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**IN THE SUPREME COURT**

**STATE OF ARIZONA**

In the Matter of:

Petition to Amend Rule 17.4 and  
Rule 38 of the Arizona Rules of  
Criminal Procedure

Arizona Supreme Court No.

**Petition to Amend Rule 17.4 and  
Rule 38 of the Arizona Rules of  
Criminal Procedure to Incorporate  
Limited Restorative Justice  
Principles via Victim-Defendant  
Conferencing**

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the Arizona Restorative Justice Coalition (“AZRJC”) respectfully submits this Petition to Amend Rules 17.4 and Rule 38 of the Arizona Rules of Criminal Procedure to Incorporate Limited Restorative Justice Principles.

## **I. Petitioner’s Interest Statement**

The Arizona Restorative Justice Coalition (“AZRJC”) envisions a world where justice is a moral and reasoned response to harm that is defined and implemented by the people who are directly impacted by each specific act of harm. AZRJC’s mission is to bring autonomous Arizona community stakeholders together to explore and propose restorative justice policies that reform existing responses to harm and devise methods by which restorative justice practices are implemented.

AZRJC’s proposed amendments to Rule 17.4 and Rule 38 of the Arizona Rules of Criminal Procedure reflect the heart of its mission to propose restorative justice policies that result in more just outcomes by empowering victims, holding offenders accountable, and making our communities safer. Justice is best achieved when those who are directly impacted by harm are consulted and involved in crafting resolutions that are designed to repair and restore. The proposed amendments, premised on consent and accountability, create discretionary restorative practices for use in victim-defendant settlement conferences that will empower victims and improve outcomes in criminal cases.

## **II. The Incorporation of Limited Restorative Justice Principles via Victim-Defender Conferences will Promote Victims’ Rights, Promote Accountability, Reduce Recidivism, and Make Our Communities Safer.**

There is a broad consensus that Arizona’s criminal justice system needs “significant reform.” Tara Jackson & Marc L. Miller, *Arizona Town Hall Reflects*

*on Criminal Justice*, Ariz. Att'y, May 2019 at 84 (2019). Arizona is not alone in needing to reform its societal responses to crime and harm. “A growing consensus exists among practitioners, policymakers, and scholars that the American criminal system is not fulfilling its aspirations of public safety, behavioral change, and justice.” Shannon M. Sliva, Elizabeth H. Porter-Merrill, Pete Lee, *Fulfilling the Aspirations of Restorative Justice in the Criminal System? The Case of Colorado*, Kan. J.L. & Pub. Pol'y, Summer 2019 at 456 (2019).

No easy solutions to crime and the harms caused by crime exist. But the burgeoning restorative justice movement is proving that restorative justice principles offer alternatives to the criminal punishment paradigm that are both effective and empowering. Although there is not a consensus model for the definition of restorative justice, there are universal themes to restorative practices. “Restorative approaches share the view that the proper response to an offense should focus not on punishment, but on meeting the needs of the victim, holding the offender accountable for the harm caused, taking steps to repair as much as possible the harm suffered by the victim and the community, and addressing the offender's needs to prevent reoffending and promote reintegration.” Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 Buff. L. Rev. 635, 640 (2021).

Although Arizona has been a leader in victims’ rights and in judicial innovation, it lags behind the rest of the country and the world in implementing

restorative justice practices within its criminal justice system. *See, e.g., Handbook on Restorative Justice Programmes*, United Nations Office on Drugs and Crime (2d. ed. 2020) (available at [https://www.unodc.org/documents/justice-and-prison-reform/20-01146\\_Handbook\\_on\\_Restorative\\_Justice\\_Programmes.pdf](https://www.unodc.org/documents/justice-and-prison-reform/20-01146_Handbook_on_Restorative_Justice_Programmes.pdf)) (last accessed Jan. 02, 2024) (compiling best practices for restorative justice reforms in criminal cases based on international input.)

Thus, the Arizona Restorative Justice Coalition proposes that Arizona courts adopt this proposal as a supplementary approach to incorporate limited restorative justice practices within its criminal justice system by empowering victims and criminal defendants to have the ability, if they choose, to participate in restorative victim-defendant conferences.

