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7
8 **IN THE SUPREME COURT**
9 **STATE OF ARIZONA**

10 In the Matter of:

Supreme Court No. R-25-

11
12 **PETITION TO AMEND RULE**
13 **39(b)(12) OF THE RULES OF**
14 **CRIMINAL PROCEDURE**

PETITION

15 Pursuant to Rule 28(a) of the Arizona Rules of Supreme Court, the State Bar
16 of Arizona (the “State Bar”) hereby petitions the Court to amend Rule 39(b)(12) of
17 the Rules of Criminal Procedure, which pertains to the victim interview request
18 process. The petition is the product of the Court’s August 31, 2023 request that the
19 State Bar’s Criminal Practice and Procedure Committee evaluate approaches to
20 improving Rule 39(b)(12) in lieu of abrogating it, as proposed in the pending rule
21 change petition filed by Arizona Attorneys for Criminal Justice in R-22-0045. A
22 copy of the proposed amendments to the Rule can be located in Appendix A.

23 **I. BACKGROUND**

24 The origins of this petition trace to the federal litigation in *Arizona Att’ys for*
25 *Crim. Just. v. Ducey* (“AACJ”), 638 F. Supp. 3d 1048 (D. Ariz. 2022). There,

1 Arizona Attorneys for Criminal Justice successfully challenged, on First
2 Amendment grounds, the constitutionality of A.R.S. § 13-4433(B), which provides
3 that “[t]he defendant, the defendant's attorney or an agent of the defendant shall
4 only initiate contact with the victim through the prosecutor's office.” The litigation
5 did not, however, involve Rule 39(b)(12) of the Rules of Criminal Procedure,
6 which provides that “the defense must communicate requests to interview a victim
7 to the prosecutor, not the victim.” *See AACJ*, 638 F. Supp. 3d at 1060 n.4. The
8 district court’s ruling is currently pending in the Ninth Circuit Court of Appeals.
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11 Following the ruling, Arizona Attorneys for Criminal Justice filed a rule
12 petition in R-22-0045 proposing to abrogate Rule 39(b)(12) based largely on the
13 same First Amendment rationale the district court employed in *AACJ* to find § 13-
14 4433(B) unconstitutional. At its August 2023 Rules Agenda, the Court continued
15 R-22-0045 to the August 2024 Rules Agenda¹ and referred possible amendments
16 to Rule 39 to the State Bar’s Criminal Practice and Procedure Committee (“the
17 Committee”) for further evaluation in an August 31, 2023 letter.
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23 ¹ As the State Bar explained in its June 10, 2024 status letter to the Court, the
24 Criminal Practice and Procedure Committee had not yet completed the work the
25 Court had referred by the time of the August 2024 Rules Agenda. At the August
2024 Rules Agenda, the Court further continued R-22-0045 to the August 2025
Rules Agenda.

1 In the letter, the Court noted that Rule 39(b)(12) was not challenged in the
2 federal litigation and explained that it “does not favor” eliminating the rule, as
3 proposed in R-22-0045. It hoped, however, that the Committee could nevertheless
4 “evaluate approaches to improving Rule 39(b)(12)” and requested that the
5 Committee specifically consider:
6

- 7 1. “Whether Rule 39(b)(12)(A) could be improved by requiring the prosecutor
8 to copy the defendant, the defendant’s attorney, or other person acting on
9 the defendant’s behalf when sending a request for an interview to the victim,
10 or if telephoning, to include the defendant’s attorney on the call, and by
11 requiring the prosecutor, absent good cause, to provide the victim’s response
12 to the defendant, the defendant’s attorney, or other person acting on the
13 defendant’s behalf by a specified date prior to trial”;
- 14 2. “Whether Rule 39(b)(12) could be improved by requiring non-interview-
15 related contacts between the defendant’s attorney or other person acting on
16 the defendant’s behalf and the victim to be carried out in such a way as to
17 preserve and protect the victim’s “right to be treated with fairness, respect
18 and dignity, and to be free from intimidation, harassment, or abuse . . .” Rule
19 39(b)(1); Ariz. Const. Art 2, Sec. 2.1(A)(1)”;
- 20 3. “Whether Rule 39(b)(12) could be further improved by providing that, in a
21 case where the defendant is representing himself, non-interview-related
22 contacts with the victim must be carried out by advisory counsel.”
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24 *See Appendix B.*

25 After receiving the Court’s letter, the State Bar’s Criminal Practice and
Procedure Committee formed the Rule 39 Workgroup on September 28, 2023, to
evaluate approaches to improving the rule, including those delineated in the Court’s

1 letter, and to propose any amendments to Rule 39(b)(12) in a draft rule change
2 petition for the Committee’s final approval.

