IN THE SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA, Respondent, v. ROBERT MICHAEL PUGA, Petitioner.	Arizona Supreme Court No. CR-25-0055-PR Arizona Court of Appeals No. 1 CA-CR 23-0162 Coconino County Superior Court No. CR 2020-00036

Arizona Attorneys for Criminal Justice *Amicus Curiae* Brief in Support of the Petition for Review.

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Issue Presented for Review

Where a juror spontaneously expressed that she did not know how her experience as a sexual assault victim would impact her as a juror and whose demeanor changed when describing her ordeal combined to establish reasonable grounds to strike the juror, did the trial court err in refusing to strike the juror where the juror's only assurances of impartiality resulted from the court's leading and conclusory rehabilitation?

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I. Interest of Amicus Curiae

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 them.

The right to a fair trial by a jury composed of fair impartial jurors is the most fundamental principle of our criminal justice system. It is universally accepted that justice cannot be achieved if meted out by biased or prejudiced jurors. This case presents important questions concerning the role of judges—at the trial and appellate level—in assuring that jurors are fair and impartial. Given Arizona's leading role in shaping a world without peremptory strikes, judges must be charged with protecting the integrity of jury trials by striking biased jurors. And appellate courts must be able to hold them accountable when they fail to meet this obligation.

Therefore, AACJ submits this brief in support of Mr. Puga because the trial court's reliance on conclusory rehabilitative questions in the face of a reasonable basis to find bias warrants correction. This Court should correct the errors below and consider the extent to which such questioning may ever serve a proper purpose.

II. Reasons to Grant Review

The Opinion below correctly acknowledges that Arizona's justice system exists in a "post-peremptory world." *State v. Puga*, 564 P.3d 631, 635 ¶21 (Ariz. App. 2025). This Court's courageous decision to abolish peremptory strikes in 2022 has been characterized as "the most radical change to the American jury in at least thirty-five years." Thomas Ward Frampton & Brandon Charles Osowski, *The End of Batson? Rulemaking, Race, and Criminal Procedure Reform*, 124 Colum. L. Rev. 1, 2 (2024).

Unsurprisingly, radical changes come with their detractors. *See*, *e.g.*, R-21-0020, Petition to Amend Rules 18.4 and 18.5 of Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure (approximately 15 of 22 comments opposing the abolition of peremptory strikes, largely out of concern that seating partial jurors will make trials unfair.)

In response to concerns that "the loss of the right to peremptorily challenge jurors will harm the fairness of trials by allowing biased jurors to survive voir dire and sit on an empaneled jury," the Petitioners who proposed abolishing peremptory strikes, Judge Swann and Judge McMurdie, predicted that "in a world without

peremptory challenges, judges can be expected to examine challenges for cause more carefully." Petitioner's Reply, R-21-0020. Judge Swann and Judge McMurdie also predicted that "the current practice of allowing rehabilitation of biased jurors" through 'magic phrases"' attesting impartiality "would yield to a serious examination of the jurors' presentations at voir dire," resulting in "more challenges for cause" being granted. *Id*. And the respected judges predicted that "appeals over jury composition would then be based on straightforward consideration of a meaningful record." *Id*.

This case provides an opportunity for this Court to ensure that the predictions of careful scrutiny during voir dire and fair appellate review in our "post-peremptory" world come true. In doing so, this Court should account for the broad scientific concern that jurors' declarations of impartiality in response to judicial rehabilitation are unreliable. *See* Jessica M. Salerno, et al., *The Impact of Minimal Versus Extended Voir Dire and Judicial Rehabilitation on Mock Jurors' Decisions in Civil Cases*, 45 L. & Hum. Behav. 336 (2021). Drawing from the wisdom of other jurisdictions, this Court should also establish the parameters by which trial courts may abuse their discretion through undue emphasis of juror rehabilitation when

seating a juror over a motion to strike for cause. *See, e.g., State v. Villeda*, 546 P.3d 268 (Or. 2024); *State v. Carroll*, 456 P.3d 502 (Haw. 2020); *O'Dell v. Miller,* 565 S.E.2d 407 (W.Va. 2002); *Walls. V. Kim*, 549 S.E. 2d 797 (Ga. App. 2001).

