

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Gilbert Martinez,

10 Petitioner,

11 v.

12 David Shinn, et al.,

13 Respondents.
14

No. CV-20-00517-PHX-DJH

ORDER

DEATH PENALTY CASE

15 Before the Court are Respondents’ Motion to Preclude Juror Contact (Doc. 13) and
16 Motion for Order Precluding Defense Team from Contacting Victims (Doc. 14). Petitioner
17 Gilbert Martinez opposes the motions. (Docs. 18, 19.)

18 **1. Motion to Preclude Juror Contact**

19 Respondents ask the Court to enter an order precluding Martinez’s defense team
20 from contacting his trial jurors absent leave of Court based on a showing of good cause.
21 Martinez contends that there is no binding authority for such a request. (Doc. 18 at 7.) He
22 also argues that interviewing jurors is a “necessary component” of investigating his case.¹
23 (*Id.* at 2.)

24 Federal courts have long recognized that “very substantial concerns support the
25 protection of jury deliberations from intrusive inquiry.” *Tanner v. United States*, 483 U.S.

26
27 _____
28 ¹ Martinez also asserts that the order sought by Respondents would improperly burden the jurors’ First Amendment rights. (Doc. 18 at 11.) The Court agrees with Respondents that Martinez has no standing to raise such a claim on behalf of the jurors.

1 107, 127 (1987). In *Tanner*, the Supreme Court acknowledged that post-verdict
2 investigation into jury misconduct would lead in some instances to the discovery of
3 improper juror behavior, but expressed concern that allegations “raised for the first time
4 days, weeks, or months after the verdict, [would] seriously disrupt the finality of the
5 process” and could undermine “full and frank discussion in the jury room, jurors’
6 willingness to return an unpopular verdict, and the community’s trust in a system that relies
7 on the decisions of laypeople.” *Id.* at 120–21.

8 Generally, a verdict may not be impeached on the basis of the jury’s internal
9 deliberations or the manner in which it arrived at its verdict. *Traver v. Meshriy*, 627 F.2d
10 934, 941 (9th Cir. 1980). Rule 606(b) of the Federal Rules of Evidence is grounded in this
11 common-law rule against admission of jury testimony to impeach a verdict. On the other
12 hand, although jurors may not be questioned about their deliberations and most matters
13 related thereto, they may be questioned regarding any extraneous influence on their verdict.
14 *Tanner*, 483 U.S. at 117; *Traver*, 627 F.2d at 941. Accordingly, Federal Rule of Evidence
15 606(b) allows jury testimony in limited circumstances to show that (1) extraneous
16 prejudicial information was improperly brought to the jury’s attention, (2) an outside
17 influence was improperly brought to bear upon any juror, or (3) there was a mistake in the
18 verdict form. *See Tanner*, 483 U.S. at 121; Fed. R. Evid. 606(b). An exception to Rule
19 606(b) also exists where a juror’s statements indicate that racial animus was a significant
20 motivating factor in his or her finding of guilt.² *Pena-Rodriguez v. Colorado*, 137 S. Ct.
21 855, 869 (2017).

22 Martinez contends that there is no authority prohibiting his federal habeas counsel
23 from interviewing jurors from his state criminal trial to discover admissible evidence of
24 juror misconduct, or requiring him to show good cause prior to doing so. Nonetheless,
25 despite there being no specific prohibition, post-verdict interviews with jurors are not
26 looked on favorably in the Ninth Circuit, *Hard v. Burlington Northern R.R.*, 812 F.2d 482,

27 ² The Court rejects Martinez’s argument that information obtained from jurors is
28 admissible with respect to claims of ineffective assistance of counsel. *See Garza v. Ryan*,
No. CV-14-01901-PHX-SRB, 2016 WL 4591854, at *2 (D. Ariz. Sept. 2, 2016) (collecting
cases).

1 485 (9th Cir. 1987), *abrogated on other grounds by Warger v. Shauers*, 574 U.S. 40 (2014),
2 and the district courts have “‘wide discretion’ to restrict contact with jurors to protect jurors
3 from ‘fishing expeditions’ by losing attorneys.” *See United States v. Wright*, 506 F.3d
4 1293, 1303 (10th Cir. 2007) (quoting *Journal Pub. Co. v. Mechem*, 801 F.2d 1233, 1236
5 (10th Cir. 1986)).

