

1 ARIZONA CRIME VICTIM RIGHTS LAW GROUP

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7 Counsel for Victim Beth Fay

8 **IN THE SUPREME COURT OF THE**
9 **STATE OF ARIZONA**

10 BETH FAY,

11 Petitioner,

12 vs.

13 HON. DEWAIN D. FOX, Judge of
14 the Maricopa County Superior Court
15 of the State of Arizona,

16 Respondent Judge,

17 and

18 STATE OF ARIZONA,

19 Real Party in Interest,

20 v.

21 JORDAN MICHAEL HANSON,

22 Respondent-Real Party
23 In Interest Defendant.

Case No.: _____

Court of Appeals No. 1 CA-SA 20-0123

Maricopa County Superior Court Case
No. CR2015-005451-001 DT

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27 **PETITION FOR REVIEW AND REQUEST TO STAY PROCEEDINGS**
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1 **SUMMARY OF ARGUMENT AND ISSUES PRESENTED FOR REVIEW**
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3 In Defendant’s untimely filed Delayed Appeal Request and separate Petition
4 for Post-Conviction Relief, he argues as follows:
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- 6 1. Neither the Victim Bill of Rights (“VBR”), the Victim Rights
7 Implementation Act (“VRIA”), nor Rule 39 grants victims the right to
8 file *any* responsive substantive pleadings or to make *any* argument in
9 Rule 32 post-conviction matters;
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- 11 2. Although crime victims have the right to present evidence, information
12 and opinions that concern ... the need for restitution pursuant to A.R.S.
13 §13-4426, they have no right to make argument to the court at any Rule
14 32 proceeding that affects a determination of restitution.
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- 16 3. *Lindsay R. v. Cohen*, 236 Ariz. 565, 567, 343 P.3d 435, 437 (App.
17 2015) prevents a murder victim’s mother and sister at any time from
18 submitting substantive pleadings and making arguments concerning
19 the determination of restitution; and
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- 21 4. Victims only have the right to receive notice of a Rule 32 proceeding
22 but no rights to submit any substantive pleadings in response to a
23 Rule 32.1(f) request for delayed appeal or in a separate Petition for
24 Post-Conviction Relief alleging ineffectiveness of restitution counsel.
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1 Because on April 14, 2020, the trial court effectively silenced a crime victim
2 from presenting information, opinion or argument, Petitioner filed a Petition for
3 Special Action seeking relief from the Arizona Court of Appeals. But the Court of
4 Appeals denied relief by trying to confine the trial court's ruling only to the question
5 of whether the Defendant's Rule 32.1(f) delayed appeal request was the Defendant's
6 fault. *See* Exhibit "A," Court of Appeals Order Accepting Jurisdiction and Denying
7 Relief dated August 21, 2020. Unfortunately, the Court of Appeals misconstrued
8 the decision made by the trial court. It had before it much more than just the
9 question of excusable neglect on a delayed appeal request. The trial court prevented
10 victim from being heard on any part of the Rule 32 Proceedings. It expressly limited
11 a victim's right to be heard on any Rule 32 request whether in the form of a delayed
12 appeal or demand for new trial alleging ineffective assistance. The trial court struck
13 the Victim's pleading in response to a Rule 32.1(f) request for delayed appeal and
14 also precluded victim from responding to defendant's amended petition for post-
15 conviction relief. The Defendant's Rule 32 request no matter how denominated,
16 directly affects the court's determination of restitution. Yet the trial court prevented
17 the victim from explaining why any purported allegations of ineffectiveness of
18 counsel or delayed appeal requests should be considered harmless due to agreements
19 made in the course of a lengthy negotiations process on restitution made below
20 between the defendant and the mother and sister of his victim. The Court of Appeals
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1 concedes that a Rule 32.1(f) proceeding generally could affect a victim's right to
2 prompt restitution but explains that this right cannot trump a Defendant's specific
3 right to request a delayed appeal. But victims do not seek to trump Defendant's right
4 to request a delayed appeal; victims only seek the right to be heard on all matters
5 affecting a determination of restitution. Artificial limitations on when victims can
6 be heard imposed by both the trial court and the factual error made by the Court of
7 Appeals cannot withstand scrutiny under the VBR, the VRJA and Rule 39.
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11 As indicated in the Petition for Special Action before the Arizona Court of
12 Appeals, the Defendant stretches the confines of his request for a delayed appeal by
13 dragging into his relief request for a delayed appeal consistent demands to silence
14 his victim from making any substantive arguments about the yearlong negotiation
15 process leading to agreements on the record. Claiming Rule 32.1(f) inadvertence
16 yet silencing his victim's mother and sister from clarifying the record and providing
17 substantive support for the Court's consideration cannot remotely be considered fair,
18 dignified or respectful and are contrary to the mandates of the VBR, the legislative
19 revisions to A.R.S. §§13-4437(A) and (E) and to Rule 39. Counsel for victim
20 requests relief from this Court to clarify victim rights and the process that is due to
21 these victims of a horrible crime involving the death of a son and a brother. Victims
22 do not ask the court to deny a Defendant the right to file his Rule 32.1(f) Petition;
23 instead, victim simply asks for the right to be heard and respond.
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1 The trial court resolved these final two disputed issues and one of Defendant's
2 appellate attorneys as well as the Department of Corrections received copies of these
3 key trial court restitution determinations. *See* n. 1, *supra*. After the trial court
4 exercised its discretion to enter a criminal restitution order pursuant to A.R.S. §13-
5 805(B), counsel for the Defendant filed a Motion to Reconsider explaining in part:
6

7
8 ***There is no dispute as to the amounts ordered by the Court,***
9 simply whether the criminal restitution order is subject to interest
10 during Mr. Hanson's incarceration. ...

11 The parties [victim counsel and restitution counsel for defendant]
12 engaged in ***extensive negotiation*** with respect to restitution in this case.
13 The parties [victim counsel and restitution counsel for defendant]
14 ultimately came to resolution on the amounts of restitution. ...

15 Based on the inability to pay during incarceration, it is requested
16 the Court reconsider if the intent was to issue a criminal restitution
17 order subject to interest. ***In the alternative, it is requested that the***
18 ***Court clarify its position on the restitution order and interest in the***
19 ***event Mr. Hanson seeks to appeal the Court's decision on the***
20 ***criminal restitution order.*** Mr. Hanson is agreement with the criminal
21 restitution amounts and the limited ability of the victims to pursue
22 payment through lawful means while incarcerated. However, the
23 issuance of a criminal restitution order is premature.

24 Ex. B, P.A. Exhibit "13," Defendant Hanson's Motion for Reconsideration or
25 Clarification of Criminal Restitution Order dated April 17, 2019 (emphasis added).
26 In early 2020, Defendant then started filing a whole new myriad of Rule 32 post-
27 conviction pleadings challenging the restitution agreements he previously made,
28 alleging ineffectiveness of restitution counsel and requesting a delayed appeal. *See*

1 Ex. B, P.A., Exhibit “16,” “Limited Petition for Post-Conviction Relief (Delayed
2 Appeal Request) and Request to Hold Further PCR Proceedings in Abeyance.”
3 Defendant makes no meaningful mention of the lengthy negotiations process
4 culminating in agreements made with his victims. *Id.* He omits key information and
5 substantive facts about the process leading to restitution agreements made on the
6 record for all but approximately one percent of the economic losses at issue and
7 whether the trial court should exercise its discretion and enter a criminal restitution
8 order pursuant to A.R.S. §13-805(B). *Id.*; *see also* Ex. B, P.A. Exhibit “13,”
9 Defendant Hanson’s Motion for Reconsideration. And before allowing the victim
10 to step up and clarify that agreements were made after an approximately one-year
11 negotiation, the Defendant took matters a step further by contending that his victim
12 has no right to respond to any of these post-conviction relief proceedings. *See* Ex.
13 B, P.A., Exhibit 16, Limited Petition for Post-Conviction Relief (Delayed Appeal
14 Request) and Request to Hold Further PCR Proceedings at 6 (“Petitioner objects to
15 any substantive pleadings filed in these post-conviction proceedings by counsel for
16 victim’s mother.”). His contentions in his request for a delayed appeal extend
17 beyond why a delay appealing restitution was allegedly not his fault. Instead he
18 challenges the mostly agreed upon determinations about restitution for economic
19 loss and the right of victims to clarify the record and to be heard about the byproduct
20 of a year of negotiations leading to a mostly agreed upon amount of economic loss.
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1 *Id.* Throughout this Rule 32 process, he contends that the mother and sister of his
2 shooting victim cannot make any substantive arguments explaining why restitution
3 should be upheld and Rule 32 relief rejected. *Id.* He gives short shrift to previous
4 restitution agreements and insists that victims have no right to be heard in any Rule
5 32 proceeding affects victim’s enumerated VBR, statutory and rule-based rights to
6 present evidence, information and make responsive arguments through counsel. So,
7 victims’ counsel filed a Response to Defendant’s Rule 32.1(f) request for a delayed
8 appeal spelling out the additional factual information omitted from the record. *See*
9 Appendix in Support of RPI Hanson’s Response to Petition, Ex. 1 Victim Fay’s
10 Response to PCR (Delayed Appeal). On April 14, 2020, the trial court struck
11 victim’s pleadings responding to the Defendant’s Rule 32.1(f) Motion for Delayed
12 Appeal stating in part:
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18 If the drafters had intended to give victims a general right to be heard in post-
19 conviction relief proceedings, or specifically on claims for permission to take
20 a delayed appeal from a CRO or for a new trial for IAC, the drafters could—
21 and presumably would—have done so expressly. As much as the Court
22 respects victim’s rights, the Court is tasked with enforcing the law as written.

23 Ex. B, P.A., Exhibit “21,” Minute Entry dated April 14, 2020, *see also*, Ex. “C”
24 Minute Entry dated Apr. 14, 2020. The Trial Court not only struck victim’s
25 Response to the Defendant’s Request for Delayed Appeal pursuant to Rule 32.1(f),
26 but it also precluded victims from responding to the Defendant’s amended petition
27 for post-conviction relief alleging ineffectiveness of restitution counsel. *Id.*
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1 (precluding victim from responding to Defendant’s amended PCR). On Special
2 Action review, the Arizona Court of Appeals upheld the trial court’s decision
3 explaining:
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5 While a delayed appeal could impact Fay’s ability “to receive prompt
6 restitution,” Ariz. Const. Art. II, Section 2.1(A) (emphasis added), her
7 general right to receive prompt restitution does not trump Hanson’s specific
8 right to a delayed appeal upon demonstration that he did not cause the delay

9 Ex. A. The Court of Appeals failed to consider the Trial Court’s order precluding
10 the victim from Responding to other Rule 32 proceedings. *Id.* (“The court explicitly
11 did not rule on whether Hanson should be able to file a delayed appeal, whether Fay
12 has a right to participate in that appeal, or whether Fay may participate in the
13 resolution of Hanson’s pending Amended Petition for Post-Conviction Relief
14 (Amended PCR).”). *Id.* at 1-2. This Petition for Review seeks both a clarification
15 that a victim can be heard on Rule 32 matters affecting a determination of restitution
16 no matter how or when presented and correction of a factual error made by the
17 appellate court about the scope of the trial court’s ruling. In addition, because the
18 state was for the most part not involved in the original determinations of restitution,
19 irreparable harm will occur without victim input responding to challenges to the
20 restitution award. Victim has filed a separate request to stay the proceedings below
21 imposed originally by the Court of Appeals.
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ISSUES PRESENTED FOR REVIEW

1. Do victims have the right to be heard on all matters affecting a determination of restitution whether in the form of a Rule 32.1(f) request for delayed appeal or allegations of ineffectiveness of restitution counsel?
2. Does a Defendant’s Rule 32.1(f) request for delayed appeal affect a determination of restitution?
3. Can a victim respond to substantive allegations made in any Rule 32 pleadings which generally affect enumerated VBR rights to prompt restitution?
4. Does allowing a victim to file a response to a Rule 32.1(f) Request for Delayed Appeal trump a Defendant’s right to a request a delayed appeal?

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REASONS THE PETITION SHOULD BE GRANTED

Almost three years after a jury convicted Defendant of Second-Degree Murder, this Defendant filed a request for a delayed appeal. Although framed as a showing of excusable neglect under Rule 32.1(f), in reality, he spells out a litany of reasons why his crime victims should no longer have any rights to be heard on any Rule 32 matters despite seeking an outcome that materially affects a specifically enumerated VBR right. The Defendant also filed a separate petition for post-conviction relief alleging ineffectiveness of restitution counsel. The State did not participate meaningfully in the underlying restitution process and the trial court prevented victim from providing opinions and arguments supporting the agreements

1 previously made and placed on the record. It is neither fair nor is justice served by
2 allowing a victim to be heard when ordering restitution but never again closing the
3 doors to the courthouse when defendant challenges the amount of restitution.
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5 Citing *Lindsay R. v. Cohen*, 236 Ariz. 565, 567-68, 343 P.3d 435, 437-38
6 (App. 2015), Defendant argues that victims must be subservient to prosecutors when
7 it comes to enforcing their restitution rights. See Ex. B, P.A., Exhibit “16,” Limited
8 Petition for Post-Conviction Relief (Delayed Appeal Request) at 5 (“counsel for the
9 victim’s mother may not invade the state’s province.... quoting *Cohen*, ‘because
10 restitution is not a claim that belongs to victims, we reject petitioner’s contention
11 that the allocation of prosecutorial duties to the state deprives victims of due
12 process.’”) (emphasis added). *Id.* But *Lindsay R. v. Cohen* is no longer good law
13 concerning this Defendant’s contentions. In 2016, immediately after the *Cohen*
14 decision, the Arizona legislature promptly amended A.R.S. §13-4437(A) and (E).
15 The outcome of this amendment legislatively overruled the portion of the *Cohen*
16 decision on which Defendant relied. As of 2016, the legislature added the following
17 language to A.R.S. §13-4437(A) which clarifies in relevant part that:
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23 (A) The rights enumerated in the victims' bill of rights, article II, section
24 2.1, Constitution of Arizona, any implementing legislation or court
25 rules ***belong to the victim.***

26 (emphasis added). And it added the following language to A.R.S. §13-4437(E)
27 which clarifies in relevant part that:
28

1 (E) Notwithstanding any other law and without limiting any rights and
2 powers of the victim, ***the victim has the right to present evidence or***
3 ***information and to make an argument to the court,*** personally or
4 through counsel, at ***any proceeding to determine the amount of***
restitution pursuant to section 13-804.

5 (emphasis added).

6 After the legislature amended A.R.S. §§13-4437(A) and (E), victims may
7 respond to any challenges to the determination of restitution. *See id.; see also* ARIZ.
8 CONST., Art. II, §2.1(A)(8). Although victims are not parties to trial or on appeal,
9 nevertheless, they have standing to seek relief “to enforce any right or to challenge
10 an order denying any right guaranteed to victims.” A.R.S. §13-4437(A). They have
11 standing to participate in these post-conviction proceedings because the issues
12 involve a determination of restitution for economic loss.
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16 The VBR never gave defendants, the judiciary or, the legislature the blanket
17 authority to first grant victims enumerated rights but later to take them away because
18 they recur after the time for appeal has expired. Instead, the plain language of the
19 VBR requires that courts and the legislature give deference to victim rights when
20 construing statutes so they do not deny or disparage other rights granted by the
21 legislature or retained by victims no matter when they arise. ARIZ. CONST., Art. 2,
22 §2.1(E).
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26 And this obligation to construe statutes liberally to advance VBR rights
27 include the obligations to treat victims with *fairness*, respect, and dignity. Ariz.
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1 Const. Art. 2, §2.1(A)(1) (emphasis added). The rules of criminal procedure and all
2 implementing statutes must be construed to protect the right to fairness, which
3 incorporates a victim’s right “to justice and due process.” These provisions are
4 mandatory. Ariz. Const. Art. 2 §32. Analyzed within this set of obligations and
5 considerations, the trial Court erred when it decided to deny a victim from being
6 heard on a request for a delayed appeal that affects a determination of restitution.
7
8 The trial court placed much broader limits on the victim’s right to be heard on
9 matters affecting a determination of restitution than the VBR requires and such an
10 outcome must be rejected. And the Court of Appeals failed to consider that the trial
11 court placed far greater restrictions on Victim’s rights than just prohibition on
12 responding to a Rule 32.1(f) delayed appeal. The decision to deny a victim from
13 being heard on a matter affecting restitution does nothing to advance VBR rights and
14 is unfair. And although the Arizona Court of Appeals did recognize that the
15 Defendant’s delayed appeal request may generally impact a victim’s right to prompt
16 restitution, the appellate court likewise did not act to protect or advance that right
17 and the right to be treated fairly in a manner consistent with the VBR.
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23 The Court of Appeals denied relief of the victim’s Petition for Special Action
24 despite conceding that a victim’s right to prompt restitution could be affected. It
25 explains that victim’s “general right[s] to receive prompt restitution does not trump
26 [Defendant’s] specific right to a delayed appeal upon demonstration that he did not
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1 cause the delay.” The Court of Appeals test for when a victim may be heard is
2 inconsistent with the VBR because victims have not asked to take away or trump the
3 Defendant’s right to ask for a Rule 32 remedy; no balancing test need occur between
4 the right of a victim and a Rule 32 right of a Defendant to ask for a remedy. Instead,
5 victims simply ask to be heard on these post-conviction matters because no matter
6 how denominated, the relief sought clearly affects the determination of restitution.
7 The victim asks only to be heard, nothing more and nothing less. This right to be
8 heard must continue irrespective of whether it arises in a trial court restitution
9 hearing or in a post-conviction appellate proceeding. *See* ARIZ. R. CRIM. P. 39(a)(1)
10 (“As used in this rule a ‘criminal proceeding’ is any matter At which the
11 defendant has the right to be present, *including any post-conviction matter.*”)
12 (emphasis added); *see also e.g. State ex rel. Montgomery v. Padilla*, 238 Ariz. 560,
13 566, 364 P.3d 479, 485 (App. 2015) (“Requests ‘seek[ing] an order’ are made to,
14 and granted by, *both* appellate and trial courts.”). Taking away the right to be heard
15 effectively returns crime victims to the same place they were in before the voters in
16 Arizona passed the VBR. Such an outcome does nothing to advance victim rights;
17 instead it restrains them without advancing any specific constitutional right
18 belonging to the Defendant.
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CONCLUSION

For these reasons, Petitioner respectfully requests that this Court grant her Petition for Review giving crime victims the right to be heard on Rule 32 proceedings irrespective of whether a Defendant claims excusable neglect under Rule 32.1(f) or ineffectiveness of restitution counsel. Allowing her to be heard in Response to the Defendant's Rule 32.1(f) request does not trump his rights to request a delayed appeal but instead allows the court to consider all the facts in the record and legal arguments in support of the victim's position as well as the defendant before making a determination on a matter affecting a fundamental VBR right belonging to the victim, her right to prompt restitution.

Additionally, victims request that this Court grant a stay of all proceedings pending a determination of the outcome of this Petition for Review.

Respectfully submitted September 17th, 2020.

ARIZONA CRIME VICTIM RIGHTS LAW GROUP

By: /s/ Randall Udelman
Randall Udelman
Victim Rights Attorney-Petitioner/Victim Beth Fay

1 **PROOF OF SERVICE**

2 **ORIGINAL** of the foregoing Petition for Review and Request to Stay
3 Proceedings e-filed with the Clerk of the Court this 17th day of September, 2020:

4 **COPIES** of the Petition for Review and Request to Stay Proceedings have
5 been electronically served on this 17th Day of September, 2020, to:

6 The Honorable Dewain D. Fox
7 Maricopa County Superior Court
8 201 West Jefferson, CCB 903
9 Phoenix, AZ 85003
10 c/o contrerasg@superiorcourt.maricopa.gov

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28 BY:/s/ Randall Udelman
Attorney for Petitioner/Victim Beth Fay

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CERTIFICATE OF COMPLIANCE

1. This Certificate of Compliance concerns a Petition for Review and Request to Stay Proceedings.

2. The undersigned certifies that the Petition for Review and Request to Stay Proceedings has been prepared in double-spaced 14-point Times Roman font and contains 3,392 words from page 1 through page 14, including footnotes, according to the word counting feature of the word processor used to prepare this Petition.

Undersigned avows that the Petition complies with the word count as set forth in Rule 14.

/s/ Randall Udelman
Randall S. Udelman, Esq.
Attorney for Petitioner/Victim Beth Fay

EXHIBIT "A"

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 8/21/20
AMY M. WOOD,
CLERK
BY: RB

BETH FAY,)
) Court of Appeals
) Division One
)
) Petitioner,) No. 1 CA-SA 20-0123
)
)
) v.) Maricopa County
) Superior Court
)
) THE HONORABLE DEWAIN D. FOX,) No. CR2015-005451-001
)
) Judge of the SUPERIOR COURT OF)
) THE STATE OF ARIZONA, in and for)
) the County of MARICOPA,)
)
) Respondent Judge,)
)
) STATE OF ARIZONA; JORDAN MICHAEL)
) HANSON,)
)
)
) Real Parties in Interest.)
)

ORDER ACCEPTING JURISDICTION, DENYING RELIEF

The Court, Judge Jennifer M. Perkins presiding, and Judges David B. Gass and Michael J. Brown participating, has considered all filings and the arguments presented on August 19, 2020.

In this special action Petitioner Fay seeks relief from the superior court's April 14, 2020 ruling. The court struck her response opposing Real Party in Interest Hanson's Limited Petition for Post-Conviction Relief (Limited PCR), in which he requested a delayed appeal to challenge the Criminal Restitution Order (CRO) entered against him. The April 14 ruling specifically and only addressed Fay's right, as a victim, to weigh in on whether Hanson should be able to file a delayed appeal. The court

explicitly did not rule on whether Hanson should be able to file a delayed appeal, whether Fay has a right to participate in that appeal, or whether Fay may participate in the resolution of Hanson's pending Amended Petition for Post-Conviction Relief (Amended PCR).

We will not address those unripe questions regarding Fay's right to participate in either a delayed appeal or the resolution of Hanson's Amended PCR because both the proposed delayed appeal and the amended petition challenge the CRO. Whether Fay has constitutional, statutory, or rule-based rights to weigh in on such a challenge are questions for another day.

On the narrow issue remaining, we see no basis for granting relief. The sole question for the superior court in resolving Hanson's Limited PCR is whether the delay in filing this appeal "was not [Hanson's] fault." Ariz. R. Crim. P. 32.1(f). Arizona appropriately protects victims' rights vigorously, enshrining them in our Constitution through a Victims Bill of Rights, Ariz. Const. Art. 2, § 2.1; in statute through the Victims Bill of Rights Implementation Act, A.R.S. § 13-4401, et seq., and elsewhere; and in our procedural rules, Ariz. R. Crim. P. 39. We discern no constitutional, statutory, or rule-based right for Fay to weigh in on whether Hanson is at fault for this delay. While a delayed appeal could impact Fay's ability "to receive prompt restitution," Ariz. Const. Art. II, Section 2.1(A) (emphasis added), her general right to receive prompt restitution does not trump Hanson's specific right to a delayed appeal upon demonstration that he did not cause the delay.

IT IS ORDERED accepting jurisdiction and denying relief.

/S/

Jennifer M. Perkins, Presiding Judge

A copy of the foregoing
was sent to:

Randall S Udelman
Lisa Marie Martin
Treasure L VanDreumel
Lori L Voepel
Thomas E Lordan
Colleen Clase
Hon Dewain D Fox

EXHIBIT "B"

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6 (480) 946-0832

7 Counsel for Victim Beth Fay

8 **IN THE COURT OF APPEALS DIVISION ONE**

9 **STATE OF ARIZONA**

10 BETH FAY,

11 Petitioner,

12 vs.

13 HON. DEWAIN D. FOX, Judge of
14 the Maricopa County Superior Court
15 of the State of Arizona,

16 Respondent Judge,

17 and

18 STATE OF ARIZONA,

19 Real Party in Interest,

20 v.

21 JORDAN MICHAEL HANSON,

22 Respondent-Real Party
23 In Interest Defendant.

Court of Appeals No. _____

Maricopa County Superior Court Case
No. CR2015-005451-001 DT

PETITIONER'S APPENDIX

1 **APPENDIX TO PETITION FOR SPECIAL ACTION**

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19 Respectfully submitted June 15, 2020.

20 ARIZONA CRIME VICTIM RIGHTS LAW GROUP

21 By: /s/ Randall Udelman
22 Randall Udelman
23 Victim Rights Attorney
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EXHIBIT “1”

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Michael K. Jeanes, Clerk of Court
*** Filed ***

6/1/2017 8:00am

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-005451-001 DT

05/24/2017

HON. PAMELA GATES

CLERK OF THE COURT
A. Olson
Deputy

STATE OF ARIZONA

KEVIN POLLAK
RANDALL S UDELMAN

v.

JORDAN MICHAEL HANSON (001)

MICHAEL E RIIKOLA
J GRANT WOODS
JAMES AUSTIN WOODS

DOB: 06/15/1994

AZ DOC
DISPOSITION CLERK-CSC
RFR

SENTENCE OF IMPRISONMENT

10:43 a.m.

Courtroom SCT 5B

State's Attorney: Kevin Pollak
Defendant's Attorney: Grant Woods, Michael Riikola, and Austin Woods
Defendant: Present

Court Reporter, Treva Colwell, is present.

A record of the proceedings is also made digitally.

LET THE RECORD REFLECT that Randal Udelman is present representing the victim.

Statements are made to the Court on behalf of the Victim.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-005451-001 DT

05/24/2017

12:01 p.m. Court stands at recess.

1:35 p.m. Court reconvenes with the Defendant and respective counsel present.

Court Reporter, Treva Colwell, is present.

A record of the proceeding is also made digitally.

Continued statements are mad to the Court on behalf of the Victim.

The Court notes that counsel need to submit a CD copy of their video presentations to the Court to be part of the record by May 29, 2017.

Statements are mad to the Court on behalf of the Defendant.

3:07 p.m. Court stands at recess.

3:15 p.m. Court reconvenes with the Defendant and respective counsel present.

Court Reporter, Treva Colwell, is present.

A record of the proceeding is also made digitally.

Count 1: The Defendant was found guilty after a trial by jury.

IT IS THE JUDGMENT of the Court Defendant is guilty of the following:

OFFENSE: Count 1 Second Degree Murder
Class 1 Felony
A.R.S. § 13-1101, 1104, 710, 701, 702, and 801
Date of Offense: September 5, 2015
Non Dangerous - Non Repetitive

AS PUNISHMENT, IT IS ORDERED Defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Corrections as follows:

Count 1: 12 CALENDAR years from May 24, 2017
Presentence Incarceration Credit: 105 days
Less Than Presumptive

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-005451-001 DT

05/24/2017

IT IS ORDERED the Defendant shall pay through the Clerk of the Superior Court:

ASSESSMENTS:

PROBATION ASSESSMENT: Count 1: \$20.00.

The Court will retain jurisdiction over restitution. No hearing is set at this time. In the event a restitution hearing is set, Defendant waives his/her presence.

The Arizona Department of Corrections shall notify the Clerk of the Court of Maricopa County of Defendant's release from custody via e-mail cforesponse@mail.maricopa.gov. The Clerk of the Court, upon said notification, shall furnish financial information for a Criminal Restitution Order for Judicial signature for any unpaid monies to date.

Community Supervision: Count 1 - Imposed pursuant to A.R.S. § 13-603(I).

IT IS FURTHER ORDERED that Defendant must submit to DNA testing for law enforcement identification purposes in accordance with A.R.S. §13-610.

IT IS ORDERED authorizing the Sheriff of Maricopa County to deliver the Defendant to the Arizona Department of Corrections to carry out the term of imprisonment set forth herein.

IT IS ORDERED the Clerk of the Superior Court remit to the Arizona Department of Corrections a copy of this Order or the Order of Confinement together with all presentence reports, probation violation reports, and medical and psychological reports that are not sealed in this cause relating to the Defendant.

4:33 p.m. Matter concludes.

IT IS ORDERED that Defense counsel shall preserve Defendant's file for post-conviction relief purposes. If Defense counsel receives notice that Defendant is seeking post-conviction relief, counsel shall prepare the file for delivery to PCR counsel and shall make timely arrangements for the exchange thereof when notified. Further, upon exchange of the file, Defense counsel shall file with the court a Notice of Compliance that shall, at a minimum, include date of compliance, recipient of the file, and an itemization of contents of the file. A copy of the Notice shall be provided to PCR counsel, the State and the PCR Unit.

LATER:

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-005451-001 DT

05/24/2017

LET THE RECORD REFLECT State's exhibit 1 is marked for identification and received in evidence.

LET THE RECORD REFLECT Defendant's exhibit 2 is marked for identification and received in evidence.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

JUDGE PAMELA S GATES

Date: May 24, 2017

CLERK OF THE COURT

A. OLSON

Deputy

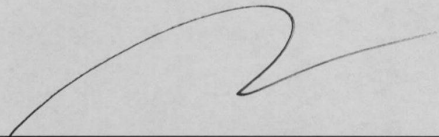
No. CR2015-005451-001

STATE v. HANSON

Let the record reflect that the Defendant's right index fingerprint is permanently affixed to this sentencing order in open court.

(right index fingerprint)





JUDICIAL OFFICER OF THE SUPERIOR COURT

EXHIBIT “2”

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1 ARIZONA CRIME VICTIM RIGHTS LAW GROUP
2 rudelman@azvictimrights.org
3 RANDALL S. UDELMAN, SBN 014685
4 P.O. Box 2323
5 Scottsdale, Arizona 85252-2323
6 (480) 946-0832
7 Counsel for Victim Beth Fay

8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
9 **IN AND FOR THE COUNTY OF MARICOPA**

10 STATE OF ARIZONA)
11) No. CR2015-005451-001
12 Plaintiff,)
13 vs.) **VICTIM BETH FAY'S MOTION FOR**
14) **CRIMINAL RESTITUTION ORDER**
15 JORDAN MICHAEL HANSON;) (Assigned to the Hon. Pamela
16) Gates)
17 Defendant.)
18)
19)
20)
21)

22 Following the conviction of the defendant, the Defendant was
23 sentenced on May 24, 2017. The trial court retains jurisdiction
24 to order restitution pursuant to A.R.S. §13-805(A)(1) and (2).
25 And pursuant to A.R.S. §13-805(B), the trial court may enter a
26 criminal restitution order at the time the Defendant has been
27 ordered to pay restitution.

28 The purpose for this Motion is to provide evidentiary support
for entry of a criminal restitution order (CRO) pursuant to A.R.S.
§13-805(B) in victim Beth Fay's favor and against Defendant for
the total amount of \$570,159.45 (Carson's lost wages of \$411,402
plus Beth's economic losses and lost wages totaling \$158,858.22)
and a separate CRO in victim Stephanie Dumbrell's favor totaling

1 \$4,094.62. This Motion is accompanied by the attached Memorandum
2 of Points and Authorities incorporated herein.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 I. Background

5 Following the Defendant's conviction of Second Degree Murder
6 of Beth Fay's son Carson Dumbrell, the court must order the person
7 convicted of an offense to make restitution to his victims for the
8 "full amount of the economic loss as determined by the court and
9 in the manner as determined by the court..." A.R.S. §13-603(C).
10 Payment of restitution for economic loss is a mandatory obligation.
11 *Id.*; see also *State v. Lindsley*, 191 Ariz. 195, 197, 953 P.2d 1248,
12 1250 (App. 1997). Restitution payment for "economic loss" has
13
14 been defined as follows:
15

16 'Economic loss' means any loss incurred by a person as a
17 result of the commission of an offense. Economic loss
18 includes lost interest, lost earnings and other losses that
19 would not have been incurred but for the offense. Economic
20 loss does not include losses incurred by the convicted person,
damages for pain and suffering, punitive damages or
consequential damages.

21 Moreover, the type of economic losses sought in this Motion
22 includes an award of lost wages suffered by Carson Dumbrell, the
23 victim. See, e.g., *United States v. Serawop*, 505 F.3d 1112, 1121
24 (10th Cir. 2007) (Court ordered defendant to pay future expected
25 life wages suffered by family as a result of death of an infant
26 child); see also *State v. Blanton*, 173 Ariz. 517, 520, 844 P.2d
27
28

1 1167, 1170 (App. 1992) (defendant owed restitution for lost wages
2 of a deceased victim). Expenses claimed in this request relate to
3 Beth and her daughter's economic loss and the lost earnings of her
4 son. A crime victim need not prove up a restitution claim beyond
5 a reasonable doubt nor do economic loss calculations need to be
6 proven to exacting specifications. Instead, calculations simply
7 need to reflect a reasonably probable economic loss. See *State v.*
8 *Howard*, 168 Ariz. 458, 460, 815 P.2d 5, 7 (App. 1991). And to
9 award restitution by motion or hearing, the state need not prove
10 economic loss beyond a reasonable doubt but instead by a
11 preponderance. See *In re Stephanie B.*, 204 Ariz. 466, 470, 75
12 P.3d 114, 118 (App. 2003).

15 II. Discussion

16 A. Wage loss

17 Economic losses include "any loss incurred by a person as a
18 result of the commission of an offense... [including] lost interest,
19 lost earnings and other losses that would not have been incurred
20 but for the offense." A.R.S. §13-105(16). A victim's lost wages
21 are included in this calculation because they would not have been
22 incurred "but for" the offense. Wage losses include victim Beth
23 Fay's lost wages, lost wages suffered by her daughter Stephanie
24 Dumbrell and lost wages suffered by her deceased son Carson
25 Dumbrell.
26
27
28

1 1. Carson's Net Wage Losses

2 At the time of his murder, Carson was employed as a waiter at
3 the Olive Garden restaurant. Vocational economist Matt Sims with
4 the firm Sims & White, P.L.L.C. has rendered an opinion on the
5 present value of Carson's vocational economic losses net of
6 consumption due to his death. As indicated in the report attached
7 as Exhibit "A," "[t]he present value loss of earnings, minus
8 personal consumption, throughout the remainder of Mr. Dumbrell's
9 career is estimated at \$411,402." (emphasis added). This amount
10 takes the present value of reasonably anticipated gross income
11 minus consumption costs over Carson's work life expectancy.
12
13

14 2. Beth's Wage Losses

15 Victim Beth Fay enjoyed an extremely close relationship with
16 her son Carson. Unfortunately, the loss of Carson has hit Beth
17 particularly hard. Since Carson's murder, Beth has been diagnosed
18 with post-traumatic stress disorder and has not been able to return
19 to work since he died.
20

21 Loss of a loved one does not come with a specific coping recipe,
22 timeline for healing or time limit on recovery. One thing is clear
23 here, Beth had a special relationship with Carson. And because he
24 was so special to her, she suffers from post-traumatic stress
25 disorder, and generalized anxiety and insomnia according to her
26 medical providers. See Exhibit "B," Physician Statement dated
27
28

1 June 15, 2016 and Aug. 11, 2017. She has not been able to return
2 to work since the date her son was murdered. One of Beth's care
3 providers confirms that she has not been able to return to work as
4 a result of the emotional trauma she still endures:

5 To a reasonable degree of medical certainty, it is my opinion
6 that this patient will not be able to return to work for this
7 calendar year due to the emotional trauma associated with
8 the loss of her son.

9 Beth has been seen for a comprehensive assessment and 25
10 sessions in which [client] has been seen for symptoms
11 consistent with PTSD. These issues have affected her
12 quality of life significantly.

13 Exhibit "C," Letter from Rani Trent, LAC counselor dated May 20,
14 2016. And more recently, on August 30, 2017, another of Beth's
15 mental health providers indicated the following:

16 [I]t is my opinion that [Beth] has not been able to return to
17 work for this calendar year. It is also my opinion that Beth
18 may not ever be able to return to her profession as a teacher
19 due to the emotional impact the death of her son has had on
20 her emotional state.

21 Beth continues to be seen in therapy for PTSD, Acute Anxiety
22 and Stress. I believe that due to these issues her life;
23 finances, wellbeing and functioning have been affected.

24 Exhibit "D," Letter dated Aug. 30, 2017 from Patricia Birmingham
25 RN, LPC, Crisis Preparation and Recovery (emphasis added).

26 Beth's wage losses total \$143,636 reflecting wage and lost
27 benefits between the date of the crime to the present. This amount
28 includes 2015 losses of \$39,313, \$52,040 for 2016-17, and for the
2017-18 school year, this amount totals \$52,283 (representing same

1 average increase in pay from 2015-2017).¹ Regarding performance
2 pay, Dysart Unified School District spells out lost performance
3 pay as follows (Exhibit "E,"):

4
5 This letter is written to signify the 301 Performance Pay Beth Fay earned in the
6 2014/2015 school year and to inform the probable amount she would have earned in
7 301 Performance Pay had she been able to work in the 2015/2016 school year.

- 8 • For the 2014/2015 school year:
 - 9 ○ Beth Fay earned \$2,194.90 in 301 Performance Pay
 - 10 ○ Beth Fay earned \$250 in Instructional Improvement Fund
 - 11 ○ Total: \$2,444.90

- 12 • For the 2015/2016 school year, based on the same goals and classifications
13 earned in the 2014/2015 school year, and taking into account the increase in
14 301 Performance Pay for the 2015/2016 school year:
 - 15 ○ Beth Fay would have more than likely earned \$2,521.80 in 301
16 Performance Pay
 - 17 ○ Beth Fay would have received \$250 in Instructional Improvement Fund
18 monies
 - 19 ○ Total: \$2,771.80

20 These numbers are probable loss estimates and not overly
21 speculative. This crime victim simply did not receive performance
22 incentive pay because she continues to suffer from the loss of her
23 son without a timetable to return to work. Beth received the
24 performance incentive pay the prior year. Her doctors do not give

25 ¹ Beth may very likely never be able to return to work facing
26 permanent income loss as a result of the crime. She reserves the
27 right to seek compensation for her permanent loss of earnings at
28 a contested restitution hearing. *State v. Howard*, 168 Ariz. 458,
460, 815 P.2d 5, 7 (App. 1991). Moreover, she reserves the right
to testify about the nature and extent this crime has had not only
on her mental health and well-being but also on her physical health
including her current medical conditions which have been affected
by this crime.

1 a specific discharge date to return to work but they do say her
2 time away from work has been and continues to be medically
3 necessary.² After adjusting and rounding down these losses, lost
4 wages as an element of Beth's economic losses total \$143,636.

5 As indicated above, in *State v. Howard*, 168 Ariz. 458, 460,
6 815 P.2d 5, 7 (App. 1991), the Arizona Court of Appeals held that
7 "[T]he full amount of a victim's economic loss includes not only
8 those losses incurred at the time of sentencing, but also those
9 losses reasonably anticipated to be incurred in the future as a
10 result of the defendant's actions." Such a rationale holds true
11 here. The full amount of Beth's economic losses must include those
12 losses which have occurred indefinitely and which are reasonably
13 estimated to continue over time. And to confirm, one of Beth's
14 mental health providers concludes that she will likely be unable
15 to return to work full time as a teacher.

18 B. Other Economic Losses

20 1. Car loan

21 Beth loaned her son money to buy a car and will not be repaid
22 this loan. The sales representative and purchase contract for the
23 car spell out purchase price for the vehicle. See Exhibit "F." Of
24 the \$18,042 vehicle price, Carson paid \$6,000 and his mother paid
25

26
27 ² Dysart's yearly contributions of approximately \$750 into Beth's
28 Health Savings Account were not considered when preparing these
calculations.

1 the difference. Carson and his mother reached an informal
2 agreement that he would pay Beth back for the amount she paid for
3 the car. Neither a UCC, DMV reports or other contract evidences
4 this agreement but the burden to show economic loss does not
5 require a showing beyond a reasonable doubt. See *Howard*, 168 Ariz.
6 at 460, 815 P.2d at 7. Instead in Carson's room, he simply wrote
7 a note to himself to pay his mother for the car. And the car
8 salesman's note corroborates this agreement. Beth can establish
9 the foundation for the agreement between son and mother and the
10 car salesman's note verifies the mutual agreement if necessary at
11 a contested restitution hearing. However, documents included in
12 Exhibit "F" spell out details of the transaction demonstrating
13 that Beth's total economic loss arising out of the lost opportunity
14 to repay her loan total \$12,042.00.
15

16 2. Insurance Premiums

17 Beth's employer no longer pays her health insurance premiums
18 nor does her employer contribute to any Health Savings Account.
19 As a result, Beth has been paying her health insurance premiums
20 out of pocket totaling \$2,044.56. See Exhibit "G," Health
21 Insurance Premium statements (redacted).
22

23 3. Physician visits and prescription co-pays

24 Mileage costs and office copayments and prescription copays
25 which Beth paid cost her the total sum of \$390.09. See Exhibit
26
27
28

1 "H," explanation of benefit statements and billing receipts
2 (redacted).

3 4. Mileage and Parking costs for visits to/from Maricopa
4 County Superior Court

5 Travel costs and parking to/from Maricopa County Superior
6 Court total \$644.80.

7 C. Stephanie Dumbrell's economic loss

8 In addition to Beth's economic loss, her daughter Stephanie
9 Dumbrell/Carson's sister suffered economic loss as a direct result
10 of the crime. And to confirm, Stephanie is considered a victim as
11 defined by A.R.S. §13-4401(19) ("Victim means...if the person is
12 killed..., the person's ... parent, ... or sibling..."). Stephanie lives
13 out of town and she incurred travel expenses taking time off from
14 work to attend her brother's funeral and trial. Exhibit "I"
15 (redacted) outlines her travel costs and lost wages suffered as a
16 direct result of the crime. These economic losses including travel
17 costs and lost wages broken down as follows:
18
19

20 Travel Costs:

21 Airline costs to attend Carson's funeral (9/6/15 - 9/18/15):

22 \$348.00

23
24 Airline costs to attend trial (1/25/17 - 2/22/17):

25 \$236.20

26 Airline costs first sentencing date (4/18/17 - 4/25/17):

27 \$259.60
28

1	Airline costs second sentencing date (5/23/17 - 5/28/17)	
2	\$473.96	
3	Total Travel Costs:	<u>\$1,317.76</u>
4	<u>Wage Losses:</u>	
5	Funeral (9/6/15 - 9/18/15):	N/A
6	Trial (1/25/17 - 2/22/17):	\$1,851.24
7	First sentencing (4/18/17 - 4/25/17):	\$ 462.81
8	Second sentencing (5/23/17 - 5/28/17):	\$ 462.81
9	Total Lost Wages:	<u>\$2,776.86</u>
10	Grand Total Lost wages and travel costs:	<u>\$4,094.62</u>

13 III. Conclusion

14 Beth's overall economic losses conservatively total

15 \$570,159.45 as a result of the defendant's crime. Beth requests

16 that this Court award her this amount representing the total of

17 her economic losses. Moreover, she requests that this Court award

18 the amount as a Criminal Restitution Order. Based upon the length

19 of sentence, without providing incentive to the Defendant to either

20 promptly pay restitution or make a good faith effort to find money

21 to pay restitution, both Beth and her daughter will not receive

22 any substantial restitution payments while he remains imprisoned.

23 This court has discretion to issue a criminal restitution order

24 (CRO) now pursuant to A.R.S. §13-805(B). Entry of a CRO means

25 that interest will begin accruing at the time of entry rather than

26

27

28

1 on release from prison which will incentivize this defendant to
2 pay restitution or make a good faith effort to find money to pay
3 restitution promptly. Otherwise, he has no incentive to pay
4 immediately and meaningful restitution payments will not begin
5 until release from prison several years later. Entry now of a CRO
6 meets the obligations spelled out in the Arizona Constitution to
7 allow a crime victim the opportunity to "receive prompt restitution
8 from the person or persons convicted of the criminal conduct that
9 caused the victim's loss or injury." ARIZ. CONST. Art. 2,
10 §2.1(A)(8).
11

12 Based upon the foregoing discussion and attached exhibits,
13 victims Beth Fay and Stephanie Dumbrell respectfully request that
14 pursuant to A.R.S. §13-805(B), this Court enter a Criminal
15 Restitution Order in Beth's favor totaling \$570,159.45
16 representing the estate's economic losses and Beth's economic
17 losses and in Stephanie Dumbrell's favor for the total sum of
18 \$4,094.62.
19

20
21 Respectfully submitted this 21st Day of March, 2018.

22 **ARIZONA CRIME VICTIM RIGHTS LAW GROUP**

23
24 /s/ Randall Udelman
25 Randall Udelman
26 P.O. Box 2323
27 Scottsdale, Arizona 85252-2323
28 (480) 946-0832
Counsel for Victim Beth Fay

1 Original of the foregoing
e-filed on this 21st day of March, 2018

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Copies of the foregoing emailed and mailed
on this 21st Day of March, 2018 to:

Maricopa County Attorney
Kevin Pollak, Deputy County Attorney
301 W. Jefferson Street, 4th Floor
Phoenix, Arizona 85003-2143
Attorneys for State of Arizona

Michael Riikola, Esq.
J. Grant Woods, Esq.
650 N 3rd Ave
Phoenix, AZ 85003-1523
Attorneys for Defendant

 /s/ Randall Udelman

EXHIBIT “3”

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1 Michael D. Kimerer, #002492
2 Rhonda Elaine Neff, #029773
3 **KIMERER & DERRICK, P.C.**
4 1313 East Osborn Road, Suite 100
5 Phoenix, Arizona 85014
6 Telephone: (602) 279-5900
7 Fax: (602) 264-5566
8 E-mail: mdk@kimerer.com
9 rneff@kimerer.com
10 Attorneys for Defendant

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR MARICOPA COUNTY

STATE OF ARIZONA,

Plaintiff,

vs.

JORDAN HANSON,

Defendant.

Case No. CR2015-005451-001

**NOTICE OF LIMITED SCOPE
APPEARANCE AS ATTORNEY FOR
JORDAN HANSON REGARDING
RESTITUTION ORDER**

(Honorable Pamela Gates)

Defendant, Jordan Hanson, through his counsel Michael D. Kimerer and Rhonda Elaine Neff of the firm of Kimerer and Derrick, P.C. in accordance with ER 1.2, Arizona Rules of Professional Conduct, hereby gives this Court notice of a Limited Scope Appearance on behalf of the Defendant. This Notice is hereby submitted based on the circumstances detailed herein.

The Defendant, Jordan Hanson was found guilty for the death of Carson Dumbrell and convicted of second degree murder on February 16, 2017. On May 24, 2017 the Defendant was sentenced to a term of imprisonment for twelve (12) calendar years in the Arizona Department of Corrections. Defendant timely filed a Notice of Appeal on May 25, 2017. Defendant's appeal is currently pending before the Arizona Court of Appeals – Division One.

On or around March 21, 2018, Counsel for the victim's family filed a request for this Court to issue a Restitution Order against the Defendant. Undersigned counsel respectfully requests permission to appear in a limited scope basis to represent the Defendant on the issue of restitution only.

1 Counsel will ask to be withdrawn from this matter following any ruling by the court
2 resolving the issue of restitution.

3 Therefore, it is respectfully requested the Court enter into the record undersigned
4 counsels Notice of Limited Scope Appearance on behalf of Defendant, Jordan Hanson, for
5 restitution proceedings arising in the above-captioned matter.

6 Respectfully submitted this 11th day of April, 2018.

7 **KIMERER & DERRICK, P.C.**

8 /s/ Michael D. Kimerer
9 Michael D. Kimerer
10 Rhonda Elaine Neff
11 1313 East Osborn, Suite 100
12 Phoenix, Arizona 85014
13 Email: mdk@kimerer.com
14 rneff@kimerer.com
15 *Attorneys for Defendant*

12 **ORIGINAL** of the foregoing filed electronically
13 On this 11th day of April, 2018, with:

14 Clerk of Court
15 Maricopa County Superior Court

16 **COPIES** of the foregoing electronically delivered
17 on this 11th day of April, 2018, to:

18 Honorable Pamela Gates
19 Maricopa County Superior Court
20 South Criminal Court Tower, Suite 13-113
21 aldecoaj@superiorcourt.maricopa.gov

22 Kevin Pollak
23 Assistant Deputy County Attorney
24 Maricopa County Attorney's Office
301 W. Jefferson Street, 4th floor
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pollakk@mcao.maricopa.gov
Attorney for the State

1 **COPY** of the foregoing electronically delivered
on this 11th day of April, 2018, to:

2
3 Randall Udelman, Esq.
4 ARIZONA CRIME VICTIM RIGHTS LAW GROUP
5 P.O. Box 2323
6 Scottsdale, Arizona 85252-2323
7 rudelman@azvictimrights.org
8 *Counsel for Victim Beth Fay*

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By: /s/ Melissa Wallingsford

EXHIBIT “4”

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1 Michael D. Kimerer, #002492
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6 Fax: (602) 264-5566
7 E-mail: mdk@kimerer.com
8 Attorneys for Defendant

9 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
10 IN AND FOR MARICOPA COUNTY

11 **STATE OF ARIZONA,**

12 Plaintiff,

13 vs.

14 **JORDAN HANSON,**

15 Defendant.

Case No. CR2015-005451-001

**DEFENDANT'S HANSON'S RESPONSE IN
OPPOSITION TO MOTION FOR
CRIMINAL RESTITUTION ORDER**

(Honorable Pamela Gates)

16 Defendant, Jordan Hanson, by and through undersigned counsel, hereby respectfully
17 submits this response in opposition to Victim's Beth Fay's Motion for Criminal Restitution
18 Order. This Memorandum is supported by the following Memorandum of Points and Authorities.

19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 **I. PROCEDURAL AND FACTUAL BACKGROUND**

21 This case involves the death of Carson Dumbrell on September 5, 2015. Jordan Hanson
22 was charged with his death. On February 16, 2017, after a jury trial, Mr. Hanson was convicted
23 of second degree murder. On May 24, 2017, Mr. Hanson was sentenced to serve twelve (12)
24 years in the Department of Corrections. A notice of appeal was timely filed. The appeal is
currently pending at the Arizona Court of Appeals. The direct appeal stage of the litigation is still
in the early process.

Mr. Hanson adamantly denies the allegations made against him in this case. He is
confident in his ability to clear his name through the appellate system. Mr. Hanson understands
that Mr. Dumbrell and his family are named "victims" in this case. The factual allegations are

1 disputed in this case as to whether Mr. Dumbrell was a “victim”. The term “victim” is used only
2 as a designation given by the Court. Mr. Hanson is not conceded, nor will he, that Mr. Dumbrell
3 was actually a victim in this case. Mr. Hanson believes that a restitution judgment should not be
4 issued prior to exhaustion of his appeals. In the event restitution is ordered, Mr. Hanson would
5 have to appeal that judgment as well. A second appeal pending on restitution issues while
6 appeals are ongoing into the actual conviction are a waste of judicial resources. Mr. Hanson has
7 no means to pay restitution while incarcerated. As such, a reasonable time period to permit the
8 appeal of the conviction causes no prejudice to the alleged victims in this case.

9 Mr. Hanson is also requesting that the Court not issue criminal restitution order. Ms. Fay
10 has argued that it is necessary to provide an incentive to Mr. Hanson to either promptly pay
11 restitution or make a good faith effort to find money to pay restitution because otherwise the
12 victims may not receive restitution for many years due to his lengthy incarceration. Motion at 10.
13 Mr. Hanson is incarcerated at this time. He has no ability to promptly pay restitution in the
14 amount sought by Mr. Fay. He is a young man without assets. While incarcerated, he has no way
15 to find money to pay restitution. If he is unsuccessful in his appeal, his only means of income
16 will be the minimal amount he receives through DOC employment. Mr. Hanson should be given
17 the same opportunity most defendants are given to begin making restitution payments without
18 the requirement that interest begin accruing immediately. To issue a criminal restitution order at
19 this time is merely punitive to Mr. Hanson because he has no means to pay the restitution order
20 while incarcerated.

