



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**STATE v. ANGEL ELEUTERIO DIAZ  
CR-09-0189-PR**

**PARTIES AND COUNSEL:**

*Petitioner:* The State is represented by Diane Leigh Hunt, Assistant Attorney General.

*Respondent:* Angel Eleuterio Diaz is represented by David Euchner, Assistant Pima County Public Defender.

**FACTS:**

Diaz was convicted of burglary, aggravated assault, and attempted armed robbery. The aggravated assault charges alone exposed him to a possible sentence of 60 years' imprisonment. A.R.S. §13-1204(A) (2) and (B); 2008 Ariz. Sess. Laws, ch. 24, § 1; *see also* A.R.S. § 13-116.

Diaz appealed, contending that only 11 jurors participated in the guilt determination, violating his right to a 12-person jury. The majority in the court of appeals agreed, reversed his convictions, and remanded for a new trial because the record did not establish that his right to 12-person jury was preserved. Although 12 jurors began deliberations, the transcript revealed only 11 jurors were polled and no portion of record was missing.

The court reviewed the issue for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶19-20, 115 P.3d 601, 607 (2005). The court noted that “[i]t is well-settled that a 12-person jury is required if a defendant's cumulative possible sentence totals 30 years or more.” Ariz. Const. art. II, § 23; A.R.S. § 21-102(A); *State v. Henley*, 141 Ariz. 465, 469, 687 P.2d 1220, 1224 (1984). Conviction based on a finding of guilt by fewer than the 12 jurors to which a defendant is entitled constitutes fundamental, prejudicial error. *State v. Price*, 218 Ariz. 311, ¶10, 183 P.3d. 1272, 1282 (App. Div. II. 2008); *see Henley*, 141 Ariz. at 469, 687 P.2d at 1224. *But see State v. Ring*, 204 Ariz. 534, ¶¶106-07, 65 P.3d 915, 946-47 (2003) (Feldman, J., concurring in part and dissenting in part) (describing trial to insufficient number of jurors as structural error).

Because such error happened, the court of appeals remanded for a new trial on the charges for which Diaz was convicted, “to vindicate his constitutional right” to a 12-person jury. *State v. Pope*, 192 Ariz. 119, ¶12, 961 P.2d 1067, 1069 (App.1998).

Judge Howard dissented, noting that the record showed the jurors were present during closing argument and that they were instructed: “All 12 of you must agree on a verdict. All 12 of you must agree whether the verdict is guilty or not guilty.” The record further showed that “[t]he jury retire[d] to begin deliberations,” and later that “[t]he jury resume[d] deliberations.” It then

showed that “[t]he Court [was] informed by the jurors through their foreperson, [juror number nine,] that they ha[d] reached verdicts in this case.” Before the verdicts were read aloud, the trial court stated: “The record may show the presence of the jury, presence of counsel, presence of the defendant.” However, in the transcript of the polling of the jury, juror number six is omitted from the jury poll. The record does not show that this juror was excused or absent at any time.

In Judge Howard’s view, the flaw in Diaz's argument is that the transcript proves only a defect in the polling, or possibly in the transcript, but it does not reflect a defect in the deliberations. Judge Howard would conclude that Diaz did not meet the burden of persuasion *Henderson* imposes, and the clerk’s omission of one juror from the court’s polling of the jury would not constitute fundamental error in this case. Accordingly, Judge Howard would affirm Diaz’s convictions and sentences.

#### **ISSUES:**

1. Did the court of appeals misapply *Henderson* so that it relieved Diaz of his affirmative burden of proving fundamental error?
2. Does the split of authority between the two divisions of the court of appeals on the issue of transcription error during jury polling compel this Court to grant review?

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