FARHANG & MEDCOFF

ATTORNEYS

A Juror's Perspective: A Presentation on the Jury Deliberation in *State v. Baron*

When: February 29, 2024 at 12:00 p m - 1:00 pm

Where: Farhang & Medcoff, PLLC
100 S. Church Ave., Ste. 100, Tucson, AZ 85701

Please **RSVP** by February 26, 2024:
https://forms.gle/kJSn1o4WQQSqqHce7

A FREE CLE Presented by Jessica Gold, PhD

1 Hour of CLE Credit
for attorneys and paralegals is offered with this event.

Lunch Provided

SCHEDULE

- 12:00-12:10
  - Introduction/Legal Background by Tyler Bugden
- 12:10-12:55
  - Presentation by Jessica Gold, PhD
- 12:55-1:00
  - Questions

JESSICA GOLD, PhD

Jessica Gold served on the Jury in *State v. Baron*. She is a sociologist, who focuses on gender and racial inequality in organizations. Her research is characterized by a mixed-methods approach, combining computational text and network analysis, quantitative statistical methods, and qualitative interviews. Dr. Gold is currently based in Tucson, AZ as a (remote) Associate Research Scientist at Northeastern University in the Sociology department and a Visiting Virtual Scholar at the ARC Network. She received a BA in Sociology from the College of William and Mary and a PhD in Sociology from the University of California, Davis. She is committed to advancing social justice through her research and outreach activities.

TYLER BUGDEN

Tyler Bugden represents individuals and companies in all phases of litigation in state and federal courts, with a focus on complex commercial litigation. Prior to joining Farhang and Medcoff PLLC, Tyler spent two years clerking for federal judges, first for Chief Judge Robert J. Shelby on the District of Utah, and then for Magistrate Judge Thérèse Wiley Dancks on the Northern District of New York. Tyler spent a year between the two clerkships successfully representing clients on appeal in New York. Tyler's appellate work resulted in the reversal of three criminal convictions, two before the Appellate Division, Fourth Department, and another one before the Court of Appeals. Tyler is licensed to practice law in Arizona, Colorado, Idaho, New York, Utah, and Wyoming.

EXHIBIT A

SUPREME COURT OF ARIZONA

In the Matter of RULES 18.4 AND 18.5, RULES OF CRIMINAL PROCEDURE AND RULE 47(e), OF THE ARIZONA RULES OF CIVIL PROCEDURE	Arizona Supreme Court No. R-21-0020 **FILED 8/30/2021**

ORDER AMENDING RULES 18.4 AND 18.5 OF THE RULES OF CRIMINAL PROCEDURE, AND RULE 47(e)OF THE RULES OF CIVIL PROCEDURE

A petition having been filed proposing to eliminate peremptory challenges in jury selection in criminal and civil trials, and comments having been received, upon consideration,

IT IS ORDERED that Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, are amended in accordance with the attachment to this order, effective January 1, 2022.

IT IS FURTHER ORDERED that these amendments shall be applicable to all cases in which the first day of jury selection occurs after January 1, 2022.

DATED this 30th day of August, 2021.

/s/
ROBERT BRUTINEL
Chief Justice

TO:

Rule 28 Distribution
Peter B Swann
Paul J McMurdie
Timothy J Casey
Brian Snyder
James M Schoppmann
Charles W Gurtler Jr
William H Sandweg III
Kip Anderson
Hon John David Napper, Presiding Judge
Victor A Aronow
Paul J McGoldrick
Benjamin Taylor
Hon Bruce R Cohen, Judge
Jay M Polk
Elizabeth Burton Ortiz
Lisa M Panahi
Mikel Steinfeld
Andrew Jacobs
Marsha Cotton
Michael E Bradford
Cory E Tyszka
J Russell Skelton
Kent J Hammond
Nicholas Klingerman
Kenneth N Vick
Claudia E Stedman
Barry D Halpern
Brett William Johnson
Tracy Olson
David J Euchner

ATTACHMENT[1]

RULES OF CRIMINAL PROCEDURE

Rule 18.4. Challenges

(a) [No change]

(b) Challenge for Cause. ~~On motion or on its own, the court must~~ The court, on motion or on its own, must excuse a prospective juror or jurors from service in the case if there is a reasonable ground to believe that the juror or jurors cannot render a fair and impartial verdict. A challenge for cause may be made at any time, but the court may deny a challenge if the party was not diligent in making it.

~~**(c) Peremptory Challenges.**~~

~~(1) *Generally*. The court must allow both parties the following number of peremptory challenges:~~

~~(A) 10, if the offense charged is punishable by death;~~

~~(B) 6, in all other cases tried in superior court; and~~

~~(C) two, in all cases tried in limited jurisdiction courts.~~

~~(2) *If Several Defendants Are Tried Jointly*. If there is more than one defendant, each defendant is allowed one-half the number of peremptory challenges allowed to one defendant. The State is not entitled to any additional peremptory challenges.~~

~~(3) *Agreement Between the Parties*. The parties may agree to exercise fewer than the allowable number of peremptory challenges.~~

COMMENT [No change]

Rule 18.5. Procedure for Jury Selection

(a) [No change]

(b) Calling Jurors for Examination. The court may call to the jury box a number of prospective jurors equal to the number to serve plus the number of alternates ~~plus the number of peremptory challenges that the parties are permitted~~. Alternatively, and at the court's discretion, all members of the panel may be examined.

(c)-(d) [No change]

(e) Scope of Examination. The court must ensure the reasonable protection of the prospective jurors' privacy. Questioning must be limited to inquiries designed to elicit

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[1] Additions to the text of the rule are shown by underscoring and deletions of text are shown by ~~strike-through~~.

information relevant to asserting a possible challenge for cause ~~or enabling a party to intelligently exercise the party's peremptory challenges~~.

(f) Challenge for Cause. Challenges for cause must be on the record and made out of the hearing of the prospective jurors. The party challenging a juror for cause has the burden to establish by a preponderance of the evidence that the juror cannot render a fair and impartial verdict. If the court grants a challenge for cause, it must excuse the affected prospective juror. If insufficient prospective jurors remain on the list, the court must add a prospective juror from a new panel. ~~All challenges for cause must be made and decided before the court may call on the parties to exercise their peremptory challenges.~~

(g) Stipulation to Remove a Prospective Juror. The parties may stipulate to the removal of a juror. ~~**Exercise of Peremptory Challenges.** After examining the prospective jurors and completing all challenges for cause, the parties must exercise their peremptory challenges on the list of prospective jurors by alternating strikes, beginning with the State, until the peremptory challenges are exhausted or a party elects not to exercise further challenges. Failure of a party to exercise a challenge in turn operates as a waiver of the party's remaining challenges, but it does not deprive the other party of that party's full number of challenges. If the parties fail to exercise the full number of allowed challenges, the court will strike the jurors on the bottom of the list of prospective jurors until only the number to serve, plus alternates, remain.~~

(h) Selection of Jury; Alternate Jurors.

(1) *Trial Jurors.* After ~~the completion of the procedures in (g)~~ the court has resolved any challenges for cause, the prospective jurors remaining in the jury box or on the list of prospective jurors constitute the trial jurors.

(2)-(3) **[No change]**

(i) Deliberations in a Capital Case. [No change]

COMMENT [as amended 2022]

Rule 18.5(b). [No change to the first two paragraphs of the comment]

The struck method calls for all of the jury panel members to participate in voir dire examination by the judge and counsel. Following disposition of the for cause challenges, ~~the juror list is given to counsel for the exercise of their peremptory strikes. When all the peremptory strikes have been taken and the court has resolved all related issues under *Batson v. Kentucky*, 476 U.S. 79 (1986),~~ the clerk calls the first 8 or 12 names, as the law may require, remaining on the list, plus the number of alternate jurors thought necessary by the judge, who become the trial jury.

Rule 18.5(d). [No change to comment]

RULES OF CIVIL PROCEDURE

Rule 47. Jury Selection; Voir Dire; Challenges

(a)-(b) [No change]

(c) Voir Dire Oath and Procedure.

(1)-(2) **[No change]**

(3) *Extent of Voir Dire.*

(A) **[No change]**

(B) Extent of Questioning. Voir dire questioning of a jury panel is not limited to the grounds listed in Rule 47(d) and may include questions about any subject that might disclose a basis for the exercise of a <u>for cause</u> ~~peremptory~~ challenge.

(d) [No change]

~~**(e) Peremptory Challenges.**~~

~~(1) *Procedure*. When the voir dire is finished and the court has ruled on all challenges for cause, the clerk will give the parties a list of the remaining prospective jurors for the exercise of peremptory challenges. The parties must exercise their challenges by alternate strikes, beginning with the plaintiff, until each party's peremptory challenges are exhausted or waived. If a party fails to exercise a peremptory challenge, it waives any remaining challenges, but it does not affect the right of other parties to exercise their remaining challenges.~~

~~(2) *Number*. Each side is entitled to 4 peremptory challenges. For this rule's purposes, each action--whether a single action or two or more actions consolidated for trial--must be treated as having only two sides. If it appears that two or more parties on a side have adverse or hostile interests, the court may allow them to have additional peremptory challenges, but each side must have an equal number of peremptory challenges. If the parties on a side are unable to agree on how to allocate peremptory challenges among them, the court must determine the allocation.~~

~~(f)~~ <u>(e)</u> Alternate Jurors.

(1)-(4) **[No change]**

~~(5) *Additional Peremptory Challenges*. In addition to the peremptory challenges otherwise allowed by law, each side is entitled to one peremptory challenge if one or two alternate jurors will be impaneled, two peremptory challenges if 3 or 4 alternate jurors will be impaneled, and 3 peremptory challenges if 5 or 6 alternate jurors will be impaneled.~~

COMMENT [as amended 2022]

1995 Amendment to Rule 47(a) and (e)
[Formerly Rule 47(a)]

[No change to the first two paragraphs of the comment]

The "struck" method calls for all of the jury panel members to participate in voir dire examination by the judge and counsel. Although the judge may excuse jurors for cause in the presence of the panel, challenges for cause are usually reserved until the examination of the panel has been completed and a recess taken. Following disposition of the for cause challenges, ~~the juror list is given to counsel for the exercise of their peremptory strikes. When all the peremptory strikes have been take, and all legal issues arising therefrom have been resolved~~, the clerk calls the first eight names remaining on the list, plus the number of alternate jurors thought necessary by the judge, who shall be the trial jury.

~~COMMENT~~

~~1961 Amendment to Rule 47(e)~~
~~[Formerly Rule 47(a) (3)]~~

~~[Rule 47(e) (formerly Rule 47(a)(3)] now compels the plaintiff to exercise all of his peremptory challenges prior to the defendant. The amended rule provides that the parties shall exercise their peremptory challenges alternately. Under the present rule, while the plaintiff receives the same number of peremptory challenges as the defendant, the order of exercising them resulted in an obvious inequity. The purpose of the proposed rule is to eliminate the inequity by giving both parties peremptory challenges which are not only equal in number but also in practical weight and value.~~

EXHIBIT B

SUPREME COURT OF ARIZONA

In the Matter of RULES OF CRIMINAL PROCEDURE 16.3, 18.3, 18.4, & 18.5; RULES OF CIVIL PROCEDURE 16 & 47; JUSTICE COURT RULE OF CIVIL PROCEDURE 134; RULE OF PROCEDURE FOR EVICTION ACTIONS 12	Arizona Supreme Court No. R-21-0045 **FILED: 12/8/2021**

ORDER ADOPTING ON AN EMERGENCY BASIS AMENDMENTS TO RULES 16.3, 18.3, 18.4, AND 18.5, RULES OF CRIMINAL PROCEDURE; RULES 16 AND 47, RULES OF CIVIL PROCEDURE; RULE 134, JUSTICE COURT RULES OF CIVIL PROCEDURE; AND RULE 12, RULES OF PROCEDURE FOR EVICTION ACTIONS

On August 24, 2021, this Court entered an order in R-21-0020 abolishing peremptory strikes in jury selection in the courts of the State of Arizona effective January 1, 2022. At the same time, the Court wished to assess whether additional changes might be appropriate in other rules governing jury selection in light of the abolition of peremptory strikes. This Court referred that responsibility to the Task Force on Jury Data Collection, Practices, and Policies, chaired by The Hon. Pamela S. Gates, with a request that the Task Force submit recommendations by November 1, 2021. A subgroup of members of the Task Force agreed to participate on the Statewide Jury Selection Workgroup ("SJSW") for the purpose of reviewing the

various sets of Arizona court rules to assess whether additional changes may be appropriate.

On November 23, 2021, Judge Gates filed a petition on behalf of the SJSW pursuant to Rule 28, Rules of the Supreme Court of Arizona, requesting expedited consideration and emergency adoption of proposed changes to the captioned rules. *See* Rule 28(h), Rules of the Supreme Court. Having considered the petition,

IT IS ORDERED, pursuant to Rule 28(h)(2), Rules of the Supreme Court of Arizona, that Rules 16.3, 18.3, 18.4, and 18.5, Rules of Criminal Procedure, Rules 16 and 47, Rules of Civil Procedure, Rule 134, Justice Court Rules of Civil Procedure, and Rule 12, Rules of Procedure for Eviction Actions, are amended on an emergency basis in accordance with the amendments shown on the attachment to this order, effective January 1, 2022.

IT IS FURTHER ORDERED that, pursuant to Rule 28(h)(2), Rules of the Supreme Court of Arizona, this matter shall be opened for public comment as to whether these amendments should be adopted permanently, with comments due by no later than May 1, 2022 and any reply due no later than June 1, 2022. The Court will consider this issue at its August 2022 Rules Agenda.

Rule petitions, including this one, may be viewed by going to: http://www.azcourts.gov/Rules-Forum. This opens the

"Welcome" page. Petitions are posted under the appropriate body of rules, for example, Rules of Criminal Procedure, which can be found by scrolling down the page.

For instructions on how to post comments electronically, follow the steps listed above and click on "FAQ" at the top of the "Welcome" page and then find "How do I file a comment on a Rule 28 petition?"

