VICTIMS' RIGHTS — Victims have right to refuse defense interviews; exceptions — Revised 3/2010

The Victims' Bill of Rights gives a victim of a crime the right to "refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant." Ariz. Const. Art. 2, § 2.1(A)(5). That constitutional protection is implemented by A.R.S. § 13-4433(A):

> Unless the victim consents, the victim shall not be compelled to submit to an interview on any matter, including any charged criminal offense witnessed by the victim that occurred on the same occasion as the offense against the victim, or filed in the same indictment or information or consolidated for trial, that is conducted by the defendant, the defendant's attorney or an agent of the defendant.

A.R.S. § 13-4433(B) requires the defense and its agents to go through the prosecution to initiate any contact with the victim.

The Arizona Supreme Court has stated that the victim's right to decline a defense interview is "absolute." State v. Roscoe, 185 Ariz. 68, 74, 912 P.2d 1297, 1303 (1996). In *Roscoe*, the Arizona Supreme Court struck down A.R.S. § 13-4433(G) as unconstitutional because it excluded police officers from the definition of “victim." The Court reasoned that Article II, § 21(C) defined a victim as "a person against whom the criminal offense has been committed," and found that the legislature did not have the power to exclude police officers from that broad definition. *Id.* at 70, 912 P.2d at 1299.

The defense is not entitled to be present during interviews between the victim and the prosecution. In *State v. O'Neil*, 172 Ariz. 180, 836 P.2d 393 (App. 1991), the victims exercised their right to refuse pretrial defense interviews. The

prosecution then set up interviews with the victims, and the defense asked for an order allowing defense counsel to attend the prosecution's interviews. The trial court refused to allow defense counsel to attend the interviews, but ordered the State to "record all statements of the victims to the prosecutor, formal or otherwise, and to provide defense counsel with copies of the transcripts of those conversations." *Id*. at 181, 836 P.2d at 394. The Court of Appeals held that the trial court abused its discretion, noting that "[a]lthough the state is required to provide the defendant with the 'relevant written or recorded statements' of witnesses, that does not mean that the state is required to make a recording any time its representatives speak with a witness." Rule 15.1(b)(1), Ariz. R. Crim. P. Nevertheless, the Victims' Bill of Rights "does not give victims a right to prevent the prosecution from complying with requests for information within the prosecutor's possession and control." *State ex rel. Romley v. Gottsfield*, 172 Ariz. 232, 240, 836 P.2d 445, 453 (App. 1992). If the victim has information favorable to the defense and makes that information available to the prosecution or a law enforcement agency, the prosecution is required to share that information with the defense. *Brady v. Maryland*, 373 U.S. 83 (1963).

Although the victim has a right to refuse pretrial defense interviews, the victim has no right to refuse to testify at trial. *S.A. v. Superior Court,* 171 Ariz. 529, 831 P.2d 1297 (App. 1992) (*citing* Ariz. Const. art. II, § 24: “In criminal prosecutions, the accused shall have the right ... to meet the witnesses against him face to face. ...”); *see als*o *State ex rel. Dean v. City Court*, 173 Ariz. 515, 844 P.2d 1165 (App. 1992) (victim did not have the right to refuse to honor a

subpoena to testify at a pretrial hearing). In *S.A. v. Superior Court*, the victim was subpoenaed for trial but claimed she had a right under the Victims' Bill of Rights to refuse to testify. The Court of Appeals upheld the trial court's order that the victim testify. *Id.* at 532, 831 P.2d at 1297-98. The Court noted that both the Arizona and United States Constitutions give defendants the right to confront and cross-examine the witnesses against them. The Court further reasoned that the prosecution, not the victim, decides whether to pursue prosecution, and concluded that "the Victims' Bill of Rights should not be a 'sword in the hands of victims' to thwart the prosecution of a wrongdoer." *Id.*

In *Benton v. Superior Court*, 182 Ariz. 466, 897 P.2d 1352 (App. 1994), a domestic violence case, the victim and the defendant reconciled before trial and she refused to turn over her medical records, arguing that her records were protected under her victim's rights. The Court of Appeals disagreed, stating, "Nothing in the constitution or statutes indicates that a victim can impede a criminal prosecution by refusing to release medical records necessary for the prosecution of a defendant." *Id*. at 468, 897 P.2d at 1354. Therefore, the Court held that the Victims' Bill of Rights did not allow the victim to thwart criminal prosecution by refusing to turn over her medical records to the prosecution.

