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

In the Matter of:

) No. R-21-0006

)

) **COMMENT OF ARIZONA**

Petition to Amend Rules 10.2, 17.4,  
32.10(a), 33.10(a), and 35.4, Rules of

) **ATTORNEYS FOR CRIMINAL**

Criminal Procedure; Rule 42.1, Rules of

) **JUSTICE REGARDING**

Civil Procedure for the Superior Courts;

) **PETITION TO ABROGATE**

Rule 6, Rules of Family Law Procedure;

) **RULES OF PROCEDURE**

Rule 2(B), Rules of Procedure for the

) **RELATED TO PEREMPTORY**

Juvenile Court; Rule 9(c), Rules of

) **CHANGES OF JUDGE**

Procedure for Eviction Actions; Rule

)

133(d), Justice Court Rules of Civil

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Procedure; Rule 7, Rules of Court

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Procedure for Civil Traffic and Civil

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Boating Violations; and Ethical Rule 8.4(g)

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of Rule 42, Rules of the Supreme Court.

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Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) hereby submits the following comment to the above-referenced petition.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a

statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ opposes the proposal of the Committee of Presiding Judges (hereinafter, "the Committee") for three reasons. First, the proposal assumes judges have a possessory interest over individual cases and it disregards Arizona's history of use of peremptory changes of judge. Second, it makes a non sequitur argument by pointing to the temporary suspension of these rules during the COVID-19 pandemic as proof that the rules are not needed. Finally, it seeks to address abuses of rules by throwing the baby out with the bathwater, when less drastic alternatives may be employed.

What is notably absent from the Committee's brief petition is any evidence supporting its claims that repealing the rules permitting peremptory changes of judge is necessary either to promote judicial independence or to facilitate administrative duties. If the Committee has such information, it should share it with the public, because failure to include this information defeats the purpose of Supreme Court Rule 28(D) insofar as the public cannot comment on information it does not have.

**I. ARIZONA’S HISTORY PERMITTING PEREMPTORY CHANGES OF JUDGES SHOWS THAT NEITHER JUDICIAL INDEPENDENCE NOR CASE ADMINISTRATION IS THREATENED BY THE PROCEDURE**

Arizona Rule of Criminal Procedure 10.2<sup>1</sup> exists for the purpose of avoiding public battles involving claims of bias. Some version of this procedure has existed since statehood. In *Stephens v. Stephens*, 17 Ariz. 306, 308-09 (1915), this Court interpreted the 1913 Civil Code<sup>2</sup> as requiring a judge’s recusal upon the filing of an affidavit by a party that states “[t]hat the affiant has cause to believe and does believe that on account of the bias or prejudice or interest of said judge he cannot obtain a fair and impartial trial,” without requiring the party to state facts to support the claim. The Rules of Criminal Procedure adopted in 1956 established a procedural right for any party to file one peremptory challenge to a judge. *See State v. Neil*, 102 Ariz. 110, 112 (1967) (describing history of practice).

The Committee notes that “this Court appointed an ad hoc committee to study attorneys’ use of the rule and to recommend whether the rule should be repealed or

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<sup>1</sup> Because AACJ is an association of criminal defense attorneys, its focus is on Criminal Rule 10.2.

<sup>2</sup> This provision is now codified at A.R.S. § 12-409 and controls civil cases. AACJ agrees with the Comment filed by Hon. Greg Sakall, Andrew Jacobs, Hon. Kenneth Lee, and Hon. Richard Gordon, which states that this Court has no authority to abrogate the peremptory change of judge in civil cases because the legislature has created a substantive right for civil litigants. Ariz. Const. art. 3.

somehow amended to curb perceived abuses.” Petition at 2. The “experimental” amendments to Rule 10.2 were added in 2001 and have remained in effect to this day (except for suspension during the pandemic). *Gilbert Prosecutor’s Office v. Foster*, 245 Ariz. 15, 17-18 ¶ 8 (App. 2018) (citing *Bergeron ex rel. Perez v. O’Neil*, 205 Ariz. 640, 647-48 ¶¶ 21-22 (App. 2003)). The Committee notes that it was tasked with collecting data to determine whether perceived abuses of the rule subsided, but it misrepresents this Court’s motive for consideration of repeal of Rule 10.2. Whereas the Committee suggests that the number of filings would be determinative, Petition at 2-3, the Court’s Comment stated that repeal would occur “[i]f such abuse [of the rule] is not substantially reduced as a result of the amendments at the conclusion of the one-year experiment...”<sup>3</sup> The Committee’s petition cites problems that were present twenty years ago, but it does not even suggest that these problems still exist today. Petition at 3. Therefore, it can only be presumed that no such problems exist today that require abrogating these rules.

