ARIZONA SUPREME COURT

MICHAEL VALLE, Petitioner, v. HON. CHRISTOPHER BROWNING, Judge of the Superior Court of the State of Arizona in and for the County of Pima, Respondent, and THE STATE OF ARIZONA, TUCSON CITY ATTORNEY'S OFFICE, CRIMINAL DIVISION, Real Party in Interest.	CR-22-0228-PR Court of Appeals No. 2 CA-SA 2022-0036 DEPARTMENT A Pima County Superior Court Cause No. CR20214571-001 Tucson City Court Docket No. TR20007735

BRIEF OF *AMICI CURIAE* CITY OF TUCSON PUBLIC DEFENDER'S OFFICE and ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR REVIEW OF A SPECIAL ACTION DECISION OF THE COURT OF APPEALS

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INTRODUCTION

This Court has never addressed whether a juror who reveals thoughts about the prosecution's case via a question submitted during trial may be removed for cause although the juror has violated no admonition nor engaged in misconduct. Jurors play an essential factfinding role in criminal cases, and a defendant has a right to conviction by a unanimous jury under both the Sixth Amendment to the U.S. Constitution and Ariz. Const. art. 2, § 23. Arizona mandates that jurors be permitted to ask questions during the presentation of evidence, but the lower courts erroneously affirmed the dismissal for cause of a juror who exercised that right. Review is needed because the lower courts' decisions conflict with the juror's right to ask questions and the defendant's constitutional rights to a unanimous verdict.

INTEREST OF AMICI CURIAE

The Tucson City Public Defender's Office (TCPD) is the only misdemeanor indigent defense agency in Pima County. Its attorneys represent many thousands of clients every year on misdemeanor charges in Tucson City Court. TCPD has a small appellate unit that represents clients in criminal cases before the Pima County Superior Court, Arizona Court of Appeals, and the Arizona Supreme Court. The questions raised in this Petition for Review directly relate to issues facing TCPD's

attorneys and clients. TCPD attorneys and clients regularly appear before Tucson City Magistrates in jury trials for driving under the influence.

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer. This case raises an important and novel issue that will impact criminal courts throughout Arizona. AACJ's member attorneys and TCPD's attorneys have an interest in the outcome of this litigation, which will address the way for-cause challenges are raised and defended in criminal trials going forward.

ARGUMENT

I. Dismissing a juror for asking probative questions during trial undermines confidence in the verdict and this Court's jury reforms.

The lower courts' decisions affirming the magistrate's dismissal of a juror based on a question submitted during the presentation of evidence undermines this

Court's innovative jury reforms. Arizona is one of two states requiring jurors be permitted to ask questions during a criminal trial. Ariz. R. Crim. P. 18.6(e); *see also* Colo. R. Crim. P. 24(g) ("Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial…").[1]

In 1993, Chief Justice Stanley Feldman established the Committee on More Effective Use of Juries ("Jury Committee") to study and evaluate jury trials in Arizona, and to make specific recommendations. The next year, the committee issued a comprehensive report recommending 55 specific changes, 15 of which resulted in rule changes. "Jurors: The Power of Twelve," The Arizona Supreme Court Committee on More Effective Use of Juries (Nov. 1994) (last visited Nov. 6, 2022). Changes in criminal cases included, among others: permitting mini-opening statements to give potential jurors an overview of the case, Rule 18.5(e); requiring lawyer participation in voir dire and authorizing the use of questionnaires and individual voir dire, Rule 18.5(c), (f); requiring jury instructions to be as "readily understandable as possible by individuals unfamiliar with the legal system," Rule 18.6(c); requiring jurors be advised that they may take notes and may submit written questions directed to witness, Rule 18.6(d)-(e); and requiring jurors be provided with

[1] Some studies cite Nevada as third, but Nevada leaves this to the court's discretion. *See Allred v. State*, 120 Nev. 410, 416 (Nev. 2004).

a copy of the court's preliminary and final instructions before deliberations.[2] These rule changes have remained largely unchanged.

Allowing jury questioning started in England in the 18th century and in the 19th century in the United States. *State v. Doleszny,* 844 A,2d 773, ¶ 13 (2004). Over time, the practice fell out of favor, but saw a resurgence in the 1990s following a series of studies, including Arizona's. Since then, most states, and all federal Circuit Courts that have addressed the issue, allow jurors to ask questions during trial. *See id.*, ¶¶13-14 (summarizing cases); *State v. Culkin*, 97 Haw. 206, 225 (Haw. 2001) (same). Only four jurisdictions proscribe juror questions, but their reasons have been invalidated. *See Medina v. People*, 114 P.3d 845, 852–54 (Colo. 2005).

