

**IN THE COURT OF APPEALS  
OF THE STATE OF ARIZONA  
DIVISION ONE**

STATE OF ARIZONA, ex rel. WILLIAM )	No. CV-13-0274-PR
G. MONTGOMERY , Maricopa County )	
Attorney, )	Arizona Court of Appeals
)	No. 1 CA-SA 13-0155
Plaintiff/Petitioner, )	
)	
v. )	Maricopa County Superior
)	Court
THE HONORABLE HARRIET CHAVEZ, )	No. CR-2013-001185-001
Judge of the SUPERIOR COURT OF THE )	
STATE OF ARIZONA, in and for the )	
County of MARICOPA, )	
)	
Respondent Judge, )	
)	
ROBERT LEE GILL, )	
)	
Real Party In Interest. )	

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**BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL  
JUSTICE IN SUPPORT OF REAL PARTY IN INTEREST**

David J. Euchner, No. 021768  
33 N. Stone Ave. #2100  
Tucson, Arizona 85701  
(520) 724-6800  
David.Euchner@pima.gov  
Attorney for **Arizona Attorneys for  
Criminal Justice**

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## INTRODUCTION

¶1 This case represents another installment of the continuous struggle to attain the right balance between the rights of the victim and of the criminally accused. In this case, the Maricopa County Attorney's Office seeks to thwart the Maricopa County Public Defender's Office from conducting standard conflict checks by refusing to turn over the date of birth of the alleged victim. MCPD employs approximately 200 lawyers and handles the lion's share of criminal cases in the Superior Court jurisdiction, and conflict checks are an essential part of ensuring that MCPD does not violate its ethical duties to present or former clients who may now be witnesses or even victims.

¶2 MCAO seeks to prevent MCPD from conducting its constitutionally-mandated duty to run proper conflict checks based solely on the outlandish claim (unsupported by any factual assertion) that defense lawyers are misusing this information. The Court of Appeals, without any basis in law, assumed that the Victim's Bill of Rights and the legislature meant to include the date of birth along with other identifying information that is not subject to disclosure. *State ex rel. Montgomery v. Welty*, \_\_ Ariz. \_\_, \_\_ P.3d \_\_, 2013 WL 3992127 (App. 2013). Arizona Attorneys for Criminal Justice submits this brief in support of the petition for review because the published opinion of the Court of Appeals mistakenly strikes the balance against the rights of defendants.

## INTERESTS OF *AMICUS CURIAE*

¶3 *Amicus curiae* Arizona Attorneys for Criminal Justice is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens’ rights, the criminal justice system, and the role of the defense lawyer. *Amicus* offers this brief in support of the Maricopa County Public Defender’s Office and its clients because both past and present clients of MCPD are entitled both to effective representation and to have the attorney-client privilege remain sacrosanct.

## ARGUMENT

### **I. Neither the Victim’s Bill of Rights nor the legislative and rule-based implementation of those rights express or even imply a victim’s right to prevent disclosure of a date of birth to defense counsel**

¶4 Article II, section 2.1(A)(1) of the Arizona Constitution protects a victim’s right “to be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.” More specifically, section 2.1(A)(5) protects 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.” The legislature, granted with “the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed by this section,” § 2.1(D), specified that victims have a privacy right in both “identifying information” and “locating information.” Specifically, victims shall not be required to testify in any court proceeding regarding *locating information* such as address, telephone number, or place of employment. A.R.S. § 13-4434(A). On the other hand, § 13-4434(A) states that victims’ contact and *identifying information* “shall be redacted by the originating agency ***in publicly accessible records*** pertaining to the criminal case involving the victim” (emphasis added).

¶5 This Court has also implemented rule-based protections for victims of crime, including:

The right to require the prosecutor to withhold, during discovery and other proceedings, the home address and telephone number of the victim, the address and telephone number of the victim’s place of employment, and the name of the victim’s employer, providing, however, that for good cause shown by the defendant, the court may order that such information be disclosed to defense counsel and may impose such further restrictions as are appropriate, including a provision that the information shall not be disclosed by counsel to any person other than counsel’s staff and designated investigator and shall not be disclosed to the defendant.

