

Rosemarie Pena-Lynch
Bar No 023400
Mcpa. Cnty. Ofc. of Public Defense Svc.
620 W. Jackson, Suite 3076
Phoenix, AZ 85003
(602) 506-7228
Rosemarie.Pena-Lynch@maricopa.gov

Gary Kula
Bar No. 012507
Mcpa. Cnty. Public Defender's Ofc.
620 W. Jackson, Suite 4015
Phoenix, AZ 85003
(602) 506-7711
Gary.Kula@maricopa.gov

Steve Koestner
Bar No. 011566
Mcpa. Cnty. Ofc. of Legal Advocate
222 N. Central, Suite 154
Phoenix, AZ 85004
(602) 506-4111
Steve.Koestner@maricopa.gov

Shannon Burns
Bar No. 015976
Mcpa. Cnty. Ofc. of Public Advocate
106 E. Baseline Rd.
Mesa, AZ 85210
(602) 372-2815
Shannon.Burns@maricopa.gov

Sherri McGuire Lawson
Bar No. 013605
Mcpa. Cnty. Ofc. of Legal Defender
222 N. Central, Suite 8100
Phoenix, AZ 85004
(602) 506-8800
Sherri.Mcguire@maricopa.gov

ARIZONA SUPREME COURT

In the matter of:

PETITION TO AMEND RULE
26.11 OF THE RULES OF
CRIMINAL PROCEDURE AND
RULES 1, 3, 4, AND 42 OF THE
RULES OF PROTECTIVE ORDER
PROCEDURE AND ADOPT RULE
43 OF THE RULES OF
PROTECTIVE ORDER
PROCEDURE

Supreme Court No. R-22-0039

Joint Comment by the Directors of the
Maricopa County Indigent Defense
Agencies Re: Petition to Amend Rule
26.11 and Protective Order Rules, 1, 3, 4,
and 42 and Adopt Protective Order Rule
43

The Maricopa County Indigent Defense Offices, which collectively represent most indigent individuals charged with criminal offenses in our jurisdiction, suggest that two changes be made to Petition R-22-0039 to ensure that the proposal comports with due process and the statutory language of A.R.S. § 13-719.

A. Amend Proposed Rule 43 to align with proposed Rule 26.11 to ensure that all defendants have the due process rights to notice and an opportunity to be heard.

“An essential principle of due process is that a deprivation of life, liberty, or property ‘*be preceded*’ by notice and opportunity for hearing appropriate to the nature of the case.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)) (emphasis added).

As drafted, Proposed Rule 43 of the Arizona Rules of Protective Order Procedure fails to explicitly ensure that defendants are provided notice and an opportunity to be heard prior to a court’s issuance of a lifetime no-contact injunction.

Rather than conform to traditional due process notice requirements, Proposed Rule 43 transforms every case in which a victim files a petition for lifetime no-contact injunction for an offense that occurred prior to September 24, 2022 into an ex parte proceeding. However, nothing in the plain language of A.R.S. § 13-719 provides for ex parte proceedings.

Instead, A.R.S. § 13-719(A) contemplates both notice and presence of the defendant by requiring that a victim request the imposition of a lifetime no-contact injunction at sentencing. Criminal defendants have a constitutional right to be present at every critical stage of a trial, including sentencing. *United State v. Gagnon*, 479 U.S. 522, 522-26 (1985). Rule 26.9 of the Arizona Rules of Criminal Procedure also requires the presence of the defendant at sentencing. Thus, a defendant is given both notice and an opportunity to be heard when a victim seeks a lifetime no-contact injunction stemming from an offense occurring after September 24, 2022.

However, under Proposed Rule 43, a defendant would not be given notice or an opportunity to be heard prior to the court's ruling. Once a victim files a petition under Proposed Rule 43(c)-(f), Proposed Rule (g) directs the court to process the petition upon its own determination that the "conviction is a qualifying offense."

