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IN THE SUPREME COURT OF THE STATE OF ARIZONA

DAVID MORGAN and **TERRI JO NEFF**, Petitioners, v. **HON. TIMOTHY B. DICKERSON**, Judge of the Superior Court of the State of Arizona, in and for the County of Cochise, Respondent.	No. _____ Cochise County Superior Court No. CR2017-00516 **PETITION FOR SPECIAL ACTION ON AN EXPEDITED BASIS**

Petitioners David Morgan and Terri Jo Neff ("Petitioners") are journalists, who ask this Court to clarify its Administrative Order 2020-143 (Aug. 26, 2020) relating to COVID-19 restrictions on access to courts because the news media are not being treated as "necessary persons," thus denying them – and by extension the public – the fundamental right of access to the criminal justice system. Without

physical access to a controversial in-person murder trial well underway in Cochise County, Petitioners have learned in practice that court-ordered "workarounds" to in-person access, especially telephonic access, are insufficient.

Additionally, Petitioners have been prohibited from hearing the names of jurors during *voir dire* or after the verdict in a criminal murder trial, so Petitioners ask this Court to order the Superior Court to end its newly implemented process of obscuring the identity of jury panel members during *voir dire*, thus creating a new practice of secret juries in the county.[1] The practice violates constitutional rights of access and is not supported by state law without a demonstration of a compelling interest in such secrecy.

While, of course, special protective measures must be taken during this pandemic, adjustments must be made where temporary practices end up interfering with important rights. Petitioners respectfully request the Court accept special action jurisdiction, with expedited consideration, of the trial court's order denying public access to the criminal trial proceedings and to access to the names of jurors, and – because there is no alternative, as the names were hidden during the original *voir dire* examination – order the Superior Court to release the names of jurors to the

[1] Petitioners opt to use the term "secret jury" in reference to the Superior Court's new jury process rather than "anonymous jury" to avoid confusion with the fact that "anonymous jury" is often used in cases when the identities of jurors are kept completely confidential from the parties to the case rather than just merely kept from the public.

press and public. A special action directly to the Supreme Court is appropriate, as more fully discussed below, because the Superior Court relied on the Court's Administrative Order in denying access to the courtroom.

JURISDICTIONAL STATEMENT

On September 14, 2020, Morgan and Neff filed a motion to intervene in the Cochise County Superior Court prior to the start of the murder trial of Roger Wilson for the limited purposes of clarifying questions of public access to the court proceedings and requesting access to the names of jurors during the *voir dire* process.[2] In response, Superior Court Judge Timothy Dickerson for Division IV of Cochise County issued an order declaring the journalists would not be able to attend the hearings in person and the names of prospective and empaneled jurors would not be made public. Order Concerning Access by Reporters During the Trial in this Mater [sic], 3, *State v. Wilson*, No. CR201700516 (Super. Ct. Cochise Cty. 2020) ("Superior Court Order"). As the trial is underway and a verdict expected this week, Petitioners now file this petition for special action with expedited consideration.

This Court has jurisdiction over special actions seeking relief from a court ruling that was "arbitrary and capricious or an abuse of discretion." Ariz. R. Civ. P. Spec. Act. 3(c). Special actions are appropriate where there is no "equally plain,

[2] The Superior Court's newly implemented secret juror process assigns numbers to jurors before *voir dire* examination, and juror names are neither said aloud in open court nor entered onto the public court record.

speedy, and adequate remedy by appeal or if a case presents an issue of first impression and one of statewide importance that is likely to recur." *State v. Bernstein*, 317 P.3d 630, 634 (Ariz. App. 2014) (internal citations omitted); *see also* Ariz. R.P. Spec. Act. 1(a). In fact, special action jurisdiction "is particularly appropriate when statutes or procedural rules require immediate interpretation." *Id.* (internal citations omitted).

