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IN THE ARIZONA SUPREME COURT

In the Matter of,

PETITION TO MODIFY RULES
18.5, 22.5, AND 32.1, ARIZONA
RULES OF CRIMINAL
PROCEDURE

ARIZONA SUPREME COURT
No. R-19-0008

COMMENT TO PETITION TO
MODIFY RULES 18.5, 22.5, AND 32.1,
ARIZONA RULES OF CRIMINAL
PROCEDURE

The Maricopa County Attorney’s Office (MCAO) has petitioned this Court to adopt proposed modifications to Arizona Rules of Criminal Procedure 18.5, 22.5, and 32.1. The proposed changes would prevent a party in a criminal case from initiating post-verdict contact with any juror who opted-out of contact unless the party first obtained permission from the court after demonstrating “good cause” for the requested contact. (Pet. at 6; Pet., App. A at 8-10.) The proposed rule changes would impede the discovery of important constitutional errors, transgress fundamental constitutional rights, and be an unnecessarily broad and restrictive

means by which to address the problem Petitioner vaguely alleges exists. For the reasons below, this Court should decline to adopt the proposed modifications to Rules 18.5, 22.5, and 32.1.

I. Background.

Petitioner proposes three related rule changes designed to limit, and in many instances eliminate, juror contact in criminal cases. First, Petitioner proposes adding a provision to Arizona Rule of Criminal Procedure 18.5 specifically prohibiting contact with prospective jurors, alternate jurors, or jurors who have not been discharged. (Pet. at 8.)¹ Second, Petitioner proposes adding a provision to Rule 22.5 requiring courts to notify criminal jurors that following discharge they may either agree or refuse to speak with parties about the case and requiring jurors to enter a decision on the record either agreeing to all future contact or declining contact. (*Id.* at 8-9.) Third, Petitioner proposes adding a provision to Rule 32.1 permitting a party who can demonstrate good cause justifying contact to obtain a court order allowing contact with a juror who previously elected not to be contacted. (*Id.* at 9.) The second and third proposed rule changes, adding provisions to Rules 22.5 and 32.1, work together to severely limit or eliminate post-verdict juror contact.

¹ While the Office of the Federal Public Defender for the District of Arizona does not believe such a rule change is necessary given local practice, it does not object to this addition to the Criminal Rules.

The Arizona Supreme Court previously considered and rejected a similar rule change. In 2014, Petitioner MCAO urged the Arizona Supreme Court to adopt a new rule of criminal procedure, which would have prevented contact with discharged jurors after they departed the court house “unless specifically permitted by the court upon a showing of good cause. Good cause must be established by substantial evidence which justifies intrusion into a juror’s privacy.” *See* Pet. to Adopt R. 23.5, Ariz. R. Crim. P., No. R-14-0008 (Jan. 1, 2014).

The State Bar of Arizona and others opposed Petitioner’s 2014 petition. The State Bar correctly observed that “absent post-verdict communication with jurors, defense counsel will never be able to provide ‘substantial evidence’ of ‘good cause’ justifying court-approved juror communication.” Comment of the State Bar of Arizona, *In re Rule 23.5, Rules of Criminal Procedure*, No. R-14-0008 at 4 (May 8, 2014). The State Bar ultimately concluded that the 2014 proposed rule “violates and effectively obviates and obliterates Rule 24.1[, which permits a new trial based on a showing of juror misconduct] as well as claims of juror misconduct permissibly raised pursuant to Rule 32.” *Id.* at 5. The Arizona Supreme Court ultimately denied Petitioner MCAO’s 2014 petition. *See* Order, *In re Rule 23.5, Rules of Criminal Procedure*, No. R-14-0008 (Ariz. Sept. 3, 2014).

Petitioner’s current rule petition—although adding provisions allowing jurors to opt in or out of future contact—does not cure the defects the State Bar and other

commenters identified in the 2014 rule change petition, and the Arizona Supreme Court should again deny the proposed change to the criminal rules.

Petitioner MCAO also urged a legislative enactment during the most recent legislative session. Like the current proposed rule change, Senate Bill 1313 would have limited post-verdict contact with jurors if they declined future contact at the close of the trial proceedings. The Arizona Legislature declined to adopt the proposed statutory limitation on post-verdict juror contact. The Arizona Supreme Court should join the Arizona Legislature in denying Petitioner's request to limit or eliminate post-verdict juror contact.

