IN THE SUPREME COURT

OF THE STATE OF ARIZONA

PATRICIA MOREHART and COLLEEN DUFFY, Petitioners, v. THE HONORABLE JANET E. BARTON, Judge of the Superior Court of Superior Court of the State of Arizona, in and for the County of Maricopa; Respondent Judge, and, THE STATE OF ARIZONA and WILLIAM CRAIG MILLER, Real Parties in Interest.	No. CV-10-0327-PR (Ct. App. 1CA-SA 10-0126) (Maricopa County Superior Court CR 2006-112056-001 DT)

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TABLE OF CONTENTS

Interests of Amici Curiae 1

Argument I 3

THE CHALLENGED DECISION WILL CAUSE VIOLATIONS OF CAPITAL DEFENDANTS' CONSTITUTIONAL RIGHTS AND FORCE DEFENSE COUNSEL TO CHOOSE BETWEEN THEIR DUTY TO OBTAIN RESOURCES NECESSARY TO VIGOROUS REPRESENTATION AND THEIR DUTY TO PROTECT PRIVILIGED INFORMATION AND STRATEGIES 3

A. Capital Defense Lawyers Must Obtain the Resources Necessary to Ensure Compliance with their Clients' Constitutional Rights to Challenge the Prosecution's Case and to Develop Mitigating Evidence 3

B. Defense Counsel Must not Disclose Information Protected by the Attorney-Client or Work Product Privileges 6

C. The Refusal to Permit *Ex Parte* Hearings Regarding Mitigation_ Places Counsel in an Insoluble Ethical Quandary 7

D. Revealing Defense Strategy to the Victim Would Effectively Reveal it to the Prosecution 11

Argument II 12

NEITHER DEFENDANTS NOR VICTIMS HAVE A CONSTITUTIONAL RIGHT TO ATTEND HEARINGS REGARDING MITIGATION RESOURCES 12

Argument III 15

NO OTHER STATE HAS INTERPRETED "VICTIMS' RIGHTS" PROVISIONS TO INCLUDE THE RIGHT TO ATTEND HEARINGS AT WHICH THE DEFENSE SEEKS MITIGATION RESOURCES 15

Conclusion 18

Certificate of Compliance 19

Certificate of Service 20

INTERESTS OF AMICUS CURIAE

Amici write in support of the pending petition for review of the decision in *Morehart v. Barton*, 225 Ariz. 269, 236 P.3d 1216 (App. 2010). It is respectfully submitted that the decision is at best overly broad and at worst simply incorrect in holding that capital defendants have no right to sealed, *ex parte* hearings regarding resources necessary to develop mitigating evidence.

Amici are organizations devoted to protecting the constitutional rights of persons accused of crimes, particularly in cases in which the accused are indigent and face the ultimate punishment. The National Association of Criminal Defense Lawyers and its affiliates, including the Arizona Attorneys for Criminal Justice, the Missouri Association of Criminal Defense Lawyers, and the New Mexico Criminal Defense Lawyers Association, are professional associations that represent more than 47,000 members. The Southern Center for Human Rights, Texas Defender Services, the Oregon Capital Resource Center, the South Carolina Capital Trial Division, and the Arizona Capital Representation Project are organizations and agencies that provide direct representation to indigent capital defendants, as well as consult with teams defending capital clients.

Amici file this brief on behalf of not only indigent capital defendants, but also their counsel. This Court must overturn the challenged decision to prevent substantial and recurring violations of our clients' constitutional rights. The

decision will also significantly impair the ability of defense counsel to provide effective representation and follow professional standards by forcing a choice between obtaining resources necessary to mount a defense or disclosing privileged evidence and defense strategies.

I

THE CHALLENGED DECISION WILL CAUSE VIOLATIONS OF CAPITAL DEFENDANTS' CONSTITUTIONAL RIGHTS AND FORCE DEFENSE COUNSEL TO CHOOSE BETWEEN THEIR DUTY TO OBTAIN RESOURCES NECESSARY TO VIGOROUS REPRESENTATION AND THEIR DUTY TO PROTECT PRIVILIGED INFORMATION AND STRATEGIES

A. Capital Defense Lawyers Must Obtain the Resources Necessary to Ensure Compliance with their Clients' Constitutional Rights to Challenge the Prosecution's Case and to Develop Mitigating Evidence

Capital cases are exponentially more complicated to defend than other criminal cases. This is partly due to the fact that the client's life hangs in the balance. The complexity also arises, in part, from the fact that Arizona's laws provide for three trials – guilt/innocence, aggravation and penalty. A.R.S. §13-752. The greatest complexity arises, however, from the nature of the issues in the penalty or mitigation phase of the trial.