21 **II. RESTITUTION SOUGHT**

22 Mr. Hanson, through counsel, has received the documentation related to the restitution
23 requests and has several concerns related to the requests. Although the title of the Motion is “Victim
24

1 Beth Fay’s Motion for Criminal Restitution Order,” the request is really being made on behalf of
2 Beth Fay and Stephanie Dumbrell. There are three separate requests for restitution:

3 1. Beth Fay’s Personal Requests:

- 4 – Ms. Fay is requesting \$143,636 in lost wages, with the ability to seek additional
5 wages in the future.
- 6 – She is requesting \$12,042 for a car loan, with no offset for sale value.
- 7 – She is requesting \$2,044.56 in insurance premiums
- 8 – She is requesting \$390.09 in physician visits and prescription copays
- 9 – She is requesting \$644.80 in travel costs and parking fees

10 2. Beth Fay’s Request for Carson Dumbrell –

- 11 – Ms. Fay is requesting \$411,402.00 in lost future earning of Carson Dumbrell

12 3. Beth Fay’s Request for Stephanie Dumbrell –

- 13 – Ms. Fay is requesting \$4,094.62 for travel expenses

14 **III. LEGAL ARGUMENT**

15 The Court can order a defendant to pay restitution for economic losses upon conviction of a
16 criminal offense. A.R.S. § 13-804(A). The Court should consider all losses caused by the criminal
17 offense. A.R.S. § 13-804(B). The Arizona Supreme Court set forth a three-part test to determine
18 whether restitution is owed. *State v. Wilkinson*, 202 Ariz. 27, 29, 39 P.3d 1131, 1133 (2002). First,
19 the loss must be economic. *Id.* Second, the loss must be one that the victim would not have incurred
20 but for the defendant’s criminal offense. *Id.* Finally, the criminal conduct must directly cause the
21 economic loss. *Id.* The state bears the burden of proving a restitution claim by a preponderance of
22 the evidence. *State v. Lewis*, 222 Ariz.321, 324 ¶ 7, 214 P.3d 409, 412 (App. 2009). A victim is
23 not entitled to receive restitution for consequential damages, but only for direct economic loss

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1 from the offense. *See* A.R.S. § 13-105(16) (“Economic loss does not include . . . consequential
2 damages.”). When a loss results from the concurrence of some event other than the defendant’s
3 criminal conduct, the loss is indirect and consequential and does not qualify for restitution.

4 **A. Lost Wages of Carson Dumbrell**

5 Ms. Fay is seeking \$411,402 if future lost earnings based off her expert’s unchallenged
6 evaluation of what Mr. Dumbrell would have made over his lifetime. In doing so, Ms. Fay makes
7 the broad assumption that she would have personally benefited from Mr. Dumbrell’s future
8 earnings. There is no evidence to support such a broad assumption. Mr. Dumbrell may have
9 benefited from his own future earnings; however, that does not translate into his mother suffering a
10 direct economic loss due to the mere assumption his earnings would directly benefit the family.
11 Ms. Fay is arguing that “but for” Mr. Dumbrell’s death, she would have directly benefited from the
12 \$411,402 in future wages of her son. That is the only way to translate this request into a “direct
13 economic loss” as required under the restitution statute. “‘But for’ causation does not suffice to
14 support restitution, for if it did, restitution would extend to consequential damages...[which] our
15 criminal code expressly provides the contrary.” *Wilkinson*, 202 Ariz. at 29, 39 P.3d at 1133.
16 Economic loss is intended to compensate victims for “loss actually suffered.” *Town of Gilbert*
17 *Prosecutor’s Office v. Downie*, 218 Ariz. 466, 469, 189 P.3d 393, 396 (2008). A victim should not
18 obtain a windfall based upon the defendant’s conviction. *Id.* at 472.

19 In this case, Ms. Fay is attempting to use the criminal restitution statutes as a replacement
20 to the civil remedies available to her. Ms. Fay is well aware of her available civil remedies as civil
21 litigation is pending which encompasses these same claims. (CV2016-003499). Our courts have
22 specifically found that criminal restitution is not intended to replace the victim’s civil remedies and
23 may not provide the victim with the full benefit of the bargain. *Town of Gilbert* at 472, 189 P.3d at
24

1 399. Ms. Fay has the ability to seek additional damages as one of her civil remedies. *Wilkinson II* at
2 30. In fact, a court's use of the restitution statutes to make victims whole for the entire direct and
3 indirect losses as a result of criminal conduct may violate the defendant's right to a civil jury trial
4 as provided for in the Arizona Constitutional. *Wilkinson* at 29-30, 39 P.3d at 1133-34. "Restitution
5 is not meant to penalize the defendant." *Town of Gilbert* at 469, 189 P.3d at 396. Requiring a
6 defendant to reimburse the victim for actual direct losses serves its function of rehabilitation
7 without using the restitution statutes as a means of penalizing criminal conduct. *Wilkinson* at 30, 39
8 P.3d at 1134.

9 The Court should not permit Ms. Fay to use the restitution statutes to claim a speculative
10 benefit to her of Mr. Dumbrell's future earnings. The Court should prohibit Ms. Fay to base her
11 restitution request off of an unchallenged expert opinion. This issue is being rightfully litigated in
12 the civil courts where it is subject to challenge, discovery, and a jury trial determination of liability
13 and damages. To permit Ms. Fay to recover these damages under the restitution statutes opens a
14 Pandora's box for all future cases. It provides an unchallenged and unfair avenue for victims to
15 obtain civil remedies through a process without the necessary checks and balances allowed for in
16 civil litigation. It essentially turns every criminal case into a means of automatic recovery for
17 victims without the necessary checks and balances to ensure proper damage calculations and
18 without the benefit of a neutral jury. The litigation required to ensure a proper determination of the
19 alleged damages being requested turns the criminal restitution hearing into a civil non-jury trial
20 proceeding. It would require a substantial amount of time to conduct discovery and for Mr. Hanson
21 to retain an expert to challenge the lost wage calculation of Ms. Fay's expert. Without the ability to
22 retain an expert to challenge damages on these types of claims, victims are being permitted to
23 expert shop for the highest possible recovery and then have the award stamped by a criminal court

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1 judge because the defendant is not put in a position to challenge the amounts requested. That
2 subverts the purpose of our civil jury trial and is an inappropriate use of the restitution statutes.

3 **B. Lost Wages of Beth Fay**

4 There is little doubt that lost earnings can qualify as restitution expenses. *State v. Lindsley*,
5 191 Ariz. 195, 198, 953 P.2d 1248, 1251 (Ct. App. 1997). Ms. Fay is requesting \$143,636 in lost
6 wages, with the ability to seek additional wages in the future. Ms. Fay's lost income claim sits on
7 different legal grounds than Mr. Dumbrell's. She is claiming that she is so distraught over the death
8 of her child that she can't work and may never be able to work again. The Courts have allowed a
9 victim's family to recover reasonable lost wages that are directly caused by criminal conduct. *Id.* at
10 198, 953 P.2d at 1251. Mr. Hanson does not dispute Ms. Fay's potential to recover some lost wages
11 for the court appearances she attended and, possibility, for a reasonable amount of time to mourn
12 her son. However, Mr. Hanson disputes that he should be required to pay \$143,636 in lost wages for
13 the past three years Ms. Fay has not been employed. Again, a reasonable grieving period is
14 appropriate. As discussed above, the Court's willingness to allow a victim's family to use the
15 restitution statutes as a means to get an easy judgment of such losses without challenge is not what
16 was intended by the restitution statutes. The simple statement by Ms. Fay's medical providers that
17 she is unable to return to work due to her grief if left unchallenged puts all defendants in a very bad
18 position moving forward. Ms. Fay's medical inability to work is something subject to dispute and to
19 challenge. In a civil action for these damages, the defendant has the ability to call adverse medical
20 professionals and other witnesses to dispute the length of time by which an alleged victim cannot
21 work. The defendant has the ability to require disclosures of medical notes and diagnosis that
22 provide proof underlying the medial professional's opinion. Most importantly, a jury gets to
23 determine the reasonableness of the lost wages and assess damages accordingly.

24

1 In this case, Ms. Fay seeks to use the easier route. In the criminal restitution process, the
2 defendant does not get to request specific disclosures related to a victim's mental or medical status,
3 to depose the victim regarding those damages and whether they are aggravating those damages for a
4 greater recovery, or get the opportunity or time to engage additional experts to dispute the restitution
5 claim, nor does he get a neutral jury to device the reasonableness of the claim. In many cases, the
6 defendant waives presence at the restitution hearing. To allow an alleged victim to use the
7 restitution process to obtain such drastic damages with or without the presence of the defendant
8 provides the alleged victim access and potential to abuse the restitution statutes and manufacture
9 damages for which the defendant cannot challenge. Ms. Fay is seeking damages for more than three
10 years of missed employment with the ability to request even more in the future. Ms. Fay has the
11 potential to abuse the restitution statutes to provide future benefits to herself based on the guise of
12 an inability to continue working due to grief. Such a claim should rightfully be determined in a civil
13 court with a neutral jury that has reviewed all the evidence from both the plaintiff and the defendant.
14 Such a judgment should not be made without challenge, without the ability to seek defense experts
15 and defense disclosures, and without a trial. A restitution hearing is simply not intended to act as a
16 civil trial for such damages. The potential for abuse is too high.

17 **C. Dumbrell Car Loan**

18 Ms. Fay is requesting \$12,042 in economic losses due to a car loan she allegedly made her
19 son. According to the Motion, she claims that the car was purchased for \$18,042.84. She claims
20 that her son promised to pay back all but \$6,000 of that loan. The Motion does not specify whether
21 the mother subsequently sold the vehicle and suffered an actual loss due to the loan. The
22 appropriate measure of economic damages in a restitution case is the fair market value of the
23 property at the time of the loss. *State v. Ellis*, 172 Ariz. 549, 550, 838 P.2d 1310, 1311 (Ct. App.
24

1 1992). This is the measure that realistically reflects the actual loss to a victim. *Id.* “Evidence of
2 fair market value may include, among other things, whether the property was new when
3 purchased, the original purchase price, how much time the owner has had the use of the
4 property and the condition of the property at the time of the [crime].” *Id.* at 551, 838 P.2d at
5 1312. None of this evidence was presented.

6 Rather, the Motion implies that Ms. Fay kept the car, giving her the benefit of the vehicle in
7 addition to the entire value of the loan. This would be a windfall to Ms. Fay and does not
8 realistically reflect the actual loss to her. Had Mr. Dumbrell been alive, Ms. Fay would not have had
9 the benefit of both the vehicle and the loan amount. Mr. Hanson does not dispute that restitution
10 may be appropriate for the amount of the actual loss to Ms. Fay, if any, in the difference between
11 the value of the fair market resale value of the car minus the remaining amount of the loan after
12 consideration of the \$6,000 paid by Mr. Dumbrell himself. There is no evidence of the fair market
13 value of the vehicle that would mitigate Ms. Fay’s losses if she sold the vehicle. Interestingly,
14 Exhibit F also does not contain any evidence that the entire amount of the vehicle of \$18,042.84 was
15 actually paid at the time of purchase rather than being purchased through a loan process. The
16 evidence provided does not support actual “economic losses” to Ms. Fay in the full amount of the
17 loan owed to her of \$12,042.

18 **D. Fay Co-Pays**

19 Ms. Fay is seeking \$2,044.56 in insurance co-pays. The basis of the request is that Ms. Fay’s
20 employer is no longer paying her health premiums. Again, this issue directly corresponds to the
21 reasonableness of Ms. Fay’s time away from work. This is a matter for a civil jury to determine.
22 Despite that objection, Ms. Fay has also not provided any evidence that her employer was paying
23 100% of her premiums prior to taking leave from her position. If Ms. Fay was responsible for any of
24

1 those insurance premiums, then she should not expect a windfall here by having Mr. Hanson pay
2 100% of the premium amount. The evidence provide does not support the amount sought and Mr.
3 Hanson strongly believes that before an order can be made on these premiums, a determination of
4 reasonableness in Ms. Fay's time away from work must be determined.

5 **E. Fay's Co-Pays and Prescriptions**

6 Mr. Hanson does not dispute that in some cases the medical treatment of a victim can be
7 subject to restitution. The burden is on the person seeking restitution to present sufficient evidence
8 that the amount sought is directly caused by the criminal conduct. *State v. Lewis*, 222 Ariz. 321,
9 324, 214 P.3d 409, 412 (App. 2009). Ms. Fay has failed to meet that burden with the documents
10 provided in Exhibit H. Ms. Fay has attached a number of billing sheets from Arrowhead Family and
11 Sports Medicine that provide little to no information on what the purpose of the medical visit was.
12 Some of the billings sheets list "expanded problem focused" or "detailed" and two of them include
13 "urinalysis". That does not provide any information on what services were being rendered or how
14 those services directly relate to Mr. Dumbrell's death. Those billing statements could relate to any
15 number of things unrelated to Mr. Dumbrell's death. It could relate to medical issues that predated
16 Mr. Dumbrell's death.

17 Ms. Fay has also provided receipts for prescriptions as well as prescription labels showing a
18 number of different medications. Once again, there is no evidence presented that these prescriptions
19 directly relate to the death of Mr. Dumbrell or that the prescription itself was only issued after his
20 death to deal specifically with the issues alleged by Ms. Fay. It is unknown whether these
21 medications were prescribed prior to his death or after his death. It is also unclear whether the
22 prescriptions were ordered to provide medication for other pre-existing conditions that may existed
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1 prior to his death. Without further information connecting these prescriptions to Mr. Dumbrell's
2 death as required for restitution, the damages are speculative at best.

3 **F. Fay Travel Costs and Parking Fees**

4 No evidence has been provided to support the \$644.80 in travel fees and parking fees
5 requested by Ms. Fay. The Motion for Restitution only states "travel costs and parking to/from
6 Maricopa County Superior court total \$644.80." There are no receipts for parking and no receipts
7 that show or support substantial costs for travel to and from the courthouse. It is unknown whether
8 those costs are associated to public transportation, gas, air fare, etc. Mr. Hanson does not dispute
9 that there may be some restitution claims that could be recovered as restitution. However, Ms. Fay
10 has failed to meet her burden as this request by providing an unsubstantiated and unsupported
11 amount.

12 **G. Stephanie Dumbrell Requests**

13 Ms. Dumbrell is seeking travel costs of \$1,317.76 for airfare. There is some case law that
14 suggests that a victim's family is not entitled to travel costs because they are not required to attend a
15 hearing. *State v. Wideman*, 165 Ariz. 364, 798 P.2d 1373 (App. 1990)(since a victim's family was
16 not required to attend hearings, the expense was not directly related to the crime and, instead, was a
17 consequential damage). Despite some case law suggesting travel expenses may not be recoverable,
18 Mr. Hanson acknowledges that others cases have allowed for such expenses to be recovered through
19 restitution. Mr. Hanson will not dispute Ms. Dumbrell's claim to airfare in the amount sought if Mr.
20 Hanson is unsuccessful in his appeals.

21 Ms. Dumbrell is seeking \$2,776.86 in lost wages for three separate time periods she was in
22 Arizona. Generally, lost profits are consequential damages and excluded from economic loss.
23 *State v. Pearce*, 156 Ariz. 287, 289, 751 P.2d 603, 605 (App. 1988), *State v. Barrett*, 177 Ariz.

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1 46, 49, 864 P.2d 1078, 1081 (App. 1993). Ms. Dumbrell seeks \$1,851.24 in lost wages to attend
2 trial, \$462.81 for attending the first sentencing hearing, and \$462.81 for attending the final
3 sentencing hearing. As with the airfare above, Mr. Hanson does not dispute that Ms. Dumbrell may
4 be entitled to lost wages for the days she attended the respective hearings. However, the amounts
5 provided do not indicate how many hours she is alleging due to her attendance. There are pay stubs
6 attached as part of Exhibit I, but those do not indicate anything other than pay during certain
7 periods. The times that are listed in the Motion for Restitution cover dates that were not entirely part
8 of these proceedings. Mr. Hanson may be subject to restitution for the amount of lost wages during
9 the attendance of hearings and necessary travel days, but disputes that Ms. Dumbrell is entitled to
10 pay for days she would not have worked anyway or days where she remained in Arizona to spent
11 family time causing her to miss work. There is insufficient information to parse out the amount
12 subject to restitution.

13 As an example, one of the requests includes lost wages from 1-25-17 through 2-22-17.
14 Presumably over that one month period of time, Ms. Dumbrell would have had a number of
15 scheduled days off. It is unknown whether those days are included in the calculation. Further, the
16 trial setting hearing was not scheduled until January 30, 2017. The final trial management
17 conference was held on January 23, 2017. Based on the date calculations, Ms. Dumbrell spent an
18 additional five days prior to trial in Arizona. Mr. Hanson was found guilty by the jury on February
19 16, 2017. Ms. Dumbrell remained in Arizona until February 22, 2017. The first sentencing was
20 scheduled for April 21, 2017. However, Ms. Dumbrell remained in Arizona from April 18, 2017
21 through April 25, 2017. The final sentencing hearing was held on May 24, 2017. Again, Ms.
22 Dumbrell remained in Arizona from May 23, 2017 through May 28, 2017. At least a portion of her
23 lost wages claims are for days she was not participating in the legal proceedings and did not need to
24

1 be present in this case. The extended dates of her travel were voluntary days she elected to miss
2 work so she could remain in Arizona with her family. Mr. Hanson should not be held responsible
3 for the additional days she elected to remain in Arizona outside of the necessary court hearings.
4 Those days fall within consequential damages, which are not recoverable through restitution.

5 Mr. Hanson requests that these requests be denied until additional information has been
6 provided to support the amounts sought.

7 **IV. CONCLUSION**

8 Based upon the foregoing, Mr. Hanson respectfully requests that this Court deny the
9 restitution requests sought in this case to the extent they are more appropriately handled through
10 civil litigation and are unsupported by sufficient evidence of actual losses.

11 Respectfully submitted this 8th day of May, 2018.

12 **KIMERER & DERRICK, P.C.**

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18 *Attorneys for Defendant*

19 **ORIGINAL** of the foregoing filed electronically
20 On this 8th day of May, 2018, with:

21 Clerk of Court
22 Maricopa County Superior Court

23 **COPY** of the foregoing electronically delivered
24 on this 8th day of May, 2018, to:

Honorable Pamela Gates
Maricopa County Superior Court
South Criminal Court Tower, Suite 13-113
aldecoaj@superiorcourt.maricopa.gov

1 **COPIES** of the foregoing electronically delivered
on this 8th day of May, 2018, to:

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10 By: /s/ Melissa Wallingsford

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EXHIBIT “5”

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5 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
6 **IN AND FOR THE COUNTY OF MARICOPA**

7 STATE OF ARIZONA)
8 Plaintiff,) No. CR2015-005451-001
9 vs.) **VICTIM BETH FAY'S REPLY IN**
10 JORDAN MICHAEL HANSON;) **SUPPORT OF HER MOTION FOR**
11 Defendant.) **CRIMINAL RESTITUTION ORDER**
(Assigned to the Hon. Pamela
12) Gates)

13 I. Background

14 The Defendant and his parents have vigorously defended
15 themselves in a separate civil lawsuit over the past two years.
16 But restitution and civil claims are independent of each other and
17 civil cases routinely occur while courts consider and award
18 restitution. *See State v. Iniquez*, 169 Ariz. 533, 536, 821 P.2d
19 194, 197 (App. 1991). The civil case pending for two years has
20 not resolved, has been pending not only against a convicted felon
21 but also against his non-criminal defendant parents and seeks
22 separate damages for pain and suffering, consequential and
23 punitive damages. A criminal defendant does not have license to
24 sidestep his obligations to pay for economic losses caused by a
25 crime that a jury said he committed simply because a civil case
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1 may lead to judgment involving separate claims, damages and
2 parties. Instead, A.R.S. §13-603(C) instructs that on conviction,
3 "the court shall require the convicted person to make restitution
4 to the person who is a victim of the crime or to the immediate
5 family of the victim if the victim has died, in the full amount of
6 the economic loss..." (emphasis added); see also *Iniguez*, 169 Ariz.
7 at 536, 821 P.2d at 197 ("One of the purposes of mandatory
8 restitution is reparation to the victim... The goal is to make the
9 victim whole."). Beth asks to be made whole financially for "all
10 losses caused by the criminal offense ... for which the defendant
11 has been convicted." A.R.S. §13-804(B). She has asked for
12 economic losses that would not have been incurred but for the crime
13 which were directly caused by the criminal conduct; nothing more
14 and nothing less. See *State v. Wilkinson*, 202 Ariz. 27, 29, 39
15 P.3d 1131, 1133 (2002); see also *State v. Madrid*, 207 Ariz. 296,
16 298, 85 P.3d 1054, 1056 (App. 2004) see also A.R.S. §13-105(16).
17 And before advancing an argument that criminal restitution is
18 somewhat relevant and interrelated to a civil case¹, a Defendant
19 must actually pay restitution. See A.R.S. §13-807 ("An order of
20 restitution in favor of a person does not preclude that person
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25 ¹ A victim may seek reimbursement for economic loss on the one hand and
26 separate damages for pain and suffering, punitive damages or consequential
27 losses on the other. *Iniguez*, 169 Ariz. at 436, 82 P.2d at 197.
28 Coordination of restitution and civil remedies only becomes relevant if
damages sought in the civil case are duplicative of restitution amounts
actually paid in the criminal case. A.R.S. §13-807.

1 from bringing a separate civil action and proving in that action
2 damages in excess of the amount of the restitution order that is
3 **actually paid.**"). (emphasis added). This defendant has already
4 telegraphed that "[h]e has no ability to promptly pay restitution
5 in the amount sought by Mr. (sic) Fay. He is a young man without
6 assets." Defendant's Response at 2. For this reason alone, civil
7 liability should not play a role in awarding restitution for
8 economic loss.
9

10 II. Argument

11 A. Carson's Wage Losses

12 Defendant suggests that Carson's lost wages have nothing to
13 do with restitution. He argues that evidence must show that Beth
14 would have personally benefited from Carson's future earnings and
15 that awarding lost wages results in a windfall to Beth. Response
16 at 4. But we know that Carson Dumbrell has no future earnings as
17 a direct result of a second degree murder that a jury said the
18 Defendant committed. The uncontested evidence shows that Carson's
19 future lost earnings total \$411,402. These conservative
20 calculations subtract personal consumption costs and have been
21 discounted to present value. See Beth Fay's Motion at Exhibit
22 "A." These calculations are no different from what Carson would
23 have presented had he survived and instead faced a permanent
24 disability and medical care costs but for the criminal act. See,
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1 e.g., *State v. Howard*, 168 Ariz. 458, 460, 815 P.2d 5, 7 (App.
2 1991) (“[T]he full amount of a victim’s economic loss includes not
3 only those losses incurred at the time of sentencing, but also
4 those losses reasonably anticipated to be incurred in the future
5 as a result of the defendant’s actions.”). Had he survived, Carson
6 obviously would have recovered restitution for his lost earnings
7 and medical costs and future anticipated medical care and
8 anticipated earnings loss. *See id.* So taking the Defendant’s
9 argument to its logical extreme, he asks this Court to reward him
10 simply because he successfully killed his crime victim rather than
11 disabling him; Arizona law never intended such a result.
12 Respectfully the real question is whether Beth may step in and
13 recover Carson’s known future economic wage losses. In other
14 words, can she assume Carson’s rights to collect restitution for
15 future lost income? She can act as personal representative for
16 the Estate of Carson Dumbrell and recover restitution on its behalf
17 for the same reasons spelled out in *United States v. Serawop*, 505
18 F.3d 1112, 1120 (10th Cir. 2007) (full restitution includes future
19 lost income resulting from homicide involving three month old
20 victim) and in *United States v. Cienfuegos*, 462 F.3d 1160, 1164
21 (9th Cir. 2006) (“[I]t is plain that the statute [Mandatory Victim
22 Restitution Act] allows a representative of the victim’s estate or
23 another family member to assume the victim’s rights to collect
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1 restitution for future lost income...").² So for these reasons, Beth
2 respectfully renews her request for an order of restitution in the
3 total sum of \$411,402.

4 B. Beth's Wage Losses

5 Defendant does not dispute the number \$143,636 nor can he
6 dispute that Beth has not worked since her son died. Her lost
7 wages are well grounded in fact and supported by specific exhibits
8 showing Beth's time off from work, the actual wage loss she has
9 faced and the expert diagnosis of post-traumatic stress disorder
10 associated with facing the loss of her son. Defendant cannot
11 dispute that Beth has not worked nor can he dispute the specific
12 lost wage claims. Instead, Defendant suggests that this court
13 should impose an artificial time limit on grief and that only a
14 "reasonable grieving period is appropriate." Defendant's Response
15 at 6. What time off from work he would consider appropriate and
16 what time off from work does he challenge as inappropriate or
17 somehow manufactured? He does not contest that Beth has not
18 worked. Imposing a reasonableness standard on a crime victim is
19 not the appropriate restitution inquiry here. Instead, imposing
20 a reasonableness inquiry ignores Arizona law requiring the
21 defendant to pay "[T]he full amount of [Beth's] economic loss
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27 ² These two federal cases interpreted the Mandatory Victim Restitution Act, 18
28 U.S.C. §3663, a statute similar to Arizona's victim rights statutes and
constitutional protections for restitution.

1 [including] not only those losses incurred at the time of
2 sentencing, but also those losses reasonably anticipated to be
3 incurred in the future as a result of the defendant's actions."
4 *State v. Howard*, 168 Ariz. 458, 460, 815 P.2d 5, 7 (App. 1991)
5 (emphasis added); see also A.R.S. §13-603(C). Because it is
6 uncontested that she has not worked since her son's death and
7 continues to suffer from PTSD, her lost wages total \$143,636, Beth
8 requests that this Court award restitution.
9

10 C. Car Loan

11 The car remains in Beth's possession and her economic losses
12 should be adjusted downward to the total sum of \$4863 representing
13 the total balance minus fair market value of the vehicle. See
14 Exhibit "A," Blue Book Valuation.
15

16 D. Insurance, Co-Pays and Prescriptions

17 Beth's 2015 tax return contains confirmation that her
18 employer paid 100% of her health insurance benefits. See Exhibit
19 "B," 2015 Form 1095-C (indicating zero employee contribution
20 toward health insurance premiums). Beth's office visits related
21 to expanded problem focus which started on a December 21, 2015
22 while she was receiving treatment for PTSD, stress, anxiety, and
23 insomnia as a direct result of the crime. She also received
24 medications for the first time relating to these new diagnoses.
25 See Exhibit "C," letter from treating physician. The doctor visits
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1 referenced by Defendant which included a urinalysis was also
2 accompanied with the continuing diagnosis "expanded problem
3 focused" her for PTSD. Beth saw the doctor those two visits for
4 more than one purpose. If the Court is so inclined to exclude
5 these visits because they included other medical purposes, each
6 visit cost \$3. Regarding Co-pays, deductibles and prescription
7 costs, other than the two office visits identified above, the
8 remaining visits and prescription costs related to treatment for
9 Beth's new physical and mental health conditions which were a
10 direct result of the crime.
11

12 E. Travel and Parking costs
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14 Defendant challenges this category of economic loss. Beth
15 attended most if not all pre-trial hearings and trial dates.
16 Considering mileage alone, she travelled round trip 45.4 miles
17 each time she attended a hearing.³ Reviewing the court docket, it
18 appears that hearings or trial dates occurred on thirty-three
19 separate dates. Considering her round-trip mileage of 45.4 miles
20 to attend hearings at an IRS approved mileage reimbursement rate
21 of \$.575 per mile, just mileage alone requires an adjustment upward
22 for this economic loss category. Considering mileage alone, Beth's
23 economic loss totals \$861.47.
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26 F. Stephanie's Economic Losses
27

28 ³ Beth will be prepared to testify about this round-trip mileage to/from her home if needed.

1 It is uncontested that Stephanie Dumbrell faced time off from
2 work and travel expenses to attend trial. The expenses claimed by
3 Defendant to be consequential do not take into account the
4 following factors for which Stephanie would testify at a hearing
5 if required:

6 1. Travel to/from New Jersey typically requires the
7 traveler to stay in Arizona for a set number of days to receive
8 the lowest fare;

9 2. Stephanie traveled to/from Arizona with a one-year old
10 child which required her to spend extra time but which also saved
11 child care costs;

12 3. At the time of the trial, Stephanie's regular schedule
13 required her to work two lunch shifts per week, Monday and
14 Wednesday. Due to the nature of a server's occupation, she also
15 often have the opportunity to pick up shifts, which she regularly
16 did (on average once every other week at minimum, which can be any
17 day of the week). Stephanie did not earn a salary and her hourly
18 wage is below the NYC minimum wage because her income mainly
19 derives from tips;

20 3. Stephanie seeks reimbursement for lost wages for her
21 trip beginning January 25th and ending February 22nd: the days she
22 would have been scheduled to work were Monday, January 30th (the
23 day of the trial setting hearing), Wednesday, February 1st (the
24
25
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28

1 day prior to the start of the trial), Monday, February 6th,
2 Wednesday, February 8th, Monday, February 13th, Wednesday,
3 February 15th, Monday, February 20th, and Wednesday, February
4 22nd. She based her economic loss request on her weekly wage
5 derived from the 4-week period before the trial with the assertion
6 that had she been home she would have picked up additional shifts
7 for her work.
8

9 4. Although the 20th and 22nd fall outside of the trial
10 dates, Stephanie requested those dates as well because she was not
11 able to book a return flight until the verdict was delivered on
12 the 16th, and returning Wednesday the 22nd was the most economical
13 option;
14

15 5. For the trip spanning April 18th-25th: Tuesday-Tuesday
16 trip was the least expensive option in terms of flights when booked
17 2 months in advance;
18

19 6. Weekend flights spanning only 3 days can easily double
20 the price;

21 7. Stephanie claims lost wages for Wednesday, April 19th,
22 and Monday, April 24th because those dates were her two regular
23 work days, though she would usually have additional shifts that
24 fall on any day of the week depending on availability which were
25 also lost because she was out of town on the days immediately
26 surrounding the court date.
27
28

1 8. For the trip spanning May 23rd-28th: Stephanie arrived
2 the day before the date of the hearing and departed the first day
3 she was economically able to do so.

4 9. Stephanie claims a loss for regular work day of
5 Wednesday, May 24th, and Thursday, May 25th.

6 These additional details should provide sufficient support
7 for Stephanie's travel and wage loss claims but she would be able
8 to provide testimony if needed and would request that such
9 testimony be secured by phone.
10

11 III. Conclusion

12 For the foregoing reasons, Beth respectfully requests that
13 this Court award restitution in the total sum of \$563,185.12 which
14 has been adjusted slightly to reflect Beth's adjusted mileage costs
15 to attend the trial and pretrial hearings, an adjustment downward
16 for co-pays involving dual purpose medical visits, and the
17 adjusted economic loss involving Carson's vehicle and in Stephanie
18 Dumbrell's favor totaling \$4,094.62 reflecting her economic
19 losses.
20

21 Respectfully submitted this 16th Day of May, 2018.
22

23 **ARIZONA CRIME VICTIM RIGHTS LAW GROUP**

24 /s/ Randall Udelman
25 Randall Udelman
26 P.O. Box 2323
27 Scottsdale, Arizona 85252-2323
28 (480) 946-0832
 Counsel for Victim Beth Fay

1 Original of the foregoing
2 e-filed on this 15th day of May, 2018
3 Copies of the foregoing emailed and mailed
4 on this 21st Day of March, 2018 to:

5 Maricopa County Attorney
6 Kevin Pollak, Deputy County Attorney
7 301 W. Jefferson Street, 4th Floor
8 Phoenix, Arizona 85003-2143
9 Attorneys for State of Arizona

10 Michael D. Kimerer, Esq.
11 KIMERER & DERRICK, P.C.
12 1313 E. Osborn Road, Suite 100
13 Phoenix, Arizona 85014
14 Attorneys for Defendant

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10 /s/ Randall Udelman

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EXHIBIT "A"



**2011 Volkswagen GTI
2.0T Hatchback Sedan
4D**

Mileage: **90,000** Condition: **Good** [Check Specs](#)



Advertisement

1 Compare Your Values

Use these values to help make a confident decision on whether to sell, trade or donate your car.

- Instant Cash Offer
- Trade-in Value
- Private Party Value
- Donate Your Car



Trade-in Range
\$6,340 - \$8,017

Trade-in Value
\$7,179

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EXHIBIT "B"

Fold Here

Form **1095-C**

Department of the Treasury
Internal Revenue Service

Employer-Provided Health Insurance Offer and Coverage

VOID

OMB No. 1545-2251

CORRECTED

2015

Part I Employee

1 Name of employee
BETH A FAY

Applicable Large Employer Member (Employer)

7 Name of employer
Dysart Unified

Employer identification number (EIN)

4 City or town
GLENDALE

5 State or province
AZ

6 Country and ZIP or foreign postal code
85308

9 Street address (including room or suite no.)
15802 N. Parkview Place

10 Contact telephone number
(623) 876-7000

11 City or town
Surprise

12 State or province
AZ

13 Country and ZIP or foreign postal code
85374

Part II Employee Offer and Coverage

Plan Start Month (Enter 2-digit number):

14 Offer of Coverage (enter required code)	All 12 Months	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
1A													
15 Employee Share of Lowest Cost Monthly Premium, for Self-Only Minimum Value Coverage	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$
16 Applicable Section 4980H Safe Harbor (enter code, if applicable)	2C												

Part III Covered Individuals

If Employer provided self-insured coverage, check the box and enter the information for each covered individual.

(a) Name of covered individual(s)	(b) SSN	(c) DOB (if SSN is not available)	(d) Covered all 12 months	(e) Months of Coverage												
				Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	
17 BETH A FAY	[REDACTED]		<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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XID #1607 For Privacy Act and Paperwork Reduction Act Notice, see separate instructions.

41-0852411

1095C

Form 1095-C (2015)

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EXHIBIT "C"

5/16/2018

Arrowhead Family Sports Medicine

7717 W DEER VALLEY RD #125

PEORIA AZ 85382-2102

(623) 561-6300

05/16/2018

Beth Fay (08/03/1961) has been under the care of our office since 2010. Her medical records have been reviewed extensively and there is no pre-existing Mental Health Disorders documented. She had never been prescribed a psychiatric medication prior to her son's murder, including sleep medications. The first documented Mental Health Disorder was documented on 09/08/15 but took place on 09/05/15. She was diagnosed with a Severe Stress Reaction/Anxiety and put on an anxiolytic (anti-anxiety medication). At her next documented visit on 11/25/15, she was diagnosed with Insomnia related to her Stress and Anxiety. She was put on Sleep Medications at that visit. She also had Disability paperwork completed on that same date as she was unable to return to work after her son's death. She was recommended to be off of work until 11/25/17, which was an estimate based on her emotional stress at the time. She had additional Disability Paperwork Completed on 02/02/16 which documented her Acute Stress Disorder/Generalized Anxiety, Post-traumatic Stress Disorder, Bereavement, Parent-Child Relationship and Victim. It was recommended at that time she be off of work until September 2017. She has been seeing a Counselor and diagnosed with Major Depression. She continues to see her counselor regularly. Her time off of work has extended due to continued stress and insomnia from the sudden loss and murder of her son and the ongoing criminal and civil cases. She will likely not be able to return to work until these cases have been finalized and she can get some closure and quit reliving the murder and loss of her son. Her new estimated return to work date is January 2019, but may be extended if the trials linger on. Please see a summary in her most recent medical chart note dated today.

Please direct any further questions to the number above. Your attention in this matter is greatly appreciated.



Robert P. Luberto, D.O.

April D. Seiler, PAC

Lori L. Hardacker, PAC



EXHIBIT “6”

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-005451-001 DT

08/17/2018

HON. PAMELA GATES

CLERK OF THE COURT
M. Cabral
Deputy

STATE OF ARIZONA

KEVIN POLLAK

v.

JORDAN MICHAEL HANSON (001)

MICHAEL D KIMERER

JUDGE GATES

RANDALL S UDELMAN

MINUTE ENTRY

8:50 a.m.

Courtroom 912 - East Court Building

State's Attorney: Jason Diekelman for Kevin Pollack
Defendant's Attorney: Michael Kimerer
Defendant: Not Present
Victim's Attorney: Randall Udelman

This is the time set for Status Conference on Victim's Motion for Criminal Restitution Order.

The parties having waived the presence of a Court Reporter,

A record of the proceedings is made digitally in lieu of a court reporter.

Status of the case is discussed.

Based on the discussions held,

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-005451-001 DT

08/17/2018

IT IS ORDERED setting Non-Witness Restitution Hearing/oral argument on October 19, 2018 at 9:00 a.m. (time allotted: 1 hour) before this Division. Defendant's presence is waived for this hearing.

IT IS FURTHER ORDERED that on or before October 10, 2018 the parties shall submit a Joint Report identifying the three categories of restitution as follows:

1. Stipulated restitution
2. Disputed restitution:
 - A. Restitution that is disputed as matter of law but with a stipulated amount; and
 - B. Restitution that is disputed as a matter of law with disputed amounts
3. Each party shall provide his or her position in each area of requested restitution but the narrative cannot exceed 2 pages per side.

9:00 a.m. Matter concludes.

EXHIBIT “7”

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1 Michael D. Kimerer, #002492
KIMERER & DERRICK, P.C.
2 1313 East Osborn Road, Suite 100
Phoenix, Arizona 85014
3 Telephone: (602) 279-5900
Fax: (602) 264-5566
4 E-mail: mdk@kimerer.com
Attorneys for Defendant

5 Randall S. Udelman, #014685
ARIZONA CRIME VICTIM RIGHTS LAW GROUP
6 P.O. Box 2323
Scottsdale, Arizona 85252-2323
7 Telephone: (480) 946-0832
Fax: (480) 970-5626
8 rudelman@azvictimrights.org
Attorneys for Victims

10 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
11 IN AND FOR MARICOPA COUNTY

12 **STATE OF ARIZONA,**

Plaintiff,

13 vs.

14 **JORDAN HANSON,**

15 Defendant.

Case No. CR2015-005451-001

**JOINT REPORT REGARDING
RESTITUTION ISSUES**

(Honorable Pamela Gates)

16 Defendant, Jordan Hanson, together with the victims, by and through their respective
17 counsel, do hereby submit this Joint Report regarding restitution pursuant to the Court’s August
18 17, 2018, Order. The parties state as follows:

19 The Court asked the parties to submit a Joint Report addressing three items: (1) stipulated
20 restitution; (2) disputed resolution both as a matter of law and as a matter of fact; and (3) a brief
21 statement addressing the parties’ position in each area of restitution.

22 **1. STIPULATED RESTITUTION**

- 23 – Beth Fay’s travel costs and parking fees - \$644.80
- 24 – Stephanie Dumbrell travel costs of \$4,094.62

1 – Ms. Fay’s physician visits and prescription copays of \$390.09

2 **2. DISPUTED RESTITUTION**

3 **a. Restitution Disputed as Matter of Law**

4 – Ms. Fay’s lost wages claim of \$143,636 with the ability to seek additional
5 wages in the future

6 – Carson Dumbrell’s lost wages claim of \$411,402.00

7 – Ms. Fay’s insurance premiums of \$2,044.56

8 **b. Restitution Dispute as Matter of Fact**

9 – Ms. Fay’s car loan request for \$4,863¹

10 – Ms. Fay’s lost wages claim of \$143,636 with the ability to seek additional
11 wages in the future

12 – Carson Dumbrell’s lost wages claim of \$411,402.00

13 – Ms. Fay’s insurance premiums of \$2,044.56

14 **3. VICTIM’S POSITION STATEMENT**

15 Beth Fay’s Lost Earnings. Beth Fay worked as a full time teacher on September 5, 2015.
16 Then her son died. Then she stopped working. She took unpaid leave after this tragedy and has
17 not worked a day since. Suggesting that she was not working when her son died or connecting
18 her inability to work now to time off from work two years prior in 2013 ignores the
19 overwhelming weight of the evidence provided by none other than the Defendant’s own expert
20 witness hired to render opinions about Beth’s mental health. Dr. Hayes explains:

21 In sum, it is my opinion, to a reasonable degree of psychological probability, that as a
22 result of Carson Dumbrell being shot and killed on September 5, 2015, Beth Fay

23 _____
24 ¹ This was adjusted in the Victim’s Reply based upon the Blue Book Value of the car currently in Ms. Fay’s
possession.

1 sustained severe emotional injuries, which are best described as Persistent Complex
2 Bereavement Disorder With Traumatic Bereavement.

3 Dr. Hayes rejects a connection to time away from work in 2013:

4 As indicated by Ms. Fay working consistently during the 2014-2015 academic year and
5 her not receiving any mental health treatment as of September 5, 2015, it appears that Ms.
6 Fay overcame the above-described historical stressors, though these lay the foundation
7 for the emotional difficulties she has experienced since Carson's death.

8 Instead, Dr. Hayes renders the following opinion:

9 In my opinion, to a reasonable degree of psychological probability:

- 10 • Up until the time of my interview on July 18, 2018 and likely after, Ms. Fay's
11 ability to work as a teacher has been disrupted due emotional difficulties
12 secondary to the loss of her son.
- 13 • Ms. Fay will be unable to work as a teacher until such time as she genuinely
14 desires to move on with her life, improve her mental health functioning, and
15 adheres to the recommended treatment plan.
- 16 • Ms. Fay was unable to work as a part-time ballroom dance instructor due to
17 emotional difficulties secondary to the loss of her son until approximately one
18 week after his death on September 5, 2015.
- 19 • Ms. Fay can currently work as a part-time ballroom dance instructor, and in fact,
20 increasing her hours would be likely helpful to her mental health.

21 **The evidence is clear. Beth was in the classroom up until the date her son was shot and**
22 **killed and has not returned since. She has not earned anything as a teacher over the past**
23 **three years. And yes she also suffers severe emotional distress. But so have other crime**
24 **victims who recover restitution for lost earnings. She does not ask for her emotional**
damages, she asks for lost earnings here, nothing more and nothing less. Rejecting lost
earnings entirely flies in the face of the obligation to make a victim whole and to do so
promptly. See State v. Iniguez, 169 Ariz. 533, 536, 821 P.2d 194, 197 (App. 1991) see also
Ariz. Const., Art. 2, §2.1(A)(8).

1 **Carson Dumbrell's Lost Wages-** A.R.S. §13-105(16) does not limit lost earnings to
2 those victims who live. Instead economic loss “means *any loss* incurred by a *person...*
3 [and] includes lost earnings...” Obviously Carson’s death caused lost earnings. This fact
4 cannot be disputed. Beth spelled out her position on recovery of Carson’s lost wages in her
5 Motion and Reply and urges this Court to adopt the reasoning of *United States v. Serawop*,
6 505 F.3d 1112, 1120 (10th Cir. 2007) (awarding lost wages resulting from the death of a
7 three month old) and *United States v. Cienfuegos*, 462 F.3d 1160, 1164 (9th Cir. 2006)
8 (awarding representative or family member the rights to recover restitution for decedent’s
9 future lost income.). “While the award of restitution must "bear[] a reasonable
10 relationship to the victim's loss,' it cannot always be confined to 'easily measurable
11 damages.” *State v. Howard*, 168 Ariz. 458, 459; 815 P.2d 5, 6 (App. 1991). Here they are
12 based upon a reasonably calculated expert analysis of Carson’s future lost earnings. Beth
13 urges this court to award these losses.

14 **Beth's vehicle loan to her son-** Beth loaned her son money to buy a car and he
15 agreed to repay her. His untimely death prevented repayment. Such economic losses are
16 recoverable.

17 **Insurance Premiums-** Beth’s employer paid all of her insurance premiums but
18 not after her son died. Such losses should be considered the same as lost earnings, are
19 direct and not consequential and should be considered as economic loss subject to a
20 restitution award.

21 **DEFENDANT’S POSITION STATEMENT**

22 **Ms. Fay's Lost Wages** - Defendant disputes the ability of Ms. Fay to receive an unlimited
23 amount of lost wages as a result of her inability to work she claims is caused by emotional distress
24

1 from her son's death. According to Dr. Hayes' report, Ms. Fay suffered from psychological
2 distress prior to Carson's death. Her inability to work is caused, at least in part, by a number of
3 factors and not just her son's death (contentious divorce, Carson's behavioral issues, working
4 with troubled youth, her mother's death after Carson's, separation from her daughter). She was
5 requested to take anti-depressants prior to Carson's death. There is no dispute that the loss of her
6 son caused emotional distress, but those damages are not recoverable as restitution whether
7 disguised as lost wages or not.

8 In addition, she had stopped working prior to his death and not as a result of his death.
9 She had also been required to take a previous leave of absence in 2013. Defendant disputes that
10 as a matter of law she is entitled to the lost wages as they amount to emotional distress damages
11 and not economic damages. Defendant does not dispute as a matter of law that she would be
12 entitled to lost wages for the days of the court proceedings in the same basic amount as her
13 daughter. However, those damages have not been claimed because Ms. Fay was not working at
14 the time of the proceedings.

15 Carson Dumbrell's Lost Wages – Defendant continues to argue that as a matter of law
16 Ms. Fay is not entitled to Mr. Dumbrell's hypothetical amount of lost wages. Even if she is
17 entitled to some amount of lost wages, as a matter of fact the amount requested is far in excess of
18 the amount recoverable. The amounts are based upon assumptions that do not take into account
19 ordinary possibilities that could arise during his life. It assumes he lives a long and sustaining
20 lifestyle. The records show that Carson had issues with the law leading up to his death that could
21 have affected his ability to work. There are a lot of ways that Carson's ability to work could be
22 impacted other than by his death. Allowing recovery based upon hypothetical likelihoods of
23 successful employment will open a Pandora's Box for restitution abuse. For the reasons
24

1 mentioned in the response, Defendant objects to an order requiring him to pay Ms. Fay for the
2 hypothetical lost wages of Carson. Ms. Fay is not the person who would have benefited from
3 Carson's lifelong employability and good work ethic, if any, so she shouldn't now get a windfall
4 based upon her belief that his life would proceed in a certain manner had he lived.

5 Carson Dumbrell Vehicle Loan – Ms. Fay is requesting \$4,863 in actual losses from the
6 loan. This amount was adjusted to account for the current fair market value of the vehicle as
7 challenged in Defendant's response. The car loan paperwork shows that Carson Dumbrell
8 himself was the purchaser of the vehicle, not Ms. Fay. There is nothing to show that the financial
9 responsibility for the vehicle upon his death fell to Ms. Fay.

10 Ms. Fay's Insurance Premiums – Defendant does not dispute that some medical expenses
11 may be recoverable as restitution which is why he agreed to stipulate to the co-pays and the
12 physician visits requested in the Motion. However, the insurance premiums are disputed. Ms.
13 Fay was not working prior to Carson's death and, as such, was likely required to pay those
14 premiums anyway during the period she was unemployed. Since Defendant objects to the fact
15 Ms. Fay has used emotional damages as a means to not work, he should not be responsible for
16 the insurance premiums during the period she was unable to work. Defendant does not dispute
17 that there may be a certain portion of the insurance premiums for certain months that he could be
18 responsible for, the entire amount of those premiums is not recoverable. Ms. Fay's absence from
19 work is not due entirely to Carson's death and was, at least in part, due to preexisting issues.

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Respectfully submitted this 10th day of October, 2018.

KIMERER & DERRICK, P.C.

/s/ Michael D. Kimerer
Michael D. Kimerer
1313 East Osborn, Suite 100
Phoenix, Arizona 85014
Email: mdk@kimerer.com
Attorneys for Defendant

ARIZONA CRIME VICTIM RIGHTS LAW GROUP

/s/ Michael D. Kimerer (with permission of Randall Udelman)
Randall Udelman, Esq.
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Scottsdale, Arizona 85252-2323
rudelman@azvictimrights.org
Attorneys for Victims

ORIGINAL of the foregoing filed electronically
On this 10th day of October, 2018, with:

Clerk of Court
Maricopa County Superior Court

COPIES of the foregoing electronically delivered
on this 10th day of October, 2018, to:

Honorable Pamela Gates
Maricopa County Superior Court
East Court Building – courtroom 912
aldecoaj@superiorcourt.maricopa.gov

Kevin Pollak
Assistant Deputy County Attorney
Maricopa County Attorney’s Office
301 W. Jefferson Street, 4th floor
Phoenix, Arizona 85003
pollakk@mcao.maricopa.gov
Attorney for the State

By: /s/ Melissa Wallingsford

EXHIBIT “8”

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-005451-001 DT

10/19/2018

HON. PAMELA GATES

CLERK OF THE COURT
G. Torrecillas
Deputy

STATE OF ARIZONA

KEVIN POLLAK

v.

JORDAN MICHAEL HANSON (001)

MICHAEL D KIMERER

JUDGE GATES

RANDALL S UDELMAN

MINUTE ENTRY

9:06 a.m.

Courtroom 912, ECB

State's Attorney:	Kevin Pollak
Defendant's Attorney:	Mike Kimerer
Victim's Attorney:	Randall Udelman
Defendant:	Presence Waived

Court Reporter, Gail Ferguson, is present.

A record of the proceedings is also made digitally.

This is the time set for Restitution Hearing.

LET THE RECORD REFLECT Kevin Pollak is excused from the courtroom and all other future matters related to restitution.

Argument is held regarding restitution.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-005451-001 DT

10/19/2018

THE COURT FINDS Ms. Fay's lost wages may constitute economic loss that would not have occurred but for the crime and are directly caused by the criminal conduct. This finding does not make a determination that the amount has a reasonable relationship to the victim's loss nor that the amount is fully recoverable. That would be a factual issue to be explored at the Evidentiary hearing.

The Court makes a similar finding regarding the insurance premiums.

IT IS ORDERED setting Evidentiary Hearing regarding restitution on 11/30/2018 at 8:15 a.m. before this division.

Further discussion is held regarding restitution.

9:35 a.m. Matter concludes.

EXHIBIT “9”

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1 Michael D. Kimerer, #002492
2 **KIMERER & DERRICK, P.C.**
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4 Phoenix, Arizona 85014
5 Telephone: (602) 279-5900
6 Fax: (602) 264-5566
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8 *Attorneys for Defendant*

9 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
10 IN AND FOR MARICOPA COUNTY

11 **STATE OF ARIZONA,**

12 Plaintiff,

13 vs.

14 **JORDAN HANSON,**

15 Defendant.

16 Case No. CR2015-005451-001

17 **MOTION TO CONTINUE**
18 **RESTITUTION HEARING**

19 (Honorable Pamela Gates)

20 Defendant, Jordan Hanson, by and through undersigned counsel and with no objection by
21 Victim's counsel, hereby moves this Court to continue the November 30, 2018, restitution
22 hearing for a period of at least forty-five (45) days. As grounds in support of this Motion, the
23 parties state as follows:

24 The victims in this case have sought restitution from the Defendant in an amount in
excess of several hundred thousand dollars. The parties have been working together to resolve
some of the issues that the Court would otherwise need to resolve at the restitution hearing. At
the hearing on October 19, 2018, the Court set a restitution hearing in this matter for November
30, 2018. The parties are currently waiting on transcripts from the civil suit filed by the Victims
that involve some of the same or similar issues being determined as part of the restitution
proceedings. The parties anticipate using those transcripts in lieu of needing to recall many of the
same witnesses. The parties are also hoping that the transcripts will assist in possibly resolving
some of the monetary amounts prior to the restitution hearing. The transcripts have been ordered
but will take additional time to get completed and reviewed by counsel. In addition, the parties

1 are still working on expert reports that will be critical to the determination of restitution. The
2 parties believe that a restitution hearing date in late January would provide sufficient time for
3 completion of the transcripts and expert reports in light of the holidays.

4 Counsel for Mr. Hanson has conferred with counsel for the victims, Randall Udelman,
5 who stipulates to this continuance.

6 Therefore, for the foregoing reasons, the parties urge this Court to continue the restitution
7 hearing currently scheduled for November 30, 2018, until a date later in January 2019.

