

COURTS OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

BENNY C. BROOKS III, Et Al.

Petitioner

vs.

HONORABLE PATRICIA A. STARR  
Presiding Criminal Judge of the Superior  
Court of the State of Arizona in and for the  
County of Maricopa,

Respondent

vs.

HONORABLE RONDA R. FISK  
Associate Presiding Judge of the  
Superior Court of the State of Arizona  
in and for the County of Maricopa

Respondent

vs.

HONORABLE SUZANNE E. COHEN  
Associate Presiding Criminal Judge of the  
Superior Court of the State of Arizona  
in and for the County of Maricopa

Respondent

vs.

No. 1-CA-SA

Maricopa County Superior Court  
Case No: Benny C. Brooks III,  
CR2018-131721-001

Defendants moving to intervene in  
this Petition for Special Action  
pursuant to Rule 24, (b) (B) having  
claims that share with the  
Petitioner  
common questions of law and fact

Xavier Avina  
CR2021-145243-001

Javon Cooper  
CR2020-001972-001

Gilberto Fabela  
CR2020-103261-001

Michael Felix  
CR2019-005915-001  
CR2019-109478-001

Melvin Flowers  
CR2020-145272-001

Christopher Garcia  
CR2020-147597-002

Israel Herrera  
CR2021-106318-003

HONORABLE M. SCOTT MCCOY  
Superior Court Judge of the State of  
Arizona

Respondent

vs.

JURY COMMISSIONER OF THE  
SUPERIOR COURT OF MARICOPA  
COUNTY, JUDICIAL BRANCH OF  
ARIZONA FOR MARICOPA COUNTY

Real Party in Interest

vs.

ALLISTER ADEL,  
Maricopa County Attorney

Real Party in Interest

Ronnie Hopkins  
CR2020-145243-001

Armando Montero  
CR2021-126025-002  
CR2021-134238-001  
CR2020-109969-001  
CR2021-126025-002

Kody Parker  
CR2019-142961-002

Joe Ramirez  
CR2021-121310-003

Jovon Robinson  
CR2020-110469-001  
CR2020-105976-001  
CR2021-001253-001

Traivon White  
CR2020-122955-001

Joel Woods  
CR2020-125962-001  
CR2020-139154-001

Tarron Wooten  
CR2020-137586-002

Adonn Wright  
CR2021-142463-001  
CR2020-131909-001

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**PETITION FOR SPECIAL ACTION**

**TABLE OF CONTENTS**

TABLE OF AUTHORITES..... 4-6

JURISDICITONAL STATEMENT..... 6-10

STATEMENT OF FACTS..... 11-19

STATEMENT OF THE ISSUES..... 10-11

ARGUMENT..... 19-36

1. The doctrines of res judicata and collateral estoppel were incorrectly applied to Petitioner's criminal case as he was not given any opportunity to appear and be heard in the constitutional jury challenge in *Martinez, et* ..... 19-25

2. A Special Master should have been appointed from the outset, given the vicarious liability and apparent authority of the Respondent Presiding Judges for the errors, actions and decisions of county jury officials alleged by Petitioner.....25-34

3. The Hon. Presiding Judge Welty's ex-parte email forwarded to all court-appointed defense attorneys with county contracts, pertained to evidence in the pending discovery matter before the Presiding Criminal Judge, and accorded the Jury Commissioner (the real party in interest) a procedural or substantive and tactical advantage with respect to the weight to be given to that evidence in Petitioner's case by the Hon. Respondent Presiding Criminal Judge Starr... 34-36

CONCLUSION..... 37

## TABLE OF AUTHORITIES

Ariz. Const. Art. 6 § 3..... 30

### Cases

*Alabams Freight Co., v. Hunt*, 29 Ariz. 419, 242 P. 658 (1926)..... 31

*Arpaio v. Davis* 221 Ariz. 116, 210 P. 3d 1287 (App. Div 1 2009).....30

*Bolding v. Hantman*, 214 Ariz. 96, 148 Ariz. P.3d 1169 (App. 2006)..... 27, 28

*Campbell v. SZL Props., Ltd*, 204 Ariz. 221, 223, ¶ 9, 62 P.3d. 966  
(App. 2003)..... 23

*Caperton v A.T. Massey Coal Co.*, 556 U.S. 868, 881, 129 S.Ct. 2252,  
173 L.Ed. 2d 1208 (2009)..... 35

*Clark. v. Campbell*, 219 Ariz. 66, 193 P.3d. 320 (App. Div. 1 2008).....33, 34

*Clem v. Pinal City*, 491 P.3d 1156, 2021 Ariz. App. LEXIS 94 (2021)..... 21

*Collins v. Miller v. Miller Ltd.*, 189 Ariz. 387, 397, 943 P. 2d  
747, 757 (App. 1996).....23

*Dobson v. State ex rel., Comm'n on App. Ct. Appointments*, 233 Ariz. 119,  
1289 (2013)..... 7

*Fragoso v. Fell*, 210 Ariz. 427, 429, ¶ 3 (App. 2005)..... 7, 8, 9

*Garcia v. General Motors Corp*, 195 Ariz. 510, 514, P9, 990 P.2d.  
1069 ( 1999)..... 22, 23

*Lois Grunow Memorial Clinic v. Davis*, 49 Ariz. 277, 284, 66 P.2d 238, 241,  
(1937) ..... 30

