

# ARIZONA SUPREME COURT

STATE OF ARIZONA

Appellee,

v.

JOSE LUIS JIMENEZ

Appellant.

No. CR-23-0202-PR

No. 2 CA-CR 22-0062

Pima County Superior Court

No. CR 2017-3703001

## Amicus Brief of Arizona Attorneys for Criminal Justice

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## INTERESTS OF AMICUS CURIAE

Arizona Attorneys for Criminal Justice (“AACJ”), the Arizona affiliate of the National Association of Criminal Defense Lawyers, is a statewide nonprofit membership organization of criminal defense lawyers, law students, and associated professionals. Founded in 1986, the organization is 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.

AACJ offers this brief in support of Petition Jose Luis Jimenez because the right to a fair jury is a cornerstone of the criminal justice system. To ensure the jury is fair, the individual jurors must be fair. Now that Arizona has abolished peremptory strikes, Criminal Rule 18.4 is the primary tool for guaranteeing fair jurors. But cases have long ignored and devalued its plain language. This case exemplifies the problem. This Court should grant review to reiterate Rule 18.4’s requirement that trial courts excuse jurors when there is a reasonable ground to believe the juror cannot be fair.

## **REASONS THIS COURT SHOULD GRANT REVIEW**

Peremptory strikes set the foundation for our jurisprudence regarding for-cause strikes. And not in a good way. Peremptory strikes made meaningful appellate review impossible. If a defendant used their peremptory strike, any error was harmless. If the defendant did not, the error was waived.

As a result, our jurisprudence became lax. Courts failed to enforce rules in a meaningful manner. They failed to enforce the rules as written.

This Court took the historic step of eliminating peremptory strikes. In doing so, this Court ensured increased diversity on our petit juries.

This case marks the next step in this Court's work. Now that peremptory strikes have been eliminated, this Court must take the next step to ensure trial courts properly consider and rule on motions to strike impaired jurors for cause.

**1. Arizona’s jurisprudence related to for-cause strikes was plagued by peremptory strikes.**

Peremptory strikes created a Catch-22. If a defendant used their peremptory strike, any error was harmless. If the defendant did not use their peremptory strike, they waived the error. Because of this, our cases have evaded serious consideration of how trial courts should address for-cause strikes.

On one side, errors were harmless when the defendant used their peremptory strike. This Court reached that decision in *State v.*

*Hickman*, 205 Ariz. 192, ¶¶ 28-36 (2003). As this Court explained, “when a defendant secures an impartial jury, even through the curative use of a peremptory challenge, a conviction by that jury will not have prejudiced that defendant.” *Id.* at ¶ 31.

On the other side, when a defendant did not use their peremptory strike, the error was waived. In *State v. Rubio*, the court of appeals reasoned, “Although failure to peremptorily strike an allegedly biased juror is not technically invited error, a finding of waiver is in keeping with the established principle that a defendant who causes error to be injected into a case waives any appellate review.” *State v. Rubio*, 219 Ariz. 177, ¶ 8 (App. 2008).

The result was an unwinnable bind. The defendant had to use their peremptory to preserve the error, but rendered the error harmless by doing so. The court of appeals admitted as much in *State v.*

*Eddington*: “We recognize that in order to preserve an appellate claim that a trial court erred in failing to strike a venireperson for cause, a defendant must use a peremptory strike to remove that person from the panel. Thus, under all but the most extraordinary circumstances, defendants will be unable, as here, to show prejudice and secure any relief arising from a trial court’s erroneous failure to strike a venireperson for cause.” [State v. Eddington, 226 Ariz. 72, ¶ 20 \(App. 2010\)](#). The court of appeals reviewed the error on the merits in *Eddington*. But the predictable happened: the court found no prejudice. *Id.* at ¶ 36. Without addressing the waiver issue, this Court affirmed in [State v. Eddington, 228 Ariz. 361 \(2011\)](#).

