

1 ARIZONA CRIME VICTIM RIGHTS LAW GROUP

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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.: CR20-0306-PR

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

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

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27 **REPLY IN SUPPORT OF PETITION FOR REVIEW**
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1 The State and Real Party in Interest Hanson agree that issues outlined in the
2 Petition for Review are ripe for this Court to consider. But for different reasons.
3 Hanson goes to extraordinary lengths to stretch and strain Arizona law saying that it
4 is okay for a defendant to ask a court to vacate a criminal restitution order in its
5 entirety (even the monies that have already been paid) without first hearing from the
6 victim who owns the criminal restitution order.¹ Taking a property interest away
7 from the victim without giving her the right to be heard offends the notion of due
8 process both within and without the parameters of the VBR. He also insists that
9 victims' rights to be heard at contested restitution hearings are limited to proof and
10 argument on the extent and need for economic loss at sentencing but nothing further.
11 Because they are not parties to the prosecution, Hanson contends victims cannot
12 present actual legal arguments on the merits no matter if the issues arise at a
13 restitution hearing or in a Rule 32 proceeding.² He urges this Court to silence his
14 victims from making substantive arguments responding to Rule 32 proceedings that
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22 ¹ Hanson apparently concedes that some restitution is due but still insists that
23 the court vacate the entire criminal restitution order. Response at 22 n. 43.
24 The Rule 32 petition concedes nothing and asks the court to vacate the entire
criminal restitution order. Vacating the entire order means that all monies
paid thus far must be repaid irrespective of any alleged concession.

25 ² Hanson suggests that victims can only present proof of loss and argue about
26 the extent of loss but nothing else because a crime victim is not a party to
27 the prosecution. Response at 19. Petitioner agrees that she is not a party to
28 the prosecution, but her status as a party or non-party has nothing to do with
her standing to present substantive arguments to assert VBR rights whenever
they arise. A.R.S. §§ 13-4437(A) and (E).

1 make a belated effort to vacate a criminal restitution order and recapture a vested
2 criminal restitution order, accrued interest and payments which have been already
3 made from an inmate spendable account pursuant to A.R.S. §31-230(C). Hanson
4 insists that only the State may respond to a PCR and delayed appeal. But he does
5 not acknowledge that the state does not own the criminal restitution order nor does
6 he acknowledge the impact his requested relief will have on his victim and her
7 property interest. His requested remedy will eviscerate an enumerated right to a
8 criminal restitution order which has been perfected, now a vested property interest
9 belonging to his victim for which payments have been made, liens valid and has
10 already been accruing interest for well over a year. But he insists that silencing his
11 victim from being heard before taking away her property interest is an acceptable
12 outcome. Really? How does he reach such a conclusion?