Both the court access and juror names issues are appropriate for a special action from this Court. The Superior Court order relied on this Court's own Administrative Order when it limited the public and press's access to the in-person criminal proceedings. Superior Court Order at 2, ¶ 2; *see also* Ariz. Admin. Order 2020-143 (the "Administrative Order"). Because this Court's order was the basis for the Superior Court's ruling, this Court is in the best position to resolve the issue. Also, since Petitioners' motion to intervene was filed, the *voir dire* examination of the jurors has been completed without jurors' names released to the public, so the Wilson trial is underway with a secret jury. Judge Dickerson ruled juror names will not be released even apparently after the trial concludes. Superior Court Order at 3 ("The names of jurors … will not be released."). The secret jury empanelment prevents Petitioners from being able to learn more about the jurors in the Wilson trial, not only impeding their work as journalists but also depriving the public of its important oversight role. Journalists and the public are barred from learning juror

names without a clear justification and specific findings by the court. Petitioners request this Court accept this special action with expedited consideration because the Wilson trial will conclude soon, likely within the week, and Petitioners desire access to the names of the jurors immediately after the resolution of the trial. Due to the extremely tight time constraints, this special action is proper, and this Court should accept it.

Furthermore, this Court should accept this special action as both issues for consideration in this case present novel issues of statewide importance likely to recur, not only in Cochise County but also in courtrooms across the state. *See Jackson v. Schneider*, 86 P.3d 381, 383 (Ariz. App. 2004) (resolution of issues likely to recur justifies acceptance of special action jurisdiction). The Petitioners seek relief from the Supreme Court to amend its own administrative order relating to court access in a global health crisis applicable to all courts in the state, so it is proper for this Court to accept this special action. Additionally, Cochise County judges have recently established a practice of conducting *voir dire* while hiding the names of the prospective and empaneled jurors from the public. This secret jury procedure has been used in Cochise County at least two other criminal trials prior to the Wilson trial. *State v. Rojas,* No. S0200-CR-2016-00734 (Min. Entry Hr'g on Mot. to Unseal Juror Names at 1, Sept. 8, 2020); *State v. Thomas*, No. S0200-CR-2019-00690 (Min. Entry: Jury Trial Day One at 1, Mar. 10, 2020). Secret jury policies inhibit the

public's and press's constitutional right of access to criminal trials. Transparent jury procedures that provide the names of jurors to the public promotes fairness and accountability in the judicial system. The legal question proposed here has broad implications for the future of jury trials in Cochise County and throughout the state. For the foregoing reasons, the Court should accept jurisdiction over this appeal.

STATEMENT OF ISSUES

(1) Whether the Superior Court abused its discretion by excluding the press from observing open court proceedings and denying proposed solutions to press concerns when the language of Administrative Order 2020-143 requires courts to "maximize the public's ability to observe court proceedings to the extent logistically possible."

(2) Whether the Superior Court proceeded in sealing juror names without legal authority.

(3) Whether the Superior Court abused its discretion by empaneling a secret jury while ignoring the First Amendment presumption of access to the names of jurors without establishing a compelling need.

RELIEF REQUESTED

(1) Petitioners request that reporters (or at least one reporter acting as a pool reporter for those interested in attending) be included in the "necessary persons"

language of Administrative Order 2020-143 and be permitted to attend the final jury sentencing in person in the Wilson trial.

(2) Petitioners request the Court order that juror names must be entered into the public record during the open *voir dire* examination process and that such action does not conflict with Arizona Revised Statute §21-312.

(3) Petitioners request the Court order Superior Courts in Cochise County to stop the new secret jury process and return to using the names of prospective and empaneled jurors during the *voir dire* examination, and specifically order that the juror names in the Wilson trial be released immediately to the public.

STATEMENT OF FACTS

Petitioners are journalists in Cochise County who report on local court and government news. Petitioners have been closely following the murder trial of defendant Roger Wilson for the past three years since Wilson was charged in the murder of Jose Daniel Arvizu in 2017. Hearings in Wilson's in-person trial began on September 15, 2020.

