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8 **IN THE ARIZONA SUPREME COURT**

9 IN THE MATTER OF:
10 PETITION TO AMEND THE
11 ARIZONA RULES OF CRIMINAL
12 PROCEDURE

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16 Pursuant to Rule 28(a) of the Arizona Rules of the Supreme Court, Arizona
17 Voice for Crime Victims (AVCV) respectfully submits this petition to amend the
18 Arizona Rules of Criminal Procedure by fully integrating the rights guaranteed to
19 victims by our constitution, Ariz. Const. art. II, § 2.1, and its implementing
20 legislation, Ariz. Const. art. II, §§ 2.1(D) and A.R.S. §§ 13-4401-43, throughout
21 each applicable rule provision. AVCV’s proposed amendments are attached to this
22 petition.
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1 Arizona Voice for Crime Victims (AVCV), founded in 1996, is a non-profit
2 organization located in Phoenix, Arizona that provides pro bono legal
3 representation and social services to victims of crime in state and federal criminal
4 proceedings. AVCV seeks to foster a fair and compassionate justice system in
5 which all crime victims are informed of their rights under the Arizona Victims'
6 Bill of Rights (VBR), fully understand their rights, and have a meaningful way to
7 participate and assert these constitutional guarantees throughout the criminal
8 justice process. To achieve these goals, AVCV empowers victims of crime
9 through legal advocacy and social services. Another key part of AVCV's mission
10 is to provide information and policy insights in an effort to ensure victims' rights
11 are upheld during the practical day-to-day application of victims' rights in
12 Arizona's courtrooms. When criminal court judges and the attorneys involved in
13 each criminal case fully understand when and how victims' rights apply in each
14 situation, victims can truly have the meaningful participation that the VBR
15 intended.

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20 Currently, Rule 39 of the Arizona Rules of Criminal Procedure generally
21 addresses victims' rights. After voters adopted the VBR in November 1990, Rule
22 39 had to be amended to conform to the mandates of the state constitution. Rule
23 39, as currently presented in the criminal rules, provides an overview of the rights
24 of crime victims. However, the context in which victims' rights will apply is
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1 lacking. Unlike the rights of the accused or the rights of the state, which are
2 appropriately and carefully presented in the criminal rules, Rule 39 does not
3 provide proper guidance to trial courts and attorneys on when victims' rights apply
4 in relation to the remainder of the rules. A comprehensive approach to victims'
5 rights will require full integration into the criminal rules so that trial courts and
6 attorneys are properly instructed on what the VBR mandates in each situation.
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9 AVCV has previously petitioned this Court to repeal Rule 39 after full
10 integration of victims' rights into the rules. After considering stakeholder concerns
11 over repealing Rule 39, this petition does not propose a repeal of Rule 39.
12 However, AVCV proposes one amendment to Rule 39(a) in the event a future
13 conflict arises between a rule and a provision of Rule 39. AVCV proposes adding
14 subsection (3)(C) that states: "If any provision of Rule 39 conflicts with a rule
15 provision where a victim's right is addressed, the individual rule provision where
16 the victim's rights has been integrated shall prevail."
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19 Proposition 104 aimed to change the criminal justice culture for victims in
20 Arizona by providing constitutional rights that would take victims from the
21 sidelines of the criminal justice system to becoming active participants. Steven J.
22 Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims' Rights in Arizona*,
23 47 Ariz. St. L.J. 421 (2015). Notably, Proposition 104 received overwhelming
24 support of Arizona's voters and the Arizona Victims' Bill of Rights (VBR) became
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1 effective on November 27, 1990. Gessner H. Harrison, *The Good, the Bad, and*
2 *the Ugly: Arizona's Courts and the Crime Victims' Bill of Rights*, 34 Ariz. St. L.J.
3 531, 532 (2002). The VBR preserved and protected specific rights to justice and
4 due process, including rights:
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7 1. To be treated with fairness, respect, and dignity, and to be free from
8 intimidation, harassment, or abuse, throughout the criminal justice
9 process.

10 2. To be informed, upon request, when the accused or convicted
11 person is released from custody or has escaped.

12 3. To be present at and, upon request, to be informed of all criminal
13 proceedings where the defendant has the right to be present.

14 4. To be heard at any proceeding involving a post-arrest release
15 decision, a negotiated plea, and sentencing.

16 5. To refuse an interview, deposition, or other discovery request by
17 the defendant, the defendant's attorney, or other person acting on
18 behalf of the defendant.

19 6. To confer with the prosecution, after the crime against the victim
20 has been charged, before trial or before any disposition of the case and
21 to be informed of the disposition.