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18 Hanson relies on law that has already been narrowed by the legislature to
19 prevent the application of the VBR he now seeks. Specifically citing *Lindsay v.*
20 *Cohen* and *State v. Lamberton*, Hanson contends that “there exists no constitutional,
21 statutory or rule-based right ... to be heard on the merits ... because Fay is a non-
22 party; and because Rule 32.9 permits only *the State* to respond to PCR claims...”
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24 Response at 1. He contends that both *Lindsay* and *Lamberton* are still good law on
25 relevant issues in this case; but they are not. Legislative modifications to A.R.S.
26 §§13-4437(A) and (E) came after *Lindsay* and *Lamberton*, legislatively and
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1 effectively overruling the considerations on which Hanson now relies. The
2 legislature clarified after amending this statute that the VBR rights belong to the
3 victim, *not* the state. The statute allows a victim, “[n]otwithstanding *any* other law
4 and *without limiting any rights and powers* of the victim ... to present evidence or
5 information and *to make an argument* to the court... at *any* proceeding to determine
6 the amount of restitution ...” A.R.S. §13-4437(A) (emphasis added). This legislative
7 right was intended to *expand* victim rights, *not* limit them. *See, e.g., State v. Lee,*
8 226 Ariz. 234, 238 245 P.3d 919, 923 (App. 2011) (court prevented civil deposition
9 of crime victims; VBR does “not limit the *proceedings* to which the right [to refuse
10 an interview] extends.”) (emphasis added). These legislative changes should have
11 clarified that claimed rights and not party or procedural status is the relevant inquiry
12 when VBR rights are at issue. Even as a non-party, a crime victim still has standing
13 to present evidence, information and to make legal arguments supporting a
14 determination of restitution. Nothing in the language of A.R.S. §13-4437(A) limits
15 this standing to seek “to seek an order ... [or] enforce any right or to challenge an
16 order denying any right guaranteed to victims” to sentencing proceedings only.
17 Nothing in in the VBR, Rule 39 or VRIA prevents Petitioner from responding to and
18 seeking an order to enforce restitution rights, a property interest that has been
19 accruing interest and for which payments have been made, that Hanson now asks to
20 be vacated in separate Rule 32 proceedings. The issues raised by Petitioner and the
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1 State in the Petition for Review are ripe for this Court to clarify for Hanson and
2 others that the scope of a victim’s right to be heard extends to any proceedings
3 affecting a VBR enumerated right whether the issue arises pre-conviction, at
4 sentencing or in Rule 32 proceedings. And the scope of a victim’s right to be heard
5 is not limited to presenting proof and argument about the need for restitution and
6 extent of loss; a victim may present legal arguments advancing their VBR rights.
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9 After the *Cohen* decision, the Arizona legislature specifically modified A.R.S.
10 §13-4437(A) and (E) and the legislature requires a liberal construction of Rule 39,
11 the VRIA and the VBR. *See* A.R.S. §13-4418. The statute does not say that a victim
12 can only present a receipt for medical care, an explanation of benefits, a note from
13 an employer or a mileage statement to establish her economic loss and then must
14 walk away from all proceedings entirely leaving to the state all the legal arguments
15 supporting an award of restitution. Perhaps before the VBR was passed in 1990, a
16 defendant could silence his victim or treat her as a piece of evidence connected to
17 crime rather than someone in need of fair, dignified and respectful treatment.
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19 Gessner H. Harrison, *The Good, The Bad, and The Ugly: Arizona’s Courts and the*
20 *Crime Victims Bill of Rights*, 34 Ariz. St. L.J. 531, 533 (2002). Not today. After
21 *Lindsay*, the legislature clarified victims have the right to “present evidence, or
22 information *and to make an argument* to the court...” (emphasis added). After
23 *Lindsay*, the legislature made clear that the enumerated rights including the right to
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1 restitution *belong to the victim*. A.R.S. §13-4437(A) (emphasis added). And the
2 legislature certainly did not limit when and where victims have standing to “seek an
3 order, to bring a special action, or to file a notice of appearance ... seeking to enforce
4 *any* right or to challenge an order denying any right guaranteed to victims.” A.R.S.
5 §13-4437(A) (emphasis added). Also, the standing granted by statute does not limit
6 a victim to presenting receipts but relying on the state to make legal arguments
7 simply because they are not parties to the prosecution.
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11 Also, often the same VBR rights and considerations arise at different times
12 throughout the same prosecution. Victims have the *same* rights to be heard each and
13 every time a VBR issue arises no matter when the issue arises. *See, e.g.*, A.R.S.
