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ARIZONA SUPREME COURT

PETITION TO ADOPT RULE
23.5, ARIZONA RULES OF
CRIMINAL PROCEDURE

Supreme Court No.R-14-0008
**COMMENTS IN SUPPORT OF
PETITION TO ADOPT RULE 23.5,
ARIZ.R.CRIM.P.**

Pursuant to Rule 28(C), the Arizona Attorney General's Office submits the following comments to the Petition to Adopt Rule 23.5 of the Arizona Rules of Criminal Procedure, a rule proposed to protect trial jurors' privacy by limiting post-verdict contact with a juror by a party to the case.

INTRODUCTION

The Arizona Attorney General's Office supports the Maricopa County Attorney's Petition to Adopt Rule 23.5, Arizona Rules of Criminal Procedure, to "prohibit any party from contacting jurors outside the courthouse after a case is concluded absent a showing of good cause and with the permission of the court." *See* Petition at 3. In recent years there has been reported unwarranted contact with jurors many years after the juror's civic service had concluded. As the Petition points out, numerous jurors have reported unwanted contact after their service was complete. This is also true in the post-conviction and federal habeas context. The proposed Rule provides the correct balance

between jurors' privacy and any necessary access to jurors for investigative purposes.

A. Background

Although our current Rules provide some privacy protections to persons summoned to court for jury service, jurors receive no statutory protection after they have been discharged or excused. Title 21 of the Arizona Revised Statutes governs juries in general, including the role of the jury commissioner, juror qualifications, permitted excuses from jury service, juror compensation, and the formation of juries. Jury service is not optional, but rather is a civic duty to be provided by all qualified summoned jurors. *See State v. Bojorquez*, 111 Ariz. 549, 535 P.2d 6 (1975) (“Jury service is not a matter of choice or right, but is a duty imposed by the state on such terms as the state may set.”). Absent postponement or excuse, a juror may be fined for failing to appear on the date scheduled. A.R.S. § 21–223. Jury service, however, is not perpetual. A juror’s term of service is fulfilled upon excuse or discharge. A.R.S. § 21–332(A)(1).

Several Arizona rules and statutory provisions protect jurors’ personal information, thus intending to protect jurors from unsolicited contact and harassment. *See* Arizona Rule of Criminal Procedure 18.3 (information obtained in jury selection kept private and not disclosed unless good cause shown); Rule 18.5(e) (ensuring juror privacy during examination at trial); Rule 23.4 (identity of jurors’ names kept private during polling); A.R.S. § 21–312 (keeping confidential jurors’ names and information).

None of the above provisions, however, specifically protect jurors from post-trial contact absent a court’s order upon a showing of good cause. In several recent capital post-conviction-relief (“PCR”) proceedings, a defendant’s team (counsel, mitigation specialist, and/or investigator) has contacted former trial jurors without the trial court’s permission or any requirement that the jurors be advised that they may decline to speak with defense counsel—protections which the jurors enjoy during trial. Several jurors have expressed concern regarding this contact, which generally occurs 5 to 10 years after the trial, outside the courtroom (including, sometimes, at the juror’s home), and by

persons who are different than those who represented the defendant at trial. Consequently, a rule is necessary to protect jurors from unsolicited contact after they are excused or discharged from service, and to give force to the assurances made to jurors who have already performed their civic duty.

B. The Proposed Rule Provides The Necessary Guidelines Protecting Juror Privacy.

As set forth by the Petition, the proposed rule would codify guidelines for post-trial contact with jurors. Several reasons support the adoption of a rule governing post-trial contact with jurors, including: (1) a juror's right to privacy; (2) protection of the integrity and finality of the jury verdict; (3) the limited grounds and time in which a motion for new trial may be filed; and (4) prevention of potential juror harassment, fear, and anxiety. Additionally, rules and guidelines adopted by other jurisdictions demonstrate that Arizona would not be alone in acting to protect jurors from unwanted post-trial contact.

a. A juror's right to privacy.