There was only one minor exception to this quagmire: when the trial court denied more motions to strike for cause than the party had peremptory strikes. See [State v. Acuna Valenzuela, 245 Ariz. 197, ¶ 23 \(2018\)](#). A rare circumstance.

Because of this lose-lose scenario, our cases have not given meaningful thought to the appropriate standards involved when ruling on motions to strike impaired jurors for cause. Rather, our appellate courts have relied upon assurances that jurors believed they could be fair and found issues waived or harmless. *See, e.g., State v. Cornwall*, 1 CA-CR 21-0305, ¶¶ 13-14, 2022 WL 4849741 (App. 2022, Memo.); *State v. Reed*, 1 CA-CR 19-0131, ¶ 27, 2020 WL 729522 (App. 2020, Memo.); *State v. Marusich*, 1 CA-CR 18-0295, ¶¶ 29-30, 2019 WL 4447629 (App. 2019, Memo.).<sup>1</sup>

More troubling, this treatment has led courts to disregard the plain language of Rule 18.4. This case illustrates that shortcoming.

**2. Rule 18.4 requires the trial court to excuse jurors when there is a “reasonable ground” to believe the juror cannot be fair.**

Criminal Rule 18.4(b) provides: “The court, on motion or on its own, must excuse a prospective juror or jurors from service in the case if

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<sup>1</sup> Supreme Court Rule 111 allows citation to memorandum decisions “to assist the appellate court in deciding whether to ... grant a petition for review” and “for persuasive value ... if it was issued on or after January 1, 2015 ....” [Ariz. R. Supreme Ct. 111\(c\)\(1\)\(B\)-\(C\)](#).

there is a reasonable ground to believe that the juror or jurors cannot render a fair and impartial verdict.” [Ariz. R. Crim. P. 18.4\(b\)](#).

For our purposes, there are two key takeaways:

1. The standard is “reasonable ground to believe” the juror cannot be fair.
2. If that standard is met, the court “must excuse” the impaired juror.

Through our focus on waiver and harmless error, Rule 18.4 has been stripped of its plain language.

First, the “reasonable ground to believe” standard is not an onerous one. In the context of arrests, this Court has explained that reasonable grounds exist if the facts and circumstances “would warrant the same belief in a prudent person.” [Barrett v. Thorneycroft](#), 119 Ariz. 389, 391 (1978). This aligns with what this Court held in [Eddington](#): the standard is the “potential for an appearance of bias ....” [Eddington](#), 228 Ariz. 361, ¶ 10.

Second, if that standard is met, dismissal is mandatory—the court “must excuse” the prospective juror. *Must* means “is required to.” Bryan Garner, [Guidelines for Drafting and Editing Court Rules](#), 29. When there is a mandate like this, the Mandatory/Permissive Canon governs:

“Mandatory words impose a duty; permissive words grant discretion.” Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts*, 112 (2012). This aligns again with what this Court held in *Eddington*: the appearance of bias “sufficed to require disqualification ....” *Eddington*, 228 Ariz. 361, ¶ 10.

The mandate also falls in line with statutory text. The applicable statute states, “The following persons shall be disqualified to serve as jurors in any particular action: \*\*\* Persons biased or prejudiced in favor of or against either of the parties.” A.R.S. § 21-211(4). *Shall* works in the same way—it’s a mandate. Biased and prejudiced panelists “shall be disqualified.” Under the Related Statutes Canon, “Statutes *in pari materia* are to be interpreted together, as though they were one law.” *Reading Law*, 252. The mandate in Rule 18.4 is consistent with the mandate in § 21-211.