In a non-capital case, like the guilt/innocence phase of a capital case, jurors are collectively required to answer a factual question – did the evidence prove the defendant committed the crime? The penalty phase of a trial requires each juror to make a reasoned moral decision based on the intricacies of the defendant's life and influences. Each juror must consider "mitigating circumstances," defined as "any factors that are a basis for a life sentence instead of a death sentence, so long as they relate to any sympathetic or other aspect of the defendant's character, propensity, history or record, or circumstances of the offense." RAJI CCSI 2.3. In

deciding life or death, "Each juror must determine whether, in that juror's individual assessment, the mitigation is of such quality or value that it warrants leniency in a particular case." *State ex rel. Thomas v. Granville* (*Baldwin*), 211 Ariz. 468, 473, 123 P.3d 662, 667 (2005).

Mitigating evidence is the key to the defense of any capital case. The United States Supreme Court has therefore recognized that a capital defendant's constitutional right to effective assistance requires counsel to conduct an exhaustive investigation into the client's life history, family history, culture, exposure to trauma, and other influences or events that may help to explain the commission of a terrible crime. *E.g.*, *Rompilla v. Beard*, 545 U.S. 374, 387 & n.7 (2005); *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003); *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000). This evidence often comes from events that are shameful and humiliating, such as abandonment, poverty, mental retardation, or sexual or physical abuse. *Wiggins v. Smith*, 539 U.S. at 516-517. Once such evidence is uncovered, witnesses are often difficult to locate and hesitant to cooperate. Experts must be retained to explain the impact of individual or repeated traumatic events on the client.

The foregoing Supreme Court decisions and their predecessors have long looked to the American Bar Association ("ABA") for direction in determining standards for effective counsel. *See also Strickland v. Washington*, 466 U.S. 668,

688 (1984). In *Wiggins* and *Rompilla*, the Court relied on the ABA Guidelines for the Appointment and Representation of Defense Counsel in Capital Cases (2003) ("Guidelines"), which provide a comprehensive guide to the rights of the accused in these "uniquely demanding" cases. Commentary to Guideline 1.1. The Guidelines describe not only the rights of the accused, but the duties of their lawyers in defending them.

This Court considered the Guidelines to be so important that it adopted them as an integral part of its heightened competency standards for capital defense counsel. Arizona Rule of Criminal Procedure 6.8(b)(1)(iii) & (2). The Guidelines are therefore a part of counsel's duty to act diligently with the "knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Arizona Rules of Professional Conduct ER 1.1; *see also Id*. ER 1.3.

Few, if any, capital defendants have the resources necessary to the preparation of an adequate defense. The Guidelines recognize that a defense team must include at least two lawyers, an investigator and a mitigation specialist. Guideline 4.1(a)(1). Funds must be obtained not only for team members' services, but to pay incidental costs, as well as fees of testifying and consulting experts. In cases in which representation is provided by a public defender office, these expenses are paid from the office's budget without notice to others. This benefit of secrecy is not available when a private defense lawyer is appointed. Private

counsel must satisfy to the trial court's satisfaction that all fees and expenses of investigators, mitigation specialists and experts are "reasonably necessary." Arizona Rule of Criminal Procedure 15.9(a).

B. Defense Counsel Must not Disclose Information Protected by the Attorney-Client or Work Product Privileges

Arizona's attorney-client privilege guarantees the privacy of criminal defendants' communications to their lawyers and their lawyers' advice. A.R.S. §13-4062(2). Defense counsel's ethical duty to maintain the confidentiality of all information obtained during the course of their representation is far more extensive.

The guiding principles for members of the Arizona bar make clear a lawyer's obligation to maintain "inviolate" the confidences and secrets of the client. Arizona Supreme Court Rule 41(f). The Rules of Professional Conduct are even more explicit in establishing the work-product privilege, "A lawyer shall not reveal information relating to the representation of a client …" Arizona Supreme Court Rule 42, ER 1.6(a). This Court recognized that "ER 1.6 is much broader than the attorney-client privilege." *Samaritan Foundation v. Goodfarb*, 176 Ariz. 497, 507, 862 P.2d 870, 880 (1993). *See also* ABA Formal Opinion 10-456 (7/14/2010)(warning defense counsel against disclosing information protected by ER 1.6 to the prosecution absent a court order even when responding to an

allegation of ineffective assistance of counsel).

