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IN THE ARIZONA SUPREME COURT

In the Matter of,

PETITION TO ADOPT RULE 23.5,
ARIZONA RULES OF CRIMINAL
PROCEDURE

ARIZONA SUPREME COURT
No. R-14-0008

COMMENT TO PETITION TO ADOPT
RULE 23.5, ARIZ. R. CRIM. P.

The Maricopa County Attorney’s Office has petitioned this Court to adopt its proposed “Arizona Rule of Criminal Procedure 23.5.” The proposal would prevent parties in a criminal case from initiating post-verdict contact with any juror without first seeking permission from the court and demonstrating “substantial evidence which justifies” the requested juror contact. (Pet. at 6.) The Office of the Federal Public Defender for the District of Arizona agrees with the comments to this petition submitted by the State Bar of Arizona, Arizona Summit Law School, and Arizona Attorneys for Criminal Justice, but comments separately to stress that

the proposed rule would transgress fundamental constitutional rights, and would be an unnecessarily broad and restrictive means by which to address the problem Petitioner alleges exists. For the reasons below, this Court should decline to adopt proposed Rule 23.5.

I. Juror Interviews Reveal Crucial Relevant Information that is Otherwise Unobtainable.

Jurors have unique information. Often, only a juror knows whether misconduct has occurred or whether improper information has been communicated to the jury or individual jurors. Jurors can also provide unique perspective on questions of prejudice, and may have a wealth of relevant but unanticipated information. These facts have been borne out repeatedly when jurors, sometimes years after a verdict, reveal case-related information and courts must confront evidence of events that occurred off the record and in the jury room.

Post-verdict juror contact has revealed, for example, that jurors independently researched blood-type and drug-dosage information in a murder case, *Gibson v. Clanon*, 633 F.2d 851, 852-53 (9th Cir. 1980); that where a trial court precluded information that a witness was the defendant's parole officer, jurors nevertheless determined the witness was a parole officer because they saw him leaving the probation office, *United States v. Langford*, 802 F.2d 1176, 1180 (9th Cir. 1986); that jurors were pressured to stay until 10 or 11 in the evenings deliberating and one juror felt they reached a "compromise verdict," *United States*

v. Marques, 600 F.2d 742, 746-47 (9th Cir. 1979); and that jurors—where lack of acquaintance was a defense in a conspiracy case—saw the defendants in the same car during the trial. *Id.* In an Arizona capital case, a juror told Graham Henry’s post-conviction investigator that jurors had gone out and performed an experiment to test the defense theory of the case—two jurors drove a truck down a gravel road together to test whether they could hear an argument occurring inside the truck’s camper. *Henry v. Ryan*, 720 F.3d 1073, 1085 (9th Cir. 2013). The experimenting jurors reported their results back to the rest of the jury. *Id.* In *State v. Miller*, it was not until after the jury returned its verdict that a juror revealed a dismissed alternate juror had “left a note on the windshield of a remaining juror’s car, which said either ‘He’s guilty’ or ‘My vote is guilty.’” 178 Ariz. 555, 557, 875 P.2d 788, 790 (1994).

Across the country, jurors have similarly revealed information post-verdict that was essential to assessing the reliability of criminal proceedings. *See, e.g., Turner v. Louisiana*, 379 U.S. 466 (1965) (fair trial rights violated where two of the state’s key witnesses had charge of and fraternized with jurors); *Parker v. Gladden*, 385 U.S. 363, 364 (1966) (granting relief on post-conviction claim that bailiff told jurors defendant was “wicked” and “guilty”); *Bulger v. McClay*, 575 F.2d 407, 409 (2d Cir. 1978) (affirming relief where juror later admitted to defense counsel that he changed his vote after another juror discussed the contents of a

newspaper article read during deliberations). While courts may not always ultimately grant relief based on the specific facts revealed in every case, these instances nevertheless demonstrate the type of relevant evidence about the proceedings that jurors alone possess and which, without interviews, counsel would have no indication existed.

These types of facts are often only known to the jurors themselves, and interviewing the jurors is the only way to discover that these facts exist. There are a variety of reasons the parties may have no indication that any misconduct has occurred before speaking to the individual jurors. For example, jurors may be especially apt to discuss problems in proceedings after the verdict (rather than with the court) where their behavior expressly violated the court's orders, where they do not recognize their behavior constitutes misconduct, where the questionable behavior was performed by the particular juror making the later statement, or where court officials themselves are accused of making mistakes or engaging in misconduct. Nicole B. Cásarez, *Examining the Evidence: Post-Verdict Interviews and the Jury System*, 25 *Hastings Comm. & Ent. L.J.* 499, 589-90 (2003) (footnotes omitted) (citations omitted).

