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7 **IN THE SUPREME COURT**
8 **STATE OF ARIZONA**

9 In the Matter of:

Supreme Court No. R-21-0045

10 **PETITION TO AMEND THE**
11 **ARIZONA RULES OF CRIMINAL**
12 **PROCEDURE 16.3, 18.3, 18.4 &**
13 **18.5; RULES OF CIVIL**
14 **PROCEDURE 16 & 47; JUSTICE**
15 **COURT RULE OF CIVIL**
16 **PROCEDURE 134; AND RULE OF**
17 **PROCEDURE FOR EVICTION**
18 **ACTIONS 12**

COMMENT

19 Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar
20 of Arizona (the “State Bar”) hereby submits the attached two (2) comments to the
21 above-captioned Petition.

22 In evaluating this Petition, the State Bar sought the input of its membership in
23 general and received practice area-specific comments from both the State Bar’s Civil
24 and Criminal Practice and Procedure Committees. Both Committees are supportive
25 of the Petition but suggest improvements that are not inconsistent with each other.
The State Bar supports the recommendations of both Committees, attached at

1 Appendix A (Civil) and Appendix B (Criminal).

2 **CONCLUSION**

3 The State Bar respectfully requests that the Court adopt the modifications
4 recommended by its Civil and Criminal Practice and Procedure Committees.
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7 RESPECTFULLY SUBMITTED this 2nd day of May, 2022.
8

9 */s/ Lisa M. Panahi*

10 _____
11 Lisa M. Panahi
12 General Counsel

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14 Electronic copy filed with the
15 Clerk of the Supreme Court of Arizona
16 this 2nd day of May, 2022.

17 by: P Seguin
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APPENDIX A
CIVIL PRACTICE & PROCEDURE COMMITTEE
COMMENT AND RECOMMENDATION

On December 8, 2021, pursuant to Rule 28(h)(2), Rules of the Supreme Court of Arizona, this Court amended on an emergency basis 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, effective January 1, 2022. The Court’s action on R-21-0045 adopted the proposals of the Task Force on Jury Data Collection, Practices, and Policies (“Task Force”), chaired by the Honorable Pamela S. Gates, and the Task Force’s Statewide Jury Selection Workgroup (“SJSW”).

Those groups proposed rule amendments to enhance jury selection in the absence of peremptory challenges, which this Court’s August 24, 2021 action on R-21-0020 eliminated. In its Order for emergency adoption, the Court opened R-21-0045 for public comment. This is the comment of the State Bar of Arizona’s Civil Practice and Procedure Committee, which largely supports the rule changes, but also respectfully suggests minor modifications to them.

A. Introduction

The Task Force and SJSW made significant recommendations to improve the overall functioning of the jury selection process. These recommendations included

public education about jury service, significantly increasing the pay of jurors for their service, and the modified rules at issue here. Both groups produced reports in a scope and level of attention to detail that is nothing short of impressive in the short time allowed. This Court’s action on those groups’ proposals resulted in considered, yet expedited, amendments to Civil Rules 16 and 47, as well as new Comments to revised Rules 47(c)(3) and 47(c)(5) and an amended comment to Rule 47(a). The State Bar’s Civil Practice and Procedure Committee is in favor of those changes and new and revised Comments, with some limited exceptions.

1. Specific goals and purpose of the changes to Arizona Rules of Civil Procedure 16 & 47

Per the Task Force Report, changes to Arizona Rules of Civil Procedure 16 and 47 are designed “[t]o implement proposed changes to *voir dire* in the post-peremptory challenge landscape . . . These materials are designed to provide more robust jury selection practice that will secure better quality information for the exercise of for-cause strikes.”¹

The Task Force’s best practices and recommended aims for *voir dire* include:

- 1) Employing written or online case-specific questionnaires to obtain answers to questions that may be more sensitive or private, such as

¹ Report and Recommendations Statewide Jury Selection Workgroup: A Workgroup of the Task Force on Jury Data Collection, Practices, and Procedures, November 1, 2021, at 3 (“Task Force November Report”).

information the juror may know about the case, a juror’s opinions or attitudes regarding relevant issues, and prior pertinent life experiences;

