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IN THE SUPREME COURT OF THE STATE OF ARIZONA

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| In the Matter of: |) | No. R-24- |
| |) | |
| Petition to Amend Ariz. R. Crim. P. |) | Petition to Amend Arizona Rule of |
| 31.8(b)(1)(B). |) | Criminal Procedure 31.8(b)(1)(B) |
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Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Petitioner hereby submits the petition to amend Arizona Rule of Criminal Procedure 31.8(b)(1)(B), as specified in the Attachment. The purpose of this proposed change is to ensure that all trial proceedings are included in the record on appeal. The current Rule expressly excludes voir dire of the jury and implicitly excludes any trial or admission of prior convictions; adopting this petition would fix that.

In 2016-17, the Task Force on the Arizona Rules of Criminal Procedure modified Rule 31.8(b)(1)(B)(ii) so that opening statements and closing arguments would be automatically included. At that time, the reason for excluding voir dire of the jury from automatic inclusion in the record on appeal was the relative unlikelihood of reversal on appeal based on what occurred in jury selection except

for an improper use of peremptory strikes. In *State v. Hickman*, 205 Ariz. 192 (2003), this Court held that a trial court's error in refusing to strike a biased juror for cause was harmless error if the defendant used a peremptory strike to remove the juror from the petit jury. *See also State v. Eddington*, 226 Ariz. 72 (App. 2010), *aff'd*, 228 Ariz. 361 (2011) (same). Now that peremptory strikes have been abolished, however, *Hickman* and *Eddington* no longer provide refuge for an appellant whose motion to strike a juror for cause is denied.

With most (if not all) proceedings that are not automatically included in the record on appeal, the superior court file reveals the need for preparation of a particular transcript. The trial court's pretrial evidentiary rulings are almost always the product of motion practice. A waiver of constitutional rights such as the right to counsel or the right to a jury trial involves a signed form as well as an oral colloquy, and the clerk always records such a waiver in the minute entry. But the clerk typically does not record motions to strike individual jurors for cause; thus, the transcript is the only available source of information for appellate counsel on the existence of the motion (not to mention the grounds for it).

That a prior convictions trial (or an admission to prior convictions) is not automatically included in the record on appeal is an oversight. Improper finding and use of prior convictions is a leading cause of appellate reversal of a sentence, even when there is no objection from trial counsel, because an illegal sentence is always

fundamental error. *State v. Allen*, 248 Ariz 352, 367 ¶ 58 (2020). In cases where appellate counsel files a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), the court of appeals is expected to conduct a thorough review of the record to search for reversible error, yet it (like counsel) would be oblivious to any issue related to admission of evidence in a prior convictions trial for which there is no transcript.

Although Rule 31.8(b)(2) contemplates that additional transcripts may be designated as part of the record within 30 days of the filing of the notice of appeal, this is often overlooked, and as a result appellate attorneys often must file motions to expand the record. Worse, if neither trial counsel nor appellate counsel designated an important transcript, post-conviction relief counsel will then have to order it, causing further (and unnecessary) delay in the proceedings. The cost of preparing these additional transcripts is minimal compared to the important constitutional and legal issues that often are borne out in those transcripts.

As seating a single biased juror is structural error, *see Gray v. Mississippi*, 481 U.S. 648, 668 (1987), and an erroneous finding of a prior conviction that leads to an illegal sentence is fundamental error, it is only sensible that these proceedings should be automatically included in the record so that the court of appeals and the attorneys can conduct appropriate appellate review.

For these reasons, Petitioner requests that this Court adopt the proposed change to Rule 31.8(b)(1)(B) as specified in the Attachment.

DATED (electronically filed): January 10, 2024.

By: /s/ David J. Euchner
David J. Euchner

ATTACHMENT¹

Ariz. R. Crim. P. 31.8. The Record on Appeal.

(a) **Composition of the Record on Appeal.**

[no change]

(b) **Certified Transcripts**

1. *Generally.* The record on appeal includes certified transcripts as follows:

- (A) if the defendant is sentenced to death, the record on appeal must include a certified transcript of all recorded proceedings, including grand jury proceedings; and
- (B) in all other cases, the record on appeal must include a certified transcript of the following proceedings:
 - (i) any voluntariness hearing or hearing to suppress the use of evidence;
 - (ii) all trial proceedings, **including any trial or admission involving prior convictions** ~~excluding the record of voir dire unless a party specifically designates it;~~
 - (iii) any aggravation or mitigation hearing;
 - (iv) proceedings for the entry of judgment and sentence; and
 - (v) any probation violation proceeding.

2. *Additions and Deletions.* [no change]

(c)-(g) [No change]

¹ Changes or additions in rule text are indicated by **bold underscoring** and deletions from text are indicated by ~~strikeouts~~.