

**ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE
DAVID J. EUCHNER, SB#021768**

David.Euchner@pima.gov

**33 N. Stone Ave., 21st Floor
Tucson, AZ 85701
(520) 724-6800**

**MARICOPA COUNTY OFFICE OF THE PUBLIC DEFENDER
MIKEL P. STEINFELD, SB#024996**

Mikel.Steinfeld@maricopa.gov

**620 W. Jackson, Suite 4015
Phoenix, AZ 85003
(602) 506-7711**

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	) No. R-20-0031
)
	) COMMENT OF ARIZONA
Petition to Amend the Arizona Rules of	) ATTORNEYS FOR CRIMINAL
Criminal Procedure (Rule 39)	) JUSTICE AND MARICOPA
	) COUNTY OFFICE OF THE
	) PUBLIC DEFENDER REGARDING
	) PETITION TO AMEND THE
	) ARIZONA RULES OF CRIMINAL
	) PROCEDURE BY REPEALING
	) RULE 39

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) and the Maricopa County Office of the Public Defender (“MCPD”) hereby submit the following comment to the above-referenced petition.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

The Maricopa County Public Defender ("MCPD") is the largest indigent defense firm in the State of Arizona with over 200 deputy public defenders providing indigent legal services in the Maricopa County Justice and Superior Courts. During the past fiscal year, the MCPD handled almost 36,000 criminal cases.

AACJ and MCPD oppose the petition of Arizona Voice for Crime Victims (AVCV) to repeal Arizona Rule of Criminal Procedure 39 and instead "integrate" that Rule's protections across the rules, because the result would be a counter-productive scattering of those protections. Although AVCV believes that this will assist trial judges in locating relevant protections for victims, this change would actually make it more challenging for judges to do so. Moreover, although AVCV

urges that these changes are merely stylistic to assist parties and judges, there are also several substantive changes.

Most concerning is Petitioner's failure not only to acknowledge that this is the third consecutive year AVCV has filed a virtually identical petition, but also to make any significant changes to account for potential reasons why this Court has rejected both previous attempts at this proposal. *See* R-19-0016 (petition filed Jan. 10, 2019); R-18-0001 (petition filed Jan. 3, 2018). Nor does Petitioner's counsel acknowledge that she repeatedly attended public meetings of both the Task Force on the Arizona Rules of Criminal Procedure and the Rule 32 Task Force to propose this idea during the public comment period, and at every meeting where the issue was raised, both Task Forces resoundingly rejected the idea both through comments by their members and through lack of a motion of any member to make this change.

AACJ and MCPD have substantively responded to AVCV's previous two petitions. Because AVCV has made no attempt to address the issues raised through previous petitions but has instead rehashed essentially the same petition, AACJ and MCPD will not rehash their comments to those petitions; instead those comments are attached hereto as Appendix A (2018 comment) and Appendix B (2019 comment) and the arguments therein are incorporated by reference.

For these reasons, AACJ and MCPD request this Court deny the petition.

DATED: May 1, 2020.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By /s/ David J. Euchner
David J. Euchner

MARICOPA COUNTY OFFICE OF THE PUBLIC DEFENDER

By /s/ David J. Euchner, for
Mikel P. Steinfeld

This comment e-filed this date with:

Supreme Court of Arizona

Copy of this Comment
Electronically mailed this date to:

Colleen Clase
Arizona Voice for Crime Victims
cclase@voiceforvictims.org

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

MIKEL STEINFELD
AZ Bar No. 024996
DEPUTY PUBLIC DEFENDER
MARICOPA COUNTY PUBLIC DEFENDER
620 W. Jackson, Ste. 4015
Phoenix, AZ 85003
Mikel.Steinfeld@Maricopa.gov
602-506-7711

SUPREME COURT OF ARIZONA

No. R -19-0016

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 Maricopa County Public Defender's Office and Arizona Attorneys for Criminal Justice respectfully submit the following Comment in Opposition to Petition R-19-0016, Arizona Voice for Crime Victims' ("AVCV") Petition to Amend the Rules of Criminal Procedure ("Petition").