- 2) A blend of open-ended and close-ended questions;
- 3) Limiting questionnaires to fewer than 60 questions;
- 4) Asking questions during oral *voir dire* that avoid leading a juror to a socially appropriate answer;
- 5) Providing the jurors with information and instruction on the importance of disclosing and discussing attitudes, beliefs, opinions, and life experiences that may affect a juror's ability to be fair and impartial;
- 6) Permitting questioning by the parties;²
- 7) Avoiding attempts by the judge to rehabilitate a prospective juror through leading questions.³

The Task Force recommendations are, in part, based upon a study entitled “The Impact of Minimal versus Extended *Voir Dire* and Judicial Rehabilitation on Mock Juror’s Decisions in Civil Cases.”⁴ This study used three mock juror cases

² This Court’s Comment to the 2022 Amendment to Rule 47(c)(5) counsels trial courts to, among other things, “refrain from imposing inflexible time limits.”

³ *Supra*, Task Force November Report at 4.

⁴ Salerno, J.M., Campbell, J.C., Phalen, H.J., Bean, S.R., Hans V., Spivack, D., & Ross, L. (in press) “The Impact of Minimal versus Extended *Voir Dire* and Judicial Rehabilitation on Mock Juror’s Decisions in Civil Cases” *Law and Human Behavior* (American Psychological Association), volume 45 Issue 4 (August), attached hereto as Exhibit 1.

(“insurance bad faith;” “wrongful birth;” “medical malpractice diagnosis”) to test the utility of minimal versus extended *voir dire* questions in predicting mock jurors’ verdicts and damage awards, and whether the biasing impact⁵ of their preexisting attitudes on case judgments could be reduced by judicial rehabilitation.⁶ The study does not contemplate its findings in a legal environment absent peremptory strikes, however. In fact, the study specifically references how extended *voir dire* will help

⁵ This paper references multiple sources regarding “bias,” one of which is the concept of “implicit bias.” Implicit biases are unconscious biases; they are much debated as to their status as a factor in objective decision-making. *See* <https://www.chronicle.com/article/can-we-really-measure-implicit-bias-maybe-not/> (Discussing IAT (implicit bias) testing and its lack of reliability and ability to predict bias-free juries). *See also*, Forsher, Lai, C., Axt, J., Ebersole, C., Herman, M., Devine, P., Nosek, B., “A Meta-Analysis of Procedures to Change Implicit Measures”, (July 1, 2017) *Journal of Personality and Social Psychology*, August 2019 (Finding “little evidence that changes implicit bias translated into changes in explicit bias and behavior . . .” Attached hereto as Exhibit 2. *See also* Lane, M. “What is Implicit Bias?” (March 1, 2017) California Senate Select Committee on Women and Inequality. <https://sor.senate.ca.gov/sites/sor.senate.ca.gov/files/Backgrounder%20on%20Implicit%20Bias%20for%20website.pdf> (“There is much debate about the reliability and utility of the IAT in measuring implicit bias and predicting discriminatory behavior. Some social psychologists question the consistency of test results over time and point out that an individual taking the test multiple times will invariably get different results regarding the extent of their bias. In addition, critics of the IAT argue that it uses arbitrary metrics when scoring the test. They see the numeric scores assigned to different levels of bias as random.”) *See also*, *Yu v. Idaho State University*, No. 20-35582; D.C. No. 4:15-cv-00430-REB, slip op. at 16-22 (9th Cir. Oct. 20, 2021), <https://cdn.ca9.uscourts.gov/datastore/opinions/2021/10/20/20-35582.pdf> Miller, J., concurring)(noting that ‘implicit bias’ expert testimony, upon proper objection, “. . . a court should not permit testimony of this kind to be presented to a jury.”)

⁶ *Supra*, Salerno at 3.

to remove prospective jurors for cause or via peremptory challenges.⁷ Moreover, the study admits that studies about *voir dire* in the civil realm are very rare, but posits that the studies that exist offer promising evidence of predictive value of case-specific attitudes.⁸

The study states that the “lofty goal” of the Seventh Amendment is to guarantee the right to a fair and impartial jury in civil cases, through the use of *voir dire*, and notes that it is “assumed that individuals are both aware of and willing to acknowledge their biases during voir dire . . . (also) it is assumed that jurors acknowledge that their own biases can be ‘rehabilitated’ through a procedure whereby a judge informs prospective jurors that they must set aside their biases and asks them explicitly whether they can agree to do so.”⁹ The paper claims that while “[d]emographic information and minimal voir dire questions did not predict case judgments, [] the majority of extended voir dire responses *predicted verdicts and damage awards.*” (emphasis added).¹⁰ The paper further concluded that judicial rehabilitation did not reduce the biasing of impact of preexisting attitudes on case judgments.¹¹

⁷ *Id.* at 4.