A. Juror rehabilitation via "magic words" is unreliable.

Jurors, like all other people, are predisposed to search for evidence that confirms their beliefs through a process known as "confirmation bias." David A. Wenner & Gregory S. Cusimano, *Combating Juror Bias*, 36 Trial 30, 35 (June 2000). They will seek information that supports their beliefs and discount that which undermines their beliefs while tainting ambiguous information to support their beliefs *Id*. Jurors are also preconditioned by life experiences to interpret evidence based on stereotypes and schemas; these life experiences impact jurors' ability to recall information, leaving gaps in memory to be filled with their preconceived notions. *Id*. at 35-37.

To root out biases and prejudices that are so deep-seated that they would prevent a juror from deciding a case based solely on the evidence at trial, courts rely on a process known as "voir dire." Brooks Holland, *Confronting the Bias Dichotomy in Jury Selection*, 81 La. L. Rev. 165, 181 (2020). Generally, voir dire relying upon

cause strikes alone has been considered inadequate to pick fair juries given the difficulty in identifying juror bias. *Id*. at 183-184.

Overreliance of voir dire procedures designed to self-report bias is not a reliable means of identifying impartial jurors. This is because "jurors do not want to answer questions in a manner which they perceive to be socially undesirable" and jurors "want to avoid the 'shame' of expressing bias, and therefore be deviant when other jurors state they can be fair and impartial." Arthur H. Patterson, Ph.D. & Nancy L. Neufer, M.S., *Removing Juror Bias by Applying Psychology to Challenges for Cause*, 7 Cornell J.L. & Pub. Pol'y 97, 103 (1997).

And when judges attempt to rehabilitate jurors by instructing them "to set aside their biases," it often has a "paradoxical effect of making the thought more cognitively accessible," leading to the juror's "bias to be even more accessible in his or her processing of the trial testimony and evidence." *Id.* (citing David M. Wegner & Ralph Erber, *The Hyperaccessibility of Suppressed Thoughts*, 63 J. Personality & Soc. Psychol. 903 (1992).). "Once bias or prejudice has been clearly voiced, subsequent retractions do not serve to qualify the juror." Daniel J. Sheehan, Jr. & Jill C. Adler, *Voir Dire: Knowledge Is Power*, 61 Tex. B.J. 630, 633 (1998). Indeed,

"[r]are is the juror who would not be intimidated by an admonishment from the court or who does not think of himself or herself as a fair and unbiased person. " Richard Gabriel, "*This Case Is Brought to You by . . . ": How High-Profile Media Trials Affect Juries*, 33 Loy. L.A.L. Rev. 725, 732 (2000).

Given the barriers to voir dire in selecting fair jurors, it is more important than ever that judges get it right in Arizona's "post-peremptory world."

B. A "post-peremptory world" requires restricted rehabilitation of jurors and meaningful appellate review.

Long ago, Chief Justice Marshall warned against relying on a biased juror's protestations of impartiality because "strong and deep impressions" undoubtedly will case the juror to "listen with more favor to that testimony which confirms, than to that which would change his opinion." *U S v. Burr*, 25 F. Cas. 49, 50 (C.C.D. Va. 1807).

Despite Chief Justice Marshall's longstanding warning, prior to the abolition of peremptory strikes, Arizona has been classified as a "state with liberal views of the juror rehabilitation doctrine." Christopher A. Cosper, *Rehabilitation of the Juror Rehabilitation Doctrine*, 37 Ga. L. Rev. 1471, 1489 (2003).

Liberal rehabilitation jurisdictions are characterized as:

- allowing jurors to be rehabilitated from any number of statements tending to show bias;
- allowing unrestricted questions by the judge to rehabilitate the prospective juror; and
- providing minimal standards for admitting the juror based on ambiguous responses to rehabilitating questions.