The Maricopa County Public Defender ("MCPD") is the largest indigent defense firm in the State of Arizona with over 200 deputy public defenders providing indigent legal services in the Maricopa County Justice and Superior Courts. During the past fiscal year, the MCPD handled almost 36,000 criminal cases.

Arizona Attorneys for Criminal Justice (“AACJ”) is the Arizona affiliate of the National Association of Criminal Defense Lawyers. AACJ was founded in 1986 to give a voice to the rights of the criminally accused and to those 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 a defense lawyer.

Discussion:

I. The Arizona Supreme Court Task Force to redraft the rules of criminal procedure has already considered and rejected AVCV’s proposal to eliminate and disseminate Rule 39 throughout the Rules.

In 2015, this Court created a Task Force to restyle the Arizona Rules of Criminal Procedure. [Admin. Order 2015-123](#). AVCV proposed to eliminate and incorporate Rule 39 during the April 7, 2017, meeting of the Task Force. *See* [CRTF draft meeting minutes, 4/7/2017](#), 1–2. The Task Force considered the proposal to eliminate and integrate Rule 39 throughout the rules. However, the Task Force rejected the proposal and declined to include references to victims in several Rules. *See, e.g., id.* at 3 (refusing to change Rule 7.3 to include AVCV’s mandatory no-contact provision), 3–4 (rejecting proposal to modify right to be heard), 4 (refusing to modify 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 to modify Rule 9.3), 6 (refusing proposal to modify 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 victims’ rights. *See, e.g., id.* at 8 (adopting proposed change to Rule 27.1), 8 (adopting proposed change to Rule 1.2).

Notably, some members of the Task Force believed there was value in Rule 39 as an umbrella rule. *See id.* at 4. Part of the reason the Task Force rejected AVCV’s proposal was that members were concerned that parsing Rule 39 “rights throughout the [R]ules might actually dilute them.” *Id.*

II. AVCV’s 2018 proposal was criticized for eliminating a useful resource in Rule 39, and for creating substantive changes to elevate victims to party status under the guise of a stylistic change.

Failing to change the Rules through the Task Force in 2017, AVCV petitioned to change the Rules in 2018 by filing Rule Change Petition R-18-0001 on January 3, 2018. The Petition met significant pushback, which can be separated into two categories of criticism. First, Rule 39 is effective at consolidating and informing practitioners of a victim’s rights, and therefore it should not be eliminated. Second, AVCV claimed its proposed modifications were stylistic, but they were actually an attempt to make substantive changes to the Rules, such as elevating victims’ attorneys to party status in criminal proceedings.

The Arizona State Bar noted that “Rule 39 is crucial to the [criminal] process and must not be deleted,” and criticized the proposed modifications to the Rules as “seek[ing] to raise crime victims to the status of parties, permitting them to file pleadings and be heard on matters not exclusively pertaining to victims’ rights.” See [Comment of the State Bar of Ariz., Sup. Ct. No. R-18-0001, 2.](#)

The Honorable Sam Myers, the Criminal Presiding Judge of Maricopa County, stated that “[t]he elimination of Rule 39 would have a detrimental effect on the courts because it would remove from the Criminal Rules the comprehensive overview relied upon by judicial officers for a concise listing of all of the rights of victims in a criminal proceeding.” He criticized the modifications to the Rules, noting that “though not explicitly mentioned in the body of the petition itself, the proposed changes in several of the specific rule amendments amount to a substantive change in criminal procedure and/or an expansion of victims’ rights not currently contained in rules, statutes or the Constitution.” [Hon. Sam Myers, Comment to Proposed Changes to the Rules of Criminal Procedure, Sup. Ct. No. R-18-0001, 1-2.](#)

The Arizona Prosecuting Attorneys’ Advisory Council (“APAAC”) wrote the only Rule Comment that did not object to modifying the Rules to elevate victims to the status of parties. Nevertheless, APAAC cautioned against the repeal of Rule 39, stating that “by repealing Rule 39 in its entirety, a long-standing and

stalwart source for victims’ rights could be lost and those enumerated rights somehow diminished.” See [Comment of the Ariz. Prosecuting Attorneys’ Advisory Council, Sup. Ct. No. R-18-0001, 11, Ins. 4-8.](#)

The Maricopa County Attorney’s Office (“MCAO”) collaborated with AVCV on a joint comment. This comment suggested amendments to the original proposal—some cosmetic and others substantial. Notably, AVCV rolled back on a number of those fixes in this year’s proposal.