3 **II. THE RULE 39 WORKGROUP**

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5 The Rule 39 Workgroup included five volunteer members of the Committee
6 (two defense attorneys, three prosecutors, and one Supreme Court Staff Attorney),
7 as well as seven additional stakeholders selected by the State Bar (one additional
8 prosecutor, two additional defense attorneys, three victim rights attorneys, and
9 counsel for the *AACJ* plaintiffs).²

10
11 The workgroup’s initial meetings centered around whether it should continue
12 evaluating approaches for improving Rule 39(b)(12) given that the district court’s
13 ruling in *AACJ* was still under review in the Ninth Circuit. In a December 2023 vote,
14 a narrow majority of the workgroup agreed that its work to improve the rule, *at least*
15 *with respect to the victim interview request process* (as opposed to the process for
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19 ² The five Committee members were Kevin Heade of Pinal County Public Defender,
20 Scott Boncoskey of Staff Attorneys Office of the Arizona Supreme Court, Bruce
21 Chalk of the Pima County Attorney's Office, Tennie Martin of the Federal Defender
22 Office for the Middle District of Florida, Caroline Allen of the U.S. Department of
23 Justice, and Adriana Genco of the United States Attorneys’ Office. The seven
24 additional stakeholders were Tamara Brooks-Primera of the Law Office of Tamara
25 Brooks-Primera, PLC, Jared Keenan of the ACLU of Arizona, Jonathan Mosher of
the Coconino County Attorney's Office, Randall Udelman of Arizona Crime Victim
Rights Law Group, Colleen Clase of Arizona Voice for Crime Victims, Jamie Balson
of Legal Services for Crime Victims in Arizona, and Dean Brault of the Arizona
Public Defenders Association.

1 contacting victims), should proceed because the ongoing federal litigation, as noted
2 in the Court’s August 31, 2023 letter, concerned only the broader statutory
3 prohibition on victim contact, not the interview request process set forth in Rule
4 39(b)(12). On January 30, 2024, a majority of the Committee affirmed that the
5 workgroup should proceed with its work despite the pending Ninth Circuit case.
6

7 All victim rights attorney members of the workgroup believed that the federal
8 litigation should first be resolved before the workgroup considered any amendments
9 to Rule 39(b)(12). Nonetheless, the still victim rights attorney members participated
10 in evaluating and voting on approaches for improving the rule, including those
11 proposed in the Court’s August 31, 2023 letter, on the understanding that they object
12 to any amendments until the federal litigation is resolved. Additionally, the ACLU
13 of Arizona member participated despite asserting that restrictions on defense
14 counsel’s ability to request an interview under both the current and proposed rule
15 violate the First Amendment. After approximately seven meetings between
16 December 2023 and April 2024, the workgroup found the rule could be improved,
17 though not necessarily in the ways suggested in the letter.
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21 For example, with respect to the Court’s second and third suggestions, which
22 concerned the regulation of “non-interview-related contacts” between the defense
23 and victim, the workgroup concluded it could not improve the rule in the ways
24 suggested without a final resolution of the federal litigation because the litigation
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1 concerns whether it is lawful to engage in non-interview-related contacts with
2 victims in the first place. However, with respect to the Court's first proposal, which
3 the workgroup viewed as getting at whether there could be more transparency and
4 timeliness in the interview request process, a majority of members agreed that the
5 rule could be improved.

