

MIKEL STEINFELD
AZ Bar No. 024996
DEPUTY PUBLIC DEFENDER
MARICOPA COUNTY PUBLIC DEFENDER
620 W. Jackson, Ste. 4015
Phoenix, AZ 85003
steinfeldm@mail.maricopa.gov

SUPREME COURT OF ARIZONA

No. R -18-0001

In the Matter of:
Petition to Amend the Arizona Rules
of Criminal Procedure

**COMMENT IN OPPOSITION TO
ARIZONA VOICE FOR CRIME
VICTIMS' PETITION TO AMEND
THE ARIZONA RULES OF
CRIMINAL PROCEDURE.**

Pursuant to Rule 28 of the Arizona Rules of Supreme Court, the Arizona Public Defender's Association ("APDA") and Arizona Attorneys for Criminal Justice ("AACJ") respectfully submit the following Comment in Opposition to Petition R-18-0001, Arizona Voice for Crime Victims' ("AVCV") Petition to Amend the Rules of Criminal Procedure ("Petition").

The APDA is a statewide organization, founded in 2002, comprised of indigent defense offices—at the federal, county, city, and tribal levels—throughout the State. APDA devoted to improving indigent representation and enhancing the integrity of the criminal justice system.

AACJ is the Arizona state affiliate of the National Association of Criminal Defense Lawyers. It was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend the accused, both in the public and private sectors. AACJ is dedicated to protecting the rights of the accused in courts, promoting excellence in the practice of criminal law, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

Discussion:

I. The Arizona Supreme Court Task Force to redraft the rules of criminal procedure considered and denied the Arizona Voice for Crime Victims' proposal to eliminate and disseminate Rule 39.

In 2015, this Court created a Task Force to restyle the Arizona Rules of Criminal Procedure (“the Rules”). [Admin. Order 2015-123](#). The Arizona Voice for Crime Victims proposed the elimination of Rule 39 to incorporate it into the remainder of the rules during the April 7, 2017, meeting. *See* [CRTF draft meeting minutes, 4/7/2017](#), 1–2. The Supreme Court Task Force considered the proposal to eliminate and integrate Rule 39 throughout the rules. The Task Force rejected the proposal and declined to include references to victims in multiple locations. *See, e.g., id.* at 3 (refusing to change Rule 7.3 to include AVCV’s mandatory no contact provision), 3–4 (rejecting proposed modification to right to be heard), 4 (refusing modification to Rule 7.6(c) because bond forfeiture is a civil proceeding), 4

(rejecting proposals to add references to victims in Rules 8.1, 8.2, and 8.4 “because they were impractical, substantive, or cumulative”), 5 (declining modification to Rule 9.3), 6 (refusing proposed modification to Rule 10), 10 (rejecting proposed change to Rule 26). Nonetheless, the Task Force included new language in the Rules where the Task Force deemed the Rules needed clarity about victim’s rights. *See, e.g., id.* at 8 (adopting change to Rule 27.1), 8 (adopting change to Rule 1.2).

Moreover, some on the Task Force believed there was value in Rule 39 as an umbrella rule. *See id.* at 4. Accordingly, members were concerned that parsing Rule 39 “rights throughout the rules might actually dilute them.” *Id.*

II. Contrary to its claims, the petition is not merely a stylistic change.

The Petition by AVCV purports to be a merely stylistic “integration” of Rule 39 into a number of Rules.¹ “Integration” is used eight times in the Petition, and the Petition makes no argument for substantive changes to victim’s rights. Indeed, the Petition states its purpose is not to “create new victims’ rights or violate the rights of the accused.” *See Pet.*, 6. Instead, the Petition states its purpose is to merely “give effect to the VBR” and to “provide comprehensive guidance to criminal justice professionals.” *Id.*

¹ Rules 1.2, 1.3, 1.5, 1.7, 1.8, 1.9, 4.1, 4.2, 5.1, 5.4, 5.8, 6.7, 7.2, 7.3, 7.4, 7.5, 7.6, 8.1, 8.2, 8.4, 8.5, 9.3, 10.2, 10.3, 15.1, 15.2, 15.6, 16.3, 16.4, 17.1, 26.7, 26.10, 27.3, 27.7, 27.8, 31.3, and 39.