Ariz. R. Crim. P. 39(b)(10). Within this rule, not only did this Court restrict the victims and prosecutors’ power to withhold disclosure of personal information to

addresses and telephone numbers, but it also provided trial courts with the authority to overrule the victims' request upon a showing of "good cause." Elsewhere in the disclosure rules, this Court uses the terms "substantial need" in the context of requiring prosecutors to produce information that the defendant cannot reasonably procure. Rule 15.1(g). *See also* Rule 15.1(j) (defense can obtain copy of child pornography for expert only "upon a substantial showing ... that reproduction or release for examination is required for the effective investigation or presentation of a defense..."). "Good cause" is not defined in the relevant statutes or rules, but it is not a high standard; it need only be colorable and meritorious and not necessarily of a constitutional magnitude. *See State v. Churchill*, 82 Ariz. 375, 380, 313 P.2d 753, 756 (1957) ("Good cause means substantial reason, that is, one that affords a legal excuse."); *Board of Educ. Of Tempe Union High School Dist.v. Lamme*, 122 Ariz. 522, 526, 596 P.2d 48, 52 (App. 1979) ("In the context of the dismissal of a continuing teacher, it means a cause which bears a reasonable relationship to a teacher's unfitness to discharge the duties assigned...").

¶6 Reading the Victim's Bill of Rights and implementing statutes and rules in conjunction, it is clear that there is no right to keep a victim's date of birth from being disclosed to defense counsel under any circumstances. Even if such a right did exist, however, Rule 39(b)(10) entitles defense counsel to the information for the purpose of a conflict check because such purpose constitutes "good cause,"

and counsel would be required to maintain the privacy of that information as a condition precedent to disclosure.

¶7 The Court of Appeals erroneously applied the rule of *ejusdem generis* to this case in reasoning that “‘general words which follow the enumeration of particular classes of persons or things should be interpreted’ to apply ‘to persons or things of the same general nature or class.’” *Welty* 11 (quoting *State v. Barnett*, 142 Ariz. 592, 596, 691 P.2d 683, 687 (1984)). Under proper application of the rule of *ejusdem generis*, unless contrary legislative intent is apparent, when a general term follows specific terms in a statute, the general term is interpreted as of the same class or type as the specific terms. *In re Julio L.*, 197 Ariz. 1, 11, 3 P.3d 383, 386 (2000). But here, there is no such general terminology following the specific enumerated terms in the relevant provisions of law, A.R.S. § 13-4434 and Rule 39(b)(10).

¶8 The Court of Appeals chose to focus on the term “or other discovery request” in article II, section 2.1(A)(5) and Rule 39(b)(11), but that is clearly not appropriate here because that general term follows defense requests for interview or deposition. Applying *ejusdem generis* in this context would allow refusal to comply with demands for medical records, *see State ex rel Romley v. Superior Court (Roper)*, 172 Ariz. 232, 238, 836 P.2d 445, 451 (App. 1992), or for fingerprints, *see State ex rel. Romley v. Schneider*, 202 Ariz. 362, 45 P.3d 685

(App. 2002), because those orders require the victim to actually *do* something. “[T]he Victim’s 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.” *Roper*, 172 Ariz. at 239, 836 P.3d at 452. Hence, the Victim’s Bill of Rights could not reasonably apply to a small piece of information that is already within the prosecutor’s control that clearly falls within the ambit of “identifying information.”