Alternatively, commenters may submit a comment by filing an original and one paper copy of the comment and one electronic copy of the written comment and any supporting documents in Microsoft Word format on a CD or other compatible electronic medium with the Clerk of the Supreme Court, 1501 West Washington St., Room 402, Phoenix, Arizona 85007, in an envelope marked "Rule Comment."

Any person filing a comment must send a copy of the comment to the Petitioner electronically or by ordinary mail.

DATED this 8th day of December, 2021.

______/s/________________________
ROBERT BRUTINEL
Chief Justice

TO:

Rule 28 Distribution
The Hon. Pamela S Gates

ATTACHMENT[1]

RULES OF CIVIL PROCEDURE

Rule 16. Scheduling and Management of Actions

(a) – (c) [No change]

(d) Scheduling Conferences. On a party's written request the court must—or on its own the court may—set a Scheduling Conference. At any Scheduling Conference under this Rule 16(d), the court may:

(1) – (18) **[No change]**

~~(19) discuss any time limits on trial proceedings, juror notebooks, brief pre-voir dire opening statements, and preliminary jury instructions, and the effective management of documents and exhibits;~~

~~(20)~~(19) determine how a verbatim record of future proceedings in the action will be made; and

~~(21)~~(20) discuss other matters and enter other orders that the court deems appropriate.

(e) Trial-Setting Conference.

(1) *Generally*. **[No change]**

(2) *Subject Matter*. In addition to setting a trial date, the court may discuss at the Trial-Setting Conference:

(A) – (C) **[No change]**

(D) ~~using juror questionnaires~~ the areas of inquiry and specific questions to be asked by the court and the parties during voir dire, including any limitations on written or oral examination and whether to permit the parties to give brief pre-voir dire opening statements;

(E) **[No change]**

(F) giving ~~brief pre-voir dire opening statements and~~ preliminary jury instructions;

(G) – (H) **[No change]**

[1] Additions to text are indicated by underscoring and deletions are shown by ~~strike-through~~.

(f) Joint Pretrial Statement; Trial Management Conference.

(1) – (3) **[No change]**

(4) *Additional Documents to File if Trial Is to a Jury*. If the trial is to a jury, the parties must--on the same day they file the Joint Pretrial Statement—file:

(A) an agreed-on set of jury instructions, verdict forms, questions for a case-specific written questionnaire, and questions for oral voir dire ~~questions~~; and

(B) any additional jury instructions, verdict forms, questions for a case-specific written questionnaire, and questions for oral voir dire ~~questions~~, but not agreed on.

(5) – (8) **[No change]**

(g) – (j) [No change]

COMMENTS

[No change]

* * *

Rule 47. Jury Selection; Juror Information; Voir Dire; Challenges

(a) Jury Selection. [No change]

(b) Juror Information.

(1) *Personal Information*. Before jury selection and oral voir dire examination starts, the clerk must provide the parties with the following information for each prospective juror: name, zip code, employment status, occupation, employer, residency status, education level, prior jury experience, and felony conviction status. ~~The clerk must keep all prospective jurors' home and business telephone numbers and addresses confidential and may not disclose them unless good cause is shown.~~

(2) *Confidentiality of Eligibility and Biographical Information*. The clerk must obtain and maintain juror information in a manner and form approved by the Supreme Court as set forth in statute, rule, Administrative Code, or Administrative Order, and this information may only be used for the purpose of jury selection. The clerk must keep all jurors' home and business telephone numbers and addresses confidential and may not disclose them unless good cause is shown.

~~(2)~~(3) *Confidentiality of Case-Specific Written Questionnaires*. All completed case-specific written questionnaires must be filed under seal. If the ~~The~~ court ~~may order~~ requires prospective jurors to complete a case-specific written questionnaire, it must maintain any completed case-specific written

questionnaires in a manner and form approved by the court as part of the case file ~~prepared by the parties and submitted to the court for approval before trial~~. Before conducting oral voir dire, ~~Unless the court orders otherwise, the clerk must provide~~ the prospective jurors' responses to the case-specific written questionnaires must be provided to each party by the clerk or court. ~~copies of any such juror questionnaire and answers to the parties and their respective counsel~~. Any party or counsel receiving a copy of ~~the~~ responses to the case-specific written questionnaires ~~questionnaire and answers must keep the information strictly confidential and~~ must not disclose the information to the public and may disclose the information only to the extent necessary for the proper conduct of the case. When jury selection is ~~done~~ completed, each recipient must destroy or return to the court all copies of the ~~juror~~ responses to the case-specific written questionnaires ~~and answers to the clerk.~~

(c) Voir Dire Oath and Procedure.

(1) *Voir Dire Affirmation and Oath*. Each prospective juror must swear or affirm that the answers provided in response to the case-specific written questionnaires are truthful. Before oral voir dire, ~~The~~ each prospective juror~~s~~ must take an oath administered by the clerk ~~before they are examined about their qualifications~~. The oath's substance must be as follows: "You do solemnly swear (or affirm) that you will truthfully answer all questions about your qualifications to serve as a trial juror in this action, so help you God." If a prospective juror elects to affirm rather than swear the oath, the clause "so help you God" must be omitted.

(2) *Explanation of Voir Dire*. At the beginning of any written or oral examination, the court must provide information on the purpose of voir dire, how the court and the parties will use the prospective jurors' information, and who may have access to the information prospective jurors provide.

(3) *Case-Specific Written Questionnaires*. Unless the court orders otherwise, the court should require each prospective juror to complete a case-specific written questionnaire in a manner and form approved by the court. The case-specific written questionnaire should include questions about the prospective juror's qualifications to serve in the case, any hardships that would prevent the prospective juror from serving, and whether the prospective juror could render a fair and impartial verdict.

~~(2)~~(4) *Brief Opening Statements*. Before oral voir dire begins, the court may allow or require the parties to present brief opening statements to the prospective jurors.

~~(3)~~(5) *Extent of Oral Voir Dire*.

(A) Questioning by Court and Parties. The court must conduct voir dire orally. During oral examination, ~~The~~ the court must thoroughly question the jury panel to ensure that prospective jurors are qualified, fair, and impartial. ~~The~~

~~court must permit each of the parties to ask the panel additional questions, but may impose reasonable limits on the questioning.~~ Upon request, the court must allow the parties sufficient time, with other reasonable limitations, to conduct a further oral examination of the prospective jurors. Written questions also may be used as provided in Rule 47(b)(2). A party's failure to submit questions to the court prior to examination should not be grounds to deny a party the opportunity to conduct an oral examination.

(B) Extent of Questioning. Voir dire questioning of a jury panel is not limited to the grounds listed in Rule 47(d) and may include questions about any subject that might disclose a basis for the exercise of a ~~for cause~~ challenge for cause.

(d) Challenges for Cause.

(1) – (2) **[No change]**

(3) *Burden of Proof.* The party challenging a juror for cause has the burden to establish by a preponderance of the evidence that the juror cannot render a fair and impartial verdict. In making its determination, the court must consider the totality of a prospective juror's conduct and answers given during voir dire.

(e)Alternate Jurors. [No change]

COMMENTS [as amended 2022]

2022 Amendment to Rule 47(c)(3)

To allow the process of challenging jurors for cause to work effectively, Rule 47(c)(3) encourages the use of case-specific written questionnaires during voir dire where feasible, deferring to the court on the method and manner of administration. Courts may use paper or electronic case-specific questionnaires, administer case-specific questionnaires in advance of trial or immediately prior to oral voir dire, or use general or case-specific questions.

2022 Amendment to Rule 47(c)(5)

When feasible, the court should permit liberal and comprehensive examination by the parties, refrain from imposing inflexible time limits, and use open-ended questions that elicit prospective jurors' views narratively. The court should refrain from attempting to rehabilitate prospective jurors by asking leading, conclusory questions that encourage prospective jurors to affirm that they can set aside their opinions and neutrally apply the law.

1995 Amendment to Rule 47(a) and (e)

[Formerly Rule 47(a)]

Prior to the 1995 amendment, [Rule 47(a) and (e) (Jury Selection and Peremptory Strikes) (formerly Rule 47(a)(1))] was read to require trial judges to use the traditional "strike and replace" method of jury selection, where only a portion of the jury panel is examined, the remaining jurors being called upon to participate in jury selection only upon excusal for cause of a juror in the initial group. Challenges for cause are heard and decided with the jurors being examined in the box. A juror excused for cause leaves the courtroom in the presence and view of the other panel members, after which the excused juror' s position is filled by a panel member who responds to all previous and future questions of the potential jurors.

The purpose of this amendment is to allow the trial judge to use the "struck" method of selection if the judge chooses. This procedure is thought by some to offer more advantages than the "strike and replace" method. See T. Munsterman, R. Strand and J. Hart, The Best Method of Selecting Jurors, The Judges' Journal 9 (Summer 1990); A.B.A. Standards Relating to Juror Use and Management, Standard 7, at 68-74 (1983); and "The Jury Project," Report to the Chief Judge of the State of New York 58-60 (1984).

The "struck" method calls for all of the jury panel members to participate in voir dire examination by the judge and counsel. Although the judge may excuse jurors for cause in the presence of the panel, challenges for cause are usually reserved until the examination of the panel has been completed and a recess taken. ~~Following disposition of the for cause challenges, the clerk calls the first eight names remaining on the list, plus the number of alternate jurors thought necessary by the judge, who shall be the trial jury.~~

Whether using strike-and-replace or the struck method, the rules do not prescribe a method for replacing an excused prospective juror in the juror jury box with a member of the panel, deferring to the court's discretion on the appropriate method.

RULES OF CRIMINAL PROCEDURE

Rule 16.3. Pretrial Conference

(a) Generally. [No change]

(b) Objectives. [No change]

(c) Duty to Confer. Before the conference, ~~T~~the court may require the parties to confer and submit memoranda, including all oral and written questions to be asked of prospective jurors during voir dire~~, before the conference~~.

(d) Scope of Proceeding. At the conference, the court may:

(1) hear motions made at or filed before the conference;

(2) set additional pretrial conferences and evidentiary hearings as appropriate;

(3) obtain stipulations to relevant facts; ~~and~~

(4) determine the areas of inquiry and specific questions to be asked by the court and the parties during voir dire, including any limitations on written or oral examination and whether to permit the parties to give brief pre-voir dire opening statements; and

(45) discuss and determine any other matters that will promote a fair and expeditious trial, including imposing time limits on trial proceedings, using juror notebooks, giving ~~brief pre-voir dire opening statements and~~ preliminary instructions, and managing documents and exhibits effectively during trial.

(e) **Stipulated Evidence. [No change]**

(f) **Record of Proceedings. [No change]**

* * *

Rule 18.3. Jurors' Information

(a) Information Provided to the Parties. Before conducting oral voir dire examination, the court must ~~furnish~~ provide each party with a list of the names of the prospective jurors on the panel called for the case. The list must include each prospective juror's zip code, employment status, occupation, employer, residency status, education level, prior jury duty experience, and any prior felony conviction within a specified time established by the jury commissioner or the court.

(b) Confidentiality of Eligibility and Biographical Information. The court must obtain and maintain juror information in a manner and form approved by the Supreme Court as set forth in statute, rule, Administrative Code or Administrative order, and this information may be used only for the purpose of jury selection. The court must keep all jurors' home and business telephone numbers and addresses confidential~~,~~ and may not disclose them unless good cause is shown.

(c) Confidentiality of Case-Specific Written Questionnaires. If the court requires prospective jurors to complete case-specific written questionnaires, any completed case-specific questionnaires must be filed under seal and must be maintained in a manner and form approved by the court as part of the case file. Before conducting oral voir dire, the prospective jurors' responses to the case-specific written questionnaires must be provided to each party by the clerk or court. Any party or counsel receiving a copy of responses to the case-specific written questionnaires must not disclose the information to the public and may disclose the information only to the extent necessary for the proper conduct of the case. When jury selection is completed, each recipient must destroy or return to the court all copies of the responses to the case-specific written questionnaires.

Rule 18.4. Challenges

(a) Challenge to the Panel. [No change]

(b) Challenge for Cause. [No change]

COMMENT

~~**1973 Comment to Rule 18.4(b).** When the predecessor to this section was adopted in 1973, it replaced the catalog of 15 grounds set forth in the 1956 Arizona Rules of Criminal Procedure, Rule 219. The omission of the list is carried over to this amended rule and is intended to direct the attention of attorneys and judges to the essential question--whether a juror can try a case fairly. A challenge for cause can be based on a showing of facts from which an ordinary person would imply a likelihood of predisposition in favor of one of the parties.~~

~~In addition, a juror may be challenged who:~~

~~(1) has been convicted of a felony;~~

~~(2) lacks any of the qualifications prescribed by law to render a person a competent juror;~~

~~(3) is of such unsound mind or body as to render him incapable of performing the duties of a juror;~~

~~(4) is related by consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant;~~

~~(5) stands in the relationship of guardian and ward, attorney and client, master and servant, or landlord and tenant, or is an employee of or member of the family of the defendant, or of the person alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;~~

~~(6) has been a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution;~~

~~(7) has served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information;~~

~~(8) has served on the trial jury which has tried another person for the offense charged in the indictment or information;~~

~~(9) has been a member of the jury formerly sworn to try the same charge and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it;~~

~~(10) has served as a juror in a civil action brought against the defendant for the act charged as an offense;~~

~~(11) is on the bond of the defendant or engaged in business with the defendant or with the person alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;~~

~~(12) is a witness on the part of the prosecution or defendant or has been served with a subpoena or bound by an undertaking as such;~~

~~(13) has a state of mind in reference to the action or to the defendant or to the person alleged to have been injured by the offense charged or on whose complaint the prosecution was instituted, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party;~~

~~(14) if the offense charged is punishable by death, entertains conscientious opinions which would preclude his finding the defendant guilty, in which case he must neither be permitted nor compelled to serve as a juror; or~~

~~(15) does not understand the English language sufficiently well to comprehend the testimony offered at the trial.~~

~~This section also permits a challenge for cause to be made whenever the cause appears. Under Rule 18.4(b), the trial court may deny the challenge if not seasonably made, but there is no absolute time limitation imposed by rule. Once the trial has begun, the prosecutor may be unable, because of double jeopardy, to invoke the right to challenge, unless there are sufficient alternate jurors to enable the trial to continue with one less juror.~~

Rule 18.5. Procedure for Jury Selection

(a) Swearing the Jury Panel. Each prospective juror must swear or affirm that the answers provided in response to the case-specific written questionnaire are truthful. Before oral voir dire, ~~All members of the jury panel~~ each prospective juror must swear or affirm that they will truthfully answer all questions concerning their qualifications.