7 Defense attorneys roundly agreed the rule should be improved in terms of
8 transparency and timeliness because the current process does not include any
9 deadline to respond to an interview request. Several prosecutors also agreed because
10 additional amendments would ensure uniformity in the interview request process.
11 However, the workgroup near-unanimously disagreed with the specific proposals for
12 improving transparency and timeliness suggested in the Court's letter, such as
13 copying the defendant on calls or letters to the victim, because they were too
14 invasive, intrusive, or logistically cumbersome.

17 Instead, a majority of the workgroup, which included members of the minority
18 that believed any action was premature until the federal litigation resolved,
19 concluded that improved transparency and timeliness in the process would be better
20 achieved through an on-the-record interview request process that requires specific
21 filings by set deadlines, which would ensure that both the court and the parties have
22 a clear understanding of the status of a victim interview request. The majority further
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1 agreed that the rule should further reinforce current interview-related constitutional,
2 statutory, and rule-based protections for victims.

3 The amendments proposed in this petition reflect these conclusions, which the
4 majority members of the Committee approved, as amended, on October 23, 2024.
5 The specific amendments proposed by the majority of the Rule 39 Workgroup and
6 Committee are discussed in greater detail in Section III of this petition. The
7 unanimous minority position taken by the three victim rights attorney members of
8 the workgroup and some prosecutor members of the Committee is discussed in
9 Section IV.

12 **III. OVERVIEW OF PROPOSED AMENDMENTS**

13 The following discussion sets forth the major changes being proposed to Rule
14 39(b)(12) and the rationale behind them, as determined by the Criminal Practice
15 and Procedure Committee and Rule 39 Workgroup. The State Bar ultimately
16 agrees that these amendments are warranted on the basis that they would,
17 consistent with the proposals in the Court’s August 31, 2024 letter, improve
18 timeliness, transparency, and fairness in the victim interview request process.

21 **A. On-the-Record Interview Requests**

22 The first proposed amendment to the Rule 39 victim interview request process
23 would require that defense requests for victim interviews be filed “with the court.”
24 This is required under proposed Rule 39(b)(12)(A), which governs requests to
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1 unrepresented victims, and proposed Rule 39(b)(12)(B), which governs requests to
2 represented victims. Currently, the rule does not specify how a victim interview
3 request is made, and the prevailing practice of defense attorneys is to email requests
4 to the prosecutor.
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6 The State Bar believes that requiring interview requests be made part of the
7 record would advance transparency, accountability, and timeliness by helping to
8 ensure the request is not forgotten or overlooked, the court is alerted to it, and
9 successor counsel can readily determine whether a request has been made. Requiring
10 that the request be filed with the court also offers the benefit of serving as a noticed
11 event that can then trigger subsequent deadlines.
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13 Of note, the proposed rule does not specify or limit the content of the request.
14 Thus, the defense may include additional information in it, such as the reasons the
15 defense believes the victim may wish to participate in the interview. To account for
16 the open nature of the request, which the proposed rule requires prosecutors convey
17 to unrepresented victims, the amendments expressly permit prosecutors to object to
18 a request on the ground that that it “violates a victim’s constitutional or statutory
19 rights,” such as the right to be free from harassment. If sustained by the court, the
20 prosecutor need not convey the interview request, and the defense can file an
21 amended request that cures the violation. The Rule 39 Workgroup anticipated that
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1 abusive interview requests would be relatively rare, particularly considering that the
2 proposed rule requires that they be filed with the court.

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4 Victim rights attorney members of the workgroup unanimously expressed
5 concerns about the potential for harassment and abuse, additional trauma, as well as
6 confusion which may exist involving perceived limitations placed on the victim right
7 to confer with prosecutors when interview requests are filed with the court.

8 **B. Separate Processes for Unrepresented and Represented Victims**

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10 Although victim interview requests must be filed on the record regardless of
11 whether the victim is represented or unrepresented, the proposed amendments
12 specify different processes for what must occur after a request is filed depending on
13 whether the victim is represented or unrepresented. Currently, the rule makes no
14 distinction between represented and unrepresented victims, requiring all interview
15 requests to go through the prosecutor, regardless of representation status.