8 Respectfully submitted this 20th day of November, 2018.

9 **KIMERER & DERRICK, P.C.**

10 /s/ Michael D. Kimerer
11 Michael D. Kimerer
12 1313 East Osborn, Suite 100
13 Phoenix, Arizona 85014
14 Email: mdk@kimerer.com
15 *Attorneys for Defendant*

16 **ORIGINAL** of the foregoing filed electronically
17 On this 20th day of November, 2018, with:

18 Clerk of Court
19 Maricopa County Superior Court

20 **COPIES** of the foregoing electronically delivered
21 on this 20th day of November, 2018, to:

22 Honorable Pamela Gates
23 Maricopa County Superior Court
24 East Court Building – courtroom 912
aldecoaj@superiorcourt.maricopa.gov

Randall Udelman, Esq.
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rudelman@azvictimrights.org
Attorneys for Victims

By: /s/ Melissa Wallingsford

EXHIBIT “10”

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-005451-001 DT

11/28/2018

HON. PAMELA GATES

CLERK OF THE COURT
M. Iniguez
Deputy

STATE OF ARIZONA

KEVIN POLLAK

v.

JORDAN MICHAEL HANSON (001)

LORI L VOEPEL

JUDGE GATES

RANDALL S UDELMAN

MINUTE ENTRY

The Court has received and reviewed Defendant's Motion to Continue Restitution Hearing filed 11/20/2018. Good cause appearing,

IT IS ORDERED vacating the Evidentiary Hearing re: Restitution on 11/30/2018 and resetting the same to 01/17/2018 at 1:30 p.m. (time certain. 3 hours) before Judge Gates.

EXHIBIT “11”

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8 rudelman@azvictimrights.org
Attorneys for Victim Beth Fay

9
10 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
11 IN AND FOR MARICOPA COUNTY

12 **STATE OF ARIZONA,**
Plaintiff,
13 vs.
14 **JORDAN HANSON,**
15 Defendant.

Case No. CR2015-005451-001

**JOINT REPORT REGARDING
REMAINING RESTITUTION ISSUES**

(Honorable Pamela Gates)

16 Defendant, Jordan Hanson, together with the victims, by and through their respective
17 counsel, do hereby submit this Joint Memorandum regarding restitution. It appears that only two
18 issues remain for consideration by this Court. Victim Beth Fay and Defendant, through respective
19 counsel request that this Court review this memorandum and the attached exhibits and resolve the
20 following remaining two issues:

21 1. Whether economic loss of \$4,863.00 representing Beth Fay's car loan to her son
22 represents double recovery in light of a restitution award of Carson Dumbrell's lost wages; and
23
24

1 2. Whether this Court should exercise its discretion and enter a criminal restitution
2 order in favor of Beth Fay at the time Defendant is ordered to pay restitution in light of A.R.S.
3 §13-805(B).

4 A. Stipulated Restitution

5 Restitution calculations simply need to reflect a reasonably probable economic loss. *See*
6 *State v. Howard*, 168 Ariz. 458, 460, 815 P.2d 5, 7 (App. 1991). And the State or victim need not
7 prove economic loss beyond a reasonable doubt but instead by a preponderance. *See In re*
8 *Stephanie B.*, 204 Ariz. 466, 470, 75 P.3d 114, 118 (App. 2003).

9 After considering this burden of proof, the Defendant and victim have conferred and agree
10 on that this Court may enter an award of restitution in Beth Fay's favor in the amount of at least
11 **\$558,117.45** and in favor of Stephanie Dumbrell in the amount of **\$4,094.62** representing the
12 following amounts.

- 13 – Beth Fay's travel costs and parking fees \$644.80
- 14 – Stephanie Dumbrell travel costs of \$4,094.62
- 15 – Beth Fay's physician visits and prescription copays of \$390.09
- 16 – Beth Fay's lost wage claims through June, 2018 of \$143,636.00
- 17 – Beth Fay's insurance premiums of \$2,044.56
- 18 – Carson Dumbrell's lost wages claim¹ of \$411,402.00²

19 _____
20 ¹ It is stipulated that Ms. Fay be awarded the agreed upon lost wages for
21 Carson Dumbrell on behalf of Mr. Dumbrell's estate. Ms. Fay acknowledges that
22 she is authorized to accept these funds on behalf of the estate.

23 ² Beth Fay contends that deductions for estimated personal consumption are not
24 necessary or appropriate pursuant to A.R.S. §13-105(16) and the rationale set
forth in *United States v. Serawop*, 505 F.3d 1112, 1128 (10th Cir. 2007).
According to economic loss expert Matt Sims, Carson's gross lost earnings
total \$1,512,507 over his work life expectancy. The agreed upon \$411,402
amount represents Carson Dumbrell's net economic loss after deducting
estimated personal consumption calculated in Matt Sims' report dated November
8, 2017. Jordan Hanson contents that *Serawop* is not applicable or binding on
this Court and that an award consistent with consumption is appropriate. Mr.

1 Only a few issues remain for consideration by this Court.

2 B. Disputed Issues

3 1. Beth Fay's car loan

4 Defendant and Beth Fay are unable to agree on economic loss sustained as a result of non-
5 payment of a car loan she made to her son leaving a total outstanding balance of \$4,863.00.
6 Defendant contends that the loan should not be considered economic loss because he agrees to an
7 award of Carson's lost wages.

8 a. Beth Fay's position

9 As long as this Court awards Carson's net lost wages, Beth Fay contends that the car loan
10 of \$4,863.00 should be considered as economic loss because the Court will already deduct personal
11 consumption from Carson's lost wages. Deducting consumption costs and an outstanding balance
12 owing on Beth's car loan leads to double deductions for consumption and the loan repayment and
13 a windfall to the Defendant for this amount as a result. If the Court were inclined to award Carson's
14 gross lost wages, then perhaps such a deduction is appropriate. But because personal consumption
15 has been subtracted from Carson's lost earnings, Beth Fay requests that this Court award her
16 \$4,863.00 because Defendant has already received a deduction for personal consumption which
17 would have represented Carson's auto loan repayment.

18 b. Defendant Jordan Hanson's position

19 Mr. Hanson does not believe that the \$4,863 should be awarded for the cost of the car. Mr.
20 Hanson's position is that the car should not be awarded where Ms. Fay is receiving lost wages
21 which would have necessarily covered the cost of the car. The use of the car would be considered
22

23 Hanson believes that the appropriate lost wages based upon Nathaniel Curtis's
24 calculation is \$75,219. However, in the interest of resolution, he has stipulated to the amount set forth by Ms. Fay's expert of \$411,402.

1 within the consumption calculations of the lost wages. 2. A criminal restitution order is
2 appropriate here

3 a. Beth Fay’s position

4 According to Article 2, section 2.1(A)(8) of the Arizona Constitution (the Crime Victim
5 Bill of Rights), a crime victim has the constitutional right to receive prompt restitution from the
6 Defendant. And to give meaning to the word “prompt,” this court “shall make all reasonable
7 efforts to ensure that all persons who are entitled to restitution pursuant to a court order promptly
8 receive full restitution.” A.R.S. §13-804(E). Once restitution has been awarded, in keeping with
9 this goal of prompt payment, a defendant has an obligation to “make a good faith effort to obtain
10 the monies required for the payment” of restitution. *See* A.R.S. §13-810(E). A criminal restitution
11 order incentivizes a defendant to promptly pay or to actively seek out financial sources to make
12 prompt payment because it accrues interest and a restitution award/lien does not. Under these
13 circumstances, this court has discretion to enter a criminal restitution order to give Defendant
14 incentive to make a good faith effort to find money to promptly pay restitution. A.R.S. §13-
15 805(B). Beth Fay requests entry of a criminal restitution order at the time restitution is awarded
16 rather than having to wait several years from now to incentivize this Defendant to promptly pay
17 his restitution obligations as soon as possible.

18 b. Defendant Jordan Hanson’s position

19 Defendant Hanson does not dispute the Court’s authority under A.R.S. § 13-805(B) to issue
20 a criminal restitution order after sentencing as to restitution only. However, the issuance of the
21 criminal restitution order after sentencing for the payment of restitution is discretionary. Mr. Hanson
22 adamantly objects to the issuance of a criminal restitution order at this time. In this case, Mr. Hanson
23 was ordered to serve 12 years in the Department of Corrections. The Court’s issuance of a criminal
24

1 restitution order requiring the payment of extensive restitution fees while incarcerated is punitive
2 rather than an incentive for speedy payment. Ms. Fay asserts that issuing such an order will give Mr.
3 Hanson an incentive to pay the money quicker. However, there is no way for Mr. Hanson to “come
4 up” with the money while incarcerated to pay it quicker. He is stuck to the approximately .30 cents
5 an hour he can earn while incarcerated. A criminal restitution order makes more sense for a defendant
6 that is out of custody on probation because the individual has the ability to obtain employment to pay
7 restitution. In those cases, the defendant would be incentivized to pay it quickly to avoid the interest.
8 However, when the defendant is incarcerated, the incentive does not exist as the defendant is limited
9 to the confines of the prison and has no external means of paying the amounts owed. As such, what
10 is the incentive to defendant? It is not that Mr. Hanson is deliberately seeking not to pay while
11 incarcerated. Rather, he has no means to pay while incarcerated. To “incentivize” a defendant to pay
12 money they don’t have and can’t earn while incarcerated is a flawed and unreasonable demand.

13 Ms. Fay’s entire position throughout the restitution proceedings have been to ensure a windfall
14 on her and her family over Carson’s untimely death. Mr. Hanson and his family have sincere
15 sympathy for Ms. Fay and her family over this loss. However, the criminal restitution process is being
16 abused in order to collect excessive amount of money that, had it been sought through a civil
17 proceeding, would most certainly not have been allowed. Mr. Hanson has many incentives to pay off
18 the restitution as quickly as he can. He understands that upon his release, assuming he is not successful
19 on appeal, he will owe a significant amount of money that he must repay. However, to penalize him
20 by compounding interest on the restitution amounts while knowing full well he has no means to pay
21 the amounts while incarcerated only seeks to punish him further. Mr. Hanson was required to give all
22 his savings and resources to his parents to pay for his legal defense. In addition, his family had to sell
23 assets and borrow against their retirement in order to assist in paying the legal expenses. Also since
24

1 the largest portion of the restitution amount are lost wages of Carson that have not yet accrued,
2 resulting in interest being paid upon amounts not yet earned, which is inherently punitive.

3 Mr. Hanson is requesting that this Court allow Mr. Hanson to complete his term of
4 incarceration prior to the issuance of a criminal restitution order. To do otherwise would be to penalize
5 Mr. Hanson through interest due solely to his incarceration and inability to make sufficient funds
6 while incarcerated to pay restitution. Mr. Hanson has no control over the money he can make while
7 incarcerated and no ability to come up with the money by other means while incarcerated.

8 C. Continuing Jurisdiction pursuant to A.R.S. §13-805(A)(2)

9 Beth Fay and Defendant agree that this Court retains jurisdiction to adjust Beth's economic
10 loss claims such as her lost wages and medical insurance premiums for 2018-19 school year and later
11 pursuant to A.R.S. §13-805(A)(2). If and when economic loss numbers rise or fall from these
12 amounts listed above, this Court can address any changes. *See, e.g., State v. Howard*, 168 Ariz. 458,
13 460, 815 P.2d 5, 7 (App. 1991) (Trial court awarded future anticipated medical expenses retaining
14 jurisdiction to adjust amounts if needed later). Beth has been diagnosed with "Acute Stress
15 Disorder/Generalized Anxiety, Post-traumatic Stress Disorder, Bereavement, Parent-Child
16 Relationship and Victim." *See* Exhibit "C," Reply in Support of Motion to Enter Criminal Restitution
17 Order dated May 16, 2018. Her physician also indicated "Her time off of work has extended due to
18 continued stress and insomnia from the sudden loss and murder of her son and the ongoing criminal
19 and civil cases. She will likely not be able to return to work until these cases have been finalized and
20 she can get some closure and quit reliving the murder and loss of her son. Her new estimated return
21 to work date is January, 2019, but may be extended if the trials linger on." *Id.* The physician hired
22 by Defense to examine Beth reached similar conclusions that she still suffers severe emotional and
23 traumatic harm as a result of her son's death that have prevented her from working. *See* Exhibit "A,"
24

1 Transcript of Trial Testimony of Jill Hayes, dated Oct. 10, 2018 at 36 (with highlights). For these
2 reasons, this Court has continuing jurisdiction over restitution until the Defendant pays economic
3 losses in full. A.R.S. §13-805(A)(2). And notwithstanding the mischaracterizations by the
4 Defendant in this Joint Report that she somehow seeks a “windfall,” respectfully, Ms. Fay seeks
5 nothing of the sort. Never in the mind of a parent would the economic losses resulting from a heinous
6 crime which caused the death of a child be considered a “windfall.”

7 Defendant Jordan Hanson’s position

8 Mr. Hanson’s position is that any future restitution should be considered suspect and should
9 be closely analyzed. There is no dispute that the Court can retain jurisdiction but, Mr. Hanson is
10 asking the Court be cognizant that once litigation has ceased, Ms. Fay should be able to return to work
11 in a short time. Ms. Hayes estimated that Ms. Fay should be able to return to work within
12 approximately 6 months to a year after this litigation concludes. Mr. Hanson acknowledges the
13 testimony given at the civil trial that Ms. Fay suffers from trauma as a result of her son’s death. There
14 is expected to be a reasonable period of time where Ms. Fay is unable to work. However, this Court
15 should not permit Ms. Fay to malingering indefinitely in order to provide a life for herself through
16 restitution. Mr. Hanson is not saying that is the case now; however, he has concerns that it could
17 become an issue moving forward. Ms. Fay has sought extensive amounts of money from the family
18 and Mr. Hanson throughout this case. Based upon the money she will receive, she has very little
19 incentive to return to work. A decision not to return to work should not be penalized against Mr.
20 Hanson. Interestingly, Ms. Fay withdrew her claim for lost wages just prior to the civil case going to
21 the jury. Mr. Hanson can only speculate as to why such a claim was withdrawn at the last moment,
22 even though testimony had been heard on the issues and there was ample insurance coverage to satisfy
23 her wage claim. As a consequence, Mr. Hanson does not have an offset for Beth’s lost wages that

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1 could have been awarded in the civil case. It is presumed that she felt the windfall would be easier
2 through restitution process than through a proceeding in which Mr. Hanson had a challenge.

3 D. Summary

4 The Defendant agrees to an award of restitution against him in the total sum of **\$558,117.45**
5 and in favor of Stephanie Dumbrell in the amount of **\$4,094.62**. He requests that the amount be
6 considered an award but not in the form of a Criminal Restitution Order.

7 Beth Fay requests that this Court consider an additional amount of **\$4,863.00** representing the
8 outstanding balance of a car loan to her son and enter a Criminal Restitution Order in her favor in the
9 total sum of **\$562,980.45**. Also, Beth Fay requests that this Court enter a Criminal Restitution Order
10 in favor of Stephanie Dumbrell in the total amount of **\$4,094.62**. And lastly, Beth and Defendant
11 agree that this Court has continuing jurisdiction over this matter as additional losses or other changes
12 arise pursuant to A.R.S. §13-805(A)(2).

13 Mr. Hanson is requesting this Court award Stephanie Dumbrell the \$4094.62 agreed to by the
14 parties. It is further agreed that Ms. Fay receive travel costs of \$644.80, physician reimbursement of
15 \$390.09, insurance premiums of \$2,044.56, and lost wages through 2018 of \$143,636.00. Finally,
16 the parties agree that Ms. Fay receive \$411,402 in lost wages for Carson's estate. In total, the
17 stipulated amount of restitution in favor of Stephanie Dumbrell is \$4094.62 and in favor of Ms. Fay
18 is \$558,117.45.

19 In the event that Ms. Fay initiates a petition for future wage loss, Mr. Hanson reserves the
20 right to object and present any relevant evidence including testimony from the civil trial, should a
21 future request for wage loss be initiated. Mr. Hanson also does not believe that the \$4863.00 requested
22 for the vehicle be awarded in this case since Ms. Fay is receiving lost wages of Carson that would
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24

1 include the vehicle payments as a part of consumption. Finally, Mr. Hanson objects to the issuance
2 of a criminal restitution order during the period of Mr. Hanson's incarceration.

3 Respectfully submitted this 23rd day of January, 2019.

4
5 **KIMERER & DERRICK, P.C.**

6 /s/ Randall Udelman (with permission)

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19 **ORIGINAL** of the foregoing filed electronically
20 On this 23rd day of January, 2019, with:

21 Clerk of Court
22 Maricopa County Superior Court

23 **COPY** of the foregoing electronically delivered
24 on this 23rd day of January, 2019, to:

Honorable Pamela Gates
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2 on this 23rd day of January, 2019, to:

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EXHIBIT “A”

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

ANDREW DUMBRELL, father of the)
deceased, Carson Dumbrell; and)
BETH FAY, mother of the deceased,)
Carson Dumbrell,)
Plaintiffs)
vs.) No. CV2016-003499
JORDAN HANSON, a single person;)
MICHAEL L. HANSON and ANNETTE S.)
HANSON, husband and wife; JANE)
and JOHN DOES I-X; BLACK AND WHITE)
CORPORATIONS I-V; ABC PARTNERSHIPS)
I-V,)
Defendants.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EXCERPT

Trial - Day 3

BEFORE JUDGE CONNIE CONTES

Phoenix, Arizona

October 10, 2018

Reported By:

Brigid M. Donovan, RPR, CCR
Arizona Certificate No. 50902

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1 P R O C E E D I N G S

2 MR. CATANESE: Thank you very much, Your
3 Honor. At this time plaintiff would call Dr. Julie
4 Hayes, please. Or Jill Hayes. I am sorry, Dr. Hayes.
5 My apologies.

6 THE COURT: You may take the stand directly
7 up this ramp and my clerk will swear you under oath when
8 you are up there.

9

10 JILL HAYES

11 called as a witness herein, having been first duly sworn,
12 was examined and testified as follows:

13

14 DIRECT EXAMINATION

15 BY MR. CATANESE:

16 Q Good afternoon, Dr. Hayes. Let me know when you
17 are ready.

18 A Ready.

19 Q Thank you. Dr. Hayes, would you please
20 introduce yourself to the jury?

21 A Sure. My name is Dr. Jill Hayes.

22 Q And Dr. Hayes, what type of doctor are you?

23 A I am a clinical, forensic, and
24 neuropsychologist.

25 Q Could you -- in English, what is that?

1 A I am the kind of psychologist that you typically
2 think of when you are having difficulty with anxiety or
3 depression or some other kind of mental health disorder
4 or difficulty. But then I have training on top of that
5 in what's called neuropsychology which deals with how the
6 brain affects a person's behavior. And then on top of
7 that I work typically at the intersection between law and
8 psychology.

9 So in cases like this where a person may be
10 having difficulties as a result of some action that
11 happened, I would testify in that kind of case. Or if a
12 person had a head injury as a result of an automobile
13 accident, I may testify in that type of case. Or on the
14 other side, in the criminal realm. I may be the person
15 who would testify related to a person's competence to
16 stand trial or sanity at this time of the crime.

17 Q Would that also include forensic analysis of
18 someone in their stages of grief due to a death?

19 A Certainly.

20 Q And Doctor, if you would give us some background
21 education-wise. How does one get to where you are from
22 an educational standpoint?

23 A For me it was kind of circuitous. I graduated
24 from a little school in Savannah, Georgia, called
25 Armstrong Atlantic State University. I then got my first

1 master's degree in psychology at August State University
2 in August, Georgia. And then I worked for a period of
3 time and then went back to school and got another
4 master's at Louisiana State University in Baton Rouge.
5 Then completed my Ph.D. at Louisiana State University in
6 Baton Rouge with degree in clinical psychology with a
7 minor in behavioral neuroscience. I did an internship at
8 the Medical University of South Carolina in Charleston
9 and then went back to Louisiana, but this time New
10 Orleans to the Louisiana State University department of
11 psychiatry and did a fellowship in forensic psychology
12 and neuropsychology.

13 Q After all of that education did you join the
14 work force?

15 A Finally, yes.

16 Q And would you give us a brief history of that
17 work history?

18 A Sure. I joined the faculty at LSU school of
19 medicine in the department of psychiatry in the division
20 of law and psychiatry. And I was working in that regard
21 with the division of law and psychiatry doing forensic
22 and neuropsychology. And then I also worked a great deal
23 with crime victims at that point as well, which I had
24 also done during my internship.

25 And then I also worked at the HIV clinic as the

1 director of mental health there. And then Hurricane
2 Katrina hit and I came out here and started working at
3 Arizona State University teaching there. And then also
4 did almost exclusively forensics at that point, and now I
5 go kind of back and forth between Louisiana and Arizona.

6 Q And currently what type of -- what does your
7 work consist of currently?

8 A I almost exclusively do forensic matters, so
9 related to consulting in the legal field or testifying
10 regarding cases like this. I also evaluate first
11 responders for preemployment evaluations. And I have a
12 very small private practice where I treat folks that are
13 having day-to-day difficulties.

14 Q And are you familiar with a Dr. Steven Pitt?

15 A Yes, I am.

16 Q And could you tell me how you are familiar with
17 Dr. Pitt?

18 A In 2003 Dr. Steven Pitt and I started working
19 together on various forensic cases, and we did that up
20 until his death this year in May.

21 Q And unfortunately, Dr. Pitt was murdered outside
22 his office in May.

23 A Yeah.

24 Q And can you tell us why you are sitting here
25 today? How were you hired?

1 A I was retained by Mr. Hill to do an evaluation
2 of Ms. Fay initially back before Dr. Pitt was murdered, I
3 was not the person who was going to be sitting here; it
4 was going to be him. And after he was murdered, he had
5 already interviewed Ms. Fay and so I had the benefit of
6 his interview with Ms. Fay and I went ahead and did my
7 own evaluation of her as well.

8 Q So she underwent two evaluations, one by you and
9 one by Dr. Pitt?

10 A Yes.

11 Q And Dr. Pitt's was an interview-type, was it
12 not?

13 A It was.

14 Q And that lasted about four hours?

15 A Yes, it did.

16 Q And did you have access to that interview?

17 A I did.

18 Q And did you discuss that interview with
19 Dr. Pitt?

20 A No, I don't believe I did.

21 Q Do you recall if after the interview Dr. Pitt
22 expressed any concerns about Beth's welfare when she
23 left?

24 A I know that he just wanted to make sure that she
25 was okay upon leaving. I mean, clearly she was talking

1 with him about a number of emotional issues, and that was
2 his regular practice. But just to clarify, Dr. Pitt and
3 I had discussed this case at length prior to his death.
4 But between the time of his -- the time that he
5 interviewed Ms. Fay and his death was less than a week.

6 Q Understood. And at this point, but for his
7 tragic passing, Dr. Pitt would probably be up here
8 testifying.

9 A He would be.

10 Q And what ended up happening was, since you are
11 working his practice and you're familiar with him, you
12 stepped in to finish this work, correct?

13 A Yes. And I had worked on this case extensively
14 prior to that as well.

15 Q You had familiarity with it once you went in to
16 take the lead on it?

17 A Yes.

18 Q Now, we know Dr. Pitt conducted an interview.
19 Can you tell us the purpose of that interview?

20 A Sure. The purpose of the interview was to get a
21 better understanding of Ms. Fay, her background, what she
22 had been through up to that point in her life when her
23 son passed away, and then after her son passed away what
24 she had been experiencing to date and how the tragedy
25 affected her.

1 Q And then you also met with her as well, correct?

2 A I did.

3 Q And could you tell us the purpose of meeting
4 with her at that time?

5 A I had the benefit of seeing and hearing
6 everything that Dr. Pitt had discussed with her at that
7 point, so it was more of an update to see how she was
8 doing from the point in time in which he met her up until
9 the time that I met with her, and also just to get some
10 clarification of what -- of some questions that I had
11 that remained after I was sent to this interview.

12 Q And she underwent a testing, correct?

13 A Yes, she did.

14 Q And based on the work Dr. Pitt did and the work
15 you did, were you able to formulate opinions?

16 A I did.

17 Q And so we're clear, this is all being done at
18 the direction of Mr. Hill, correct?

19 A That's right.

20 Q And in fact, Mr. Hill didn't just hire you to
21 give opinions, he asked specific questions he wanted you
22 to look into regarding my client, correct?

23 A Certainly.

24 Q And one of the things he asked you to look at is
25 if you could find evidence of malingering?

1 A Yes.

2 Q And that was one of the things you were asked.
3 Could you explain to the jury what malingering is?

4 A Certainly. Malingering is the intentional
5 production of false -- like not true symptoms or
6 extremely exaggerated symptoms for some sort of gain. It
7 could be anything as banal as avoiding jury duty because
8 you don't want to be there so you make up some things
9 avoid that, to escaping punishment for murder because you
10 are saying that you had mental health difficulties such
11 that you didn't understand what was going on at the time,
12 to trying to appear more impaired as a result of an event
13 so that you'll get more money in a lawsuit.

14 Q And did you, in fact, address whether Ms. Fay
15 was malingering or faking it or exaggerating?

16 A I did.

17 Q In this case did you find that she was, in fact,
18 malingering or faking it?

19 A No, I did not. I did not believe that she was
20 malingering. The testing indicated that there was an
21 extreme response, but that could be due to either her
22 having severe mental health symptoms. It could be due to
23 her making -- trying to make me understand how badly she
24 was suffering. Or it could be due to her exaggerating
25 her symptoms. But when I looked at everything all

1 together and compared the way she presented with me, her
2 records, and the testing, it was my opinion that she was
3 not malingering.

4 Q And in fact, there was specific diagnosis that
5 you ended up rendering for her, correct?

6 A Yes.

7 Q And Doctor, part of that is what's called using
8 a reference called the DSM-5 now?

9 A Yes.

10 Q And can you explain to the jury what a DSM-5 is?

11 A Sure. The DSM-5 refers to the Diagnostic and
12 Statistical Manual of Mental Disorders. It's in its
13 fifth edition now. That's the manual that mental health
14 clinicians, psychologists, psychiatrists, social workers,
15 counselors, folks like that use to diagnose various
16 mental health difficulties and substance abuse
17 difficulties.

18 Q We are going to get to those diagnosis. Do you
19 have your report with you?

20 A I do.

21 Q And through it I want to go through -- well, the
22 first thing that Mr. Hill asked you was, plaintiff Beth
23 Fay is claiming emotional suffering. To what extent is
24 she suffering emotionally as related to the loss of her
25 son. Did you understand what you were going to be asked

1 there?

2 A Yes.

3 Q And could you tell the jury what you understood
4 you were being asked?

5 A Basically I thought it was fairly clear. The
6 question was related to, was Ms. Fay suffering, and to
7 what extent was she suffering or having a hard time as a
8 result of her son's death.

9 Q As part of that, one of the things that you
10 wrote was her physical and cognitive complaints, as well
11 as her emotional complaints, correct?

12 A Yes. I divided it into three categories. One
13 was physical; one was emotional; and the other was
14 cognitive.

15 Q And can you explain to the jury what her
16 physical complaints were?

17 A Sure. Her physical complaints, as she reported
18 them to me -- and again, I am not a medical doctor so I
19 can't really offer any opinions in this regard -- but
20 what she complained of was headaches, nausea, trembling,
21 intestinal upset that went from constipation to diarrhea,
22 and worsened -- her worsened skin condition, which is
23 vitiligo.

24 Q Now, in addition to the physical complaints, she
25 noted cognitive complaints. Could you -- cognitive means

1 thinking?

2 A Yes. Pretty much your ability to think,
3 remember, function on a day-to-day basis with regard to
4 cognitive skills.

5 Q And with respect to those cognitive complaints,
6 what was she telling you?

7 A Mostly it was related to concentration
8 difficulties, some confusion. And then she also
9 complained of what's called slowed processing speed. If
10 you think about a computer and the computer's processing
11 speed, then applied that to the brain, what she was
12 saying is that her processing speed in her brain was just
13 slowed down from the way it used to be. She just didn't
14 process things as quickly as she did before.

15 Q Now, one of the things, I am assuming that when
16 you are doing these tests and you are doing the
17 interviews, you are looking to assess someone, making
18 sure they are being not just truthful but they're giving
19 their best effort?

20 A Yes.

21 Q And that is something -- in fact, you
22 specifically have testing to determine, to make sure that
23 maybe if they are good at faking it, you can tell whether
24 someone is giving their best effort and is being
25 truthful?

1 A We do the best that we can. We are certainly
2 not 100 percent foolproof. But certainly we are going to
3 look at that -- or at least a forensic psychologist
4 should -- each and every time, especially when there is
5 litigation involved.

6 Q And did do you that with Beth?

7 A Yes.

8 Q And did you find that she was giving her best
9 effort?

10 A I believe that she was.

11 Q And do you believe that she was trying to answer
12 your questions as honestly as she could?

13 A I do. I think that -- as you could see, I mean,
14 she had an extreme emotional response. So sometimes she
15 went a little overboard, but I think that was the way
16 that she was. That was who she was. That wasn't related
17 to her trying to pull the wool over my eyes.

18 Q Right. I am assuming, Doctor, everyone in this
19 room is different. So when something happens, you can't
20 expect us all to react the same, correct?

21 A Yes.

22 Q We react as to who we are. And what you saw was
23 Beth reacting as who she is?

24 A That's correct.

25 Q With respect to -- we went through the physical

1 complaints, there were four or five. We went through the
2 cognitive complaints. There were two. With respect to
3 the emotional complaints, there were two pages of them.

4 A They were extensive.

5 Q Yes, they were. And some of them were sadness,
6 I am not happy anymore.

7 A Yes.

8 Q Reliving the incident again and again and again,
9 and that's when it freezes and numbs me.

10 A Yes.

11 Q Guilt. I play the what-ifs.

12 A Yes.

13 Q And another emotional complaint she had was
14 numbness, feeling frozen?

15 A Yes.

16 Q Crying spells would be another one.

17 A Yes.

18 Q Screaming until my throat hurts.

19 A Yes.

20 Q Blackouts not due to substance use, but just the
21 inability to account for time.

22 A That's correct.

23 Q Difficulty sharing intimacy?

24 A Yes.

25 Q Lack of sex drive?

1 A Yes.

2 Q Hearing screams would sometimes wake her up at
3 night.

4 A Yes.

5 Q Hearing Carson's voice.

6 A Yes.

7 Q Hypervigilance. Constantly on edge, feeling
8 like something is going to come up behind her?

9 A That's right. She described that when she was,
10 for example, brushing her teeth.

11 Q Uncaring about the future.

12 A Yes.

13 Q Now, one of the things you state in your report
14 is that grief is a normal response to the death of a
15 loved one.

16 A Yes, it is.

17 Q And it would not be unusual when you lose a
18 loved one to suffer grief. In fact it would be expected?

19 A Yes.

20 Q Doctor, do you agree with me that the manner in
21 which the death occurs can affect the grief?

22 A Absolutely.

23 Q If I've got a relative that we know has been
24 sick for years and terminally ill, that's kind of
25 expected. That's one type of grief, correct?

1 A There are variations within that.

2 Q Sure. And then the extreme is, someone who you
3 would expect to see every day for a long time is suddenly
4 gone?

5 A Correct.

6 Q And that's what Beth was faced with, the latter.

7 A Yes.

8 Q And am I correct that a majority of individuals
9 can adjust adequately over time to a death?

10 A Yes.

11 Q But there are those individuals -- and they are
12 the minority -- that experience what is termed prolonged
13 grief, complicated grief. You call it persistent,
14 complex bereavement disorder.

15 A Yes.

16 Q And is that -- can you explain what persistent
17 complex bereavement disorder is?

18 A Sure. In this, it's when people have an extreme
19 reaction to the death of a loved one. And the reaction
20 is generally centered around persistent longing to be
21 with that person again; sorrow and emotional pain;
22 preoccupation with the manner and cause of death and of
23 the deceased.

24 And then there is reactions that the person
25 would have to their loved one's death such as having

1 difficulty accepting it; disbelieving it actually
2 occurred or being emotionally numb; being bitter and
3 angry about the loss. And then there is also social or
4 identity disruption to where a person may want to just
5 die so that they can be with their loved one; feel alone
6 or detached or not like they can love anymore; having
7 difficulty trusting.

8 And the disturbance in all of the symptoms are
9 to such a degree they have a problem kind of functioning
10 in everyday life: Working; socializing; participating in
11 events that they would before. And it's out of
12 proportion to what would be expected in the culture in
13 which the person lives.

14 Q Now, Doctor, am I correct that you -- it's your
15 opinion Ms. Fay has developed severe and persistent grief
16 and mourning reactions?

17 A Yes.

18 Q And those are consistent with the persistent
19 complex bereavement disorder with traumatic bereavement?

20 A Yes.

21 Q What's the traumatic bereavement part of it?

22 A The traumatic bereavement part stems from the
23 death of a loved one in a traumatic way. So the way that
24 it's termed is, it's due to generally homicide or
25 suicide. And so the bereaved individual has just

1 persistent recollections of the person's that they loved
2 last moments alive and they replay those over and over
3 again in their head.

4 And they think about the injury, the nature of
5 the death, what happened to the person that they loved.
6 So it's not like when your parent might die of a natural
7 cause; it's what a person experiences if the individual
8 they cared about or loved died in a traumatic way.

9 Q Now, one of the things I notice in your report,
10 you addressed PTSD versus the persistent complex
11 bereavement disorder, correct?

12 A Yes.

13 Q With respect to PTSD, that's part of the DSM-5,
14 correct?

15 A Yes.

16 Q And the DSM-5 says, if you are going to call
17 somebody -- if you are going to opine that they have
18 PTSD, there are a number of factors that have to be
19 present in order to do that, correct?

20 A Generally.

21 Q Right. And let's assume I have four of the
22 five, then I may have four of the five symptoms of PTSD.
23 But without that fifth one, it's not -- at least in your
24 opinion -- appropriate to diagnose it as PTSD.

25 A I wouldn't diagnose it. But then you could also

1 say the person has characteristics of PTSD.

2 Q Go it. And did you find in this case that she
3 actually did have characteristics of PTSD?

4 A I did. But her symptoms were better captured
5 with the diagnosis that you mentioned earlier.

6 Q Exactly. It's a more pinpointed diagnosis is
7 the one you've given us.

8 A Yes.

9 Q And with respect to that, there are certain
10 conditions that are involved in this persistent complex
11 bereavement disorder. One of them is persistent
12 yearning, longing for the deceased, is that correct?

13 A Yes.

14 Q Is that something you found with Ms. Fay?

15 A Yes.

16 Q And how about intense sorrow and emotional pain
17 in response to this? That would be number two, correct?

18 A Yes.

19 Q And did you find that she had that?

20 A Yes.

21 Q Preoccupation with the deceased.

22 A Yes. She had that.

23 Q How about preoccupation with the circumstances
24 of the death?

25 A She certainly did.

1 Q That was the big one, wasn't it?

2 A Yes.

3 Q You also found that she had clinically
4 significant reactive distress as a result of Carson's
5 death, correct?

6 A I did.

7 Q And in fact, you found that was evidenced by her
8 marked difficulty in accepting the death?

9 A Yes.

10 Q Let me try this one. I am going to need some
11 help, Doctor. Experiencing disbelief or emotional
12 numbness over the loss?

13 A Yes.

14 Q Did she have that?

15 A Yes.

16 Q Another one of the conditions is bitterness or
17 anger related to the loss?

18 A Yes.

19 Q Maladaptive appraisals about one's self and the
20 relationship to the deceased. What does that mean?

21 A That means that the person may self-blame is an
22 example. That they could have done something to prevent
23 it, things like that.

24 Q And one of the things she told you was somehow
25 it's like she did something wrong?

1 A Well, I mean, when you look at -- when you look
2 at the transcript, one of the things you could see is
3 that she did say that she played the what-ifs, that she
4 wondered could she have done something differently. Like
5 for example, with regard to Carson's substance use or
6 legal history, could she have intervened somewhere to
7 prevent those.

8 Q You note that she has experienced a clinically
9 significant disruption in social activities and her
10 identity.

11 A Yes.

12 Q And that was evidenced by a desire to die in
13 order to be with the deceased.

14 A Yes.

15 Q Feeling alone or detached from other individuals
16 since the death.

17 A Yes.

18 Q Feeling that life is meaningless or empty
19 without the deceased or the belief that one cannot
20 function without the deceased. Did you find evidence of
21 that with Beth Fay?

22 A Yes.

23 Q And Doctor, what is your opinion as to -- from
24 a -- what is your opinion to a reasonable degree of
25 psychological probability as to what emotional injuries

1 she sustained as a result of her son?

2 A No. In my opinion she sustained severe
3 emotional injuries.

4 Q Now, one of the things you were also asked was,
5 did Beth suffer any preexisting psychological or
6 psychiatric condition events that are relevant to her
7 current status. Did you understand what you were being
8 asked to do with that question?

9 A I did.

10 Q And what did you understand it to be?

11 A Basically did she have any sort of mental health
12 difficulties prior to her son's death that may have laid
13 the foundation for what she's experiencing now.

14 Q Just so we are clear, by mental health history
15 you don't mean mental illness.

16 A Well, it could be either. I mean, it could be.
17 You know, a person may be prone to have depressive
18 symptoms, but not have been diagnosed with a depressive
19 illness or a mental illness. And so it could be anything
20 as benign as ADHD in school to prior suicidality.

21 Q And unfortunately when a death comes our way, it
22 comes to us as we are and the baggage we carry with us.

23 A Definitely.

24 Q And then we've got to carry that grief along
25 with that excess baggage.

1 A Yes.

2 Q And you found that she had a number of stressors
3 in her life, correct?

4 A Yes.

5 Q Divorce?

6 A Yes.

7 Q There was some issues -- she had some stressors
8 due to the work she was doing at school?

9 A Correct.

10 Q She had some issues with raising Carson.

11 A Yes.

12 Q There were difficulties in the fact that he --
13 he had difficulty in school and as a teacher she
14 struggled with that?

15 A She did.

16 Q There were also a couple of instances where he
17 misbehaved -- I don't mean -- he acted in a manner that
18 she believed was wrong and the police were involved.

19 A Yes, on quite a few occasions.

20 Q And with respect to all these stressors, did you
21 come to an opinion as to how they contributed to her --
22 the emotional distress and the emotional pain she's
23 suffering from her son's death?

24 A I did.

25 Q And what did you find? How -- did they

1 contribute a little? A lot? Overwhelm her?

2 A It was my opinion that the difficulties that she
3 had before Carson's death, as you probably could imagine,
4 were kind of the foundation upon which her current
5 difficulties are laid. But her current problems that
6 she's having are -- they appeared to me to be separate
7 and apart from the difficulties that she had prior to
8 Carson's death. Because when you looked at prior to
9 Carson's death, she had gotten through those and she was
10 on track. And Carson's death derailed her.

11 Q We talked about the malingering. Am I correct,
12 Doctor, it's your opinion, to a reasonable degree of
13 psychological probability, that she is not intentionally
14 producing false or grossly exaggerated psychological
15 symptoms in furtherance of her litigation?

16 A That's correct.

17 Q She's not doing any of this for this courtroom,
18 is she, in your opinion?

19 A I mean, it was clear that on the testing there
20 was some exaggeration. But like I said before, I think
21 that -- I mean, she taugt drama. I think that's who she
22 is.

23 Q Okay. And we can't help who we are, correct?

24 A No.

25 Q One of the other things you were asked to do

1 were to see if you believe that she could use -- she will
2 need future care associated with the loss of her son.

3 You were asked to look into that?

4 A Yes.

5 Q And did do you that?

6 A Yes.

7 Q And you basically -- what it is, is you
8 prepare -- again, you are not her treating doctor and you
9 are not here treating her. You were asked if you -- what
10 you believe, everything you read, and talking to her
11 should be recommended for her to help her through her
12 grief?

13 A Yes, to try to help her get better from where
14 she is.

15 Q And could you tell us what you believe she needs
16 to do to help herself?

17 A The first thing I think is, I do believe she
18 needs to get psychiatric care. I believe she needs to
19 get psychiatric care from a very good psychiatrist or
20 very good geriatrician --

21 Q Excuse me. I saw that in here. What is a
22 geriatrician?

23 A A person who treat older folks. And the reason
24 I had that, not because -- I don't want to address her
25 directly -- but not because Ms. Fay is an older

1 individual, but because geriatricians have so much
2 experience dealing with death and dying in their
3 population. So in no way was I trying to be
4 disrespectful to Ms. Fay; it was just that a very
5 competent geriatrician is going to have the experience
6 that's going to be needed, not that I was suggesting that
7 she was in the senior citizen group.

8 But the reason being is that persistent complex
9 bereavement disorder responds differently to medications
10 than does an individual who has garden variety
11 depression. So for example, medication A may be great
12 for a person who has major depressive disorder, but it
13 may not be beneficial for a person who has what I believe
14 that she has. So that's why I thought she needed to go
15 to someone who had real experience with that.

16 And I wanted her to get stable on whatever
17 medication it is that was recommended. And so that may
18 be, you know, a month. It may be three months. It may
19 be six months. It may be a little bit longer. But to
20 where she's stable on that medication before she starts
21 the second thing that I recommended which was complex
22 grief therapy. There is --

23 Q Let me go back a second only because I want to
24 talk about the medication part.

25 A Certainly.

1 Q You wanted a psychiatrist to provide her -- and
2 again, I don't want to minimize it -- but like an
3 antidepressant?

4 A I think an antidepressant probably would be
5 indicated. I am not a medical doctor and I am not the
6 person who would be prescribing. But certainly it seems
7 like that would be in order. Because another thing is,
8 like some common medications that are used for anxiety
9 are kind of contraindicated in a persistent grief. And
10 one of the medications she is taking right now, it's not
11 like it's going to be incredibly ineffective; it's just
12 not going to help move her forward with getting to the
13 place that she needs to get to.

14 Q And in that process, it is a trial and error of
15 right medication, right dosages?

16 A Yes and no. That's one of the things that's
17 always driven me crazy about psychiatrists is that
18 they'll say, well, I've had good luck with medication A,
19 B, or C. I don't want to know what your luck is; I want
20 to know what the science says. And that's why I wanted
21 her to go to someone who really understood persistent
22 grief.

23 Because if you know the literature, if you know
24 the research in the area, you are going to start her on
25 say Celexa as opposed to Wellbutrin. Even though

1 Wellbutrin is a fine medication, it's just not indicated,
2 and the science shows that Celexa is going to do better
3 with a person with persistent grief. So it is -- there
4 is an art to it. But I would want her to go see someone
5 who has a firm grounding in the science.

6 Q And with respect to that, you not only
7 determined what she needed, you provided a cost analysis
8 for us?

9 A I was asked to because, as you know, this is a
10 lawsuit so you've got to figure out how much it's going
11 to cost, and so I did.

12 Q And with respect to -- at least let's start off
13 with the medication management. That's what we are
14 calling the psychiatrist, correct?

15 A Yes.

16 Q With respect to that medication management, what
17 did you find your anticipated educated guess would be as
18 to what would be suitable?

19 A This is just for the psychiatric care for about
20 six months to where she would be seen for an initial
21 evaluation, then she would be seen every six weeks for
22 six months, and every month for one year, and then every
23 three months for another year. So you're looking at
24 about two and a half years from the time in which she
25 starts. That would be around \$2700.

1 Q Okay. But that does not include the cost of the
2 medications, correct?

3 A Exactly.

4 Q So that would have to be factored in there, but
5 that's something that needs to be left to someone else?

6 A Yes. But I used the three medications that are
7 indicated in the literature to be most effective for
8 persons with persistent grief, and then gave the cost of
9 those on a monthly basis.

10 Q And the monthly would be, if it's Celexa?

11 A Yes.

12 Q That would be 3252 a month.

13 A Yes.

14 Q If it's Prozac it's 3489 a month.

15 A Yes.

16 Q And if it's Lexapro, it's 7752 per month.

17 A Yes.

18 Q And just so we are clear, Doctor, that 2700 is
19 \$200 for the initial eval?

20 A That's correct.

21 Q 900 every six weeks for six months. Every six
22 weeks for six months would be \$900.

23 A Yes.

24 Q Every month for one year is \$1200.

25 A Yes.

1 Q Every three months for a year is 400 and that's
2 where we get the total of 2700?

3 A Yes.

4 Q You mentioned that's phase one. There is more
5 to come?

6 A Yes.

7 Q This is going to be a process for her.

8 A Yes.

9 Q And do you agree with me that process is going
10 to depend on a lot of what hurdles come her way which
11 we're never going to be able to predict?

12 A That's correct.

13 Q Let's talk about what you believe the next stage
14 was.

15 A Sure. We all know that just medications alone
16 really are not going to do everything that you need in a
17 case like this, or really anybody who's having some
18 emotional difficulties. What you would need is therapy
19 that has been shown to be efficacious for a person with
20 prolonged grief. And the one that has had -- that is the
21 most effective is called complicated grief therapy. And
22 that is generally a 16-week program.

23 Q And you had the initial evaluation costing how
24 much? 400?

25 A Yes.

1 Q And then the 16-week program being 1600 for a
2 total of \$2,000.

3 A Yes.

4 Q You also talk about her prognosis. And one of
5 the things you state is, it is now approximately three
6 years since Carson's death and Ms. Fay's mental health is
7 not appreciably better than it was immediately after his
8 death. Is that your opinion?

9 A It's not just mine. It's what Ms. Fay indicated
10 with the interview with Dr. Pitt and with me.

11 Q And she has a concern, does she not, about
12 dealing with the grief?

13 A She has what?

14 Q A concern that if her grief lessens and she
15 moves over, she has got a fear, doesn't she?

16 A She does.

17 Q What is that fear?

18 A She fears that if she processes the grief and
19 moves on, that in some way she's going to forget her son
20 and who he was.

21 Q Her statement to you is, I am in my house. I
22 can't even touch things. I fear that if I disturb
23 anything, I will somehow disturb all my memories of my
24 son. True?

25 A Yes.

1 Q As part of the prognosis, one of the things you
2 talk about is, if she remains as she is now, her current
3 high levels of distress and impairment place her at risk.
4 Is that true?

5 A They do.

6 Q And what do they place her at risk for?

7 A For not only continuing with severe emotional
8 difficulties, but a person who experiences severe
9 emotional difficulties is also at risk for developing
10 medical conditions such as cardiovascular disease,
11 immunological conditions. She already has vitiligo.
12 Hypertension, sleep problems.

13 Q What is your prognosis for Beth Fay?

14 A It's first that she has to want to change and
15 she has to want to get better. I mean, that's the case
16 with us, any of us who wants to change a behavior.

17 Q And just so we are clear though, for her that
18 fear is that change means I lose my grief -- her fear is
19 abandoning her son.

20 A Yes. But if she can make the choice that she
21 wants to move on with her life, then start the
22 psychiatric care, get the complicated grief therapy. And
23 if she does that, then her prognosis is going to be
24 moderate to good. Also with time, with parents of
25 bereaved children, the more time that passes, it doesn't

1 get all the way better, but it gets more tolerable, if
2 not easier.

3 Q I've heard people who have suffered the loss of
4 a child say the loss never goes away, you just kind of
5 have to get a different view of life and deal with it
6 differently.

7 A You are never going to forget. Certainly a song
8 or a birthday or a holiday is going to bring everything
9 back. You are never going to forget. But you can learn
10 better ways to cope and to deal with it and learn that
11 there is more -- there is more that you can do. You can
12 focus on say your daughter or your granddaughter and move
13 past, but still carry the memories with you.

14 Q That's quite a balance someone has to achieve.

15 A Certainly.

16 Q You were also asked about her inability to work.
17 And you understand that prior to this Beth was a teacher?

18 A Yes.

19 Q And in fact, she has not returned to work in
20 part because she says every time she sees a student it
21 reminds her of her son?

22 A She didn't tell me that, that I can recall.

23 Q What do you recall the reasons she can't work?

24 A Well, for one, it's going to be the mental
25 health difficulties that she has. It would be very

1 difficult to be around her at work, quite frankly.

2 Q Why do you say that?

3 A Because she focuses so much on the loss of her
4 son that, say, if you were her teacher's aide, that's all
5 that you would hear. And it would be very difficult to
6 work in an environment like that, especially with
7 children.

8 Another thing is, is that she had not only the
9 criminal litigation but this litigation. And so the
10 litigation and this -- while she wants the litigation
11 because she wants to tell her son's story, it also serves
12 to continue the feelings of loss and what she describes
13 as retribution and vengeance that she wants. So the
14 litigation has continued it. But I think the biggest
15 reason that she would be unable to work would be her
16 emotional suffering.

17 Q And one of the things about litigation is,
18 unfortunately I found out is that it slows or retards the
19 ability to move forward and put it behind you.

20 A Yeah.

21 Q But you mentioned something here, this
22 litigation is important for her because she wants her
23 son's story told, doesn't she?

24 A That's what she said both to myself and to
25 Dr. Pitt.

1 Q Let's talk about -- you were also asked to opine
2 concerning the nature of the relationship between Beth
3 Fay and her son.

4 A Yes.

5 Q And you found Beth undoubtedly had a caring and
6 loving relationship with her son.

7 A Yes, they did in my opinion.

8 Q And one of the things she said was, no, you
9 don't understand. Life without my son is like acid and
10 it pours down on me every minute of every day. I go numb
11 because it hurts so bad.

12 A Yes.

13 Q In fact, one of the things that you note in here
14 is, her view of Carson as a person is, I guess the word
15 is unrealistic?

16 A Overblown, unrealistic.

17 Q But that's not unusual in prolonged grief with
18 trauma, correct?

19 A No, it's not.

20 Q This isn't unique to Beth, correct?

21 A No, it's not.

22 Q You lose that loved one and all you are thinking
23 is the best of them.

24 A I mean, even without the prolonged grief we tend
25 to do that. I mean, when you go to a memorial service or

1 when you look at a headstone, you usually don't see
2 someone standing up there and saying, Dad was a jerk, you
3 know. Or they don't put that on the headstone. You
4 always talk about the nice things. And Carson was no
5 different.

6 But with prolonged grief and with Ms. Fay, she's
7 focusing on what she perceives to be his most positive
8 qualities and genuinely forgetting many of the
9 difficulties that he had.

10 Q Doctor, obviously you charge for your work,
11 correct?

12 A I do.

13 Q And you charge \$450 per hour, correct?

14 A I do.

15 Q And Dr. Pitt charged 600 per hour, correct?

16 A I don't know.

17 Q I have his bill here. It's in evidence as
18 Exhibit 89. It says 600 an hour. You don't have any
19 reason to dispute that, do you?

20 A No, not at all.

21 Q And just so we are clear, you had 42.3 hours of
22 work that you charged the defense for -- or you charged
23 Mr. Hill.

24 A Okay.

25 Q Only because I have your bill.

1 A Oh, that's fine.

2 Q And you charged Mr. Hill, who is Jordan's
3 attorney, \$21,131, correct?

4 A I believe so.

5 Q And Dr. Pitt's was a little over \$20,000,
6 correct?

7 A I didn't review his bills.

8 Q And then obviously you are here today because I
9 asked you to come. And we worked that out and I am going
10 to be paying your bill as well, correct?

11 A Yes.

12 Q And your charges for today?

13 A You asked me to be here at 1:30. And so
14 whatever the amount of time that is that I am going to be
15 testifying, plus the preparation time to go over my
16 report and the interviews and all of that.

17 Q Thank you very much. I appreciate you coming
18 and talking to the jury for us.

19 A Thank you.

20

21 CROSS-EXAMINATION

22 BY MR. HILL:

23 Q Since David is paying you, I am going to keep
24 you here about eight, nine hours.

25 A I don't think the jury would like that.

1 Q They would not like that. I want to just -- I
2 think you did a pretty thorough job of covering what you
3 were hired to do and what you did do. I want to go back
4 to the -- just a couple of things. One, the validity
5 test that you do. You did an MMPI-2 on her, a
6 personality assessment on Ms. Fay, is that correct?

7 A That's correct.

8 Q And there is a Trauma Symptom Inventory 2 that
9 is perhaps more specific to trauma-related patients?

10 A That's right.

11 Q So those two both showed, in some form, invalid
12 results, is that true?

13 A Yes, it was.

14 Q And one of the things that you consider -- that
15 is, one of the probable reasons for that is exaggeration
16 of symptoms, is that true?