14 §§13-806(A), (C), -804(M), -810(B) (pre-conviction liens, sentencing
15 considerations, post-conviction collection issues). Standing to be heard and to
16 counter efforts to vacate a previously established restitution order and accrued
17 interest does not stop simply because the victim previously presented evidence,
18 information and opinions on a determination of restitution once at sentencing.
19 A.R.S. §13-4426(A). Hanson’s approach to the right to be heard suggests that when
20 it comes to restitution issues, Petitioner’s rights stop after sentencing never to be
21 considered again unless they arise at a re-sentencing. Not true; otherwise voters
22 would not have passed the VBR and the legislature would not have passed 13-4418
23 and *both* A.R.S. §13-4426 and -4437(E), redundant statutes containing similar
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1 language but granting expansive rights to be heard and present evidence,
2 information, argument and/or opinion on restitution matters at different times. And
3 the legislature would never have granted victims standing together with the broad
4 right to be heard to seek enforcement of an order when a right is affected. And the
5 legislature would never have confirmed that restitution and other VBR rights belong
6 to the victim. A.R.S. §13-4437(A).
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9 The statute on standing also should not be read to dictate procedural
10 limitations on when the right to be heard may be asserted if a defendant asks a court
11 to vacate a criminal restitution order using Rule 32. The proper consideration is
12 whether Hanson asked for something that involves a determination of restitution not
13 how he did it. Over a year ago, the court entered its order and created a property
14 right and a lien at the time it was perfected on any real, personal property or vehicles
15 pursuant to A.R.S. §13-806(G)(1)-(3). The Defendant's Rule 32 asks to vacate the
16 criminal restitution order, accrued interest and payments made and liens entered.
17 Fairness dictates that a victim should be heard first before the court considers taking
18 away a criminal restitution order, which has already been perfected, interest accrued
19 and payments begun.
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25 The Court already has continuing jurisdiction to address ongoing issues until
26 restitution is paid in full and victims often rely on the Court's continuing jurisdiction
27 to seek modification or enforcement of restitution. See A.R.S. §13-805(A)(2); see
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1 also A.R.S. §13-804(M); -810(B). Because victims are already heard throughout the
2 pre-conviction, prosecution, sentencing and post-conviction process, it makes no
3 sense to limit a victim's right to be heard only when a defendant uses Rule 32 to ask
4 the court to take away a victim's property right. A.R.S. §13-805(A)(2); *see also*
5 *State v. Howard*, 168 Ariz. 458, 460, 815 P.2d 5, 7 (App. 1991) (trial court retained
6 jurisdiction to adjust restitution amounts if needed later). Petitioner has asked to be
7 heard while the court retains continuing jurisdiction over restitution. Why would it
8 be fair for a court to consider victim input to adjust the amount or manner or enforce
9 payment of restitution pursuant to A.R.S. §13-805(A)(2) but not if a Defendant uses
10 Rule 32 to ask the court to vacate the entire restitution order? Before a court
11 considers a full-throated Rule 32 assault on a CRO, accrued interest and payments
12 already made thus far, why wouldn't a defendant agree to let the victim be heard?
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18 Hanson insists that only the State has the right to be heard. In *EH v Slayton*,
19 this court has already cautioned against outsourcing to the State restitution rights
20 because the right to restitution *belongs to the victim*. ___ Ariz. ___, ___, 468 P.3d
21 1209, 1214 (2020). This Court has reasoned that a restitution cap or agreement made
22 when negotiating a plea agreement between the defendant and the state without
23 victim consent would be considered illusory. *Id.* In reaching this decision,
24 presumably this Court relied on the legislative modification to A.R.S. §13-4437(A)
25 post-*Lindsay*, concluding that the right to restitution belongs to the victim. *Id.* So
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1 while a *victim* can waive VBR restitution rights, the *state* lacks authority to do so.
2 *Id.*; *see also* A.R.S. §13-4437(A). This very same principle applies with equal vigor
3 on a Rule 32 proceeding involving a Defendant's effort to vacate a criminal
4 restitution order. While Petitioner can ask the State to respond to the PCR and argue
5 in support of her vested property rights, she should not be forced by a defendant to
6 rely on the state because the right to restitution belongs to the victim and not the
7 State. For the same policy reasons this Court set forth in *Slayton*, Petitioner should
8 be heard on Hanson's Rule 32 efforts to vacate a restitution award and criminal
9 restitution order. *Id.* *See* A.R.S. §13-4437(C). He should not force the Petitioner
10 to outsource her position and arguments on the merits to the State especially after
11 the criminal restitution order has been perfected and payments have already begun.