16
17 For unrepresented victims, proposed Rule 39(b)(12)(A)(i) requires that the
18 prosecutor “diligently convey a written or electronic copy of the filed request to the
19 victim,” unless an objection to it has been sustained. Proposed Rule 39(b)(12)(A)(ii)
20 then requires that the prosecutor “file a notice of the victim’s response, or attempts
21 to obtain a response, with the court” “no later than 30 days” after the interview
22 request is filed or the court overrules an objection to the interview request. “[I]f an
23 unrepresented victim consents to or declines an interview after the prosecutor files
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1 the notice”—whether because the victim changed his or her mind or, for whatever
2 reason, was unable to answer the request in the 30-day period—Proposed Rule
3 39(b)(12)(A)(iii) requires that the prosecutor “file a subsequent notice in accord with
4 (12)(A)(ii).” The content of the prosecutor’s notice(s) is discussed in the next
5 subsection.
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7 Considering that the rule currently specifies no process for how or when an
8 interview request is conveyed, or when the victim’s response should be obtained, the
9 State Bar believes that proposed Rule 39(b)(12)(A) would foster greater
10 transparency and timeliness in the victim interview request process by requiring that
11 a copy of the interview request be conveyed to the victim in full and by requiring
12 that the prosecutor provide a notice of the victim’s response to the request, or notice
13 of the prosecutor’s efforts to obtain a response, within 30 days of the request.
14

15 For represented victims, the proposed amendments do not require that the
16 prosecutor take any action, nor do they require that victim counsel provide a copy of
17 the request to the victim or file a notice in response to the interview request within
18 30 days, as prosecutors must do for unrepresented victims. Instead, proposed Rule
19 39(b)(12)(B)(ii) merely requires that victim counsel “promptly convey the victim’s
20 answer [to the request] by filing the victim’s position in a response with the court.”
21 Accordingly, the interview request process is streamlined for represented victims
22 under the proposed amendments.
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1 The Rule 39 Workgroup determined that the ethical communication duties
2 victim counsel owe their clients are sufficient to ensure defense interview requests
3 are diligently and accurately conveyed to victims, obviating the need to mandate that
4 the victim be given a copy. Similarly, it found that counsel's ethical obligations are
5 sufficient to ensure victim counsel can diligently obtain and file their client's answer
6 to the request, eliminating the need to mandate that a notice be filed apprising the
7 court and parties of the status of the request within a specified period.
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10 **C. Content of Prosecutor's Notice of Response**

11 Proposed Rule 39(b)(12)(A)(ii)(aa)-(dd) specifies that the prosecutor's notice
12 must include: "(aa) the date(s) the prosecutor conveyed or attempted to convey the
13 request, (bb) the means by which the prosecutor conveyed or attempted to convey
14 the request, (cc) whether the victim wants the prosecutor to be present at the
15 defense interview, and (dd) the date the victim responded to the request."
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18 The first two requirements, when and how the request was conveyed, are
19 aimed at providing greater transparency in the interview process and encouraging
20 timely conveyances. The third requirement protects the right of the victim to have
21 the prosecutor present at the interview. *See* A.R.S. § 13-4433(E) ("Unless
22 otherwise directed by the victim, the prosecutor may attend all interviews"). The
23 fourth requirement promotes transparency by requiring the prosecutor to provide
24 notice of whether the victim agrees to the interview. If the prosecutor has not
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1 obtained an answer within the 30-day window, proposed Rule 39(b)(12)(A)(ii)
2 requires the prosecutor to file a notice explaining the efforts to obtain an answer.

3
4 Ultimately, while the workgroup acknowledged that the notice imposes a new
5 filing obligation on the part of already busy prosecutors, it determined that the
6 information required to be included in the notice is sufficiently brief and
7 straightforward to not render the notice requirement unduly burdensome,
8 particularly in light of its transparency benefits.
9

