

ARIZONA SUPREME COURT

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

R-19-

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

Pursuant to Rule 28(C) of the Rules of the Supreme Court of Arizona, the Arizona Attorney General's Office submits the following comments to the Maricopa County Attorney's petition to modify the criminal rules to protect juror privacy by reasonably limiting parties' post-verdict contact with jurors.

The Arizona Attorney General's Office supports the Maricopa County Attorney's Petition to modify Rules 18.5, 22.5, and 32.1 of the Arizona Rules of Criminal Procedure, to "protect juror privacy during and after their service in criminal jury trials." (Petition at 1.) In recent years, as the Petition points out, there have been repeated instances of unwarranted and unwanted contact between criminal defense teams and jurors years after the juror's civic service had concluded, particularly in capital cases—often during Rule 32 and federal habeas proceedings. (Petition at 3–4.) The proposed changes provide a balance between jurors' privacy and any necessary access to jurors for legitimate investigative purposes.

A. Background.

Although the current Arizona Criminal Rules provide some privacy protections to persons summoned to court for jury service, jurors receive no statutory protection after they have been discharged or excused. Title 21 of the Arizona Revised Statutes governs juries in general, including the role of the jury commissioner, juror qualifications, permitted excuses from jury service, juror compensation, and the formation of juries. Jury service is not optional, but rather is a civic duty to be provided by all qualified jurors. *See State v. Bojorquez*, 111 Ariz. 549 (1975) (“Jury service is not a matter of choice or right, but is a duty imposed by the state on such terms as the state may set.”). Absent postponement or excuse, a juror may be fined for failing to appear on the date scheduled. A.R.S. § 21–223. Jury service, however, is not perpetual. A juror’s term of service is fulfilled upon excuse or discharge. A.R.S. § 21–332(A)(1).

Several Arizona rules and statutory provisions protect jurors’ personal information in order to shield them from unsolicited contact and harassment. *See* A.R.S. § 21–312 (keeping confidential jurors’ names and information); Ariz. R. Crim. P. 18.3 (information obtained in jury selection kept private and not disclosed unless good cause shown); Ariz. R. Crim. P. 18.5(e) (ensuring juror privacy during examination at trial); Ariz. R. Crim. P. 23.3 (identity of jurors’ names kept private during polling).

None of the above provisions, however, specifically protects jurors from post-trial contact. In several recent capital post-conviction-relief (“PCR”) proceedings, as well as federal habeas proceedings, a defendant’s team (counsel, mitigation specialist, and/or investigator) has contacted former trial jurors, without advance court permission and without being told that they may decline to speak with the defense team—protections which the jurors enjoy during trial. Several jurors have expressed concern regarding this contact, which generally occurs several years post-trial, outside the courtroom (including, sometimes, at the juror’s home), and by persons who are different than those who represented the defendant at trial. Rule changes are necessary to protect jurors from such and to give force to the assurances made to jurors who have completed their civic duty.¹

¹ This Court acknowledges the intended juror protection on its website, in relevant part, as follows.

Both prospective and impaneled jurors have the right to privacy and confidentiality.

* * *

Your home or mailing address is known only to the court. *Only the judge can order the release of jurors' addresses, usually to the lawyers in the case, and only for a good, legal reason. This very rarely happens.* At the conclusion of the trial, should you be contacted by the lawyers in a case in which you sat as a juror, remember that you are not obligated to divulge any information concerning the deliberations, the verdict, or your opinions about anything concerning the case unless ordered to do so by the court.

* * *

Reporters may interview the lawyers or parties in a case, and once the trial is over may request to interview the jurors. It is your decision

(continued ...)

B. The Proposed Changes Provide Necessary Continued Protection to Juror Privacy in all Post-Verdict Proceedings.

As set forth by the Petition, the proposed changes would codify guidelines for post-trial contact with jurors. Several reasons support the changes, including: (1) a juror's right to privacy; (2) protection of the integrity and finality of the jury verdict; (3) the limited grounds and time in which a motion for new trial may be filed; and (4) prevention of potential juror harassment, fear, and anxiety. Additionally, rules and guidelines adopted by other jurisdictions demonstrate that Arizona would not be alone in acting to protect jurors from unwanted post-trial contact.

a. A juror's right to privacy.

Jury service does not negate a juror's right to privacy, and jurors should not have to fear its loss. As a matter of policy, Arizona courts have recognized a juror's right to privacy to encourage jury service. *See State v. Ramirez*, 178 Ariz. 116, 127 (1994); *Stewart v. Carroll*, 214 Ariz. 480, ¶ 20 (App. 2007).

