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

9 In the Matter of:

Supreme Court No. R-17-0014

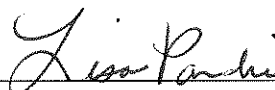
10 **PETITION TO AMEND RULE 23.1**
11 **OF THE ARIZONA RULES OF**
12 **CRIMINAL PROCEDURE**

13 **COMMENT OF**
14 **THE STATE BAR OF ARIZONA**


15 The State Bar of Arizona (“State Bar”) received a proposed comment in
16 opposition to this Petition from the State Bar’s Criminal Defense Practice &
17 Procedure Committee. After deliberation, the State Bar has decided not to adopt the
18 proposed comment as its own, and instead, to take no position on this Petition. The
19 State Bar submits this Comment only to tender a draft of the Criminal Defense
20 Practice & Procedure Committee’s proposed comment for the Court’s
21 consideration, with no further recommendation from the State Bar. A copy of this
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1 proposed comment is attached as the Appendix¹ to this Comment. The Criminal
2 Prosecution Practice & Procedure Committee did not submit a proposed comment,
3 therefore the State Bar does not have a proposed comment from the prosecutors'
4 committee to tender with this Comment.
5

6 RESPECTFULLY SUBMITTED this 22nd day of May, 2017.
7

8 
9 _____
10 Lisa M. Panahi
General Counsel

11 Electronic copy filed with the
12 Clerk of the Arizona Supreme Court
13 this 22nd day of May, 2017.

14 by: 
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21 _____
22 ¹ The proposed comment attached as the Appendix has been modified by the State
23 Bar to reflect the true drafter of the proposed comment. As such, the instances where
24 the State Bar of Arizona was referenced as filing the comment were modified, in
25 brackets, and replaced with "Criminal Defense Practice & Procedure Committee."

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APPENDIX

1 **PROPOSAL SUBMITTED BY CRIMINAL DEFENSE**
2 **PRACTICE & PROCEDURE COMMITTEE**

3 **INTRODUCTION**

4 Petition R-17-0014 proposes changing Rule 23.1 to permit jury forepersons
5 to sign a verdict form with their juror number and initials in lieu of placing a
6 signature on the verdict form. The stated purpose for the requested change is to
7 protect the identity of jurors from public release.
8

9 **DISCUSSION AND ANALYSIS**

10 As pointed out in Petition 17-0014, there are rules in existence already that
11 protect the identity of jurors. (Petition at 2). The petition argues that juror privacy
12 is not protected if the public can access the jury verdict form in a criminal case.
13 (*Id.*). The petition relies on *State v. McIntosh*, 213 Ariz. 579, 146 P.3d 80 (App.
14 2006). The [Criminal Defense Practice & Procedure Committee, hereinafter
15 “CDPP”] agrees that *McIntosh* ruled that a verdict form may be “signed” if the juror
16 “signs” simply with his number as opposed to his name. The concern here,
17 however, deals with the common understanding and practice relating to the
18 application of Rule 23.1.
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22 The verdict form presented to a jury has a signature line for the foreperson to
23 sign. The common practice is for an actual signature to be affixed above the line.
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1 *McIntosh* was an aberration of common usage and understanding associated with
2 Rule 23.1. While a verdict form may be valid if it is marked with a number as
3 opposed to a signature, that does not mean that *McIntosh* intended to interpret Rule
4 23.1 so as to do away with the actual written signature of the foreperson.
5

6 **Amending Rule 23.1 Will Result in Diminishing a Juror’s Sense of**
7 **Responsibility When Imposing a Death Sentence in a Capital Case.**

8 Capital cases are unlike any other criminal case in that the jurors, not the
9 judge, determine whether to impose a sentence of life or a sentence of death. Death
10 verdicts require a higher degree of reliability to be considered constitutional. *See,*
11 *Zant v. Stephens*, 462 U.S. 862, 884-885 (1983).
12

