

VICTIMS' RIGHTS BRIEF

For Arizona's Justice System Administrators, Practitioners and Advocates



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The Victims' Rights Brief is published by the Arizona Attorney General's Office of Victim Services, which remains wholly responsible for its content. The goal in generating the Brief is to promote justice and healing for crime victims by sharing information and fostering sensitivity within the justice system. To learn more about victims' rights visit us at www.azag.gov.

Creating New Law: Arizona Attorney General Fights to Protect Victims' Rights

Arizona has long been a leader in advancing victims' rights and in setting precedent for victims of crime throughout Arizona and the rest of the country. The two Arizona cases summarized in this edition of the Victims' Rights Brief highlight Arizona's efforts in fighting for victims of crime.

The first case, **State v. Nichols**, clarified the definition of "victim" to conclude that crime victim's rights under the Arizona Victim's Bill of Rights ("VBR") attach at the time of the commission of the offense against the victim and that these VBR rights are not forfeited by later incarceration of the victim. Secondly, **State v. Franklin** interpreted the scope of VBR, holding that victims in a criminal case retain their constitutional right to refuse to be deposed in a civil proceeding where the subject matter of the proposed deposition is the criminal offense committed against those victims.

Definition of "Victim"

State v. Nichols (Ergonis), 224 Ariz. 569, 233 P.3d 1148 (Ct. App. 2010).

In this special action, Assistant Attorney General Kim Ortiz sought relief from the respondent judge's order compelling a crime victim, J.C., to submit to a pretrial interview by defense counsel. At issue was a temporal ambiguity in the definition of a "victim" in Arizona's Victims' Bill of Rights, article II, § 2.1 of the Arizona Constitution. The question the Court of Appeals reviewed was whether, by excluding from the VBR's definition of a "victim" any person "in custody for an offense," Arizona voters intended to deny victims' rights not only to inmates against whom a criminal offense was committed while they are incarcerated but also, more broadly, to exclude those who, after having been victimized, subsequently are taken into custody and remain incarcerated for any reason when they otherwise could exercise a right or rights conferred on victims by the VBR.

Real party in interest Robert Ergonis was one of four co-defendants indicted in March 2008 in Pima County. The indictment charged Ergonis with five dangerous-nature felonies committed against J.C., who was kidnapped, robbed, and assaulted in Tucson on December 8, 2007. Shortly thereafter, J.C. moved from Arizona to Massachusetts. There, J.C. was arrested for and later convicted of an unrelated weapons offense, for which he was incarcerated from October 30, 2008, until March 10, 2009.

While the victim was serving his jail sentence in Massachusetts, an attorney for a co-defendant of Ergonis made a written request to the State to interview the victim. This co-defendant's attorney argued that under the definition of "victim" in VBR, a victim who is in custody loses his or her constitutional rights, including the right to refuse a defense discovery request. The trial court agreed with the defense and ordered the victim to submit to an interview over the State's objection. After this co-defendant entered a guilty plea and the judge's order compelling an interview of the victim became moot, Ergonis persisted in his efforts to interview J.C. Because Ergonis' attorney had not made a request to interview the victim until after J.C. had been released from custody, the state opposed interview requests from Ergonis as untimely. The trial court (respondent), however, accepted an oral joinder by Ergonis' attorney in the co-defendant's made after J.C. had been released from custody and ruled that "the defense [had] file[d] a request to interview the victim at a time when the victim did not have the right to refuse to be interviewed because of his incarceration."

In its Special Action, the State argued that a crime victim's rights attach upon commission of the crime and that a victim never is divested of his or her rights, regardless of whether a victim is later taken into custody for an unrelated reason. (Continued on Page 2)

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The Arizona Court of Appeals, Division Two, agreed with the State and vacated the order compelling the victim to submit to a pre-trial defense interview. In analyzing legislative intent, the Appellate Court noted that the explicitly stated purpose of the VBR is to “preserve and protect victim’s rights to justice and due process.”

Court of Appeals Judge J. William Brammer Jr. on behalf of the court stated in the opinion “the VBR denies victim status and rights only to persons who are themselves “the accused” or “who are already in custody when the criminal offense is committed against them.” The court further emphasized this point saying “we conclude that a crime victim’s rights, which ‘are specific to a crime committed upon that victim,’ are not thereafter lost if the victim subsequently should be ‘in custody for an [unrelated] offense.’”

