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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	No. R-19-0008
	)	
	)	**COMMENT OF ARIZONA**
Petition to Modify Rules 18.5, 22.5 and	)	**CAPITAL REPRESENTATION**
32.1, Arizona Rules of Criminal	)	**PROJECT, MARICOPA COUNTY**
Procedure	)	**PUBLIC DEFENDER, AND**
	)	**ARIZONA ATTORNEYS FOR**
	)	**CRIMINAL JUSTICE**
	)	**REGARDING PETITION TO**
	)	**MODIFY ARIZ. R. CRIM. P. 18.5,**
	)	**22.5 AND 32.1**
	)	

Pursuant to Rule 28 of the Arizona Rules of Supreme Court, the Arizona Capital Representation Project ("ACRP"), the Maricopa County Public Defender's Office ("MCPD"), and Arizona Attorneys for Criminal Justice ("AACJ") hereby submit the following comment to the above-referenced petition to modify Ariz. R. Crim. P. 18.5, 22.5 and 32.1submitted by the Maricopa County Attorney's Office ("MCAO").

ACRP is a non-profit legal organization that represents capital defendants and provides pro bono training and consultation to teams defending capital clients throughout the State of Arizona. ACRP tracks and monitors all capital cases at all stages state-wide. Its mission is to improve the quality of representation afforded to capital defendants in Arizona.

MCPD is the largest indigent defense law firm in the State of Arizona and handles a majority of all felonies, and is the presumptive agency of assignment for all designated or anticipated death penalty cases in Maricopa County.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order 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.

The proposed amendments would substantially and unnecessarily interfere with post-conviction litigants' ability to investigate and reveal prosecutorial misconduct and constitutional violations. The proposed modifications are inconsistent with precedent and contrary to the expansion of inquiries into juror misconduct. Similar proposals were rejected by this Court in 2014 and by the Arizona Legislature earlier this year. The interests of justice require that they again be rejected.

1. **The proposed modifications would impede defense attorneys' ability to thoroughly and competently represent their clients.**

Proposed Rule 22.5 would impede defense attorneys' ability to competently represent their clients by interfering with counsel's ability to investigate potential claims for new trial and post-conviction relief. To provide competent representation, counsel must investigate his or her client's constitutional claims. *See, e.g.*, *McCleskey v. Zant*, 499 U.S. 467, 498 (1991) ("[P]etitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition."); ABA Criminal Justice Standards, Defense Function (3d ed.), Standard 4-4.1 (defense counsel has a duty to "conduct a prompt investigation of the circumstances of the case and explore

all avenues leading to facts relevant to the merits"); Standard 4-8.5, Commentary ("Since a postconviction proceeding is fundamentally an original judicial proceeding, involving problems of investigation, preparation, and trial, the Standards governing lawyers in these tasks are essentially the same as those outlined in these Standards for the defense of a criminal case."); ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.15.1 and Commentary (2003) ("Post-conviction counsel should seek to litigate all issues . . . that are arguably meritorious . . . [and] preserve them for subsequent review."); ABA Guideline 10.7(A) (attorneys at each stage are obliged "to conduct thorough and independent investigations relating to the issues of both guilt and penalty"). The ABA Guidelines further impose a professional obligation to contact jurors in post-conviction proceedings. *See, e.g.*, Guideline 10.15.1(E)(4) ("Post-conviction counsel should … continue an aggressive investigation of all aspects of the case."); 10.10.2, Commentary n.260 ("[C]ounsel investigating a capital case should be particularly alert to the possibility that, notwithstanding surface appearances, one or more jurors were unqualified to sit at either phase of the trial and make every effort to develop the relevant facts, whether by interviewing jurors or otherwise. Such inquiries can be critical in discovering constitutional errors.") (citation and internal quotation marks omitted).