13 Consideration of the realities and the grave consequences of a death verdict
14 is a constitutionally required function of a penalty-phase jury. Indeed, the United
15 States Supreme Court’s Eighth Amendment jurisprudence “has taken as a given that
16 capital sentencers would view their task as the serious one of determining whether
17 a specific human being should die at the hands of the State.” *Caldwell v. Mississippi*,
18 472 U.S. 320, 329 (1985). The belief that jurors do “treat their power to determine
19 the appropriateness of death as an ‘awesome responsibility. . .’ is indispensable to
20 the Eighth Amendment’s ‘need for reliability in the determination that death is the
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1 appropriate punishment in a specific case.” *Id.* at 330, quoting *Woodson v. North*
2 *Carolina*, 428 U.S. 280, 305 (1976)(plurality opinion).

3
4 It is a standard procedure during voir dire for most capital defense attorneys
5 as well as many capital case prosecutors to use the fact that the jury foreperson is
6 required to sign a death verdict to impress upon the venire the awesome
7 responsibility of condemning a person to death. *See, e.g., People v. Tully*, 282 P.3d
8 173, 223-24 (Cal. 2012), (counsel’s reference during voir dire to a prospective
9 juror’s need to sign a death verdict if elected foreperson “was a way of impressing
10 upon her the gravity of a juror’s role in imposing the death penalty. . . .”).

11
12 The [CDPP] submits that amending Rule 23.1 as requested will lessen capital
13 jurors’ sense of responsibility in that there is a substantial difference between the
14 requirement to own up to a life and death decision by putting your name on a death
15 verdict as opposed to jotting down an all-but-anonymous number followed by two
16 letters from the alphabet.
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18
19 Consider how capital voir dire might appear following the requested
20 amendment to Rule 23.1:

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22 Counsel: Juror number 5, having listened to the
23 explanation of how the penalty phase will proceed, if you
24 are elected foreperson will you be able to place your juror
25 number and initials on a death verdict?

1
2 Juror #5: You mean I don't have to sign my name if I vote
3 for death?

4 Counsel: No. If you decide death is the appropriate
5 punishment, all you have to do is put down your juror
6 number and your initials.

7
8 Juror #5: Sure, I can do that.

9 The ability of a capital juror to take refuge behind the anonymity of a number
10 and a couple of letters will distance and insulate the juror from the awesome
11 responsibility of condemning a human being to death. It de-humanizes the decision
12 to impose death by seeming to remove the individual from the process. The death
13 decision becomes mechanical: The defendant is sentenced to death, signed #11
14 P.G.

15
16 **Jurors May Wrongly Perceive that a Defendant is Dangerous**
17 **When Told that a Signature is Not Required on a Verdict Form.**

18
19 With regard to all criminal cases, jurors may consider that the need for juror
20 anonymity arises due to a danger posed by the defendant. All parties to a criminal
21 case usually go to considerable lengths to avoid having the jury see the accused in
22 jail clothing, or being escorted into the courtroom by the detention officer, or having
23

1 difficulty moving about due to restraints. The concern is that jurors may believe
2 the defendant is dangerous and might try to harm them in the event he obtained
3 identifying information.

4
5 The potential prejudice to an accused is so great in those situations that the
6 United States Supreme Court ruled that an accused has a due process right not to
7 appear before a jury in any kind of visible restraints absent a requisite finding by
8 the court. *See, Deck v. Missouri*, 544 U.S. 622 (2005). Many cases have been
9 reversed or mistrials granted when a jury inadvertently viewed a defendant in
10 restraints.

11
12 If Rule 23.1 is amended as requested, there is a danger that jurors may believe
13 a defendant is dangerous when they are told that the foreperson is not required to
14 sign the verdict form, and that a number and initials will suffice.

15
16 In lieu of amending Rule 23.1, the [CDPP] believes that a simple solution, in
17 cases where it seems necessary, is to simply have the court seal the verdict form
18 after it has been read and reviewed by trial counsel.

19 **Conclusion**

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21 For the foregoing reasons, the [CDPP] opposes amending Rule 23.1 as
22 requested in Petition R-17-0014.
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