II. Post-Verdict Juror Interviews are Necessary to Discover Constitutional Errors.

Many significant constitutional violations are only discoverable through juror interviews. Jurors have unique information and are often the only people to know whether misconduct, bias, or extraneous influences improperly affected the jury process. While claims alleging juror misconduct, juror bias, extraneous influence, or comparable constitutional violations may warrant relief, many such claims would never come to light without juror interviews.

There are a variety of reasons the parties may have no indication that any misconduct has occurred before speaking to the individual jurors. Issues related to juror bias or misconduct are often not reflected in the trial record. In addition, jurors may not share problems in the proceedings with the court during or immediately

following the trial for several reasons, including if they perceive their behavior as violating the court's orders, if they do not recognize that particular actions constituted misconduct, or if the misconduct involved the actions of a court official. *See* Nicole B. Cásarez, *Examining the Evidence: Post-Verdict Interviews and the Jury System*, 25 *Hastings Comm. & Ent. L.J.* 499, 589-90 (2003) (describing circumstances in which jurors are unlikely to reveal misconduct to the court). For example, if the trial judge entered the deliberation room to discuss a jury question without the attorney present, the jurors are unlikely to recognize this as actionable misconduct or to report that misconduct to the judge who initiated the interaction.

Post-verdict juror contact has repeatedly revealed important information that otherwise would not have come to light. For example, juror interviews have revealed jury processes improperly influenced by racial animus, *see, e.g., Tharpe v. Sellers*, 138 S. Ct. 545, 546-47 (2018); *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), juror and bailiff misconduct, *Wellons v. Hall*, 558 U.S. 220, 220-26 (2010) (per curiam); *State v. Gallardo*, 225 Ariz. 560, 564, 242 P.3d 159, 163 (2010); *State v. Miller*, 178 Ariz. 555, 557, 875 P.2d 788, 790 (1994), and jurors' improper exposure to, or consideration of, extraneous information, *Parker v. Gladden*, 385 U.S. 363, 363-65 (1966) (per curiam); *Turner v. Louisiana*, 379 U.S. 466, 468-69, 472-74 (1965); *Tarango v. McDaniel*, 837 F.3d 936, 940-41, 945-52 (9th Cir. 2016).

In addition to information about misconduct during the jury process, jurors may have unique information relevant to a range of other important issues, including inappropriate communications with prosecutors,² prejudice resulting from alleged constitutional violations, and information relevant to clemency decisions. *See* 25 Hastings Comm. & Ent. L.J. at 514-546 (detailing types of information jurors often discussed in post-verdict interviews).

The information discovered in juror interviews implicates important constitutional rights and courts have an obligation to ensure the propriety of the jury process. Thus, it is imperative that defendants are not encumbered in their efforts to investigate and present these relevant facts in court.

III. The Proposed Limitations on Post-Verdict Contact Impede the Discovery of Constitutional Violations.

The proposed rule changes significantly impede the discovery and presentation of crucial evidence underlying important constitutional claims. Proposed Rule 22.5(c) requires jurors in a criminal case to decide whether or not they are open to post-verdict contact with the parties *immediately following the conclusion of their jury service*. Requiring jurors to make a decision about contact immediately following the completion of their potentially lengthy and stressful jury

² On March 1, 2019, the State Bar of Arizona filed a formal bar complaint against MCAO prosecutor Juan Martinez. The complaint alleged, among other things, improper contact between Mr. Martinez and a released juror involving inquiries from Mr. Martinez as to the internal thoughts and reactions of remaining jurors.

service poses a risk that many jurors will decline contact. An initial decision to decline contact carries significant consequences and is likely to prohibit any future contact with the juror.

Such consequences are not alleviated even if some jurors agree to contact. Because of the nature of the jury process—driven by the individual experiences of every juror on the panel—a rule preventing contact with even a single juror may result in an inability to discover and present important evidence of juror misconduct, bias, or consideration of extraneous evidence. For example, if one or two jurors, who later opted out of post-verdict contact, engaged in improper internet research or conducted an out-of-court experiment and did not openly share this information with other jurors, then interviewing only jurors who opted in would not lead to the discovery of this misconduct. By preventing contact with any juror, the proposed rule threatens to prevent the discovery of important evidence.