Post-trial juror misconduct claims are governed by Ariz. R. Crim. P. 24.1(c)(3). A defendant has only ten days from return of the verdict to file such a claim; this time limit is jurisdictional and cannot be extended. Rule 24.1(b); *see also State v. Fitzgerald*, 232 Ariz. 208, 212 ¶ 20 (2013) ("Rule 24 contains no 'discovery rule' exception to the ten-day requirement in Rule 24.1(b)."). Further, "Because claims of juror misconduct can be raised on post-trial motion under Rule 24, [a defendant] generally is precluded from raising them in a petition for post-conviction relief." *State v. Kolmann*, 239 Ariz. 157, 163 ¶ 25 (2016). By requiring a court order to approach jurors who indicate a refusal to speak with litigants, MCAO's proposed Rule 22.5(c)(3) places an almost impossible burden on defendants seeking to meet the ten-day deadline. The proposed modification is further unworkable because it requires that a motion for leave to contact such jurors be placed within Rule 32, thus providing no avenue under Rule 24.

ACRP, MCPD, AACJ members, and other members of the criminal defense community who practice post-appeal litigation in capital and non-capital cases consider it essential to investigate all potential avenues for relief for their clients, including investigating the possibility of juror misconduct or misconduct witnessed by jurors. Due to the secretive nature of jury deliberations, and the fact that there is no ability to record or otherwise document their processes, there is simply no other way to learn of such misconduct without asking members of the panel. Thus,

requiring counsel to demonstrate good cause--or to meet any standard--before contacting jurors to investigate misconduct impedes counsel's ability to provide thorough and adequate representation.

2. <u>Proposed Rule 32.1(c) would prevent discovery and presentation of valid constitutional claims in violation of the rights of criminal defendants.</u>

Further, Proposed Rule 32.1(c) would prevent valid constitutional claims from being discovered or, at best, delay discovery until federal habeas proceedings. As enshrined in our state and federal Constitutions, criminal defendants are entitled a fair and impartial jury. U.S. Const. amends. V, VI, XIV; Ariz. Const. art. 2, §§ 4, 23, 24. In capital cases, the right to an impartial jury is further protected by prohibitions against cruel and unusual punishment. U.S. Const. amend. VIII; Ariz. Const. art. 2, § 15; *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982). The Supreme Court has insisted that the right to an impartial jury be scrupulously protected, *see, e.g.*, *Parker v. Gladden*, 385 U.S. 363, 364-66 (1966), and state and federal collateral proceedings are the proper venues for pursuing relief when this paramount right has been violated.

Arizona post-conviction petitioners are required to "include every ground known to him or her for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed upon him or her" and to provide "[a]ffidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition . . . ." Ariz. R. Crim. P. 32.5. In order to obtain *formal*

discovery in post-conviction proceedings, a petitioner is first required to file his or her petition and establish good cause therein. *Canion v. Cole*, 210 Ariz. 598 (2005). Proposed Rule 32.1(c) would impose a "good cause" threshold and require trial courts to micromanage the defense investigation by "defin[ing] the scope of permissible contact" with each juror. It is virtually impossible to determine whether any juror misconduct occurred or whether a juror witnessed misconduct without reaching out to jurors themselves. Arizona jurisprudence is rife with examples of instances where misconduct came to light via juror contact after conviction. Even where juror misconduct was discovered by happenstance, juror contact would have provided the best assurance that juror misconduct was discovered.

In *State v. Hall*, 204 Ariz. 442, 446 ¶ 12 (2003), the defense contacted jurors post-verdict and discovered that the bailiff had inappropriately discussed prejudicial facts surrounding defendant's tattoos with the jury, and that the jury had discussed those facts among themselves. The defense presented this information to the court in the form of affidavits. Additionally, their investigative interviews with the jurors were used to impeach jurors who testified at the evidentiary hearing that they had not heard or considered the information. *Id*. at 447 ¶ 13. Because the jurors had considered extrinsic evidence, this Court reversed the trial court's denial of relief, and reversed Hall's murder conviction and death sentence. *Id*. at 449 ¶ 25.

In *State v. Glover*, 159 Ariz. 291, 292-293 (1988), the defense presented an affidavit from the jury foreman revealing two instances of significant juror misconduct. One juror had asked his wife, a person with medical training, for information regarding the crucial fact at issue, namely the effect that the defendant's consumption of alcohol and prescription drugs would have had on him (the defense was accident). Another had asked a person in law enforcement regarding the effect of a hung jury and was incorrectly advised that the defendant would "walk out a free man." This Court reversed the aggravated assault conviction and remanded for a new trial. *Id*. at 294.