While attorneys and judges initially feared jury questions would interfere with trial strategy, cause juror bias, or have a prejudicial effect on the verdict, those fears were unfounded. Studies have shown:

- "'Juror questions help jurors get to the truth.'"
- "'Juror questions promote juror understanding of the facts and issues and alleviate juror doubts about trial evidence.'"
- "'…[J]uror questions serve a clarifying function.'"
- Jurors "were more confident 'that they had sufficient information for reaching a responsible verdict in trials where questions were allowed.'"

[2] Ariz. R. Civ. P. 51(b)(1), incorporated by Ariz. R. Crim. P. 21.1.

- "'…[J]urors who were permitted to ask questions were more satisfied that the questioning of witnesses had been thorough, seldom thought that a witness needed to be further questioned, and were more satisfied that the jury had sufficient information to reach a responsible verdict.'"

Mitchell J. Frank, The Jury Wants to Take the Podium-but Even with the Authority to Do So, Can It? An Interdisciplinary Examination of Jurors' Questioning of Witnesses at Trial, 38 Am. J. Trial Advoc. 1, 12-13 (2014), *citing* Steven D. Penrod & Larry Heuer, Tweaking Commonsense: Assessing Aids to Jury Decision Making, 3 Psychol. Pub. Pol'y & L. 259, 274-79 (1997). Among the unfounded concerns studied in the Penrod & Heuer study was the fear that "[j]uror questions have a prejudicial effect." The authors found the opposite: "Jury questions did not affect the pattern of jury verdicts and did not affect judge-jury verdict agreement, the judges and lawyers did not see such prejudicial effects …, and jurors had more favorable views of both attorneys in trials where juror questions were permitted." Penrod & Heuer, *supra,* 279.

After reviewing additional jury-questioning studies over the past several decades, Frank concluded, "Statistically, juror questioning has proven its merit." Frank, *supra,* 18. Others reached the same conclusion: "Overall, [juror questioning] advances the interests of justice and the search for truth by enhancing the fact-finding and decision-making function of the jurors." A. Barry Cappello & G. James Strenio, Juror Questioning: The Verdict Is In, Trial, June 2000 at 44. Indeed, long before the

Penrod & Heuer study, the Fifth Circuit recognized that "it makes good common sense to allow a question to be asked" by jurors because "[t]rials exist to develop truth." *United States v. Callahan*, 588 F.2d 1078, 1086 (5th Cir. 1979), *disapproved by United States v. Winter*, 663 F.2d 1120 (1st Cir. 1981).

Although a defendant has a right to an unbiased jury, this does not mean that a jury must "sit[ ] as a passive receptacle of information." *Medina*, 114 P.3d at 856–57. As a result of being an engaged and active juror, a juror may form a bias about a piece of evidence or make a credibility determination during a trial without violating his oath as a juror. *Id.* at 857. As Judge Eckerstrom explained, "To invite jurors to ask questions is to invite them to consider, clarify, explore, and intellectually probe the evidentiary presentations of the parties." *Decision* ¶8 (Eckerstrom, J., dissenting).

That is precisely what happened here. In a driving-under-the-influence case, the magistrate dismissed a seventy-year-old scientist, who submitted the question, "If I missed the standard deviation of the breath and blood test, I apologize. But without these values, I cannot vote a guilty verdict because I don't know the accuracy of the tests" before the State rested. Appendix, Ex. 5 p. 5.

Rather than address the juror's concerns about the State's evidence, the prosecutor moved to dismiss the juror for cause, arguing that the question indicated

that the juror was "not able to follow the law." *Id.* Not only did the juror unequivocally and repeatedly tell the judge that he could follow the law, *id.* at 21-22, he also stated that he had not discussed his concern with anyone else, *id.*[3] Defense counsel noted that the State still could call an expert and that defense counsel had "brought this up several times even before the trial." *Id.* at 6. The record thus shows that the prosecutor was aware of the defect in his presentation long before he moved to strike a juror merely for pointing out the obvious.

The magistrate dismissed the juror for cause "based on his statements," *id.* at 25. Yet, the magistrate gave several jury instructions demonstrating that the juror's question was probative of the State's evidence. Instruction No. 4 told the jury, "The presumption of innocence alone is sufficient to acquit a Defendant if any element necessary to constitute the crime charged has not been proved beyond a reasonable doubt." *Id.*, Ex. 4. Instruction No. 18 instructed:

> You may weigh the results of the intoxilyzer test, together with the other evidence in determining whether the Defendant was under the influence of intoxicating liquor, taking into account any evidence, or lack thereof, as to the device's accuracy and reliability.

[3] "[A] juror's assurances of impartiality need not be couched in absolute terms." *State v. Hoskins*, 199 Ariz. 127, ¶37 (2000) (finding for-cause motions to strike properly denied); *see also State v. Clabourne*, 142 Ariz. 335, 344 (1984) ("The fact that a juror possesses certain opinions or preconceived ideas does not necessarily render that juror incompetent to decide fairly and impartially.").