The victim's right to refuse pretrial interviews does not ordinarily conflict with the defendant's Sixth Amendment right to confront witnesses. *State ex rel. Romley v. Hutt*, 195 Ariz. 256, 987 P.2d 218 (App. 1999). In *Hutt*, the victim allowed the defendant to use his car, but she never returned it and he reported it stolen. The defendant then fraudulently obtained title to the car. She was

charged with theft of the car. After the victim refused a defense interview, the defendant moved for a pretrial hearing to determine whether the victim had "refused an interview based on bias, interest, or hostility." *Id*. at 258 ¶ 4, 987 P.2d at 220. The defendant argued that because her defense was that the victim gave her the car, denying her the opportunity to question the victim about his refusal would deny her the right to confront the witness and would destroy her ability to cross-examine him at trial. The trial court ordered a pretrial hearing, finding that it would effectively deny the defendant her defense if she could not develop impeachment material at a preliminary hearing. The State sought relief and the Court of Appeals reversed, noting that "confrontation rights under the Sixth Amendment do not normally afford criminal defendants a right to pretrial discovery." *Id*. at 260 ¶ 7, 987 P.2d at 222. The Court concluded:

> Victims are often important, crucial, and even critical witnesses. It is no doubt a sound practice for lawyers to interview witnesses before trial. But to compel victim interviews based on the kind of generic considerations presented here would nullify a significant constitutional protection afforded crime victims.

Id. at 261 ¶ 9, 987 P.2d at 223.

As the Arizona Supreme Court has stated, "It cannot be doubted that victims of crime, and their families, have certain rights. It is equally clear, however, that these rights do not, and cannot, conflict with a defendant's right to a fair trial." *State v. Bible*, 175 Ariz. 549, 602, 858 P.2d 1152, 1205 (1993) [citations omitted]. Nevertheless, in some cases with unusual facts, a victim's rights may be required to give way to a defendant's federal constitutional rights. In *State ex rel. Romley v. Superior Court*, 172 Ariz. 232, 836 P.2d 445

(App.1992), the defendant stabbed her husband and was charged with aggravated assault. She claimed self-defense and sought disclosure of the victim's medical records to show that he had been frequently hospitalized for a mental illness that predisposed him to violent behavior. The Court of Appeals upheld the trial court's order that the victim disclose the records. The defendant argued that the records would be exculpatory as establishing that her acts were justified, and also that the records were needed to effectively impeach the victim if he chose to testify. The Court of Appeals reasoned that the defendant had presented sufficient evidence to raise the affirmative defense of self-defense and put the burden on the State to overcome that defense. *Id*. at 238, 836 P.2d at 451.Therefore, the defendant needed the victim's medical records to prepare an effective, reasonable cross-examination. The Court concluded:

> The Victim's Bill of Rights was appropriately amended to the Arizona Constitution as a shield for victims of crimes. See Slayton v. Shumway, 166 Ariz. 87, 800 P.2d 590 (1990). However, the amendment should not be a sword in the hands of victims to thwart a defendant's ability to effectively present a legitimate defense. Nor should the amendment be a fortress behind which prosecutors may isolate themselves from their constitutional duty to afford a criminal defendant a fair trial.

Id. at 241, 836 P.2d at 454.