*Kopp v. Physician Group of Ariz.* 244 Ariz. 439, 421 P.3d 149 (2018)... 29

|  |        |
|--|--------|
| <i>Medders v. Conlogue</i> , 208 Ariz. 75, 90 P.3d. 1241,1242 (App. 2004)                                | 19, 28 |
| <i>Miller v. Mason-Mcduffie Co.</i> , 153 Ariz. 585, 739 P.2d 806, (1987).....                           | 29     |
| <i>Montana v. United States</i> , 440 U.S. 147, 164, n. 11, 99 S.Ct. 970,<br>59 L.Ed. 2d 210 (1979)..... | 23     |
| <i>O'Brien v. Escher</i> , 204 Ariz. 459, P 3, 65 P.3d. 107, 108 (App. 2003).....                        | 8      |
| <i>Owens v. Kaiser Found. Health Plan</i> , 244 F.3d 708, 714 (9th Cir. 2001)...                         | 21     |
| <i>Ruesga v. Kindred Nursing Ctrs, L.L.C.</i> 215 Ariz. 589 ¶ 29, 161 P.3d<br>1253 (App. 2007).....      | 30     |
| <i>Smith v. Cigna Health Plan</i> , 203 Ariz. 173, 52 P.3d 205<br>(App. Div. 2 2002).....                | 21, 22 |
| <i>State v. Barnes</i> 118 Ariz. 200, 202, 575 P.2d 830, 832 (App. 1978).....                            | 28     |
| <i>State v. Boggs</i> , 218 Ariz. 325, 332, ¶ 25, 185 P.3d 111, 118, (2008).....                         | 19     |
| <i>State v. Ingram</i> , 239 Ariz. 228, 368 P.3d 936 (App. Div. 2 2016).....                             | 9,10   |
| <i>State v. Jeffers</i> , 135 Ariz. 404, 661 P.2d 1105 (1983).....                                       | 34     |
| <i>State v. Mincey</i> , 141 Ariz. 425,687 P.2d 1180 (1984).....   | 34     |
| <i>State v. Neil</i> , 102 Ariz. 110, 425 P.2d 842 (1967).....   | 34     |
| <i>State v. Pandeli</i> , 215 Ariz. 514, 530 161 P.3d 557, 573, (2007).....                              | 19     |
| <i>State v. Superior Court</i> , 4 Ariz. App. 562, 565, 422 P.2d 393, 396<br>(App. 1967).....            | 31,32  |
| <i>Taliaferro v. Taliaferro</i> 186 Ariz, 221, 921 P.2d 21, (1996).....                                  | 9      |
| <i>Wiggs v. City of Phoenix</i> , 198 Ariz. 367, 371, ¶ 13 (2000).....                                   | 29     |

**Articles and Reports**

|   |    |
|---|----|
| Frank, Disqualification of Judges 56 Yale L.J. 605, 611,-612 (1947).....              | 35 |
| The Federalist No. 10, p. 59, (J. Cooke ed. 1961) (J. Madison).....                   | 35 |
| Restatement (Second) of Judgments § 68.1 (c), (Tent. Draft No. 4, April 15 1977)..... | 23 |
| Restatement (Second) of Agency, § 217B, cmt.c (Am. Law Inst. 1958).....               | 29 |

**Statutes and Rules**

|  |       |
|--|-------|
| Ariz. R. P. Spec. Act. 1(a).....           | 6, 25 |
| Ariz. R. Crim. P. 10.1(a).....             | 34    |
| Rule 3 (b) Ariz. R. P. Spec. Actions.....  | 19    |
| Rule 18.4 Ariz. R. Crim P.....             | 8     |
| Rule 92 (a), (2), Ariz. Sup.Ct.....        | 33    |
| Rule 92 (b) Ariz. Sup. Ct. R.....          | 32    |
| Code of Judicial Conduct 2.11 (A) (1)..... | 35    |
| Code of Judicial Conduct R. 2.9.....       | 36    |

**JURISDICTIONAL STATEMENT**

This Court may, in its discretion, exercise jurisdiction over a special action where there is no equally plain, speedy, and adequate remedy by appeal. Ariz. R. P. Spec. Act. 1 (a). Petitioner seeks review of the Respondent Judges' rulings which have denied him any right to appear and be heard on the merits of his claim that the Maricopa County jury selection system fails to comply with the fair cross

sections requirements of the Sixth Amendment. The Respondent Judges' rulings denied Petitioner the right to consolidate his Sixth Amendment claims with a jury challenge that had been pending in another criminal case (hereinafter "*Martinez, et al.*," CR2017-150971-001). (App. 3-42) The Respondent Judges would then erroneously apply the doctrines of res judicata and/or collateral estoppel to Petitioner, denying him any opportunity to present any of his own constitutional arguments and claims in his own pending murder case. (App. 4 50-53) (App. 6-64-68)

Petitioner was never treated as a party to the *Martinez, et al.* jury challenge, did not appear in that proceeding and was given no opportunity to present evidence, or witnesses, including expert witnesses, and be heard on the merits of the issues. (App. 9 79-92). In such a situation in which a criminal defendant is being denied the right to appear and be heard on the merits of a constitutional issue, special action relief is the only available remedy as all of these due process violation issues will become moot once his trial begins. See, *Fragoso v. Fell*, 210 Ariz. 427, 429, ¶ 3 (App. 2005). See also, *Dobson v. State ex rel., Comm'n on App. Ct. Appointments*, 233 Ariz. 119, 121 ¶ 7, 309 P.3d 1289 (2013) (finding special action jurisdiction was appropriate to address purely legal questions of statewide importance. )

This Court has found special action review is “particularly appropriate” when “purely legal issues are of first impression and of statewide importance and could readily recur in other cases.” *Fragoso v. Fell*, 210 Ariz. 427, 429, ¶ 3 (App. 2005), *citing*, *O'Brien v. Escher*, 204 Ariz. 459, P 3, 65 P.3d. 107, 108 (App. 2003). The issues raised in the Petition fit these criteria. The issues are purely legal as they do not require this Court to consider any of the facts or legal arguments underlying Petitioner's constitutional claims before the trial court regarding the underrepresentation of Blacks and Hispanics from the jury selection system.

The issues presented in this Petition embrace fundamental notions of procedural due process and the power of any court in Arizona to give prospective application of its rulings to the constitutional claims of other criminal defendants asserting their right to an impartial jury. These particular legal issues have added statewide importance as effective January 1, 2022, peremptory challenges are no longer permitted in Arizona. The newly revised Rule 18.4, 'Challenges', Ariz. R. Crim. P. have left criminal defendants entirely dependent on their county's jury selection system to produce jury panels that comply with the Sixth Amendment's guarantee of impartial juries chosen from a fair cross section of the community. Accordingly, there is a need for immediate, final relief to address the serious

questions presented with the respect to the jury selection system. *Fragoso v. Fell*, 210 Ariz. at 429, ¶ 3 (App. 2005)