Notably absent from the Committee’s petition is any reference to the language of this Court’s 2001 comment that “Rule 10.2 is intended to ensure a party’s right to have a matter heard before a fair and impartial judge without the necessity of

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<sup>3</sup> The comment states that the period of time would expire on June 30, 2002, but it was extended multiple times until 2004. *Gilbert Prosecutor’s Office*, 245 Ariz. at 18 n.2.

divulging details that could cause needless embarrassment and antagonism or showing actual bias which may be difficult to prove.” Rule 10.2, 2001 cmt. The court of appeals relied on this language in *Bergeron*, noting the Court’s comment also:

cited with approval our opinion in *Anonymous v. Superior Court ex rel. County of Pima*, 14 Ariz. App. 502, 484 P.2d 655 (1971). In that case, we observed:

“While other states require that the affidavit of bias and prejudice set forth the facts upon which the allegation of bias and prejudice is based ..., Arizona has the salutary rule making disqualification automatic. Thus, in this state it is not necessary to embarrass the judge by setting forth in detail the facts of bias, prejudice or interests which may disqualify him nor is it necessary for judge, litigant and attorney to involve themselves in an imbroglio which might result in everlasting bitterness on the part of the judge and the lawyer.”

*Bergeron*, 205 Ariz. at 648 ¶ 23 (quoting *Anonymous*, 14 Ariz. App. at 504)).

The Committee suggests, without any supportive reasoning, that an “unintended consequence” of the peremptory change of judge “is that they can operate to hide the truth when a judge needs to be removed for cause or needs to address deficiencies in areas such as judicial demeanor or knowledge of the law.” Petition at 4. Presumably, judges who *need* to be removed for cause are already the subject of motions pursuant to Rule 10.1. The whole point of Rule 10.2 is to avoid public battles over a judge’s perceived bias. If the challenge is successful, the judge suffers severe credibility damage. If it is unsuccessful, then the party (or more to the point, the lawyer) will likely have difficulties practicing in front of the challenged judge in the future. Lawyers are generally familiar with the saying, “If you shoot at

the king, you better not miss,” and they are understandably reluctant to file motions under Rule 10.1. Even if a motion to recuse a judge would prove to be successful, that lawyer may fear incurring the wrath of other judges in that court for embarrassing a judge. These are real concerns across the Arizona bar.

The Committee also relies on Wyoming’s repeal of its rule to suggest a trend. But the Committee is wrong to rely on the experience of one state to justify repeal of a time-honored tradition in our state. In *State v. City Court of City of Tucson*, 150 Ariz. 99, 102 (1986), this Court noted, “Arizona is part of a minority of three states, along with Indiana and North Dakota, with such a ‘liberal’ rule of disqualification.” This Court cited favorably to *State v. Keel*, 137 Ariz. 532, 534 (App. 1983), which stated that “[t]he right to a change of judge without cause is zealously protected...”<sup>4</sup> Thus, Arizona has not only recognized but embraced its outlier status in this regard.

Sometimes it is appropriate to revisit old ideas and even to change one’s mind. In *State v. Hickman*, 205 Ariz. 192, 193 ¶ 1 (2003), this Court revisited a court-created rule permitting for “automatic reversal of a criminal trial when a defendant uses a peremptory strike to remove a prospective juror whom the trial court should have excused for cause.” But it only did so after thoroughly discussing changes in

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<sup>4</sup> *Keel* is no longer good law to the extent that it permits a wrongful denial of a peremptory change of judge to be raised on direct appeal after a conviction. See *State v. Ingram*, 239 Ariz. 228, 231-32 ¶¶ 11-16 (App. 2016).

circumstances justifying the change and carefully explaining why the rule was bad policy. Unlike the rule overturned in *Hickman*, the Committee has provided no reason to revisit the procedural right of a peremptory change of judge, and there is overwhelming reason to maintain it.

