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10 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
11 MARICOPA COUNTY

12 STATE OF ARIZONA,
13
14 Plaintiff.

15 vs.

16 SELMON ROGERS

17 Defendant.

No: CR-2020-135320-001
CR-2020-100568-001

RESPONSE AND OBJECTION TO
MOTION FOR PARTIAL
CONSOLIDATION/ RULE 10.1
MOTION FOR CHANGE OF JUDGE
FOR CAUSE (PRESIDING
JUDGES)/

(Assigned to Hon. Peter Thompson)

(Oral Argument Requested)

21
22 Defendant, Selmon Rogers, by his attorney, Dave Erlichman, Comeback Law
23 P.C., respectfully moves the Court to deny in part, the request for Partial Consolidation
24 filed by the Judicial Branch for Maricopa County, and instead Order the appointment of
25 an impartial Special Master or Referee to hear the discovery motion and any related
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1 motions. ¹ In the event the Presiding Judge, the Hon. Joseph Welty, or the Criminal
2 Presiding Judge, the Hon. Patricia Starr, or the Associate Criminal Presiding Judge, the
3 Hon. Ronda Fisk, ("the Presiding Judges") were to grant partial consolidation of the
4 discovery motions (filed by over twenty criminal defendants with pending cases before
5 the Court), and assign themselves to hear same, then in that event, Defendant objects,
6 and moves the Presiding Judges to recuse themselves on the basis of their involvement
7 in the subject matter of the action, having in their dual role of county jury managers,
8 "personal knowledge of the facts that are in dispute in the proceeding." Defendant
9 asserts that by reason of the involvement of the Presiding Judges in the administration of
10 the jury system, he cannot receive a fair and impartial hearing on his discovery motion,
11 or in his responses to motions filed on behalf of the Judicial Branch for Maricopa
12 County (referring to itself as the "Jury Commissioner") because of the interest of the
13 Presiding Criminal Judges. Specifically, Defendant files this Response and Objection
14 and Motion for Change of Judge for Cause for the purpose of objecting to any transfer of
15 the motion, and responses, to the Presiding Criminal Judges. This Response is not
16 intended in any way to criticize or show any disrespect to the Presiding Criminal Judges
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24 ¹ Such motions include the Motion to Strike filed on April 15, 2021, by the Judicial
25 Branch for Maricopa County, said motion being filed with the trial court divisions (after
26 the filing of its Motion for Partial Consolidation). The motion asserts that Defendant's
27 discovery motion seeks to modify or overrule the prior ruling of the Presiding Criminal
28 Judge in the *Martinez* jury challenge in 2020. In fact, no collateral review of that ruling
is sought by Defendant's motion which requests specific discovery of records and
documents only, the extensive references to the prior ruling of the Presiding Criminal
Judge in the *Martinez* jury challenge being "facts" presented solely for the purpose of
supporting the discovery requests.

1 but simply to recognize the difficulty that any person in their situation would have in
2 fairly and impartially hearing a challenge implicating their own administrative
3 responsibilities. This Response and Motion for Change of Judge(s) for Cause is
4 supported by the following facts and points and authorities.
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6 Facts

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8 1. The Presiding Criminal Judge and the Assistant Presiding Criminal Judge ("Presiding
9 Judges") are interested parties in the pending motions, which interest prevents a fair and
10 impartial hearing. As the Presiding Judges have personal knowledge of the facts subject
11 to this proceeding they are interested parties and should be recused from hearing the
12 pending motions.
13

14 2. The nature of the Presiding Judges' interest in the action before the Court, relates to
15 their exercise of exclusive administrative authority (and personal knowledge of the facts)
16 pertaining to their management of the court's jury selection system through appointed
17 county officials and outsourced corporate vendors.
18

19 3. The Presiding Judge for each county are appointed by the Arizona Supreme Court
20 which has exclusive authority to administer the Superior Courts and has elected to do so
21 by its Supreme Court Rules which delegate virtually all administrative duties over the
22 operation of the county courts to the particular county's Presiding Judge.
23

24 4. Pursuant to Rule 92, Ariz. Sup. Ct R., the Presiding Judge in each county, exercises
25 general supervision over all court personnel, and general administrative supervision over
26 the court and the judges thereof, but that authority does not include the authority to
27 require other judges to make decisions in any specific way in any case.
28

1 5. Having general supervision over all court personnel, the Presiding Judge has
2 exclusive power and control of the jury system, except for whatever supervision (if any)
3 they receive from the Office of the Administrator of the Arizona Supreme Court.
4

5 6. Pursuant to Local Rule 1.2, Ariz. Super. Ct. Maricopa the court is divided into as
6 many judicial divisions as there are judges, and each division has a numerical
7 designation specified by supplemental order. The court consists of departments
8 designated by the Presiding Judge, each under the administrative authority of a
9 Department Presiding Judge selected by the Superior Court Presiding Judge, including:
10 Civil; Criminal; Family Court; Juvenile; Probate; and Tax.
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13 7. With respect to criminal cases, Local Rule 4.1 provides that the Presiding Judge shall
14 appoint one (1) of the criminal division judges as the Presiding Criminal Judge. The
15 Presiding Criminal Judge shall exercise general administrative supervision of the
16 criminal calendar.
17

18 8. With respect to its exercise of general administrative supervision of the criminal
19 calendar, and general administrative supervision over all court personnel, the Presiding
20 Judge and the Presiding Criminal Judge manage the court's jury selection system.
21

