



SUPERIOR COURT OF ARIZONA
COUNTY OF MARICOPA

Joseph C. Welty
Presiding Judge

Old Courthouse
125 West Washington, 5th Floor
Phoenix, Arizona 85003
Office (602) 372-2537

May 20, 2021

Honorable Robert M. Brutinel
Chief Justice
Arizona Supreme Court
1501 West Washington Street
Phoenix, Arizona 85007

Re: Request to Amend Superior Court Local Rule – Maricopa County

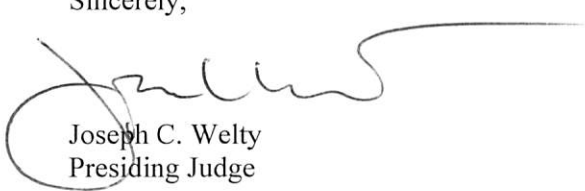
Dear Chief Justice Brutinel:

Pursuant to Rule 28.1 of the Rules of the Supreme Court, I request your approval to amend Rule 4.1 of the Superior Court Local Rules – Maricopa County. The proposed amended rule was presented to, and approved by, the judges of the Superior Court in Maricopa County on November 8, 2019. The proposed rule amendment was recently posted on the website of the Superior Court in Maricopa County for 30 days, in accordance with Rule 28.1(d). The Superior Court received two comments to the proposed amendment, both of which are attached.

Local Rule 4.1 governs court organization as it relates to criminal cases in the Superior Court in Maricopa County. The proposed amendment to Rule 4.1 would add an additional paragraph “g” to the rule to help ensure that in criminal cases where a new or amended complaint is filed on an existing case, the judicial officer assignment remains unchanged. In addition, under the amended rule, when a case is dismissed pursuant to Rule 16.4, Rules of Criminal Procedure, and then refiled as a new complaint, the case will stay with the same judicial officer as the original case, to the extent possible.

I appreciate your time in reviewing and approving these changes to the Superior Court Local Rules – Maricopa County.

Sincerely,


Joseph C. Welty
Presiding Judge

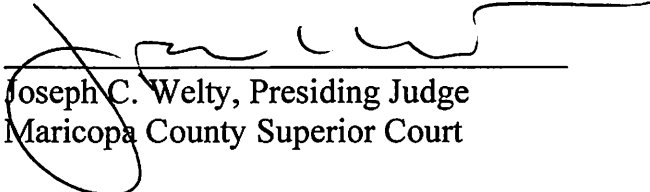
**IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA,
MARICOPA COUNTY**

**ORDER AMENDING RULE 4.1
LOCAL RULES OF PRACTICE,
MARICOPA COUNTY SUPERIOR COURT**

A majority of the judges of the Maricopa County Superior Court having approved, pursuant to Rule 28.1, R. Ariz. Sup. Ct., the proposed amendment to Rule 4.1 of the Maricopa County local court rules,

IT IS ORDERED amending Rule 4.1, Local Rules of Practice for the Maricopa County Superior Court, in accordance with the attachment hereto as Exhibit A, effective May 20th, 2021.

DATED in the City of Phoenix, Arizona, this 20th day of May, 2021.



Joseph C. Welty, Presiding Judge
Maricopa County Superior Court

APPROVED this ____ day of _____, 2021.

Robert M. Brutinel, Chief Justice
Arizona Supreme Court

ATTACHMENT A

LOCAL RULES OF PRACTICE FOR THE MARICOPA COUNTY SUPERIOR COURT

Rule 4.1 Court Organization

(a) – (f) [no changes]

(g) New Charges in Pre-Existing Cases. If the State files a new or amended direct complaint, information or indictment in a prosecution that is pending at the time of the filing, the filing shall be made under the existing case number, and the judicial officer assignment shall remain unchanged. If the State files a new or amended direct complaint, information or indictment that commences another prosecution following a dismissal pursuant to Rule 16.4(d), the case shall, if possible, receive the same judicial officer assignment. The State shall advise the court and clerk upon the filing of the new or amended direct complaint, information, or at the return of the indictment, of the pending or dismissed prosecution.