In *State v. Compton*, 127 Ariz. 420, 421 (App. 1980), the defendants were convicted of conspiracy to commit murder. The trial court conducted an evidentiary hearing on the defense motion for a new trial based on the bailiff's improper statement to jurors that the judge would not allow them to go home that evening without reaching a verdict. Over the prosecution's objection, jurors testified in support of the motion, and, given that the bailiff denied making the statement, those contacts were instrumental in supporting the defense motion. The trial court ordered a new trial. The appellate court overruled the prosecution's objection and affirmed the trial court's order.

In fact, Arizona's courts not only accept declarations from jurors, but require them to support post-trial claims. In *State v. Pearson*, 98 Ariz. 133, 135 (1965), the

defendant sought a new trial based on the judge's alleged improper statements to jurors. The motion was supported by defense counsel's affidavit relating a juror's statement—not the juror's affidavit. *Id.* at 135-36. This Court held that a juror's affidavit is a prerequisite to relief. *Id*. at 136. *Accord State v. McMurtrey*, 136 Ariz. 93, 98 (1983) (rejecting claim that jurors saw defendant in shackles, and stating, "It is well settled that affidavits of third parties as to unsworn statements of jurors are not competent evidence of juror misconduct.") (citations omitted); *State v. Wassenaar*, 215 Ariz. 565, 576 ¶ 44 (App. 2007).

The foregoing decisions are merely examples. Arizona case law, both recent and dating to the earliest days of statehood, is replete with parties' reliance on juror affidavits obtained through post-trial investigation. *State v. Nelson*, 229 Ariz. 180, 190-91 ¶ 47 (2012); *State v. Dickens*, 187 Ariz. 1, 15 (1996); *Dunn v. Maras*, 182 Ariz. 412, 419-20 (App. 1995); *State v. Walker*, 181 Ariz. 475, 483-84 (App. 1995); *Richtmyre v. State*, 175 Ariz. 489, 491 (App. 1993); *Brooks v. Zahn*, 170 Ariz. 545, 548 (App. 1991); *Kirby v. Rosell*, 133 Ariz. 42, 43 (App. 1982); *State v. Poland*, 132 Ariz. 269, 282 (1982); *Valley Nat'l Bank v. Haney*, 27 Ariz. App. 692, 693 (1976); *Board of Trustees Eloy Elementary Sch. Dist. v. McEwen*, 6 Ariz. App. 148, 149 (1967); *Webb v. Hardin*, 53 Ariz. 310, 312 (1939); *Southwest. Cotton Co. v. Ryan*, 22 Ariz. 520, 524 (1921); *Hull v. Larson*, 14 Ariz. 492, 495 (1913). *See also State v. Aguilar*, 224 Ariz. 299-300 ¶¶ 1-3 (App. 2010) (ordering new trial where bailiff

stumbled upon evidence of juror misconduct that could have been discovered through post-trial juror interviews).

3. <u>The constitutional right to challenge verdicts based on misconduct in jury rooms is expanding,</u>

In *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), the Court established a constitutional exception to the centuries-old limitation on post-trial inquiries into jury deliberations. The Court recognized that the common law Mansfield Rule prohibited jurors "from testifying either about their subjective mental processes or about objective events that occurred during deliberations." *Id*. at 863. This standard eventually evolved into Federal Rule of Evidence 606(b)(1), which provides, in pertinent part, "[A] juror may not testify about any statement made or incident that occurred during the jury's deliberations …" Every state has adopted some variation of the rule. *Id*. at 865.

Before *Pena-Rodriguez*, the Court had never found an exception to the rule. *Id*. at 866. However, the Court spoke strongly in announcing an exception designed to battle racism in the courtroom, "A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." *Id*. at 869. Jurors must be encouraged to reveal racism and other misconduct that may taint convictions. Adoption of MCAO's proposal would deter jurors from doing so.

