Treasure VanDreumel, 012392
LAW OFFICE OF TREASURE VANDREUMEL, PLC
801 N. 1st Avenue
Phoenix, Arizona 85003
602-253-7348
vandreumellaw@gmail.com

Lori L. Voepel, #015342
JONES, SKELTON & HOCHULI, PLC
40 N. Central Avenue, Suite 2700
Phoenix, Arizona 85004
(602) 263-7312
lvoepel@jshfirm.com
minuteentries@jshfirm.com
Attorneys for RPI Hanson

IN THE SUPREME COURT

STATE OF ARIZONA

BETH FAY,

Petitioner,

v.

THE HONORABLE DEWAIN D. FOX, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,

Respondent Judge,

and

STATE OF ARIZONA; JORDAN MICHAEL HANSON,

Real Parties in Interest.

Arizona Supreme Court Case No. CR-20-0306-PR

Court of Appeals, Division One No. 1 CA-SA 20-0123

Maricopa County Superior Court No. CR 2015-005451-001

RPI HANSON'S COMBINED RESPONSE TO PETITIONER FAY'S AND PETITIONER STATE'S PETITIONS FOR REVIEW

I. INTRODUCTION:

Arizona crime victims have a right to be heard to enforce any right granted them by the Victim's Bill of Rights ("VBR"), as implemented by the Victim Rights Implementation Act ("VRIA") and court rules. In Rule 32 proceedings the rights *created by* the VBR are the right to notice of and to be present during criminal proceedings, art. 2, §2.1(A)(3), and the right *to be heard* "at any proceeding in which postconviction *release* from confinement is being considered." art. 2, §2.1(A)(9). However, because victims are not parties to criminal proceedings, they may not file substantive pleadings concerning the merits of the case, control the proceedings, plead defenses, or examine or cross-examine witnesses. *State v. Lamberton,* 183 Ariz. 47, 49 (1995); *Lindsay R. v. Cohen,* 236 Ariz. 565 (App.2015). Legislative modifications to the VRIA made post-*Lamberton* and post-*Lindsay R.* have altered none of this, nor could they.

Petitioners seek review of Respondent Judge's ruling that victims lack any right "to be heard"concerning post-conviction relief ("PCR") claims seeking a delayed appeal and alleging ineffective assistance of counsel ("IAC"). Because there exists no constitutional, statutory or rule-based right for Petitioner Fay ("Fay") to be heard on the merits of either claim; because Fay is a non-party; and because Rule 32.9 permits only *the State* to respond to PCR claims; Fay lacks any right to plead defenses to Hanson's claims. Respondent's ruling was wholly consistent with the VBR and longstanding precedent disallowing victims from acting as a party. Now seems a good time for this Court to *again* distinguish the respective roles of parties from non-parties in criminal proceedings.

II. THE ISSUE PRESENTED FOR REVIEW:

Whether Respondent Judge correctly ruled victims lack any right "to be heard" on the merits of a defendant's post-conviction claims for delayed appeal and ineffective assistance of counsel.

III. THE MATERIAL FACTS AND RESPONSE TO THE FACTS ASSERTED BY PETITIONERS:

Hanson was convicted of second degree murder after he and his longtime friend got into an altercation, struggled over a gun which fired, instantly killing the victim. Hanson was sentenced to a mitigated term of 12 years. At the time of sentencing, restitution wasn't requested.

Hanson timely appealed his conviction. Two years later, while Hanson's appeal remained pending, Fay submitted pleadings in the superior court requesting restitution, arguing the law, and arguing for entry of a Criminal Restitution Order ("CRO"). State's counsel played no role in those proceedings. Because Fay's counsel lacked the responsibilities and obligations of a prosecutor, Fay secreted from the court and defense counsel relevant information concerning restitution. Restitution orders were entered, as was a CRO.

Hanson, who was in prison and had waived his presence for the restitution proceedings, wasn't timely informed of the court's orders. He wasn't endorsed on them, didn't learn of them until several months later, and wasn't informed of his right to appeal those orders. By the time he learned of them, his time to appeal had expired.

The mandate then issued affirming his conviction.