¶9 Furthermore, the Court of Appeals’ opinion neglected to apply the more appropriate doctrine of *expressio unius est exclusio alterius* – the expression of one or more items of a class indicates intent to exclude omitted items of the same class. *Champlin v. Sargeant*, 192 Ariz. 371, 16, 965 P.2d 763, 766 (1998) (citing *State v. Roscoe*, 185 Ariz. 68, 71, 912 P.2d 1297, 1300 (1996)). When the legislature expresses a list, generally, Arizona courts will assume the exclusion of items not listed. *State v. Ault*, 157 Ariz. 516, 519, 759 P.2d 1320, 1323 (1988). “[T]he expression of one or more items of a class indicates an intent to exclude all items of the same class which are not expressed.” *State v. Fell*, 203 Ariz. 186, 11, 52 P.3d 218, 221 (App. 2002) (citations omitted). By specifying that victims’ addresses and telephone numbers are protected by Rule 39(b)(10), this Court intended to exclude the date of birth from that list. By specifying that “locating information” shall not be disclosed in testimony while “identifying information”

shall be redacted from public records, the legislature made no attempt to protect victims' dates of birth from disclosure to the defense.

¶10 The Court of Appeals conducted a flawed balancing test by assuming that “disclosure of birth dates would severely damage victims’ privacy” regardless of the recipient or purpose of that disclosure. The Court of Appeals relied exclusively on *Scottsdale Unified School Dist. No. 48 v. KPNX Broadcasting Co.*, 191 Ariz. 297, 955 P.2d 534 (1998), which held that birth dates of public employees should not be disclosed to the press. This Court reasoned that among the information that could be gleaned once a birthdate is obtained is “an individual’s criminal record [and] arrest record (which may not include disposition of the charges).” *Welty* 10 (quoting *KPNX*, 191 Ariz. 297, 18, 955 P.2d at 539). But that is precisely the information that MCPD is trying to glean by obtaining the date of birth and the whole point of the request. MCPD will find out about the victim’s criminal history anyway through required disclosure because it can be used for impeachment pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). But MCPD needs to know whether, during the acquisition of said criminal history, the victim was represented by MCPD.

¶11 One of the considerations in determining whether a defendant’s rights in the criminal justice process must give way to some other interest is the scale of the burden suffered by the defendant. For example, when considering whether a

defendant's Sixth Amendment right to a speedy trial is violated when trial occurs beyond the time mandated in Ariz. R. Crim. P. 8, courts do not automatically dismiss the prosecution, rather, courts consider how long was the delay, the reasons for it, whether defendant asserted the right, and whether any prejudice resulted. *Barker v. Wingo*, 407 U.S. 514, 530-33 (1972); *State v. Henry*, 176 Ariz. 569, 579, 863 P.2d 861, 871 (1993). Whether a defendant's absence from jury selection is structural error that mandates automatic reversal of convictions depends, in part, on whether the defendant missed all of jury selection or only a small part. Compare *State v. Rose*, 231 Ariz. 500, ¶¶ 9-10, 297 P.3d 906, 910 (2013), with *State v. Garcia-Contreras*, 191 Ariz. 144, ¶¶ 20, 953 P.2d 536, 541 (1998).

¶12 There is logic in applying the same reasoning to the Victim's Bill of Rights, particularly since victim's rights must yield to the constitutional rights of the criminally accused. *State v. Riggs*, 189 Ariz. 327, 330, 942 P.2d 1159, 1162 (1997). In *Schneider*, cited by the State in its special action petition, the Court of Appeals reasoned that fingerprinting violates public policy because it subjects victims to trauma and harm, 202 Ariz. 362, ¶¶ 12, 45 P.3d at 688, yet that case says nothing about trauma caused by revealing the date of birth of the victim even though that fact is included in the case. *Schneider* states that Rule 39 "was adopted to 'balance the interests of victims in being treated with dignity and compassion with the interests of society as a whole in preserving the truth-seeking function of

judicial proceedings.” *Id.* 13 (quoting Rule 39, cmt. (2001)). Fingerprinting may impair the dignity of the victim, but in no way can the same be said about giving a date of birth to MCPD for purposes of the conflict check. At the end of the day, truly a victim suffers no real burden by having his or her birthdate disclosed to a defense attorney.