In addition to information about witness or juror misconduct, jurors may have unique information relevant to a range of other important issues, including, for example, the resulting prejudice from alleged constitutional violations. *See*

generally id. at 514-546 (footnotes omitted) (quotations and citations omitted) (detailing types of information jurors often discussed in post-verdict interviews). These revelations form the bases for asserting and protecting defendants' rights in a variety of contexts. If discovered soon enough, the facts may form the bases for requests for new trials. *See State v. Gallardo*, 225 Ariz. 560, 564, 242 P.3d 159, 163 (2010). The evidence is also crucial to asserting defendants' rights in post-conviction proceedings. Thus, it is imperative that defendants are not encumbered in their efforts to investigate and present these relevant facts in state court.

II. Petitioner's Proposal Poses an Intolerable Threat to Defendants' Rights to Reliable and Fair Proceedings and to the Effective Assistance of Counsel.

The proposed rule would arrest defendants' ability to discover and present crucial information about the proceedings against them. By doing so, the proposed rule endangers defendants' Sixth and Fourteenth Amendment rights in at least two ways. First, preventing counsel from discovering, investigating, and presenting evidence relevant to the reliability of criminal proceedings would encumber defendants' rights to a fair trial and impartial jury. Second, imposing restrictions on vital avenues of investigation would create a state-imposed obstacle to the constitutionally guaranteed effective assistance of counsel.

"It is undisputed that a criminal defendant is entitled to be tried by an impartial jury." *Miller*, 178 Ariz. at 557, 875 P.2d at 790 (citing U.S. Const.

amends. VI, XIV; *Turner*, 379 U.S. at 471-72). “The requirement that a jury’s verdict ‘must be based upon the evidence developed at the trial’ goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.” *Id.* (quoting *Turner*, 379 U.S. at 472; *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)). These rights are implicated in a wide variety of circumstances, including but not limited to when there has been improper communications with jurors, *Turner*, 379 U.S. 466; *Parker*, 385 U.S. 363; *Remmer v. United States*, 347 U.S. 227 (1954), or when jurors consider evidence that is not properly before them, *Gibson*, 633 F.2d at 854-55. As the United States Court of Appeals for the Ninth Circuit has found, cases spanning multiple jurisdictions

have noted that when a jury considers facts that have not been introduced in evidence, a defendant has effectively lost the rights of confrontation, cross-examination, and the assistance of counsel with regard to jury consideration of the extraneous evidence. In one sense the violation may be more serious than where these rights are denied at some other stage of the proceedings because the defendant may have no idea what new evidence has been considered. It is impossible to offer evidence to rebut it, to offer a curative instruction, to discuss its significance in argument to the jury, or to take other tactical steps that might ameliorate its impact.

Gibson, 633 F.2d at 854-55 (footnote omitted); *see also Parker*, 385 U.S. at 364.

Defendants’ well-established Sixth and Fourteenth Amendment rights to fair trials and unbiased juries, however, have little meaning if defendants are prevented from learning whether violations of these and other fair trial rights have occurred.

Forcing a defendant to meet an arbitrary “substantial evidence” burden before investigating jury issues, (Pet. at 6), renders these rights meaningless and leaves defendants without means to challenge violations of these rights.

Further, the rights described above would have little meaning without the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684 (1984). As the United States Supreme Court has explained, the “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.” *Id.* at 686 (internal citations omitted). Because jurors have unique information which may be impossible to uncover in the absence of a juror interview, interviewing jurors is central to investigating the fundamental fairness of a criminal trial. As one scholar has explained,

[j]urors are often the sole witnesses to acts of juror misconduct, either because they themselves have committed the misconduct or because the misconduct took place in the privacy of jury deliberations. If jurors do not come forward during trial, none of the procedural protections . . . can address the misconduct.

Benjamin T. Huebner, *Beyond Tanner: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. Rev. 1469, 1470-71 (2006) (footnotes omitted) (citations omitted). Thus, imposing a “substantial evidence” standard before allowing an investigation into what that evidence is would interfere with counsel’s

performance and the rights that constitutionally-guaranteed effective performance was intended to protect.

What is more, although Petitioner's proposal does not explicitly carve out different rules for capital cases, this Court should not ignore the implications this proposal would have in capital cases. High-profile and capital cases carry a great risk of outside influence. *See generally*, Bill Goodykoontz, *Social Media Helped Shape Jodi Arias Trial*, The Ariz. Republic (May 9, 2013, 1:05 PM), <http://www.azcentral.com/community/mesa/articles/20130508arias-social-media-helped-shape-trial.html> ("When you think of media coverage of trials, you think of words like 'evidence' and 'testimony' and 'prosecution.' And now, 'hashtag.' . . . It's not just the U.S. that was tweeting about the trial. 'Jodi Arias' and 'Nancy Grace' were also among the top 10 trending topics worldwide."). Given the nature of the punishment at stake, review in capital cases should carefully ensure that criminal proceedings do not violate defendants' constitutional rights. *See State v. Bible*, 175 Ariz. 549, 609, 858 P.2d 1152, 1212 (1993) ("[W]ith the death penalty, we have taken, and should continue to take, the extra step—indeed walk the extra mile—to ensure fairness and accuracy in criminal cases"); *see also Zant v. Stephens*, 462 U.S. 862, 884-85 (1983) ("[T]here is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (internal quotation omitted)). Preventing access to information

relevant to defendants' constitutional rights and the proceedings against them could only serve to decrease reliability.