17 A That is correct.

18 Q And one of the other things you mentioned is
19 that it could be kind of a cry for help?

20 A That's right.

21 Q You kind of took an overall view of Ms. Fay to
22 say that it may be that it's her just kind of emotional
23 condition that led to that exaggeration of symptoms?

24 A Yes.

25 Q It also could be simply exaggeration of

1 symptoms?

2 A That's right.

3 Q Although you ruled out malingering as kind of a
4 condition or a factor. Exaggeration in a lawsuit can be
5 considered malingering, true?

6 A Yes, if it's intentional.

7 Q We talked about her condition, that she is truly
8 suffering because of the loss of her son. No doubt about
9 that, true?

10 A That's correct.

11 Q And she was kind of predisposed to excessive
12 suffering just because of the nature of who she was
13 before her son passed. Is that fair to say?

14 A I don't recall her experiencing significant
15 suffering prior to her son's passing.

16 Q No, I didn't mean to say she was suffering. I
17 meant she was kind of -- because of just her personality
18 she's kind of predisposed to excessive suffering just
19 because of the nature of who she was before her son died?
20 Not that she had excessive suffering, but her personality
21 type lended itself to be kind of being more focused on
22 physical and emotional symptoms. Is that fair to say?

23 A I mean, yes. I mean, when you look at her prior
24 history, she reacted to things in a way that was more --
25 I'm trying to think of the right word, so excuse me as I

1 try to think of the right word -- she reacted to things
2 in a way that made things more difficult than they needed
3 to be perhaps. Like, for example, she taught school.
4 And she taught school in what she described was a pretty
5 rough middle school. And so after teaching at that
6 school full-time for about three years she took a leave
7 of absence. It's not typical for teachers, after they've
8 taught for just a few years, to take a few months' leave
9 of absence.

10 Similarly, when she had -- when she was going
11 through the divorce with Carson's dad, there was some
12 protracted litigation. I mean, divorce is never easy.
13 Divorce is never quick. And divorce is never fun
14 usually. But this went on from 2005 to 2012. And that
15 was more than would be expected in most.

16 Q That's kind of what I meant. I just don't know
17 how to say it.

18 A And clearly I didn't either.

19 Q I truly thought you were starting to be an
20 expert there for a minute.

21 A Pardon?

22 Q I though you were being David's expert there for
23 a minute, trying to beat me up.

24 A No.

25 Q I just don't articulate things the way you guys

1 do and I apologize. Let me move on to one other subject
2 I wanted to talk to you about and that is the feelings of
3 guilt. Not the kind of suffering because of the loss,
4 but the kind of blaming herself. You started to touch on
5 that a bit. What did she tell you about why she was
6 feeling guilty about Carson's death?

7 A Sure. She had indicated that she felt guilt
8 based upon what could she have done differently as a mom.
9 Could she have foreseen this. Could she have fixed it.
10 Could she have stopped it. Did she do something wrong,
11 which if she had changed may have prevented this. So
12 that was the guilt that I was referring to. Kind of
13 like, could I have stepped in earlier so when Carson was
14 drinking and using drugs, could she have stepped in at
15 different points and stopped that so that we all wouldn't
16 be sitting here today. And so that's where I think some
17 of the guilt is coming from.

18 Q We talked a little bit about other stressors in
19 her life and you indeed did find she had other things
20 that caused emotional suffering in her life. Is that
21 fair to say?

22 A Yes.

23 Q You mentioned the divorce. Can you kind of just
24 take us through what those other stressors were that
25 leads to suffering in Ms. Fay's life?

1 A Well, we've talked about some of them already.
2 We talked about the divorce. One of the things that she
3 had problems with was related to Carson. We had touched
4 on that as well. He received anger management counseling
5 through the juvenile court. He was often in trouble for
6 his behavior at school and then he had a significant
7 legal history with police involvement.

8 And the involvement was related to him making
9 threats, say, to Ms. Fay as well as to her boyfriend.
10 Shooting off guns, air rounds. I don't know that it's
11 actually a gun. Let me take that back. I am not real
12 familiar with whatever you shoot, like air rounds or
13 something. Airsoft rounds. He was on probation for
14 shoplifting. So she also worked in the school where she
15 had to take to leave of absence. So this has kind of set
16 the foundation for the mental health difficulties she
17 would have on a go-forward basis after Carson's death.

18 Q I believe you mentioned in your report that she
19 also had a daughter and a granddaughter that lived in New
20 York across the country from her? One of her issues?

21 A Yes. That's a continuing stressor. So if you
22 look at Carson's death, the ones I had mentioned just
23 before were the things that happened before his death.
24 The things that happened after his death, her daughter
25 was already in New York. But she is in New York now or

1 at least she was when I evaluated Ms. Fay with her
2 granddaughter. And then also her mother had passed away
3 after Carson died as well.

4 Q Do you remember when that was?

5 A I think it was within the year of his death, but
6 I am not positive.

7 Q You wrote in your report, mother's death
8 in 2016.

9 A That sounds about right.

10 Q So she had a lot of things going on pre Carson's
11 death and some significant events after Carson's death
12 that is also leading to some suffering. Would that be
13 fair to say?

14 A Yes and no. I mean, to be fair, one of the
15 things that Ms. Fay had indicated was that because of her
16 emotional numbness she didn't feel the death of her
17 mother as acutely as I think someone else would feel.
18 And with regard to her daughter, it was almost a
19 double-edged kind of situation. Her daughter and her
20 granddaughter were helpful in boosting her mood. But at
21 the same time, she's said things to her therapist, like
22 she has no reason to live, kind of negating the
23 relationship that she had with her daughter.

24 So for example, I made a -- I didn't recommend,
25 but I said, what about you moving to New York. And she

1 said, no, I don't want to do that because it would mean
2 disturbing all my memories of Carson. So on one hand,
3 while it would be beneficial for her to be closer to her
4 daughter; on the other hand she can't quite do it. But
5 then at the same time, I think she has almost dismissed
6 that she has still a living daughter and a living
7 granddaughter from which to derive pleasure and
8 enjoyment. To be fair, she still says that's the only
9 boost that she has and that's her only reason for living.
10 But when you look at other notes and other records, it
11 says otherwise.

12 Q There was one of your, the factors that went
13 into your diagnosis for her: Excessive avoidance,
14 reminders of the loss, and you had evidence for meeting
15 that diagnostic criteria and evidence against it that
16 seemed to be kind of inconsistent. Do you remember that?

17 A I do.

18 Q Could you tell the jury about that
19 inconsistency?

20 A Sure. She had told either myself or Dr. Pitt
21 that she really could not go into her son's room at all.
22 Yet she told her therapist that she went in there all the
23 time. So it was a little bit of an inconsistency. Well,
24 it was an inconsistency.

25 Q Do you know which it is? She can go in or she

1 can't go in? Do you know? Were you able to resolve that
2 inconsistency?

3 A No. And I asked her a little bit about some of
4 the inconsistencies and she said, you know, she can't
5 explain it really either. And so I can't really resolve
6 it.

7 Q You had indications in her notes of one
8 position, and then in her interview with you there was
9 kind of an opposing view?

10 A Yes. Either she can go in or she can't go in.
11 With Dr. Pitt and I, she had indicated that she couldn't
12 go in. She could count a handful of times that she could
13 go in. And with the therapist she said she had gone in
14 all the time. So, you know, can I resolve it? No.
15 Either you do or you don't. I can't resolve that.

16 Q You said PTSD, she had some of the factors or
17 criteria for that, but you've kind of more synthesized
18 this down to that complex bereavement. I am going to
19 mess that up. The diagnosis you had, is that a form of
20 PTSD or is that something different than PTSD?

21 A It has overlap certainly. But with persistent
22 complex bereavement disorder, you kind of yearn and long
23 for and you really don't avoid the memories of your
24 beloved deceased. One of the things that she does is she
25 keeps reminders with her. She has on a shirt that has

1 his birthday on it and his tattoos on it. She'll wear
2 crucifixes that have his flowers from his funeral. So
3 she's not trying to avoid thinking about Carson or
4 thinking about his death.

5 Whereas with post-traumatic stress disorder, one
6 of the hallmarks of post-traumatic stress disorder is
7 avoidance. Avoiding people, places, or things that
8 remind you of the trauma. So that's kind of the major
9 difference between the two.

10 But do you have what's called hypervigilance in
11 PTSD, and do you have hypervigilance in persistent
12 complex bereavement disorder? Absolutely. You know, do
13 you have reliving in both, where you would relive the
14 trauma in both, whether it's PTSD or it's persistent
15 complex bereavement disorder? You would have it in both.
16 But the real difference is going to be that avoidance,
17 that you don't avoid with persistent complex bereavement
18 disorder but you do avoid with PTSD.

19 Q So let's talk a little bit more about might be
20 what I would call the good news, the ability to address
21 what she has. One of the things is that she has to be
22 willing to improve her condition. Is that fair to say?

23 A Certainly.

24 Q And if she is willing to improve her condition,
25 you've found a program for her specifically tailored to

1 the diagnosis you gave her, yes?

2 A Yes.

3 Q And it doesn't sound like it's too prolonged of
4 a treatment course. We are talking about 18 months to
5 maybe two years of the intense program?

6 A Well, the specific therapy for persistent
7 complex grief is called complicated grief therapy. That
8 specifically, that therapy is 16 weeks. It's very
9 intense. But it's a very intense 16 weeks. But I
10 believe she needed the psychiatric treatment, that
11 foundation, before you start that. Because I wouldn't
12 want her to start an incredibly intense therapy without
13 having the backup of a psychiatrist in the wings and
14 having medications on board to begin that process. I
15 don't think would be fair to her. And I also thought
16 that she could continue treatment with her current
17 therapist until that time.

18 Q So getting the supportive care she's getting
19 now, but eventually you would expect or want her to
20 transition to this more intense treatment program that
21 you have suggested?

22 A Yes, once she's stable on medications.

23 Q And that time frame, the psychiatric care and
24 the medication portion of this, you said would be how
25 long before you would get her into that intense therapy,

1 psychotherapy?

2 A I would want her to be on the same medication
3 and at the same dose for at least six weeks. Because if
4 she goes to a good psychiatrist, what the good
5 psychiatrist should do is not put her on 20 milligrams of
6 Prozac and leave her on that forever. That doesn't do
7 really any good. What a good psychiatrist is going to do
8 is try to get her to the highest level that he or she can
9 before letting her go and do this complex bereavement
10 therapy, complex grief therapy.

11 So that may mean adding on a different
12 medication, changing medications, adjusting dosages until
13 you get her to where you want her to be or until you get
14 her to as good as she's going to be before you start
15 that. So it may be a bit of time before you get to that
16 point. But once you do, then the treatment for
17 complicated grief is a 16-week program.

18 Q I misunderstood that then. So the initial phase
19 of getting her adequately medicated would be perhaps a
20 minimum of six weeks and maybe a few weeks longer?

21 A I think it would be a good bit longer.

22 Q Give me kind of the outside of that.

23 A I think you'd probably be looking at -- and I
24 also recommended after this ends that she start all of
25 this.

1 Q After the lawsuit?

2 A After the lawsuit is completed. Because I think
3 that with the resolution with the lawsuit, like for her
4 as with many, many plaintiffs, after the resolution of
5 the lawsuit it's kind of like a door has finally closed
6 and they can then move on. And so I am not trying to
7 suggest she's any different than others, but after the
8 resolution of this lawsuit, I think it's probably going
9 to be three to six months before she's going to get on
10 the proper medication at the proper dosage. And it's
11 going to take some trial and error to get there.

12 Q And you had listed three different medications,
13 Celexa, Prozac, and Lexapro, in your report. Were you
14 talking about combining those or one of those three as
15 being what you think would be the operative medication?

16 A One of the three would be the operative
17 medication. Though I would by no means try to say what's
18 going to be the best for her. It's just those are the
19 three that have been reported in the research literature
20 to be the most effective.

21 And certainly it's better to maintain someone on
22 one medication as opposed to what we call polypharmacy,
23 which is giving her multiple medications, because with
24 multiple medications come multiple potential interactions
25 and side affects.

1 Q Okay. I just wanted to make sure. You went
2 through three. I wanted to make sure it was one of the
3 three. You are not making the decision obviously; a
4 psychiatrist would do that. But you were thinking of one
5 medication on a monthly basis renewing, that kind of
6 thing?

7 A And that's what the literature says as well.

8 Q So we've got about three to six months -- and
9 again, this will be after the lawsuit which we are hoping
10 to get done in the next couple of days here. But then
11 about three to six months to get the medication type and
12 amount regulated by a psychiatrist, is that right?

13 A Or a geriatrician.

14 Q And then after that is when you would you start
15 the 16-week psychotherapy program tailored to the complex
16 bereavement. Is that fair to say?

17 A Yes.

18 Q So that would take us through, if we say six
19 months to get her, the medication regulated, and then
20 another month and a half or so for that intense -- or I
21 am sorry, about three to four months for the intense
22 therapy program. So we are talking about, maybe about a
23 year?

24 A Certainly.

25 Q It sounded like the prognosis for folks that go

1 through this are moderate to good. I mean, not a hundred
2 percent outcome always good, but the probability is that
3 she's going to benefit from this program?

4 A Yes.

5 Q And if she -- if we go by the probabilities,
6 does that mean that she would then be able to socialize,
7 I don't want to say normally, but functionally?

8 A Yes.

9 Q And work?

10 A Perhaps not in the same capacity, but yes.

11 Q And kind of the total cost of that program you
12 are recommending for this specific diagnosis that she
13 has, the psychiatric care would be about \$2700, the
14 intense therapy about \$2,000, and then the medications
15 would be roughly 30 to \$70 a month?

16 A Yes.

17 Q Let's talk just a little bit about the effect of
18 the lawsuit on someone like Ms. Fay. What is it about
19 being involved in a lawsuit that kind of inhibits a
20 person's ability to move on?

21 A Well, you bring it up often. Unfortunately,
22 there is depositions and phone calls and meetings with
23 attorneys. And so you might be having a good day and
24 then you get something in the mail. For her, right
25 before she met with Dr. Pitt she had gotten some appeal

1 information in the mail, so that kicked back up a lot of
2 the difficulties that she was having. So with lawsuits
3 and litigation, both criminal and civil, it makes it to
4 where you can't quite put it past you until those things
5 are resolved.

6 Q You said in your report that the civil
7 litigation is profoundly affecting Ms. Fay's mental
8 health recovery to the point where she is solely
9 motivated by her search for justice and retribution.
10 This is what is keeping her alive and focused at this
11 time.

12 Is that your assessment, that this lawsuit
13 itself is having a profound effect on her? Is that
14 something that she told you or your assessment based upon
15 what you looked at and heard and tested and those kind of
16 things?

17 A Yes, yes, and yes. She had indicated that the
18 litigation on a one-to-ten scale, with ten being the most
19 difficult, the most difficulty that a person could have
20 was a ten. So that is what she had indicated. And then
21 when I reviewed her therapist notes, there was -- it was
22 replete with mentions of the criminal and the civil trial
23 and -- and so those are the only two things that I can
24 think of right now. It was multiple notes from the
25 therapists as well as what she had indicated to myself

1 and Dr. Pitt.

2 Q No more questions. Thank you.

3 A Thank you.

4

5

REDIRECT EXAMINATION

6 BY MR. CATANESE:

7 Q Doctor, I am going to go through this real
8 quick. You heard all about these stressors that he went
9 over and over and over again, but it's your opinion that
10 they had little effect on her grief now, correct?

11 A I think that the symptoms that she's
12 experiencing now are materially different than the ones
13 that she had prior to. I mean, certainly she experienced
14 depression and stress and things like that as a result of
15 the teaching at school. But the stressors that she has
16 now are materially different.

17 Q Right. And just to use your words, she
18 experienced a number of historical stressors as well as
19 some current stressors, but they contributed little to
20 her claimed emotional distress results from her son's
21 death. True?

22 A Exactly.

23 Q And let me talk a little bit about some of the
24 things you said. You talked about a number of prior
25 stressors: School, divorce, and then there was Carson,

1 which was basically parenting, right? I mean, that's the
2 stressor was parenting a child because they are not all
3 perfect, are they?

4 A No, they are definitely not all perfect. But it
5 was more than just the stress of parenting. I mean,
6 parenting is like, oh, what's the best punishment to
7 give, what's the best thing to do. I think, to be fair
8 you would say that Carson had some difficulties.

9 Q Right. And she dealt with them the best she
10 could as a single parent.

11 A She did.

12 Q And let's get to the most important question
13 with respect to that. It's your opinion she had a loving
14 and caring relationship with her son, true?

15 A I do believe so.

16 Q And despite all of his faults and all of his ups
17 and downs, you agree with me, despite what he might have
18 put her through, loved and cared for him just as much,
19 didn't she?

20 A Yes. And I mean, we all do, all the parents
21 that are in this room, we love our children as they come.

22 Q Absolutely. Absolutely. And my perfect
23 example, I've got an aunt, she had twins. One of them
24 is, every time turning around, in the paper is an award.
25 And the other one is I'll call a ne'er-do-well. And the

1 ne'er-do-well at times I think it's more love and care
2 from the mom than her son that people can't stop
3 applauding about.

4 A Oftentimes they get more attention than the ones
5 that everybody applauds because they need the most help.

6 Q And when you put that kind of love and care into
7 that child who starts responding to you, that that loss
8 eats at you even more?

9 A It what?

10 Q It would eat at you even more, that loss even
11 more, because you understood that the sweat and love you
12 put into this child, and he's coming around, and you end
13 up with things like -- you end up with a kid that,
14 despite the fact you go through ups and downs, did you
15 see this?

16 A I did.

17 Q Right. And despite all of that, despite as bad
18 as this kid might have been to people or bad you can make
19 him out, loved his mother, didn't he?

20 A Loved his mom.

21 Q And she loved him right back, didn't she?

22 A She did.

23 Q You talked about the blame, but that's not
24 unique to her.

25 A The blame?

1 Q Where someone, where there is a death, what
2 could I have done, I should have done this, I should have
3 done that?

4 A No, that is not unique to her.

5 Q That's actually kind of one of the stages of
6 grief, I believe, isn't it?

7 A It's not really a stage of grief. But with the
8 type of grief that she experiences, it's part of the
9 persistent complex bereavement disorder. That is part
10 that. But it's not like when you think of one of the
11 Kubler Ross stages of grief.

12 Q And you talked about her -- you mentioned
13 that -- let's talk a little bit about the litigation.
14 One of the things you said, it's difficult for her in the
15 criminal end because on the appeal, the murderer -- to
16 her the murderer is still trying avoid accountability and
17 that's just driving her nuts, isn't it?

18 A She didn't say that. It was that she felt like
19 his sentence was not reflective of the crime.

20 Q Correct.

21 A And that...

22 Q That was something that really got to her,
23 wasn't it, that he only got 12 years?

24 A That got to her as well as feeling like she
25 didn't get a chance to tell Carson's story during the

1 criminal trial and she was looking forward to doing that
2 here.

3 Q Right. That's here. And we won't -- the reason
4 this woman is in this room today is a search for justice
5 for her son, like a good mother. Isn't that the reason
6 she's here? At least that's what she told you?

7 A Yes.

8 Q And no reason to disbelieve her, is there?

9 A No.

10 Q One of the things we talked about was the road
11 ahead. And two things we do know. It's going to be
12 intense and it's going to be difficult, true?

13 A Yes, it is.

14 Q And as far as the times that you were giving us,
15 that is an educated guess, true?

16 A Certainly.

17 Q Because a lot of it is going to have to deal
18 with -- you mentioned finding the right psychiatrist.
19 You may not get the right one the first time. It may
20 take one or two to have that match where you feel you can
21 trust -- let me go back a second.

22 One of the things that's going to have to happen
23 for her is, she's going to have to get over the fact that
24 if she moves forward she's going to lose the memory of
25 her son. There is that. I want to be pulled away but I

1 fear I am leaving my son and I can't abandon him. So
2 that's kind of something she's going to have to overcome
3 in order to move forward, true?

4 A Yes.

5 Q And her greatest fear is abandoning her son by
6 doing that, true?

7 A It's certainly one of her fears.

8 Q So what she's being asked to do is being asked
9 to overcome one of her greatest fears in order to get
10 forward for herself?

11 A I think to be fair, she's never going to forget
12 her son.

13 Q Understood.

14 A He's always going to be with her. And I think
15 she knows that. You know that she knows that. But it's
16 getting her to the point where she can move forward. And
17 I think with the conclusion of this litigation, she
18 doesn't want to be the way that she is right now. She
19 wants to get better and I think that she can get better.
20 And that I mean genuinely I hope that they can and that
21 she does.

22 Q And that is greatly appreciated. Doctor, one
23 last thing. Trial is over, gets the medication, gets the
24 psychiatrist, goes down that road, you agree with me she
25 can do anything she wants, there is nothing that is going

1 to bring her son back, is there?

2 A No.

3 Q Thank you.

4 THE COURT: Any questions from the jury for
5 this witness? I do not see any indications of any injury
6 questions for this witness. So this witness may be
7 excused and released?

8 MR. CATANESE: Yes, Your Honor. Thank you
9 very much, Doctor.

10 THE COURT: Thank you.

11 THE WITNESS: Thank you Your Honor.

12 THE COURT: Above it be a good time to take
13 a brief recess or how about the mid afternoon recess 15
14 minutes.

15 MR. CATANESE: Thank you Your Honor.

16 THE COURT: Please remember the admonition.

17 (Jurors not present.)

18 (Brief recess.)

19 THE COURT: Back on the record outside the
20 presence of the jury with out couple and all parties
21 anything for the jury is brought back in.

22 MR. CATANESE: Nothing Your Honor.

23 THE COURT: Please bring the jury in.

24 (Jurors present.)

25 THE COURT: We're back on the record in the

1 presence of the jury after the midafternoon recess. You
2 may continue, Mr. Catanese.

3 MR. CATANESE: Thank you, Your Honor. At
4 this time plaintiff calls Patricia Birmingham as the next
5 witness.

6
7 PATRICIA BIRMINGHAM
8 called as a witness herein, having been first duly sworn,
9 was examined and testified as follows:

10
11 DIRECT EXAMINATION

12 BY MR. CATANESE:

13 Q Good afternoon, Mrs. Birmingham -- or
14 Ms. Birmingham.

15 A Thank you. You may call me Patricia -- or
16 Tricia.

17 Q Thank you very much. Tricia, would you like
18 some water before we start?

19 A I'll pour myself a glass while I am waiting.

20 Q Would you introduce yourself to the jury,
21 please?

22 A My name is Patricia Birmingham. I go by Tricia.

23 Q And Tricia, how do you know Beth Fay?

24 A I am her counselor.

25 Q And where are you a counselor at?

1 A I work for a company called Crisis Preparation
2 and Recovery, which is a private counseling agency here
3 in the valley.

4 Q And let's talk about your background. How is it
5 you came to be a counselor, if you would tell us. Was
6 that your first venture into the health field?

7 A No. I've been a nurse since 1979 and I worked
8 mostly in trauma situations as a nurse. But I also got
9 involved with critical incident stress management,
10 helping first responders with stress issues. And while I
11 was doing that I discovered I liked doing that work, so I
12 went back and got my master's in counseling and have been
13 doing that since 1990.

14 Q You currently are at the Crisis Preparation and
15 Recovery Center?

16 A I work for them. The office that I am in is
17 located in the Glendale Police Department family advocacy
18 center. We have an agreement with them to provide
19 services for victims of crime.

20 Q And is that how Beth got to you?

21 A Yes.

22 Q And let's talk about working with Beth. Are you
23 the only counselor at Crisis Preparation that's worked
24 with her?

25 A No, I am not.

1 Q And in fact, there was someone, Ronnie?

2 A Ronnie Trent, yes. She was another counselor
3 that worked in the office. We shared office space.
4 She's no longer at the facility though.

5 Q And Ronnie was Beth Fay's initial counselor?

6 A Yes.

7 Q And do you recall for how long?

8 A I am not exactly sure. It might have been a
9 little over a year.

10 Q Okay. And my understanding is that Beth starts
11 getting the counseling shortly after Carson's death. Am
12 I correct?

13 A That's correct, yes.

14 Q At that time it would have been Ronnie.

15 A Right.

16 Q And initially was there a time in which you --
17 in which you were doing some counseling, a couple of
18 sessions?

19 A Beth had EAP services through the company that
20 she worked for. And EAP is an employee assistance
21 program. And because I am licensed and Ronnie was not, I
22 had to see her for those three sessions. And then she
23 went back to seeing Ronnie again.

24 Q And then I believe from my records, at some time
25 in about September of 2016 you become Beth's counselor

1 consistently.

2 A Yes. And that's because Ronnie left the office
3 that we were working in.

4 Q And by the time Beth gets to be your -- or you
5 get to be her counselor, you've already got some
6 background and familiarity with her.

7 A Yes.

8 Q So you've been -- have you been counseling
9 her -- let's see, we are in October -- about two years
10 now?

11 A Pretty close to that, yes.

12 Q Has it been consistent over those two years?

13 A Pretty consistent. There has probably been a
14 few times when Beth missed -- she didn't miss
15 appointments, but we had a break maybe for four weeks or
16 so if she was going back to New York to see her daughter
17 or traveling with some friends or whatever. But
18 generally, she's been very consistent about seeing me at
19 least twice a month, sometimes more frequently.

20 Q And does it depend on what's going on in her
21 life as to how she -- how frequently she sees you?

22 A It's more about my concern about what's going on
23 in her life that I schedule her that frequently.

24 Q And again, Beth's not here, correct?

25 A Right.

1 Q Feel a bit more comfortable?

2 A Yes.

3 Q So let's talk about it. What do you mean, when
4 you have concerns you see her more?

5 A My concerns about how depressed she appears or
6 the grief that she's been dealing with, the fact that she
7 doesn't sleep enough. She's not eating well. It's the
8 symptoms that she shows me that says I need to keep a
9 closer eye on her.

10 Q Got it. And you and I have somewhat of a
11 similar, in that we didn't know her before Carson but
12 have gotten to know her after.

13 A Yes.

14 Q Let's talk about initially, if you would. If
15 could you briefly tell us about what the sessions consist
16 of and how you found Beth, at least initially.

17 A Initially Beth, her depression was very obvious.
18 She has got a very complicated grief process that she's
19 going through. It's very hard for her. She misses her
20 son very, very much. Over time her symptoms have gotten
21 better and then there have been times when she's kind of
22 slipped back. Right now my biggest concern is that she's
23 still very depressed. She's not eating well. She's not
24 sleeping well. She's showing a lot of signs of her PTSD,
25 the grief and depression.

1 Q And based on your counseling experience, you
2 feel comfortable saying that she is suffering from PTSD.

3 A Yes.

4 Q And we just had Dr. Hayes in here who diagnosed
5 her with something about a prolonged grief?

6 A Uh-huh.

7 Q Are you familiar with that?

8 A I am.

9 Q And would you agree that's also consistent?

10 A I agree with that, yes.

11 Q And in fact, she testified that the PTSD and
12 this prolonged grief can sometimes overlap.

13 A Absolutely.

14 Q You understand that PTSD, you have to have all
15 the symptoms in the DSM-5.

16 A She meets the criteria for that.

17 Q So you're meeting with her at least twice at
18 month, sometimes more frequently.

19 A Yes.

20 Q Now, you mentioned some concerns about sleep.
21 Is it even more so now than it was before?

22 A I believe it is.

23 Q And why do you say that?

24 A When I see Beth, I check in on some of the
25 things that are going on with her. And one of my

1 concerns is that sleep and depression kind of revolve
2 around each other. If you don't get enough sleep, the
3 more depressed you get; the more depressed you get, the
4 less sleep you get. And sometimes she reports she's
5 sleeping less than two hours a night and that's not
6 healthy.

7 Q You also have a concern about her nutrition?

8 A I have.

9 Q Can you tell us about that?

10 A From the time that I began seeing Beth on a
11 regular basis until now, she's lost a significant amount
12 of weight.

13 Q Has there been any experiences you've had in
14 which you've realized how she's eating or lack thereof?

15 A Recently she needed to use the restroom in our
16 facility. And she was clanging something in the sink and
17 I asked her about it. She said that she needed to clean
18 the straw out because that's the way she was taking her
19 nutrition, through liquids. And that left me even more
20 concerned because previously we had talked about at least
21 having one healthy meal a day.

22 Q Is it just a matter of she doesn't want to take
23 care of herself? She doesn't want to get better?

24 A I don't believe that's true. I just feel that
25 because of her symptoms -- and again, when you are

1 looking at depression and PTSD, a lot of these symptoms
2 go hand in hand with each other. And I think that
3 she's -- she needs -- she needs help with that and that's
4 why I keep a close eye on her.

5 Q Dr. Hayes was here talking about maybe the need
6 for a psychiatrist and medication. Is that something
7 that -- do you disagree with that?

8 A No, I don't disagree with that at all. I have
9 spoken with Beth about it several times.

10 Q And that is something you are encouraging too?

11 A Yes.

12 Q And can you tell us why she's fighting it?

13 A I don't know that she's actually fighting it. I
14 believe that she's just so overwhelmed with all the
15 things that are going on, you know, all the legal issues.
16 She really pays close attention to that and I think it
17 just overwhelms her and she just doesn't get around to
18 it. And we've talked about it, how important it is, and
19 hopefully she'll follow through.

20 Q During your sessions you talk quite a bit about
21 the litigations?

22 A Yes.

23 Q And you find that those are important to Beth?

24 A They are very important to her. She wants her
25 son to be known as a good person and she wants justice

1 for him. And it's very important for her to see this
2 process through.

3 Q And it was part of that reason, her reaction to
4 the 12-year sentence?

5 A Oh, she was very unhappy with that.

6 Q Kind of fueled her -- Dr. Hayes was saying that
7 in some ways she sees this as vengeance and retribution.
8 That, at least to her, unfair sentence fuels that,
9 doesn't it?

10 A I am not so sure it's a retribution thing. But
11 I think that Beth valued her son's life more than 12
12 years. And the fact that she'll never get her son back,
13 it was very hard for her to hear just 12 years.

14 Q Let talk a little bit about what happens in
15 these sessions when you see her.

16 A Most of the time I allow Beth a significant
17 amount of time to vent and to talk about what's going on.
18 And then we address issues about her feelings and how to
19 take care of herself. And I give her tools to use to
20 help her with her health issues, recommending the doctor.
21 We do some mindfulness work that has to do with breathing
22 and helping her relax enough so she might be able to
23 sleep more than a few hours a night.

24 Q I read something about tapping?

25 A Tapping? Yes.

1 Q What's tapping.

2 A Tapping is another tool that we use in terms
3 of -- it goes along with a thing called EMDR, which is
4 eye movement desensitization. And what it does is it
5 allows both sides of the brain to function together. And
6 helps people with solutions and allowing their emotions
7 to calm down. It's hard to get Beth to focus on those
8 things right now.

9 Q Why?

10 A Emotionally she's just not ready for it. You
11 have to be a little more stable for that kind of activity
12 and right now she's not there.

13 Q One of the things in order to implement that is,
14 you have to recognize the need to use it. And that's
15 kind of where she hasn't gotten yet?

16 A I believe that she's an intelligent woman. I
17 believe that she has the ability to recognize that these
18 are important things. But I think her grief and the
19 overwhelming stress that she has related to these court
20 hearings and issues that she has to deal with, it just
21 over- -- it takes over her mind.

22 Q Right. And one of the things I think you showed
23 me was this (Indicating).

24 A Exactly.

25 Q Let's talk about appearance-wise. How is she

1 appearance-wise when you see her at sessions sometimes?

2 A Well, generally Beth is very well kept. I mean,
3 she comes in. She's well dressed. I find that her hair
4 is usually very disheveled. But I think she's taking
5 care of her physical needs in terms of keeping herself
6 clean and taking care of her clothes and stuff. But like
7 I said earlier, I am concerned about the amount of weight
8 she's lost and that she's not sleeping. She looks tired.
9 She looks exhausted. And from the time that I started
10 seeing Beth to today, she has aged significantly.

11 Q Let's talk about crying. How often does it
12 occur in the sessions?

13 A Probably every session.

14 Q Still to this day, three years later?

15 A Yeah. Uh-huh.

16 Q Is that a yes?

17 A Yes.

18 Q Thank you. Just for the record. Would I be off
19 base to say three years later it's still raw for her?

20 A Absolutely.

21 Q What are we going to do?

22 A Well, I am hoping that when this trial is over
23 with that she can start focusing more on herself and we
24 can start working a little bit more --

25 MS. GOLIGHTLY: Objection, Your Honor. Can

1 we approach?

2 THE COURT: Yes, please.

3 (Bench conference was had on the record as
4 heard by the court reporter:)

5 MS. GOLIGHTLY: Your Honor, this witness
6 hasn't been disclosed to testify to any prognosis or any
7 future care whatsoever.

8 MR. CATANESE: I was doing you a favor by
9 saying she was going to get better.

10 MS. GOLIGHTLY: I understand that. But to
11 the extent you are going to go any further --

12 MR. CATANESE: No. I wasn't going to. I
13 was just going to say what are we -- you know. We are
14 good with that.

15 MS. GOLIGHTLY: Thank you.

16 THE COURT: Okay.

17 (Proceedings returned to open court.)

18 THE COURT: You can continue.

19 MR. CATANESE: Thank you very much.

20 Q (By Mr. Catanese) Initially during the sessions,
21 what was Beth focused on and what was your work? What
22 did you find, at least initially, your work had to be?

23 A Initially the work is about helping her deal
24 with her grief and on the loss and the accepting of the
25 loss. And she isn't quite there yet.

1 Q And we do -- during this time that she's seeing
2 you, she had, for lack of a better term, boyfriend?

3 A Yes.

4 Q And he was in the sessions as well.

5 A I had the boyfriend in only one session.

6 Q Okay.

7 A There was one other time he came with her that I
8 asked him to stay out in the waiting room. And he has
9 not returned.

10 Q And it's no secret there have been difficulties
11 with that relationship, correct?

12 A I believe so, yes.

13 Q And one in which she's had difficulty breaking
14 away from it?

15 A I would -- yeah, I would say it's two-sided, but
16 it's been a hard process for her.

17 Q And I mean this by no disrespect. Right now for
18 someone to be in a relationship, either familial or any
19 other, would be difficult why?

20 A Absolutely.

21 Q But why?

22 A Well, she's not able to focus on a relationship.
23 And it takes two people to work on a relationship and
24 that's not -- she's not able to do that right now.

25 Q Okay. And how about as far as her view of

1 Carson? How does she talk about him?

2 A She always talks very kindly about her son, what
3 a good son he was to her, the kind of relationship that
4 they had together, the things she enjoyed most about him.
5 And one of the benefits for her, I think, was that he had
6 lots of friends and they would come around. And that was
7 also something very important to her, to know that there
8 were other young people in his life and her life.

9 Q Is it your understanding that she's tried to
10 stay active with those young people?

11 A Yes, I believe so.

12 Q Let's talk about, at least not so much today but
13 initially, how was Beth's outlook on life?

14 A That's a difficult question. You know, right
15 now I think -- from the time I met her until today, her
16 outlook is about finding justice for her son and about
17 making sure that people know what a good person he was.
18 And it's mainly been focused on about Carson.

19 Q Does she ever talk about, you know, problems
20 raising him or parenting him?

21 A We talked about that a few times. And, you
22 know, she admits, you know, he was a typical teenager and
23 sometimes they had some difficulties. But they were
24 always able to resolve their differences as far as I --
25 you know, as far as she alluded to in her sessions.

1 Q Let's call them the downs of the up and downs of
2 life. During those downs, was there any indication given
3 to you that Beth loved her son or cared for him any less
4 because of those downs?

5 A Absolutely not.

6 Q Kind of the opposite?

7 A I think he was very important to her from the
8 day he took his first breath.

9 Q Are you going to continue to see her?

10 A Absolutely.

11 Q She's going to get better?

12 A That's my hope for her.

13 Q Thank you so much.

14 THE COURT: Thank you.

15

16 CROSS-EXAMINATION

17 BY MS. GOLIGHTLY:

18 Q Good afternoon, Ms. Birmingham.

19 A You can call me Tricia.

20 Q I am going to pick up where David left off. You
21 guys were just discussing about how Beth would talk to
22 you about Carson and that he was a typical teenager,
23 correct?

24 A Uh-huh. Yes.

25 Q Did she ever mention to you that Carson had

1 threatened to kill her and Steve with a knife?

2 A No, she never brought that up.

3 Q Never brought that up?

4 A And I didn't ask about it.

5 Q Did she ever talk to you about Carson having to
6 go through anger management classes?

7 A No.

8 Q What about a shoplifting incident in Tucson?

9 A No.

10 Q Did she ever talk to you about Carson being
11 diagnosed with ADHD?

12 A I believe she mentioned that maybe once or
13 twice, but we didn't dwell on that.

14 Q You didn't dwell on that?

15 A No.

16 Q Did you talk to Beth in any detail about the
17 things that might have happened in her life prior to
18 Carson's passing?

19 A I think most of the sessions that we deal with,
20 we try to deal with what's going on in her life at the
21 present moment. And I don't go back into a lot of the
22 history. I don't have her talk about his death as much.
23 I try to not have her revisit the images that she carries
24 in her mind. I try to focus on today.

25 Q Sure. And I probably inartfully asked the

1 question. But I am curious if prior to Carson's death
2 did you guys ever talk about things that were going on in
3 Beth's life prior to Carson's death that might have
4 affected her afterward?

5 A I would say that we've talked about her career
6 and her work with kids and the fact that she was a
7 teacher for a long time. One of the things that I did
8 talk to her about is if she thought she could go back to
9 work. And right now I don't think that she's able to
10 because working with children would be too hard.

11 Q And your opinion as to Beth going back to work,
12 that's limited to her going back to work as a teacher,
13 correct?

14 A Right.

15 Q You are not saying or you are not telling the
16 jury that she couldn't work doing something else,
17 correct?

18 A At this point in time I don't think she's
19 capable of handling any kind of job until we can get her
20 emotions stabilized.

21 Q And you provided a letter to that effect,
22 correct?

23 A I did.

24 Q Is it your opinion that Beth is going to be in a
25 better condition to return to work after this trial is

1 over?

2 A I don't know that at this point in time, at this
3 moment, and maybe for several months. I don't know. I
4 don't know how she's going to progress. My hope is that
5 I can get her stabilized enough to get her on some
6 medications. She's not going to have to focus on this
7 legal matter so that she can maybe start focusing on some
8 of the other activities that we need to do in her
9 therapy.

10 Q And you just mentioned medications. You spoke
11 with Mr. Catanese about that as well?

12 A Uh-huh.

13 Q You've recommended that Beth start taking
14 antidepressants, correct?

15 A I have, yes.

16 Q And you can't prescribe those, correct?

17 A No, I cannot.

18 Q But are you aware of -- let me rephrase that.
19 Do you have any idea why Beth hasn't started taking those
20 antidepressants, other than what you have already said?

21 A No. No other reason other than what I have
22 already testified to.

23 Q Have you encouraged her to do that though
24 because it might make her better?

25 A Absolutely. And I can honestly say that at

1 almost every session probably for the last six months or
2 so, I have not only encouraged her to get medications but
3 I've provided her some physiological education about how
4 it would help her brain. Again, I have to say right now,
5 Beth is having a difficult time focusing on just getting
6 through her days sometimes.

7 Q And as of right now, to your knowledge she has
8 not followed those recommendations, correct?

9 A At her --

10 Q Is that correct?

11 A At her last session she told me she made an
12 appointment.

13 Q When is the last time you saw her?

14 A I want to say last Wednesday.

15 Q And did you two discuss your testimony here
16 today at all?

17 A No.

18 Q You would agree with me, Tricia, that in
19 addition to Carson's death, there were other stressors
20 going on in Beth's life from the time that you started
21 seeing her until the present, correct?

22 A I would have to say that's probably true, yeah.

23 Q And some of those do involve her boyfriend
24 Steve?

25 A Yes.

1 Q Or her ex-boyfriend Steve?

2 A Ex-boyfriend, whatever.

3 Q Whichever. And that was actually quite the
4 focus in many of the sessions that you and Ronnie
5 counseled her on, correct?

6 A I have counseled her on some of the issues in
7 that relationship. But most of the time the therapy
8 session revolved around helping her deal with her grief
9 and building some tools so that she could function
10 better.

11 Q And did you have a chance to review Beth's
12 records in total from Ronnie's treatment as well as your
13 own treatment before today?

14 A I've looked over my notes in the past, but not
15 Ronnie's.

16 Q So you have not seen any of Ms. Trent's
17 treatment records.

18 A No, I have not.

19 Q Do you think at all that it would have been
20 helpful for you in treating Beth to review what she'd
21 done for the year after Carson's death?

22 A I mean, I have read the notes. But Ronnie and I
23 would consult on her from time to time, so I was aware
24 about Beth even before I started seeing her.

25 Q Okay. In addition -- let's go back for a

1 second. In addition to her relationship with Steve, I
2 got the sense from the records that that was a very
3 unhealthy relationship. Would you agree with that?

4 A Yes.

5 Q And that it was a relationship that in addition
6 to the understandable grief that Ms. Fay was experiencing
7 as a result of Carson's death, that that was the thing
8 that she talked about the most aside from Carson,
9 correct?

10 A I would say a good part of the time, yeah. But
11 not all the time.

12 Q And she told you that he was abusive towards
13 her, correct?

14 A It was my assumption he was. And that's because
15 of the experience I have working with women who have been
16 in domestic violence relationships.

17 Q But you don't recall whether or not she ever
18 expressly told you that he was abusive.

19 A No.

20 Q Did she ever talk to you about Carson's drug and
21 alcohol use?

22 A No.

23 Q Never?

24 A You know, I have to say that as a mother of sons
25 she would tell me things, you know, about, you know, he

1 was a typical teenager. And I could relate to that
2 because I raised two sons and I remember them as
3 teenagers. But she didn't elaborate on that. And again,
4 my focus with her in her therapy sessions was about
5 helping her deal with her grief and helping her get
6 better and supporting her need to let people know that
7 her son was not a bad person and that she really had
8 respect for him as a young man.

9 Q Sure. And it's your professional opinion that
10 learning those things about Carson that I've already
11 mentioned here today in terms of maybe that he wasn't the
12 best child on the planet, that those don't affect in any
13 way -- that's not something that you wanted to know
14 about?

15 A You know, it's not something that would make a
16 difference in her therapy dealing with her grief. And it
17 was not something that I needed to focus on. My focus
18 for Beth is about helping her deal with her grief and to
19 get healthy again.

20 Q Okay. And with respect to Carson, fair to say
21 that she thought that he was a very fantastic child?

22 A I think that she had a realistic thought about
23 him as a teenager. But as a young man, as a young man
24 who is going into adulthood, I think she respected him.
25 And the thing about her relationship with Carson is that

1 she loved him and he loved her and they had a good
2 relationship at that time.

3 Q Do you remember at any time telling Beth that
4 maybe she had an unrealistic or magical thought about
5 Carson as a person?

6 A I don't recall if I had said anything like that.
7 But I have been confrontive with her and I am with all of
8 my clients.

9 Q So do you have a recollection of a session where
10 she compared him to Jesus by chance?

11 A No. Don't remember that phrase at all.

12 Q Do you have a stack of documents in front of
13 you?

14 A I do.

15 Q Marked Exhibit Number 69?

16 A Yeah.

17 Q Can you turn to page 120 in the corner of that,
18 please. Are you on that page?

19 A I am.

20 Q Do you see in the third sentence of Exhibit 69,
21 Bates label 120, client continues to have some magical,
22 unrealistic thoughts about her son, including comparing
23 him to Jesus at one point and making reference to the,
24 quote, hundreds of lives, end quote, he changed and the
25 way he, quote, changed the community, end quote? Do you

1 see that?

2 A Yeah, I see that. I am looking to see if that's
3 my note or Ronnie's note.

4 Q Fair point.

5 A Well, it's dated July of 2016 and I probably was
6 seeing her more regularly then. So it's possible that I
7 wrote that, but I seriously don't remember it.

8 Q You don't remember it.

9 A No.

10 Q Okay. But you are not denying that that's
11 something she either told you or Ronnie, correct?

12 A That's possible, yes.

13 Q Did Beth ever talk to you about her relationship
14 with Drew, her ex-husband?

15 A No. We never had a conversation about him, not
16 that I recall.

17 Q So you are not aware of the seven-year divorce
18 that they went through?

19 A No. And again, that's not something that I saw
20 as important in our therapy.

21 Q Okay. Can you please turn to page 145 of
22 Exhibit 69. Do you see that's a treatment note from
23 November 29th, 2016?

24 A Uh-huh.

25 Q Sorry. Is that a yes?

1 A Yes. I am sorry.

2 Q And says, author, Patricia Birmingham.

3 A Yes. That's me.

4 Q And about halfway down in that paragraph do you
5 see where it says, explored with her how she took care of
6 herself when she was going through her abusive marriage
7 and divorce period?

8 A Okay. I wrote it, so obviously we did have that
9 conversation.

10 Q And do you, as you sit here today, remember what
11 you explored with Beth about her abusive marriage and
12 divorce?

13 A No, I don't. I don't remember.

14 Q No recollection?

15 A No.

16 Q Okay.

17 A It's been a while.

18 Q Sure. Do you remember Beth ever telling you or
19 in the course of her treatment, the sessions that you sat
20 in on with Ronnie, do you ever recall Beth telling you
21 that Drew wasn't close to Carson?

22 A No, I don't recall that.

23 Q If you go to page nine of that same exhibit. Up
24 at the top it says, integrated diagnosis summary and
25 initial plan, correct?

1 A Yes, it does.

2 Q And about halfway down that page it says,
3 client, no history of abuse from childhood or other
4 relationships, correct?

5 A Yes.

6 Q But later on Beth reported how she had an
7 abusive marriage, correct?

8 A I need to look at a little bit more of that
9 document, because if it's part of her intake assessment,
10 that would have been done by Ronnie.

11 Q And you didn't do that.

12 A I did not do that.

13 Q But you and Ronnie have talked about Beth's
14 treatment, correct?

15 A We have. But it had always been about how we
16 were helping her through her grief, dealing with her
17 depression, those kind of things.

18 Q Sure.

19 A Yeah. I would have to say that's probably a
20 note from Ronnie.

21 Q Beth reported that she and her ex-husband are
22 divorced and that he wasn't close to their son. That's
23 something that Beth said to Ronnie, not you?

24 A Correct.

25 Q Okay. Do you know if Beth is currently on any

1 medications?

2 A None. Not that I know of. And I have
3 encouraged her to seek medical treatment for months. So
4 she does not report that she's taking anything.

5 Q Do you recall doing an annual assessment of Beth
6 at any point while you have been treating her?

7 A Yes.

8 Q And you were treating her in September of 2016,
9 right?

10 MR. CATANESE: She starts in September of
11 2016.

12 MS. GOLIGHTLY: She testified to that
13 earlier, correct --

14 Q (By Ms. Golightly) That you had started treating
15 her in -- you started treating her after Ronnie left in
16 September of 2016. Pardon me.

17 A Right. So what page are you looking at?

18 Q I am on page 153. And did you do an initial
19 intake or assessment of Beth when you started treating
20 her exclusively in September of 2016?

21 A I think I just began doing treatment notes at
22 that time. Our company requires us to do an annual
23 review once a year, and I did a review at some point in
24 time.

25 Q And is that this document that's labeled as 153?

1 A Yes.

2 Q And at least at that time do you see where it
3 says medication progress, about halfway down the page?

4 A Yeah.

5 Q Beth was taking Xanax, correct?

6 A On 153, halfway down where it says medication
7 progress?

8 Q Yes.

9 A It also says PNP only.

10 Q Correct.

11 A She may have been taking Xanax at that time, but
12 I don't believe she's on that anymore.

13 Q Do you have any idea when she discontinued the
14 use of that?

15 A No, I don't.

16 Q And you don't know if she's on any medications
17 currently.

18 A None that I know of, but she has not reported to
19 me.

20 Q None that you know of.

21 A And she has not been seeing a doctor as far as I
22 know.

23 Q I didn't hear that.

24 A She has not been seeing a doctor as far as I
25 know.

1 Q Tricia, since you have been treating Beth, has
2 she ever done anything that you think has hindered her
3 progress or hindered her ability to deal with Carson's
4 death?

5 A Has she done anything? I would have to say no,
6 other than maybe not following through or following up
7 with medical appointments. But again, I have to say it's
8 related to the overwhelming exhaustion and the fact that
9 she's really struggling with her loss.

10 Q Okay. There is nothing else?

11 A Not that I know of.

12 Q Okay. Now, you've had concerns about what's
13 been described in the records as an obsession with the
14 litigation, correct?

15 A I think that it's been very important for her
16 throughout this whole process from the very beginning,
17 that her son be seen as a good person.

18 Q Sure. And would you agree with me that Beth
19 spending so much time focused on things like the
20 litigation or reliving what happened to Carson, those are
21 things that are not necessarily helping her get better?

22 A I would have to say it's not helped her get
23 better.

24 Q And would you -- you might have answered this
25 earlier and I apologize if I am asking it again, but as

1 you sit here today do you honestly believe that she is
2 trying to get better?

3 A I believe that now that she's getting close to
4 what she considers the end, that there is more hope for
5 her and she's more focused on her daughter and
6 granddaughter.

7 Q And since you started treating her, have you
8 seen any improvements with how she's handling her grief
9 whatsoever?

10 A There have been some moments when I have seen
11 some improvement and then she slides back. And it's
12 usually related to something that has to do with the
13 legal issues that she's been confronted with.

14 Q So it's not a situation where it started worse
15 and has gotten progressively better?

16 A No. It's been up and down.

17 MS. GOLIGHTLY: Let me just look at my
18 notes real quick. I might not have any more questions.
19 One second.

20 Q (By Ms. Golightly) That's all I have. Thank you
21 so much.

22 A Okay.

23 THE COURT: Redirect?
24

25 REDIRECT EXAMINATION

1 BY MR. CATANESE:

2 Q Real quick. The goal here is to move her
3 forward.

4 A Absolutely.

5 Q And that's a slow movement so far, right?

6 A Yeah.

7 Q And we are hoping after this, it will get moving
8 hopefully a little faster.

9 A Right.

10 Q You were asked a lot of questions about her past
11 and with Carson and relationships and all of that. But
12 am I correct that if you want to be moving forward, you
13 don't want to be looking back all the time?

14 A That's true.

15 Q And one of the reasons you don't want to focus
16 on that is because you want the thoughts going that way
17 and not that way?

18 A Yes. I am trying to get her to focus on today.

19 Q Even better. Not even just that. You just want
20 to get it here hoping to go there?

21 A Yes.

22 Q Good. You heard a lot about these stressors,
23 the marriage, the boyfriend, the divorce, all of that.
24 And these were brought up with Dr. Hayes and it was
25 Dr. Hayes' opinion that while she had these past

1 stressors, they contributed little to the emotional
2 distress she's suffering from the death of her son. Do
3 you agree with that?

4 A I would agree with that.

5 Q Do you agree with me that had she had no
6 stressors in her life, the reaction to losing her son the
7 way she did probably would be the same?

8 A Say that again?

9 Q Sure. Let's assume -- we were told that she has
10 all these stressors in her life. And I guess what
11 they're trying to say is, with all these stressors that's
12 what makes her grief worse. Do you agree with me that
13 regardless of the stressors, this woman's grief would be
14 the same?

15 A Yes.

16 Q There was stuff about this magical, about the
17 way she sees Carson. You have been counseling people
18 that have suffered losses, correct?

19 A I have.

20 Q And when they do talk about those loved ones
21 that they lost, do they tend to look toward the good
22 points of them and even exaggerate them?