6 While this Court’s local rules do not prohibit Martinez’s counsel from contacting
7 and interviewing jurors from his trial, neither do they specifically authorize such contact.
8 The local rules do recognize that approval for the interview of federal jurors will only be
9 granted when proposed written interrogatories are submitted to the court within the time
10 granted for a motion for a new trial, and only upon a showing of good cause. *See* LRCiv
11 32.9(b) (citing Fed. R. Evid. 606(b)). While there is no corresponding rule prohibiting
12 counsel from invading the provenance of state jurors in federal habeas proceedings, the
13 absence of a rule is not dispositive, as the Court is no less concerned with the protection of
14 state jurors than federal jurors, and has the discretion to address these concerns on a case
15 by case basis.

16 In addition to the policy concerns expressed in *Tanner*, there are “very cogent
17 reasons” for requiring a preliminary showing of illegal or prejudicial intrusion into the jury
18 process before allowing counsel to conduct post-trial interviews. These include protecting
19 the jury from post-verdict misconduct and the courts from time consuming and futile
20 proceedings; reducing the chances and temptations for tampering with the jury; and
21 increasing the certainty of verdicts. *Wilkerson v. Amcon Corp.*, 703 F.2d 184, 185–86 (5th
22 Cir. 1983) (“We continue to decline to ‘denigrate jury trials by afterwards ransacking the
23 jurors in search of some ground . . . for a new trial’ unless a preliminary showing is made.”)
24 (additional citation omitted). The reluctance of courts to inquire into the conduct of jurors
25 during deliberations is also “to avoid harassment of jurors, inhibition of deliberation in the
26 jury room, a deluge of post-verdict applications mostly without real merit, and an increase
27 in opportunities for jury tampering; it is also to prevent jury verdicts from being made more
28 uncertain.” *King v. United States*, 576 F.2d 432, 438 (2d Cir. 1978) (“To overcome this
reluctance and to authorize a post-verdict inquiry, there must be ‘clear evidence,’ ‘strong

1 evidence,’ ‘clear and incontrovertible evidence,’ ‘substantial if not wholly conclusive
2 evidence.’”) (additional citation omitted). Finally, the Ninth Circuit has held that “there is
3 no federal constitutional problem involved in the denial of a motion to interrogate jurors
4 where . . . there has been no specific claim of jury misconduct.” *Smith v. Cupp*, 457 F.2d
5 1098, 1100 (9th Cir. 1972).

6 Therefore, the Court finds that the proper way for Martinez to proceed is first to
7 make a preliminary showing that extraneous prejudicial information or outside influence
8 was improperly brought to the jury’s attention, or evidence that a juror was motivated by
9 racial animus, and seek leave of the court to approach the jury. *See Hard*, 812 F.2d at 485
10 n.3. Good cause may be shown by satisfying the requirements of the exceptions stated in
11 Rule 606(b) and *Pena-Rodriguez*.

12 Martinez asserts that the holding in *Pena-Rodriguez* renders the above analysis
13 “inapposite.” (Doc. 18 at 8.) The Court disagrees. *Pena-Rodriguez* simply added an
14 exception to Rule 606(b)’s limitations on post-verdict juror testimony. The holding did not
15 foreclose a court from imposing a good cause requirement on juror contact. *See Mitchell v.*
16 *United States*, 958 F.3d 775, 787 (9th Cir. 2020) (“[I]n cases where there has been no
17 showing of juror misconduct, we have held that a district court ‘d[oes] not abuse [its]
18 discretion in refusing to allow postverdict interrogation of jurors.’”) (quoting *United States*
19 *v. Eldred*, 588 F.2d 746, 752 (9th Cir. 1978)); *Smith*, 457 F.2d at 1100.

20 **2. Motion for Order Precluding Defense Team from Contacting Victims**

21 Respondents move the Court for an order precluding Martinez’s defense team from
22 directly contacting any victim in this case and directing that the team instead initiate any
23 such contact through the Office of the Arizona Attorney General. (Doc. 14 at 2.) In support
24 of their request, Respondents cite provisions of state and federal law, including A.R.S. §
25 13–4433(B), which provides that “[t]he defendant, the defendant’s attorney or an agent of
26 the defendant shall only initiate contact with the victim through the prosecutor’s office,”
27 and the Crime Victims’ Rights Act (CVRA), which affords state crime victims in federal
28 habeas cases “the right to be treated with fairness and with respect for the victim’s dignity
and privacy.” 18 U.S.C. § 3771(a)(8).

