

1 Lisa M. Panahi, Bar No. 023421
2 General Counsel
3 State Bar of Arizona
4 4201 N. 24th Street, Suite 100
5 Phoenix, AZ 85016-6288
6 (602) 340-7236

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

9 In the Matter of:

Supreme Court No. R-18-0001

10 **PETITION TO AMEND THE**
11 **ARIZONA RULES OF CRIMINAL**
12 **PROCEDURE AND REPEAL**
13 **RULE 39**

COMMENT OF THE
STATE BAR OF ARIZONA

14 **I. Background:**

15 The Arizona Rules of Criminal Procedure were recently reviewed and revised
16 by this Court. During the review process, representatives of victims' rights
17 organizations suggested that Rule 39 be deleted and other criminal rules be
18 modified to add language regarding crime victims and victims' rights to participate
19 in criminal trials. The committee charged with drafting the proposed revisions to
20 the Rules of Criminal Procedure did not incorporate these suggested revisions into
21 the proposed revised rules.
22

23 Subsequently, the Arizona Voice for Crime Victims (AVCV) filed Petition
24 R-18-0001, which seeks to delete Rule 39 governing victims' rights and amend
25

1 three dozen criminal rules.

2 For the following reasons, the State Bar of Arizona opposes the Petition.

3
4 **I. Discussion and Analysis:**

5 This Court promulgated Rule 39 following amendment of the Arizona
6 Constitution to provide for victims' rights (Victim Bill of Rights, "VBR"), and to
7 implement those rights. Rule 39 contains provisions for invoking rights, for
8 exercising rights, as well as limitations and exclusions – procedural mechanisms and
9 requirements – which are not otherwise contained in the Rules of Criminal Procedure.
10 If Rule 39 is deleted, as the Petition requests, certain provisions of the VBR will not
11 be carried over into the proposed rule modifications. Rule 39 is crucial to the process
12 and must not be deleted.
13
14

15 The petition proposes a multitude of modifications to the Rules of Criminal
16 Procedure. These modifications seek to raise crime victims to the status of parties,
17 permitting them to file pleadings and otherwise be heard on matters which do not
18 pertain exclusively to victims' rights. Arizona has long held that victims are not
19 parties to criminal proceedings¹ and may not challenge the legal rulings of trial judges
20 pertaining to the merits of a criminal case.²
21
22
23

24
25

¹ *Lynn v. Reinstein*, 205 Ariz. 186 (2003).

² *State v. Lambertson*, 183 Ariz. 47 (1995).

1 The Petition seeks to expand the rights afforded crime victims *via* rule
2 modifications under the auspices of Section 2.1(A)(11)³ of the VBR, which states that
3 victims have a right to have “all rules governing criminal procedure and the
4 admissibility of evidence” to protect victims. However, this Court has held that this
5 provision is to be “narrowly construed” to “deal [] with procedural rules *pertaining to*
6 *victims* and not with the substantive general subject of the [Supreme Court’s] rule
7 making power.”⁴
8
9

10 Since *Slayton v. Shumway*, Arizona has consistently held that the “scope of
11 legislative rulemaking power under VBR extends to those rules that define,
12 implement, preserve and protect *the specific* rights *unique* and particular to crime
13 victims, as guaranteed and *created by* VBR.”⁵ *Slayton* and its progeny make it clear
14 that VBR section 2.1(A)(11) cannot and does not require consideration of victim
15 rights in connection with *all* evidentiary matters and *all* Arizona Rules of Criminal
16
17
18
19
20
21

22 ³ See, Article 2, Section 2.1 of the Arizona Constitution.

23 ⁴ *Slayton v. Shumway*, 166 Ariz. 87, 92 (1990) (emphasis added).

24 ⁵ *State v. Brown*, 194 Ariz. 340, 343 (1999) (emphasis added); See also, *Champlin*
25 *v. Sargeant*, 192 Ariz. 371, 373 n. 2 (1998) (rulemaking power under VBR “extends
only so far as necessary to protect rights created by the [VBR] and not beyond.”);
State v. Hansen, 215 Ariz. 287, 290 (2007)(same).

