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10 **IN THE SUPREME COURT**
11 **STATE OF ARIZONA**

12 In the Matter of:

Supreme Court No. R-14-0022

13 **PETITION TO AMEND RULE 39**
14 **OF THE ARIZONA RULES OF**
15 **CRIMINAL PROCEDURE**

16 **COMMENT OF**
17 **THE STATE BAR OF ARIZONA**

18
19 **Introduction**

20 On April 22, 2014, Governor Brewer signed HB 2454, which would combat
21 human trafficking and prostitution in Arizona. The provisions of the bill took effect
22 July 24, 2014. One provision amended A.R.S. § 13-4434 related to a crime victim's
23 right to privacy. The amendment provides that any identifying and locating
24 information of a victim obtained, compiled or reported by any law enforcement or
25 prosecution agency shall be redacted from records pertaining to the criminal case,
including discovery disclosed to the defendant. Identifying information is
specifically defined as a victim's date of birth, social security number and official
state or government issued driver's license or identification number.

1 In response to the amendments to A.R.S. § 13-4434, the Administrative Office
2 of the Courts (“AOC”) has proposed an amendment to Rule 39(b), Ariz. R. Crim. P.,
3 to conform that rule to the statute changes.

4 The State Bar of Arizona takes no unified position on the AOC’s rule-change
5 petition because of significant opposing perspectives of the two subcommittees of its
6 Criminal Practice & Procedure Committee:

- 7 • The defense subcommittee objects to the proposed rule amendment
8 primarily on grounds the new provisions of A.R.S. § 13-4434 have not
9 been determined to be constitutional.
- 10 • The prosecution subcommittee takes the position that the proposed rule
11 amendment is necessary to harmonize an existing conflict between A.R.S.
12 § 13-4344 and Rule 39(b).

13 Instead, the State Bar presents both perspectives, further developed below, and hopes
14 the information will aid the Court in deciding whether to approve the rule-change
15 petition.

16 **Perspective from the Defense Subcommittee**
17 **of the State Bar’s Criminal Practice & Procedure Committee**

18 Petitioner seeks to modify Rule 39 to require police and prosecutors to redact
19 from police reports information that positively identifies the complainant/victim in
20 a criminal case. Specifically, the rule seeks to shield from defense counsel the
21 victim’s date of birth, social security number, official state or government issued
22 driver license number and email address. This information currently must be
23 disclosed unless redacted following a prosecutor’s motion and court order pursuant
24 to Rule 15.5, and no information obtained in connection with criminal proceedings
25 may be publicly disclosed by either party. Rule 15.4(d) Ariz. R. Crim. P.

1 The amendments to Rule 39(b)(10), Ariz. R. Crim. P., should not be supported
2 because:

- 3 • The Legislature exceeded its authority as authorized by the Victim's
4 Bill of Rights ("VBR") in passing a statute that effectively modifies
5 Rule 39 and other criminal-procedure rules;
- 6 • The new statute violates the separation of powers;
- 7 • The proposed rule change conflicts with a defendant's Sixth
8 Amendment right to conduct an independent pre-trial investigation and
9 to meaningfully confront and cross-examine witnesses against him;
- 10 • The proposed rule change precludes defense counsel from running
11 conflict checks; and
- 12 • The proposed rule change results in unnecessary court proceedings and
13 delay.

14 **A. Background**

15 Rule 15.1(b)(1), Ariz. R. Crim. P., mandates the disclosure of "[t]he names
16 and addresses of all persons whom the prosecutor intends to call as witnesses in the
17 case-in-chief together with their relevant written or recorded statements," while Rule
18 15.1(b)(3) compels the disclosure of "[a]ll then existing original and supplemental
19 reports prepared by a law enforcement agency in connection with the particular
20 crime with which the defendant is charged."

21 Although Rule 15.1 does not permit the redaction of personal information
22 pertaining to victims, witnesses or suspects listed in police reports, the version of
23 Rule 39(b)(10) in effect prior to July 24 authorized prosecutors to withhold "the
24 home address and telephone number of the victim, the address and telephone number
25 of the victim's place of employment and the name of the victim's employer,
provided that such information may be ordered disclosed "for good cause shown by

1 the defendant.”