C. The Refusal to Permit *Ex Parte* Hearings Regarding Mitigation Places Counsel in an Insoluble Ethical Quandary[1]

Defense counsel can rarely explain their need for mitigation resources without revealing information or strategies that are protected from disclosure by the attorney-client or work product privileges. Denial of an *ex parte* hearing forces counsel to attempt an impossible compromise. Counsel must gamble as to which areas of potential mitigation may be investigated without revealing privileged information to an adverse party.

For example, a client may tell defense counsel that during his childhood, an adult neighbor gave him drugs and sexually abused him and two friends with whom the client has not had contact for many years. The defense team must attempt to locate the friends, as well as others who lived nearby or attended the same school. If successful, the defense team must develop sufficient trust with the witnesses to elicit their recollections of traumatic and shameful incidents. The defense team must attempt to locate the neighbor and determine whether others ever made drug or sexual allegations against him. Perhaps the neighbor denies the

[1] **Error! Main Document Only.**The challenged decision involved a hearing regarding a previously issued out-of-state summons to obtain mitigation evidence. *Morehart v. Barton*, 225 Ariz. at 271. The decision inexplicably and erroneously speaks in unnecessarily broad terms, stating that victims have the right to attend "all criminal proceedings." *Id.* A victim's right to attend other types of hearings is not at issue and cannot reasonably decided here.

client's allegations and alleges that the client committed crimes against the neighbor.

Counsel has no way of knowing whether particular investigations will lead to evidence that will help or hurt the client. The same is true of expert witnesses. A behavioral psychologist may not support the mitigation theme developed by the defense, but a neuropsychologist may. Unlike a prosecutor, who is under a duty to disclose all evidence that may help the defendant,[2] the defense team not only need not, but must not disclose witnesses or evidence that will not be used at trial. *Smith v. McCormick*, 914 F.2d 1153, 1160 (9th Cir. 1990), *quoting* United States v. Alvarez, 519 F.2d 1036, 1045-47 (3d Cir.1975)("The attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness."). *See also Jones v. Ryan*, 583 F.3d 626, 638 (9th Cir. 2009).

This Court, in *State v. Apelt*, 176 Ariz. 349, 365 n.3 (1993), stated that *ex parte* hearings were unnecessary because under Arizona's Criminal Rules, "[T]he defendant must disclose all witnesses and defenses." The court of appeals decision now challenged relied on this language in *Apelt*. *Morehart v. Barton*, 225 Ariz. at 272.

It is respectfully submitted that the *Apelt* decision speaks in such broad

[2] *E.g., Brady v. Maryland*, 373 U.S. 83 (1963).

terms as to be inaccurate or, at best, misleading. The applicable rule, Criminal Rule 15.2(h) does not require any defense disclosure regarding mitigation until the defense team has had the opportunity to conduct its investigation, at least 180 days after the prosecution discloses its evidence regarding penalty. Further, Rule 15.2(h) requires only that defense counsel inform the prosecution of categories of mitigating circumstances to be used at trial, as well as the identities of defense lay and expert witnesses', their recorded statements, and any physical evidence the defense may introduce. In short, defense counsel is under no duty to make disclosure until counsel has determined that the witness or evidence will be helpful to the defense.

The court of appeals' reliance on *Apelt* is erroneous for additional reasons. *Morehart v. Barton*, 225 Ariz. at 272. While *Apelt* is arguably distinguishable because it was limited to hearings regarding funds to hire an expert, it is respectfully submitted that this Court must revisit that decision. First, subsequent to *Apelt,* this Court endorsed the Guidelines by enacting Criminal Rules 6.8. The defense right to investigate and prepare its case in confidence is emphasized throughout the Guidelines. Guideline 4.1(B)(2) states that defense communications with appointed experts should receive the same protection that would exist with experts paid from private funds. Further, "[I]t is counsel's obligation to insist upon making such requests [for resources] *ex parte* and *in*

camera." Commentary to Guideline 10.4.

Second, the Court also, subsequent to *Apelt*, recognized the propriety of *ex parte* hearings such as those at issue here through the adoption of Criminal Rule 15.9(b). The adoption of this rule also addresses the concerns of the court in *Apelt* that there was "no authority" for granting an *ex parte* hearing, 176 Ariz. At 365.