1 Procedure.⁶ For example, victims were not entitled to attend *ex parte* hearings held
2 pursuant to Rule 15.9(b), Ariz. R. Crim. P.⁷

3
4 The Petition seeks to insert victim rights into the rules of criminal procedure
5 where they otherwise do not exist. This includes, for example, a right to file
6 pleadings on matters not limited to rights created by the VBR, such as change of
7 venue and dismissal of prosecution. The Petition also seeks to preclude the
8 disclosure of information currently authorized by court order, and to insert victims'
9 "speedy trial right" into various rules of criminal procedure.
10

11 Distribution of victims' speedy trial right throughout the Rules of Criminal
12 Procedure, as proposed by the Petition, is unnecessary because such a distribution
13 will not change the rights of the prosecution or defense to be heard on that issue.
14

15 Of course, only parties may file pleadings in a criminal case; victims may be
16 heard, but only on matters squarely within the rights *unique and particular to* crime
17 victims as *created by* the VBR. The Petition also seeks to overturn Arizona
18 authority authorizing the disclosure of certain information *via* court order when
19 necessary to protect a defendant's due process right.
20
21
22
23

24 _____
25 ⁶ *Slayton*, 166 Ariz. at 89, 92.

⁷ *Morehart v. Barton*, 226 Ariz. 510 (2011).

1 Because the changes sought by the Petition are vast, attached to this
2 Comment, as Exhibit A, is a rule by rule analysis of many of the proposals contained
3 within Petition R-18-0001 put together by the State Bar's Criminal Practice &
4 Procedure Committee.
5

6 **III. Conclusion.**

7 The Petition goes beyond protection of "the specific rights unique and
8 *peculiar* to crime victims, as guaranteed and *created* by the VBR".⁸ The Petition
9 seeks to overcome established case law by expanding victim rights to matters which
10 are *not* unique or peculiar to crime victims, and in so doing effectively elevates
11 crime victims to the status of a party to the criminal proceedings.
12

13 For the reasons set forth herein, the State Bar of Arizona respectfully requests
14 that this Court reject the Petition.
15

16 **RESPECTFULLY SUBMITTED** this 21st day of May, 2018.

17
18 Lisa Panahi
19 Lisa M. Panahi
20 General Counsel

21 Electronic copy filed with the
22 Clerk of the Arizona Supreme Court
23 this 21st day of May, 2018.

24 by: D. Segre
25

⁸ *State v. Brown*, 194 Ariz. 340, 343 (1999) (emphasis added).

1 **EXHIBIT A**

2
3 **Rule 1.3 (a)(5) Computation of Time:** The Petition seeks to modify
4 subsection (A)(5) of the rule to include crime victims in the rule’s time computation.
5 The proposed modification would implicitly sanction the filing of pleadings by
6 crime victims or their counsel. While victims have a right to be heard in delineated
7 circumstances, only *parties* may file pleadings. The rule should not be modified as
8 requested.
9

10 **Rule 1.5(C)(3) Defendant’s Appearance by Videoconference:** The rule
11 provides for a defendant’s appearance in certain proceedings by “interactive
12 audiovisual system” when the parties so stipulate. Petitioner seeks to amend the
13 rule to preclude such an appearance by stipulation *unless* the interactive audiovisual
14 system “will allow a victim means to view and participate in the proceedings and
15 ensure compliance with all victims’ rights laws.” (Appendix A of Petition at 3).
16
17

18 In-custody defendants have no control over the system utilized by the court
19 and jail. And while out-of-custody defendants may (with the approval of the court)
20 appear through Skype, criminal defendants have no way to ensure victims are
21 conferenced in to the interactive audiovisual system utilized. Because proceedings
22 employing an interactive audiovisual system take place in open court, victims are
23 free to appear in court to exercise any right specifically afforded by the VBR.
24
25

1 Modifying the rule to make use of the methodology contingent upon the victim’s
2 participation in *the system* will effectively nullify the authorized process. The rule
3 should not be modified as requested.
4

5 **Rule 1.9 Motions, Oral Argument, and Proposed Orders:** The Petition
6 seeks to modify Rule 1.9 and its subsections to permit victims or their counsel to
7 file pleadings in criminal actions. Only *parties* may file pleadings, and victims are
8 not *parties* to the criminal action—they may not be heard on purely legal matters
9 distinct from those *unique, peculiar rights created by VBR.*⁹
10

11 **Rule 4.2(c) Combining an Initial Appearance with an Arraignment:**

12 The Petition seeks to modify the provision allowing for a combined Initial
13 Appearance with an Arraignment to require “if requested, the victim has been given
14 notice and an opportunity to be present and heard”. A victim’s right to be heard in
15 this situation already exists.¹⁰
16

17 **Rule 5.1(c)(2) Preliminary Hearings/Continuance:** The proposed
18 modification seeks to limit a magistrate’s authority to continue a preliminary
19 hearing by conditioning such an order upon the magistrate’s finding “that [the
20
21

22
23 ⁹ *Lynn v. Reinstein*, 205 Ariz. 186, 191 (2003) (“ . . . [V]ictims are not parties to a
24 defendant’s criminal case.”). *See, also, State v. Lamberton*, 183 Ariz. 47, 49 (1995)
25 (The VBR provides “victims the right to participate and be notified of certain
criminal proceedings. This is not the same as making victims ‘parties.’”).