2 The redacted addresses, phone numbers and employment information is
3 seldom crucial to the truth-finding process and does not infringe on any
4 constitutionally right afforded defendants. But where defense counsel shows “good
5 cause” justifying the disclosure of that information, the court “may impose such
6 further restrictions as are appropriate, including a provision that the information shall
7 not be disclosed by counsel to any person other than counsel’s staff and designated
8 investigator and shall not be conveyed to the defendant.” Rule 39(b)(10). This
9 provision is in direct harmony with Rule 15.4(d), which expressly states that “[a]ny
10 materials furnished to an attorney pursuant to this rule shall not be disclosed to the
11 public but only to others to the extent necessary for the proper conduct of the case.”

12 The purpose of the rule authorizing the withholding of addresses, phone
13 numbers and employment information pertaining to complainant/victims was not to
14 hide their true identity from defense counsel, but rather to protect the information
15 from disclosure in order to prevent harassment from those they accuse as well as by
16 the general public. Once criminal charges are filed, criminal defendants are
17 prohibited by court order from contacting alleged victims. A.R.S. § 13-4433(B)
18 similarly prohibits defense lawyers from initiating contact with alleged victims.

19 Rule 15.5 grants trial courts, not prosecutors, the discretion to permit partial
20 redaction of disclosure falling outside the discovery rules – information such as birth
21 dates and social security numbers – if the prosecutor establishes that redaction is
22 warranted and appropriate under the circumstances.

23 **B. Improper Redaction of Victim Birth Dates**

24 After Rule 39 was originally promulgated, prosecutors began withholding a
25 victim’s identifying information by unilaterally redacting victims’ dates of birth
from police reports – an act that violated both Rule 39 and the discovery rules. In

1 *State ex rel. Montgomery v. Chavez*, 234 Ariz. 255, 321 P.3d 420 (2014), the Arizona
2 Supreme Court held that prosecutors had impermissibly redacted victim dates of
3 birth from disclosure because that information fell outside the parameters of the
4 disclosure rules. Rejecting the state’s claim that its action was justified in order to
5 preserve the victim’s “right to privacy,” the Court observed:

6
7 [¶19] Although victims have privacy interests in their birth
8 dates, both prosecutors and the defense have good reason to
9 seek this information. For example, a birth date may help
10 identify the victim of a crime. Likewise, a victim’s exact age
11 may be relevant as an element of an offense or as a factor for
12 determining corresponding punishment. A birth date may also
13 allow the parties to determine if the victim has a criminal
14 history, which can affect the victim’s credibility, and may allow
15 defense counsel to identify possible conflicts that could prevent
16 counsel from representing a defendant.

17 [¶20] The limited disclosure of a birth date in a criminal case
18 thus seeks to balance these interests, allowing both parties
19 restricted use of the information while maintaining the victim’s
20 right ‘to be treated with fairness, respect and dignity, and to be
21 free from intimidation, harassment, or abuse, throughout the
22 criminal justice process.’ Ariz. Const. art. II, §2.1 (A)(1)
23 Disclosure of a victim’s birth date does not, in itself, reveal a
24 victim’s locating or contact information. And the record does
25 not establish how easily such information may be obtained from
the combination of a birth date and information that is publicly
available, e.g., on the Internet.

[¶21] Moreover, to the extent that disclosing a victim’s birth
date may create a risk of harassment or other harm, we reiterate
that the existing rules allow a prosecutor to seek a court order
denying or limiting disclosures otherwise required by Rule
15.1. Thus, a court may authorize a prosecutor to redact victim
birth dates from law enforcement reports that are disclosed to

1 the defense if the prosecutor establishes that redaction is
2 appropriate under Rule 15.5(a). *See, e.g., State v. McMurtrey,*
3 *136 Ariz. 93, 97, 664 P.2d 637, 641 (1983)* (noting that the
4 “preferred procedure” is for the prosecutor to obtain a court
5 order under Rule 15.5(c) before redacting information, but
6 recognizing trial courts’ power to approve redactions
7 subsequently).

