APPENDIX A

IN THE
SUPREME COURT OF THE STATE OF ARIZONA

DAVID M. MORGAN AND TERRI JO NEFF,
Petitioners,
v.
HON. TIMOTHY DICKERSON AND HON. LAURA CARDINAL, JUDGES OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF COCHISE,
Respondent Judges,
and
THE STATE OF ARIZONA,
Real Party in Interest.

No. CV-21-0198-PR
Filed June 14, 2022
Special Action from the Superior Court in Cochise County

The Honorable Timothy Dickerson
The Honorable Laura Cardinal Nos. CR201700516, CR201800156

AFFIRMED

VACATED IN PART

COUNSEL:

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VICE CHIEF JUSTICE TIMMER authored the opinion of the Court, in which CHIEF JUSTICE BRUTINEL and JUSTICES LOPEZ, BEENE, MONTGOMERY, and KING joined. JUSTICE BOLICK concurred.

VICE CHIEF JUSTICE TIMMER, opinion of the Court:

¶1 The superior court in Cochise County uses "innominate juries" for all criminal jury trials. Under that procedure, prospective and impaneled jurors are referred to by numbers rather than by names throughout open-court proceedings, although the court and the parties know their identities.

Consequently, although voir dire examinations and trials are open for public viewing, observers are not provided jurors' names absent order of the court.

¶2 The issue here is whether the First Amendment to the United States Constitution prohibits the court's routine use of innominate juries. Specifically, we are asked to decide whether the First Amendment provides the public a qualified right of access to jurors' names during voir dire, thereby creating presumptive access to those names that can be overcome only on a case-by-case basis by showing both a compelling state interest and that denying access is a remedy narrowly tailored to serve that interest. We hold the First Amendment does not prohibit the court's practice.

BACKGROUND

¶3 This matter arises from two criminal cases that used innominate juries without objection by either party. In each case, journalist David M. Morgan intervened and unsuccessfully sought access to prospective and impaneled jurors' names before and after trial.[1] On special action review, the court of appeals consolidated the cases and upheld the rulings. *Morgan v. Dickerson*, 252 Ariz. 14, 15–16 ¶ 1 (App. 2021). In doing so, the court rejected Morgan's arguments that the Cochise County Superior Court's innominate jury system is not authorized under Arizona law and violates the First

[1] Terri Jo Neff, another journalist, joined Morgan in requesting access to the jurors' names. Although Neff participated in the proceedings below, she did not join Morgan's petition for review filed in this Court.

Amendment. *See id.* at 17 ¶ 9, 18 ¶¶ 12–13.

¶4 Morgan sought review of the court of appeals' opinion but only as it concerns the First Amendment challenge. We accepted review because the constitutionality of the innominate jury system is a recurring issue of statewide importance.

DISCUSSION

I.

¶5 Arizona law provides that "[t]he 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); *see also* Ariz. R. Sup. Ct. 123(e)(10) (stating that juror-identifying information obtained in juror questionnaires or during voir dire is confidential "unless disclosed in open court or otherwise opened by order of the court"); Ariz. R. Crim. P. 23.3(b) (requiring the court to refrain from naming jurors when polling the jury "to ensure the jurors' privacy"). Nevertheless, Morgan argues the First Amendment provides a qualified right of public access to jurors' names during voir dire, which creates a presumption of access that can be overcome only if a compelling state interest exists in a particular case to shield the names, and denying access is a narrowly tailored remedy to serve that interest. Consequently, he asserts the superior court's presumptive use of innominate juries in all cases violates the First Amendment.

¶6 It is worth noting that despite strained efforts to view his First Amendment argument as consistent with § 21-312(A), Morgan effectively challenges that statute's facial validity. If the First Amendment right attaches, it creates a presumption for access that can

be overcome only by a compelling interest in secrecy. Section 21-312(A) creates an inverse presumption—prohibiting disclosure unless affirmatively required by law or court order. These presumptions cannot coexist. If Morgan is correct, application of § 21-312(A) would violate the First Amendment in every circumstance, making it facially unconstitutional. *See State v. Wein*, 244 Ariz. 22, 31 ¶ 34 (2018) (stating that a statute is facially unconstitutional if "no set of circumstances exists under which the [statute] would be valid" (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987))). As the challenging party, Morgan "bears the 'heavy burden' of demonstrating that the restriction [in § 21-312(A)] is facially unconstitutional." *See id.* at 26 ¶ 10 (quoting *Salerno*, 481 U.S. at 745).

¶7 We review whether the First Amendment guarantees the press and public a qualified right of access to jurors' names during voir dire de novo as an issue of constitutional law. *See Fann v. State*, 251 Ariz. 425, 432 ¶ 17 (2021).

II.
A.

¶8 The First Amendment, as applied to Arizona through the Fourteenth Amendment, prohibits the state from "abridging the freedom of speech, or of the press." U.S. Const. amend. I. It does not explicitly guarantee the press or public access to a criminal trial. *Cf.* U.S. Const. amend. VI ("In all criminal prosecutions, *the accused* shall enjoy the right to a speedy and public trial." (emphasis added)); *Gannett Co. v. DePasquale*, 443 U.S. 368, 379–80 (1979) (holding the Sixth Amendment public trial guarantee

is personal to the accused). But because the First Amendment "was enacted against the backdrop of the long history of trials being presumptively open," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (plurality opinion), to "enhance[] both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system," *Press-Enter. Co. v. Superior Court* (*Press-Enterprise I*), 464 U.S. 501, 508 (1984), and the explicit guarantees of free speech and a free press necessitate the ability to gather information by observing proceedings, the First Amendment implicitly guarantees the press and public a coextensive right to attend criminal trials, *Richmond Newspapers*, 448 U.S. at 575–77, 580; *see also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) ("And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government.").

¶9 The access right guaranteed by the First Amendment is not absolute, but qualified. *See Globe Newspaper*, 457 U.S. at 606–07. Criminal trials are presumptively open to the public, and the court can close the proceedings only if the state shows a compelling state interest for doing so and that closure is a remedy narrowly tailored to serve that interest. *See id.*

¶10 The Supreme Court has identified two complementary considerations for deciding whether the First Amendment affords the public a qualified right to access criminal proceedings through

attendance or by obtaining transcriptions of those proceedings. *Press-Enter. Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 8, 13 (1986). First, courts should ask "whether the place and process have historically been open to the press and general public" (the experience inquiry). *Id.* at 8. Second, courts should ask "whether public access plays a significant positive role in the functioning of the particular process in question" (the logic inquiry). *Id.* If both inquiries yield affirmative answers, the right attaches. *See id.* at 9; *see also Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989). Applying these considerations, the Court has held that the First Amendment guarantee of qualified public access attaches to criminal trials, *see Richmond Newspapers*, 448 U.S. at 580, voir dire examinations, *see Press-Enterprise I*, 464 U.S. at 508–10, and trial-like preliminary hearings, *see Press- Enterprise II*, 478 U.S. at 13.