23 A Exactly, yeah.

24 Q And you would expect that, wouldn't you?

25 A Yes. And that's common in loss.

1 Q You were asked questions about Carson's
2 relationship with Drew. Do you remember that?

3 A Yes.

4 Q You agree with me probably the best person to
5 ask about Carson's relationship with Drew is Drew?

6 A Yes.

7 Q That's all I have. Appreciate you coming down
8 today.

9 THE COURT: Thank you. Do any members of
10 the jury have any questions for this witness? I do see
11 at least one question from members of the jury.

12 (Bench conference was had on the record as
13 heard by the court reporter:)

14 MR. CATANESE: I think the only thing is --
15 I think that's probably the only part of it. From is.

16 MS. GOLIGHTLY: Yeah, I am okay with it,
17 the first part.

18 THE COURT: I need to know the part you are
19 talking about.

20 MS. GOLIGHTLY: The first part about
21 domestic violence and stuff but from, in other words is
22 it.

23 MR. CATANESE: I'm okay with that.

24 THE COURT: Okay. I'll just start with is
25 it.

1 MR. CATANESE: Yes.

2 MS. GOLIGHTLY: And that's about Steve.

3 This isn't Drew. Do we even care?

4 MR. CATANESE: It's up to you. I hate not
5 asking. I don't have a problem with it.

6 MS. GOLIGHTLY: Wait a second. It's
7 couched now that I -- so it's couched on is it because
8 she's a domestic violence victim and she didn't mention
9 that stuff about Steve and that's not the --

10 MR. CATANESE: I would ask and then we'll
11 go into it, the focus is dealing with the grief and going
12 forward. I am assuming that's --

13 MS. GOLIGHTLY: I am fine with that.

14 MR. CATANESE: Just start from is and I'll
15 follow up on that and we'll clear it up.

16 (Proceedings returned to open court.)

17 THE COURT: I've gone over these questions
18 with the attorneys and I am going to ask you this
19 question, ma'am. It's in abbreviated form. Is it
20 surprising to you that Beth did not mention her prior
21 marriage or go into more detail about the relationship
22 with Steve?

23 THE WITNESS: Can you repeat the first part
24 of that question?

25 THE COURT: Is it surprising to you that

1 Beth did not mention her prior marriage or go into more
2 detail about the relationship with Steve?

3 THE WITNESS: I would have to say no. And
4 the reason for that is, a lot of times I will direct the
5 session in terms of what we are going to talk about. And
6 a lot of times the therapy sessions were about helping
7 Beth deal with the loss of her son.

8 THE COURT: Follow-up on behalf of your
9 client, Mr. Catanese?

10

11 FURTHER REDIRECT EXAMINATION

12 BY MR. CATANESE:

13 Q Let me go back over this. One of the things we
14 discussed is you want to keep her moving forward.

15 A I do.

16 Q The other thing is -- and if I am wrong, please
17 tell me -- my understanding is, all she is focused on is
18 the death of her son and how it happened and seeking
19 justice for him. She's kind of pushed away anything
20 else?

21 A Pretty much, yes.

22 Q So while it may be there, she's just
23 hyper-focused.

24 A And perhaps in the future when she's more
25 focused on her life and getting healthy, she may want to

1 talk about some of the abuse that might have happened in
2 those relationships. But at this point in time, we focus
3 on her grief and helping her get her depression under
4 control.

5 Q Thank you.

6 THE COURT: Follow-up on behalf of the
7 defense?

8 MS. GOLIGHTLY: Not from me, Your Honor.

9

10 FURTHER CROSS-EXAMINATION

11 BY MR. HILL:

12 Q Those issues that the jury raised in the
13 questions, they were significant enough that Beth wrote
14 them down and provided them to you guys though, right?

15 A Well --

16 Q That's correct. She wrote them down and put
17 them in an intake form?

18 A She didn't write them down. When we do an
19 intake, it's my interviewing the client. And when she
20 met with Ronnie, which was back in I think 2015, those
21 kind of questions may have been answered based on what we
22 have as a guide to our intake session.

23 Q But the reason you are asking those questions is
24 you want to find out significant history from the client,
25 right?

1 A Right.

2 Q One of those things that's significant, that you
3 ask about, is prior abusive relationships, as an example,
4 correct?

5 A And that would be one if the things that we
6 would focus on. But again, I have to go back to say, my
7 focus has always --

8 Q I understand.

9 A -- been on dealing with her grief.

10 MR. CATANESE: Excuse me. Can she finish
11 her answer, please.

12 MR. HILL: It was a yes or no question.

13 Q (By Mr. Hill) My question was: You guys ask
14 those questions because they are significant history from
15 your patient or your client, correct?

16 A Right.

17 Q If it didn't matter, you wouldn't have that on
18 the intake interview at all, right? Correct, ma'am?

19 A I guess the way I would answer that is --

20 Q Well, it's yes or no really.

21 A Ask the question again.

22 Q I am just trying to figure out, if the subject
23 is important enough to ask about and it elicits a
24 response, it's a significant piece of information about
25 the history of that client, correct?

1 A Right. You are absolutely right about that.

2 Q I understand your focus is on something else.

3 A And that intake was done almost a year before I
4 started seeing her.

5 Q I am not suggesting that you did it or didn't.
6 It was just part of the process that your office follows
7 to document significant information about a client
8 including abusive relationships, correct?

9 A Yes.

10 Q Thank you.

11 MR. CATANESE: May I follow up, Your Honor?

12 THE COURT: Yes. It's redirect to
13 supplemental question.

14

15 FURTHER REDIRECT EXAMINATION

16 BY MR. CATANESE:

17 Q It's there and it's out there and you have
18 conversations with Beth. And if it's something that is
19 significant for her, she's going to bring it up, true?

20 A Right.

21 Q In your cases, has she been bringing up this
22 past and how it's bothering her?

23 A No.

24 Q Does she even recognize it at this point?

25 MR. HILL: Foundation.

1 MR. CATANESE: She's the counselor.

2 THE COURT: Overruled.

3 Q (By Mr. Catanese) He's got the blinders on that
4 the death of her son and justice for his death?

5 A Right.

6 Q Thank you.

7 THE COURT: Is there another question by
8 any members of the jury? I saw some rustling of papers.
9 I went over the questions and there are certain reasons
10 why some of the question is asked and other parts of the
11 question is not asked.

12 THE JUROR: Can I rephrase?

13 THE COURT: You can try again, sure. Just
14 remember I have to apply the same rules to the jurors'
15 questions as I do to the lawyers' questions.

16 (Bench conference was had on the record as
17 heard by the court reporter:)

18 MS. GOLIGHTLY: I don't think it's --

19 MR. CATANESE: I can't imagine how it's
20 relevant. I can't figure out where she's going. I am
21 trying to help her.

22 MR. HILL: I think it's okay to ask. We
23 started down that path. If it goes to her emotion and
24 suffering, it's an issue.

25 THE COURT: I think the juror may be

1 looking for the qualifications of this expert.

2 MS. GOLIGHTLY: And I think that it's based
3 on comments this juror has made during jury selection.

4 MR. CATANESE: Yup.

5 THE COURT: Do you want me to ask it or not
6 ask it?

7 MS. GOLIGHTLY: I don't -- it's fine to
8 ask.

9 MR. CATANESE: Yeah. I don't have a
10 problem with it. That way it gets asked.

11 (Proceedings returned to open court.)

12 THE COURT: I've gone over this question
13 with the attorneys and I am going to ask you these
14 questions. Do domestic violence victims always disclose
15 their abuse on intake forms? Why or why not?

16 THE WITNESS: They may divulge some
17 information, but a lot of times they will hold back on
18 some information. Sometimes it's out of fear. Sometimes
19 it's they are not ready to talk about it. Sometimes it's
20 just they don't know what to say.

21 THE COURT: Thank you. Follow-up
22 Mr. Catanese?

23 MR. CATANESE: Nothing, Your Honor. Thank
24 you.

25 THE COURT: On behalf of the defense?

1 MS. GOLIGHTLY: No, Your Honor.

2 MR. HILL: No, Your Honor.

3 THE COURT: If there are no further
4 questions, may this witness be excused and released?

5 MR. CATANESE: Yes, Your Honor.

6 THE COURT: Thank you.

7 THE WITNESS: Thank you.

8 --oOo--

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C E R T I F I C A T E

I, Brigid M. Donovan, CR, a Certified Reporter in the State of Arizona, do hereby certify that the foregoing pages constitute a full, true, and accurate transcript of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

SIGNED and dated this 16th day of November, 2018.

/s/ *Brigid M. Donovan*

Brigid M. Donovan, RPR

Certified Reporter #50902

Brigid M. Donovan, RPR
AZ CR. 50902

EXHIBIT “12”

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-005451-001 DT

04/05/2019

HON. PAMELA GATES

CLERK OF THE COURT
K. Ballard
Deputy

STATE OF ARIZONA

KEVIN POLLAK

v.

JORDAN MICHAEL HANSON (001)

LORI L VOEPEL
MICHAEL D KIMERER

APPEALS-CCC
AZ DOC - INMATE TRUST ACCOUNTS
RFR

RANDALL S UDELMAN

ORDER ENTERED BY COURT

The court received and considered the parties' January 23, 2019 Joint Report Regarding Remaining Restitution Issues.

IT IS ORDERED entering the following Criminal Restitution Order in favor of the following individuals for the following amounts:

Beth Fay in the amount of **\$562,980.45, which is inclusive of the following amounts:**

- Beth Fay's travel costs and parking fees \$644.80
- Beth Fay's physician visits and prescription copays of \$390.09
- Beth Fay's lost wage claims through June 2018 of \$143,636.00
- Beth Fay's insurance premiums of \$2,044.56
- Beth Fay's car loan to Carson Dumbrell of \$4,863.00
- Carson Dumbrell's lost wages claim of \$411,402.00 paid to Beth Fay on behalf of Carson Dumbrell's estate

Stephanie Dumbrell in the amount of **\$4,094.62**

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-005451-001 DT

04/05/2019

Restitution shall be paid monthly in an amount to be determined by the Arizona Department of Corrections in compliance with A.R.S. § 31-230.

IT IS FURTHER ORDERED retaining jurisdiction of restitution.

EXHIBIT “13”

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8 *Attorneys for Defendant*

9 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
10 IN AND FOR MARICOPA COUNTY

11 **STATE OF ARIZONA,**

12 Plaintiff,

13 vs.

14 **JORDAN HANSON,**

15 Defendant.

16 Case No. CR2015-005451-001

17 **DEFENDANT HANSON'S MOTION FOR**
18 **RECONSIDERATION OR**
19 **CLARIFICATION OF CRIMINAL**
20 **RESTITUTION ORDER**

21 (Honorable Pamela Gates)

22 Defendant, Jordan Hanson, by and through undersigned counsel, hereby moves this Court
23 to reconsider its entry of a criminal restitution order set forth in the April 5, 2019, minute entry
24 or, in the alternative, for clarification by the Court of whether its intent was to issue a criminal
restitution order subject to interest during Mr. Hanson's incarceration rather a restitution
judgment that would be converted to a criminal restitution order upon his release and begin
accruing interest upon his release from the Department of Corrections. There is no dispute as to
the amounts ordered by the Court, simply whether the criminal restitution order is subject to
interest during Mr. Hanson's incarceration. As grounds in support of this Motion, Mr. Hanson
states as follows:

The parties engaged in extensive negotiation with respect to restitution in this case. The
parties ultimately came to resolution on the amounts of restitution. However, there remained a
dispute in whether the Court should issue a criminal restitution order subject to interest during
Mr. Hanson's incarceration as requested by the victims or whether the Court should wait until his

1 release from his confinement to issue the criminal restitution order as requested by Mr. Hanson.
2 The Court's order of April 5, 2019, orders a criminal restitution order in the amounts agreed by
3 the parties. However, there is no discussion of the Court's findings as it relates to the
4 discretionary use of a criminal restitution order subject to interest during the period of Mr.
5 Hanson's incarceration.

6 Mr. Hanson had objected to the criminal restitution order during incarceration because he
7 has no reasonable means to pay the restitution while incarcerated. While the victims had argued
8 that the entry of the criminal restitution order would encourage him to work harder to pay off the
9 balance while incarcerated. However, that is an untenable position as Mr. Hanson has no ability
10 to work harder in prison. He is subject to the jobs and pay that the Department of Corrections
11 assigns him. The victim's position really is an effort to get Mr. Hanson's family to pay restitution
12 for him – something they have no obligation to do. It is a punitive measure against Mr. Hanson
13 to permit such a large restitution judgment to obtain interest during a period of time where no
14 reasonable actions can be made by Mr. Hanson to pay the debt. Based on the inability to pay
15 during incarceration, it is requested the Court reconsider if the intent was to issue a criminal
16 restitution order subject to interest. In the alternative, it is requested that the Court clarify its
17 position on the restitution order and interest in the event Mr. Hanson seeks to appeal the Court's
18 decision on the criminal restitution order. Mr. Hanson is agreement with the criminal restitution
19 amounts and the limited ability of the victims to pursue payment through lawful means while
20 incarcerated. However, the issuance of a criminal restitution order is premature.

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Respectfully submitted this 17th day of April, 2019.

KIMERER & DERRICK, P.C.

/s/ Michael D. Kimerer
Michael D. Kimerer
1313 East Osborn, Suite 100
Phoenix, Arizona 85014
Email: mdk@kimerer.com
Attorneys for Defendant

ORIGINAL of the foregoing filed electronically
On this 17th day of April, 2019, with:

Clerk of Court
Maricopa County Superior Court

COPIES of the foregoing electronically delivered
on this 17th day of April, 2019, to:

Honorable Pamela Gates
Maricopa County Superior Court
East Court Building – courtroom 912
aldecoaj@superiorcourt.maricopa.gov

Randall Udelman, Esq.
P.O. Box 2323
Scottsdale, Arizona 85252-2323
rudelman@azvictimrights.org
Attorneys for Victims

By: /s/ Melissa Wallingsford

EXHIBIT “14”

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-005451-001 DT

05/21/2019

HON. PAMELA GATES

CLERK OF THE COURT
A. Gonzalez
Deputy

STATE OF ARIZONA

DENISE O'ROURKE
JASON THOMAS DIEKELMAN

v.

JORDAN MICHAEL HANSON (001)

LORI L VOEPEL
MICHAEL D KIMERER

AZ DOC - INMATE TRUST ACCOUNTS
JUDGE GATES
RFR

RANDALL S UDELMAN

RULING / CRIMINAL RESTITUTION ORDER SIGNED

On April 5, 2019, the Court issued its Minute Entry entering a Criminal Restitution Order in favor of Victims Beth Fay (\$562,980.45) and Stephanie Dumbrell (\$4,094.62), directing that said restitution be paid by Defendant while incarcerated in an amount to be determined by the Arizona Department of Corrections in compliance with A.R.S. §31-230.

On 4/16/2019, above-named Victims filed a Notice of Lodging Proposed Criminal Restitution Order, which the Court has considered.

On 4/17/2019, the Court received Defendant Hanson's Motion for Reconsideration or Clarification of Criminal Restitution Order dated 4/17/2019.

IT IS ORDERED denying Defendant's Motion for Reconsideration et al.

IT IS FURTHER ORDERED settling and approving the formal Criminal Restitution Order signed by the Court on 5/13/2019 and filed/entered on 5/20/2019. In accordance therewith,

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-005451-001 DT

05/21/2019

As to Count 1:

Defendant shall pay restitution to Victim Beth Fay (an individual) in the amount of \$562,980.45 plus interest at the highest legal rate pursuant to A.R.S. §13-805(E); and,

Defendant shall pay restitution to Victim (an individual) Stephanie Dumbrell in the amount of \$4,094.62 plus interest at the highest legal rate pursuant to A.R.S. §13-805(E).

The Criminal Restitution Order does not expire until paid in full and may be recorded and enforced as any civil judgment and also in reliance upon all collection tools available in the Criminal Code pursuant to A.R.S. §13-810 et seq. In addition, the Criminal Restitution Order is a criminal penalty for purposes of any federal bankruptcy involving Defendant pursuant to A.R.S. §13-805(I).

IT IS FURTHER ORDERED that Defendant shall maintain with the Clerk of the Superior Court his current address for billing and collection purposes until the restitution amounts are paid in full.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of ordering, modifying and enforcing the manner in which payments are made until paid in full pursuant to A.R.S. §13-805(A)(2).

Restitution shall continue to be paid monthly in an amount to be determined by the Arizona Department of Corrections in compliance with A.R.S. § 31-230.

No restitution ledger provided.

EXHIBIT “15”

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FILED
5/20/19 3:05pm
A. Gonzalez, Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA)	No. CR2015-005451-001
Plaintiff,)	
vs.)	CRIMINAL RESTITUTION ORDER
JORDAN MICHAEL HANSON;)	
Defendant.)	

This Court having considered the evidence presented and having issued its restitution award in its Minute Entry dated April 5, 2019, pursuant to A.R.S. §18-805(B), a Criminal Restitution Order is entered in the above-entitled proceeding and set forth as follows:

IT IS ORDERED:

Victim Beth Fay is awarded a Criminal Restitution Order against Defendant JORDAN MICHAEL HANSON for the total sum of \$562,980.45 plus interest at the highest legal rate pursuant to A.R.S. §13-805(E). Victim Stephanie Dumbrell is awarded a Separate Criminal Restitution Order against Defendant JORDAN MICHAEL HANSON for the total sum of \$4,094.62 plus interest at the highest legal rate pursuant to A.R.S. §13-805(E). These orders are subject to the following information and adjustment pursuant to A.R.S. §13-806(B):

- A. The name of the Defendant is JORDAN MICHAEL HANSON whose date of birth is June 15, 1994;
- B. Defendant JORDAN MICHAEL HANSON, Inmate Number 319077 currently resides at the ASPC-L Morey Unit, Arizona Department of Corrections Lewis Complex, 26700 AZ-85, Buckeye, AZ 85326;

1 C. The criminal proceeding pursuant to which the Criminal Restitution Order is filed
2 is:

3 *State of Arizona v. Jordan Michael Hanson*
4 Criminal Cause Number CR2015-005451-001
5 Maricopa County Superior Court
6 201 West Jefferson Avenue
7 Phoenix, Arizona 85003

8 D. The name and address of the attorney representing the State of Arizona in the
9 proceeding pursuant to which the Criminal Restitution Order is filed is as follows:

10 Jason Diekelman, Esq.
11 Maricopa County Attorney's Office
12 301 West Jefferson Street, 2nd Floor
13 Phoenix, Arizona 85003

14 E. The name and address of the attorney representing Beth Fay and Stephanie
15 Dumbrell, as victims is:

16 Arizona Crime Victim Rights Law Group.
17 P.O. Box 2323
18 Scottsdale, Arizona 85252-2323

19 F. This Criminal Restitution Order and notice of lien is being filed pursuant to
20 A.R.S. §§ 13-805(E) and -806(A)-(J)

21 G. Pursuant to A.R.S. §13-806(A)(7), notice is hereby given that this amount will
22 change and that the clerk of the court in which the proceeding was or is pending
23 shall maintain a record of the outstanding balance.

24 **IT IS FURTHER ORDERED:** That this criminal restitution order does not expire until
25 paid in full and may be recorded and enforced as any civil judgment and also in reliance upon all
26 collection tools available in the Criminal Code pursuant to A.R.S. §13-810, *et. seq.* In addition,
27 this Criminal Restitution Order is a criminal penalty for purposes of a federal bankruptcy
28

1 involving the Defendant pursuant to A.R.S. §13-805(I). All payments are payable to the Clerk of
2 the Superior Court.

3 **IT IS FURTHER ORDERED:** That the Defendant shall maintain with the Clerk of the
4 Superior Court the current address of the Defendant for billing and collection purposes, until all
5 payments pertaining to this Order are paid in full.
6

7 This Court shall retain jurisdiction of this matter for purposes of ordering, modifying and
8 enforcing the manner in which payments are made until paid in full pursuant to A.R.S. §13-
9 805(A)(2).

10 DATED this 13th day of May, 2019.

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13 _____
14 Honorable Pamela Gates
15 Maricopa County Superior Court
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INFORMATION STATEMENT OF JUDGMENT CREDITOR/VICTIM

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- 1) Judgment Debtor/Defendant: JORDAN MICHAEL HANSON
Case Number: CR2015-005451-001
Address: Inmate No. 319077
ASPC-L Morey Unit
Arizona Department of Corrections
Lewis Complex
26700 AZ-85
Buckeye, Arizona 85326
Telephone Number: Unknown
- 2) Judgment Creditor(s): Beth Fay
Stephanie Dumbrell
Mailing Address: c/o Clerk of the Superior Court
Maricopa County
301 W. Jefferson, Suite 960
Phoenix, Arizona 85003
- 3) Total amount of Judgment/CRO:
Victim Beth Fay: \$562,980.45
Victim Stephanie Dubmbrell: \$ 4,094.62
- 4) Judgment Debtor's
Social Security No.: xxx-xx-1757
Date of Birth: June 15, 1994
Driver's License Number: Unknown
- 5) Stay of Enforcement has been ordered: [] Yes [] No
Date the Stay Expires: _____

EXHIBIT “16”

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1 Treasure VanDreumel, 012392
2 **LAW OFFICE OF TREASURE VANDREUMEL, PLC**
3 801 N. 1st Avenue
4 Phoenix, Arizona 85003
5 602-253-7348
6 vandreumellaw@gmail.com
7 Attorneys for Defendant/Petitioner

8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
9 **IN AND FOR THE COUNTY OF MARICOPA**

10 STATE OF ARIZONA,
11
12 Plaintiff/Respondent,
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14 v.
15 JORDAN MICHAEL HANSON,
16
17 Defendant/Petitioner

18 CR 2015-005451-001 DT
19 **DEFENDANT'S LIMITED PETITION FOR**
20 **POST CONVICTION RELIEF (DELAYED**
21 **APPEAL REQUEST) AND**
22 **REQUEST TO HOLD FURTHER PCR**
23 **PROCEEDINGS IN ABEYANCE**
24
25 (Assigned to the Dewain Fox, Rule 32
26 Management Unit; Honorable Pamela
27 Gates, trial judge)

28 Defendant/Petitioner, by and through undersigned counsel, hereby files a limited petition for post-conviction relief seeking leave of the court to file a delayed appeal pursuant to Rule 32.1(f), Ariz.R.Crim.P. ("Grounds for relief are: the failure to file a notice of appeal within the required time was not the defendant's fault.") Petitioner requests these PCR proceedings be thereafter held in abeyance pending exhaustion of his appellate remedies.

This limited PCR is supported by the accompanying Memorandum of Points and Authorities, and the exhibits affixed hereto. For the reasons stated in the Conclusion, an expedited ruling is respectfully requested.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND:

3 From inception of this case through trial and sentencing, Petitioner was represented by
4 retained counsel Mr. Grant Woods. Following trial, on May 24, 2017 Petitioner was sentenced to 12
5 years imprisonment for the crime of second degree murder. During that sentencing, the court asked
6 the prosecutor whether a specific amount of restitution was being requested, or whether the State
7 was requesting the court retain jurisdiction over restitution. (Exhibit A, RT 5/24/17, 42:2-4) The
8 State responded that absent stipulation concerning the amount of restitution to be ordered, "we
9 should hold that open and we can gather the documentation we need." *Id.*, at 42:11-16. Counsel
10 representing the victim's mother added that holding the restitution determination open "would allow
11 us the opportunity to further develop it." *Id.*, at 42:18-20. Defense counsel stated that Petitioner
12 would waive his appearance for a future restitution hearing; the court confirmed his representation.
13 *Id.*, at 42:22-43:5.

14 At the conclusion of the sentencing hearing, the court said: "It is the judgment and sentence
15 of the Court that you be imprisoned for 12 years in the Department of Corrections. That sentence
16 will start from today's date. You have credit for 105 days of [presentence] incarceration credit. The
17 Court is retaining jurisdiction over restitution. As I indicated, Mr. Hanson has waived his presence
18 for any future restitution hearing. The Court is imposing the \$20 probation assessment." *Id.*, at
19 83:7-15. Immediately after entering the orders of confinement and probation assessment, the Court
20 said to Petitioner: "*You have the right to appeal the orders of this Court and the findings of the jury.*
21 *... However, if you want to appeal, you must do so within 90 days of today's date or you lose that*
22 *right.*" *Id.*, at 83:16-21. Petitioner orally confirmed that he understood his appellate rights;
23 respective counsel confirmed that the Court did not "overlook or misstate anything." *Id.*, at 83:24-
24 84:3.

25 The sentencing minute entry order reflected that the court retained jurisdiction over
26 restitution, that no restitution hearing was set at the time of sentencing, and Petitioner waived his
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1 presence at any upcoming restitution hearing. The written "Notice of Rights of Review After
2 Conviction and Procedure" signed by Petitioner at the time of sentencing advised that he had "the
3 right to appeal from a final judgment of conviction, from an order denying a post-trial motion, or from
4 a sentence which is illegal or excessive." (Exhibit B, attached) It stated that "in order to exercise
5 [his] right to appeal", he was required to file a "notice of appeal within 20 days of judgment and
6 sentence"; failure to do so would result in the loss of the right to appeal. Thus, it's not the Court's
7 mistaken oral advisement that Petitioner had "90 days" within which to appeal that forms the basis of
8 the instant limited petition for post-conviction relief. That error was corrected by the written "Notice
9 of Rights of Review After Conviction and Procedure" signed by and provided to Petitioner.
10 Petitioner timely appealed his conviction and sentence. Attorney Lori Voepel entered her
11 appearance as counsel of record on direct appeal.¹

12 Rather, it is the lack of a clear advisement as to *what orders* were appealable which is at
13 issue here. At the time of sentencing, the trial court orally advised Petitioner of his "right to appeal
14 the orders of this Court and the findings of the jury." At the time, the "orders of this Court and the
15 findings of the jury" were comprised of Petitioner's criminal conviction, the twelve-year order of
16 imprisonment, and the \$20 probation services fee. The written "Notice of Rights of Review After
17 Conviction and Procedure" similarly advised Petitioner of his "right to appeal from a *final judgment of*
18 *conviction...or from a sentence which is illegal or excessive.*" Critically, it advised that "[t]he *entry of*
19 *judgment and sentence occurs at the time of sentencing*"—which in this case was on May 24, 2017
20 some two years before any restitution orders would be entered.

21 In March, 2018—while the criminal appeal was pending—counsel representing the victim's
22 mother filed a request for restitution and issuance of a Criminal Restitution Order. Attorney Michael
23 Kimerer then filed a "Notice of Limited Scope Appearance as Attorney for Jordan Hanson Regarding
24

25 ¹ Although Voepel filed a "Limited Notice of Appearance" before the trial court in order to
26 cause omitted pleadings submitted during trial but inadvertently omitted from the superior court
27 record, she neither noticed her appearance nor appeared as counsel of record at the superior court
28 level.

1 Restitution Order.” Pleadings were thereafter filed in the superior court by both counsel for the
2 victim’s mother and Petitioner’s counsel concerning restitution. No rulings were made by the trial
3 court in 2018.

4 The court of appeals denied relief on direct appeal by memorandum decision filed November
5 11, 2018. Petitioner then sought review of that decision in the Arizona Supreme Court.

6 By minute entry order of April 5, 2019 and May 21, 2019—while the Petition for Review on
7 direct appeal was pending—the superior court entered restitution awards and a Criminal Restitution
8 Order concerning same. The court awarded \$562,075.07 in restitution. The Criminal Restitution
9 Order attached interest accruing at 10% per year to that amount; thus, by the time Petitioner was
10 released from prison, the interest alone will total \$680,490.00 and be added to the original restitution
11 awards.

12 Although the superior court’s restitution orders constituted an appealable judgment,
13 Petitioner was not advised of his right to appeal those restitution orders. Both the court’s oral
14 pronouncement at sentencing *and* the written notice strongly suggested that only the judgment of
15 conviction and sentence both imposed “at the time of sentencing” could be appealed. The restitution
16 orders, of course, did not “occur at the time of sentencing” on May 24, 2017. Any ambiguity must be
17 resolved in Petitioner’s favor as opposed to resulting in the denial of an appellate right.

18 Nor was Petitioner endorsed on those restitution minute entry orders; both orders
19 inadvertently omitted endorsement as to him even though he was incarcerated and his address
20 easily attainable. Although he’d waived his right to be present during restitution hearing(s), he did
21 not waive his right to receive notice from the court concerning the restitution ultimately ordered. Nor
22 was Petitioner provided copies of those restitution orders or timely advised of their entry by his
23 attorney of record Mr. Kimerer or anyone else.² (Exhibit C, Petitioner’s Affidavit) He didn’t learn of
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25 ² Attorney Lori Voepel was incorrectly endorsed on the restitution orders as counsel of
26 record. Because she merely represented Petitioner on direct appeal of his conviction and
27 sentence, and because the restitution orders were not part of the conviction and sentence on which
28 the appeal was taken and pending, she paid no attention to the restitution orders and did not advise
29 Petitioner of same.

1 the superior court's determinations concerning restitution until some five months after their entry. *Id.*

2 **II. LAW AND ANALYSIS:**

3 Due process requires a criminal defendant be provided with notice of all final judgments
4 entered against him along with notice of his right to appeal such orders. The superior court's
5 restitution determinations are appealable judgments; appeal must be filed within 20 days of their
6 entry. Here Petitioner was not provided timely notice of the restitution orders entered, nor was he
7 advised of his right to appeal those restitution orders. Rule 32.1(f) provides an avenue for relief in
8 circumstances where a defendant fails to timely appeal a judgment through no fault of his own; if
9 so, the superior court may enter an order granting a petitioner leave to file a delayed appeal. For the
10 reasons stated, Petitioner respectfully seeks leave of this Court to file a delayed appeal concerning
11 the restitution orders entered in April and May, 2019.

12 In this vein, Petitioner requests that once granted a delayed appeal, the instant PCR
13 proceedings be held in abeyance pending exhaustion of his appellate remedies. Post-conviction
14 proceedings permit relief on several grounds, including that of ineffective assistance of counsel.
15 However, in *State v. Spreitz*, 202 Ariz. 1, ¶4 (2002) our supreme court acknowledged that, in
16 general, claims of ineffective assistance of counsel that were raised or could have been raised in an
17 initial post-conviction proceedings are regarded as waived and precluded if raised in a successive
18 petition. Thus, to avoid waiver and preclusion, Petitioner must raise *all* claims of ineffective
19 assistance of counsel—that is, those relating to both trial counsel and counsel representing him
20 during the restitution proceedings—in his *initial* petition for post-conviction relief.

21 The current due date for the petition for post-conviction relief is January 13, 2020. The two-
22 year bifurcation between the sentencing and issuance of the restitution orders render this case
23 unique in its procedural posture. Because post-conviction review and investigation as to trial
24 counsel remains incomplete to date, and because Petitioner cannot possibly raise claims of
25 ineffective assistance of restitution counsel prior to exhaustion of his appellate remedies, he
26 respectfully requests the instant proceedings be held in abeyance pending the restitution appeal, to

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1 be resumed once his appellate remedies have been exhausted and jurisdiction returned to the
2 superior court.

3 One final note concerning the scope of victim's rights and its impact on the instant Notice of
4 Limited Petition for Post Conviction Relief. The Victim's Bill of Rights does not make victim's
5 "parties" to the prosecution—including that occurring in post-conviction proceedings. *State v.*
6 *Lamberton*, 183 Ariz. 47, 49 (2995)(VBR does not make victims "parties" to the prosecution).
7 Although crime victims have the right to "present evidence, information and opinions that
8 concern...the need for restitution", A.R.S. §13-4426, here that right has already been afforded.
9 Neither VBR, VIRA nor Rule 39 grants victims the right to file responsive substantive pleadings in
10 Rule 32 post-conviction matters. That right is reserved for the State of Arizona alone, and with good
11 reason.

12 "[R]estitution is not a claim which belongs to the victim, but a remedial measure that the
13 court is statutorily obligated to employ." *State v. Iniguez*, 169 Ariz. 533, 536 (App.1991). Though
14 "the prosecutor owes duties to victims, the prosecutor's responsibility is to represent society's
15 interests and 'see that justice is done on behalf of both the victim and the defendants.'" *Lindsay R. v.*
16 *Cohen*, 236 Ariz. 565, 567 (App.2015), quoting *State v. Superior Court (Flores)*, 181 Ariz. 378, 382
17 (App.1995) In this case, counsel for the victim's mother may not invade the state's province in these
18 Rule 32 proceedings by filing substantive pleadings which usurp the prosecutor's role. As the Court
19 of Appeals explained in 2015 concerning litigation surrounding restitution:

20 Unlike a prosecutor, a victim's personal counsel serves solely as an advocate for
21 the victim. *The purpose of restitution proceedings would be subverted if the victim's*
22 *counsel were allowed to take the prosecutor's place—such an arrangement would*
23 *essentially transform a criminal sentencing function into a civil damages trial.*
24 Contrary to the petitioner's assertions, nothing in the VBR, the VRIA, Rule 39 or
Arizona case law authorizes such a result, even under the liberal-construction
standard proscribed by A.R.S. §13-4418. Further, because restitution is not a claim
that belongs to victims, we reject the petitioner's contention that the allocation of
prosecutorial duties to the state deprives victims of due process.

25 *Lindsay R., supra.*, at 567-68 ¶10 (*emphasis added*) As in the restitution proceedings themselves,
26 counsel representing the victim's mother may not submit substantive pleadings asserting a position

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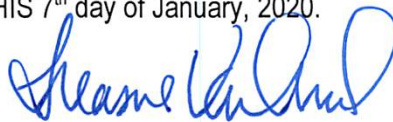
1 concerning Petitioner's requests brought herein. The VRIA expressly provides that "[o]n request of
2 the victim, the prosecutor's office that is responsible for handling any post-conviction or appellate
3 proceedings immediately shall notify the victim "of the proceedings and any decisions that arise out
4 of the proceeding." A.R.S. §13-4411(C). Neither VBR, VRIA nor Rule 39 expands this right of
5 *notice* and, by providing a copy of the instant Limited Petition for Post Conviction Relief to victim's
6 counsel, undersigned counsel provides such notice to victim's counsel on the State's behalf.
7 Petitioner objects to any substantive pleadings filed in these post-conviction proceedings by counsel
8 for the victim's mother.

9 **III. CONCLUSION:**

10 Based on the aforementioned, Petitioner respectfully requests and Order permitting the filing
11 of a delayed appeal since his failure to appeal the restitution orders was through no fault of his own.
12 Rule 32.1(f), Ariz.R.Crim.P. If granted, a Notice of (Delayed) Appeal and designation of record will
13 be filed in the superior court by undersigned counsel. Upon such occurrence, Petitioner requests the
14 instant post-conviction proceedings be held in abeyance pending exhaustion of appellate remedies,
15 to automatically resume following issuance of the mandate on appeal. See, Rule 31.22(a),
16 Ariz.R.Crim.P. ("An appellate court retains jurisdiction of an appeal until it issues the mandate.")
17 Only then may Petitioner ensure that all claims of ineffective assistance of counsel are raised in his
18 *initial* petition for post-conviction relief to be filed in the superior court.

19 Petitioner respectfully requests an expedited ruling on the instant limited petition for post-
20 conviction relief so that, in the event it is denied, he may seek an extension of the January 13, 2020
21 post-conviction filing deadline prior to its occurrence.

22 RESPECTFULLY SUBMITTED THIS 7th day of January, 2020.

23 

24 _____
25 Treasure VanDreumel
26 Attorney for Defendant/Petitioner
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28


1 Original of the foregoing filed
2 this 7th day of January, 2020 with
3 the Maricopa County Superior Court
4 via electronic filing;

5 COPY of the foregoing
6 emailed this same date to:

7 Mr. Jeffrey L. Sparks
8 MARICOPA COUNTY ATTORNEY
9 MCAOAPPEALS@mcao.maricopa.gov
10 Counsel for the State of Arizona

11 and a courtesy copy emailed this date to:

12 Mr. Randall S. Udelman
13 Arizona Crime Victim Rights Law Group
14 rudelman@azvictimrights.org

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EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA)	
)	
v.)	
)	No. CR 2015-005451-001
JORDAN MICHAEL HANSON)	1 CA-CR 17-0350
)	
)	
)	
)	

Phoenix, Arizona
May 24, 2017

BEFORE: THE HONORABLE PAMELA S. GATES

REPORTER'S TRANSCRIPT OF PROCEEDINGS
SENTENCING

(COPY)

FOR APPEAL

PREPARED BY:
Treva B. Colwell, RPR
Official Reporter
Arizona CCR 50275

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A P P E A R A N C E S

ON BEHALF OF THE STATE:

Kevin Pollak, Esq.

ON BEHALF OF THE DEFENDANT:

J. Grant Woods, Esq.
Austin Woods, Esq.
Michael Riikola, Esq.

ON BEHALF OF THE VICTIM:

Randall Udelman, Esq.

1 presumptive of 16. Thank you.

2 THE COURT: And sir, are you requesting any specific
3 restitution amount or are you requesting that I retain
4 jurisdiction over restitution?

5 MR. POLLAK: I would have to discuss that with
6 Mr. Woods. I think that we should -- well, maybe.

7 MR. UDELMAN: May I be heard on that very briefly?

8 THE COURT: Let me make sure Mr. Pollak has been
9 concluded and then I will hear from you.

10 What was the conclusion of your statement?

11 MR. POLLAK: I know that there was the request for
12 Mr. Dumbrell in the presentence report. I, to be honest with
13 you, haven't had an opportunity to discuss that with Mr. Woods.
14 I think that perhaps for now, unless you are willing to
15 stipulate to that amount, we should hold that open and we can
16 gather the documentation that we need.

17 THE COURT: All right. Yes, sir.

18 MR. UDELMAN: Actually, I think if the Court holds
19 jurisdiction open, that would allow us the opportunity to
20 further develop it.

21 THE COURT: All right. Thank you.

22 And Mr. Woods, I know you have a presentation to
23 submit to the Court. At some point would you please address if
24 there is a future restitution hearing whether Mr. Hanson would
25 like to be brought back or whether he would like to waive his

1 presence for a future restitution hearing.

2 MR. G. WOODS: I think we can waive that, Your Honor.

3 THE COURT: All right. The Court will note that the
4 Court is retaining jurisdiction over restitution and is noting
5 that Mr. Hanson's presence is waived.

6 Sir, is there anything you would like to say on behalf
7 of your client? Mr. Woods.

8 MR. G. WOODS: Yeah. We have -- I think we're going
9 to start with a video, which should take us right up to
10 3 o'clock, and then we will have a few people who want to make
11 statements, and then Mr. Hanson would make a statement, and I'd
12 like to give my argument to the Court, and then we should be
13 done.

14 THE COURT: And, counsel, there were a number of
15 motions filed regarding the videos. I have the one on a flash
16 drive, which is something I cannot file, so I need to have both
17 videos in a formatted CD that I can file and insure that it is
18 part of the record in this case. So if by Monday you folks can
19 submit to me a CD copy of the two videos. I have them on my
20 laptop -- on my desktop, but I don't want to be responsible for
21 burning those and insuring the accuracy. That will be your
22 responsibility. Just a moment and I will pull that up.

23 (Whereupon, the defendant's video is played to the
24 Court.)

25 MR. G. WOODS: Your Honor, would you like to continue

1 will have that badge forever. You must determine whether that
2 is who you are. To me, you owe Carson more than that. You owe
3 Carson a lifetime of helping people, of becoming a better
4 person, of turning your life into something productive, one of
5 service, one of growth, one of wisdom. You owe that to Carson.

6 On balance, it is the judgment of the Court that the
7 mitigating factors outweigh the aggravating factors. It is the
8 judgment and sentence of the Court that you be imprisoned for
9 12 years in the Department of Corrections. That sentence will
10 date from today's date. You have credit for 105 days of
11 presence incarceration credit.

12 The Court is retaining jurisdiction over restitution.
13 As I indicated, Mr. Hanson has waived his presence for any
14 future restitution hearing.

15 The Court is imposing the \$20 probation assessment.

16 You have the right to appeal the orders of this Court
17 and the findings of the jury. If you cannot afford an
18 attorney, one will be appointed for you. If you cannot afford
19 the necessary records and transcripts, they will be provided to
20 you at no cost. However, if you want to appeal, you must do so
21 within 90 days of today's date or you lose that right.

22 Do you understand that?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: Counsel, did I overlook or misstate
25 anything? From the State.

1 MR. POLLAK: No, Your Honor.

2 THE COURT: From defense?

3 MR. G. WOODS: No.

4 THE COURT: Now, ladies and gentlemen, before I had
5 the defense leave first. I'm going to ask that the victim's
6 family leave first this time, and I'm going to ask with your
7 respect that you leave and leave the courthouse. Throughout
8 the duration of the trial, I noted that it's an opportunity
9 sometimes for you folks everyone to be able to talk and catch
10 up, share tears and hugs and moments, but I ask that you do
11 those outside the courthouse so that people on both sides of
12 the courtroom can leave.

13 Mr. Hanson, if you would please go over to my judicial
14 assistant. You are hereby remanded to do the Department of
15 Corrections.

16 THE DEFENDANT: Thank you, Your Honor.

17 (Whereupon, the matter concludes at 4:33 p.m.)
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C E R T I F I C A T E

I, TREVA B. COLWELL, do hereby certify that the foregoing proceedings constitute a full, true, and accurate transcript of the proceeding had in the above matter, all done to the best of my skill and ability.

DATED this 31st day of July, 2017.

/s/ Treva B. Colwell
Treva B. Colwell, RPR
Certified Reporter
(AZ #50275)

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EXHIBIT B

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

State of Arizona

VS.

Jordan Michael Hanson

Defendant

No: CR2015-005451-001
NOTICE OF RIGHTS OF REVIEW
AFTER CONVICTION
AND PROCEDURE

RIGHT TO APPEAL

You have the right to appeal from a final judgment of conviction, from an order denying a post-trial motion, or from a sentence which is illegal or excessive. Arizona Constitution art. 2, sec. 24; Arizona Revised Statutes Annotated sec 13-4031 (1978). IF YOU ARE A NONCAPITAL DEFENDANT, YOU DO NOT HAVE THE RIGHT TO APPEAL. IF YOU HAVE PLEADED GUILTY OR NO CONTEST OR HAVE ADMITTED A VIOLATION OF CONDITIONS OF PROBATION, IN THAT CASE, RELIEF MAY BE SOUGHT ONLY BY PETITION FOR POST-CONVICTION RELIEF. Rules 17.1, 17.2 and 27.8, Rules of Criminal Procedure, Arizona Revised Statutes Annotated sec. 13-4033 (B) (1992).

In order to exercise your right to appeal;

1. You must file a **NOTICE OF APPEAL**, (FormXXIV) within 20 days of the entry of judgment and sentence. If you do not file a notice of appeal within 20 days you will lose your right to appeal. The entry of judgment and sentence occurs at the time of sentencing.
2. To file a **NOTICE OF APPEAL**, you should contact a lawyer by letter, telephone or in person, telling him or her that you want to appeal. You can file a notice of appeal before you leave the courtroom on the day you are sentenced if you wish.
3. If you do not have a lawyer, get copies of Forms 5(a) and (b), **Defendant's Financial Statement and Motion for Appointment of Counsel** and Form XXIV (A), **NOTICE OF APPEAL**, either from the clerk of the court, jail or prison, fill them out and file or send them to the clerk of the superior court in the county where you were sentenced. They must arrive at the clerk's office within 20 days after you are sentenced.
4. You should have a lawyer handle your appeal.

RIGHT TO POST CONVICTION RELIEF

You also have a right to petition the superior court for post-conviction relief. Rule 32, Rules of Criminal Procedure, ARS § 13-4231.

In order to exercise your right to post-conviction relief,

1. You must file a **NOTICE OF POST-CONVICTION RELIEF**, (FormXXIV (b)) within 90 days of the entry of judgment and sentence. If you do not file or you do not have the right to file a Notice of Appeal. If you do appeal, the time you have to file a Notice of Post-Conviction Relief is extended to within 30 days of the order and mandate affirming the judgment and sentence on direct appeal. If you do not timely file a Notice of Post-Conviction Relief you may never have another opportunity to have any errors made in your case corrected by another court.
2. To file a **NOTICE OF POST-CONVICTION RELIEF**, you should contact a lawyer by letter, telephone or in person, telling him or her that you want to seek post-conviction relief. You can file a notice of post-conviction relief before you leave the courtroom on the day you are sentenced if you wish.
3. If you do not have a lawyer, get a copy of FormXXIV (b), **NOTICE OF POST-CONVICTION RELIEF**, either from the clerk of the court, jail or prison, fill it out and file or send it to the clerk of the superior court in the county where you were sentenced. The notice must arrive at the clerk's office within 90 days after you are sentenced or within 30 days of the order and mandate affirming the judgment and sentence on direct appeal.
4. If you cannot afford to hire a lawyer, you should execute the **Affidavit of Indigency** contained in the Notice of Post-Conviction Relief and request that a lawyer be appointed to represent you.

If you want a full copy of the rules governing appeals and post-conviction relief, the clerk of the court in the county where you were convicted will send you one upon request.

RECEIPT BY THE DEFENDANT

I have received a copy of this notice explaining my right to appeal, my right to seek post-conviction relief and the procedures I must follow to exercise these rights.

DATE: 05/24/2017



Defendant

EXHIBIT C

AFFIDAVIT OF JORDAN MICHAEL HANSON

I, Jordan Michael Hanson, do hereby verify under penalty of perjury that the following is true and correct to the best of my knowledge:

1) That I am the named defendant in *State v. Hanson*, Maricopa County Superior Court case number CR2015-005451-001 DT;

2) That I was charged and convicted following a jury trial of the crime of second degree murder;

3) That at trial I was represented by attorneys Grant Wood and Michael Riikola;

4) That on May 24, 2017 a Judgment of Conviction and Sentence of Imprisonment was entered by the Court, sentencing me to prison for 12 years;

5) That on the day of sentencing, the court acknowledged that no restitution hearing was set, but in the even one was set, I waived my presence for that hearing;

6) That on May 25, 2017 my trial attorneys filed a Notice of Appeal from Superior Court on my behalf;

7) That my parents retained attorney Lori Voepel to represent me on my direct appeal only;

8) That in April, 2018 as my direct appeal was pending before Arizona's higher courts, but prior to the conclusion of that action, attorney Mike Kimerer entered a limited appearance in the superior court to represent me on the issues of restitution before the trial court;

9) That by minute entry orders of April 5, 2019 and May 21, 2019 entered while my direct appeal was still pending before Arizona's higher courts, the trial court issued restitution orders;

10) That although I was (and am) incarcerated at the Arizona Department of Corrections, I was not endorsed on the trial court's orders concerning the restitution orders entered, did not receive a copy of those orders and was not informed of those orders until approximately five months after they were entered;

11) That although I waived my appearance for purposes of court determination of restitution, I never waived my right to notice concerning that restitution determination;

12) That I was never informed by the court or anyone else that I had a right to appeal any aspect of the restitution orders entered against me;

13) That had I been informed of my right to appeal any aspect of the restitution orders entered against me, I would have availed myself of that right to appeal;

14) That my failure to timely appeal the restitution orders entered was through no fault of my own;

15) That I wish to file a delayed appeal concerning the restitution orders entered in my case.

DATED THIS 25th day of October, 2019.



Jordan M. Hanson

EXHIBIT “17”

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7 Attorneys for Defendant/Petitioner

8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
9 **IN AND FOR THE COUNTY OF MARICOPA**

10 STATE OF ARIZONA,
11
12 Plaintiff/Respondent,
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14 v.
15 JORDAN MICHAEL HANSON,
16
17 Defendant/Petitioner

CR 2015-005451-001 DT

**MOTION TO STRIKE AND PROHIBIT
FUTURE RESPONSIVE PLEADINGS
FILED BY VICTIM'S COUNSEL
AND TO ADJUST REPLY DEADLINE**

(Assigned to the Dewain Fox, Rule 32
Management Unit; Honorable Pamela
Gates, trial judge)

16 Defendant/Petitioner, by and through undersigned counsel, hereby moves to strike the
17 Victim's Response to Petitioner's Limited Petition for Post Conviction Relief, filed January 13, 2020.
18 In sum, neither crime victims nor their representatives have a right to file substantive pleadings on
19 the question of whether a Petitioner in post-conviction proceedings is, or is not, entitled to relief
20 afforded by Rule 32.1(f) or Rule 32.1(a), Ariz.R.Crim.P.. Petitioner requests an Order prohibiting
21 victim's counsel from filing further pleadings concerning Petitioner's PCR. Last, he requests an
22 Order adjusting his reply time in the event the instant motion is denied.

23 This motion is supported by the attached Memorandum of Points and Authorities,
24 incorporated herein by reference.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND:

3 On January 7, 2020, Petitioner filed a Limited Petition for Post Conviction Relief (“PCR”)
4 seeking relief afforded by Rule 32.1(f)—leave of the court to file a delayed appeal; he amended that
5 PCR on January 20, 2020. On January 13, 2020, counsel for the victim’s representative filed a
6 substantive response contending relief under Rule 32.1(f) should be denied. Petitioner moves to
7 strike that response, as victims have no “right”—under any Arizona authority—to file such pleadings
8 under the circumstances presented. He also moves for an Order prohibiting Victim’s counsel from
9 filing a response to his amended Petition.

10 II. LAW AND ANALYSIS:

11 The issue is whether crime victims are authorized by the Arizona Constitution, VRIA, or Rule
12 39 to file pleadings in post-conviction matters concerning whether a petitioner is, or is not, entitled to
13 relief under Rule 32.1(f), Ariz.R.Crim.P. The answer is *no*.

14 “A post conviction proceeding is part of the original criminal action and is not a separate
15 action.” Rule 32.3(a). Rule 32.1(f) grants a Petitioner to seek leave of the court to permit him to file
16 a delayed appeal. Rules 32.5 and 32.6 expressly grant “*the State*” the opportunity to respond to that
17 request. Any response filed by the State “*must attach* any affidavits, records, or other evidence that
18 contradicts the petition’s allegations.” Rule 32.6(a) The Petitioner is entitled to file a reply to *the*
19 *State’s* responsive pleading. Rule 32.6(b).

20 Victim’s are not parties to the prosecution, *Lynn v. Reinstein*, 205 Ariz. 186, 68 P.3d 412
21 (2003), and thus are not parties to PCR proceedings. That’s why the rules of criminal procedure do
22 not grant victims the right to respond to petitions for post-conviction relief. The conclusion is equally
23 clear from the law governing victim’s rights. Although §2.1(A)(11) facially grants a “right” to have *all*
24 *rules* governing criminal procedure and the admissibility of evidence protect victims, in 1990 the
25 Arizona Supreme Court “narrowly construed” the provision to “deal[] only with *procedural rules*
26 *pertaining to victims* and not with the substantive general subject of the [supreme court’s] rule
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1 making power.” *Slayton v. Shumway*, 166 Ariz. 87, 92, 800 P.2d 590 (1990)(emphasis added)

2 It has since consistently held that the “scope of legislative rulemaking power under VBR
3 extends to those rules that define, implement, preserve, and protect *the specific rights unique and*
4 *peculiar* to crime victims, as guaranteed and *created by* the VBR.” *State v. Brown*, 194 Ariz. 340,
5 343 ¶11, 982 P.2d 815 (1999)(emphasis added); *Champlin v. Sargeant*, 192 Ariz. 371, 373 n. 2, 965
6 P.2d 763 (1998)(rulemaking power under the VBR “extends only so far as necessary to protect
7 rights *created by* the [VBR] and not beyond.”); *State v. Hansen*, 215 Ariz. 287, 290 ¶¶11-13, 160
8 P.3d 166 (2007)(same).

9 *Slayton* and its progeny make clear §2.1(A)(11) cannot require consideration of VBR in
10 connection with *all* evidentiary matters or *all* Arizona Rules of Criminal Procedure. 166 Ariz., at 89,
11 92.¹ As explained in *Day v. Superior Court*, 170 Ariz. 215, 216, 823 P.2d 82 (App. 1992),
12 “[§2.1(A)(11)] merely provides the mechanism to protect rights *created by* the Victim’s Bill of Rights”.