In sum, proposed Rule 23.5 would adversely impact defendants' Sixth and Fourteenth Amendment rights, and would decrease the reliability of review, especially in capital cases. For these reasons, this Court should decline to adopt Petitioner's proposal.

III. Petitioner's Proposal Would Improperly Burden the Rights of Free Speech and Access Guaranteed by the First Amendment.

Both the United States and Arizona constitutions guarantee the freedom of expression. U.S. Const. amends. I, XIV; Ariz. Const. art. 2 § 6 ("Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."). The Arizona Constitution's free-expression guarantees have even "greater scope than the first amendment." *State v. Stummer*, 219 Ariz. 137, 143, 194 P.3d 1043, 1049 (2008) (internal quotations and citation omitted). Arizona's free-speech protections "are too plain for equivocation. The right of every person to freely speak, write and publish may not be limited." *Id.* at 142 (internal quotations and citations omitted). Any prior restraint on speech bears a "heavy presumption against its constitutional validity." *E.g.*, *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (internal quotations and citations omitted).

In the context of voir dire proceedings, the United States Supreme Court made clear that restrictions on access to jurors' statements must be based upon specific factual findings, not unsupported generalizations about concerns for juror privacy. *Press Enter. Co. v. Superior Court*, 464 U.S. 501, 513 (1984). Although the Court's decision in *Press Enterprise* addressed voir dire statements and not post-verdict interviews, juror privacy concerns are even more heightened during voir dire, when jurors must answer questions in a public forum, rather than having the choice to speak or not speak during a private post-verdict interview. See generally *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1306 (1983) (Brennan, Circuit Justice) (noting State interest in shielding jurors becomes attenuated after verdict is returned). Thus, even more so in the post-verdict interview context, *Press Enterprise* should counsel that restricting speech based on unsupported, non-specific allegations would be an unacceptable intrusion on free speech. See *United States v. Antar*, 38 F.3d 1348, 1364 (3d Cir. 1994) (overturning trial court restriction on post-verdict interviews where court made no findings harassment had taken place or was intended); *In re Express-News Corp.*, 695 F.2d 807, 810 (5th Cir. 1982) (finding order forbidding interviews with discharged jurors unconstitutionally overbroad because it prohibited "both courteous as well as uncivil communications").

Petitioner’s proposal, however, would flip the presumption of free and open communication and expression on its head. Not only would jurors and parties in cases have a state-imposed obstacle preventing their communication, but parties would have an affirmative “substantial evidence” burden to meet before exercising those rights to communicate. This burden would be imposed automatically, without any evidence of a concrete threat of harassment. (Pet. at 6.) Rather than seeking an individualized determination that some circumstance justifies curtailing free expression and investigation, the State would lay the burden on private actors to prove “substantial evidence” justifying a private conversation. (*See* Pet. at 6.)

Petitioner’s proposal is, thus, aimed at speech that should remain fundamentally unrestricted. Given the concerns above, this Court should decline to adopt such overreaching burdens on speech.

IV. Petitioner’s Proposal is Overly Broad and Based on Unsubstantiated, Unproven Allegations.

The heart of Petitioner’s advocacy for the proposed rule is based on its allegation that Arizona’s “current rules . . . are no longer able to protect the privacy of our jurors. Inexpensive, fast internet service makes it possible for anyone to quickly find a juror’s home address, phone numbers, and other information that should be protected.” (Pet. at 2.) Petitioner broadly asserts that post-verdict contact is “unwanted” and “understandably upsetting” to jurors. (Pet. at 2-3.)

As an initial matter, Petitioner fails to recognize that the implications of “fast internet service” unfold in a multitude of directions. Quick access to the internet, for example, makes it easier for jurors to conduct personal research into case-related issues. In one recent survey of federal judges and attorneys practicing criminal law in the federal courts, ten percent of respondents reported personal knowledge of a juror conducting internet research. *See* Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. Colo. L. Rev. 409, 415 (2012). Jurors can, for example, quickly and easily research definitions of legal terms, examine court case files, view photographs of crime scenes, and download medical descriptions of drugs. *Id.* at 411-12. It would be difficult and in some cases impossible to discover or prove that jurors had conducted this type of research during their deliberations if defendants were forced to jump through hoops before speaking to jurors.