¶11 Morgan conflates the right to attend voir dire with a right to access juror names. They are far from the same thing. Here, the public was not barred from attending any part of the criminal trials, including voir dire, so the most essential press and public right is not implicated. But the Supreme Court has not addressed whether the First Amendment guarantee of qualified public access to voir dire examinations extends to learning jurors' names. Regardless, Morgan argues that failing to disclose jurors' names essentially bars the public from attending part of the voir dire examinations. Consequently, he asserts we should apply the experience and logic inquiries to determine whether the First Amendment guarantees the public a qualified right of access to those names.

¶12 The experience and logic inquiries are an imperfect fit. They were designed to determine whether criminal proceedings should be open for public attendance and scrutiny, not whether the public has a presumptive right to information concerning criminal proceedings that is not announced in open court. *See Press-Enterprise II*, 478 U.S. at 8. Notably, jurors' names are neither a "place" nor a "process," the focal points for the experience and logic inquiries. Also, use of the inquiries risk conflict with the accepted principle that the First Amendment does not guarantee "a right of access to all sources of information within government control." *Houchins v. KQED, Inc.*, 438 U.S. 1, 9, 14 (1978) ("The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."); *see also United States v. Blagojevich*, 612 F.3d 558, 563 (7th Cir. 2010) (reflecting uncertainty about "whether we should treat the judge's decision [to refer to impaneled jurors by number] as a partial closure of voir dire covered by *Press-Enterprise I* or as a right-of-access situation more like *KQED*"); *In re Boston Herald, Inc.*, 321 F.3d 174, 183 (1st Cir. 2003) (noting courts have rejected First Amendment right-of-access claims to discovery materials, withdrawn plea agreements, search warrant affidavits, and presentence reports).

¶13 Despite the incongruity of the test here, we will apply the experience and logic inquiries to determine whether announcing jurors' names forms an integral part of voir dire examinations, thereby giving the public a qualified constitutional right to learn those names. *See Press- Enterprise I*, 464 U.S. at 505–10. Other courts have applied these inquiries in deciding

whether the First Amendment guarantees a qualified right of access to jurors' names, and the parties offer no other analytical paradigm. *See, e.g.*, *Commonwealth v. Long*, 922 A.2d 892, 901 (Pa. 2007); *Gannett Co. v. State*, 571 A.2d 735, 736–37 (Del. 1989).

B.

1. Experience

¶14 The experience inquiry focuses on whether the "place or process" has been open historically throughout the country rather than in particular states or localities. *See El Vocero de Puerto Rico* (*Caribbean Int'l News Corp.*) *v. Puerto Rico*, 508 U.S. 147, 150–51 (1993). The Supreme Court has drawn from multiple sources to pinpoint historical practice, including English and American commentators on the common law existing when the Constitution was adopted and ratified, then-existing state authorities, and modern statutes reflecting the public's understanding of historical practices. *See Gannett*, 571 A.2d at 743–44 (collecting cases).

¶15 We are spared the task of combing history to decide whether the voir dire examination process was traditionally open to the public. The Court in *Press-Enterprise I* concluded that historically, "the process of selection of jurors has presumptively been a public process." 464 U.S. at 505–08. Our inquiry, then, focuses on whether revealing jurors' names was traditionally part of those public proceedings.

¶16 Many courts and commentators have probed history and concluded that jurors' names were trad-

itionally revealed during jury selection proceedings. *See, e.g.*, *United States v. Wecht*, 537 F.3d 222, 235–37 (3d Cir. 2008) (reviewing cases, statutes, and commentary before concluding "it appears that public knowledge of jurors' names is a well-established part of American judicial tradition"); *Long*, 922 A.2d at 901–03 (conducting similar survey and concluding "jurors' names have commonly been disclosed during trial"); David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 Temp. L. Rev. 1, 30 (1997) ("The names of jurors have been available to the public throughout the history of the common law."). We need not re-plow this ground and thus accept it.

¶17 Courts have reached opposing conclusions regarding whether this history merits an affirmative answer to the experience inquiry. Most courts have concluded it does. *See, e.g.*, *Wecht*, 537 F.3d at 237 ("[T]he 'experience' prong . . . favors a conclusion that jurors' names have traditionally been available to the public prior to the beginning of trial."); *Long*, 922 A.2d at 902–03 (to same effect); *State ex rel. Beacon J. Publ'g Co. v. Bond*, 781 N.E.2d 180, 193 ¶ 42 (Ohio 2002) (to same effect). A minority of courts have reached the opposite conclusion. The Delaware Supreme Court's decision in *Gannett* exemplifies the minority reasoning. Although recognizing the history of revealing jurors' names during voir dire, the *Gannett* Court disagreed that the nation has "any historical tradition of constitutional dimension regarding public access to jurors' names" and instead concluded this tradition simply "gives trial courts discretion over such matters." *Gannett*, 571 A.2d at 748; *see also United States v. Black*, 483 F. Supp. 2d

618, 624–26 (N.D. Ill. 2007).

¶18 Although the minority position is well taken, we find the majority position more persuasive. The Supreme Court has focused on whether courts historically permitted access to proceedings without discussing whether those proceedings were conducted as a matter of discretion or directive. *See Press-Enterprise II*, 478 U.S. at 8 (explaining courts should consider "whether the place and process have historically been open" because "a 'tradition of accessibility implies the favorable judgment of experiences'" (quoting *Globe Newspaper*, 457 U.S. at 605)). *But see In re Reps. Comm. for Freedom of the Press*, 773 F.2d 1325, 1332 (D.C. Cir. 1985) ("The further requirement that the historical practice play 'an essential role' in the proper functioning of government is also needed, since otherwise the most trivial and unimportant historical practices—for example, the courts' earlier practice of reading their judgments aloud in open session—would be chiselled in constitutional stone."). Tradition is the driving force behind this inquiry, not the authority underpinning that tradition. Whether access to jurors' names was discretionary with courts, and thus considered nonessential to public observation of voir dire, bears on whether access "play[ed] a significant positive role in the functioning of [voir dire]," which is the subject of the logic inquiry. *See Press-Enterprise II*, 478 U.S. at 8. We answer the experience inquiry by concluding that courts have historically revealed jurors' names during voir dire proceedings.

