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ARIZONA SUPREME COURT

IN RE: **PETITION TO AMEND RULE 22.5, ARIZONA RULES OF CRIMINAL PROCEDURE**	R-20-0015 **REPLY TO ACRP, MCPD, AACJ'S COMMENT TO PETITION TO AMEND RULE 22.5, ARIZONA RULES OF CRIMINAL PROCEDURE TO REGULATE POST-TRIAL JUROR CONTACT**

Pursuant to Rule 28, Rules of the Supreme Court of Arizona, the Maricopa County Attorney hereby replies to the comment filed by the Arizona Capital Representation Project ("ACRP"), the Maricopa County Office of the Public Defender ("MCPD"), and Arizona Attorneys for Criminal Justice ("AACJ") in this matter. For the reasons set forth below, ACRP, MCPD, AACJ's complaints about the proposed rule amendment provide no persuasive reason to reject the proposed rule amendment that neither bans nor prohibits juror contact, but instead *reasonably regulates* juror contact after the 10-day time period set forth in Arizona Rule of Criminal Procedure 24.1.

1. **The proposed rule amendment does not prohibit post-trial juror contact nor does it "impede defense attorneys' ability to thoroughly and competently represent their client."**

Throughout the comment there is a general theme that the rule change is so onerous it is a ban on post-trial jury contact. This theme is simply not true. First, it fails to acknowledge the parties' ability to contact the jurors for 10 days after the verdict without advance notice to the jurors or permission from the court. This completely unregulated opportunity to speak to the jurors is essentially an extension of the opportunity to speak with jurors in the courthouse after the court has excused them and lifted the admonition. Moreover, it is undeniable that the hours and days following the trial is the best time to speak with jurors about the trial because it is fresh in their minds. *See e.g., Logerquist v. Danforth*, 188 Ariz. 16, 22 (App. 1996) ("evidence is less available as time passes; witnesses may no longer be available; and evidence becomes less trustworthy because memories fade or are affected by intervening events and experiences.").

Second, the comment fails to establish how requiring good cause to contact the jurors, after the 10-day period, is so onerous as to constitute a ban. Presumably, the party seeking contact with a juror after the 10-day period will have a specific reason for requesting the contact as fishing expeditions are not countenanced. *See State v. Kevil*, 111 Ariz. 240, 242 (1974) ("Arizona has long been committed to a broad interpretation of its discovery rules, but mere 'fishing expeditions' are not

countenanced."). *See also Corbin v. Superior Court (Maricopa)*, 103 Ariz. 465, 469 (1968); *State v. Fields*, 196 Ariz. 580, ¶ 9 (App. 1999).

The comment's assertion that the proposed rule amendment, "if adopted, would prevent valid constitutional claims from being discovered or, at best, delay discovery until federal habeas proceedings" is not accurate because juror misconduct is usually discovered shortly after trial. Indeed, in the majority of cases cited in the Rule Petition,[1] including *State v. Hall*, 204 Ariz. 442, 446, ¶ 11 (2003), cited in the comment, counsel was alerted to potential juror misconduct within 10 days of trial. (Cmt. at 9.)

In *Hall*, 204 Ariz. at 446, ¶ 11, the day after the jury received the case, "Defendant moved for a mistrial, claiming that the bailiff, in response to a question from a juror, had told the juror that Defendant was not in custody." The trial court

[1] *See Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 861 (2017) (two jurors spoke with defense counsel immediately following discharge of the jury); *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); *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).

denied the motion. "After the verdict, Defendant filed a motion for a new trial, setting forth several issues, including possible juror misconduct [and t]hree weeks later, Defendant filed a supplemental motion, supported by affidavits from two jurors." *Id*. at ¶ 12. Thus, the information in that case that led to the claims was known and could be investigated within the 10-day period, or would have provided the "good cause" needed for contact after the 10 days if the new rule were in effect at that time. Adopting this rule change would not have prevented that defendant from raising misconduct claims in that case.