In *Knapp v. Martone*, 170 Ariz. 237, 823 P.2d 685 (1992), the defendant was charged with killing his two daughters. He confessed but later recanted, claiming he had lied to protect the real killer, his wife. The State charged the defendant with murder as a principal and, in the alternative, as an accessory. On the "accessory" theory, Mrs. Knapp was the principal or "co-conspirator," but she was never charged with or held to answer for any crime. Although the State said

it would not call Mrs. Knapp to testify, Knapp sought to depose her, arguing that she was a potential defense witness and not a "victim" protected under the Victims' Bill of Rights because she was a suspect in the case. The trial court ordered that Knapp could depose her, reasoning that the drafters of the Victims' Bill of Rights intended to exclude from the definition of "victim" anyone "who was, is, or could be a suspect." *Id*. at 239, 823 P.2d at 687. The Court disagreed, noting that Mrs. Knapp was not an "accused" because she was never charged with any crime. As the mother of the murdered children, Mrs. Knapp was a victim and had the right to refuse to be deposed.

When a victim exercises the victim's right to refuse a pretrial interview, the defense is allowed to cross-examine the victim about why the victim refused. *State v. Riggs*, 189 Ariz. 327, 942 P.2d 1159 (1997). In *Riggs*, the defendant argued that he should be allowed to cross-examine a victim about why the victim refused a pretrial interview, contending that the victim's reasons for refusing would be relevant to the victim's credibility. The Arizona Supreme Court held that the defendant must be allowed to cross-examine the victim about his refusal:

> Unlike a defendant's right to remain silent, the purpose underlying a victim's right to refuse pretrial interviews is not advanced by precluding comments on the victim's refusal. Commenting on a criminal defendant's exercise of the right to remain silent diminishes the benefit of that right by suggesting to the jury that the defendant is culpable. In contrast, the benefits of the victim's right to refuse a pretrial interview -- protection of privacy and minimizing contact with the defendant prior to trial -- are not diminished by the defendant's comments. Because the Victim's Bill of Rights does not, and could not, allow the victim to refuse to testify at trial, contact with the defendant is not completely avoidable. *S.A. v. Superior Court*, 171 Ariz. 529, 531, 831 P.2d 1297, 1299 (App. 1992). Thus, asking the victim at trial about his or

> her refusal to grant a pretrial interview does not result in any greater breach of the victim's privacy, or greater contact with the defendant, than is already necessary.
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> Moreover, if, in a given case, the victim's state constitutional rights conflict with a defendant's federal constitutional rights to due process and effective cross-examination, the victim's rights must yield.

Id. at 330, 942 P.2d at 1162.

When the victim exercises the victim's right to appear and make a statement at sentencing, the defendant has the right to cross-examine the victim about the victim's statement. *State v. Blackmon*, 184 Ariz. 196, 908 P.2d 10 (App. 1995). In *Blackmon*, the defendant pleaded guilty and the victim made statements to the probation officer, who included those statements in the presentence report. Before the sentencing hearing, the defendant moved to have the victim's statements excised from the presentence report and requested the opportunity to cross-examine the victim about those statements if she chose to appear at the sentencing hearing. The trial court ruled that "if the State called the victim to testify and she was sworn, the Defendant could cross-examine her, but if the victim chose to make a statement on her own pursuant to the Victims' Bill of Rights without being sworn, the Defendant could not cross-examine her." *Id*. at 197, 908 P.2d at 11. At the sentencing hearing, the victim made an unsworn statement and the court did not allow the defendant to cross-examine her.

The Court of Appeals granted relief. Quoting from *State v. Asbury*, 145 Ariz. 381, 386, 701 P.2d 1189, 1194 (App. 1984), a pre-Victims' Bill of Rights case, the Court reasoned that "basic concepts of fairness, justice and impartiality mandate that the defendant be allowed, at an aggravation and mitigation hearing,

to cross-examine the victims in order to bring out mitigating circumstances." The Court concluded that "regardless of whether the victim testifies under oath or makes an unsworn statement, the principle of *Asbury* applies, and the Defendant should have been allowed to cross-examine the victim."[1] *Blackmon*, 184 Ariz. at 198, 908 P.2d at 12.

[1] Because the victim in *Blackmon* appeared voluntarily at the sentencing hearing, the Court did not decide whether the Victims' Bill of Rights allows a defendant to subpoena a victim to testify at such a hearing.