⁸ *Id.* at 8.

⁹ *Id.* at 5.

¹⁰ *Id.* at 3.

¹¹ *Id.*

Additionally, the changes this Court adopted encourage the creation and use of case-specific questionnaires. “This process allows litigants, lawyers, and the court to gather candid information from jurors prior to starting oral *voir dire*. Moreover, this process allows more streamlined questioning and permits the prospective jurors to provide information in a more private setting.”¹²

The State Bar’s Civil Practice and Procedure Committee acknowledges that written questionnaires have been around for decades and harbors no opposition to written questionnaires that handle the preliminary matters to ferret out hardship or basic juror qualifications and ability to serve. However, while standard questionnaires may seem to be a time-saving measure, unwieldy spreadsheets—like those that may come from overly long questionnaires—can contain an overwhelming amount of data that is hard to digest in a short timeframe. In addition, because the parties may not agree on the content of such questionnaires, the trial court will have to decide the content, just as it does when resolving disputes over proposed jury instructions or statements of the case to be read during oral *voir dire*. This may increase the time the court and the parties must spend on *voir dire*.

¹² Task Force October 4, 2021, Report at 43, *available at* <https://www.azcourts.gov/Portals/74/Jury%20TF/Resources/Final%20Report%20Posting%20JTF%20100421.pdf?ver=2021-10-04-171251-953>.

2. Brief Subcommittee Comment Regarding Rule 47(c)(3).

The Task Force and SJSW recommended that case-specific written questionnaires be strongly encouraged and start with the presumption of questionnaires being required, and this Court agreed.¹³ Specifically, new emergency Rule 47(c)(3) states:

(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.

The proposed Task Force language for Rule 47(c)(3) does not make case-specific questionnaires mandatory. However, the rule suggests case-specific questionnaires “should” be the norm. Some members of the State Bar’s Civil Practice and Procedure Committee favored a proposal to revise the emergency rule to use more permissive “may” language, rather than the existing “should” language, with respect to case-specific written questionnaires. This position did not get majority support in the Committee.

¹³ Statewide Jury Selection Workgroup Petition at 10. “First, the recommendation creates a presumption that trial courts should use case-specific written questionnaires: ‘[u]nless the court orders otherwise, the court should require prospective jurors to complete a case-specific written questionnaire . . .’ Of note, the proposed language is permissibly written, stating that trial courts ‘should require’ case-specific questionnaires.”

3. The Recommended Specific Language Changes to Certain Rules and Comments.

Rule 47(b)(2)

Rule 47(b)(3) now mandates the sealing of questionnaires, but other personally identifying juror biographical information is maintained by the Clerk of the Superior Court and subject to confidentiality governed by Ariz. R. Supreme Ct. 123(e)(10), which should be upheld in the absence of a court order to the contrary.¹⁴

Therefore, the following slight revision to Rule 47(b)(2) is recommended:

(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 by order of the court for good cause is shown.

Rule 47(c)(2)

Additionally, Rule 47(c)(2) should be amended to read:

(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. Any case-specific written questionnaires used should include this information in an introduction.

¹⁴ Identifying information provided to counsel before trial should be limited to avoid private investigators' potential invasion of juror privacy before in-person *voir dire*.

The amendment would remind trial courts and parties drafting case-specific written questionnaires to include appropriate introductory and explanatory language, even when *voir dire* begins in a completely written format.

Rule 47(c)(5)

While permitting liberal and comprehensive *voir dire* examination by the parties is encouraged, courts should be mindful of parties attempting to argue the merits of the case. “Participation by counsel in the *voir dire* process frequently results in undue expenditure of time in the jury selection process, with selection of a jury that has been exposed to studied efforts to predispose the result before the trial commences in earnest.” *See Hicks v. Mickelson*, 835 F.2d 721, 726 (8th Cir. 1987):

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. The court, in its discretion, may permit counsel to ask such questions during *voir dire*. Nothing in this rule prevents the court from managing *voir dire* and precluding improper questioning.