4. <u>MCAO cites no persuasive authority in support of the proposal.</u>

MCAO only cites two Arizona Court of Appeals decisions in support of its proposal. It primarily relies on *Stewart v. Carroll*, 214 Ariz. 480 (App. 2007), but fails to do so accurately. The case addressed A.R.S. § 21-202(B)(1), which permits excusal of a "prospective juror [who] has a mental or physical condition that causes the juror to be incapable of performing jury service." The defendant challenged § 21-202(B)(4)(e) to the extent that it provided that medical records submitted by such prospective jurors "are not public records and shall not be disclosed to the general public." The court rejected the defendant's challenge based on the mandate in article 2, section 11 of the Arizona Constitution that "justice in all cases shall be administered openly …" *Id*. at 484 ¶ 18. The court held, "The legislature's decision to maintain the confidentiality of medical statements submitted by prospective jurors does not infringe the constitutional requirement of 'public judicial proceedings' …" *Id*. at ¶ 20.

MCAO claims *Stewart* to be an example of "the court [having] shielded disclosure of a prospective juror's medical condition from public disclosure …" Petition at 2. However, as the court noted, it was the legislature that provided the protection. Further, that statute does not shield the medical records from consideration in court or from the defense; it only keeps them from being public records. Finally, the court pointed out, "[T]he open-courts requirement 'does not

guarantee a defendant access to information that he or she desires. Any constitutional right to this information must be found elsewhere.'" *Stewart*, 214 Ariz. at 485 ¶ 20, *quoting State v. Ramirez*, 178 Ariz. 116, 127 (1994). In other words, the court left open the option that this narrow category of information may be exposed under other constitutional provisions.

MCAO also cites *State v. Olague*, 240 Ariz. 475 (App. 2016). After he was convicted, Olague filed two motions for a new trial based on juror misconduct, "The trial court denied the motions and prohibited Olague from initiating further contact with jurors absent the court's prior approval." *Id.* at 477 ¶ 4. The appellate court found no abuse of discretion. *Id*. at 480 ¶ 17. It first concluded that the juror declarations filed in support of the motion did not establish grounds for a new trial. *Id*. at 480-481 ¶¶ 19-20.

Second, as to the trial judge's requirement that Olague show good cause before further contacting jurors, the court noted that it upheld such an order in *State v. Paxton*, 145 Ariz. 396, 397 (App. 1985), though "with little reasoning or analysis …" 240 Ariz. at 481 ¶ 23. Regardless, the *Olague* court stated:

> Stare decisis therefore requires special justification to depart from existing precedent. *Turley v. Ethington*, 213 Ariz. 640 ¶ 26 (App. 2006). Yet neither party has addressed *Paxton* on appeal. Moreover, Olague has not developed a meaningful argument that the trial court's order prevented him from discovering any jury misconduct in this case.

Id. The court further noted that Olague's investigation obtained the contact information for eight jurors, that he had interviewed four, and submitted declarations from two. *Id*. at 481-82 ¶ 24. In addition:

> The time for filing a new trial motion already had expired when the trial court made its order limiting his access to the jurors. Olague has not explained which jurors, if any, the court's order prevented him from contacting or attempting to contact. We therefore find no special justification, on the particular facts before us, to disturb our holding in *Paxton*.

Id. . It is noteworthy that no reported decision has ever cited *Olague* or *Paxton* to support the denial of a defendant's right to conduct post-trial juror investigation. The cases cited by MCAO do not support the broad changes to the criminal rules that it seeks.

5. <u>Current Arizona provisions adequately protect jurors' privacy.</u>

ACRP, MCPD, and AACJ recognize that jurors' interests in privacy and being free of harassment are deserving of protection. However, those interests are already sufficiently protected by Arizona's rules, ethical standards, and caselaw.[1]

For example, Rule 18.3(b) provides, "The court must keep all jurors' home and business telephone numbers and addresses confidential, and may not disclose them unless good cause is shown." Rule 18.5(e) mandates that, during voir dire,

[1] MCAO's proposal that a provision be added (Rule 18.5(j)) barring contact with "prospective jurors, alternate jurors, or jurors who have not been discharged" is wholly unnecessary. Every judge in Arizona imposes this requirement in every trial.

"The court must ensure the reasonable protection of the prospective jurors' privacy." Rule 18.6(d)(4) ensures that notes jurors take are destroyed at the conclusion of trial.

At the close of trial, Rule 22.5(c) requires the court to "advise the jurors that they are released from service." Further, "If appropriate, the court must release them from their duty of confidentiality and explain their rights regarding inquiries from counsel, the media, or any person." Rule 24.1(d) limits the scope of juror testimony at hearings on post-trial motions, thus removing any incentive a party might have to pepper a former juror with irrelevant, intrusive questions.