> You are not bound to accept the results as conclusive, but should give it the weight to which you find it to be entitled. You may disregard the result if you find it to be unreasonable.

Id.

The lower courts mischaracterized the juror's question as one indicating a refusal to comply with the court's instructions, without identifying said instruction. Instead, the question reflected an engaged and diligent factfinder—as the Jury Committee's rule changes intended. Defense counsel correctly argued that the juror's question did not signal that he could not follow the law, but rather, it was a "tip" that "benefit[ted] the Prosecutor just as much as the Defense." *Id.*, Ex. 5 p. 7. Instead, the prosecutor chose to oust the juror, presumably fearing a trial loss. But the juror did not violate the court's instructions or admonition; he simply asked a question that the state could not, or did not want to, satisfy. The magistrate's dismissal violated Michael Valle's right to a unanimous verdict, and the juror's right to ask questions and hold the State to its burden of proof.

II. The magistrate violated Michael Valle's Sixth Amendment right to a unanimous jury by dismissing a juror for exposing a flaw in the State's evidence that constituted reasonable doubt.

Arizona's rules permit the court to strike a juror for cause "if there is a reasonable ground to believe that the juror … cannot render a fair and impartial verdict." Ariz. R. Crim. P. 18.4(b). Dismissing a juror on improper grounds,

however, constitutes structural error; the "'remedy for a juror wrongfully excluded is potent.'" *State v. Anderson*, 197 Ariz. 314, ¶20 (2000) (internal quotation omitted); *see also Batson v. Kentucky*, 106 S.Ct. 1712 (1986). Although a court may dismiss a juror for cause after the presentation of evidence has begun, *see State v. Cook*, 170 Ariz. 40, 53-54 (1991), this Court has never addressed the limitation on a court's discretion based on the juror's doubts about the State's evidence.

The Sixth Amendment to the United States Constitution and article 2, section 23 of the Arizona Constitution both require a unanimous verdict to convict. Although no Arizona opinion addresses this issue, the federal circuit courts unanimously hold that dismissal of the juror is improper if there is "any reasonable possibility" that the dismissal stems from the juror's views of the merits." *United States v. Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999). Because "a dissenting juror might be excused under the mistaken view that the juror is engaging in impermissible nullification," a "juror should be excused only when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence." *United States v. Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001).

The superior court, sitting as the appellate court, refused to consider the unanimous position of the federal circuits on this constitutional issue, purportedly because Arizona's courts are not bound by federal court decisions. Appendix, Ex. 1;

Decision, ¶14, n.3 (Eckerstron, J., dissenting). While it is true that Arizona's courts are not bound by federal interpretations of Arizona's laws or constitution, where the state and federal constitution or rule are identical, "federal precedent is highly persuasive." *State v. Soto-Fong*, 250 Ariz. 1, ¶43 (2020). Moreover, federal courts' interpretations of the U.S. Constitution are binding. *State v. Jean*, 243 Ariz. 331, ¶92 (2018) ("Our federalist system allows us to interpret our state constitution differently than the U.S. Supreme Court interprets the national Constitution, so long as we do not diminish federal constitutional protections or transgress federal laws enacted pursuant to the U.S. Constitution.") (Bolick, J., concurring in part).

While the federal opinions involve jurors dismissed during deliberations, the same logic applies to jurors who present questions that highlight a problem with the prosecution during the presentation of evidence. Arizona's jurors are expected to actively participate in a trial's factfinding function. While jurors may not confer during the presentation of evidence, and they must wait to reach a conclusion, jurors are expected to begin their personal deliberative process at the start of the State's case through active participation. *Decision*, ¶8 (Eckerston, J., dissenting). A juror such as the scientist in Mr. Valle's case might be the lone holdout when the jury is sent to deliberate. Indeed, after the juror was dismissed, the remaining jurors,

without the benefit of the dismissed juror's insights, ultimately reached a unanimous guilty verdict. Appendix, Ex. 3.

Cook involved the dismissal for cause of a juror before deliberations had begun. Although that juror violated the court's admonition, this Court observed that "[i]n certain circumstances there may be constitutional constraints on the trial court's exercise of discretion regarding whether to excuse a juror for cause, particularly when a juror has indicated that, from the evidence heard, he or she might be disinclined to vote for a conviction." 170 Ariz. at 54, *citing United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987). In *Brown*, the court held that dismissal stemming from doubts a juror harbors about the sufficiency of the government's evidence would render the right to a unanimous verdict "illusory," a result that would be "unacceptable under the Constitution." 823 F.2d at 596. Likewise, the lower courts' dismissal of the juror in this case raises serious concerns about the illusory nature of the unanimous verdict against Mr. Valle.

