|  |  |
| --- | --- |
| Elizabeth Burton Ortiz, Bar No. 012838  Executive Director  Arizona Prosecuting Attorneys’ Advisory Council  3838 N. Central Avenue, Suite 850  Phoenix, AZ 85012  (602) 542-7222 / FAX (602) 274-4215  [Elizabeth.Ortiz@apaacaz.com](mailto:Elizabeth.Ortiz@apaacaz.com) |  |

**IN THE SUPREME COURT  
STATE OF ARIZONA**

|  |  |
| --- | --- |
| In the Matter of:  **PETITION TO AMEND THE ARIZONA RULES OF CRIMINAL PROCEDURE** | Supreme Court No. R-20-0031  **COMMENT OF**  **THE ARIZONA PROSECUTING ATTORNEYS’ ADVISORY COUNCIL** |

**I. BACKGROUND OF PETITION**

The Arizona Voice for Crime Victims (“AVCV”) has filed a new petition[[1]](#footnote-2) relating to Rule 39, Arizona Rules of Criminal Procedure. As in previous petitions, AVCV is seeking to integrate existing victims’ rights provisions from the Arizona Constitution and its implementing legislation into each applicable rule throughout the Rules of Criminal Procedure. However, in sharp contrast to its previous petitions, AVCV is no longer seeking the full repeal of existing Rule 39 (“Victims’ Rights”).

The Arizona Prosecuting Attorneys’ Advisory Council (“APAAC”) has again considered the AVCV petition and its proposed changes and supports them. Integrating victims’ rights into the various criminal rules will have a significant impact on how the rights of crime victims are ensured and protectedin our criminal justice system. At the same time, not repealing Rule 39 will enhance continued understanding and knowledge of victims’ rights throughout the criminal justice system.

**II. DISCUSSION/ANALYSIS**

Arizona voters in 1990 approved Prop 104 amending the Arizona Constitution to add a Victims’ Bill of Rights (“VBR”). Ariz. Const. art. 2, § 2.1. The next year, the Victims’ Rights Implementation Act was passed by the Legislature, codified as A.R.S. §§ 13-4401 *et seq*. Ch. 229, 1991 Ariz. Sess. Laws 1137. For the past 30 years, Arizona courts have continued to stress the importance of the VBR in securing crime victims’ rights to justice and due process in the criminal justice system. *Z.W. v. Foster*, 244 Ariz. 478, ¶ 3 (App. 2018) (the VBR secures crime victims’ “important rights” to justice and due process); *See also* *State v. Patel*, 247 Ariz. 482, ¶ 5 (App. 2019) (addressing a victim’s right to restitution under the VBR). Integrating victims’ rights throughout the Rules of Criminal Procedure further secures and protects a victim’s right to justice and due process in our system.

**A. Non-Repeal of Rule 39**

In its previous petitions, AVCV recommended the full repeal of Rule 39. However, as it notes (Petition, p. 3), consideration of stakeholder concerns over full repeal has caused it to reconsider that recommendation. APAAC applauds AVCV’s new recommendation to keep Rule 39 intact. Rule 39 has long been the recognized and cited source for victims’ rights in Arizona. It was the foundation upon which both the VBR and its implementing statutes was based.[[2]](#footnote-3) Practitioners, advocates, students, and courts have been trained on Rule 39 and have learned to rely upon it. Innumerable appellate decisions have addressed the rule’s specific provisions. At this point, a full repeal of Rule 39 would be counterproductive to ensuring and protecting victims’ rights. Notably, AVCV has proposed a new rule (39(a)(3)(C)) to address any conflict between a specific criminal rule and Rule 39.

**B. Suggested Integration Clarifications**

As it has in years past, APAAC has identified certain areas of the petition’s proposed rule changes for which clarifications are suggested:

1. New Rule 1.2 (a)(3) (“Victims are not Parties”)

In its previous petitions and again here, AVCV has added “*crime victim*” or “*victim’s attorney*” to the language of Rule 1.3 (“Computation of Time”), Rule 1.7 (“Filing and Service of Documents”), Rule 1.8 (“Clerk’s Distribution of Minute Entries and Other Documents”) and Rule 1.9 (“Motions, Oral Argument, and Proposed Orders”). To address previous concerns that these modifications elevate victims to “party” status, AVCV has proposed a new Rule 1.2(a)(3) to clarify that the suggested modifications should not be construed to make victims parties to a criminal case. (*See also* Petition, p. 6). While this clarification is useful, it should be stressed that a victim’s active participation in making motions and requesting orders in the criminal process is limited to matters that directly involve the victim enforcing a right or challenging the denial of a right. A.R.S. § 13-4437(A); *State ex rel. Montgomery v. Padilla*, 238 Ariz. 560, ¶ 22 (App. 2015).

