ARIZONA SUPREME COURT

In the Matter of: PETITION TO MODIFY RULE 22.5 ARIZONA RULES OF CRIMINAL PROCEDURE	R–20–0015 **COMMENT OF ARIZONA ATTORNEY GENERAL IN SUPPORT OF MARICOPA COUNTY ATTORNEY'S PETITION TO MODIFY RULE 22.5 OF ARIZONA RULES OF CRIMINAL PROCEDURE**

Pursuant to Rule 28(C) of the Rules of the Supreme Court of Arizona, the Office of the Arizona Attorney General 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 Attorney General's Office supports the Maricopa County Attorney's Petition to modify Rule 22.5 of the Arizona Rules of Criminal Procedure to regulate post-trial contact with jurors. (Petition at 1.) In recent years, there have been repeated instances of unwarranted and unwanted contact between criminal defense teams and jurors. This contact has occurred years after the jurors' civic service has concluded and has been particularly frequent in capital cases during the Rule 32 and federal habeas proceedings. The proposed rule change provides a balance between protecting jurors' privacy and allowing access to jurors for legitimate investigative purposes, while bringing consistency to how parties interact with jurors post-verdict.

Arizona subscribes to the "general rule, known as Lord Mansfield's rule, [] that a juror's testimony is not admissible to impeach the verdict." *State v. Acuna Valenzuela*, 245 Ariz. 197, 215, ¶ 60 (2018), quoting *State v. Nelson*, 229 Ariz. 180, 191, ¶ 48 (2012). The purpose of this rule is "to protect the process of frank and conscientious jury deliberations and the finality of jury verdicts," as well as to prevent undue harassment of jurors. *Id*., quoting *State v. Poland*, 132 Ariz. 269, 282 (1982); *State v. Callahan*, 119 Ariz. 217, 219 (App. 1978). This is a "policy long followed by courts nationwide," *Nelson*, 229 Ariz. at 191, ¶ 48, and for this reason, Arizona forbids any testimony or affidavit "that relates to the subjective motives or mental processes which led a juror to agree or disagree with the verdict." Ariz. R. Crim. P. 24.1(d).

Moreover, the Constitution does not require courts to permit post-verdict interviews of jurors. *See Tanner v. United States*, 483 U.S. 107 113–28 (1987); *see also Smith v. Cupp*, 457 F.2d 1098, 1100 (9th Cir. 1972) ("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 more recently created a narrow exception to the so-called "no impeachment rule,"[1] it reiterated that rule's importance because it "promotes full and vigorous discussion by providing jurors with considerable assurance that after

[1] *See* Federal Rules of Evidence, 606(b).

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 (2017).

As the petition details (Petition at 10–11), the proper vehicle to raise a juror-misconduct claim is a motion for new trial under Arizona Rule of Criminal Procedure 24.1. And since subsection (b) of that rule requires a motion for new trial based on juror misconduct to be made within 10 days of the verdict, any juror-misconduct claim not timely raised is precluded in state post-conviction proceedings and, concomitantly, procedurally defaulted in federal habeas proceedings. *See* Ariz. R. Crim. P. 32.2(a)(3);[2] 28 U.S.C. § 2254(b). There is good reason for this narrow window to operate proximately to the end of trial. *See, e.g.*, *State v. Miller*, 178 Ariz. 555, 557 (1994) (new evidentiary hearing on juror misconduct several years past trial is problematic). And when there is an indication of juror misconduct, it will appear in the record and be timely raised.[3]

---

[2] *See State v. Kolmann*, 239 Ariz. 157, 163 ¶ 25 (2016) ("Because claims of juror misconduct can be raised on post-trial motion under Rule 24, [defendant] is generally precluded from raising them in a petition for post-conviction relief."); *State v. Fitzgerald*, 232 Ariz. 208, 210–13, ¶¶ 7–22 (2013) (in capital cases motion for new trial for juror misconduct must be filed within 10 days of each verdict).