B. Conclusion

The State Bar's Civil Practice and Procedure Committee supports the permanent adoption of the changes made on an emergency basis to Civil Rules 16 and 47, as well as the permanent adoption of the amended and additional Comments thereto, with those limited modifications outlined above.

(Blackline of Proposed Changes)

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

...

(b) Juror Information.

(1) [No change]

(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 by order of the court for good cause is shown.

...

(c) Voir Dire Oath and Procedure.

(1) [No change]

(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. Any case-specific written questionnaires used should include this information in an introduction.

...

COMMENTS [as amended 2022]

...

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. ~~The court, in its discretion, may permit counsel to ask such questions during voir~~

dire. Nothing in this rule prevents the court from managing voir dire and precluding improper questioning.

(Clean Version)

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

...

(b) Juror Information.

(1) [No change]

(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 by order of the court for good cause shown.

...

(c) Voir Dire Oath and Procedure.

(1) [No change]

(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. Any case-specific written questionnaires used should include this information in an introduction.

...

COMMENTS [as amended 2022]

...

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. Nothing in this rule prevents the court from managing voir dire and precluding improper questioning.

APPENDIX B
CRIMINAL PRACTICE & PROCEDURE COMMITTEE
COMMENT AND RECOMMENDATION

The State Bar's Criminal Practice and Procedure Committee supports the Petition with two exceptions, which are found within Rules 18.3(c) and 18.5(c), Arizona Rules of Criminal Procedure. The Committee proposes solutions to each of the concerns raised in this Comment.

I. BACKGROUND.

In light of this Court's recent elimination of peremptory challenges of jurors, the Petition seeks to amend Arizona Rules of Criminal Procedure 16.3, 18.3, 18.4 and 18.5 pertaining to jury selection in criminal cases. The Petition rightly observes that jury selection requires prospective jurors to identify and publicly discuss sensitive and personal beliefs, attitudes, opinions, and life experiences. Research indicates that juror questionnaires, including electronically administered questionnaires, increase prospective jurors' willingness to provide complete and candid answers to questions. The Petition correctly observes that the use of written and online questionnaires provides prospective jurors with a greater sense of privacy and comfort than answering questions in open court—but as discussed herein, concerns exist that need to be addressed.

II. DISCUSSION AND ANALYSIS

A. Proposed Rule 18.3(c), Confidentiality of Case-Specific Written Questionnaires

To protect juror confidentiality, the rule contains an embedded protective order: “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.” While this protective order serves a legitimate purpose, a criminal defendant’s federal constitutional rights must not bow to concerns of juror confidentiality. The final sentence of the rule threatens that result, stating: “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.”

From a procedural standpoint, the Court will possess all original questionnaires submitted in the case, and ultimately will file those questionnaires under seal so that they are maintained in the record. Presumably then, copies returned to the Court by the parties will be destroyed as duplicates of the originals already filed under seal. Alternatively, the rule permits both parties to themselves destroy their respective copies. Either way, the answered questionnaires once possessed by the prosecutor and defense counsel will be destroyed.

It is rare that a prosecutor’s notes on the pages of answered juror questionnaires will later become relevant in a case, because such notes are typically

protected as work product and not subject to post-conviction disclosure. But infrequency of occurrence drives neither the inquiry nor its answer in the federal constitutional context; in limited circumstances, claims of privilege may give way. Take for example, the hypothetical circumstance where the Defendant is Black, and the prosecution strikes every Black juror for cause. While the for-cause reason(s) may facially justify the juror's removal, should a post-conviction investigation reveal that the prosecutor noted each jurors' race on his copies of the questionnaires, the racially motivated, constitutionally intolerable conviction will be exposed. Destruction of that evidence would forever secret the constitutional infirmity, eviscerating even the possibility of its exposure.

Far less rare is the import of defense counsel's notes written on answered questionnaires. Juror selection issues are frequently raised in post-conviction proceedings—proceedings which are initiated several years following the trial itself. Although post-conviction claims are limited, permissible claims include newly discovered evidence or that trial counsel rendered ineffective assistance. These and every other post-conviction claim must be supported by some evidence existing either within or outside of the record. Where the evidence exists outside the record, an evidentiary hearing is held at which time the evidence is admitted and becomes of record.