2. Logic

¶19 By asking whether access to jurors' names "plays

a *significant* positive role in the functioning of the particular process in question," the logic inquiry sets an exacting standard. *See id.* (emphasis added). A minimally positive role falls short. Morgan argues the standard is met here because public access to jurors' names carries the same benefits as accessing voir dire proceedings and trials. The State counters that accessing jurors' names would not significantly add to the proper functioning of voir dire, and disclosure would expose jurors to the risk of danger and embarrassment.

¶20 *Press-Enterprise I*'s reasoning for holding that open voir dire examinations play a significant positive role in that process guides our answer to the logic inquiry. The Court observed that the public right to attend voir dire promotes fairness and the appearance of fairness, critical to public confidence in the criminal justice system. *Press-Enterprise I*, 464 U.S. at 508. Specifically, "[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Id.* Open proceedings also have a "community therapeutic value" by providing an outlet for public reaction to criminal acts. *Id.* at 508–09 (quoting *Richmond Newspapers*, 448 U.S. at 570). "[P]ublic proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected." *Id.* at 509. In short, open proceedings play a significant positive role in voir dire by checking the courts to ensure

established standards are being used to select jurors and by simultaneously assuring the public that fairly selected jurors are holding offenders to account for their crimes. *See id.* at 508–09; *see also Press-Enterprise II*, 478 U.S. at 9.

¶21 Morgan has failed to show that public access to jurors' *names* likewise plays a significant positive role in voir dire. With or without such access, the press and the public can attend voir dire proceedings and were able to do so in these cases. Anyone can sit in the courtroom during a criminal trial and observe the juror screening process, including voir dire examinations. They can also observe for-cause challenges and peremptory strikes, hear the judge's rulings, and mark any deviation from standards put in place by the legislature or this Court to select a fair jury.[2] *See* A.R.S. §§ 21-301 to -336 (providing jury pool formation procedures); Ariz. R. Crim. P. 18.2–18.6 (outlining jury selection procedures). The public is also generally entitled to access public records reflecting how jury pools are formed in the superior court. *See* A.R.S. § 39-121.01(D) (establishing public records request procedures); Ariz. R. Sup. Ct. 123 (setting forth presumptive open record policy for court records and establishing access procedures). Accessing jurors' names would not significantly add to the public's ability to assure itself that voir dire is fairly conducted or to check the courts in disregarding established standards for jury selection.

¶22 Other courts have reached the opposite con-

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[2] Effective January 1, 2022, Arizona no longer permits peremptory strikes of jurors. *See* Ariz. Sup. Ct. Order No. R-21-0020.

clusion, reasoning that public knowledge of jurors' names would deter prospective jurors from misrepresenting their answers during voir dire, permit public investigation of the accuracy of those answers, and assure the public that prospective jurors are drawn from a fair cross-section of the community. *See, e.g.*, *Long*, 922 A.2d at 903–04. We disagree.

¶23 First, the public's role in voir dire is as an observer, not as a participant charged with selecting a fair jury. *See Press-Enterprise I*, 464 U.S. at 508 (describing the value of openness in terms of observation). The judge and the parties are charged with that responsibility. *See DePasquale*, 443 U.S. at 383 ("In an adversary system of criminal justice, the public interest in the administration of justice is protected by the participants in the litigation."). They are provided prospective jurors' names and are highly motivated to safeguard the integrity of the process, ensure the jury pool is drawn from a fair cross-section of the community, and unearth any information demonstrating juror bias. *See Gannett*, 571 A.2d at 750 ("The courts, the State and the defendant have concurrent paramount concerns for, and obligations to assure, a fair trial."); Ariz. R. Crim. P. 18.4 (authorizing parties to challenge both the entire jury panel on the ground it was not properly selected and the seating of individual jurors if a reasonable ground exists to believe the juror cannot render a fair and impartial verdict).

¶24 Second, we are unconvinced that providing open access to jurors' names would cause prospective jurors to be more forthcoming during voir dire. *See Gannett*, 571 A.2d at 750 (refusing to adopt the "cynical view"

that jurors would not respond truthfully unless the press has access to jurors' names). It is just as likely that such access would motivate them to be less than forthcoming to avoid public embarrassment about very sensitive matters, like disabilities, medications, and past experiences as crime victims. *See Black*, 483 F. Supp. 2d at 628 (stating that public access to jurors' names during trial "enhances the risk that the jury will [not be] able to function as it should, in secrecy and free of any outside influence" (emphasis omitted)). And in this internet age, where jurors' names can trigger lightning-fast access to a wealth of biographical information, including addresses, any slightly positive role in divulging jurors' names to the public is outweighed by the risk to jury integrity.

¶25 In sum, public access to jurors' names promotes neither fairness in voir dire proceedings nor the perception of fairness. As such, it does not play a significant positive role in the functioning of voir dire, and we answer the logic inquiry in the negative. Consequently, the First Amendment does not provide the press or public with a qualified right to access jurors' names, and § 21-312(A) is facially valid. The Cochise County Superior Court therefore did not err by presumptively using innominate juries.

¶26 The court has discretion to order access to jurors' names. *See* § 21-312(A); Ariz. R. Sup. Ct. 123(e)(10). The standards for exercising that discretion are not before us today. We note, however, that when a court denies a request for access, a best practice would be to explain its reasoning on the record. Finally, prospective and seated jurors are naturally free to take the initiative and publicly reveal their own names.

CONCLUSION

¶27 For these reasons, we affirm the trial courts' orders. Although we agree with the court of appeals' conclusion, we vacate ¶¶ 10–21 of its opinion to replace that court's reasoning with our own.

BOLICK, J., concurring:

¶28 I agree entirely with the Court's analysis. I write only to add that the statute protecting juror names survives even the most demanding First Amendment compelling-interest standard. Unlike most states, Arizona's constitution contains an express privacy protection, providing in relevant part that "[n]o person shall be disturbed in his private affairs . . . without authority of law." Ariz. Const. art. 2, § 8. Whatever the scope of that right, *see State v. Mixton*, 250 Ariz. 282 (2021), the State plainly has a compelling interest in enforcing it to protect juror privacy. *See, e.g.*, *Simpson v. Miller*, 241 Ariz. 341, 345 ¶ 9 (2017) (constitutional provisions reflect "state interests of the highest order"); *cf. State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 601 ¶ 53 (2017) (agreeing with the proposition that a right protected by the state constitution is "a subject of state concern"); *id.* at 607 ¶ 83 (Bolick, J., concurring in part and in the result) (stating that a state constitutional right "necessarily elevates the subject matter to statewide concern"). For this reason, in addition to the reasons set forth in the main opinion, I concur.

APPENDIX B

In The

ARIZONA COURT OF APPEALS
DIVISION TWO

DAVID M. MORGAN AND TERRI JO NEFF,
Petitioners,
v.
HON. TIMOTHY DICKERSON AND HON. LAURA CARDINAL, JUDGES OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF COCHISE,
Respondents,

and

THE STATE OF ARIZONA,
Real Party in Interest.

