

Committee on Criminal Rules Regarding Victims

State Courts Building, Phoenix

Meeting Minutes: March 25, 2022

Members attending: Hon. John R. Lopez IV (Chair), Hon. Ronald Reinstein (Vice Chair), Tim Agan, Colleen Clase, Hon. Maria Elena Cruz by her proxy Hon. Kent Cattani, *Ryan Green, Hon. Kellie Johnson, *Hon. Patti Starr, *Rick Unklesbay, Hon. Maria Del Mar Verdin, *Cathryn Whalen

Guests: Theresa Rassas, Desiree Kerfoot

AOC Staff: Mark Meltzer, Sabrina Nash

*indicates virtual attendance

1. Call to order; introductory remarks; approval of meeting minutes. The Chair called the eleventh meeting of the Committee on Criminal Rules Regarding Victims ("CRV") to order at 10:04 a.m. The Chair introduced Ms. Sabrina Nash, who will now provide administrative support to the Committee. The Chair briefly reviewed materials in today's meeting packet; one document included hyperlinks to two pending bills in the Legislature that could impact the victims' rights provisions of Rules 15 and 26.

The Chair outlined his aspiration for completing the CRV's review of the section (v) provisions at the April meeting. The Chair then requested members to review draft minutes of the January 20, 2022 meeting. Members had no corrections or comments to the draft.

Motion: A member moved to approve the draft January 20, 2022 meeting minutes. The motion received a second and it passed unanimously. **CRV-012**

2. Rule-by-rule review. Members then continued their rule-by-rule review of the section (v) provisions. They concluded the January 20 meeting with a discussion of Rule 4.1 ("procedure upon arrest"). They will begin today by revisiting Rule 1.3, and then proceeding to Rule 4.2. As noted in the January 20 minutes, a rule is not mentioned in the minutes if there was no proposed modification to the rule. Furthermore, members approved the provisions and modifications discussed below unless otherwise noted.

Rule 1.3 (now, "computation of time," and as proposed, "victim participation"). New Rule 1.3 locates the first mention of victims' rights in a prominent place at the beginning of the Criminal Rules and displaces current Rule 1.3 on computation of time, which will be relocated as Rule 1.10.

At the January 20 meeting, members discussed the desirability of adding a provision to new Rule 1.3 regarding "opting in." In response, Ms. Rassas and staff drafted

a second paragraph of the comment to Rule 1.3. Ms. Rassas explained that this new paragraph clarifies for victims that they have certain rights enumerated by law, however, they must request those rights (i.e., “opt in”) to receive them. The new provision is provided as a comment rather than in the body of the rule because the provision is informational only. That is, other than mentioning that the prosecutor will provide information about opting in for post-conviction rights, the new provision does not direct the court or the parties to do anything. Members agreed with the language of the new provision.

Notwithstanding, one member noted a concern of the Commission on Victims in the Courts (“COVIC”), specifically, that victims are required to opt-in before conviction, and then a second time to obtain post-conviction rights. COVIC members believe that a single opt-in at the inception of a case should be sufficient. CRV members, however, concluded that a separate post-conviction opt-in is required by statute, and they had no authority to modify the requirement by a rule amendment.

Rule 4.2 (“initial appearance”). Rule 4.2(v) has two subparts. During their discussion of the first subpart, members considered A.R.S. § 13-4421 (“initial appearance”), which expressly provides for a victim’s right to be heard at the initial appearance. Members expressed their views on whether the victim’s right to be heard is implicit in the court’s consideration of the victim’s comments. To clarify a victim’s right to be heard at the initial appearance and to further distinguish that right from the magistrate’s duty to consider the victim’s comments, members agreed to modify the draft of subpart (v)(1) as follows:

At the defendant’s initial appearance, ~~a magistrate must permit, and the magistrate must consider, oral or written comments from any~~ a victim has the right to be heard concerning the defendant’s possible release and the conditions of release.

Members also modified subpart (v)(2) by using the passive voice concerning who must provide notice to the victim. Accordingly, members made this change to the second sentence of the subpart:

If a magistrate delays an arraignment under section (c), ~~the court must provide~~ sufficient notice must be provided to the victim of the date for the continued arraignment.

Members considered the 5-day reference in A.R.S. § 13-4409 (“notice of criminal proceedings”) when making the change to subpart (v)(2), but they agreed the reference did not need to be included in this subpart if someone other than the court was providing notice.

Rule 5.1 (“right to a preliminary hearing; waiver; continuance”). Rule 5.1(v) has three subparts. The second subpart, shown here, was the subject of extensive discussion:

Before continuing a preliminary hearing on motion or on its own initiative under section (c), a magistrate must also consider the victim’s views and right to a speedy disposition. If the magistrate orders a continuance of the preliminary hearing, the victim, if requested, must be notified of the magistrate’s order and the new hearing date pursuant to A.R.S. § 13-4409.

A member suggested adding the underlined words (“views and”) in the first sentence. Another member proposed removing the first sentence of this provision. The member contended that considering the abbreviated time for conducting a preliminary hearing, the process of obtaining the views of a victim -- who might not be present for a variety of reasons, including a lack of proper notice -- would act as a “speed bump” and delay the proceeding pending an inquiry into those views. The member contended that the essence of subpart (v)(2) is the second sentence, which requires notice to the victim if the magistrate continues the hearing.