As stated previously, numerous cases in Maricopa County have seen jurors complain of unsolicited contact by a defense team member after the juror's service,

(... continued)

whether or not to consent to an interview. You are not obligated to divulge any information concerning the deliberations, the verdict, or your opinions about anything concerning the case.

(<https://www.azcourts.gov/juryduty/Jury-Service-What-to-Expect> Emphasis added.)

and sometimes this contact is not identified to jurors as on behalf of the defendant. And because this unsolicited contact often occurs in the PCR or federal habeas stage, the contact is anywhere between 5 and 10 years after the conclusion of jury service. These post-conviction contacts take place with no court oversight and no notice to the jurors or the State. The rule changes would provide the needed juror protection, while simultaneously permitting court oversight for post-verdict defendants seeking any legally justifiable information from jurors.

b. *Protecting the integrity and finality of jury verdicts.*

Public policy concerns also support court oversight of juror contact to prevent improper inquiries into the jury's deliberative process. *See Hyde v. United States*, 225 U.S. 347, 383–84 (1912); *State v. Landrum*, 25 Ariz. App. 446, 448 (1975). Guidelines and limitations governing post-trial juror contact protect the integrity and finality of the jury's verdict—something in which the State, the court, the community, and crime victims have an interest. *See State v. Callahan*, 119 Ariz. 217, 219 (App. 1978); *see also* Ariz. Const. Art. 2.1(A)(10) (victims have a right to prompt and final conclusion of the case after the conviction and sentence).

“[L]ong-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry.” *Tanner v. United States*, 483 U.S. 107, 127 (1987). Prevention of juror harassment is a legitimate and compelling reason for courts to regulate post-verdict juror contact. *McDonald v. Pless*, 238 U.S. 264, 267–68 (1915). *See United States v. Gutman*, 725 F.2d 417, 422 (7th Cir. 1984)

(the practice of obtaining affidavits from jurors is “inherently intimidating”). The United States Supreme Court has further explained that “[b]y the beginning of [the twentieth] century, if not earlier, the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict.” *Tanner*, 483 U.S. at 117. This is supported by “substantial policy considerations” that necessitate “shielding jury deliberations from public scrutiny:”

Let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

Id. at 119-20, quoting *McDonald*, 238 U.S. at 267-68.

Federal courts widely recognize the importance of a formal process for obtaining information from jurors, and therefore generally disfavor or prohibit post-verdict juror interviews. See e.g. *United States v. Griek*, 920 F.2d 840, 842 (11th Cir. 1991); *United States v. Kepreos*, 759 F.2d 961, 967 (1st Cir. 1985) (“[T]his Circuit prohibits the post-verdict interview of jurors by counsel, litigants or their agents except under the supervision of the district court, and then only in such extraordinary situations as are deemed appropriate”); *Haeberle v. Texas*

Intern. Airlines, 739 F.2d 1019, 1020 (5th Cir. 1984); *Gutman*, 725 F.2d at 422; *Smith v. Cupp*, 457 F.2d 1098, 1100 (9th Cir. 1972). Federal courts have also found that restrictions on juror interviews violate neither the Sixth nor First Amendment. See *Griek*, 920 F.2d at 843–44. The Ninth Circuit expressly condemns the intrusion into the expressions, arguments, motives, and beliefs of jurors, and has held that it is “improper and unethical” for lawyers to interview jurors to discover “what was the court” of a jury’s deliberation. *Northern Pac. Ry. Co. v. Mely*, 219 F.2d 199, 202 (9th Cir. 1954) (internal quotation marks omitted).

Moreover, the Constitution does not require courts to permit post-verdict interviews of jurors. See *Tanner*, 483 U.S. at 113–128; see also *Smith*, 457 F.2d at 1100 (“there is no federal constitutional problem involved in the denial of a motion to interrogate jurors where [] there has been no specific claim of jury misconduct.”). Even when the Supreme Court recently created a narrow exception to the so-called “no impeachment rule,”² it reiterated that rule’s importance because it “promotes full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict,” which “gives stability and finality to verdicts.” *Pena-Rodriguez v. Colorado*, ___ U.S. ___, 137 S. Ct. 855, 865 (2016).

² See Federal Rule 606(b).