22 7. To read pre-sentence reports relating to the crime against the victim
23 when they are available to the defendant.

24 8. To receive prompt restitution from the person or persons convicted
25 of the criminal conduct that caused the victim's loss or injury.

9. To be heard at any proceeding when any post-conviction release
from confinement is being considered.

10. To a speedy trial or disposition and prompt and final conclusion of
the case after the conviction and sentence.

1 11. To have all rules governing criminal procedure and the
2 admissibility of evidence in all criminal proceedings protect victims'
3 rights and to have these rules be subject to amendment or repeal by
4 the legislature to ensure the protection of these rights.

5 12. To be informed of victims' constitutional rights.

6 Ariz. Const. art. II, §§ 2.1(A)(1)-(12)

7 Integrating victims' rights into each applicable rule would be consistent with
8 the right established in paragraph 11 of the VBR, namely that "*all rules governing*
9 *criminal procedure and the admissibility of evidence in all criminal proceedings*
10 *protect victims' rights.*" (emphasis added.) Ariz. Const. art. II., § 2.1(A)(11). Full
11 integration is further justified by the constitutional right to be treated with fairness,
12 respect, and dignity and to be free from intimidation, harassment, or abuse
13 throughout the criminal justice process. Ariz. Const. art. II, § 2.1(A)(1). This
14 Court has acknowledged that the VBR broadly recognizes these rights to fairness,
15 respect, and dignity. *J.D.;M.M. v. Hegyi*, 236 Ariz. 39, 42 (Ariz. 2014). The
16 purpose of the VBR and its implementing legislation is to provide crime victims
17 with the "basic rights of respect, protection, participation and healing of their
18 ordeals." *Champlain v. Sargeant*, 192 Ariz. 371, 375 (Ariz. 1998) (citing 1991
19 Ariz. Sess. Laws ch. 229, § 2). The constitutional mandate requiring that victims
20 be treated with "fairness" throughout the criminal justice process can be best
21 achieved by fully integrating victims' rights into the Arizona Rules of Criminal
22 Procedure, which, in turn, will "integrate victims into the day to day workings of
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1 the process.” Paul Cassell, *Treating Crime Victims Fairly: Integrating Victims into*
2 *the Federal Rules of Criminal Procedure*, 2007 Utah L. Rev. 861, 863 (2007).

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4 It is important to point out that in seeking integration, AVCV is not asserting
5 that victims are parties to a criminal case nor is AVCV seeking to elevate victims
6 to party status. Arizona case authority is clear that victims of crime are not parties
7 to a criminal prosecution. *State v. Lamberton*, 183 Ariz. 47 (1995) (victim is not
8 an aggrieved party with standing to file her own petition for review in a Rule 32
9 proceeding); *Lindsay R. v. Cohen*, 236 Ariz. 565 (App. 2015) (noting VBR did not
10 make victims parties). AVCV proposes an amendment to Rule 1.2(a) to clarify
11 that fully integrating victims’ rights throughout the rules of procedure will not
12 make victims parties to a criminal case. AVCV proposes adding subsection (3) to
13 read: “*Victims Are Not Parties*. These rules are not to be construed to make victims
14 parties to a criminal case.” Although victims are not parties, they are important
15 participants with enforceable rights throughout the entirety of Arizona’s criminal
16 justice process. AVCV merely seeks to ensure that trial courts and attorneys are
17 aware of each applicable situation where a victim may assert a right guaranteed
18 under the VBR or the VRJA.
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23 Our legislature recognizes that victims have a right to meaningful
24 participation during a criminal prosecution. This right has been upheld by our
25 Court of Appeals. A “victim has standing to seek an order, to bring a special

1 action or to file a notice of appearance in an appellate proceeding, seeking to
2 enforce any right to challenge an order denying any right...” A.R.S. § 13-
3 4437(A); *State ex rel. Montgomery v. Padilla*, 238 Ariz. 560, 566 (App. 2015) (A
4 request for an order in a criminal case must be timely, in writing, served and filed
5 with the court. For victims, the subject matter of such a request is limited and must
6 be directed to enforcing any right or to challenging an order denying any right
7 guaranteed to victims). Additionally, “[o]n the filing of a notice of appearance,
8 counsel for the victim shall be endorsed on all pleadings and, if present, be
9 included in all bench conferences and in chambers meetings and sessions with the
10 trial court that directly involve a victim's right...” A.R.S. § 13-4437(D). Because
11 victims have participatory rights, it is essential that Arizona’s trial courts and
12 attorneys are provided proper guidance through this Court’s rule-making authority
13 regarding when victims’ rights apply in relation to the remainder of the criminal
14 rules. Because this guidance is lacking in Rule 39, which states what rights
15 victims have but fails to provide the context in which they apply, some trial courts
16 have overlooked victims’ rights.