ATTACHMENT B

Comment Number One

Full Name:

Jason Kalish

Email Address:

kalish@mcao.maricopa.gov

Additional Contact Information:

602-372-0163

Comments:

Earlier this year the Court issued Administrative Order 2021-006 amending Local Rule 4.1. The stated purpose of the amendment is to prevent a "refiled" case from being "assigned a new case number and then randomly assigned to a new judge." That rule has now been opened to public comment. The amended rule also may require a new or amended direct complaint, information or indictment in a prosecution that is pending at the time of the filing to be filed under the existing case number (although the rule does not explicitly state this, the practice may occur due to interpretation of the rule and the stated purpose when originally filed). The Maricopa County Attorney's Office agrees with the goal of having a refiled case handled by the judge who heard the original case. However, that goal can be achieved without requiring the cases to have the same case number. Having two separate prosecutions under the same case number causes problems with applying the Criminal Rules to the "new" case and will make our statewide criminal history records unreliable. 1. There is no mechanism to amend an existing indictment (or other charging document) Local Rule 4.1 contemplates the filing of an amended charging document. While the Civil Rules of Procedure allow for a complaint to be amended, the Criminal Rules of Procedure do not. Rule 13.5(b) of the Rules of Criminal states A preliminary hearing or grand jury indictment limits the trial to the specific charge or charges stated in the magistrate's order or the grand jury indictment. Unless the defendant consents, a charge may be amended only to correct mistakes of fact or remedy formal or technical defects. Therefore, the only way to "amend" charges is to file a new charging document and start a new case. 2. Issues arise when a second case is filed while the first is still pending A case may be refiled in two distinct scenarios. A case may be refiled sometime after the original case is dismissed or a new case may be filed charging new or different crimes while the original case is still pending. In the second scenario, when the State files a subsequent charging document the first charging document must be dismissed and that can only happen after service of the new charging document is made. A hypothetical example illustrates the problems the new rule will cause in this scenario. A defendant is charged with Second Degree Murder in CR 2021-123456. The defendant is in custody on that charge. The State develops evidence of premeditation and obtains a second indictment charging one count of First Degree Murder. At this point, the defendant has two cases pending. The first case cannot be dismissed until the second case is served or the defendant would be released from

custody. Under the former rule, the second indictment was filed and received a new CR number, CR 2021-987654. The State filed a motion to dismiss CR 2021-123456 and the prosecution resumed under CR 2021-987654. All timelines reset, and the case was treated as a new case. The new Rule will cause confusion in numerous parts of the system in this scenario. The State cannot file a motion to dismiss CR 2021-123456 because that cause number refers to both indictments. A motion to dismiss the case will result in both indictments being dismissed. Rather, the State will have to file a motion to dismiss the first indictment. "An indictment issued by a prior grand jury is not automatically nullified or voided by an indictment issued by a subsequent grand jury." *Caesar v. Campbell*, 236 Ariz. 142 (App. 2014). The court could issue an order dismissing the first indictment by attempting to specify it by something other than the case number. For example, the court may state that it is dismissing CR2021-123456 that was filed on X date, but such an order is likely to cause confusion with the clerk's office and, more concerning, with the jail causing them to release the defendant because the only cause number holding that person is CR2021-123456 and that case has been dismissed. Using the same case number causes other issues with the criminal rules. Using the example above, assuming the "right" CR2021-123456 can be identified and dismissed without unintended consequences, the assigned judge must now consider the following legal issues: • Does Rule 8 time start over? Arguably decided by *State v. Wassenaar*, 215 Ariz. 565 (App.2015). • Do all timelines under all criminal rules start over? • Do previous pleadings still apply to the case? • Does disclosure need to be done again? • Do previous rulings in the case apply? • What constitutes the record on appeal? For example, Rule 16.1(d) states that a court "may not reconsider an issue previously decided in the case except for good cause or as these rules provide otherwise." It is clear that if CR 2021-123456 is dismissed and refiled as CR 2021-987654, Rule 16.1(d) does not apply. However, the scenario where one indictment simply replaces another is not as clear. In that instance, since the case is not dismissed, many judicial officers may rule that Rule 16.1(d) applies. If that becomes the norm, then two standards will exist where previous rulings in a case either stand, or can be relitigated, depending solely on the timing of the filing of a new indictment. Because this system is not contemplated by the criminal rules, the result will be different interpretations by individual judicial officers resulting in inconsistent application of the rules and needless litigation. 3. Issues arise when a case is dismissed and refiled under the same cause number. If interpreted to require the same case number on a case refiled after dismissal Rule 4.1 would also create unintended. Some of those problems are the same as listed above, such as whether previous pleadings apply to the new indictment. A major issue will be interpretation of Rule 31.8. That rule requires that the record on appeal to consist of all documents filed in the superior court on or before the effective date of the filing of a notice of appeal. The rule does not contemplate two different actions being consolidated under one cause number, specifically when one of those actions was dismissed before the filing of the second charging document. The lack of clarity creates issues for the clerk of the court, as well as the parties to decide what gets transmitted to the Court of Appeals. Similarly, Rule 4.1 would create issues with the reporting of case dispositions. A.R.S. § 41-1751 requires every court to furnish case dispositions to the Department of Public Safety (DPS). Combining two cases into one cause number makes that difficult, if not

