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

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| In the Matter of:<br><br>PETITION TO AMEND RULE 23.1 OF THE ARIZONA RULES OF CRIMINAL PROCEDURE | No. R-17-0014<br><br>**COMMENT OF ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN OPPOSITION TO THE PETITION** |

Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Arizona Attorneys for Criminal Justice ("AACJ") submits this comment in opposition to the Petition to Amend Rule 23.1 of the Rules of Criminal Procedure, R-17-0014, because it proposes an unnecessary change that will burden the rights of criminal defendants.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. 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.

**Discussion**

The proposed rule change seeks to amend the Rules of Criminal Procedure to allow jurors to sign the verdict form by using just a juror number and initials. This is an extension of the current jury system in Maricopa County, wherein jurors are referred to by number, not name. While the system being employed in Maricopa County is not directly an anonymous jury, they are of a similar species. The Supreme Court of Wisconsin reviewed just such a system in *State v. Tucker*, 657 N.W.2d 374 (Wis. 2003). In *Tucker*, "[b]oth parties had access to all the juror information, including the jurors' names." *Id.* at ¶ 11. The Court further presumed that the public could have obtained juror identity through the clerk's office. *Id.* Thus, the Court noted that the scenario was not the classic anonymous jury. *Id.* Nonetheless, the Court noted that numerical juries were of the same species. *Id.*

Anonymous verdict form fit in the same vein. It is a variation on anonymity at one of the most important stages of the jury function. Moreover, many of the concerns related to anonymous juries—the impact upon the presumption of innocence, accountability—are implicated by anonymous verdict forms.

AACJ opposes the petition for two reasons. First, the petition will negatively impact defendant rights. Specifically, anonymous juries and verdict forms violate a

defendant's right to be presumed innocent as jurors will interpret the anonymity as a reflection upon the defendant. Second, the petition seeks to solve a problem that does not exist. Where a privacy or security concern is present, the trial court can already order anonymous juries, numerical juries, an anonymous verdict form, seal the verdict form, or take any other number of steps as deemed appropriate. This conduct, however, is meant to be an exception. The petition seeks to normalize that exception and remove all mechanisms currently in place designed to protect the defendant.

1. **Anonymous juries and anonymous verdict forms negatively impact a defendant's constitutional rights.**

"Notwithstanding whether the jury … is characterized as an 'anonymous' or a 'numbers' jury, if restrictions are placed on juror identification or information, due process concerns are raised regarding a defendant's rights to an impartial jury and a presumption of innocence." *Id.* While some reasons to avoid anonymous juries do not squarely apply in a numerical jury setting or an anonymous verdict form, such as the ability to exercise peremptory strikes, *see U.S. v. DiDomenico*, 78 F.3d 294, 301-02 (7th Cir. 1996), others apply with equal weight.

As the Eleventh Circuit pointed out, "An anonymous jury raises the specter that the defendant is a dangerous person from whom the jurors must be protected, thereby implicating the defendant's constitutional right to a presumption of innocence." *U.S. v. Ross*, 33 F.3d 1507, 1519 (11th Cir. 1994). *Accord U.S. v.*

*Ochoa-Vasquez*, 428 F.3d 1015, 1034 (11th Cir. 2005) (quoting *Ross*). An anonymous verdict form does the same thing—it communicates that the defendant is a risk to the foreperson. While this is at the end of the presentation of evidence, it nonetheless implicates a defendant's right to the presumption of innocence.

The concern over a defendant's right to an impartial jury and the presumption of innocence is very real. A 1998 study published in *Law and Human Behavior*, found that anonymous juries convicted at a substantially higher rate, and recommended far more egregious penalties than non-anonymous juries. D. Lynn Hazelwood & John C. Brigham, *The Effects of Juror Anonymity on Jury Verdicts*, 22 Law and Human Behavior 695 (1998) ("Hazelwood & Brigham"). The study constructed hypothetical student disciplinary proceedings and had four-person juries deliberate guilt. *Id.* at 700-03. The study manipulated the hypothetical to create strong, moderate, and weak cases for guilt. *Id.* at 700-01. For each category of strength, more convictions resulted in anonymous juries. *Id.* at 703-05. *See also* Christopher Keleher, *The Repercussions of Anonymous Juries*, 44 U.S.F. L. Rev. 531, 563-63 (2010) ("Keleher") (discussing prior testing on accountability that reflected greater conviction rates for unaccountable juries). Beyond just the greater propensity for convictions, the anonymous juries were also more likely to impose harsher punishments. Hazelwood & Brigham, 22 Law and Human Behavior 695,