8 *Id.* at ____, 321 P.3d at 423.

9 In response to *Chavez*, the Arizona Legislature modified A.R.S. § 13-4434(B)
10 to require law enforcement and prosecutorial agencies to redact from police reports
11 “identifying information” of victims, including birth dates, social security numbers,
12 and official state- or government-issued driver license or identification numbers, as
13 well as “locating information,” which included e-mail addresses from records
14 pertaining to the criminal case involving the victim as well as “discovery disclosed
15 to the defendant” pursuant to Rule 15.

16 Petitioner now seeks to amend Rule 39(b)(10) “to conform” with the recently
17 modified statute – a statute that also effectively amends other existing discovery
18 rules while simultaneously obviating Rules 15.5 and 15.4(d).

19 **C. The Newly Modified Statute is Unconstitutional**

20 No rule or rules should be amended to conform to an unconstitutional statute.
21 Thus, the initial question is whether the Arizona legislature may, through modifying
22 A.R.S. § 13-4434, effectively amend the criminal procedure rules governing
23 disclosure (Rules 15.1 through 15.8) as well as the court’s authority to redact
24 information contained in police reports following motion by a prosecutor (Rule
25 15.5). Stated pragmatically, the question is whether the Legislature may pass a law
effectively modifying existing criminal-procedure rules with the aim of preventing
defense counsel from ascertaining the true identity, history and background of the
complaining witness or conducting conflict checks. Statutory procedures

1 inconsistent with procedural rules adopted by the Supreme Court are
2 unconstitutional. *State v. Fowler*, 156 Ariz. 408, 413, 752 P.2d 497, 502 (App.
3 1987); *State v. Bejarano*, 158 Ariz. 253, 254, 762 P.2d 540, 541 (1988).

4 **1. Violation of Separation of Powers**

5 The authority to enact procedural rules pertaining to court matters is vested
6 exclusively in the Arizona Supreme Court. Ariz. Const. art. VI, §5. This authority
7 includes the power to adopt rules governing disclosure in a criminal case. *Rivera-*
8 *Longoria v. Slayton, ex rel. County of Coconino*, 228 Ariz. 156, 264 P.3d 866 (2011).
9 In *Rivera-Longoria*, the Court made clear the existing discovery rules in criminal
10 cases were carefully crafted:

11 Disclosure in criminal cases is governed by Rules 15.1 through
12 15.8 of the Arizona Rules of Criminal Procedure. In 2003, the
13 disclosure rules were substantially amended based on the
14 recommendations of a committee that included judges,
15 prosecutors, and defense attorneys. *The 2003 amendments*
16 *sought, among other things, to align the disclosure rules more*
17 *closely ‘with the realities of modern practice,’ and to recognize*
18 *‘the defense attorney’s need for basic information early in the*
19 *proceedings in order to meaningfully confer with the client and*
20 *make appropriate strategic decisions.*

21 *Id.* at 158, 264 P.3d at 868 (emphasis added).

22 The amendments to A.R.S. § 13-4434 unconstitutionally usurp the Court’s
23 authority to make procedural rules governing the disclosure of information in the
24 discovery process. The Legislature may not effectively modify Rule 39 and other
25 discovery rules by simply modifying a statute. *Cf. State v. Irving*, 165 Ariz. 219,
224, 797 P.2d 1237, 1242 (App. 1990) (“[T]he legislature does not have the right to
force the courts to admit evidence just because they pass a statute”).

24 **2. The Legislature Lacks Authority Effectively Amend Rule 39**

25 Under Arizona law, the Legislature may only amend the Rules of Criminal

1 Procedure to conform to an expressed “right” created by the Victim’s Bill of Rights
2 – a right that is unique and peculiar to crime victims. *Slayton v. Shumway*, 166 Ariz.
3 87, 92, 800 P.2d 590 (1990); *Champlin v. Sargeant*, 192 Ariz. 371, 373 fn. 2, 965
4 P.2d 763 (1998) (rulemaking power under VBR “extends only so far as necessary to
5 protect rights created by [VBR] and not beyond”).