Consistent with denying Petitioner any right to be heard, the legal issues presented in Petitioner's Rule 10.1 motions for change of judge should also be adjudicated prior to trial to ensure Petitioner a fair proceeding. Although this case involves Rule 10.1 motions for change of judge for cause, which arguably could be heard on appeal, for the most part, appellate review of Rule 10.2 denials must always be obtained by special action, because an appeal makes no sense. *State v. Ingram*, 239 Ariz. 228, 368 P.3d 936 (App. Div. 2 2016), *Taliaferro v. Taliaferro* 186 Ariz, 221, 921 P.2d 21, (1996), *Medders v. Conlogue*, 208 Ariz. 75, 90 P.3d. 1241, 1242 (App. Div. 2 2004). As stated by the Court in *Taliaferro*, 186 Ariz. at 223, and cited in *Ingram*, "[e]rrors occurring where the trial court fails to honor the notice for a change of judge for example when the court rules that the notice is untimely when it is indeed timely, are not well suited to an appeal after final judgment." *Id.*, 239 Ariz. at 231. "Once a defendant has been convicted and sentenced, [i]t is too late in the day to be worrying about who tried the case, short of true challenges for cause." Here, although this matter is a true challenge for cause, the reasoning is essentially the same as in peremptory challenges under Rule 10.2 which since *Taliaferro*, are required to be brought by special action. *See, Ingram, supra*, 239 Ariz. ¶ 5. Having been denied all right to be heard with respect

to the jury challenge in *Martinez, et al*, Petitioners certainly wouldn't want to lose their right to appeal after conviction and judgment on the challenge for cause issue because they had failed to seek special action relief. Accordingly, on account of the due process and challenge for cause issues, special action relief is appropriate.

### **STATEMENT OF ISSUES**

1. Whether the Hon. Respondent Presiding Criminal Judge, Patricia Starr abused her discretion by applying the doctrines of res judicata and/or collateral estoppel to Petitioner, giving prospective application of her April 20, 2020 ruling in the *Martinez, et al* constitutional jury challenge to Petitioner's criminal case, when Petitioner was not given any opportunity to appear and be heard on the merits?
2. Whether the Hon. Respondent Presiding Criminal Judges proceeded without or in excess of their jurisdiction and legal authority, by refusing to disqualify themselves, when the errors and actions and policy decisions of county jury officials were being asserted by Petitioner, and were imputed to the Hon. Respondent Presiding Criminal Judges given their vicarious liability and apparent authority as managers of the county's jury officials?
3. Whether the Hon. Respondent Judge proceeded without or in excess of his jurisdiction and legal authority and or abused his discretion, by refusing to disqualify all of the Presiding Criminal Judges from hearing the case, when an ex-

parte communication made by the Hon. Presiding Judge had given substantive and tactical advantage to one of the parties to the proceeding?

### **STATEMENT OF MATERIAL FACTS**

#### **1. Petitioner was never given any opportunity to appear and be heard in the Martinez, et al jury challenge, and the ruling denying that jury challenge was prospectively applied to his case**

1. Petitioner Brooks, by Order of the Hon. John Hannah of April 13, 2020, was made a party to a consolidated jury challenge which included several criminal cases in which the defendants were all represented by the Maricopa County Public Defender's Office. (App.1-39)

2. The Presiding Criminal Judge, the Hon. Sam Myers, was assigned to the "jury challenge" when it was initiated on November 6, 2018, upon the filing of a discovery motion. (App. 2-40-41) Judge Myers conducted the first hearing on the jury challenge on January 8, 2019 (App. 2-40-41) The Hon. Patricia A. Starr then assumed her own responsibilities as Presiding Criminal Judge and would conduct all further hearings on the jury challenge which included at one point up to ten defendants all represented by the Public Defender's Office. (App. 3-42-49)

3. Petitioner's privately retained attorney ("defense counsel") had represented Mr. *Martinez* in CR2017-150971-001 (a murder case) while employed by the county as a salaried, deputy public defender, until being discharged from his position with the Public Defender's Office on September 25, 2019. (App.10-97)

4. Beginning in November 2018, defense counsel had prepared the initial discovery pleadings, and had participated in two depositions in the jury challenge, but he was not the designated lead attorney, and was given no authority as an attorney to make decisions on how it would be conducted. (App. 10-97)

5. After being discharged from his job, defense counsel had no further participation in the jury challenge and had no contact with anyone involved with it, including the defendant, defense attorneys, prosecutors, and court staff. Additionally, defense counsel was not involved in preparing any of the pleadings which were later filed including the Motion, and the Reply. (App.10-97-98)

6. The Court would not conduct any oral argument before making its ruling denying the jury challenge by Minute Entry of April 20, 2020. (App. 4-50-53)  
Petitioner and defense counsel did not receive any notice of the Respondent Judge's ruling. (App.4-50-53)

7. On January 1, 2020, defense counsel had opened his own non-publicly funded law firm, and within a matter of weeks, had been privately retained on eleven major felony cases pending in Maricopa County Superior Court. (App.5-54-63)

8. The jury challenge was still pending (with the Jury Commissioner's Response having not yet been filed) when Petitioner filed his Motion for Partial Consolidation on February 10, 2020 (App. 5-54-63)

9. In her Minute Entry of June 8, 2020, Respondent Presiding Criminal Judge Starr ruled that: "[i]n *State v. Martinez*, CR2017-150971-001, the Court entered a ruling on the consolidated Motion Challenge Juror Selection Process. Shortly before the Court entered its ruling, this Defendant's Motion to Consolidate was granted. At the time of the ruling in *Martinez, et al*, the Court was unaware of the consolidation. The Court thus notes that the ruling in *Martinez* applies to this case as well. " (App. 6-64)

10. Petitioners had filed their Motion to Compel Partial Consolidation & Demand for Evidentiary Hearing/ re: Pending Constitutional Challenge of County's Jury Selection System and Presiding Judges' Non-Compliance with Sec. 5-203 ACJA (J) (3) *Monitoring the System*. on April 16, 2020. (App. 7-69-77). The motion was filed by defense counsel on behalf of eight privately retained felony clients who were not subject to Judge Hannah's Order granting the partial consolidation. (App 7-69).