(b) Explanation of Voir Dire. At the beginning of any written or oral examination, the court must provide information on the purpose of voir dire, how the court and the parties will use the prospective jurors' information, and who may have access to the information prospective jurors provide.

(c) Case-Specific Written Questionnaires. Unless the court orders otherwise, the court should require each prospective juror to complete a case-specific written questionnaire in a manner and form approved by the court. The written questionnaire should include questions about the prospective juror's qualifications to serve in the case, any hardships that would prevent the prospective juror from serving, and whether the prospective juror could render a fair and impartial verdict.

~~(b)~~(d) Calling Jurors for Examination. The court must conduct voir dire orally. During oral examination, ~~The~~ the court may call to the jury box a number of prospective jurors

equal to the number to serve plus the number of alternates. Alternatively, and at the court's discretion, all members of the panel may be examined.

~~**(c)**~~**(e)** **Inquiry by the Court; Brief Opening Statements.** Before orally examining the prospective jurors, the court must identify the parties and their counsel and~~,~~ briefly outline the nature of the case~~, and explain the purpose of the examination~~. The court must then ask any necessary questions about the prospective jurors' qualifications to serve in the case. With the court's permission and before oral voir dire examination, the parties may present brief opening statements to the entire jury panel.

~~**(d)**~~**(f)** **Voir Dire Examination.** In courts of record, voir dire examination must be conducted on the record. The court must conduct a thorough oral examination of the prospective jurors and control the voir dire examination. Upon request, the court must allow the parties ~~a reasonable~~ sufficient time, with other reasonable limitations, to conduct a further oral examination of the prospective jurors. A party's failure to submit questions to the court prior to examination should not be grounds to deny a party the opportunity to conduct an oral examination. However, the court may limit or terminate the parties' voir dire on grounds of abuse. Nothing in this rule precludes submitting written questionnaires to the prospective jurors or examining individual prospective jurors outside the presence of other prospective jurors.

~~**(e)**~~**(g)** **Scope of Examination.** The court must ensure the reasonable protection of the prospective jurors' privacy. Questioning must be limited to inquiries designed to elicit information relevant to asserting a possible challenge for cause.

~~**(f)**~~**(h)** **Challenge for Cause.** Challenges for cause must be on the record and made out of the hearing of the prospective jurors. The party challenging a juror for cause has the burden to establish by a preponderance of the evidence that the juror cannot render a fair and impartial verdict. In making its determination, the court must consider the totality of a prospective juror's conduct and answers given during voir dire. If insufficient prospective jurors remain on the list, the court must add a prospective juror from a new panel.

~~**(g)**~~**(i)** **Stipulation to Remove a Prospective Juror.** The parties may stipulate to the removal of a juror.

~~**(h)**~~**(j)** **Selection of Jury; Alternate Jurors.**

(1) – (3) **[No change]**

~~**(i)**~~**(k)** **Deliberations in a Capital Case.**

(1) – (2) **[No change]**

COMMENTS [as amendment 2022]

2022 Comment to Rule 18.5(c). To allow the process of challenging jurors for cause to work effectively, Rule 18.5(b) encourages the use of case-specific questionnaires during

voir dire where feasible, deferring to the court on the method and manner of their administration. Courts may use paper or electronic questionnaires, administer questionnaires in advance of trial or immediately prior to oral voir dire, or use general or case-specific questions.

1995 Comment Rule 18.5(~~b~~d) (Formerly Rule 18.5(b)). Before a 1995 amendment, Rule 18.5(b) was interpreted to require trial judges to use the traditional "strike and replace" method of jury selection, where only a portion of the jury panel is examined, the remaining jurors being called upon to participate in jury selection only upon excusing for cause a juror in the initial group. A juror excused for cause leaves the courtroom, after which the excused juror's position is filled by a panel member who responds to all previous and future questions of the potential jurors.

As currently drafted, the trial judge is allowed to use the "struck" method of selection if the judge chooses. This procedure is thought by some to offer more advantages than the "strike and replace" method. *See* T. Munsterman, R. Strand and J. Hart, *The Best Method of Selecting Jurors*, THE JUDGES' JOURNAL 9 (Summer 1990); A.B.A. Standards Relating to Juror Use and Management, Standard 7, at 68-74 (1983); and "The Jury Project," Report to the Chief Judge of the State of New York 58-60 (1994).

The "struck" method calls for all of the jury panel members to participate in voir dire examination by the judge and counsel. ~~Following disposition of the for cause challenges, the clerk calls the first 8 or 12 names, as the law may require, from those remaining on the list, plus the number of alternate jurors thought necessary by the judge who become the trial jury.~~

Whether using strike-and-replace or the struck method, the rules do not prescribe a method for replacing an excused prospective juror in the juror jury box with a member of the panel, deferring to the court's discretion on the appropriate method.

2022 Comment Rule 18.5(~~d~~f). When feasible, the court should permit liberal and comprehensive examination by the parties, refrain from imposing inflexible time limits, and use open-ended questions that elicit prospective jurors' views narratively. The court should refrain from attempting to rehabilitate prospective jurors by asking leading, conclusory questions that encourage prospective jurors to affirm that they can set aside their opinions and neutrally apply the law.

JUSTICE COURT RULES OF CIVIL PROCEDURE

Rule 134. Trials

a. Trial procedures. The court may impose reasonable time limits for a trial or for any portion of a trial. The order of proceedings in a trial by jury, so far as applicable, also governs a trial to a judge without a jury. A jury will be summoned, and a trial to a jury

will proceed, as provided by Title 22, Chapter 2 of the Arizona Revised Statutes, and as provided by this rule. Unless the parties agree otherwise, the number of individuals selected as trial jurors, and the number of jurors needed to render a verdict, shall be as provided by Title 21, Chapter 1, of the Arizona Revised Statutes, or as otherwise provided by law. The order of trial is as follows:

(1) Potential jurors are summoned to the court and are given an oath to truthfully answer questions about their qualifications to serve as trial jurors. The court may conduct an initial examination of prospective jurors by case-specific written questionnaire, orally, or by both methods. Case-specific written questionnaires may be administered before potential jurors are summoned to the court. If used, case-specific written questionnaires shall be administered in a manner and form used by the court in compliance with Arizona Rules of Civil Procedure 47(c)(3). Either after prospective jurors complete a case-specific written questionnaire or during an initial oral examination, Tthe judge, and the parties, as the judge may allow, then ask questions to prospective jurors concerning their qualifications and fitness to serve as jurors. Potential jurors may be challenged for cause based on answers on a case-specific written questionnaire or during the course of questioning. The party challenging a juror for cause has the burden to establish by a preponderance of the evidence that the juror cannot render a fair and impartial verdict. Upon request, the judge may allow the parties to make brief opening statements to the prospective jurors before the questioning process. The jurors then selected to hear the case are sworn, and the judge gives the jury preliminary instructions concerning the jury's duties, its conduct, the order of proceeding, and elementary legal principles that govern the trial. The judge will instruct the jurors that each of them may take handwritten notes during the trial, which the jurors can take to the jury room, and the court will provide jurors with note-taking materials.

(2) – (13) **[No change]**

b. Motion for judgment as a matter of law. [No change]

RULES OF PROCEDURE FOR EVICTION ACTIONS

Rule 12. Trial by Jury

a. When an action is called for trial by jury, the jury panel shall be assembled. Voir dire may be conducted by the court and the parties as the judge may allow, by case-specific written questionnaire, orally, or by both methods. Case-specific written questionnaires may be administered before potential jurors are summoned to the court. If used, case-specific written questionnaires shall be administered in a manner and form used by the court in compliance with Arizona Rules of Civil Procedure 47(c)(3). Failure to submit written voir dire questions a day before the panel is assembled, or by a date ordered by

the court, waives the right to submit questions. The party challenging a juror for cause has the burden to establish by a preponderance of the evidence that the juror cannot render a fair and impartial verdict. After challenges for cause are exercised, a panel of seven jurors in justice court or nine jurors in superior court shall be assembled. One of the jurors shall be selected as the alternate after the evidence is presented and before deliberations.

b. – d. [No change]

EXHIBIT C

RECENT ORDER

Criminal Procedure — Jury Selection — Arizona Supreme Court Abolishes Peremptory Strikes in Jury Selection. — Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, No. R-21-0020 (Ariz. 2021).

In *Batson v. Kentucky*,[1] the U.S. Supreme Court established a three-part test for rooting out the racially discriminatory use of peremptory strikes.[2] While Justice Marshall welcomed *Batson* as an improvement over the prior standard, he presciently warned that *Batson* would "not end the racial discrimination that peremptories inject into the jury-selection process."[3] Only the abolition of peremptory strikes could do that.[4] As Justice Marshall predicted, *Batson* failed to end the racist use of peremptories.[5] But despite widespread recognition of *Batson*'s failure,[6] significant reform has taken decades to materialize.[7] Recently, Arizona embraced Justice Marshall's call and became the first state to abolish peremptory strikes.[8] After an extensive process resembling notice-and-comment rulemaking,[9] the Arizona Supreme Court amended the state's rules of civil and criminal procedure to eliminate litigants' ability to remove prospective jurors without cause.[10] The court's bold move promises to definitively eliminate the discrimination that *Batson* failed to end. But without peremptories, Arizona defendants are left with only challenges for cause. While the court's decision to abolish

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[1] 476 U.S. 79 (1986).

[2] *Id.* at 96.

[3] *Id.* at 102–03 (Marshall, J., concurring).

[4] *Id*. at 103.

[5] *See* Miller-El v. Dretke, 545 U.S. 231, 267 (2005) (Breyer, J., concurring) ("Today's case reinforces Justice Marshall's concerns."); *see also* David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 73 & n.197 (2001) (finding that *Batson* barely decreased the racially discriminatory use of peremptory strikes in capital trials in Philadelphia).

[6] *See, e.g.*, Catherine M. Grosso & Barbara O'Brien, *A Call to Criminal Courts: Record Rules for* Batson, 105 KY. L.J. 651, 652 (2017) ("No one paying attention needs to be told the verdict on *Batson v. Kentucky*. . . . *Batson* failed."); Nancy S. Marder, Batson *Revisited*, 97 IOWA L. REV. 1585, 1586 (2012).

[7] *See* Annie Sloan, Note, *"What to Do About* Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 CALIF. L. REV. 233, 236 (2020) (noting that Washington became the first state to meaningfully alter the *Batson* framework in 2018).

[8] *See* Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, No. R-21-0020 (Ariz. 2021) [hereinafter Order Abolishing Peremptory Strikes]; *see also* Hassan Kanu, Commentary, *Arizona Breaks New Ground in Nixing Peremptory Challenges*, REUTERS (Sept. 1, 2022, 2:52 PM), https://www.reuters.com/legal/legalindustry/arizona-breaks-new-ground-nixing-peremptory-challenges-2021-09-01 [https://perma.cc/8Q9N-LMRX].

[9] *Compare* ARIZ. SUP. CT. R. 28, *with* 5 U.S.C. § 553.

[10] Order Abolishing Peremptory Strikes, *supra* note 8, at 3–6.

peremptories is laudable, the court should have paired it with a robust expansion of voir dire requirements to better protect defendants against biased jurors.[11]

For centuries, lawyers could use peremptory strikes to remove potential jurors without giving any reason at all.[12] This enabled serious abuse, with prosecutors using "peremptory strikes to prevent Black people from serving on juries."[13] In its landmark 1986 *Batson* decision, the U.S. Supreme Court held that a party who uses a peremptory strike must give a race-neutral reason if the party challenging the strike makes a prima facie showing that the strike was based on race.[14] The trial judge must then decide whether the challenging party has carried their burden of proving "purposeful discrimination."[15] Despite frequent critiques of *Batson*, no state substantially altered its framework until Washington adopted General Rule 37 in 2018.[16] Under that rule, the party challenging a strike need not show purposeful discrimination; if an "objective observer could view race or ethnicity as a factor in [its] use," the court must deny the strike.[17]

On January 8, 2021, an Arizona Bar Association committee known as the *Batson* Working Group embraced Washington's reform. Pursuant to Rule 28 of the Rules of the Supreme Court of Arizona,[18] the Working Group petitioned that court to adopt a modified version of General Rule 37.[19] But for Judges Swann and McMurdie of the Arizona Court of Appeals, the Working Group's proposal did not go far enough. Three days later, the two judges petitioned the Arizona Supreme Court

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[11] *See* Brent J. Gurney, Note, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 257 (1986).

[12] *See* Swain v. Alabama, 380 U.S. 202, 220 (1965) ("[T]he peremptory challenge is . . . exercised without a reason stated, without inquiry and [beyond] the court's control.").

[13] EQUAL JUST. INITIATIVE, RACE AND THE JURY: ILLEGAL DISCRIMINATION IN JURY SELECTION 6 (2021), https://eji.org/wp-content/uploads/2005/11/race-and-the-jury-digital.pdf [https://perma.cc/FT2T-MLTS].

[14] Batson v. Kentucky, 476 U.S. 79, 96–98 (1986). The Court has held that striking jurors on the basis of gender or ethnicity is also unconstitutional. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994); Hernandez v. New York, 500 U.S. 352, 355 (1991).

[15] Miller-El v. Dretke, 545 U.S. 231, 239 (2005) (quoting *Batson*, 476 U.S. at 98).

[16] Sloan, *supra* note 7, at 236.