Nos. 2 CA-SA 2021-0007 and 2 CA-SA 2021-0019
(Consolidated)
Filed July 20, 2021

Special Action Proceeding
Cochise County Cause Nos. CR201700516 and CR201800156

JURISDICTION ACCEPTED; RELIEF DENIED

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OPINION

Vice Chief Judge Staring authored the opinion of the Court, in which Presiding Judge Espinosa and Chief Judge Vásquez concurred.

STARING, Vice Chief Judge:

¶1 In these consolidated special actions, petitioners David Morgan and Terri Jo Neff seek access to the names of jurors seated in two criminal trials in Cochise County. They contend the innominate jury system[1] the respondent judges employed is not authorized by Arizona law and violates the First Amendment to the United States Constitution. We disagree and therefore, although we accept review, we deny relief.

¶2 In *State v. Wilson*, the underlying criminal case in SA 2021- 0007, petitioners, who publish material on the internet from Cochise County, intervened and sought clarification concerning their access to the proceedings under COVID protocols and access to the names of the jurors. Respondent Judge Dickerson clarified that their access under the COVID

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[1] "Innominate" describes a procedure that shields juror names from the public, but not from the parties, generally identifying the panel members in court by number. *See United States v. Honken*, 378 F. Supp. 2d 880, 898, 919 (N.D. Iowa 2004) (describing various degrees of juror anonymity in the context of challenge based on Sixth Amendment right to trial by impartial jury).

protocols would be solely through audio recording,[2] and also ordered: "The names of jurors, both potential and those selected to serve, will not be released." During trial, the jurors were assigned numbers, but their names were not publicly stated, although counsel had access to their names. After the trial, petitioners again sought the names of the jurors. Judge Dickerson denied the motion to unseal the jurors' names, citing Wilson's history of violence toward his attorneys and the judge in the case; Morgan's relationship with Wilson's mother; and concerns from the jurors themselves for their safety. Petitioners sought special-action relief.

¶3 In *State v. McCoy*, the criminal proceeding underlying SA 2021-0019, Respondent Judge Cardinal also used the innominate system for jurors. Petitioners again sought to intervene, asking for access to the courtroom during trial and for the juror names to be public during voir dire. They also asked that if the names were kept private during voir dire, they be released after the trial and the jurors not be promised that their names would be kept secret.

¶4 Judge Cardinal allowed petitioners to be present

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[2] Citing Arizona Supreme Court Administrative Order No. 2020-143 (Aug. 26, 2020), addressing COVID protocols, Judge Dickerson determined that reporters would not be allowed in the courtroom, but that they "may listen to the trial by live audio [or] telephone" and that an audio recording of the trial would also be available to the public. Petitioners have not separately challenged the COVID protocols in this special action, and we therefore do not address any issues relating to them. *See Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2 (App. 2007) (finding issue waived on appeal because party failed to develop it).

in the courtroom, but she denied their requests to release jurors' names. She noted generally the defendant's right to a fair trial and "concerns that the jurors may feel pressured if their names are known," particularly "in a small community that they may feel that their privacy is compromised in some way, or that they feel under pressure to make particular decisions one way or the other." Petitioners again sought special-action relief.

¶5 In these consolidated special actions, petitioners argue both judges "proceeded in sealing juror names without legal authority" and "ignor[ed] the First Amendment presumption of access to the names of jurors without establishing a compelling need." We accept special-action jurisdiction because the issue presented "is one of law and of statewide importance." *State ex rel. Montgomery v. Rogers*, 237 Ariz. 419, ¶ 5 (App. 2015). To obtain relief, petitioners must show the respondent judges "proceeded . . . without or in excess of . . . legal authority" or their decisions were "arbitrary and capricious or an abuse of discretion." Ariz. R. P. Spec. Act. 3(b), (c).

¶6 We first address the respondent judges' authority to proceed with an innominate jury. Arizona has several statutes and court rules addressing juror information. Pursuant to A.R.S. § 21-312(A), "[t]he list of juror names or other juror information shall not be released unless specifically required by law or ordered by the court." Likewise, "[a]ll records that contain juror biographical information are closed to the public." § 21-312(B).

Section 21-312 was adopted in 2007, as part of a bill that made a number of the changes to the statutory scheme for the formation of juries. *See* 2007 Ariz. Sess. Laws, ch. 199, § 14. Legislative documents describing the bill spoke broadly of closing juror records to the public and maintaining the privacy of juror information, including juror names. *See, e.g.*, S. Fact Sheet for S.B. 1434, 48th Leg., 1st Reg. Sess. (Ariz. 2007). In addition to adding these provisions, the legislature eliminated a long-standing provision allowing a list of juror names to be obtained with payment of a fee. 2007 Ariz. Sess. Laws, ch. 199, §§ 14, 19.

¶7 Similarly, Arizona's Rules of Criminal Procedure require that

> [t]he 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.

Ariz. R. Crim. P. 18.3(b). In 1997, after establishing the Committee on More Effective Use of Juries, our supreme court adopted the provision now found in Rule 123(e)(10), Ariz. R. Sup. Ct. That rule 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.

Id. That committee's report suggested that "juror information that might be used for contact purposes," such as names, phone numbers, and employment information that "could be used to locate the individual juror," should be withheld. The committee also concluded that while no "formal recommendation, rule or policy" was then required, "the decision to proceed with juror numbers rather than names ought to be left to the individual trial judge's sound discretion."

¶8 In 2001, our supreme court created another committee to study jury practices. Ariz. Sup. Ct. Admin. Order No. 2001-69 (July 11, 2001). That committee recommended the procedure now set forth in Rule 23.3, Ariz. R. Crim. P., requiring that when polling the jurors for their verdicts, the court use something other than their name "to accommodate the jurors' privacy." Notably, if the names of potential jurors were disclosed during voir dire, a person present in the courtroom during both voir dire and the polling of the jury could easily identify jurors by name and publicize their identities, including their votes. Thus, an innominate jury is

consistent with the requirements of Rule 23.3. In view of the history of these rules and § 21-312, we reject petitioners' claim that Judge Dickerson erred in relying on § 21-312(B) to utilize an innominate jury.[3]

¶9 In sum, our statutes and rules generally require a trial court to keep juror records and biographical information private. *See* § 21-312(B); Ariz. R. Sup. Ct. 123(e)(10). Juror names, except for the names on the master list, are presumptively private unless release is "required by law or ordered by the court," § 21-312(A), including when they are "disclosed in open court," Ariz. R. Sup. Ct. 123(e)(10). Use of an innominate jury, wherein juror names are not disclosed in open court, is therefore authorized under Arizona law.