Third, *Apelt* is inconsistent with other Arizona decisions. This state's courts have long recognized "the inherent power of the court to conduct *in camera* proceedings." *Phoenix Newspapers, Inc. v. Superior Court*, 140 Ariz. 30, 33, 680 P.2d 166, 169 (App. 1983). *See also State ex rel. Mahoney v. Superior Court*, 78 Ariz. 74, 79, 275 P.2d 887, 889 (1954). The court also stated in *Apelt* that a defendant can remedy any prejudice the denial of an *ex parte* hearing causes on appeal, 176 Ariz. at 365. This is inconsistent with decisions granting special action jurisdiction to protect – not retrospectively remedy disclosure of – privileged information. *Ulibarra v. Superior Court*, 184 Ariz. 382, 382, 909 P.2d 449, 451 (App. 1996); *State ex rel. Romley v. Superior Court*, 172 Ariz. 232, 235, 836 P.2d 445, 448 (App. 1992); *Samaritan Health Services, Inc. v. Jones*, 142 Ariz. 435, 437, 690 P.2d 154, 156 (App. 1984).

Fourth, the denial of an *ex parte* hearing is unconstitutional in requiring a defendant to make a public request for resources not because he is indigent, but because he happens to be represented by a private lawyer, not a public defender's

office with its own investigative resources. *Mason v. Arizona*, 504 F. 2d 1345, 1351, 1354 (9th Cir. 1974)(denial of an "equivalent" and "fundamentally fair" substitute for the investigative services of a public defender violated equal protection and effective representation).

Finally, the reasoning in *Apelt* no longer holds water. The decision states that, if denied an *ex parte* hearing, the defense should make the request for resources in open court and, if prejudiced by disclosing privileged information, raise the issue on appeal. It is respectfully submitted that the denial of an *ex parte* hearing is not only prejudicial whenever it reveals defense strategy, but that this procedure unfairly forces defense counsel to walk a tightrope between refraining from potentially beneficial investigation and disclosing privileged evidence.

D. Revealing Defense Strategy to the Victim would Effectively Reveal it to the Prosecution

The problems caused by the denial of an *ex parte* hearing will not be remedied even if the defense could make their requests in a hearing sealed to all but the victims or their representatives. The legislation implementing the Victims' Bill of Rights contemplates that the prosecutor will be able to assume any of the rights of the victim at their request, A.R.S. §13-1447(C). This provision means that any of the rights the victim may assert must potentially be treated as belonging to the prosecution as well.

Barring everyone but the victims from these proceedings does not resolve

the prejudicial errors described in this brief and in the pending Petition for Review. The challenged decision makes impossible the already overwhelming challenge faced by death penalty defense counsel. It is respectfully submitted that this court must correct this error by either paring back the language of the decision below or by reversing it.

II

NEITHER DEFENDANTS NOR VICTIMS HAVE A CONSTITUTIONAL RIGHT TO ATTEND HEARINGS REGARDING MITIGATION RESOURCES

The constitutional and statutory provisions on which the challenged decision relies grant victims the right to attend "all criminal proceedings where the defendant has the right to be present." Ariz. Const. §2.1(3). *Accord* A.R.S. §13-4420. The challenged decision addresses only the victims' right to attend "all criminal proceedings, but ignores the rest of the provision that limits the right to hearings "where the defendant has the right to be present." *Morehart v. Barton*, 225 Ariz. at 271. The decision is in error because the accused did not have the right to be present at the hearing in question. This conclusion is required by fundamental and sound rules of construction and is necessary to give vitality to Rule 15.9(b), Arizona Rules of Criminal Procedure.

The pretrial hearing at issue here was limited to "out-of-state summons" for "the procurement of mitigation." *Id*.[3] This Court recognized a defendant's right to attend trial, but further explained:

> However, this right "applies only to those proceedings in open court 'whenever [a defendant's] presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.' " *State v. Christensen*, 129 Ariz. 32, 38, 628 P.2d 580, 586 (1981) (*quoting Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934), *overruled in part by Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)). Thus, the right does not "extend to in-chambers pretrial conferences ..." 5 Wayne R. LaFave, Jerold H. Isreal, & Nancy J. King, Criminal Procedure § 24.2(a) (2d ed.1999) (footnotes omitted).

State v. Dann, 205 Ariz. 557, 571, 74 P.3d 231, 245 (2003).

