ARIZONA CAPITAL REPRESENTATION PROJECT
NATMAN SCHAYE, SB# 007095
natman@azcapitalproject.org
25 South Grande Avenue, Tucson, AZ 85745
TEL: (520) 229-8550

MARICOPA COUNTY OFFICE OF THE PUBLIC DEFENDER
JOHN CANBY, SB#010574
John.Canby@maricopa.gov
620 W. Jackson, Suite 4015, Phoenix, AZ 85003

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE
DAVID J. EUCHNER, SB#021768
David.Euchner@pima.gov
33 N. Stone Ave., 21st Floor, Tucson, AZ 85701
TEL: (520) 724-6800

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	No. R-20-0015
	)	
	)	**COMMENT OF ARIZONA**
Petition to Amend Rule 22.5, Arizona Rules of Criminal Procedure	)	**CAPITAL REPRESENTATION**
	)	**PROJECT, MARICOPA COUNTY**
	)	**OFFICE OF THE PUBLIC**
	)	**DEFENDER, AND ARIZONA**
	)	**ATTORNEYS FOR CRIMINAL**
	)	**JUSTICE REGARDING PETITION**
	)	**TO AMEND ARIZ. R. CRIM. P. 22.5**
	)	

Pursuant to Rule 28 of the Arizona Rules of Supreme Court, the Arizona Capital Representation Project ("ACRP"), the Maricopa County Office of the Public Defender ("MCPD"), and Arizona Attorneys for Criminal Justice ("AACJ") hereby

submit the following comment to the above-referenced petition to amend Ariz. R. Crim. P. 22.5 submitted 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 addition of Rule 22.5(c) would substantially and unnecessarily interfere with post-trial and 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 2019, and the Arizona Legislature also rejected a similar proposal in 2019.[1] 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.**

Since its last effort was denied, MCAO has modified its proposal so that only Rule 22.5 would be amended under its current request. Furthermore, this proposal does not seek to limit juror contact within the ten days after a verdict is rendered for purposes; presumably this was designed to allay the concerns about investigating claims of juror misconduct that could be the basis for a motion for new trial under Rule 24.1(c)(3). The limitation it creates after ten days, however, is so onerous that

[1] MCAO acknowledges its petition R-19-0008 (filed Jan. 8, 2019), which, in addition to Rule 22.5, also sought to amend Rules 18.5 and 32.1. That petition was denied. However, it does not similarly acknowledge its other efforts to accomplish this goal. *See* R-14-0008 (petition filed Jan. 10, 2014) (seeking to add new Rule 23.5 to prohibit post-trial juror contact).

In 2019, the Arizona Senate passed S.B. 1313, a bill sponsored by Sen. Eddie Farnsworth, but the bill was held in the House of Representatives and did not pass. https://apps.azleg.gov/BillStatus/BillOverview/71933 (last visited April 28, 2020).

for all practical purposes it serves as an absolute ban on contact. Thus, it is no less offensive than its predecessor petitions.

Moreover, the proposal does not provide for opportunity to contact jurors within ten days of their discharge, but within "the 10-day time period in Rule 24.1." Rule 24.1(b) specifies the deadline for filing a motion for new trial is ten days after the return of the verdict being challenged. *State v. Fitzgerald*, 232 Ariz. 208, 211-12 ¶¶ 15-18 (2013) (interpreting previous version of Rule 24.1(b) to require the time limit be applied to the particular verdict being challenged). In capital cases where the jury returns a verdict of guilty as to first-degree murder, assuming the defense presents any meaningful mitigation case, ten days will have already elapsed by the time any party's representative has an opportunity to speak with jurors.

In *Fitzgerald* this Court recognized a potentially anomalous result that would deny capital defendants the opportunity to challenge juror misconduct in the guilt phase. *Id*. at 212 ¶ 19. It found that while Rule 24.1 contains no "discovery rule" for learning of the basis for a motion for new trial, other rules could protect defendants' rights in such a situation, such as Rule 24.2 and Rule 32. *Id*. ¶ 20 (citing cases approving of use of those rules).

