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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

) No. R-25-0034

)

Petition to add Ariz. R. Crim. P. 12.10
and Amend Ariz. R. Crim. P. 12.7,
12.21, and 12.25

) **Comment of Arizona Attorneys for**
) **Criminal Justice regarding Petition to**
) **Add Ariz. R. Crim. P. 12.10 and**
) **Amend Ariz. R. Crim. P. 12.7, 12.21,**
) **and 12.25**

)

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) hereby submits the following comment on the petition to add Rule of Criminal Procedure 12.10 and Amend Ariz. R. Crim. P. 12.7 and 12.25.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law

students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

Petitioner raises valid concerns respecting protection of grand juror privacy and the need to protect the integrity of physical evidence. The proposal aims to address real concerns as to both issues. Defense attorneys frequently file motions to remand for a redetermination of probable cause and/or other motions to which they attach the grand jury transcripts, including an unredacted list of the grand jurors who deliberated. Similarly, where physical evidence has been submitted to a grand jury, the preservation of such evidence is important to both the defense and the State.

However, the proposed cure goes far beyond what is necessary to protect the integrity of the grand jury. AACJ proposes alternative changes that are more narrowly tailored to the concerns Petitioner raises.

I. Rule 12.7.

The proposal seeks to protect the privacy of grand juror identities by amending Rule 12.7 with the addition of subsection (d) prohibiting the inclusion of the names of grand jurors in grand jury transcripts. Instead, the transcript may only provide the

initials of grand jurors, while the actual list of names must be sealed, only to be accessible to the defense upon the filing of a motion.

“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, 484 ¶ 20 (App. 2007). This Court has recognized that the First Amendment does not guarantee that the press should have an unfettered right to the identities of trial jurors. *Morgan v. Dickerson*, 253 Ariz. 207 (2022). The restrictions on access to the identities of trial jurors in Cochise County at issue in *Morgan* likely came about because Morgan posted video depicting jurors while a trial was ongoing, causing the superior court to grant the defendant a new trial. *See State v. Rojas*, 247 Ariz. 399, 400-01 ¶¶ 2-8 (App. 2019). This concern should apply equally to grand jurors, particularly when there is a high-profile case of great public interest.

There are multiple situations in which the names of grand jurors are important to litigation arising from grand jury presentations. In considering issues related to grand juries, a “defendant has no representative to watch out for his interests before the grand jury.” *Maretick v. Jarrett*, 204 Ariz. 194, 197 ¶ 10 (2003). “Because defendants enjoy few procedural rights before the grand jury, grand juries must be unbiased and must act ‘independently of either prosecutor or judge.’” *Id.* ¶ 8 (quoting *Marston’s Inc. v. Strand*, 114 Ariz. 260, 264 (1977)). A.R.S. § 21-414 requires that “[a]n indictment shall not be returned without the concurrence of at least 9 grand

jurors.” A.R.S. § 21-414(A). While it does not happen often, there are occasions in which review of the list of jurors who are present for returns will include only nine grand jurors, the minimum required, but one or two of those grand jurors were not present during the grand jury presentation and thus were not voting grand jurors who concurred in the indictment.

There have also been situations in which the State has asked whether any grand jurors feel unable to be impartial following a brief description of the case, a particular grand juror has indicated issues with impartiality and removed him/herself from the presentation, but then participated in returns or even remained present and participated in the vote. While not as common a concern in larger counties as in smaller counties, it is generally prudent for the defense, including the defendant, to review the names of grand jurors to determine whether any are personally known to the defendant such that the grand juror’s participation in the presentation and vote may raise concerns. In the context of a trial, such concerns are not a significant issue because voir dire allows the defense the opportunity to expose biases. With a grand jury, the defense’s only knowledge of the proceedings is the transcript, and there is no opportunity for voir dire.

Respecting the possible issues discussed above, the use of initials minimizes but does not eliminate the concerns expressed. For example, the proposed rule does not address circumstances in which multiple grand jurors have the same initials.

AACJ believes the intent of the petition can be achieved through a different approach. Rather than replacing the names with initials, a better approach is to require the parties to redact the names of grand jurors when attaching grand jury transcripts to a filing. In the motion to which the transcript is attached, in the unlikely event that identifying a particular grand juror is necessary, then initials may be used, with proper adjustments for circumstances in which multiple grand jurors have the same initials. In limited circumstances such as where a grand juror is challenged under Rule 12.8(b)(2), it may be impractical to redact or use initials. In such cases, the defendant could file a motion to file the grand jury transcript (and if necessary, the motion itself) under seal.