13 None of the authorities pertaining to victims *created a right* permitting victims to be heard
14 regarding relief requested pursuant to Rule 32—*unless* the relief sought pertains to the defendant’s
15 release from confinement. A.R.S. §13-4414(A) speaks specifically to the rights afforded crime
16 victims in post-conviction proceedings:

17 The victim has a right to be present and be heard at any proceeding in which
18 postconviction *release from confinement* is being considered pursuant to §31-233,
31-411 or 41-1604.13.

19 Here, Petitioner’s Limited Petition for Post Conviction Relief sought a *delayed appeal*, not “*release*
20 *from confinement*”; his amended Petition also doesn’t seek release from confinement. Thus, victim’s
21 counsel has no “right” to be heard by weighing in on the merits of Petitioner’s claims or whether the
22 relief requested should be granted.

23 Petitioner’s right to appeal is one expressly guaranteed by the Arizona Constitution and also
24 implicitly included within in its guarantee of due process. See, Arizona Constitution, Art. 2, §§4, 24.

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27 ¹ See e.g., *Morehart v. Barton*, 226 Ariz. 510, 250 P.3d 1139 (2011) (victims not
entitled to attend *ex parte* hearings held pursuant to Rule 15.9(b))

1 Such rights are "superior" to any right afforded crime victims. As was explained in *State ex rel.*
2 *Romley v. Superior Court*, 172 Ariz. 232, 236 (App.1992):

3 We therefore hold that when the defendant's constitutional right to due process
4 conflicts with the Victim's Bill of Rights in a direct manner...then due process is the
5 superior right. This is so because due process is the foundation of our system of
6 laws, having been first provided to the people in the Magna Carta and given to us by
our founders in the United States Constitution. When there is a conflict, the due
process clause of the U.S. Constitution prevails over a provision of a state
constitution by virtue of the Supremacy Clause....

7 See, U.S. Const., art. VI and Ariz. Const., art. 2, §3. This notwithstanding, there exists no conflict
8 between victim's rights and Petitioner's rights asserted here since the issue presented *sub judice*
9 involves no "right" afforded crime victims. In this vein, A.R.S. §13-4437 is equally unavailing to the
10 victim under the present circumstances. It states:

11 The rights enumerated in the victims' bill of rights, article II, section 2.1, Constitution
12 of Arizona, any implementing legislation or court rules belong to the victim. The
13 victim has standing to seek an order, to bring a special action or to file a notice of
14 appearance in any appellate proceeding, *seeking to enforce any right or to*
challenge an order denying any right guaranteed to victims. In asserting any right,
the victim has the right to be represented by personal counsel at the victim's
expense.

15 The first sentence of the provision is self-evident. Equally self-evident is the fact that here the victim
16 does not seek "to enforce any right or to challenge an order denying any right guaranteed to victims".
17 Rather, here the victim seeks to weigh-in on the question of whether or not Petitioner should be
18 granted a delayed appeal, a new trial or a new restitution determination. Again, these issues don't
19 encompass any "*specific rights unique and peculiar to crime victims, as guaranteed and created by*
20 *the VBR.*" *Brown, supra.*

21 At bottom, the aforementioned authorities make clear the victim lacks standing to appear and
22 file pleadings opposing Petitioner's requested relief on PCR. For that reason alone, the victim's
23 responsive pleading must be stricken. But there's another reason dictating that result: Ignoring the
24 law, the victim's responsive pleading is prejudicial to the matter at hand. In riposte, the victim's
25 response interjects "facts"—many of which he admittedly "presumes"—absent "affidavits, records, or
26 other evidence" supportive of his stance, and does so in an obvious attempt to influence this Court

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1 adversely to Petitioner. The response thus not only violated Rules 32.5 and 32.6, it violated the
2 ethical rules governing lawyers. Rule 42, ER 3.5(a), Ariz.R.Sup.Ct. (A lawyer shall not seek to
3 influence a judge by means prohibited by law.) Needless to say, Petitioner does not agree with the
4 unsupported information masquerading as “facts” supplied in the victim’s procedurally unauthorized,
5 procedurally deficient, response. Unless it is stricken and *not considered* by this Court in its ruling
6 on Petitioner’s claims, Petitioner and reviewing courts will be left to wonder whether the victim’s
7 unsupported assertions contained within its procedurally unauthorized response improperly
8 influenced this Court’s ruling.

9 Striking the response affirmatively dispels that notion.

10 Finally, *the State* has 45 days to respond to the Limited Petition for Post Conviction Relief
11 (with extensions permitted). Rule 32.6(a). Once served, Petitioner has 15 days to reply (with
12 extensions permitted). Rule 32.6(b) Because the rules don’t permit victims to file responses in PCR
13 proceedings, they don’t provide for any time in which Petitioner must reply. Consequently, in the
14 event this Court *denies* the instant motion to strike, Petitioner respectfully requests his time within
15 which to reply commence the day following receipt of notice of the court’s ruling. On the other hand,
16 in the event the instant motion is *granted* and *the State* responds to the PCR as amended, Petitioner
17 will file a reply within 15 days or timely seek an extension thereto.

18 **III. CONCLUSION**

19 Based on the aforementioned, Petitioner’s motion to strike should be granted because the
20 victim lacks standing to file pleadings concerning the issue raised in the Limited PCR—or any other
21 claim on PCR that doesn’t involve relief in the form of Petitioner’s release from confinement. The
22 Victim’s response is procedurally improper as a matter of law. Petitioner requests it be stricken from
23 the record and not considered by the court. Petitioner also requests and Order prohibiting victim’s
24 counsel from filing additional responses on PCR. Finally, he requests his reply time be adjusted in a
25 manner consistent with that requested herein.

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RESPECTFULLY SUBMITTED THIS 20th day of January, 2020.



Treasure VanDreumel
Attorney for Defendant/Petitioner

Original of the foregoing filed
this 20th day of January, 2020 with
the Maricopa County Superior Court
via electronic filing;

COPY of the foregoing
emailed this same date to:

Mr. Jeffrey L. Sparks
MARICOPA COUNTY ATTORNEY
MCAOAPPEALS@mcao.maricopa.gov
Counsel for the State of Arizona

and a courtesy copy emailed this date to:

Mr. Randall S. Udeman
Arizona Crime Victim Rights Law Group
rudelman@azvictimrights.org

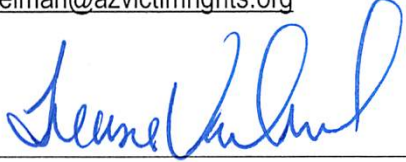


EXHIBIT “18”

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14 Attorneys for Defendant/Petitioner

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16 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
17 **IN AND FOR THE COUNTY OF MARICOPA**

18	STATE OF ARIZONA,)	CR 2015-005451-001 DT
19)	
20	Plaintiff/Respondent,)	AMENDED PETITION FOR POST
21)	CONVICTION RELIEF
22	v.)	(Assigned to the Honorable Dewain Fox,
23	JORDAN MICHAEL HANSON,)	Rule 32 Management Unit)
24)	
25	Defendant/Petitioner)	

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Petitioner filed a Limited PCR on January 7, 2019, seeking relief pursuant to Rule 32.1(f) (delayed appeal). Good cause exists for the amended PCR; the State's response time has yet to elapse, and the State has yet to respond. Moreover, grant of delayed appeal *may* obviate some of the IAC claims asserted herein. But to ensure *all claims* of IAC are levied in his initial petition, Petitioner hereby amends that PCR to include those claims. Rule 32.1(a). Given that the relief sought doesn't pertain to Petitioner's release from confinement, victim's counsel lacks authority to respond on PCR; a motion to strike his response is filed simultaneously herewith, as is Petitioner's request for discovery brought pursuant to *Canion v. Cole*, 210 Ariz. 598 (2005). This amended PCR is supported by the Memorandum of Points and Authorities, incorporated herein by reference.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. FACTUAL AND PROCEDURAL SUMMARY:**

3 Petitioner Jordan Hanson ("Petitioner") was charged with second degree murder for
4 intentionally, knowingly or recklessly causing the death of his friend Carson Dumbrell ("Carson") on
5 September 5, 2015. The indictment further alleged the offense was a "dangerous felony because
6 the offense involved the discharge, use, or threatening exhibition of a hand gun, and/or the
7 intentional or knowing infliction of serious physical injury...". Two aggravating factors were alleged:
8 use of a weapon during a crime and financial or emotional harm to the victim's family.

9 Trial commenced January 31, 2017. The testimony revealed: Jordan and several friends
10 (Anthony, Julia, and Rochelle, hereinafter "Jordan's group") met at a restaurant early in the evening,
11 planning to go to a party at Tyler's house. After leaving the restaurant, they stopped at a place
12 where Jordan bought packaged alcohol called "Moonshine" and a liter of soda to bring to the party
13 as a "party favor". Carson and his friends (Brandy, Brittney and Tanner, hereinafter "Carson's
14 group") were at the party, as were many others including two young women who worked with Carson
15 (Kyleen, Chantell). Jordan and Carson were virtually life long friends; both were 21 at the time.
16 Many of the kids at the party—who ranged from ages 18 to 21—knew each other from high school.
17 Several testified they'd seen Carson using cocaine and drinking alcohol at Tyler's party; they said he
18 was visibly intoxicated. Members of Carson's group testified they'd seen Jordan drinking
19 "Moonshine" at the party—which was odd since none had reported that fact to police following
20 Carson's death and police noted no indicia of alcohol or intoxication at the time of Jordan's arrest.
21 Jordan testified he wasn't drinking alcohol because he was the designated driver; at the party, he
22 drank water from a "Solo cup". Subsequent testing revealed no alcohol in Jordan's blood; autopsy
23 revealed cocaine and alcohol (over twice the legal limit) in Carson's blood.

24 Jordan and his group left Tyler's party to go to Jordan's house. Jordan's parents were out of
25 state at the time; he knew his parents didn't want people over in their absence. The plan was that
26 his group would stay a brief time until Jordan had to go pick up his girlfriend from work. As they
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1 were leaving Tyler's party, Jordan learned that one in his group had invited a member of Carson's
2 group to Jordan's house. On the way to Jordan's house, Jordan saw Carson driving his group
3 recklessly, weaving in and out of traffic. When they arrived at Jordan's house, Jordan allowed
4 Carson's group inside. Jordan didn't want them there, but didn't voice his disdain over their arrival.
5 Using a door that the home's cameras could not see (so Jordan's parents wouldn't know), everybody
6 went inside to the downstairs basement area of the home.

7 Downstairs there was a bathroom, a bar room, a movie theater room and Jordan's
8 bedroom. As both groups remained in the bar room, Carson went to the movie room and sat
9 reclined in a movie chair. He said he was "really drunk" and not feeling well. The movie room was
10 completely dark: no lights were on and there were no windows. As the kids helped themselves to
11 alcohol in the bar area, Jordan went into his bedroom. While there, he suddenly heard things get
12 quiet in the bar area. Fearing that Carson's group had gone upstairs to rummage around in Jordan's
13 parent's bedroom where his mother kept expensive jewelry, Jordan retrieved a gun he kept in his
14 bedroom, tucked it in the front waistband of his pants, and pulled his shirt over it so it wasn't in view.
15 He exited his bedroom and sure enough, found members of Carson's group were absent from the
16 bar room. Heading upstairs toward's his parent's bedroom, he glanced at the front door and saw
17 Carson's group smoking outside in plain view of the camera focused on the front door. Angered,
18 Jordan told them to leave; they said Carson was their ride. Jordan closed the front door locking
19 them out, then proceeded downstairs to tell Carson to leave with his friends.

20 While the remainder of the kids were seated in the bar area, Jordan came downstairs and
21 yelled for Carson to take his friends home. Carson responded "fuck you" or "fuck that." With Carson
22 still seated, reclined in the movie room chair, Jordan angrily asked "What did you say?" Jordan
23 approached Carson, then either punched or pushed Carson's shoulder. Witness the testimony
24 differed on this fact, likely due to their vantage point coupled with the darkness of the movie room.
25 Carson's friends—who remained in the bar area—said Jordan punched Carson in the face. Jordan
26 said he pushed Carson's shoulder. No photos were presented depicting the true lighting conditions.

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1 Regardless, what next occurred was out of the vantage point of any witness. Jordan took
2 several steps back away from Carson, towards the movie screen. In the darkness, Carson stood up
3 from the still reclined chair. Jordan thought Carson was leaving, but that's not what happened.
4 Carson tackled Jordan into the wall immediately adjacent to the movie screen, leaving an observable
5 dent in the drywall. The two then fell to the floor in a struggle. During that struggle, Jordan felt
6 Carson's hand on the gun still tucked in Jordan's waistband. Jordan resisted by pressing the gun
7 against his abdomen with such force that it left a red mark on his abdominal area when
8 photographed by police hours later. The gun came out and as the two struggled over it, it
9 fired—striking Carson in the head, killing him instantly. Jordan ran from the movie room,
10 spontaneously saying “He grabbed my gun!” Fearing retribution from Carson's group, he left in his
11 truck, drove to a gas station and called police. Police arrived and arrested him; they didn't observe
12 any indicia of drinking or intoxication at the time of that arrest.

13 No evidence revealed whose hand was on the gun when it fired. Although DNA evidence
14 couldn't establish Carson touched the gun, there was a void of blood on Carson's palm—indicating
15 his hand was either on the gun or in very close proximity to it when it fired. The State argued Jordan
16 was angry and intentionally or knowingly killed Carson. Defense counsel argued a convoluted
17 theory of self-defense—which implicitly meant Jordan himself fired the gun. Neither party requested
18 a jury instruction on causation; none was given. The jury was instructed on the lesser-included
19 crime of manslaughter arising when a defendant “causes death through conscious disregard of a
20 substantial and unjustifiable risk of death”, but was neither instructed on “heat of passion”
21 manslaughter nor the lesser-included offenses of negligent homicide.

22 On February 16, 2017 the jury convicted of second degree murder, but could not agree that
23 the crime was a dangerous offense—meaning it could not agree whether the offense involved
24 *Jordan's* “discharge, use or threatening exhibition of a deadly weapon.” It unanimously acquitted on
25 the aggravating factor that the offense involved *Jordan's* “use, threatened use or possession of a
26 deadly weapon during the commission of a crime, specifically a firearm.” However, it unanimously
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1 found the aggravating factor of emotional or financial harm to the victim's immediate family was
2 proved since "the victim died as a result of the *conduct* of the defendant".

3 On May 24, 2017 Jordan was sentenced to a mitigated term of 12 years imprisonment. A
4 restitution hearing was to be scheduled in the future; Jordan waived his presence for that hearing.
5 He timely appealed his conviction, but because restitution had yet-to-be ordered, it wasn't part of the
6 judgment and sentenced appealed. Nearly a year later—while Jordan was incarcerated and his
7 appeal was pending—the victim submitted a restitution request with supporting documentation.

8 Relief on appeal was denied in a memorandum decision filed November 18, 2018; Jordan
9 sought review in the Arizona Supreme Court on January 22, 2019. On April 5, 2019—while review
10 was pending—the superior court entered a restitution order totaling \$567,075.07. By minute entry
11 order dated May 21, 2019, the Court issued a Criminal Restitution Order which permitted interest to
12 accrue at 10% annually to the restitution award. Thus, by the time of Jordan's release, interest
13 alone would add \$680,490.00 to the original restitution award. Jordan was not endorsed on either
14 minute entry, nor did the court advise him of his right to appeal those orders. The Arizona Supreme
15 Court denied review of Jordan's direct appeal on May 28, 2019.

16 Jordan timely filed for post-conviction relief ("PCR"). On January 7, 2020, he filed a limited
17 PCR requesting a delayed appeal. Rule 32.1(f). Whereas here the State's time to respond has yet
18 to expire—and the State has yet to respond—Jordan now supplements his initial PCR.

19 **II. SUPPLEMENTAL CLAIMS RAISED:**

- 20 1. Trial counsel rendered ineffective assistance. Rule 32.1(a)
- 21 2. Restitution counsel rendered ineffective assistance. Rule 32.1(a)

22 **III. LAW AND ANALYSIS:**

23 **A. Ineffective assistance of counsel and Rule 32.1(a) in general.**

24 "A defendant who claims to have been denied effective assistance of counsel must show
25 both that counsel performed deficiently and that counsel's deficient performance caused him
26 prejudice." *Buck v. Davis*, 137 S.Ct. 759, 775 (2017); *Strickland v. Washington*, 466 U.S. 668
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1 (1984); *State v. Vickers (Vickers III)*, 180 Ariz. 521, 525 (1994); *State v. LaGrand*, 152 Ariz. 483,
2 485, 733 P.2d 1066 (1987). "The benchmark for judging any claim of ineffectiveness must be
3 whether counsel's conduct so undermined the proper functioning of the adversarial process that the
4 trial [and/or sentencing] cannot be relied on as having produced a just result." *Strickland*, at 686.
5 "Unless a defendant makes both showings, it cannot be said that the conviction or ... sentence
6 resulted from a breakdown in the adversary process that renders the result unreliable." *Id.*, at 687.

7 **1) Deficient Performance**

8 Proof of deficient performance 'requires showing that counsel made errors so serious that
9 counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment."
10 *LaGrand, supra.*, quoting *Strickland*, 466 U.S., at 686; see also, *Rompilla v. Beard*, 545 U.S. 374,
11 379 (2005) ("Ineffective assistance of counsel under *Strickland* is deficient performance by counsel
12 resulting in prejudice, with performance being measured against an 'objective standard of
13 reasonableness,' 'under prevailing professional norms'"); *Wiggins v. Smith*, 539 U.S. 510, 521
14 (2003)("The proper measure of attorney performance remains simply reasonableness under
15 prevailing professional norms.")

16 "An attorney's ignorance of a point of law that is fundamental to his case combined with his
17 failure to perform basic research on that point is a quintessential example of unreasonable
18 performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2004). *Strickland's* "first
19 prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal
20 community: 'The proper measure of attorney performance remains simply reasonableness under
21 prevailing professional norms.'" *Hinton v. Alabama*, 571 U.S. 263, 273 (2014), quoting *Strickland*, at
22 688 and *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010)

23 In *Powell v. Alabama*, 287 U.S. 45, 57 (1932), the Court recognized the vital importance of
24 "thorough-going investigation and preparation" from the time of arraignment until the beginning of
25 trial. Over the ensuing decades, the Supreme Court has continued to repeatedly make plain that
26 counsel has the "duty to make reasonable investigations or to make a reasonable decision that
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1 makes particular investigations unnecessary." *Strickland*, at 691; *Kimmelman v. Morrison*, 477 U.S.
2 365, 384 (1986); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Hinton, supra*. In this vein, the Ninth
3 Circuit has repeatedly held "counsel must, at a minimum, *conduct a reasonable investigation*
4 enabling him to make informed decisions about how best to represent his client." *Phillips v.*
5 *Woodford*, 267 F.3d 966, 978 (9th Cir.2001) (*emphasis in original*); *Sanders v. Ratelle*, 21 F.3d
6 1446, 1456 (9th Cir.1994)(*emphasis in original*); *Douglas v. Woodford*, 316 F.3d 1079, 1089-90 (9th
7 Cir.2003); *see also, Jennings v. Woodford*, 290 F.3d 1006, 1014 (9th Cir.2002) ("[A]ttorneys have
8 considerable latitude to make strategic decisions ... *once they have gathered sufficient evidence*
9 *upon which to base their tactical choices.*")(*emphasis in original*). Thus, "[r]easonable performance
10 of counsel includes an adequate investigation of the facts of the case, consideration of viable
11 theories, and development of evidence to support those theories." *Henderson v. Sargent*, 926 F.2d
12 706, 711 (8th Cir.1991) Only then is trial counsel in a position to make reasonable decisions with
13 respect to determining the best strategy to advance at trial. "Under *Strickland*, counsel's
14 investigation must determine trial strategy, not the other way around." *Weeden v. Johnson*, 854
15 F.3d 1063, 1070 (9th Cir.2017).

16 Entirely unsound strategy decisions constitutes ineffective assistance of counsel. *Vickers*
17 (*Vickers III*), *supra.*, at 525-26 (finding ineffective assistance where "the decision to advance a
18 conspiracy defense", *inter alia*, lacked a "reasoned basis"); *accord, Macias v. Collins*, 810 F.Supp.
19 782, 786 (W.D. TX 1991), *aff'd* 979 F.2d 1067 (5th Cir.1992)(finding defense counsel's strategy
20 unreasonable, and thus grounds for ineffective assistance of counsel, where the law was not well
21 researched and misunderstood). To comply with the Sixth Amendment, trial counsel must uphold
22 the "right of the accused to require the prosecution's case to survive the crucible of meaningful
23 adversarial testing" and "hold the prosecution to its heavy burden of proof beyond a reasonable
24 doubt" with respect to the charge alleged. *United States v. Cronin*, 446 U.S. 648, 656 (1984).
25 Defense counsel may not admit their client's guilt absent express consent of the client. *McCoy v.*
26 *Louisiana*, 138 S.Ct. 1500 (2018).

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1 As the Ninth Circuit has explained, the court “must analyze each of [petitioner’s] claims
2 separately to determine whether his counsel was deficient, but ‘prejudice may result from the
3 cumulative impact of multiple deficiencies.’” *Boyde v. Brown*, 404 F.3d 1159, 1175 (9th Cir.2005),
4 quoting *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir.1978)(*en banc*), *cert. denied*, 440 U.S.
5 974 (1979); *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir.1992)(same); *United States v. Tucker*, 716
6 F.2d 576, 595 (9th Cir.1983)(“a court may find unfairness—and thus prejudice—from the totality of
7 counsel’s errors and omissions”); *Ewing v. Williams*, 596 F.2d 391, 395 (9th Cir.1979) (“prejudice
8 may result from the cumulative impact of multiple deficiencies”).

9 2) Prejudice

10 *Strickland* requires a criminal defendant show “that the deficient performance prejudiced the
11 defense.” *Id.*, at 687. To satisfy *Strickland*’s prejudice prong, a “defendant must show that there is a
12 reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding
13 would have been different.” *Id.*, at 694. A reasonable probability is one “sufficient to undermine
14 confidence in the outcome.” *Id.* Although counsel’s deficient performance must have had more than
15 a “conceivable effect” on the outcome, it need not have “more likely than not altered” the outcome.
16 *Weeden, supra.*, at 1070, citing *Strickland*, at 693; *see also, Nix v. Whiteside*, 475 U.S. 157, 175
17 (1986)(“a defendant need not establish that the attorney’s deficient performance more likely than not
18 altered the outcome in order to establish prejudice under *Strickland*.”).

19 Simply put, *Strickland* asks whether there is a “reasonable probability” of a different result,
20 not whether the jury “might have” reached the same result. *Strickland*, at 694; *Weeden*, at 1072.
21 Jordan is not required to show that but-for counsels’ deficient performance *he would have been*
22 acquitted at trial or would have won a claim on direct appeal. *Strickland* expressly rejected such an
23 “outcome determinative standard” as “not quite appropriate.” *Id.*, at 693-694; *see also, Strickland* at
24 697 (“With regard to the prejudice inquiry, only the strict outcome determinative test...imposes a
25 heavier burden on defendants than the tests laid down today.”) Jordan must show counsels’
26 deficient performance so infected the adversarial process that the result of the proceeding was

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1 “rendered unreliable, and hence the proceeding itself unfair”. *Ibid.*

2 As the Ninth Circuit has observed for over two decades, “[t]he *Strickland* prejudice analysis
3 is complete in itself; there is no place for an additional harmless-error review.” *Weeden, supra.*, at
4 1071, n. 3); *Jackson v. Calderon*, 211 F.3d 1148, 1154 n. 2 (9th Cir.2000), *cert. denied*, 531 U.S.
5 1072 (2001)(“We reject the State’s contention that, in addition to the *Strickland* requirement of
6 prejudice, we must also conduct a standard harmless-error review of any *Strickland* violations. The
7 *Strickland* prejudice analysis is complete in itself; there is no place for an additional harmless-error
8 review.”)(internal citations omitted); *see also, Avila v. Galaza*, 297 F.3d 911, 918 n. 7 (9th Cir.2002)
9 (“We need not conduct a harmless error review of *Strickland* violations under *Brecht v. Abrahamson*
10 ... because the *Strickland* prejudice analysis is complete in itself; there is no place for an additional
11 harmless-error review.”).

12 **3) Arizona Procedure on PCR**

13 A petitioner “need not provide detailed evidence, but must provide specific factual allegations
14 that, if true, would entitle him to relief.” *State v. Donald*, 198 Ariz. 406, 414 (App.2000) citing *United*
15 *States v. Hearst*, 638 F.2d 1190, 1194 (9th Cir.1980), *Wagner v. United States*, 418 F.2d 618, 621
16 (9th Cir.1969); *see also, State v. Blazak*, 131 Ariz. 598, 604, *cert. denied* 459 U.S. 882 (1982)(claim
17 alleged is “better shown at a proper post-conviction hearing, at which time evidence may be taken to
18 show the truth or falsity of defendant’s allegations.”). “The relevant inquiry for determining whether
19 the petitioner is entitled to an evidentiary hearing [under Rule 32.8, Ariz.R.Crim.P.] is whether he
20 has alleged facts which, if true, would *probably* have changed the verdict or sentence.” *State v.*
21 *Amaral*, 239 Ariz. 217, 220, ¶11 (2016)(*emphasis in original*). The purpose of an evidentiary hearing
22 in the Rule 32 context is to allow the court to receive evidence, make factual determinations, and
23 resolve material issues of fact. *State v. Gutierrez*, 229 Ariz. 573, 579 ¶31 (2012). But “when there
24 are no material facts in dispute and the only issue is the legal consequences of undisputed material
25 facts, the superior court need not hold an evidentiary hearing.” *Amaral, supra.*, at 220, ¶12 .

26 Arizona procedural rule 32.8(c), Ariz.R.Crim.P., states: “Burden of Proof. The defendant has
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1 the burden of proving factual allegations by a preponderance of the evidence. If the defendant
2 proves a constitutional violation, the State has the burden of proving beyond a reasonable doubt that
3 the violation was harmless.” Because the Supremacy Clause prevails, our state supreme court
4 could not have meant the first sentence to imply that *Strickland’s prejudice* prong must be proved
5 by a preponderance of the evidence. See, *Strickland*, at 693-694 (rejecting the preponderance of
6 the evidence standard, holding the “result of a proceeding can be rendered unreliable, and hence
7 the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the
8 evidence to have determined the outcome.”)

9 Based on the Supremacy Clause as incorporated in Article 2, §3 of the Arizona Constitution,
10 Arizona’s additional “harmless error” review is unconstitutional. As stated, the *Strickland* analysis is
11 complete within itself. Where it is shown that counsel’s ineffectiveness resulted in a “breakdown in
12 the adversary process that render[ed] the result unreliable”, *Strickland*, at 687, the Sixth Amendment
13 violation is proved and relief must be granted. The *Strickland* standard is different from the harmless
14 error standard. Because “the ultimate focus of the inquiry must be on the fundamental fairness of
15 the proceeding whose result is being challenged”, *Strickland*, at 696, if the proceedings were
16 fundamentally unfair and the outcome *unreliable*, it is akin to structural error and not amenable to
17 harmless error analysis. Arizona is not constitutionally permitted to insert additional avenues for
18 denying relief once *Strickland* is satisfied.

19 Consequently, with respect to *all* claims of ineffective assistance of counsel raised herein
20 pursuant to *Strickland*, Jordan objects to application of “the preponderance of the evidence”
21 standard concerning its prejudice prong *and* to the inclusion of an additional harmless-error
22 analysis—neither accurately represent *Strickland’s* standard.

23 **B. Ineffective assistance of trial counsel in Jordan’s case:**

24 **1) Deficient Performance:**

25 At trial, the State’s theory was straightforward: An intoxicated Jordan entered the movie
26 room in an enraged state and, realizing he was losing the fight with Carson—pulled his gun from his
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1 waistband and shot Carson in the head. The charge of second degree murder, it said, was
2 established since Jordan acted intentionally, knowingly or recklessly.

3 Jordan testified that when he retrieved the gun, he knew it was loaded with a bullet in the
4 chamber. (RT 2/14/17, 39:9) He kept the gun like that with the safety on; the safety was always on,
5 he said, and he made sure it was on when he tucked it in the front waistband of his pants. *Id.*, 39:13.
6 He testified the fight started when Carson tackled him; after that, he fought to keep Carson from
7 getting his gun. (*Id.*, 111:7-22). He testified repeatedly that he didn't know how the gun went off,
8 denying he'd pulled the trigger. (*Id.*, 106:4-15; 108:9-12; 108:14-20; 110:11) On cross-examination,
9 the prosecutor asserted: "Being that this was your gun, you were familiar with how it worked,
10 correct?" to which Jordan answered: "I'm not an expert in guns but I do understand how to safely
11 operate a firearm, yes." Broadening the question's scope, the prosecutor then asserted that while
12 Jordan wasn't an expert, he did have "experience with guns", then asked: "Have you fired guns
13 before?" Jordan answered: "Not that gun particularly, in particular." Undeterred, the prosecutor
14 said: "I didn't ask about that gun, did I?", Jordan responded: "I have fired firearms before, yes." (*Id.*,
15 80: 17-81:3) The prosecutor knew what the jury did not: Jordan's room contained other guns which
16 did not belong to him; they belonged to his father, but photos of those guns had been precluded by
17 stipulation as had the gun case. The jury picked up on the innuendo, however, asking: "Is this the
18 only gun you own?", to which Jordan answered "Yes." (*Id.*, 120:4-6) The jury then asked why Jordan
19 possessed a gun he didn't know much about; Jordan again answered it was the only gun he owned
20 and he'd owned it for a short time but did know about *this* gun. (*Id.*, 125:23-126:2). In follow-up,
21 defense counsel asked: "*is that the only handgun you own?*" Jordan responded: "Yes" (*Id.* 128:17-
22 129:2) And with that, following a bench conference, the court permitted the State to introduce the
23 fact that another handgun was in a holster kept inside Jordan's nightstand drawer along with an
24 assault rifle case that was photographed in Jordan's closet bearing Jordan's name and phone
25 number. (*Id.*, 132:23-136:22; 142:21-146:18) When defense counsel objected, the court said: "This
26 was your question and he answered it....Had the question not been asked as to whether or not there
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1 was a gun in the case, I would never have allowed [it]." (*Id.*, 151:5-10) Defense counsel's
2 questioning thus opened the door to introduction of the other hand gun *and* the assault rifle case—
3 evidence which in the end portrayed Jordan as a gun nut and otherwise would not otherwise have
4 been permitted. See *State v. Poland (Poland I)*, 132 Ariz. 269, 281 (1982)("Admission into evidence
5 of weapons which are not connected with the crime can be prejudicial to the defendant and has
6 been held to be reversible error. *United States v. Green*, 648 F.2d 587 (9th Cir.1981); *United States*
7 *v. Warledo*, 557 F.2d 721 (9th Cir.1977). In the instant case, the State did not connect the weapon
8 to the crime, and it was an abuse of discretion to admit the taser gun into evidence."); see also,
9 *State v. Poland (Poland II)*, 144 Ariz. 388, 402 (1985)(on retrial, admission of empty taser box was
10 irrelevant, but not prejudicial). This was the last evidence the jury received at trial; defense
11 counsel's blunder prejudicially impacted the jury's view of Petitioner's character and credibility.

12 In closing, defense counsel said that when Carson refused to leave, Jordan pushed him as
13 he sat in the chair. Even if Jordan assaulted Carson, Jordan was justified in using non-deadly force
14 to rid his residence of a trespasser, it said. A.R.S. §13-407(A)(defense of premises) allows one to
15 use reasonable force or threaten (but not use) deadly force to extent necessary to prevent a criminal
16 trespass. Jordan used physical force and did not threaten deadly force. Carson agreed to leave, but
17 instead got up and assaulted Jordan, causing a fight to ensue. During the fight, Jordan's gun was
18 removed from his waistband despite Jordan's best effort to keep it in his waistband and maintain
19 control of it. As the struggle continued, the gun discharged, accidentally killing Carson. The
20 defense requested and was granted the self defense instruction indicating that Jordan was justified
21 in using deadly force to prevent Carson's use of deadly force against Jordan with Jordan's own gun.
22 A.R.S. §13-405(A)(2) (deadly force justified if "immediately necessary to protect self against
23 another's use or attempted use of unlawful deadly physical force.") Despite this, defense counsel
24 argued in closing that "*No one is saying that Carson was shot because [Jordan] thought he could*
25 *shoot him in self defense. We have never said that. What happened here was the fight happened*
26 *and then the gun went off. So yeah, it was an accident, but the self defense is not, 'Oh, I can just go*
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1 shoot a guy.' He couldn't, and he didn't, but that's not what we're saying." (RT 2/15/17, 80:22-81:3)
2 With that, defense counsel contradicted and defeated any self-defense claim.

3 Defense counsel also requested the jury be instructed on A.R.S. §13-418 (use of force in
4 defense of a residence) and the presumptions the law affords in A.R.S. §13-419(A), (B). Counsel
5 was apparently unaware that neither §13-418 and §13-419 applied, since it authorized deadly
6 physical force *only* upon those "unlawfully or forcefully *entering*" a premises—which Carson did not
7 do; Carson was invited in along with the rest. (See, RT 2/14/17, 182:20-189:7, reflecting counsel's
8 mistaken understanding of the law).

9 In sum, although the case boiled down to the sole questions of *who* pulled the gun from
10 Jordan's waistband and *who* caused the gun to fire—and exactly no evidence answering either
11 question was disclosed by the evidence or adduced at trial—defense counsel asserted the factually
12 and legally unsupported defenses of accident and self-defense. Under this construct, the defenses
13 asserted tacitly admitted *Jordan's guilt*: that *Jordan* himself pulled the gun from his waistband, and
14 *Jordan fired the gun accidentally or Jordan fired the gun in self-defense*. Jordan didn't authorize
15 counsel to concede guilt.

16 **2) Prejudice**

17 The crime of second degree murder required proof that Jordan intentionally, knowingly or
18 recklessly caused Carson's death. The jury could reasonably find Jordan was reckless *if* the
19 evidence established he was intoxicated at the time. Although Jordan denied he'd been drinking
20 and *none* of the witnesses interviewed at the time reported to police Jordan had been drinking, at
21 trial the uniform refrain of those same witnesses asserted Jordan had been drinking "Moonshine".
22 Not coincidentally, those witnesses were from Carson's group and—unbeknownst to trial
23 counsel—had gathered with Carson's mother on occasions between Carson's death and the trial.
24 After his death, Carson's mother continued to throw celebrations on his birthday, at which Carson's
25 friends were present. (**Appendix, Exhibit A**, at 125:23-127:7) Although she was repeatedly told not
26 to discuss the case with witnesses, in June 2016—six months prior to commencement of the criminal

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1 trial—Carson’s mother told her counselor she “has been helping some of the witnesses prepare for
2 their depositions” in the criminal trial. (**Appendix, Exhibit B**) Carson’s mother’s antagonism towards
3 Jordan is obvious—made even more apparent by her own deposition testimony wherein she revealed
4 that she’d called ADC because she “wanted to know what the murderer’s life was like”; was angered
5 over the fact that prisoners could “buy a TV”, “go to chapel” and could “walk around”; and possibly
6 told another that if she could ever get her “hands on the boy who killed her son”, she’d kill him
7 herself. (**Appendix, Exhibit A**, at 115-116, 119). Thus, bolstered by the mantra of Carson’s friends
8 that Jordan had been drinking “Moonshine” on the evening of Carson’s death, the prosecutor enticed
9 the jury to believe that at a minimum Jordan acted recklessly, inviting the jury to speculate that
10 Jordan’s blood *would have revealed* the presence of alcohol *if* police had drawn the blood before the
11 alcohol dissipated. (RT 2/15/17, 111:9-14)(“... *try to determine whether or not you believe that*
12 *means that a person has zero alcohol in their system six hours before.*”).

13 However, from the evidence presented, no inference could be drawn that Jordan was
14 intoxicated at the time *or* that *Jordan* pulled the gun *and himself* shot Carson, absent speculation.
15 Like direct evidence, circumstantial evidence may not be grounded in reasonable inferences born of
16 suspicion or speculation. *United States v. Thomas*, 453 F.2d 141, 143 (9th Cir.1971), *cert. denied*,
17 405 U.S. 1041 (1972)(“While inferences from facts that have been established by circumstantial
18 evidence may be sufficient to sustain a verdict of guilt, mere suspicion or speculation cannot be the
19 basis for the creation of logical inferences.”); *Sears Roebuck & Co. v. Jackson*, 21 Ariz.App. 176,
20 181, 517 P.2d 529 (App.1973) (“While the probative value distinction between direct and
21 circumstantial evidence has been eliminated, speculation is not synonymous with circumstantial
22 evidence.”); *Juan H. v. Allen*, 408 F.3d 1262, 1279 (9th Cir.2005)(“Speculation and conjecture cannot
23 take the place of reasonable inferences and evidence—whether direct or circumstantial...”.) And no
24 verdict may properly rest “upon suspicion or mere probability or from the fact that he may have had
25 an opportunity to commit the crime.” *Hash v. State*, 48 Ariz. 43, 58 (1936).

26 The prejudice runs deep. Having caused the introduction of previously inadmissible
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1 evidence of another hand gun and assault rifle case, defense counsel stood idly by as the State
2 enticed the jury to conclude through speculation that Jordan was intoxicated, pulled the gun from his
3 waistband and fired it. *The State* requested the lesser included offense of manslaughter, A.R.S.
4 §13-1103(A)(1)(“recklessly causing the death of another person”); defense counsel neither objected
5 (RT 2/14/17, 64:24) nor requested instructions critical to the jury's determination.

6 Both second degree murder and reckless manslaughter required proof that Jordan *caused*
7 Carson's death. Every criminal offense in Arizona requires proof beyond a reasonable doubt of
8 *causation*. A.R.S. §13-203(A) The State was required to prove that but-for *Jordan's* conduct, death
9 would not have occurred. Stated another way, it was required to prove that *Jordan himself* caused
10 the gun to fire, killing Carson. Proof that Jordan somehow contributed to the death (*i.e.*, the firing of
11 the gun) is insufficient to establish causation. *Burrage v. United States*, 571 U.S. 204 (2014)
12 (contributing factor to any degree insufficient to establish causation). Defense expert Englert testified
13 that, based on blood spatter patterns contained on Carson's right arm and a void of spatter on
14 Carson's right hand, Carson was either touching the gun or his hand was very close to the gun when
15 it was fired. His testimony was uncontradicted. The import of the testimony was *not* that Englert
16 couldn't prove Carson was touching the gun. Rather, it's import was that *the State couldn't prove*
17 that Carson *wasn't* touching the gun when it fired—a fact necessary and critical to causation. Given
18 the defense theory that *Jordan* fired the gun accidentally or in self-defense, defense counsel failed to
19 request instruction on causation, so none was given. Defense counsel was required to know the
20 jury was not bound by the defense theory. *State v. Pieck*, 111 Ariz. 318, 320 (1974).

21 Married to its “strategy”, the defense omitted argument concerning the utter absence of proof
22 that *Jordan* was the one who actually caused the gun to fire, and omitted argument that speculation
23 of causation was legally impermissible and insufficient to support conviction. The prosecutor argued
24 circumstantial evidence proved Jordan fired the gun (RT 2/15/17, 121:6-23), but it didn't—absent
25 *speculation* that Carson's hand *was not* on the gun when it fired. See, e.g., “Dog Named Molly

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1 shoots an Oklahoma Woman Who Was In the Car, October 2019¹ (puppy jumped on gun causing it
2 to fire) Although by their verdict the jury found Jordan “caused” death, such a finding cannot be
3 supported where, as here, it received no causation instruction. Moreover, the jury’s inability to find
4 the crime was a “dangerous” one, coupled with their acquittal on the aggravating factor requiring
5 proof beyond a reasonable doubt that the offense involved “the use” of a firearm is extraordinarily
6 telling: Both required a finding *Jordan used* the gun. But the remaining aggravator—that of
7 emotional/financial harm to the victim’s family— required only the finding that “the victim died as a
8 result of the conduct of the defendant.” Its finding of that aggravator coupled with its failure to find
9 the sentencing enhancement or the other aggravator strongly suggests the jury found Jordan’s
10 conduct resulted in death, but that Jordan *himself* caused death was unproven.

11 Without the causation instruction, the defense-requested “voluntary act” instruction at best
12 ambiguous—at worst misleading. (RT 2/14/17, 167:11-22) The jury was instructed that to support a
13 conviction, it must find beyond a reasonable doubt that *the defendant committed a voluntary act*. “A
14 voluntary act means a bodily movement performed consciously and as a result of effort and
15 determination. You must consider all the evidence in deciding *whether the Defendant committed*
16 *the act voluntarily*.” The “voluntary act” referred to the *actus reas* of the offense, *State v. Lara*, 183
17 Ariz. 233 (1995)(explaining that “voluntary act” refers to *actus reas* of offense), which here meant the
18 event causing death: *Jordan’s* pulling of the trigger. But the prosecution argued to the jury that
19 Jordan’s act of taking the gun into the movie room was the voluntary act. (RT 2/15/17, 124:18-20)
20 (“Does he take that gun out and put it in a safe place? No. That itself was a voluntary act of taking
21 the gun in there.”) The instruction itself did not inform the jury of what “*the act*” addressed by the
22 instruction was.

23 Defense counsel argued that it was not reckless for Jordan to get and carry a gun while
24 inside the house. (RT 2/15/17, 84:17) This too carried the implication that the “act” at issue was

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26 ¹ Found at:
27 <https://www.washingtonpost.com/nation/2019/10/07/woman-was-hospitalized-after-bullet-struck-her-thigh-shooter-puppy-named-molly/>

1 Jordan's retrieval of the gun from his bedroom. Defense counsel did not specifically argue or
2 address what "act" the law required Jordan to voluntarily engage in; he did, however, argue that
3 since Jordan didn't know *how* the gun went off—speculating that *it could have been* his own finger on
4 the trigger—he didn't fire intentionally so his act was not voluntary. (RT 2/15/17, 100:15-101:17) With
5 these differing acts, the jury lacked lucid guideposts concerning the "voluntary act" committed. At a
6 minimum, "[i]n combination with the instructions, the comments of the prosecutor [created] a
7 'legitimate basis for finding ambiguity concerning the [act] actually considered by the' jury."
8 *California v. Brown*, 479 U.S. 538, 546 (1987); *accord, United States v. Hartley*, 16 USCMA 249
9 (1966)(court martial case where it was recognized that the voluntary act instruction implied reference
10 to the accused's "intentional pulling of the trigger", but the jury was not so told—and thus were
11 "without lucid guideposts upon which to base their determination. Unenlightened, they were left to
12 shop around and to pick and choose from among the many acts of the accused.").

13 Additionally, given their defense, defense counsel failed to request any other lesser-included
14 offense to second degree murder—despite the fact that the evidence plainly supported those lessers.
15 Rule 13.2(c)(Supp.2017) instructed that charging an offense "shall constitute a charge of that
16 offense *and of all offenses necessarily included therein*." (Now Rule 13.1(e)) In a criminal trial, the
17 parties are entitled as a matter of law to have the jury determine "all offenses necessarily included in
18 the offense charged." *State v. Wall*, 212 Ariz. 1 (2006); *Gipson, infra*. "The test for whether an
19 offense is 'lesser-included' is whether, by its very nature, always a constituent part of the greater
20 offense...". *State v. Chabolla-Hinojosa*, 192 Ariz. 360, 363, ¶12, 965 P.2d 94 (App.1998). "An
21 offense is necessarily-included when it is lesser-included and the facts of the case as presented at
22 trial are such that a jury could reasonably find that only the elements of a lesser offense have been
23 proved." *State v. Gipson*, 229 Ariz. 484, 486, ¶14, 277 P.2d 189 (2012) The court must consider all
24 the evidence in the record, not just that presented by the defense, when determining whether to give
25 a lesser-included offense instruction. *Wall, supra.*, at n. 2. However, in non-capital cases, the court
26 is not required to *sua sponte* instruct on lesser-included offenses; in fact, it should not do so.

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1 *Gipson, supra*. In other words, absent a request by a party, the court should not on its own provide
2 the jury with instructions on lesser-included offenses.

3 Here the crimes of reckless manslaughter, "heat of passion" manslaughter, and negligent
4 homicide were lesser-included offenses of second degree murder. But the record makes clear that
5 defense counsel employed an "all or nothing" strategy—meaning Jordan would either be convicted of
6 second degree murder or outright acquitted based on the defenses of accident or self defense. This
7 decision does not, however, excuse counsel's failure to defend against the lesser included
8 manslaughter instruction introduced by the State, nor does it excuse their failure to request other
9 applicable lesser included offense instructions.

10 **Reckless Manslaughter:** The manslaughter instruction tracked the language of A.R.S. §13-
11 1103(A): "A person commits manslaughter by recklessly causing the death of another person."
12 Again, causation required proof that *Jordan* himself caused death, *albeit* recklessly. The instruction
13 added: "Second Degree Murder and Manslaughter may both result from recklessness. *The*
14 *difference is that the culpable recklessness involved in Manslaughter is less than the culpable*
15 *recklessness involved in Second Degree Murder.*" The "difference" instruction confused defense
16 counsel, who in closing argument said to the jury: "*If you can make heads or tails of what the*
17 *distinction is between the two, then more power to you, but basically it's this: a compromised verdict.*
18 *Let's try to split the baby. Let's just try to, you know, make everybody happy. And it's one last*
19 *chance.*" (RT 2/15/17, 101:18-102:2) Defense counsel was obligated to know the difference, and
20 explain it to the jury despite his all-or-nothing strategic approach. Arizona law has long explained
21 that "while manslaughter requires only a showing of recklessness, reckless second degree murder
22 requires also a showing of 'extreme indifference to human life' which 'created a grave risk of death'
23 to another in addition to the requirement of recklessness." *State v. Walton*, 133 Ariz. 282, 291
24 (App.1982); *State v. Woodall*, 155 Ariz. 1, 4 (App.1987) Thus, *if Jordan himself* did not pull the gun
25 from his waistband and intentionally point it at Carson's head, second degree murder's "extreme
26 indifference to human life which created a grave risk of death" distinguishing element didn't exist.

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1 Defense counsel was required to actually defend against *both* second degree murder and
2 manslaughter. Instead, he simply told the jury that there wasn't sufficient evidence for either charge
3 (RT 2/15/17, 102:5) but never clearly or precisely even attempted to explain *why* that was so.

4 **Heat of Passion Manslaughter:** A.R.S. §13-1103(A)(2) is a second form of manslaughter
5 which states: "A person commits manslaughter by *committing second degree murder ... upon*
6 *sudden quarrel or heat of passion resulting from adequate provocation by the victim.*" This means
7 that if the jury found second degree murder was proved, but the offense occurred during a sudden
8 quarrel provoked at least in part by Carson, conviction for "heat-of-passion" manslaughter was
9 justified. The facts supported this instruction; the jury could have found it was tailor made for this
10 case. Taking the evidence in the light most favorable to the State, the evidence showed Jordan
11 punched Carson as he sat in the chair. This altercation ended, and involved no use or threatened
12 use of deadly force. Carson next got up from the chair and tackled Jordan into the wall; the two
13 unquestionably became embroiled in a physical fight. Carson's attempt to grab Jordan's gun as the
14 two fought. Carson's conduct constituted adequate provocation. Although cocaine ingestion is
15 known to cause abnormal aggression, *State v. Plew*, 155 Ariz. 44, 48 (1987), counsel neither
16 adduced the point from any expert nor conducted independent testing of Carson's blood to
17 determine whether or not steroids were also present—which also are known to give rise to abnormal
18 aggression. Here, as in *Plew*, "the case was close in the sense that only the defendant and victim
19 were witnesses to the actual shooting." *Id.*, at 50. There was evidence the victim was intoxicated by
20 alcohol, "had used cocaine before the shooting, and was intoxicated with cocaine at that point. An
21 explanation of the effects of cocaine"—and possibly steroids²—may have persuaded the jury to decide
22 guilt was not proved beyond a reasonable doubt." *Id.* It's preclusion was reversible error. *Ibid.* So
23 too, here counsel's failure to conduct an independent investigation concerning the drugs in Carson's
24 blood, and present expert testimony concerning the effects of cocaine (at a minimum), constituted

26 ² Because there exists no right to discovery prior to the filing of a PCR, *Canion v. Cole*, 210
27 Ariz. 598 (2005), Jordan files his discovery motion simultaneously herewith.

1 deficient performance. The evidence that *was* presented reveals the instruction *could have* and
2 *should have* been demanded by the defense—but wasn't.

3 **Negligent Homicide:** A.R.S. §13-1102 states: "A person commits negligent homicide if with
4 criminal negligence the person causes the death of another person." The difference between
5 manslaughter and negligent homicide is that for manslaughter, the person must be consciously
6 aware of and disregard a risk of death—whereas negligence occurs when the person *lacks*
7 *awareness* of such risk of death. *State v. Walton*, 133 Ariz. 282, 291 (App.1982). The facts of
8 record supported this lesser-included charge as well. Arizona's negligent homicide statute is the
9 functional equivalent of "involuntary manslaughter." *United States v. Anderson*, 201 F.3d 1145 (9th
10 Cir.2000) excellently explains the import of this instruction in a case such as this. Distinguishing
11 voluntary manslaughter from involuntary manslaughter the court said:

12 The failure to instruct on involuntary manslaughter was error if there was evidence
13 in the record to support the theory that the killing was accidental. 'An accidental
14 killing may be second degree murder, manslaughter, [negligent homicide], or no
15 crime at all.' *United States v. Lesina*, 833 F.2d 156, 160 (9th Cir.1987)(citing
16 *Thomas v. United States*, 419 F.2d 1203, 1205 (D.C.Cir.1969)

17 If the defendant killed with the mental state required for murder (intent to kill or
18 recklessness with extreme disregard for human life), but the killing occurred in the
19 'heat of passion' caused by adequate provocation, then the defendant is guilty of
20 voluntary manslaughter. The finding of heat of passion and adequate provocation
21 negates the malice that would otherwise attach.

22 By contrast, the absence of malice in involuntary manslaughter arises not because
23 of provocation induced passion, but rather because the offender's mental state is
24 not sufficiently culpable to meet the traditional malice requirements. Thus,
25 involuntary manslaughter is an unintentional killing that evidences a wanton or
26 reckless disregard for human life but not of the extreme nature that will support a
27 finding of malice.

28 Even when the evidence is conflicting, if any construction of the evidence and
testimony would rationally support a jury's conclusion that the killing was
unintentional or accidental, an involuntary manslaughter instruction must be given.
When the defendant maintains that the killing was unintentional, the instruction is
necessary even when there is also testimony by others that the defendant stated his
intention to kill the deceased.

As this circuit held in *Paul*, when evidence is presented in support of an accidental
death theory, the instructions given must 'explain that involuntary manslaughter is
an unintentional killing.' 37 F.3d at 500-01

1 [S]elf-defense and involuntary manslaughter are not mutually exclusive. A
2 defendant who intends to use non-deadly force to protect himself, but who uses that
3 force in a criminally negligent way resulting in death, could be found guilty of
4 involuntary manslaughter.