6 Although A.R.S. § 13-4434 is entitled “victim’s right to privacy,” the “right
7 to privacy” is neither a right contained in or created by Article 2, § 2.1 of the Victim’s
8 Bill of Rights (“VBR”) nor is the “right to privacy” a right which is unique and
9 peculiar to crime victims since such right has existed long before VBR and applies
10 to all citizens. *See State v. Brown*, 194 Ariz. 349, 343, 982 P.2d 815 (1999) (“scope
11 of legislative rulemaking power under VBR extends to those rules that define,
12 implement, preserve and protect the specific rights unique and peculiar to crime
13 victims, as guaranteed and created by the VBR”; observing VBR’s general “speedy
14 trial” right “neither creates a right nor defines a right peculiar and unique to victims
15 as the right to speedy trial pre-existed VBR.”).

16 It is clear that the Legislature may not constructively amend any rule of
17 criminal procedure falling outside of “rights” created by VBR and unique and
18 peculiar to crime victims. The VBR grants the Legislature no authority to modify
19 Rule 39 or the procedural discovery rules. Nor does it authorize the Legislature to
20 obviate protections already afforded victims by Rules 15.4(d) and 15.5. The
21 constitutionality of the new statute has yet to be determined.

22 **D. The Proposed Modification of Rule 39 Violates the Constitutional**
23 **Rights of Criminal Defendants and Gives Rise to Unnecessary Court**
24 **Proceedings and Delay.**

25 **1. Constitutional Rights of Criminal Defendants are Superior**

“The Arizona Rules of Criminal Procedure do not limit the right of a criminal

1 defendant to conduct an independent pre-trial investigation.” *Carpenter v. Superior*
2 *Court*, 176 Ariz. 486, 491, 862 P.2d 246 (1993). The discovery procedures are
3 “designed to enhance the search for truth in the criminal trial by insuring both the
4 defendant and the State ample opportunity to investigate certain facts crucial to the
5 determination of guilt or innocence.” *State v. Lawrence*, 112 Ariz. 20, 22-23, 536
6 P.2d 1038 (1975), quoting *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). The pre-
7 trial investigation for truth involves obtainment of records and information crucial
8 to the accurate determination of anticipated trial issues—including but not limited
9 to those involving the criminal history and other information impacting the
10 credibility of witnesses. *State v. Lehr*, 201 Ariz. 509, 518, 38 P.3d 1172 (2002)
11 (“The test is whether the defendant has been denied the opportunity of presenting to
12 the trier of fact information which bears either on the issues in the case or on the
13 credibility of the witness[es],” quoting *State v. Flemming*, 117 Ariz. 122, 125, 571
14 P.2d 268 (1977)).

15 Arizona courts have long recognized that a person’s mere name is insufficient
16 to establish identity. *State v. Terrell*, 156 Ariz. 499, 503, 753 P.2d 189 (App.1998)
17 (“Mere identity of the defendant’s name with that of the individual with the prior
18 conviction is insufficient to show the actual identity of that person.”). Instead,
19 positive identity is established by a name coupled with other information such as
20 birth date, social security number or other similarly unique information.

21 As noted in *Chavez*, in every criminal case information that positively
22 identifies an alleged victim allows defense counsel to determine if the victim has a
23 criminal history, as well as to discover other information impacting the victim’s
24 credibility. Such investigation is a crucial component of the effective assistance of
25 counsel in that it ensures a defendant’s Sixth Amendment confrontation right – a
right that the United States Supreme Court has stressed “means more than simply

1 being able to physically confront witnesses in the courtroom; confrontation also
2 includes as its ‘main and essential purpose’ the ability to effectively cross-examine
3 witnesses.” *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *State ex rel Romley*
4 *v. Superior Court (Hutt)*, 195 Ariz. 256, 259, 987 P.2d 218 (App. 1999) (holding
5 pre-disclosure of victim medical records was constitutionally required for
6 defendant’s preparation of impeachment of the victim at trial); *accord*, ABA
7 Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-4.1(a)
8 (mandating a “prompt investigation of the circumstances” by defense counsel and
9 “exploration of all avenues leading to facts relevant to the merits of the case. . .”);
10 *see also* Ariz. R. Sup. Ct., Rule 42, ER 1.1, competency (requiring inter alia
11 “thoroughness and preparation reasonably necessary for representation” and
12 comment [5] thereto).

