ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

PATRICIA MOREHART v. STATE OF ARIZONA and WILLIAM C. MILLER
CV-10-0327-PR

PARTIES:

Petitioners: William Craig Miller ("defendant").

Respondents: Patricia Morehart and Colleen Duffy ("victims").

Amici Curiae: (1) National Association of Criminal Defense Lawyers, of Washington, D.C., (2) Southern Center for Human Rights, of Atlanta, Georgia, (3) Oregon Capital Resource Counsel, of Portland, Oregon, (4) South Carolina Commission on Indigent Defense, of Columbia, South Carolina, (5) Arizona Attorneys for Criminal Justice, of Chandler, Arizona, (6) Missouri Association of Criminal Defense Lawyers, of Jefferson City, Missouri, (7) New Mexico Criminal Defense Lawyers Association, of Santa Fe, New Mexico, and (8) Texas Defender Services, of Houston, Texas.

FACTS:

Defendant William Craig Miller was indicted on five counts of first-degree murder, as well as other charges not at issue in this case. The State filed a Notice of Intention to Seek the Death Penalty. Defendant requested an *ex parte* hearing before Judge Janet Barton on matters relating to investigation into mitigation issues. The prosecutor did not object on behalf of the State to the request for an *ex parte* hearing; however, Patricia Morehart and Colleen Duffy, as surviving family members of the murder victims, opposed the motion and asserted the right to be present. The victims objected on two grounds: (1) any *ex parte* hearing that excludes a victim is unconstitutional under the Victim's Bill of Rights; and (2) a victim has a constitutional and statutory right to attend any criminal proceeding at which a defendant has the right to be present.

[***Note:*** An "*ex parte*" hearing is a hearing granted upon the application of one party without notice to, or opportunity for attendance by, the adverse party.]

Defendant submitted additional information at the court's request indicating an *ex parte* hearing was necessary to discuss out-of-state summonses issued in connection with defendant's mitigation investigation. After hearing oral argument, Judge Barton ruled that, with respect to matters dealing with "the discovery and the procurement of mitigation," the court "can handle and should handle those *ex parte*, and that under Arizona law, the victims do not have the right to be present . . . ." The court thus granted the motion and scheduled the *ex parte* hearing.

The victims filed a Petition for Special Action in the Court of Appeals. The Court accepted

jurisdiction and granted relief. In its published opinion, the Court held that the victims had a right to be present at the hearing because the plain language of the Victims' Bill of Rights and the implementing Arizona statute confer the right to be present at any "criminal proceeding" where the defendant has the right to be present. Ariz. Const. art. 2 § 2.1(A)(3); A.R.S. § 13-4420. "Criminal proceeding" is defined as "any hearing, argument or other matter that is scheduled by and held before a trial court but . . . [not including] any deposition, lineup, grand jury proceeding or other matter that is not held in the presence of the court." A.R.S. § 13-4401(7).

Even assuming the defendant's need for confidentiality were established under Criminal Rule 15.9, dealing with appointment of investigators and expert witnesses for indigent defendants, the Court found no authority suggesting that the rule was intended to trump a victim's right to be present at all "criminal proceedings" at which the defendant has such right. Rule 15.9(b) provides: "No ex parte proceeding, communication, or request may be considered pursuant to this rule unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be recorded verbatim and made a part of the record available for appellate review."

The Appeals Court deemed its conclusion consistent with *State v. Apelt*, 176 Ariz. 349, 365 (1993) (finding no constitutional right to *ex parte* proceedings and that the broad disclosure requirements of the Arizona Rules of Criminal Procedure cut against such a conclusion). It also rejected the contention that allowing victims at the hearing on mitigation matters would chill defense efforts to fully investigate mitigation. The Court acknowledged defendant's citations of authority establishing defense counsel's obligation to investigate all potentially mitigating evidence. Nevertheless, it found that defendant offered "no authority for the proposition that the reasonable exercise of such a duty equates to a right to *ex parte* proceedings absent additional justification for such a request."

The Court also acknowledged the need, in certain instances, to balance victims' and defendants' constitutional rights. *State ex rel. Romley v. Superior Court (Roper)*, 172 Ariz. 232, 236 (App. 1992). In this case, however, such balancing was unnecessary because the "record is devoid of any argument that defendant's constitutional rights are in jeopardy." On this narrow record, the Court declined to address any purported conflict between the parties' respective constitutional rights.

Defendant's petition for review to the Arizona Supreme Court is supported by an *amicus curiae* brief filed by a group of capital defense organizations from various states. Amici contend that the Appeals Court's opinion, if allowed to stand, will lead to recurring violations of capital defendants' constitutional rights, and will compel defense counsel to choose between their duty to obtain resources necessary for vigorous representation and their duty to protect privileged information and strategies.

ISSUE:

Surviving family members, as victims, had a state constitutional right to be present at a hearing at which defendant planned to address matters of mitigation.

This Summary was prepared by the Arizona Supreme Court Staff Attorneys' Office solely for educational purposes. It should not be considered official commentary by the Court or any member thereof or part of any brief, memorandum, or other pleading filed in this case.