A judge member noted that the Rule 8 right to a speedy disposition begins at the arraignment, which is after the preliminary hearing, so there cannot be a right to a speedy preliminary hearing under Rule 8. On the other hand, A.R.S. § 13-4435(A), a provision that ensures a speedy trial for the victim, refers to “any proceeding,” which would seemingly include a preliminary hearing; except that the definition of “criminal proceeding” in A.R.S. § 13-4401(7) refers to matters “before a trial court,” which might exclude preliminary hearings conducted in a justice court. Members also considered the Arizona Constitution, Article 2.1, section (A)(10), which provides the victim a right “to a speedy trial or disposition...” “Disposition” would arguably include the right to a prompt preliminary hearing.

Members continued to discuss alternative phrasing of this subpart, and whether the provision should include a statutory reference. Ultimately, the members kept the words “views and” in the draft provision set out above. They also agreed that the CRV’s recommendations should provide two alternatives to the Court. Some members prefer an alternative that strikes the first sentence of subpart (v)(2). Doing so would focus the provision on notice to the victim but eliminate consideration of the victim’s views. Other members preferred an alternative that would retain the first sentence and add a reference to A.R.S. § 13-4435(A). These members believed that a magistrate should consider the victim’s views and proceed to rule on a motion to continue without hearing the victim’s views only when the victim received proper notice yet failed to appear, or when the prosecutor had made reasonable efforts to provide notice to the victim. The Committee’s report will reflect those alternatives.

Rule 5.4 (“determining probable cause”). The draft text of Rule 5.4(v) provides:

The victim has a right to be heard whenever the defendant under section (a) requests a magistrate to reconsider the conditions of the defendant’s release.

The members’ discussion of this provision included consideration of the Arizona Constitution, Article 2.1, section (A)(4) (the victim’s right “to be heard at any proceeding involving a post-arrest release decision,”), Rule 7, and Rule 39(b). Staff noted rule petition number R-21-0051, which could impact this provision. However, because the rule petition is still pending, it did not induce members to modify their draft. Members make no changes to the text shown above.

Rule 5.8 (“notice if an arraignment is not held”). Members had a few comments concerning the draft of section (v), which provided (the following shows subsequent editorial markup):

Pursuant to A.R.S. § 13-4409, a victim has a right to receive ~~written~~ notice from the prosecutor, on request, of dates for further proceedings, ~~and other important deadlines that the magistrate sets under section (a).~~

A member found the phrase “important deadlines” to be ambiguous and suggested removing it. Members considered adding at the end of the provision the words “and any changes in the schedule.” They noted, however, that Rule 5.8 currently makes no reference to victims, and after further discussion, they deleted all the text after the words “further proceedings,” as shown above. They also deleted the word “written” (a phone call could be sufficient) and added the words “on request” after the word “prosecutor,” as also shown above. They approved the provision with these modifications.

Rule 6.3 (“duties of counsel; withdrawal”). Section (v) has two titled subparts. The title of the first subpart is “court consideration of the victim’s rights under section (c).” Members discussed whether the first subpart should include a reference to A.R.S. § 13-4435(F) (“before ruling on a motion for continuance, the court shall consider the victim’s views and the victim’s right to a speedy trial.”) Members decided to not include the reference, however, because the draft already requires the court to “consider the victim’s right to a speedy disposition;” and because this subpart does not govern Rule 8 speedy trial issues but instead concerns defense counsel’s motion to withdraw.

The title of the second subpart is “appearance and withdrawal of the victim’s attorney.” Ms. Rassas, citing to A.R.S. § 13-4401, suggested this change: “Before representing a victim in ~~court~~ a criminal proceeding, a victim’s attorney must file a notice of appearance.” Members agreed to make this change. They believed it would help assure that victim’s counsel is entered in the case management system and that it would facilitate the clerk providing notices to the victim’s counsel.

Rule 7.2 (“right to release”). Staff’s draft had proposed five new subparts in Rule 7.2(v). Those subparts were intended to relocate, add, and clarify victims’ rights provisions in subparts (a)(2), (b)(3)(F), (c)(1)(C), and (c)(2)(C), and add a fifth subpart concerning notice. Staff’s subpart (v)(1) would have added a victims’ right pertinent to a defendant’s release on a bailable offense before conviction because the current rule does not clearly contain such a right. Members found these five subparts to be unduly complex. They struck them all and replaced them with the following simplified text for Rule 7.2(v). This text is based in part on the Arizona Constitution, Article 2.1, section (A)(4) and on A.R.S. § 13-4422 (“post-arrest custody decisions”):

If requested, a victim has ~~a right~~ the rights to be notified of, present at, and heard at any proceeding involving a post-arrest release decision, and to be informed if a defendant is released from custody. [Note: Staff made the changes shown here after the March 25 meeting.]

Rule 7.3 (“conditions of release”). Members rejected staff’s proposed Rule 7.3(v) because it was redundant to other provisions in Rule 7.3. They retained Rule 7.3(b) (“victim protection”), a section that the members had previously added during a discussion of R-20-0031. They made no other changes to Rule 7.3.

Rule 7.4 (“procedure”). Staff’s draft of Rule 7.4(v) included four subparts. For reasons similar to those contained in the discussion of Rule 7.2, members struck those subparts and replaced them with a provision that is identical to the one they added to Rule 7.2, as recited above.

Rule 7.5 (“review of conditions; revocation of release”). As they did in Rules 7.2 and 7.4, members struck staff’s proposed draft of Rule 7.5(v) and replaced it with the same language they had approved for Rules 7.2 and 7.4.

3. Roadmap. Although today’s meeting materials included a substantially revised draft report, members were unable to discuss it because the meeting had already run past the announced time. The Chair encouraged members to be familiar with the report for the next meeting. Ms. Nash will send an inquiry to the members regarding their availability for the next meeting date. The next meeting will be for a full day, beginning at 10:00 a.m.

4. Call to the public; concluding remarks; adjourn. There was no response to a call to the public.

The meeting adjourned at 2:28 p.m.