21 The following cases are not an exhaustive list¹ of instances where trial courts
22 have violated victims’ rights, but are presented for this Court’s consideration.

25 ¹ AVCV has additional case examples available upon request of this Court..

1 *State v. Simcox*, CR 2013-428563-001. In *State v. Simcox*, the trial court²
2 failed to recognize Rule 39(b)(1) (the right to be treated with fairness, respect and
3 dignity, and to be free from intimidation, harassment, or abuse throughout the
4 criminal justice process) and Rule 39(d)(4) (In asserting any of the rights
5 enumerated in this rule or provided by any other provision of law, a victim has a
6 right to be represented by personal counsel of the victim's choice). When victim's
7 counsel attempted to object to a pro per defendant directly questioning the victim
8 representative at a pretrial evidentiary hearing, the trial court advised that the
9 victim's counsel did not have standing to make argument to the trial court.
10 Instead, he advised, that the victim's counsel would have to make argument to the
11 assigned deputy county attorney (DCA) and that the DCA could decide whether
12 the victim's arguments were worthy of the court's consideration. Having each of
13 these rules integrated as indicated below would have assisted the trial court in
14 understanding victims' rights during the proceedings and the role of the victim's
15 counsel in asserting victims' rights.

16 AVCV proposes placing Rule 39(b)(1) in a prominent place, the very first
17 rule— Rule 1.2 because Rule 1.2 addresses the purpose and construction of the
18 rules. It is crucial that trial courts know that victims' rights are applicable

25 ² This victims' rights violation occurred at a July 23, 2015 hearing. AVCV has a copy of the transcript on file. Ariz. R. Sup. Ct. (a)(4)(B) sets a 20 page limit on the petition and supporting documentation, excluding the text of the proposed rules.

1 throughout the criminal justice process and that they must be construed to protect
2 the rights enumerated in the VBR including the right to be treated with fairness,
3 respect, and dignity, and to be free from intimidation, harassment, or abuse.
4 Placing this important right in Rule 1.2 not only makes sense, but it would
5 emphasize the importance this Court places on victims' rights to trial court judges
6 and practitioners throughout Arizona.
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9 AVCV also proposes replacing Rule 39(d)(4) with a newly created rule,
10 Rule 1.10(b)(4). Placement in Section 1 of the rules where other preliminary
11 matters including motions, time for filing, service, distribution of minute entries,
12 etc. are covered is appropriate. While no one questions whether the government or
13 a criminal defendant can have an attorney, some still question whether a victim can
14 have an attorney. This is a matter that should be addressed for trial court judges
15 and practitioners at the beginning of the rules.
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18 *State v. Temple*, CR 2015-150007-001. In *State v. Temple*, the trial court³
19 judge failed to recognize Rule 39(b)(1) and Rule 39(d)(4). The victim in *Temple*
20 was a DPS trooper who was called to testify at a pretrial evidentiary hearing. At
21 the hearing, defense counsel objected to the victim's counsel being in the well of
22 the courtroom. Despite the fact that the victim was testifying at this hearing, the
23 trial court asked victim's counsel to leave the well of the courtroom denying the
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25 ³ This victims' rights violation occurred at an April 4, 2017 hearing. AVCV has requested the transcript.

1 victim his right to have his own counsel participate as needed while the victim
2 testified. In this case, having Rules 39(b)(1) and 39(d)(4) integrated as indicated in
3 the Simcox example would have assisted the trial court in understanding victims'
4 rights during the criminal proceedings and the role of counsel in representing a
5 victim who is called to testify during a pre-trial evidentiary hearing.
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7 *State v. Main*, CR 2015503594. In *State v. Main*, the trial court⁴ failed to
8 acknowledge and consider Rule 39(b)(12) (the right to refuse an interview,
9 deposition, or other discovery request by the defendant, the defendant's attorney,
10 or other person acting on the defendant's behalf...). Defendant Main is facing the
11 death penalty for the murder of a 4 year old child who was in her care. The 4 year
12 old homicide victim's brothers are victims under A.R.S. § 13-4401(19).
13 Additionally, two of them are listed as victims of child abuse on the indictment.
14 Defense counsel, without citing any authority regarding discovery or any authority
15 that would warrant an exception to the rights of the child-victims in this case,
16 sought all medical, counseling, education, and WIC records that currently existed
17 and those that would come into existence at a future time. The trial court did ask
18 for the child-victims' *guardian ad litem* (GAL) in the dependency case to appear at
19 the next hearing. The GAL did appear as ordered, but posed no objection on behalf
20 of the child-victims to having their privileged and confidential records submitted
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25 ⁴ This victims' rights violation occurred at an October 31, 2016 hearing. AVCV has the transcript on file.

