KRISTIN K. MAYES
Arizona Attorney General
(Firm State Bar No. 14000)

Alice Jones
State Bar No. 028062
Deputy Solicitor General/Chief Counsel Criminal Appeals Section
2005 North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542-8587
Alice.Jones@azag.gov

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**	Supreme Court No. R-24-0016 **COMMENT IN OPPOSITION TO PETITION TO AMEND RULE 17.4 AND RULE 38 OF THE ARIZONA RULES OF CRIMINAL PROCEDURE**

"Restorative justice" is a broad concept that can take many different forms in practice. Its broad goals of reducing recidivism and increasing the power victims feel in the criminal justice system are to be commended. And the Arizona Attorney General's Office thus welcomes further dialogue about the role restorative justice can play in Arizona's criminal justice system. But the Office opposes this specific rule change petition because of at least three major flaws.

First, the rule change sidelines the State except for giving it the power to object to a restorative agreement. *See* Proposed Rule 17.4(a)(3)(vii). In a criminal case, the State has the responsibility to "see that justice is done on behalf of both the victim and the defendants." *State ex rel. Romley v. Superior Court in and for County of Maricopa*, 181 Ariz. 378, 382 (App. 1995); *see also* ER 3.8 cmt. ("A prosecutor has the responsibility of a minister of justice and not just simply that of an advocate."); *Berger v. United States*, 295 U.S. 78, 88 (1935) (stating a prosecutor's role in criminal prosecution is not to win a case but instead see "that justice shall be done"); *Lindsay R. v. Cohen*, 236 Ariz. 565, 567, ¶ 9 (App. 2015) ("[T]he prosecutor's responsibility is to represent society's interests[.]"). Furthermore, it is within the prosecutor's discretion whether a defendant may participate in diversion. *Cranmer v. State,* 204 Ariz. 299, 302, ¶ 10 (App. 2003); *State v. Brown*, 121 Ariz. 125, 126 (App. 1978) (whether a defendant may be admitted into an Adult Diversion Program is within the prosecutor's discretion); *King v. Neely,* 143 Ariz. 329, 331 (App. 1984) (whether a defendant is admitted into a child molester's treatment program is within prosecutor's discretion).

But in the proposed rule change, the State is excluded from any decision on whether a victim-defendant conference is held or terminated. The State is excluded from the victim-defendant conference itself unless relegated to another role (such as, perhaps, one of four community representatives). And the State is excluded from

shaping the terms of any restorative agreement unless the facilitator, victim, or defendant ask the prosecutor for input beforehand (though there is no requirement to do so). Sidelining the State in these ways would subvert its party status, its power to negotiate criminal cases to resolution, and its responsibility to ensure justice is done.

Even assuming this Court were to adopt such a rule, including the State in a victim-defendant conference could prevent an objection to a restorative agreement. For example, the State could believe an agreement requires a specific term—a term to which the defendant and victim would readily agree—and could work to have that term included in the agreement from the start instead of objecting to the agreement after the fact.

Second, the rule change fails to identify the types of offenses to which it does or does not apply. To illustrate, consider recanting victims in domestic violence cases who no longer want the defendant to be held accountable, a principle on which restorative justice hinges. *See* Petition, at 8–9 (discussing accountability as a principle of restorative justice). Because of this and other considerations unique to domestic violence offenses, there may be good reason to exclude these types of cases or, at least, have special considerations for these types of cases. As another example, consider minor victims who have been repeatedly molested or sexually abused and who have a complex relationship with the offender, particularly if the offender is a

parent or parental figure. Protecting the minor's psychological wellbeing may prove enough to warrant excluding such cases. But, again, the rule change does not account for such circumstances.

Third, the rule change lacks important details on the "third-party facilitator" other than to say that the person must be "familiar with restorative justice mediation principles." Proposed Rule 17.4(a)(3)(i). But merely being "familiar" with principles of restorative justice seems insufficient for a position that could impact an entire criminal case (and thus the lives of the case's key participants). *See* Proposed Rule 17.4(a)(3)(viii)(aa) (providing the "restorative agreement" could "[d]ismiss the case"). Specific qualifications would seem more appropriate, including whether the person has been trained in how to conduct the conference and a determination of what type of training and experience is necessary. This raises additional questions of whether the crimes at issue also would require different types of facilitators because, for example, the conference in a case involving assaults or sexual assaults would be much different than in cases involving property crimes. There are also no details on who would pay the facilitator and whether the facilitator must be neutral.

In sum, the Attorney General's Office supports further discussion on how restorative justice reforms might benefit our criminal justice system, but is opposed to this specific rule change. The proposed rule change would drastically upend the nature of our justice system with little study and little input from stakeholders

preceding those drastic changes. And some of the changes apparently contemplated by the rule change might even require involvement of the legislative branch (e.g. to provide funding for facilitators). To the extent restorative justice reforms are considered, much more modest and gradual efforts would likely be more appropriate. At the very least, any rule change on restorative justice should not be adopted without considerable time and study, as well as input and collaboration from all stakeholders. To the extent this Court believes that a task force to study these issues would benefit the courts, the Attorney General's Office would not object and would be willing to participate.

RESPECTFULLY SUBMITTED this 30th day of April, 2024

KRISTIN K. MAYES
Arizona Attorney General

By /s
Alice Jones (#028062)
Deputy Solicitor General/Chief Counsel
Criminal Appeals Section