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ARIZONA SUPREME COURT

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 Judge.

No. CV-20-0285-SA

Cochise County Superior
Court No. S0200CR2017-00516

RESPONSE TO PETITION FOR SPECIAL ACTION

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INTRODUCTION

The Honorable Timothy Dickerson, Judge of the Cochise County Superior Court, submits this substantive Response to Petitioners David Morgan and Terri Jo Neff's Petition for Special Action in accordance with *Hurles v. Superior Court*¸174 Ariz. 331, 332-33 (App. 1993), which provides that a judge may respond to a special-action petition to explain or defend the general validity of the court's administrative practice, policy, or local rule. On the eve of trial in the case of *State v. Roger Delane Wilson* (Cochise County Case CR201700516), Petitioners filed a Motion to Intervene for the purpose of requesting in-person access to the courtroom during the criminal trial. On September 14, 2020, the court issued its Order Concerning Access by Reporters During the Trial in this Mat[t]er. (Pet. App. 3-6).[1] The order set out limitations for access to the courtroom during the criminal trial and the accommodations that the court would use for the public during the trial in compliance with the Arizona Supreme Court's Administrative Order 2020-143, and denied the Petitioners' request for admission to the courtroom for the trial. The Petitioners wanted the court to deem the press to be "necessary persons" under Administrative Order 2020-143 and to order that at least one member of the press was entitled in-person access to the courtroom during a criminal trial.

[1] This Response will refer to the Petition's Appendix as "Pet. App." and to the Response's Appendix as "R. App."

Petitioners also asked the court to disclose the names of the potential and selected jurors. The court's order denied that request, citing A.R.S. § 21-312(B) and Arizona Supreme Court Rule 123(e)(10). (Pet. App. 5-6.)

Petitioners seek relief from the September 14, 2020, order. This Court should decline to accept special-action jurisdiction. Alternatively, if it accepts special-action jurisdiction, it should address the in-person access to criminal trials issue only to provide guidance for future trials and not to invalidate Respondent's order concerning in-person access to the trial that has now ended. It should also deny Petitioners all the relief that they are seeking with respect to the access to juror names during criminal trials issue.

JURISDICTIONAL STATEMENT

This Court's acceptance of special-action jurisdiction is appropriate when the petitioner lacks an equally plain, speedy, or adequate remedy by appeal. *See* Ariz. R. P. Spec. Acts. 1(a). Orders granting or denying motions to intervene are generally appealable orders. *Bechtel v. Rose,* 150 Ariz. 68, 71(1986); *JAR v. Superior Court*, 179 Ariz. 267, 272 (App. 1994); *Winner Enters., LTD v. Superior Court,* 159 Ariz. 106, 108 (App. 1988). However, the acceptance of special-action jurisdiction is discretionary. *Potter v. Vanderpool*, 225 Ariz. 495, ¶ 6 (App. 2010). "A primary consideration is whether the petitioner has an equally plain, speedy and adequate remedy by appeal." *Am. Family Mut. Ins. Co. v. Grant*, 222 Ariz. 507,

511, ¶ 9 (App. 2009). Other considerations include whether the case raises issues of statewide importance, issues of first impression, pure legal questions, or issues that are likely to arise again. *Luis A. v. Bayham-Lesselyong*, 197 Ariz. 451, 452-53, ¶ 2 (App. 2000).

While the trial court granted Petitioners' Motion to Intervene, it denied Petitioners the relief that they requested. Given the fact that Petitioners filed the Motion to Intervene on the day before the trial and the trial court entered its order on the same day, an appeal cannot afford Petitioners timely relief with respect to the *State v. Wilson* matter.

The trial in *State v. Wilson* proceeded as scheduled and has concluded. A guilty verdict was entered on October 1, 2020. Any relief that the court could grant in this particular case is therefore moot. (R. App. 15.) Appellate courts usually decline to consider moot issues. *Star Publ'g Co. v. Bernini,* 228 Ariz. 490, 492, ¶ 3 (App. 2012). They may, however, do so if the issues are capable of repetition and of evading review. *JV-132324 v. Superior Court*, 181 Ariz. 337, 342 (App. 1995) (accepting special-action jurisdiction where the moot issue complained of was "an ongoing issue of court policy").

Petitioners have not established that Respondent's actions concerning in-person access to the trial were arbitrary, capricious, or an abuse of discretion under the circumstances. Since the trial has now concluded, the Court should decline to

accept special-action jurisdiction. If it accepts special-action jurisdiction, it should address the in-person access to criminal trials issue only to provide guidance for future trials, not to invalidate the order that Respondent entered with respect to in-person access to the trial that has been concluded.