Applying this standard, Mr. Miller did not have the right to attend the hearing at issue. Such hearings are limited to defense counsel's description of resources needed to investigate and rebut the prosecution's case and build a defense. No such hearing would even take place if the accused could finance the defense or was represented by a public defender office with its own funds for investigators, mitigation specialists, and experts. (*See* pages 5-6, above).

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[3] As noted in footnote 1, the hearing at issue was limited to the return of out-of-state summons for mitigating evidence. The court of appeals' decision speaks in overly broad terms, stating that victims have the right to attend "all criminal proceedings." *Id*. A victim's right to attend other types of hearings is not at issue here.

Further, firmly established rules of construction and sound reasoning establish that the court of appeals erred in the present case by failing to give meaning to the phrase "where the defendant has the right to be present." *Morehart v. Barton*, 225 Ariz. at 272, *quoting* Ariz. Const. §2.1(3). This Court has always enforced "plain and unambiguous" statutory language. *Avery v. Pima County*, 7 Ariz. 26, 39-40, 60 P. 701, 706 (1900). *See also Bilke v. State,* 206 Ariz. 462, 464, 80 P.3d 269, 271 (2003). Further, a "cardinal principle" of construction requires that "each word, phrase, clause and sentence must be given meaning so that no part will be void, inert, redundant or trivial." *Adams v. Bolin*, 74 Ariz. 269, 276, 247 P. 617, 621 (1952). *See also Mejak v. Granville*, 212 Ariz. 555, 557, 136 P.3d 874, 876 (2006). These precedents require that meaning be given to the phrase -- "where the defendant has the right to be present."

The challenged decision violates another well settled rule of construction by brushing aside this Court's enactment of Rule 15.9(b). That rule authorizes *ex parte* proceedings upon a "proper showing [of] ... the need for confidentiality."[4] The court of appeals merely stated that Rule 15.9(b) cannot "trump" the victim's constitutional right to attend hearings. 225 Ariz. at 272. That conclusion violates the established rule of construction "that different statutes bearing upon the same

[4] Arizona recognized "the inherent power of the court" to conduct closed hearings when necessary to protect the rights of a party long before Rule 15.9 was enacted. (*See* cases cited at page 10, above).

subject-matter should be so construed, if possible, as to give effect to all." *Gideon v. St. Charles*, 16 Ariz. 435, 439, 146 P. 925, 927 (1915). *See also State ex rel. Dept. of Economic Security v. Hayden*, 210 Ariz. 522, 523-524, 115 P.3d 116, 117-118 (2005). The victims' rights provision and Rule 15.9(b) may both be given effect by permitting victims to attend only those hearings at which the accused has the right to be present.

III

NO OTHER STATE HAS INTERPRETED "VICTIMS' RIGHTS" PROVISIONS TO INCLUDE THE RIGHT TO ATTEND HEARINGS AT WHICH THE DEFENSE SEEKS MITIGATION RESOURCES

The challenged decision goes farther than any state court decision, constitutional provision or statute in elevating the rights of victims to the point of allowing them to attend all hearings without regard to the rights of the accused,[5] even hearings from which the prosecution is excluded. The absence of support from our sister states further demonstrates that the challenged decision must not be allowed to stand.

[5] The court of appeals decision closes by referring to prior decisions in which it "recognized the need in certain instances for weighing the interests between victims' and defendants' constitutional rights." 225 Ariz. at 272. However, the court deemed such analysis to be unnecessary in the present case. *Id*. Even if the decision is read to recognize that victims may be excluded under certain circumstances, review is required because the remainder of the decision will cause confusion in the trial courts and lead to the violation of defendants' constitutional rights.

The legislatures or voters of thirty-seven other states have enacted constitutional or statutory provisions that formally permit crime victims to attend criminal proceedings.[6] Twelve states have provisions, like Arizona's, that permit victims to attend hearings at which the accused has the right to be present.[7] Two of those states - South Carolina and Washington - specifically grant trial judges discretion to exclude victims. S.C. Stat. §16-3-26(C)(1); Wa. Const. Art. 1, §35. The supreme courts of two others - Oklahoma and Tennessee - hold that indigent defendants have the right to *ex parte* hearings to seek resources. *State v. Barnett*, 909 S.W.2d 423 (Tn. 1995); *McGregor v. State*, 733 P.2d 416 (Okla. 1987).