Notably, Proposed Rule 43(i)(2)(c) recognizes that judicial errors happen by permitting a defendant to request that a lifetime no-contact injunction be dismissed because it is premised on a non-qualifying conviction.

The Maricopa County Indigent Defense Offices respectfully assert that due process requires that all defendants—not just those subject to lifetime no-contact injunctions at sentencing—be afforded notice and an opportunity to be heard prior to issuance of the injunction.

Accordingly, we recommend that Proposed Rule 43 of the Rules of Protective Order Procedure be amended by adding a new subsection (g), “Notice to the Defendant.” The suggested addition would follow the currently proposed subsection (f), “Continuing Duty to Provide Current Address.” The remainder of the proposed rule would be renumbered following the inclusion of:

(g) Notice to the Defendant. The court must provide the defendant’s sentencing counsel notice of the victim’s petition, including the information provided in the victim’s petition pursuant to Rule 43(e)(1)-(3) & (5). If the defendant was unrepresented by counsel at sentencing, the court must provide notice to the defendant. The defendant must have the opportunity file a written response before the court issues a lifetime no-contact injunction.

By incorporating the suggested change into Proposed Rule 43, the due process rights of defendants would be protected while also promoting judicial economy. Erroneously ordered lifetime no-contact injunctions will be avoided without requiring judicial hearings absent a showing of good cause. Rights of victims will also be protected by shifting the notice requirement to the court rather than risking that a victim inadvertently disclose confidential information through compliance with service requirements otherwise contemplated by Rule 1.7(c) of the Arizona Rules of Criminal Procedure.

Moreover, the proposed change would merely accord defendants the same procedural protections afforded to victims under Proposed Rule 43(i)(3).

The second recommendation offered by the Maricopa County Indigent Defense Offices concerns the discrepancy between the ambiguous language in Proposed Rule 43(i)(1) and the clear mandate of A.R.S. § 13-719(E)(2).

B. Amend Proposed Rule 43(i)(1) to conform with a court’s mandatory obligation to dismiss a lifetime no-contact injunction at the victim’s request as required by A.R.S. § 13-719(E)(2) or upon the defendant’s request as required by A.R.S. § 13-719(E)(1).

A.R.S. § 13-719(E)(2) requires courts to grant a victim’s request to terminate a lifetime no-contact injunction.

A.R.S. § 13-719(E)(1) requires courts to grant a defendant’s request to terminate a lifetime no-contact injunction upon meeting the statutory criteria.

But Proposed Rule 43(i) does not include language reflecting this statutory directive. Instead, Proposed Rule 43(i) is—at best—ambiguous as to whether a court has discretion to grant or deny such requests even where the criteria set forth in A.R.S. § 13-719(E) have been met.

Accordingly, the Maricopa County Indigent Defense Offices recommend that Proposed Rule 43(i) be amended to reflect the rights to the termination of a lifetime no-contact injunction established by A.R.S. § 13-719(E).

1. A.R.S. § 13-719(E)(2) requires a court to grant a victim’s request to terminate a lifetime no-contact injunction.

A.R.S. § 13-719(E)(2) provides that a lifetime no-contact injunction “does not expire and is valid for the defendant’s natural lifetime unless” “a victim submits a

written request to the court for an early expiration.” The statute authorizes further court inquiry via a hearing only to “verify the victim’s request.” *Id.*

A plain reading of A.R.S. § 13-719(E)(2) establishes that the statute mandates courts to grant every request for early expiration filed by a victim. *See Powers v. Carpenter*, 203 Ariz. 116, 118, ¶ 9 (2002) (plain language is most reliable indicator of statutory meaning).

The mandatory nature of the statute is established using the word “unless” at the end of A.R.S. § 13-719(E). “Unless” is defined as “except on the condition that: under any other circumstance than.” Unless, Merriam-Webster Online Dictionary (available at <https://www.merriam-webster.com/dictionary/unless>) (last accessed Oct. 18, 2022).