11. Petitioner's motion was filed just two business days before the Respondent Judge Starr denied the jury challenge in *Martinez, et al*, in its entirety by Minute Entry of April 20, 2020, without conducting any oral argument to consider the legal impact of Judge Hannah's ruling of April 13, 2020. (App. 1-39) (App. 4-50-53) (App. 7-69-77)

12. The Hon. Respondent Judge Starr had avowed that she was not aware of the Hon. Judge Hannah's ruling of April 13, 2020, when she made her ruling of April 20, 2020, but defense counsel had emailed a copy of Petitioner's motion to the Judge's Judicial Assistant, Kimberly Riordan, on Thursday April 16, 2020. (App. 1-39), (App. 4-50-53) (App. 8-78) The email was sent at 11:31 AM and had attached copies of the Hon. Judge Hannah's Minute Entries granting the consolidation in the three cases. Twenty-eight other prosecutors and judicial assistants received the same email at the same time. (App. 8-78)

13. On May 11, 2020, Petitioner filed his Motion to Vacate As Void Ab Initio the Presiding Criminal Judge's Minute Entry of April 20, 2020: Re Constitutional Challenge of Jury System in State v. Martinez, Et al, CR2017-150971. (App. 9-79-92) The motion specifically addressed the Respondent Judge Starr's Minute Entry of April 20, 2020 and asserted that: "the Court's Order was "void ab initio", "invalid from the outset". (App 4-50-53), (App. 9-79-92)

**2. Petitioner's Rule 10.1 motions for change of judge for cause alleged that the Presiding Judges should be disqualified from hearing the case by reason of their vicarious liability and apparent authority for the errors, actions and decisions of county jury officials and personal knowledge of the facts and ex-parte communication giving the real party in interest (Jury Commissioner) a procedural or substantive or tactical advantage**

14. On February 11, 2020, Petitioner had filed his Rule 10.1 motion for change of judge for cause and supporting affidavit. (App. 10-93-112) The motion asserted

that the Hon. Respondent, Presiding Criminal Judge Starr's administrative duties had made her interested in the subject of that proceeding, with personal knowledge of the facts, and prevented a fair and impartial hearing. (App.10-93-112)

15. Petitioner's Rule 10.1 Motion was assigned to the Hon. Respondent Ronda R. Fisk, the Associate Deputy Presiding Criminal Judge who ruled that: "the motion was premature because Defendant Brooks' Consolidation Motion was not yet addressed by the Case Management Judge. In other words, Defendant Brooks is not a party to the pending jury challenge and therefore has no standing to file the Rule 10.1 Motion. ("a party is entitled to a change of judge if the party shows that the assigned judge's interest or prejudice would prevent a fair and impartial hearing or trial." (App. 11-113-114)

16. In her Minute Entry of February 25, 2020, the Hon. Respondent Judge Fisk expressed concern that defense counsel had previously represented the defendant in the jury challenge in *Martinez, et al*, while employed as a deputy public defender, and that allowing Petitioner to consolidate his case with that jury challenge "and then seek a change of judge pursuant to Rule 10.1 would be an inappropriate end- run around the rule's clear time constraints." (App. 11-114)

17. In her Minute Entry of February 25, 2020, the Hon. Respondent Judge Fisk had summarized the procedural history of the jury challenge and emphasized the fact that while employed as a deputy public defender, defense counsel had filed the

initial discovery motion in that jury challenge on November 9, 2018, and that defendant *Martinez* had not timely filed any Rule 10.1 motion raising the issue of the Presiding Criminal Judge's administrative duties. (App. 11-113-114). The Hon. Respondent Judge Fisk did not explain in her Minute Entry why the actions of a privately retained attorney previously employed as an attorney with the Public Defender's Office could be imputed to Petitioner. <sup>1</sup> (App. 11-113-114)

18. In her Minute Entry of April 20, 2020, denying the jury challenge in *Martinez, et al*, without oral argument, the Hon. Respondent Presiding Criminal Judge Starr, had denied all relief requested by the defendants. (App. 4-50-53).

19. In its Motion to Deny as Moot, of April 28, 2020, the Maricopa County Jury Commissioner, alleged that the Respondent Judge Starr's Order of April 20, 2020, had rendered moot all of the constitutional claims of Petitioner regardless of whether he had been permitted to join the Jury Challenge or not. (App. 12-115-123)

20. On June 6, 2021, Petitioners filed his Notice of Filing of Supplemental Rule 15.1 (g) Request seeking the disclosure by the Judicial Branch of Arizona for Maricopa County, of its May 2021, Report, 'Racial and Ethnic Representation

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<sup>1</sup> As an attorney employed by the Maricopa County Public Defender's Office, defense counsel had no authority to file any Rule 10.1 Motion; all such decisions being made by "supervisors" and "managers" in that county office.

through the Jury Selection Process. An Analysis of 2019 Jury Data from the Superior Court in Maricopa County. Petitioners also sought disclosure of the Appendixes referred to in the Report. (App. 13-124) (App. 20-178-186)

21. Defendant asserted that the May 2021, Report (which was amended in July 2021) would have been included within his Petitioner's specific request disclosure set forth in his discovery motion. (App. 14-127-152) (App. 20-178-186)

22. On June 25, 2021, an attorney for "OPDS", provided defense counsel with a copy of the email sent on June 17, at 11:35 A.M. by the Hon. Presiding Judge Joseph Welty to Allister Adel, (the County Attorney), and Chris Phillis (the Director of "OPDS"). (App. 15-153-154).

23. At 11:40 AM, just five minutes after receiving the email from the Hon. Presiding Judge Joseph Welty, Ms. Phillis forwarded the email to all contract attorneys with "OPDS" (150 attorneys). Defense counsel, who is a private, non-publicly funded attorney, was not provided a copy of the email by "OPDS" until June 25, 2021. (App. 15-153-154) The anomaly mentioned in the Hon. Presiding Judge Welty's email was relevant to Petitioner's discovery motion as it was another example of a serious "glitch" in the system, proving that county jury officials were

unable to competently produce racial and ethnic statistics utilizing the county's "Crystal Reports" software.<sup>2</sup> (App.13-124) (App. 15-153-154) (App. 20-178-186)

24. The Hon. Presiding Judge Welty's email of June 17, 2021, confirmed the agency relationship existing between county jury officials with the Presiding Judges, with multiple references to the county jury officials as "our data group". (App. 15-154).

25. On June 27, 2021, Petitioner filed his Motion for Authorization for Payment by "OPDS" of Expert Witness/ Motion for Change of Judge alleging that the Hon. Presiding Judge, Welty had engaged in extra-judicial actions regarding the subject matter of the discovery motions then pending before the Court. (App. 16-155-165).