It is not difficult to see how notations made by defense counsel on juror

questionnaires play a significant role in post-conviction proceedings. Take for example the juror who answers “No” on the written questionnaire to the question “Have you or any member of your family ever been convicted of a crime?” Defense counsel may note on the questionnaire his skepticism of the juror’s veracity, and then, during oral voir dire, may word the same question differently to the juror. Receiving the same answer in open court, defense counsel cannot aggressively pursue the point since the juror may soon have his client’s freedom or even life in her hands.

Contrast that with post-conviction proceedings—where counsel has significantly more time and resources to investigate. Perhaps it is discovered that the juror and most of her family were in fact convicted criminals. The juror is then exposed to be lacking the quality of indifference which, along with impartiality, is the hallmark of an unbiased jury. Additionally, the Court will presume bias where a juror lies in order to secure a seat on the jury and acclaim of newly discovered evidence impacting the validity of the verdict arises. Now suppose trial counsel’s notations on the juror questionnaire were “Felony conviction, August 2000.” Counsel could not prove that belief during jury selection because he lacked the time to obtain the documentary evidence—but that notation defeats any claim of “newly discovered evidence” since it was “known” to counsel at the time.

Thus, the inquiry shifts to one of ineffective assistance for trial counsel’s

failure to raise the issue with the Court and obtain the necessary records to prove the juror's lie. In Arizona, claims of ineffective assistance of trial counsel in violation of a defendant's Sixth Amendment rights may only be raised in post-conviction proceedings following the direct appeal. Sound strategy decisions made by trial counsel are insulated from claims of ineffective assistance of counsel.

If dereliction of duty is the case, a claim of ineffective assistance will exist. But if defense counsel's notes reflect his inaction was grounded in a sound strategic decision, the factual and legal viability of the claim becomes dubious. Based on this as well as a myriad of other plausible scenarios, the critical import of defense counsel's notations contained on juror questionnaires to the post-conviction process cannot be overstated. Indeed, this is precisely why post-conviction counsel obtains and reviews all of trial counsel's notes and research.

The State Bar's Criminal Practice and Procedure Committee proposes the following solution: the last sentence of proposed Rule 18.3(c) should be revised to mandate that prosecutors and defense lawyers maintain their copies of questionnaires securely within their respective case files as protected by the work product privilege. Where the criminal defendant is self-represented, the pro se litigant's copies of the written questionnaires should be returned to the Court.

B. Proposed Rule 18.5 (c), Case-Specific Written Questionnaires

This rule provides "the court should require each prospective juror to

complete a case-specific written questionnaire in a manner and form approved by the court.” The relevant portion of the Comment to that provision provides that “[c]ourts may use paper or electronic questionnaires in advance of trial....” The Petition states that “questionnaires can be provided to prospective jurors at the time the individuals are summoned.” (Petition at page 3). This means that juror questionnaires may be electronically sent to prospective jurors for completion within their home, office, or other environment. Timesaving as this proposed methodology might be, it nonetheless gives rise to two distinct, very real risks to the integrity of the judicial process.

First, completion of a case-specific questionnaire in an extra-judicial environment invites collaboration with relatives, friends, or associates. Utterly unmonitored, the process is incapable of ensuring that the answers provided are the prospective juror’s own thoughtful, independent, uninfluenced views. *“They want to know how we feel about the death penalty, honey.” “Kill ‘em all, and quickly—an eye for an eye,”* the spouse responds. The dutiful partner’s answer on the written questionnaire is not his or her own—and yet, the summoned spouse is the one faced with in-court voir dire. Are the answers to questions posed during in-court voir dire based on personal views, or are the answers consistent with the views of a spouse, siblings, parents, friends or associates? The answer is impossible to discern but critical to the integrity of the jury selection process. Identical reasons underlying the

admonition prohibiting seated jurors from discussing any aspect of the case with anyone outside of the courtroom underscore the necessity that juror answers to questionnaires reflect their own, uncounseled, uninfluenced thoughts and beliefs.