Hanson timely initiated PCR proceedings.[1] Initially, he filed a "Limited PCR" requesting a delayed appeal, Rule 32.1(f). (Fay PFR Appx., Exhibit 16). He requested "these PCR proceedings be thereafter held in abeyance pending exhaustion of his appellate remedies." *See, State v. Rosales, infra.* Petitioners contend Hanson's Limited PCR raised "sentencing issues ... in the form of restitution arguments".[2] It *didn't;* it asserted *only* what Rule 32.1(f) required: Hanson's failure to appeal the restitution orders was through no fault of his own.[3]

Fay responded in opposition, stating: "Defendant's Petition should be denied because nothing in it suggests that he allegedly had no notice of and would have timely appealed a decision on restitution that had previously been entered on agreement between himself and [the victims]." She asserted "it was certainly the Defendant's fault if he chose... not to appeal from this Criminal Restitution Order"; "any claimed right to appeal has long since gone away."[4] Fay continued those assertions on special

---

[1] Although not at issue, Petitioners suggest Hanson's PCR was untimely. *See,* Fay PFR, 1:3; State PFR, p. 4. The mandate affirming Hanson's conviction and sentence issued June 24, 2019–triggering his right to file a *Notice* of post-conviction relief for claims raised under Rule 32.1(a). Rule 32.4(b)(3)(A). Claims under Rule 32.1(f) must be noticed "within a reasonable time after discovering the basis of the claim." Rule 32.4(b)(3)(B). Hanson's claims were timely.

[2] State PFR, p. 2; *see also,* Fay PFR, 6:23-28, contending Hanson's request for delayed appeal "challenge[d] the mostly agreed upon" restitution.

[3] Footnote 2 of the State's PFR gratuitously adds that Hanson's appellate lawyer received the restitution orders. It fails to mention the appellate lawyer was *not counsel of record* in the superior court; her endorsement was a clerical error. She relied on the court's obligation to inform Hanson of those orders and right to appeal, Rule 26.11. She also properly assumed Hanson's superior court counsel of-record would abide his duties and obligations.

[4] Hanson SA Response Appx., Exhibit A

action. (*See,* SA Pet., 16:12, complaining Respondent Judge precluded the victim "from now arguing that this Defendant has waived any" challenges to the restitution or CRO).

Although a Rule 32.1(f) claim for delayed appeal *does not* serve to waive other potential claims–such as IAC–which might later be brought on PCR, *State v. Rosales,* 205 Ariz. 86 (App.2003)[5], Fay's substantive response in opposition coupled with the procedural tension born of this Court's decision in *State v. Spreitz,* 202 Ariz. 1 (2002)[6] rendered *the risk* of waiver of other PCR claims too great. Thus, authorized by Rule 32.9(d), Hanson filed an Amended PCR.[7] The amendment was not a "separate" PCR as Fay contends, nor did it allege "various claims including a significant number of issues to the award of restitution to the Victim" as the State contends.[8] Hanson's Amended PCR levied two additional claims: *Trial counsel* rendered ineffective assistance, and *restitution counsel* rendered ineffective assistance.

Simultaneously therewith, Hanson filed a Motion to Strike Fay's response to his "Limited PCR" and prohibit Fay from responding to his amended petition.[9] Outlining the pertinent law, Hanson asserted Fay

---

[5] "We conclude that petitioner, by restricting his first Rule 32 petition to a request for a delayed appeal under Rule 32.1(f), filed solely as a procedural means of obtaining this court's review and raising no substantive issues on which the trial court ruled, did not waive any potential claims arising under any of the other provisions of Rule 32.1." 205 Ariz., at 91, ¶16.

[6] Holding that in general, claims of IAC must be raised in an initial PCR to avoid waiver and preclusion.

[7] Fay PFR Appx., Exhibit 18

[8] State PFR, p. 5

[9] Fay PFR Appx., Exhibit 17, 1:6-9

lacked standing to "be heard" on the issues of whether a delayed appeal should be granted *or* whether Hanson received IAC.

Fay responded to the motion to strike, contending her "rights to prompt payment of restitution" and "justice and due process" translated to a right to be heard on Hanson's PCR claims.[10] She sought "to enforce the [CRO] entered by the court", adding that "[s]triking [her] Response bars victims from alerting [the] court to the defendant's previous restitution agreements".[11]

Respondent initially denied Hanson's motion to strike. Hanson sought reconsideration[12]; Respondent granted it, directing Petitioners respond to the narrow issue presented: Whether there exists any right for victims to "be heard" on whether a defendant should be granted a delayed appeal or received IAC.[13]

Petitioners each responded.[14] Fay asserted that her right to "prompt payment of restitution", and "fairness, dignity, respect and due process", along with the VRIA, conferred a right to be heard on Hanson's claims. She complained Hanson: "claims for the first time in [an amended] PCR that the restitution award is 'illegal'"; "asks this court to silence his victim from explaining why his restitution challenge should fail"; and "has

---

[10] Fay PFR Appx., Exhibit 19, 2:10-14

[11] *Id.*, at 2:15-16, 5:9. Of course, should relevant facts exist outside the record, an evidentiary hearing will be set by the PCR judge. *That's what PCR is for.* If an evidentiary hearing is set, Fay, her counsel, and others will be called to testify *as witnesses.*

[12] SA Response, Appx. Exhibit B.

