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9  
10 **IN THE SUPREME COURT**  
11 **STATE OF ARIZONA**

13 BETH FAY,  
14  
15           Petitioner,  
16  
17           v.  
18 THE HONORABLE DEWAIN D.  
19 FOX, Judge of the SUPERIOR  
20 COURT OF THE STATE OF  
21 ARIZONA, in and for the County  
22 of MARICOPA,  
23           Respondent Judge,  
24  
25 and  
26 STATE OF ARIZONA; JORDAN  
27 MICHAEL HANSON,  
28           Real Parties in Interest.

Arizona Supreme Court Case  
No. CR20-0306-PR  
  
Court of Appeals, Division One  
No. 1 CA-SA 20-0123  
  
Maricopa County Superior Court  
No. CR 2015-005451-001

**RPI HANSON'S  
SUPPLEMENTAL BRIEF  
(RESPONSE TO BRIEF OF  
AMICUS CURIAE)**

1 **I. The Procedural Background in a Nutshell:**

2 In this case RPI Hanson timely initiated post-conviction proceedings.  
3 Pursuant to Rule 32.1(f), he sought permission to file a delayed appeal  
4 concerning the restitution orders entered some two years following  
5 sentencing. The rule requires him to show that his failure to timely appeal  
6 was through no fault of his own.

7 Hanson subsequently amended his Petition for Post-Conviction Relief  
8 to include a claim that *trial counsel* rendered ineffective assistance and  
9 *restitution counsel* rendered ineffective assistance—both of which caused  
10 demonstrable prejudice. Rule 32.1(a); *Strickland v. Washington*, 466 U.S. 668  
11 (1984); *State v. LaGrand*, 152 Ariz. 483, 485 (1987)(adopting *Strickland*). To  
12 prove this claim, “[f]irst, the defendant must show that counsel’s  
13 performance was deficient. This requires showing that counsel made errors  
14 so serious that counsel was not functioning as the ‘counsel’ guaranteed the  
15 defendant by the Sixth Amendment. Second, the defendant must show that  
16 the deficient performance prejudiced the defense. This requires showing  
17 that counsel’s errors were so serious as to deprive the defendant of a fair  
18 trial, a trial whose result is reliable. Unless a defendant makes both  
19 showings, it cannot be said that the conviction or ... sentence resulted from  
20 a breakdown in the adversary process that renders the result unreliable.”  
21 *Id.*, at 687.

22 Petitioner Fay—the crime victim’s mother in this case—filed a response  
23 opposing Hanson’s claim for delayed appeal. She contended his failure to  
24 appeal was his fault and that the restitution orders entered were not subject  
25 to appeal because Hanson’s restitution counsel *himself* mostly agreed to it.  
26 Hanson moved to strike Fay’s response, and similarly moved to prohibit  
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1 her from responding to his Sixth Amendment claims of ineffective  
2 assistance of counsel. Following more briefing, Respondent Judge granted  
3 Hanson's motion.

4       Fay sought special action relief. The appellate court found that no  
5 right existed under the Victim's Bill of Rights ("VBR"), its implementing  
6 statutes ("VRIA"), or court rules to permit Fay to weigh in on whether a  
7 delayed appeal should be afforded. Erroneously believing Respondent  
8 Judge had not ruled on Hanson's motion to prohibit Fay from responding  
9 to his claims of ineffective assistance of counsel, it found Fay's claim on that  
10 issue "unripe".

11       Both Fay and the State sought Review; Hanson filed a Combined  
12 Response and Petitioners replied. The Arizona Voice for Crime Victims and  
13 National Crime Victim Law Institute have now presented a brief as *amicus*  
14 *curiae* in support of Petitioners.

15       Hanson hereby addresses the contentions raised in that brief.

## 16 **II. Law and Analysis:**

### 17 **A. The premise of *Amici's* argument is, respectfully, wrong.**

18       Like Petitioners, *Amici* assert that the VBR provides a right to be heard  
19 as to whether delayed appeal should be permitted, as well as a right to be  
20 heard on Hanson's claims of ineffective assistance of counsel, since  
21 resolution of either claim might impact the previously entered restitution  
22 orders. Specifically, *Amici* contend: "The only construction of the VBR that  
23 effectuates the intent of the drafters and the voters in this case is to interpret  
24 the right to 'prompt restitution' to include the due process right to be heard  
25 when the victims are confronted with a *proceeding that impacts that right.*"  
26 (*Amicus*, p. 12, *emphasis added*).