[17] WASH. GEN. R. 37(e). In 2020, California enacted similar legislation. Emmanuel Felton, *Many Juries in America Remain Mostly White, Prompting States to Take Action to Eliminate Racial Discrimination in Their Selection*, WASH. POST (Dec. 23, 2021, 3:00 PM), https://www.washingtonpost.com/national/racial-discrimination-jury-selection/2021/12/18/2b6ec690-5382-11ec-8ad5-b5c50c1fb4d9_story.html [https://perma.cc/8MET-HTJW].

[18] Rule 28 allows any person to petition the court to "adopt, amend, or abrogate" the state's rules of procedure, and the court may grant the petition after allowing public comment. ARIZ. SUP. CT. R. 28(a), (c), (e), (g).

[19] Petition to Amend the Rules of the Supreme Court of Arizona to Adopt Rule 24 — Jury Selection at 12, 19–20, No. R-21-0008 (Ariz. Jan. 8, 2021).

to eliminate peremptory strikes.[20] Their petition claimed that abolition would "end definitively one of the most obvious sources of racial injustice in the courts."[21]

Judges Swann and McMurdie's "argument for abolition" proceeded in three parts.[22] First, they noted that peremptory strikes are not constitutionally required.[23] In fact, they argued, peremptories interfere with the constitutional goal of empaneling juries drawn from a representative cross section of the community.[24] Judges Swann and McMurdie then listed studies showing "that peremptories are exercised in a discriminatory fashion."[25] And they suggested that the racist use of peremptories explained why Black jurors were underrepresented by sixteen percent, Native American jurors by fifty-one percent, and Hispanic jurors by twenty-one percent on Arizona criminal juries.[26] Finally, Judges Swann and McMurdie argued that abolition would improve public confidence that juries are not the product of discrimination.[27]

On January 21, 2021, Justice Gould of the Arizona Supreme Court opened both the Swann and McMurdie petition and the Working Group petition to public comments.[28] Several trial court judges voiced support for Judges Swann and McMurdie's proposal.[29] But among practitioners, opposition was nearly unanimous.[30] Many worried about "jurors who state that they can be fair and impartial even when they . . . reveal prior experiences that indicate otherwise."[31] When a prospective juror reveals a bias, judges usually "ask whether the juror can 'set it aside'" and "'follow the law.'"[32] "[A]s long as the juror ultimately says that they can be fair and impartial," judges "are often reluctant to strike" them.[33]

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[20] Petition to Amend Rules 18.4 and 18.5 of the Arizona Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure at 2, No. R-21-0020 (Ariz. Jan. 11, 2021) [hereinafter Swann & McMurdie Petition].

[21] *Id.*

[22] *Id.* at 7.

[23] *Id.*; *see also* Ross v. Oklahoma, 487 U.S. 81, 88 (1988) ("We have long recognized that peremptory challenges are not of constitutional dimension.").

[24] Swann & McMurdie Petition, *supra* note 20, at 8.

[25] *Id.* at 9.

[26] *Id.* at 12.

[27] *Id.* at 13–15.

[28] Order Opening Rules for Public Comment, Nos. R-20-0040 et seq. (Ariz. 2021).

[29] *See, e.g.*, Comment of the Committee on Superior Court at 5, No. R-21-0020 (Ariz. Apr. 12, 2021).

[30] This dynamic is unsurprising. While many scholars and jurists have argued for abolition, "[t]he opposite view seems to be the consensus among practicing lawyers." Dru Stevenson, *Jury Selection and the Coase Theorem*, 97 IOWA L. REV. 1645, 1648 (2012).

[31] Comment of the State Bar of Arizona at 3, No. R-21-0020 (Ariz. Apr. 30, 2021); *see also* Comment of the Central Arizona National Lawyers Guild Opposing the Abolition of Peremptory Strikes at 6–7, No. R-21-0020 (Ariz. Apr. 30, 2021).

[32] Comment of the State Bar of Arizona, *supra* note 31, at 5.

[33] Maricopa County Attorney's Comment in Opposition at 3, No. R-21-0020 (Ariz. May 3, 2021); *see also* Comment of the Arizona Prosecuting Attorneys' Advisory Council at 2–3, No. R-21-0020 (Ariz. Apr. 30, 2021).

Without peremptory strikes, litigants "would have no recourse . . . if a judge failed to grant an appropriate challenge for cause."[34] Opponents like the Arizona Attorney General complained that the petition contained no provision easing requirements for challenges for cause, like the one Canada included when it abolished peremptory strikes in 2019.[35] And the Arizona State Bar Association argued that if the court eliminated peremptory strikes, it would have to provide for more extensive voir dire.[36]

Many opponents of the Swann and McMurdie petition urged the Arizona Supreme Court to adopt the Working Group's proposal modeled on Washington's rule instead.[37] A civil rights group, for example, argued that abolition was "too extreme an act aimed at avoiding squarely addressing discrimination in jury selection," while the Working Group's proposal sought to tackle the problem head-on.[38] Several lawyers from Washington State urged the court to grant the Working Group's petition, with Seattle University's Korematsu Center for Law and Equality arguing that General Rule 37 is "working well," that suspect "peremptories are being attempted far less often," and that appellate courts are increasingly willing to invalidate peremptory strikes.[39]

On August 30, 2021, the Arizona Supreme Court granted the Swann and McMurdie petition.[40] In a simple order that contained no reasoning, the court struck all language from the state's rules of civil and criminal procedure allowing for or referring to peremptory strikes.[41] The court also added language permitting the parties to stipulate to the removal of a juror.[42] Under the new rules, litigants retain the ability to challenge prospective jurors "for cause," but they bear "the burden [of] establish[ing] by a preponderance of the evidence that the juror cannot render a fair and impartial verdict."[43] Effective January 1, 2022, litigants in Arizona state court may no longer strike prospective jurors without providing reasons and establishing cause.[44]

When it announced its decision to abolish peremptories, the court directed its Task Force on Jury Data Collection, Practices, and

[34] Maricopa County Attorney's Comment in Opposition, *supra* note 33, at 2.

[35] Comment of the Arizona Attorney General's Office at 4–5, No. R-21-0020 (Ariz. May 3, 2021).

[36] *See* Comment of the State Bar of Arizona, *supra* note 31, at 6–8.

[37] *See, e.g.*, *id.* at 15–16.

[38] Comment of the Central Arizona National Lawyers Guild Opposing the Abolition of Peremptory Strikes, *supra* note 31, at 10.

[39] Letter from Robert S. Chang, Exec. Dir., Korematsu Ctr. for L. & Equal., & Taki V. Flevaris, Fac. Affiliate, Korematsu Ctr. for L. & Equal., to the Hon. Justices of the Arizona Sup. Ct. (Apr. 29, 2021) (on file with the Harvard Law School Library).

[40] *See* Order Abolishing Peremptory Strikes, *supra* note 8, at 1.

[41] *Id.* at 3–6.

[42] *Id.* at 4.

[43] *Id.*

[44] *See id.* at 1.

Procedures to consider changes to Arizona's for-cause removal rules.[45] On November 1, 2021, the Task Force recommended minor amendments to "[*e*]*ncourage* case-specific written juror questionnaires when feasible," "[*d*]*iscourage* attempts by the trial judge to rehabilitate prospective jurors through leading, conclusory questioning," and "[*p*]*ermit* extended oral voir dire," among other suggestions.[46] These recommendations do not impose requirements on trial judges, who "maintain judicial discretion and flexibility" over jury selection.[47] On December 8, 2021, the court adopted the recommendations on an "emergency basis" and opened the adopted recommendations to public comment until June 2022, with a decision expected in August.[48]

Arizona's bold move correctly recognizes that *Batson* has failed to redress race-based peremptory strikes. And it embraces a position advocated by many scholars: that the abolition of peremptory strikes is the "only fix."[49] While abolition is a laudable move, it also deprives criminal defendants of one of the few tools available for securing their Sixth Amendment right to an impartial jury.[50] Without peremptories, Arizona defendants are left to seek an impartial jury through challenges for cause and voir dire. But mounting a successful challenge for cause is difficult.[51] And trial judges, eager to save time, often use their broad discretion to severely limit voir dire, leaving defendants with no real opportunity to develop their case against jurors they believe to be biased.[52] The Arizona Supreme Court acknowledged this concern by

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[45] Order Adopting on an Emergency Basis Amendments to Rules 16.3, 18.3, 18.4, and 18.5, Rules of Criminal Procedure; Rules 16 and 47, Rules of Civil Procedure; Rule 134, Justice Court Rules of Civil Procedure; and Rule 12, Rules of Procedure for Eviction Actions at 1, 8–9, 13, No. R-21-0045 (Ariz. 2021) [hereinafter Emergency Order]. In the order, the court erroneously refers to the task force as the "Task Force on Jury Data Collection, Practices, and Policies." *Id.* at 1.

[46] STATEWIDE JURY SELECTION WORKGROUP, TASK FORCE ON JURY DATA COLLECTION, PRACS., AND PROCS., REPORT AND RECOMMENDATIONS 3 (2021) [hereinafter TASK FORCE REPORT] (emphases added), https://www.azcourts.gov/Portals/74/Jury%20TF/SJS%20Workgroup/SJSW_Final%20Report%20and%20Recommendations_11_01_21.pdf [https://perma.cc/4PRA-XQ7C].

[47] *Id.* at 6.

[48] Emergency Order, *supra* note 45, at 2.

[49] Grosso & O'Brien, *supra* note 6, at 653; *see also* Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 811–12 (1997); Marder, *supra* note 6, at 1586.

[50] While the U.S. Supreme Court has said that states can abolish peremptories, *see* Ross v. Oklahoma, 487 U.S. 81, 89 (1988), it has also acknowledged that peremptories are a "means to the constitutional end of an impartial jury and a fair trial," Georgia v. McCollum, 505 U.S. 42, 57 (1992). Moreover, the Court had previously long described peremptories as "one of the most important rights secured to the accused." *Ross*, 487 U.S. at 89 (quoting Swain v. Alabama, 380 U.S. 202, 219 (1965)).

[51] The bar "is so high" that "very few potential jurors will meet the requirements of a 'for cause' dismissal." Stevenson, *supra* note 30, at 1663–64.

[52] *See* Gurney, *supra* note 11, at 269 ("Trial judges frequently use their discretion to restrict questioning for the sake of efficiency, potentially terminating promising lines of inquiry before a juror reveals his bias.").

adopting the Task Force's recommendation to, inter alia, "[p]ermit extended . . . voir dire."[53] But its decision to make expanded voir dire a nonbinding suggestion on trial judges risks doing little to protect defendants from biased jurors. The court should have instead paired abolition with a robust expansion of voir dire requirements — not merely the nonmandatory changes recommended by the Task Force.

Batson has failed to end the racist use of peremptory strikes. As Justice Marshall predicted, prosecutors routinely conjure up race-neutral reasons for striking potential jurors — reasons that courts rarely "second-guess."[54] Courts have accepted as satisfactory explanations under *Batson* the fact that stricken Black jurors had "unkempt hair" and a beard;[55] rented rather than owned their home;[56] lived in a neighborhood where exposure to drug traffickers was likely;[57] nodded at the defendant's brother outside the courtroom;[58] and "wore a beret one day and a sequined cap the next."[59] An Illinois judge joked that "new prosecutors are given a manual, probably entitled, 'Handy Race-Neutral Explanations.'"[60] And in North Carolina, prosecutors actually received a cheat sheet called "Batson Justifications: Articulating Juror Negatives."[61] Unsurprisingly, then, studies routinely find that *Batson* has failed to meaningfully reduce the racist use of peremptory strikes.[62] Arizona's bold move, by contrast, promises to definitively "end the racial discrimination that peremptories" have long "inject[ed] into the jury-selection process" — at least in the Grand Canyon State.[63]

While laudable, abolition also stands to reduce the little protection that defendants have against biased jurors. Notably, the U.S. Supreme Court has read the Constitution to require little in the context of jury selection that would help defendants secure impartial juries. As a matter of federal constitutional law, jurors are presumed impartial, and they need not be "ignorant of the facts and issues involved" in a case.[64] Even a prospective

[53] TASK FORCE REPORT, *supra* note 46, at 3; Emergency Order, *supra* note 45, at 8.

[54] Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

[55] Purkett v. Elem, 514 U.S. 765, 769 (1995) (per curiam).

[56] United States v. Gibson, 105 F.3d 1229, 1231–32, 1232 n.2 (8th Cir. 1997); People v. Mack, 538 N.E.2d 1107, 1113 (Ill. 1989).

[57] United States v. Uwaezhoke, 995 F.2d 388, 393 (3d Cir. 1993).

[58] United States v. Jones, 195 F.3d 379, 381 (8th Cir. 1999).

[59] Smulls v. Roper, 535 F.3d 853, 856, 862 (8th Cir. 2008).

[60] People v. Randall, 671 N.E.2d 60, 65 (Ill. App. Ct. 1996).

[61] Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, NEW YORKER (June 5, 2015), https://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors [https://perma.cc/A7CZ-LSSL].

[62] *See, e.g.*, Baldus et al., *supra* note 5, at 73 & n.197; Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1533 (2012).

[63] Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring).

[64] Irvin v. Dowd, 366 U.S. 717, 722 (1961); *see id.* at 723.

juror's "preconceived notion as to the guilt or innocence of [the] accused" is not "sufficient to rebut the presumption" of impartiality.[65] And it is often enough for a judge to find that a prospective juror can set "aside his impression or opinion and render a verdict based on the evidence."[66]

Voir dire is supposed to help weed out those too biased to base their verdict solely on the evidence. But the Constitution does not guarantee voir dire sufficient to achieve this aim because it leaves excessive discretion to trial judges.[67] As a general matter, the Constitution does not require judges to ask prospective jurors about specific biases feared by the defendant.[68] Instead, trial judges retain broad discretion over what to ask and how many questions to pose. Vague, limited inquiries into a juror's ability to be impartial often suffice.[69] The Supreme Court's 2010 decision in *Skilling v. United States*[70] shows that voir dire need not be extensive and that strong challenges for cause are often denied. In that case, Jeffrey Skilling, the former chief executive of Enron, was on trial for fraud and insider trading in Houston, the city where thousands had lost their jobs, homes, and retirements because of Enron's stunning collapse.[71] Yet the trial judge conducted only five hours of in-person voir dire.[72] The Supreme Court said that this voir dire was not only adequate but also reflected the trial judge's "aware[ness] of the greater-than-normal need . . . to ensure against jury bias."[73] However, jurors seated over Skilling's objections included a woman "angry" over losing her 401(k) because of Enron's collapse and a man who openly blamed the collapse on legally dubious behavior motivated by greed.[74]

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[65] *Id.* at 723.