[13] SA Response, Appx. Exhibit C

[14] SA Response, Appx. Exhibits D, E

waived any new efforts to reverse course and challenge on PCR what has been previously been [*sic*.] agreed upon restitution."[15] The State's response asserted the VRIA and the victim's right to receive prompt restitution entitled Fay to be heard on the merits of Hanson's claims.[16]

Hanson replied, countering Petitioners' contentions.[17] In a thorough, detailed order, Respondent granted the motion to strike and prohibited Fay from responding to Hanson's amended PCR, stating:

> 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 the 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. As much as the Court respects victim's rights, the Court is tasked with enforcing the law as written.

Fay sought special action relief; the State responded in support. Following oral argument held August 19, 2020[18] the appellate court denied Fay relief regarding Hanson's Rule 32.1(f) claim; it found her contention as to Hanson's Rule 32.1(a) claim unripe. Hanson agrees it was not unripe.

Both the State and Fay now seek review.

Fay initially asserts that *Hanson* "argues" victims lack the right "to file *any* responsive substantive pleadings or to make *any* argument in Rule 32 post-conviction matters." (Fay PFR, p. 1, ¶1, *emphasis* in original). The record belies this. Hanson has *always* acknowledged that victims may

---

[15] SA Response, Appx. Exhibit D

[16] SA Response, Appx. Exhibit E

[17] SA Response, Appx. Exhibit F

[18] **Appendix hereto, Exhibit A,** Transcript of oral argument, August 19, 2020)

assert their rights whenever a right guaranteed by the VBR, VRIA or Rule 39 arises; his pleadings below made that clear.[19]

Hanson's pleadings consistently framed the issue narrowly, as one concerning *only* whether Fay has a "right to be heard" regarding *the merits* of his 32.1(f) and (a) claims.[20] Respondent's ruling answered the precise issue Hanson raised:

> [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.

(Fay PFR, Exhibit 21). It is Fay who, commencing with her objection to Hanson's Motion to Strike her response to Hanson's Limited PCR, has consistently re-cast the issue into one asking whether victim rights apply to PCR proceedings–a non-issue she carried into the appellate court.[21] She did this despite having filed eight other pleadings below, both before *and after*[22] Respondent's ruling, *none* of which Hanson moved to strike. Hanson has, repeatedly, highlighted Fay's attempt to re-cast the issue.[23] To the extent Petitioners contend Respondent *held* victims could never be heard on

---

[19] *See, e.g.,* RPI Hanson's Response Re: Petitioner's Supplemental Authority In Support of Her Petition for Special Action, filed 8/12/20.

[20] *See* Fay PFR, Appx. Ex. 17, Hanson Motion to Strike; SA Response Appx. Ex. B, Motion for Reconsideration, p. 15; SA Response Appx. Exhibit F, Reply Re: Motion to Strike, p. 47.

[21] SA Pet., 4:1-2; 9:28-10:1 (Respondent *held* "victims do not have standing to give input into any Post-Conviction proceedings" and nothing "grants victims with the right [*sic.*] to be heard during any post-conviction relief proceedings [*sic.*]".)

[22] *See,* **Appendix hereto**, **Exhibits B, C**

[23] *Id.,* footnotes 19, 20; *see also,* Hanson SA Response, 1:13-19

any issue in post-conviction proceedings[24], both misstate Respondent's ruling.

Hanson agrees with the State: The issue presented is of statewide interest and public importance and will inevitably arise again.[25] Because Petitioners posit that neither *State v. Lamberton* nor *Lindsay R. v. Cohen* remain good law, guidance from this Court appears warranted.