The juror issue in *Pena-Rodriguez*, it should be noted, arose immediately after trial when two jurors voluntarily spoke with defense counsel, who in turn reported the information to the court. *Id.* at 861. With court permission and supervision, defense counsel then obtained sworn affidavits from the reporting jurors. *Id.*

The proposed rule modifications protect the integrity of jury deliberations while allowing for investigation into allegations of jury misconduct, with court supervision and upon a showing of good cause. The incidents of post-discharge juror contact mentioned previously occurred years after a verdict, and have little to do with allegations of juror misconduct. Most post-conviction contacts have inquired into the impact of evidence—that was admitted or not admitted at trial. Not only is this type of information prohibited,³ but this type of contact undermines the integrity of jury verdicts and calls for court supervision in this area.

Arizona courts have recognized the importance of protecting juror privacy and confidentiality, and, further, of encouraging jury service by appropriately protecting jurors. In *Carroll*, a case in which the court rejected a defendant's constitutional challenge to the portion of the Arizona statute allowing certain prospective jurors to opt out of jury service, and prohibiting public disclosure of statements submitted by those jurors asking to be excused for "mental or physical" reasons, this Court held:

³ See Arizona Rule of Criminal Procedure 24.1(d).

Individuals who are called for jury duty *do not forfeit their privacy rights when they are called for jury duty*. As a matter of policy, *we wish to encourage jury service*. Requiring prospective jurors to run the risk of having their private mental or physical conditions made public hardly encourages jury service. Further, as our supreme court has recognized, the 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.”

214 Ariz. at 485–86, ¶ 20 (emphasis added), *quoting Ramirez*, 178 Ariz. at 127.

Other state courts likewise recognize the public policy reasons for protecting discharged jurors. For example, in *Townsel v. Superior Court*, the California Supreme Court opined that “strong public policies protect discharged jurors from improperly intrusive conduct in all cases,” and, further, that “the uncontrolled invasion of juror privacy following completion of service on a jury is, moreover, a substantial threat to the administration of justice.” 979 P.2d 963, 967 (Ca. 1999). The court further explained that there are several “policy-based” reasons for preventing disclosure of juror information:

These reasons included protecting a juror’s state constitutional right to privacy; the possible deterrence of prospective jurors from fulfilling their obligation to serve if they knew they would be subject to postverdict intrusions into their lives; reducing incentives for jury tampering; promoting free and open discussion among jurors in deliberations; and protecting the finality of verdicts.

Id. at 968 (internal citation omitted).

Public policy also supports court oversight of juror contact to prevent improper inquiries into the jury’s deliberative process. *See Hyde*, 225 U.S. at 383–84; *Landrum*, 25 Ariz. App. at 448. For this reason, juror testimony or affidavits

may not be used in Arizona courts to impeach the verdict, except in strictly limited cases of juror misconduct. *See* Ariz. R. Crim. P. 24.1(d). Indeed, Arizona Rule of Criminal Procedure 24.1(d) prohibits courts from *receiving* testimony or affidavits “which inquires into the subjective motives or mental processes which led to a juror assent or dissent from the verdict.”

Reasonable oversight of post-conviction juror contact also protects the integrity and finality of the jury’s verdict, which is vital to all criminal justice stake-holders, especially crime victims. *See Callahan*, 119 Ariz. at 219; *see also* Ariz. Const. Art. 2.1(A)(10). The United States Supreme Court has articulated the public policy interest in the integrity and finality of jury verdicts:

[t]here is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussion in the jury room, jurors’ willingness to return an unpopular verdict, and the community’s trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.

Tanner, 483 U.S. at 120–21 (internal citations omitted).

c. Limited time in which to raise juror misconduct claims.

The proper vehicle to bring claims of juror misconduct is a motion for new trial filed within 10 days after the verdict. Ariz. R. Crim. P. Rule 24.1(b) and (c). The necessity for this narrow window is illustrated by this Court’s analysis

addressing the propriety of an evidentiary hearing regarding a claim of juror misconduct four years after the verdict:

The arguments against ordering a hearing at this late date are understandable. Memories fade with time. Assuming the jurors can be reassembled, testimony obtained now might be suspect, and its reliability subject to challenge. Moreover, the judge who saw the witnesses and heard the case on its merits has long since retired. Ordering a hearing now will leave another judge who had no involvement in the trial with the difficult task of determining whether the communication prejudiced the verdict.