The only discretion available to the court under A.R.S. § 13-719(E)(2) is the discretion to hold a hearing, but the scope of the hearing is limited. That hearings are discretionary is established using the word “may.” *See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts* at 112 (2012) (explaining the permissive use of “may” under the Permissive/Mandatory Canon of statutory construction).

The scope of the hearing is also expressly limited “to verify a victim’s request.” A.R.S. § 13-719(E)(2). Absent an issue with verification, the statute unambiguously requires a court to grant a request for early expiration. By including

only one condition for the court to conduct a hearing to consider a victim's request, the Legislature has excluded from the court's consideration any issues not associated with simple verification of a victim's request. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 112 (2012) (explaining that under the Negative-Implication Canon of statutory construction, the inclusion of one thing implies the exclusion of others).

However, Proposed Rule 43(i) adds unnecessary ambiguity with superfluous language concerning a court's obligation to grant a victim's request. Under Proposed Rule 43(i)(1), courts are authorized to "schedule a hearing to make a determination on the victim's request for dismissal." The scope of the court's "determination" is not defined by the Proposed Rule 43(i)(1) despite the limitation required by A.R.S. § 13-719(E)(2) concerning verification of the victim's request.

"Determination" is defined as "a judicial decision settling and ending a controversy." *Determination*, Merriam-Webster Online Dictionary, (available at <https://www.merriam-webster.com/dictionary/determination>) (last accessed Oct. 18, 2022). Given this common dictionary definition, it is evident that the plain language of Proposed Rule 43(i)(1) expands the scope of judicial discretion beyond the confines of A.R.S. § 13-719(E)(2). *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 69 (2012) (explaining

that words are to be accorded ordinary everyday meanings under the Ordinary-Meaning Canon of statutory construction).

The ambiguity concerning the existence of the court's discretion is compounded by the next sentence of Proposed Rule 43(i)(1): “*If the court grants the victim's request...*” (emphasis added). Read in context, Proposed Rule 43(i)(1) bestows upon courts unfettered discretion to grant or deny a victim's request to terminate a lifetime no-contact injunction.

Such a construction of A.R.S. § 13-719(E)(2) is inconsistent with the Legislature's directive “that its statutes ‘shall be liberally construed to preserve and protect the rights to which victims are entitled.’” *Fay v. Fox in & for Cnty. of Maricopa*, 251 Ariz. 537, 541, ¶ 21 (2021) (quoting A.R.S. § 13-4418).

“The legislature possesses authority to enact substantive laws but may also enact ‘procedural laws to define, implement, preserve, and protect the rights guaranteed to victims’ by the Victim's Bill of Rights, Ariz. Const. art. 2, § 2.1.” *State v. Reed*, 248 Ariz. 72, 76, ¶ 10 (2020) (internal citation omitted). A.R.S. § 13-719 bestows upon victims of certain crimes the right to obtain and rescind a lifetime no-contact injunction upon request. Rules implementing A.R.S. § 13-719 must respect those rights and not limit them.

2. A.R.S. § 13-719(E)(1) requires a court to grant a defendant’s request to terminate a lifetime no-contact injunction under three circumstances.

The preceding subsection established that A.R.S. § 13-719(E)(2) requires a court to terminate a lifetime no-contact injunction upon the request of a victim. The same statutory mandate applies to requests made by defendants subject to the satisfaction of any of the criteria¹ listed in A.R.S. § 13-719(E)(1)(a)-(b).

Yet, Proposed Rule 43(i)(2) also adds ambiguity concerning a court’s discretion to grant a defendant’s request. Nothing in Proposed Rule 43(i)(2) reflects the statutory requirement that a court grant the defendant’s request upon meeting the statutory criteria. Accordingly, the Maricopa County Indigent Defense Offices proposes that Proposed Rule 43(i)(2) also be amended to eliminate the ambiguity and align the text with its suggested change to Proposed Rule 43(i)(1).