[66] *Id.*

[67] *See* Sophia R. Friedman, Note, *Sixth Amendment — The Right to an Impartial Jury: How Extensive Must Voir Dire Questioning Be?*, 82 J. CRIM. L. & CRIMINOLOGY 920, 935–36, 939 & n.140 (1992).

[68] Ristaino v. Ross, 424 U.S. 589, 594–95 (1976) ("[T]he State's obligation to the defendant to impanel an impartial jury generally can be satisfied by less than an inquiry into a specific prejudice feared by the defendant." *Id.* at 595.). In a limited set of circumstances, the Fourteenth Amendment's Due Process Clause requires the trial judge to inquire into the racial prejudices of potential jurors. *See id.* at 595–97. But even then, trial judges retain broad discretion over the number, content, and format of the questions. *See* Turner v. Murray, 476 U.S. 28, 36–37 (1986).

[69] For example, in *Mu'Min v. Virginia*, 500 U.S. 415 (1991), the trial judge asked groups of jurors whether they could remain impartial and instructed those who thought they could to remain silent. *Id.* at 420; *id.* at 452 (Kennedy, J., dissenting).

[70] 561 U.S. 358 (2010). Notably, Skilling was prosecuted in federal court, which meant that the U.S. Supreme Court had "more latitude" to require extensive voir dire than it would for a prosecution in a state court. *See id.* at 446 n.9 (Sotomayor, J., concurring in part and dissenting in part) (quoting *Mu'Min*, 500 U.S. at 424).

[71] *Id.* at 375–76 (majority opinion).

[72] *Id.* at 437 (Sotomayor, J., concurring in part and dissenting in part).

[73] *Id.* at 389 (majority opinion). The Court also credited the district court's use of written questionnaires. *Id.* at 388.

[74] *Id.* at 396–97.

Arizona's jury selection rules do not meaningfully augment federal constitutional requirements because they too leave significant discretion to trial judges. Arizona law formally requires judges to conduct a "thorough oral examination of . . . prospective jurors" and mandates that parties receive "sufficient time, with other reasonable limitations, to conduct . . . further oral examination."[75] But Arizona trial judges retain ultimate control over voir dire and wide latitude to limit questioning.[76] Defendants must climb a steep hill to secure an appellate reversal of a trial judge's voir dire decisions, which are reviewed for abuse of discretion.[77] They must "demonstrate not only that the voir dire examination was inadequate[] but also that . . . the jury selected was not fair, unbiased, and impartial."[78] And an Arizona trial judge's denial of a challenge for cause is also deferentially reviewed for abuse of discretion.[79]

To ensure that defendants are not left in the lurch by the abolition of peremptory strikes, the Arizona Supreme Court should have paired abolition with expanded voir dire requirements — not optional changes that leave the defendant's right to an impartial jury to the discretion of the trial judge. Expanded voir dire has real benefits: "[E]mpirical evidence indicates that" it "enhance[s] the efficacy of cause challenges."[80] More effective challenges for cause in turn ensure that those with serious biases do not sit in judgment of defendants.[81] And extensive voir dire also impresses upon potential jurors the solemnity and importance of jury duty.[82] The Arizona Supreme Court implicitly recognized these benefits by adopting changes to encourage more robust voir dire.[83] But history already shows us that trial judges are inclined to limit voir dire to save time and that appellate courts are reluctant to second-guess those limits.[84] By failing to make expanded voir dire mandatory, the Arizona Supreme Court missed an opportunity to protect defendants' impartial jury right while securing the important benefits of peremptory strike abolition.

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[75] ARIZ. R. CRIM. P. 18.5(f).

[76] *See* State v. Acuna Valenzuela, 426 P.3d 1176, 1187 (Ariz. 2018).

[77] *Id.*

[78] *Id.* (omission in original) (quoting State v. Moody, 94 P.3d 1119, 1146 (Ariz. 2004)).

[79] *Id.* at 1188.

[80] Gurney, *supra* note 11, at 270; *see also id.* at 270–73 (collecting studies showing that expanded voir dire leads to more successful challenges for cause).

[81] *Id.* at 271.

[82] *See* Nancy S. Marder, *Juror Bias, Voir Dire, and the Judge-Jury Relationship*, 90 CHI.-KENT L. REV. 927, 940 (2015).

[83] Emergency Order, *supra* note 45, at 7–8.

[84] Gurney, *supra* note 11, at 268–69.

EXHIBIT D

Arizona Revised Statutes Annotated
Title 13. Criminal Code (Refs & Annos)
Chapter 5. Responsibility (Refs & Annos)

A.R.S. § 13-502

§ 13-502. Insanity test; burden of proof; guilty except insane verdict

Effective: January 1, 2023
Currentness

A. A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong. A mental disease or defect constituting legal insanity is an affirmative defense. Mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders. Conditions that do not constitute legal insanity include momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred or other motives in a person who does not suffer from a mental disease or defect or an abnormality that is manifested only by criminal conduct.

B. In a case involving the death or serious physical injury of or the threat of death or serious physical injury to another person, if a plea of insanity is made and the court determines that a reasonable basis exists to support the plea, the court may commit the defendant to a secure state mental health facility under the department of health services, a secure county mental health evaluation and treatment facility or another secure licensed mental health facility for up to thirty days for mental health evaluation and treatment. Experts at the mental health facility who are licensed pursuant to title 32, [1] who are familiar with this state's insanity statutes, who are specialists in mental diseases and defects and who are knowledgeable concerning insanity shall observe and evaluate the defendant. The expert or experts who examine the defendant shall submit a written report of the evaluation to the court, the defendant's attorney and the prosecutor. The court shall order the defendant to pay the costs of the mental health facility to the clerk of the court. The clerk of the court shall transmit the reimbursements to the mental health facility for all of its costs. If the court finds the defendant is indigent or otherwise is unable to pay all or any of the costs, the court shall order the county to reimburse the mental health facility for the remainder of the costs. Notwithstanding § 36-545.02, the mental health facility may maintain the reimbursements. If the court does not commit the defendant to a secure state mental health facility, a secure county mental health evaluation and treatment facility or another secure licensed mental health facility, the court shall appoint an independent expert who is licensed pursuant to title 32, who is familiar with this state's insanity statutes, who is a specialist in mental diseases and defects and who is knowledgeable concerning insanity to observe and evaluate the defendant. The expert who examines the defendant shall submit a written report of the evaluation to the court, the defendant's attorney and the prosecutor. The court shall order the defendant to pay the costs of the services of the independent expert to the clerk of the court. The clerk of the court shall transmit the reimbursements to the expert. If the court finds the defendant is indigent or otherwise unable to pay all or any of the costs, the court shall order the county to reimburse the expert for the remainder of the costs. This subsection does not prohibit the defendant or this state from obtaining additional psychiatric examinations by other mental health experts who are licensed pursuant to title 32, who are familiar with this state's insanity statutes, who are specialists in mental diseases and defects and who are knowledgeable concerning insanity.

C. The defendant shall prove the defendant's legal insanity by clear and convincing evidence.

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D. If the finder of fact finds the defendant guilty except insane, the court shall determine the sentence the defendant could have received pursuant to § 13-707 or § 13-751, subsection A or the presumptive sentence the defendant could have received pursuant to § 13-702, § 13-703, § 13-704, § 13-705, § 13-706, subsection A, § 13-710 or § 13-1406 if the defendant had not been found insane, and the judge shall suspend the sentence and shall order the defendant to be placed and remain under the jurisdiction of the superior court and committed to a secure state mental health facility under the department of health services pursuant to § 13-3992 for the length of that sentence. In making this determination the court shall not consider the sentence enhancements for prior convictions under § 13-703 or 13-704. The court shall expressly identify each act that the defendant committed and separately find whether each act involved the death or physical injury of or a substantial threat of death or physical injury to another person.

E. A guilty except insane verdict is not a criminal conviction for sentencing enhancement purposes under § 13-703 or 13-704.

Credits

Added by Laws 1993, Ch. 256, § 3, eff. Jan. 2, 1994. Amended by Laws 1996, Ch. 173, § 1; Laws 2007, Ch. 138, § 1; Laws 2008, Ch. 301, § 14, eff. Jan. 1, 2009; Laws 2021, Ch. 390, § 4; Laws 2021, Ch. 390, § 5, eff. Jan. 1, 2023.

Notes of Decisions (162)

Footnotes

1 Section 32-101 et seq.

A. R. S. § 13-502, AZ ST § 13-502
Current through legislation of the First Regular Session of the Fifty-Sixth Legislature (2023).

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EXHIBIT E

Div.29 1/22/24

Section 1

You are being asked to answer the following questions to determine anything you might know about the case, your feelings as to the nature of the allegations, and your ability to be fair and objective. These questions are not intended to invade your privacy but are to help select jurors who can be fair to both sides. Your answers will only be shared with the attorneys and judge.

We all have attitudes, feelings, opinions, and life experiences that could influence the way we consider a trial. We ask that you acknowledge and talk about these things so that we can ensure justice is served. You will have the opportunity to discuss your answers privately, with only the judge and lawyers if you request that when you report. As a juror, you must decide this trial based only on the evidence presented during trial.

You are asked to complete the questionnaire under oath and to answer the questions truthfully and completely. Please take your time and do not rush. There are no right or wrong answers. Do not share or discuss the questions or your answers with anyone or do any research on the case or the people involved, including on the Internet or social media. From this point on, please do not read, watch, or listen to news about this case, or discuss it with friends, family, co-workers or anyone else.

If you have trouble reading, understanding, or completing this questionnaire, please contact the Jury Commissioner's office at (520) 724-4222 for assistance.

Section 2

Oath & General Information

1.Do you swear or affirm to give true and accurate responses to the best of your knowledge and belief?

I do.

2.What is your first and last name?

Enter your answer

3.What is your 7-digit juror badge number?

Enter your answer

4.What is your phone number? We will only use it to communicate updates about your juror reporting status.

Enter your answer

5.What is your email address? We will only use it to communicate updates about your juror reporting status.

Enter your answer

Section 3

Length of Trial and Possible Hardship

As a citizen of the United States and Arizona, one of your responsibilities and privileges is to serve on juries when summoned. In-person jury selection is scheduled to start January 22, 2024 and the case is expected to last until February 1, 2024. You are to report in person, unless you are notified by email or phone that you have been excused. The excused notifications will be sent out on or about January 19, 2024 after all responses have been collected and reviewed. Please do not check the juror page on the court's web site or the phone line for your reporting group's status as that information applies only to people who do not fill out this questionnaire. Please report to Pima County Superior Court on January 22, 2024 at 11:00 a.m. unless you are informed otherwise as the judge will be expecting you.

The normal trial schedule is weekdays from 9:00 a.m. or 10:30 a.m. until 4:30 p.m., with lunch and afternoon breaks. Opening statements are expected to begin on January 22, 2024 followed by the presentation of evidence, which is expected to last 9 days. After closing arguments are presented by the parties, your deliberations on the issue of whether the defendant is guilty of the charges can last as long as necessary.

Jurors are paid $12 per day plus roundtrip mileage for each day they are sworn on a case. Employers are required by law to allow employees to attend jury service, and some pay their employees for jury service. You may want to check with your employer about a jury service policy. Jurors who are not paid by their employer can be compensated for lost income up to $300 per day of jury service by submitting reimbursement forms. To receive this reimbursement, a juror may submit paperwork available in the jury office, which includes documenting the lost income, employer verification of income, employer jury service policy, and other information as needed under Arizona law. Jurors who are retired or not employed may submit the form to be paid a daily rate of $40. Forms are available in the jury office, which is open from 7 a.m. to 5 p.m. for questions about juror pay and jury service.

6.Jury service is essential to the administration of justice. Accordingly, inconvenience alone will not be sufficient to excuse a prospective juror. To be excused a juror must show a substantial amount of personal hardship. In light of these considerations, would service as a juror in this case create an unacceptable personal, financial or professional hardship for you?

Yes

No

7.Please describe the nature of the hardship that would prevent you from serving as a juror.

Enter your answer

8.Do you currently suffer from any medical or mental health condition(s) that might impact your jury service?

Yes

No

9.If yes, please explain your medical or mental health condition(s) that might impact your jury service.

Enter your answer

Section 4

Legal Concepts

10.As a juror, you must base your decision only on the evidence you see and hear during the trial. You are <u>not</u> to do any independent research, including Internet searches. You are <u>not</u> to discuss the trial with anyone until it is over and you have been excused. Will you be able to do this?

Yes

No

Unsure

11.If you answered "no" or "unsure" please explain.

Enter your answer

12.As a juror, you are to keep an open mind and not reach a decision on a verdict until you have seen and heard all the evidence and discussed it with your fellow jurors. Will you be able to do this?

Yes

No

Unsure

13.If you answered "no" or "unsure" please explain.

Enter your answer

14.Do you have any philosophical, religious, or other beliefs that prevent you from serving as a juror, e.g., that would prevent you from being fair and impartial to both sides, keeping an open mind throughout the trial, and deliberating with our fellow jurors to make a decision at the end of the trial?

Yes

No

15. If you answered "yes" please explain.

Enter your answer

Section 5

Nature of the Case

In this case, Dwarka Tito Baron has been charged with First Degree Murder. Specifically, the State alleges that on March 23, 2020, Dwarka Tito Baron murdered Charles Viney. Dwarka Tito Baron has pled “not guilty”. His plea of “not guilty” means that the State must prove every part of the charge beyond a reasonable doubt.