26. In his Notice of June 6, 2021, Petitioners had asserted that the Report was relevant to the pending discovery motion and had been published and made available to the public after the filing of Petitioners' discovery motion and prior to oral argument. (App. 13-123-126)

27. By Minute Entry of May 5, 2021, the Hon. Respondent Judge M. Scott McCoy, denied Petitioner's Rule 10.1 motion holding that he had failed to substantiate any

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<sup>2</sup> In 2020, the same county jury officials had made a 10,000 person duplicate counting and reporting error using the same "Crystal Reports" software which Petitioner has alleged is not part of the Supreme Court's approved AgileJury jury management software.

extra-judicial source of bias, and offered only hyperbolic and conclusory statements not proof, and did not cite to anything in the record on FTR recordings suggesting that Judge Starr should be disqualified. (App. 17-170-172)

28. By Minute Entry of September 7, 2021, the Hon. Respondent Judge Starr would also apply her ruling in *Martinez et al*, to Petitioner's Rule 15 (g) discovery requests, which had challenged and questioned the ruling in *Martinez, et al*, and had requested the Jury Office to disclose evidence of the Court's compliance with the steps it had indicated it had taken to address the various issues raised in *Martinez, et al* (App. 18-173-175 (App. 14-127-152)

### **Standard of Review**

The appellate courts review legal and constitutional challenges de novo. *State v. Boggs*, 218 Ariz. 325, 332, ¶ 25, 185 P.3d 111, 118, (2008), *State v. Pandeli*, 215 Ariz. 514, 530 161 P.3d 557, 573, (2007).

With respect to the Court's denial of Petitioner's motions for change of judge for cause, the standard is whether the Respondent Judges proceeded without, or in excess of their jurisdiction and legal authority, by denying those motions. *Medders v. Conlogue*, 208 Ariz. 75, 90 P.3d. 1241, 1242 (App. Div. 2 2004), Rule 3 (b) Ariz. R. P. Spec. Actions,

### **Argument**

**1. The Hon. Respondent Judge Starr's Minute Entry of June 8, 2020, erroneously applied the doctrines of res judicata and collateral estoppel to**

**Petitioner's pending criminal case, having prospectively applied her ruling in the *Martinez, et al*, jury challenge to Petitioner, who was never accorded a full and fair opportunity to appear and be heard on the issues presented**

The Hon. Respondent, Presiding Criminal Judge Patricia Starr's, Minute Entry of June 8, 2020, gave prospective application of the ruling denying the jury challenge in *Martinez, et al*, to Petitioner, who she believed was a non-party to that challenge, but who was in fact, a party. <sup>3</sup> (App.1-39) (App. 4-50-53 ) (App. 6-64-68). By Minute Entry of September 7 2021, the Hon. Respondent Judge Starr would also apply her ruling in *Martinez et al*, to Petitioner's Rule 15 (g) discovery requests. (App. 14-127-152) (App.18-173-175)

Petitioner had not been accorded any right to appear and be heard on the merits of the jury challenge in *Martinez et al*. (App. 9-79-92). The doctrines of res judicata "(claim preclusion) "and /or collateral estoppel ("issue preclusion") were improperly applied by the Hon. Respondent Judge Starr and have deprived Petitioner of his right to due process. The Respondent Judges' rulings have effectively silenced Petitioner, prevented from expressing any of his concerns or criticisms on the merits of the issues involved in those rulings. (App. 9-81)

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<sup>3</sup> The Court indicated in its ruling that it had been unaware that the Hon. John Hannah had granted Petitioner, Brooks' motion for consolidation with the jury challenge.

Res judicata bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action. For res judicata to apply, the two actions must share 1) an identity of claims, 2) final judgment on the merits, and 3) identity or privity between parties. *Clem v. Pinal City*, 491 P.3d 1156, 2021 Ariz. App. LEXIS 94 (2021), *citing*, *Owens v. Kaiser Found. Health Plan*, 244 F.3d 708 (9th Cir. 2001), *see also*, *Smith v. Cigna Health Plan*, 203 Ariz. 173, 52 P.3d 205 (App. Div. 2 2002). Here, the Respondent Judge Starr's ruling on the jury challenge in *Martinez, et al*, was erroneously attributed to Petitioner who had never appeared and was denied all opportunity to be heard on the merits in the prior action. The two doctrines of res judicata and collateral estoppel are "not rigidly applied and may be qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice." *supra*, *Smith*, 203 Ariz. at 179.

The Hon. Respondent Judge Starr's ruling was given "final judgment" status with respect to all discovery requests presented by Petitioner, (and all other defendants represented by defense counsel, joining this petition), including his request for the authorization for payment by the county of the Petitioner's population studies expert witness. (App. 16-155-169) (App. 18-173-175) That request was considered a request for "reconsideration" of the Court's rulings, and by denying it, the Respondent Judge Starr's ruling prevented the statistical

reporting error made by Jury Office in its May 2021 Report, to be subjected to any review and analysis by that expert witness. (App. 18-173-175) (App. 20-178-186)

The evidence shows that Petitioner had not sought reconsideration of any of the Respondent Judge Starr's rulings; but had asserted his own constitutional 6th Amendment rights. By her rulings, the Hon. Respondent Judge Starr had essentially designated her prior rulings *in Martinez, et al.* as "res judicata" on all issues included in that ruling, interpreting any legal assertion pertaining to the jury challenge as being a request for reconsideration of the prior rulings in *Martinez, et al.* (App. 6-64-68) (App. 18-173-175).

The doctrine of collateral estoppel ("issue preclusion") also was misapplied by the Respondent Judge's rulings on account of the same due process concerns. Collateral estoppel bars" the re-litigation of issues actually litigated regardless of whether the prior action is based upon the same claim as the second suit. But issue preclusion only applies when the issue has been "actually fully litigated in a previous proceeding and the parties...have had a full and fair opportunity and motive to litigate the issue. " *Smith, supra*, 203 Ariz. at 180 *citing, Garcia v. General Motors Corp*, 195 Ariz. 510, 514, P9, 990 P.2d. 1069 (1999). In *Garcia*, the Court held that: "[f]or collateral estoppel to apply, (1), the issue must have actually litigated in a previous proceeding, 2) the parties must have had a full and fair opportunity and motive to litigate the issue, 3) a valid and final decision on the

merits must have been entered, 4) resolution of the issue must be essential to the decision, 5) there must be common identity of the parties. *Id*, 195 Ariz. at 514, *citing, Collins v. Miller v. Miller Ltd.*, 189 Ariz. 387, 397, 943 P. 2d 747, 757 (App. 1996), *see, also, Campbell v. SZL Props., Ltd*, 204 Ariz. 221, 223, ¶ 9, 62 P.3d. 966 (App. 2003)

Here, although the action had been litigated in the jury challenge filed in the *State v. Martinez*, et al, with the issues briefed, none of the Petitioners had ever been a party to that proceeding, and defense counsel, while employed as a deputy public defender, had only been involved in the preliminary discovery matters in the prior jury challenge. Defense counsel had not participated in any way in the preparation of the defendants' Motion and Reply, filed by the attorneys employed by the Public Defender's Office, nor was he ever permitted to address the Court in any of the preliminary court proceedings. (App. 10-93-112) Accordingly, none of the Petitioners joining with this special action were given any ability to present evidence through documents and witnesses, or to appear and make their arguments to the Court. ("Redetermination of issues may be warranted if there is reason to doubt the quality, extensiveness, or fairness of issues followed in prior litigation."). *Montana v. United States*, 440 U.S. 147, 164, n. 11, 99 S.Ct. 970, 59 L.Ed. 2d 210 (1979), *citing*, Restatement (Second) of Judgments § 68.1 (c), (Tent. Draft No. 4, April 15, 1977.

