

No. 18-

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IN THE

**Supreme Court of the United States**

JOSE ALEJANDRO ACUNA VALENZUELA,

*Petitioner,*

v.

STATE OF ARIZONA,

*Respondent.*

On Petition for a Writ of Certiorari to the  
Supreme Court of Arizona

**PETITION FOR A WRIT OF CERTIORARI**

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**CAPITAL CASE**  
**QUESTIONS PRESENTED**

- I. Whether the trial court violated Mr. Acuna's constitutional rights to a fair and impartial jury, to due process, to heightened reliability, and to be free from cruel and unusual punishment, by failing to strike a prospective juror for cause who had a close personal relationship with a member of the prosecutor's office and who could not unequivocally state that the relationship would not affect her ability to be fair and impartial.
  
- II. Whether the trial court violated Mr. Acuna's constitutional rights to a fair and impartial jury and to due process by denying Mr. Acuna's motion to vacate judgment after Mr. Acuna discovered that the juror who had a close personal relationship with a member of the prosecutor's office published an online blog demonstrating that she had lied about the extent of her pro-State/anti-defense bias at voir dire.

## TABLE OF CONTENTS

Questions Presented .....	i
Table of Contents.....	ii
Table of Authorities .....	iii
Opinions Below.....	1
Jurisdiction.....	1
Constitutional and Statutory Provisions Involved .....	2
Statement of the Case .....	4
Reasons for Granting the Petition.....	7
I. The trial court violated Mr. Acuna’s constitutional rights to a fair and impartial jury, to due process, to heightened reliability, and to be free from cruel and unusual punishment, by failing to strike a prospective juror for cause who had a close personal relationship with a member of the prosecutor’s office and who could not unequivocally state that the relationship would not affect her ability to be fair and impartial.....	7
II. The trial court violated Mr. Acuna’s constitutional rights to a fair and impartial jury and to due process by denying Mr. Acuna’s motion to vacate judgment after Mr. Acuna discovered that the juror who had a close personal relationship with a member of the prosecutor’s office published an online blog demonstrating that she had lied about the extent of her pro-State/anti-defense bias at voir dire. ....	9
Conclusion.....	11
Appendix A: Supreme Court of Arizona Decision Below .....	1a
Appendix B: Maricopa County Superior Court Decision Below .....	34a

## TABLE OF AUTHORITIES

### CASES:

<i>Morgan v. Illinois</i> , 504 U.S. 719 (1992).....	8, 10
<i>Powers v. Ohio</i> , 499 U.S. 400 (1991).....	7
<i>Rosales-Lopez v. United States</i> , 451 U.S. 182 (1981).....	8
<i>State v. Eddington</i> , 228 Ariz. 361 (2011) .....	7–8
<i>State v. Glassel</i> , 211 Ariz. 33 (2005) .....	8
<i>State v. Jones</i> , 197 Ariz. 290 (2000) .....	8

### STATUTES:

28 U.S.C. § 1257(a).....	1
A.R.S. § 21-211 .....	3, 7–10

### CONSTITUTIONAL PROVISIONS:

Ariz. Const. Art. 2, sec. 4.....	2, 7, 9–10
Ariz. Const. Art. 2, sec. 15.....	3, 7, 9
Ariz. Const. Art. 2, sec. 23.....	3, 7, 9
Ariz. Const. Art. 2, sec. 24.....	3, 7, 9–10
U.S. Const. amend V.....	2, 7, 9–10
U.S. Const. amend VI.....	2, 7, 9–10

U.S. Const. amend VIII ..... 2, 7, 9

U.S. Const. amend XIV ..... 2, 7, 9–10

**RULES:**

Ariz. R. Crim. P. 18.4 ..... 7, 10

Ariz. R. Crim. P. 24.2 ..... 5, 10

## **OPINION BELOW**

The Supreme Court of Arizona's opinion is reported at 426 P.3d 1176 (2018). Pet. App. 1a-33a. The trial court's order is unreported but is reproduced in the appendix. *Id.* at 34a-38a.

## **JURISDICTION**

The Supreme Court of Arizona issued its decision on September 25, 2018. Petitioner filed the petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 2, section 4 of the Arizona Constitution provides:

No person shall be deprived of life, liberty, or property without due process of law.

Article 2, section 15 of the Arizona Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Article 2, section 23 of the Arizona Constitution provides:

The right of trial by jury shall remain inviolate. Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict. In all other cases, the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law.

Article 2, section 24 of the Arizona Constitution provides:

In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Arizona Revised Statute, section 21-211 provides:

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.