Most worrisome is that this year’s proposal still has the same significant problems as last year’s proposal—it seeks to elevate crime victims to the status parties and eliminates Rule 39.

III. AVCV’s 2019 Petition is flawed like its 2018 Petition because it attempts to elevate victims to party status and eliminates a useful resource for judges and practitioners in Rule 39.

For the second year in a row, AVCV purports its petition is a stylistic “integration” of Rule 39 into a number of Rules.¹ The words “integration” or “integrating” are used twelve times in the Petition,² 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.”

¹ Rules 1.2, 1.3, 1.4, 1.5, 1.7, 1.8, 1.9, 1.10, 4.1, 4.2, 5.1, 5.4, 5.8, 6.3, 6.7, 7.2, 7.3, 7.4, 7.5, 7.6, 8.1, 8.2, 8.5, 10.2, 10.3, 15.1, 15.2, 15.3, 16.3, 16.4, 17.1, 18.1, 19.7, 19.8, 26.7, 26.10, 26.17, 27.3, 27.7, 27.8, 27.10, 31.3, 32.4, 32.6 and 39.

² Up from eight references in the AVCV’s 2018 Petition.

See Pet., 7. Instead, the AVCV states the purpose of its Petition is merely to “give effect to the VBR” and to “provide comprehensive guidance to criminal justice professionals.” *Id.* This language is identical to AVCV’s 2018 Petition and remains false.

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) (stating Due Process Clause requires substantial procedural protections to shield defendants against the devastation of imprisonment and the high cost of wrongful conviction).

Although AVCV took some of the most egregious “integrations” out of this year’s Petition, AVCV still seeks significant substantive changes, while claiming the Petition seeks only stylistic change. AVCV became less ambitious in some regards. For instance, AVCV eliminated a 2018 proposed reduction in the timeline for capital defendants under Rule 6.7, as well as a 2018 proposed Rule 15.6 change that would have placed a victim’s speedy trial rights above the due process rights of a defendant. Nevertheless, AVCV’s 2019 Petition retains several other problematic substantive changes to the Rules reminiscent of last year’s proposal.

The following list highlights some of the same proposed substantive changes contained in this year's Petition, which go beyond the scope of stylistic integration by creating new victims' rights and limiting the due-process rights of the accused:

1. The proposed change to Rule 1.9 explicitly grants a victim new rights, including the right to file motions, ask for arguments and hearings, and grants the victim's attorney a new right to propose court orders. The right to propose orders is uniquely retained by attorneys of victims, such as attorneys at the AVCV. Pet., Appx. A: Abridged Text of Proposed Changes, 10.
2. The proposed Rule 7.3 establishes an automatic order proscribing the defendant contact with a victim, and it shifts the burden to the defendant to show "good cause" to overcome the order. Pet., Appx. A, 24.
3. The proposed Rule 7.5 creates new reasons a victim can seek to modify a defendant's release conditions. Pet., Appx. A, 27.
4. The proposed Rule 16.3 allows a victim to interject into the proceedings before the court hears motions, sets hearings or conferences, accepts stipulations, or does anything else at any pretrial hearing. Pet., Appx. A, 47.

These changes are identical in impact, if not in form, to proposed substantive changes in last year's Petition. AVCV's proposed modifications do not merely "integrate" Rule 39 into the Rules; the Petition is replete with substantive changes that would provide new procedural rights for victims at the cost of a defendant's due process rights and the integrity of the criminal justice system as a whole. Meanwhile, rather than addressing the need for substantive changes, AVCV claims that its proposed changes are all merely integration of existing rules.

