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In the Matter of:

PETITION TO AMEND THE ARIZONA
RULES OF CRIMINAL PROCEDURE
(SECTION (v) AMENDMENTS)

Supreme Court No. R-22-0035

Joint Comment by the Directors of the Maricopa
County Indigent Defense Agencies

The Maricopa County Indigent Defense Offices, which jointly represent the majority of indigent individuals charged with criminal offenses in our jurisdiction, oppose Petition R-22-0035.

The changes suggested have already been considered and overwhelmingly rejected by two different committees, including a committee established for the express purpose of considering these changes. This prior rejection is warranted as there is no need for full integration, the proposed reforms risk confusion and will lead to more litigation, and the proposal improperly elevates victims to the status of a party.

Reasons this Court should reject the proposal

For the last several years, Arizona has considered and rejected some variation of the current request. This was done first through the Task Force to Restyle the Arizona Rules of Criminal Procedure, which rejected the request. Arizona Voice for Crime Victims (AVCV) then filed petitions with the same request for three consecutive years. The first two petitions received significant criticism and were not adopted.

In response to the most recent petition, this Court created the Committee on Criminal Rules Regarding Victims to consider whether to incorporate victims' rights into the Rules of Criminal Procedure. That Committee reached the same conclusion as the Criminal Rules Restyling Committee and the several voices responding to the prior petitions: the Committee overwhelmingly rejected the petition.

Nonetheless, a proposal is again before this Court asking to incorporate victims' rights throughout the Rules of Criminal Procedure. This Court should reject the proposal.

1. The proposed changes--incorporating victim rights throughout the Rules of Criminal Procedure--has been rejected. Repeatedly.

Two different committees—the Task Force to Restyle the Arizona Rules of

Criminal Procedure and the Committee on Criminal Rules Regarding Victims—have now reached the same conclusion: Arizona should not incorporate victims’ rights throughout the Rules of Criminal Procedure. The indigent defense offices stand with both committees and oppose this proposal.

a. The Task Force on the Arizona Rules of Criminal Procedure overwhelmingly rejected the proposed changes.

In 2015, this Court created a Task Force to Restyle the Arizona Rules of Criminal Procedure. [Admin. Order 2015-123](#).

During the April 7, 2017 meeting of the Task Force, Arizona Voice for Crime Victims (AVCV) proposed to eliminate and incorporate Rule 39. See [CRTF Minutes 4/7/2017](#), 1–2. The Task Force rejected the proposal and declined to include references to victims in several Rules. *See, e.g., id.* at 3 (refusing to change Rule 7.3 to include AVCV’s mandatory no-contact provision), 3–4 (rejecting proposal to modify right to be heard), 4 (refusing to modify Rule 7.6(c) because bond forfeiture is a civil proceeding), 4 (rejecting proposals to add references to victims in Rules 8.1, 8.2, and 8.4 “because they were impractical, substantive, or cumulative”), 5 (declining to modify Rule 9.3), 6 (refusing proposal to modify Rule 10), and 10 (rejecting proposed change to Rule 26).

Nonetheless, the Task Force included new language in the Rules where the Task Force concluded the Rules needed clarity about victims’ rights. *See, e.g., id.* at 8 (adopting proposed change to Rule 27.1 and adopting proposed change to Rule 1.2).

b. The Committee on Criminal Rules Regarding Victims--which was created to consider this very issue--overwhelmingly rejected the proposal.

Although the Task Force on the Arizona Rules of Criminal Procedure considered and rejected AVCV's proposal, AVCV petitioned for a rule change for three straight years. *See* R-18-0001; R-19-0016; R-20-0031.

After rejecting the proposal for two years, this Court created a Committee to consider whether to further incorporate victims' rights throughout the Rules of Criminal Procedure. [AO 2020-183](#). After several meetings, the core issue came to the forefront on September 2, 2021. *See* [CRV Minutes 9/2/2021](#), 5. During this meeting, the members voted on four key questions. Some 70% to 80% of the committee overwhelmingly rejected all attempts to sprinkle victims' rights throughout the Rules of Criminal Procedure:

- 7 of the 10 members voted to “retain the criminal rules as they currently are and without any of the revisions discussed by the Committee.”
- 8 of the 10 members voted against full integration.