Jurors who have performed their civic duty should not have to worry about their privacy after their discharge from service. Jury service does not negate a juror's right to privacy. As a matter of policy, Arizona courts have recognized a juror's right to privacy to encourage jury service. *See Stewart v. Carroll*, 214 Ariz. 480, ¶ 20, 154 P.3d 382 (App. 2007); *State v. Ramirez*, 178 Ariz. 116, 127, 871 P.2d 237, 248 (1994).

Proposed Rule 23.5 provides a necessary protection that is currently missing for jurors. As the Petition states, numerous cases in Maricopa County have seen jurors complain of unsolicited contact by a defense team member after the juror's service. Likewise, there have been numerous incidents of unsolicited juror contact in capital cases in the PCR or federal habeas stage. Many of these jurors are contacted anywhere between 5 to 10 years after their service. These post-conviction contacts take place with no court oversight and no notice to the jurors or the State. The Proposed Rule would provide the necessary protection for jurors and provide guidelines for the parties to follow in requesting any necessary information from jurors.

Arizona courts have recognized the importance of protecting juror privacy and confidentiality, and of encouraging jury service by appropriately protecting jurors' contact information. This privacy should also include the protection from unsolicited post-trial contact provided by the proposed rule.

b. *Protecting the integrity and finality of jury verdicts.*

Public policy concerns also support court oversight of juror contact to prevent improper inquiries into the jury's deliberative process. *See Hyde v. United States*, 225 U.S. 347, 383–84 (1912); *State v. Landrum*, 25 Ariz. App. 446, 448, 544 P.2d 270, 272 (1975). Guidelines and limitations governing post-trial juror contact protect the integrity and finality of the jury's verdict—something in which the State, the court, the community, and crime victims have an interest. *See State v. Callahan*, 119 Ariz. 217, 219, 580 P.2d 355, 357 (App. 1978); *see also* Ariz. Const. Art. 2.1(A)(10) (victims have a right to final conclusion of the case after the conviction and sentence).

“[L]ong-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry.” *Tanner v. United States*, 483 U.S. 107, 127 (1987). The Supreme Court has explained these concerns:

There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.

Id. at 120–21 (internal citations omitted).

The Proposed Rule protects the integrity of jury deliberations while allowing for investigation into allegations of jury misconduct, with court supervision and upon a showing of good cause. The incidents of juror contact mentioned above, occurring years

after a verdict, have had little to do with allegations of juror misconduct. Most post-conviction contacts have inquired into the impact of evidence—admitted or not admitted at trial. Not only is this type of information prohibited,¹ but this type of contact undermines the integrity of jury verdicts and calls for court supervision in this area.

c. *Limited time in which to raise juror misconduct claims.*

The proper vehicle to bring claims of juror misconduct is a motion for new trial filed within 10 days after the verdict. Ariz. R. Crim. P. Rule 24.1(b) and (c). The necessity for this narrow window is illustrated by this Court’s analysis addressing the propriety of an evidentiary hearing regarding a claim of juror misconduct four years after the verdict:

The arguments against ordering a hearing at this late date are understandable. Memories fade with time. Assuming the jurors can be reassembled, testimony obtained now might be suspect, and its reliability subject to challenge. Moreover, the judge who saw the witnesses and heard the case on its merits has long since retired. Ordering a hearing now will leave another judge who had no involvement in the trial with the difficult task of determining whether the communication prejudiced the verdict.

State v. Miller, 178 Ariz. 555, 557, 875 P.2d 788, 790 (1994). The ideal time for interviewing jurors, in contrast, comes immediately after trial, when events are fresh in the jurors’ minds.²

¹ Arizona Rule of Criminal Procedure 24.1(d) prohibits courts from even *receiving* testimony or affidavits “which inquire[] into the subjective motives or mental processes which led to a juror assent or dissent from the verdict.”

² See *United States v. Villar*, 586 F.3d 76, 78–88 (1st Cir. 2009) (juror emailed defense counsel within hours of verdict to report racial bias); *Williams v. Price*, 343 F.3d 223, 226–39 (3d Cir. 2003) (juror misconduct claim raised in motion for new trial shortly after verdict); *Doan v. Brigano*, 237 F.3d 722, 726–27 (6th Cir. 2001) (juror misconduct raised during juror interviews occurring after conviction but before sentencing); *United States v. Swinton*, 75 F.3d 374, 380–82 (8th Cir. 1996) (juror contacted defendant after trial to report consideration of extrinsic evidence); *Burton v. Johnson*, 948 F.2d 1150, 1153–59 (10th Cir. 1991) (defense counsel contacted jurors and filed a motion for a new trial within one month of the verdict); *Keller v. Petsock*, 853 F.2d 1122, 1124–30 (3rd Cir.