1 for an in camera review despite the fact that defense counsel had not shown a
2 substantial need or sufficiently specific basis to warrant an exception to the child-
3 victims' constitutional rights.
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5 AVCV proposes replacing Rule 39(b)(12) with newly numbered Rule 15.3
6 (g)(2). Rule 15 addresses discovery. Rule 15.3 currently address depositions.
7 This petition proposes integrating Rule 39(b)(12) by amending Rule 15.3 to
8 include when a victim has a constitutional right to refuse a request of a defendant,
9 whether a deposition or other discovery request. Had Rule 39(b)(12) already been
10 fully integrated into the rules as Rule 15(g)(2) rather than tucked away in Rule 39
11 without any guidance to the trial courts on when and how victims may refuse a
12 defendant's discovery request, the trial court may have known not to order an *in*
13 *camera* review of the child-victims' privileged and confidential records absent the
14 requisite showing to warrant an exception to their constitutional right to refuse a
15 discovery request.
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19 *State v. Gilchrist*, JC 2015-148974-001. In *State v. Gilchrist*, the justice
20 court⁵ failed to consider Rule 39(b)(1) and was indifferent to the crime victim's
21 constitutional right to receive prompt restitution from the person convicted of the
22 criminal conduct that caused the victim's injury under Ariz. Const. art. II, §
23 2.1(A)(8). The victim had been attacked by the defendant's dog, at the direction of
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25 ⁵ This victims' rights violation occurred at a March 23, 2017 hearing. AVCV has a copy of the transcript on file.

1 the defendant, and left with severe injuries that required multiple reconstructive
2 surgeries. In a separate civil suit, a small settlement had been reached. Defense
3 counsel argued that restitution was precluded because of the civil settlement.
4 During a restitution hearing, the justice court questioned the victim's need for the
5 reconstructive surgeries and without regard for her right to be treated with fairness,
6 respect, and dignity, and to be free from intimidation, harassment, and abuse made
7 an inappropriate and harassing comment about the victim, who was present at the
8 hearing, on the record. The justice court stated: "...how do I know if the doctor
9 hasn't said, you know, we've taken care of the bite, but, you know, you're a pretty
10 lady, and this will get you even kind of a Hollywood smile here."
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14 This case presents an extreme example of indifference towards victims'
15 rights, specifically the right to be treated with fairness, respect, and dignity, and to
16 be free from intimidation, harassment, or abuse throughout the criminal justice
17 process. As discussed above in the Simcox example, integrating Rule 39(b)(1) by
18 placing it in a prominent place, Rule 1.2 makes sense and is necessary, especially
19 when needed to prevent a judge from being disrespectful to a victim.
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21 *State v. Bruce*, CR 2017-121025-001. In *State v. Bruce*, the trial court⁶
22 failed to acknowledge and consider Rule 39(b)(7)(B) (upon request, the right to
23 notice of and to be heard at any criminal proceeding involving the accused's post-

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⁶ This victims' rights violation occurred on October 12, 2017. AVCV has a copy of the FTR and is requesting a copy of the transcript.

1 arrest release or release conditions). The victims attended and wished to be heard
2 at a hearing where the defendant's motion to modify release conditions was being
3 considered so that they could oppose the defendant's request. In this case, the trial
4 court conditioned the right of the victims to be heard on whether they had personal
5 knowledge of the defendant. Rule 39(b)(7)(B), as well as our statutory and
6 constitutional provisions related to a victim's right to be heard regarding a post-
7 arrest release decision, are not conditioned on whether they have personal
8 knowledge of the defendant.
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11 The trial court started by saying:

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13 Let me make clear what I think is the focus of this
14 hearing. The issue in this hearing is not what the
15 defendant did or did not do. The issue is not the
16 seriousness of the offense, and by that I don't, in any
17 way, trivialize the charge. And, the issue is not what
18 effect his conduct may have had on others. The very
19 narrow issue for this hearing is whether or not the
20 defendant will appear for all proceedings that are
21 scheduled to take place in the future in this court. So,
22 therefore, what I would like to hear and *only* what I want
23 to hear is what conditions are necessary to make sure the
24 defendant appears and what facts support that. Or,
25 alternatively, what makes the defendant a flight risk and
what facts support that.