IV. REASONS WHY RELIEF SHOULD BE DENIED:

A. The standards governing the claims raised on PCR:

In Arizona, criminal defendants have a constitutional "right to appeal in all cases." Ariz.Const. art. 2, §24; *see also,* A.R.S. §13-4033(A)(3) (authorizing appeal from a restitution order). "A convicted defendant's right to appeal is substantive, but 'the manner in which the right may be exercised is subject to control through the use of procedural rules.'" *State v. Reed,* 248 Ariz. 72, ¶14 (2020)(quoting *State v. Birmingham,* 96 Ariz. 109, 110 (1964). When an appeal is not timely taken, a defendant may seek relief by requesting permission to file a delayed appeal. Rule 32.1(f). The defendant must prove "the failure to timely file a notice of appeal was not the defendant's fault." *Ibid.*

Petitioners assert that because the subject matter of the anticipated appeal necessarily involves the restitution orders entered, Fay has a right to be heard on Hanson's request for delayed appeal. Quite the contrary, neither the claim nor its proof concern the merits of the appeal sought.

---

[24] *See*, Fay PFR, p. 2 ("trial court prevented victim from being heard on any part of the Rule 32 proceedings."); State PFR, p. 5 (Respondent "found that nothing ...gave victims the right to be heard in a post-conviction relief proceeding, even as to issues of restitution.").

[25] State PFR, pp. 6-7

To prove IAC, Hanson "must show both that counsel performed deficiently and that counsel's deficient performance caused him prejudice." *Buck v. Davis,* 137 S.Ct. 759, 775 (2017); *Strickland v. Washington,* 466 U.S. 668 (1984). The Supreme Court has pointedly recognized two key points upon which Hanson's IAC claims are based: First, "the type of breakdown in the adversarial process that implicates the Sixth Amendment is not limited to counsels' performance as a whole--specific errors and omissions may be the focus of a claim of ineffective assistance of counsel as well." *United States v. Cronic,* 466 U.S. 648, 656 n. 20 (1984). Second, "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research is a quintessential example of unreasonable performance under *Strickland*", *Hinton v. Alabama,* 571 U.S. 263, 274 (2004). Proof of a Sixth Amendment violation requires setting aside the judgment. *Strickland, supra.*

Because Hanson's IAC claim outlined specific errors and omissions by his restitution counsel, and highlighted counsel's failure to know the law, Petitioners parlay Hanson's claim into one implicating Fay's right to be heard at *sentencing–to wit,* proceedings *to determine* restitution–and her constitutional right "to receive prompt restitution."

For the reasons stated below, Petitioners are incorrect.

B. As non-parties, victims may not file substantive pleadings or plead defenses to the merits of any criminal action.

Although A.R.S. §13-4437(A) grants victims standing to "seek an order" *to enforce* any *victim* right, Fay's response to Hanson's Rule 32.1(f) claim instead sought an order *denying the defendant* his right of appeal, and she's desirous of an opportunity to seek an order *denying the defendant's* right to relief under the Sixth Amendment.

The procedural construct governing lawyers representing victims is is akin to that governing lawyers representing non-party witnesses in any criminal proceeding: The lawyer may not submit substantive pleadings *other than* those necessary to ensure the witness's rights are protected. Nobody would disagree that a lawyer asserting a non-party witness's Fifth Amendment right to refuse to testify *could not* file substantive pleadings weighing in on whether dismissal is warranted due to that invocation. Substantive pleadings on the law and merits of a criminal action are reserved for the parties alone.

In *State v. Lamberton* this Court stated: "[N]either the VBR nor the VRIA gives victims a right to control the proceedings, to plead defenses, or to examine or cross-examine witnesses; the VBR and the VRIA give victims the right to participate and be notified of certain criminal proceedings. This is not the same as making victims parties." *Id.,* at 49. The point was reiterated in *Lynn v. Reinstein,* 205 Ariz. 186, 191 ¶15 (2003) and *Lindsay R. v. Cohen,* 236 Ariz. 565 (App. 2015)(as non-parties, victims may neither usurp the prosecutor's unique role nor file "substantive pleadings *other than* those that are necessary to ensure that victim rights are being protected.").

The State posits that VRIA modifications subsequent to *Lamberton* and *Lindsay R.* "have changed the legal landscape."[26] Citing the 2016 modifications to A.R.S. §13-4437, Fay contends *Lindsay R.* was "legislatively overruled".[27] In essence, Petitioners contend that as a consequence of statutory changes, "victims may respond to any challenges to the determination of restitution" and consequently "have standing to participate in these post-conviction proceedings because the issues involve a determination of restitution for economic loss."[28]

Careful inspection of *Lamberton, Lindsay R.,* the VRIA, and Hanson's claims reveals Petitioners are wrong with respect to that which matters here. In a nutshell, the statutory changes had no impact on *Lamberton* or *Lindsay R.'s* command that victims aren't parties; the VRIA *does not* permit victims to "respond to any challenges to the determination of restitution" –it grants only a right to be heard on "the extent of the loss and the need for restitution" in proceedings *determining* restitution; Hanson's PCR claims *do not* involve "a determination of restitution"; and victims lack standing to plead defenses to claims raised under Rule 32.1.