AVCV states in its Petition that “AVCV is not asserting that victims are parties to a criminal case nor is AVCV seeking to elevate victims to party status,” correctly noting that this would be contrary to Arizona law. Pet., 6. However, the modifications proposed by AVCV effectively elevate crime victims to the status of parties. Close scrutiny of the specific wording of the proposed changes to Rule 1.9 reveals the Petition’s intent to elevate crime victims to the status of parties. The Petition includes the following proposed changes:

1. Rule 1.9(b) “Service of Motion; Response; Reply” would read “(w)hen addressing matters that impact any victim’s rights, a victim may file motions, responses, and replies that comply with these rules.” Pet., Appx. A, 10.
2. In Rule 1.9(d) “Waiver of Requirements,” the Petition would eliminate an essential qualifying phrase limiting waiver to parties or the court. *Id.*
3. In Rule 1.9(e) “Oral Argument,” the Petition would eliminate the qualifying phrase “(o)n a party’s request or on its own” as a necessary precursor for setting an hearing or waiving requirements of motions, arguments, or orders. *Id.*
4. Rule 1.9(f) “Proposed Orders” would read “(a) party or victim’s attorney must serve the proposed order on the court and all other parties and victim’s attorney. A party or victim’s attorney must not file a proposed order, and the court will not docket it, until a judge has reviewed and signed it” *Id.*

These changes mirror last year’s proposed changes, which would explicitly grant a victim’s attorney new rights to file motions, ask for arguments and hearings, and propose court orders. Pet. R-18-0001, Appx. A: Abridged Text of Proposed Changes, 5. The only significant change in this year’s Petition is that

AVCV inserted the phrase “when addressing matters that impact any victim’s rights” Pet., Appx. A, 10. This qualifying phrase is so overly broad as to be meaningless because virtually any matter can be shoehorned into a “victim’s rights” argument under the broad language of the Victim’s Bill of Rights, which reads “*all rules* governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims’ rights.” Ariz. Const. art. II, §2.1(A)(11) (emphasis added).

As AVCV may anticipate, the proposed changes to Rule 1.9, combined with the broad language of Article II, would grant victims the ability to litigate at evidentiary hearings, suppression hearings, dismissal hearings, and conceivably any other hearing that might take place during a criminal proceeding. This renders the qualifying phrase “. . . (w)hen addressing matters that impact any victim’s rights” included in this year’s Petition meaningless. Since that qualifying phrase was the only significant change between last year’s proposal and this year’s proposal, and because that qualifying phrase would not actually serve as an effective qualifier, there is no significant distinction between this year’s petition and last year’s petition regarding the elevation of victims to party status.

Neither Rule 39 nor the Victim’s Bill of Rights intended to elevate victims to party status, and that is what the proposed changes would accomplish. That is improper. Furthermore, it is improper to propose such substantive changes under

the guise of style, especially without any discussion or presentation of facts that demonstrate the need, impact, or efficacy of such changes to the Rules.

IV. Proposed Rule 1.9, which would grant victims 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 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 Arizona’s 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). This is the balance of the criminal justice system.

Meanwhile, a 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 a 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 changes would go beyond these enumerated rights and obligations, and insert the victim into the delicate balance between the prosecution and defense in a way not contemplated by the VBR. Under the VBR, a victim’s right to be heard applies to hearings that might result in a 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 stages of the criminal proceeding. *See* Ariz. Const. art. II, § 2.1(A)(2), (3), (7), (12). 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 them an adjunct prosecutor. This expansion of power exceeds the victim's right to be informed or be treated with dignity and respect and tramples on the province of the prosecutor and the due-process rights of the defendant.

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

Conclusion:

The MCPD 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 a 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 a defendant's substantive due-process rights. The petitioners attempt to accomplish these changes without any showing of need. Based on the forgoing, the MCPD and AACJ oppose the Petition.

RESPECTFULLY SUBMITTED this 1st day of May, 2019.

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

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