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11 **IN THE SUPREME COURT**  
12 **STATE OF ARIZONA**

14 In the Matter of: ) Supreme Court No. R-14-0008  
15 )  
16 ) **COMMENT OPPOSING**  
17 PETITION TO ADOPT RULE 23.5, ) **ADOPTION OF RULE 23.5**  
18 ARIZONA RULES OF CRIMINAL )  
19 PROCEDURE )  
20 )

21 We, the undersigned law professors, write to oppose Proposed Rule 23.5. As  
22 attorneys and professors of constitutional law, criminal law, and other subjects, we  
23 have concerns about the impact of this proposed rule on defendants' constitutional  
24 rights.  
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1           The proposed rule seriously impacts attorneys’ responsibilities—and  
2 rights—to investigate and pursue potential juror misconduct claims or other claims  
3 discoverable through juror interviews. This, in turn, impacts defendants’ ability to  
4 raise and pursue those claims during post-trial litigation.  
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6           Arizona’s current approach under the existing rules is consistent with United  
7 States Supreme Court precedent on the issue of juror contact. Once jurors are  
8 released at the conclusion of a trial, anyone can contact them, and they can decide  
9 for themselves whether they want to talk. *See Capital Cities Media, Inc. v. Toole*,  
10 463 U.S. 1303, 1306 (1983) (noting that the state’s interest in shielding jurors  
11 “becomes attenuated after the jury brings in its verdict and is discharged”). Mr.  
12 Montgomery claims that “harassing jurors” is “unseemly,” but points only to  
13 complaints from former jurors who were “contacted and questioned by defense  
14 attorneys or defense investigators about the trial.” Contacting former jurors is not  
15 prohibited by law, as that is the only way for attorneys to discover if a former juror  
16 will consent to answering questions. Questioning jurors who have consented to  
17 answer questions is also permitted by law. Neither “contacting” nor “questioning”  
18 is the same as “harassing.” Mr. Montgomery’s petition improperly conflates these  
19 ideas.  
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1 Over the past few years, prosecutors have filed motions to prohibit juror  
2 contact in numerous cases. Disturbingly, these actions have not only impacted  
3 attorneys and defendants in the cases where pleadings have been filed, but also  
4 have had a “chilling effect” on defense attorneys in other cases, who are concerned  
5 that engaging in the thorough investigation required of them could lead, ironically,  
6 to their being prevented from conducting that very investigation.  
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9 These concerns are heightened in capital cases, where defense attorneys bear  
10 a weighty responsibility to provide a rigorous, thorough defense for their clients. In  
11 2003, the American Bar Association (“ABA”) promulgated a set of rules calling  
12 for “high quality legal representation” that exceeds the level of representation  
13 required in noncapital cases “because . . . the extraordinary complexity and  
14 demands of capital cases [require] a significantly greater degree of skill and  
15 experience on the part of defense counsel[.]”  
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19 These ABA Guidelines for the Appointment and Performance of Defense  
20 Counsel in Death Penalty Cases “are not aspirational” but rather “embody the  
21 current consensus about what is required to provide effective defense  
22 representation in capital cases.” To that end, they demand from post-conviction  
23 counsel “an aggressive investigation of all aspects of the case” and litigation of “all  
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1 issues, whether or not previously presented, that are arguably meritorious under the  
2 standards applicable to high quality capital defense representation.”  
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4 Interference with investigation at the state post-conviction level not only  
5 affects a defendant’s state post-conviction proceedings, but also can impair later  
6 federal habeas corpus proceedings. In order for a claim to be raised in a federal  
7 habeas petition, it must first be exhausted in the state courts, or alternatively the  
8 petitioner must demonstrate that the claim would be procedurally barred under  
9 state law if the petitioner attempted to present it to the state court. Preventing  
10 defense attorneys from engaging in thorough investigation impacts defendants’  
11 ability to raise serious constitutional violations in their federal habeas petitions.  
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15 Additionally, the inclusion of “good cause” language in the proposed rule  
16 change does little to ameliorate the problems identified above. Because  
17 investigating attorneys are unlikely to be able to establish “good cause” before  
18 conducting an investigation—and because the proposed rule change actually  
19 *requires* the showing of “good cause” *before* conducting an investigation—lawyers  
20 will be caught in a catch-22. Notably, because jurors are often the only witnesses  
21 to juror misconduct, these facts will not appear in the record and must be  
22 developed through post-verdict investigation.  
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1 Finally, Arizona attorneys are bound by ethical rules while acting as  
2 advocates, and specific rules guide contact with jurors. Pursuant to Arizona Ethical  
3 Rule 3.5, attorneys are prohibited from communicating with a juror after discharge  
4 of the jury if “(1) the communication is prohibited by law or court order; (2) the  
5 juror has made known to the lawyer a desire not to communicate; or (3) the  
6 communication involves misrepresentation, coercion, duress or harassment[.]”  
7 Thus, because defense attorneys already are guided and bound by these ethical  
8 rules, the Court need not interfere with counsel’s investigation in an attempt to  
9 further protect jurors. The rules protect jurors and set out clear standards for  
10 attorneys.  
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14 For all of the foregoing reasons, we respectfully oppose the proposed rule  
15 change and urge the Court to preserve defendants’ right to explore and develop  
16 viable legal claims in their defense.  
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19 **RESPECTFULLY SUBMITTED** this 16th day of May, 2014.

20 By  
21 /s/Teresa Burnham, Assistant Professor of  
22 Law

23 /s/Sandra Durant, Assistant Professor of  
24 Law

25 /s/Maureen Kane, Legal Writing Coach

26 /s/Steve Gonzales, Associate Professor of  
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28 /s/Nancy E. Millar, Assistant Professor of  
Law

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/s/Keith Swisher, Associate Professor of Law

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Electronic copy filed with the Clerk  
of the Supreme Court of Arizona  
this 16th day of May, 2014.

By: Nancy E. Millar

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\* Institutional designation is for identification purposes.