And Rule 18.4 works in concert with Rule 18.5. Under Rule 18.5(h), the party moving to strike 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.” *Ariz. R. Crim. P. 18.5(h)*. How does an attorney satisfy this preponderance of the evidence standard? By

showing that there is “a reasonable ground to believe that the juror ... cannot render a fair and impartial verdict.” See [Ariz. R. Crim. P. 18.4\(b\)](#). This conclusion reads the rules together—as they were meant to be read. See *Reading Law*, 252 (Related Statutes Canon). And it ensures the provisions of our Rules of Criminal Procedure are “interpreted in a way that renders them compatible, not contradictory.” *Id.* at 180 (Harmonious-Reading Canon).

Our cases, however, have strayed away from the plain language in Rule 18.4. While courts occasionally paid lip service to the rule, they ignored the two pertinent portions: the low standard and the mandate. *Jimenez* exemplifies this shortcoming.

### **3. *Jimenez* exemplifies how our lower courts have gutted Rule 18.4 of any meaning.**

The focus on deference that was justified by peremptory strikes stripped Rule 18.4 of any power. And the Catch-22 drove us further away. Even when there were “reasonable grounds” to believe a juror was impaired, our courts deferred to trial court assessments. And if the “reasonable grounds” were convincing, the errors were deemed

harmless or waived. The result was a rule that litigants had no way to enforce.

*Jimenez* illustrates this problem.

In *Jimenez*, the court of appeals correctly stated, “A trial court must excuse prospective jurors for cause if there is a reasonable ground to believe they cannot render a fair and impartial verdict, including if they are biased or prejudiced in favor of or against either of the parties.” [State v. Jimenez, \\_\\_ Ariz. \\_\\_, 534 P.3d 516, ¶ 4 \(App. 2023\)](#) (cleaned up).

But then the court moved away from the mandate and the standard. The court emphasized what it characterized as the trial court’s “broad discretion to excuse or retain potential jurors who have been challenged for cause.” *Id.* at ¶ 8. And they characterized the mandate to excuse as a permissive option: trial courts “*may* excuse potential jurors on their own motions.” *Id.* (emphasis added).

This was wrong. The plain language of Rule 18.4(b) requires courts to excuse jurors when there is a reasonable ground to believe the juror is impaired. And the standard remains a mandate if the court excuses on its own. “The court, on motion or on its own, must excuse a prospective juror ... if there is a reasonable ground to believe that the

juror ... cannot render a fair and impartial verdict.” [Ariz. R. Crim. P. 18.4\(b\)](#) (emphasis added). That is neither broad discretion nor permissive.

*Jimenez* goes on to demonstrate how this interpretation is flawed.

The panel below recognized that the trial court faced “a non-trivial motion to strike a juror for cause.” [Jimenez, 534 P.3d 516, ¶ 9](#). There were several objective reasons to believe the prospective juror could not be fair. *Id.* The juror had been a career police officer. *Id.* Much of the juror’s career focused on the types of crimes at issue in Mr. Jimenez’s case. *Id.* The juror had “special expertise in assessing the truthfulness of a suspect’s claims of innocence—a claimed aptitude especially relevant in the instant case, where Jimenez testified at trial.” *Id.*

Based on all of this, the court of appeals agreed that one “could have reasonably questioned Juror 8’s objective ability to be unbiased.” *Id.*

That is all Rule 18.4 requires. Dismissal is mandatory so long as there is a “reasonable ground to believe” the prospective juror cannot be fair. [Ariz. R. Crim. P. 18.4\(b\)](#). And a “reasonable ground” is not an onerous burden. It means that the circumstances “would warrant the

same belief in a prudent person.” *Barrett*, 119 Ariz. at 391. Or, in this Court’s language, it means there is the “potential for an appearance of bias ....” *Eddington*, 228 Ariz. 361, ¶ 10.

At that point, the issue didn’t turn on whether in-person interactions may have led the trial court to discount the concerns.

The issue turned on whether the trial court followed the law.

It didn’t. The trial court had reasonable grounds to question the juror’s ability to be fair. At that point, dismissal was mandatory. When the trial court failed to excuse the juror, the court failed to follow Rule 18.4.

