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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

) No. R-14-0008

)

) **COMMENT OF ARIZONA**

Petition to Adopt Rule 23.5,

) **ATTORNEYS FOR CRIMINAL**

Arizona Rules of Criminal Procedure

) **JUSTICE AND ARIZONA**

) **CAPITAL REPRESENTATION**

) **PROJECT REGARDING**

) **PETITION TO ADOPT RULE 23.5,**

) **ARIZONA RULES OF CRIMINAL**

) **PROCEDURE**

Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) and the Arizona Capital Representation Project (“ACRP”) hereby submit the following comment to the above-referenced petition to adopt Proposed Rule 23.5 (the “Petition”) submitted by the Maricopa County Attorney’s Office (“MCAO”). 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. AACJ is the Arizona state affiliate organization to the National Association of Criminal Defense Lawyers, with which it shares its pursuit of ensuring justice and due process for persons accused of crimes; improving the integrity, independence, and expertise of the criminal defense profession; and promoting the proper and fair administration of criminal justice.

ACRP is is a non-profit organization that represents capital defendants and provides training and consultation to teams defending capital clients throughout the State of Arizona. ACRP's mission is to improve the quality of representation afforded to capital defendants in Arizona.

Proposed Rule 23.5 would operate to prohibit any party to a case from initiating contact with a juror after the jury has been discharged "unless specifically permitted by the court upon a showing of good cause[,] . . . established by substantial evidence which justifies intrusion into a juror's privacy." Proposal, pg. 6. For the reasons that follow, AACJ and ACRP oppose the Petition to adopt Proposed Rule 23.5.

1. Proposed Rule 23.5 would impede defense attorneys' ability to thoroughly and competently represent their clients.

First, Proposed Rule 23.5 would impede defense attorneys' ability to competently represent their clients by interfering with counsel's ability to investigate potential claims for new trial and post-conviction relief. To provide competent representation, counsel must investigate his or her client's constitutional claims. *See, e.g., McCleskey v. Zant*, 499 U.S. 467, 498 (1991) (“[P]etitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition.”); ABA Criminal Justice Standards, Defense Function (3d ed.), Standard 4-4.1 (defense counsel has a duty to “conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits”); Standard 4-8.5, Commentary (“Since a postconviction proceeding is fundamentally an original judicial proceeding, involving problems of investigation, preparation, and trial, the Standards governing lawyers in these tasks are essentially the same as those outlined in these Standards for the defense of a criminal case.”); ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.15.1 and Commentary (2003) (“Post-conviction counsel should seek to litigate all issues . . . that are arguably meritorious . . . [and] preserve them for subsequent review.”); ABA Guideline 10.7(A) (attorneys at each stage are obliged “to conduct thorough and independent investigations relating to the issues of both

guilt and penalty”). The ABA Guidelines further impose a professional obligation to contact jurors in post-conviction proceedings. *See, e.g.*, Guideline 10.15.1(E)(4) (“Post-conviction counsel should ... continue an aggressive investigation of all aspects of the case.”); 10.10.2, Commentary n.260 (“[C]ounsel investigating a capital case should be particularly alert to the possibility that, notwithstanding surface appearances, one or more jurors were unqualified to sit at either phase of the trial and make every effort to develop the relevant facts, whether by interviewing jurors or otherwise. Such inquiries can be critical in discovering constitutional errors.”) (citation and internal quotation marks omitted).

AACJ members, ACRP, and other members of the criminal defense community who practice post-appeal litigation in capital and non-capital cases, consider it essential to investigate all potential avenues for relief for their clients, including investigating the possibility of juror misconduct or misconduct witnessed by jurors. Due to the nature of the jury proceedings, and the fact that there is no ability to record or otherwise document their processes, there is simply no other way to learn of such misconduct without asking members of the panel. Thus, requiring counsel to demonstrate good cause--or to meet any standard--before contacting jurors to investigate misconduct impedes counsel’s ability to provide thorough and adequate representation.