[3] *See, e.g.*, *State v. Burns*, 237 Ariz. 1, 26–28, ¶¶ 112–23 (2015) (no fundamental error where one juror investigated a fellow juror's anti-death penalty political activity and shared it with other jurors); *State v. Manuel*, 229 Ariz. 1, 8–9, ¶¶ 37–41

(continued ...)

Moreover, in the event of an appropriate and timely hearing, a court can receive juror testimony on only six specific grounds. *See* Ariz. R. Crim. P. 24.1(c)(3)(A–F); *Poland*, 132 Ariz. at 282. In other words, jurors are not otherwise proper "witnesses" to the trial itself. Therefore, absent a showing of good cause, a defendant, or defendant's representative, pursuing juror interviews past the rule-permitted 10-day window is engaging in an impermissible "fishing expedition" for a likely improper means to impeach a valid jury verdict. *See State v. Kevil*, 111 Ariz. 240, 242 ("'fishing expeditions' are not countenanced"); *Corbin v. Superior Court (Maricopa)*, 103 Ariz. 465, 469 (1968); *State v. Fields*, 196 Ariz. 580, 583, ¶ 9 (App. 1999). *See also State v. Dickens*, 187 Ariz. 1, 15–18 (1996) (trial court correctly refused to consider juror affidavits because Lord Mansfield's Rule prohibits use of juror affidavits to impeach the verdict), abrogated on other grounds, *State v. Ferrero*, 229 Ariz. 239 (2012); *State v. Spears*, 184 Ariz. 277,

(... continued)

(2011) (trial court did not abuse discretion in denying defendant's motions for new trial based on alleged juror intoxication during penalty phase); *State v. Gallardo*, 225 Ariz. 560, 564–65, ¶¶ 5–9 (2010) (trial court did not abuse its discretion in declaring a mistrial after jurors prematurely discussed the case); *State v. Garcia*, 224 Ariz. 1, 10–11, ¶¶ 28–31 (2010) (trial court learned of possible juror misconduct on first day of aggravation phase and appropriately granted a mistrial of that phase and empaneled a new jury); *State v. Dann*, 220 Ariz. 351, 370–71, ¶¶ 106–16 (2009) (evidence of jurors discussing evidence in the hallway did not amount to juror misconduct warranting a new trial and trial court did not abuse its discretion by declining to conduct additional hearings); *State v. Hall*, 204 Ariz. 442, 446–49, ¶¶ 10–25 (2003) (trial court abused its discretion in denying motion for new trial for juror misconduct based on consideration of extrinsic evidence provided by bailiff).

288–89 (1996) (various allegations of foreperson's letter to the trial court would require prohibited inquiry into subjective motives or mental processes of the jurors).

Further, a post-conviction fishing expedition is not countenanced by the reduced constitutional trial rights and limited discovery afforded to a post-verdict defendant. *See* Ariz. R. Crim. P., 32.6 (b)(1) (requiring showing of "substantial need" for discovery after filing of notice) and (b)(2) (requiring showing of "good cause" for discovery after filing of petition). Unlike pre-trial, after a defendant has been convicted and sentenced, presumptions in post-conviction collateral attack are in favor of the State because a "presumption of regularity" attaches to final judgments, even when the question is a waiver of constitutional rights. *See Parke v. Raley*, 506 U.S. 20, 29–30 (1992), citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

Further, as the Arizona district court has recognized, post-conviction "investigation aimed at discovering inadmissible considerations of motives and influences that led to a juror's verdict, including questions designed to elicit a juror's thoughts on what their verdict might have been in response to evidence not presented at trial, is inappropriate and unethical." *State v. Harrod*, 2:16-cv-02011PHX-GMS (Doc. 20, Order dated 10/18/16), citing *Northern Pac. Ry. Co. v. Mely*, 219 F.2d 199, 202 (9th Cir. 1954) ("improper and unethical for lawyers . . . to interview jurors to discover what was the course of deliberation of a trial jury");

Traver v. Meshriy, 627 F.2d 934, 941 (9th Cir. 1980) (because evidence concerning the manner at which a jury arrived at its verdict is inadmissible to test the validity of a verdict, "the practice of counsel in propounding questions on these subjects to jurors after trial should be discouraged.").