10 **D. Victim Advisement Prior to Interview**

11 Proposed Rule 39(b)(12)(C) is largely a prophylactic provision. It ensures that
12 the victim is advised of all statutory and constitutional rights prior to any interview,
13 even if that advisement has already occurred as current law contemplates. *See, e.g.*
14 *Ariz. Const. Art. 2 § 2.1(A)(12)* (Conferring victims the right “[t]o be informed of
15 victims' constitutional rights.”); *A.R.S. § 13-4405* (requiring law enforcement to
16 advise victim of rights). While proposed Rule 39(b)(12)(C)(iv) generally requires
17 that the victim be informed of “all” “statutory and constitutional rights,” the
18 proposed rule also expressly delineates several specific rights that are of particular
19 importance in the interview context, such the “the right to terminate the contact or
20 interview at any time for any reason.” *See A.R.S. § 13-4433(D)* (The victim has the
21 right to terminate the interview at any time or to refuse to answer any question during
22 the interview.”).
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IV. MINORITY POSITION³

The workgroup was comprised of three victim rights attorneys out of twelve workgroup participants. The workgroup was tasked with assessing and reviewing a Rule directly impacting constitutional, statutory and rule-based application and protection of victim rights particularly after the Arizona District Court found compliance with A.R.S. 13-4433(B) to be an unconstitutional violation of a defense attorney's First Amendment right to request an interview with a crime victim. Because the proposed changes to Rule 39(b)(12) could likewise have First Amendment implications, victim rights attorney members of the workgroup have unanimously opposed any changes at this time and instead believe it appropriate to receive guidance from the Ninth Circuit Court of Appeals about whether the First Amendment challenges will be upheld before considering any changes to Rule 39(b)(12) which could similarly trigger First Amendment challenges by participants receiving direction from proposed Rule changes.

Setting aside any concerns about workgroup participation by only three victim rights attorneys on victim-centric issues, all minority victim rights attorney members have expressed unanimous opposition to any changes to Rule 39(b)(12)

³ The minority position was written by a victim rights attorney member of the workgroup, and its inclusion was deemed necessary to fully explain the process that led to this petition.

1 proposed in this petition at this time. Moreover, rather than reinforce victim rights
2 to refuse interview requests, the proposed changes as advanced by the workgroup,
3 while certainly understandable and may be workable in some manner dependent
4 on the outcome of the Ninth Circuit Decision in *AACJ*, the proposed rule changes
5 advanced in this petition appears to create confusion and will have an unintended
6 negative impact on a victim's right to confer with prosecutor about all aspects of a
7 case, including the right to refuse interview requests.
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10 As a result, without further guidance from the Ninth Circuit on scope and
11 limits of First Amendment rights of parties making interview requests, it is
12 respectfully the unanimous position of all victim rights attorney members of the
13 workgroup that any changes to Rule 39(b)(12) at this time would invite further
14 litigation and confusion rather than fairness and transparency. Instead, at this time,
15 nothing would be gained by ignoring the *AACJ* decision before considering any
16 proposed rule changes.
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19 **V. CONCLUSION**

20 While the State Bar appreciates the minority position, it ultimately believes
21 that the proposed amendments to Rule 39(b)(12) will, consistent with the
22 approaches suggested in the Court's August 31, 2023 letter, improve transparency,
23 timeliness, and fairness in the victim interview request process regardless of the
24 outcome of the Ninth Circuit's decision in *AACJ*. The State Bar therefore
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1 respectfully requests that the Court amend Rule 39(b)(12) as set forth in Appendix
2 A.

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4 RESPECTFULLY SUBMITTED this 17th day of January, 2025.

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9 Lisa M. Panahi
10 General Counsel

11 Electronic copy filed with the
12 Clerk of the Supreme Court of Arizona
13 this 17th day of January, 2025.

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15 by: PSequin
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APPENDIX A

Additions to the text of a rule are shown by underscoring and deletions are shown by ~~strike-through~~.