¹⁰ *See*, Article 2, Section 2.1(A)(4) of the Arizona Constitution.

1 continuance] does not infringe on the victim’s right to a speedy trial.” (Appendix A
2 of Petition at 9).

3
4 The right to a speedy trial, however, was not created by the VBR. Paragraph
5 10 of Article 2, Section 2.1(A)¹¹ of the Arizona Constitution, “which addresses a
6 general ‘speedy trial’ right, neither create[d] a right nor define[d] a right peculiar
7 and unique to victims.”¹² Further, when in conflict, a criminal defendant’s Sixth and
8 Fourteenth Amendment rights trump a victim’s desire for a speedy trial.¹³ As
9 proposed, the revision runs afoul of established case law by rendering the
10 defendant’s constitutional rights subservient to those of the victim. The proposal
11 should be rejected.
12

13
14 **Rule 6.7(a) Appointment of Investigators / Experts for Indigent Defendants:**

15 The rule as written addresses the court’s obligation to appoint investigators,
16 experts and mitigation specialists necessary for a defendant’s case. The Petition
17 seeks to require the court advise each appointed investigator/expert “that the victim
18 has a right to a speedy trial.” Such an advisory is unproductive and unnecessary
19
20
21

22 ¹¹ The codification of the Victims’ Bill of Rights.

23 ¹² *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 343 ¶12 (1999).

24 ¹³ *State ex rel. Romley v. Superior Court/Roper (RPI)*, 172 Ariz. 232, 236,
25 (App.1992) (“We therefore hold that when the defendant’s constitutional right to
[defendant’s] due process conflicts with the Victim’s Bill of Rights in a direct manner, . . . then
[defendant’s] due process is the superior right.”).

1 under the circumstances since defense investigators and experts work for the
2 defense attorney, and the defense attorney is charged with complying with speedy
3 trial rules.
4

5 **Rule 6.7(d) Appointments of Investigators/Experts, Capital Case:**

6 The Petitioner seeks to modify the rule by reducing the time limits for defense
7 motions for appointment of experts from 60 days after the State's disclosure to
8 requiring such motions be filed 30 days after the State's disclosure. This requested
9 revision is unrelated to the protections from the VBR. If the petitioner seeks a
10 modification for deadlines or procedures relating to capital cases, then a petition
11 specifically addressing those issues is more appropriate.
12

13 **Rule 8.1(e) Suspension of Rule 8:** The rule authorizes either party to move
14 for a hearing to establish extraordinary circumstances requiring a suspension of
15 Arizona's speedy trial provisions. Petitioner seeks a rule change compelling an
16 opportunity to be heard on any such motion, as well as compelling the court's
17 consideration of "the victim's right to speedy trial" before ruling on the motion.
18

19 As to this proposed revision and with regard to all proposed revisions to Rule
20 8, this revision is unnecessary because Rule 39 already addresses a victim's right to
21 a speedy trial. Restating this right is unnecessary because the State, the Defendant,
22 and the victim already have the right to be heard on speedy trial issues.
23
24
25

1 **Rule 8.4 Excluded Periods:** The rule excludes specific time periods from
2 the time computation set forth in Rules 8.2 and 8.3. Petitioner seeks to modify the
3 rule to add a requirement that such time periods may not be excluded absent
4 consideration of “the victim’s right to speedy trial.” However, the excluded periods
5 in the rule are unrelated to the protections of the VBR.
6

7 **Rule 8.5(b) Continuing a Trial Date/Grounds:** The rule sets forth the
8 procedure for a party’s motion to continue a trial. The rule states that a continuance
9 may be ordered “only on a showing that extraordinary circumstances exist and that
10 delay is indispensable to the interests of justice, and only for so long as is necessary
11 to serve the interests of justice.” The Petition would modify the requisite showing
12 to include that delay “is not a denial of the victim’s right to a speedy trial.” This
13 language would be in addition to the already specific requirement that the court
14 consider the rights of the victim for a prompt resolution, and is thus redundant.
15
16

17 The proposed revision attempts to elevate a victim’s speedy trial right to one
18 superior to a defendant’s Sixth Amendment right to the effective assistance of
19 counsel as well as his Fourteenth Amendment right to procedural due process.
20 However, when the rights of the victim and the defendant are in conflict, the
21 defendant’s constitutional rights are superior.¹⁴
22
23
24

25 ¹⁴ See, *State v. Superior Court/Roper (RPI)*, *supra*, at fn. 13.