Petitioners have not established that the press's qualified First Amendment right of access to criminal trials encompasses access to juror names during a criminal trial. They have also failed to establish that the trial court lacked discretion to require that juror names be replaced by juror numbers during voir dire or to refuse to release any court records containing jurors' names. The Court should therefore decline to accept special-action jurisdiction. If the Court accepts special-action jurisdiction, it should deny Petitioners all the relief that they are seeking with respect to the access to juror names during criminal trials issue.

STATEMENT OF THE ISSUES

1. Have Petitioners established that the trial court's order violated their First Amendment right to access criminal trials?

2. Have Petitioners established that the press's qualified First Amendment right of access to criminal trials encompasses access to juror names during a criminal trial?

3. Have Petitioners established that the trial court lacked discretion to require that juror names be replaced by juror numbers during voir dire or to refuse to release any court records containing jurors' names?

STATEMENT OF MATERIAL FACTS

On March 11, 2020, Arizona Governor Doug Ducey declared a statewide public health emergency with respect to the COVID-19 pandemic. (R. App. 1.) In response to the Governor's declaration and pursuant to the authority of the Arizona Constitution, article VI, sections 3 and 5, this Court issued several Administrative Orders that limited or modified court operations. (*Id*)

The current Administrative Order, A.O. number 2020-143, issued August 26, 2020, continues the limitations on court operations and sets out a plan for a phased in return to normalcy. (R. App. 1-14.)

On September 14, 2020, A.O. number 2020-143 limited in-person attendance for court proceedings to "attorneys, parties, victims, witnesses, judicial officers, court employees, and other necessary persons, where necessary to maintain the recommended social distancing within the courthouse and each courtroom and the judicial officer in each proceeding is authorized to make reasonable orders to ensure the health and safety of hearing participants consistent with the parties' right to due process." (R. App. 3, ¶ 7.)

On September 14, 2020, Petitioners filed their Motion to Intervene in the *State v. Wilson* matter requesting permission for in-person access to the criminal trial set to begin on September 15, 2020. (Pet. App. 16.) The Motion also requested access to the names of prospective and empaneled jurors in the *State v. Wilson* trial. (*Id.*)

On September 14, 2020, the court entered its order granting the Motion, but denying the request for in-person attendance at the trial, citing the lateness of the requests, the access allowed pursuant to A.O. number 2020-143, the implementation of alternative access via a live audio feed by telephone and by posting an audio recording of the proceedings on *Youtube*, and denying access to juror names, citing A.R.S. § 21-312(B) and Arizona Supreme Court Rule 123(e)(10). (Pet. App. 4-6.)

On September 28, 2020, Petitioners filed their Petition for Special Action.

On September 30, 2020, the *State v. Wilson* trial concluded with a guilty verdict. (R. App. 15.)

ARGUMENT

I. Petitioners Have Not Established that the Trial Court's Order Violated Their First Amendment Right to Access Criminal Trials.

A. Arizona Supreme Court Order Number 2020-143 Placed Limitations on Access to Court Proceedings Due to the COVID-19 Statewide Health Emergency.

In March 2020, the Governor of Arizona declared a state-wide public health emergency to slow the spread of COVID-19. The pandemic created new challenges for public agencies, including the courts. In response to the Governor's declaration and pursuant to Arizona Constitution article VI, sections 3 and 5, this Court issued several Administrative Orders regarding court operations. It issued the current Administrative Order, A.O. number 2020-143, on August 26, 2020. (R. App. 1.)

The Court set out the limitations of public access to the court proceedings with a goal of protecting the health and safety of the public, judicial staff, parties, attorneys, witnesses and jurors. It directed courts to conduct business in a manner that reduced the risks associated with COVID-19 but to resume certain operations in an orderly way that prioritized the safety of the public, judicial officers and employees of the judiciary. (*Id.*) It ordered courts to limit persons in courtrooms based on the social distancing recommendations and the space available at the location. (*Id.* at ¶ 7.) Persons permitted access to courtrooms include attorneys, parties, victims, witnesses, jurors, judicial officers, court employees, and other

necessary persons while maintaining recommended social distancing. (*Id.*) Given the unprecedented health crisis within which we are living, the limitations on public access to courtrooms are reasonable and prudent. Judges who restrict in-person access to the courtroom in compliance with A.O. number 2020-143 act responsibly. Orders limiting access within the parameters of the Administrative Order are not issued arbitrarily or with capriciousness and they do not constitute abuses of the court's discretion.

