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11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
12 **IN AND FOR THE COUNTY OF MOHAVE**

13 **STATE OF ARIZONA,**  
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15 Plaintiff,  
16  
17 vs.  
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19 **JUSTIN JAMES RECTOR,**  
20  
21 Defendant.

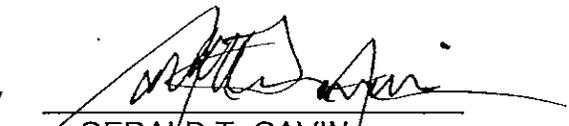
NO: CR 2014-01193

**DEFENSE MOTION TO PRECLUDE  
POST-VERDICT CONTACT BETWEEN  
THE TRIAL JUDGE AND JURY**

(ASSIGNED TO THE HON. LEE JANTZEN)

22 COMES NOW Defendant Justin James Rector, by and through undersigned  
23 counsel, and pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to  
24 the United States Constitution, and Article II, §§ 1, 4, 13, 23, 24, 32 and 33 of the  
25 Arizona Constitution who moves this court to avoid any post-verdict contact with the  
26 jurors for the reasons contained in the memorandum attached hereto and incorporated  
27 herein.

28 **RESPECTFULLY SUBMITTED** this 28<sup>th</sup> day of April, 2015

By   
GERALD T. GAVIN  
Defendant's Co-Counsel

  
RON GILLES  
Defendant's Co-Counsel



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## M E M O R A N D U M

### INTRODUCTION

To avoid any confusion at the outset...this motion would be filed with any Judge assigned to this case. Anyone drawing an inference the defense is hostile or unhappy with Judge Jantzen is 1) incorrect and 2) missing the thrust of the underlying motion. Some trial judges, as a matter of routine, privately meet with juror's after the trial verdict to learn how they feel about the general trial experience. Commonly, the post-verdict discussion will evolve into discussions about the evidence, the defendant, the attorneys, and other particular matters of the trial. In the possible event further proceedings may be necessary, i.e. a sentencing, a post-conviction review, appellate proceedings involving potential jury issues, etc... the Defendant requests that this Court avoid engaging in communication with the jurors between the verdict and any possible future hearing.

### LAW AND ARGUMENT

A judge has an affirmative obligation not only to be impartial, but to be seen as impartial. Matter of Haddad, 128 Ariz. 490, 498, 627 P.2d 221 (1981). "Even when there is no actual bias, justice must appear fair." State v. Salazar, 182 Ariz. 604, 608, 898 P.2d 982, 986 (App. Div 1 1995) (quoting McElhanon v. Hing, 151 Ariz. 403, 411, 728 P.2d 273, 281 (1986), cert denied 481 U.S. 1030, 107 S.Ct. 1956, 95 L.Ed. 2d 529 (1987)) "Next in importance to rendering a righteous judgment, is that it be accomplished in such a manner that no reasonable question as to impartiality or fairness can be raised." State v. Romano, 34 Wash.App. 567, 569, 662 P.2d 406,407 (1983) (citing In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955)). The Court in Romano held the judge's *ex parte* communication regarding the defendant's

1 case violated due process by creating an appearance of unfairness despite the lack of  
2 any showing the judge was affected by the communications.)

3 *ex parte* communications concerning a pending matter. It also requires the judge to  
4 assure all interested parties a full opportunity to be heard on a matter. Rule 81, Canon  
5 3, Rules of the Supreme Court states in pertinent part:

6 (A) Adjudicative Responsibilities

- 7 (4) A judge should accord to every person who is legally interested  
8 in a proceeding, or his lawyer, full right to be heard according to  
9 law, neither initiate nor consider *ex parte* applications concerning  
a pending or impending proceeding.

10 The commentary to the above Rule states:

11 The proscription against communications concerning a proceeding  
12 includes communication from lawyers, law teachers, and other persons  
13 who are not participants in the proceeding, except to the limited extent  
14 permitted [for example, brief *amicus curiae*]. To the extent possible, all  
parties or their lawyers shall be included in communications with a  
judge.

15 Also, the Arizona Code of Judicial Conduct requires a judge to disqualify himself  
16 from any proceeding if his impartiality might be reasonably questioned or if he has a  
17 personal bias or prejudice concerning a party. Rule 81, Canon 3, Rules of the Supreme  
18 Court states in pertinent part:

19 (C) Disqualification

- 20 (1) A judge should disqualify himself in a proceeding in which his  
21 impartiality may be questioned, including but not limited to instances  
22 where:  
23 (a) He has a personal bias or prejudice concerning a party or  
personal knowledge of disputed evidentiary facts concerning  
the proceeding.

24 The commentary to the above rule states: "Under this rule, a judge is disqualified  
25 Whenever the judge's impartiality might reasonably be questioned, regardless whether  
26 any of the specific rules in § 3E(1) apply."  
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1           “The *ex parte* rule carries a distinct purpose to protect the parties due process  
2 Kansas)1    A defendant has a Due Process right to assure that his sentence is based  
3 on accurate and truthful information. A sentence based on false or misleading  
4 information denies him this right. Townsend v. Burke, 334 U.S. 736, 740-41, 68 Sup.  
5 Ct. 1252 (1948). Defendant’s Due Process rights are violated if he is denied the  
6 opportunity to adequately address information considered in determining the  
7 appropriate sentence. Gardner v. Florida, 430 U.S. 349, 362, 97 S.Ct. 1197, 1206-7  
8 (1977).