The COVID-19 pandemic has caused significant changes in jury trial procedures. *See* Admin. Order 2020-143. Specifically, the Administrative Order provides that "judicial leadership should limit any required in person proceedings to attorneys, parties, victims, witnesses, jurors, judicial officials, court employees, and *other necessary persons*" when necessary to maintain social distancing requirements

(emphasis added). *Id.* at 3. Further, when access to in-person proceedings is limited, the Administrative Order requires that superior courts provide public video or audio access to the greatest extent logistically possible in order to maximize the public's ability to observe court proceedings. *Id.* at 5.

Recently, Superior Court Judges in Cochise County have instituted a "new process" of assigning numbers to summoned jurors and addressing jurors solely by those numbers during a criminal trial, while their names are sealed. *See Rojas* Minute Entry at 1. The new secret jury practice prevents the names of the empaneled jurors from entering the public court record, an abrupt departure from tradition.

Because Petitioners were concerned they would not be able to attend the courtroom proceedings in the Wilson trial due to the Administrative Order's COVID-19 restrictions and were also worried about the recent practice hiding the identity of juror names, on September 14, 2020, Petitioners filed a motion to intervene for the limited purposes of clarifying public access to the court proceedings and allowing the names of the Wilson trial jurors to be announced during *voir dire*. That same day, Judge Dickerson denied Petitioners' request for in-person access to the Wilson criminal trial. Superior Court Order at 2. Judge Dickerson also denied the public access to the names of prospective and empaneled jurors. Superior Court Order at 3. The secret jury procedures were utilized during the *voir dire* examination of jurors in the Wilson trial.

The Superior Court also determined that reporters are not allowed in the courtroom at any time, including when the jury is not present and during breaks or recesses. Superior Court Order at 2. The Superior Court based this finding on the premise that the Arizona Supreme Court did not explicitly include the press in its list of persons who must be allowed in the courtroom. *Id.* Additionally, the Superior Court determined that any video access to the Wilson criminal trial is not feasible (even though the Court has a video-recording system). *Id.* As such, the public and press are limited to accessing the criminal trial only via live telephone audio. Throughout the early portions of the Wilson trial Petitioners have encountered numerous issues that significantly hamper their ability to cover the criminal proceedings.

During the *voir dire* process and the ensuing criminal trial, Petitioners faced several challenges which inhibited their reporting of the court proceedings. The telephone line used to provide public audio access to the Wilson trial suffered from technical problems that resulted in difficult-to-hear audio. The phone line also had connectivity issues. These problems have caused Petitioners to miss parts of the criminal proceedings. Additionally, when there is no audio, Petitioners have no way to know whether there is a technical issue or the whether the court is simply in recess.

Petitioners have also been denied access to examine any exhibits in the trial. Superior Court Order at 3. Lack of access to exhibits and the courtroom clerk has

created difficulties in reporting on evidence presented in the trial. Petitioners are unable to view maps of the crime scene, photographs of evidence, or 911 transcripts. In this trial, at least one audio recording admitted as evidence was difficult for Petitioners to understand. Because of the lack of physical access, the reporters were unable to obtain transcripts that they normally would have been able to read. Petitioners were also unable to view a video recording that was entered into evidence and played in the courtroom during an open court proceeding. Again, because of the lack of access, Petitioners were unable to assess the evidence being presented in open court.

Exclusion from the courtroom has blocked Petitioners from assessing who is present in the courtroom and gauging their reactions to significant moments throughout the criminal trial. These observations often provide critical context and important details in the story of the trial, which is of interest to the public. This includes facial expressions and body language of the defendant, attorneys, witnesses, jurors, and other attendees.

Further, the defense attorney in the Wilson trial complained to the judge that, during breaks, listeners on the telephone line overheard private conversations within the courtroom among various persons, including between the criminal defendant and his attorney. Typically, the public would not be privy to these conversations because those in attendance would be escorted to the lobby during the breaks. The Petitioners

cannot hang up the telephone line during these breaks because there is no way to know when open proceedings resume without remaining on the line. If Petitioners hang up during a break, they risk missing testimony and other open court proceedings.

