clock for 10.2 notice
9 purposes. *Godoy v. Hantman*, 205 Ariz. 104, 106 ¶ 7 (2003). Such a tactic effectively
10 permits a prosecuting agency to obtain a change of judge at any time it wishes, by
11 dismissing the case and obtaining a new indictment and a new CR number. The defendant,
12 because he has no ability to dismiss indictments and refile at his whim, does not have the
13 same power and cannot obtain the same benefit.

14 The proposed rule change petition addresses this imbalance in the narrowest way
15 possible. It does not limit the State’s ability to seek a change of judge in the ordinary
16 course, nor does it remove the power to notice a judge entirely. Instead, it limits the State’s
17 ability to obtain a change of judge outside the normal 10.2 timeframe by clarifying that the
18 State may not seek a change of judge after dismissing and refileing a case.

19 The State Bar’s comment in opposition to the rule change makes two arguments
20 against the rule, neither of which is particularly availing. First, it argues that the proposed
21 rule “recreates the imbalance, now in favor of a defendant, by removing only the State’s
22 access to relief under Arizona Rule of Criminal Procedure 10.2.” However, that is clearly
23 not true – the proposed rule change does not affect the State’s ability to seek a change of
24 judge in any situation other than that described above. In the normal case, the State will be
25 able to exercise its ability to notice a judge in the exact same manner as the defendant. It
26 simply will not be able to unilaterally restart the clock on 10.2 notices for its own benefit.

27 Second, the State Bar’s comment argues that “the Petition’s use of the undefined
28 phrase ‘a prosecution involving the same subject matter’ will lead to unneeded litigation

1 as courts are forced to grapple with the meaning behind the amorphous new phrase.” But
2 the “same subject matter” standard is used elsewhere in the law to no such effect – for
3 instance, in determining whether a particular claim is barred by claim preclusion, or res
4 judicata. *See, e.g., Hall v. Lalli*, 194 Ariz. 54, 57 ¶ 7 (1999) (“The doctrine of res judicata
5 will preclude a claim when a former judgment on the merits was rendered by a court of
6 competent jurisdiction and the matter now in issue between the same parties or their
7 privities was, or might have been, determined in the former action.”). Arizona appellate
8 courts also frequently determines whether statutes concern the “same subject matter” when
9 interpreting statutes. *State v. Gamez*, 227 Ariz. 445, 449 ¶ 27 (App. 2011) (“[S]tatutes that
10 are *in pari materia*—those that relate to the same subject matter or have the same general
11 purpose as one another—should be construed together as though they constitute one
12 law.”). The “same subject matter” standard is thus neither “new” nor “amorphous” – it is
13 a standard that Arizona courts know well how to apply.

14 DATE: May 1, 2024

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21 Copy of the foregoing e-filed and
e-served this 1st day of May, 2024 on:

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