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The Proposed Rule does not limit Rule 24.1. Rather, it provides necessary guidelines for counsel to contact jurors when there is good cause to believe jury misconduct has occurred. Counsel should not wait years before contacting jurors. But even if there is good cause to believe jury misconduct occurred years later, counsel can seek permission from the court to investigate the claims. This structure protects jurors from unwarranted contact and protects their privacy.

d. *Prevention of potential harassment.*

Prevention of juror harassment is yet another legitimate and compelling reason for courts to regulate post-trial juror contact. *McDonald*, 238 U.S. at 267–68. *See also United States v. Moten*, 582 F.2d 654, 665 (2d Cir. 1978) (“in order to insure that jurors are protected from harassment, a district judge has the power, and sometimes the duty, to order that post-trial investigation of jurors shall be under his supervision”).

The possibility of being subjected to post-trial contact years after the verdict creates a “possible deterrence of prospective jurors from fulfilling their obligation to serve.” *Townsel*, 979 P.2d at 968. For example, jurors might reasonably experience fear and anxiety when contacted by the representative of a convicted murderer they sentenced to death. *See United States v. Gutman*, 725 F.2d 417, 422 (7th Cir. 1984) (the practice of obtaining affidavits from jurors is “inherently intimidating” and must not be encouraged). Furthermore, if the practice of obtaining post-trial juror affidavits “ever becomes widespread [it] will make it even more difficult than it already is to get competent people

(... continued)

1988) (jurors visited attorney within 10 days of verdict to report juror misconduct); *United States v. Perkins*, 748 F.2d 1519, 1529–34 (11th Cir. 1984) (jurors contacted appellant, his counsel, and the court immediately after the verdict to report jury misconduct); *Bulger v. McClay*, 575 F.2d 407, 408–09 (2d Cir. 1978) (defense counsel questioned jurors as they left the courtroom and discovered basis for jury-misconduct claim); *United States v. Wilson*, 534 F.2d 375, 376–79 (D.C. Cir. 1976) (juror contacted jury commissioner’s office after jury was discharged); *United States v. Kum Seng Seo*, 300 F.2d 623, 623–26 (3d Cir. 1962) (juror contacted defense attorney to report jurors’ consideration of newspaper article).

to serve on juries.” *Id.*

Most significantly, a defendant’s representative arriving at a juror’s doorstep years after trial is completely different than a request to speak with jurors in the courtroom immediately after trial:

We do not encourage or suggest approval of post-verdict contact with jurors, seeking information with which to impeach the verdict, where such contacts are initiated without any cause to believe that improprieties occurred. . . . To some jurors, *a post-verdict contact by a convicted murderer’s agent may be an event of particular stress and fear. Such contacts may or may not invite accurate responses that recount events as they occurred.* Instead, because of the difficult position in which a juror is placed, such contact may invite statements which the contacted juror may think necessary to satisfy the agent.

State v. Chesnel, 734 A.2d 1131, 1139-40 (Me. 1999) (emphasis added). The proposed rule strikes a balance between protecting jurors from such unwanted contact while preserving the ability to investigate potential juror misconduct when warranted. *See Hall v. State*, 253 P.3d 716, 722, 724–25 (Idaho 2010) (good cause requirement balances protection from “unwanted contact and potential harassment” with defendant’s right to fair trial).

e. *Guidance from other jurisdictions.*

i. *Other states.*

Recognizing the need to balance juror protection with the defendant’s rights, other states require a showing of good cause before post-trial juror contact may occur and regulate the contact.

