AMY KALMAN, Bar No. 024978
MIKEL STEINFELD, Bar No. 024996
Arizona Attorneys for Criminal Justice
P.O. Box 41213, Phoenix, AZ 85080-1213
kalmana@mail.maricopa.gov
steinfeldm@mail.maricopa.gov

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of: Petition to Amend Rules 10.2, 15.1, 16.6 of the Arizona Rules of Criminal Procedure	No. R-17-0021 **REPLY IN SUPPORT OF PETITION**

Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Arizona Attorneys for Criminal Justice ("AACJ") submits this Reply in support of its Petition to Amend Rules 10.2, 15.1, and 16.6 of the Arizona Rules of Criminal Procedure.

The Petition seeks to modify Rules 10.2, 15.1, and 16.6 so that the dismissal and refiling of a case does not operate as a boon for one side of the aisle. The dismiss-refile process can be used as a means to generate a new judicial strike of right, new Rule 8 timelines, and new deadlines, including the deadline to file an allegation of death. All of these benefits inure uniquely to the prosecution because the prosecution is the only side able to dismiss and refile—a defendant has no ability to dismiss his or her case and recharge it.

Two responses were filed to the Petition: one by the Arizona Prosecuting Attorneys' Advisory Council (APAAC) and one by Maricopa County Attorney's Office (MCAO). The two comments identify the same concerns—that it is important for prosecutors to be able to file new charges to reflect new information. However, both comments suffer from the same shortcoming: prosecutors can already file new charges without implicating new judicial strikes or speedy trial concerns by filing a supervening indictment. When the practice of supervening indictments is taken into consideration, neither APAAC nor MCAO have provided any reason to reject the petition.

1. **Neither MCAO nor APAAC have offered any reason why prosecutors should be permitted to engage in judicial shopping when dismissing and refiling charges.**

Neither response has offered any policy reason to justify why parties should be given a new judicial strike when charges are dismissed and refiled. The closest that either came was MCAO's assertion that the concern is not "widespread" and undersigned counsel did not point to a litany of cases where county attorneys abused the process.

Foremost, nothing about the rule-change process requires parties to refrain from proposing new rules until there are widespread abuses of the rules.

Second, the argument carries no weight because either alternative favors the Petition. If abuses are happening, then a rule change is necessary to avoid the

abuses. If abuses are not happening, then the rule change has no negative impact on prosecution and avoids the potential for future abuses.

Third, neither MCAO nor APAAC have addressed the inequity in the current system. Under the current rules, defendants do not have the ability to dismiss and reindict themselves. Abuse of this system, whether slight or rampant, can only be brought by prosecutors.

Because of the inherent and unjustified inequity, and because there is no negative consequence under MCAO's rationale, this Court should at least adopt the proposed change to Rule 10.2(a) and the pertinent portion of the proposed avowal in Rule 16.6(d).

2. Because prosecutors can still add charges through a supervening indictment, the only concern raised by the MCAO and APAAC is illusory.

The primary concern raised by both MCAO and APAAC is that prosecutors need to be able to add charges and death notices because prosecutions are ever-evolving circumstances. The premise is true—prosecutions are always evolving. The premise, however, does not lead to the conclusion proposed by MCAO and APAAC. The evolving nature of a prosecution does not require the specific dismiss-reindict process; the evolution of a case can be accommodated by the supervening indictment process.

Three years ago, the Court of Appeals identified what a supervening (or superseding) indictment is: "an indictment issued in the absence of a dismissal of the prior charging document." *Caesar v. Campbell*, 236 Ariz. 142, ¶ 1 n.1 (App. 2014). Indeed, this understanding is reflected in this Court's cases. *See State v. Leenhouts*, 218 Ariz. 346, ¶ 3 (2008) (discussing a supervening indictment issued one year after initial indictment that added a subsection to the charge);*McKaney v. Foreman ex rel. County of Maricopa*, 209 Ariz. 268, ¶ 28 (2004) (noting the Department of Justice "sought superseding indictments in all pending capital cases setting forth" aggravating circumstances for death eligibility); *Matter of Morris*, 164 Ariz. 391, 392 (1990) (describing a superseding indictment); *State v. Baumann*, 125 Ariz. 404, 409 (1980) (noting a state grand jury returned a superseding indictment that alleged a crime identical to previous indictment).

Indeed, our rules discuss the process for supervening indictments. Rule 12.7(c) requires the trial court to send "a notice of supervening indictment in lieu of issuing a warrant or summons" for supervening indictments.

Both APAAC and MCAO describe reasons why prosecutors must remain free to add charges; for the purposes of this petition, AACJ does not disagree. However, neither APAAC nor MCAO provide any reason why the process for adding charges must be accomplished through the dismiss-reindict process or why the supervening indictment process is inadequate.

Moreover, the supervening indictment process is uniquely preferable to the dismiss-reindict process. First, the supervening indictment process does not start timelines anew. As a result, the supervening indictment process is more consistent with the right to a speedy trial held by both defendant and victim. *See* Ariz. Const. Art. 2, §§ 2.1(10) (victims), 24 (accused). Indeed, Rule 16.6(a) already seeks to protect this right to a speedy trial by requiring an avowal that "the purpose of the dismissal is not to avoid the provisions of Rule 8." By implementing a scheme that prefers supervening indictments, the right to a speedy trial is better protected for victims and defendants alike. Second, the supervening indictment process does not trigger a renewed ability to strike judges as a matter of right. Instead, the parties remain with the judicial officer who is most familiar with the case. Thus, whatever the risk of abuse might be—and the Petitioners and Respondents disagree on the risk—the risk is mitigated.

