WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY
(FIRM STATE BAR NO. 00032000)

MARK FAULL
CHIEF DEPUTY
301 WEST JEFFERSON STREET, SUITE 800
PHOENIX, ARIZONA 85003
TELEPHONE: (602) 506-3800
(STATE BAR NUMBER 011474)

ARIZONA SUPREME COURT

IN RE: PETITION TO AMEND RULES 10.2, 15.1, 16.6 OF THE ARIZONA RULES OF CRIMINAL PROCEDURE	R-17-0021 MARICOPA COUNTY ATTORNEY'S RESPONSE TO PETITION TO AMEND RULES 10.2, 15.1, 16.6 OF THE ARIZONA RULES OF CRIMINAL PROCEDURE

The Maricopa County Attorney hereby responds to the Petition to Amend Rules 10.2, 15.1, and 16.6 of the Arizona Rules of Criminal Procedure and asks this Court to deny the Petition because the requested change is completely unnecessary and will have significant negative consequences on our justice system.

Respectfully submitted this 22nd day of May, 2017.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

By _____
for MARK FAULL
CHIEF DEPUTY

I. Introduction

Petitioners ask this Court to modify several rules of criminal procedure to effectively reverse this Court's previous rulings regarding the ability of a party to exercise the right to notice a judge under Rule 10.2 and the right to file a notice of intent to seek the death penalty under Rule 15.1. Petitioners assert that prosecutors dismiss and refile cases to engage in judicial forum shopping or to circumvent the deadlines to file a notice of intent to seek the death penalty. Although Petitioners have correctly noted that this Court's prior decisions allow for new Rule 10.2 notices and a renewed period to file an intention to seek the death penalty when a case is refiled, they have failed to show that these judicial rulings cause any harm to the Arizona criminal system. In sum, Petitioners seek to change rules that are not broken, and, worse, in the case of notices to seek the death penalty they ask this Court to create a system where prosecutors would be forced to file such a notice in more first degree murder cases.

II. Discussion

A. Petitioners have not shown any problem or widespread abuses that need to be addressed though a rule change.

Petitioners appear to base their proposal on the assumption that prosecutors are engaging in, what they term, "strategic dismissals" to gain new timelines for notices of change of judge under Rule 10.2. *Godoy v. Hantman*, 205 Ariz. 104, 67 P.3d 700

(2003) held that a new indictment begins a separate matter and *both* sides can exercise a peremptory change of judge as if the previous action had never been filed. *Godoy* has been the well-established law of Arizona for more than 14 years. To support their notion of "strategic dismissals" Petitioners cite two cases where they claim such dismissals occurred. Of the hundreds of thousands of cases that have been prosecuted in State of Arizona in the 14 years since *Godoy* was decided, Petitioners present only two to support their request to modify the criminal rules. Even assuming, while in no way conceding, that the two examples they cite actually support their "strategic dismissal" concept, the fact that they point to only two demonstrates that there is need to change the rules. Furthermore, in both of Petitioner's examples, the courts imposed remedies for what they found to be misconduct and no rule change was necessary to do so.

B. <u>Petitioners' requested prohibition on dismissing and refiling a case to address substantive rulings would caused unnecessary litigation and hinder the truth seeking function of the criminal justice system.</u>

In addition to having no need for Petitioners' rule changes, the proposed changes to Rule 16.6 dealing with substantive rulings is particularly problematic. As Petitioners, both experienced criminal defense attorneys know, the prosecution does not usually have a full and complete picture of a defendant's criminal behavior the moment a crime is charged. Additional investigation and information can uncover additional crimes, different motivations, additional victims, the existence of co-

defendants, and a myriad of other new facts that change how a case should be charged and presented to a jury. Cases are frequently dismissed to add new charges, add additional co-defendants, add newly discovered victims, or to make the charges more accurate based on the current facts. The United States Supreme Court has recognized this reality in the context of prosecutorial vindictiveness claims:

> In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that the information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized.

United States v. Goodwin, 457 U.S. 368, 381 (1982). If Rule 16.6 were modified as requested, it would frequently lead to litigation when prosecutors sought to accurately charge a case after new information was discovered. If a prosecutor realized additional crimes had occurred and wanted to refile the case to add those charges, any attempt to dismiss the original case would lead to litigation if the court had made any type of substantive rulings. The defense would argue that the real motivation behind the dismissal and refile was to circumvent a substantive decision while the prosecutor would counter that the reason was to add new charges. The court would then have to determine what the "real" motivation was. This additional litigation is particularly pointless because the prosecution absolutely *should* be able to refile a case to specifically address substantive rulings.

The facts of a case Petitioners cite present a good example of a situation where a court's substantive rulings are a legitimate and appropriate reason to refile a case. In the *Martinson* case, the trial court ruled that under *State v. Styers*, 177 Ariz. 104, 865 P.2d 765 (1993), the State could not present evidence showing that the child victim in that case had been killed intentionally because the case was charged as felony murder based on child abuse – a ruling that the Court of Appeals found to be an error. *State v. Martinson*, 241 Ariz. 93, ¶ 26, 384 P.3d 307, 313 (App. 2016). After a new trial was ordered following a conviction, the State obtained a new indictment to add a count for premeditated murder and then sought to dismiss the original case. *Id.* at ¶ 9. Obviously this was done to correct the way the case was charged so the prosecutors could present all the relevant evidence to the jury. Petitioners' proposed changes would prevent dismissals in these types of situations but why that should be the law is completely unclear in the Petition.