¶10 Having concluded that the respondent judges' use of innominate juries was authorized by Arizona law, we must consider whether such a practice violates the First Amendment as petitioners argue. *See Falcone Brothers & Assocs. v. City of Tucson*, 240 Ariz. 482, ¶ 11

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[3] Petitioners point out that § 21-312(B) falls under article 2 ("Selecting Persons for Prospective Jury Service") and not article 3 ("Summoning Jurors"), which they allege applies to "individual trial juries." But this incorrectly characterizes the articles. Historically, there were sections both for selecting jurors generally for the master list and for selecting jurors for a panel. But article 2.1, relating to selecting jurors for a panel, was repealed as part of the 2007 changes. 2007 Ariz. Sess. Laws, ch. 199, § 19. Thus, all provisions relating to selecting jurors remained solely in article 2. Article 3, rather than providing for selection of a jury panel, relates to summoning jurors for service generally. A.R.S. §§ 21-331 to 21-336.

(App. 2016) (court does not reach constitutional claim if case may be resolved on other grounds). In *Press-Enterprise Co. v. Superior Court* (*Press-Enter. I*), the United States Supreme Court addressed the First Amendment right to "a complete transcript of the *voir dire* proceedings" in a criminal trial. 464 U.S. 501, 503, 509 n.8 (1984). The Court recited an extensive history of the process of juror selection, which it described as "presumptively . . . a public process with exceptions only for good cause shown," *id.* at 505–08 & 505, and described various benefits of an open process, *id.* at 508–10. It then concluded the trial court's denial of access to the transcript had been overbroad and the court had failed to adequately justify its order. *See id.* at 513.

¶11 A few years later, the Supreme Court returned to First Amendment questions in a case in which a trial court sealed the transcript of a preliminary hearing in a criminal matter. *Press-Enter. Co. v. Superior Court* (*Press-Enter. II*), 478 U.S. 1, 3–5 (1986). In that decision, the Court set forth a two-part test for addressing First Amendment claims in the context of access to court proceedings. First, a court must consider "whether the place and process have historically been open to the press and general public." *Id.* at 8. Second, a court is to "consider[] whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* "If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches." *Id.* at 9.

¶12 These cases, however, focused on public access to courtroom proceedings, not to the disclosure of

certain confidential information held by the court itself. Juror biographical information, including juror names, is not evidence to be presented or, if not disclosed in the proceeding, necessarily part of the public proceeding. Rather, it is information held by the government, which ordinarily possesses a broad spectrum of confidential information not made available to those observing court proceedings. And, the Supreme Court "has never intimated a First Amendment guarantee of a right of access to all sources of information within government control." *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978); *see also L.A. Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 39-40 (1999) (noting that "California could decide not to give out arrestee information at all without violating the First Amendment"); *Fusaro v. Cogan*, 930 F.3d 241, 248–58 & 256 (4th Cir. 2019) ("Maryland could have decided not to release its voter registration list 'without violating the First Amendment.'" (quoting *United Reporting*, 528 U.S. at 40)); *In re Bos. Herald, Inc.*, 321 F.3d 174, 183 (1st Cir. 2003) (noting courts have rejected First Amendment claims for access to "discovery materials, withdrawn plea agreements, affidavits supporting search warrants, and presentence reports" (citations omitted)). Thus, given the nature of the information sought, we conclude the identity of jurors falls outside the First Amendment's right of access.

¶13 Further, even applying the First Amendment test set forth in *Press-Enterprise II*, which all parties have addressed, petitioners have not established the innominate jury system violates the First

Amendment. In both cases, petitioners focus on the past practices of Cochise County. But the Supreme Court has clarified that "the 'experience' test . . . does not look to the particular practice of any one jurisdiction, but instead 'to the experience in that *type* or *kind* of hearing throughout the United States.'" *El Vocero de Puerto Rico (Caribbean Int'l News Corp.) v. Puerto Rico*, 508 U.S. 147, 150 (1993) (quoting *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 323 (1st Cir. 1992)). Petitioners have provided us with no record of such experience.[4]

¶14 Moreover, even had petitioners established a national practice of disclosing juror names, we conclude they have not shown that logic requires such disclosure. Citing *United States v. Wecht*, petitioners argue "access allows the public to verify the impartiality of jurors, ensures fairness and public trust in the judicial system, and deters misrepresentation in *voir dire*." 537 F.3d 222, 238 (3rd Cir. 2008). A number of courts have addressed this issue, sometimes in split decisions, reaching differing outcomes. We are persuaded by those concluding that

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[4] Our review of the relevant case law shows that courts considering the historical practice in this area have concluded it "support[s] a conclusion that jurors' names were generally available to the public." *Commonwealth v. Long*, 922 A.2d 892, 901–03 & 903 (Pa. 2007); *see, e.g.*, *In re Balt. Sun Co.*, 841 F.2d 74, 75 (4th Cir. 1988); *Commonwealth v. Fujita*, 23 N.E.3d 882, 885 (Mass. 2015); *State ex rel. Beacon J. Pub. Co. v. Bond*, 781 N.E.2d 180, ¶¶ 39–42 (Ohio 2002). *But see Gannett Co. v. State*, 571 A.2d 735, 745 (Del. 1989) (concluding historical sources presented "hardly support the type of strong national tradition recognized in other right of access cases").

the First Amendment does not require disclosure.[5]

¶15 In *Press-Enterprise I* and *II*, the Supreme Court discussed that openness in criminal trials "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enter. II*, 478 U.S. at 9 (quoting *Press-Enter. I*, 464 U.S. at 501). This is consistent with the Court's previous description of the benefits of open criminal trials, including ensuring fair proceedings, encouraging unbiased decisions, deterring misconduct and perjury, and securing public confidence in the legal system. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570–73 (1980). But, unlike the voir dire process generally, the disclosure of juror names does little to promote these benefits. *See In re Reps. Comm. for Freedom of the Press*, 773 F.2d 1325, 1332 (D.C. Cir. 1985) ("The

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[5] *See Wecht*, 537 F.3d at 239, 243; *In re Globe Newspaper Co.*, 920 F.2d 88, 98 (1st Cir. 1990); *In re Balt. Sun Co.*, 841 F.2d at 76; *United States v. Edwards*, 823 F.2d 111, 112-13 (5th Cir. 1987); *United States v. Black*, 483 F. Supp. 2d 618, 631 (N.D. Ill. 2007); *United States v. Calabrese*, 515 F. Supp. 2d 880, 886 (N.D. Ill. 2007); *In re Indianapolis Newspapers, Inc.*, 837 F. Supp. 956, 958 (S.D. Ind. 1992); *Gannett Co.*, 571 A.2d at 751; *Fujita*, 23 N.E.3d at 889; *In re Disclosure of Juror Names & Addresses*, 592 N.W.2d 798, 807-08 (Mich. App. 1999); *In re Newsday, Inc.*, 518 N.E.2d 930, 931-32 (N.Y. 1987); *Beacon Journal Pub. Co.*, 781 N.E.2d 180, ¶ 51; *Long*, 922 A.2d at 904–06; *see also* David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 Temp. L. Rev. 1, 25–33 (1997); Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 Vand. L. Rev. 123, 125, 151-52 (1996); Robert Lloyd Raskopf, *A First Amendment Right of Access to a Juror's Identity: Toward a Fuller Understanding of the Jury's Deliberative Process*, 17 Pepp. L. Rev. 357, 365–69 (1990).

further requirement that the historical practice play 'an essential role' in the proper functioning of government is also needed, since otherwise the most trivial and unimportant historical practices . . . would be chiselled in constitutional stone.").