Second, answers provided in the questionnaire must be truthful. The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors. The bias or prejudice of even a single juror violates the defendant's right to a fair trial. For the jury selection process to function as intended, jurors must answer questions truthfully. Like a judge who is biased, *see Tumey v. Ohio*, 273 U.S. 510 (1927), the presence of a biased juror introduces a structural defect not subject to harmless error analysis. *See generally, Arizona v. Fulminante*, 499 U.S. 279, 307-10 (1991).

Unfortunately, jurors do not always answer questions truthfully. Take for example *Dyer v. Calderon*, 151 F.3d 970 (1988). There the juror was asked Question 13: "Have you or any of your relatives or close friends ever been the victim of any type of crime?" and Question 15: "Have you or any of your relatives or close friends ever been accused of any offense other than a traffic case?" The Juror at issue answered "no" to both questions and was seated in a death penalty case.

After the guilt phase verdict but before the penalty phase (where the jury decides life or death), the defense learned the Juror's brother had been shot and killed six years earlier. When questioned by the judge, she explained she answered "no"

because she thought the shooting was an accident, not a crime. In fact, her brother was pistol whipped and shot in the back of head—much like the Defendant’s own victims. Her answer to Question 15 was equally false. At the time the juror was questioned, her husband was incarcerated pending a rape charge. When asked about this, the Juror explained that she did not consider her husband to be “a relative.” *Id.*, at 980. Her failure to mention that any of her relatives had been accused of a crime defied explanation. Nearly every close relative had been arrested: Her husband for rape; her father for kidnapping; her uncle for murder and again for armed robbery; her brother for possession of brass knuckles and again for drug possession; her cousin for the attempted rape of the juror herself.

The Ninth Circuit found that the juror “plainly lied when she answered ‘no’ to voir dire questions 13 and 15; no rational trier of fact could find otherwise. And she lied again when she was questioned by the state judge in chambers, presumably to cover her earlier lie and remain on the jury.” *Id.*, at 979. But the deception went further. “[The Juror’s] account of [her brother’s] death was just the tip of Pinocchio’s nose. [She] also lied when she said she had never been a victim of crime.” *Id.*, at 980. The Court then detailed the mountain of crimes in which she was a victim—some serious, some less so in that they were crimes against property.

The Juror minimized, insisting that the crimes against her “didn’t have a bearing on the case to me;” she downplayed her uncle’s arrest for murder, asking

“Am I to reveal everything, the little information that I know about other relatives? That’s ridiculous.” Then she forthrightly stated: *“I dislike giving information that to me is not relevant...[E]ven if my brother was the victim of a violent crime, how can you take that little information and say ‘Here she was unfair to Alfred Dyer’?”* *Id.*, at 981, emphasis added.

The Juror in *Dyer* is certainly not the only prospective juror to harbor such beliefs. And yet, as the Ninth Circuit aptly recognized, “there is a fine line between being willing to serve and being anxious, between accepting the grave responsibility for passing judgment on a human life and being so eager to serve that you court perjury to avoid being struck. The individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent.” *Id.*, at 982.

One need only possess passing familiarity with *Dyer* to understand the crucial point asserted here: Ensuring truthful answers by prospective jurors is an absolute necessity. A Court is obligated to do everything in its power to ensure that prospective jurors’ answers on questionnaires are completely truthful.

To that end, the State Bar’s Criminal Practice and Procedure Committee offers the following solution: jurors provided with case-specific questionnaires for completion outside of the courthouse environment must include an attestation, under the penalty of perjury, that the answers provided on the questionnaire are the prospective juror’s

own, independently provided absent consultation with or interjection by others and are truthful. Much like the attestation citizens make when applying for a drivers' license—except in this context, the consequences for lying have a far greater reach for everyone involved in the judicial process.

III. CONCLUSION.

The State Bar's Criminal Practice and Procedure Committee respectfully recommends:

1) As to proposed **Rule 18.3(c)**, the last sentence should be deleted in favor of the following language: "When jury selection is completed, prosecutors and defense counsel shall maintain their copies of the case-specific questionnaires securely within their respective case files. If the defendant is self-represented, copies of the questionnaires shall be returned to the Court."

2) As to proposed **Rule 18.5(c)**, if the Court provides prospective jurors with questionnaires in electronic format along with juror summonses outside of the courthouse environment, every such questionnaire must require the prospective juror to attest under penalty of perjury that the answers provided are the prospective juror's own, independently provided absent consult or interjection by others, and that the answers provided are truthful.