In light of the vote, no further meetings were scheduled, and the Committee provided the Chair the authority to prepare the final report. *Id.* at 5-6.

Yet four months later that Committee was meeting again, this time to address a “section (v) approach,” which has become the basis for this proposal. [CRV 1/20/2022](#), 1. Although the members had already rejected incorporation, the Committee painstakingly went through this new proposal over a series of meetings.

Five months and four meetings later, the core question again arose. [CRV Minutes](#)

[6/27/2022](#), 2. The members again overwhelmingly rejected the attempt to more fully integrate victims' rights into the criminal rules:

Question #1: Should victims' rights be more fully integrated into the criminal rules?

Yes: 2

No: 8

After all this work, 80% of the members voted against integration.

c. The prior committees deserve to have their work and proposals respected, not ignored.

Two different committees considered this issue; both rejected integration. That time and effort should be respected. This Court created both committees and balanced different stakeholder groups when setting the membership lists. Both committees devoted significant time, effort, and thought to their processes. Both committees fairly considered the proposal: one did so in the course of a broader restyling effort; one did so specifically to address this very issue. Both committees reached the same result—both rejected integration.

2. The proposed changes were rejected for good reason.

More to the point, the majority of Committee members were on solid ground when they rejected the proposal. Foremost, there is no need for full integration. Second, the proposed reforms risk confusion and will lead to more litigation. And finally, the proposal improperly elevates victims to the status of a party.

a. There is no need for the proposed changes.

As an initial point, there is no actual need for incorporation. Rule 39 comprehensively addresses victims' rights. Where further incorporation was deemed important, the Task Force to Restyle the Arizona Rules of Criminal Procedure made the needed changes. For example, the Task Force adopted changes to Rules 1.2 (adding a reference to victims to the purpose and construction of the Rules) and 27.1 (adding a requirement to impose probation conditions that protect victims). [CRTF Minutes 4/7/2017](#), 8.

Moreover, nothing in the petition or attached appendices suggests that there are any persistent, pervasive, or prevalent violations of victims' rights. The current system works; there's no need to change it.

b. The proposed reforms risk confusion and will increase litigation.

Bryan Garner, a legal writing expert, set forth a number of principles for crafting rules in his [Guidelines for Drafting and Editing Court Rules](#).

Unfortunately, this proposal ignores those guidelines. And the result is that the incorporation proposed by this petition will lead to more confusion and litigation.

Two rules in particular are cast aside in this proposal:

- 1.4 Organize the rule to serve clarity, readability, and brevity.
- 3.1 Organization of Rules.

Under Guideline 1.4, Garner instructs that rules should "Use structure to enhance

readability and reinforce meaning.”

This then coincides with Garner’s recommendation in Guideline 3.1 that drafters should “Group similar items together, preferably introducing them with parallel headings and subheadings.”

Rule 39 does this. Rule 39 groups similar items (the rules regarding victims’ rights) together. The result is a single rule that can be easily referenced whenever a question of victims’ rights arises. It also means that whenever it becomes necessary to amend or modify the rules regarding victims’ rights, that can be done efficiently.

Although the proposal retains Rule 39, it nonetheless sprinkles victims’ rights throughout the Rules of Criminal Procedure. The result is precisely what Garner’s guidelines seek to avoid: inconsistency and uncertainty.

In fact, the proposal proves that full integration is too unwieldy and will lead to more litigation. For example, in Rule 1.4, the proposal offers a definition of “victim.” But this is different from the statutory definition. Consider the two:

A.R.S. § 13-4401(19)

“Victim” means a person against whom the criminal offense has been committed, including a minor, or if the person is killed or incapacitated, the person's spouse, parent, child, grandparent or sibling, any other person related to the person by consanguinity or affinity to the second degree or *any other lawful representative of the person*, except if the person or the person's spouse, parent, child, grandparent, sibling, other person related to the person by

Proposed Rule 1.4

“Victim” means a person or entity against whom the criminal offense has been committed or *a representative who is designated or appointed to act on their behalf*. If the person against whom the offense was committed was killed or incapacitated, “victim” includes the person’s spouse, parent, child, grandparent, or sibling, or another

consanguinity or affinity to the second degree or other lawful representative is in custody for an offense or is the accused.

individual specified in A.R.S. § 13-4401, unless that person is in custody or is the accused.