¶16 Further, we conclude that other Arizona law effectively addresses concerns about maintaining juror impartiality, the fairness of proceedings, and preserving public confidence. The master jury list is created from voter registrations, driver licenses, and "other lists as determined by the supreme court" in order to ensure a fair cross-section of Arizonans are called for service. A.R.S. § 21-301(A). Certain persons with an interest in the proceeding or a bias "in favor of or against either of the parties" are disqualified. A.R.S. § 21-211. Juror questionnaires are employed "to determine whether a person is qualified to serve." A.R.S. § 21-314(A). Pursuant to § 21-314(D), the jury commissioner "may investigate the accuracy of the answers to the [juror] questionnaire and may call on law enforcement agencies and the county attorney for assistance in an investigation." Once called to a panel, jurors are subjected to public voir dire, during which the parties and the court may question them further.

¶17 Petitioners asserted at oral argument that despite these provisions, additional "public oversight of the system" is required. To that end, "journalists want to know more about the process," including looking at racial bias and whether "justice writ large was served." But, as outlined above, the process of calling jurors and voir dire makes a great

deal of information about those issues public. And, even the defendant in a criminal proceeding is entitled only to a fair trial, not a perfect one. *See State v. Leslie*, 147 Ariz. 38, 45 (1985). Thus, even if a reporter or other member of the public were able to procure additional information about a juror, we cannot say that such information would be likely to play "a significant positive role in the" proceeding. *Press-Enter. II*, 478 U.S. at 8; *cf.* Ariz. R. Crim. P. 24.1(d) (prohibiting court from receiving testimony "that relates to the subjective motives or mental processes leading a juror to agree or disagree with the verdict"). Indeed, "there is *no* ordinary public right to 'know' what occurs in the jury room. It is undisputed that the secrecy of jury deliberations fosters free, open and candid debate in reaching a decision." *In re Globe Newspaper Co.*, 920 F.2d 88, 94 (1st Cir. 1990). And, in view of the system set forth in Arizona law and information available to the public thereby, we see little possibility that a court could create the kind of secret trial that might bring the justice system into question solely on the basis of withholding juror names. *See Press-Enter. I*, 464 U.S. at 508–10 & 509 (discussing problems of "[p]roceedings held in secret" and benefits of openness).

¶18 We likewise reject the premise that disclosure of juror names is required to ensure that jurors do not engage in misconduct or perjury. Although the possibility of public disclosure of their identity may encourage jurors to answer questions honestly to avoid being caught in a falsehood, it may also encourage them to avoid direct answers to questions or to lie in order to avoid embarrassment. On the

record before us, concluding which possibility is more likely would be purely speculative; indeed, either might be true, depending on the individual. We therefore cannot say that requiring disclosure of juror names would "play[] a significant positive role in the functioning of the . . . process" of voir dire and trial. *Press-Enter. II*, 478 U.S. at 8.

¶19 In contrast, we see a substantial potential for harm in mandating the disclosure of juror names. As we stated in upholding A.R.S. § 21-202(B)(1)(c) against a challenge under the Arizona Constitution, "Individuals who are called for jury duty do not forfeit their privacy rights when they are called for jury duty." *Stewart v. Carroll*, 214 Ariz. 480, ¶¶ 4, 18, 20 (App. 2007). If potential jurors know that they and their families may be subject to danger, harassment, or unwanted media attention as a result of their service, they will be deterred from serving. Although a court may move to a more secret jury scheme upon discovering that a case has garnered media attention or that a threat has arisen, it may be too late to secure jurors' identities. Once a juror's name is public, with the current availability of information through the internet and other sources, a vast array of information about them is accessible—sometimes in a matter of seconds. The courts should not be bound to create an incentive for others to seek out private information about jurors who have done their civic duty, thereby exposing them to risk of public embarrassment, harassment, or danger. Creating a presumption for disclosure of juror names would do just that.

¶20 Moreover, allowing for innominate juries will also avoid many of the fair-trial concerns faced by

defendants in high-profile cases. In *State v. Rojas*, this court affirmed the grant of a new trial after a video of jurors was placed online and jurors became aware that their identities had been disclosed. 247 Ariz. 399, ¶¶ 2–9, 22 (App. 2019). We concluded that despite the jurors' assurance that they could still be impartial, the trial court had not abused its discretion in ruling that it could not determine beyond a reasonable doubt that the information had not affected the verdict. *See id.* ¶¶ 17, 21. The danger of jurors being exposed to information or questions about the case, concerns about their safety or reputation as a result of their vote, and violations of their privacy may create violations of due process. *See generally Sheppard v. Maxwell*, 384 U.S. 333 (1966). Requiring that jurors' names be presumptively disclosed heightens the risk that such circumstances may arise. As the Supreme Court stated, "[R]eversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception." *Id.* at 363.

¶21 In sum, petitioners have failed to establish a national historical practice regarding the disclosure of juror names, and we cannot agree that such disclosure plays a significant positive role in the process of a criminal trial. Because petitioners have not shown that disclosure "passes the[] tests of experience and logic," no "qualified First Amendment right of public access attaches." *Press-Enter. II*, 478 U.S. at 9. The respondent judges therefore did not abuse their discretion or act without authority in proceeding with innominate juries.

Disposition

¶22 For these reasons, although we accept jurisdiction, we deny relief.

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA, In and for the County of Cochise

JUDGE: HONORABLE LAURA CARDINAL,
AMY J. HUNLEY, Clerk of the Superior Court
DIVISION: I
by: Jennifer Anderson (4/9/2021), Deputy Clerk
COURT REPORTER: Aaron Schlesinger
INTERPRETER: ------
HEARING DATE: 04/06/2021

STATE OF ARIZONA,
Plaintiff,
VS

LONNEY McCOY,

Defendant.