13 A pretrial investigation that satisfies due process and the accused’s Sixth
14 Amendment right can only occur when defense counsel is armed with the very
15 identifying information that the proposed Rule 39 modification seeks to withhold
16 from defense counsel: An accuser may not remain cloaked in the shadow of
17 anonymity until actually called to testify at a criminal trial.

18 In *Chavez*, our supreme court determined that “[t]he limited disclosure of a
19 birth date in a criminal case thus seeks to balance [the interests of both victim and
20 defendant], allowing both parties restricted use of the information while maintaining
21 the victim’s right[s].” Further, in *Crawford v. United States Trustee et.al.*, 194 F.3d
22 954, 959 (9th Cir. 1991), the Ninth Circuit held that disclosure of a person’s social
23 security number through publicly available bankruptcy records did not violate
24 privacy rights. As such, neither the birth date nor the social security number of
25 alleged victims are protected from disclosure to defense counsel by a claimed “right
to privacy.” *Whalen v. Roe*, 429 U.S. 589 (1977).

1 Assuming arguendo a “privacy right” unique to victims exists, Arizona has
2 repeatedly held victim’s rights must yield to a criminal defendant’s right to due
3 process and effective cross-examination. *State v. Riggs*, 189 Ariz. 327, 330, 942
4 P.2d 1159 (1997); *State ex rel Romley v. Superior Court (Roper)*, 172 Ariz. 232,
5 236, 240-241, 836 P.2d 445 (App. 1992); *P.M. v. Gould*, 212 Ariz. 541, 136 P.3d
6 223 (App. 2006).

7 Particularly in light of the fact that defense lawyers are prohibited by Rule
8 15.4(d) from disclosing the identifying information outside of the criminal case,
9 withholding victim-identifying information from defense counsel engaged in the
10 representation of criminal defendants serves no legitimate victim interest other than
11 to violate the due process and Sixth Amendment rights of the accused.

12 **2. Identification of Conflicts of Interest and Unnecessary Delay**

13 *Chavez* also recognized that information that positively identifies alleged
14 victims is critical in ascertaining possible conflicts of interest that could prevent
15 defense counsel from representing the defendant. Indeed, in the absence of complete
16 victim identification information, a probability exists that public defender agencies
17 may handle cases from beginning to end while a conflict of interest exists. In
18 situations in which a conflict is discovered well into representation, counsel will
19 have to withdraw after having spent months or years on a case, then new counsel
20 would have to start virtually from scratch. Statewide indigent defender offices have
21 agreed that in the absence of victim identifying information, conflicts checks become
22 extremely time consuming and cost-ineffective, assuming such checks can be
effectively performed at all.

23 **E. Conclusion**

24 Rule 39 should not be modified until the constitutionality of the statute is
25 affirmatively determined. The proposed modification cannot be harmonized with the

1 constitutional guarantees inherent within Arizona's discovery rules and in fact
2 attempts to modify current procedures while simultaneously running afoul of Rule
3 1.2. The proposed modification obviates the procedural safeguards already afforded
4 victims by Rule 15.5 (permitting prosecutors to redact information upon court order)
5 and Rule 15.4 (prohibiting public disclosure of information obtained in criminal
6 proceedings). It violates the due process and Sixth Amendment rights of the
7 criminally accused, and substantially impedes -- if not prevents -- defense counsel
8 from determining conflicts of interest. Finally, it will cause unnecessary delay.