Yet the court of appeals turned away from Rule 18.4’s plain language and looked at the issue from a different framing. *Id.* at ¶ 10. The panel emphasized what it characterized as the trial court’s discretion and the portions of the record where the challenged juror avowed he could be fair. *Id.* at ¶¶ 10-15.

This is representative of how our appellate courts looked at for-cause strikes when peremptories were in play. In *Cornwall*, for example, the court of appeals affirmed because the juror assured the trial court that he could be fair. *Cornwall*, 1 CA-CR 21-0305, ¶¶ 13-14,

[2022 WL 4849741](#). The same was true in *Marusich*, where jurors who had been sexually abused as children avowed they could be fair—in a sex case. *Marusich*, 1 CA-CR 18-0295, ¶¶ 28-29, 2019 WL 4447629.

That approach, however, doesn't make sense now that we've eliminated peremptory strikes.

**4. Without peremptories, our appellate courts must enforce Rule 18.4 and reverse when the trial court incorrectly fails to strike jurors for cause.**

Because our cases largely stripped Rule 18.4 of meaning, the primary tool for guaranteeing a fair and impartial jury became the peremptory strike.

Indeed, many of the comments opposing the abolition of peremptory strikes were worried that, without peremptory strikes, unfair panelists would make it onto the petit jury. For example, James Schoppmann of the Mohave County Attorney's Office argued that peremptory strikes were necessary to eliminate "jurors who claim they have very strong pro- or anti-law enforcement beliefs but later claim they can be fair and impartial." [R-21-0020](#), Schoppmann Comment (cleaned up). William Sandweg III was concerned because "A successful

challenge for cause is what the trial judge says it is.” [R-21-0020](#), Sandweg Comment. He was also worried that trial judges were “reluctant to grant challenges for cause,” particularly where it might require more panelists. *Id.* Brian Snyder shared this concern. [R-21-0020](#), Snyder Comment. And Kip Anderson—commenting for the Mohave County Superior Court—pointed out just how problematic our for-cause jurisprudence was: “Current case law (regarding striking prospective jurors for cause) allows jurors to remain on a jury who clearly favor one side of the case.” [R-21-0020](#), Anderson Comment.

These concerns were not reason to reject a proposal that would do so much to improve jury diversity and remove discrimination from the jury-selection process.

Rather, this Court recognized that our judiciary needed to improve to “allow the process of challenging jurors for cause to work effectively ....” [Ariz. R. Crim. P. 18.5, 2022 Comment to Rule 18.5\(c\)](#). This Court thus encouraged “the use of case-specific questionnaires where feasible ....” *Id.*

For “the process of challenging jurors for cause to work effectively,” our courts must abide by the rules regarding dismissing jurors for cause.

Without peremptory strikes, Rule 18.4 is how we ensure juries are fair. We do it by requiring the trial courts to follow the rule. By requiring the trial courts to excuse jurors when there is a reasonable ground to believe the person cannot be fair. And when a trial court gets that wrong—and a person serves on the jury when there was a reasonable ground to question their impartiality—we should reverse the convictions.

## CONCLUSION

Rule 18.4(b) sets a clear mandate: the trial court “must excuse a prospective juror or jurors from service in the case if there is a reasonable ground to believe that the juror ... cannot render a fair and impartial verdict.” The reasonable ground burden is not onerous. If a person of reasonable prudence would be justified in believing the juror cannot be fair, dismissal is required.

The rule is even more important now that we have eliminated peremptory strikes. In the past, we’ve relied upon peremptory strikes to save any errors. So much so that we created a Catch-22.

This Court should accept review to make clear that Rule 18.4 is not to be ignored; courts must enforce it. And if a trial court fails to enforce it, we will not accept the verdict of a potentially biased jury.

RESPECTFULLY SUBMITTED this 3rd day of November, 2023.

By  /s/ Mikel Steinfeld  
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