The Arizona Rules of Professional Conduct also protect jurors' privacy. They recognize that a lawyer may approach a juror after the jury has been discharged, but require that the lawyer "respect the desire of the juror not to talk with the lawyer," and the lawyer "may not engage in improper conduct during the communication." Ariz. R. Sup. Ct. 42, E.R. 3.5(c) & cmt. [3]; *see also* ABA Model Rules of Prof'l Conduct R. 3.5(c) & cmt. [3]. The ABA Criminal Justice Standards also provide that defense counsel "should not intentionally make comments to or ask questions of a juror for the purpose of harassing or embarrassing the juror in any way which will tend to influence judgment in future jury service." ABA Standards for Criminal Justice: Prosecution & Defense Function, Defense Function Standard 4-7.3. Finally, as noted in Section 4, *supra*, Arizona's appellate courts already recognize that judges have discretion to limit parties' post-trial contacts with jurors.

In attempting to support its proposal, MCAO states, "Without citizens willing to serve, the constitutional right to a jury trial is meaningless." Petition at 2. While certainly true, MCAO provides no evidence that existing rules and ethical standards fail to adequately protect jurors. The proposal would, in fact, threaten this constitutional right by unnecessarily impairing defendants' right to investigate violations of their right to a fair trial.

In light of the foregoing, it is unsurprising that this Court rejected MCAO's similar proposal five years ago. *See* R-14-0008. It is similarly unsurprising that the Arizona Legislature rejected a similar statutory proposal earlier this year. *See* S.B. 1313, attached as Exhibit A.

6. <u>MCAO presents no evidence supporting its proposal.</u>

MCAO's proposes modifications based on speculative and unsubstantiated concerns. It claims that unidentified "jurors contacted the State to express their displeasure at having their privacy invaded." Petition at 4. MCAO makes no claim that anyone who reached out to the jurors did anything illegal, unethical or improper. In fact, it is standard procedure for counsel in post-conviction capital cases to seek interviews with trial jurors. The defense bar is unaware of a single claim of an improper statement or act made to a court, law enforcement, the State Bar or anyone else.

Further, if a juror, or anyone else with potentially relevant information, does not wish to speak to defense counsel, the person can simply decline and counsel will abide by such wishes. However, it is AACJ, ACRP and MCPD's experience that most jurors do not decline. This is also true of jurors across the country who have voluntarily consented to post-verdict interviews by counsel, academics, and the press. *See, e.g.*, Neil Vidmar, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS JURY AWARDS (1995) (Vidmar conducted detailed interviews with jurors in five medical malpractice cases); William J. Bowers, *The Capital Jury Project: Rationale Design and a Preview of Early Findings*, 70 Ind. L.J. 1043, 1077-79 (1993) (describing interviews of 1201 jurors across 14 states conducted by researchers); Sanja Kutjnak Ivkovich & Valerie Hans, *Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 Law & Soc. Inquiry 441-82 (2003) (Ivkovich and Hans conducted interviews with a sample of 269 jurors who decided cases involving business and corporate defendants); Daniel Shuman & Anthony Champagne, *Removing the People from the Legal Process: The Rhetoric and Research on Judicial Selection and Juries*, 3 Psychol. Pub. Pol'y & L. 242–58 (1997) (Shuman and Champagne interviewed lawyers, testifying experts, and jurors about how the juries responded to expert testimony presented in large samples of trials).

The media, which will not be regulated by MCAO's proposed modifications, also frequently contacts jurors after high-profile trials and questions them without any limitation as to scope or propriety. Jurors are free to answer questions and many have done so. For example, the high-profile cases of George Zimmerman and Jodi Arias have shown that some jurors are eager to talk about their experiences. Those who chose not to speak have clearly shown their ability to refuse such requests. Certainly, media contacts, likely from multiple media sources, are at least as intrusive as contacts by a defense lawyer or investigator.

Thus, MCAO offers not a single instance of a defense representative having harassed a juror. But MCAO's proposed "solution" will impede fundamental rights of defendants and obligations of defense counsel to investigate potential claims.