5 *Anderson* concluded plain error ("fundamental error" in Arizona) was present:

6 Miranda's and Anderson's testimony was substantial evidence that the killing was
7 an accident in the course of a struggle for control over Jackson's knife. Yet because
8 there was no jury instruction on involuntary manslaughter, the jury was without
9 guidance on how federal law treats such an accidental killing. ***

10 In this case, the failure to give an involuntary manslaughter instruction...created the
11 risk that the jury chose the least of the lesser included offenses contained in the
12 instructions given, and wrongfully convicted Miranda and Anderson of voluntary
13 manslaughter. The instructions deprived Miranda and Anderson of their right to
14 have the jury consider whether their version of the events—that the killing was
15 accidental—entitled them to a conviction of the lesser offense of involuntary
16 manslaughter. *Our concern with the 'fairness, integrity or public reputation of
17 judicial proceedings' is intensified by an additional issue. Virtually all the physical
18 evidence in this case was lost on the way back to Los Angeles after analysis by the
19 Federal Bureau of Investigation in Washington D.C., and was unavailable during
20 both trials. *** "*

21 *Anderson's* parallels to *Jordan's* case are obvious. Meaningful DNA testing of the gun was rendered
22 impossible by fingerprint processing; police failed to obtain Carson's fingerprints to compare against
23 the fingerprints on the gun; and police failed to preserve DNA and fingerprints found on the gun for
24 independent testing. A *Willits* instruction was given. The "fairness, integrity or public reputation of
25 [the] judicial proceedings [was] intensified by these additional [evidentiary] issues." *Id.* Heat-of-
26 passion manslaughter clearly applied; the instruction should have been requested and given. That
27 the jury rejected the alternative form of manslaughter and convicted on second degree murder
28 doesn't eviscerate the impact the error or prejudice: The manslaughter instruction actually given was
demonstrably *different* from heat-of-passion manslaughter.

At bottom, defense counsel's failure to know the law caused them to fail "to require the
prosecution's case to survive the crucible of meaningful adversarial testing" and "hold the
prosecution to its heavy burden of proof beyond a reasonable doubt" with respect to the charges,
United States v. Cronin, supra., while at the same time caused them to defend on unsupported self-
defense claims. Counsel *could have* and *should have* demanded the jury be properly instructed on

1 *causation* and the “voluntary act” associated with it, as well as demanded instruction on *all of* the
2 additional lesser-included offenses. Instead, he ignored the law, insisting on the factually
3 unsupported “defense of premises” instruction and presumptions which clearly didn’t apply. Although
4 “strategy” decisions typically preclude claims of ineffective assistance of counsel, that’s not the case
5 where the “strategy” is unreasonable under the circumstances—as it was here.

6 That professional deficiency was obviously prejudicial: the defense tacitly admitted Jordan’s
7 guilt absent his consent in violation of *McCoy v. Louisiana, supra*—a flaw which alone requires
8 reversal; failed to have the jury instructed on and otherwise meaningfully challenge the critical
9 element of *causation*; permitted juror speculation to carry the day on causation and recklessness;
10 failed to defend against the manslaughter instruction given at the State’s behest; and *prevented* juror
11 consideration of *other* lesser-included offense instructions plainly supported by the evidence. Had
12 the jury been instructed on causation and had counsel explained that neither causation nor
13 recklessness could be proved by speculation or inference, there’s a reasonable probability of a
14 different result. The same conclusion arises from omission of instruction on the lessers of “heat of
15 passion” manslaughter and negligent homicide. *Strickland* calls for an inquiry into the objective
16 reasonableness of counsel’s performance, not counsel’s subjective state of mind. *Harrington v.*
17 *Richter*, 562 U.S. 86, 110 (2011). The Ninth Circuit’s conclusion in *Crace v. Herzog*, 798 F.3d 840,
18 852-53 (9th Cir.2015) is particularly *appropo* to the circumstances here:

19 Indeed, we would find Crace’s attorney’s actions were manifestly unreasonable
20 even if we thought that he had *consciously chosen not to request the instruction*. In
21 certain circumstances, it may be reasonable for a defense attorney to opt for an ‘all-
22 or-nothing’ strategy, forcing the jury to choose between convicting on a severe
23 offense and acquitting the defendant altogether. *But once the trial court decided to*
24 *instruct the jury on one lesser included offense—i.e. attempted second-degree*
assault—there was no longer any conceivable reason for Crace’s counsel not to
request an instruction on a second lesser included offense. An all-or-nothing
strategy was also clearly inappropriate in this case, given that a conviction only for
unlawful display of a weapon [the omitted lesser-included offense] would have
spared Crace a third strike and thus decades of prison.

25 We conclude that Crace’s attorney’s performance “fell below an objective standard
26 of reasonableness.” ... Because Crace has satisfied both prongs of *Strickland*, his
conviction for attempted second-degree assault cannot stand.

1 Trial counsel's conduct so undermined the proper functioning of the adversarial process that the trial
2 [and/or sentencing] cannot be relied on as having produced a just result." *Strickland*, at 686.

3 **C. Ineffective Assistance of Counsel in the Restitution Proceedings:**

4 **1) Deficient Performance**

5 No restitution hearing was held. Issues were determined based on pleadings filed by victim's
6 counsel and defense counsel. As explained *infra.*, defense counsel agreed to forms of restitution
7 which were illegal as non-compensable under the law; opposed other forms of non compensable
8 restitution without well researching the law; agreed to restitution providing a "windfall"; and opposed
9 entry of a Criminal Restitution Order without objecting to its unconstitutionality. Non-compensable
10 economic losses awarded as restitution are illegal as are awards which provide a "windfall" to the
11 victim. His conduct fell below prevailing professional norms and gave rise to prejudice. An illegal
12 restitution award amounts to fundamental error, despite lack of objection. *State v. Whitney, 151*
13 *Ariz. 113, 115 (App.1985).*

14 **2) Prejudice**

15 Petitioner was prejudiced with respect to the following awards of restitution: 1) restitution
16 awarded the victim's mother for "physician visits and prescription copays" in the amount of \$390.09
17 was duplicative of that awarded her in the related civil wrongful death action; 2) restitution awarded
18 the victim's mother in the amount of \$143,636.00 for "lost wages" incurred between September 2015
19 and June 2018, *and* award of \$2,044.56 for recoupment of health insurance premiums, were illegal
20 as not compensable under the restitution statutes; 3) restitution awarded the victim's mother in the
21 amount of \$4,862.00 for a car loan she made to the victim was an illegal windfall; 4) restitution
22 awarded the victim's mother in the amount of \$411,403.00 representing the decedent victim's "lost
23 wages" from the time of his death up through the projected time of his retirement was illegal as not
24 compensable under the restitution statutes; and 5) entry of the Criminal Restitution Order attaching
25 10% interest while the Defendant was serving a 12 year sentence in the Arizona Department of
26 Corrections was unconstitutional. The court entered the restitution award and Criminal Restitution

1 Order without endorsing Petitioner on its orders, and without informing Petitioner of his right to
2 appeal those orders. See, Rules 26.1(b), (c); 26.11.

3 **1. The Restitution Orders of April 5, 2019**

4 In the months following Petitioner's indictment for second degree murder, Carson's parents
5 brought a civil wrongful death action against Jordan and his parents, *Dumbrell v. Hanson*, CV2016-
6 003499. Trial occurred in October 2018. The jury found Jordan's parents were 0% at fault and
7 awarded no damages. Against Jordan, it awarded Carson's father \$560,000.00 for compensatory
8 damages; awarded Carson's mother \$964,000.00 in compensatory damages; and awarded punitive
9 damages in the amount of \$550,000.00. (**Appendix, Exhibit C**) Judgment was entered December 5,
10 2018 and paid in full to both Plaintiffs about a week later. (**Appendix, Exhibit D**) Four months later,
11 the criminal court entered the restitution award; later, it entered the Criminal Restitution Order.

12 **A. "Physician visits and prescription copays":**

13 During the civil wrongful death action the jury was instructed, *inter alia*, to award "[t]he
14 reasonable expenses of necessary medical care and services, if any, for [the decedent's mother]
15 arising out of Carson's death." (**Appendix, Exhibit E**). The compensatory damages awarded *and*
16 *paid* to the victim's mother in the civil case thus necessarily included the \$390.09 subsequently
17 awarded her by the criminal trial court as restitution for "physician visits and co-pays."

18 "When the restitution statutes are construed together in light of their purposes it appears that
19 the Legislature intended that the courts coordinate criminal restitution and civil damage
20 recoveries....[T]he statutory scheme contains no hint that the Legislature intended to go beyond full
21 compensation and confer a windfall." *State v. Iniguez*, 169 Ariz. 533, 537 (App.1991) Consequently,
22 the trial court "should not order restitution exceeding the victim's actual economic losses *after*
23 *crediting payments received by the victim outside the criminal proceeding.*" *Id.* (*emphasis added*);
24 *accord, Town of Gilbert Prosecutor's Office v. Downie*, 218 Ariz. 466, 469 ¶11 (App.2008)(citing ¶13-
25 804(E) as "[r]equiring reduction of a victim's recovery for sums already received" as demonstrative of
26 legislative intent).

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1 Although victim's mother's counsel attended at least some of the civil trial, and although the
2 civil judgment preceded the restitution award by six months, the victim's mother's counsel failed to
3 inform this court or defense counsel that restitution requested for "physical visits and insurance co-
4 pays" duplicated that already paid in the civil action. Defense counsel obviously didn't check into the
5 matter. Duplicative of that awarded the victim's mother in the civil wrongful death action, the
6 restitution award for the victim's mother's "physician visits and copays" was an illegal windfall.

7 **B. The Victim's Mother's "lost wages" and health insurance:**

8 The victim's mother was employed as a school teacher and also taught dance classes.
9 Following her son's murder, she took a three-year leave of absence from her job as a school
10 teacher; however, she continued to teach dance classes. (**Appendix, Exhibit A, 106:13; Exhibit F**)
11 Victim's counsel failed to inform the court or defense counsel that during her absence from teaching
12 the mother received disability payments from the government in an amount of approximately 66% of
13 her wages. (**Appendix, Exhibit A, 103:9-104:24; 123:7-13**) Moreover, because her employer was
14 no longer paying for her own health insurance, she had to pay the premiums herself, and claimed
15 she was entitled to restitution in that amount as well.

16 Over defense counsel's lack-of-reasonableness objection (ROA 242), she was awarded
17 restitution for wages lost between September 2015 and June, 2018 without deduction of the
18 disability payments she'd received. She was *also* awarded reimbursement for the health insurance
19 premiums she personally paid. The restitution awards were illegal since not only did she receive a
20 "windfall" due to failure to detect disability payments, but as the victim's *representative* she was not
21 entitled to her own lost wages or her own health insurance premiums stemming from her three-year
22 voluntary leave of absence from work.³ Rather, her lost wages and insurance premiums constitute
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24 ³ Jordan does not dispute that, as representative of the victim, she would have been
25 entitled to lost wages due to court appearances attendant to the criminal proceedings. *State v.*
26 *Lindsley*, 191 Ariz. 195, 198-99 (App.1997); *State v. Madrid*, 207 Ariz. 296, ¶1, 297
27 (App.2004)(upholding restitution awarded for "reasonable" expenses related to murder victim's
children's trial attendance). But that was not her claim since she was not working when she
attended the court proceedings.

1 indirect losses excluded from the criminal restitution statutes as third-party consequential damages.
2 Defense counsel was required to know that and present the law to the court. But he did not.

3 **(i) Economic loss must be suffered by or on behalf of the actual**
4 **victim of the offense of conviction:**

5 A.R.S. §13-603(C) requires restitution to be paid to "the victim of a crime" whether he is
6 alive or deceased. If he's deceased, restitution owed to him is to be tendered to his immediate
7 family. Carson's mother was not "*the victim of the crime.*"

8 The VIRA defines "Victim" as "a person against whom the criminal offense has been
9 committed...*or* if the person is killed... the person's spouse, parent, child, grandparent or sibling, any
10 other person related to the [victim] by consanguinity or affinity to the second degree *or any other*
11 lawful representative of the [victim]." A.R.S. §13-4401(19) (*emphasis added*) Simply put, where the
12 actual crime victim is deceased, the statute designates those who may stand in his shoes as legal
13 representative to collect any restitution owed the actual crime victim pursuant to §13-603(C). Here it
14 is indisputable that the decedent's mother was not present when her son was murdered, nor was
15 she a victim of any crime committed by Jordan; she was a "victim" only in a representative capacity.

16 Arizona has "refused to allow restitution to third parties who have suffered losses as [a] result
17 of the defendant's conduct where such losses were separate and unrelated to *the victim's* losses."
18 *In re Erika V.*, 194 Ariz. 399, 400 (App.1999) "The courts have distinguished between the situation
19 where the third party 'stands in the shoes of the victim because it is legally required to suffer the
20 victim's own precise loss' and where the third party suffers a separate loss and did not step into the
21 victim's shoes." *Id.*, at 401, quoting *State v. Prieto*, 172 Ariz. 298, 299 (App.1992). Indeed, as this
22 court explained in *State v. Whitney*, 151 Ariz. 113, 114 (App.1985), "[t]he statute which limits
23 restitution to the 'victim of the crime' must therefore necessarily distinguish between victims and third
24 parties. This distinction is grounded in sound policy. Restitution statutes contemplate reparation for
25 damages to one injured by virtue of a defendant's violation of criminal law. Disposing of possible
26 civil claims of third parties, however, cannot be a proper function of restitution in a criminal case."
27 (internal citations omitted); see also, *State v. French*, 166 Ariz. 247 (App.1990)(legislature did not

1 intend the phrase “the victim of the crime” in A.R.S. §13-603(C) to include everyone who suffered
2 economic loss, either directly or indirectly, of the defendant’s crime.); *State v. Guadagni*, 218 Ariz. 1,
3 6, ¶16 (App.2008)(same).

4 A.R.S. §13-804(A) grants the court discretion to “order that all or any portion of the fine
5 imposed be allocated as restitution *to be paid* by the defendant *to any person who suffered an*
6 *economic loss* caused by the defendant’s conduct.” Subsection (B) states: “In ordering restitution for
7 economic loss pursuant to §13-603, subsection C or subsection A of this section, the court shall
8 consider *all losses* caused by the criminal offense or offenses for which the defendant has been
9 convicted.” (*emphasis added*) Both §§13-603(C) and 13-804 were enacted in 1977 and although
10 subsequently renumbered, must be read in *in para materia*—a rule of statutory construction whereby
11 the meaning and application of a ... portion of a statute is determined by looking to statutes which
12 relate to the same...thing and which have a purpose similar to that of the statute being construed.
13 Statutes *in pari materia* must be read together and all parts of the law on the same subject must be
14 given effect, if possible.” *Collins v. Stockwell*, 137 Ariz. 416, 419 (1983). Where as here the statutes
15 were enacted at the same time, the presumption that the legislature was aware of the contents of
16 both statutes is particularly strong.

17 Read *in para materia*, §13-804(A) tells us *to whom* a criminal fine allocated as restitution is
18 to be paid: “to any person who suffered an economic loss” means it must be paid to *any person*
19 authorized to receive restitution under §13-603(C), *to wit.*, the actual crime victim(s) or “to the
20 immediate family if the victim has died.” *State v. King*, 157 Ariz. 508 (1988)(“The trial court may
21 order the defendant to pay restitution *to the victim* pursuant to A.R.S. §13-603(C). Alternatively, the
22 trial court may impose a fine on the defendant and order that all or any portion of the fine imposed
23 pursuant to A.R.S. §13-801 be allocated *to the victim* pursuant to A.R.S. §13-804(A).”)(*emphasis*
24 *added*) Subsection A does not expand those eligible to receive restitution.

25 Similarly, §13-804(B), read *in para materia* with subsection A, §13-603(C) and §13-105(16)
26 (defining “economic loss”), neither expands the subset of persons entitled to restitution nor expands
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1 the types of losses recoverable. Subsection B makes no mention of the persons entitled to
2 restitution. Although mandating court consideration of “*all losses caused by the criminal offense or*
3 *offenses for which the defendant has been convicted*”, it means *only* those losses compensable as
4 restitution which exclude “damages for pain and suffering, punitive damages or consequential
5 damages.” A.R.S. §13-105(16) Such losses “caused by the criminal offense or offenses for which
6 the defendant has been convicted” means direct, compensable losses incurred by *the victim or*
7 *victims* of the crime or crimes of conviction, §13-603(C).

8 Had the legislature intended to expand the scope of persons *eligible* for restitution, it would
9 have modified §13-603(C) to reflect just that. *Cf., State v. French, supra.* (“If the legislature had
10 intended to require a defendant to pay restitution to any person incurring loss as the result, direct or
11 indirect, of a defendant’s behavior, rather than to ‘victims of *the crime*’, the legislature would have so
12 stated.”) Instead, §13-804(B) simply directs the court to consider all compensable losses incurred by
13 the crime victim(s), whether restitution is ordered pursuant to §13-603(C) or allocated as a fine
14 pursuant to §13-804(A).

15 The advent of VBR, VRIA and Rule 39 in 1990 impacted the persons eligible for restitution
16 directly flowing from the crime of conviction. “The VBR enshrine[d] a victim’s right to seek ‘prompt
17 restitution from the person or persons convicted of the criminal conduct that caused *the victim’s* loss
18 or injury.” *State v. Patel*, 3 Ariz.CasesDigest 7, ¶5, 452 P.3d 712 (App.2019). “As with legislative
19 enactments, we presume the voters who approved the VBR in 1990 were well aware of the statutes
20 authorizing restitution and the existing Arizona case law interpreting victims’ rights to restitution. As
21 such, we further presume that had the voters wished to restrict [, expand] or otherwise distinguish
22 rights to restitution under the VBR from those under existing criminal statutes, such as §13-603(C),
23 they would have done so.” *Id.*, at ¶8.

24 Notwithstanding §13-603(C)’s directive concerning “*the immediate family of the victim[’s]*”
25 entitlement to collect restitution owed *the victim* where the victim had died, the VBR and VIRA
26 expressly designated—and *expanded*—*who* was entitled to stand in a deceased victim’s shoes as
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1 legal representative. Legal representatives, whether related to the victim or not, could thereafter
2 assert a decedent victim's rights and privileges on the decedent's behalf, Ariz.Const., art. 2,
3 §2.1(12)(C); A.R.S. §13-4401(19), including but not limited to the "right to be present throughout all
4 criminal proceedings in which the defendant has the right to be present," A.R.S. §13-4420, and the
5 right "[t]o receive prompt restitution from [the convicted defendant] that caused *the victim's* loss or
6 injury." Ariz.Const., art. 2, §2.1(8) Thus, by casting legal representatives as "victims" where the
7 actual victim had died, the legal representatives themselves became entitled to recoup their own
8 losses incurred when acting *on the victim's behalf*. They were vicariously entitled to restitution for
9 losses such as "lost wages" due to attendance at court proceedings, *State v. Lindsley*, 191 Ariz. 195
10 (1997); travel expenses affiliated with attendance at court proceedings, *State v. Madrid*, 207 Ariz.
11 296 (App.2004); and funeral expenses, *State v. Leal*, 5 Ariz.CasesDigest 21, __ P.3d __ (App.2019)
12 –and virtually any other direct economic loss compensable under the restitution statutes incurred *on*
13 *the victim's behalf*.

14 Here the trial court imposed no fine at sentencing; §13-804(A) was not implicated. Thus,
15 pursuant to subsection B, the court considered "all losses" caused by the offense of conviction and
16 ordered "restitution for economic loss pursuant to §13-603, subsection C"–actual losses sustained by
17 *the crime victim* to be paid to his legal representative which here was his mother. Because the
18 primary purpose of restitution is to make *the victim of the crime* whole rather than to punish the
19 defendant, pursuant to §13-604(C) the court should not have awarded the victim's mother/legal
20 representative \$143,636.00 in "lost wages" for *her own* voluntary three-year leave of absence from
21 work or awarded \$2,044.56 as reimbursement for insurance premiums she was thereafter required
22 to herself pay for *her own* health insurance. Both fall outside of §13-603(C) since she as not "the
23 victim of the crime"; both fall outside of VBR and VIRA's provisions, as neither were incurred on the
24 victim's behalf.

25 As *Whitney, supra*. recognized, the statutory distinction between victims and third
26 parties–which here was the victim's mother despite her dual role as legal representative of a
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1 deceased crime victim—is “grounded in sound policy”. Erasing the distinction would mean that every
2 murder victim’s spouse, parents, children, grandparents, siblings, relatives by consanguinity or
3 affinity to the second degree and other legal representative(s) could all quit their jobs and seek
4 recoupment of “lost wages” as restitution. This is by no means a fictional stretch. In cases where
5 the actual victim is deceased, incapacitated, or a minor the definition of “victim” is written in the
6 disjunctive indicating legislative intent that the actual victim have only one legal representative. See,
7 §13-4401(19); *State v. Pinto*, 179 Ariz. 593, 595 (App.1994) (“Or” is “a disjunctive particle used to
8 express an *alternative* or *to give a choice* of one among two or more things.”) However, Arizona not
9 interpreted the statute in the disjunctive; it has interpreted it in the conjunctive. See, e.g., *In re Erika*
10 *V.*, 194 Ariz. 399, 400 ¶8 (App.1999)(where crime victim “Kellie” was a minor, it was held that both
11 parents were “entitled to restitution for their lost wages incurred while taking Kellie to medical
12 appointments and juvenile court hearings occasioned by Erika’s assault.”); *In re Ryan A.*, 202 Ariz.
13 19, 26-27 ¶¶ 29-32 (App. 2002)(same); *State v. Madrid*, 207 Ariz. 296, 300 ¶10 (App.2004)
14 (concluding “that the travel expenses relating to [the murder victim’s three] children’s voluntary
15 attendance at Madrid’s trial constitute an economic loss for which they are entitled to restitution.”).
16 Similarly, in *Hurt v. Superior Court*, 124 Ariz. 45, 50 (1979) the Court held that although the wrongful
17 death statute permitted “children or parents” of the decedent to recover damages, it was “to be
18 interpreted in the conjunctive rather than the disjunctive.”⁴

19 To avoid this absurd result, ¶13-604(C) permits a victim’s family member to collect restitution
20 owed to “the victim of the crime” on the decedent’s behalf when the victim has died. “Because
21 appellant was ordered to pay restitution to one who was not a ‘victim of the crime’ [for losses
22 incurred *other than* on the crime victim’s behalf] the sentence was illegal and can be reversed on
23 appeal...”. *Whitney*, 151 Ariz. at 115. Statutorily unauthorized, the restitution awarded for the
24 victim’s mother’s lost wages and insurance premiums here were illegal.

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26 ⁴ In the instant case, both the victim’s mother and sister were awarded travel expenses for
27 attending court proceedings; the victim’s sister was also awarded lost wages due to attending court
28 proceedings. Jordan doesn’t challenge those orders.

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1 (ii) Economic losses sustained by the victim's mother were indirect
2 consequential damages excluded by A.R.S. §13-105(16):

3 Even assuming *arguendo* that the victim's mother was a crime victim eligible for restitution,
4 her lost wages and insurance premiums were consequential damages excluded by the restitution
5 statutes. The victim's mother was compensated in the civil wrongful death action for her "[emotional]
6 pain, grief, sorrow, anguish, stress, shock and mental suffering." (Appendix, Exhibit C) *Those*
7 *conditions* intervened to cause her to take a three-year leave of absence from work. *That leave of*
8 *absence* intervened to cause her to lose the benefit of her employer's payment of health insurance
9 premiums, which she herself then paid. These losses, said her lawyer in the criminal case, "would
10 not have been incurred 'but for' the offense" committed by Jordan. (ROA 232)

11 However, as our supreme court recognized in 2002, "[b]ut for" causation does not suffice to
12 support restitution, for if it did, restitution would extend to consequential damages. Yet our criminal
13 code expressly provides the contrary." *State v. Wilkinson*, 202 Ariz. 27, 29 (2002)

14 "Consequential damages are such as are not produced without the concurrence of some
15 other event attributable to the same origin or cause; such damage, loss, or injury as does not flow
16 directly and immediately from the action of the party, but only from the consequence or results of
17 such act. The term may include damage which is so remote as to not be actionable." *State v.*
18 *Morris*, 173 Ariz. 14, 17 (App.1992). "By eliminating consequential damages, the statutory scheme"
19 requires "the criminal conduct must *directly* cause the economic loss. If the loss results from the
20 concurrence of some causal event other than the defendant's criminal conduct, the loss is indirect
21 and consequential and cannot qualify for restitution under Arizona's statutes." *Wilkinson, supra.*
22 (*emphasis added*); *see also, State v. Slover*, 220 Ariz. 239, 243 (App.2009)(victim's counsel's
23 attorneys fees "did not flow directly from the defendant's criminal conduct but rather arose from
24 either the state's inability to prosecute the case independently and competently or the [victim's]
25 wife's mistrust that it would do so." "Those fees were therefore consequential rather than direct
26 damage arising from Slover's crime and not recoverable as restitution under Arizona statute.")

27 Simply put, "[t]he statutes direct a court to award restitution for those damages that flow
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1 directly from the defendant's criminal conduct, *without the intervention of additional causative*
2 *factors.*" *Wilkinson, supra.* (*emphasis added*) This conclusion "remains faithful to the statutory
3 language, but also prevents the restitution statutes from conflicting with the right to a civil jury trial
4 preserved by [the Arizona Constitution]." *Id.*, at 30.

5 A loss is recoverable as restitution if it meets three requirements: (1) the loss must be
6 economic, (2) the loss must be one that the victim would not have incurred but for the criminal
7 conduct, and (3) the criminal conduct must directly cause the economic loss. *State v. Lewis*, 222
8 Ariz. 321, 324 ¶7 (App.2009). Thus, the government must not only prove "that a particular
9 [economic] loss would not have occurred but for the conduct underlying the offense of conviction, but
10 also that the causal nexus between the conduct and loss is not too attenuated (either factually or
11 temporally)". *Lewis, supra.*, at ¶11, citing *State v. Gulliams*, 208 Ariz. 48, 53 ¶18 (App. 2004).

12 The causal nexus requirement was absent here. As stated, it requires the economic loss
13 must flow from the defendant's conduct "without the intervention of additional causative factors."
14 *Gulliams*, at 53, ¶17, quoting *Wilkinson, supra.*, at ¶7. "[A] defendant cannot be ordered to pay for
15 losses that 'do not flow' directly from the criminal activity." *State v. Morris*, 173 Ariz. 14, 17
16 (App.1992) In the restitution context, the causation determination is case-specific." *Gulliams*, 208
17 Ariz., at ¶¶18-19. "[D]etermination that losses are actual losses rather than consequential damages
18 will rest on a causal connection between the criminal conduct and the claimed loss." *Morris, supra.*
19 The but-for analysis is thus couched "in terms of 'direct result.'" *Ibid.*

20 Courts "usually arrive at the 'direct result' determination by employing a 'foreseeability' or
21 'natural consequence' analysis similar to the causation determination in civil cases." *Ibid.* The
22 United States Supreme Court has stated the same. *Paroline v. United States*, 572 U.S. 434, 444-45
23 (2014)(in the restitution context, "[p]roximate cause is often explicated in terms of foreseeability or
24 the scope of the risk created by the predicate conduct. A requirement of proximate cause thus
25 serves, *inter alia*, to preclude liability in situations where the causal link between conduct and result
26 is so attenuated that the consequence is more aptly described as mere fortuity.") Here the victim's
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1 mother's grief, stress and anxiety was born "from the consequences or results" of her son's murder;
2 her mental distress thus constituted consequential damages for which she was awarded a monetary
3 recovery in the civil wrongful death action. Her decision to take a three-year voluntary leave of
4 absence from work—although still choosing to work as a dance instructor—was neither foreseeable⁵
5 nor reasonable⁶; *that decision* "would not have occurred without the consequence of [the] second
6 causal event"—her grief, stress and anxiety. *Wilkinson, supra.*, at ¶10. Consequently, her lost wages
7 were not *directly* caused by Jordan's criminal conduct; they were indirect and attenuated, attributable
8 to "the intervention of additional causative factors". *Id.*

9 Even further indirect and attenuated were the costs of the victim's mother's own health
10 insurance premiums. Again, that "economic loss" was not directly caused by her son's murder; it
11 resulted from the intervention of a third causal event—her decision to take leave from her
12 employment. Because neither the victim's mother's "lost wages" nor insurance premiums were the
13 *direct result* of the victim's murder, the restitution awards were illegal. Defense counsel was
14 required to thoroughly research the law and provide the court with that law. But he did not, and
15 Petitioner was prejudiced because of it—as exemplified by the awards entered.

16 C. Reimbursement to the victim's mother for a car loan:

17 The victim's mother's lawyer asserted that the victim's mother was owed restitution for a loan
18 made to the decedent in the amount of \$12,042.00 for a used vehicle the decedent purchased
19 approximately two months prior to his death. (ROA 232) The purchase price was \$18,042.00 of
20 which the decedent himself paid \$6000. *Id.* Jordan's counsel objected, contending "[t]he motion
21 does not specify whether the mother subsequently sold the vehicle and suffered an actual loss due
22 to the loan." (ROA 242) But then he asserted "[t]he appropriate measure of economic damages ...is
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24 ⁵ Although the victim's father suffered and was compensated for the same emotional pain
25 and stress in the civil wrongful death action, he did not take a leave of absence from work; nor did
the victim's sister—save for the times she attended court proceedings in the criminal action.

26 ⁶ "[A] key to the analysis is reasonableness, which is determined on a case by case basis."
27 *State v. Quijada*, 246 Ariz. 356, 369 ¶42 (App.2019)(defendant not responsible for costs beyond
reasonable period to restore equanimity.)

1 the fair market value of the property at the time of the loss." *Id.* This methodology, however, applies
2 only to situations where property is stolen. See, e.g., *State v. Reynolds*, 171 Ariz. 678, 682
3 (App.1992)("We affirm the general proposition from *Pearce* that the victim is entitled to recover the
4 difference between the fair market value of the property at the time it was stolen and the fair market
5 value of the property at the time it was recovered. If not recovered, the measure of the victim's full
6 economic loss is the fair market value of the property at the time of the loss.")

7 In reply, the victim's mother's lawyer said: "The car remains in [the mother's] possession and
8 her economic losses should be adjusted downward to the total sum of \$4863 representing the total
9 balance minus fair market value of the vehicle." (ROA 243) Thus, seizing on defense counsel's
10 erroneously asserted measure of damages, he attached a Kelley Blue Book page revealing a
11 "Trade-in" value⁷ of \$7,179.00 in 2018—some three years following the homicide. *Id.*

12 The Court awarded the victim's mother \$4863 as restitution for car loan. The award was a
13 legally prohibited "windfall." The vehicle was purchased on July 16, 2015. The victim was murdered
14 on September 5, 2015. Had the vehicle been sold shortly thereafter, the victim's mother would have
15 recouped her loan as well as most if not all of the proceeds paid by the victim himself at the time of
16 its purchase. But that didn't happen.

17 Instead, on October 5, 2015 the victim's mother transferred the title to the car to herself,
18 electing to keep the vehicle. (**Appendix, Exhibit G**) Victim's counsel failed to inform either defense
19 counsel or the court of that critical fact. Had he done so, the court would not have ordered Jordan to
20 reimburse her *for a car she herself owned*; she could not keep the car *and* collect restitution for its
21 purchase. That's a windfall. Nor was she entitled to recoup her loan on a car she owned in the
22 amount of the vehicle's claimed depreciated value. *United States v. Tyler*, 767 F.2d 1350, 1351-52
23 (9th Cir.1985) aptly demonstrates the point. There the defendant was arrested for cutting down
24 timber from a national forest. The government took possession of the timber that same day, but
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26 ⁷ Trade-in value is not fair market value. Indeed, as of December 30, 2019, the exact
27 vehicle at issue had a retail value of \$10,390.00. (Appendix, Exhibit E)

1 retained it for evidentiary purposes. By the time the government sold it, the value of the timber had
2 dropped significantly. The district court ordered Tyler to pay restitution for the decreased value of
3 the timber. The Ninth Circuit reversed the restitution order and found that Tyler did not cause the
4 loss. The court observed: "Any reduction in [the timber's] value stems from the government's
5 decision to hold the timber during a period of declining prices, not from Tyler's criminal acts." *Id.*, at
6 1352. The court reasoned that "restitution is proper only for losses *directly* resulting from the
7 defendant's offense." *Id.*, at 1351.

8 Here the car loan was secured by the car itself, which she herself owned. Any reduction in
9 the vehicle's value stems from the mother's decision to keep the vehicle after the victim's death as it
10 depreciated, *not from* Jordan's criminal act. *Tyler, supra*. Because the primary purpose of restitution
11 is to make the victim whole rather than to punish the defendant, a court should not award restitution
12 in an amount greater than the victim's actual economic loss so as to provide a "windfall" to the
13 victim. *State v. Iniguez*, 169 Ariz. 533, 537 (App.1991). Defense counsel was required to
14 investigate the circumstances, research the issue, and provide the court with the information and
15 law. Had he done so, there's a reasonable probability the court wouldn't have ordered a windfall.

16 **D. The decedent victim's lost potential future employment earnings, lost potential**
17 **future advancement opportunities and benefits, lost potential future investment**
18 **returns, and lost potential retirement:**

19 Counsel for the decedent victim's mother asserted she was entitled to \$411,402.00
20 representing the 21 year-old decedent's "lost wages". (ROA 232) Defense counsel objected,
21 contending the request subverted "the purpose of our civil jury trial and is an inappropriate use of the
22 restitution statutes." (ROA 242) Even as a statutory victim, the decedent's mother suffered no
23 personal economic loss from the decedent's lost wages, he said. *Id.* The court entered the award
24 for "lost wages" as requested. The award was illegal under our restitution statutes.

25 As Mark Twain once said, "[t]he difference between the *almost right* word and the *right* word
26 is really a large matter. 'Tis the difference between the lightning bug and the lightening."⁸ Although

27 ⁸ Mark Twain, *The Wit and Wisdom of Mark Twain*

1 the definition of "economic loss" includes "lost wages", a decedent crime victim's lost hypothetical
2 potential future earning capacity covering what would have been the remainder of his hypothetical
3 worklife, lost hypothetical potential future advancement opportunities and benefits, lost hypothetical
4 potential future investment returns, and lost hypothetical potential retirement do not constitute "lost
5 wages." Collectively considered, they represent the decedent's *lost future potential earning capacity*.

6 Although Arizona's criminal code does not define the word "loss" in the context of
7 restitution, our supreme court has observed that "'loss' is commonly defined as the difference
8 between what was had before and after a specified event. *E.g.*, Webster's College Dictionary 778
9 (2nd ed. 1977)(defining "loss" to mean "the act of losing possession of something" or "an amount or
10 number lost"); *see also*, A.R.S. §1-213(2002)(requiring that words be given their ordinary meaning)." *Town of Gilbert Prosecutor's Office v. Downie, supra.*, 218 Ariz., at 469, ¶11. In this vein, the court
11 said: "The concept that restitution compensates victims only for losses actually suffered is well
12 established." *Id.*, at ¶12. "Restitution therefore should not compensate victims for more than their
13 actual loss." *Id.*, at ¶13 (*emphasis added*) "Limiting the victim's restitution to the amount necessary
14 to recompense direct losses comports the language of the restitution statutes, makes practical
15 sense, and preserves the proper place and function of a civil jury to determine a victim's actual
16 damages...". *Id.*, at ¶14. "To hold otherwise would upset the relationship among reparation,
17 retribution, and rehabilitation, and blur the distinction between criminal restitution and recovery for
18 ancillary damages protected by the civil jury trial. It might also provide a windfall to the victim and
19 encroach into punishment for the defendant." *Ibid.* Truer words have never been spoken—or written.

21 "Our legislature has narrowed the definition 'economic loss,' as that term is used in reference
22 to restitution, in A.R.S. §13-603(C). The definitional parameters selected by the legislature
23 demonstrate an intelligent choice between competing interests. If the phrase 'full amount of the
24 economic loss' were defined broadly to permit the recovery of *unliquidated damages*, i.e., pain and
25 suffering, punitive damages, *decreased earning capacity*, loss of consortium *and the like*, the
26 criminal courts would be forced to make difficult and time-consuming evaluations of losses usually

1 reserved for civil juries. Our courts have repeatedly recognized that the goals of restitution in a
2 criminal case differ from damages imposed in civil actions. Moreover, unlike a civil judgment debtor,
3 a victim entitled to restitution is protected from a discharge of that obligation in bankruptcy court.”
4 *State v. Foy*, 176 Ariz. 166, 170 (App.1993)⁹ (*emphasis added*, internal citations omitted).

5 In wrongful death actions, losses are statutorily limited to those “resulting from the death,”
6 §12-613, including deaths “caused under such circumstances as amount in law to *murder in the first*
7 *or second degree* or manslaughter”, §12-611. (*emphasis added*) The losses awarded here as
8 restitution for “lost wages” did not represent wages actually “lost” at all: They represented decedent’s
9 *prospective future earning capacity* compensable only under the wrongful death statute. See, *Kemp*
10 *v. Pinal County*, 8 Ariz.App. 41, 45 (1968) (“Evidence of the decedent’s *capacity* and *disposition* to
11 earn money is pertinent to the issue of damages in a wrongful death action.”); *Summerfield v.*
12 *Superior Court*, 144 Ariz. 467, 472 (1985) (prospective earning capacity compensable under
13 wrongful death statute); *Walsh v. Advanced Cardiac Specialists Chartered*, 229 Ariz. 193, 196 ¶8
14 (2012)(wrongful death damages “may include the decedent’s prospective earning capacity”).

15 “Disposing of civil liability cannot be a function of restitution in a criminal case.” *State v.*
16 *Pearce*, 156 Ariz. 287, 289 (App.1988) Civil lawsuits serve a different purpose, employ different
17 procedural rules and are subject to affirmative defenses unavailable in the criminal restitution forum.
18 As *Pearce*, quoting *State v. Reese*, 124 Ariz. 212, 215 (App.1979), observed:

19 A party sued civilly has important due process rights, including appropriate
20 pleadings, discovery, and a right to a trial by jury on the specific issues of liability
21 and damages. The judge in a criminal trial should not be permitted to emasculate
22 those rights by simply declaring his belief that the defendant owes a sum of money.

23 Nor should a victim’s lawyer be permitted to emasculate those rights in a criminal case by using VBR
24 and VRIA as a *shield* to avoid discovery rights pertaining to “[e]vidence of the decedent’s *capacity*
25 and *disposition* to earn money” otherwise discoverable as “pertinent to the issue of damages in a
26 wrongful death action”, *Kemp, supra.*, while at the same time using VBR and VRIA as a *sword* to

27 ⁹ Disapproved on other grounds by *Hoffman v. Chandler ex rel. County of Pima*, 231 Ariz.
28 362 (2013).

1 expediently carve out a claim for what amounts to *possible prospective future* “losses” grounded in
2 purely hypothetical statistical assumptions and presumptions.

3 Whereas here the evidence of the decedent’s capacity and disposition to earn money was
4 secreted from defense counsel, the criminal court, and quite possibly from the victim’s expert
5 himself, this case presents the paradigmatic example of what happens when a criminal
6 defendant—precluded by victim’s rights from deposing a “victim” and otherwise gathering relevant
7 evidence necessary for his own retention of experts—is confronted with a report authored by a
8 victim’s Vocational Economist professing to disclose a reliable prediction of a decedent’s lost
9 potential earning capacity. To demonstrate the critical nature of the evidence *undisclosed* in the
10 criminal restitution proceeding and how that evidence would have impacted the validity of the
11 statistical assumptions and presumptions underlying the victim’s expert’s analysis and conclusions,
12 Jordan footnotes that evidence adduced during the civil trial.

13 Unquestionably, a restitution award must be based on “proof and not speculation.” *Inguiez*,
14 *supra.*, at 538. Although statistically based, calculation of a decedent’s future potential earnings
15 necessarily presumes a great deal. The decedent here was two years out of high school and, after
16 losing several jobs, had been employed as a restaurant worker for about one year. He lived with his
17 mother and did not pay rent or other expenses save for his cell phone bill.¹⁰ Nothing in the
18 decedent’s personal or educational history suggested that he was going to be an average performer
19 throughout his worklife.¹¹ Yet the calculation for his future potential earnings presumed the contrary.

20 _____
21 ¹⁰ **Appendix, Exhibit H**

22 ¹¹ The statistical calculations offered accounted for none of the following: According to his
23 mother, the decedent was diagnosed with ADHD when he was in middle school. (**Appendix,**
24 **Exhibit I**) ADHD is a diagnostic mental disorder recognized in the Diagnostic and Statistical Manual
25 of Mental Disorders (“DSM”) as causing impulsivity. The DSM-5 advises that with ADHD,
26 “impulsivity refers to hasty actions that occur in the moment without forethought and that have high
27 potential for harm”; impulsive behaviors may manifest as “making important decisions without
28 consideration of long-term consequences.” (DSM-5, 2013, p. 61) “ADHD begins in childhood”; “it
occurs in about 5% of children and about 2.5% of adults.” *Ibid.* In high school, the decedent’s
mother had consistent battles with him over his behavior and being disruptive in class. (**Appendix,**
Exhibit J) “[I]t was tough to get him to conduct himself in a classroom”, she said. *Id.* She was
“constantly called by the school regarding his disruptions”, “the discipline was constant and long”,

1 It presumed the decedent would have remained gainfully employed and received advancements and
2 benefits throughout his worklife¹²; presumed he would have invested money for retirement;
3 presumed money would have been invested and remained in his retirement account¹³ and increased
4 at an estimated future interest rate; and presumed he would have survived through the age of
5 retirement¹⁴ to later receive retirement benefits. Although the present value calculation deducted the
6 decedent's estimated life long "consumption"—meaning the estimated anticipated costs of personal
7 necessities, housing, etc.—there's no indication of deducted annual income taxes. Restitution for
8 compensation the decedent would never have actually received—such as taxes paid—is illegal.

9
10 she said. (Appendix, Exhibit K) Accommodations were attempted in his Junior year but were
11 unsuccessful; "he was failing classes" his mother said. (Appendix, Exhibit L) In his senior year,
12 he left the high school and attended the E Institute where he could complete school online. He was
13 "able to work at his own pace [because] it was just him and the computer"; "no other kids to distract
14 [him]." (Appendix, Exhibit M) He flourished and earned his high school diploma. (Appendix,
15 Exhibit N)

16 ¹² The calculation didn't, and couldn't, account for the fact that he could have been fired
17 from future potential jobs and/or otherwise unemployable for any number of reasons. In the last
18 year of his life, the decedent worked at Olive Garden restaurant. (Appendix, Exhibit O) Before
19 that, he worked as a server at a couple other restaurants, but according to his mother, he "was let
20 go and then he went and found another job". (Appendix, Exhibit P)

21 ¹³ At the time of death, no money was invested. Individuals may choose to withdraw funds
22 from retirement account prior to retirement, paying penalties to the IRS for early withdrawal.

23 ¹⁴ The calculation failed to account for the decedent's chronic use of alcohol, marijuana,
24 and other illicit drugs, as heightening the risk of potentially catastrophic results well before the age
25 of retirement. According to the decedent's mother, he was "regularly drinking alcohol [even] before
26 he turned 21" as well as regularly smoking pot. (Appendix, Exhibit Q) He'd been drinking and
27 driving since high school. (Appendix, Exhibit A, 79:16-80:7) In the hours preceding his death, he
attended a party where he was seen drinking alcohol and using cocaine. (RT 2/2/17, 28:2-30:15;
RT 2/6/17, 166:22-167:12; RT 2/7/17, 165:12-14) He then drove erratically to Jordan's house with
others inside his vehicle, weaving in and out of traffic. (RT 2/4/17, 32:19-33:18) Autopsy found
vitreous alcohol level was .17—more than twice Arizona's legal limit—cocaine in the blood, as well as
metabolic remnants of prior cocaine ingestion. (RT 2/9/17, 132:12-133:10) In 2016, 28% of all
traffic related deaths were from alcohol-impaired drivers. (Appendix, Exhibit R) More than 1
million were arrested for driving under the influence of alcohol or narcotics. *Id.* Drugs other than
alcohol are involved in about 16% of motor vehicle crashes—and marijuana users were about 25%
more likely to be involved in a crash than drivers with no evidence of marijuana use, however other
factors such as age and gender may account for the increased crash risk among marijuana users.
Actuarial tables used by insurance companies in calculating life and automobile insurance policies
recognize the heightened likelihood of catastrophe where an insured smokes, abuses drugs and/or
alcohol, or drives while impaired—increasing insurance rates accordingly.

1 The best-case scenario characterized by the victim's mother's counsel as being based on
2 "uncontested evidence" (ROA 243) nonetheless contained considerable supposition and speculation
3 of dubious validity given Carson's "*capacity to earn money and disposition.*" *Kemp, supra.*

4 It's true that crime victims are entitled to receive restitution for future losses such as lost
5 wages and medical expenses where it can be shown the victim *would* suffer such losses. *See, e.g.,*
6 *State v. Howard*, 168 Ariz. 458 (App.1991)(ordering payment of future medical expenses and lost
7 wages, with the caveat that the order may be adjusted downward in the event victim's medical
8 expenses proved to be less or if the victim was able to return to work sooner than anticipated).

9 However, here nothing in the record refutes that the decedent victim's potential lifework earning
10 capacity was nothing more than a *possibility*. Arizona's statutory restitution scheme simply does not
11 allow for restitution orders based on statistical speculation rather than proof. In this vein, although
12 an award of restitution need not be confined to "easily measurable damages", *State v. Garner*, 115
13 Ariz. 579, 581 (App.1977), the government cannot bear the burden of proving the amount of a loss
14 by a preponderance of the evidence when it is no more than *possible* that the loss will occur at all.

15 *See, e.g., Matter of Maricopa County Juvenile Action*, 147 Ariz. 153, 155 (App.1985)(restitution order
16 to pay victim's real estate commissions remanded because amount was speculative; evidence failed
17 to establish victim "*would have received commissions that month even if she could have worked in*
18 *her business.*") In contrast, it's been long established that in a civil action for wrongful death the
19 present value of the decedent's earning power over the period of his life expectancy is for the jury to
20 decide. *Keefe v. Jacobo*, 47 Ariz. 162 (1936). Considering the law prohibiting speculative losses in
21 restitution awards, there's no mystery in why Arizona has never before authorized recoupment of a
22 decedent's *lost future potential earning capacity* as restitution in a criminal case, much less
23 characterized the same as "lost wages."

24 For the aforementioned reasons, the court's award of \$411,042 for the decedent victim's
25 "lost wages" in the criminal action was illegal. Holding otherwise not only blurs the distinction
26 between civil damages and criminal restitution while simultaneously implicating the significant legal
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1 shortfalls already outlined, but has practical consequences as well. In *every homicide* case—whether
2 first degree murder, second degree murder, manslaughter, or negligent homicide—the State would be
3 required to retain a Vocational Economist or similarly qualified experts; indigent defendants would be
4 entitled to appointment of similar experts at taxpayer expense. Rule 6.7(a), Ariz.R.Crim.P.; *see also*,
5 *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985); *Knapp v. Hardy*, 111 Ariz. 107, 110 (1974); *Jacobson v.*
6 *Anderson*, 203 Ariz. 543, 545 (App.2002).

7 Hampered by victim's rights protecting them from disclosure of information, defense experts
8 would be incapable of obtaining the data and information critical to analysis of a decedent's future
9 potential earning capacity and disposition. Restitution proceedings could no longer occur in the
10 absence of hearing where witnesses, lay and expert, possessing tax records and other information
11 concerning the victim's educational and personal history (not subject to pre-hearing disclosure due to
12 victim's rights) would be required to testify. The proceeding would become a battle of the experts
13 over the acceptability of methodologies utilized in any particular expert's life-work calculation, as
14 governed by *Daubert v. Merrel Down Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progenies.
15 To discern *Daubert's* second-prong's "fit" requirement, trial courts would be required to delve into the
16 decedent's personal proclivities, propensities, educational and employment history and legitimate
17 future prospects in order to ensure the facts upon which the expert testimony is based are not
18 impermissibly conjectural and/or contradictory of the facts in evidence. Criminal restitution
19 proceedings would become protracted, complicated and costly—forcing courts "to make difficult and
20 time-consuming evaluations of losses usually reserved for civil juries", *Foy, supra*.

21 And *still*, at the end of the day, in all but the rarest cases it couldn't be shown that a particular
22 decedent victim *would more likely than not* have actually ever reaped the projected income and
23 benefits much less suffered the prospectively presumed economic losses. The mere *possibility* that
24 such prospective future losses *might have been* incurred is, and would remain, an insufficient basis
25 for an award of criminal restitution for "actual losses." All of this is why the criminal restitution
26 statutes provide for reasonably ascertainable wages "lost"—even those which will be lost in the

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1 future—but *not* for the “loss” of *potential future earnings* covering a decedent’s estimated worklife.

2 The award entered here was illegal; defense counsel’s failure to thoroughly research the law
3 and understand the difference between “lost wages” and speculative “loss of potential future
4 earnings” constitutes deficient performance under the prevailing professional norms. Indeed, *no*
5 *Arizona case* has ever found such damages to be compensable under the criminal restitution
6 statutes. The prejudice is apparent from the entry of the award itself.

7 **2. The Criminal Restitution Order (“CRO”):**

8 The court sentenced Jordan to 12 years imprisonment on May 24, 2017. On April 5, 2019, it
9 entered an order that he pay the victim’s mother \$562,980.45 and pay the victim’s sister \$4,092.62
10 in restitution. Then, at the victim’s mother’s counsel’s behest—and over Jordan’s objection—entered a
11 Criminal Restitution order on May 21, 2019 commanding Jordan pay the restitution “plus interest at
12 the highest legal rate...”. Entry of the Criminal Restitution Order under the circumstances violated
13 the federal constitution.

14 A.R.S. §13-805(B) provides in part: “At the time the defendant is ordered to pay restitution by
15 the court, the court *may* enter a criminal restitution order in favor of each person who is entitled to
16 restitution for the unpaid balance of any restitution order.” (*emphasis added*)

17 Subsection C of the statute mandates that “[a]t the time the defendant completes the
18 defendant’s period of probation or the defendant’s sentence or the defendant absconds from
19 probation or the defendant’s sentence, the court *shall* enter both” a criminal restitution order in favor
20 of the state for any unpaid fines, costs, fees and surcharges *and* a criminal restitution order in favor
21 of the victim “if a criminal restitution order is not issued pursuant to subsection B of this section.”

22 Subsection E provides that a criminal restitution order may be recorded and is enforceable
23 as any civil judgement. “Enforcement of a criminal restitution order by any person or by the state on
24 behalf of any person who is entitled to restitution *includes the collection of interest that accrues at a*
25 *rate of ten percent a year.*” (*emphasis added*)

26 Subsections B and E are at issue here. Subsection B is clearly permissive while subsection
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1 C is mandatory. “[T]he use of the ‘may’ generally indicates permissive intent...while ‘shall’ generally
2 indicates a mandatory provision...If a statute employs both mandatory and discretionary terms, we
3 may infer that the legislature intended each term to carry its ordinary meaning.” *Walter v. Wilkinson*,
4 198 Ariz. 431, 432 ¶7 (App.2000). The court’s discretion to enter a Criminal Restitution Order at the
5 time restitution is imposed is not unlimited. Its discretion must be exercised in conjunction with
6 A.R.S. §13-804(E), which states in relevant part that after determining the amount of restitution to be
7 paid, the court then determines “the manner in which the restitution is to be paid.” *Id.*

8 “In deciding the manner in which the restitution is to be paid”, the court “*shall* consider the
9 economic circumstances of the defendant. In considering the economic circumstances of the
10 defendant, the court *shall* consider all of the defendant’s assets and income, including workers’
11 compensation and social security benefits.” *Id.* Here the court provided no reasons for entering the
12 Criminal Restitution Order. It presumably did so for the reason implicitly asserted by counsel for the
13 victim’s mother—to force Jordan’s parents, family or friends to immediately pay Jordan’s restitution
14 debt. To be precise, the victim’s mother’s counsel justified the request for entry of the Criminal
15 Restitution Order with the following:

16 Based upon the length of sentence, without providing incentive to the Defendant to
17 either promptly pay restitution *or make a good faith effort to find money to pay*
18 *restitution*, both [the victim’s mother] and her daughter will not receive any
19 *substantial restitution payments while he remains in prison*. This court has
20 discretion to issue a criminal restitution order (CRO) now pursuant to A.R.S. §13-
21 805(B). Entry of a CRO means that *interest will* begin accruing at the time of
22 entry rather than on release from prison which will *incentivize this defendant to pay*
23 *restitution or make a good faith effort to find money to pay restitution promptly*.
24 Otherwise, he has no incentive to pay immediately and meaningful restitution
25 payments will not begin until release from prison several years later.

