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8 **IN THE SUPREME COURT**
9 **STATE OF ARIZONA**

10 In the Matter of:

Supreme Court No. R-14-0008

11 **PETITION TO ADOPT RULE 23.5,**
12 **ARIZONA RULES OF CRIMINAL**
13 **PROCEDURE**

COMMENT OF
THE STATE BAR OF ARIZONA

14 The Maricopa County Attorney's Office proposes a new rule of criminal
15 procedure intended to prevent "defense counsel" from "harassing jurors following
16 their service to our community" by prohibiting all post-verdict contact unless
17 counsel first establishes "good cause . . . by substantial evidence which justifies
18 intrusion into a juror's privacy." Thereafter, contact would be allowed only
19 "with court oversight" designed to restrict "the nature and form of any contact by
20 a party to protect the juror's privacy and to reduce the possibility of harassment."

21 The State Bar of Arizona respectfully requests that this Court reject this
22 proposal.

23 Rule 24.1(c)(3), Ariz. R. Crim. P., provides for the grant of a new trial upon
24 showing juror misconduct through receipt of evidence not properly admitted during
25 the criminal proceedings; deciding the verdict by lot; perjuring himself or herself

1 or willfully failing to respond fully to a direct question posed during voir dire;
2 receiving a bribe or pledging his or her vote in any other way; becoming intoxicated
3 during the course of deliberations; or conversing before the verdict with any interested
4 party about the outcome of the case. None of these instances of juror
5 misconduct are ascertainable without post-verdict communication with former trial
6 jurors.

7 Caselaw makes clear that juror polling carries no presumption that juror
8 misconduct does not exist while Rule 24.1(c) itself makes clear that none of the
9 grounds can be investigated much less substantiated without first talking to the
10 jurors post-verdict and “good cause” based on “substantial evidence” justifying
11 post-verdict juror contact is impossible to establish before any juror interviews are
12 conducted. Impeachment of a verdict is not limited to the six grounds enumerated in
13 Rule 24.1(c)(3) as juror “misconduct.” *State v. Compton*, 127 Ariz. 420, 421, 621
14 P.2d 926, 927 (“The state contends that unless a new trial is sought on one of the six
15 grounds enumerated in Rule 24.1(c)(3), juror testimony is inadmissible. We do not
16 agree.”) Moreover, where a viable claim of juror misconduct exists, the fact that the
17 jury was polled and individually confirmed its verdict “does not preclude the
18 granting of a new trial.” *Id.*

19 Rule 24.1(d), which expressly addresses admissibility of juror
20 evidence to impeach the verdict, must be read in tandem with Rule 24.1(c).
21 Subsection d provides that whenever the validity of the verdict is challenged under
22 Rule 24.1(c), “the court may receive the testimony or affidavit of any witness,
23 including members of the jury, which relates to the conduct of a juror, official of the
24 court or third person. No testimony or affidavit shall be received which inquires
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1 into the subjective motives or mental processes which led a juror to assent or
2 dissent from the verdict.”

3 Rule 606(b), Ariz. R. Evid., also concerns admissibility of juror testimony
4 into the validity of verdicts. Arizona departed from the federal version of the rule,
5 however, by limiting its application to civil cases only. Arizona’s adoption of Rule
6 24.1(d), Ariz. R. Crim. P., evidences its embracement of the more liberal House
7 version of Federal Rule of Evidence 606(b) — as opposed to the version set forth by
8 the Senate and adopted by the Federal Rules of Evidence along with a majority of
9 the States. The House version—the minority position adopted by Arizona — permits
10 inquiry into juror misconduct, “such as where a juror alleged that the jury refused to
11 follow the trial judge’s instructions or that some of the jurors did not take part in the
12 deliberations.” *Tanner v. United States*, 483 U.S. 107 (1987); *see also Kirby v. Rosell*,
13 133 Ariz. 42, 43-44, 648 P.2d 1048 (App.1982) (Rule 24.1(d) permits “the receipt of
14 juror testimony or affidavits in limited circumstances for the purposes of impeaching
15 the jury’s verdict.”); *State v. Compton*, 127 Ariz. 420, 621 P.2d 926 (App.1980)
16 (“The new rules have changed the traditional rule prohibiting juror testimony or
17 affidavits to impeach the verdict.”) Thus, Petitioner’s recitation of “similar rules that
18 prohibit contact with jurors post-verdict absent specific court approval” enacted
19 in other jurisdictions (Petition at 4) are inconsequential in Arizona.