The opinion also observed that a victim who is subsequently incarcerated for an unrelated offense is eligible for victims’ rights, but recognized the “administrative considerations” and “logistical challenges” presented by the fact of custody which operate to prevent the victim from being present at proceedings that he or she otherwise would be entitled to attend. The Court, while acknowledging the procedure specified in Rule 39, Ariz. R. Crim. P., was not dispositive, pointed out that Rule 39 accommodated the constraint of custody by providing an incarcerated victim with the opportunity to submit a written statement.

The Defendant/Appellee filed a Petition for Review (“PFR”) with the Arizona Supreme Court, which denied review. From this Special Action, the law in Arizona is clear that a crime victim’s rights under VBR attach at the time of the commission of the offense against the victim and that these VBR rights are not forfeited by later incarceration.

Scope of Victims’ Rights

State v. Lee (Franklin, Sr.), 226 Ariz. 234, 245 P.3d 919 (Ct. App. 2011).

In this special action, Assistant Attorney General Mike Jette sought relief from the respondent civil judge’s order compelling victims in a criminal case to submit to a deposition in a parallel civil proceeding (forfeiture case also being prosecuted by AAGO) being conducted on behalf of the defendants. Before filing the special action, the State tried to block the depositions by filing motions for protective orders; first in the criminal case and then in the civil case. The criminal judge denied the State’s motion asserting he lacked jurisdiction over the civil case. Then, the civil judge simply disagreed with the State’s position that the Victim’s Bill of Rights (hereinafter “VBR”) protected victims in a pending criminal case from being deposed in a parallel civil proceeding and refused to grant the relief requested. The State sought appellate relief arguing that the civil judge’s order violated the victims’ rights under the VBR. Ariz. Const. art. 2 § 2.1(A)(5); A.R.S. §13-4433; Ariz. R. Crim. P. 39(b)(11).

As factual background, after notices of deposition had been served in the civil forfeiture case on the victims in the criminal case, the Attorney General’s Office of Victim Services sent letters to the victims informing them that their depositions had been scheduled in the civil forfeiture case. These letters also informed the victims that the prosecutors believed that, under the VBR, the victims could refuse to submit to the depositions. The letters also specifically asked the victims whether they wanted either to assert their right to refuse to be interviewed or deposed before the criminal trial or to waive this right. Two of the victims returned the letters stating they intended to assert their right to refuse an interview, and four verbally informed the AAGO that they did not wish to be interviewed.

Before reaching the merits of the State’s argument, the defense suggested a procedural bar to the special action. The Franklins/defendants argued first that the State lacked standing even to *bring* the special action because no victim specifically had requested the State’s representation or the filing of the special action, and further that no victim has refused to be deposed. The defense argued further that while Rule 2(a)(2), Ariz. R.P. Spec. Actions allowed a prosecutor to institute special action proceedings at the request of a victim to seek relief from an order that violates a victim’s rights, and while Rule 39(c)(2), Ariz.R.Crim.P. conferred standing on the prosecutor to assert any of the victim’s rights “upon the victim’s request,” the victims’ responses to the Attorney General’s letters were insufficient to constitute such a request.

The Appellate Court disagreed with the defense, observing that nothing in the rules suggested that a victim must initiate the discussion about whether rights granted by the VBR are implicated or need to be protected, nor did there appear any requirement that a victim must specify the method by which the prosecutor is to assert those rights. Division Two specifically declined to find an implied requirement in the rule that *victims* must initiate contact or specifically request the appropriate form of proceeding, noting that the rules do not require the prosecutor to obtain a victim’s consent before filing each motion or petition to enforce the asserted rights.

On the substantive issue, the Appellate Court reviewed the constitutional language of the VBR granting a “victim of crime” the right “[t]o refuse a [] . . . deposition . . . request by the defendant” or a representative of the defendant. [Ariz. Const. art. II, § 2.1\(A\)\(5\)](#). The Franklins argued that the scope of the VBR did not protect victims from civil depositions. The State argued to the contrary, that victims are allowed to assert their rights “any time during the criminal justice process” and that “[s]o long as the criminal process is underway, the right to refuse a deposition is absolute,” regardless of the venue.