## **II. THE EXISTING RULES FOR PEREMPTORY CHANGES OF JUDGE ALREADY ACCOUNT FOR MINIMIZING INTERRUPTIONS TO JUDICIAL DOCKETS**

The Committee states that “the challenges posed by peremptory change of judge rules cannot be overstated,” Petition at 4, but in fact these challenges have been overstated. AACJ does not question that some individual cases may be affected, and that there might be a more noticeable impact in “smaller[,] more geographically remote courts.” *Id.* Absent evidence to support the Committee’s claims, however, it is hard to agree that judicial efficiency is “threatened.”

To support its claim that peremptory changes of judge wreak havoc on judicial dockets, the Committee quotes the order of the Wyoming Supreme Court repealing their similar rule in 2013. The Committee did not supply any of the evidence upon which that court relied. Some of those findings do not apply in Arizona (for example, that “unfettered peremptory challenges of judges encourages judge shopping”), while others require factual support that might exist in Wyoming but was not provided by the Committee in support of the petition to repeal Arizona’s rules.

Perhaps the most striking difference between Wyoming and Arizona is the population of each state. Wyoming is the least populated state in the country and ahead of only Alaska in terms of population density, whereas Arizona's population is 7.5 million and growing significantly each year. Of course, Arizona is a very diverse state, with the population base almost entirely in two counties. But challenges faced by Arizona's rural counties is not a new circumstance; those counties did not suddenly become rural in the last twenty years since this Court last considered abrogating Rule 10.2. "The supreme court was aware when it issued its decision in *State v. City Court* that the situation present in this case is common in many counties with smaller populations, that is, where the prosecutor's office consists of one or two prosecutors who have available to them only one or two justice court precincts and superior court divisions." *State v. Greenlee County Justice Court, Precinct 2*, 157 Ariz. 270, 275 n.3 (App. 1988).

Because the right to a fair and unbiased tribunal is protected by Rule 10.1, and Rule 10.2 exists independently of that right, this Court is free to require litigants to follow strict procedures. In *Higuera v. Lee*, 241 Ariz. 76, 77 ¶¶ 2-3 (App. 2016), the defendant failed to comply with Pima County Local Rule 3.1, which requires a copy of all pleadings to be distributed to the assigned judge. As a result, the judge presided over a scheduled case management conference with no objection from the defendant, and the defendant's request for change of judge was deemed waived. Similarly,

because changes of judge are not for cause and are thus “a matter of grace,” a party may not appeal that denial but must file a special action. *State v. Ingram*, 239 Ariz. 228, 230-31 ¶¶ 8-10 (App. 2016) (quoting *Taliaferro v. Taliaferro*, 186 Ariz. 221, 223-24 (1996)).

The notice must be filed early in the case, and prior to any rulings on contested matters or participation in pre-trial hearings. *See also Higuera*, 241 Ariz. at 81-82 n.7 (“Nothing in Rule 10 requires a judge to transfer the proceeding to the presiding judge if a notice is untimely or the right has been waived.”). The entirety of this process takes a couple of days. The only cases where this process might cause undue delay are those that are assigned to a new judge on the eve of trial, in which case a party must file “no later than 5:00 p.m. on the next business day ... or by the start of trial, whichever occurs earlier.” Rule 10.2(c)(2). It should be a rare occurrence that a new judge is assigned less than two days before trial begins; it certainly is not so common so as to have a drastic effect on administration of court dockets. AACJ is unaware of any case where a defendant was denied a speedy trial as a result of a peremptory change of judge;<sup>5</sup> if such ever occurs, the court should honor the constitutional right to a speedy trial over the rule-based right to a peremptory change

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<sup>5</sup> *But see State v. Lukezic*, 143 Ariz. 60, 70, 691 P.2d 1088, 1098 (1984) (trial judge’s unexpected hospitalization necessitated brief trial continuance because no other judge could be available for 15 days).

of judge. Thus, the finding of the Wyoming Supreme Court that “delays in the timely resolution of juvenile and criminal cases may result” does not apply in Arizona.