Similarly, the consequences of an initial decision declining contact are not alleviated by the provisions in Proposed Rule 32.1(a)-(c), which permit contact with a juror who initially declined contact if a party obtains a court order after demonstrating good cause for the requested contact. The good cause provision is likely to prove illusive. As the State Bar of Arizona observed in response to Petitioner’s 2014 rule change petition, “absent post-verdict communication with jurors, defense counsel will never be able to provide ‘substantial evidence’ of ‘good

cause’ justifying court-approved juror communication.” Comment of the State Bar of Arizona, *In re Rule 23.5, Rules of Criminal Procedure*, No. R-14-0008 at 4 (May 8, 2014). In the absence of juror contact, the good cause requirement will be difficult or impossible to meet because, as discussed above, often only jurors have the information necessary to form a factual basis sufficient to demonstrate good cause. If counsel has not interviewed the jurors and jurors are the only witnesses to acts of misconduct, counsel has no way of presenting information sufficient to demonstrate good cause.

IV. Petitioner’s Proposed Rule Changes Impede the Rights to Reliable and Fair Proceedings, the Effective Assistance of Counsel, and Free Speech.

By impeding defendants’ ability to discover and present crucial information about the proceedings against them, the proposed rule changes endanger 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 encumbers defendants’ rights to a fair trial and impartial jury. Second, imposing restrictions on vital avenues of investigation creates a state-imposed obstacle to the constitutionally guaranteed effective assistance of counsel. The proposed rule changes also burden the First Amendment right to freedom of expression and access by placing broad restrictions on communications with jurors.

A. The Proposed Rules Burden the Rights to a Fair Trial and Impartial Jury.

“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). These rights are implicated in a wide variety of circumstances, including but not limited to when there have been improper communications with jurors, *Turner*, 379 U.S. at 472-74; *Parker*, 385 U.S. at 363-66; *Remmer v. United States*, 347 U.S. 227, 228-30 (1954), or when jurors consider evidence that is not properly before them, *Gibson v. Clanon*, 633 F.2d 851, 853-55 (9th Cir. 1980).

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 show good cause to contact a juror who previously declined future contact imperils these rights and renders their promise essentially meaningless by leaving defendants without adequate means to discover and challenge violations.

B. The Proposed Rules Burden the Right to the Effective Assistance of Counsel.

Further, the rights described above would have little meaning without the effective assistance of counsel. *See 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. By impairing counsel’s ability to investigate the underlying proceedings, the proposed rule changes interfere with the effective representation of counsel.

C. The Proposed Rules Burden the First Amendment Right to Free Speech and Access.

Finally, both the United States Constitution and the Arizona Constitution guarantee the freedom of expression. U.S. Const. amends. I, XIV; Ariz. Const. art. 2 § 6; *see also State v. Stummer*, 219 Ariz. 137, 143, 194 P.3d 1043, 1049 (2008) (noting that the Arizona Constitution’s free-expression guarantees have even “greater scope than the first amendment” (internal quotations and citation omitted)). Any prior restraint on speech bears a “heavy presumption against its constitutional

validity.” *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (internal quotations and citations omitted).

The United States Supreme Court has made clear that restrictions on access to jurors’ statements must be based upon specific factual findings, not unsupported generalizations about concerns for juror privacy. *See 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 more heightened during voir dire—when jurors must answer questions in a public forum. *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, in the post-verdict interview context, *Press Enterprise* counsels that restricting speech based on unsupported, non-specific allegations would be an unacceptable intrusion on freedom of expression. *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 proposed changes to Rules 22.5 and 32.1 work together to create a broad and onerous burden on communications with criminal jurors. These restrictions on post-verdict juror contact unnecessarily burden speech, presenting serious constitutional concerns.

V. Petitioner's Proposed Rule Changes are Unnecessary and Overly Broad

Petitioner asserts that the proposed rule changes are necessary because the increasing ease of internet research has facilitated juror contact and “[s]ome of these jurors contacted the State to express their displeasure at having their privacy invaded.” (Pet. at 4.)³ Petitioner's vague assertion that some jurors have expressed “displeasure” with post-verdict contact lacks the context and substance necessary to justify the proposed rule changes.