## STATEMENT OF THE CASE

Jose Acuna Valenzuela was convicted after a jury trial of first-degree murder, attempted first-degree murder, discharge of a firearm at a structure, and misconduct involving weapons. Pet. App. 15a. The jury found the existence of two aggravating circumstances: that Mr. Acuna had a prior serious offense; and that Mr. Acuna murdered the victim in retaliation for the victim's testimony in a court proceeding. *Id.* The jury sentenced Mr. Acuna to death. *Id.*

During voir dire, Mr. Acuna moved to strike prospective Juror 202 for cause based upon the Juror's close relationship with a member of the Maricopa County Attorney's Office—the same office that was prosecuting Mr. Acuna. *Id.* at 17a. When asked by the trial court if it would be “difficult for you to be fair to both sides because of your relationship with her,” the Juror responded, “more than likely not.” Tr. 7/14/14 at 13–14. The trial court denied the strike for cause. Pet. App. 18a. Prospective Juror 202 was ultimately empanelled on the deliberating jury as Juror 16. *Id.* at 22a.

The day after the jury delivered its death verdict and was released, Juror 16 published an online blog about her experience, with an update two weeks later. *Id.* at 22a. In the blog, the Juror stated that in response to being questioned by defense counsel during voir dire, “My body language became closed off, and at one point I angled my entire body away from him.” The Juror's reaction to the prosecutor during

voir dire was quite the opposite, as the Juror described her as “professional and cordial,” and stated that she “didn’t want it to seem like I was predisposed to like her better” so she relied on all her bearing to not show her true feelings. *Id.* at 22a.

The Juror’s opinion of both the prosecution and defense did not change throughout the trial: “The prosecution was all politeness and comfort. The defense was all douchebaggery and well ... defense.” *Id.* The Juror confided that “I had to work hard every time I entered that courtroom to ground any negative energy/feelings I was having towards the defense.” Record on Appeal (“R.”) 643, Ex. [1]. In fact, the Juror was so enamored with the State that after trial had ended she met with the prosecutor “over a couple of beers.” R. 643, Ex. [2].

Mr. Acuna filed a motion to vacate judgment pursuant to Rule 24.2 of the Arizona Rules of Criminal Procedure, arguing that the Juror had misled the court about her pro-State/anti-defense bias, thereby rendering the judgment and sentence unconstitutional. Pet. App. 22a. The trial court denied the motion, finding that the blog posts were not material to the issue involved and that their admission would not likely change the verdict or sentence. *Id.* at 24a.

Mr. Acuna appealed the convictions and death sentence to the Arizona Supreme Court. Mr. Acuna argued, in pertinent part, that the failure to strike Juror 16 for cause because of her personal relationship with a member of the prosecutor’s office and her inability to unequivocally state that she could put the relationship aside and remain fair

and impartial violated Mr. Acuna's constitutional rights to a fair and impartial jury, to due process, to heightened reliability, and to be free from cruel and unusual punishment. Mr. Acuna also argued on appeal that the failure to grant the motion to vacate judgment after Mr. Acuna discovered that Juror 16, who had a close personal relationship with a member of the prosecutor's office, published an online blog demonstrating that she had lied about the extent of her pro-State/anti-defense bias at voir dire, and that this violated Mr. Acuna's constitutional rights to a fair and impartial jury and to due process.

The Supreme Court of Arizona affirmed Mr. Acuna's convictions and sentences. In particular, the court found that the trial court did not abuse its discretion in denying the motion to strike Juror 16, "[a]lthough this is a close question, particularly in light of Juror [16's] subsequent conduct," i.e., the blog posts. Pet. App. 19a. The court further held that the trial court did not abuse its discretion in denying the motion to vacate judgment without an evidentiary hearing, finding that the blog posts did not reflect intentional concealment of Juror 16's bias during voir dire. *Id.* at 24a. The court rejected Mr. Acuna's remaining arguments on appeal.

This petition followed.

## REASONS FOR GRANTING THE WRIT

- I. The trial court violated Mr. Acuna’s constitutional rights to a fair and impartial jury, to due process, to heightened reliability, and to be free from cruel and unusual punishment, by failing to strike a prospective juror for cause who had a close personal relationship with a member of the prosecutor’s office and who could not unequivocally state that the relationship would not affect her ability to be fair and impartial.**

The United States and Arizona Constitutions guarantee a defendant the right to a fair and impartial jury. U.S. Const. amend. V, VI, VIII, XIV; Ariz. Const. art. 2, §§ 4, 15, 23, 24. Arizona rules of procedure and statutory law also obligate a trial court to excuse for cause any juror that cannot render a fair and impartial verdict. Rule 18.4(b), Ariz. R. Crim. P.; A.R.S. § 21-211. This includes persons who have a direct or indirect interest in the matter and those persons who are “biased or prejudiced in favor of or against either of the parties.” A.R.S. § 21-211. Further, as a matter of public policy, the criminal court system has a responsibility to provide the public with confidence in jury verdicts. *See Powers v. Ohio*, 499 U.S. 400, 413, 111 S. Ct. 1364, 1372 (1991) (“The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.”); *see also State v. Eddington*, 228 Ariz. 361, 363 ¶ 8, 266 P.3d 1057, 1059 (2011) (recognizing that A.R.S. § 21-211 serves the goal of “protecting the appearance of fairness, which helps instill public confidence in the judicial system.”).