1) *State v. Lamberton*

In *Lamberton,* the defendant filed a PCR contending his sentence violated the Eighth Amendment. Victim's counsel filed a "legal memorandum" analyzing the case relied on by Lamberton; Lamberton interposed no objection.

---

[26] State PFR, pp. 3, 9

[27] Fay PFR, 10:19

[28] Fay PFR, 11:6-15

Lamberton's claim was successful; a *new* sentencing was ordered. The victim was heard at the re-sentencing and, displeased with the result of the proceedings, filed her *own* petition for review. Recognizing victims were neither aggrieved by court decisions *not* relating to victim rights, nor parties to the criminal proceedings, *Lamberton* held victims lack standing under Rule 32.9(c)[29] to file their own petition for review.

Citing *Lamberton,* the State tries mightily to convince this Court its decision expressly permitted victims to file substantive pleadings in defense to claims raised under Rule 32.1. Twice it asserts this Court "held" "that a victim has the right to be heard, including the right to file pleadings in post-conviction proceedings, on sentencing issues."[30]

Lamberton **did not** so hold. As it expressly clarified: "The only issue we decide in this opinion is whether the court of appeals erred in dismissing the Victim's separate petition for review. We find that it did not." *Id.,* at 48. It noted that "[i]f the trial court had refused to hear from the Victim at the post conviction relief proceeding, for example, then the Victim could have filed a special action with the court of appeals to assert her right under article 2, §2.1(A)." *Id.,* at 50. Assuming *Lamberton's* Eighth Amendment claim sought his *release* from confinement, that's certainly true–the VBR grants victims the right to be heard on *that* issue. §2.1(A)(9).[31] However, in prohibiting victims from "pleading defenses" to claims raised in a criminal case, *Lamberton* inferentially made clear the victim's "legal

---

[29] Now Rule 32.16(a)(1)

[30] State PFR, p. 10

[31] There's no question the victim had a right to be heard at Lamberton's *re-sentencing.* Ariz.Const., art. 2, §2.1(A)(4).

memorandum" containing "her own analysis of *Bartlett II*"–the case relied on in support of Lamberton's Eighth Amendment claim–crossed the line separating parties from non-parties.

The State posits *Lamberton's* holding doesn't survive the amendments to A.R.S. §§13-4401(2), 13-4437(A).[32] Except that it does. Read collectively, these provisions make clear a victim's "standing to seek an order, to bring a special action or to file a notice of appearance in an appellate proceeding seeking to enforce any right or to challenge an order denying any right guaranteed victims" under the VBR, VRIA or court rules. *Lamberton* acknowledged this, but observed: "Section §13-4437, however, does not give the Victim standing to argue before an appellate court that the trial court's ruling in a criminal proceeding was error or to bring the types of action against the defendant that the State can bring." *Id.,* at 50.

The statutory modifications didn't change that.

The "types of action *against the defendant that the State can bring"* are *all* are captioned *State v. Defendant. Cf., Lamberton,* at 49 (noting "the parties on a petition for review in the appellate court are designated the same as the parties in the trial court.").

The provisions of §13-4437(A)–existing both at the time of *Lamberton* and today–make clear victims may "bring a special action" aimed at enforcing their rights. The 2019 amendment reiterated "the proceedings may be initiated by the victim's counsel or the prosecutor." Such proceedings are not *against the defendant;* they are *against the Judge*–as this case aptly demonstrates.

---

[32] State PFR, p. 10, n. 3

Lamberton's actual holdings remain good law and controlling: As non-parties, victims may not control criminal proceedings or "plead defenses" to the merits of a criminal case; at the superior court level, victims may *only* file pleadings seeking to enforce some right enumerated by the VBR. Victims aren't harmed by trial court rulings unrelated to victim rights because such rulings do not operate to deny some personal or property right, nor does it impose a substantial burden on victims. *Id.,* at 49; *accord, State v. Reed,* 248 Ariz. 72, ¶33 (2020)(Victims possess no right to avoid trial court decisions on their merits). And while victims may initiate proceedings in higher courts *against the judge* challenging "an order denying any right", they may not initiate proceedings challenging a court's grant or denial of relief on Rule 32.1 claims.