The Appellate Court’s analysis emphasized that preserving crime victims’ right to refuse to be deposed *in any venue* regarding the offense committed against them is necessary to promote the purpose of the VBR. The decision also observed that the purpose underlying a victim’s right to refuse a pretrial interview is to protect the victim’s privacy and minimize contact with the defendant prior to trial, and that any deposition about the offense would expose victims (*Continued on Page 3*)

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to the very harm against which the VBR protects. Further, unlike other positive rights afforded under the VBR that cannot be reduced by actions taken or abstained from in a parallel civil proceeding (e.g., right to be present for, informed of, and heard at particular proceedings, [Ariz. Const. art. II, § 2.1\(A\)\(2\)-\(4\)](#)), the Appellate Court noted that the right to refuse to be deposed is *immediately and completely defeated* if the defendant can compel a victim to submit to a deposition in a separate proceeding.

In conclusion, Division Two, in a 2-1 decision, agreed with the State that a victim may assert the right to refuse to be deposed in any venue throughout the duration of the criminal justice process. The Court interpreted the VBR language as limiting the scope of a victim's right only by the identity of the person requesting the interview—the defendant or the defendant's representative—and the identity of the person to whom the request is directed—a crime victim. It did *not* limit the proceedings to which the right extended. The Appellate Court held that victims retain their constitutional right to refuse to be deposed by the defense in a civil proceeding where the subject matter of the proposed deposition was the criminal offense committed against those victims, and granted the State's requested relief. The decision reaffirmed long-standing Arizona precedent broadly interpreting a victim's right to refuse an interview about the offense against the victim, noting again that "a victim's right to refuse to be interviewed about the offense committed against that victim is inviolate." No Petition for Review was filed in the case.

These two opinions clearly demonstrate that case law interpreting the VBR continues to evolve. The Attorney General's Office will persevere in the fight to protect victims' rights and to develop sound law to ensure that victims are treated with fairness, respect and dignity.

2012 ATTORNEY GENERAL DISTINGUISHED SERVICE AWARDS FOR OUTSTANDING SERVICE TO CRIME VICTIMS

The Attorney General's Office is now accepting nominations for the 2012 Distinguished Service Awards. Recipients of the 2012 Distinguished Service Awards will be selected on the basis of the contents of the nomination submissions, and will be invited to the National Crime Victims' Rights Week event held on **Tuesday, April 24, 2012** in Phoenix. Awards are given in recognition of commitment, exemplary service, and contribution to preserving and protecting victims' rights to justice and due process, and to improving the treatment of crime victims.

Nominations are being sought from the following award categories: **Advocacy/Direct Services** (Individual, Group of Individuals or Organization); **Service Coordination** (Group of Individuals or Organization); **Innovative Practices** (Individual, Group of Individuals or Organization); **Public Policy** (Individual, Group of Individuals or Organization); and **Leadership** (Individual, Group of Individuals or Organization).

A nomination form has been provided on Page 4 of the Victims Rights Brief. Please attach a letter of nomination, not to exceed two (2) pages, about why your nominee should be honored for the appropriate category, to the nomination form. A Letter of Nomination and the Nomination Form must be postmarked by Friday, February 17, 2012 and mailed to the Attorney General's Office of Victim Services to be considered for an award.

For the complete Nomination Form with further explanations of the categories and the information to be included in the nomination letter, please visit the Attorney General's Office website located at http://www.azag.gov/victims_rights/. You may also request a copy to be mailed or emailed to you by contacting Heather Tanner, Office Administrator for the Office of Victim Services at (602) 542-8807 or via email at heather.tanner@azag.gov.

VICTIMS' RIGHTS TRAINING SCHEDULE

The Office of Victim Services provides a Victims' Rights 101 Training as well as a Victims' Rights Advanced Training. Advanced Training is updated annually with new topics and material.

Training is offered free of charge and while registration is required, there is still space available in the sessions.

For questions regarding training, please contact the Renu Sapra at (602) 542-8456 or via email to OVSTraining@azag.gov.

Upcoming Training Sessions

Globe—January 12-13, 2012

Yuma—February 16-17, 2012

Florence—January 19-20, 2012

Flagstaff—February 2-3, 2012

Nogales—March 1-2, 2012

Phoenix—March 8-9, 2012

Prescott—March 15-16, 2012

Show Low—March 29-30, 2012

Kingman—April 12-13, 2012

Safford—April 28-29, 2012

Tucson—May 10-11, 2012

Parker—May 24 -25, 2012

We're on the Web!
www.azag.gov

Have an idea for an article? Give the Victims' Rights Brief a call! Contact Colette Chapman at 602-542-8848