B. The Trial Court's Order Did Not Violate Petitioners' First Amendment Rights to Access Criminal Trials.

Petitioners argue that open access to judicial proceedings is a recognized right of the public and in particular of the press, citing *Richmond Newspapers v. Virginia*, 448 U.S. 555, 569 (1980). (Pet. at 11.) They also argue 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. (*Id.*) Respondent agrees that court proceedings are of great public interest and should be as open as possible. In this instance, an overriding interest required him to close his courtroom to the general public, namely the need to maintain social distancing in compliance with A.O. number 2020-143.

In any murder trial, the persons required to be present in the courtroom number nearly two dozen. (Twelve jurors, two alternates, the defendant, the defense attorney, the prosecutor, the judge, the bailiff, the court reporter, the clerk,

a witness at any given time, and the victims.) To maintain at least six feet for social distancing, Respondent had to restrict in-person access because the courtroom could not safely accommodate any additional persons. Space for social distancing is a valid overriding interest.

Recognizing the public's right to access to the proceedings, Respondent made alternative accommodations. He permitted the public to attend the proceedings by telephone or to listen to a live audio feed at the courthouse. In addition, the Respondent notified the Petitioners that a recording of the proceeding would be posted on-line. He reiterated the reporters' right to enter the court building while wearing masks and maintaining social distancing. He made the court's law library available to reporters after the jury was seated, as long as sufficient space for social distancing was available. (*See* Pet. App. at 3-6.)

Petitioners argue that excluding the press from observing court proceedings must be necessitated by a compelling state interest and that such exclusion must be narrowly tailored, citing *Ridenour v. Schwartz,* 179 Ariz. 1, 3 (1994). (Pet. at 12.) In *Ridenour,* this Court cited *Allied Daily Newspapers v. Eikenberry*, 848 P2d. 1258, 1261 (Wash. 1993), which recognized that closing a courtroom is permissible for the case-specific reasons for which closure is traditionally permitted (i.e., overcrowded courtroom, witness protections, etc.). 179 Ariz. at 4. The present COVID-19 safety precautions are compelling state interests. The

Governor's declaration of a state-wide public health emergency evidences the compelling state interest that courts must manage. That compelling state interest justifies the closure of Respondent's courtroom to the general public because the space limitations in the courtroom cannot ensure safe social distancing.

Respondent entered appropriate orders after considering the argument that Petitioners made in the Motion to Intervene. Given the late date at which Petitioners filed the Motion, with trial starting the next day, Respondent arranged for alternative access to the court proceeding, thereby ensuring that public and the press had real-time access to the events as they occurred in the courtroom. Because Respondent's actions were not arbitrary, capricious, or an abuse of discretion, if this Court accepts special-action jurisdiction, it should deny Petitioners the relief that they are seeking with respect to his order.

The issue of in-person access to the courtroom in the present case is not likely to be repeated because this trial has concluded. Petitioners argue that the limitation of access is of statewide importance and is likely to be repeated in other cases in Cochise County. (Pet. at 4.) If this Court accepts special-action jurisdiction, it should do so only for the purpose of giving guidance rather than to invalidate the order entered that Respondent entered with respect to in-person access to the trial that has now ended.

II. Petitioners Have Not Established that the Press's Qualified First Amendment Right of Access to Criminal Trials Encompasses Access to Juror Names During a Criminal Trial.

Petitioners contend that their qualified right of access to criminal trials "extends to the names of jurors." (Pet. at 12.) While it appears that neither the United States Supreme Court nor any Arizona appellate court has specifically addressed this issue, some courts have held that the press's qualified right of access to criminal trials does not encompass access to juror names during a criminal trial. While these cases are not controlling, their reasoning is persuasive, and this Court should adopt it. This is especially true because Petitioners have not cited a single case to the contrary.

In *Gannett Co. v. State*, 571 A.2d 735, 736 (Del. 1990), Delaware's Supreme Court considered whether the press had a qualified First Amendment right to require that jurors' names be announced during a highly publicized first degree murder trial "even though the parties have full access to such information and the proceedings are otherwise open to the public." The jurors in the case were given numbers that were exclusively used instead of their names in open court. *Id*. at 737. The court stated that no previous case had considered the issue under similar circumstances and that it did not "fit neatly into any analytical structure previously applied" in First Amendment cases involving juror names. *Id*. at 740-41. It applied the test that the United States Supreme Court had established for

considering First Amendment claims to a qualified right of access to closed criminal proceedings in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"), as providing the most closely analogous basis for resolving the matter. 571 A.2d at 741, 743. Under that test, a First Amendment claim's proponent must establish (1) that "the place and process have historically been open to the press and general public" and (2) that "public access plays a significant positive role in the functioning of the particular process in question." 478 U.S. at 8. These tests are respectively referred to as "the experience test" and the "logic test." 571 A.2d at 743.