1 **Rule 10.3(c) Changing the Place of Trial:** The rule permits a party to seek
2 a change of the place of trial if the party demonstrates that a fair and impartial trial
3 cannot be had in the current location. A defendant’s right to a fair and impartial
4 trial is guaranteed by the Sixth Amendment of the United States Constitution, and
5 Article 2, Sections 4, 23, and 24 of the Arizona Constitution.
6

7 A victim’s right to be heard already exists. But the Petition goes even farther
8 by requiring the court’s consideration of “the victim’s right to be present.” The
9 proposed modification can be read to suggest a victim’s right to argue the *legal*
10 justification warranting a change of venue thus improperly making a victim
11 essentially a party to the proceedings with the right to present legal arguments.
12

13 There can be no doubt that courts already consider the inconvenience to
14 witnesses when ruling on change of venue motions. Such consideration necessarily
15 includes both testifying and non-testifying crime victims. The rule should not be
16 modified as requested by Petitioner.
17

18 **Rule 15.1(e)(2) State Disclosures Upon Request:** The rule requires
19 prosecutors to make, *inter alia*, 911 calls available to the defendant for examination,
20 testing and reproduction. Petitioner seeks to add the following condition for the
21 disclosure: “In the case of 911 calls from the victim, before permitting access or
22 testing of such tapes, the court must first consider the victim’s rights to be treated
23
24
25

1 with fairness, respect, and dignity, and to be free from intimidation, harassment,
2 and abuse.” (Petition, Appendix A, at 28).

3
4 The proposed amendment makes court involvement mandatory in every case
5 involving a 911 call. Involvement by the court in every 911 case will slow the
6 discovery process and overburden criminal court calendars. The Rule already
7 requires access to these calls, subject to the prosecution’s right to impose
8 conditions, with the trial court having the authority to make appropriate orders.
9

10 Further, 911 calls are often the first piece of evidence in a criminal
11 prosecution, containing information that must be investigated immediately before
12 potential evidence becomes lost or stale. Such calls often contain victim statements
13 concerning what has occurred as well as the identity of the perpetrator. Victim
14 accounts are, typically, next memorialized in police reports. While such calls are
15 critical to the entire criminal justice process, they are not so unique from other
16 recorded statements that the existing Rule’s access and protections are ineffective.
17
18

19 **Rule 15.1(g)(1) & (i) State’s Disclosure by Court Order:** Our supreme
20 court struck a balance between a victim’s right to privacy and a defendant’s right to
21 the disclosure of information necessary to his defense. In this vein, it defined
22 “Identifying and Locating Information” in Rule 39(a)(2) of the Rules of Criminal
23 Procedure; it also acknowledged the victim’s right to require the prosecutor to
24
25

1 withhold, during discovery and other proceedings, the victim’s identifying and
2 locating information. Rule 39(11), Ariz. R. Crim. P.

3
4 However, when balancing a defendant’s due process and Sixth Amendment
5 right to the effective assistance of counsel, the Court provided an exception to the
6 rule with an accompanying order prohibiting the dissemination of the information
7 to persons outside the defendant’s legal team. Rule 39(11)(A) (B), Ariz. R. Crim.
8 P.

9
10 The Petition seeks to delete the exception, prohibiting a court from ordering
11 the disclosure of the victim’s identifying and locating information (proposed rules
12 15.1(g)(1); 15.1(i)(3)(A)(I); 15.1(i)(4)(A) & (B)). The proposed revision must be
13 rejected. A defendant’s due process rights prevail when in direct conflict with
14 victim rights.

15
16 **Rule 15.2(h)(1)(B) Defense Additional Disclosure/Capital Cases/Time**

17 **Extensions:** The rule permits the court to extend the deadline(s) for a defendant’s
18 disclosure in capital cases. The Petition seeks to condition any extension by the
19 court “only after considering the victim’s right to a speedy trial.” This revision
20 again conflicts with a defendant’s due process rights, and is unnecessary in light of
21 the existence of paragraph 10 of Article 2, Section 2.1(A) of the Arizona
22 Constitution, as well as the already-existing right of victims to be heard in Rule
23 39(b)(7 and 17).
24
25

1 **Rule 15.6(e)(2) Extension of Time for Completion of Testing/Capital**

2 **Cases:** The rule permits a motion to be filed to complete disclosure unless the court
3 finds that the need for the extension resulted from dilatory conduct or neglect, or
4 the request is made for an improper reason. The Petition would add that the court
5 may not grant an extension of time if doing so “would infringe on the victim’s right
6 to a speedy trial asserted by the victim or by the state on behalf of the victim”.

