

# Statewide Jury Selection Workgroup

Initial Report Due to the  
Arizona Supreme Court on  
November 1, 2021

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## Our job

- Consider whether Ariz. R. Civ. P. 47(c)(3) and Ariz. R. Crim. P. 18.5(d) and (e) should be expanded or modified with respect to for-cause challenges to accommodate the abolition of peremptory strikes. Any proposed revisions due Nov. 1, 2021.
- Best practices for jury selection
- Training

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## Workgroups

- Rules and best practices for selection including potential differences between struck/strike and replace/other options (e.g., J. Napper's suggestion)
- Revision of scripts and evaluation of questionnaires
- Training, including instruction on cause challenges, voir dire, rehabilitation, permissible questioning and potentially impermissible questioning, who should question prospective jurors

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## RULES OF CRIMINAL PROCEDURE

### Rule 18.4. Challenges

**(a) [No change]**

**(b) Challenge for Cause.** The court, on motion or on its own, must excuse a prospective juror or jurors from service in the case if there is a reasonable ground to believe that the juror or jurors cannot render a fair and impartial verdict. A challenge for cause may be made at any time, but the court may deny a challenge if the party was not diligent in making it.

**(c) [Deleted Peremptory Challenges].**

**COMMENT [No change]**

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COMMENT: ... A challenge for cause can be **based on a showing of facts from which an ordinary person would imply a likelihood of predisposition in favor of one of the parties.** In addition, a juror may be challenged who:

- Has been convicted of a felony;
- Lacks any of the qualifications prescribed by law to render a person a competent juror;
- Is of such unsound mind or body as to render him incapable of performing the duties of a juror;
- Is related by consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant;
- Stands in the relationship of guardian and ward, attorney and client, master and servant, or landlord and tenant, or is an employee of or member of the family of the defendant, or of the person alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;
- Has been a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution;
- Has served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information;

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COMMENT: ... CONT.

- Has served on the trial jury which has tried another person for the offense charged in the indictment or information;
- Has been a member of the jury formerly sworn to try the same charge and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it;
- Has served as a juror in a civil action brought against the defendant for the act charged as an offense;
- Is on the bond of the defendant or engaged in business with the defendant or with the person alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;
- Is a witness on the part of the prosecution or defendant or has been served with a subpoena or bound by an undertaking as such;

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## COMMENT: ... CONT.

- Has a state of mind in reference to the action or to the defendant or to the person alleged to have been injured by the offense charged or on whose complaint the prosecution was instituted, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party;
- If the offense charged is punishable by death, entertains conscientious opinions which would preclude his finding the defendant guilty, in which case he must neither be permitted nor compelled to serve as juror; or
- Does not understand the English language sufficiently well to comprehend the testimony offered at the trial.

This section also permits a challenge for cause to be made whenever the cause appears. Under Rule 18.4(b), the trial court may deny the challenge if not seasonably made, but there is no absolute time limitation imposed by rule. Once the trial has begun, the prosecutor may be unable, because of double jeopardy, to invoke the right to challenge, unless there are sufficient alternate jurors to enable the trial to continue with one less juror.

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## Ariz. R. Crim. P.

## Rule 18.5. Procedure for Jury Selection

**(a) [No change]**

**(b) Calling Jurors for Examination.** The court may call to the jury box a number of prospective jurors equal to the number to serve plus the number of alternates. Alternatively, and at the court's discretion, all members of the panel may be examined.

**(c)-(d) [No change]**

**(e) Scope of Examination.** The court must ensure the reasonable protection of the prospective jurors' privacy. Questioning must be limited to inquiries designed to elicit information relevant to asserting a possible challenge for cause.

**(f) Challenge for Cause.** Challenges for cause must be on the record and made out of the hearing of the prospective jurors. The party challenging a juror for cause has the burden to establish by a preponderance of the evidence that the juror cannot render a fair and impartial verdict. If the court grants a challenge for cause, it must excuse the affected prospective juror. If insufficient prospective jurors remain on the list, the court must add a prospective juror from a new panel.

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### Rule 18.5. Procedure for Jury Selection (Cont.)

**(g) Stipulation to Remove a Prospective Juror.** The parties may stipulate to the removal of a juror.

**(h) Selection of Jury; Alternate Jurors.**

(1) *Trial Jurors.* After the court has resolved any challenges for cause, the prospective jurors remaining in the jury box or on the list of prospective jurors constitute the trial jurors.