3. The Maricopa County Indigent Offices recommend the following amendments to Proposed Rule 43(i)(1).

In order to ensure that both victims’ and defendants’ rights to terminate a lifetime no-contact injunction is not abrogated by the ambiguity provided in

¹ The Maricopa County Indigent Defense Offices agrees with the inclusion of Proposed Rule 43(i)(2)(3) permitting a defendant to seek the termination of a lifetime no-contact injunction issued pursuant to a non-qualifying conviction. Such an order would be void and unenforceable and should be subject to termination at the defendant’s request. *See State v. Serrano*, 234 Ariz. 491, 495, ¶ 14 (App. 2014) (establishing that post-sentencing collateral orders are void unless authorized by statute.).

Proposed Rule 43(i)(1), the Maricopa County Indigent Defense Offices proposes the following alternative language:

~~(i)~~ **(j) Validity; Dismissal.** A lifetime no-contact injunction issued pursuant to A.R.S. § 13-719(D) is effective on service and is valid for the defendant's natural lifetime unless it is dismissed.

(1) *Dismissal on Request of the Victim.* The victim may make a request to the court to dismiss the lifetime no-contact injunction at any time by filing a written motion to dismiss. Court personnel must verify the victim's identity when the motion is filed. The court may schedule a hearing to ~~make a determination on~~ **verify** the victim's request for dismissal. ~~If~~ **The court must grant** the victim's request **upon verification**, ~~it must~~ issue a written order and provide a copy to the victim and the defendant.

(2) *Dismissal on Request of the Defendant.* The defendant, by filing a written motion, may request dismissal of a lifetime no-contact injunction. **The court must grant the request only if:**

(a) the victim has died;

(b) the conviction on which the lifetime no-contact injunction is based has been dismissed, expunged or overturned, or the defendant has been pardoned; or

(c) the conviction on which the lifetime no-contact injunction is based is not a qualifying conviction.

(3) *Notification; Response.* Before granting a defendant's request to dismiss a lifetime no-contact injunction based on 2(b) or (c), the court must notify the victim of the request and give the victim an opportunity to file a written response.

Conclusion

The Maricopa County Indigent Defense Offices, which jointly represent most indigent individuals charged with criminal offenses in our jurisdiction, suggest that two changes be made to Petition R-22-0039. The proposal comports with due process and the statutory language of A.R.S. § 13-719.

The first suggestion is to require that courts provide notice to sentencing counsel before ruling upon a victim's request for a lifetime no-contact injunction for offenses committed before September 24, 2022. The proposed amendment affords defendants the same procedural protections to defendants subject to lifetime no-contact injunctions requested at sentencing. Moreover, the proposed procedural protections mirror those afforded to victims under Proposed Rule 43(i)(3).

The second suggestion is to amend Proposed Rule 43(i) to reflect the plain meaning of A.R.S. § 13-719(E). The statute vests victims with the right to terminate a lifetime no-contact injunction upon request. The statute similarly affords defendants the right to terminate a lifetime no-contact injunction if statutory criteria are met. However, Proposed Rule 43(i) is ambiguous. As written, Proposed Rule 43(i) could be interpreted to vest broad discretion with courts to grant or deny such requests. This ambiguity should be eliminated.

Both suggestions will ensure that the proposed rules comport with due process and the statutory language of A.R.S. § 13-719.

Respectfully submitted October 31, 2022.

By /s/ Rosemarie Pena-Lynch
Rosemarie Pena-Lynch, Director
Mcpa. Cnty. Ofc. of Public Defense Svc.

By /s/ Gary Kula
Gary Kula, Director
Mcpa. Cnty. Public Defenders Ofc.

By /s/ Steve Koestner
Steve Koestner, Director
Mcpa. Cnty. Ofc. of Legal Advocate

By /s/ Shannon Burns
Shannon Burns, Director
Mcpa. Cnty. Ofc. of Public Advocate

By /s/ Sherri McGuire Lawson
Sherri McGuire Lawson, Director
Mcpa. Cnty. Ofc. of Legal Defender