RULES OF CRIMINAL PROCEDURE

Rule 39. Victims' Rights

(a) [No change]

(b) **Victims' Rights.**

(1)-(11) [No change]

(12) the right to refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on the defendant's behalf, and:

~~(A) the defense must communicate requests to interview a victim to the prosecutor, not the victim to request an interview with an unrepresented victim, the defense must file a notice of a request for a victim interview with the court;~~

(i) unless the court grants an objection by the prosecutor raised on the grounds that the notice of request for interview violates a victim's constitutional or statutory rights, the prosecutor must diligently convey a written or electronic copy of the filed request to the victim;

(ii) no later than 30 days after the notice of request is filed or the court overrules an objection to the interview request, the prosecutor must file a notice of the victim's response, or of the prosecutor's attempt to obtain a response, with the court that includes:

(aa) the date(s) the prosecutor conveyed or attempted to convey the request,

(bb) the means by which the prosecutor conveyed or attempted to convey the request,

(cc) whether the victim wants the prosecutor to be present at the defense interview, and

(dd) the date the victim responded to the request;

(iii) if an unrepresented victim consents to or declines an interview after the prosecutor files the notice described in (12)(A)(ii), the prosecutor must promptly file a subsequent notice in accord with (12)(A)(ii);

(B) ~~a victim's response to such requests must be communicated through the prosecutor~~ to request an interview with a represented victim, the defense must request an interview with the victim's counsel;

(i) the defense must file the request with the court;

(ii) victim's counsel must promptly convey the victim's answer by filing the victim's position in a response with the court;

(C) if the defense requests an interview, among other rights, the victim must be advised prior to the start of the interview that the victim maintains:

(i) the right to refuse an interview,

(ii) the right to be treated with fairness, respect and dignity,

(iii) the right to be free from intimidation, harassment, or abuse,

(iii) the right to terminate the contact or interview at any time for any reason,

(iv) the right to confer with the prosecutor, and

(vi) all other statutory and constitutional rights;

(€D) [No change in text]

(13)-(18) [No changes]

(c)-(h) [No changes]



Supreme Court

STATE OF ARIZONA

FROM THE CHAMBERS OF
ROBERT M. BRUTINEL
CHIEF JUSTICE

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August 31, 2023

SENT VIA EMAIL AND US MAIL

Mr. Joel F. England
Chief Executive Officer/Executive Director
State Bar of Arizona
4201 N. 24TH Street Ste 100
Phoenix, AZ 85016-6266

Re: Rule Petition R-22-0045

Dear Mr. England,

As you know, our Court recently considered Arizona Attorneys for Criminal Justice's Rule Petition R-22-0045, which proposed abrogating Rule 39(b)(12) (A) and (B) of the Arizona Rules of Criminal Procedure. The Court does not favor the elimination of those provisions, but has continued the Petition to the August 2024 Rules Agenda. During this time, we hope the Criminal Practice and Procedure Committee will evaluate approaches to improving Rule 39(b)(12), Rules of Criminal Procedure. Specifically, we request that the Committee consider:

- That AACJ did not explicitly challenge Rule 39(b)(12) in *AACJ v. Ducey*, CV-17-01422-PHX-SPL, when it challenged the constitutionality of A.R.S. § 13-4433(B);
- Whether Rule 39(b)(12) (A) could be improved by requiring the prosecutor to copy the defendant, the defendant's attorney, or other person acting on the defendant's behalf when sending a request for an interview to the victim, or if telephoning, to include the defendant's attorney on the call, and by requiring the prosecutor, absent good cause, to provide the victim's response to the defendant, the defendant's attorney, or other person acting on the defendant's behalf by a specified date prior to trial;
- Whether Rule 39(b)(12) could be improved by requiring non-interview-related contacts between the defendant's attorney or other person acting on the defendant's behalf and the victim to be carried out in such a way as to preserve and protect the victim's "right to be treated with fairness, respect

and dignity, and to be free from intimidation, harassment, or abuse . . .”
Rule 39(b)(1); Ariz. Const. Art 2, Sec. 2.1(A) (1); and

- Whether Rule 39(b)(12) could be further improved by providing that, in a case where the defendant is representing himself, non-interview-related contacts with the victim must be carried out by advisory counsel.

We appreciate the Committee’s willingness to continue working toward improving Rule 39(b)(12) as well as its many other contributions, past and present, to the betterment of Arizona’s criminal rules.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Brutinel", written in a cursive style.

Robert Brutinel
Chief Justice

cc: State Bar Criminal Practice and Procedure Committee
Attn: Patricia Seguin