26 (ROA 232)(*emphasis added*) Although Jordan was 21 years old and indigent under the law, victim’s
27 mother’s counsel knew Jordan’s parents paid for his entire defense—including experts. However, like
28 the law imposes no obligation upon a parent to foot the bill for their son’s criminal defense—*Knapp v.*
Hardy, supra., at 110 (parent “had no legal obligation to provide legal counsel for the defendant;
determination of indigency must be based on *defendant’s* financial condition and not that of
relatives and friends); *Jacobson v. Anderson, supra.*, at 545 (same). Objecting to the entry of a

1 Criminal Restitution Order, defense counsel plead:

2 Mr. Hanson is incarcerated at this time. He has no ability to promptly pay restitution
3 in the amount sought by [the victim's mother]. He is a young man without assets.
4 While incarcerated, he has no way to find money to pay restitution.... Mr. Hanson
5 should be given the same opportunity most defendants are given to begin making
6 restitution payments without the requirement that interest begin accruing
7 immediately. To issue a criminal restitution order at this time is merely punitive to
8 Mr. Hanson because he has no means to pay the restitution order while
9 incarcerated.

10 (ROA 242) The legislature did not intend a defendant's family or friends be forced to bear the burden
11 of a restitution obligation because *they* have an earning ability. Nor did it intend to coerce
12 defendants into pressuring family or friends to pay a criminal defendant's restitution obligations when
13 the defendant himself lacks the ability to pay. The record does not show the court considered
14 Jordan's personal economic circumstances as mandated by A.R.S. §13-804(E). There's a reason
15 that such consideration is mandated. It's unreasonable to determine that a prison inmate has
16 sufficient earning ability to pay the restitution over the twelve years of incarceration ordered.

17 "Restitution orders should represent 'an application of law,' not a decisionmaker's caprice." *Paroline*
18 *v. United States, supra.*, 572 U.S., at 462, quoting *Phillip Morris USA v. Williams*, 549 U.S. 346, 352
19 (2007)(internal quotation marks omitted). Entering the Criminal Restitution Order with the purpose of
20 garnering payment by relatives or friends defeats the purpose of restitution and under the
21 circumstances constitutes a denial of justice.

22 "[C]ourts have recognized that criminal penalties generally do not bear interest and that
23 'restitution' is a criminal penalty." *State v. Foy, supra.*, at 169. "In *Sleight*, the court observed that
24 while the purpose of restitution is to make the victim whole, it is imposed as a part of a criminal
25 sentencing procedure and remains inherently a criminal penalty." *Ibid.*, citing *United States v.*
26 *Sleight*, 808 F.2d 1012, 1020 (3rd Cir.1987). *Foy* concluded that "[c]learly, post-judgment interest on
27 awards of restitution is not a 'loss' that would not have been suffered "but for the offense.'" *Id.*, at
28 171. The statutory provision permitting accrual of interest on "enforcement of Criminal Restitution
Orders" was added January 1, 2006—prior to *Foy*. But even so, as *Foy* observation that interest on
restitution is not a loss that would not have been suffered but-for the offense remains sound

1 notwithstanding VBR and VRJA. Where, as here, the defendant is incarcerated and thus lacks any
2 ability to pay, the interest assessment is clearly punitive; it can serve no other purpose.

3 Constitutional objections arise to the interest accrual provision where enforcement occurs at a
4 time when a criminal defendant is unable, through no fault of his own, to comply with the restitution
5 order. *Cf., Bearden v. Georgia*, 461 U.S. 660 (1983)(probation revocation for failure to pay fine and
6 restitution violated due process). Even then, the defendant's own responsibility for his inability to pay
7 would be relevant to the enforceability of the order. *Id.*, at 667-668.

8 Instructive by analogy, in *Bearden* the Court said "[t]he more appropriate question is whether
9 consideration of a defendant's financial background in setting or resetting a sentence is so arbitrary
10 as to be a denial of due process." *Id.*, at 666, n. 8. If a probationer cannot pay a fine or restitution,
11 "it is fundamentally unfair to revoke probation automatically without considering whether adequate
12 alternative methods of punishing the defendant are available." *Id.*, at 668-669.

13 So too, it is fundamentally unfair to impose annually accruing interest at a rate of 10%—a rate
14 no bank would pay if the restitution was immediately paid and placed in an account—where a
15 defendant is incarcerated and lacks *any* means to pay. Here the interest accrues at \$56,707.50 per
16 year during Jordan's incarceration; after 12 years, the interest alone will add \$680,490.00 to the
17 total original restitution award of \$567,075.07. Entry of the CRO while the defendant is imprisoned
18 thus provides a windfall to the victim and encroaches into punishment for the defendant. The
19 Arizona legislature may not obviate a criminal defendant's federal constitutional due process
20 protections by simply passing a law. Undoubtedly aware of that, it made entry of a Criminal
21 Restitution Order before a defendant completed his sentence permissive, not mandatory.

22 In addition to violating due process, the interest accrual provision when applied to
23 defendants sentenced to lengthy incarceration periods implicates the Excessive Fines Clause of the
24 Eighth Amendment. To be sure, the Supreme Court has said that "the Excessive Fines Clause was
25 intended to limit only those fines directly imposed by, and payable to, the government." *Browning-*
26 *Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 268 (1989). But while restitution is

1 paid to a victim, it is imposed by the Government "at the culmination of a criminal proceeding and
2 requires conviction of an underlying" crime. *United States v. Bajakajian*, 524 U.S. 321 (1998). Thus,
3 in *Paroline*, *supra.*, the Court said that "despite the differences between restitution and a traditional
4 fine, restitution still implicates 'the prosecutorial powers of the government'" and although its goal is
5 remedial, "it also serves punitive purposes". 572 U.S., at 456, citing *Pasquantino v. United States*,
6 544 U.S. 349, 365 (2005)(purpose of awarding restitution "is to mete out appropriate criminal
7 punishment"). As *Paroline* observed, "[t]hat may be 'sufficient to bring [it] within the purview of the
8 Excessive Fines Clause", *ibid.*, quoting *Bajakajian*, *supra.*, at 329, n. 4.

9 Arizona statutes provide adequate alternative methods to avoid violation of the Due Process
10 and Excessive Fines Clauses of the United States Constitution in cases where a defendant receives
11 a lengthy sentence of incarceration. To be sure, financial obligations may be imposed upon a
12 defendant who is indigent at the time of sentencing but subsequently acquires the means to
13 discharge his obligations. *Fuller v. Oregon*, 417 U.S. 40 (1974)(recoupment of costs of appointed
14 counsel). Thus, a court can order the Criminal Restitution Order become effective on the date of the
15 defendant's release from confinement. Although parole for incarcerated prisoners was abolished in
16 1992, it was replaced with a statutory requirement that offenders be sentenced to community
17 supervision for a period of one day for every seven days of the sentence imposed, §13-603(I). That
18 provision was imposed upon Jordan at the time of sentencing. (ROA 209)¹⁵ If a community
19 supervision officer has reason to believe that court ordered restitution is not being made, the officer
20 must report to the court the defendant's failure to make restitution in a timely manner and the court
21 may revoke the defendant's community supervision. *Id.*

22 A second alternative lies within the court's discretion to defer entry of the Criminal Restitution
23 Order—and consequently the accrual of interest—until "the time the defendant completes" his
24 sentence, §13-805(C), meaning at the time community supervision expires.

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¹⁵ A probation assessment of \$20 was also imposed, even though Jordan received no sentence of probation. No start date was set for the payment.

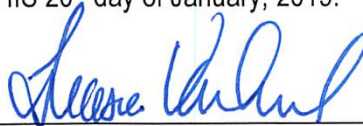
1 Under either alternative, and in obvious recognition that indigency—through incarceration or
2 otherwise—may be temporary, the legislature provided for restitution liens to attach to any property
3 owned or acquired by the defendant, including assignment of any tax refund that is owed to the
4 defendant by the state, A.R.S. §§13-804(L), 13-806. It declared “[a] criminal restitution order is a
5 criminal penalty for the purposes of a federal bankruptcy involving the defendant”, §13-805(I). And it
6 expressly provided that “[a] criminal restitution order does not expire until paid in full.” §13-804(E).
7 Consequently, victims will receive court ordered restitution and be made whole, regardless of when
8 interest begins to accrue, even if payments are to be made for the rest of defendant's life.

9 Defense counsel failed to research the law and thus raised no constitutional objections to
10 entry of the CRO. Thus, his performance fell below the prevailing norms expected of lawyers. The
11 prejudice is established by entry of the CRO while Petitioner remains incarcerated.

12 **IV. CONCLUSION/RELIEF REQUESTED:**

13 *Strickland* is satisfied as all of Petitioner's claims of ineffective assistance of counsel.
14 Because trial counsel violated his Sixth Amendment rights, a new trial should be ordered. And
15 because restitution counsel did the same, the complained-of restitution and CRO orders should be
16 vacated.

17 RESPECTFULLY SUBMITTED THIS 20th day of January, 2019.

18 

19 _____
20 Treasure VanDreumel
21 Lori Voepel
22 Attorneys for Defendant/Petitioner

23 Original of the foregoing filed
24 this 20th day of January, 2019 with
25 the Maricopa County Superior Court
via electronic filing;

26 COPY of the foregoing
27 emailed this same date to:
28

1 Mr. Jeffrey L. Sparks
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4 and courtesy copy emailed to:

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EXHIBIT “19”

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5 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
6 **IN AND FOR THE COUNTY OF MARICOPA**

7 STATE OF ARIZONA)
8 Plaintiff,) No. CR2015-005451-001
9 vs.) **VICTIMS BETH FAY AND STEPHANIE**
10 JORDAN MICHAEL HANSON;) **DUMBRELL'S RESPONSE TO MOTION**
11 Defendant.) **TO STRIKE PLEADINGS FILED BY**
12) **VICTIM'S COUNSEL AND TO ADJUST**
13) **REPLY DEADLINE**
14) (Assigned to the Hon. Dewain
15) Fox, Rule 32 Management Unit;
16) Hon. Pamela Gates, trial judge)
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15 A victim's constitutionally protected rights continue even
16 after a defendant has been convicted. These rights simply do not
17 vanish after a jury convicts a defendant, then he agrees to a
18 criminal restitution order and later attempts to walk away from
19 his own agreements. This defendant attempts to use a PCR to back
20 out of an agreement on restitution and by doing so, he also
21 attempts to silence his victims' fundamental rights to justice and
22 due process. However, A.R.S. §13-4402(A) provides in relevant
23 part that victims' "rights and duties *continue* to be enforceable
24 ... *until the final disposition* of the charges, including ... *all post-*
25 *conviction release and relief proceedings and the discharge of all*
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1 criminal proceedings related to restitution. If a defendant is
2 ordered to pay restitution to a victim, the rights and duties
3 continue to be enforceable by the court until restitution is paid."
4 (emphasis added). Victims have standing to seek to "enforce any
5 right or to challenge an order denying any right guaranteed to
6 victims." A.R.S. §13-4437(A). Defendant now challenges a criminal
7 restitution order, a right guaranteed to his victims for which he
8 originally agreed to most of the dollar amounts. This Defendant's
9 PCR affects specific enumerated constitutional rights to prompt
10 payment of restitution, ARIZ. CONST., Art. 2, §2.1(A)(8), giving
11 victims an opportunity to respond to preserve their "rights to
12 justice and due process." ARIZ. CONST., Art. 2, §2.1(A). By
13 responding, Beth and her daughter seek to enforce the Criminal
14 Restitution Order entered by the Court. No matter how Defendant
15 chooses to characterize his opposition to enforcement of a
16 restitution order, victims have standing to be heard.

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20 This Defendant tries to silence Beth and her daughter by
21 looking away from the enumerated VBR restitution rights at issue
22 and instead focusing on the Rule 32 procedure. He points to form
23 over substance for support. For the first time in his Petition,
24 he asks the court to reject restitution which for the most part he
25 had previously agreed to pay. The VBR protections and the standing
26 granted to victims spelled out above advance the specific and
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1 peculiar enumerated right to prompt payment of restitution as
2 "guaranteed and created by the VBR." *State v. Brown*, 194 Ariz.
3 340, 343, 982 P.2d 815, 818 (1999). These rights to be heard and
4 standing to present challenges to this enumerated right must still
5 be available to victims no matter when presented; otherwise,
6 victims' rights to address this VBR right to be heard on
7 restitution issues would be rendered meaningless whenever a
8 defendant chooses appeal or to collaterally attack restitution
9 stipulations and awards. By passing the VBR almost thirty years
10 ago, voters in the state of Arizona could never have contemplated
11 such an outlandish result.
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14 Beth and her daughter have the right to first establish the
15 amount and manner of restitution and then to enforce it. *Compare*
16 A.R.S. §§13-4437(E) (victim has standing to "present evidence or
17 information and to make an argument to the court... at any proceeding
18 to determine the amount of restitution..."); *with* A.R.S. §13-
19 810(B) ("[I]f a defendant who is ordered to pay restitution defaults
20 in the payment of the restitution ..., the court on ... petition of
21 *any person entitled to restitution* pursuant to a court order ...
22 shall require the defendant to show cause why the defendant's
23 default should not be treated as contempt...") (emphasis added). It
24 is absurd to suggest that notwithstanding these rights, Beth and
25 her daughter do not also have the right to urge courts to uphold
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1 this constitutional right by rejecting a PCR. At a minimum, any
2 ambiguities about standing to address challenges to a specific
3 enumerated VBR right must be construed liberally to give effect to
4 a victim's enumerated VBR constitutional protections. A.R.S. §13-
5 4418. The court can give Defendant the process that is due him
6 yet still preserve a victims' right to be heard regarding
7 restitution by allowing victims the opportunity to respond to a
8 PCR. See, e.g., *Morehart v. Barton*, 226 Ariz. 510, 516, 250 P.3d
9 1139, 1145 (2011) (victim rights must yield only when their VBR
10 rights conflict with a defendant's federal constitutional rights).
11 A victim of crime is not a party to prosecution and the State of
12 Arizona does not represent victims; so prosecutors will not
13 necessarily advance a victim's restitution interests in response
14 to a PCR. See *State v. Lamberton*, 183 Ariz. 47, 50, 899 P.2d 939,
15 942 (1995) ("The VBR does not ... make the Victim a 'party' to all
16 proceedings involving that defendant."); see also A.R.S. §13-
17 4437(A) ("The rights enumerated in the victims' bill of rights,
18 article II, section 2.1, Constitution of Arizona, any implementing
19 legislation or court rules *belong to the victim.*") (emphasis
20 added). So by rejecting the Defendant's Motion to Strike and
21 Prohibit Future Responsive Pleadings filed by Victim's Counsel,
22 this Court preserves Beth and her daughter's right to be heard.
23 Denying Defendant's Motion gives victims rights to justice and due
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1 process regarding restitution claims made in the Defendant's PCR.
2 And it preserves Defendant's rights to claim he did not know what
3 he agreed to when stipulating to a vast majority of claimed
4 restitution. But in contrast, striking victims' Response and
5 silencing Beth and her daughter from commenting in any future
6 proceedings involving their enumerated VBR right prevents these
7 crime victims from exercising their rights to justice and due
8 process. Striking their Response bars victims from alerting this
9 Court to the defendant's previous restitution agreements at this
10 point in the criminal case. But just because the specifically
11 enumerated VBR right to comment on prompt restitution challenges
12 arose in a Rule 32 petition does not mean that victim's rights to
13 be heard on restitution disappear. The Defendant's time for appeal
14 has long since passed but victims' VBR rights have not.

17 For these reasons, Beth and her daughter respectfully
18 requests that this Court Deny Defendant's Motion to Strike.
19

20 Dated this 26th Day of January, 2020.

21 ARIZONA CRIME VICTIM RIGHTS LAW GROUP

22 /s/ Randall Udelman
23 Randall Udelman
24 Victim Rights Attorney

25 / / /

26 / / /

27

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1 ORIGINAL of the foregoing
E-filed on this 26th Day of
2 January, 2020

3 COPIES of the foregoing
4 E-mailed on this 26th Day of
January, 2020 to:

5 Jeffrey L. Sparks, Esq.
6 MARICOPA COUNTY ATTORNEY'S OFFICE
7 MCAOAPPEALS@mcao.maricopa.gov

8 Treasure Van Dreumel, Esq.
9 LAW OFFICE OF TREASURE VANDREUMEL, PLC
Vandreumellaw@gmail.com

10
11 /s/ Randall Udelman

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EXHIBIT “20”

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-005451-001 DT

01/28/2020

HONORABLE DEWAIN D. FOX

CLERK OF THE COURT
K. Sotello-Stevenson
Deputy

STATE OF ARIZONA

DENISE O'ROURKE

v.

JORDAN MICHAEL HANSON (001)

LORI L VOEPEL

COURT ADMIN-CRIMINAL-PCR
JUDGE FOX

RANDALL S UDELMAN

**MOTION TO STRIKE DENIED
REQUEST FOR REMOVAL OF BLOOD EVIDENCE RECEIVED
RESPONSE FROM STATE DUE**

The Court has received and considered Defendant's "Request for Order Permitting Removal of Blood Evidence from Medical Examiner for Testing" filed on January 21, 2020, Defendant's "Motion to Strike and Prohibit Future Responsive Pleadings Filed by Victim's Counsel and to Adjust Reply Deadline" filed on January 21, 2020, and "Victims Beth Fay and Stephanie Dumbrell's Response to Motion to Strike Pleadings Filed by Victim's Counsel and to Adjust Reply Deadline" filed on January 26, 2020. Defendant requests an order to permit testing of the Victim's blood for steroids and other substances. In addition, Defendant moves to strike a response filed by two victims. Victims, however, point out that A.R.S. § 13-4402(A) provides that the victim's "rights and duties continue to be enforceable . . . until the final disposition of the charges, including . . . all post-conviction release and relief proceedings and the discharge of all criminal proceedings related to restitution. If a defendant is ordered to pay restitution to a victim, the rights and duties continue to be enforceable by the court until restitution is paid."

IT IS THEREFORE ORDERED as follows:

- 1) The State's Response to Defendant's "Request for Order Permitting Removal of Blood Evidence from Medical Examiner for Testing" must be filed no later than

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March 13, 2020. Defendant may file a Reply within 15 days after the Response is served.

- 2) The State must preserve during the pendency of this proceeding all evidence in the State's possession or control that could be subjected to testing.
- 3) Denying Defendant's "Motion to Strike and Prohibit Future Responsive Pleadings Filed by Victim's Counsel and to Adjust Reply Deadline."

EXHIBIT “21”

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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04/14/2020

HONORABLE DEWAIN D. FOX

CLERK OF THE COURT
K. Sotello-Stevenson
Deputy

STATE OF ARIZONA

LISA MARIE MARTIN

v.

JORDAN MICHAEL HANSON (001)

LORI L VOEPEL
TREASURE L VANDREUMEL

COURT ADMIN-CRIMINAL-PCR
JUDGE FOX

RANDALL S UDELMAN

**RULING ON PETITIONER'S "OBJECTION TO RULING
PRIOR TO REPLY TIME EXPIRATION [AND]
REPLY/MOTION FOR RECONSIDERATION RE: MOTION TO STRIKE"**

This post-conviction relief matter has a complex procedural history. A review of this history is important for context and to understand the issue currently before the Court. It also will aid in any appellate review of this ruling.

Procedural History

On May 24, 2017, Petitioner was convicted and sentenced for second-degree murder, and the Court retained jurisdiction over restitution. Petitioner timely appealed his conviction and sentence. In April and May of 2019, while the appeal was pending, the Court considered and resolved the issue of restitution. On May 20, 2019, the Court entered a formal Criminal Restitution Order ("CRO"). On June 24, 2019, the Court of Appeals issued its Mandate affirming the conviction and sentence. Defendant never filed an appeal from the CRO.

On January 7, 2020, Petitioner filed "Defendant's Limited Petition for Post-Conviction Relief (Delayed Appeal Request) and Request to Hold Further PCR Proceedings in Abeyance" (the "Limited Petition"). In the Limited Petition, Petitioner sought an expedited ruling on his request to proceed with a delayed appeal of the CRO while holding his claim of ineffective assistance of counsel ("IAC") in abeyance pending exhaustion of his appellate remedies.

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On January 13, 2020, the Victims filed “Victims Beth Fay’s and Stephanie Dumbrell’s Response to Limited Petition for Post-Conviction Relief (Delayed Appeal Requested) and Request to Hold Further PCR Proceedings in Abeyance” (the “Victims’ Response”). The Victims’ Response sets forth the Victims’ arguments as to why Petitioner should not be entitled to appeal the CRO and asks the Court to summarily deny Petitioner’s request in the Limited Petition for permission to file a delayed appeal.

On January 21, 2020, Petitioner filed his “Motion to Strike and Prohibit Future Responsive Pleadings Filed by Victim’s Counsel and to Adjust Reply Deadline” (the “Motion to Strike”). In the Motion to Strike, Petitioner contends that the Victims lack standing to file pleadings concerning the issue raised in the Limited Petition or any other post-conviction relief claim that does not involve a request for Petitioner’s release from confinement. Petitioner asks the Court to (i) strike and not consider the Victims’ Response, and (ii) prohibit the Victims’ counsel from filing additional responses concerning Petitioner’s claims for post-conviction relief. Petitioner also asks the Court to adjust his time for filing a reply in support of the Limited Petition depending upon the Court’s ruling on the Motion to Strike.

On January 21, 2020, Petitioner also filed his “Amended Petition for Post-Conviction Relief” (the “Amended Petition”). Petitioner filed the Amended Petition to include his IAC claim in his initial post-conviction relief proceeding. Petitioner asserts in the Amended Petition that the Victims’ counsel lacked authority to respond to the Amended Petition (and a contemporaneously filed motion for discovery), because the relief sought by Petitioner does not include his release from confinement. (Amended Petition at p.1:24-27).¹

On January 26, 2020, the Victims filed and served “Victims Beth Fay and Stephanie Dumbrell’s Response to Motion to Strike Pleadings Filed by Victim’s Counsel and to Adjust Reply Deadline” (the “Response to Motion to Strike”). In the Response to Motion to Strike, the Victims assert that they have a right to be heard on restitution issues and ask the Court to deny the Motion to Strike.

By Minute Entry dated January 28, 2020 (filed January 29, 2020), the Court denied the Motion to Strike. By separate Minute Entry filed January 29, 2020, the Court acknowledged receipt of the Amended Petition and ordered the State to file a response by March 13, 2020.

On January 30, 2020, Petitioner filed his “Objection to Ruling Before Reply Time Expiration [and] Reply/Motion for Reconsideration Re: Motion to Strike” (the “Objection/Motion for Reconsideration”). In the Objection/Motion for Reconsideration, Petitioner initially asserts

¹ In his prayer for relief, Petitioner also asserts that “the complained-of restitution and CRO orders should be vacated.” (Amended Petition at p.46:15-16).

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that he had until January 30 to file his reply in support of the Motion to Strike, and the Court's denial of the Motion to Strike was premature.² The Objection/Motion for Reconsideration also sets forth Petitioner's argument that the Victims lack standing to be heard on substantive matters in this post-conviction relief proceeding and asks the Court to reconsider its denial of the Motion to Strike. Petitioner's counsel also asks to be endorsed on all minute entries in this matter.

By Minute Entry dated January 31, 2020 (filed February 3, 2020), the Court set a briefing schedule on the Objection/Motion for Reconsideration and suspended briefing on the Limited Petition until the Objection/Motion for Reconsideration is resolved.

On February 24, 2020, the State and the Victims filed their Responses to the Objection/Motion for Reconsideration. The Victim's Response sets forth their substantive arguments as to why they have standing to be heard on both the Limited Petition and the Amended Petition. The Victims ask the Court to overrule/deny the Objection/Motion for Reconsideration, accept and consider the Victims' Response to the Limited Petition and grant them permission to file a response to the Amended Petition. The State admits that the Court should consider Petitioner's arguments on standing in the Objection/Motion for Reconsideration; however, the State asserts that the Court properly denied the Motion to Strike and Petitioner's arguments in the Objection/Motion for Reconsideration do not alter that result.

On March 9, 2020, Petitioner filed his "Reply Re: Motion for Reconsideration of Petitioner's Motion to Strike Victim Pleadings on PCR". With this filing, the Objection/Motion for Reconsideration was fully briefed and ready for decision. Given the complex procedural history and the nature of the issue before the Court, the Court scheduled oral argument on the Objection/Motion for Reconsideration on April 17, 2020.³ In the exercise of its discretion, after further review of the filings, the Court determines that the issues have been thoroughly briefed and oral argument will not assist the Court in resolving the limited issue before the Court--namely,

² Under Rules 1.3(a) and 1.9(b), Ariz.R.Crim.P., Petitioner had until February 3, 2020, to file his reply in support of the Motion to Strike. This calculation assumes that Petitioner was entitled to an additional five calendar days following service. *See* Rule 1.3(a)(5), Ariz.R.Cr.P. Even without this additional time, the Court's ruling on the Motion to Strike clearly was premature.

³ Since oral argument was scheduled, the Court's presiding judge issued Administrative Order 2020-055, which restricts physical access and limits the types of in-person proceedings that can be conducted in the courthouse through April 30, 2020, due to the COVID-19 pandemic. The Court's staff contacted counsel about how to conduct oral argument under the circumstances. The Court understands that all counsel expressed willingness to stand on their written briefs.

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whether the Victims have standing to be heard on the Limited Petition and the Amended Petition.⁴ As such, the Court will vacate oral argument and rule on the Objection/Motion for Reconsideration.

Analysis

Under Article II, Section 2.1(A) of the Arizona Constitution (the Victims' Bill of Rights), crime victims have the right (among others): (i) "[t]o be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing; (ii) "[t]o confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition"; (iii) "[t]o receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury"; and (iv) "[t]o be heard at any proceeding when any post-conviction release from confinement is being considered." The only express rights "to be heard" under the Victims' Bill of Rights are at proceedings involving a post-arrest release decision, negotiated plea, sentencing or request for post-conviction release from confinement. Although a victim has a constitutional right to confer with the prosecution before trial or any disposition and to receive prompt restitution, neither of those rights expressly includes the right to be heard.

The legislature also enacted statutory rights for crime victims. *See* A.R.S. §§ 13-4401 through 13-4443. These statutory rights include the right for a crime victim "to be heard" as to particular issues. Specifically: (i) A.R.S. § 13-4414(A) grants "the right to be present and be heard at any proceeding in which post-conviction release from confinement is being considered pursuant to § 31-233, 31-411 or 41-1604.13"; (ii) A.R.S. § 13-4440(A) grants "the right to be present and be heard at any proceeding in which a person's factual innocence is being considered pursuant to § 12-771"; and (iii) A.R.S. § 13-4441(A) grants "the right to be present and be heard at any proceeding in which the defendant has filed a petition pursuant to § 13-925 to restore the defendant's right to possess a firearm." Although A.R.S. § 13-4420 generally grants a victim the "right to be present throughout all criminal proceedings in which the defendant has the right to be present", none of the statutory provisions expressly gives a victim the right "to be heard" in a post-conviction relief proceeding involving whether to allow a defendant to take a delayed appeal from a restitution award or to grant a new trial due to ineffective assistance of counsel.

In 2016, the legislature added subsection E to A.R.S. § 13-4437. A.R.S. § 13-4437(E) gives a victim standing "to present evidence or information and to make an argument to the court, personally or through counsel, at any proceeding **to determine the amount of restitution pursuant to § 13-804.**" (emphasis added). The issues before the Court in this post-conviction

⁴ The merits of Petitioner's claims for post-conviction relief, including whether to allow a delayed appeal from the CRO, will be decided by another judicial officer (presumably Judge Gates) after the Limited Petition and Amended Petition are fully briefed and ready for ruling.

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relief proceeding are (i) whether to allow Petitioner to take a delayed appeal from the CRO, and (ii) whether to grant the Petitioner a new trial on his IAC claim. Significantly, the Court is not determining the amount of restitution pursuant to A.R.S. § 13-804. As such, A.R.S. § 13-4437(E) does not give the Victims standing to participate in Petitioner's post-conviction relief proceeding.

Finally, a crime victim also has the right by rule "to be heard" upon request "at any criminal proceeding involving: (A) the initial appearance; (B) the accused's post-arrest release or release conditions; (C) a proposed suspension of Rule 8 or a continuance of a trial date; (D) the court's consideration of a negotiated plea resolution; (E) sentencing; (F) the *modification of any term of probation that will substantially affect* the victim's safety, the defendant's contact with the victim, or *restitution*; (G) the early termination of probation; (H) a probation revocation disposition; and (I) post-conviction release." Rule 39(b)(7), Ariz.R.Crim.P. (emphasis added). Even "constru[ing] [this rule] to preserve and protect a victim's rights to justice and due process" (Rule 39(b), Ariz.R.Crim.P.), a post-conviction relief proceeding involving whether to allow a defendant to take a delayed appeal from a restitution award or to grant a new trial due to ineffective assistance of counsel is outside the scope of the right "to be heard" under Rule 39.

The drafters of the Arizona Constitution, statutes and rules of criminal procedure all knew how to grant a victim the "right to be heard" when that was their intent. Indeed, as set out above, they expressly did so for certain types of proceedings. If the drafters had intended to give victims a general right to be heard in post-conviction relief proceedings, or specifically on claims for permission to take a delayed appeal from a CRO or for a new trial for IAC, the drafters could--and presumably would--have done so expressly. As much as the Court respects victim's rights, the Court is tasked with enforcing the law as written.⁵ Accordingly,

IT IS ORDERED vacating oral argument scheduled in this case on April 17, 2020, at 9:00 a.m.

IT IS FURTHER ORDERED granting Petitioner's requests for relief in the Objection/Motion for Reconsideration, specifically (i) striking the Victims' Response to the Limited Petition, and (b) precluding the Victims from filing a response to the Amended Petition.

⁵ Although the Court finds that the Victims do not have a right to be heard on Petitioner's post-conviction relief claim for permission to take a delayed appeal from the CRO, the Court expresses no opinion as to whether, if a delayed appeal is permitted, the Victims have standing to file an appellate brief addressing the merits of Petitioner's challenge to the legality of the CRO. The appellate courts will have to decide that issue, if it arises.

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MARICOPA COUNTY

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IT IS FURTHER ORDERED vacating paragraph 3 of the Orders contained in the Court's Minute Entry dated January 28, 2020 (filed January 29, 2020). The Minute Entry remains in full force and effect in all other respects.

IT IS FURTHER ORDERED that the State must file and serve a response to the Limited Petition and the Amended Petition by May 29, 2020. Petitioner may file and serve a reply within 15 days after service of the State's response.

IT IS FURTHER ORDERED that both of Petitioner's counsel, Treasure VanDreumel and Lori Voepel, must be endorsed on all Minute Entries issued in this post-conviction relief proceeding.

EXHIBIT “22”

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-005451-001 DT

05/04/2020

HONORABLE DEWAIN D. FOX

CLERK OF THE COURT
K. Sotello-Stevenson
Deputy

STATE OF ARIZONA

LISA MARIE MARTIN

v.

JORDAN MICHAEL HANSON (001)

LORI L VOEPEL
TREASURE L VANDREUMEL

COURT ADMIN-CRIMINAL-PCR
JUDGE FOX

RANDALL S UDELMAN

ORDER SUSPENDING BRIEFING ON PCR PETITIONS

The Court has considered Victim Beth Fay's "Request for Stay of PCR Proceedings Pending Appellate Resolution of Petition for Special Action" (the "Request") filed April 23, 2020; "Petitioner's Opposition to Victim Request to Stay PCR Proceedings" filed April 27, 2020; and Victim's "Reply in Support of Victim's Request for Stay of PCR Proceedings Pending Appellate Resolution of Petition for Special Action" filed April 28, 2020.

Pursuant to the Court's "RULING ON PETITIONER'S 'OBJECTION TO RULING PRIOR TO REPLY TIME EXPIRATION [AND] REPLY/MOTION FOR RECONSIDERATION RE: MOTION TO STRIKE'" dated April 14, 2020 (filed April 15, 2020) (the "April 14 Order"), the State's response to Petitioner's Limited Petition and Amended Petition¹ is due by May 29, 2020. Aside from setting this deadline, the April 14 Order struck the Victim's response to the Limited Petition and precluded her from filing a response to the Amended Petition. The Victim has expressed her intent to seek special action relief from the April 14 Order. In the Request, "the Victim seeks a stay of all post-conviction proceedings pending the resolution of special action proceedings in the Court of Appeals as well as any related further review." (Request at 2:7-10). Petitioner opposes any stay.

¹ These terms are defined in the April 14 Order.

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Petitioner does not dispute the standard to be applied to the Victim's stay request. "A request for a stay made in conjunction with special action proceedings should be evaluated based on the traditional criteria for the issuance of preliminary injunctions, which are: '(1) a strong likelihood of success on the merits; (2) irreparable harm if the stay is not granted; (3) that the harm to the requesting party outweighs the harm to the party opposing the stay; and (4) that public policy favors the granting of the stay.' *Smith v. Az. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410-11 (2006)." (Request at 2:15-22). The analysis is based on a sliding scale, not simply counting factors. "The greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need be." *Id.*

The Victim contends she has shown a strong likelihood of success on the merits. The Court disagrees, because the April 14 Order is based on the plain language of the Arizona Constitution, the enabling statutes and the Arizona Rules of Criminal Procedure. Nevertheless, the Court is unaware of any appellate case law resolving the issue addressed in the April 14 Order, so there is at least some possibility of success.

The Victim contends that, without a stay of the April 14 Order, she will suffer irreparable harm by being deprived of her alleged right to submit a response to Petitioner's Limited Petition and Amended Petition. The Victim also contends that any prejudice to Petitioner from a delay in resolution of the post-conviction relief proceeding is relatively minor in comparison to the Victim's irreparable harm. Petitioner responds that a stay of the proceedings would deprive him and the State from briefing and obtaining rulings on discovery issues.² Petitioner further contends that a stay is unnecessary, because (i) the parties can obtain extensions of the briefing schedule without a stay, and (ii) Petitioner will not oppose the Court delaying its ruling on his petitions, if the special action still is pending when the PCR petitions are fully briefed and ready for ruling.

The Court agrees that the Victim sufficiently showed that irreparable harm will occur absent a stay, if the Court of Appeals ultimately determines that she had a constitutional right to participate in the briefing of the petitions. The Court further finds that the potential harm to the Victim outweighs the harm to Petitioner, particularly because the Court can suspend briefing of the petitions without staying Petitioner's post-conviction relief discovery. Finally, public policy favors granting the stay, so that the appellate courts can review the scope of the Victim's rights in this post-conviction relief proceeding. Accordingly,

IT IS ORDERED suspending briefing on the Limited Petition and the Amended Petition pending the outcome of the Victim's special action challenge to the April 14 Order.

² The Court notes that there is a discovery issue currently pending.

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MARICOPA COUNTY

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05/04/2020

IT IS FURTHER ORDERED that the suspension of briefing does not stay any other aspect of the post-conviction relief proceeding, specifically including the parties briefing and the Court ruling on discovery issues.

EXHIBIT “23”

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-005451-001 DT

06/11/2020

HONORABLE DEWAIN D. FOX

CLERK OF THE COURT
K. Sotello-Stevenson
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STATE OF ARIZONA

LISA MARIE MARTIN

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TREASURE L VANDREUMEL

COURT ADMIN-CRIMINAL-PCR
JUDGE FOX

RANDALL S UDELMAN

**RULING ON PETITIONER'S DISCOVERY MOTIONS
ORDER REINSTATING PCR BRIEFING**

The Court has received from the PCR Management Unit Petitioner's "Request for Order Directing Disclosure" filed April 29, 2020 (the "April 29 Motion"); Petitioner's "Supplemental Authority Re: Request for Order Directing Disclosure" filed May 2, 2020; Victim Beth Fay's (the "Victim") "Objection to Petitioner/Defendant's Request for Order Directing Disclosure" filed May 6, 2020; Petitioner's "Reply Re: Request for Order Directing Disclosure (Victim Retainer Agreement)" filed May 11, 2020 (the "Reply"). In the April 29 Motion, Petitioner asks for an Order requiring disclosure of all documentation regarding the Victim's engagement of counsel, including (without limitation) the engagement agreement.

The Court also has received from the PCR Management Unit Petitioner's "Request for Order Requiring Disclosure (Medical Examiner File) filed May 2, 2020 (the "May 2 Motion"). In the May 2 Motion, Petitioner asks for "an Order directing the Maricopa County Office of the Medical Examiner produce its file in its entirety in its own case number 15-05899, *including bench notes and communication logs.*" (May 2 Motion at 2:12-15) (emphasis in original). The State has not responded to the May 2 Motion, and its time to do so has expired.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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06/11/2020

April 29 Motion

Petitioner contends that the information requested in the April 29 Motion is relevant to the post-conviction relief claims asserted in his January 7, 2020 “Defendant’s Limited Petition for Post-Conviction Relief (Delayed Appeal Request) and Request to Hold Further PCR Proceedings in Abeyance” (the “Limited Petition”). Specifically, Petitioner asserts that the information will show that Victim’s counsel perpetrated a fraud upon the Court in obtaining a restitution award for economic losses already recouped in a civil proceeding. (Reply at 3:1-4:18). But the scope of relief requested in the Limited Petition is very narrowly restricted to permission to file a delayed appeal from the Criminal Restitution Order. Petitioner has not established why the requested information is necessary to resolve this narrow issue, which does not include reviewing the amount of the restitution award. Indeed, Petitioner’s counsel concedes that the information “is not *essential* to Petitioner’s claims on PCR.” (Reply at 8:17-18) (emphasis in original).

It appears that Petitioner really wants the information to use in the appellate court, if he is granted permission to take a delayed appeal. In this regard, Petitioner stated that “[i]f delayed appeal is granted, victim’s counsel’s representations and omissions before the court during restitution proceedings--at which he acted in the place of the prosecutor--will be a focal point of what transpired, and why.” (Reply at 4, n.1). The Court will defer to the assigned judicial officer --who will be deciding whether to allow the delayed appeal--to decide whether the record for appeal should be supplemented with the requested information. Accordingly,

IT IS ORDERED denying the April 29 Motion without prejudice to Petitioner asking the assigned judicial officer to order production of the requested information when ruling on the Limited Petition.

May 2 Motion

As set forth above, the May 2 Motion is unopposed. Accordingly,

IT IS ORDERED granting the May 2 Motion and directing the Maricopa County Office of the Medical Examiner to produce to Petitioner’s counsel its file in its entirety in its own case number 15-05899, including bench notes and communication logs.

Order Reinstating PCR Briefing Schedule

On April 14, 2020, the Court issued an Order (i) striking the Victim’s Response to the Limited Petition, (ii) precluding the Victim from filing a response to “Amended Petition for Post-Conviction Relief” (the “Amended Petition”), and (iii) requiring the State to file its response to the

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MARICOPA COUNTY

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06/11/2020

Limited Petition and the Amended Petition within 45 days. On April 23, 2020, the Victim filed a “Request For Stay Of PCR Proceedings Pending Appellate Resolution Of Petition For Special Action” and asked for expedited consideration. On May 4, 2020, the Court issued an Order “suspending briefing on the Limited Petition and the Amended Petition pending the outcome of the Victim’s special action challenge to the April 14 Order.”

As of June 10, 2020: (1) it has been (a) 57 days since the Court issued the April 14 Order, (b) 48 days since the Victim notified the Court that she intended to seek special action relief from the April 14 Order, and (c) 37 days since the Court issued the May 4 Order suspending the PCR briefing schedule pending resolution of the anticipated special action; and (2) the Victim has not filed a petition for special action, according to the website for Division One of the Court of Appeals. The Court determines that the Victim has had more than ample time to initiate a special action without doing so, and it no longer is appropriate to suspend the PCR briefing schedule. Accordingly,

IT IS ORDERED that the State must file and serve a response to the Limited Petition and the Amended Petition by July 27, 2020. Petitioner may file and serve a reply within 15 days after service of the State’s response.

EXHIBIT "C"

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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04/14/2020

HONORABLE DEWAIN D. FOX

CLERK OF THE COURT
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JUDGE FOX

RANDALL S UDELMAN

**RULING ON PETITIONER'S "OBJECTION TO RULING
PRIOR TO REPLY TIME EXPIRATION [AND]
REPLY/MOTION FOR RECONSIDERATION RE: MOTION TO STRIKE"**

This post-conviction relief matter has a complex procedural history. A review of this history is important for context and to understand the issue currently before the Court. It also will aid in any appellate review of this ruling.

Procedural History

On May 24, 2017, Petitioner was convicted and sentenced for second-degree murder, and the Court retained jurisdiction over restitution. Petitioner timely appealed his conviction and sentence. In April and May of 2019, while the appeal was pending, the Court considered and resolved the issue of restitution. On May 20, 2019, the Court entered a formal Criminal Restitution Order ("CRO"). On June 24, 2019, the Court of Appeals issued its Mandate affirming the conviction and sentence. Defendant never filed an appeal from the CRO.

On January 7, 2020, Petitioner filed "Defendant's Limited Petition for Post-Conviction Relief (Delayed Appeal Request) and Request to Hold Further PCR Proceedings in Abeyance" (the "Limited Petition"). In the Limited Petition, Petitioner sought an expedited ruling on his request to proceed with a delayed appeal of the CRO while holding his claim of ineffective assistance of counsel ("IAC") in abeyance pending exhaustion of his appellate remedies.

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On January 13, 2020, the Victims filed “Victims Beth Fay’s and Stephanie Dumbrell’s Response to Limited Petition for Post-Conviction Relief (Delayed Appeal Requested) and Request to Hold Further PCR Proceedings in Abeyance” (the “Victims’ Response”). The Victims’ Response sets forth the Victims’ arguments as to why Petitioner should not be entitled to appeal the CRO and asks the Court to summarily deny Petitioner’s request in the Limited Petition for permission to file a delayed appeal.

On January 21, 2020, Petitioner filed his “Motion to Strike and Prohibit Future Responsive Pleadings Filed by Victim’s Counsel and to Adjust Reply Deadline” (the “Motion to Strike”). In the Motion to Strike, Petitioner contends that the Victims lack standing to file pleadings concerning the issue raised in the Limited Petition or any other post-conviction relief claim that does not involve a request for Petitioner’s release from confinement. Petitioner asks the Court to (i) strike and not consider the Victims’ Response, and (ii) prohibit the Victims’ counsel from filing additional responses concerning Petitioner’s claims for post-conviction relief. Petitioner also asks the Court to adjust his time for filing a reply in support of the Limited Petition depending upon the Court’s ruling on the Motion to Strike.

On January 21, 2020, Petitioner also filed his “Amended Petition for Post-Conviction Relief” (the “Amended Petition”). Petitioner filed the Amended Petition to include his IAC claim in his initial post-conviction relief proceeding. Petitioner asserts in the Amended Petition that the Victims’ counsel lacked authority to respond to the Amended Petition (and a contemporaneously filed motion for discovery), because the relief sought by Petitioner does not include his release from confinement. (Amended Petition at p.1:24-27).¹

On January 26, 2020, the Victims filed and served “Victims Beth Fay and Stephanie Dumbrell’s Response to Motion to Strike Pleadings Filed by Victim’s Counsel and to Adjust Reply Deadline” (the “Response to Motion to Strike”). In the Response to Motion to Strike, the Victims assert that they have a right to be heard on restitution issues and ask the Court to deny the Motion to Strike.

By Minute Entry dated January 28, 2020 (filed January 29, 2020), the Court denied the Motion to Strike. By separate Minute Entry filed January 29, 2020, the Court acknowledged receipt of the Amended Petition and ordered the State to file a response by March 13, 2020.

On January 30, 2020, Petitioner filed his “Objection to Ruling Before Reply Time Expiration [and] Reply/Motion for Reconsideration Re: Motion to Strike” (the “Objection/Motion for Reconsideration”). In the Objection/Motion for Reconsideration, Petitioner initially asserts

¹ In his prayer for relief, Petitioner also asserts that “the complained-of restitution and CRO orders should be vacated.” (Amended Petition at p.46:15-16).

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that he had until January 30 to file his reply in support of the Motion to Strike, and the Court's denial of the Motion to Strike was premature.² The Objection/Motion for Reconsideration also sets forth Petitioner's argument that the Victims lack standing to be heard on substantive matters in this post-conviction relief proceeding and asks the Court to reconsider its denial of the Motion to Strike. Petitioner's counsel also asks to be endorsed on all minute entries in this matter.

By Minute Entry dated January 31, 2020 (filed February 3, 2020), the Court set a briefing schedule on the Objection/Motion for Reconsideration and suspended briefing on the Limited Petition until the Objection/Motion for Reconsideration is resolved.

On February 24, 2020, the State and the Victims filed their Responses to the Objection/Motion for Reconsideration. The Victim's Response sets forth their substantive arguments as to why they have standing to be heard on both the Limited Petition and the Amended Petition. The Victims ask the Court to overrule/deny the Objection/Motion for Reconsideration, accept and consider the Victims' Response to the Limited Petition and grant them permission to file a response to the Amended Petition. The State admits that the Court should consider Petitioner's arguments on standing in the Objection/Motion for Reconsideration; however, the State asserts that the Court properly denied the Motion to Strike and Petitioner's arguments in the Objection/Motion for Reconsideration do not alter that result.

On March 9, 2020, Petitioner filed his "Reply Re: Motion for Reconsideration of Petitioner's Motion to Strike Victim Pleadings on PCR". With this filing, the Objection/Motion for Reconsideration was fully briefed and ready for decision. Given the complex procedural history and the nature of the issue before the Court, the Court scheduled oral argument on the Objection/Motion for Reconsideration on April 17, 2020.³ In the exercise of its discretion, after further review of the filings, the Court determines that the issues have been thoroughly briefed and oral argument will not assist the Court in resolving the limited issue before the Court--namely,

² Under Rules 1.3(a) and 1.9(b), Ariz.R.Crim.P., Petitioner had until February 3, 2020, to file his reply in support of the Motion to Strike. This calculation assumes that Petitioner was entitled to an additional five calendar days following service. *See* Rule 1.3(a)(5), Ariz.R.Cr.P. Even without this additional time, the Court's ruling on the Motion to Strike clearly was premature.

³ Since oral argument was scheduled, the Court's presiding judge issued Administrative Order 2020-055, which restricts physical access and limits the types of in-person proceedings that can be conducted in the courthouse through April 30, 2020, due to the COVID-19 pandemic. The Court's staff contacted counsel about how to conduct oral argument under the circumstances. The Court understands that all counsel expressed willingness to stand on their written briefs.

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whether the Victims have standing to be heard on the Limited Petition and the Amended Petition.⁴ As such, the Court will vacate oral argument and rule on the Objection/Motion for Reconsideration.

Analysis

Under Article II, Section 2.1(A) of the Arizona Constitution (the Victims' Bill of Rights), crime victims have the right (among others): (i) "[t]o be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing; (ii) "[t]o confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition"; (iii) "[t]o receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury"; and (iv) "[t]o be heard at any proceeding when any post-conviction release from confinement is being considered." The only express rights "to be heard" under the Victims' Bill of Rights are at proceedings involving a post-arrest release decision, negotiated plea, sentencing or request for post-conviction release from confinement. Although a victim has a constitutional right to confer with the prosecution before trial or any disposition and to receive prompt restitution, neither of those rights expressly includes the right to be heard.

The legislature also enacted statutory rights for crime victims. *See* A.R.S. §§ 13-4401 through 13-4443. These statutory rights include the right for a crime victim "to be heard" as to particular issues. Specifically: (i) A.R.S. § 13-4414(A) grants "the right to be present and be heard at any proceeding in which post-conviction release from confinement is being considered pursuant to § 31-233, 31-411 or 41-1604.13"; (ii) A.R.S. § 13-4440(A) grants "the right to be present and be heard at any proceeding in which a person's factual innocence is being considered pursuant to § 12-771"; and (iii) A.R.S. § 13-4441(A) grants "the right to be present and be heard at any proceeding in which the defendant has filed a petition pursuant to § 13-925 to restore the defendant's right to possess a firearm." Although A.R.S. § 13-4420 generally grants a victim the "right to be present throughout all criminal proceedings in which the defendant has the right to be present", none of the statutory provisions expressly gives a victim the right "to be heard" in a post-conviction relief proceeding involving whether to allow a defendant to take a delayed appeal from a restitution award or to grant a new trial due to ineffective assistance of counsel.

In 2016, the legislature added subsection E to A.R.S. § 13-4437. A.R.S. § 13-4437(E) gives a victim standing "to present evidence or information and to make an argument to the court, personally or through counsel, at any proceeding **to determine the amount of restitution pursuant to § 13-804.**" (emphasis added). The issues before the Court in this post-conviction

⁴ The merits of Petitioner's claims for post-conviction relief, including whether to allow a delayed appeal from the CRO, will be decided by another judicial officer (presumably Judge Gates) after the Limited Petition and Amended Petition are fully briefed and ready for ruling.

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relief proceeding are (i) whether to allow Petitioner to take a delayed appeal from the CRO, and (ii) whether to grant the Petitioner a new trial on his IAC claim. Significantly, the Court is not determining the amount of restitution pursuant to A.R.S. § 13-804. As such, A.R.S. § 13-4437(E) does not give the Victims standing to participate in Petitioner's post-conviction relief proceeding.

Finally, a crime victim also has the right by rule "to be heard" upon request "at any criminal proceeding involving: (A) the initial appearance; (B) the accused's post-arrest release or release conditions; (C) a proposed suspension of Rule 8 or a continuance of a trial date; (D) the court's consideration of a negotiated plea resolution; (E) sentencing; (F) the *modification of any term of probation that will substantially affect* the victim's safety, the defendant's contact with the victim, or *restitution*; (G) the early termination of probation; (H) a probation revocation disposition; and (I) post-conviction release." Rule 39(b)(7), Ariz.R.Crim.P. (emphasis added). Even "constru[ing] [this rule] to preserve and protect a victim's rights to justice and due process" (Rule 39(b), Ariz.R.Crim.P.), a post-conviction relief proceeding involving whether to allow a defendant to take a delayed appeal from a restitution award or to grant a new trial due to ineffective assistance of counsel is outside the scope of the right "to be heard" under Rule 39.

The drafters of the Arizona Constitution, statutes and rules of criminal procedure all knew how to grant a victim the "right to be heard" when that was their intent. Indeed, as set out above, they expressly did so for certain types of proceedings. If the drafters had intended to give victims a general right to be heard in post-conviction relief proceedings, or specifically on claims for permission to take a delayed appeal from a CRO or for a new trial for IAC, the drafters could--and presumably would--have done so expressly. As much as the Court respects victim's rights, the Court is tasked with enforcing the law as written.⁵ Accordingly,

IT IS ORDERED vacating oral argument scheduled in this case on April 17, 2020, at 9:00 a.m.

IT IS FURTHER ORDERED granting Petitioner's requests for relief in the Objection/Motion for Reconsideration, specifically (i) striking the Victims' Response to the Limited Petition, and (b) precluding the Victims from filing a response to the Amended Petition.

⁵ Although the Court finds that the Victims do not have a right to be heard on Petitioner's post-conviction relief claim for permission to take a delayed appeal from the CRO, the Court expresses no opinion as to whether, if a delayed appeal is permitted, the Victims have standing to file an appellate brief addressing the merits of Petitioner's challenge to the legality of the CRO. The appellate courts will have to decide that issue, if it arises.

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IT IS FURTHER ORDERED vacating paragraph 3 of the Orders contained in the Court's Minute Entry dated January 28, 2020 (filed January 29, 2020). The Minute Entry remains in full force and effect in all other respects.

IT IS FURTHER ORDERED that the State must file and serve a response to the Limited Petition and the Amended Petition by May 29, 2020. Petitioner may file and serve a reply within 15 days after service of the State's response.

IT IS FURTHER ORDERED that both of Petitioner's counsel, Treasure VanDreumel and Lori Voepel, must be endorsed on all Minute Entries issued in this post-conviction relief proceeding.