Likewise, in *State v. Glover*, 159 Ariz. 291, 292 (1988), *State v. Compton*, 127 Ariz. 420, 421 (App. 1980), and *State v. Pearson*, 98 Ariz. 133, 135-36 (1965), also cited in the comment, the defendants filed motions for new trial alleging juror misconduct. (Cmt. at 9-10.) These defendants obviously learned of the facts supporting their juror misconduct claims within the 10-day jurisdictional time period to file a motion for new trial. Thus, these cases provide no support for the comment's contention that the proposed rule change would impede defense counsels' ability to investigate juror misconduct, to competently represent their client, or to present valid constitutional claims.

To the extent that the comment is concerned that the State will be involved in the process of giving jurors notice, MCAO's revised rule amendment (filed in the reply to APAAC's comment) resolves that issue. (Cmt. at 6.) The revised rule

amendment provides that "the requesting party must inform the juror(s) in writing, and copy the opposing party, ..." Nothing in the proposed rule amendment requires the State to approve the notice before it is sent.

If the party seeking contact with the jurors discovers something supporting a claim for relief after the 10-day time period to file a motion for new trial, that discovery will likely constitute good cause to support the request. "Good cause" is a well-known standard in our criminal procedures. *See e.g., Canion v. Cole*, 210 Ariz. 598, 600, ¶ 10 (2005) ("trial judges have inherent authority to grant discovery requests in PCR proceedings upon a showing of good cause"); Ariz. R. Crim. P. 15.1 and 15.2 ("The court may extend the deadline . . . initial disclosures" if the party "shows good cause…"); Ariz. R. Crim. P. 16.1 ("A court may not reconsider an issue previously decided in the case except for good cause or as these rules provide otherwise"); Ariz. R. Crim. P. 18.3 ("The court must keep all jurors' home and business telephone numbers and addresses confidential, and may not disclose them unless good cause is shown."); Ariz. R. Crim. P. 19.1 (in the conduct of a trial, "the parties may offer evidence in rebuttal unless the court, for good cause, allows a party's case-in-chief to be reopened"); Ariz. R. Crim. P. 31.8 ("For good cause shown, a party may request an addition to the record" on appeal). (Emphasis added by underline to all cites.)

Contrary to the claims in the comment, "good cause" is not an onerous

standard that will effectively serve to ban all juror contact outside the 10-day period. The proposed rule amendment does not require a showing of extraordinary circumstances nor does it treat a request for juror contact as discovery which would require the filing of a petition for postconviction relief. *See Canion*, 210 Ariz. at 601. ¶ 18 ("Because no petition has been filed, Canion has neither established good cause for discovery nor made a colorable claim that he is entitled to post-conviction relief"). Thus, contrary to the complaints raised in the comment, requiring good cause after the 10-day time period is not onerous or burdensome, but a reasonable requirement to regulate juror contact well after the jury has been excused. The good cause showing does not impede defense counsels' ability to thoroughly and competently represent their client.

To the extent that the comment contends that the proposed rule amendment would interfere with the defendant's ability to investigate and reveal prosecutorial misconduct, this contention fails because juror contact is irrelevant to a claim of prosecutorial misconduct. (Cmt. at 3.) Arizona law "provide[s] that juror testimony is admissible to impeach a verdict, *but only for the types of jury misconduct enumerated in Rule 24.1*." *State v. Poland*, 132 Ariz. 269, 282 (1982) (emphasis added). Arizona law prohibits any juror testimony or affidavit "that relates to the subjective motives or mental processes leading a juror to agree or disagree with the verdict." Ariz. R. Crim. P. 24.1(d). Arizona subscribes to the "general rule, known

as Lord Mansfield's rule, [] that a juror's testimony is not admissible to impeach the verdict." *See State v. Nelson*, 229 Ariz. 180, 191, ¶ 48 (2012) (juror affidavit stating the jury did not follow instructions was precluded by Lord Mansfield's Rule); *State v. Dickens*, 187 Ariz. 1, 15–17 (1996) (affidavits revealing juror's sharing of personal knowledge and experiences bearing on the evidence and a juror's expression of bias could not be used to impeach the verdict); *State v. Spears*, 184 Ariz. 277, 288 (1996) (juror affidavit alleging that "a juror thought that defense counsel's failure to object to every exhibit might indicate that he thought his client was guilty" would require impermissible inquiry into juror's mental processes).

