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ARIZONA SUPREME COURT

In the Matter of:

Petition to Amend Ariz. R. Crim.
P. 31.8(b)(1)(B)

Supreme Court No. R-24-0008

Joint Comment by the Directors
of the Maricopa County Indigent
Defense Agencies

The indigent representation offices of Maricopa County (IR) collectively handle most cases filed in Maricopa County in which there has been a finding of indigency. The Office of Public Defense Services (OPDS) provides administrative and financial oversight to the staffed offices and the Office of Contract Counsel (OCC). The staffed offices are comprised of the Office of the Public Defender (OPD), the Office of the Legal Advocate (OLA), the Office of the Legal Defender (OLD), and the Office of the Public Advocate (OPA). We jointly submit this comment in support of the proposal to amend Rule 31.8(b)(1)(B).

Maricopa County is one of the largest and fastest-growing counties in the United States.¹ Nearly 29,000 felony criminal cases were filed in Maricopa County Superior Court last fiscal year.² A significant number of those defendants cannot afford counsel, either at trial or on appeal, and the vast majority are handled by the IR offices.

¹ *Maricopa County Quick Facts*, MARICOPA COUNTY, <https://www.maricopa.gov/3598/County-Quick-Facts> (last accessed March 14, 2024).

² *Statistics: Felony Filings by Fiscal Year*, ARIZ. SUP. CT., <https://www.azcourts.gov/statistics/Interactive-Data-Dashboards/Felony-Filings> (last accessed March 14, 2024).

We support Petition R-24-0008 because voir dire and trials on prior felony convictions implicate fundamental constitutional rights and requiring appellate counsel to request transcripts of those proceedings causes additional delays.

1. Voir dire transcripts are critical to appellate counsel’s diligent review of whether a defendant’s constitutional right to trial by an impartial jury was vindicated.

Before the elimination of peremptory strikes in 2022, the trial court’s justification for a denial of a motion to strike a prospective juror for legal cause was largely irrelevant under *State v. Hickman*, 205 Ariz. 192 (2003). Under the current rules, however, trial counsel can no longer cure or invite error with peremptory strikes. See Ariz. R. Crim. P. 18.4; *State v. Rubio*, 219 Ariz. 177, ¶ 12 (App. 2008) (articulating the “cure or waive” rule). This has multiple implications for the record on appeal.

Seating a biased juror is a structural error, violating the defendant’s Sixth Amendment right to an impartial jury. See *Gray v. Mississippi*, 481 U.S. 648, 668 (1987). Whether a juror can be impartial is a fact-intensive determination. *State v. Colorado*, 256 Ariz. 97, ¶¶ 15–16 (App. 2023). The questions asked of the juror at issue and the juror’s

responses are necessary to determine if the juror was biased.

Additionally, counsel's arguments and the trial court's reasoning are directly relevant to whether the trial court abused its discretion in failing to strike the juror.

The Court of Appeals has hailed the 2022 amendments to Rules 18.4 and 18.5 specifically because they “allow trial courts to develop a more robust factual record. Our trial courts have more facts to assess, more dialogue to consider before empaneling a juror, and more information from which to assess credibility before empaneling a juror. All those facts make motions to dismiss a juror for cause even more fact-specific than before.” *Id.* at ¶ 19. Minute entries often do not reflect—and certainly do not reflect in full—these complex factual issues.

Given the holistic, fact-intensive inquiry required when evaluating a juror's self-assurances of fairness, transcripts of voir dire are critical to appellate counsel's review in every case to guarantee structural errors of a constitutional dimension are not overlooked.

2. Transcripts of the priors trial or the admission of prior convictions are necessary to protect defendants from illegal sentences.

A flawed finding or use of priors results in an illegal sentence and subjects a defendant to undue punishment. An error of this magnitude is fundamental. *State v. Allen*, 248 Ariz. 352, ¶ 58 (2020). An error in a priors trial, especially in the absence of an objection, will likely not be reflected in a minute entry. Moreover, given the fundamental error review standard, without the transcript, the appellate court is unable to complete the required full review of the record in the instance of a brief filed pursuant to *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297 (1969).

3. The proposed rule promotes efficiency and prevents delay.

As explained above, diligent appellate counsel should request transcripts for both voir dire and priors trial/admission. As a matter of practice, the appellate attorneys in the indigent defense offices request these transcripts in all cases. This requires additional work by the attorneys and staff. These requests also require additional work from the appellate courts to review the requests and order additional transcripts.

Although it is common practice for appellate counsel with indigent defense agencies to request these transcripts—solo and private

practitioners often do not. When cases are transferred from these practitioners to court-appointed counsel, appointed counsel must file motions to supplement for these transcripts. Given the length of these transcripts, their preparation and review almost always necessitate extensions of brief deadlines. If these transcripts were ordered at the inception of the appeal, these delays would be eliminated.

Conclusion

The directors of the indigent defense agencies of Maricopa County ask the Court to adopt the proposed changes to best facilitate appellate review of these critical issues while promoting efficiency.

Respectfully submitted this ____ day of ____, 2024.

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