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

COUNSEL

First Amendment Clinic, Phoenix
By Gregg P. Leslie, a clinical professor appearing pursuant to Rule 38(c), Ariz. R. Sup. Ct., and Jill Mceldowney and Simon Hawks, students certified pursuant to Rule 39(c), Ariz. R. Sup. Ct.
Counsel for Petitioners

Mark Brnovich, Arizona Attorney General
By Marjorie S. Becklund, Assistant Attorney General, Tucson
Counsel for Respondents

Brian M. McIntyre, Cochise County Attorney
By Lori Ann Zucco, Chief Criminal Deputy, and
Michael A. Powell, Deputy County Attorney, Bisbee
Counsel for Real Party in Interest

Mark Brnovich, Arizona Attorney General
Lacey Stover Gard, Deputy Solicitor General/Chief of Capital Litigation
By Ginger Jarvis, Assistant Attorney General, Phoenix
Counsel for Amicus Curiae Arizona Attorney General

Elizabeth Burton Ortiz, Phoenix
Counsel for Amicus Curiae The Arizona Prosecuting Attorneys' Advisory Council

---

OPINION

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

S T A R I N G, 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

[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 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.

[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).

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

---

[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.

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 (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

[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").

differing outcomes. We are persuaded by those concluding that 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 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

---

[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).

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.