(2)-(3) **[No change]**

**(i) Deliberations in a Capital Case. [No change]**

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### Rule 18.5. Procedure for Jury Selection (Cont.)

**COMMENT [No change to the first two paragraphs of the comment]**

**COMMENT**

**Rule 18.5(b).** Before a 1995 amendment, Rule 18.5(b) was interpreted to require trial judges to use the traditional “strike and replace” method of jury selection . . .

As currently drafted, the trial judge is allowed to use the “struck” method of selection if the judge chooses. This procedure is thought by some to offer more advantages than the “strike and replace” method. See T. Munsterman, R. Strand and J. Hart, *The Best Method of Selecting Jurors*, THE JUDGES' JOURNAL 9 (Summer 1990); A.B.A. Standards Relating to Juror Use and Management, Standard 7, at 68-74 (1983); and “The Jury Project,” Report to the Chief Judge of the State of New York 58-60 (1994).

The “struck” method calls for all of the jury panel members to participate in voir dire examination by the judge and counsel. Following disposition of the for cause challenges, the clerk calls the first 8 or 12 names, as the law may require, remaining on the list, plus the number of alternate jurors thought necessary by the judge, who become the trial jury.

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### Rule 18.5. Procedure for Jury Selection (Cont.)

#### COMMENT [cont.]

**Rule 18.5(d).** The court should instruct counsel that voir dire is permitted to enable counsel to ask questions seeking relevant information from jurors, but not to ask questions intended to raise arguments to the jurors. The court should be particularly sensitive to the prejudice that can arise from voir dire by an unrepresented defendant.

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### Ariz. R. Civ. P. 47

#### (a)-(b) Jury Selection. [No change]

##### (b) Juror Information.

(1) *Personal Information.* Before jury selection and voir dire examination starts, the clerk must provide the parties with the following information for each prospective juror: name, zip code, employment status, occupation, employer, residency status, education level, prior jury experience, and felony conviction status. The clerk must keep all prospective jurors' home and business telephone numbers and addresses confidential and may not disclose them unless good cause is shown.

(2) *Questionnaires.* The court may order prospective jurors to complete a written questionnaire prepared by the parties and submitted to the court for approval before trial. Unless the court orders otherwise, the clerk must provide copies of any such juror questionnaire and answers to the parties and their respective counsel. Any party or counsel receiving a copy of the questionnaire and answers must keep the information strictly confidential and must not disclose the information. When jury selection is done, each recipient must return all copies of the juror questionnaires and answers to the clerk.

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### Ariz. R. Civ. P. 47 [Cont.]

#### (c) Voir Dire Oath and Procedure.

(1) *Voir Dire Oath*. (No Change)

(2) *Brief Opening Statements*. (No Change)

(3) *Extent of Voir Dire*.

(A) Questioning by Court and Parties. The court must thoroughly question the jury panel to ensure that prospective jurors are qualified, fair, and impartial. The court must permit each of the parties to ask the panel additional questions but may impose reasonable limits on the questioning. Written questions also may be used as provided in Rule 47(b)(2).

(B) Extent of Questioning. Voir dire questioning of a jury panel is not limited to the grounds listed in Rule 47(d) and may include questions about any subject that might disclose a basis for the exercise of a for cause challenge.

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### Ariz. R. Civ. P. 47 (Cont.)

#### (d) Challenges for Cause.

(1) *Grounds*. A party may challenge a prospective juror for cause on one or more of the following grounds:

(A) the prospective juror lacks one or more of the required statutory qualifications specified in A.R.S. § 21-211;

(B) the prospective juror is a party's:

- (i) family member;
- (ii) guardian or ward;
- (iii) master or servant;
- (iv) employer or employee;
- (v) principal or agent;
- (vi) business partner or associate; or
- (vii) surety or obligee on a bond or obligation;

(C) the prospective juror was a witness or served as a juror in a previous trial between the same parties in the same action; or

(D) the prospective juror has--by words or actions--shown bias or prejudice for or against any party or otherwise demonstrated their unfitness to serve as a juror.

(2) *Procedure*. The court must rule on challenges for cause. A prospective juror who is challenged for cause may be examined under oath by the court or, with the court's permission, by a party.

