

1 WILLIAM G. MONTGOMERY  
2 MARICOPA COUNTY ATTORNEY  
(FIRM STATE BAR NO. 00032000)

3 MARK C. FAULL  
4 CHIEF DEPUTY  
5 301 WEST JEFFERSON STREET, SUITE 800  
6 PHOENIX, ARIZONA 85003  
7 TELEPHONE: (602) 506-3800  
(STATE BAR NUMBER 011474)

8 ARIZONA SUPREME COURT

10  
11 PETITION TO MODIFY RULES  
12 18.5, 22.5, AND 32.1, ARIZONA  
13 RULES OF CRIMINAL  
14 PROCEDURE

R-19-\_\_\_\_\_

MARICOPA COUNTY ATTORNEY'S  
PETITION TO MODIFY RULES 18.5, 22.5  
AND 32.1, ARIZONA RULES OF CRIMINAL  
PROCEDURE

15 The Maricopa County Attorney files this petition to modify the criminal rules to  
16 protect juror privacy during and after their service in criminal jury trials.

17  
18 Respectfully submitted this 9<sup>th</sup> day of January, 2019.

19 WILLIAM G. MONTGOMERY  
20 MARICOPA COUNTY ATTORNEY

21 By   
22 MARK C. FAULL  
23 CHIEF DEPUTY  
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1 **I. Introduction**

2 Criminal prosecution in Arizona includes a constitutionally guaranteed right to a  
3 jury trial for both the accused and the State. Ariz. Const. art. II, §24; A.R.S. § 13-  
4 3983; *Phoenix City Prosecutor’s Office v. Ybarra*, 218 Ariz. 232, 234 ¶¶ 10-13 (2008).  
5  
6 To fulfill this constitutional guarantee, women and men are court ordered to appear and  
7  
8 serve as jurors. The willingness of these citizens to step out of their everyday lives to  
9  
10 appear and serve as jurors is the foundation of our entire trial-by-jury system. Without  
11  
12 citizens willing to serve, the constitutional right to a jury trial is meaningless. The  
13  
14 system must do what it can to protect the safety and privacy of those who serve as  
15  
16 jurors. Failing to do so increases the burden of jury service, reducing the number of  
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18 those willing to serve, and further burdening those who do. Juror privacy is one area  
19  
20 where Arizona must do more to protect our jurors.

17 **II. Argument**

18 **ARIZONA MUST GIVE CRIMINAL TRIAL JURORS THE ABILITY TO**  
19 **PROTECT THEIR PRIVACY.**

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21 Our appellate courts have recognized, as a matter of policy, the importance of  
22 encouraging jury service. *Stewart v. Carroll*, 214 Ariz. 480, 484 ¶ 20 (App. 2007). To  
23 that end, the court has shielded disclosure of a prospective juror’s medical condition  
24 from public disclosure stating: “Individuals who are called for jury duty do not forfeit  
25 their privacy rights when they are called for jury duty.” *Id.* at 484-85. As the court  
26 concluded, “Requiring prospective jurors to run the risk of having their private mental  
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1 or physical conditions made public hardly encourages jury service.” *Id.* at 484-85.  
2 These juror privacy concerns prompted our legislature to enact A.R.S. § 21-  
3 202(B)(1)(c)—a statute exempting disclosure of a prospective juror’s mental or  
4 physical condition which renders them incapable of jury service. Another statute,  
5 A.R.S. 21-312, limits release of jurors’ names and biographical information.  
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8 The need to protect jurors’ privacy has never been more vital than it is today.  
9 Today’s public forum exists online via Twitter, blogs, and all manner of social  
10 networking communication. Information gathering no longer requires a trip to the  
11 courthouse and hours spent thumbing through files or scrolling through microfiche.  
12 Most records are now lodged in databases awaiting a Google search request which can  
13 be launched by anyone anywhere who has a computer or smart phone and an internet  
14 connection. Distributing the gathered information no longer depends on newspaper  
15 articles vetted and reviewed by an editor, approved for printing, and delivered each  
16 morning. Instead, with just a computer and internet connection, the information is  
17 disseminated almost instantaneously to a worldwide audience. *See Blue’s Guide to*  
18 *Jury Selection*, by Lisa Blue Ph.D., J.D. and Robert B. Hirschhorn, J.D., Appendix G-  
19 5, by Ted A. Donner, December 2016 update.  
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24 Once a juror’s first and last names are found, that juror’s home address and other  
25 contact information are often easily found using any one of many internet-based  
26 people-locating search engines. This readily accessible information has led private  
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1 investigators or others seeking to discuss the specifics of juror service or deliberations  
2 to contact juror months or years after their service. Two examples of tracking down  
3 jurors years after their discharge from jury service arose in *State v. Pandeli*, 215 Ariz.  
4 514 (2007), and *State v. Leteve*, 237 Ariz. 516 (2015)<sup>1</sup>. Some of these jurors contacted  
5 the State to express their displeasure at having their privacy invaded.  
6