Id. at 1489-1490 (discussing liberal rehabilitation of jurors in *State v. Walden*, 183 Ariz. 595, 608 (1995); *State v. Martinez*, 196 Ariz. 451, 458-459 (2000); *State v. Trostle*, 191 Ariz. 4, 13 (1997); *State v. Clayton*, 109 Ariz. 587, 592 (1983); *State v. Poehnelt*, 150 Ariz. 136, 146 (App. 1985)).

After 2003, any shortcomings in Arizona's liberal use of juror rehabilitation was expected to be cured by a party's vigilant use of peremptory strikes. *See State v. Hickman*, 205 Ariz. 192, 198, ¶28 (2003) (holding that "the curative use of a peremptory challenge should be subject to harmless error review" in circumstances where a peremptory challenge is used to correct an erroneous denial of a motion to strike for cause.) But now that peremptory strikes no longer provide a safety net for erroneous denials of a motion to strike for cause, this Court should discard its liberal

approach to juror rehabilitation and replace it with a more conservative one. *See* *Cosper*, *supra* at 1505-1506 (identifying characteristics and proposed language of a "Model Rule for Juror Rehabilitation.")

The approaches of Oregon, Georgia, Hawaii, and West Virginia should be illustrative in shaping the use of rehabilitation in Arizona's "post-peremptory world."

1.) Oregon's approach to rehabilitation.

Recently, in *State v. Villeda*, 546 P.3d 268 (Or. 2024), the Oregon Supreme Court reaffirmed its approach to safeguard against unreliable juror rehabilitation methods. Like Arizona, Oregon reviews trial court rulings on challenges to a juror for cause for an abuse of discretion. *Villeda*, 546 P.3d at 270; *State v. Allen*, 253 Ariz. 306, 307, ¶41 (2022). Like Juror 6 in this case, *Villeda's* Juror 155 expressed doubt about her ability to be impartial and responded emotionally when rehabilitated with questions about whether the juror could set aside her experiences and weigh "the evidence and the law as its presented." *Puga*, 564 P.3d at 634, ¶¶6-7 ; *Villeda*, 546 P.3d at 272.

But *Villeda* approaches the role of the trial court during voir dire differently than *Puga*. *Puga* declares that the "superior court oversees jury selection and it must 'conduct a thorough oral examination of the prospective jurors and control the voir dire examination.'" *Puga*, 564 P.3d at ¶20. *Puga* therefore suggests the trial court's role is merely administrative. *Id*.

Whereas *Villeda* declares the right to an impartial jury is "guarded zealously by the courts, and the courts should guarantee that juries consist of impartial persons." *Villeda*, 546 P.3d at 272. Like Arizona, Oregon applies a totality of the circumstances test to assess whether a juror is impartial. *Id*.

But Oregon's totality of the circumstances test requires that courts "give more weight to a juror's unprompted statements of bias and less weight to any statements made in response to statements or leading questions by counsel or the court designed to 'rehabilitate' a juror who had disclosed a preexisting bias." *Villeda*, 546 P.3d at 273. Drawing on its precedent, Oregon summarized its approach to the rehabilitation of jurors:

1.) a party does not have a right to rehabilitate a biased juror;

2.) a juror's unprompted statements of bias should be given special weight; and

3.) attempting to persuade a juror that they could be fair despite their expressed biases interferes with the court's effort to assess whether the prospective juror's "probability of bias" is sufficient to excuse the juror for cause.

Villeda, 546 P.3d at 273-274,

When making this rule, the Oregon Supreme Court relied extensively upon the work of "legal scholars and empirical studies." *Id*. at 274.

2.) Georgia's approach to rehabilitation.

In *Walls v. Kim*, 549 S.E.2d 797 (Ga. App. 2001), the Georgia Court of Appeals provided a similar framework concerning the rehabilitation of jurors. Like *Villeda*, *Walls* emphasized that "the judge is the only person in a courtroom whose primary concern, indeed primary duty is to ensure the selection of a fair and impartial jury." *Walls*, 549 S.E.2d at 799. *Walls* also lamented how commonplace it was for "trial courts confronted" with "clearly biased and partial jurors" to "rehabilitate" the jurors by asking a version of this loaded question:

> After you hear the evidence and my charge on the law, and considering the oath you take as jurors, can you set aside your preconceptions and decide this case solely on the evidence and the law?