The magistrate below expressed concern that the scientist-juror was relying on his professional experience in identifying the information missing from the State's evidence. But this is not cause for striking a juror; this is a factfinder's mission in holding the State to its burden of proving guilt beyond a reasonable doubt. As Judge Eckerstrom noted, neither the prosecutor nor the magistrate identified any

wrongdoing, but merely a question that raised the possibility of a not-guilty verdict. *Decision*, ¶12. "It is unrealistic and impossible to expect or require that a jury be a laboratory completely sterilized and freed from all external factors." *Bruce v. Duckworth*, 659 F.2d 776, 781 (7th Cir. 1981). Here, the jurors were instructed to use their "good common sense" and to consider the evidence "in the light of your experience..." Appendix, Ex. 4. Moreover, Arizona's courts have long held that a person's professional experience does not constitute cause for striking the person from a jury. *See, e.g., State v. Hill*, 174 Ariz. 313, 319 (1993) (no error in refusal to strike police officer who stated he presumed police investigations to be complete and also knew the prosecutor, investigator, and coroner).

On appeal, the superior court found that the magistrate did not err in striking the juror for cause because the juror was "predisposed to vote not guilty *unless*" the prosecutor provided "additional evidence." Appendix, Ex. 1. The superior court ignored the presumption of innocence as well as the instruction regarding the validity of the breathalyzer test, both of which demonstrate that the juror was not requesting "additional evidence" but was questioning the credibility of the evidence the State had presented. *Id.*

Review is needed because this Court has never addressed the question whether a trial court's discretion to dismiss a juror for cause is curtailed by the defendant's

right to a unanimous jury verdict once a juror expresses doubt about the State's evidence. This issue is particularly important considering jurors' right to ask questions during trial and the recent rule change eliminating peremptory challenges. Ariz. S. Ct. Order No. R-21-0020 (Aug. 30, 2021).

III. The record is adequate to address the Sixth Amendment implications of dismissing a juror based on his view of the State's evidence.

The Court of Appeals (COA) majority decision denied special action review in part because Mr. Valle did not include the entire trial transcript or preliminary jury instructions in the Appendix. *Decision*, ¶¶1, 4, n.1. In *State v. Geeslin*, this Court noted that a petitioner's failure to include the entire record does not preclude special action review; where the record is sufficient to address the issue raised, the appellate courts should address the argument on the merits. 223 Ariz. 553, ¶¶6, 9-10 (2010). Neither the entire trial transcript nor the preliminary jury instructions were necessary to address the constitutional violation raised in this Petition for Special Action. *Decision*, ¶17, n.6 (Eckerstrom, J. dissenting).

Rule 7(e), Ariz. R. P. Spec. Act., requires "[a] copy of the decision from which the petition is being taken," and "an appendix of documents in the record before the trial court that are necessary for a determination of the issues raised by the petition." If the respondent believes the petitioner's appendix is missing essential records, "[t]he response to the petition shall, if necessary, be supported by an appendix of

documents in the record before the trial court that are necessary for a determination of the issues raised by the petition which are not contained in the petitioner's appendix." *Id.*; *State v. Campoy*, 220 Ariz. 539, ¶3 (App. 2009) (COA denied respondent's request to decline jurisdiction based on missing portions of the record where respondent did not seek to expand record).

Here, the record is adequate, and the State did not seek to supplement the Appendix. The Appendix includes the Superior Court's decisions denying the appeal and rehearing, the trial court verdict, final jury instructions, and the transcript of the trial proceedings regarding the State's oral motion to strike the juror for cause, which includes the trial court's voir dire of the juror, arguments of counsel, and the court's decision to strike the juror. Appendix. While the COA majority claimed that the lack of complete trial transcript prevented the judges from "ascertaining the extent to which the results of the breath testing were challenged as unreliable," *Decision* ¶4, n.1, the transcript belies this assertion. *Id.*, ¶17 n.6 (Eckerstrom, J., dissenting). The transcript includes defense counsel's argument, which plainly raised both the Sixth Amendment and reliability issues, arguing, "As I've been saying all along, it is the State's obligation to prove the accuracy. And I'm arguing margin of error … and the jury heard." Appendix, ex. 5 p. 6. Accordingly, the record was adequate to address

the issues raised in the Petition for Special Action. This Court should grant review also to explain that an "adequate record" does not equal a "complete record."

CONCLUSION

This case presents a novel issue of statewide importance. The dismissal of jurors in criminal trials based on probing questions potentially adverse to the prosecution renders the constitutional right to a unanimous verdict illusory and undermines the integrity of the jury trial system. Because this Court has adopted an active rather than passive jury system, this Court's review is needed to ensure that jurors are not dismissed for exercising their right to participate, thereby denying criminal defendants their right to a unanimous verdict under both the Sixth Amendment and Ariz. Const. art. 2, §23.

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