7
8 This revision places victim rights in direct conflict with a defendant’s due
9 process rights, and it is unnecessary in light of the existence of paragraph 10 of
10 Article 2, Section 2.1(A) of the Arizona Constitution, and the already-existing right
11 in Rule 39(b)(17).
12

13 **Rule 16.3(d) Pretrial Conference/Scope of Proceeding:** The current rule
14 establishes pretrial conferences for the purpose of accomplishing certain objectives.
15 The rule permits the court to hear motions made at or filed before the conference;
16 set additional conferences; obtain stipulations to relevant facts; and discuss and
17 determine any other matters that will promote a fair and expeditious trial.
18

19 The Petition seeks to require a court to *first* “consider the views of the victim”
20 before addressing any matters outlined. While victims have the right to be heard,
21 victims have no *specific, unique, peculiar* right *created* by VBR to be heard with
22 respect to any of the issues set forth in Rule 16.3(d), e.g., motions, stipulations, use
23 of juror notebooks, opening statements, jury instructions, etc. The Petition seeks to
24
25

1 create new rights elevating victims to the status of a party to the proceedings with
2 the right to address legal issues. The proposed revision should be rejected.

3
4 **Rule 16.4(d) Dismissal of Prosecution:** The rule currently provides that
5 dismissal of a prosecution “is without prejudice to commencing another
6 prosecution, unless the court finds that the interests of justice require the dismissal
7 to be with prejudice.” The Petition seeks to insert a requirement that the court first
8 consider the rights of the victim to justice and due process before reaching a
9 decision concerning dismissal with or without prejudice.
10

11 However, whether a dismissal of a criminal prosecution occurs with or
12 without prejudice is purely a *matter of law* about which VBR creates no right.
13 Where the prosecution moves to dismiss due to an insufficiency of evidence
14 necessary to convict pursuant to Rule 16.4(a), the matter is one of law grounded in
15 the prosecutor’s legal assessment of the case. So too, where a defendant moves for
16 dismissal of a charging document as “insufficient as a matter of law” in accordance
17 with Rule 16.4(b), the decision to grant or deny the motion rests squarely in the law.
18
19

20 Under both scenarios, a court’s decision to dismiss with or without prejudice
21 is itself grounded in the law governing the case. For example, where the
22 prosecution is barred by double jeopardy, it is the law that dictates the matter be
23 dismissed with prejudice. Because the court’s decision on whether to dismiss a
24 criminal prosecution with or without prejudice is governed by law, and is thus not
25

1 dependent upon the desires of alleged crime victims,¹⁵ and because the VBR
2 creates no specific right to be heard on matters of law governing the merits of a
3 prosecution, Petitioner’s proposed rule amendment must be rejected.
4

5 **Rule 27.8(b)(2) Probation Revocation/Violation Hearing:** The current rule
6 provides for a probationer’s right to be present during a violation hearing, and
7 advises that such hearing may proceed in the probationer’s absence in certain
8 circumstances. The Petition seeks to modify the rule to add that the victim also has
9 a right to be present during the violation hearing—about which there is no debate.
10 However, any modification to the rule must also state that the violation hearing may
11 proceed in the victim’s absence.
12

13 **Rule 31.3(b) Suspension of an Appeal:** The rule currently states that an
14 appellate court, on its own motion or on that of a party, may suspend an appeal if a
15 motion under Rule 24 (motion for new trial) or a petition under Rule 32 (post-
16 conviction relief) is pending. The Petition seeks to modify the rule to require the
17 appellate court to first consider “the rights of the victim” before suspending an
18 appeal. However, victims have no *specific, unique, peculiar* right created by the
19 VBR with respect to whether or not an appellate court should suspend an appeal. It
20
21
22
23

24 ¹⁵ See, e.g., *State v. Granados*, 172 Ariz. 405, 408, 837 P.2d 1140 (App.1992)
25 (dismissal without prejudice appropriate “regardless of the wishes of the victim. . .”).

1 is inappropriate, through a Rule petition, to elevate victims to the standing as parties
2 in a criminal action so that they may present legal arguments.
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25