Id. at 799.

Walls noted that appellate and trial judges alike "wholeheartedly agree" that trial judges must retain "significant discretion in deciding whether to excuse jurors for cause." *Id.* But *Walls* "just as wholeheartedly" *disagreed* "with the way the 'rehabilitation' question has become something of a talisman relied upon by trial and appellate judges to justify retaining biased jurors." *Id.* Rather, *Walls* explained that the better practice "is for judges to simply use their discretion to remove such partial jurors." *Id.* Applying this rationale, *Walls* held that the trial court had abused its discretion by relying on rehabilitation questions to seat an otherwise biased juror. *Id.* at 800.

3.) Hawaii's approach to rehabilitation.

Hawaii also recognizes that leading rehabilitative questions, "particularly from the court, may often lead to unreliable answers." *State v. Carroll*, 456 P.3d 502, 516 (Haw. 2020). *Carroll* noted that such suggestive questions produce unreliable responses because of "a juror's desire to 'say the right thing' or to please the authoritative figure of the judge.'" *Id.* (quoting *McGill v. Commonwealth*, 391 S.E.2d 597, 600 (Va. App. 1990)). Echoing Georgia's approach to rehabilitation, *Carroll* concluded that when a juror does not, "in her own words, clarify or modify

her earlier indicated bias in a fashion demonstrating that her bias can be set aside," a trial judge should "'err on the side of caution by dismissing, rather than trying to rehabilitate.'" *Carroll*, 456 P.3d at 516 (*quoting Walls*, 549 S.E.2d at 799).

4.) West Virginia's approach to rehabilitation.

Like Oregon, Georgia, and Hawaii, West Virginia also recognizes that "trial judges must resist the temptation to 'rehabilitate' prospective jurors simply by asking the 'magic question' to which jurors respond by promising to be fair when all the facts and circumstances show that the fairness of that juror could be reasonably be questioned." *O'Dell v. Miller*, 565 S.E.2d 407, 412 (W. Va. 2002). In *O'Dell*, the West Virginia Supreme Court emphasized that it is for trial judges, not the juror, to resolve whether the juror harbors bias or prejudice that renders the juror unfit. 565 S.E.2d at 411. Accordingly, *O'Dell* declared that "once a perspective juror has made a clear statement during voir dire indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair." *O'Dell*, 565 S.E.2d at 412.

5.) *Puga's* approach to rehabilitation is incompatible with a "post-peremptory world."

Puga concludes that the trial court did not engage in the sort of leading and conclusory questions designed "to encourage prospective jurors to affirm that they can set aside their opinions and neutrally apply the law" cautioned against in the 2022 Comment to Ariz. R. Crim. P. 18.5(f). *Puga*, 564 P.3d at 636, ¶23. Instead, *Puga* deemed the questions as proper attempts at clarification. *Id*. at ¶24.

But *Puga's* conclusion is untenable.

Rather than support its conclusion with authority addressing the dangers of judicial rehabilitation via the use of "magic words," *Puga* rests upon a flawed analysis of what constitutes a "leading question." *Puga*, 564 P.3d at 636, ¶23. Pointing to *State v. McKinney*, 185 Ariz. 567, 575 (1996), the majority identifies "The cat was black, wasn't it?" as a prototypical leading question. *Id*. Thus *Puga* surmises that a leading question only "suggests the desired answer" by *explicitly providing* the answer.

But a question need not explicitly provide an answer to suggest the answer. Rather, leading questions differ from open-ended questions in that they encourage a particular answer by containing information the examiner is looking to have

confirmed. Melilli, Kenneth J., *Leading Questions on Direct Examination: A More Pragmatic Approach*. American Journal of Trial Advocacy. 27: 155 (2003).