In its pleadings, the Jury Commissioner refused to acknowledge any conflict of interest of the Respondent Presiding Judges in hearing matters related to the errors, actions and decisions of its own jury officials. The Jury Commissioner accused Petitioner of having improperly sought "horizontal appeal" of the Respondent Judge's rulings. (App.12-115-123) The Jury Commissioner contended that by filing the discovery motion in his case, (as in all the other defendants' cases represented by defense counsel) Petitioner "was arguing before other judicial officers that Judge Starr's ruling was wrong, which is a horizontal appeal in purpose and effect." (App.12-117). The Jury Commissioner's contention that Petitioner (and the other defendants joining this petition) were seeking a re-hearing from another judge of the Hon. Respondent Judge's Starr's ruling was most respectfully, not true. All defendants represented by defense counsel were also simultaneously seeking to have the Respondent Presiding Judges disqualify themselves from hearing the case with the appointment of a Special Master. The accusation by the Jury Commissioner that Petitioner was seeking an improper horizontal appeal of the Hon. Respondent Judge Starr's ruling demonstrates why the Court should never have ruled on such a disputed issue involving the actions of its own county jury officials. (App. 112-115-123)

As the doctrines of res judicata and collateral have been incorrectly applied, the Respondent Presiding Criminal Judges have respectfully engaged in "attorney

preclusion", incorrectly equating the attorney as a party to the proceeding. As the doctrines of res judicata and collateral estoppel do not apply to these facts, the Respondent Presiding Criminal Judge abused her discretion, by misapplying those doctrines to Petitioner, and has left him (and the other defendants joining this petition) with no plain, speedy, and adequate remedy by appeal, warranting the exercise of special action jurisdiction. Ariz. R. P. Spec. Act. 1(a).

**II. Given the vicarious liability and apparent authority of the Respondent Presiding Judges for the errors, actions and decisions of county jury officials, a Special Master should have been appointed from the outset**

**1. The Respondent Associate Presiding Criminal Judge Fisk's ruling denying Petitioner's Rule 10.1 motion for change of judge as premature erroneously applied the doctrines of res judicata and collateral estoppel to Petitioner.**

In her Minute Entry of February 25, 2020, the Hon. Respondent Associate Presiding Criminal Judge, Ronda Fisk, adopted the reasoning later employed by the Hon. Respondent Presiding Criminal Judge, Patricia Starr's misapplication of res judicata and or collateral to deny Petitioner any right to be heard. (App.4-50-53) (App.11-113-115). The Hon. Respondent Judge Fisk made her ruling without conducting any hearing or granting any oral argument on the motion. (App.11-113-115). The Hon. Respondent Judge Fisk made findings of fact pertaining to defense counsel's involvement as an attorney in *Martinez, et al*, without giving him any right to be heard on those disputed facts. (App. 11-113-115). In doing so, the Hon. Respondent Judge Fisk essentially engaged in "attorney preclusion" having

expressed her concerns that Petitioner had exploited his attorney's role in the *Martinez et al*, jury challenge, by improperly seeking an "inappropriate end around Rule 10.1's clear time constraints by filing his motion for change of judge." (App. 11-114)

In the Court's Minute Entry of February 25, 2020, the Hon. Respondent Judge Fisk would summarize the procedural history of the *Martinez, et al*, jury challenge and emphasize that while employed as a deputy public defender, defense counsel had filed the initial discovery motion in that jury challenge on November 9, 2018, and that defendant *Martinez* had not timely filed any Rule 10.1 motion raising the issue of the Presiding Criminal Judge's administrative duties. (App. 11-113) As defense counsel was defendant *Martinez's* deputy public defender and did not file any timely Rule 10.1 motion at that time, the Court reasoned that Petitioner (and apparently all criminal defendants privately represented by defense counsel in the future) should be bound by the failure to disqualify the Hon. Presiding Criminal Judge in November 2018. (App. 11-113-115).

But the facts relied upon by the Hon. Respondent Judge Fisk were disputed as defense counsel had represented defendant *Martinez* while employed by the county, and subject to the control and authority of his county supervisors managing the Office of the Public Defender. (App. 10-97). In her Minute Entry of February 25, 2020, the Hon. Respondent Judge Fisk did not explain how the actions of a

privately retained attorney, previously employed as an attorney with the Public Defender's Office and representing a completely different defendant could be imputed to Petitioner's case. <sup>4</sup> (App. 11-113-115)

The Hon. Respondent Judge Fisk's ruling that Petitioner's first Rule 10.1 motion was premature, is erroneous, conflicting with the holding in *Bolding v. Hantman*, 214 Ariz. 96, 148 Ariz. P.3d 1169 (App. 2006). The Court held that:" to interpret Rule 10.2 as only applying to a judge to whom an entire case is assigned would unnecessarily abrogate a defendant's right to seek a preemptory change of a judge." *Id.* ¶¶ 12, 16. The Court made clear that the term "case" in Rule 10.2 "was not limited to the case as a whole but encompasses separate motion hearings." Although *Bolding, supra*, involved Rule 10.2 and not 10.1, that difference is immaterial to the issue of whether the motion was timely, as *Bolding* held that; "here the trial court assigned the case to the respondent judge to decide a specific legal question and the respondent judge's decision was not subject to review by the trial court. Therefore we conclude the respondent judge was "assigned the case for

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<sup>4</sup> As an attorney employed by the Maricopa County Public Defender's Office, defense counsel had no authority to file any Rule 10.1 motion. All such decisions were made by supervisors and managers in that county office. In fact, defense counsel wanted to file the Rule 10.1 motion in *Martinez, et al*, but was specifically denied permission to do so. The Public Defender's Office would not allow the filing of any such motion against a fellow county stakeholder such as the Presiding Criminal Judge. (App. 10 p.5)

purposes of Rule 10.2 at the time of the contested hearing (...) and that Rule 10.2 applies by its plain language." *citing, Medders v. Conlogue*, 208 Ariz. 75, 90 P.3d. 1241, 1242 (App. 2004).