2. Proposed Rule 23.5 would prevent discovery and presentation of valid constitutional claims in violation of the rights of criminal defendants.

Further, the Proposed Rule 23.5 would prevent valid constitutional claims from being discovered, or otherwise delay discovery until federal habeas proceedings. As enshrined in our state and federal Constitutions, criminal defendants are entitled a fair and impartial jury. U.S. Const. amends. V, VI, XIV; Ariz. Const. art. II, §§ 4, 23, 24. In capital cases, the right to an impartial jury is further protected by prohibitions against cruel and unusual punishment. U.S. Const. amend. VIII; Ariz. Const. art. II, § 5; *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982). The Supreme Court has insisted that the right to an impartial jury be scrupulously protected, *see, e.g., Parker v. Gladden*, 385 U.S. 363, 364-66 (1966), and state and federal collateral proceedings are the proper venues for pursuing relief when this paramount right has been violated.

Arizona post-conviction petitioners are required to “include every ground known to him or her for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed upon him or her” and to provide “[a]ffidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition” Ariz. R. Crim. P. 32.5. In order to obtain *formal discovery* in post-conviction proceedings, a petitioner is first required to file his or her petition and establish good cause therein. *Canion v. Cole*, 210 Ariz. 598, 115 P.3d 1261 (2005). Proposed Rule 23.5 would impose a “good cause” and “substantial evidence” requirement before counsel may even *investigate* potential

juror misconduct. However, it is virtually impossible to determine whether any juror misconduct occurred or whether a juror may have witnessed misconduct without reaching out to jurors themselves. Arizona jurisprudence is rife with examples of instances where misconduct came to light via juror contact after conviction. Even where juror misconduct was discovered by happenstance, juror contact would have provided the best assurance that juror misconduct was discovered.

a. Juror contact has revealed misconduct.

In *State v. Hall*, 204 Ariz. 442, 65 P.3d 90 (2003), the defense contacted jurors post-verdict and discovered that the bailiff had inappropriately discussed prejudicial facts surrounding defendant's tattoos with the jury, and that the jury had discussed those facts among themselves. The defense presented this information to the court in the form of affidavits. Additionally, their investigative interviews with the jurors were used to impeach jurors who testified at the evidentiary hearing that they had not heard or considered the information. Because the jurors had considered extrinsic evidence, the Arizona Supreme Court ruled that the trial court should have found misconduct, and reversed this felony murder conviction and death sentence.

In *State v. Glover*, 159 Ariz. 291, 767 P.2d 12 (1988), the defense presented an affidavit from the jury foreman discussing two instances of significant juror

misconduct. One juror had asked his wife, a person with medical training, for information regarding the crucial fact at issue, namely the effect that the defendant's consumption of alcohol and prescription drugs would have had on him (the defense was accident). Another had asked a person in law enforcement regarding the effect of a hung jury and was incorrectly advised that the defendant would "walk out a free man." The Arizona Supreme Court vacated the conviction in this aggravated assault case and remanded the matter for a new trial.

In *State v. Compton*, 127 Ariz. 420, 621 P.2d 926 (App. 1980), the defense moved for a new trial based on the bailiff's improper statement to the jury that the judge would not allow the jury to go home that evening without reaching a verdict. The matter was subjected to an evidentiary hearing at which jurors testified, and, given that the bailiff denied making the statement, those contacts were instrumental in supporting the evidence for an order for new trial.