CASE NO: S0200CR201800156

MINUTE ENTRY: JURY TRIAL DAY ONE

HEARING START TIME: 8:33 AM
HEARING END TIME: 4:06 PM
State present by Michael Powell, Deputy County Attorneys Defendant present in person, in custody and by Peter Kelly, Esq.

THE RECORD MAY SHOW that prior to these proceedings, State's Exhibits 1 and 2 were marked for

identification purposes and admitted into evidence on March 17, 2021. On March 24, 2021, State's Exhibits 3 – 17 were marked for identification purposes. Upon stipulation of the parties, State's Exhibits 1 – 11 were admitted into evidence on March 24, 2021.

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This matter came regularly before the Court for day one of the Jury Trial with the presence of the Defendant, who is in custody, and his counsel, Peter Kelly, Esquire, Michael Powell on behalf of the State and Case Officer Detective John Papatrefon. The jury pool is not present.

The Court reviewed several motions to be addressed as preliminary matters.

The Court has read and received the motions, responses and replies as to all motions.

As to the Motion for Stay of Trial Proceedings and the Motion to Allow Videotaping, Photography or Recording During the Proceedings:

Mr. Powell presented the position of the State as to both motions and objected to both.

Mr. Kelly presented the position of the Defendant as to both motions and objected to the entirety of the Motion to Stay and presented objection to videotaping and photography of the proceedings but had no

objection to the print material.

Pursuant to Rule 122(d), the Court FINDS that videotaping, photographing or recording this proceeding could have an impact on the right of privacy of the Jurors and the Defendant, could possibly impact their safety and will distract participants or the dignity of the proceedings.

The Court further FINDS the Petitioner was allowed at a previous jury trial to photograph the proceedings and defied the court order to not show jurors in the pictures and that resulted in a mistrial and retrial of that case. Therefore,

IT IS ORDERED DENYING the Motion to Allow Videotaping, Photography or Recording of the Proceedings at this time as to this jury trial.

Based on the reasons stated for the record, **IT IS FURTHER ORDERED** DENYING the Motion to Stay Proceedings at this time as to this jury trial.

As to the Motion to Intervene:

Upon inquiry of the Court, Mr. Powell did not make an oral record as to this motion because opposing Counsel had no notice of this hearing. The Court had her Judicial Assistant contact opposing Counsel by phone to allow them to make an appearance for this hearing. At 8:38 a.m., the Court was advised there was no answer at the law firm.

After a brief synopsis of the motion to intervene, Mr. Kelly took no position as to the motion.

IT IS ORDERED GRANTING the first request of the Motion to Intervene, one to two reporters shall be allowed in the courtroom as long as COVID-19 safety measures are practiced.

IT IS FURTHER ORDERED DENYING the second request of the Motion to Intervene, the names of the prospective and final jurors will not be made public as to this jury trial.

IT IS FURTHER ORDERED DENYING the third request of the Motion to Intervene, the names of the jurors will not be disclosed at the conclusion of this jury trial.

IT IS FURTHER ORDERED the Court will inform the prospective jurors and final jurors that they have the right to speak with members of the press and disclose any personal information they wish to, however that information will not be provided by the Court.

The Court stated a request was made by the County Attorney to have polycom on during the proceeding to allow other members of the office to hear the proceedings, the request was DENIED by the Court.

Discussion was held as to scheduling the witness utilizing Zoom for testimony.

The Court addressed Mr. Morgan directly and the Court repeated the Court's previous orders and Mr. Morgan stated he understood the orders of the Court.

Upon inquiry of the Court, Mr. Kelly stated one witness will need to appear telephonically. The Court DENIED Mr. Kelly's request for any telephonic witnesses, they will need to appear by Zoom.

Mr. Powell raised objection to the proposed witness and requested sanctions for disclosure violations. Based on the discussion held, the witness testimony of Kevin Swearing in, shall be excluded.

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA, In and for the County of Cochise

JUDGE: HONORABLE TIMOTHY DICKERSON,

AMY J. HUNLEY, Clerk of the Superior Court
DIVISION: Four
by: Angelia Bates (10/2/2020), Deputy Clerk
COURT REPORTER: Aaron Schlesinger
INTERPRETER: ------
HEARING DATE: 10/01/2020

STATE OF ARIZONA **VS** **ROGER DELANE WILSON,** **DOB: 7/20/1968** **Defendant.**	**CASE NO: S0200CR201700516** **MINUTE ENTRY: JURY TRIAL DAY TEN** **HEARING START TIME: 09:00 AM** **HEARING END TIME:10:56 AM**

State Represented by: Lori Zucco, Chief Criminal Deputy County Attorney Present: Cpl. Todd Borquez
Defendant present, in custody and by Chris Kimminau, Esq.

This matter came before the Court this date for Jury Trial – Day Ten.

THE RECORD MAY SHOW that the Jury returned to the courtroom at 9:00 a.m. to continue their deliberations.

At 10:32 a.m., the Court reconvened with the presence of Lori Zucco, Chief Criminal Deputy County Attorney, Cpl. Todd Borquez, Defendant and Chris Kimminau, Esq. The Jury is not present.

The Court was notified that the Jury had reached a verdict, however, there was a Jury question from the Foreperson (marked as Court's 21). The Court addressed the parties regarding the Jury question.

At 10:36 a.m., the Court reconvened with the presence of Lori Zucco, Chief Criminal Deputy County Attorney, Cpl. Todd Borquez, Defendant and Chris Kimminau, Esq. The Jury is present.

Upon inquiry by the Court, Juror # 1, who was the Foreperson stated that the Jury had reached a verdict. The bailiff presented the Court with the sealed envelope.

IT IS ORDERED that the verdict form shall be sealed and not available for public record due to it having the name/signature of the Jury Foreperson.

The Court stated that there was a problem with the verdict form and the Court excused the Jury to discuss the issue with counsel.

Upon the Jury being excused, the Court realized that the Court had misread the form and the Jury returned to the courtroom.

With the Jury being present, the Court apologized to the Jury and the clerk was instructed to read the verdict, which was read as follows:

OMITTING THE FORMAL PARTS

We, the Jury, duly impaneled and sworn in the above entitled action, upon our oaths, do find the Defendant:

On the charge of first-degree murder, caused the death of J.D.A. with premeditation, intending or knowing that his conduct would cause death, on or about the 22nd day of June 2017,

_____Not Guilty
__X__Guilty
_____Unable to agree

Date 01 Oct 2020
/s/ Foreperson

Ladies and Gentlemen of the Jury is this your true and correct verdict. The Jury responded yes.

Mr. Kimminau requested that the Jury be polled. The Clerk polled the Jury with every Juror stated yes, that it was their true and correct verdict.

