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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of:)	
)	
PETITION TO AMEND)	
RULE 39 OF THE)	Supreme Court No. R-14-0022
ARIZONA RULES OF)	
CRIMINAL PROCEDURE)	PETITIONER'S REPLY
_____)	

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, David K. Byers, Administrative Director, Administrative Office of the Courts, respectfully submits this Reply to the Comments received.

A. Proposed Amendment to 39(b)(10)

The petition in this matter was handled as a technical amendment to the rule to implement statutory changes in the victim information protected by ARS § 13-4434. The legislation addressed by this petition was likely a response to the Court's invitation to the State in *Chavez* 321 P.3d 420 (March 26, 2014) to pursue a rule change or statutory amendment.

Essentially, the State urges us to rewrite Rule 39(b) and § 13-4434 to better shield certain victim-related information. That argument, however, should be brought through different channels. Whether the disclosure requirements should be revised in light of technological advances is better addressed through a rule change or statutory amendment, either of which would allow broad input and consideration of the policy implications.

Id. at 423 ¶22.

In his comment the Maricopa County Attorney asserts the legislation enacted did not only add identifying information to the list of confidential victim's information but also created an absolute substantive statutory right that this information be withheld from discovery disclosed to the defendant. Accordingly, he objects to the Rule 39(b)(10) "good cause" exception to the victim's right to have information withheld. The only exception the Maricopa County Attorney recognizes is "when the victim's right comes into direct conflict with a defendant's constitutional right to due process or a fair trial."

Petitioner presumes the legislation is constitutional until held otherwise, *Hall v. A.N.R. Freight Sys., Inc.*, 149 Ariz. 130, 133, 717 P.2d 434, 437 (1986), rather than addressing commenters arguments concerning the constitutionality of the legislation. In light of the comments received, Petitioner believes the Court is faced with the following options for resolving the issues raised:

1. Reverse the order adopting Petitioner's rule change, and await an opportunity to decide the constitutionality of the amendments to ARS § 13-

4434 in the context of an appeal, perhaps, due to the conflict between the amended statute and rule.

2. Let stand the rule change adopted in this matter, since the legislation did not address the trial court's authority to make exceptions to nondisclosure of the victim's information.
3. Further amend Rule 39(b)(10) as requested in the Maricopa County Attorney's Comment by removing a judge's discretion to order disclosure of identifying and locating information to defense counsel for good cause shown:

10. The right to require the prosecutor to withhold, during discovery and other proceedings, the victim's date of birth, social security number, official state- or government-issued driver license or identification number, home address, and telephone number, e-mail address, the address and telephone number of the victim's place of employment, and the name of the victim's employer; ~~provided however, that for good cause shown by the defendant, the court may order that such information be disclosed to defense counsel and may impose such further restrictions as are appropriate, including a provision that the information shall not be disclosed by counsel to any person other than counsel's staff and designated investigator and shall not be conveyed to the defendant.~~

4. Further amend Rule 39(b)(10) by narrowing disclosure to defense counsel and defense counsel's staff and investigator when required by the defendant's constitutional right to due process or a fair trial:

10. The right to require the prosecutor to withhold, during discovery and other proceedings, the victim's date of birth,

social security number, official state or government issued driver license or identification number, home address, and telephone number, of the victim, e-mail address, the address and telephone number of the victim's place of employment, and the name of the victim's employer, providing, however, when required by the defendant's constitutional right to due process or a fair trial, the court may order that such information be disclosed to defense counsel and may impose such further restrictions as are appropriate, including a provision that the information shall not be disclosed by counsel who shall not disclose the information to any person, including the defendant, other than counsel's staff and designated investigator and shall not be conveyed to the defendant.

5. Further amend Rule 39(b)(10) as requested in the Maricopa County Public Defender's Comment by narrowing disclosure to defense counsel and defense counsel's staff and investigator, and prohibiting disclosure to defendant without a prior court order:

10. The right to require the prosecutor to withhold, during discovery and other proceedings, the victim's date of birth, social security number, official state- or government-issued driver license or identification number, home address, and telephone number, e-mail address, the address and telephone number of the victim's place of employment, and the name of the victim's employer; ~~provided however, that for good cause shown by the defendant, the court may order that such information be disclosed to defense counsel and may impose such further restrictions as are appropriate, including a provision that the information shall not be disclosed by counsel to any person other than counsel's staff and designated investigator and shall not be conveyed to the defendant.~~ Any information withheld pursuant to this subsection shall be provided to defense counsel. Defense counsel shall not disclose such information to any person other than counsel's staff and designated investigator, and shall not convey the information to the defendant, without previous authorization from the court.

6. Vacate the Court's June 11, 2014 order adopting the rule change and appoint a workgroup of stakeholders to recommend how the legislation can best be implemented based on broader input.

Petitioner does not advocate for or against any of these options, however Petitioner acknowledges that a victim's date of birth or social security number could assist someone to obtain the victim's address. However, this information may not be necessary as it is possible to locate a person with an online service such as Zabasearch.com with nothing more than a name and state of residence, though the identity of the person cannot be confirmed.

B. Proposed Amendment to Rule 39(b)(11)

Petitioner agrees with the Maricopa County Attorney's suggestion in footnote 1, that a portion of Rule 39(b)(11) should be deleted in accordance with the Supreme Court's opinion in *State v. Roscoe*, 912, P.2d 1297 (1996), which addressed language exempting a peace officer who becomes a victim while acting in his or her official capacity from the right to refuse a defense interview. The opinion found this language and the related statute, ARS § 13-4433(F), to be an unconstitutional restriction on the rights of victims who happen to be peace officers. Consistent with the *Roscoe* opinion, the legislature removed the following language from A.R.S. §§ 8-412 and 13-4433 when it enacted Chapter 268, Laws 2012 (HB 2550):

For the purposes of this section, a peace officer shall not be considered a victim if the act that would have made the officer a victim occurs while the peace officer is acting in the scope of the officer's official duties.

Accordingly, Petitioner proposes the following language appearing in ~~strikethrough~~ be removed from 39(b)(11):

11. The right to refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant. After charges are filed, defense initiated requests to interview the victim shall be communicated to the victim through the prosecutor. The victim's response to such requests shall also be communicated through the prosecutor. If there is any comment or evidence at trial regarding the victim's refusal to be interviewed, the court shall instruct the jury that the victim has the right to refuse an interview under the Arizona Constitution. ~~For purposes of a pretrial interview, a peace officer shall not be considered a victim if the act that would have made him or her a victim occurs while the peace officer is acting in the scope of his or her official duties.~~

RESPECTFULLY SUBMITTED this ____ day of October, 2014.

By _____
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