706. Where no nonanonymous jury imposed expulsion, five anonymous juries did. *Id.*

These findings validate the concern expressed by *Tucker* and *Ross*. Defendants have a due process right to the presumption of innocence. Jury anonymity substantially impacts that presumption. While a hypothetical student discipline proceeding is not a perfect analog, the creation of a perfect analog would be nearly impossible. Indeed, it has been observed that the rarity and recency of anonymous juries, along with their anonymous nature, contribute to a "paucity of research." Keleher, 44 U.S.F. L. Rev. 531, 560. Moreover, the student disciplinary hypotheticals do not carry the same optics as a criminal case. When a person is charged with a criminal case, the trial court's decision to proceed with jury anonymity communicates that the defendant is a danger—something the hypotheticals did not.

More recent legal scholarship has reiterated a concern for the presumption of innocence. A 2010 University of San Francisco Law Review article noted the impact of jury anonymity on the jury: "Jurors can interpret anonymity as a precaution against an unpredictable and violent defendant. These attributes are equated with guilt, prejudicing the jury before the first witness is called. Courts have noted this predicament." Christopher Keleher, *The Repercussions of Anonymous Juries*, 44 U.S.F. L. Rev. 531, 553 (2010).

Keleher went further, pointing to the interplay between the public trial clause and jury accountability. *Id.* at 564. From this perspective, Keleher argued that juror anonymity decreased accountability, and therefore undermined fairness. *Id.* at 564-65. Keleher relied largely upon prior scholarship that found unaccountable jurors recalled less evidence and were more likely to convict than accountable jurors. *See id.* at 563-65.

The findings by Keleher and Hazelwood & Brigham create a dire concern for capital cases. Given that anonymity increases both the likelihood of conviction and the severity of the punishment recommended, numerical juries and verdict forms that give an appearance of anonymity pose a particular risk in capital cases because the jury is the sentencer. In light of the fact that all capital cases necessarily involve a murder charge, jurors are left to believe the anonymity corroborates the defendant's danger. And where capital cases should reflect the most serious of decisions, anonymity risks a decrease in accountability.

In light of this confluence, anonymous and numerical verdict forms should not be considered the equivalent or the norm. And presently, anonymous or numerical verdict forms are not the norm. That is not to say, however, they are impossible. But the current scheme ensures variants of jury anonymity are only imposed on a case-by-case basis, are supported by sufficient concern, and the defendant's rights are adequately guarded.

**2. Where a trial court has a strong reason to believe a juror's safety or privacy is at risk, the trial court can already take steps to protect the juror. This must be balanced, however, with the impact to the defendant.**

With all of these concerns, and because the concerns are of constitutional dimension, trial courts must individually determine that jury anonymity, or a variant, is necessary. *See State v. Sundberg*, 247 P.3d 1213, 1222 (Or. 2011). As the United States Court of Appeals for the District of Columbia observed, "[d]ecisions on … anonymity require a trial court to make a sensitive appraisal of the climate surrounding a trial and a prediction as to the potential security or publicity problems that may arise during the proceedings." *U.S. v. Childress*, 58 F.3d 693, 702 (D.C. Cir. 1995).[1]

Regardless of whether security is or is not a legitimate concern, the trial court must make an individualized decision regarding jury anonymity or a variant. The Second Circuit noted two requirements: "'[a] strong reason to believe the jury needs protection' and the district court '[must take] reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected.'" *U.S. v. Wong*, 40 F.3d 1347, 1376 (2d Cir. 1994) (quoting *U.S. v. Paccione*, 949, F.2d 1183, 1192 (2d Cir. 1991)).

[1] Because security is the concern, it is worth noting that some have argued the safety concern is illusory. *See* Keleher, 44 U.S.F. L. Rev. 531, 559. Keleher concluded, "The fear that jurors could be harmed because of their verdict is understandable but unfounded. No one has ever been killed because he sat on a jury. Security is imperative …. [but t]he rationale of security has limits." *Id.*

In determining whether there is sufficient cause to justify an anonymous jury, courts consider a number of factors, generally including:

> (1) the defendants' involvement in organized crime; (2) the defendants' participation in a group with the capacity to harm jurors; (3) the defendants' past attempts to interfere with the judicial process or witnesses; (4) the potential that, if convicted, the defendants will suffer a lengthy incarceration and substantial monetary penalties; and, (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment.