impossible. Consider the circumstance where a felony criminal case gets dismissed, and then refiled a year later. Under the current system, the clerk would report the disposition (dismissal) of the first case. Then, when the case is refiled, the court would issue a new cause number and the clerk could report the new disposition under the new cause number. Rule 4.1, however, could dictate a different result, with no current mechanism to accomplish it. If the first case has cause number CR 2021-123456, and gets dismissed, then the clerk of the court will report it to DPS as dismissed. DPS will then report the case as dismissed and all criminal records nationwide will show CR 2021-123456 as dismissed. If the case is refiled a year later, Rule 4.1 requires it be given the same cause number: CR 2021-123456. As a result, anybody searching criminal records will not know that there is a pending case against the defendant, as those records will show CR 2021-123456 as having been dismissed. This has the potential for making criminal history records unreliable, as no disposition that reads "dismissed" can be trusted.

4. Conclusion

While the purpose of Rule 4.1 is a valid one, the provision that any refiled case be given the same cause number as a previously filed case is not related to the purpose of the rule and causes a number of problems not contemplated by the rule. Almost all criminal justice stakeholders including the clerk of the court, sheriff's office and DPS in addition to prosecutors and defense attorneys will have to update processes, and possible computer systems to implement this local rule that gives two different cases the same identifying number. Even if those process and computer issues can be solved, the rule creates situations not contemplated by the statewide rules of criminal procedure. This will result in inconsistent rulings and needless litigation. The Maricopa County Attorney's Office strongly urges the court to immediately suspend and rewrite Rule 4.1 to remove the requirement that subsequently filed charging documents be given the same cause number. We believe that the purpose of the rule can be accomplished by requiring a notice to be filed by the State when a case is refiled, and by having the case assigned to the previously assigned judicial officer. Assigning a subsequent filing the previously assigned cause number does nothing further to accomplish the stated purpose.

Comment Number 2

MEMORANDUM

To: Dennis Carpenter

From: John Hannah
Judge, Superior Court of Arizona in Maricopa County

Subject: Proposed Amendment to Local Rule 4.1

Date: May 6, 2021

Pursuant to Supreme Court Rule 28.1(d), I respectfully submit this comment in support of the proposed amendment to Rule 4.1 of the Local Rules of Practice of the Superior Court in Maricopa County. I speak for myself, not the Superior Court as a body or court leadership.

Continuity of case assignments to individual judicial officers serves interests of fairness, consistency and judicial economy. To further these interests, the Rules of Criminal Procedure and the Maricopa County Local Rules encourage the assignment of related cases to a single judicial officer, not just at the request of the parties but also on the court's own initiative. Local Rules of Practice of the Superior Court, Maricopa County Rule 4.1(d) ("All cases pertaining to the same defendant shall be assigned to one (1) division whenever possible"); *see* Ariz. R. Crim P. 13.3(c) (court may consolidate criminal proceedings "in the interest of justice"). Conversely, the rules carefully limit the ability of the parties to effect a change of judge once they have received notice of the judicial assignment. Ariz. R. Crim. P. 10.1 and 10.2.

The Maricopa County Superior Court's current process for initiating criminal cases makes it difficult to maintain continuity of judicial assignments, and sometimes thwarts that goal entirely, when the court orders a remand to the grand jury for a new probable cause finding or the State modifies the charges in an existing case. Under existing practice, the filing of a new charging document triggers the creation of a "new case" that is given a new case number and randomly assigned to a new judge. There is, however, no mechanism for returning the case to the original judge.

As a matter of practice, most new indictments in existing cases find their way back to the previously assigned judge, by stipulation of the parties or order of the new judge. But that *ad hoc* approach creates opportunities for mistakes and, sometimes, for manipulation. The parties can effect a change of judge that the rules otherwise would not allow, simply by not informing the newly assigned judge that the case was previously assigned to a different judge. More forthrightly, one or both parties can try to persuade the new judge not to assign the case back to the original judge by observing (correctly) that the new

assignment followed the rules and no rule provides for reassignment. An aggressive litigant can prevent reassignment entirely, by filing a Rule 10.2 notice that otherwise would have been untimely.

When I brought this issue to the attention of former Maricopa County Superior Court Criminal Presiding Judge Sam Myers, we decided that the best solution would be a new local rule. Proposed Maricopa County Local Rule 4.1(g) is the result of our collaboration.

