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**SUPREME COURT OF ARIZONA**

|                                |   |                            |
|--------------------------------|---|----------------------------|
| In the matter of:              | ) | R-22-0045                  |
|                                | ) |                            |
| <b>PETITION TO AMEND</b>       | ) | <b>ARIZONA PROSECUTING</b> |
| <b>Rule 39(b)(12), ARIZONA</b> | ) | <b>ATTORNEYS' ADVISORY</b> |
| <b>RULES OF CRIMINAL</b>       | ) | <b>COUNCIL'S COMMENT</b>   |
| <b>PROCEDURE</b>               | ) | <b>IN OPPOSITION</b>       |
| _____)                         |   |                            |

Because Petition R-22-0045 misconstrues the purpose of Rule 39(b)(12), Arizona Rules of Criminal Procedure, the Arizona Prosecuting Attorneys' Advisory Council recommends denial of the Petitioner's requested action.

***a. Rule 39(b)(12) is a procedural, not substantive, discovery requirement.***

The intent and effect of Rule 39(b)(12), Arizona Rules of Criminal Procedure (ARCrP), is to regulate pretrial discovery procedures; namely interviews, depositions, and other discovery requests of the victim, made by the defendant, the defendant's attorney, or other person acting on the defendant's behalf. (Id., Rule 39(b)(12)). This regulation of pretrial conduct is consistent with the stated purpose

of the Rules of Criminal Procedure generally, which is to govern procedures in all criminal proceedings. Rule 1.1, ARCrP. The Arizona Supreme Court has the original, Constitutional “[p]ower to make rules relative to all procedural matters in any court.” ARIZ.CONST. Art. 6, §5(5). The management of discovery requests is the management of criminal proceedings. Arizona courts have consistently held that a criminal defendant has no vested right to a particular mode of procedure. *State of Arizona v. Warner*, 168 Ariz. 261, 264, 812 P.2d 1079 (Ct. App., 1990), (review denied, July 10, 1991); *citing to: State v. Staatz*, 159 Ariz. 411, 768 P.2d 143 (1988); and *State v. Birmingham*, 96 Ariz. 109, 392 P.2d 775 (1964).

“Uniformly, substantive law is that part of the law which creates, defines and regulates rights; whereas the adjective, remedial or procedural law is that which prescribes the method of enforcing the right or obtaining redress for its invasion”. *State v. Birmingham, Id.*, 96 Ariz. at 110, 392 P.2d at 776.

Rule 39(b)(12) is a procedural rule. The defense must communicate discovery requests for a victim interview to opposing counsel (the prosecutor). The victim has a constitutional right to refuse discovery requests, including but not limited to interviews. ARIZ.CONST. Art. 2, §2.1(5). The prosecutor conveys the victim’s response to opposing counsel (the defense attorney). The request may be granted or denied. The discovery can occur, or the discovery may not occur, at the election of the victim. If refused, defense counsel still retains the right to seek (by motion) a discovery order under Rule 15.3(a)(2), ARCrP.

***b. Arizona Attorneys for Criminal Justice v. Ducey is not dispositive. Rather, it is, at best, inconsequential to the Petition at hand.***

The Petitioners have attained a federal trial court decision from the District Court of Arizona. [*Arizona Attorneys for Criminal Justice v. Doug Ducey*, CV-17-01422-PHX-SPL, Doc. #269, p.12, November 2, 2022]. The decision does not abrogate the Rule. This §1983 action narrowly adjudicated the defense counsels' personal right to free speech under Article 1 of the Federal Constitution's Bill of Rights. The decision is on appeal. No victim was named or appeared as a defendant to vindicate rights under Art. 2.1 of the Arizona Constitution. And no particular defendant was named or appeared as a plaintiff to allege obstruction of federal or state constitutional rights to confrontation (the Confrontation Clause), or to secure the balance of rights to present a fair defense under the Sixth Amendment to the U.S. Constitution, as made applicable to the States through the 14<sup>th</sup> Amendment and brought as suit under 42 U.S.C. §1983.

The U.S. District Court acknowledged this critical distinction in footnote 5 to Paragraph 39 of the Findings of Fact and Conclusions of Law:

“To the extent that Plaintiffs argue that the statute hinders their ability to effectively represent their clients by limiting their ability to investigate facts, circumstances, mitigation evidence and the like..., the Court finds that these issues go not to Plaintiff's First Amendment rights but rather to their clients' Sixth Amendment rights, which are not at issue here”. *Arizona Attorneys for Criminal Justice, et al., v Doug Ducey*, (Id.,).

And:

“[n]othing in this Order shall be construed to enjoin enforcement of any other provision of Arizona law, including a crime victim’s right to refuse an interview, deposition or other discovery request pursuant to Article II, §2.1(A)(5) of the Arizona Constitution and the requirements under Arizona Rules of Criminal Procedure 39(b)(12) that the defense must communicate a request to interview a victim to the prosecutor rather than the victim.”

The personal speech rights of defense counsel are not pivotal, implicated, or consequential when it comes to regulating pretrial criminal discovery procedures.

“The federal constitution gives the defense no greater right to discovery than exists under state law”. *State ex rel. Romley v. Superior Court in and for the County of Maricopa*, 172 Ariz. 232, 236, 836 P.2d 445, 449 (1992) (rev. denied September 22, 1992).

The *Romley* decision does elaborate on resolving conflicts between State and Federal Constitutional provisions and those instances when an Arizona Victim’s Constitutional Rights encounter a Defendant’s need to know so as to prepare an adequate defense. But that is not the issue in *AACJ v. Ducey*. AACJ vindicated its membership’s speech entitlements, not entitlements of their clients. And as noted, discovery conflicts are first resolved by motion practice under Rule 15.3, ARCr.P., or by other protective orders. Remedies exist under state laws and procedures. So, there is nothing in the District Court decision that, alone, requires an amendment to Rule 39(b)(12). In fact, the decision acknowledges respect for the Rule.

c. ***Conclusion: There is no analog between what Petitioners achieved in litigation and the current state of the Arizona Rules of Criminal Procedure.***

Rule 39(b)(12) is a procedural, pretrial discovery rule. The Rule advises litigants regarding the method for taking discovery from Victims. The Rule regulates how discovery is taken. It does not implicate a defense counsel's First Amendment right to speak at a Victim. It merely provides the mechanism for doing so when the intent is to conduct discovery. It is of no consequence, therefore, that the discovery request goes through the prosecutor as an intermediary. Discovery requests in nearly every thinkable category are mediated and self-regulated through retained or assigned counsel who communicate on such issues, as per the rules of procedure. The *AACJ v. Ducey* decision is not dispositive. It is distinguishable. It is on appeal. And it is noteworthy for what it did not decide. At best, it is a distraction that bears little weight upon the Petition.

When the Petition is taken upon what merits remain there is no constitutional necessity that warrants a change. For the reasons stated above, the Arizona Prosecuting Attorneys' Advisory Council opposes Petition R-22-0045.

RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of April, 2023.

ARIZONA PROSECUTING ATTORNEYS'  
ADVISORY COUNCIL

By: Ehjabek Ortiz for  
William P. Ring  
APAAC Chair