The audio issues coupled with the secret jury procedures impeded Petitioners ability to properly discern the composition and characteristics, such as age and sex, of the empaneled Wilson trial jury.

The Wilson trial is currently ongoing, and Petitioners continue to face difficulties in properly reporting on the developments of the court proceedings with telephonic access only.

ARGUMENT

I. The First Amendment and Arizona Constitution Provide the Public and Members of the Press a Qualified Right of Access to Criminal Trials.

The United States judicial system was founded on traditions of openness and transparency. This founding historical precedent affords the public and the press an implicit right to attend criminal trials. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 569 (1980). Furthermore, the Supreme Court of the United States has long recognized that the presumption of judicial openness is so pervasive that, without an overriding interest based on proper findings by a court, criminal trials must be conducted publicly in order to ensure public trust in the justice system. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508-09 (1984) ("Press-Enterprise

I"); *see also Ridenour v. Schwartz*, 875 P.2d 1306, 1308 (Ariz. 1994) (determining any exclusion of the press from observing court proceeding must be necessitated by compelling state interest and such exclusion must be narrowly tailored).

Furthermore, the Arizona Constitution demands that "[j]ustice in all cases shall be administered openly, without unnecessary delay." Ariz. Const. Art. 2 § 11. This Court has affirmed the public's right of access to criminal trials under both the First Amendment and under the State Constitution. *Ridenour,* 875 P.2d at 1308. Rule 9.3 of the Arizona Rules of Criminal Procedure provide that "all criminal proceedings must be open to the public *unless* the court finds, on motion or on its own, that an open proceeding presents a *clear and present danger* to the defendant's right to a fair trial." 16A A.R.S. R. Crim. P. 9.3(b) (emphasis added). Rule 9.3(b)(2) also requires the court keep a complete record of all closed proceedings and make such record available to the public upon the trial's completion. *Id*.

Petitioners' qualified right of access to criminal trials extends to the names of jurors in order to preserve the historically open role of juries in the criminal trial procedure and to promote a fair judicial process. Further, while the courts face clear challenges during this public health emergency, the Court should ensure the public's right of access to criminal trials is preserved to the greatest extent possible.

II. The Press Serves an Essential Role in the Criminal Justice System and Should Be Considered "Necessary" Under the Court's Administrative Order.

Members of the press exercise an essential function in the judicial process and thus should be considered necessary persons under the language of the Administrative Order. This Court has long acknowledged the critical role that members of the press serve in the judicial system:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Phoenix Newspapers, Inc. v. Superior Court, 418 P.2d 594, 597 (Ariz. 1966) (internal citation omitted). The public's and press's right of access to criminal trials serves as a check on the judicial process, which the United States Supreme Court calls "an *essential component* in our structure of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) (emphasis added).

Given the importance this Court and the United States Supreme Court have placed on the role of the press in the judicial system, the Court should include members of the press within the list of necessary persons who are permitted to attend in-person court proceedings specified in its Administrative Order.

A. The Court Should Further Accommodate the Public's Right of Access to Criminal Trials During This Public Health Emergency.

The conditions and safeguards required to manage the COVID-19 pandemic likely make complete public access to criminal trials untenable. Courts may not be able to accommodate every member of the public and press interested in a criminal trial. Under necessary social distancing guidelines, the courts are restricted by space and may only be able to accommodate a limited number of persons. Such precaution to reduce the spread of the virus is important, but so, too, is the right of access for the press and public.

The Court stated the First Amendment guarantees both "the right to attend the trial and report on what transpires" in criminal trials. *KPNX Broadcasting Co. v. Superior Court*, 678 P.2d 431, 441 (Ariz. 1984). The Court defines the press's right of access as the right to "sit, listen, watch, and report." *Id.* This language implicitly recognizes the value of not just hearing what transpires in court but also being present in the courtroom and seeing what occurs.