**A. Victim-Defendant Conferences are Empowering, Effective, and Needed.**

“While remorse and apology are central to judgments about offenders and are important to victims and the public, day-to-day criminal justice makes very little room for them.” Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 Yale L.J. 85, 95 (2004).

Although known by many different names (victim-offender mediation/conference/reconciliation, group conferencing, peacemaking circles, etc.), restorative conferences like the victim-defendant conference in this proposal generally involve:

...the inclusion of victims and offenders in direct dialogue, nearly always face-to-face, about a specific offense or infraction; the presence of at least one additional person who serves as mediator, facilitator, convener, or circle keeper; and usually, advance preparation of the parties so they will know what to expect. The focus of the encounter nearly always involves naming what happened, identifying its impact, and coming to some common understanding, often including reaching agreement as to how any resultant harm would be repaired. Use of these processes can take place at any point in the justice process, including pre-arrest, pre-court referral, pre-sentencing, post-sentencing, and even during incarceration.

Mark S. Umbreit & Betty Vos, Robert B. Coates, Elizabeth Lightfoot, *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 *Cardozo J. Conflict Resol.* 511, 529 (2007).

Like other restorative justice practices, victim-defendant conferences are empowering to victims, defendants, and community stakeholders because the process ensures that needs are heard, accountability plans are developed, and that responses to harm are individually tailored to the circumstances. Unlike a traditional criminal settlement conference, victim-defendant conferences are not geared toward resolving cases by relying on aggregate norms, pressures created by mandatory sentencing laws, or threats of harsher punishment. At the core of the victim-defendant conference process is the understanding that repair and accountability for harm must build from consent and trust, not coercion and punishment.

## **B. Restorative Justice Practices Promotes Victims' Rights.**

Arizona has been a leader in the national movement to recognize rights of victims in criminal cases. The Arizona Constitution's Victims' Bill of Rights was passed by voters over 30 years ago to promote fairness to victims, facilitate truth seeking, and to prevent victim alienation within the criminal justice system. Steven J. Twist, Keelah E.G. Williams, *Twenty-Five Years of Victims' Rights in Arizona*, 47 *Ariz. St. L.J.* 421, 424 (2015). “[F]or much of the past century, crime victims were marginalized by the criminal justice system -- viewed primarily as ‘unfortunate by-products’ rather than active participants.” *Id.*

But the criminal justice system often fails to accord the needs of victims. “Empirical research supports the claim that restorative justice offers more to victims than the criminal process.” Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 *Buff. L. Rev.* 635, 644 (2021)

AZRJC's proposal centers victims' needs by providing an opportunity for victims to play an active role in the resolution of their case. “Victim-survivors have reported that one of the chief reasons they participate in a restorative process, when given the opportunity, is to help shape the response to a crime.” Lynn S. Branham, *The Overlooked Victim Right: According Victim-Survivors a Right of Access to Restorative Justice*, 98 *Denv. L. Rev. Forum* 1, 13 (2021).

Studies have shown that many victims feel a need to share the impact the harm caused by an offender has had on their lives. Many victims also want to play a role in identifying how the offender should be held accountable for their conduct. Because the needs of each victim are different, victim-defendant conferences ensure that individual needs are identified and met.

Moreover, the restorative process itself can be healing, as “dialogue may unveil dimensions of the harm or attributes of the responsible party that victim-survivors were unaware of before the conference. Those revelations may, in turn, prompt victim-survivors to realize they need something more or different from the responsible party than they had initially thought at the outset of the restorative process.” *Id.* at 13-14. The result is that—after participating in a restorative justice conference like a victim-defendant conference—victims are more likely to experience “diminishing emotional harm” from a crime over time. *Id.*

The benefits of restorative justice practices extend beyond furthering victims’ rights. The community benefits, too.

