

1 **Law Office of**
2 **REBECCA R. JOHNSON**
3 P.O. Box 469
4 616 S. Eighth Avenue
5 Safford, AZ 85548
6 (928) 428-7323
7 State Bar No: 24182

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

9 In Re the Matter of:)
10 R-21-0006 Petition to Amend Various) COMMENT
11 Rules of Procedure Related to the)
12 Peremptory Change of Judge.)
13

14 It appears that COVID-19, and the Arizona Supreme Court’s reaction to it,
15 likely may have been the catalyst for the introduction of “R-21-0006 Petition to Amend
16 Various Rules of Procedure Related to the Peremptory Change of Judge.” On May 8th,
17 2020, Rule 10.2 of the Arizona Rules of Criminal Procedure was suspended with
18 Administrative Order No. 2020-75 (and subsequently kept suspended through
19 December 31st, 2020 with Administrative Order No. 79, 114, 143, 177, and 197). The
20 suspension of Rule 10.2 cause criminal defendants to lose the ability to change their
21 judge – one time – as a matter of right. As a result, Arizona judges enjoyed a
22 theoretically streamlined calendar, and criminal defendants suffered from their
23 diminished due process rights.
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1 **I. Due Process**

2 Rule 10.2 is necessary to secure due process rights for criminal defendants. The
3 due process requirements of the Fifth Amendment and the right to a fair trial in the
4 Sixth Amendment have not been abrogated, regardless of the aftereffects of a
5 pandemic. A defendant is entitled to a judge who both is – and who appears to be –
6 fair and impartial. *State v. Carver*, 160 Ariz. 167, 172 (1989). A judge has a “positive
7 obligation . . . not only to be impartial, but **to be seen to be impartial.**” *Id.* (emphasis
8 added); *see also State v. Brown*, 124 Ariz. 97, 99–100 (1979); *In re Haddad*, 128 Ariz. 490,
9 498 (1981) (“A judge . . . must not only strive to insure fair treatment toward every
10 individual who appears before him, but he must also present the appearance of
11 fairness and probity in his behavior as a judicial officer. If that appearance falters, the
12 confidence of the public will naturally wane.”).

13 The pandemic suspension of Rule 10.2 was a state action. And a state action
14 cannot overcome due process – a truism so obvious that Arizona courts have never
15 clearly stated it. We must rely, then, on the United States Supreme Court to elaborate.
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17 The establishment of prompt efficacious procedures to achieve
18 legitimate state ends is a proper state interest worthy of cognizance in
19 constitutional adjudication. But the Constitution recognizes higher values
20 than speed and efficiency. Indeed, one might fairly say of the Bill of Rights
21 in general, and the Due Process Clause in particular, that they were
22 designed to protect the fragile values of a vulnerable citizenry from the
23 overbearing concern for efficiency and efficacy that may characterize
24 praiseworthy government officials no less, and perhaps more, than
25 mediocre ones.

26 Procedure by presumption is always cheaper and easier than
27 individualized determination.
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1 *Stanley v. Illinois*, 405 U.S. 645, 656–57 (1972). *See also Reed v. Reed*, 404 U.S. 71, 76 (1971);
2 *Carrington v. Rash*, 380 U.S. 89, 96 (1965).

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4 In this time of uncertainty about whether the pandemic management by state
5 courts nationwide will affect the criminal-justice system, Jessica Roth, law professor at
6 Cardozo School of Law, writes for The Atlantic about how the constitutional rights of
7 criminal defendants have been “put on hold.” Jessica A. Roth, *The Constitution is On*
8 *Pause in America’s Courtrooms*, The Atlantic (Oct. 10, 2020).¹ Roth posits that if the courts’
9 case management during the pandemic are found not to be “consistent with
10 constitutional rights and principles core to the American criminal-justice system,” then
11 “convictions obtained pursuant to the new procedures may be unfair and vulnerable to
12 reversal on appeal.” *Id.*

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15 Because the wheels of justice turn slow and the COVID-19 pandemic is little
16 more than a year old, there is scant case law upon which to rely regarding due-process-
17 appropriate pandemic measures. One district court in the United States District Court of
18 Nevada upheld a magistrate’s analysis stating: “In this extraordinary setting of COVID
19 19, the Court errs on the side of due process” *United States v. Randall*, Case No. 2:18-
20 CR-303 JCM (EJY) (D. Nev. May 8, 2020).