Perhaps the least persuasive argument in favor of abrogating the peremptory change of judge is the assertion that “[m]any superior court judges and all justices of the peace are elected in Arizona, yet these rules allow parties to remove a judge from serving thereby contravening the will of the voters.” Petition at 4. This ignores the fact that for more than half of Arizona’s statehood, voters elected all judges—including justices of this Court. The Arizona Constitution was amended in 1974 to require merit selection for members of the appellate courts and for superior court judges in counties exceeding a population threshold. The manner of selecting judges in this state has never been a relevant consideration in determining whether there should be a procedural right of a peremptory change of judge. The voters may get to elect who presides in a particular courtroom, but they do not get to decide which judge hears a particular case.

### **III. RATHER THAN ABROGATE THESE RULES ENTIRELY, THIS COURT CAN MAKE APPROPRIATE CHANGES TO THE EXISTING RULES**

To the extent that Rule 10.2 is imperfect, the better practice would be to fix any problems. Such a process requires collecting and sharing information with

stakeholders—including practitioners in criminal, civil, and juvenile law, as well as all other areas of specialization that might be affected.

In *City Court of City of Tucson*, 150 Ariz. at 102-03, this Court held that a prosecuting agency may not “blanket order” a judge to be noticed on all cases from that office. In *Gilbert Prosecutor’s Office*, 245 Ariz. at 18-19 ¶ 14, the court of appeals stated that the remedy for abuse of Rule 10.2 “is to report the abuse to the State Bar.” The problem with this remedy is that judges and defense attorneys rarely file bar charges.

Abuse of Rule 10.2 is most likely to come from a prosecuting agency, primarily because of the unequal control the State has to dismiss and re-file prosecutions. If a motion to remand to the grand jury is granted, the State can either obtain a new probable cause finding under the existing case number, or it can dismiss that case and refile under a new case number. If the former, then it is the same case for purposes of Rule 10.2. *Woodington v. Browning*, 240 Ariz. 288, 291 ¶¶ 10-12 (App. 2016). If the State dismisses and refiles in a new case, however, the parties may file a notice under Rule 10.2 regardless of what actions were taken in the prior case. *Godoy v. Hantman*, 205 Ariz. 104, 105 ¶ 1 (2003). *See also Mesa v. Granville*, 241 Ariz. 201 (2016) (deadline for filing notice of intent to seek death penalty restarts if State dismisses and refiles).

In *Polk v. Hancock*, 236 Ariz. 301, 304 ¶ 9 & n.4 (App. 2014), *vacated*, 237 Ariz. 125 (2015), the court of appeals noted the Yavapai “County Attorney sent an email to the trial judge and others” stating that she “will instruct [her] attorneys” to impose a blanket policy striking the respondent judge. The court implied that the email constituted “an ‘improper attempt to influence a judge in his judicial decisions.’” *Id.* at 307 ¶ 24 (quoting *City Court of City of Tucson*, 150 Ariz. at 102). Most other agencies will not be so brazen as to advertise their intent to engage in expressly prohibited conduct.

To the extent abuse is occurring, this Court could create alternative remedies to requiring a report to the State Bar. For example, to combat abuse by prosecuting agencies, this Court “could, for example, grant the defendant a right to peremptory challenge of a judge and not give that same right to the prosecutor. Indeed, some states do give this right to the defendant only and not to the state.” *City Court of City of Tucson*, 150 Ariz. at 103-04. Alternatively, it could overrule *Gilbert Prosecutor’s Office* through a rule change that permits a court to hold a hearing to determine whether a peremptory change of judge is for an improper purpose. AACJ is not opposed to modifications to the rules that would address such abuses.

Nor is AACJ opposed to the creation of a task force, comprised not only of judges but also practitioners in all areas of law affected by the proposal, which could study the question and collect evidence that could support and/or refute the

Committee's assertions. More information is always better than less. But if the Committee is going to ask this Court to throw out a practice that has existed since statehood, more information is not only better, but it is necessary.

## **CONCLUSION**

For these reasons, AACJ requests this Court deny the petition. AACJ does not oppose creation of a task force to look at abuses of the rules and ways to improve the process.

DATED: May 3, 2021.

By /s/ David J. Euchner  
David J. Euchner

This comment e-filed this date with:

Supreme Court of Arizona

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