The plaintiff in *Gannett* focused on what it asserted was Delaware's historical courtroom practice in arguing that jurors' names had traditionally been announced to the press and the public. *Id*. at 744. The court stated that this "rather myopic focus" was "too narrow to establish a national constitutional right" and that if a qualified First Amendment right to jurors' names existed, it had to be "drawn from the broad spectrum of sources" that the United States Supreme Court typically consulted in determining whether a constitutional right of access exists. *Id*. at 744. Under this analysis, Petitioners' assertion here that they satisfy the experience test *solely* because the Cochise County Superior Court had previously released the names of jurors to the press and public during criminal trials (Pet. at 17-18) fails.

The *Gannett* court concluded that the authorities that the plaintiff had cited "hardly support[ed] the type of strong national tradition recognized in other right of access cases." 571 A.2d at 746. It also stated that "[p]aramount in any historical analysis" was the fact that courts in Delaware and other states had traditionally had "specific statutory discretion over the release of jurors' names" and that federal local rules of court and statutes that Congress had enacted provided "additional insight into the historical discretion traditionally afforded trial courts in connection with disclosing jurors' names." *Id*. at 746; *see also id*. at 747-48. It concluded that "the historical tradition gives trial courts discretion over such matters, which is reflected in express statutory provisions enacted by duly elected representatives of the people at the state and national levels" and noted the United States Supreme Court had "repeatedly referred to such enactments as additional evidence of a public tradition in constitutional right of access cases." *Id*. at 748. It therefore held that the plaintiff had failed to meet its burden under the experience test "of establishing any historical tradition of constitutional dimension regarding public access to jurors' names." *Id*.

Turning to the logic test, the court noted that applying that test required it to determine whether public access to juror names played a significant positive role in a criminal trial or in jury selection in such a trial. *Id*. at 749. It explained that the role played had to be an essential or indispensable one so that trivial or

unimportant historical practices did not become "chiselled in constitutional stone." *Id*. (internal quotation marks omitted). It further explained that the logic test helped "to distinguish between what the Constitution permits and what it requires." *Id*. (internal quotation marks omitted).

The plaintiff in *Gannett* argued that announcing prospective jurors' names promoted "both fairness and the appearance of fairness." *Id*. It asserted that the practice "encourages fairness by allowing the public to serve as a further check on the possibility that a juror may have some undisclosed bias, which publication of his or her name may ultimately reveal." *Id*. It further asserted that the practice "promotes the appearance of fairness by enhancing public trust in the criminal justice system through open criminal proceedings." *Id*.

The court noted that several aspects of Delaware's jury selection process adequately safeguarded the process's fairness. *Id*. It cited (1) selecting a panel of jurors randomly from registered voter lists supplemented with names from other sources, (2) initially screening jurors through juror qualification forms that required basic information such as name, address, and occupation; (3) conducting a second screening during voir dire when the jurors were asked questions that the court and counsel had prepared to determine which jurors should be dismissed for cause; and (4) conducting a third screening when counsel exercised peremptory challenges without regard to cause. *Id*. The court commented that the careful use

of voir dire was the "most effective and perhaps most critical procedural safeguard available to protect and maintain juror impartiality in a highly publicized murder trial." *Id*. (internal quotation marks omitted). It noted that counsel in the case had been given the jurors' names and the other information on the juror qualification forms and that the jurors had been subjected to the screening procedures that it had described, which had been "more intense than usual." *Id*. It concluded that "[u]nder these circumstances, announcement of the jurors' names is insignificant." *Id*. It further concluded that the participants in the litigation protect the "public interest in the administration of justice." *Id*.

The court also noted that the proceedings were not closed and that the public, including the press, had attended and observed jury selection. It stated that

> [the plaintiff's] fairness argument is based on the presumption that jurors will not respond truthfully, and therefore, the public requires a further safeguard, which it is claimed only the press can provide. We refuse to adopt such a cynical view of the criminal justice system. The courts, the State and the defendant have concurrent paramount concerns for, and obligations to assure, a fair trial. This includes a proper solicitude for the jury so that it is not subject to the extraneous influences of a media representative which is also engaged in the business of selling newspapers. *See also Sheppard,* 384 U.S. at 353, 86 S. Ct. at 1517.

Id. at 750 (footnote omitted).