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1 From a pragmatic standpoint, *Amici's* stance means the VBR must be  
2 interpreted as granting victims the right to be heard in *every* criminal  
3 appeal. All criminal appeals challenge the conviction, sentence, or both; if  
4 successful, vacating a conviction and/or sentence also vacates any  
5 restitution orders entered. Thus, under *Amici's* stated premise, because an  
6 appeal might "*impact*" the right to receive prompt restitution, there exists a  
7 right to be heard as to every defendant's claims on appeal. Similarly, every  
8 ground available for post-conviction relief challenges the validity of the  
9 defendant's conviction and/or sentence. *See*, Rule 32.1(a-h). If successful,  
10 the conviction, sentence or both are vacated. This too "*impacts*" a victim's  
11 right to receive prompt restitution, and under *Amici's* premise, thereby  
12 creates a victim's right to be heard on every claim levied in every post-  
13 conviction proceeding.

14 *Amici's* premise is, respectfully, wrong. As Mark Victor Hansen once  
15 said, "You can't get the right answers if you're asking the wrong  
16 questions." The question *is not* whether a victim's right might be *impacted*  
17 by resolution of a defendant's claims on appeal or in post-conviction  
18 proceedings.<sup>1</sup> Rather, the question is whether a right to be heard is  
19 expressly *afforded* and *implicated* by either of Hanson's claims on PCR.  
20 Indeed, a criminal defendant's constitutional right of appeal and procedural  
21 right to initiate post-conviction proceedings certainly may *impact* a victim's  
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23 <sup>1</sup> *Amici* assert "the victims sought to be heard on [*sic.*] a proceeding  
24 that not only impacts their right to [receive] 'prompt' restitution but also  
25 their right to full restitution—as *the appeal challenges the restitution order*  
26 *itself.*" (*Amicus*, p. 8)(*emphasis added*). No appeal has been filed because  
27 Hanson's Rule 32.1(f) claim, which seeks permission to file a delayed  
28 appeal, has yet to be granted. *That* is the claim on which the victim insists  
she has a right to be heard.

1 right to “prompt and final conclusion of the case after the conviction and  
2 sentence”, Article 2, §2.1(A)(10), but neither claims for appellate nor post-  
3 conviction relief *implicate* any victim right. *Cf., Reed, infra.* Although  
4 §2.1(A)(11) of the VBR facially grants a “right” to have *all rules* governing  
5 criminal procedure protect victims, in 1990 our supreme court “narrowly  
6 construed” the provision to “deal[ ] only with *procedural rules pertaining to*  
7 *victims*”, *Slayton v. Shumway*, 166 Ariz. 87, 92 (1990)(*emphasis added*). Like  
8 claims brought on direct appeal pursuant to Rule 31, Ariz.R.Crim.P., claims  
9 brought under Rule 32.1(a) and 32.1(f) are simply *not* procedural rules  
10 “pertaining to victims.”

11 This conclusion also enures from *Amici’s* stance that because appellate  
12 or post-conviction review may *impact* a victim’s right to receive “prompt”  
13 restitution, victims have a right to be heard on the merits in both appellate  
14 and post-conviction proceedings. But like Petitioners, *Amici* critically fail to  
15 acknowledge this Court’s rationale underlying *State v. Reed*: “Subsection  
16 (A)(1)’s requirement that victims ‘be treated with fairness, respect, and  
17 dignity, and...be free from intimidation, harassment, or abuse, throughout  
18 the criminal justice process’; *it does not create rights to any particular*  
19 *disposition*. Subsection (A)(8)’s declaration that victim must ‘receive prompt  
20 restitution’ [is a right which] contemplates the entry of a restitution order  
21 that is subject to appellate scrutiny, which may result in reversal or  
22 modification of the order. Because subsection (A)(8) *does not guarantee*  
23 *victims any particular appellate disposition,*” a victim’s right to prompt  
24 payment of restitution is unaffected by such review. 248 Ariz. 72, 456 P.3d  
25 453, 459, ¶24 (2020)(*emphasis added*); *see also, Reed* at 462 ¶33 (“The victim’s  
26 rights would not be infringed by a decision on the merits [of an appeal], as  
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1 she never possessed a right to avoid such a decision.”).