9           Judges are prohibited from talking with jurors outside counsel’s presence during  
10 deliberations. State v. Sammons, 156 Ariz. 51, 57, 749 P.2d 1372, 1378 (1988). This  
11 rule exists because of the risk that the judge may, in some way, even if inadvertently,  
12 influence the jury’s deliberations and jurors may draw the judge into improper  
13 substantive discussions. See State v. Guytan, 192 Ariz. 514, 968 P.2d 587, ft.nt.5 (A  
14 (App. Div. 1 1998) (and cited cases). A similar analysis must be applied to post-verdict  
15 judge/juror meetings but for the opposite reason. That is, there is a risk that juror  
16 comments will influence the judge for sentencing, particularly when counsel is absent  
17 and thus unable then or any other time to respond. Frankly, even if counsel is present,  
18 and the judge makes a statement or expresses an opinion to a juror member or  
19 members, the attorney is placed in the ethically challenging position of disagreeing with  
20 the judge, or being seen attacking his credibility or the power of his office. Thus, any  
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24 1 *Ex Parte* communications deprive the absent party of the right to respond  
25 and be heard. They suggest bias or partiality on the part of the judge. *Ex*  
26 *Parte* conversations or correspondence can be misleading; the information  
27 given to the judge “may be incomplete or inaccurate, the problem can be  
28 incorrectly stated. At the very least, participation in *ex parte*  
communications will expose the judge to one-sided argumentation, which  
carries the attendant risk of an improper erroneous ruling on the law or  
facts. At worst, *ex parte* communication is an invitation to improper  
influence if not outright corruption.” Shaman, *Judicial Conduct and Ethics*,  
§ 5.01. Quoted in State v. Scales, 933 P.2d at 741.

1 attorney forced to confront the authority of the court, a position attorneys are taught  
2 beginning in law school not to do...to never undermine the authority of the court, is  
3 potentially placing his/her career in jeopardy.

4 Post verdict *ex parte* judge/juror communications clearly violate the Judicial Code  
5 of Conduct, Rule 81, Canon 3, Rules of the Supreme Court, quoted above. Considering  
6 *ex parte* judge/juror communications in another context reveals impropriety of such  
7 discussions. For example, a judge may not read a "confidential" letter from a juror  
8 concerning the defendant's upcoming sentencing without bringing it to counsel's  
9 attention. State v. Jackson, 186 Ariz. 20, 29, 918 P.2d 1038, 1047 (1996).

10 There is no difference between the above scenario and the judge meeting  
11 privately with jurors in the jury room immediately after the verdict is read. The fact that  
12 the meeting takes place just after the verdict's reading, and that this is the jury's first  
13 opportunity to talk with the judge about the case, makes it likely that the jurors will  
14 initiate conversations about all sorts of issues relating to the trial, including facts and  
15 eventual sentencing. Anyone familiar with post-verdict meetings with jurors knows one  
16 of the most common, if not the most common, juror inquiry is what will happen at  
17 sentencing and what penalty the defendant is facing.

18 In the above captioned case, the jury may have multiple verdict forms to choose  
19 from: First Degree Murder, Second Degree Murder, and possibly others. The jury will  
20 be instructed as to various theories of each form of verdict. The judge, in talking *ex*  
21 *parte* with the jury, may learn theories relied on in convicting the defendant. Such  
22 knowledge could affect the Judge's ultimate sentencing decision, on whether to accept  
23 or modify a jury's sentencing conclusion....negating the chance of a judicial not  
24 withstanding judgment determination.  
25

26  
27 "By definition, *ex parte* contacts are rarely on the record and, therefore, are  
28 usually unreviewable." Hing, supra. 151 Ariz. at 411, 728 P.2d at 281. Since the *ex*

1 *parte* communication would not be on the record, and, at the very least, would create  
2 the appearance of partiality and impropriety, the Defendant respectfully requests that  
3 this Court avoid any and all *ex parte* communications with the jury subsequent to any  
4 verdict. Although not addressed by cited caselaw, even communication with jurors post  
5 verdict *with* counsel present places counsel in the ethical dilemma of challenging the  
6 authority of the court should counsel disagree with the court's assessment of the trial,  
7 the evidence, his client, the witnesses, or anything related. ANY such communication,  
8 *ex parte* or not, is fraught with danger and exposes the Court and Counsel  
9 unnecessarily to post conviction relief, appellate scrutiny, and potential action by the  
10 State Bar and Judicial Conduct review procedures. The simpler, smarter and legally  
11 safer position is that all unnecessary communication be eliminated.  
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ORIGINAL of the 28<sup>th</sup> day of April, 2015 with:

Clerk of the Court  
401 E Spring Street  
Kingman Arizona 86401

COPY of the forgoing delivered  
This 28<sup>th</sup> day of April, 2015 to:

Honorable Lee Jantzen  
Judge of the Superior Court  
Mohave County Courthouse  
401 E. Spring Street  
Kingman Arizona 86401

Greg McPhillips  
Assigned Deputy County Attorney  
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Ron Gilleo  
Mohave County Legal Defender  
Co-Counsel for Justin James Rector  
313 Pine Street  
PO Box 7000  
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Client Justin James Rector  
Mohave County jail

File

BY: 