9
10 **Perspective from the Prosecution Subcommittee**
of the State Bar's Criminal Practice & Procedure Committee

11 The Arizona Constitution was amended in 1990 to include a Victims' Bill of
12 Rights ("VBR"). Ariz. Const. art. 2, § 2.1. Among the rights specifically enumerated
13 in the VBR is a crime victim's right "[t]o have all rules governing criminal procedure
14 and the admissibility of evidence in all criminal proceedings protect victims' rights and
15 to have these rules be subject to amendment or repeal by the legislature to ensure the
16 protection of these rights." Ariz. Const. art. 2, § 2.1(11). The VBR further provides
17 that the legislature has "the authority to enact substantive and procedural laws to
18 define, implement, preserve and protect the rights guaranteed to victims" by the
19 section. Finally, "[t]he enumeration in the constitution of certain rights for victims
20 shall not be construed to deny or disparage others granted by the legislature or
21 retained by victims." *Id.*, § 2.1(E).

22 In 2007, the Arizona Legislature passed A.R.S. § 13-4434, a law pertaining to
23 a victim's right to privacy. That statute was enacted pursuant to the legislature's
24 grant of authority under the VBR. Ariz. Const. art. 2, § 2.1(E); *see also Champlin v.*
25 *Sargeant in and for County of Maricopa*, 192 Ariz. 371, 373, ¶ 9, 965 P.2d 763, 765

1 (1998). In 2014, HB 2454 amended A.R.S. § 13-4434 to add new definitions
2 pertaining to a victim’s “identifying information” and “locating information.” The
3 Arizona Legislature was within its powers when it enacted the amendments to A.R.S.
4 § 13-4344 to ensure the protection of victims’ rights, and Governor Brewer signed
5 the legislation into law. The new definitions in A.R.S. § 13-4434, and the amended
6 provisions contained therein, are now currently the law in Arizona.

7 The AOC proposes a rule change to bring Rule 39(b) into conformity with
8 existing law. Without that change, there exists a conflict between current law and
9 the Rules of Criminal Procedure that cannot be harmonized. The proposed change
10 promotes congruity and addresses the situation presented in *Patterson v. Mahoney*,
11 219 Ariz. 453, 199 P.3d 708 (App. 2008), in which Rule 39(a) had not been changed
12 to conform to the Legislature’s amended statutory definition of “victim” and a
13 conflict existed between the statute and rule.¹ In the same way, a conflict between
14 A.R.S. § 13-4344 and Rule 39(b) will continue to exist without the rule change. Law
15 enforcement and prosecution agencies will continue to be faced with incompatible
16 legal mandates when redacting victim information. The proposed rule change will
17 eliminate the discordant requirements and allow uniform application of the statute
18 and the rule.

19 The constitutionality of a statute is a matter of law reserved for the courts. *State*
20 *v. Hansen*, 215 Ariz. 287, 289, ¶ 6, 160 P.3d 166, 168 (2007). An act of the Legislature
21 will not be declared unconstitutional unless a court is satisfied beyond a reasonable
22 doubt that the act conflicts with the constitution. *State v. Gastelum*, 75 Ariz. 271,
23

24 _____
25 ¹ The Court held that the statutory definition controlled. *Patterson v. Mahoney*,
219 Ariz. at 456, 199 P.3d at 711.

1 273, 255 P.2d 203, 204 (1953). There is a presumption that statutes are
2 constitutional, and any doubts about the constitutionality of a statute are viewed in
3 favor of its validity. *Chevron Chemical Co., v. Superior Court*, 131 Ariz. 431, 438,
4 641 P.2d 1275, 1282 (1982).

5 Any issue as to the constitutionality of the provisions of A.R.S. § 13-4344
6 needs to be properly brought in an action before the courts or addressed with the
7 Legislature.

8 Rule 39(b) now conflicts with A.R.S. § 13-4344. Consequently, law
9 enforcement agencies and prosecution agencies have inconsistent mandates related
10 to discovery in criminal matters.

11 **CONCLUSION**

12 The State Bar hopes these differing perspectives will aid the Court in deciding
13 whether to approve the rule-change petition.

14 RESPECTFULLY SUBMITTED this 19th day of September, 2014.

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18 
19 _____
20 John Furlong
21 General Counsel

22 Electronic copy filed with the
23 Clerk of the Arizona Supreme Court
24 this 19th day of September, 2014.

25 by: 