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23 “To sustain a due process claim, a plaintiff must demonstrate a protected liberty
24 or property interest.” *Baker v. Arizona Dept. of Revenue*, 209 Ariz. 561, 567 ¶ 25 (App.
25 2005). There is a liberty interest in having a neutral arbiter. *State v. Hill*, 174 Ariz. 313,
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¹ <https://www.theatlantic.com/ideas/archive/2020/10/constitution-pause-americas-courtrooms/616633/>.

1 326 (1993) (“Both the Arizona and United States Constitutions guarantee the right to an
2 impartial judge, free of bias and prejudice, within the right to a fair trial.”); *Ward v. Ohio*,
3 409 U.S. 57, 61–62 (1972) (“Petitioner is entitled to a neutral and detached judge in the
4 first instance.”); *State v. Granados*, 235 Ariz. 321, 325 ¶¶ 8–11 (App. 2014); *State v. Reid*,
5 114 Ariz. 16, 21 (1976) (“[A] defendant in a criminal case [is] entitled, as a constitutional
6 right, to an impartial (and independent) judge”); Ariz. R. Crim. P. 1.2 (“Courts . . .
7 should construe these rules to secure . . . fairness in administration . . . and to protect the
8 fundamental rights of the individual”).

11 Due process is the foundation upon which the following arguments are built.

12 It is a legal fiction that judges are assumed to be without bias. Judges are human
13 and, as such, have implicit biases. “A syllogism: All sentient humans have learned,
14 implicit biases, all judges are sentient human beings, ergo, all judges have implicit
15 biases.” Hon. James M. Redwine, *You’re biased, I’m biased. So what are we judges going to*
16 *do about it?*, The National Judicial College (June 25, 2008).² Rule 10.2 allows litigants and
17 their counsel to gracefully and delicately disengage a judge if he or she has a general
18 track record that seems that it might favor one side over another.

22 II. Outlying Counties

23 Earlier this year, an Arizona judge³ reviewed a motion for change of judge for
24 cause that was filed last December. In his decision denying the motion, he referenced
25 the small size of a county as a basis for the decisions not to reassign a judge because of
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28 ² <https://www.judges.org/news-and-info/youre-biased-im-biased-sowhat-are-we-judges-going-to-do-about-it/>

³ Judge X for the sake of simplicity and anonymity.

1 fewer judicial resources. A defendant who happens to find himself charged in a small
2 county should not be afforded fewer or reduced due process rights merely because
3 there is only one judge. The fact that there is only one judge should instead prompt
4 smaller jurisdictions to carefully protect the right to a change of judge and not steamroll
5 it under the guise of economy – merely because it is more procedurally difficult to
6 effectuate.
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9 In the balance between judicial economy and due process, judicial economy
10 should not – must not – wholly trump due process. Another truism so obvious that it is
11 almost never stated out loud, at least not in Arizona courts. Finding cases that support
12 obvious truisms is difficult. We must look outside of Arizona.

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14 Here, a sampling of states. *Boyle v. O'Bannon*, 500 Pa. 495, 499 (1983) (“Due
15 process cannot be abolished to achieve judicial efficiency and convenience.”); *Pizza Hut*
16 *of America, Inc. v. Kesler*, 254 Ga. 360, 361 (1985) (“Due process must be preserved at the
17 expense of judicial economy.”); *State v. Townes*, 941 S.W.2d 756, 758 (Mo. App. 1997)
18 (“Due process of law requires that the defendant's right to a fair trial must be given
19 priority over considerations of expense, efficiency and convenience.”); *In re Boyo*, 143
20 S.W.3d 472, 473 n.1 (Tex. App. 2004) (“[W]e must not sacrifice due process for judicial
21 economy.”); *People v. Morrison*, 66 N.Y.S.3d 682 (App. Div. 2017) (citing *Gutierrez v.*
22 *Superior Court*, 24 Cal.App.4th 153, 169–170 (App.2d Dist. 1994), cert. denied, 514 U.S.
23 1049 (1995)) (“the pursuit of judicial economy and efficiency may never be used to deny
24 a defendant . . . a fair trial,”); *State v. Johnson*, 128 So.3d 325, 329 (La. App. 2013) (“[A]
25 defendant's due process rights should not yield to equitable considerations of judicial
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1 economy.”); see also *State v. Elkins*, 77 N.E.3d 360, 365 ¶ 15 (Ohio App. 2016); *Breed v.*
2 *Jones*, 421 U.S. 519, 537 (1975).