In possessing these two advantages, the supervening indictment process properly balances the interests of both sides. Prosecutors are able to add charges when a case develops but there is a reduced risk for tactical abuse. Moreover, speedy trial rights are better protected for both the defendant and the victim.

Nor does MCAO's concern that prosecutors must be able to add charges to circumvent trial court rulings require the dismiss-reindict process. After the

proposed amendments, prosecutors would still be able to obtain a supervening indictment and file a motion to reconsider based on the change in circumstances.

None of the amendments proposed in the Petition prevent prosecutors from adding new charges at a later date. The Petition merely funnels this process through the supervening indictment process rather than the dismiss-reindict process. In doing so, the Petition properly attends all of the concerns raised by the MCAO and APAAC while properly balancing the inequities in the current system.

3. MCAO's response demonstrates why the dismiss-refile process is unnecessary in capital cases.

Foremost, APAAC did not respond in any manner to the unique ability to create a new death allegation deadline with the dismiss-refile process.

MCAO advanced two arguments. First, MCAO argued again that cases develop over time and a new death allegation may become necessary beyond the deadline. MCAO Resp. 6-7. However, MCAO's second argument undercuts the risk asserted by its first argument.

As MCAO observes, "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 …." MCAO Resp. 8. This is correct. The current rules do not absolutely bar the untimely filing of a death notice. The question is one of burden.

Under the current rule scheme, if the State provides an untimely notice, the trial court may impose appropriate sanctions under Rule 15.7. *Mesa v. Granville*,

241 Ariz. 201, ¶ 16 (2016). As this Court noted, when an untimely disclosure or notice is made, "the trial court shall impose appropriate sanctions, 'unless the court finds that the failure to comply was harmless or that the information could not have been disclosed earlier even with due diligence ….'" *Id.* (quoting Ariz.R.Crim.P. 15.7(a)).

The dismiss-reindict process, however, empowers the prosecution to completely circumvent any sanctions consideration. Instead, the State can use the dismiss-reindict process to create a new deadline for death notices.

MCAO is correct that there are circumstances when the prosecution learns new information and that changes the decision whether to pursue the death penalty. When this occurs, the current scheme provides a mechanism through which the State can file an untimely death notice; the dismiss-reindict process is not necessary.

The Petition does not seek to absolutely bar the State from filing untimely death notices; the Petition seeks to prevent the State from using the dismiss-reindict process to circumvent any discussion of whether sanctions are proper for an untimely death notice.

MCAO's final argument—that the State will allege death in more cases—is without merit and merely threatens unethical conduct in order to maintain a status quo that enables prosecutors to evade sanction discussions. This Court confronted

an identical claim in *Holmberg v. De Leon*, 189 Ariz. 109, 112-13 (1997). Just as here, the State argued in *Holmberg* that they would file death notices more regularly if held to a strict deadline. *Id.* at 112.

This Court "categorically" rejected this argument. *Id.* As this Court explained, "We do not believe that Arizona prosecutors would so lightly disregard the special responsibilities imposed upon them under ER 3.8 as ministers of justice. Indeed, in our experience, we believe that this argument is not fairly reflective of the professionalism the vast majority of prosecutors show day in and day out." *Id.* at 113. Undersigned counsel agree with this Court that prosecutors are not likely to ignore their ethical duties.

4. Neither MCAO nor APAAC explain why the justice system benefits from an inequitable scheme that grants one side of the aisle the unique power to reset deadlines, create new judicial strikes, and reset speedy trial deadlines.

While the MCAO and APAAC raise a legitimate concern about the ability to modify charges after learning new information, neither have explained why the dismiss-reindict process is necessary to accomplish these goals. Rather, Petitioner has presented a legitimate policy reasons to explain the harms incumbent with the dismiss-reindict process. Regardless of the propensity of abuse, the cases cited by Petitioner demonstrate that the dismiss-reindict process is being used to create new deadlines, obtain new judicial strikes, and circumvent prior rulings.

Moreover, neither APAAAC nor MCAO have justified the inequity incumbent within the system. Neither have challenged Petitioner's base premise that the defense has no concurrent power; a defendant cannot dismiss and reindict herself to clarify charges, circumvent a trial court's ruling and obtain a horizontal appeal, restart disclosure or speedy trial deadlines, or obtain a new judicial strike. The State does have that power. And even if the process is not being frequently abused, the potential for any abuse is sufficient justification to implement the proposed changes.

Conclusion

Ultimately, the proposed changes address all of the concerns raised by both sides of the aisle. New judicial strikes and deadlines cannot be abusively obtained, as Petitioners are concerned. Respondents' concerns about additional charges or late death notices are addressed by the availability of supervening indictments and late notices.

Nothing about the proposed changes prevent prosecutors from filing a late death notice or additional charges upon further investigation. The amendments merely prevent the use of an inequitable procedure that can be—and has been—abused.

RESPECTFULLY SUBMITTED this _____ day of June, 2017.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By: *Amy Kalman*
Amy Kalman
AACJ President

Mikel Steinfeld
Mikel Steinfeld
AACJ Board Member, Amicus/Rules Co-Chair