In Appendix B, the proposal characterizes this as a paraphrase of the statutory definition. But the emphasized difference is not mere paraphrase. The proposal uses more words to define lawful representative--12 words compared to 7 words in the statute--and changes the nature of the inquiry. The inquiry is no longer whether the person is a “lawful representative”; the inquiry turns to one of “appointment” or “designation.”

But this leaves questions unanswered: What is “appointment” or “designation”? What is the process? What is needed? Is it simply a motion filed in the criminal proceeding? Or must the person have already been appointed as a guardian? Does an unappointed person have standing to bring a motion for appointment? Does the state?

The lack of clarity will force litigation to even attempt the answers.

The changes to Rule 26.6 offer another example of where litigation will arise because of changes. Consider how the current version of 26.6(b) compares to the proposed 26.6(v):

Current Rule 26.6(b)

The court must permit the victim to review the presentence report after it makes the report available to the defendant, excluding any portions the court excises or that are confidential by law.

Proposed Rule 26.6(v)

The court must permit the victim to read the presentence report, excluding any portions the court excises or that are confidential by law, after it makes the report available to the defendant. If the victim requests, the prosecutor must provide the victim with an excised copy of the report.

Though subtle, there is an important change to the rule: the proposal moved the clause that reads “excluding any portions the court excises or that are confidential by law.”

There’s no need for this restyling; the current rule explains the process that’s needed. There’s no need to move “excluding any portions the court excises or that are confidential by law” to the middle of the sentence.

But, more importantly, this restyling confuses the process. By inserting the end result (victim access) before the necessary predicate (defense access), the proposed modification inserts ambiguity.

The order of events is key. Defense access is a necessary predicate to victim disclosure because the defense needs an opportunity to review the presentence report and argue sections are confidential or should be excised. The issue should not devolve to a race to disclose the presentence report to a victim.

The current version emphasizes the order of events, thereby reinforcing the defense need for an opportunity to propose excisions.

And the proposal isn’t even consistent in how it addresses incorporation. Consider how changes were handled in just three of the rules: 9.3, 7.3, and 17.1.

In Rule 9.3, the petition moves the victims’ rights language in subsection (a)(2)(A) to a new subsection (v). This represents what many of the changes were meant to do.

But this wasn’t the process followed in Rule 7.3. In Rule 7.3 the petition strikes language in subsection (d) and moves it to a subsection (b). There is no subsection (v) in

Rule 7.3.

Nor was it the process followed in Rule 17.1, where the petition split its treatment of the victim-related language. In subsection (f)(1)(F) (dealing with victim rights generally), the petition moves the language to a subsection (v). But in subsection (f)(2)(B) (dealing with pleas by mail), the petition both retains victim-related language in the subsection and moves it to the new subsection (v).

The result is a set of rules that is more scattered and more inconsistent than the current rules. Attorneys will find victims' rights in a subsection (v) in some rules, but in a different subsection for other rules. And sometimes they'll find victims' rights in multiple places in the same rule.

Scattered and inconsistent rules lead to confusion. This will lead to unnecessary litigation and risk noncompliance. Such inconsistency illustrates why 80% of the Committee members voted against integration.

c. The proposal improperly elevates victims to party status.

The proposal also makes a substantive change that risks elevating victims to party status: Rule 1.9.

In its Administrative Order, this Court was clear that the Committee “cannot make substantive changes to the current victims’ rules.” [AO 2020-183](#).

Yet the current proposal includes a new Rule 1.9(v) that grants victims a broad right to file a response to any motion that might impact a victims’ right:

A victim has standing to file motions that request the court to enforce any right guaranteed to victims, or that challenge an order denying any such right. A victim may file a reply concerning that motion. A victim may also file a response to a party's motion if the party's motion impacts a victim's right.

This authority fundamentally changes the nature of a victim's role in a criminal proceeding and elevates victims to party status.

In 1940, United States Attorney General Robert Jackson addressed the Second Annual Conference of United States Attorneys in Washington D.C. He opened by acknowledging what has only grown more true over time — the immense power of prosecutors. “The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous.” Robert H. Jackson, *THE FEDERAL PROSECUTOR*, 31 *Am. Inst. Crim. L. & Criminology* 3 (1940-1941). “While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.” *Id.* These statements are equally true for the prosecutors at the state, county, and local levels. The power of the prosecutor is enormous.