Further, Petitioner has presented no concrete evidence of problems with juror contact. Petitioner relies solely upon the vague, general assertion that some former juror has complained about post-verdict contact. Petitioner provides no evidence of how many jurors have complained, the context of the complaint, or any other details. Such a broad restriction as Petitioner now proposes cannot be based on such generalizations. *See Antar*, 38 F.3d at 1364 (“[W]e conclude that restrictions on post-trial interviews must reflect an impending threat of jury

harassment rather than a generalized misgiving about the wisdom of such interviews.”); *see generally Press Enterprise*, 464 U.S. at 513.

In fact, empirical data indicate that many jurors who agree to interviews are specifically interested in sharing their experiences as part of the American jury system. 25 *Hastings Comm. & Ent. L.J.* at 514-15 (footnotes omitted). After a study of 761 articles reporting juror statements, Professor Nicole Cásarez concluded that “[i]n looking again at the . . . categories of juror comments, . . . it becomes apparent that these categories are merely variations on the same overriding theme: jurors want the public to understand their decisions.” *Id.* at 546 (footnote omitted).¹

Even if Petitioner had put forth evidence of some concrete example, however, that is not enough to justify the drastic intrusion Petitioner now proposes. Any harassment can be addressed through means that are significantly less restrictive and less fatal to the rights embodied in the First, Sixth, and Fourteenth Amendments and the Arizona Constitution.

In Arizona, the harassment Petitioner alleges is regulated and prohibited. This Court has already codified that a lawyer “shall not . . . communicate with a

¹ Professor Cásarez also concluded, “insufficient evidence exists to show that post-verdict juror interviews distort the deliberative process . . . critics cite no proof beyond their own assumptions, nor did my Houston Chronicle study indicate [any].” *Id.* at 582 (footnote omitted).

juror or prospective juror after discharge of the jury if . . . the juror has made known to the lawyer a desire not to communicate; or . . . the communication involves misrepresentation, coercion, duress or harassment.” Ariz. R. Sup. Ct. 42, E.R. 3.5. Counsel must “respect the desire of the juror not to talk with the lawyer,” and “may not engage in improper conduct during the communication.” Ariz. R. Sup. Ct. 42, E.R. 3.5, 2003 cmt. 3. Indeed, this protection focuses on the alleged problem in a more directed way than Petitioner’s current proposal. Interviews which are only meant to harass or intimidate can and should be addressed and taken seriously on a case-by-case basis. There is no justification, and Petitioner offers none, for basing the proposed rule on a broad, unsupported, blanket allegation that the parties’ counsel in all criminal proceedings—officers of the court²—should be presumed untrustworthy, unethical, or uncontrollable. In other contexts, courts begin with the presumption that counsel acts reasonably, *Strickland*, 466 U.S. at 689, and this Court should not begin an overbroad intrusion onto vital investigation on the presumption that counsel will fail in those duties in this context.

Thus, ethical rules and corresponding sanctions are a sufficient and less restrictive means to address the problem Petitioner now alleges exists. Former

² *In re Wren*, 79 Ariz. 187, 191, 285 P.2d 761, 763 (1955) (“Lawyers as officers of this court are responsible to it for professional misconduct. As a corollary thereto this court is responsible for seeing that professional misconduct shall not go unnoticed. We do not shirk that duty, as unpleasant as it may be.”).

jurors may guard or exercise their expression as they freely choose without paternalistic interference, and the State can adequately protect its interests through preventing the precise harm it seeks to avoid—harassment—focusing on that type of behavior where it is proven to exist.

Conclusion

As one scholar has analogized,

More than a hundred years ago, the Wyoming Territory embarked on a bold experiment by authorizing women to serve on juries. Opponents predicted a parade of horrors, including that women in the jury room would distract male jurors from the serious business of deliberating. Today we can laugh at such an inane assumption, knowing it was based on nothing more than fear and prejudice. . . . Yet [critics of post-verdict interviews] offer no more proof than did those nineteenth-century naysayers who expected female jurors to turn Wyoming jury deliberations into mere flirtations.

25 Hastings Comm. & Ent. L.J. at 600-01 (footnotes omitted) (citations omitted).

Similarly, the Maricopa County Attorney has proposed a rule which would obstruct constitutionally-protected investigation and communication and decrease reliability based on an unproven presumption about what all jurors want. For the reasons above, the undersigned respectfully ask this Court to decline to adopt these unnecessarily broad and overreaching measures.

Respectfully submitted this 20th day of May, 2014.

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By s/ Jennifer Y. Garcia
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Certificate of Service

I hereby certify that on May 20, 2014, I electronically filed the foregoing with the Arizona Supreme Court by using the Court Rules Forum website. I certify that Petitioner will be served with a copy of the comment via email as allowed by Arizona Supreme Court Rule 28(D)(2).

s/ Jennifer Y. Garcia
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