The proposed amendment to Rule 22.5 would actually deny juror contact entirely to capital defendants who, like Fitzgerald himself, are convicted in the guilt phase but have a mistrial declared in the penalty phase. Although the circumstances

leading to the mistrial in *Fitzgerald* are somewhat unusual, mistrials are declared all the time when a jury cannot reach a unanimous verdict in penalty proceedings. *See* A.R.S. § 13-752(K) (defendant shall be exposed no more than twice to a penalty-phase trial); *State v. Arias*, 16 Ariz. Cases Digest 18, 19 ¶ 10 (App., Apr. 21, 2020) (two juries failed to return unanimous verdict for death). In cases where no penalty verdict is returned, there could be no basis for a motion for new trial as to the penalty phase; nor could there be a basis for such a motion as to guilt because more than ten days will have elapsed since the return of the guilt-phase verdicts. And, because the proposed limitation in Rule 22.5 is for the sole purpose of filing a motion under Rule 24.1, the proposal would ban contact for the purpose of a motion under Rule 24.2 or a post-conviction investigation under Rule 32.[2]

By requiring a court order to approach jurors—even those who do not indicate a refusal to speak with litigants and might actually welcome it—MCAO's proposed Rule 22.5(c) places an almost impossible burden on defendants. First, the defendant

[2] "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). *Kolmann* does not contradict *Fitzgerald* or other authorities, however, because Kolmann raised his claim of juror misconduct as one of ineffective assistance of counsel and as a stand-alone claim, and not as one of newly-discovered facts under Rule 32.1(e). *Kolmann*, 239 Ariz. at 160 ¶ 6. This Court did acknowledge, however, that the facts described in Kolmann constitute jury misconduct under Rule 24.1(c)(3) and that such evidence of misconduct is not inadmissible under Rule 24.1(d). *Id*. at 163 ¶ 24.

must file a motion with the court, which necessarily means that the State has an opportunity to respond (the proposal does not include any provision for *ex parte* requests). And the proposed Rule requires written notification to jurors of the request to speak with them, but it does not explain who would author or send that request. Presumably the State would want a voice in that process, in which case the State can be expected to demand language that makes jurors feel that contact with the defense team would be unpleasant and undesireable. This would impede defense attorneys' ability to competently represent their clients by interfering with counsel's ability to investigate potential claims for relief.

To provide competent representation, counsel must investigate the 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).

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 necessarily 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.

Further, this proposal, if adopted, would prevent valid constitutional claims from being discovered or, at best, delay discovery until federal habeas proceedings. 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-trial and 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 . . . ." Proposed Rule 22.5(c) would impose a "good cause" threshold and require trial courts to micromanage the defense

investigation by defining 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, such as in *Kolmann*. Even where juror misconduct was discovered by happenstance, such as in *Fitzgerald*, 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, 292-94 (1988), this Court reversed convictions because the defense presented an affidavit from the jury foreman revealing two instances of significant juror misconduct involving asking nonjurors with specialized knowledge for insight as to the evidence and trial procedures. And

in *State v. Compton*, 127 Ariz. 420, 421 (App. 1980), 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, which the court of appeals affirmed. In fact, Arizona's courts not only accept declarations from jurors, but require them to support post-trial claims. *See State v. Pearson*, 98 Ariz. 133, 135-36 (1965) (defense counsel's affidavit relating a juror's statement was insufficient to support motion for new trial in absence of the juror's affidavit). *Accord State v. McMurtrey*, 136 Ariz. 93, 98 (1983) ("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).

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).

2. <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 Supreme 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.

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

As it did in last year's petition, MCAO cited two Arizona Court of Appeals decisions in support of its proposal, *Stewart v. Carroll*, 214 Ariz. 480 (App. 2007), and *State v. Olague*, 240 Ariz. 475 (App. 2016). This year, it additionally cites several other cases; but none of those cases involves outright prohibition on juror contact for the purpose of determining whether any misconduct actually occurred.

First, MCAO's reliance on *Stewart* is questionable since that case has nothing to do with juror contact. Instead, it addressed a challenge to 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 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. That statute shields jurors' medical records from disclosure to the general public, not from consideration in court or from the defense. Finally, the court noted that "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.'" *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.

Next, MCAO now cites *State v. Paxton*, 145 Ariz. 396, 397 (App. 1985), which was cited approvingly in *Olague*. *Paxton* provided no reasoning or analysis at all to support its conclusion that the trial court properly prohibited juror contact after the polling of the jury. 145 Ariz. at 397. *Olague* recognized this, and avoided criticizing Paxton only based on the principle of *stare decisis* and a lack of criticism of the case from the parties. 240 Ariz. at 481 ¶ 23. Unlike *Paxton*, however, in *Olague* the defense had already contacted jurors and obtained affidavits prior to the trial court entering an order prohibiting further contact absent good cause. *Id*. at 481-82 ¶ 24. The court of appeals found that Olague's juror affidavits failed to support a claim of misconduct under Rule 24.1(c), rather they fell under challenges to jurors' subjective mental processes in deliberations prohibited under Rule 24.1(d). *Id*. at 481 ¶ 20. *Olague*, decided five months after *Kolmann*, did not cite or distinguish *Kolmann* as to its application of Rule 24.1(d), but since it is presumed that judges

know the law and follow the law, *see State v. Trostle*, 191 Ariz. 4, 22 (1997), *Olague* must be read consistenly with *Kolmann* as to the use of juror affidavits in connection with juror misconduct claims. No reported decision has ever cited *Olague* or *Paxton* to support the denial of a defendant's right to conduct post-trial juror investigation.