In many states, courts require defendants to show good cause before initiating post-trial juror contact. *See, e.g., People v. Wilson*, 43 Cal.App.4th 839, 852 (App. 2 Dist. 1996); *People v. Barton*, 37 Cal.App.4th 709, 716 (App. 2 Dist. 1995); *Hall*, 253 P.3d at 722; *Gatewood v. Sampson*, 812 So.2d 212, 217 (Miss. 2002); *Cyr v. State*, 308 S.W.3d 19, 30 (Tex. App. 4 Dist. 2009); *State v. Beskurt*, 293 P.3d 1159, 1162 (Wash. 2013); *State v. Blazina*, 301 P.3d 492, 493–94 (Wash. 2013)

Similarly, many states have codified guidelines in court rules and statutes designed to protect jurors' personal information or to prohibit post-trial contact absent a showing of good cause. *See e.g.*, Cal. Code Civ. P. § 206; *Id.* § 237(b); Haw. R. Prof. Conduct 3.5³; Ill. 12th Jud. Cir. Local R. 3.03; KY. Knox and Laurel Cir. Ct. R. 26; N.J. R. Ct. 1:16–1; Ohio Cuyahoga County Ct. Common Pleas Local R. 22(e); Tex. Code Crim. P. art. 35.29; Wash. Gen. R. 31(j).

ii. Federal jurisdictions.

Recognizing the importance of a formal process for obtaining information from jurors, and therefore generally disfavoring or prohibiting post-verdict juror interviews, federal courts also require a showing of good cause and regulate post-trial juror contact. The First Circuit Court of Appeals, for example, “prohibits the post-verdict interview of jurors by counsel, litigants or their agents except under the supervision of the district court, and then only in such extraordinary situations as are deemed appropriate.” *United States v. Kepreos*, 759 F.2d 961, 967 (1st Cir. 1985). The Fifth Circuit additionally refuses requests to contact jurors post-trial “unless specific evidence of misconduct was shown by testimony or affidavit,” because “[p]rohibiting post-verdict interviews protects the jury from an effort to find grounds for post-verdict charges of misconduct, reduces the ‘chances and temptations’ for tampering with the jury, increases the certainty of civil trials, and spares the district courts time-consuming and futile proceedings.” *Haeberle v. Texas Intern. Airlines*, 739 F.2d 1019, 1020 (5th Cir. 1984) (citation omitted). *See also Gutman*, 725 F.2d at 422 (request to contact the jurors requires a “showing of adequate need.”); *Griek*, 920 F.2d at 842 (post-trial juror contact prohibited absent a showing of good cause). And the Ninth Circuit’s statement that the “better practice” is to “seek leave of the court to approach the jury”—though not a requirement—further supports the notion that a party should show good cause before contacting jurors after a trial. *Hard v.*

³ This rule is intended to prevent “jury harassment” and “fishing expeditions,” and protect jurors’ thought processes and privacy. Haw. R. Prof. Conduct 3.5(e)(4) cmt.

Burlington Northern R.R., 812 F.2d 482, 485 n.3 (9th Cir. 1987).

Additionally, many federal district courts—including the District of Arizona—have enacted rules intended to protect the privacy and security of the jurors, and/or prohibit post-trial juror contact absent a showing of good cause. *See* D.Ariz., LRCiv. 39.2(b) (requiring a showing of good cause and submission of interrogatories for approval); LRCiv. 39.2(c) (providing for juror rights);⁴ *see also* D. Colo, Gen. Order 2007–3; D. D.C., Local Crim. R. 24.2; S. D. Fla., Local R. 11.1; E. D. La., Local Civ. R. 47.5; M. D. La., Local Civ. R. 47.4; D. N.H., Local Civ. R. 47.3; D. N.J., Local Crim. R. 24.1(g); W. Dist. of N.C., Local Civ. R. 47.1; E. D. Va., Local Crim. R. 24; S. D. W. Va., Local R. Crim. P. 31.1; E. D. Wis., Gen. Local R. 47(c).

The rules and procedures promulgated by these state and federal jurisdictions provide a model for the protections that should also be provided to Arizona’s jurors.

C. Conclusion.

The Arizona Attorney General’s Office respectfully requests that this Court adopt the Maricopa County Attorney’s proposed addition to the Arizona criminal procedure rules.

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⁴ The District of Arizona criminal rules follow the civil rule’s requirements regarding communications with trial jurors. *See* LRCrim. 24.2.

Respectfully submitted,

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