The court further characterized the plaintiff's argument that announcing the jurors' names promotes fairness as confusing the defendant's rights under the Sixth Amendment with the public's rights under the First Amendment. *Id*. It noted that

the press could not rely on the Sixth Amendment's "guarantee of a fair trial to the defendant, particularly when courts have determined that criminal defendants may have a fair trial even without knowing jurors' names." *Id.* It further noted that courts had repeatedly upheld the use of anonymous juries against defendants' Sixth Amendment challenges based on fair trial rights. *Id.* It observed that "[t]he defendant clearly has an equal, if not greater, interest than the media in receiving a fair trial," and it saw "no reason to afford the media greater rights of access to jurors' names than the Constitution permits the parties to a trial."[2] *Id.*

The court concluded that the plaintiff had failed to meet its burden under the logic test because announcing the jurors' names in court "promotes neither the fairness nor the perception of fairness when the parties are provided with the jurors' names and all proceedings are open to the public" and stated that "[i]t strains credulity that such an announcement was essential to the proper functioning of the trial." *Id.* at 751.

Like the plaintiff in *Gannett*, Petitioners argue that announcing juror names in court "promotes fairness and accountability in the judicial system" (Pet. at 6, *see*

2. Some courts have distinguished "anonymous jury" cases like those that the *Gannett* court cited from cases like the present one in which the parties have the jurors' names but the jurors are referred to by numbers rather than by their names in open court and have said that this situation does not deprive criminal defendants of their right to a fair trial either. *See, e.g.*, *Perez v. People*, 302 P.3d 222, 224-26, ¶¶ 10-21 (Colo. 2013); *People v. Hanks*, 740 N.W.2d 530, 532-33 (Mich. App. 2007); *People v. Williams*, 616 N.W.2d 710, 712-14 (Mich. App. 2000).

also id. at 12) and that "[s]hedding 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" (Pet. at 19). Under the *Gannett* court's reasoning, Petitioners have failed to meet their burden of establishing under the logic test that public access to juror names plays a significant positive role in a criminal trial or in jury selection in such a trial. As in *Gannett*, 571 A.2d at 736-37, the jurors here were identified by numbers rather than by their names in open court (Pet. at 2), but the parties to the case had full access to the jurors' names (Pet. at 2 n.1). Arizona's jury-selection process has the same aspects that the *Gannett* court found, 571 A.2d at 749, adequately safeguarded the process's fairness. The public health emergency that COVID-19 has created precluded the trial here from being as open to the public as it otherwise would have been (*see* this Court's Administrative Order number 2020-143 [R. App. 1]) and as the proceedings in *Gannett* were, 571 A.2d at 750-51. But the trial court in this case did permit reporters to listen to the trial over the phone and made the audio recording of the trial available to the public online. (Pet. App. at 4, item 4.) Moreover, Petitioners are asking this Court to recognize that they have a qualified First Amendment right to access juror names during a criminal trial (Pet. at 2, 6, 12, 16-19), and such a right would continue to exist after the public health crisis dissipates and courts are no longer compelled to limit the media's and the

public's attendance at trials for the safety of all concerned. As the *Gannett* court noted, announcing the jurors' names in open court does not promote fairness or the perception of fairness when the parties are provided with the jurors' names and all proceedings are open to the public. 571 A.2d at 751.

In *United States v. Black*, 483 F. Supp. 2d 618 (N.D. Ill. 2007), the district court considered whether a newspaper's First Amendment right to access criminal proceedings included the right to access the names of empaneled jurors and alternates during a highly publicized fraud trial. Although the prospective jurors had identified themselves by name in open court during the voir dire proceeding, the trial court had disclosed the names and addresses of the twelve empaneled jurors and the six alternates only to the parties and had not made that information publicly available. *Id*. at 621 & n.3.

In applying *Press-Enterprise II*'s experience test, the court recognized that in *Press Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press Enterprise I*"), the Supreme Court had established that the First Amendment guaranteed the press and public the right to attend voir dire proceedings. 483 F. Supp. 2d at 623-24. But the court stated the question whether the newspaper had a constitutional right to learn the jurors' names before the jury returned its verdict or whether the court retained discretion in that regard was a distinct issue. *Id*. at 624; *see also id*. at 627 n.9 (stating that *Press Enterprise I* did not control the outcome or the

analysis in the case because access to voir dire proceedings and access to juror names were factually distinct issues); *id*. at 628 n.12 (stating that the fact that the press and the public have a qualified right to attend voir dire proceedings does not necessarily mean that they have a right to access juror names because the two issues are analytically distinct). Under this analysis, Petitioners' arguments here that *Press Enterprise I* required the trial court to reveal the jurors' names unless a juror had requested that his or her name be suppressed and that granting a request to suppress a juror's name would have been improper under *Press Enterprise I* in any event because a name is not the type of deeply personal matter that could warrant suppression (Pet. at 11, 16-17) fail. Petitioners' arguments that *Press Enterprise I* required the trial court to examine all alternatives to partial closure or sealing before ordering that juror names be replaced by juror numbers (Pet. at 16) and to identify a compelling interest that required that replacement and make specific findings concerning that interest (Pet. at 17) also fail.