2 Moreover, like Petitioners, *Amici* fails to mention that the victim  
3 currently receives restitution payments—and will continue to do so unless  
4 and until the conviction or sentence is vacated.

5 At bottom, the victim’s right to receive prompt restitution is not  
6 *implicated* by Hanson’s post-conviction claims raised below. Should he  
7 succeed on any claim ultimately resulting in a new sentencing, the victim  
8 will then have the right to be heard on sentencing issues, including  
9 restitution. *See*, A.R.S. §13-4402(B); Art. 2, §2.1(A)(4); A.R.S. §13-4437(E).

10 **B. The VBR is plain; it requires no interpreting.**

11 *Amici’s* related contention is that this Court must interpret the VBR in  
12 a manner which effectuates the intent of those who framed its provisions.  
13 (*Amicus*, p. 11). This is certainly true, but on the issue presented the VBR is  
14 plain; it requires no interpreting.

15 Only those rights expressly afforded by the VBR control the inquiry  
16 here. The VBR, VRIA and court rules *do not* provide victims a right to be  
17 heard on whether a defendant should be afforded a delayed appeal, or a  
18 right to be heard on whether a defendant received ineffective assistance of  
19 counsel. Although contextually distinguishable, the reasoning in *Bostock v.*  
20 *Clayton County, Georgia*, 140 S.Ct. 1731 (June 15, 2020)(Gorsuch, J.) is  
21 particularly *apropos* in demonstrating the futility of *Amicus’* “framer’s  
22 intent” argument. (*Amicus*, at p. 11).

23 First, the voters, the legislature, and this Court pointedly and  
24 expressly set forth the instances and subjects upon which a victim’s “right  
25 to be heard” attaches. *See, e.g.*, Rule 39(b)(7)(A-I)(listing circumstances  
26 where victim’s right to be heard attaches). At least *some people* foresaw

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1 Respondent Judge’s application of that law as written. *Cf., Bostock*, at 1750.

2 Second, presuming that nobody contemplated the *result* reached by  
3 Respondent Judge here, *Amicus* implies this Court should not dare to admit  
4 that Respondent’s ruling follows ineluctably from the VBR, Rule 39 and the  
5 statutory text of VRJA; rather, the Court should decline to enforce the plain  
6 terms of the law. *Cf., Bostock, supra.* “That is exactly the sort of reasoning  
7 [the United States Supreme Court] has long rejected.” *Ibid.* This Court  
8 should reject it as well.

9 Third, “[t]he people are entitled to rely on the law as written, without  
10 fearing that courts might disregard its plain terms based on some  
11 extratextual consideration.” *Bostock*, at 1749.

12 “However framed, [*Amicus*] logic impermissibly seeks to displace the  
13 plain meaning of the law in favor of something lying beyond it.” *Ibid.*  
14 Crime victims, like the legislature, are not free to expand rights beyond  
15 those expressly afforded by the VBR. *See, Champlin v. Sargeant*, 192 Ariz.  
16 371, 373 n. 2 (1998) (rulemaking power under VBR “extends only so far as  
17 necessary to protect rights *created by* the [VBR] and not beyond.”); *State v.*  
18 *Hansen*, 215 Ariz. 287, 290 ¶¶11-13 (2007)(same); *Reed, supra.*, at 459, ¶20  
19 (2020)(“The legislature’s rulemaking authority under the VBR is restricted.  
20 It ‘extends only so far as necessary to protect rights *created by* the VBR’.”).

21 The VBR itself makes clear that whether Hanson is at fault for failing  
22 to timely appeal, and whether he received ineffective assistance of counsel  
23 during any criminal proceeding, are *not* subjects on which victims have a  
24 right to be heard. Respondent Judge’s ruling did not place “form over  
25 substance” as *Amici* asserts. (*Amicus*, p. 8). Rather, it was a ruling born  
26 purely of substance... in accordance with the law... as written.

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1 **III. Conclusion**

2 The VBR does not grant victims a right to be heard on whether a  
3 criminal defendant's failure to timely appeal was through no fault of his  
4 own. Nor does the VBR grant victims a right to be heard on whether a  
5 criminal defendant received ineffective assistance of counsel in violation of  
6 the Sixth Amendment. Respondent's ruling prohibiting the victim from  
7 filing responses regarding these two issues was correct; it should be upheld.

8  
9 RESPECTFULLY SUBMITTED this 2nd day of November, 2020.

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