### **C. Restorative Justice Practices Result in More Just Outcomes.**

The incorporation of restorative justice policies into Arizona’s criminal justice system will result in more just outcomes that center healing and accountability over blame and punishment. “Restorative justice is an approach that characterizes crime as an injury to people and communities, and the aim of justice as healing.” Shannon

M. Sliva, Elizabeth H. Porter-Merrill, Pete Lee, *Fulfilling the Aspirations of Restorative Justice in the Criminal System? The Case of Colorado*, Kan. J.L. & Pub. Pol'y, Summer 2019, at 456, 460 (2019) (citing Howard Zehr, *The Little Book of Restorative Justice* at 19 (2014)). Given its emphasis on voluntary participation aimed at accountability and repair, it is no surprise the restorative justice practices make our communities safer than traditional criminal justice procedures.

#### **a. Accountability**

Existing adversarial criminal justice procedures' emphasis on blame and punishment create an environment that discourages offenders from being accountable for their actions. Whereas restorative justice "aims to have offenders accept responsibility for the choices they make, while recognizing that those choices may be constrained by social and economic conditions and influenced by the offender's own experience of trauma and victimization." Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 Buff. L. Rev. 635, 645 (2021). When an offender is given the ability to participate in a restorative process, they are more likely to understand the "full impact of his actions, accept responsibility, express sincere remorse for the harm caused, and take steps to try to repair the harm and avoid reoffending." *Id.* at 644.

The emphasis on accountability rather than punishment, context of the pressures on the offender leading to the harm rather than viewing the offender as the

mythical atomized individual, and the goal of healing rather than blame make restorative justice practices like victim-defendant conferences well-equipped to respond to harm and reduce the likelihood that a particular offender engages in similar or more harmful behavior in the future.

### **b. Reduced Recidivism**

The emphasis on creating accountability by directly responding to the needs of the offender, victim, and community largely results in reduced recidivism. “[M]ediation participants are less likely to recidivate and that, when they do recidivate, they commit less serious offenses.” Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 Yale L.J. 85, 133 (2004). And the results are not limited to minor offenses. Even violent offenses are subject to the recidivism-reducing consequences of restorative justice practices. See Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 Buff. L. Rev. 635, 645 (2021).

While the data may be incomplete, studies generally establish that restorative justice approaches have a statistically significant impact on reducing recidivism. *Id.*

### **c. Safer Communities**

Restorative justice practices will also help create safer communities. In addition to promoting accountability, healing, and reducing recidivism, restorative justice practices provide practical ways for community members to interact, engage

in constructive dialogue, and foster shared senses of interconnection. When community members are conscious of the needs of others and are able to comprehend how the conduct of one impacts the emotional and financial well-being of others, members are less likely to cause harm and more able to identify available resources to address needs.

By incorporating more community members and organizations into the resolution of criminal cases via the victim-defendant conferences, the proposal will foster broader societal dialogue at the local, regional, and state levels for how our society supports the needs of others and mitigate harmful contexts that are likely to encourage harmful behavior. *See* “Restorative justice focuses on repairing harm and strengthening relationships,” Center for Justice Innovation (available at <https://www.innovatingjustice.org/areas-of-focus/restorative-justice#:~:text=Beyond%20the%20individuals%20directly%20impacted,accountability%20and%20creating%20safer%20communities.>) (last accessed Jan. 02, 2024.)

**D. The Proposed Amendments are Consistent with Chief Justice Brutinel’s Strategic Plan.**

AZRJC’s proposal aligns with Chief Justice Brutinel’s vision for Arizona’s judiciary. *See* Chief Justice Robert Brutinel, *Justice for the Future: Planning for Excellence* at Restorative Justice at 9 (2019) (available at <https://www.azcourts.gov/Portals/0/Communications/JusticeForTheFuture.pdf?ver=2019-06-28-165330-887>). Recognizing that “our local courts face high case

volumes driven by underlying social problems such as homelessness, mental illness, and other social issues, Chief Justice Brutinel’s strategic agenda has implored Arizona’s “courts and communities” to “work to provide” support to defendants and victims, “resolve the underlying social circumstances” that contributed to the criminal behavior, and “heal both the offender and any victim.” *Id.*

