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9 **IN THE SUPREME COURT**
10 **STATE OF ARIZONA**

11 In the Matter of:

Supreme Court No. R-19-0008

12 **PETITION TO MODIFY RULES**
13 **18.5, 22.5, AND 32.1, ARIZONA**
14 **RULES OF CRIMINAL**
15 **PROCEDURE**

16 **COMMENT OF**
17 **THE ARIZONA PROSECUTING**
18 **ATTORNEYS' ADVISORY**
19 **COUNCIL**

20 **I. BACKGROUND OF PETITION**

21 The Maricopa County Attorney has filed a petition seeking to amend three
22 criminal rules affecting a party's contact with jurors and potential jurors during and
23 after a criminal case. The petition proposes adding new subsections to Rule 18.5
24 ("Procedure for jury selection"), 22.5 ("Discharging a jury"), and 32.1 ("Scope of
25 remedy" on post-conviction relief). The Arizona Prosecuting Attorneys' Advisory
Council ("APAAC") has considered the proposed changes in the petition and
supports them.

1 **II. DISCUSSION/ANALYSIS**

2 **A. Protecting Juror Privacy is of Paramount Concern.**

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4 In today's world of social media and the internet, a juror or potential juror's
5 information may be readily available, if not protected, for discovery and
6 dissemination by simple internet searches. Chopra, Sonia (2012, February). Using
7 the Internet and social media in jury selection. *Plaintiff Magazine*, pp. 1-5.
8 [https://www.plaintiffmagazine.com/images/issues/2012/02-](https://www.plaintiffmagazine.com/images/issues/2012/02-february/reprints/Chopra_Using-the-Internet-and-social-media-in-jury-selection_Plaintiff-magazine.pdf)
9 [february/reprints/Chopra_Using-the-Internet-and-social-media-in-jury-](https://www.plaintiffmagazine.com/images/issues/2012/02-february/reprints/Chopra_Using-the-Internet-and-social-media-in-jury-selection_Plaintiff-magazine.pdf)
10 [selection_Plaintiff-magazine.pdf](https://www.plaintiffmagazine.com/images/issues/2012/02-february/reprints/Chopra_Using-the-Internet-and-social-media-in-jury-selection_Plaintiff-magazine.pdf). Consequences can be serious when a party or a
11 party's representative has had improper contact with a juror or potential juror. *See*
12 *State v. Rojas*, 177 Ariz. 454 (App. 1993) (new trial ordered where juror made
13 contact with victim); *State v. Lang*, 176 Ariz. 475 (App. 1993) (new trial ordered for
14 contact between detective and jurors); *State v. Adams*, 27 Ariz. App. 389 (1976)
15 (new trial considered due to communications between a juror and the defendant).
16 *See also* Criminal Rule 24.1(c)(3)(F) (new trial may be granted where juror
17 converses before verdict about outcome of case with interested party).
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21 Protecting juror privacy and safety is a paramount concern affecting the
22 integrity of the judicial system. *State v. Garcia*, 141 Ariz. 580, 583 (App. 1984)
23 (“preservation of the integrity of our judicial system mandates that witnesses and
24 jurors avoid engaging in conversation with one another during a trial”); *People v.*
25

1 *Rhodes*, 212 Cal. App. 3d 541 (1989) (“the integrity of our jury system must be
2 carefully safeguarded” - allowing free access to jurors’ addresses and telephone
3 numbers “would further jeopardize our jury process”). *See also* A.R.S. § 21-312
4 (personal juror information is protected from disclosure and dissemination); Rule
5 23.3(b) (jurors’ names may not be used in polling to ensure jurors’ privacy); *State v.*
6 *McIntosh*, 213 Ariz. 579, 581-82, ¶ 12 (App. 2006) (verdict form may be signed with
7 assigned juror number rather than name).
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10 Issues involving post-verdict juror contact is a continuing one in Arizona. In
11 *State v. Olague*, 240 Ariz. 475 (App. 2016), the defendant, through his own
12 “investigative techniques” obtained contact information from eight former jurors
13 and obtained affidavits from two in support of a motion for new trial. The trial court
14 prohibited defendant from initiating any further contact with the jurors without prior
15 approval and a showing of “good cause.” On appeal, the Court of Appeals, Division
16 Two, affirmed that ruling. A few years earlier, in an unpublished opinion,¹ Division
17 One found that a defense team would be allowed personal contact with penalty phase
18 jurors pursuant to an approved questionnaire only upon a showing of “good cause.”
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21 *State v. Rayes ex rel. County of Maricopa*, 2012 WL 2929436, ¶ 7 (2012). The State
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25 ¹ APAAC cites this opinion not for its persuasive value (Ariz.R.Sup.Ct. 111(c)(1)(C)) but merely to serve as an example that the issue is a recurring one.

1 had opposed such contact absent superior court authorization based upon a showing
2 of good cause that such contact was necessary for a post-conviction claim for relief.

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4 To address the concerns raised over contact between parties and jurors,
5 Petitioner has proposed three amendments to the criminal rules. The first would
6 create a *new* subsection (j) to Rule 18.5 (“Procedure for Jury Selection”) prohibiting
7 any party or party’s representative from having contact with prospective jurors,
8 alternate jurors or sitting jurors who have not been discharged. The second would
9 create a *new* subsection (c) to Rule 22.5 (“Discharging a Jury”) requiring courts to
10 inform discharged jurors that they may refuse to speak to parties, that their option
11 must be recorded by polling or written form, and that if the juror has opted not to
12 speak, no party or party representative may contact that juror without a court order.
13
14 The third would create a new subsection to Rule 32.1 (“Scope of Remedy”)²
15 providing that if a juror has declined post-verdict contact, no party or party
16 representative may contact that juror without a court order, which can be issued only
17 upon a showing of good cause.
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20 APAAC supports the proposed changes to these rules. Their goal is to
21 preserve the integrity of the judicial system by protecting jurors’ privacy interests,
22 providing a common-sense process for how jurors are contacted by parties, and
23
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25 ² APAAC recommends that this proposal be a stand-alone one as Rule 32.13 [NEW].

1 ensuring future citizen participation in the jury process. The proposals do not impact
2 a defendant's ability to seek necessary juror information for post-verdict motions or
3 post-conviction relief.
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5 The provisions of the proposed changes in this petition are not without legal
6 precedent. In 2001, the California State Legislature adopted laws with provisions
7 similar to those proposed here. *See Townsel v. Superior Court*, 20 Cal. 4th 1084,
8 1087 (1999) ("the Legislature has recently enacted statutes, and amended existing
9 ones, to maximize juror privacy and safety" while retaining a defendant's right to
10 contact jurors if sufficient need is shown). California Code of Civil Procedure § 206
11 provides that prior to discharging a jury, the judge "shall inform the jurors that they
12 have an absolute right to discuss or not to discuss the deliberation or verdict with
13 anyone." Similarly, § 237 of the California code provides a process for how a
14 defendant may access a juror's identifying information as necessary. A.R.S. § 21-
15 312 follows this reasoning by protecting juror's biographical information.
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19 APAAC concurs that protecting the confidentiality of jurors' private
20 biographical information should be of paramount concern. The amendments
21 proposed by Petitioner would help protect juror privacy while still ensuring that
22 defendants had the ability to gain access to the information through the court upon a
23 showing of good cause.
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1 Electronic copy filed with the
2 Clerk of the Arizona Supreme Court
3 this 18th day of March, 2019.

4 By: _____
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