16.Have you seen, heard, or read anything about this case?

Yes

No

Unsure

17.Under our justice system, it is vital that trials be decided by fair and impartial jurors. It is likewise vital that no defendant is guilty simply because he is charged with a crime. Instead, all defendants are presumed innocent until the State presents evidence that proves the defendant's guilt beyond a reasonable doubt.

Equally important, a defendant has no obligation to present any evidence or even testify in his defense, and as a juror you can't use his choice not to do so against him.

Will you be able to follow these legal concepts?

Yes

No

Unsure

18.If you answered "no" or "unsure" please explain.

Enter your answer

19.With these legal concepts in mind, the trial you have been selected for concerns allegations of murder. If you don't think you could be a fair and impartial juror to both sides in this case, please explain.

Enter your answer

20.Considering the nature of the trial and any of your above answers, is there anything about this trial that would prevent you from being a fair, objective, and impartial juror?

Yes

No

Unsure

21.If you answered "yes" or "unsure" please explain.

Enter your answer

22.Have you, friends or relatives ever been victims of a serious crime?

Yes

No

23.Please briefly describe the circumstance(s) in which you, friends or relatives were victims of a serious crime including if there was any prosecution of that crime, and what was the outcome?

Enter your answer

24.This case is going to involve a defense of Guilty Except Insane, where the defendant will admit the conduct, but claims he was insane at the time the crime was committed. A defendant is guilty except insane if at the time of the crime the defendant was afflicted with a mental disease or defect of such severity that the defendant did not know the criminal act was wrong. The defendant must prove guilty except insane by clear and convincing evidence, which means that it is highly probable that the defendant was insane. This is a lesser standard of proof than “beyond a reasonable doubt.” A mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders. Conditions that do not constitute insanity include but are not limited to passion, growing out of anger, jealousy, revenge, and hatred.

Do you have either negative or positive feelings about such a defense? If yes, will these feelings make it difficult for you to listen to testimony regarding insanity and render a fair and impartial verdict?

Enter your answer

25.This case will involve testimony from forensic psychologists. Do you have any strong opinions on the field of forensic psychology, or psychology generally, that would make it difficult for you to listen to testimony regarding mental diseases and defects and render a fair and impartial verdict?

Enter your answer

Section 6

Law Enforcement and Legal System

26.Have you or family members been charged or accused of a crime or offense as juveniles or adults (minor offenses such as traffic tickets need not be listed)?

Yes

No

27.If you or a family member have been charged or accused of a crime, please explain. What was the outcome and would this prevent you from being a fair and impartial juror?

Enter your answer

28.Do you or a close family member/friend have any law-enforcement training or background?

Yes

No

29. If you or a close family member/friend have any law-enforcement training or background, please explain.

Enter your answer

30.If you answered yes to the law-enforcement training/background question, is there anything about this that would prevent you from being a fair and impartial juror in this trial?

Yes

No

31.Have you ever had a particularly good experience with a law enforcement officer or a particularly bad experience with a law enforcement officer?

Yes

No

32.Please give a brief description of the law enforcement interaction. Is there anything about it that would prevent you from being a fair and impartial juror in this case?

Enter your answer

33.Have you served in the military?

Enter your answer

34.If so, which branch?

Enter your answer

35.If not already noted above, is there any reason it wouldn’t be appropriate for you to sit as a juror in this trial?

Enter your answer

EXHIBIT F

248 Ariz. 601
Court of Appeals of Arizona, Division 1.

STATE of Arizona, Appellee,
v.
Javier ROMERO, Appellant.

No. 1 CA-CR 18-0334
|
FILED 3/31/2020

Synopsis
Background: Defendant was convicted in the Superior Court, Maricopa County, No. CR 2014-001009-001, Peter Reinstein, J., of second-degree murder and aggravated assault. Defendant appealed.

Holdings: The Court of Appeals, Brown, J., held that:

[1] defense counsel could not examine court-appointed expert about consequences of guilty except insane (GEI) verdict, and

[2] trial court was not required to declare defendant GEI as a matter of law.

Affirmed.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection.

West Headnotes (18)

[1] **Criminal Law** Review De Novo

Appellate court reviews the propriety of jury instructions de novo.

[2] **Criminal Law** Duty of judge in general

Instructions inform the jury how to apply the law.

[3] **Criminal Law** Construction and Effect of Charge as a Whole

When reviewing the propriety of jury instructions, appellate court will not reverse unless the instructions, taken together, would have misled the jurors.

1 Case that cites this headnote

[4] **Criminal Law** Plain or fundamental error

When defendant did not object at trial to the instructions given to the jury, appellate court will reverse only if the court committed fundamental error resulting in prejudice.

2 Cases that cite this headnote

[5] **Criminal Law** Criminal Intent and Malice

Unless the legislature plainly indicates otherwise, a crime requires both guilty conduct and a culpable mental state.

[6] **Criminal Law** Ignorance or mistake of law

The criminal law's general indifference to whether a defendant knows an act is criminal reflects the core principle that ignorance of the law is no defense.

[7] **Criminal Law** Criminal Intent and Malice

"Knowingly," in the context of a defendant's mindset while committing a crime, refers to factual knowledge, not knowledge of an act's legal or moral impropriety.

1 Case that cites this headnote

[8] **Criminal Law** Insanity

To establish a defense on the ground of insanity under the Rule of M'Naghten's Case, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

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[9] **Criminal Law** Insanity

The first part of the Rule of M'Naghten's Case, which is used to establish a defense on the ground of insanity, asks about cognitive capacity: whether a mental defect leaves a defendant unable to understand what he is doing; its second part addresses the lack of moral capacity: whether a mental disease or defect leaves a defendant unable to understand that his action is wrong.

[10] **Criminal Law** Insanity

In the context of the test for criminal insanity, Arizona defines the word "wrong" in accordance with generally accepted moral standards of the community; this concept necessarily includes both legal and moral wrong. Ariz. Rev. Stat. Ann. § 13-502.

1 Case that cites this headnote

[11] **Criminal Law** Insanity

Evidence of a defendant's inability to know an act has been criminalized is insufficient to establish a guilty except insane (GEI) defense. Ariz. Rev. Stat. Ann. § 13-502.

2 Cases that cite this headnote

[12] **Criminal Law** Insanity

If the State counters a guilty except insane (GEI) defense with evidence showing the defendant was aware his conduct was illegal, then it would not be improper for the jury to conclude that he also knew his conduct was morally wrong. Ariz. Rev. Stat. Ann. § 13-502.

[13] **Witnesses** Particular matters in general

Defense counsel could not examine court-appointed expert about consequences of guilty except insane (GEI) verdict, in prosecution for second-degree murder and aggravated assault, though defendant argued he needed to question expert about issue to rebut State's insinuation during cross-examination of expert that GEI defense was lesser punishment; jury was not allowed to consider consequences of verdict during trial's guilt phase, prosecutor's cross-examination of expert contained qualified, conditional terms, prosecutor's questions sought to elicit possible explanations for malingering and why that was a concern for psychologists, which was a relevant and proper subject of questioning, and defense counsel addressed on re-direct whether issue of malingering contributed to expert's opinions. Ariz. Rev. Stat. Ann. § 13-502.

[14] **Criminal Law** Reception and Admissibility of Evidence

Criminal Law Evidence

Appellate court reviews the trial court's evidentiary rulings and restrictions on witness examination for an abuse of discretion.

4 Cases that cite this headnote

[15] **Criminal Law** Deliberations in General

Because the decision of which punishment to impose is generally the court's task alone, juries are not permitted to consider the consequences of their verdicts.

[16] **Criminal Law** Deliberations in General

Because disposition of a defendant upon the jury's verdict has nothing to do with the defendant's guilt or innocence, it can never be considered by the jury in its deliberations.

[17] **Criminal Law** Defenses in General

Criminal Law Defense of insanity

Homicide Insanity

Affirmative defenses were questions of fact for the factfinder to resolve, and, therefore, trial court was not required to declare defendant guilty except insane (GEI) as a matter of law, in prosecution for second-degree murder and aggravated assault. Ariz. Rev. Stat. Ann. § 13-502.

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[18] **Criminal Law** Defense of insanity

Statute governing guilty except insane (GEI) defense explicitly leaves insanity in the fact finder's hands. Ariz. Rev. Stat. Ann. § 13-502.

****226** Appeal from the Superior Court in Maricopa County, No. CR 2014-001009-001, The Honorable Peter C. Reinstein, Judge, *Retired*. **AFFIRMED**

Attorneys and Law Firms

Arizona Attorney General's Office, Phoenix, By Terry M. Crist III, Counsel for Appellee

Michael J. Dew Attorney at Law, Phoenix, By Michael J. Dew, Counsel for Appellant

Judge Michael J. Brown delivered the opinion of the Court, in which Presiding Judge Jennifer M. Perkins and Judge Samuel A. Thumma joined.

OPINION

BROWN, Judge:

***602** ¶1 Javier Romero appeals from his convictions and sentences for second-degree murder and aggravated assault. He argues the superior court (1) committed fundamental error by failing to provide an additional jury instruction defining legal insanity; (2) improperly precluded testimony addressing the consequences of a guilty except insane ****227** ***603** ("GEI") verdict; and (3) should have found him GEI as a matter of law. For the following reasons, we affirm.

BACKGROUND

¶2 While Romero was working in a restaurant, he suddenly grabbed a large kitchen knife and repeatedly stabbed a co-worker to death. Romero then moved the victim's body to a nearby room and attempted to clean up the blood. Other employees, including Romero's brother, discovered the body shortly after the stabbing. Security cameras also captured the incident. When Romero's brother saw what had happened, he grabbed Romero and asked him what he had done. Romero did not respond; his brother testified he "looked like a deer in the headlights ... like he was shocked [at] what he did."

¶3 When police officers arrived, they found Romero waiting in the restaurant with his supervisor, who explained what Romero had done. Romero had a blank expression on his face and did not seem to understand instructions. Noticing extensive cuts on Romero's arms, officers took him to a hospital for treatment. Romero told hospital staff his wounds were self-inflicted. After his wounds were cared for, Romero reached out from his hospital bed and grabbed at a nearby officer's handgun. The officer prevented Romero from obtaining the weapon and restrained him, after which Romero looked at the officer and said, "I don't know why I did that."

¶4 As an affirmative defense, Romero sought to prove he was GEI under A.R.S. § 13-502, which states that "[a] person may be found [GEI] if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong." At trial, the superior court's preliminary instructions informed the jury that if it found beyond a reasonable doubt that Romero committed the charged offenses, it would then be required to decide whether he proved by clear and convincing evidence he was GEI when the crimes were committed.

¶5 The three medical experts who testified at trial agreed that Romero suffered from schizophrenia but disagreed as to whether Romero knew at the time that his acts were wrong. Dr. James Sullivan, testifying for the defense, opined that Romero did not know his acts were wrong due to a paranoid delusional episode. Dr. Janet Perry, the court-appointed expert, agreed. But the State's expert, Dr. James Seward, offered no definitive conclusion as to whether Romero knew his acts were wrong. Dr. Seward opined that when Romero began stabbing the victim, Romero was likely not aware what he was doing was wrong, but there were signs he became aware what he was doing was wrong in the course of the stabbing. Dr. Seward also stated it was possible that Romero's "behaviors were all some kind of manifestation of his psychotic state rather than being an awareness that the act was wrong."

¶6 The jury found Romero guilty on both counts, rejecting his GEI defense. This timely appeal followed.

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DISCUSSION

¶7 Our standard of review of the asserted errors depends on whether Romero objected in the superior court. If he objected and we find error, the State must prove the error was harmless. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 18, 115 P.3d 601, 607 (2005). Otherwise, we review for fundamental error resulting in prejudice. *See State v. Escalante*, 245 Ariz. 135, 140, ¶ 12, 425 P.3d 1078, 1083 (2018).

A. Jury Instructions

[1] [2] [3] [4] ¶8 Romero argues the superior court erred by giving instructions that misinformed the jury of the elements required to establish GEI under A.R.S. § 13-502(A). We review the propriety of jury instructions de novo. *State v. Fierro*, 220 Ariz. 337, 338, ¶ 4, 206 P.3d 786, 787 (App. 2008). Instructions inform the jury how to apply the law, *State v. Noriega,* 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996), and we will not reverse unless the instructions, taken together, would have misled the jurors, *State v. Doerr*, 193 Ariz. 56, 65, ¶ 35, 969 P.2d 1168, 1177 (1998). Despite our de novo review of the legal sufficiency of the jury instructions, because Romero did not object at trial to the instructions ****228 *604** given, we will reverse only if the court committed fundamental error resulting in prejudice. *See Fierro*, 220 Ariz. at 340, ¶ 11, 206 P.3d at 789.

¶9 Romero takes issue with two of the superior court's instructions. The first one paraphrased the standard under A.R.S. § 13-502(A) and quoted the Revised Arizona Jury Instructions ("RAJI") Statutory Criminal 5.02-1 (4th ed. 2018):

> You must determine from the evidence whether the defendant was [GEI] at the time the crime was committed. A defendant is [GEI] if at the time of the crime the defendant was afflicted with a mental disease or defect of such severity that the defendant did not know the criminal act was wrong.

The second instruction, paraphrasing A.R.S. § 13-105(10)(b) and quoting RAJI Statutory Criminal 1.0510(b), stated:

> "Knowingly" means that a defendant acted with awareness of or belief in the existence of conduct or circumstances constituting an offense. It does not mean that a defendant must have known the conduct is forbidden by law.