A court rule may not define or regulate a substantive right. *Patterson v. Mahoney*, 219 Ariz. 453, ¶ 12 (App. 2008). Substantive rights arise from statutes or the Constitution. *Id.*; *see, e.g., Simpson v. Miller*, 241 Ariz. 341, ¶¶ 9, 21 (2017) (holding right to liberty is fundamental and substantive); *Tibbs v. Florida*, 457 U.S. 31, 45 (1982) (due process clause requires substantial procedural protections to shield defendants against the devastation of imprisonment and the high cost of wrongful conviction).

While the Petition purports its changes to the Rules are merely “integrations” and guides, the Petition does much more. The following highlights just some of the proposed changes in the Petition that go beyond the scope of stylistic integration, creating “new victims’ rights” and limiting the due process rights of the accused:

1. The proposed change to Rule 1.9 explicitly grants the victim’s attorney new rights, including the right to file motions, ask for arguments and hearings, and propose court orders. Seemingly, this right would not be afforded to victims not represented by counsel, but only to attorneys of victims, such as the attorneys at the Arizona Voice for Criminal Victims. Pet., Appx. A: Abridged Text of Proposed Changes, 5.
2. The proposed Rule 6.7 cuts the time given to the defendant in a capital case to move for an expert witness after the State makes its disclosure under Rule 15.1(i)(3) in half from 60 to 30 days. Pet., Appx. A, 11.
3. The proposed Rule 7.3 establishes an automatic no-contact order with the victim, and it shifts the burden onto the defendant to show “good cause” to overcome it. Pet., Appx. A, 14.

4. The proposed Rule 7.5 widens the scope of reasons a victim can seek to modify a defendant's release conditions. Pet., Appx. A, 17.
5. The proposed Rule 15.6 places the victim's speedy trial rights above the due process rights of the accused by allowing the judge to ignore the requirement that reasonable time be given to complete discovery. Pet., Appx. A, 36.
6. The proposed Rule 16.3 allows the victim to weigh in before the court hears motions, sets hearings or conferences, accepts stipulations, or does anything else at any of the pretrial hearings. Pet., Appx. A, 37.

These changes do not merely “integrate” Rule 39 into the Rules. These changes achieve exactly what the AVCV claims the Petition does not do—they “create new victim’s rights and violate the rights of the accused.” The Criminal Rules Task Force recognized some of the changes now presented were substantive and rejected them for that reason. *See e.g.*, [CRTF draft meeting minutes, 4/7/2017](#), 3 (refusing to change Rule 7.3 to include AVCV’s mandatory no contact provision), 3–4 (rejecting proposed right to be heard modification), 4 (refusing modification to Rule 7.6(c) because bond forfeiture is a civil proceeding), 4 (rejecting proposals to add reference to victims in Rules 8.1, 8.2, and 8.4 “because they were impractical, substantive, or cumulative”).

The Petition is loaded with meaningful changes that would provide new procedural rights for victims at the cost of the defendant’s due process rights and the integrity of the criminal justice system as a whole. However, AVCV failed to explain why any substantive changes are justified. Instead, the Court is left to

speculate why victims need the existing time limit for defense in a capital case to move for an expert witness to be halved, why victims should have the right to be heard at non-dispositive hearings, and why victims' attorneys should be allowed to act as adjunct prosecutors by being given the ability to file motions, request hearings, and propose orders.

The changes proposed by the Petition are substantive. They would deplete a defendants' due process rights by imposing new barriers to pre-trial release, reducing the time needed to properly prepare a case for trial, and inserting the victim and his attorney in non-dispositive stages of the trial. These limitations were not intended by Rule 39 or the Victim's Bill of Rights ("VBR"), and are illegal. It is improper to propose such substantive changes under the guise of style, especially without any discussion or presentation of fact demonstrating the need, impact, or efficacy of the proposed changes.

III. Proposed Rule 1.9, granting victims' attorneys the right to present motions and participate in oral arguments, is unwise and intrudes on the exclusive province of the state.

In 1940, Attorney General Robert Jackson addressed the Second Annual Conference of United States Attorneys in Washington D.C. He opened by acknowledging what has only grown more true over time — the immense power of prosecutors. "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous." Robert H.

Jackson, *THE FEDERAL PROSECUTOR*, 31 Am. Inst. Crim. L. & Criminology 3 (1940-1941). “While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.” *Id.* These statements are equally true for the prosecutors at the state, county and local levels. The power of the prosecutor is enormous.

Jackson was aware that the vast grant of power should not come at the cost of “the best in our American traditions.” *Id.* He concluded that because of this enormous power, prosecutors also have enormous responsibilities. “A sensitivity to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen’s safety lies in a prosecutor who tempers zeal with human kindness, who seeks the truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.” *Id.* at 6.