7  
8 Providing jurors with an option to either allow contact or decline contact could  
9 address these concerns before unwanted contact occurs. “Opt-in/opt-out” provisions  
10 are, in today’s world, familiar to most every consumer. Whether it be Facebook  
11 privacy settings, or credit card privacy options, privacy is an option many consumers  
12 embrace. Offering jurors a privacy option is consistent with the practice in the  
13 marketplace. A post-verdict opt-in/opt-out election that could only be disturbed by  
14 petitioning a court under a good-cause standard and allowing a court to set the scope  
15 of permissible contact would be a major step in the direction of juror privacy and would  
16 be consistent with current case law. *See State v. Olague*, 240 Ariz. 475, 481-82 (App.  
17 2016).  
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21 Reluctance to serve on a criminal-case jury is understandable. Jurors in criminal  
22 trials are often exposed to violence, depravity and graphic evidence that is a far cry  
23 from what they see and deal with in their everyday lives. Their reluctance to appear  
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27 <sup>1</sup>The juror-track-down issue was not addressed in the cited appellate opinions. Citations are  
28 included for reference, only.

1 for jury service is exacerbated when, in addition to the unpleasant realities they must  
2 face during the trial, they forfeit their privacy for years to come.

3  
4 Shielding jurors' home addresses from disclosure in voir dire is not new. In 1959  
5 the Ninth Circuit upheld such an order. In that case, the federal circuit court affirmed  
6 a trial court's discretionary decision to shield jurors' home addresses by allowing jurors  
7 to identify the area or district in which they lived, rather than their specific address.  
8 *Johnson v. U.S.*, 270 F.2d 721, 724 (9<sup>th</sup> Cir.1959), *cert. denied*, 362 U.S. 937 (1960).  
9

10 Some courts take a further step in protecting juror privacy by empaneling an  
11 "anonymous jury." This method shields juror names from all parties. Although this  
12 petition does not ask the Court to implement a provision for anonymous juries in  
13 Arizona, this technique is briefly mentioned to demonstrate one approach courts have  
14 used to address the privacy issue. Anonymous juries have been empaneled in high  
15 profile trials, such as the trial of former Illinois governor Rod Blagojevich. In the  
16 Blagojevich case the Seventh Circuit determined that the question was not whether  
17 juror names can be withheld, but rather what circumstances justify either deferred  
18 disclosure of juror names or keeping juror names secret. *U.S. v. Blagojevich*, 612 F.3d  
19 558, 561 (7<sup>th</sup> Cir. 2010). According to research published by Blue's Guide to Jury  
20 Selection, there is a growing acceptance in federal court of anonymous juries for the  
21 attendant safety and protection accorded to jurors. Federal Courts have upheld the use  
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1 of anonymous juries in the six circuits including the D.C. circuit.<sup>2</sup> From the present  
2 day trial of Mexican drug lord Joaquin Guzman Loera, a.k.a. El Chapo, to the early  
3 1990's trial of the Gambino organized-crime boss John Gotti, and as far back as the  
4 1977 trial of Harlem drug kingpin Leroy "Nicky" Barnes, anonymous juries have been  
5 utilized to protect jurors and to protect the integrity of the criminal justice system.<sup>3</sup>  
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7  
8 This petition addresses both the policy and practical challenges of according  
9 increased privacy to jurors by requesting three changes. First, the proposed change to  
10 Rule 18.5 specifically prohibits any contact with prospective, seated, or deliberating  
11 jurors until they are discharged. Second, the proposed changes to Rule 22.5 gives  
12 criminal trial jurors the power to "opt out" of conversations about the case and protect  
13 their privacy in the future. Finally, the changes to Rule 32.1<sup>4</sup> will permit contact with  
14 a juror who has requested no contact when it is in the interests of justice.  
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22 <sup>2</sup> Blue's Guide to Jury Selection, Appendix G-5, by Lisa Blue Ph.D., J.D. and Robert B. Hirschhorn,  
J.D., December 2016 update

23 <sup>3</sup> Alan Feuer, "*El Chapo Jurors Will Be Anonymous During Trial*", N.Y. Times, Feb. 6, 2018;  
24 Arnold H. Lubasch, "*Jurors in Gotti Case To Be Sequestered And Not Identified*", N.Y. Times,  
Nov. 15, 1991.