1 Martinez opposes the motion, arguing that the request is not supported by state or
2 federal law, that counsel are obligated to perform an investigation that may include contact
3 with victims, and that the request is premature. (Doc. 19.) The Court disagrees.

4 In other capital habeas cases in this district, the court has considered and rejected
5 these arguments, ordering petitioners to obtain consent through Respondents’ counsel
6 before contacting a victim and, in the event a victim did not consent, ordering briefing on
7 the applicability of Arizona’s victims’ rights laws. *See, e.g., Sansing v. Ryan*, No. 11-CV-
8 1035-PHX-SRB (D. Ariz.); *Chappell v. Ryan*, No. CV-15-00478-PHX-SPL (D. Ariz.);
9 *Pandeli v. Ryan*, No. CV-17-1657-PHX-JJT (D. Ariz.). In *Sansing*, the court explained that
10 its “directive requiring Petitioner to obtain consent from Respondents’ counsel to contact
11 victims furthers the rights to dignity and privacy set forth in § 3771(a)(8). It is a reasonable
12 limitation that does not unfairly disadvantage Petitioner.” *Sansing*, No. 11-CV-1035-PHX-
13 SRB (D. Ariz.) (Doc. 29); *see Roseberry v. Ryan*, No. 15-CV-1507-PHX-NVW (D. Ariz.)
14 (Doc. 18).

15 Martinez’s arguments do not alter this analysis. Whether or not § 13–4433(B)
16 directly applies to these proceedings through the CVRA, the mechanism it establishes
17 furthers the goal of respecting a crime victim’s dignity and privacy without unduly
18 burdening Martinez. *See, e.g., Chappell*, No. CV-15-00478-PHX-SPL (D. Ariz. Jul. 21,
19 2015) (Doc. 19). “Using counsel for Respondents to channel requests to contact victims,
20 as contemplated by the CVRA itself, 18 U.S.C. § 3771(b)(2)(B)(i) and (d)(1), does not
21 unduly burden [petitioner’s] access to the victims.”³ *Pandeli v. Ryan*, No. CV-17-1657-
22 PHX-JJT (D. Ariz. Oct. 5, 2017) (Doc. 23).

23 Finally, the Court rejects Martinez’s argument that an order granting the relief
24 sought by Respondents would unconstitutionally burden habeas counsel’s First
25 Amendment rights. (Doc. 19 at 11–12.) “[A]ttorneys are properly subject to an array of
26 different restrictions and regulations that can have the effect of limiting their ability to
27 obtain information—even potentially exculpatory information—from prospective

28 ³ Under 18 U.S.C. § 3771 (d)(1), the “attorney for the Government may assert” the crime
victim’s rights.


1 witnesses.” *Johnson v. Ryan*, No. CV-18-00889-PHX-DWL, 2018 WL 6573228, at *6 (D.
2 Ariz. Dec. 13, 2018) (citing Ariz. R. Prof. Conduct, ER 4.1(a); Ariz. R. Prof. Conduct, ER
3 4.2; and LRCiv 39.2(b)).

4 Accordingly,

5 **IT IS HEREBY ORDERED granting** Respondents’ Motion to Preclude Juror
6 Contact (Doc. 13). Martinez may not contact any jurors other than by leave of Court upon
7 a showing that extraneous prejudicial information or outside influence was improperly
8 brought to the jury’s attention, or where there is evidence of racial animus affecting the
9 verdict. *See* Fed. R. Evid. 606(b); *Pena-Rodriguez*, 137 S. Ct. at 869.

10 **IT IS FURTHER granting** Respondents’ motion for order precluding contact with
11 victims (Doc. 14). No person who is defined as a victim in this matter pursuant to Arizona
12 law shall be contacted by anyone working with or on behalf of Martinez or Martinez’s
13 counsel unless the victim, through counsel for Respondents, has consented to such contact.
14 If consent is not provided and Martinez nonetheless believes the contact is necessary,
15 Martinez may file a motion with the Court explaining the necessity for such contact.

16 Dated this 1st day of July, 2020.

17
18 
19 _____
20 Honorable Diane J. Humetewa
21 United States District Judge
22
23
24
25
26
27
28