¶10 Romero argues these instructions wrongly informed the jury it could find he knew his conduct was wrong even if he could not understand it was forbidden by law. He contends the instructions given were "in direct contradiction to the elements of the [GEI] affirmative defense," and the superior court should have sua sponte given the jury instruction at issue in *State v. Corley*, 108 Ariz. 240, 242–43, 495 P.2d 470, 472–473 (1972) and *State v. Tamplin*, 195 Ariz. 246, 247, ¶ 4, 986 P.2d 914, 915 (App. 1999), to explain what "wrong" means in the context of A.R.S. § 13-502. The relevant instruction given in those two cases stated:

> Knowledge that an act was wrong, as the phrase is used in these instructions, means knowledge that the act was wrong according to generally accepted moral standards of the community and not the defendant's own individual moral standards. Knowledge that an act was forbidden by law will permit the inference of knowledge that the act was wrong according to generally accepted moral standards of the community.

Corley, 108 Ariz. at 242–43, 495 P.2d at 472–473; *Tamplin*, 195 Ariz. at 247, ¶ 4, 986 P.2d at 915 (hereinafter referred to as the "*Corley* instruction"). In those cases, the respective appellate courts rejected the defendants' arguments that the instruction should not have been given, whereas here Romero contends the court fundamentally erred by failing to

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give the same instruction. *Corley*, 108 Ariz. at 243, 495 P.2d at 473; *Tamplin*, 195 Ariz. at 249, ¶ 12, 986 P.2d at 917.

[5] ¶11 To address whether the superior court was required to sua sponte give the *Corley* instruction at Romero's trial, we begin with the well-accepted premise that unless the legislature plainly indicates otherwise, a crime "requires both guilty conduct and a culpable mental state." *See e.g., State v. Slayton*, 214 Ariz. 511, 514, ¶ 9, 154 P.3d 1057, 1060 (App. 2007). Under Arizona's criminal code, a person acts "knowingly" when, "with respect to conduct or to a circumstance described by a statute defining an offense," the person engages in such conduct with the "aware[ness] or belie[f] that the ... conduct is of that nature or that the circumstance exists." A.R.S. § 13-105(10)(b). A defendant need not have acted, however, with "any knowledge of the unlawfulness of the act or omission." *Id.*

[6] **[7]** ¶12 The criminal law's general indifference to whether a defendant knows an act is criminal reflects a second core principle—ignorance of the law is no defense. *See* A.R.S. § 13-204(B); *State v. Morse*, 127 Ariz. 25, 31, 617 P.2d 1141, 1147 (1980). "Knowingly" thus refers to factual knowledge, not knowledge of an act's legal or moral impropriety. *See State v. Francis*, 243 Ariz. 434, 436–37, ¶ 12, 410 P.3d 416, 418–19 (2018) (collecting cases holding "that knowledge of an act, even without understanding its legal significance, can establish the culpable mental state necessary for conviction of a crime that must be 'knowingly' committed"); *see also Bryan v. United States*, 524 U.S. 184, 193, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998) ("[T]he term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense.").

****229** ***605** ¶13 Under the statutes at issue here, the State was required to prove that Romero had an awareness of or a belief that his conduct at the restaurant was of such a nature that it would "cause death or serious physical injury," A.R.S. § 13-1104 (second degree murder), and that in the hospital he was aware of or had a belief that he was "tak[ing] or attempt[ing] to exercise control over" a firearm belonging to an officer, A.R.S. § 13-1204(A)(9)(a) (aggravated assault). Thus, the superior court's instruction, stating that knowingly "does not mean that a defendant must have known the conduct is forbidden by law," properly reflects Arizona law.

[8] **[9]** ¶14 Turning to the GEI instruction, wrongfulness in context of a GEI defense has its origins in "what is known as the Rule of *M'Naghten's Case* as the test for criminal insanity," which Arizona has long followed. *See State v. Schantz*, 98 Ariz. 200, 206, 403 P.2d 521 (1965) (collecting cases). The Rule states as follows:

> [T]o establish a [defense] on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was [laboring] under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843). The Rule's first part "asks about cognitive capacity: whether a mental defect leaves a defendant unable to understand what he is doing." *Clark v. Arizona*, 548 U.S. 735, 747, 126 S.Ct. 2709, 165 L.Ed.2d 842 (2006). Its second part addresses the "lack of moral capacity: whether a mental disease or defect leaves a defendant unable to understand that his action is wrong." *Id.*

¶15 After its adoption in 1977, Arizona's courts consistently understood A.R.S. § 13-502 as codifying *M'Naghten*. *See, e.g., State v. Mott*, 187 Ariz. 536, 541, 931 P.2d 1046, 1051 (1997); *State v. Zmich*, 160 Ariz. 108, 110, 770 P.2d 776, 778 (1989); *State v. Heartfield*, 196 Ariz. 407, 410, 998 P.2d 1080, 1083 (App. 2000). In 1993, however, our legislature deleted the first prong of the test from the statute's text, so that now a person is GEI only if a "mental disease or defect" caused the person to "not know the criminal act was wrong." A.R.S. § 13-502(A); *see Clark*, 548 U.S. at 742, 126 S.Ct. 2709 (upholding changes to Arizona's moral incapacity-based insanity test as constitutional); *cf. Kahler v. Kansas*, ––– U.S. ––––, 140 S.Ct. 1021, 1028–29, 206 L.Ed.2d 312 (2020) (upholding Kansas's cognitive incapacity-based insanity test as constitutional).

[10] ¶16 Though the meaning of "wrong," as used in *M'Naghten*, "has been an enigma since the standard was ... adopted," Arizona defines the word "wrong" in accordance with generally accepted moral standards of the community. *Corley*, 108 Ariz. at 243, 495 P.2d at 473 (citing *State v. Malumphy*, 105 Ariz. 200, 212, 461 P.2d 677, 689 (1969) (McFarland, J., specially concurring)); *see also* *State v. Skaggs*, 120 Ariz. 467, 472, 586 P.2d 1279, 1284 (1978) (citing *Malumphy*). This concept necessarily "include[s] both legal and moral wrong." *Corley*, 108 Ariz. at 243, 495 P.2d at 473.

[11] **[12]** ¶17 As relevant here, in pressing his GEI defense, Romero was required to prove by clear and convincing evidence that his mental disease or defect rendered him unable to know his acts were legally and morally wrong according to the standards of the community. *Id.* Romero's argument is that the instructions informed the jury that it could find he knew his acts were wrong—and thus could not prove his GEI defense—even if he did not know the acts were forbidden by law. What Romero asserts as error, however, is a correct statement of the law. Indeed, *M'Naghten* contemplated the scenario where a defendant lacks knowledge that his act was illegal:

> If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious ****230** ***606** that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable....

M'Naghten's Case, 8 Eng. Rep. at 723; *accord Malumphy*, 105 Ariz. at 212, 461 P.2d at 689. Stated differently, evidence of a defendant's inability to know an act has been criminalized is insufficient to establish a GEI defense. Moreover, if the State counters this defense with evidence showing the defendant was aware his conduct was illegal, then it would not be improper for the jury to conclude that he also knew his conduct was morally wrong. *See* *Corley*, 108 Ariz. at 243, 495 P.2d at 473 (rejecting defendant's challenge to jury instruction stating in part that " '[k]nowledge that an act was forbidden by law will *permit the inference of knowledge* that the act was wrong according to generally accepted moral standards of the community' ") (emphasis added).

¶18 In the oft-cited case of *People v. Schmidt*, 216 N.Y. 324, 110 N.E. 945 (1915), the court further explained the difference between legally and morally wrong. *See Malumphy*, 105 Ariz. at 210–12, 461 P.2d at 687–689. There, the defendant argued the trial court mis-instructed the jury under a *M'Naghten*-type statute by limiting "wrong" to mean no more than "contrary to the laws of the state." *Schmidt*, 110 N.E. at 946 (internal quotations omitted). On appeal, however, the court was "unable to accept the view that the word 'wrong' ... [should] receive so narrow a construction." *Id.* Analyzing *M'Naghten*, the court explained that "a defendant who knew nothing of the law would none the less be responsible if he knew that the act ... was morally wrong." *Id.* at 947. Although *M'Naghten* had not explicitly considered "[w]hether [a defendant] would also be responsible if he knew [the act] was against the law, but did not know it was morally wrong," *id.*, the *Schmidt* court pointed out that, in most cases, the analysis will be coterminous because "[o]bedience to the law is itself a moral duty." *Id.* at 949.

¶19 By not limiting "wrong" to mean "against the law," the GEI instruction here did not incorrectly bar the jury from considering evidence related to Romero's understanding of both the legal and moral wrongness of his acts. The instruction accurately reflected § 13-502, and Romero has not shown that modeling the jury instruction on the statutory language was improper. *See State v. Harris*, 151 Ariz. 236, 238, 727 P.2d 14, 16 (1986) (upholding jury instructions for burglary based on statutory language, despite subsequent clarifying case law). In the absence of any authority requiring the *Corley* instruction, we cannot say the superior court erred here. *Cf.* 1 Wayne R. LaFave, *Substantive Criminal Law* § 7.2(b)(4) (3d ed. 2018) (noting that this prong of *M'Naghten* is often "simply given to the jury without explanation").

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¶20 We appreciate Romero's argument that the superior court should have given the *Corley* instruction because it more accurately describes this unique area of law. Thus, in future cases we encourage trial judges to give the *Corley* instruction because it provides juries, expert witnesses, and counsel a better understanding of the GEI defense. The instruction may have been helpful in this case given that the State's expert was the only individual at trial who offered the jury with a definition of "wrong," and he incorrectly stated that "to the best of my understanding, in Arizona, not knowing that an action was wrong refers to the legal wrongness as opposed to moral wrongness." Nonetheless, the court's failure to sua sponte give the *Corley* instruction was not improper.

B. Testimony Regarding Consequences of a GEI Verdict

[13] ¶21 Romero also argues the superior court erred by not allowing him to examine Dr. Perry about the consequences of a GEI verdict. Romero contends he needed to question Dr. Perry about the issue "to rebut the State's insinuation that the GEI defense was less punishment." Because Romero raised this issue in the superior court, which rejected his argument, we review that ruling for harmless error.

[14] **[15]** ¶22 We review the superior court's evidentiary rulings and restrictions on witness examination for an abuse of discretion. *State v. McGill*, 213 Ariz. 147, 156, ¶ 40, 140 P.3d 930, 939 (2006). Because the decision ****231** ***607** of which punishment to impose is generally the court's task alone, juries are not permitted to consider the consequences of their verdicts. *State v. Cornell*, 179 Ariz. 314, 327, 878 P.2d 1352, 1365 (1994).

¶23 During cross-examination of court-appointed expert Dr. Perry, the prosecutor questioned whether Romero was malingering when Perry interviewed him in the following exchange:

Q. Okay.... A person in Mr. Romero's position, hypothetically may consider, a finding of legal insanity to be a benefit over a finding of guilt in a courtroom?

A. I did not discuss that [with] him.

Q. Okay. But, hypothetically, I mean, people may perceive one option is better than the other?

¶24 Romero objected to this line of questioning, but the superior court overruled him. The prosecutor continued:

Q. ... A subject that you're examining such as Mr. Romero --

A. Uh-huh.

Q. -- may in the time he's had between the incident and when he's being evaluated -- may come in his mind, rightly or wrongly, to a realization that one result might be better for him than another?

A. Yes.

Q. More in his self-interest?

A. Yes....

Q. And that's one of the problems in competency exams as well, test subjects may feel a certain result might be more favorable to them?

A. Yes.

Q. Now that might be true not just of persons charged with crimes, but anyone seeing someone in your profession?

A. Yes.

...

Q. ... In your experience doing GEI cases, have you encountered test subjects who fabricate information about the offense?

A. Yes.

Q. And usually, would that be hypothetically to make themselves look better?

A. Yes.

¶25 At an ensuing bench conference, Romero argued that the prosecutor's questions "opened the door to punishment ... [by] asking those questions about what [Romero's] feelings were about being convicted" and requested to ask the witness "about what happens if a person gets convicted of GEI, where do they go." The superior court ultimately denied Romero's request to ask Dr. Perry about the consequences of a GEI verdict.

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¶26 Romero cites authority discussing appropriate factors for the jury to consider during a capital case's penalty phase in support of his assertion that the jury should have been informed about the consequences of a GEI verdict. *See* *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (plurality opinion); *State v. Escalante-Orozco*, 241 Ariz. 254, 386 P.3d 798 (2017), *abrogated in part by* *Escalante*, 245 Ariz. at 140–41, ¶ 16, 425 P.3d at 1083–84. But nothing in those cases implies that a jury should be allowed to consider the consequence of its verdict during a trial's guilt phase. *See, e.g.*, *Simmons*, 512 U.S. at 163, 114 S.Ct. 2187 (explaining that "[a]rguments relating to a defendant's future dangerousness ordinarily would be inappropriate at the guilt phase of a trial" but may be considered when the jury "has sentencing responsibilities").

[16] ¶27 In fact, our supreme court has rejected a similar argument. *See* *State v. McLoughlin*, 133 Ariz. 458, 461, 652 P.2d 531, 534 (1982). In *McLoughlin*, "an unidentified third party" told a juror the defendant would go free if the jury found him insane, and "[t]his juror passed along this information to the rest of the jury" during deliberations. *Id.* at 460, 652 P.2d at 533. The court made clear that "this information is always inadmissible." *Id.* at 461, 652 P.2d at 534. Although ultimately reversing his conviction, the court nonetheless disagreed with the defendant's assertion that "an instruction correctly stating what would have happened had he been acquitted by reason of insanity ... would have avoided the problem caused by the juror misconduct." *Id.* Because "disposition of a defendant upon the jury's verdict has nothing ****232 *608** to do with the defendant's guilt or innocence," it can "never be considered by the jury in its deliberations." *Id.* at 461–62, 652 P.2d at 534–35. In other words, the court would not correct an error by allowing another error to occur. *See* *id.* Consistent with this principle, the superior court properly instructed the jury not to consider Romero's possible punishment in its deliberations.