The *Black* court noted that the newspaper had not provided any case law to establish that it had a constitutional right to obtain the jurors' names during trial and stated that several cases indicated that "the courts' prevailing practice has been to the contrary." 483 F. Supp. 2d at 624-25. Although it stated that the cases that it cited suggested that access to juror names had not historically been available to the press and the public, it did not definitively reach that issue because the

newspaper had failed to analyze that aspect of the experience test. *Id*. at 625 n.7. It further noted that 28 U.S.C. § 1863(b)(7), which requires federal courts to adopt a master plan for random jury selection, contains the clause "[i]f the plan permits [juror] names to be made public," thereby authorizing federal courts to adopt a plan that does not reveal prospective juror names at all. 483 F. Supp. 2d at 625-26. The court concluded that in light of the authority that it had discussed, the newspaper had failed to establish under the experience test that juror names had historically been available to the press and public during criminal trials. *Id*. at 626.

As previously noted, Petitioners here relied solely on the Cochise County Superior Court's previous practice of releasing juror names during such trials to satisfy this test (Pet. at 17-18), which is not sufficient to establish a constitutional right of access. *Gannett*, 571 A.2d at 744. And like the newspaper in *Black*, 483 F. Supp. 2d at 624, Petitioners have not cited any case that actually holds that the constitutional right that they are asserting exists (*see* Pet. at 12 [stating that Petitioners' "qualified right of access to criminal trials extends to the names of jurors" without citing any authority to support that assertion]).

Turning to the logic test, the *Black* court considered whether public access to juror names during a criminal trial would play a significant positive role in the process. 483 F. Supp. 2d at 626. It noted that the jury "occupies a critical, but shrouded role in the criminal process" and that this "lack of public scrutiny into the

jury's function contrasts significantly with other aspects of criminal proceedings that fall within the First Amendment right to access, such as pretrial hearings, voir dire, and the trial itself." *Id*. at 626-27. It discussed the ways in which conducting the latter aspects of criminal trials openly before the press and public helped to ensure fairness, including the fact that openness allowed the press and the public "to absorb the nonverbal aspects of the proceedings," which a transcript would not reveal. *Id*. at 627. It determined that "there is a logical link between public access to voir dire (to fully appreciate all verbal and nonverbal communication) and the benefit of access (to ensure that the government deals fairly with a defendant)." *Id*. at 628.

It further determined, however, that "open access to juror names during the pendency of trial has no similar effect and in fact, disclosure enhances the risk that the jury will not be able to function as it should, in secrecy and free of any outside influence." *Id*. The court noted that especially in high-profile trials, disclosing jurors' names before the jury has returned a verdict "flies in the face of the historic traditions of the courts, does nothing to enhance the jury system (in fact, may harm it through undue inquiry into the jury's deliberations), and exposes the jurors to press intrusion when they are most emotionally drained while still separated from family and friends." *Id*. (internal quotation marks omitted). It further noted that releasing the jurors' name before the verdict in such a case "threatens the integrity

of the jurors' ability to absorb the evidence and later to render a verdict based only on that evidence" because it "increases the risk of third-party contact by the press or by non-parties who are monitoring [the] proceedings through the vast media attention" that the case will have gathered. *Id*. It stated that any such contact was presumptively prejudicial to a defendant's right to a fair trial and could give rise to jury tampering." *Id*. It concluded that "while public scrutiny serves a positive function as to the majority of aspects of criminal proceedings, the opposite is true regarding public disclosure of juror names during the pendency of trial." *Id*. at 629. It therefore held that the newspaper had not met its burden of establishing under the logic test that there is any logical connection between public access to juror names while a criminal trial is pending and the jury's proper functioning. *Id*. at 630.

Under this analysis, Petitioners' assertions that releasing jurors' names before the verdict is entered in a criminal trial "promotes fairness and accountability in the judicial system" (Pet. at 6, *see also id*. at 12) and that "[s]hedding 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" (Pet. at 19) fail. While the *Black* court's primary focus was the effect of releasing juror names before the verdict in high-profile criminal trials, the negative effects of doing so are not necessarily

limited to such trials and the court's reasoning establishes that doing so would not play a significant positive role in any jury's functioning.