There is great value to members of the press attending a criminal trial in person. Reporting from the courtroom allows the press to provide the public with the most accurate report on the trial. Without in-person access to the court, Petitioners risk missing the personal contact and details that matters to journalists: emotional responses by parties and witnesses, visual access to exhibits submitted to the clerk, reactions from family members of both the victim and the defendant, the ability to

approach jurors post-verdict, and the opportunity to identify and approach those who wish to speak on the record.

Considering the journalistic imperatives of a reporter's physical presence in the courtroom, members of the press should be afforded access to the greatest extent possible. The United States Supreme Court recognizes that the press is the public's chief source of information about criminal trials and other court proceedings. *Richmond Newspapers*, 448 U.S. at 572-73. In this sense, the press serves as a surrogate for the public when reporting on criminal trials.

Ideally, the Court would permit any member of the press or public who wishes to attend a criminal trial in person to do so. However, because of social distancing requirements, normal access will, of course, be curtailed. Yet when full public access is not possible, this limitation of in-person access could be overcome by permitting at least a single member of the press to act as a pool reporter for all those who would like to attend. Such an accommodation would limit the number of people physically present in the courtroom while allowing members of the press to work together to inform the public. If the Court permits even a single pool reporter, the Court accommodates every member of the public who reads or watches the reports on the criminal trial. Any accommodation that makes courts more accessible to the public, or its surrogates in the press, serves the important functions discussed above.

Should the Court determine that allowing even a single pool reporter into the courtroom is not tenable, Petitioners urge the Court to ensure that the public is provided with video access to each phase of every criminal trial. In the absence of in-person attendance, a live-streamed video of the proceedings provides at least some of the benefits discussed above related to the visual details of a trial.

III. Under the First Amendment, The Public and Members of The Press Have a Qualified Right of Access to Information Disclosed in *Voir Dire* Examination.

Due to the historical tradition of the open jury selection process and the benefits that public oversight provides in ensuring a fair judicial system, the United States Supreme Court has held that the public's right of access to court proceedings extends to *voir dire* examination. *Press-Enterprise I*, 464 U.S. at 505. This right is balanced against juror privacy interests that concern "deeply personal matters." *Id*. at 511. However, even when a juror's privacy interest may relate to personal embarrassing information, a juror must affirmatively request suppression of their disclosures during the *voir dire* process to a presiding judge in order to "minimize the risk of unnecessary closure." *Id*. at 512. Upon notice of a privacy request by a juror, a judge must examine all alternatives to partial closure or sealing before ordering such action in order to comply with the constitutional requirements of the First Amendment. *Id*.

The standards set forth in *Press-Enterprise I* as applied to Petitioners' request support the conclusion that juror names should be provided during the *voir dire* process because no juror has affirmatively requested suppression of their name during the Wilson trial. Even if a juror requested his or her name to be suppressed for privacy concerns, it would be improper for a court to hold that an individual's name "touches deeply personal matters" and thus requires the use of a secret jury.

Courts are not foreclosed from using secret jury procedures if the specific facts of a case present a compelling interest which requires the sealing of juror information and point to specific findings. *Press-Enterprise I*, 464 U.S. at 510-14; *see also* 16A A.R.S. R. Crim. P. 9.3(b) ("all criminal proceedings must be open to the public unless the court finds... an open proceeding presents a clear and present danger to the defendant's right to a fair trial"). In its Order, the Superior Court made no such findings for the Wilson trial, nor did the court consider any alternatives, such as temporarily sealing juror names and releasing those names at the conclusion of the trial.

Without a compelling interest, public court proceedings are strongly presumed to be open to the public. *Richmond Newspapers*, 448 U.S. at 573-75. Also, the release of juror names during the *voir dire* process has long been an expected procedure in Cochise County, and the open process of releasing juror names weighs more favorably for a public right of access than it does in favor of protecting juror

privacy under the experience and logic test. Thus, the names of jurors should not be concealed behind a randomly assigned number before official court proceedings begin, because such policies unduly restrict a public access to a well-established open and transparent *voir dire* process.