In *Bolding supra*, the Court further held that: "[a]lthough nothing in the record with which we have been provided suggests the respondent judge is in any way biased, we agree with Division One of this court that a "litigant is entitled to an impartial judge at any and all stages of the proceeding." *Id, State v. Barnes* 118 Ariz. 200, 202, 575 P.2d 830, 832 (App. 1978). *Bolding, supra*, also involved a consolidated hearing, and supports Petitioner 's right to have filed his Rule 10.1 motion challenging the Hon. Presiding Criminal Judges, upon the Hon. Respondent Judge Starr being assigned to hear Petitioner's Motion for Partial Consolidation with *Martinez, et al.*

### **3. The common law doctrine of vicarious liability required the disqualification of the Presiding Judges when the errors, actions and decisions of county jury officials were being challenged by Petitioner**

In her Minute Entry of July 9, 2021, denying Petitioner's Rule 10.1 motion for change of judge for cause, the Hon. Suzanne E. Cohen, Associate Presiding Judge ruled that; "[a]part from imputation, Defendant's only argument for disqualifying Judge Starr is a rehash of his earlier motion seeking to disqualify all presiding judges. That argument remains unpersuasive." (App. 19-176-177) The Minute Entry further states: "Petitioner offers nothing suggesting that Judge Starr

should be disqualified" (App. 19-177.) According to the Minute Entry of May 5, 2021 (App.17-170-172 of the Hon. Respondent Judge Scott McCoy, "Defendant offers only hyperbolic and conclusory statements, not proof, and does not cite to anything in the record, or FTR recordings suggesting that Judge Starr should be disqualified. " (App.17-170-172 p. 3).

Vicarious liability (also known as "derivative liability") rests solely from the principal-agent relationship. ("those whose liability is only vicarious are fault free someone else's fault is imputed to them by operation of law." *Kopp v. Physician Group of Ariz.* 244 Ariz. 439, 421 P.3d 149 (2018), *citing*, *Wiggs v. City of Phoenix*, 198 Ariz. 367, 371, ¶ 13 (2000), see also *Restatement (Second) of Agency*, § 217B, cmt.c (Am. Law Inst. 1958) (stating that "the liability of the principal cannot exist without the liability of the agent.").

In Arizona, the touchstone of apparent authority is conduct of a principal that allows a third party to reasonably conclude that an agent is authorized to make certain representations or act in a particular way. It is firmly established that if the principal's conduct creates apparent authority, the principal is subject to liability for the agent's actions even if the agent is acting for his own purposes. *Miller v. Mason-Mcduffie Co.*, 153 Ariz. 585, 739 P.2d 806, (1987). In order to hold a principal liable for an agent's acts on a theory of apparent authority, the third party must show that his reliance upon the agent's apparent authority was

reasonable. *Id.*, citing *See, e.g., Lois Grunow Memorial Clinic v. Davis*, 49 Ariz. 277, 284, 66 P.2d 238, 241-42 (1937).

Here, it is non disputed that the county jury officials are all appointed and employed by the Jury Office, which is the same entity as the Judicial Branch of Arizona for Maricopa County. The Jury Commissioner has not disputed that said county jury officials have "actual authority" to act on behalf of the Judicial Branch, the employment contracts of those county employees being direct evidence of an express contract of agency between the principal (Judicial Branch) and the agents (jury officials).<sup>5</sup> *See, Ruesga v. Kindred Nursing Ctrs, L.L.C.* 215 Ariz. 589 ¶ 29, 161 P.3d 1253 (App. 2007). It is entirely reasonable for Petitioner and all criminal defendants to conclude that the actions of county jury officials are imputed to the Judicial Branch (and therefore to the Presiding Judges).

In evaluating the principal- agent relationships of the county jury officials with the Presiding Judges, and of the Presiding Judges themselves, it is necessary to consider that Arizona's constitution provides that the Supreme Court has administrative supervision over all of the courts of the state. Ariz. Const., art. 6, § 3. *Arpaio v. Davis* 221 Ariz. 116, 210 P. 3d 1287 (App. Div 1 2009). The Supreme

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<sup>5</sup> Petitioner's motions to depose county jury officials and to depose the Presiding Judge to prove the agency relationships existing between the Judicial Branch and the county officials, and among the Presiding Judge and other Presiding Judges was denied without any oral argument.

Court's administrative powers have been channeled through the Uniform Rules of Practice of the Superior Court to the Presiding Judge in each of the counties of Arizona. *State v. Superior Court*, 4 Ariz. App. 562, 565, 422 P.2d 393, 396 (App. 1967).

In *State v. Superior Court*, the authority of Assignment Judges was at issue, which is essentially the same issue here, being the delegation of administrative authority by the Presiding Judges to the Hon. Presiding Criminal Judge, and to the Hon. Associate Criminal Judge, who is also the Assignment Judge. *Id.* 422 P.2d. at 396. In *State v. Superior Court*, the Court recognized that "**there is an essential distinction between administrative and judicial power.**" [boldface added for emphasis] *Id.*

But in her ruling of July 9, 2021, the Hon. Respondent Associate Presiding Judge Cohen, failed to recognize that there are two distinct hats worn by Presiding Judges; 1) judicial officers deciding cases, and 2) as administrators running the daily operations of the Court which includes the jury selection system. When applied to the issue of the "disqualification" of the Presiding Judges, such facts are not "conclusory statements" but proof. *See, Alabams Freight Co., v. Hunt*, 29 Ariz. 419, 242 P. 658 (1926). where the Arizona Supreme Court wrote: "[a]s to what is judicial and what is not seems to be better indicated by the nature of the thing than its definition." *Id.* 29 Ariz. at 426. Here, the "nature of the thing" is a legal

challenge by an individual criminal defendant to the errors, actions and decisions of county jury officials and the request for a Special Master to hear the case.