20 The proposed rule delays post-verdict investigation by defense counsel crucial
21 to the timeliness of a new trial motion by first requiring “substantial evidence”
22 establishing “good cause” before any juror-related investigation even commences.
23 This Court has held that the 10-day time limit within which to file a motion for
24 new trial is jurisdictional and a trial court has no power to grant a new trial after
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1 its expiration. *State v. Hill*, 85 Ariz. 49, 330 P.2d 1088 (1958); *State v. Hickie*, 129
2 Ariz. 330, 332, 631P.2d 112 (1981).

3 Equally problematic is the fact that absent post-verdict communication with
4 jurors, defense counsel will never be able to provide “substantial evidence” of
5 “good cause” justifying court-approved juror communication. A motion seeking juror
6 contact to investigate any of the enumerated grounds for new trial will be summarily
7 denied as “speculative,” and rightfully so. The proposed rule thus creates an
8 impossible standard to justify post-trial contact with jurors and in so doing, obviates
9 a defendant’s right to timely seek a new trial based on grounds set forth in Rule
10 24.1 as substantiated by facts existing exclusively outside of the record.

11 Not only do Rule 24.1(c) and (d) make clear the permissibility, necessity and
12 scope of post-verdict juror interview and affidavits, subsection d appropriately
13 shields former jurors from the types of “harassment” and invasions of privacy that
14 the proposed new rule professes to address -- while simultaneously protecting a
15 convicted person’s right to raise and substantiate a claim of juror misconduct in a
16 timely motion for new trial. Indeed, no lawyer may ethically “harass” any court-
17 proceeding participant, including but not limited to jurors. *See, e.g.* Rule 42,
18 Ariz. R. Sup Ct., Ethical Rule 3.5 (governing lawyer contacts with current
19 and former jurors). Petitioner uses the terms “harassment” and “violation of privacy”
20 to connote the mere contact and questioning of jurors post-trial. Yet the pursuit
21 of justice conducted within the express parameters of Rule 24.1 ensures the protection
22 of a defendant’s constitutional rights while simultaneously ensuring a prosecutor’s
23 role as “minister of justice.” It is neither accurately nor appropriately characterized
24 as juror “harassment” or a “violation of [juror] privacy.” An identical observation
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1 holds true with respect to claims of juror misconduct discovered for the first time
2 during post-conviction proceedings governed by Rule 32, Ariz. R. Crim. P.
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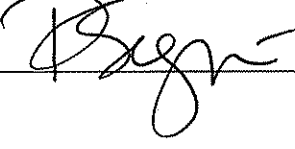
4 **CONCLUSION**

5 The State Bar of Arizona respectfully requests that the Court reject this
6 proposed addition to the Arizona criminal procedure rules. The propose new rule
7 violates and effectively obviates and obliterates Rule 24.1 as well as claims of juror
8 misconduct permissibly raised pursuant to Rule 32. It is procedurally impossible for
9 defense counsel to produce “substantial evidence” establishing “good cause” to
10 permit juror interview prior to any juror interview actually occurring. The state may
11 not properly shield convictions borne of juror misconduct by effectively insulating
12 former jurors from the timely discovery of same post-trial; that is contrary to its role
13 as “minister of justice.” The scope of permissible post-trial juror inquiry and
14 admissible evidence in post-trial proceedings is established by Rule 24.1(d) -- a
15 provision that itself prohibits admissibility of a juror’s “subjective mental motives or
16 mental processes” leading to their assent or dissent from the verdict, and thereby
17 aptly regulates the “types of interrogations” that Petitioner claims are “clearly
18 upsetting” to jurors. Lawyer conduct regarding contact with existing and former
19 jurors is also governed by ER 3.5.
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21 RESPECTFULLY SUBMITTED this 8th day of May, 2014.

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25 John Furlong
General Counsel

1 Electronic copy filed with the
2 Clerk of the Arizona Supreme Court
3 this 9th day of May, 2014.

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