State v. Miller, 178 Ariz. 555, 557 (1994). The ideal time for interviewing jurors, in contrast, comes immediately after trial, when events are fresh in the jurors' minds.⁴

The proposed rule modifications do not limit Rule 24.1. Rather, they

⁴ See *United States v. Villar*, 586 F.3d 76, 78–88 (1st Cir. 2009) (juror emailed defense counsel within hours of verdict to report racial bias); *Williams v. Price*, 343 F.3d 223, 226–39 (3d Cir. 2003) (juror misconduct claim raised in motion for new trial shortly after verdict); *Doan v. Brigano*, 237 F.3d 722, 726–27 (6th Cir. 2001) (juror misconduct raised during juror interviews occurring after conviction but before sentencing); *United States v. Swinton*, 75 F.3d 374, 380–82 (8th Cir. 1996) (juror contacted defendant after trial to report consideration of extrinsic evidence); *Burton v. Johnson*, 948 F.2d 1150, 1153–59 (10th Cir. 1991) (defense counsel contacted jurors and filed a motion for a new trial within one month of the verdict); *Keller v. Petsock*, 853 F.2d 1122, 1124–30 (3rd Cir. 1988) (jurors visited attorney within 10 days of verdict to report juror misconduct); *United States v. Perkins*, 748 F.2d 1519, 1529–34 (11th Cir. 1984) (jurors contacted appellant, his counsel, and the court immediately after the verdict to report jury misconduct); *Bulger v. McClay*, 575 F.2d 407, 408–09 (2d Cir. 1978) (defense counsel questioned jurors as they left the courtroom and discovered basis for jury-misconduct claim); *United States v. Wilson*, 534 F.2d 375, 376–79 (D.C. Cir. 1976) (juror contacted jury commissioner's office after jury was discharged); *United States v. Kum Seng Seo*, 300 F.2d 623, 623–26 (3d Cir. 1962) (juror contacted defense attorney to report jurors' consideration of newspaper article).

provide necessary procedures for counsel to contact jurors when there is good cause to believe jury misconduct has occurred while simultaneously protecting juror privacy. Counsel should not wait years before contacting jurors. But even if there is belated good cause to believe in the existence of juror misconduct, counsel can seek permission from the court to investigate the alleged claim.

d. *Prevention of potential harassment.*

Prevention of juror harassment is yet another legitimate and compelling reason for courts to regulate post-trial juror contact. *McDonald*, 238 U.S. at 267–68. *See also United States v. Moten*, 582 F.2d 654, 665 (2d Cir. 1978) (“in order to insure that jurors are protected from harassment, a district judge has the power, and sometimes the duty, to order that post-trial investigation of jurors shall be under his supervision”).

The possibility of being subjected to post-trial contact years after the verdict creates a “possible deterrence of prospective jurors from fulfilling their obligation to serve.” *Townsel*, 979 P.2d at 968. For example, jurors might reasonably experience fear and anxiety when contacted by the representative of a convicted murderer they sentenced to death. *See Gutman*, 725 F.2d at 422 (the practice of obtaining affidavits from jurors is “inherently intimidating” and must not be encouraged). Furthermore, if the practice of obtaining post-trial juror affidavits “ever becomes widespread [it] will make it even more difficult than it already is to get competent people to serve on juries.” *Id.*

Most significantly, a defendant's representative arriving at a juror's doorstep years after trial is completely different than a request to speak with jurors in the courtroom immediately after trial:

We do not encourage or suggest approval of post-verdict contact with jurors, seeking information with which to impeach the verdict, where such contacts are initiated without any cause to believe that improprieties occurred. . . . To some jurors, *a post-verdict contact by a convicted murderer's agent may be an event of particular stress and fear. Such contacts may or may not invite accurate responses that recount events as they occurred.* Instead, because of the difficult position in which a juror is placed, such contact may invite statements which the contacted juror may think necessary to satisfy the agent.

State v. Chesnel, 734 A.2d 1131, 1139-40 (Me. 1999) (emphasis added). The proposed rule changes strike a balance between protecting jurors from such unwanted contact while preserving the ability to investigate potential juror misconduct when warranted. *See Hall v. State*, 253 P.3d 716, 722, 724-25 (Idaho 2010) (good cause requirement balances protection from "unwanted contact and potential harassment" with defendant's right to fair trial).

e. *Guidance from other jurisdictions.*

i. Other states.

Recognizing the need to balance juror protection with the defendant's rights, other states require a showing of good cause before post-trial juror contact may occur and regulate the contact.