Consistent with this understanding of leading questions, the *Puga* partial dissent correctly explains how the trial court's questions encouraged Juror 6 to answer in the affirmative that she could set aside her personal experiences and apply the law neutrally. *Puga*, 564 P.3d at 641-643, ¶¶58-69 (Jacobs, J., concurring in part and dissenting in part.) And the *Puga* partial dissent—not the majority—aligns with how other courts and commentators define and disapprove of unreliable judicial rehabilitation via "magic words." *Compare Puga*, 564 P.3d at 643, ¶¶68-70 *with Villeda*,546 P.3d at 274; *Walls*, 549 S.E.2d at 799; *Carroll*, 456 P.3d at 515-516; *O'Dell*, 565 S.E.2d at 412.

The *Puga* majority was not wrong in asserting that courts should ask clarifying questions when the basis of a juror's bias is expressed equivocally. *Puga*, 564 P.3d at 636, ¶.24; *see*, *also, O'Dell,* 565 S.E.2d at 411-412 . But rather than do as the trial judge did below, which the *Puga* majority blessed with approval on appeal, "the better view . . . is that if a prospective juror makes an inconclusive or vague statement during *voir dire* reflecting or indicating the possibility of a disqualifying bias or

prejudice, further probing into the facts and background related to such bias or prejudice is required." *O'Dell*, 565 S.E.2d at 411; *see*, *also*, *Griffin v. Commonwealth*, 454 S.E.2d 363, 366 (Va. App. 1995) (Judge's demand for a "commitment" from juror in response to juror equivocation deemed leading and improper.)

Yet, despite the guidance from the 2022 Comment to Ariz. R. Crim. P. 18.5(f), when confronted with an emotional juror whose lived experiences would give pause to any reasonable jurist about the juror's ability to be unbiased in a case that would renew the jurors emotional anguish, the trial court did not ask open-ended questions about the nature of the juror's lived experience. *Puga*, 564 P.3d at 642, ¶63

The *Puga* partial dissent notes that jury selection should be different after the adoption of the 2022 Comment. *Puga*, 564 P.3d at 643, ¶¶68-70. But comments to rules do not carry the force of law. *State v. Aguilar*, 209 Ariz. 40, 48, ¶26 (2004).

Thus, the question this case poses for this Court is whether Arizona's "post-peremptory world" is compatible with its historical acquiescence to liberal juror rehabilitation. *Compare* Petitioner's Reply, R-21-0020 (predicting changes to trial court practices and appellate review of jury selection if peremptory strikes were

abolished) *with* Cosper, *supra*, 1489-1492,1508 (describing liberal rehabilitation like Arizona's as a "vital flaw" to voir dire in systems *with* peremptory strikes.)

All of the available information establishes that "posing close-ended questions to rehabilitate' a juror is an ineffective way to discern a juror's actual biases and achieve the goal of selecting a fair and impartial jury." *Villeda*, 546 P.3d at 274–275.

Thus, this Court should grant review and take remedial measure to ensure that the predictions of a fairer method of voir dire and meaningful appellate review following the abolition of peremptory strikes comes true. *See* Petitioner's Reply, R-21-0020.

III. Conclusion

The abolition of peremptory strikes has been successful in Arizona's juries and reducing avenues for discrimination against potential jurors. *See* Paul J. McMurdie et. al., *Arizona's Elimination of Peremptory Challenges: A First Look*, 56 Ariz. St. L.J. 1793 (2024). With the abolition of peremptory strikes, this Court also implemented procedural improvements to Arizona's jury-selection rules. *Id*. at 1820 (describing changes to rules to promote "sufficient' voir dire and the use of case-specific juror questionnaires)

But the work to shape Arizona's "post-peremptory world" is not done.

This case provides an opportunity for this Court to critically examine its historical reliance on liberal juror rehabilitation and decide whether the practice is consistent with fairness and justice in an era without peremptory strikes. As the partial dissent aptly explains and other jurisdictions have held, unreliable bias assessment are inevitable if trial courts rely on talismanic responses to demands for impartiality. And if this Court charts a better course by providing guidance to trial courts about the limits on such juror rehabilitation, appellate review will be meaningful. Thus, this Court should grant review.

Respectfully submitted this 25th day of April, 2025

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