2. Rule 15.1 (“The State’s Disclosures”)

AVCV again proposes limitations on a court’s ability to order disclosure by the State on motion of a defendant. Proposed Rule 15.1(g)(1) would allow a court to order disclosure by the State, on a defendant’s motion, from any person “*other than the victim*”. As APAAC noted in previous comments, a victim’s right to refuse a discovery request by a defendant under the VBR may sometime yield to federal and state constitutional mandates of due process entitling a defendant to a fair trial. *State e rel. Romley v. Superior Court (Roper)*, 172 Ariz. 232, 240 (App. 1992).

The *Roper* decision was recently analyzed and softened by Division One in *R.S./S.E. v. Thompson in and for County of Maricopa*, 247 Ariz. 575 (App. 2019), in which the Court granted relief from a superior court ruling requiring the State to produce the victim’s privileged mental health records for an in camera review. But the Court resolved the issue based on the statutory physician-patient privilege and did not reach the superior court’s ruling regarding the VBR. *Thompson*, ¶ 9. And the Court agreed with *Roper* that “when a defendant’s established due process right directly conflicts with a non-federal constitutional right, the due process right must prevail.” *Thompson*, ¶ 21. APAAC again suggests that the AVCV proposed language be modified to state “*other than the victim, absent a determination by the court that the evidence would be exculpatory*.”

3. Rule 16.3 (“Pretrial Conference”)

Rule 16.3 allows the court to set evidentiary hearings and pretrial conferences. AVCV also proposes, as it did in previous petitions, to limit a court’s ability to set evidentiary hearings and pretrial conferences unless “*the rights and views of the victim, the victim’s right to a speedy trial, and the victim’s right to be present at all proceedings*” have been considered. Proposed Rule 16.3(d)(2). The court’s ability to set evidentiary hearings and pretrial conferences, which are generally ministerial and determined by a court’s docket, should not be hampered by the addition of the proposed language. Instead, APAAC suggests that if a change to Rule 16.3(d) is necessary to protect victims’ rights, the proposed modification should be clarified to apply only to motions to continue these hearings, as provided in A.R.S. § 13-4435(F).

4. Rule 16.4 (“Dismissal of Prosecution”)

Rule 16.4(a) allows the court to dismiss a prosecution without prejudice on the State’s motion and for good cause. AVCV again proposes adding a requirement to this section that the court could only dismiss for good cause on motion of the State “*after considering the views of the victim*.” This proposed language inserts the victim into the State’s decision to dismiss a prosecution and the court’s ability to grant it. Fairly read, this proposal could give a victim the right to object to a dismissal by the State. This is not something that currently exists in the VBR or its implementing statutes.

APAAC has previously pointed out that a victim has the right, upon request, to confer with the prosecution about a dismissal (A.R.S. § 13-4419(A)), but that right does not extend to having the court deny a dismissal if the victim objects. A prosecuting attorney must be free to decide which cases to pursue or not, and the case law is clear that a prosecutor has broad discretion to prosecute cases “regardless of the wishes of the victim.” *State v. Granados*, 172 Ariz. 405, 408 (App. 1991); *State v. Peltz*, 242 Ariz. 23, ¶ 8 (App. 2017) (“[t]he prosecutor has broad discretion in deciding both whether to charge and which charges to file against a defendant.”). A victim has no authority to direct the prosecution of a case. A.R.S. § 13-4419(C). APAAC recommends that if the proposed modification is to be adopted, it should be amended to read “*after determining that the victim has conferred with the prosecutor*.”

**III. CONCLUSION**

The Arizona Prosecuting Attorneys’ Advisory Council recognizes and commends the work of the AVCV in its continuing efforts to enhance and protect victims’ rights in Arizona. APAAC offers the suggestions in this comment with the intent of strengthening the proposed changes as set forth in AVCV’s petition.

RESPECTFULLY SUBMITTED this 1st day of April, 2020.

/s/ Elizabeth Burton Ortiz

Elizabeth Burton Ortiz, #012838

Executive Director

Arizona Prosecuting Attorneys’

Advisory Council

Electronic copy filed with the

Clerk of the Arizona Supreme Court

this 2nd day of April, 2020.

By: /s/ Diana Cooney

1. Similar petitions were filed in R-18-0001 and R-19-0016. [↑](#footnote-ref-2)
2. Rule 39 was promulgated by the Arizona Supreme Court on July 24, 1989 and became effective on August 1, 1989. It was the basis upon which Arizona voters approved Prop 104 in 1990. [↑](#footnote-ref-3)