AZRJC’s proposal also aligns with the Arizona Supreme Court’s goal to “identify best practices for restorative justice programs and establish ways to expand access to such programs in courthouses and in communities.” *Id.*

AZRJC’s victim-defendant conference model proposal reflects the best practices for restorative conferences. *See, e.g., Restorative Facilitator's Handbook, Restorative Resources* (2015) (available at [https://www.restorativeresources.org/uploads/5/6/1/4/56143033/handbook\\_5-4-15\\_.pdf](https://www.restorativeresources.org/uploads/5/6/1/4/56143033/handbook_5-4-15_.pdf)); *RJC Practitioners Handbook, Restorative Justice Council* (2016) (available at [https://restorativejustice.org.uk/sites/default/files/resources/files/Practitioners%20Handbook\\_0.pdf](https://restorativejustice.org.uk/sites/default/files/resources/files/Practitioners%20Handbook_0.pdf)); *Restorative Justice Practices [Principles for Legislation]*, Model Penal Code: Sentencing § 6.14 TD No 4 (2016); *Handbook on Restorative Justice Programs, Criminal Justice Handbook Series*, United Nations Office on Drugs and Crime (2nd. Ed. 2020) (available at [https://www.unodc.org/documents/justice-and-prison-reform/20-01146\\_Handbook\\_on\\_Restorative\\_Justice\\_Programmes.pdf](https://www.unodc.org/documents/justice-and-prison-reform/20-01146_Handbook_on_Restorative_Justice_Programmes.pdf)).

### **III. Proposed Amendments to Rule 17.4 and Rule 38 of the Arizona Rules of Criminal Procedure to Incorporate Restorative Conferencing.**

AZRJC's proposal, although ambitious and innovative, is quite simple. Under the proposal, if the victim and the defendant both consent, the superior court would be required to hold a victim-defendant conference. The procedures for the victim-defendant conference would be supplemented to Rule 17.4 of the Arizona Rules of Criminal Procedure with the addition of Rule 17.4(a)(3).

If the victim and the defendant both agree to participate in a victim-defendant conference, then the parties could agree to retain a third party facilitator who is a trained restorative justice mediator to conduct the conference. Proposed Rule 17.4(a)(3)(i). Trained restorative justice mediators have studied restorative justice philosophy and understand the strains a criminal case puts on victims, defendants, families of both, and their communities.

If the parties are unable to agree on a third party facilitator, then either the court or its designee would be required to mediate the conference. Proposed Rule 17.4(a)(3)(i). Logistically, this would require additional training of court staff so that courts are equipped to conduct the conferences in a manner consistent with restorative justice philosophy and best practices.

The facilitator would hold pre-conference meetings with both the victim and the defendant to identify needs and goals of each while mapping out concerns that

must be addressed or avoided at the conference. Consent to participate in the conference must be confirmed after each pre-conference meeting. Proposed Rule 17.4(a)(3)(v).

The facilitator would select up to four community representatives to participate in the conference. The selection would include diverse members of the community impacted by the harm, have differing perspectives, and not be unequally aligned with either party. Proposed Rule 17.4(a)(3)(iv). The victim and defendant also would choose up to three representatives to participate. Proposed Rule 17.4(a)(3)(ii - iii).

The victim-defendant conference would begin with opening statements and proceed with a circle dialogue aimed at identifying the harm that the conference is held to address, discussing the emotional, financial, physical, and other impacts of the harm, exploring reasons why the harm occurred, identifying needs of the victim and the defendant in responding to the harm, and, if possible, repairing it, and developing a restorative agreement to redress the harm. Proposed Rule 17.4(a)(3)(vi).