AACJ proposes a more measured approach to achieve the ends intended by the proposal while also ensuring the protection of the due process rights of defendants. For these reasons, AACJ offers the following alternative proposal for adding Rule 12.7(d):

Rule 12.7. Record of Grand Jury Proceedings

(a) through (c) [No changes]

(d) Grand Juror Names. No party may release grand juror identities to the public. If a transcript of any grand jury proceedings is used as an exhibit in court or attached to a motion or other pleading, the party must redact the names of the grand jurors. If redacting the transcript is not practical, then the party must file a motion to file the transcript under seal.

This proposal adequately protects the privacy of grand jurors, because those who violate the rule may be subject to sanctions.

II. Rules 12.10 and 12.25.

Regarding the preservation of physical evidence in proposed new Rule 12.10 and amended Rule 12.25, the proposal seeks to ensure preservation while making the evidence available for inspection and viewing by the parties, but requires the court to impose limitations on access to that evidence. AACJ supports the aim of the proposal while simultaneously seeking to ensure the due process rights of a defendant. Proposed Rule 12.10(a) makes clear that the defendant has equal access to the exhibits as the State, but it is not clear that Proposed Rule 12.10(b) would not also apply to the parties. AACJ is concerned that the language of (b) might serve to restrict the defendant's access under (a).

There are meaningful concerns that the lack of discretion in the requirement that judges impose limitation may harm the interests of the parties. Notably, physical evidence includes "records," a term that is not defined in the Rules of Criminal Procedure but is defined elsewhere. A.R.S. § 41-151.18 defines the term as follows:

"Records" means all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics, including prints or copies of such items produced or reproduced on film **or electronic media** pursuant to § 41-151.16, made or received by any governmental agency in pursuance of law or in connection with the transaction of public business and preserved or appropriate for preservation by the agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or

other activities of the government, or because of the informational and historical value of data contained in the record, and includes records that are made confidential by statute.

A.R.S. § 41-151.18 (emphasis added). Regarding the courts themselves, “record” is defined as follows:

“Record” means all existing documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other materials, regardless of physical form or characteristics, made or received pursuant to law or in connection with the transaction of any official business by the court, and preserved or appropriate for preservation by the court as evidence of the organization, functions, policies, decision, procedures, operations or other governmental activities.

Ariz. R. Sup. Ct. 123(b)(18). Irrespective of which definition of “record” applies to Criminal Rule 12, the definition will be exceptionally broad.

The amended rules, rather than guaranteeing reasonable access of a defendant to physical evidence (including records) presented to the grand jury, instead requires a judge to limit access to such evidence. This raises the concern that the State may seek to “bury” evidence by presenting it to the grand jury and thereby limiting the defendants’ access to it. Another concern arises related to the ability of a defendant, particularly one who is in custody, to view, examine, or inspect the evidence if that evidence is only available for viewing and inspection at the clerk’s office instead of being made available in the same manner as a grand jury transcript. Where actual physical evidence is involved, the amended rule may hamper the ability of a defendant to conduct necessary scientific testing.

Given these concerns, AACJ opposes only those parts of the new rule 12.10 and the amended rule 12.25 that requires the imposition of “limitations on access, use, transport, care, and disposal,” of physical evidence presented to or considered by a grand jury. AACJ’s concerns can be sufficiently ameliorated by a specification that, to the extent due process and a defendant’s right of access, need for testing, or other legitimate need requires, a court must grant a defendant access to, use of, testing of, copying of, and examination of physical evidence presented to a grand jury unless the court specifically finds, with its reasons in writing, that such access will defeat the ends of justice.

The spirit of Petitioner’s proposal seems to recognize the defendant’s right as well as the rights of private property owners whose property has become relevant in a grand jury investigation. In order to clarify the rights of all persons involved, AACJ offers the following alternative proposal for Rules 12.10(b) and 12.25(b):

Rule 12.10. Preservation of Grand Jury Evidence

(a) [No change to Petitioner’s Proposal]

(b) Release or Retention. If physical evidence was produced before a grand jury, and the owner or possessor of that property has a right to possess or regain custody over it, the court must not order the release the property to its lawful owner or possessor until the defendant has a fair and reasonable opportunity to inspect the evidence. Records, documents, or any other evidence maintained in a format that is suitable for duplication may be copied by the owner.

As the Petition uses the same language in Rules 12.10(b) and 12.25(b), AACJ similarly suggests that its proposal for Rule 12.10(b) be carried into Rule 12.25(b) as well.

Conclusion

AACJ requests this Court adopt the alternative proposals for Rules 12.7(d) and 12.10(b) to ensure the defendant's rights are protected while also protecting the interests of others.

DATED (electronically filed): April 29, 2025.

By: /s/ David J. Euchner
David J. Euchner & Seth M. Apfel

Copy delivered to:

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