Jackson was aware that the vast grant of power should not come at the cost of “the best in our American traditions.” *Id.* He concluded that because of this enormous power, prosecutors also have enormous responsibilities. “A sensitivity to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in a prosecutor who tempers zeal with human kindness, who seeks the truth and not victims, who serves the law and not factional purposes, and who approaches his task

with humility.” *Id.* at 6.

Endorsing the same principles Jackson spoke of, our ethical rules task prosecutors with “the responsibility of a minister of justice and not simply that of an advocate.” Ariz.R.Sup.Ct. 42, E.R. 3.8, cmt. 1; *accord State v. Hulsey*, 243 Ariz. 367, ¶ 123 (2018); *State v. Miller*, 234 Ariz. 31, ¶ 21 fn.3 (2013); *State v. Martinez*, 230 Ariz. 208, ¶ 33 (2012).

This is the balance of the criminal justice system. Meanwhile, the victim has the right “to be treated with fairness, respect and dignity, and to be free from intimidation, harassment and abuse, throughout the criminal justice process.” Ariz. Const. Art. 2, § 2.1(A)(1). No part of the rules governing criminal procedure should abrogate the rights of the victim to be so treated. Ariz. Const. art. II § 2.1(A)(11).

However, “victims are not parties to a defendant’s criminal case.” *Lynn v. Reinstein (Glassel)*, 205 Ariz. 186, ¶ 15 (2003). The proposed change to Rule 1.9 goes beyond these enumerated rights and obligations, and inserts the victim into the delicate balance between the prosecution and defense in a way not contemplated by the Victims’ Bill of Rights (VBR). Under the VBR, the victim’s right to be heard applies to hearings that might result in the defendant’s release. *See* Ariz. Const. art. II, § 2.1(A)(4) and (9). The VBR further grants victims the right to be present and to be informed at various other stages of the criminal proceeding. *See id.* (A)(2) (“To be informed ...”); (A)(3) (“To be present at and ... informed ...”); (A)(7) (“To read presentence reports ...”); (A)(12) (“To be informed ...”). At its core, the VBR intends to protect and inform the victim, and in its current form

it does so ably.

What the Petition seeks, and what the VBR does not intend, is to make victims a quasi-party, equal with the defendant and the state throughout the criminal process. The proposed changes would grant a victim's attorney unprecedented power, but with none of the ethical obligations and responsibilities of the prosecutor. The victim's attorney would gain new powers to present motions, serve replies, request waivers of requirements, set motions for argument, and propose orders.

The proposed Rule 1.9 would convert a victim's attorney from a counselor for the victim to an advocate in the criminal proceeding, anointing them as adjunct prosecutors capable of disrupting and influencing pretrial hearings and criminal proceedings.

But the victim's attorney is not beholden to any of the obligations of a prosecutor. Unlike a prosecutor, the victim's attorney has none of the prosecutor's ethical obligations. Unlike the prosecutor, a victim's representative is not bound to seek the truth or be impartial. Unlike a prosecutor, a victim's counsel is not a minister of justice and need not be sensitive to fair play.

The proposed rule's last sentence is especially expansive: "A victim may also file a response to a party's motion if the party's motion impacts a victim's right." A motivated advocate could argue that anything "impacts a victim's right." A motion to suppress may lead to dismissal, and thus impact a victim's right to be heard before a defendant is released; a motion for a voluntariness hearing to preclude a confession impacts the victim's right to

justice; a request for a *Daubert* hearing regarding DNA evidence could be portrayed as impacting a victim's right to be free from harassment.

This expansion of power exceeds the victim's right to be informed or treated with dignity and respect, tramples on the province of the prosecutor, and violates Arizona's fundamental notions of justice and fair play.

Conclusion

The Maricopa County indigent defense agencies oppose the changes proposed by the petition. Two different committees have now spent years on this issue and have uniformly agreed that incorporation is neither needed nor desirable. At its best, further incorporation of victims' rights will cause confusion and require litigation; at its worst, it will violate principles of justice that are the bedrock of our criminal justice system. This Court should reject the proposed change.