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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: PETITION TO AMEND/REPEAL RULE 10.2(b) OF THE RULES OF CRIMINAL PROCEDURE	Supreme Court No. R-13-_____

Pursuant to Rule 28, Rules of the Supreme Court, Mike Palmer, a member of the public deeply concerned about justice,[1] petitions this Court to amend/repeal Rule 10.2(b) of Criminal Procedure, *Change of judge upon request; procedure.* Specifically, this petition seeks to repeal Rules 10.2(b)(1) through (7) and modify the text of Rule 10.2(b) appropriately.

Legally, as it stands now, the Rule is unconstitutional on its face. By this Court's own precedent, it has no legal force. Not surprisingly then, it violates several statutes.

In practice, the Rule potentially discriminates against true patriots who refuse to waive their constitutional rights because the Court says they must to get a

1 Per Amos 5:15 in the Bible: "Hate evil, love good. Maintain justice in the courts."

change of judge as a matter of right.

Also, the Rule potentially discriminates against true believing Jewish and Christian litigants who hold to God's values and who believe that lying is sin.[2] These with deeply held convictions may suffer for refusing to acquiesce to the Court's "politically correct" public policy as expressed in Rule 10.2(b)(4). As a consequence, these litigants will be deprived of a change of judge as a matter of right for not kowtowing to the Court's world view.

And even for those who don't believe lying is sin, it puts them in the untenable position of potentially perjuring themselves before a court to maintain a constitutional right, when the exercise of that right is arbitrarily said to be "abuse" in the eyes of the Court.

I. Background and Purpose of the Proposed Rule Amendment

As a naturally born citizen of the United States, presumably under the same oath as naturalized citizens (if not more so),[3] I was horrified when I learned that YouTube sensation Jennifer Jones (of Quartzsite, Arizona) was required to lodge an avowal (per procedural Rule l0.2(b)) in order to exercise her Fourteenth Amendment constitutional right to a fair trial. (When she sought a peremptory

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2 Leviticus 19:11

3 To "defend the Constitution against all enemies foreign and domestic."

change of judge away from Judge Larry King as a matter of right.[4]) This is akin to forcing citizens to take a literacy test before allowing them to vote.

Forcing litigants to pass a test of the Court's own making in order to exercise a right inherently abridges ("lessens") that right on its face. (Regardless if litigants cheat on the test or not.) This Court has no authority to lessen the constitutional right to a change of judge.

But don't take my word for it. Take the word of this Court. Quoting from the criminal matter of *Marsin v. Udall*, 78 Ariz. 309, 312, 279 P.2d 721 (Ariz: Supreme Court 1955),

> The right to a fair and impartial trial before a fair and impartial judge is a valuable substantive right originating in the common law and recognized by statute in both criminal and civil cases. **Neither this court nor the superior court can by rule of procedure deprive a party of the opportunity to exercise this right.** Courts cannot enact substantive law. **A court is limited to passing rules which prescribe procedure for exercising the right. Any rule of court that operates to lessen or eliminate the right is of no legal force.** It has even been held by the Supreme Court of the United States that under some circumstances a procedure that had such effect offended the due process clause of the Federal constitution.

Now first (as if there should be any question about it), the constitutional right to due process, the right to a fair trial, is still a right in

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4 While she did not have to state a reason to exercise that right, see *Judge King blows up at Jennifer Jones*, youtu.be/Qs9HeXSpb80.

Arizona, as is evident from Rule 10.2(a) itself. Titled *Entitlement*, that Rule says "In any criminal case, each side is entitled **as a matter of right** to a change of judge."