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**(f) Alternate Jurors.**

(1)-(4) No Change

**COMMENT**

Prior to the 1995 amendment, [Rule 47(a) and (e) (Jury Selection and Peremptory Strikes) (formerly Rule 47(a)(1))] was read to require trial judges to use the traditional “strike and replace” method of jury selection . . .

The “struck” method calls for all of the jury panel members to participate in voir dire examination by the judge and counsel. Although the judge may excuse jurors for cause in the presence of the panel, challenges for cause are usually reserved until the examination of the panel has been completed and a recess taken. Following disposition of the for cause challenges, the clerk calls the first eight names remaining on the list, plus the number of alternate jurors thought necessary by the judge, who shall be the trial jury.

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## Ariz. R. Proc. Evid. Act. Rule 12

- a. . . . When, after challenges for cause, a panel of thirteen in justice court or fifteen in superior court is available, the court shall permit three peremptory challenges per side to reduce the jury to seven in justice court or nine in superior court. . . .

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## A.R.S. § 21-211 Jury Disqualification

The following persons shall be disqualified to serve as jurors in any particular action:

1. Witnesses in the action.
2. Persons interested directly or indirectly in the matter under investigation.
3. Persons related by consanguinity or affinity within the fourth degree to either of the parties to the action or proceedings.
4. Persons biased or prejudiced in favor of or against either of the parties.

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## Constitutional Protections

- U.S. Constitution 6<sup>th</sup> and 14<sup>th</sup> Amendments and Arizona Constitution Art. 2 § 13 & 24
  - Guarantees a criminal defendant the right to an impartial jury. *Witherspoon v. Illinois*, 391 U.S. 510, 518 (1968)
  - Juries must be select from a “representative cross section of the community [which] is an essential component of the Sixth Amendment right to jury trial.” *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975)
- U.S. Constitution 7<sup>th</sup> Amendment
  - Guarantees the right to jury in civil cases
- U.S. Constitution 14<sup>th</sup> Amendment and Arizona Constitution Art. 2 §13
  - Guarantees equal protection and privileges

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"The decision as to whether a juror can render a fair and impartial verdict is for the trial court." *State v. Chaney*, 141 Ariz. 295, 303 (1984) (citing *State v. Rose*, 121 Ariz. 131, 139 (1978)).

Because the trial court has the opportunity to observe the potential juror's demeanor and credibility, [an appellate court] will not set aside the trial court's ruling on a challenge to a juror absent a clear showing that the court abused its discretion. *State v. Lavers*, 168 Ariz. 376, 390.

"Even if a juror is sincere in his promises to uphold the law, a judge may still reasonably find a juror's equivocation 'about whether he would take his personal biases into the jury room' sufficient to substantially impair his duties as a juror, allowing a strike for cause." *State v. Ellison*, 213 Ariz. 116, 137 ¶ 89 (2006) (quoting *State v. Glassel*, 211 Ariz. 33, 48 ¶ 49 (2005)).

"Jurors who merely 'voice [] general objections to the death penalty or express [] conscientious or religious scruples against its infliction' may not be struck for cause." *State v. Boyson*, 231 Ariz. 539, 548 ¶ 40 (2013) (citing *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968))

A juror may be stricken for cause if his or her performance as a juror would be substantially impaired by his or her feelings about capital punishment. *State v. Garcia*, 224 Ariz. 1, 9 ¶ 19 (2010).

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### Other topics to consider:

- Whether questions regarding religion, race, politics, and ethnicity are permissible. Are the questions directly related to the case (ex. one of the parties is a religious organization). (*Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.*, 636 N.E.2d 503 (1994); *Duncan v. Peterson*, 947 N.E.2d 305 (2d Dist. 2010); *Riley v. State*, 496 A.2d 997, 1006 (Del. 1985)). Are the questions related to race or ethnicity and are there "special circumstances," meaning looking into whether the jury would still be indifferent absent questioning about racial prejudice. (*People v. Johnson*, 945 N.E.2d 610 (1st Dist. 2010); *Ristaino v. Ross*, 424 U.S. 589 (1976); *Turner v. Murray*, 476 U.S. 28 (1986)); *Rosales-Lopez v. United States*, 451 U.S. 182 (1981)).
- What questions invade the privacy of prospective jurors?

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