Additionally, Arizona jurors have an expectation of privacy and confidentiality. The Arizona Legislature validated this expectation by making juror contact information confidential. A.R.S. § 21–312(B). The Arizona Rules of Criminal Procedure further provide that juror information is "limited to use for the purpose of jury selection only" and that the "court shall keep all jurors' home and business telephone numbers confidential unless good cause is shown to the court which would require such disclosure." Ariz. R. Crim. P. 18.3. Unless "specifically required by law or ordered by the court," juror names or other juror information "shall not be released." A.R.S. § 21–312(A).

In fact, even before A.R.S. § 21–312(A) was enacted, this Court acknowledged the trial court's ability to limit juror contact. *State v. West*, 176 Ariz. 432 (1993), overruled on other grounds by *State v. Rodriguez*, 192 Ariz. 58, 64, ¶ 30 n.7 (1998). In *West*, "[a]fter trial, the defendant asked the judge to provide him with the names and addresses of the trial jurors, contending he was entitled to this information to investigate and see whether any juror was guilty of misconduct." 176 Ariz. at 446. The trial court refused. *Id*. On direct appeal, West argued this was error because capital cases justified "the exercise of judicial authority to order

more liberal discovery than usual." *Id*. at 447. This Court disagreed—"In researching the cases cited by counsel, and through our own research, we find the judge's refusal of this information to be entirely proper." *Id*. (emphasis added); *see also State v. Paxton*, 145 Ariz. 396, 397 (App. 1985) (holding no abuse of discretion in trial court's denial of the defense's request to interview jurors after returning a guilty verdict, where "two jurors were visibly upset after the verdict and one of them was crying").

Additionally, public interest favors jury service and the finality of jury verdicts—two worthy goals thwarted by unsupervised juror contact years post-verdict for the purpose of impeaching long-valid verdicts. Individuals would be discouraged from serving on juries if they know that they may be contacted indiscriminately, years later, to explain their thought processes and conduct during trial. Jurors who performed their civic duty should not have to be concerned about their privacy years after they have been released from this duty. Neither a person's civic duty to serve on a jury, nor a post-verdict defendant's right to due process, forfeits a juror's right to privacy under Arizona's criminal rules and statutes.

There is a substantial difference between a juror choosing to speak with an attorney within days of the conclusion of a trial, and a juror being contacted years after a verdict by the defendant, or his representative, whom the juror found guilty and/or sentenced to death. *See United States v. Gutman*, 725 F.2d 417, 422 (7th Cir. 1984) (practice of obtaining affidavits from jurors is "inherently

intimidating"). And whether any particular juror wishes to speak with a defendant or his representative, or may not be distressed by unsolicited contact from the defendant or his representative, does not change the principle: Released jurors are protected by Arizona statutes and rules from post-verdict contact from defendants and their representatives.

As the petition points out, this is a continuing issue that needs to be addressed for consistency. (Petition at 4.)[4] Court oversight of post-verdict juror contact is consistent with Arizona statutes and case law and is also good public policy.[5]

---

[4] Citing recent orders in *State v. Acuna-Valenzuela*, CR 2011-140108, ME 8/7/19; *State v. Sanders*, CR 2009-157459, ME 8/7/19, 11/12/19.

[5] In its comment in support of the petition, the Arizona Prosecuting Attorneys Advisory Council notes an ambiguity in the proposed rule regarding the responsibility for notifying the juror(s) in the event a court finds good cause for juror contact past the rule-authorized 10 days. (APAAC Comment, at 4–5.) The Attorney General agrees that this ambiguity should be rectified and suggests that the rule indicate that, upon a finding of good cause, *the court* shall notify the juror(s) so that the juror contact information remains under seal and court control.

RESPECTFULLY SUBMITTED this 29th day of April, 2020.

Mark Brnovich
Attorney General
(Firm State Bar No. 14000)

Lacey Stover Gard
Chief Counsel

/s/
Ginger Jarvis
Assistant Attorney General
Capital Litigation Section
2005 N. Central Avenue
Phoenix, Arizona 85004–1580
Telephone: (602) 542–4686
cadocket@azag.gov
State Bar Number 014487