7. <u>MCAO committed the only know harassment of a juror.</u>

Ironically, the only allegation of juror harassment of which AACJ, ACRP or MCPD are aware is detailed in a complaint pending before the State Bar of Arizona against one of MCAO's best known death penalty prosecutors, Juan Martinez. That complaint, No. PDJ 2019-9008, among other allegations, accuses Mr. Martinez of revealing the identity of the lone holdout juror in the Jodi Arias trial. https://www.abc15.com/news/region-phoenix-metro/central-phoenix/arizona-state-bar-files-formal-complaint-against-arias-prosecutor-juan-martinez.

8. <u>The Constitution requires that a remedy be provided for every right.</u>

Juror misconduct includes the reception of extrinsic evidence, deciding the verdict by lot, answering questions dishonestly during voir dire, bribery, vote pledging, intoxication, and conversing before the verdict with any interested party about the outcome of the case. Rule 24.1(c)(3). Additionally, a new trial may be ordered if "[f]or any other reason not due to the defendant's own fault the defendant has not received a fair and impartial trial or phase of trial." Rule 24.1(c)(5). Similarly, grounds for relief under Rule 32.1 include that the conviction or sentence was in violation of the Arizona or United States Constitution. Rule 32.1(a).

It is a long-held principle in American jurisprudence that a right must have a remedy. *Marbury v. Madison*, 5 U.S. 137, 146 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy."); *State v. Rosengren*, 199 Ariz. 112, 122 ¶ 32 (App. 2000) ("[T]he remedy for violation of crucial constitutional rights must not render such rights hollow or illusory.").

The rights to petition for a new trial and for post-conviction relief give effect to those constitutional rights that protect the right to not be denied life, liberty, and property without due process of law. MCAO's proposal would effectively gut the remedies of motions for new trial and petitions for post-conviction relief under Rule 32.1, by creating an unreasonable and often impossible standard to meet before being given the ability to fully investigate the issues.

9. <u>MCAO's proposal would uniquely suppress defenses lawyers' free speech rights.</u>

Defense lawyers, like every other person, possess the right to free speech under the Arizona and United States Constitutions. U.S. Const. amend. I; Ariz. Const. art. 2, § 6. The Supreme Court has repeatedly held, "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963); *see also New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968). State actions that deter free association must be justified by a "compelling" state interest. *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958).

The Arizona Constitution's protections are even more rigorous than those of the U.S. Constitution. *Coleman v. City of Mesa*, 230 Ariz. 352 (2012). Any prior restraint on free speech is "heavily" presumed to be unconstitutional. *See State v. Book-Cellar, Inc.*, 139 Ariz. 525 (App. 1984). The proposed rule would create a unique class of persons--parties to a case--who are not permitted to talk to jurors. Meanwhile, members of academia and the media have an interest in interviewing jurors and are permitted to do so. To prevent defense counsel from doing so does not even meet a rational-basis standard.

Any journalist, blogger, or mere curiosity-seeker can contact any former juror at will without fear of sanction. Only post-conviction lawyers, officers of this Court

and charged with investigating "every claim" for relief under the Constitution and Rule 32, need fear. They alone would be enjoined from discharging their duties to their clients. MCAO's proposal cannot co-exist in the same universe with Rules 6.8 and 32, the ethical rules governing lawyers, and the First and Sixth Amendments.

10. Conclusion

Not everyone likes being summoned from their daily routines to decide the liberty or life of another, and some jurors are annoyed when a defense lawyer or investigator appears at their door and asks to speak with them about their case. But our state and federal constitutions create a system that imposes these small burdens on the many to protect the fundamental rights of the few who are – rightly or wrongly – targeted by government.

It thwarts the interests of justice to suggest to jurors at their discharge that they have the right to avoid a minor disturbance days or years in the future. If justice is to be served, judges should, if anything, encourage jurors to answer questions about their service that may be posed by lawyers, investigators or academics. Justice flourishes in the light of day, not in darkness. The current advice provided by trial judges, however, is sufficient; jurors are advised that they may choose to speak with anyone they want, or not.

For the reasons set forth above, AACJ, ACRP and MCPD respectfully request this Court deny MCAO's petition.

DATED: April __, 2019

ARIZONA CAPITAL REPRESENTATION PROJECT

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