*U.S. v. Branch*, 91 F.3d 699, 724 (5th Cir. 1996) (quoting *U.S. v. Krout*, 66 F.3d 1420, 1427 (5th Cir. 1995)). *Accord* Keleher, 44 U.S.F. L. Rev. 531, 538; Hazelwood & Brigham, 22 Law and Human Behavior 695, 696.

Notably absent from the list of considerations set forth in *Branch* is mere privacy from the media. Keleher observed that media presence may actually improve juror accountability, and therefore the reliability of verdicts. Keleher, 44 U.S.F. L. Rev. 531, 564-65. Regardless of whether mere privacy from the media is sufficient to warrant anonymity, the trial court already has tools available to ensure privacy. Just as with any other pleading, exhibit, or filing, the trial court can seal a verdict form if the trial court has good reason to believe a juror would be placed at risk. Alternatively, if the trial court had good reason to believe a juror would be placed at risk by signing her name, the trial court would have the ability to authorize the procedure requested here.

The existence of the process employed nationally also demonstrates that there is no real need for the proposed change. A mechanism already exists for the trial court to use a numerical or anonymous jury, it is merely a question of the presumption and the process. The current process presumes a nonanonymous jury and allows for deviation when there is good cause. The proposed rule change strips that presumption and good cause requirement and allows for trial courts to utilize numerical jury signatures on a whim.

**3. Because the proposed rule change eliminates the protections currently in place, the status quo better balances all interests.**

The petition would remove the protections that exist under the widely accepted approach. The proposed change would remove the standard presumption of an open, nonanonymous jury and verdict form. Instead, the verdict form may be filled out in one of two ways. There is no requirement that the trial court make an individualized finding of risk or media exposure.

Also problematic is that the proposed rule change does away with any affirmative protection of a defendant's rights. As the Second Circuit noted, if anonymity is to be allowed, steps must be taken to protect the rights of criminal defendants. *Wong*, 40 F.3d at 1376. One such step was discussed in *U.S. v. Paccione*: an instruction that the anonymity is to protect the jury from media contacts, as opposed to defendant threat. 949 F.2d at 1192-93. The proposed rule

change contains no mechanism or device to ensure a defendant is adequately protected and the jury does not wrongfully interpret the granted anonymity.

Finally, the fact that this change conforms to changes made in the civil rules of procedure should not carry weight. Civil litigants are in a markedly different position from criminal defendants. The criminally accused have constitutional rights that civil litigants do not have. Moreover, jury anonymity will not have a unidirectional assumption in civil cases. In civil cases, jurors will be no more likely to think the anonymous verdict form is due to the plaintiff or defendant. In criminal cases, however, jurors will presume that an anonymous verdict is to protect them from a dangerous and retributive defendant. The current distinction between civil and criminal cases makes perfect sense.

All-in-all, the current system better balances all interests. Where there is a strong reason to believe a juror's safety or privacy is at risk, the trial court may take proper action. However, this action must be taken on a case-by-case basis; it cannot be taken in every without reason to believe there is a risk, as the proposed change would allow. Moreover, the action must be supported by a strong reason to believe the juror is at risk; not merely a preference or whim, as the petition would allow. Finally, the trial court must take affirmative steps to protect a defendant's constitutional rights, which the proposed change does not require.

## Conclusion

The present proposal normalizes what should be an exception. Anonymous verdicts and anonymous or numerical juries should be an exception, not a regular process. The policy reasons behind anonymous verdicts do not apply to every case. Not every case involves defendants involved in organized crime, defendants who previously attempted to interfere with the judicial process, defendants facing lengthy incarceration or substantial monetary penalties, or pretrial publicity that would expose the jurors to intimidation or harassment. Some cases do, but these are the exceptional cases, not the standard.

That is not to say that judges cannot order anonymous verdicts when appropriate. Where the trial court has a strong reason to believe an anonymous verdict form should be used and takes steps to adequately protect the defendant's interests, an anonymous or numerical verdict form is available (as is an order sealing the verdict form). But this Court should not make an exception the norm. In light of the important constitutional interests, nonanonymous verdict forms should be the presumption.

The status quo better balances the interests of all involved and protects the rights of criminal defendants. Accordingly, AACJ asks that this Court reject Petition R-17-0014.