In many states, courts require defendants to show good cause before initiating post-trial juror contact. *See, e.g., People v. Wilson*, 43 Cal.App.4th 839,

852 (App. 2 Dist. 1996); *People v. Barton*, 37 Cal.App.4th 709, 716 (App. 2 Dist. 1995); *Hall*, 253 P.3d at 722; *Gatewood v. Sampson*, 812 So.2d 212, 217 (Miss. 2002); *Cyr v. State*, 308 S.W.3d 19, 30 (Tex. App. 4 Dist. 2009); *State v. Beskurt*, 293 P.3d 1159, 1162 (Wash. 2013); *State v. Blazina*, 301 P.3d 492, 493–94 (Wash. 2013)

Similarly, many states have codified guidelines in court rules and statutes designed to protect jurors' personal information or to prohibit post-trial contact absent a showing of good cause. *See e.g.*, Cal. Code Civ. P. § 206; *Id.* § 237(b); Haw. R. Prof. Conduct 3.5⁵; Ill. 12th Jud. Cir. Local R. 3.03; KY. Knox and Laurel Cir. Ct. R. 26; N.J. R. Ct. 1:16–1; Ohio Cuyahoga County Ct. Common Pleas Local R. 22(e); Tex. Code Crim. P. art. 35.29; Wash. Gen. R. 31(j).

ii. Federal jurisdictions.

Recognizing the importance of a formal process for obtaining information from jurors, and therefore generally disfavoring or prohibiting post-verdict juror interviews, federal courts also require a showing of good cause and regulate post-trial juror contact. The First Circuit Court of Appeals, for example, “prohibits the post-verdict interview of jurors by counsel, litigants or their agents except under the supervision of the district court, and then only in such extraordinary situations

⁵ This rule is intended to prevent “jury harassment” and “fishing expeditions,” and protect jurors’ thought processes and privacy. Haw. R. Prof. Conduct 3.5(e)(4) cmt.

as are deemed appropriate.” *Kepreos*, 759 F.2d at 967. The Fifth Circuit additionally refuses requests to contact jurors post-trial “unless specific evidence of misconduct was shown by testimony or affidavit,” because “[p]rohibiting post-verdict interviews protects the jury from an effort to find grounds for post-verdict charges of misconduct, reduces the ‘chances and temptations’ for tampering with the jury, increases the certainty of civil trials, and spares the district courts time-consuming and futile proceedings.” *Haerberle*, 739 F.2d at 1020 (citation omitted). *See also Gutman*, 725 F.2d at 422 (request to contact the jurors requires a “showing of adequate need.”); *Griek*, 920 F.2d at 842 (post-trial juror contact prohibited absent a showing of good cause). And the Ninth Circuit’s statement that the “better practice” is to “seek leave of the court to approach the jury”—though not a requirement—further supports the notion that a party should show good cause before contacting jurors after a trial. *Hard v. Burlington Northern R.R.*, 812 F.2d 482, 485 n.3 (9th Cir. 1987).

Additionally, many federal district courts—including the District of Arizona—have enacted rules intended to protect the privacy and security of the jurors, and/or prohibit post-trial juror contact absent a showing of good cause. *See* D.Ariz., LRCiv. 39.2(b) (requiring a showing of good cause and submission of

interrogatories for approval); LRCiv. 39.2(c) (providing for juror rights);⁶ *see also* D. Colo, Gen. Order 2007–3; D. D.C., Local Crim. R. 24.2; S. D. Fla., Local R. 11.1; E. D. La., Local Civ. R. 47.5; M. D. La., Local Civ. R. 47.4; D. N.H., Local Civ. R. 47.3; D. N.J., Local Crim. R. 24.1(g); W. Dist. of N.C., Local Civ. R. 47.1; E. D. Va., Local Crim. R. 24; S. D. W. Va., Local R. Crim. P. 31.1; E. D. Wis., Gen. Local R. 47(c).

The rules and procedures promulgated by these state and federal jurisdictions provide a model for the protections that should also be provided to Arizona’s jurors. The rule modifications will also give Arizona’s federal courts more ability to protect Arizona jurors and Arizona convictions proceed through federal court once state appellate and post-conviction proceedings are exhausted. It is not just juror contact information, but juror contact itself that must be protected and regulated by a showing of good cause and court oversight through post-conviction and federal habeas proceedings. Protection of Arizona convictions requires rule changes to ensure that Arizona state criminal rules and protections do not evaporate as state criminal cases move to federal court for habeas proceedings. (See Attachment A, Order in *Harrod v. Ryan*, CV-16-02011-PHX-GMS, October 18, 2016.)

⁶ The District of Arizona criminal rules follow the civil rule’s requirements regarding communications with trial jurors. *See* LRCrim. 24.2.

C. Conclusion.

The Arizona Attorney General's Office respectfully requests that this Court adopt the Maricopa County Attorney's proposed modifications to the Arizona criminal procedure rules.

DATED this [Day] day of [Month/Year].

Respectfully submitted,

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