Moreover, the right to a one time peremptory change of judge is recognized and protected by Arizona statute. A.R.S. § 12-411(A) says, "Not more than one change of venue or one change of judge may be granted in any action, **but each party shall be heard to urge his objections to a county or judge in the first instance.**" (Admittedly the statute could have been worded better.)[5]

But Rule 10.2 is schizophrenic. Inconsistent. Illogical. On the Dr. Jekyll side, Rule 10.2(a) acknowledges the right to a change of judge. On the Mr. Hyde side, Rule 10.2(b) operates to eliminate that right. As this Court concluded in *Marsin*, "[a]ny rule of court that operates to lessen or eliminate the right is of no legal force."

More inconsistency: The civil counterpart to Rule 10.1(b) is Rule

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5 For authority that A.R.S. § 12-411(A) is specifically about peremptory change of judge, see *Brush Wellman, Inc. v. Lee*, 996 P. 2d 1248, 1250 - Ariz: Court of Appeals, 2nd Div., Dept. A 2000. For authority that A.R.S. 12-411(A) applies to criminal matters, see *State ex rel. Thomas v. Gordon*, 144 P. 3d 513, 519 - Ariz: Court of Appeals, 1st Div., Dept. E 2006. ". . . we note the statute speaks broadly, referring as it does to 'any action'. . . "

42(f)(1)(A) in the Rules of Civil Procedure. That Rule, quite correctly, does not abridge a litigant's right by requiring a good faith avowal. There, a notice for a change of judge as a matter of right "shall neither specify the grounds nor be accompanied by an affidavit . . ." Whereas Rule 10.2(b) requires an avowal—an affidavit for the pro se litigant. Two different Rules.

Stare decisis dictates they should be the same. ("[O]ur supreme court has held the rules of law pertaining to change of judge are essentially the same in civil as in criminal cases."[6] Rule 42(f)(1)(A) has it right. Rule 10.2(b) has it wrong and must be changed to match its counterpart.

Next, there is no statutory authority (nor can there be) to nullify the constitutional right to a peremptory change of judge. So the Court has made new "law," codifying its self-proclaimed "bad faith" motives in Rule 10.2(b). Per *Marsin*, "Courts cannot enact substantive law. A court is limited to passing rules which prescribed procedure for exercising the right." The Court has exceeded its bounds.

Not surprisingly then, Rule 10.2(b) arguably violates litigants' First Amendment right to Free Speech. Litigants are potentially forced to say

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6 *State ex rel. Thomas v. Gordon*, 144 P. 3d 513, 519)

something they don't want to say as a condition for getting a change of judge. But "one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say."[7] When a litigant is forced to acquiesce to the Court's politically correct language of Rule 10.2(b)(4), it's a violation of the litigant's free-speech rights.

Further, Rule 10.2(b)(4) potentially trespasses on the First Amendment right of free exercise of religion for people of faith.

For example, the Court is forcing litigants to abide—or at least to swear that they abide—by the Court's secular-religious beliefs. Through Rule 10.2(b)(4), denying the right to a change of judge for religious affiliation, the Court is saying that a litigant who is, say, Jewish Orthodox (kippah and all) is not acting in good faith when he wants a change of judge because his judge is a radical Wahhabi Muslim. Given what Wahhabi Muslims openly preach about what they want to do to Jews (annihilate Israel, etc.) it's not bad faith for a Jew to want a fair trial in such a situation. But by promulgating Rule 10.2(b)(4), the Court has decreed it is. The Court is effectively punishing the religious Jew for wanting a change of judge in such a situation.

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7 *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995) (quotations omitted)

But the Legislature forbids punishing litigants who ask for a change of judge. Specifically, A.R.S. 12-410 says “No judge or court shall punish for contempt any one making, filing or presenting the affidavit provided for by section 12-409, or any motion founded thereon.” The Legislator's intent is to protect litigants who exercise their constitutional right to a change of judge.[8]

Again, as above, Rule 10.2(b) can potentially harm litigants—especially litigants of faith who won’t compromise their principles (that is, lie in their avowal).