The proposal then allows the restorative agreement to form the basis of a dismissal of the criminal case, a deferred prosecution agreement under Rule 38.1, or a plea agreement that encompasses the terms of the restorative agreement. Proposed Rule 17.4(a)(3)(viii)

Notably, the proposal retains prosecutor discretion to accept or reject the terms of the restorative agreement. Proposed Rule 17.4(a)(3)(vii). This component is at odds with general restorative justice philosophy. But hopefully prosecutors become educated about the process and see the benefits of permitting directly impacted stakeholders to develop and implement responses to harm in their individual cases. Additionally, given that the current proposal will be implemented through this Court's procedural rule-making authority, retaining the discretion of the prosecutor to accept the restorative agreement respects the separation of powers outlined in the Arizona Constitution.

Lastly, the proposal includes a broad confidentiality provision intended to promote full and free participation in the victim-defendant conference without fear of reprisal. Proposed Rule 17.4(a)(3)(x).

#### **IV. Conclusion**

Arizona courts have been a leader in innovation and inclusion through numerous reforms and programs over the years. This proposal builds upon the success of the settlement conference reforms, lends itself to the successes of Arizona's problem-solving courts, and has the potential to initiate a second wave of victim-centered approach to our collective response to harm.

AZRJC's proposal is innovative for Arizona courts, but the philosophy and practice is proven to make communities safer. This Court should adopt it as written.

Alternatively, this Court could form a Task Force to study AZRJC's proposal, explore alternatives, identify best practices and procedures for courts that adopt restorative justice policies, and suggest other pathways for our state's judicial branch to integrate restorative justice practices into its conflict-resolution paradigm.

**Respectfully submitted January 9<sup>th</sup>, 2024**

**Arizona Restorative Justice Coalition**

By /s/ Kevin D. Heade

**Kevin D. Heade**  
**AZRJC Member**

/s/ Paula Barr Skillicorn

**Paula Barr Skillicorn**  
**AZRJC Member**

## AZRJC's Proposed Amendments to Ariz. R. Crim. P. 17.4, 38.1, 38.2, & 38.3

### (Proposed) Rule 17.4. Plea Negotiations and Agreements

#### (a) Plea Negotiations.

(1) *Generally.* The parties may negotiate and reach agreement on any aspect of a case.

(2) *Judicial Participation.* At either party's request or on its own, a court may order counsel with settlement authority to participate in good faith discussions to resolve the case in a manner that serves the interests of justice. The assigned trial judge may participate in this discussion only if the parties consent. In all other cases, the discussion must be before another judge. If settlement discussions do not result in an agreement, the case must be returned to the trial judge.

(3) Restorative Justice Victim-Defendant Conference. If both the victim and defendant consent to participate, the court must hold a victim-defendant conference. The victim-defendant conference must:

(i.) Permit a third-party facilitator familiar with restorative justice mediation principles to conduct the victim-defendant conference if the victim and defendant agree on the selection of the facilitator. Otherwise the victim-defendant conference must be conducted by the court pursuant to Rule 17.4(a)(2) or a designee of the court.

(ii.) Permit the participation of the victim and up to three representatives of the victim's choosing. The victim must provide notice to the defendant and the court of the identity of the victim's representatives, including a description of the relationship of each representative to the victim.

(iii.) Permit the participation of the defendant and up to three representatives of the defendant's choosing. The defendant must provide notice to the victim and the court of the identity of the defendant's representatives, including a description of the relationship of each representative to the defendant.

**(Proposed) Rule 17.4. Plea Negotiations and Agreements (cont'd)**

(iv.) Permit the participation of up to four representatives from the community. The community representatives must be chosen by the facilitator of the conference. In choosing the community representatives, the facilitator must apply criteria that identifies a diverse selection of representatives who understand the impacts of the circumstances on the community, victim, and the defendant.

(v.) Prior to the victim-defendant conference, the facilitator must:

(aa.) Meet with the defendant and the defendant's attorney to discuss the goals of the conference, identify the questions that will be discussed, explore the defendant's concerns, and prepare the defendant for participating in the conference. At the end of the pre-conference meeting, the facilitator must confirm that the defendant still wishes to participate in the conference.

(bb.) After meeting with the defendant, meet with the victim, the victim's counsel or the prosecutor to discuss the goals of the conference, identify the questions that will be discussed, explore the victim's concerns, and prepare the victim for participating in the conference. At the end of the pre-conference meeting, the facilitator must confirm that the victim still wishes to participate. The victim may choose a surrogate to participate in the conference on the victim's behalf.