The model for the proposed rule is Pinal County Local Rule 5.4. We expanded the Pinal County rule to cover all new indictments issued in cases in which an indictment is pending, not just indictments that follow a remand, because we saw no reason not to treat those situations the same. We also sought to cover re-indictment of dismissed cases, similar to how Maricopa County Local Rule 3.1 addresses the analogous issue on the civil side.

Proposed Local Rule 4.1(g) refers to a pending or newly commenced “prosecution,” rather than a “case,” in an effort to keep the terminology consistent with the Rules of Criminal Procedure. Rule 16.4, which concerns refile after dismissal, uses the term “prosecution” in the same way. Because the proposed rule relies on the prosecuting attorney to notify the court of the pending or dismissed case upon the new case, the prosecutor will determine in the first instance what constitutes the same “prosecution” for purposes of the rule. If the defendant disagrees with the prosecutor’s determination, the defendant will have the right to file a motion requesting reassignment. A motion of that nature would be decided by the criminal presiding judge or her designee, as are other motions involving judicial assignments.

The Maricopa County Attorney’s Office has filed a comment objecting to the proposed local rule. MCAO accurately observes that, under the existing process, “all timelines reset” upon the filing of a second indictment, “and the case [is] treated as a new case.” However, nothing in the Rules of Criminal Procedure either mandates the current approach or prohibits the proposed alternative. To the contrary, the proposed rule is entirely consistent with the Rules of Criminal Procedure and the existing Local Rules.

MCAO’s assertion that the Rules of Criminal Procedure do not allow amended or superseding indictments is simply wrong. Criminal Rule 13.5(b) obliges the State to go back to the grand jury to amend an existing indictment, but nothing in Rule 13.5 or any other rule requires the court to “start a new case” upon filing the amended indictment, and no case has ever interpreted the rules that way. A superseding indictment created the issue in the case that MCAO’s comment cites, *Cesar v. Campbell*, 236 Ariz. 142, 336 P.3d 775 (App. 2014), but the case in no way suggests that the rules do not authorize superseding indictments or that the State had somehow proceeded improperly. What happened in *Cesar* was that the grand jury considering the supervening indictment “no-billed” some of the original charges, so the State *chose* to dismiss that indictment and instead tried the defendant on the original indictment. *Id.*, ¶¶ 4-6. The case holds that the law permitted the State to make that choice, not that it was required to do so. *Id.*, ¶¶ 7-14.

The existing practice of opening a new case with every new indictment is just that: a practice that developed over time in the absence of a controlling rule. That the rule may change the practice is not a reason to reject the rule. MCAO's concerns about "confusion" are overstated. We surely will be able to figure out how to order dismissal of an obsolete indictment without accidentally dismissing the whole case; and our partner agencies surely will be able to implement our orders without accidentally releasing in-custody defendants.

That a change in practice may create new legal issues is likewise not a reason to reject change. The process of addressing some of the issues on MCAO's list, such as the application of Rule 16.1(d) (prohibiting reconsideration except for good cause), may change the practice for the better. Other of those issues are merely administrative. The issue that is arguably most consequential, the application of Rule 8, is addressed in part in the rule itself. Ariz. R. Crim. P. 8.4(a)(2) (excluding delay caused by remand for new probable cause determination).¹ To the extent that Rule 8 will have to be interpreted when applied to new situations, judges will do that, just as they always do.

Finally, MCAO's alternative to the proposed rule—requiring notice to be given by the State when a case is refiled, and having the case assigned to the previously assigned judicial officer—is inadequate. The most important reason is that this approach fails to account for Rule 10.2. If the filing of an indictment "resets" the parties' rights under the rules, they have the right to "notice" the previously assigned judge. A local rule codifying MCAO's proposal could not prohibit a change of judge, because that would squarely conflict with the Rules of Criminal Procedure. Though that problem cannot be avoided entirely, proposed Local Rule 4.1(g) minimizes it by limiting the circumstances under which the prosecutor may dismiss and refile.

Proposed Local Rule 4.1(g) would create a clear rule that advances the policies expressed in the Rules of Criminal Procedure more effectively than the existing practice and makes the day-to-day administration of justice easier. The Court should approve the proposed rule change.

¹ It is worth noting that Rule 8.4(a)(2)'s existence refutes MCAO's claim that the proposed rule change would create a system "not contemplated by the criminal rules." If the drafters of the criminal rules had intended that every new indictment would start a "new case," they would not have written a rule excluding time for grand jury remands.