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[6] The states without such provisions are Georgia, Hawaii, Iowa, Kentucky, Maine, New Hampshire, New York, Pennsylvania, Rhode Island, Wyoming, Virginia and West Virginia. Pennsylvania does have a statutory provision that allows victims to be accompanied in court "by a family member, a victim advocate or other person providing assistance or support." 18 P.S. §11.201(3). The Georgia Supreme Court holds that indigent defendants have the right to *ex parte* hearings to seek resources. *Zant v. Bradley*, 411 S.E.2d 869 (1992).

[7] Connecticut (Cn.Const. Art. 1, §8); Illinois (Il.Const. Art. 1, §8.1), Maryland (Md.Crim.Proc. §11-102), Michigan (Mi.Const. Art. 1, §24); Missouri (Mo.Const. Art. 1, §32); New Mexico (N.M.Const. Art. 2, §24), Oklahoma (Ok.Const. Art. 2, §34), South Carolina (S.C.Const. Art. I, §24(a)(3)(also limiting right to "proceedings which are dispositive of the charges"), Tennessee (Tn.Const. Art. 1, §35); Washington (Wa.Const. Art. 1, §35). Colorado and Louisiana limit the victims' right to "critical proceedings". Co.Const. Art. 2, §16(a); La.Const. Art. 1, §25. Those provisions track this Court's analysis regarding the defendant's right to be present in *State v. Dann*, 205 Ariz. at 571, discussed at page 13, above.

Twenty-one of the remaining states limit victims' right of attendance to public hearings[8] or - like Arizona's Criminal Rule 15.9(b) - grant trial courts discretion to exclude victims where appropriate.[9] The highest courts of all three states that have addressed the issue recognized that indigent defendants are entitled to seek resources in *ex parte* proceedings. *Williams v. State*, 958 S.W.2d 186 (Tx. 1997); *State v. Ballard*, 428 S.E.2d 178 (1993); *People v. Anderson*, 742 P.2d 1306 (Ca. 1987).

The four remaining states' codes contain provisions that may be read to allow victims to attend all hearings.[10] However, the state courts have not addressed

[8] California (Ca.Const. Art. 1, §28), Indiana (In.Const. Art. 1, §13(b), Kansas (Ks.Const. Art. 15, §15), Minnesota (Mn. St. §611A.03), Montana (Mt.St. 46-24-106), Nebraska (Ne.Const. Art. 1, §28), Nevada (Nv.Const. Art. 1, §8(2)(b); New Jersey (N.J.Const. Art. 1, ¶22), North Carolina (N.C.Const. Art. 1, §37(1)(a); N.C.St. §15A-825), North Dakota (N.D.St. §12.1-34-02), Oregon (Or.Const. Art. I, §42), Texas (Tx.Const. Art. 1, §30), and Utah (Ut.Const. Art. 1, §28; Ut.St. §77-38-2). California (Ca.Penal §987.9), Kansas (Ks.St.§22-4508), Minnesota (Mn.St. §611.21), and Nevada (Nv.St. §7.135) have provisions specifically providing for *ex parte* hearings to obtain resources.

[9] Alabama (Al.Const. Art. 1, §601), Arkansas (Ar.St. §16-90-1103), Delaware (De.St.Ti. 11, §9407), Florida (Fl.Const. Art. 1, §16), Ohio (Oh.Const. Art. 1 §10a; Ohio Rev. Code. Ann. §2930.09), South Dakota (S.D.St. §23A-28C-1(6)), Vermont (Vt.St.T. 13, §5309; Vt.R.Ev. 615), and Wisconsin (Wi.Const. Art. 1, §9(m)).

[10] Alaska (Ak.St. §12.61.010), Idaho (Id.St. §19-5306), Massachusetts (Ma.St. 258B §3), and Mississippi (Ms.St. §99-43-21).

the issue presented here. No other state appellate court is in accord with the challenged decision in the present case.

CONCLUSION

It is respectfully submitted that this Court must grant review and hold that victims do not have the right to attend hearings at which defense counsel seeks resources necessary to effective representation. At a minimum, the Court must correct the court of appeals' overly broad statement that victims' right of attendance extends to every hearing of every kind in every criminal case.

RESPECTFULLY SUBMITTED this 17th day of November, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Civil Appellate Procedure, Rules 6(c) and 14(a)(1), I certify that this memorandum brief is double-spaced using a Times New Roman font and contains 4,056 words.

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CERTIFICATE OF SERVICE

Natman Schaye, co-counsel for Amici, certifies that the original plus seven (7) copies of the foregoing was mailed on the 17th day of November, 2010, to:

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