Therefore, a juror's opinion about a prosecutor and the impact of the prosecutor's conduct on his or her mental impressions of the case or the evidence is irrelevant and inadmissible. Reviewing courts are in the best position to determine the overall impact of any misconduct and they regularly perform that role without the opinions of individual jurors. The proposed rule change will not alter a defendant's ability to assert prosecutorial misconduct claims.

Additionally, the proposed rule amendment does affect the outcome or analysis in *State v. Fitzgerald*, 232 Ariz. 208, 211-12 ¶¶ 15-18 (2013). The comment contends that 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." (Cmt. at 4.) This

contention is erroneous. As discussed above, the proposed rule change does not ban juror contact after the 10-day time period set forth in Rule 24.1. A court can authorize contact upon a showing of good cause after the 10-day period. Nor does the proposed rule amendment prohibit a capital defense lawyer from speaking with the jury about the guilt phase and aggravation phases following a mistrial in the aggravation phase. The only change from the current rule in this situation is that if the attorney wants to talk to the jurors more than 10 days after the jury was excused, the attorney would need to show good cause to do so. Within that 10-day period, the ability to contact and talk to jurors would be the same as it is today.

Thus, the comment's concerns are unfounded. The rule change does not ban all juror contact nor does it create impenetrable barriers to juror contact. Likewise, the rule change does not prevent defense attorneys' from thoroughly and competently representing their clients.

2. <u>The proposed rule amendment does not impact a defendant's right to challenge the verdict based on misconduct in the jury room.</u>

Citing *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), the comment complains that the proposed rule change would deter jurors from revealing racism and other misconduct that may taint convictions. (Cmt. at 11-12.) *Pena-Rodriguez v. Colorado* provides absolutely no support for this assertion. As noted in the Rule Petition and in footnote one above, the juror misconduct in that case was discovered *immediately* following the discharge of the jury when two jurors spoke to defense

counsel. Additionally, the proposed rule change would not prevent jurors from contacting defense counsel or anyone else on their own at any time. Thus, the rule change does not deter jurors from disclosing anything.

3. Arizona's current rules do not sufficiently protect jurors after discharge.

Despite the rules prohibiting disclosure of jurors' addresses and telephone numbers and promises of privacy made to jurors, parties still locate and contact jurors, sometimes without advance notice, years after the jurors have been discharged. This contact is evidenced by the juror affidavits filed in support of petitions for postconviction relief and federal habeas, which are often stricken or not considered because they contain inadmissible "subjective motives or mental processes," of the juror or deliberative information leading to the verdict. Thus, it is evident that the current rules do not sufficiently protect discharged jurors because they do not give the jurors advance notice of the contact or remind them that they have the absolute right not to discuss the case. The proposed rule amendment would do that, while preserving the defendant's right to adequately investigate claims of juror misconduct.

4. The proposed rule amendment does not violate free speech rights.

Lastly, the comment's claim that the proposed rule amendment would "uniquely suppress defenses lawyers' free speech rights" fails to recognize that defense lawyers are contacting these jurors as a result of their mandatory civic duty

to participate in a criminal proceeding and, therefore, that contact is part of those proceedings, where speech is controlled or managed by the courts. Participants in the criminal justice process do not have an unfettered free speech right to talk to everyone involved in a criminal proceeding. Victims, for example, are protected from unwanted pre-trial contact and there is no reason why jurors should not receive similar protections for post-trial contact long after their service as jurors has ended.

Conclusion.

The comment provides no supported, rational, or valid reason to reject the proposed rule amendment that would regulate juror contact *after* the 10-day time period in Rule 24.1. Jurors, hailed into court pursuant to a summons, do not forfeit their right to privacy after performing their civic duty of serving on a jury. The proposed rule amendment strikes a reasonable balance by providing court oversight of juror contact more than 10 days after being discharged from duty, while still fully allowing defendants to pursue relief from violations of their constitutional rights based on juror misconduct.

Respectfully submitted this 1st day of June 2020.

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