



Maricopa County

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Maricopa County Public Defense Offices—Joint Support Re: R-21-0045 Petition to Amend Rules of Criminal Procedure 16.3, 18.3, 18.4 & 18.5

The directors of the public defender agencies handling the majority of the indigent felony cases filed in Maricopa County jointly submit this comment in support of the petition. The proposed rule changes are reasonable, thoughtful, and necessary considering the court's abolition of peremptory strikes.

The petition's emphasis on juror questionnaires is well-taken. Written questionnaires allow for a more comprehensive jury selection process and promote efficiency in the use of court resources. Written questions seeking sensitive and personal beliefs, attitudes, opinions and life experiences are more likely to yield honest, unvarnished answers than are in-court oral inquiries. In our experience, and in the experiences of our trial lawyers, prospective jurors are less likely to open-up when asked to speak in a crowded courtroom than they are when putting their thoughts down on paper. Public speaking is a known fear, and jurors intimidated by speaking before a large group of strangers tend to avoid answering probing questions in an open court setting. The written questionnaire also has the advantage of avoiding one juror's adoption of another's answers. In the open courtroom setting, there are times when a prospective juror's answers reflect less on his honest beliefs and more on parroting others in hopes that the inquiry will swiftly move to another juror.

We also agree with the Statewide Jury Selection Workgroup's (SJSW) comment discouraging judges from rehabilitating jurors by asking them leading and conclusory questions. A judge's assessment of whether a juror's views would "prevent or substantially impair the performance of his duties" isn't fleshed out by using this language in the form of a question. *Wainwright v. Witt*, 469 U.S. 412 (1985). Posing a question couched in legal verbiage—are your views such that you would be "prevented from making an impartial decision"—yields no valuable information about a juror's internal biases. *Witherspoon v. Illinois*, 391 U.S. 1119 (2004). We in the defense bar, like the SJSW, encourage trial courts to disengage from such attempts at rehabilitation. Judges should focus on the words used by prospective jurors and their mannerisms and expressions used while answering oral questions, rather than their answers to leading, conclusory questions about following the law.

Though we support this petition, there are two areas of concern the Court may wish to address relating to use of written questionnaires. First, the proposed rules do not

provide direction or guidance to the courts or to the parties on alternatives for jurors who are not able to complete a written questionnaire due to physical, cognitive, educational, or technical impediments. There is a risk that the emphasis on written pre-screening and case-specific questionnaires, without commentary on the necessity to provide alternatives for jurors otherwise qualified to serve, could result in de facto qualifications for jury service beyond those enumerated in A.R.S. § 21-201.

Second, the requirement for the parties to return or destroy all copies of case-specific written questionnaires in proposed Rule 18.3(c) of the Rules of Criminal Procedure is problematic. Ready access to the case-specific juror questionnaires may be necessary for determining whether mid-trial motions to remove jurors, or post-verdict motions for new trials based on juror misconduct, are appropriate. Additionally, it is imperative for defense counsel to maintain a complete copy of a client's file and an accurate record of the proceedings for appellate and post-conviction review. Balancing the need for respecting jurors' sensitive information with upholding the rights of the accused can best be accomplished by providing case-specific juror questionnaires to the parties under a protective order, rather than depriving the parties of the questionnaires before a trial commences and before final review of a trial is completed.

The indigent defense offices of Maricopa County support the proposed rule changes in this petition, with the caveats noted above. We recognize and appreciate the Court's leadership in addressing racial bias in the jury selection process and are cautiously optimistic that the elimination of peremptory strikes will promote juries that more closely reflect the communities in which our clients are tried. The proposed rule changes—encouraging the use of case-specific questionnaires and memorializing the need for comprehensive oral voir dire—will likely assist in that endeavor.

Respectfully submitted this 22nd day of April 2022

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