22 FTR, October 12, 2017, 5:36-6:33 (emphasis added).

23 When the assigned prosecutor brought up the fact that the victims are
24 opposed to modification, the trial court responded:
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1 Right, I don't mean them any disrespect...but...I can't
2 say it any differently from I did at the outset. The issue
3 here is whether the defendant is going to show up for
4 future court proceedings...and the law is...the least
5 invasive, the least demanding conditions are the only
6 conditions that can be imposed.

7 FTR, October 12, 2017, 13:13-14:00.

8 The prosecutor again brought up the victims towards the end of the hearing.

9 FTR, October 12, 2017, 15:56.

10 The Court again responded:

11 Again, I mean them no disrespect. But, unless they have
12 *personal knowledge* of facts that bear on the likelihood
13 of the defendant appearing for court proceedings, for
14 purposes of this hearing, ...the only thing relevant that I
15 need to hear, and, I suspect they are like most victims,
16 *they don't have that personal knowledge*. So...I've
17 identified the facts that bear on the decision.

18 FTR, October 12, 2017, 16:06-16:45 (emphasis added).

19 AVCV proposes integrating Rule 39(b)(7)(B) into Rule 7.4(c)(2). Rule
20 7.4(c)(2) currently states that a motion to reexamine the conditions of release must
21 comply with victims' rights requirements provided in Rule 39. AVCV proposes
22 amending the language to remove the reference to Rule 39 and instead inform the
23 trial court that: "[a] victim has the right to notice of and the right to be heard at
24 any hearing regarding any motion to modify release conditions." In this instance,
25 integration of Rule 39(b)(7)(B) may have assisted the trial court in knowing that

1 the victims did indeed have a constitutional right to be heard that was not
2 conditioned on having personal knowledge of the defendant.

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4 *State v. Moreno*, CR 2014-101861-001. In *State v. Moreno*, the trial court⁷
5 failed to acknowledge and consider Rule 39(b)(4) (the right to be present at all
6 criminal proceedings) and Rule 39(b)(7)(E) (the right to be heard at sentencing)
7 when he would only allow child-victims to attend and make a victim impact
8 statement only if their counselor or therapist would provide a note that attending
9 sentencing would not traumatize them further. Here, the trial court conditioned the
10 victims' rights to be present and heard at sentencing on receiving confirmation that
11 the victims would not be further traumatized. Rule 39(b)(4) and Rule 39(b)(7)(E),
12 as well as our statutory and constitutional provisions related to a victim's right to
13 be present and heard at sentencing, are not conditioned on trial courts receiving
14 approval from counselors.
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18 AVCV proposes amending Rule 26.10(b)(1) to make clear to trial courts that
19 victims must also have an opportunity to address the court at sentencing.
20 Additionally, AVCV proposes newly numbered rule 1.10(a)(4) that will place
21 exercising the right to be heard in a more prominent place. In this instance, having
22 Rule 1.10(a)(4) in a more prominent place and amending Rule 26.10(b)(1) to
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25 ⁷ This victims' rights violation occurred at a November 7, 2017 hearing. AVCV has a copy of the transcript on file.

1 include victims may have made the trial court aware that conditions, regardless of
2 the intent, cannot be placed on victims' rights.

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4 Integration of Rule 39 into each individual rule of procedure will provide
5 comprehensive guidance to criminal justice professionals using the constitutional
6 and statutory mandates that already exist to specifically lay out when victims'
7 rights are implicated and must be considered throughout the criminal justice
8 process. Maintaining Rule 39 as the only guide to victims' rights in Arizona's
9 Rules of Criminal Procedure welcomes misunderstanding of their applicability by
10 trial courts and attorneys at it only provides a general overview of victims' rights.
11 Full integration of the VBR into the applicable rules would not create new victims'
12 rights or violate the rights of the accused. Rather, it would give effect to the VBR
13 by allowing victims meaningful participation in the day-to-day workings of the
14 process. Ensuring each applicable rule fully complies with the constitutional and
15 statutory provisions will safeguard the rights of crime victims, especially for the
16 majority who do not have the benefit of their own counsel.
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20 Arizona has traditionally been on the forefront of victims' rights. It was one
21 of the first states in the country to provide victims of crime with constitutional
22 rights. Harrison, 34 Ariz. St. L.J. at 532 (2002). Since then, this Court has been
23 tasked with balancing the rights of victims with those of the accused and has
24 addressed issues of first impression that have both protected and upheld victims'
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