Some substantive rulings, like the *Styers* ruling in *Martinson*, are based solely on the way a case is charged. Petitioners appear to advance the idea that once charges are filed on a specific fact pattern they can never change. But such a view is completely unrealistic in the real world where charging decisions are frequently made very quickly to comply with the rules and new information develops as the case progresses. Sometimes that new information is a court ruling – right or wrong – about how the charges in a case will limit the presentation of evidence to a jury. It

makes no sense to create a rule that says prosecutors cannot correct a charging error or oversight so the truth can be presented at trial. Doing so does not unfairly prejudice the defendant. The defendant will have plenty of notice and an opportunity to prepare for the charges and the evidence that will be admitted. In the vast majority of situations like this the defense is already well aware of the evidence the State wants to present. Refiling a case with appropriate charges to allow the jury to hear all the facts is exactly how a criminal system should work and it is how our current system does work. Petitioners' desire to change our system to prevent prosecutors from improving their charging decisions will no doubt help their clients by preventing a jury from hearing all the facts, but such a system does not serve the interest of our community as a whole or our criminal system's mandate to seek justice.

C. Creating a permanent bar on the State's ability to seek the death penalty after the procedural deadline will encourage excessive filings of notices to seek the death penalty and deny victims their constitutional right to justice and due process.

Finally, Petitioners turn to the notice of intent to seek the death penalty and they seek to permanently prevent filing a capital punishment notice if a murder case is dismissed after the deadline to file has passed and the case is later refiled. The fact that Petitioners discuss only one case to support their rule change proves that there is no widespread practice of refiling murder cases to add death penalty notices. However, as discussed above, and as is evident in *Mesa v. Granville*, 241 Ariz. 201,

386 P.3d 287 (2016) another case Petitioners seek to reverse with their Petition, sometimes critical facts change during the investigation of a case. In *Mesa* the defendant was originally charged with first degree murder for his participation in the killing of a smoke shop clerk. *Id.* at ¶ 3. During the pendency of the prosecution, the State learned that the defendant's participation in the killing was far more egregious as was his conduct after the killing when the defendant laughed about the victim talking about his children while pleading for his life. *Id.* at ¶¶ 3-4. Based on this new information, the defendant was re-indicted on additional charges to reflect the truth about his participation in the murder and the State filed a notice to seek the death penalty. *Id.* at ¶ 6.

Contrary to Petitioners' suggestions, *Mesa* is not a case where the prosecution used a "strategic dismissal" to file a notice to seek the death penalty just because there was some change of heart. In fact, the case was dismissed, refiled with new charges, and a capital punishment notice filed because new facts were discovered that painted the defendant's conduct in a completely different light and showed that he was deserving of our system's ultimate penalty.

Petitioners warn this Court that without a rule change every murder case will mandate the assignment of a capital team. This fact, they assert, will be a tremendous burden on the defense community. Yet, today, capital teams are not appointed on every first degree murder case even within the first 60 days after arraignment.

Further, as this Court noted in *Mesa*, the current rule has never stood as an absolute bar to untimely filings of an intent to seek the death penalty, yet capital defense teams are not appointed on every first degree murder case as Petitioners suggest is required because the State could potentially seek the death penalty at any time during the case. *See id.* at ¶ 16; [Petition at 7]. Petitioner's claim that the current rules mandate capital teams on all murder cases is simply not true.

Ironically, Petitioners' rule change would cause the very harm they claim to want to prevent – a dramatic increase in the number of capital teams appointed in murder cases. If the deadline to file an intent to seek the death penalty became an absolute, permanent bar to a capital punishment notice for that incident, cautious prosecutors will have no choice but to file the notice in far more cases just to be on the safe side in the event that critical new information comes to light during the pendency of the prosecution. While this would not cause the filing of a notice to seek the death penalty on every murder case – some first degree murder cases have no aggravating factors – it would encourage a prosecutor to file the notice on cases anytime capital aggravators are present. Prosecutors around the state routinely decide not to file the intent to seek the death penalty in a large numbers of cases where the sentence is legally available, but, in the exercise of their discretion, the prosecutor decides not to pursue it. If, however, the prosecutor knew that there would never be any legal way to seek the death penalty after the deadline passed no matter what new

information was uncovered about the defendant or the crime, far more notices would be filed to ensure that option was still available should new information come to light. While the vast majority of these types of notices would be dismissed before trial, they would still clog the court system and require the appointment of capital qualified attorneys while the case was pending.

Additionally, victims in this state have a constitutional right to justice and due process. AZ CONST., Art. II, § 2.1(A). A rule that would forever bar a prosecutor from seeking to vindicate a victim's death through the imposition of the highest punishment because the prosecutor did not know every detail surrounding the crime within 60 days of arraignment would absolutely run afoul of those rights. While a victim's right to justice does not require the State to seek the ultimate penalty in every first degree murder case, it does mandate that a prosecutor be able to pursue a just penalty when, during the course of a prosecution, the State learns, for example, that a defendant planned the killing and relished in the victim's suffering. A victim of such a killing as no real right to justice if the death penalty could not be pursued in that case just because those facts came to light after a rules deadline had passed.

III. Conclusion

Petitioners' requested rule change is unnecessary, unwise, and contrary to an efficient and effective system of justice. Petitioners have not identified any problem that needs to be solved with their requested changes and their proposal will do

nothing but harm the system overall. Therefore, the Maricopa County Attorney asks this Court to deny the Petition in its entirety.

Respectfully submitted this 22nd day of May, 2017.

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