With respect to the administrative powers of the Court, such powers have been deemed to be delegated by the Supreme Court to the Presiding Judges. When that power is further delegated by the Presiding Judge to the Presiding Criminal Judge or Associate Presiding Criminal Judge (Assignment Judge) only the administrative authority of the Court is subject to that delegation without any increase in power or authority of such judge such as the authority to overrule judicial decisions made by other judges in cases properly assigned to them." *State v. Superior Court*, 422 P.2d at 396. The authority of the Presiding Judges is set forth in Rule 92, Ariz. Sup. Ct. R. which provides that the presiding judge in each county exercises general administrative supervision of the court and the judges of the court. In Maricopa County, such supervision includes the Hon. Respondent, Presiding Criminal Judge, and the Hon. Respondent, Associate Presiding Criminal judge, who both serve at the pleasure of the Presiding Judge and exercise and discharge all powers and duties of the presiding judge (except the associate presiding judge may not appoint court commissioners or appoint judges permanently to special assignments.) *See*, Rule 92 (b) Ariz. Sup. Ct. R.

As the Presiding Criminal Judge and the Associate Presiding Criminal, serve at the pleasure of the Presiding Judge it is an established fact that the

Presiding Judge has supervisory authority over those judges and such a reasonable conclusion from the facts is respectfully, not a "hyperbolic and conclusory statement" which Petitioner was criticized for having engaged in as stated by the Hon. Respondent Judge Scott McCoy in his Minute Entry of May 5, 2021 denying Petitioner's motion for change of judge for cause. (App.17-170-172). In fact, the administrative supervision of Presiding Judges was confirmed in *Clark v. Campbell*, 219 Ariz. 66, 193 P.3d. 320 (App. Div. 1 2008) (involving the power of the Court to impose discipline on an elected constable). In *Clark*, the Court recognized that a presiding judge is empowered to take supervisory "corrective action" when he or she determines that a court official, including an elected official is not adequately doing his or her job. *Id.* 219 Ariz. at 71. Here, the actions of unelected jury officials appointed by the Presiding Judge are subject to that Court's supervisory authority. If the Presiding Judge has the authority to discipline jury officials, then by that same actual authority, the Presiding Judge has the authority to direct and even discipline the Presiding Criminal Judge and the Associate Presiding Judge.

Included within the specific powers and duties of the presiding judge is the power to exercise general supervision of all court personnel, which would include all county jury officials. *Id.* Rule 92 (a), (2), Ariz. Sup. Ct. R. That delegation of power includes the power of control of personnel... working

directly in connection with the administration of justice. *Clark, supra*, 219 Ariz. 66, 71. The authority to operate the daily functions of the court includes the hiring and supervision of all court personnel by the Presiding Judge, and or whomever the Hon. Presiding Judge may delegate that hiring authority to.

**3. The Hon. Presiding Judge Joseph Welty's email forwarded to all court-appointed defense attorneys having county contracts, pertained to evidence in a pending discovery matter before the Presiding Criminal Judge, and contained a cautionary warning to those attorneys not to rely on that evidence and accorded the Jury Commissioner a procedural or substantive and tactical advantage with respect to the weight to be given to the evidence in Petitioner's case by the Presiding Criminal Judge**

The right to hearings presided over by a judge who is impartial and free of bias or prejudice is included within the right to a fair trial guaranteed by both the Arizona and the United States Constitutions. *See, State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180 (1984), *citing, State v. Neil*, 102 Ariz. 110, 425 P.2d 842 (1967). In order to insure this right, Ariz. R. Crim. P. 10.1(a) provides that: "[in any criminal case prior to the commencement of a hearing or trial the state or any defendant shall be entitled to a change of judge if a fair and impartial hearing or trial cannot be had by reason of the interest or prejudice of the assigned judge." It is the burden of the moving party to establish the truth of his or her allegations. *State v. Jeffers*, 135 Ariz. 404, 661 P.2d 1105 (1983). The Due Process clause incorporates the common law rule that a judge must recuse themselves when he [or she] has a direct, personal, substantial, pecuniary interest

in a case. This rule reflects the maxim that no man or woman is allowed to be a judge in their own cause, because their interest would certainly bias their judgment, and not improbably corrupt their integrity." *Caperton v A.T. Massey Coal Co.*, 556 U.S. 868, 881, 129 S.Ct. 2252, 173 L.Ed. 2d 1208 (2009), *citing*, The Federalist No. 10, p. 59, (J. Cooke ed. 1961) (J. Madison), see Frank, Disqualification of Judges 56 Yale L.J. 605, 611, 612 (1947).

In determining whether due process required the recusal of the Hon. Respondent Presiding Judges, the Court "asks not whether the judge is actually subjectively biased, but whether the average judge in his (or her) position is likely to be neutral or whether there is an unconstitutional potential for bias. *Caperton, supra*, 556 U.S. 868, 881.

As set forth in Ariz. CJC R. 2.11 (A) (1), "a judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. " Petitioner asserts that the specific facts set forth above demonstrate that the Hon. Presiding Judge Welty's communication with "OPDS" addressed a substantive matter before the Court, and that his email was forwarded within five minutes after it had been received by the Director of "OPDS" to over one hundred and fifty attorneys (with county

contracts) cautioning them not to rely upon the Report which was evidence in Petitioner's pending case. *See*, Ariz. CJC. R. 2.9. (App. 15-153-154). Such an extraordinary communication by a Presiding Judge cautioning attorneys what not to do in their legal representation on court appointed criminal cases, would clearly impact the weight to be given by the Court to the same Report which Petitioner was presenting affirmatively as evidence in the pending hearing. (App. 13-124-126.) (App. 15-153-154). Most respectfully, it is an issue of fact whether the Hon. Presiding Judge Welty had intended that his email be forwarded, but the fact that it was sent to one hundred and fifty county contract attorneys would seemingly raise a reasonable inference that it had been intended to be forwarded in that manner by the Director of "OPDS." (App.15-153-154)

Another reasonable inference to be drawn is that Petitioner's filing of his Notice of Filing of Supplemental Rule 15.1 (g) Request on June 6, 2021, had triggered the Hon. Presiding Judge Welty's email to "OPDS", instructing that agency not to allow its county attorneys to rely upon the Report. (App. 13-124-126) (App.15-154). As Defendant was specifically asking the Court to Order "OPDS" to authorize the payment of his population studies expert to analyze and assess that Report, the Court's action directly impacted a pending substantive matter before the Court. (App.13-124-126) (App.15-154).

## **Conclusion**

For the foregoing reasons, the Court should accept jurisdiction and grant special action relief and vacate the rulings denying Petitioner the right to appear and be heard with respect to the *Martinez, et al*, jury challenge, which proceeding should resume and be heard by a Special Master appointed by the Court.

Dated: January 17, 2022

Respectfully submitted,

/s/ \_\_\_\_\_  
Signed electronically: DE  
Dave Erlichman  
Attorney for Benny C. Brooks,