In fact, Arizona's courts not only accept declarations from jurors, but require them to support many post-trial claims. In *State v. Pearson*, 98 Ariz. 133, 135, 402 P.2d 557, 559 (1965), the defendant sought a new trial based on the judge's alleged improper statements to jurors. The motion was supported by defense counsel's affidavit relating a juror's statement—not the juror's affidavit. *Id.* at 135-36, 559, . This Court held that a juror's affidavit is a prerequisite to relief. *Id.* at 136. *Accord State v. Wassenaar*, 215 Ariz. 565, 576 ¶ 44, 161 P.3d 608, 619 (App. 2007); *State*

v. McMurtrey, 136 Ariz. 93, 98, 664 P.2d 637, 642 (1983) (rejecting claim that jurors saw defendant in shackles, and stating, “It is well settled that affidavits of third parties as to unsworn statements of jurors are not competent evidence of juror misconduct.”) (citations omitted).

The foregoing decisions are merely examples. Arizona case law, both recent and dating to the earliest days of statehood, is replete with parties’ reliance on juror affidavits obtained through post-trial investigation. *State v. Nelson*, 229 Ariz. 180, 190-91 ¶ 47, 273 P.3d 632, 642-43 (2012); *State v. Dickens*, 187 Ariz. 1, 15, 926 P.2d 468, 482 (1996); *Dunn v. Maras*, 182 Ariz. 412, 419-20, 897 P.2d 714, 721-22 (App. 1995); *State v. Walker*, 181 Ariz. 475, 483-84, 891 P.2d 942, 950-51 (App. 1995); *Richtmyre v. State*, 175 Ariz. 489, 491, 858 P.2d 322, 324 (App. 1993); *Brooks v. Zahn*, 170 Ariz. 545, 548, 826 P.2d 1171, 1174 (App. 1991); *Kirby v. Rosell*, 133 Ariz. 42, 43, 648 P.2d 1048, 1049 (App. 1982); *State v. Poland*, 132 Ariz. 269, 282, 645 P.2d 784, 797 (1982); *Valley Nat’l Bank v. Haney*, 27 Ariz. App. 692, 693, 558 P.2d 720, 721 (1976); *Board of Trustees Eloy Elementary Sch. Dist. v. McEwen*, 6 Ariz. App. 148, 149, 430 P.2d 727, 728 (1967); *Webb v. Hardin*, 53 Ariz. 310, 312, 89 P.2d 30, 31 (1939); *Sw. Cotton Co. v. Ryan*, 22 Ariz. 520, 524, 199 P. 124, 126 (1921); *Hull v. Larson*, 14 Ariz. 492, 495, 131 P. 688, 689 (1913).

- b. Juror contact would have revealed misconduct in cases where it was revealed through other means.

Some rare circumstances have revealed juror misconduct in the absence of juror contact. All are based on chance and all could have been discovered through juror interviews. In *State v. Aguilar*, 224 Ariz. 299, 230 P.3d 358 (App. 2010), an attempted murder case, the bailiff was in the process of cleaning the jury room following discharge of the jury when he discovered documents demonstrating that the jurors had conducted outside research using Google as to the legal definition for attempted first-degree murder. The Court of Appeals ordered a new trial on the attempted first-degree murder count due to the State's failure to prove that the research had not tainted the verdicts. Had the jurors discarded their research, rather than leaving it in their notebooks for the bailiff to find, the misconduct would not have been discovered unless jurors were interviewed. Additionally, there would have been no way for post-conviction counsel to present this possibility as a colorable claim without first interviewing jury members.

In *State v. Martinson*, CR 2004-124662-001 SE (Maricopa County Superior Court) (dismissed on other grounds and currently on appeal and cross-appeal to the Arizona Court of Appeals), a capital murder case, the trial court ordered a new trial on the basis of substantial juror misconduct on the part of the foreman. In that case, two different jury members made efforts to contact the court and defense counsel to inform them of their concerns as to the inappropriate behavior of the foreman. One juror was dismissed for his attempts, as they violated the

admonition. Another happened upon the correct way to raise her concerns, which was through letters sent to the judge. Even if, as happened here, a juror is both savvy enough to identify misconduct and forthright enough to bring it up, this further highlights the need to permit defense counsel to contact jurors post-verdict.

