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IN THE SUPREME COURT OF THE STATE OF ARIZONA

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| In the Matter of: |) | No. R-24-0010 |
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| Petition to Amend Ariz. R. Crim. P. |) | Reply to Comments on Petition to |
| 10.2(a). |) | Amend Arizona Rule of Criminal |
| |) | Procedure 10.2(a) |
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Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Petitioner hereby replies to the comments of the Maricopa County Attorney (MCAO), the Arizona Attorney General’s Office (AAG), the Arizona Prosecuting Attorneys’ Advisory Council (APAAC), Arizona Attorneys for Criminal Justice (AACJ), and the State Bar. AACJ’s comment supports the petition, while the other comments oppose the petition; thus, this Reply will focus on the opposing comments.

The opposing comments decry the loss of a procedural right for prosecutors, but they entirely ignores how prosecutors currently hold an unequal right to seek a notice of change of judge. These comments do not dispute that prosecutors alone hold the power to decide whether to use the same case number (where the parties’ right under Rule 10.2 is not renewed) or obtain a new case number (where it is

renewed). By the time the prosecutor is making this decision, the prosecutor has a basis for determining whether the currently assigned judge is favoring one side or the other. If the prosecutor is dissatisfied with the judge's rulings, nothing stops the prosecutor from dismissing the case without prejudice and refiling under a new case number—and then obtaining a renewed opportunity to notice the judge.

It is plain to see that the current rules favor prosecutors—unfairly so. The petition suggests a sensible change that would strike a more appropriate balance. It would discourage prosecutors from using their unilateral power to obtain a new case number, because doing so would confer a benefit on the defendant.

The opponents also note that the Petition relies on a single case, *State v. Morf*. It is curious that the opponents protest so much when the number of cases where the issue would arise is so little. Notably, while complaining that the Petition cites little authority, none of the opposing comments cites a single example where the State would suffer actual prejudice from being denied the renewed notice of change of judge. Nor could they, because the State would still have the right to seek a change of a biased judge under Rule 10.1.

The comments also suggests that use of the phrase “same subject matter” would engender further litigation because it is not clear what this means. This is a red herring; these are commonly understood terms that people of reasonable intelligence understand. Civil practitioners fully understand this concept in the

context of issue preclusion and claim preclusion. *See* AACJ Comment at 3 (citing *Hall v. Lalli*, 194 Ariz. 54, 57 ¶ 7 (1999)).

APAAC asserts the court can dismiss a case with prejudice if it finds that the prosecutor acted improperly in dismissing a case without prejudice. (AAG also makes this point in its short comment.) This is not true. In *State v. Martinson*, 241 Ariz. 93 (App. 2016), the prosecution attempted to dismiss an indictment without prejudice and refile charges, and when the trial judge dismissed the indictment with prejudice for prosecutorial misconduct, the court of appeals reversed. APAAC cites several cases for support, most of which involve speedy trial violations, not one of which is remotely on point for the issue in this petition. As for its assertion that “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 ... with or without prejudice,” APAAC Comment at 3-4, a more recent case involved a reversal of the trial judge’s decision to dismiss with prejudice. *State v. Leota*, 256 Ariz. 320 (App. 2023).

Bergeron ex rel. Perez v. O’Neil, 205 Ariz. 640 (App. 2003), does not support APAAC’s claim. *Bergeron* interpreted the plain language of Rule 10.2. This petition requests a change in that language. At the time, the *Bergeron* court believed that the prospect of professional discipline adequately deterred attorneys from abusing Rule 10.2, but experience has proven that prosecutors are rarely referred to the State Bar.

See Michael Kiefer, “Prosecutors Under Scrutiny Are Seldom Disciplined,” *Arizona Republic*, October 28, 2013 (“It is rare for prosecutors to be referred to the State Bar for misconduct, let alone be disciplined by the Bar or sanctioned by trial judges.”).

APAAC correctly points out that the petition would treat a dismissal that occurs close in time to arraignment the same as one that occurs close in time to trial. APAAC Comment at 6. Any attempt to affix a time-based requirement to the loss of the right would be arbitrary. As for APAAC’s claim that prosecutors might wish to change the judge in the second prosecution “for reasons that ... are totally independent from the prosecutor’s motive for dismissing and refileing the prosecution,” that is certainly not the case. Prosecutors are human, and they consider all the information before them when deciding whether to notice a judge. It may be 1% because of the judge’s decision in this case, or it might be 99%. Just as a time-based rule would be impossible to enforce, neither could courts determine the extent to which a judge’s decisions impacted the prosecutor’s decision to dismiss and refile and notice the judge.

APAAC concludes with a suggestion that the petition tries to throw away the baby with the bathwater. APAAC Comment at 6 (“even if legitimate conduct is swept away in the process.” What legitimate conduct would this sweep away? No answer.

MCAO incorrectly asserts that *Morf* did not involve an allegation of abuse of Rule 10.2. It plainly did, as shown in the petition for review filed in this Court. *See [Morf v. Metcalf, CR-24-0107-PR](#)*.

This petition is a small fix, not a dramatic sea change as the opposing comments imply. Prosecutors still get to notice judges in all other circumstances without question. And the petition avoids the evil recognized in *Bergeron* and *Gilbert Prosecutor's Office*: evidentiary hearings to question the prosecutor's motives.

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

DATED (electronically filed): June 3, 2024.

By: /s/ David J. Euchner
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