Given the foregoing discussion, Petitioners have failed to establish that the press's qualified First Amendment right of access to criminal trials encompasses access to juror names during a criminal trial. Petitioners contend that state law required the trial court to identify a compelling need and make specific findings concerning that need before replacing the jurors' names with numbers at voir dire (Pet. at 2, 5-6, 12), but the constitutional provision and the Criminal Procedure rules that they cite only generally require open access to the courts and to criminal proceedings and make no mention of any right to access juror names. *Ridenour v. Schwartz*, 179 Ariz. 1, 3 (1994), which Petitioners also cite (Pet. at 12) concerned closing a court building to the public. Petitioners do not explain how any of the general access to the courts provisions and cases entitle them to relief in light of the fact that they have not established that any constitutional right to access juror names during a criminal trial exists.

For the foregoing reasons, this Court should deny Petitioners' requests (Pet. at 7) that it order that juror names be entered into the public record during open voir dire examinations and that it specifically order the trial court to release the juror names in the present case to the public.

III. Petitioners Have Not Established that the Trial Court Lacked Discretion to Require that Juror Names Be Replaced by Juror Numbers During Voir Dire or to Refuse to Release Any Court Records Containing the Jurors' Names.

The previous argument demonstrates that Petitioners have not established that there was any constitutional requirement that the jurors' names be announced during voir dire. Petitioners contend that the trial court misconstrued A.R.S. § 21-312 as prohibiting it from having the jurors' names announced during voir dire. (Pet. at 19-21.)

The trial court's order does not say that the trial court believed that A.R.S. § 21-312 prohibited it from allowing the jurors' names to be announced during voir dire. (*See* Pet. App. at 5-6, item 9.) The court may have simply believed that it had the discretion to assign the jurors numbers to be used instead of their names in open court. The court cited Arizona Supreme Court Rule 123(e)(10), which is entitled "Juror Records" and which provides that "[t]he home and work telephone numbers and addresses of jurors, and all other information obtained by special screening questionnaires or in voir dire proceedings that personally identifies jurors summoned for service, except the names of jurors on the master jury list, are confidential, unless disclosed in open court or otherwise opened by order of the court." (Pet. App. at 5, item 9.) The court noted in its order that the "master jury list" (which is not confidential under the rule) is the "large list of individuals who may be summoned for jury service" and that Petitioners were instead requesting

the names of the persons who had actually been summoned and selected for trial. (*Id.* at 6, item 9.)

Since the jurors' names were not disclosed in open court here, any special screening questionnaires or any records concerning the voir dire proceedings containing the jurors' names would be confidential under this rule unless they were "opened by order of the court." *See* Rule 123(b)(17) (broadly defining "record"); (b)(17)(B)(1) (defining "case record" as including "any record that is collected, received, or maintained by a court or clerk of court in connection with a judicial proceeding"). The court's order correctly noted that Rule 123(e)(10) did not require it to disclose the jurors' names. (Pet App. at 5, item 9.) It also noted that it did not believe that Rule 123(e)(10) conflicted with A.R.S. § 21-312(B). (*Id.*)

In relevant part, A.R.S. § 21-312 provides as follows:

> **A.** The list of juror names or other juror information shall not be released unless specifically required by law or ordered by the court.
>
> **B.** All records that contain juror biographical information are closed to the public and shall be returned to the jury commissioner, the jury manager or the court when jury selection is completed and may not be further disclosed or disseminated by a party or the party's attorney.

Arizona Code of Judicial Administration section 5-203(I) provides in pertinent part as follows:

> **Juror Biographical Information.** To reduce the time required for voir dire, basic background information regarding panel members, as required by Rule[] . . . 18.3 of the Arizona Rules of Criminal Procedure, shall be made available to counsel for each party on the

> day on which jury selection is to begin. The jury commissioner shall obtain and maintain such information as to each potential juror in a manner and form to be approved by the supreme court.

Arizona Rule of Criminal Procedure 18.3, which is entitled "Jurors' Information" provides as follows:

> **(a) Information Provided to the Parties.** Before conducting voir dire examination, the court must furnish each party with a list of the names of the prospective jurors on the panel called for the case. The list must include each prospective juror's zip code, employment status, occupation, employer, residency status, education level, prior jury duty experience, and any prior felony conviction within a specified time established by the jury commissioner or the court.
>
> **(b) Confidentiality.** The court must obtain and maintain juror information in a manner and form approved by the Supreme Court, and this information may be used only for the purpose of jury selection. The court must keep all jurors' home and business telephone numbers and addresses confidential, and may not disclose them unless good cause is shown.