¶28 Furthermore, viewed in context, we do not view the questions posed to Dr. Perry as entering the impermissible area of punishment. Importantly, the prosecutor's questions contained qualified, conditional terms such as "hypothetically," "perceive," and "rightly or wrongly." And they were generally sought to elicit possible explanations for malingering and why that was a concern for psychologists in many clinical situations. This was a relevant and proper subject of questioning, one Romero's counsel raised while examining Dr. Sullivan. And on re-direct, without mentioning consequences, defense counsel addressed whether and to what extent the issue of malingering contributed to Dr. Perry's opinions, giving Romero an adequate opportunity to rebut any implication that he might have been feigning his mental condition. Accordingly, the superior court acted within its discretion in denying Romero's request.

C. GEI as a Matter of Law

[17] **[18]** ¶29 Citing A.R.S. § 13-103(B), and *State v. Bayardi*, 230 Ariz. 195, 281 P.3d 1063 (App. 2012), Romero contends the superior court should have declared him GEI as a matter of law. We are aware of no authority that authorizes a court to take such action, and § 13-502 explicitly leaves insanity in the fact finder's hands. *See* A.R.S. § 13-502(D) (stating "if the finder of fact finds the defendant [GEI] ...."). Nor does *Bayardi*, which concerned the types of criminal defenses available under Arizona law, provide support. *Id.* at 198, ¶13, 281 P.3d at 1066. The issue there was whether the defendant's proffered statutory defense was "an affirmative defense, a justification defense or a defense that denies an element of the charge or responsibility." *Id.* at 198, ¶10, 281 P.3d at 1066. We held that the statute at issue created an affirmative defense, expressing no view about whether any affirmative defense—such as GEI—can be established as a matter of law. *Id.* at 201, ¶22, 281 P.3d at 1069. To the contrary, *Bayardi* contemplated that such defenses are questions of fact for the factfinder to resolve. *Id.* at 200, ¶20, 281 P.3d at 1068 (providing that affirmative defenses excuse a defendant from responsibility "[w]hen the requisite facts are established"). We therefore reject Romero's contention that the court should have found him GEI as a matter of law.

CONCLUSION

¶30 We hold that the superior court did not (1) commit fundamental error by failing to instruct the jury with more specificity on the definition of insanity; (2) abuse its discretion in precluding testimony about the consequences of a GEI verdict; or (3) err in failing to declare Romero GEI as a matter of law. We therefore affirm Romero's convictions and sentences.

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EXHIBIT G

COURT'S FINAL JURY INSTRUCTIONS

STATE OF ARIZONA

v.

DWARKA TITO BARON

CR20201655-001

No. 1 - Duty Of Jury

I am now going to tell you the rules you should follow to decide this case. It is your duty as a juror to decide this case by applying these jury instructions to the facts as you determine them. They are the rules you should use to decide this case.

It is also your duty to determine the facts in this case by determining what actually happened. Determine the facts only from the evidence produced in court. When I say "evidence," I mean the testimony of witnesses and the exhibits introduced in court. You should not guess about any fact. You must not be influenced by sympathy or prejudice. You must not be concerned with any opinion that you feel I have about the facts. You are the sole judges of what happened.

You must consider all these instructions. Do not pick out one instruction or part of one, and disregard the others. As you determine the facts, however, you may find that some instructions no longer apply. You must then consider the instructions that do apply, together with the facts as you have determined them.

No. 2 - Indictment Is Not Evidence

The State has charged the defendant with a crime. A charge is not evidence against the defendant. You must not think that the defendant is guilty just because of a charge. The defendant has pled "not guilty." This plea of "not guilty" means that the State must prove each element of the charge beyond a reasonable doubt.

No. 3 - Presumption Of Innocence

The law does not require a defendant to prove innocence. The defendant is presumed by law to be innocent. You must start with the presumption that the defendant is innocent.

No. 4 - Burden Of Proof

There are three standards for the burden of proof:

1. Preponderance of the evidence;
2. Clear and convincing evidence;
3. Beyond a reasonable doubt.

Preponderance of the Evidence – A party having the burden of proof by a preponderance of the evidence must persuade you, by the evidence, that the claim or a fact is more probably true than not true. This means the evidence that favors that party outweighs the opposing evidence.

Clear and Convincing Evidence – A party having the burden of proof by clear and convincing evidence must persuade you, by the evidence, that the claim or a fact is highly probable. This standard is higher than the standard for proof by a preponderance of the evidence, but is lower than the standard for proof beyond a reasonable doubt.

Beyond a Reasonable Doubt – The State has the burden of proving the defendant guilty beyond a reasonable doubt. This means the State must prove each element of each charge beyond a reasonable doubt. Proof beyond a reasonable doubt is proof, by the evidence that leaves you firmly convinced of the defendant's guilt. This standard is higher than the standard for either proof by a preponderance of the evidence or proof by clear and convincing evidence.

There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

No. 5 - Jury Not To Consider Penalty

You must decide whether the defendant is guilty, not guilty, or guilty except insane by determining what the facts in the case are and applying these jury instructions. You must not consider the possible punishment when deciding on guilt; punishment is left to the judge.

No. 6 - Evidence To Be Considered

You are to determine what the facts in the case are from the evidence produced in court. If an objection to a question was sustained, you must disregard the question and you

must not guess what the answer to the question might have been. If an exhibit was offered into evidence and an objection to it was sustained, you must not consider that exhibit as evidence. If testimony was ordered stricken from the record, you must not consider that testimony for any purpose.

No. 7 – Defendant Need Not Produce Evidence

The State must prove guilt beyond a reasonable doubt with its own evidence. The defendant is not required to produce evidence of any kind. The decision not to produce any evidence is not evidence of guilt.

No. 8 - Lawyers' Comments Are Not Evidence

In their opening statements and closing arguments, the lawyers have talked or will talk to you about the law and the evidence. What the lawyers said or will say is not evidence, but it may help you to understand the law and the evidence.

No. 9 - Presence of Investigator

The State is entitled to have one investigator at counsel's table. The investigator's presence in this courtroom should not be considered by you for any purpose, influence your view of the evidence, or impact your deliberations in any way.

No. 10 - Exhibits

Not all exhibits marked and used during trial are admissible. Only those exhibits admitted into evidence may be in the jury deliberation room and used by the jury during deliberations.

No. 11 - Direct And Circumstantial Evidence

Evidence may be direct or circumstantial. Direct evidence is a physical exhibit or the testimony of a witness who saw, heard, touched, smelled or otherwise actually perceived an event. Circumstantial evidence is the proof of a fact or facts from which the existence of another fact may be determined. The law makes no distinction between direct and circumstantial evidence. You must determine the weight to be given to all the evidence without regard to whether it is direct or circumstantial.

No. 12 - Credibility Of Witnesses

In deciding the facts of this case, you should consider what testimony to accept, and what to reject. You may accept everything a witness says, or part of it, or none of it.

In evaluating testimony, you should use the tests for truthfulness that people use in determining matters of importance in everyday life, including such factors as: the witness's ability to see or hear or know the things the witness testified to; the quality of the witness's memory; the witness's manner while testifying; whether the witness had any motive, bias, or prejudice; whether the witness was contradicted by anything the witness said or wrote before trial, or by other evidence; and the reasonableness of the witness's testimony when considered in the light of the other evidence.

Consider all of the evidence in the light of reason, common sense, and experience.

No. 13 - Stipulations

The lawyers are permitted to stipulate that certain facts exist. This means that both sides agree those facts do exist and are part of the evidence. You are to treat a stipulation as any other evidence. You are free to accept it or reject it, in whole or in part, just as any other evidence.

No. 14 - Testimony Of Law Enforcement Officers

The testimony of a law enforcement officer is not entitled to any greater or lesser importance or believability merely because of the fact that the witness is a law enforcement officer. You are to consider the testimony of a police officer just as you would the testimony of any other witness.

No. 15 - Motive

The State need not prove motive, but you may consider motive or lack of motive in reaching your verdict.

No. 16 - Voluntariness Of Defendant's Statements

You must not consider any statements made by the defendant to a law enforcement officer unless you determine beyond a reasonable doubt that the defendant made the statements voluntarily.

A defendant's statement was not voluntary if it resulted from the defendant's will being overcome by a law enforcement officer's use of any sort of violence, coercion, or threats, or by any direct or implied promise, however slight.

You must give such weight to the defendant's statement as you feel it deserves under all the circumstances.

No. 17 - Expert Witness

A witness qualified as an expert by education or experience may state opinions on matters in that witness's field of expertise, and may also state reasons for those opinions.

Expert opinion testimony should be judged just as any other testimony. You are not bound by it. You may accept it or reject it, in whole or in part, and you should give it as much credibility and weight as you think it deserves, considering the witness's qualifications and experience, the reasons given for the opinions, and all the other evidence in the case.

No. 18 – Defendant Need Not Testify

The State must prove guilt beyond a reasonable doubt based on the evidence. You must not conclude that the defendant is likely to be guilty because the defendant did not testify. The defendant is not required to testify. The decision on whether or not to testify is left to the defendant acting with the advice of an attorney. You must not let this choice affect your deliberations in any way.

No. 19 – Calling Witnesses

Neither side is required to call as witnesses all persons who may have been present at the time of the events disclosed by the evidence or who may appear to have some

knowledge of these events or produce all objects or documents mentioned or suggested by the evidence.

No. 20 – First-Degree Murder

The crime of first-degree murder requires proof that the defendant:

1. caused the death of another person; and
2. intended or knew that he would cause the death of another person; and
3. acted with premeditation.

"**Premeditation**" means that the defendant intended to kill another human being or knew he would kill another human being, and that after forming that intent or knowledge, reflected on the decision before killing. It is this reflection, regardless of the length of time in which it occurs, that distinguishes first-degree murder from second degree murder. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion. The time needed for reflection is not necessarily prolonged, and the space of time between the intent or knowledge to kill and the act of killing may be very short.

No. 21 – Affirmative Defense

The defendant has raised the affirmative defense of Guilty Except Insane. The burden of proving each element of the offense beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of Guilty Except Insane is on the defendant. The defendant must prove the affirmative defense of Guilty Except Insane by clear and convincing evidence. If you find that the defendant has proven the affirmative defense of Guilty Except Insane by clear and convincing evidence you must find the defendant Guilty Except Insane of the offense of First-Degree Murder.

No. 22 – Insanity (Guilty Except Insane)

You must determine from the evidence whether the defendant was guilty except insane at the time the crime was committed.

A defendant is guilty except insane if at the time of the crime the defendant was afflicted with a mental disease or defect of such severity that the defendant did not know the criminal act was wrong.

The defendant must prove guilty except insane by clear and convincing evidence, which means that it is highly probable that the defendant was insane. This is a lesser standard of proof than "beyond a reasonable doubt."

A mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders.

Conditions that do not constitute insanity include, but are not limited to:

- momentary, temporary conditions arising from the pressure of the circumstances;
- moral decadence;
- depravity;
- passion growing out of anger, jealousy, revenge, hatred; or
- passion growing out of other motives in a person who does not suffer from a mental disease or defect or an abnormality that is manifested only by criminal conduct.

Knowledge that an act was wrong, as the phrase is used in these instructions, means knowledge that the act was wrong according to generally accepted moral standards of the community and not the defendant's own individual moral standards. Knowledge that an act was forbidden by law will permit the inference of knowledge that the act was wrong according to generally accepted moral standards of the community.

No. 23 – Definitions Regarding State Of Mind

Intentionally or "With Intent To"

"Intentionally" or "with intent to" means that a defendant's objective is to cause that result or to engage in that conduct.

Intent may be inferred from the facts and circumstances disclosed by the evidence. It need not be established exclusively by direct sensory proof. The existence of intent is one of the questions of fact for your determination.

No. 24 – Jury Foreperson

When you go to the jury room you will choose a foreperson. The role of the jury foreperson is important, but please remember that the foreperson's opinion about the case is not more important than that of the other jurors. The opinions of each juror count equally.

The jury foreperson's responsibilities include the following:

1. Make sure every member of the jury is present during all discussions and deliberations.
2. Make sure that the deliberations are conducted respectfully and that all issues are fully discussed. The discussions should be open and free so that every juror may participate.
3. All jurors should be allowed to state their views about the case and what they think the verdict should be and why.
4. All members must agree unanimously on any verdict. Therefore, the foreperson should count the votes to ensure that every juror has voted.
5. If you reach a verdict, fill out the verdict forms and then sign the forms on behalf of the jury.
6. If the jury reaches a verdict, the foreperson will inform the bailiff. When the jury returns to the courtroom, the foreperson will bring the signed or unsigned verdict forms as well as any question forms that may have been used.
7. When you return to the courtroom, the court will ask the foreperson whether the jury has reached any verdict. The foreperson will respond "yes" or "no." The foreperson is not expected to read any verdict to the court; that will be done by the Clerk.

No. 25 – Closing Instruction

The case is now submitted to you for decision. When you go to the jury room, you will choose a Foreperson. He or she will preside over your deliberations.

I suggest that you discuss and then set your deliberation schedule. You are in charge of your schedule and may set and vary it by agreement and the approval of the Court. After you have decided on a schedule, please advise the bailiff.

You are to discuss the case and deliberate only when all jurors are together in the jury room. You are not to discuss the case with each other or anyone else during breaks or recesses. The admonition I have given you during the trial remains in effect when all of you are not in the jury room deliberating.

After setting your schedule, I suggest that you next review the written jury instructions and verdict form. It may be helpful for you to discuss the instructions and verdict form to make sure that you understand them. Again, during your deliberations you must follow the instructions and refer to them to answer any questions about applicable law, procedure, and definitions.

Should any of you, or the jury as a whole, have a question for me during your deliberations or wish to communicate with me on any other matter, please utilize the jury question form that we will provide you. Your question or message must be communicated to me in writing and must be signed by you or the Foreperson.

I will consider your question or note and consult with counsel before answering it in writing. I will answer it as quickly as possible.

Remember that you are not to tell anyone, including me, how you stand, numerically or otherwise, until after you have reached a verdict or have been discharged.

All twelve of you must agree on the verdict. You must be unanimous. Once all twelve of you agree on a verdict, only the Foreperson need sign the verdict forms on the line marked “Foreperson.”

You will be given one form of verdict on which to indicate your decision. It reads as follows.