22 9. Having administrative supervision over all court personnel, the Presiding Judge and
23 the Presiding Criminal Judge, and the Associate Presiding Criminal Judge are final
24 decision-makers with respect to the day-to- day operations of the Superior Court's jury
25 selection process. In their role as managers of the jury system, the Presiding Judges do
26 not act as judicial officers, but as administrators, which could naturally, and through no
27 fault of their own, cause them to favor and support their own actions and decisions.
28

1 10. As final decision-makers with respect to jury selection matters, the Presiding Judges
2 do not function as judicial officers, but instead are county administrators (i.e "county
3 stakeholders") managing staff and entering into contracts with corporations running the
4 jury selection system.
5

6 11. Although the Presiding Judges for this motion, refer to themselves as the "Jury
7 Commissioner", in fact, as the Presiding Judges exercise general administrative
8 supervision over all court personnel, that supervision includes any "Jury Commissioner."
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10 12. The administrative decisions of the Presiding Judges are therefore "in issue" with
11 respect to the discovery requests of the criminal defendants asserting Sixth Amendment
12 fair cross section violation claims.
13

14 13. Given the conflict of interest of the Presiding Judges to hear Defendant's discovery
15 motion, the Arizona Constitution provides that judges of the superior court may appoint
16 court commissioners, masters, and referees in their respective counties, who shall have
17 such powers and perform such duties as may be provided by law or by rule of the
18 supreme court. Ariz. Const. art. VI, § 24. The Constitution does not limit the superior
19 court's authority to any particular proceeding.
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22 Argument

23 The Due Process Clause incorporated the common law rule that a judge must
24 recuse himself when they have a "direct, personal, substantial, pecuniary interest in a
25 case." This rule reflects the maxim that "no man is allowed to be a judge in his own
26 cause; because his interest would certainly bias his judgment, and, not improbably,
27 corrupt their integrity." *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 129 S.Ct.
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1 2252, 173 L.Ed. 2nd 8 (2009), *citing*, The Federalist No. 10, p 59 (J. Cooke ed. 1961) (J.
2 Madison); see Frank, Disqualification of Judges, 56 Yale L. J. 605, 611-612 (1947).

3
4 As stated by the U.S. Supreme Court in *Caperton*:

5 "[t]he difficulties of inquiring into actual bias, and the fact that the inquiry is
6 often a private one, simply underscore the need for objective rules. Otherwise there may
7 be no adequate protection against a judge who simply misreads or misapprehends the
8 real motives at work in deciding the case. The judge's own inquiry into actual bias, then,
9 is not one that the law can easily superintend or review, though actual bias, if disclosed,
10 no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that
11 personal inquiry, or on appellate review of the judge's determination respecting actual
12 bias, the Due Process Clause has been implemented by objective standards that do not
13 require proof of actual bias. *Caperton, id.* at 556 U.S. 883, *citing*, *Tumey v. Ohio*, 273
14 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25
15 Ohio L. Rep. 236 (1927). 273 U.S., at 532, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law
16 Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236; *Mayberry, supra*, at 465-466, 91
17 S. Ct. 499, 27 L. Ed. 2d 532; *Lavoie*, 475 U. S., at 825, 106 S. Ct. 1580, 89 L. Ed. 2d
18 823. In defining these standards the Court has asked whether, "under a realistic appraisal
19 of psychological tendencies and human weakness," the interest poses such a risk of
20 actual bias or prejudgment that the practice must be forbidden if the guarantee of due
21 process is to be adequately implemented." *Withrow*, 421 U.S., at 47, 95 S. Ct. 1456, 43
22 L. Ed. 2d 712.

23 Pursuant to Rule 2.11(a) of the Arizona Code of Judicial Conduct, "[a] judge
24 shall disqualify himself or herself in any proceeding in which the judge's impartiality
25 might reasonably be questioned, including but not limited to the following
26 circumstances: (1) The judge has (...) personal knowledge of facts that are in dispute in
27 the proceeding." A judge shall also disqualify himself or herself if the judge "served in
28 governmental employment, and in such capacity participated personally and
substantially as a lawyer or public official concerning the proceeding." Ariz. Code of
Judicial Conduct 2.11(a)(6). Rule 81 of the Arizona Rules of the Supreme Court, Canon
3(E)(1) provides that "A judge shall disqualify himself or herself in a proceeding in

1 which the judge's impartiality might reasonably be questioned" The test is an
2 objective one: whether a reasonable and objective person knowing all the facts would
3 harbor doubts concerning the judge's impartiality. *State ex rel Corbin v. Superior Court*,
4 155 Ariz. 560, 748 P.2d 1184 (1987); *Liljeberg v. Health Services Acquisition Corp.*,
5 486 U.S. 847, 108 S. Ct. 2194, 100 L.Ed.2d 855 (1988).
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8 As the facts of this proceeding involve the county's jury selection system which is
9 administered at the direction and under the exclusive authority of the Presiding Judges,
10 their impartiality with respect to the proceeding might reasonably be questioned (albeit
11 through no fault of their own). Moreover, the Presiding Judges , have personal
12 knowledge of the facts being raised in the discovery motion and responses and have
13 effectively served in governmental employment with respect to these issues.
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15 Accordingly, recusal of the Presiding Judges is necessary and proper.
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18 Respectfully submitted,

19 /s/ _____
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