¶13 Finally, the Court of Appeals erred when it assumed, solely upon the representation of MCAO and without any supporting evidence, that MCAO is fully capable of discharging the burden of running MCPD’s conflict checks. This part of the *Welty* opinion places defense attorneys in an unwarranted ethical dilemma based on nothing more than the State’s unsupported speculation that defense counsel may “misuse” the alleged victims’ information. Defense attorneys cannot delegate to opposing counsel their responsibilities under Ethical Rules 1.6, 1.7, 1.8, 1.9, 1.10, 1.11, 5.1, 5.2, and 5.3, Ariz. R. Sup. Ct. 42. While it is likely that current conflicts of interest described in E.R. 1.7 would be discovered relatively easily, *Welty*’s holding will hamper the discovery of former clients (who may now be alleged victims) and the timely and proper application of a conflict analysis required under the ethical rules.

¶14 The Court of Appeals accepted MCAO’s offer on behalf of all defense attorneys without any consideration of the impact on the defense bar when attorneys will inevitably be charged with unethical conduct. MCAO has no

personal interest or stake in running such a check, and MCAO would suffer no adverse consequences, such as prosecution or bar complaint, should it fail in any way to detect a conflict. Such an expectation is clearly unreasonable. As the Court of Appeals said in *Schneider*, “if defense counsel’s good faith belief that there is a conflict remains (without the fingerprint evidence), defense counsel should move to withdraw.” 202 Ariz. 362, 14, 45 P.3d at 688. *Schneider* is appropriate policy because MCAO provided the date of birth of the victim; without even giving that much, MCPD could potentially have this level of uncertainty in so many cases that its withdrawal would defeat the very purpose of the organization. *But see State v. Sustaita*, 183 Ariz. 240, 243, 902 P.2d 1344, 1347 (App. 1995) (“We decline to adopt a rule disqualifying the entire public defender’s office any time that office has represented the victim of a crime.”). When considering the gravity of a defense attorney’s ethical obligations to current and past clients in a proper light, it is self-evident that *Welty*’s holding is not merely erroneous but dangerous to the practical application of the ethical rules for public defender agencies.

¶15 In its pleadings before the Court of Appeals, MCAO alleged – without any basis in fact – that some lawyers who received victims’ dates of birth were using that information not only for conflict checks but for investigation. MCAO considers such investigation “in violation of the victim’s rights” but does not specify any provision of law that protects a victim’s right not to be investigated by

the defense. It is extremely common, for example, for victims to withhold and even lie about their past words and actions to the police and prosecutors, but only the defense has real incentive to discover this information and use it in court. Naturally, discovery of such information would reduce MCAO's ability to obtain convictions in cases where victim testimony is critical to obtaining the conviction. MCAO's action and the Court of Appeals' opinion in *Welty* fail to honor the purpose of the Victim's Bill of Rights stated in article II, section 2.1(A)(1) – that victims should “be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process” – and instead arbitrarily limits the defense of the criminally accused.

## CONCLUSION

¶16 The Respondent Judge correctly concluded in this case that the State had no legal basis for refusing to disclose the alleged victim's date of birth. The good cause shown by MCPD for requesting that information was rejected without analysis by the Court of Appeals. Furthermore, the Court of Appeals' suggestion that defense attorneys (particularly public defense agencies such as MCPD) may delegate their conflict checks to opposing counsel, is dangerous and clearly invites unethical conduct by both sides. AACJ asks this Court to grant review of the petition from the Real Party in Interest to address this important issue of balancing

the privacy interests of the alleged victim against the constitutional right of the criminally accused to conflict-free representation.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of September, 2013.

ARIZONA ATTORNEYS FOR CRIMINAL  
JUSTICE

By /s/ David J. Euchner

David J. Euchner  
33 N. Stone Ave. #2100  
Tucson, AZ 85701  
Attorney for **Arizona Attorneys for  
Criminal Justice**