(vi.) The victim-defendant conference procedures must include:

(aa.) Opening statements of the facilitator explaining the purpose of the conference, the procedures, and the requirements for participation.

(bb.) Introductions of the facilitator and the participants.

**(Proposed) Rule 17.4. Plea Negotiations and Agreements (cont'd)**

(cc.) Circle dialogue that respects the views of each participant and is conducted in a respectful manner.

(dd.) If possible through the circle dialogue, the creation of a restorative agreement.

(ee.) Clarification of the next steps with the restorative agreement that includes confirmation that both the victim and defendant agree to the conditions set forth in the restorative agreement.

(vii.) Revocation of consent to participate may be asserted by the victim or defendant at any time prior to the adoption of a restorative agreement. The facilitator must terminate victim-defendant conference proceedings if consent to participate is revoked by either the victim or the defendant.

(viii.) If a restorative agreement is established, and the prosecutor does not object to the terms of the restorative agreement, the court may:

(aa.) Dismiss the case pursuant to the terms of the restorative agreement;

(bb.) Dismiss the case pursuant to a deferred prosecution agreement under Rule 38.1 and the terms of the restorative agreement, or;

(cc.) Accept a plea agreement pursuant to Rule 17.4 and the terms of the restorative agreement.

(ix.) If a restorative agreement is not reached, any evidence developed through the victim-defendant conference process may not be used against the defendant for any purpose.

**(Proposed) Rule 17.4. Plea Negotiations and Agreements (cont'd)**

(x.) Confidentiality of the victim-defendant conference: Any communications made exclusively during or for the victim-defendant conference process will be confidential except as to the provisions indicated in this section. Exceptions to confidentiality are limited to:

(aa) Disclosure agreed upon by the defendant and victim. The defendant and victim may disclose information to their respective attorneys.

(bb) Disclosure relevant to a claim or defense made by a party against a participant or facilitator for a breach of a legal obligation.

(cc) Disclosure of threatened or actual violence during the restorative process and evidence derived thereof that is related to the threatened or actual violence disclosure.

(dd) Disclosure required statute, including information about abuse or neglect of a child or vulnerable adult per A.R.S. § 13-3620 and A.R.S. § 13-3623.

(ee) No partner, including the responsible person, may disclose any information about the program process in a particular case, communications, or participants to anyone except program partners unless the court, the victim, and defendant agree, or it is otherwise required by law.

**(Proposed) Rule 17.4. Plea Negotiations and Agreements (cont'd)**

(bb.)Victim-defendant conference participants (other than the victim and defendant) will not be inquired of or called as a witness or deponent or compelled to produce documents in any proceeding, criminal or civil, related to the communications or proceedings of the victim-defendant conference. However, participants may be called as a witness or deponent or compelled to produce documents for criminal and civil violations which occur during the program itself.

(cc.)Documents and information otherwise discoverable under the Arizona Rules of Civil Procedure will not be shielded from discovery merely because they are submitted or referred to in the program.

**(b) Plea Agreement.** The terms of a plea agreement must be in writing and be signed by the defendant, defense counsel (if any), and the prosecutor. The parties must file the agreement with the court. Any party may withdraw from an agreement before the court accepts it.

**(c) Determining Accuracy, Voluntariness, and Intelligent Acceptance of the Agreement.** Before accepting the plea agreement, the court must address the defendant and confirm that the written plea agreement contains all the agreement's terms and that the defendant understands and agrees to the terms.

**(d) Accepting the Plea.** After making the determinations required by (c) and considering the victim's comments under (v)(2), the court must either accept or reject the submitted plea. The court is not bound by any provision in the plea agreement regarding the sentence or probation terms and conditions if, after accepting the agreement and reviewing a presentence report, the court rejects the provision as inappropriate.