Notably, Petitioner does not allege, and has presented no evidence, that any of the contact was harassing or otherwise improper. To the extent any post-verdict contact is improper, Arizona law already protects jurors from harassing or unwanted contact.

³ Although Petitioner frames the proposed rule changes as necessary to protect juror privacy, it is worth noting that the proposed rule changes only attempt to limit unexpected or unwanted initial contact with former jurors by a party or a representative of a party. The proposed rule changes do not prohibit media or other interested individuals or organizations from contacting former jurors and do not shield juror contact information.

Arizona Revised Statute § 13-2921 prohibits harassment, which includes contact or communication that “would cause a reasonable person to be seriously alarmed, annoyed or harassed” and does “in fact seriously alarm[], annoy[] or harass[.]” Ariz. Rev. Stat. § 13-2921(E). Moreover, Arizona Rule of Professional Conduct 3.5 prohibits lawyers from communicating with a juror “after discharge of the jury if . . . the juror has made known to the lawyer a desire not to communicate” or if “the communication involves misrepresentation, coercion, duress or harassment.” Ariz. R. Sup. Ct. 42, E.R. 3.5, 2003. The commentary to the rule requires that attorneys “respect the desire of the juror not to talk with the lawyer” and prohibits “improper conduct during the communication.” *Id.*, cmt. 3. Finally, the Code of Ethics promulgated by the National Association of Legal Investigators prohibits licensed investigators from knowingly violating any right or privileged of any individual guaranteed by state law. Together, these rules ensure, in a much more direct way than the proposed rule changes, that defense counsel and investigators will not mistreat jurors and provide a remedy if any such misconduct occurs. Interviews that are harassing or misleading can and should be addressed on a case-by-case basis.

If the “displeasure” described by Petitioner is simply the result of contact by a party’s representative and surprise that the representative was able to obtain the juror’s contact information, the problem is more appropriately addressed by

educating jurors about the possibility of future contact by a representative of the parties. Educating jurors directly addresses the problem of surprise, fear, or displeasure, and does not run the very real risk of preventing discovery of important constitutional claims.

While, according to Petitioner, some jurors have found post-verdict contact displeasing, Petitioner provides no evidence of how many jurors have complained, the context of the complaint, or any other details. Empirical evidence indicates that many jurors do not decline contact made following discharge. Thousands of jurors have participated in post-verdict interviews with academics, the media, and with counsel. The Capital Jury Project alone has conducted interviews with approximately 1200 jurors across 14 states who have served on over 350 capital trials. *See What is the Capital Jury Project?*, School of Criminal Justice, University at Albany, State University of New York, *available at* <https://www.albany.edu/scj/13189.php> (last visited April 19, 2019) (explaining the Capital Jury Project researches “how persons who serve as jurors on capital cases make the life or death sentencing decision”); *see also* 25 Hastings Comm. & Ent. L.J. at 509-10 (reviewing literature and articles and finding that many jurors are interested in sharing their experiences as part of the jury system).

Here in Arizona, the vast majority of juror contacts occur without incident and jurors are free to either participate in an interview or decline. Capital defense teams

in Arizona have contacted scores of jurors who are interested in sharing their experiences.

The broad restrictions proposed by Petitioner are not justified by Petitioner's unsubstantiated assertion that some jurors have expressed displeasure at post-verdict contact. *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.

VI. Conclusion.

While juror concerns about post-verdict contact should be taken seriously, Petitioner's proposed rule changes strictly limit the investigation, discovery, and presentation of serious constitutional violations. A more studied and refined approach—including a fact-based inquiry into any complaints by contacted jurors—is necessary to address the concerns raised by Petitioner. To the extent any post-verdict contact with jurors is improper or harassing, Arizona has a process for addressing such misconduct. If the concerns of jurors are simply that they have been identified as a juror and their contact information is publicly available, the jurors' concerns are better addressed through simple juror education: notifying jurors that post-verdict contact is common and no cause for concern. For the reasons above, the

undersigned respectfully ask this Court to decline to adopt Petitioner's unnecessarily broad and restrictive proposed rule changes.

Respectfully submitted this 29th day of April, 2019.

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This comment e-filed this 29th day of April, 2019, with:

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