Although this year's petition is significantly longer and better researched than what MCAO filed last year, the cases upon which it relies involve the distinction between proper use of juror affidavits to support a claim under Rule 24.1(c) from inadmissible uses under Rule 24.1(d). MCAO's reliance on *Hyde v. United States*, 225 U.S. 347, 383–84 (1912), *McDonald v. Pless*, 238 Ariz. 264, 267-68 (1915), and *Tanner v. United States*, 483 U.S. 107, 120-21 (1987), is misplaced not only because those cases merely explain that a rule limiting the use of jurors' statements about deliberations to impeach the verdict was necessary to avoid turning a "private deliberation" into "the constant subject of a public investigation," but also because *Pena-Rodriguez*, 137 S. Ct. at 864-66, acknowledged all of those cases in deciding that in some situations jurors may be called to give evidence about jurors' mental processes in deliberations. *Landrum*, 25 Ariz. App. at 448-49, and *Callahan*, 117 Ariz. at 219-20, also focus on the interplay between Rules 24.1(c)(3) and 24.1(d).

MCAO finds support in a passing comment in *Pena-Rodriguez*, 137 S. Ct. at 869, that "[t]he practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court

rules, both of which often limit counsel's post-trial contact with jurors." It incorrectly infers the Court endorses a blanket rule prohibiting juror contact absent a showing of good cause to the trial judge. Instead, the Court was merely recognizing rules that require parties and their representatives to respect jurors who express their wishes not to be contacted. As in its past attempts, MCAO again fails to cite any authority demonstrating a need or the propriety for such broad changes to the criminal rules.

4. <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 case law. MCAO provides no evidence that existing rules and ethical standards fail to adequately protect jurors.

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, "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(b) 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." *Id*. 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.

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) (authors 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, in the high-profile cases of George Zimmerman and Jodi Arias, some jurors were 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. In light of the foregoing, it is unsurprising that this Court has twice before rejected MCAO's similar proposal five years ago. It is similarly unsurprising that the Arizona Legislature rejected a similar statutory proposal last year.

5. MCAO committed the only know harassment of a juror.

Ironically, the only known allegation of confirmed juror harassment was committed not by a defense attorney but by MCAO's best known death penalty prosecutor, Juan Martinez. That misconduct, is documented in Case 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. This Court accepted jurisdiction of the State Bar's petition for special action in No. CV-20-0035-SA. Weeks ago, the MCAO announced its intent to terminate Mr. Martinez's employment. https://www.azcentral.com/story/news/local/arizona/2020/03/13/maricopa-county-attorney-fire-jodi-arias-prosecutor-juan-martinez/5047645002/.

6. The Constitution requires that a remedy be provided for every right.

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.

7. MCAO's proposal would uniquely suppress defenses lawyers' free speech rights.

Defense lawyers, like every other person, possess the right to free speech under the Arizona and United States Constitutions. U.S. Const. amend. I; *see also* Ariz. Const. art. 2, § 6 ("Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."). 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).

Article 2, section 6 of the Arizona Constitution provides even more rigorous protection than the First Amendment. *Coleman v. City of Mesa*, 230 Ariz. 352 (2012). It requires that people may only be punished for exercising free speech upon "abuse of that right." *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 281-82 ¶¶ 45-46 (2019). The language of this right is "majestic in its sweep," and "is a categorical guarantee of the individual right to freely speak, write, and publish, subject only to constraint for the abuse of that right." *Id.* at 306 ¶ 169, 307 ¶ 174 (Bolick, J., concurring). 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 who have an interest in interviewing jurors are freely permitted to do so. To prevent defense counsel from doing so does not even meet a rational-basis standard, much less strict scrutiny.

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.

8. 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, rightly or wrongly, are 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, once again, to deny MCAO's petition.

DATED: May 1, 2020.

ARIZONA CAPITAL REPRESENTATION PROJECT

By /s/ *David J. Euchner, for*
Natman Schaye

MARICOPA COUNTY OFFICE OF THE PUBLIC DEFENDER

By /s/ *David J. Euchner, for*
John Canby

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By /s/*David J. Euchner*
David J. Euchner

This comment e-filed this date with:

Supreme Court of Arizona
1501 West Jefferson
Phoenix, AZ 85007-3329

Copy of this Comment
Electronically mailed this date to:

Kenneth N. Vick
Chief Deputy Maricopa County Attorney
mcaomod@mcao.maricopa.gov