The "list of juror names or other juror information" to which A.R.S. § 21-312(A) refers is undoubtedly the list that Criminal Procedure Rule 18.3(a) identifies. Under A.R.S. § 21-312(B), that list and any other records that contain juror biographical information within the meaning of Arizona Code of Judicial Administration section 5-203(I) (incorporating Criminal Procedure Rule 18.3) "are closed to the public and shall be returned to the jury commissioner, the jury manager or the court when jury selection is completed and may not be further disclosed or disseminated by a party or the party's attorney." So juror names contained in any special screening questionnaires or any records concerning the

voir dire proceedings could be released by order of the court under Supreme Court Rule 123(e)(10) and the list of juror names could also be released if required by law or if ordered by the court under A.R.S. § 21-312(A), but those provisions did not require the court to release the names. Moreover, once jury selection was completed, the names would be "closed to the public" under A.R.S. § 21-312(B).

So the trial court was correct that Rule 123(e)(10) did not require it to release the juror names, that A.R.S. § 21-231(B) would preclude it from doing so once the jury selection was complete, and that the two provisions did not conflict. (*See* Pet. App. 5-6, item 9.) Moreover, since A.R.S. § 21-231(B) does not apply until jury selection is complete and it says nothing about voir dire, neither its plain language nor the trial court's order supports Petitioners' contention (Pet. at 19-21) that the trial court thought that it prohibited the court from allowing the jurors' names to be announced during voir dire.

Petitioners have not established that there was any constitutional or other requirement that the jurors' names be announced during voir dire. They also have not established that the trial court lacked discretion to require that jurors be identified by juror number rather than by name in voir dire. In *State v. Greer*, 2 CA-CR 2018-0080, 2020 WL 1862300 (April 13, 2020), the defendant was convicted of conspiracy to commit first-degree murder, assisting a criminal street gang, knowingly supplying a firearm to another person to be used in the

commission of a felony, and possessing a firearm while a prohibited possessor.[3] *Id*. at *1, ¶ 1. During voir dire, prospective jurors had stated their names, residences, employment, and details about their families in the defendant's presence. *Id*. at *2, ¶ 6. After testimony revealed that the defendant was a member of the Arizona Aryan Brotherhood gang and that gang members gathered information to target and kill people on the gang's behalf, jury members notified the court that they were concerned for their safety. *Id*. at *1, ¶ 2; *2, ¶ 6. The court ruled that going forward, the jurors would be identified by number instead of by name and that the voir dire transcripts would be sealed. *Id*. at *2, ¶ 7. The defendant moved for a mistrial before he was convicted and for a new trial after he was convicted, essentially arguing that the jurors' discussions regarding their fear of him and their concern for their personal safety before deliberation constituted juror misconduct that denied him due process and a fair trial. *Id*. at *2, ¶ 8; *3, ¶ 10. The trial court denied both motions. *Id*. at *2, ¶ 8; *3, ¶ 10.

On appeal, the court of appeals affirmed the denial of both motions. *Id*. at *4, ¶¶ 13, 17. It rejected the argument that a case in which it had affirmed the trial court's grant of a new trial after information about the jurors had left the courtroom

3. Arizona Supreme Court Rule 111 governs the citation of decisions. ARCAP 28(f). Rule 111(c)(1)(C) provides that a memorandum decision may be cited for persuasive value if it was issued after January 1, 2015; no opinion adequately addresses the issue before the court; and the citation is not to a depublished opinion. *Greer* is apparently the only Arizona case that mentions using numbers rather than names to identify jurors.

required a different result. *Id*. at *4, ¶ 15. It noted that in the case before it, the trial court had taken extensive steps to ensure that this did not occur and to address the jurors' safety concerns, including referring to the jurors by number. *Id*. at *4, ¶¶ 16-17. Although there were specific circumstances in *Greer* that prompted the court to require that jurors be identified by number rather than by name, nothing in the court's discussion indicated that a trial court could impose such a requirement only if such circumstances were present.

Given the foregoing discussion, Petitioners have not established that the trial court lacked discretion to require that juror names be replaced with juror numbers during voir dire or to refuse to release any court records containing the jurors' names. This Court should therefore deny Petitioners' request (Pet. at 7) that it order that jurors names be entered into the record during voir dire and that it order that this action does not violate A.R.S. § 21-312.

CONCLUSION

For the foregoing reasons, this Court should decline to accept special-action jurisdiction. Alternatively, if it accepts special-action jurisdiction, it should address the in-person access to criminal trials issue only to provide guidance for future trials and not to invalidate Respondent's order concerning in-person access to the trial that has now ended. It should also deny Petitioners all the relief that

they are seeking with respect to the access to juror names during criminal trials issue.

Respectfully submitted this 2nd day of October, 2020.

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