**(Proposed) Rule 17.4. Plea Negotiations and Agreements (cont'd)**

**(e) Rejecting the Plea.** If the court rejects a plea agreement or any provision in the agreement, it must give the defendant an opportunity to withdraw the plea. The court must inform the defendant that if the plea is not withdrawn, the disposition of the case may be less favorable to the defendant than what the agreement provided.

**(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements.** Arizona Rule of Evidence 410 governs the admissibility of a plea, a plea discussion, and any related statement.

**(g) Change of Judge if Plea Withdrawn.** A defendant who withdraws a plea after a presentence report is submitted may exercise a change of judge as a matter of right under Rule 10.2 if the defendant has not previously exercised that right.

**(v) Victims' Rights.**

(1) *Victim Participation During Plea Discussions.* The victim must have an opportunity to confer with the prosecutor, if they have not already conferred, before any case resolution. The prosecutor or the victim's representative must inform the court and defense counsel of the victim's position. If the defendant is present during settlement discussions, the victim also must have the opportunity to be present and to be heard regarding settlement.

(2) *Before the Court Accepts or Rejects a Plea Agreement.* Before the court makes the determinations required by (c) and accepts or rejects the plea agreement, it must afford the victim the opportunity to be heard and consider any comments expressed by the victim.

### **(Proposed) Rule 38.1. Application for a Suspension Order**

- (a) Generally.** After filing a complaint, indictment, or information, but before adjudication, the State may file a motion requesting that the court suspend further proceedings to allow a defendant to participate in a deferred prosecution program.
- (b) Motion's Content.** The motion must state facts establishing that the defendant is legally eligible for participation in a deferred prosecution program. The motion must be accompanied by the defendant's signed consent agreeing to participate in the program. The consent also must be signed by defense counsel, if any. If the defendant's consent is predicated upon a restorative justice agreement entered pursuant to Rule 17.4(a)(3), the motion must avow that the restorative agreement governs the terms of the deferred prosecution program.
- (c) Suspension Order.** After reviewing the motion and the defendant's signed consent, and upon finding the defendant legally eligible for a deferred prosecution program, the court must suspend further proceedings for the period specified in the motion, not exceeding two years. If the defendant is in custody, the court may order the defendant's release.

## **(Proposed) Rule 38.2. Resuming Prosecution**

- (a) Notice of Failure to Fulfill Deferred Prosecution Conditions.** If the State is not satisfied that the defendant has fulfilled the conditions of the deferred prosecution program, it may file a written notice to that effect and request that the court vacate its order suspending prosecution. The State must serve a copy of the notice on the defendant. If the deferred prosecution program is governed by the terms of a restorative agreement entered pursuant to Rule 17.4(a)(3), the victim or a victim's representative must also agree that the defendant has not fulfilled the conditions of the deferred prosecution program before the court may vacate its order suspending prosecution.
- (b) Order to Resume Prosecution.** After receiving a notice of the defendant's failure to fulfill the deferred prosecution conditions, the court must vacate the suspension order and order that the prosecution resume. The court must mail a copy of the order to the defendant and defense counsel, if any.
- (c) Time for Trial.** Subject to Rule 8.4 and irrespective of the phase of the case when the prosecution was suspended, the defendant must be tried no later than 90 days after the filing of the order to resume prosecution.

### **(Proposed) Rule 38.3. Dismissal of Prosecution**

- (a) At the End of Two Years.** Two years after an order suspending prosecution is filed, the court may order the prosecution dismissed without prejudice.
- (b) On Successful Completion.** If the State notifies the court that the defendant has satisfactorily completed the terms of the deferred prosecution program, the court must order a dismissal of the charges. If the State or the victim provides notice that the defendant has successfully completed the terms of a restorative justice agreement entered pursuant to Rule 17.4(a)(3), the court must dismiss the case with prejudice. If the defendant provides notice of successful completion of restorative justice agreement entered pursuant to Rule 17.4(a)(3), the court may dismiss the case with prejudice upon finding that the defendant has completed the terms of the restorative agreement. Before dismissing the case on a defendant's motion, the court must provide the victim and the State an opportunity to be heard.