25 <sup>4</sup> The rule regarding obtaining a court order could be a stand-alone rule with the post-trial motion  
26 rules or the appellate rules because juror contact may be an issue in either of those contexts. It is  
27 proposed as a Rule 32 addition, however, because that is the most common situation where jurors  
28 have their privacy invaded by being contacted about their service years after a case has concluded.  
The proposed change to Rule 22.5 cross references the procedure for obtaining a court order to remind  
practitioners of the procedure for obtaining an order if it is needed outside the Rule 32 context.

1 **III. Conclusion**

2 For all the reasons explained above the Maricopa County Attorney asks this Court  
3  
4 to modify the criminal rules as specified in the appendix below.

5 Respectfully submitted this 9<sup>th</sup> day of January, 2019

6 WILLIAM G. MONTGOMERY  
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10 CHIEF DEPUTY

1 APPENDIX A

2 RULE 18.5, ARIZONA RULES OF CRIMINAL PROCEDURE

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4 **Rule 18.5. Procedure for Jury Selection**

5 (a) – (i) [No Change]

6 (j): CONTACT WITH JURORS. A PARTY OR A PARTY'S  
7 REPRESENTATIVE MUST NOT HAVE ANY CONTACT WITH PROSPECTIVE  
8 JURORS, ALTERNATE JURORS, OR JURORS WHO HAVE NOT BEEN  
9 DISCHARGED.

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13 RULE 22.5, ARIZONA RULES OF CRIMINAL PROCEDURE

14 **Rule 22.5. Discharging a Jury**

15 (a) [No Change]

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17 (b) **Disclosures and Release from Confidentiality.** When discharging a jury at  
18 the conclusion of the case, the court must advise the jurors that they are released from  
19 service. If appropriate, the court must release them from their duty of confidentiality  
20 and explain their rights regarding inquiries from counsel UNDER (C), the media, or  
21 any person.  
22

23  
24 (c) CONSENT TO INQUIRIES FROM COUNSEL.

25 (1) NOTICE OF RIGHTS. UPON DISCHARGE THE COURT MUST  
26 INFORM JURORS THAT THEY MAY AGREE OR REFUSE TO SPEAK WITH  
27

1 THE PARTIES ABOUT THE CASE. THE COURT MUST ALSO INFORM THE  
2 JURORS THAT IF THEY AGREE, THE PARTIES MAY SPEAK TO THEM  
3 ABOUT THE CASE NOW OR AT SOME TIME IN THE FUTURE AND IF THEY  
4 REFUSE THE PARTIES MUST NOT TALK TO THEM ABOUT THE CASE  
5 WITHOUT A COURT ORDER. EVEN IF A JUROR AGREES TO SPEAK THEY  
6 CAN DECIDE TO END ANY CONVERSATION AT ANY TIME.

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9 (2) DECISION ON THE RECORD. EACH JUROR'S OPTION MUST BE  
10 RECORDED EITHER BY POLLING EACH JUROR ON THE RECORD OR USING  
11 A WRITTEN FORM WHICH WILL THEN BE FILED WITH THE CLERK.

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13 (3) REFUSAL. A PARTY OR ANY PERSON ACTING ON BEHALF OF  
14 A PARTY MAY NOT CONTACT A JUROR WHO HAS REFUSED TO SPEAK TO  
15 DISCUSS ANY ASPECT OF JURY SERVICE WITHOUT A COURT ORDER AS  
16 PROVIDED IN RULE 32.1.

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20 **RULE 32.1, ARIZONA RULES OF CRIMINAL PROCEDURE**

21 **RULE 32.1: Scope of Remedy**

22 **Petition for Relief.** [No Change]

23 **Of-Right Petition.** [No Change]

24 **Grounds for Relief.** [No Change]

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26 **JURORS WHO REFUSED POST-VERDICT CONTACT.**

1           (a) GENERALLY. IF A JUROR REFUSED CONTACT UNDER RULE  
2 22.5(C), NO PARTY OR ANYONE ON BEHALF OF ANY PARTY MAY HAVE  
3 ANY CONTACT WITH THAT JUROR TO DISCUSS ANY ASPECT OF JURY  
4 SERVICE, UNLESS THE COURT ISSUES AN ORDER AUTHROIZING THE  
5 CONTACT.

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8           (b) RIGHT TO RESPOND. ALL PARTIES HAVE THE RIGHT TO  
9 RESPOND TO ANY MOTION SEEKING A COURT ORDER FOR CONTACT  
10 UNDER THIS RULE.

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12           (c) NATURE OF THE ORDER. THE COURT MAY ISSUE AN ORDER  
13 PERMITTING THE JUROR CONTACT ONLY UPON A SHOWING OF GOOD  
14 CAUSE. ANY ORDER PERMITTING CONTACT MUST SPECIFY THE GOOD  
15 CAUSE FOUND AND DEFINE THE SCOPE OF PERMISSIBLE CONTACT.  
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