At 10: 41 a.m., the Court thanked the Jury for their service and stated that the State has alleged aggravating circumstances. The Court excused the Jury, so the additional instructions could be addressed with counsel.

Without the presence of the Jury, Ms. Zucco stated that since the Defendant was found guilty of first-degree murder, she did not need to have the aggravating circumstances.

At 10:47 a.m., the Court reconvened with the presence of Lori Zucco, Chief Criminal Deputy County Attorney, Cpl. Todd Borquez, Defendant and Chris Kimminau, Esq. The Jury is present.

The Court informed the Jury that after consulting with the attorneys that it had been decided that the aggravation phase would not be necessary in this case.

The Court discharged the Jury of the admonition and excused the Jury.

Based on the conviction, **IT IS ORDERED** whatever the **conditions of release** are, they are **VACATED**, and Mr. Wilson will be held without bail.

Mr. Kimminau addressed the Court as to the Defendant's other counts. Ms. Zucco stated she had not made a decision regarding the other counts.

The Court stated that Ms. Zucco had to Friday, October 16, 2020 to make a decision regarding the other counts.

IT IS FURTHER ORDERED setting a **Review Hearing/Sentencing** for **Monday, November 9, 2020** at **8:30 a.m.** in **Division Four** of this Court. Defense waived time.

IT IS FURTHER ORDERED that a Presentence Report shall be prepared, and the report writer shall contact counsel as to arranging an interview.

The Defendant addressed the Court.

THE RECORD MAY FURTHER SHOW that the following exhibits were returned to the Sheriff's department: #42, #52, #54, #54, #56, #56a-#56c, #58, #58a-#58c, #100, #105, #106, #107, #112, #113, #114, #115, #116, #117, #118, #118a-
#118c, #119, #120, #121, #122, #123, #124, #125, #126, #127, #128, #129, #130, #136, #136a-#136c, #137, #137a, # 138, #139, #139a-#139c, GG and HH.

At 10:56 a.m. proceedings adjourned.

APPENDIX E

SUPERIOR COURT, STATE OF ARIZONA,
In and for the County of Cochise

STATE OF ARIZONA,
Plaintiff,
vs.

ROGER DELANE WILSON,
Defendant,

DAVID MORGAN and TERRI JO NEFF,
Intervenors.

Case No. CR201700516

ORDER CONCERNING ACCESS BY REPORTERS DURING THE TRIAL IN THIS MATER

The court has considered intervenors' motion and finds as follows:

1. Trial in this case begins at 8:15 a.m. tomorrow, September 15, 2020. The motion was filed at noon today and the court read an emailed copy of the motion shortly before noon. There is not time for a hearing without disrupting the trial.
2. Two felony jury trials were recently conducted in Division V of this court under the same policy concerning access by reporters as this court intends to follow. Intervenors are aware of how

these trials were conducted.

3. The trial in this case has been scheduled for several months.
4. The motion could have been filed more in advance of the trial which may have allowed time for a full hearing and participation by the state and defendant.
5. Intervenors have requested an order concerning the rules applicable to reporters which will be in effect during this trial. An order and brief explanation are provided below.

IT IS ORDERED as follows.

1. The motion to intervene is granted for the purpose of issuing this order.
2. Reporters will not be allowed in the courtroom at any time during the trial, including times when the jury is not present and during breaks or recesses. This policy complies with Arizona Supreme Court Administrative Order 2020-143 ("Order"). The Supreme Court could have easily included reporters in the list of persons who must be allowed in the courtroom. It did not include reporters therefore this court concludes that the question of allowing reporters in the courtroom is left to the discretion of the court. The court's primary consideration is the safety of the jurors, who are compelled to attend the trial. The exclusion of reporters includes times when the jury is not present because the virus is spread by air and this means that the presence of additional parties in the room, even when the jury is not present, increases the risk of air borne contamination. It is important to maintain the

courtroom within a protective bubble to the extent possible to both reduce the actual risk and to promote confidence that the court is protecting Jurors.

3. A live video feed of the proceedings is not feasible. The court has discussed the matter with court IT. The necessary equipment and software are not readily available. Another obstacle is that the camera controls are on the bench and must be operated by the judge.
4. Reporters may listen to the trial by live audio, by telephone. Intervenors have the telephone number or may obtain it. The court has taken steps to ensure as good a quality audio feed as possible. Callers must mute their telephones and are not permitted to identify themselves when they call in or to use the telephone line to communicate with each other or with persons in the courtroom. The audio recording of the trial will also be available to the public at https://www.youtube-.com/-channel/UCMEGJlojlBoahlvwHahUeWg/videos.
5. The combination of a live audio feed and the audio recording comply with the requirement of the Order that the court "provide public access by video or audio to civil and criminal court proceedings."
6. Reporters will not be allowed to examine exhibits during the trial. Such access causes at least two problems: 1) it would require allowing reporters in the courtroom, which as noted above goes against protecting jurors and other from contact with unnecessary persons, and 2) it would disrupt the work of court staff. The only time the courtroom clerk could make the

exhibits available would be when the court is on a break and this is also his or her break. The exhibits are not public records until admitted into evidence and then the obligation of the court is to make the record available within a reasonable time after a request, which does not mean immediately.

7. Reporters may enter the court building and may bring in their electronic devices. The normal rules apply, i.e,. wear a mask, maintain social distancing, no audio or video recording.
8. Reporters may not use the law library as a place to sit during jury selection because the room will be used as part of the process. Once a jury is seated, reporters may use the law library if there is enough room with social distancing considered. The primary purpose of the law library remains to serve the public and the public has priority. Reporters will be asked to leave if the room becomes too full.
9. The names of jurors, both potential and those selected to serve, will not be released. The court does not see a conflict between A.R.S. § 21-312(b), which states that "all records that contain juror biographical information are closed to the public," and Arizona Supreme Court Rule 123(e) (10), which states "[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." A.R.S. § 21-312(b)

prohibits release of juror names and Rule 123(e)(10) does not require the court to disclose the names. Further Rule 123(e)(10) applies to the "master jury list," which is the large list of individuals who may be summoned for jury service and intervenors are requesting the names of the persons who are summoned and selected for this trial. If the two provisions do conflict, the court would follow the prohibition in A.R.S. § 21-312(b) as it is on point.

10. This order only is in effect during the trial in this case commencing September 15, 2020 and it is not binding on other judges of this court.

DATED: *SEP 14 2020*
HONORABLE TIMOTHY B DICKERSON
JUDGE OF THE SUPERIOR COURT

APPENDIX F

Constitution of the United States, Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX G

Ariz. Rev. Stat. § 21-312. Juror records

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.

C. A random jury box seating list is confidential before use.