As these cases demonstrate, the best way to ensure that constitutional claims are fully investigated, developed, and presented is to allow counsel to conduct the investigation as they see fit and within the bounds of current ethical rules and procedural safeguards.

3. Proposed Rule 23.5 would be an outsized response to speculative concerns; there is scant evidence that any problem of juror harassment exists.

In addition to impeding defense attorneys' ability to adequately represent their clients and infringing defendants' ability to discover and raise constitutional claims, Proposed Rule 23.5 does so in the name of speculative and unsubstantiated concerns.

The MCAO petitions this Court to adopt Proposed Rule 23.5 "to protect trial jurors' privacy by limiting post-verdict contact with a juror by a party to the case." Petition at 1. Although a juror's interest in privacy and being free of harassment are deserving of protection, the protection of these interests does not require the significant interference in post-conviction investigation of statutory and constitutional claims imposed by Proposed Rule 23.5. To the extent the MCAO is

concerned about harassment of jurors and invasion of their privacy by parties to the case, there are already procedural safeguards and other ethical rules in place to protect against such conduct.

For example, the Arizona Rules of Criminal Procedure require the court, at the conclusion of trial, “to instruct jurors that they are discharged from service and, if appropriate, release them from their duty of confidentiality and explain their rights regarding inquiries from counsel, the media, or any person.” Ariz. R. Crim. P. 22.5(c). In addition, the Arizona Rules of Professional Conduct state that a lawyer may want to communicate with a juror after the jury has been discharged, but requires that the lawyer “must respect the desire of the juror not to talk with the lawyer,” and the lawyer “may not engage in improper conduct during the communication.” Ariz. R. Sup. Ct. 42, E.R. 3.5(c) & cmt. [3]; *see also* ABA Model Rules of Prof’l Conduct R. 3.5(c) & cmt. [3]. The ABA Criminal Justice Standards also require that defense counsel “should not intentionally make comments to or ask questions of a juror for the purpose of harassing or embarrassing the juror in any way which will tend to influence judgment in future jury service.” ABA Standards for Criminal Justice: Prosecution & Defense Function, Defense Function Standard 4-7.3.

Further, if a juror, or anyone else with potentially relevant information, does not wish to speak to defense counsel, the person can simply decline and counsel

will abide by such wishes. More often, however, jurors do not decline. Rather, jurors across the country have voluntarily consented to post-verdict interviews by counsel, academics, and the press. *See, e.g.*, Neil Vidmar, *MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS JURY AWARDS* (1995) (Vidmar conducted detailed interviews with jurors in five medical malpractice cases); William J. Bowers, *The Capital Jury Project: Rationale Design and a Preview of Early Findings*, 70 Ind. L.J. 1043, 1077-79 (1993) (describing interviews of 1201 jurors across 14 states conducted by researchers); Sanja Kutnjak Ivkovich & Valerie Hans, *Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 Law & Soc. Inquiry 441-82 (2003) (Ivkovich and Hans conducted interviews with a sample of 269 jurors who decided cases involving business and corporate defendants); Daniel Schuman D & Anthony Champagne, *Removing the People from the Legal Process: The rhetoric and Research on Judicial Selection and Juries*, 3 Psychol. Pub. Pol'y & L. 242-58 (1997) (Schuman and Champagne interviewed lawyers, testifying experts, and jurors about how the juries responded to expert testimony presented in large samples of trials).

The media, which will not be regulated by the proposed rule, also frequently contacts jurors after high-profile trials and conducts interviews of the jurors to gain their impressions of the trial, the reason for their decision, and any additional

information of interests. Jurors are free to accept or reject these contacts, and many have done so. For example, the high-profile cases of George Zimmerman and Jodi Arias have shown that certain members of jury panels are just as eager to speak about their experience as other members of the same panels are to not speak. Those who choose not to speak have clearly shown that they have the ability to refuse such requests. Certainly media contacts, likely from multiple media sources, cannot be considered less intrusive than contact by a defense attorney or investigator.