Also, forcing litigants to avow something as a condition for exercising a constitutional right is coercion. It places the litigant under duress. I'm not an attorney, but isn't a “confession” obtained by coercion inadmissible? “A confession is involuntary and thus inadmissible if "a defendant's will was overborne by the circumstances surrounding [it]." *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (internal quotations omitted). Since litigants are required/coerced into making a vow, their avowal is inadmissible on its face. Therefore a Rule 10.2(b) avowal is moot and pointless and serves no

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8 While the statute cites a §12-409 motion only, the intent applies across the board. § 12-410 only mentions a § 12-409 motion because that motion can be denied and the litigant would end up facing an offended judge. Then §12-410 comes into play. But here we're talking about a right to a change of judge as a matter of right. It's supposed to be a done deal, never to see the first judge again. And so § 12-410 would never be in play.

legitimate purpose.

Further along Fifth Amendment lines, "[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . ." Yet the Court is compelling litigants to be a witness against themselves in a (Rule 10.2) criminal matter. If an honest litigant has to avow, but were to avow that he wanted a change of judge for the prohibited cause of gender,[9] has he not "incriminated" himself in the sense that he confessed to one of the Court's 10.2(b)(4) thought crimes?

"[N]or [shall any person] be deprived of life, liberty, or property, without due process of law." By confessing their "politically incorrect" beliefs to a court via a coerced confession, will not the honest litigant be deprived of a constitutional right and possibly thereafter their life, liberty or property at the hands of a biased judge?

Last, A.R.S. § 12-109(A) says "The rules [of the Supreme Court] shall not abridge, enlarge or modify substantive rights of a litigant." At bottom then, because Rule 10.2(b) does abridge substantive constitutional rights of

9 Say because he believes God's lament over godless Israel in Isaiah 3:12.

litigants, the Court is in open violation of state law.[10]

Post Script

As to Rule 10.2(b)(5), I know the Court will hate this, but it's called "Jury Nullification." If a group of legal professionals believe they have a bad judge, it's their right to get a one-time change of judge for each of their clients. If the Court wants to nullify that right of its officers, it has already done so via ER 8.4 of its Rules of Professional Conduct.

Likewise, while I understand that the intent of Rule 10.2(b)(1), (2), (3), (6) & (7) is to prevent gamesmanship and forum shopping, well-meaning as that might be, that does not give the Court the authority to deprive litigants of their constitutional right to a change of judge. Just as free speech may sometimes have unpleasant consequences, so the Fourteenth Amendment may sometimes have unpleasant consequences as well. The Court cannot abridge a citizen's Fourteenth Amendment right any more than it can a citizen's First. Again, the proper place to call this misconduct is in ER 8.4, which the Court has already done.

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10 But you can't sue the Justices to the Arizona Supreme Court to make them obey the law. They'd be their own judges. If the Justices don't act quickly to repeal this Rule, it appears the only remedy is to sue the Justices in federal court seeking declaratory and injunctive relief from Rule 10.2(b).

II. Contents of the Proposed Rule Amendment

Rule 10.2. Change of judge upon request

b. Procedure. A party may exercise his or her right to a change of judge by filing a pleading entitled "Notice of Change of Judge" signed by counsel, if any, stating the name of the judge to be changed. ~~The notice shall also include an avowal that the request is made in good faith and not:~~

~~1. For the purpose of delay;~~

~~2. To obtain a severance;~~

~~3. To interfere with the reasonable case management practices of a judge;~~

~~4. To remove a judge for reasons of race, gender or religious affiliation;~~

~~5. For the purpose of using the rule against a particular judge in a blanket fashion by a prosecuting agency, defender group or law firm (*State v. City Court of Tucson*, 150 Ariz. 99, 722 P.2d 267 (1986));~~

~~6. To obtain a more convenient geographical location; or~~

~~7. To obtain advantage or avoid disadvantage in connection with a plea bargain or at sentencing, except as permitted under Rule 17.4(g).~~

~~The avowal shall be made in the attorney's capacity as an officer of the court.~~

SUBMITTED this 10th day of January, 2013

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