A. Access to Juror Names Has Been a Historically Common Practice in Arizona and Specifically Cochise County.

When balancing the public interest in judicial transparency against the constitutional rights of other parties in criminal trials, the Supreme Court looks to apply the two-pronged "experience and logic" test. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986) ("Press-Enterprise II"). Under this test, in order to evaluate whether a presumptive right of access applies to a certain aspect of a criminal trial, the court must consider: (1) "whether the place and process have historically been open to the press and general public" and (2) "consider whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* at 8.

Under the "experience and logic test" as applied to Petitioners' specific request of press access to juror names in Cochise county, the first prong of the test is satisfied. Until this year, juror names and the *voir dire* examination process were typically available to the public and media. Even the court admits the secret juror process is a new development in Cochise County. *See Rojas* Minute Entry at 1. Petitioners had traditionally utilized their access to juror names throughout their

professional journalism careers, and only recently documented an increase spike in sealed juror information throughout Cochise County.

The second prong of the "experience and logic test" is also clearly satisfied. The historical understanding of the judicial process included the concept that a defendant would be tried by a jury of his or her peers. *Richmond Newspapers*, 448 U.S. at 568-69. As mentioned previously, the Supreme Court routinely supports the theory that public access to courtroom activity has "historically been thought to enhance the integrity and quality" of courtroom procedures. *Id*. at 578. In the context of this case, providing journalists, like Petitioners, with juror names allows members of the media to fully provide context to public citizens about all facets of a criminal trial, including the composition and opinions of the jury. Shedding light on participating jurors in a criminal trial ensures jury biases and prejudices are properly reviewed and provides the public another invaluable avenue of scrutiny over the judicial process.

B. The Superior Court Interpretation of Arizona Revised Statute § 21-312 Applies Only to Judicial Records Not the Open Process of *Voir Dire*.

The Superior Court improperly interpreted that Arizona Revised Statute §21-312 permits the court to unilaterally empanel a secret jury and prevent juror names from entering open court proceedings by using a system which assigns jurors a random number before court proceedings officially begin. The Superior Court

ordered specifically A.R.S. §21-312 (b) prohibits the release of juror names in all instances and requires the use of a secret jury procedure because the statute states "all records that contain jury biographical information are closed to the public." Superior Court Order at 4. This is an improper interpretation of the statute as it applies to open court proceedings like *voir dire* because § 21-312 only applies to judicial records.

Section 21-312(a) states that "*the list* of juror names or other juror information shall not be released unless specifically required by law or ordered by the court." A.R.S. §21-312(a) (emphasis added). The "list" language referenced in the statute may refer to the "Master Jury List" or the "Master Jury File" as defined in the definitions section of the code. A.R.S. §21-101. The term "list" must be interpreted as referencing judicial records created during the judicial summoning process and not any other open court proceeding. Under this interpretation, Petitioners are not foreclosed from hearing names of jurors during *voir dire* examination.

The exact language of A.R.S. §21-312 specifically applies to judicial records. The name of the statute is "Juror Records" and the language of the statute makes direct reference to records throughout §21-312. At no point does the statute restrict the release of juror names during open judicial proceedings. Thus, the Superior Court's conclusion that statutory language "prohibits" the release of juror names during the *voir dire* process is unsupported by the statutory language. This Court

should find the Superior Court abused its discretion and thus direct it to stop its secret jury process and return to using the names of prospective jurors during the *voir dire* examination and the names of the empaneled jurors during the trial.

CONCLUSION

David Morgan and Terri Jo Neff respectfully request this Court order the relief requested above for the foregoing reasons on an expedited basis. The press plays a crucial role in keeping public confidence in the judicial system, and the continued exclusion of the press harms the public's and press's constitutional right of access to court proceedings under the First Amendment.

Respectfully submitted,

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