Thus, there is scant evidence that any real problem of juror harassment exists, and the proposed solution to this “problem,” in the form of the proposed new rule, impedes fundamental rights of defendants and obligations of defense counsel. Proposed Rule 23.5 drastically overvalues a few jurors’ potential desire to be left alone at the expense of many jurors’ desire to communicate, as well as the rights of criminal defendants to meaningful collateral review and defense counsel’s obligations to thoroughly investigate those claims.

4. Constitutional Law requires that a remedy be provided for every right.

Juror misconduct can include the reception of extrinsic evidence, deciding the verdict by lot, failure to honestly answer questions during voir dire, bribery, vote pledging, intoxication, and conversing before the verdict with any interested party about the outcome of the case. Ariz. R. Crim. P. 24.1 (3). Additionally, a

new trial may be ordered if “[f]or any other reason not due to the defendant’s own fault the defendant has not received a fair and impartial trial or capital sentencing.” Ariz. R. Crim. P. 24.1 (5). Similarly, grounds for relief under Rule 32.1 include the grounds that the conviction or sentence was in violation of the Arizona or United States Constitution. Ariz. R. Crim. P. 32.1 (1).

It is a long-held principle in American jurisprudence that a right must have a remedy. *Marbury v. Madison*, 5 U.S. 137, 146 (1803) (“It is a settled and invariable principle, that every right, when withheld, must have a remedy.”); *State v. Rosengren*, 199 Ariz. 112, 122, 14 P.3d 303, 313 (App. 2000) (“[T]he remedy for violation of crucial constitutional rights must not render such rights hollow or illusory.”).

The rights to petition for new trial and for post-conviction relief give effect to those constitutional rights that protect the right to not be denied life, liberty, and property without due process of law. Proposed Rule 23.5 would effectively gut the remedies of motions for new trial and petitions for post-conviction relief under Rule 32.1, by creating an unreasonable and often impossible standard to meet before being given the ability to fully investigate the issues.

5. Proposed Rule 23.5 would uniquely suppress the free speech rights of the defense attorney.

Defense attorneys, along with every other person, possess the right to free speech under the Arizona and United States Constitutions. U.S. Const. amend. I; Ariz. Const. art. 2, § 6. The Supreme Court has repeatedly held, “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963); *see also New York Times Co. v. U.S.*, 403 U.S. 713, 714 (1971); *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968). State actions that deter free association must be justified by a “compelling” state interest. *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958).

The Arizona Constitution’s protections are considered to be even more rigorous than those of the U.S. Constitution. *Coleman v. City of Mesa*, 230 Ariz. 352, 284 P.3d 863 (2012). Any prior restraint on free speech is “heavily” presumed to be unconstitutional. *See State v. Book-Cellar, Inc.*, 139 Ariz. 525, 679 P.2d 548 (App. 1984). The proposed rule would create a unique class of persons-- parties to a case--who are not permitted to talk to the jurors. Meanwhile, members of academia and the media have an interest in interviewing jurors and are permitted to do so. To prevent defense counsel from doing so does not even meet a rational-basis standard.

Any journalist, blogger, or mere curiosity-seeker can contact any former juror at will without fear of sanction. Only the post-conviction lawyers, officers of

this Court specifically appointed by this Court and charged with investigating “every claim” for relief under the Constitution and Rule 32, who need fear. They alone would be enjoined from discharging their duties to their commission and their clients. Proposed Rule 23.5 cannot co-exist in the same universe with Arizona Rules of Criminal Procedure 6.8 and 32, the ethical rules governing attorneys, and the First and Sixth Amendments.

For the reasons set forth above, AACJ and ACRP respectfully request this Court deny the Petition to Adopt Rule 23.5.

DATED: May 16, 2014.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

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ARIZONA CAPITAL REPRESENTATION PROJECT

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