Voir dire plays a critical role in assuring the right to a fair and impartial jury. *Rosales-Lopez v. United States*, 451 U.S. 182, 188, 101 S. Ct. 1629, 1634 (1981). It is not enough to simply ask prospective jurors whether they can follow the law and be fair and impartial. *Morgan v. Illinois*, 504 U.S. 719, 735–36, 112 S. Ct. 2222, 2233 (1992). Rather, the trial court has a responsibility to conduct “adequate voir dire to identify unqualified jurors.” *Morgan*, 504 U.S. at 729. “[D]efendants have the right to know whether a potential juror will automatically impose the death penalty once guilt is found, regardless of the law,” and “[t]hus, defendants are entitled to address that issue during voir dire.” *State v. Glassel*, 211 Ariz. 33, 45 ¶ 37, 116 P.3d 1193, 1205 (2005) (quoting *State v. Jones*, 197 Ariz. 290, 303 ¶ 27, 4 P.3d 345, 358 (2000) (construing *Morgan*)).

Regarding Juror 16, the trial court violated A.R.S. § 21-211 by empanelling this juror as a deliberating juror despite her close relationship with a member of the Maricopa County Attorney’s Office. Because of this significant relationship with another prosecutor, Juror 16 had an indirect interest in this matter. *See Eddington*, 228 Ariz. at 363 ¶ 11 (“[A]n interest under A.R.S. § 21-211(2) . . . may also include a desire to see one side prevail in litigation or an alignment with or loyalty to one party or side.”).

Juror 16 admitted that it was only “more likely than not” that her relationship with another prosecutor would affect her ability to be fair and impartial. This assertion is the equivalent of a finding based upon a preponderance of the evidence standard. That a juror would admit that the odds of their being unbiased was only slightly better than even makes clearer the “close question” of whether the trial court erred in denying

the motion to strike. Juror 16's participation on the deliberating jury not only undermines the public confidence in the judicial system, but it also violated Mr. Acuna's rights to a fair and impartial jury, to due process, to heightened reliability, and to be free from cruel and unusual punishment. U.S. Const. amend. V, VI, VIII, XIV; Ariz. Const. art. 2, §§ 4, 15, 23, 24; A.R.S. § 21-211. Accordingly, this Court should grant certiorari.

**II. The trial court violated Mr. Acuna's constitutional rights to a fair and impartial jury and to due process by denying Mr. Acuna's motion to vacate judgment after Mr. Acuna discovered that the juror who had a close personal relationship with a member of the prosecutor's office published an online blog demonstrating that she had lied about the extent of her pro-State/anti-defense bias at voir dire.**

As discussed above, the Arizona Supreme Court found that it was a "close question" as to whether Juror 16's answers at voir dire were sufficient to ensure that she would be fair and impartial. Juror 16's statements in her online blog, however, remove the question and reveal Juror 16's pre-existing pro-State/anti-defense bias. This is especially true of those statements that refer to the Juror's strongly held feelings about the defense and the prosecutor during voir dire—before she had been empanelled on the jury. These statements evidence that Juror 16 lied about her bias and her ability to be fair and impartial.

A criminal defendant is entitled to be tried by a fair and impartial jury under the United States and Arizona Constitutions. U.S. Const. amends. VI; Ariz. Const. Art. II,

§ 24. And, Arizona law specifically excludes from jury service a juror who is biased in favor of one of the parties. A.R.S. § 21-211; Ariz. R. Crim. P. 18.4(b).

Arizona Rule of Criminal Procedure 24.2(a) authorizes the trial court to vacate a judgment on the grounds that a defendant's conviction was obtained in violation of the United States or Arizona Constitutions. Here, Juror 16's actual pro-State bias denied Mr. Acuna his right to be tried by a fair and impartial jury because the empaneling of a single biased juror in a capital case violates the Sixth Amendment. *Morgan*, 504 U.S. at 728-29, 112 S. Ct. 2222.

In her blog, Juror 16 admitted that she had to use all her bearing to hide her bias for the State and against the defense. Juror 16 also admitted that during voir dire it was her belief that defense counsel was such a "douchebag" that she had to physically shield herself by turning her body away from Mr. Acuna's attorney. The fact that Juror 16 went for drinks with the prosecutor in Mr. Acuna's case just weeks after the verdict reinforces the conclusion that Juror 16 possessed a deeply held pro-State/anti-defense bias that she lied about during voir dire.

As a result of the empaneling of a biased juror in this matter, Mr. Acuna's jury convictions and sentence are in violation of the United States and Arizona Constitutions. U.S. Const. amends. V, VI, XIV; Ariz. Const. art. II, §§ 4, 24. Accordingly, this Court should grant certiorari.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

RESPECTFULLY SUBMITTED, this 20<sup>th</sup> day of December, 2018.



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