It is for this reason that our ethical rules task prosecutors with “the responsibility of a minister of justice and not simply that of an advocate.” Ariz.R.Sup.Ct. 42, E.R. 3.8, cmt. 1; *accord State v. Hulsey*, 243 Ariz. 367, ¶ 123 (2018); *State v. Miller*, 234 Ariz. 31, ¶ 21 fn.3 (2013); *State v. Martinez*, 282 P.3d 409, ¶ 33 (2012). This is the balance of the criminal justice system.

Meanwhile, the victim has the right “to be treated with fairness, respect and dignity, and to be free from intimidation, harassment and abuse, throughout the criminal justice process.” Ariz. Const. art. II, § 2.1(A)(1). No part of the rules

governing criminal procedure should abrogate the rights of the victim to be so treated. Ariz. Const. art. II § 2.1(A)(11). However, “victims are not parties to a defendant’s criminal case.” *Lynn v. Reinstein*, 205 Ariz. 186, ¶ 15 (2003).

The proposed change to Rule 1.9 goes beyond these enumerated rights and obligations, and inserts the victim into the delicate balance between the prosecution and defense in a way not contemplated by the VBR. Under the VBR, the victim’s right to be heard applies to hearings that might result in the defendant’s release. *See* Ariz. Const. art. II, § 2.1(A)(4); (9). The VBR further grants victims the right to be present and to be informed at various other stages of the criminal proceeding. *See* Ariz. Const. art. II, § 2.1(A)(2) (“To be informed ...”); (A)(3) (“To be present at and ... informed ...”); (A)(7) (“To read pre-sentence reports ...”); (A)(12) (“To be informed ...”). At its core, the VBR intends to protect and inform the victim. What the Petition seeks, and what the VBR does not intend, is to make victims a quasi-party, equal with the defendant and the state throughout the entire criminal process.

The proposed changes would grant a victim’s attorney unprecedented power, but with none of the ethical obligations and responsibilities of the prosecutor. The victim’s attorney would gain new powers to present motions, serve replies, request waivers of requirements, set motions for argument, and propose orders. *See* Petition, Appx. A: Abridged Text of Proposed Changes, Rule 1.9: Motions, Oral

Argument, and Proposed Orders. The proposed Rule 1.9 would convert a victim's attorney from a counselor for the victim into a party to the criminal proceeding, making him a sort of adjunct prosecutor, capable of disrupting and influencing pretrial hearings and criminal proceedings. This expansion of power exceeds the victim's right to be informed or treated with dignity and respect while trampling on the province of the prosecutor and the due process rights of the defendant.

Unlike a prosecutor, the victim's attorney has none of the prosecutor's ethical obligations. Unlike the prosecutor, a victim's representative is not bound to seek the truth or be impartial. Unlike a prosecutor, a victim's counsel is not a minister of justice and need not be sensitive to fair play. To elevate the victim or his attorney to party status in a criminal proceeding violates the most fundamental notions of justice.

Conclusion:

The APDA and AACJ oppose the changes proposed by the Petition. Victims and their attorneys should not be elevated to the position of party in criminal proceedings. The Victim's Bill of Rights does not give the victim or the victim's attorney the right to be heard at evidentiary hearings or any other hearing where the defendant is not being released or sentenced, and neither should the Arizona Rules of Criminal Procedure. Nor should victims, who may be biased by their

circumstances, be given a role in the disposition of justice. That is rightfully the exclusive province of the State.

Furthermore, the changes, justified as merely stylistic, invent new rights for the victim's attorney that do not exist and abrogate substantive due process rights of the defendant. The proposed changes reduce the defendant's time for discovery in capital cases, expand the scope of reasons a defendant could be denied bail, and create new burdens for the defendant. The petitioners attempt to accomplish all these changes without any showing of need. Based on the forgoing, the APDA and AACJ oppose the Petition.

RESPECTFULLY SUBMITTED this 21st day of May, 2018.

By: /s/ Mikel Steinfeld
MIKEL STEINFELD
DEPUTY MARICOPA COUNTY
PUBLIC DEFENDER

By: /s/ Terri Capozzi
TERRI CAPOZZI
PRESIDENT APDA

By: /s/ David Euchner
DAVID EUCHNER
CO-CHAIR AACJ AMICUS COMMITTEE