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16 The legislature intended that victims should be heard on all matters affecting
17 restitution whether they arise pre-conviction, (A.R.S. §13-806(C) (pre-conviction
18 restitution lien)), at sentencing, (A.R.S. §13-4426(A) (evidence, information and
19 opinion at sentencing), or during post-conviction proceedings. (A.R.S. §§13-
20 805(A)(2) (continuing jurisdiction), -804(M) (adjustment to manner of payment), -
21 810 (contempt proceedings) -812 (garnishment collection efforts)). It flies in the
22 face of statutory interpretation and VBR jurisprudence for Hanson to claim that
23 voters, the legislature and the judiciary intended to give victims less VBR and
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1 statutory rights to be heard in Rule 32 proceedings seeking to vacate restitution
2 awarded and the payment stream currently underway pursuant to A.R.S. §31-230(C).

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4 Hanson’s attempts to take away a victim’s right to be heard on matters
5 affecting restitution in a Rule 32 proceeding parlays his Rule 32 claim into a victim’s
6 right to be heard because the he chose to make an issue out of an enumerated VBR
7 right in his pleadings and previously agreed upon more than a year ago. His choice
8 to now ask a court to vacate the very award on which he previously agreed implicates
9 a victim’s right to be heard notwithstanding his choice to use Rule 32. Also,
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11 Petitioner has no interest in controlling criminal proceedings here; instead, she just
12 wants to be heard and explain why her VBR rights are implicated and why the Rule
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14 32 petition should fail before the court makes any potentially draconian decisions.
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16 Even before the legislature modified A.R.S. §13-4437(A), at least the victim in *State*
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18 *v. Lamberton*, 183 Ariz. 47, 48, 899 P.2d 939, 940 (1995) was heard in Rule 32
19 proceedings. And although rejecting a victim’s petition for review challenging a
20 resentencing decision, the Arizona Supreme Court confirmed that the victim was at
21 least heard and “filed a written statement and *her own [legal] analysis...*” The court
22 also noted that the “The Victim was heard at the evidentiary hearing ... on
23 defendant’s *petition for post-conviction relief*; she testified and filed a written
24 statement and *legal memorandum.*” *Id.* at 49, 899 P.2d at 941 (emphasis added).
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26 Citing A.R.S. §13-4437, the Supreme Court explained that “[i]f the trial court had
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1 *refused* to hear from the Victim at the post-conviction relief proceeding, for example,
2 then the Victim *could have filed a special action* with the court of appeals to assert
3 her right under article 2, §2.1(A), to be heard.” *Id.* at 50, 899 P.2d at 942 (emphasis
4 added). After the *Lindsay* and *Lamberton* holdings, the legislature clarified that
5 VBR rights belong to the victim. So the criminal restitution order entered over a
6 year ago belongs to Petitioner and not to the state or anyone else. Interest on the
7 criminal restitution order which began accruing over a year ago and payments which
8 have been made for the past year belong to the victim and not to the state or anybody
9 else. The few payments Hanson has made over the past year from his inmate
10 spendable account belong to the victim and not to the state or anybody else. Liens
11 appropriately perfected already have given notice to others about this restitution
12 order. Hanson attempts to interfere with these distinct vested property rights asking
13 the Court to vacate the restitution order and in so doing, claw back interest and
14 payments made thus far.³ Contrary to his suggestions, this requested relief imposes

21 ³ Hanson insists on moving forward and affecting his victim’s vested property
22 right without giving the right to his victim to be heard. But outside the
23 confines of the VBR, such efforts to interfere with a vested property right
24 cannot occur without first giving an aggrieved party an opportunity to be heard
25 based on due process considerations. *See, e.g., Hall v. A.N.R. Freight Sys.*,
26 149 Ariz. 130, 140, 717 P.2d 434, 444 (1986) (right vests “when it is actually
27 assertable as a legal cause of action or defense or is so substantially relied
28 upon that retroactive divestiture would be manifestly unjust.”). And even
Hanson’s reliance on *Lamberton* misses the mark because the court rejected the
victim’s petition for review explaining that the victim was not aggrieved
“because the judgment of the trial court does not operate to deny her some
personal or property right, nor does it impose a substantial burden upon her.”
183 Ariz. at 49, 899 P.2d at 941 (citation omitted). But it does here; Hanson’s
Rule 32 requested relief would take away accrued and vested property rights and

1 a substantial burden on Petitioner. Response at 14. Fairness and due process spelled
2 out in the VBR requires that the owner of this criminal restitution order should be
3 heard on the merits before a court makes any decisions to claw back a restitution
4 order. *See* ARIZ. CONST. ART. II, §2.1(A) (granting specific enumerated rights “to
5 preserve and protect victim’s rights to justice and *due process*...”) (emphasis added).
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7 Limiting the right to be heard to the State is neither fair nor just. Hanson’s claim
8 that no VBR right is implicated in his Rule 32 petition cannot withstand scrutiny.
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10 Of course Hanson seeks relief that affects a determination of restitution and
11 implicate Petitioner’s VBR rights. Rights to restitution belong to the victim and this
12 crime victim has standing to and may be heard whenever establishing, modifying or
13 enforcing them. Responding to a Rule 32 petition and attempting to enforce a VBR
14 right that has previously been perfected is fair and just. Taking away the property
15 interest without first giving the aggrieved party a right to be heard would fly in the
16 face of any process due to a crime victim.
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21 For the foregoing reasons, Petitioner respectfully requests that this Court grant
22 her petition for review and ensure that crime victims have a voice in these Rule 32
23 proceedings affecting the determination of restitution.
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26 impose a substantial burden on his victim. Doing so absent the right to be
27 heard is not fair nor is it consistent with any notion of due process envisioned
28 by the VBR or any other civil process.

1 Respectfully submitted October 15th, 2020.

2 ARIZONA CRIME VICTIM RIGHTS LAW GROUP

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4 By: /s/ Randall Udelman
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6 Victim Rights Attorney
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