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4 Temporarily abrogating Rule 10.2 as a reaction to a pandemic prioritized judicial
5 economy over due process. This was an error. Justice in a pandemic should be
6 substantively similar to justice before a pandemic began or after it is over.

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8 Several of the outlying Arizona counties have only one superior court judge. *How*
9 *Arizona Courts Are Organized*, Arizona Judicial Branch (June 30, 2018).⁴ Maricopa County
10 has 98 superior court judges. *Id.* If a Maricopa County Superior Court judge makes any
11 statements indicating even the mildest prejudice and the defendant moves for a change
12 of judge for cause, there are numerous other Maricopa superior court judges who are
13 available to act as the settlement court judge. Even in the unlikely scenario that all the
14 other 97 Maricopa County judges have dockets too busy to handle one more criminal
15 case, there are 111 full- and part-time pro tem judges, commissioners, and hearing
16 officers available in the Superior Court to act as a settlement court judge. *Id.* Case
17 transfers from one county to another county happen all the time. Maricopa should bear
18 the load and share judicial resources with outlying counties in order that criminal
19 defendants keep all their due process rights.
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23 If the petition is approved, outlying counties will be subject to one judge – in
24 every matter – despite counsel’s knowledge that the singular elected judge would not
25 be a suitable judge in a particular case. Recall the originating example. Judge X denied
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⁴ <https://www.azcourts.gov/guidetoazcourts/HowArizonaCourtsareOrganized.aspx>.

1 the motion for a change of judge for cause because of *perceived* limited judicial resources
2 in an outlying county. That he did so relegated that outlying county to a “second class
3 citizen” county – not deserving of the same due process rights afforded to a defendant
4 in the most populous county.
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6 **III. Rule 10.1**

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8 Rule 10.2 is necessary because reviewing judges and appellate courts bend over
9 backwards to deny a Rule 10.1 motion. For example, in one specific case, defense
10 counsel felt there were some concerns with the superior court judge and filed a Motion
11 for Change of Judge for Cause. At the hearing on that motion, the State took no
12 position. The reviewing judge could have – but did not – read between the lines of the
13 State’s position; the reviewing judge issued an Under Advisement Ruling finding no
14 prejudice. Still concerned about the issue, defense counsel filed a special action petition.
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17 The Court of Appeals asked for briefing. From the State’s response:

18 “The State agrees in principle with the Appellant’s position in this Special
19 Action and requests that the Court issue an order granting relief.”⁵

20 “The State acknowledges that the Statement of Facts recited in Appellant’s
21 Opening Brief on this Special Action is accurate, upon information and
22 belief.”

23 “[T]he State does concede that Appellant’s argument appears to the State to
24 be legally and factually accurate, and the State does agree that Appellant’s
25 position about Rule 10.1 . . . should be the legally correct analysis.”


26 The Court of Appeals also took an unusual step and asked for the audio of the
27 pertinent hearings cited in the petition. Then – a month and a half later – declined to

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⁵ When was the last time the State agreed with a defendant on anything? Much less the issue of a judge exhibiting prejudice?

1 accept jurisdiction. In other words, both the State and a criminal defendant can agree
2 that the superior court judge has exhibited prejudice, agree that a new judge should be
3 assigned, follow all the rules of procedure to oust the judge, including taking it up to
4 the Court of Appeals – and it will not matter. In sum, Rule 10.1 is toothless.
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6 Rule 10.2 is necessary because Rule 10.1 is simply window dressing.
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9 Dated this 3rd day of May 2021.
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13 Rebecca R. Johnson,
14 Attorney for Defendant
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