2) *Lindsay R. v. Cohen*

In *Lindsay R. v. Cohen* victim's counsel again overstepped the bounds of the law. In connection with restitution proceedings, he filed a "memorandum of law" concerning restitution. *Id.,* at 566 ¶3. He also gave notice that he "intended to conduct the restitution hearing." *Ibid.* Defense counsel moved to strike the victim's substantive filing and sought to determine the lawyer who would control the restitution hearing. Victim's counsel opposed the motion.

The trial court ruled the victim was "precluded from submitting any substantive pleadings other than those [that] are necessary to ensure that ... victims rights are being protected." *Ibid.* It also limited the role of victim's counsel to "providing out-of-court assistance to the assigned prosecutor and presence at all proceedings to ensure victim rights are protected." *Ibid.*

The rulings were affirmed on special action. The court made clear that "[t]hough the prosecutor owes duties to victims, the prosecutor's responsibility is to represent society's interests and 'see that justice is done on behalf of *both* the victim and the defendants.'" *Id.,* at 567, ¶9. "The purpose of restitution proceedings would be subverted if the victim's counsel were allowed to take the prosecutor's place–such an arrangement would essentially transform a criminal sentencing function into a civil damages trial. Contrary to the petitioners' assertions, nothing in the VBR, the VRIA, Rule 39, or Arizona case law authorizes such a result, even under the liberal-construction standard prescribed by A.R.S. §13-4418." *Id.,* at 567-568, ¶10.

Lindsay R. concluded:

> The superior court's order appropriately limited the victims' participation in the restitution proceedings to accord with the rights provided by the VBR. **While a victim has the right to have counsel present evidence on the subjects enumerated in A.R.S. §13-4426, the victim's counsel in this case sought to invade the state's province.**

Id., at 568, ¶11 (**emphasis** added).

Following *Lindsay R.,* victims *still* are not permitted to file substantive pleadings concerning the law governing restitution–or usurp the prosecutor's role in any way. As *Lindsay R.* recognized, victims could "present evidence **on the subjects enumerated in A.R.S. §13-4426.**" Then, as today, that statute permits victims to "present evidence, information and opinions that concern...the *need for* restitution". That statute was and is aligned with §13-4410(C)(2),(3), permitting victims to present "an explanation of *the extent of* any economic loss or property damage" and "an opinion of *the need for and extent of* restitution." *Those are* "the subjects" on which the VRIA grants victims a right to be heard concerning restitution.

Highlighting *Lindsay R.'s* observation that restitution is not a claim that "belongs to the victim", Petitioners contend the VRIA "legislatively overruled" *Lindsay R.* in 2016.[33] It didn't do so in any way that matters here.

Recognizing that victims aren't parties to criminal proceedings, *Lindsay R.* said: "Restitution is not a claim which belongs to the victim, but a remedial measure that the court is statutorily obligated to employ." 236 Ariz., at 567 ¶9. The "remedial measure"governing restitution is found at A.R.S. §§13-603(C) and -804.

A year later, A.R.S. §13-4437(A) was amended to state that the rights guaranteed victims by the VBR, VRIA and court rules "belong to the victim." The remedial measure addressed in *Lindsay R.* is not found within those provisions. Despite its echo of *Lindsay R.'s* "belong to the victim" language, the statutory amendment was clearly not a legislative clap-back to its holding that victims are prohibited from usurping the prosecutor's role or filing substantive pleadings concerning the law.

Petitioners contend the 2016 addition of subsection (E) to A.R.S. §13-4437 "explicitly gave victims the right to present evidence or information and to make argument to the court, personally or through counsel, at any proceeding to determine the amount of restitution pursuant to §13-804."[34] That's what the statute now states, but Fay baldly asserts what the State implies: the amendment permitted "victims [to] respond to any challenges to the determination of restitution" whenever such challenges arise.[35]

---

[33] State PFR, pp. 10-11; Fay PFR, 10:19-28.

[34] State PFR, p. 11.

[35] Fay PFR, 10:26-11:9.

Succinctly put, Petitioners suggest that because victims are entitled to be heard *on something* during restitution proceedings, the amendment granted entitlement to be heard on *anything,* and *everything, anytime*.

Petitioners are grossly mistaken.

As *Lindsay R.* accurately observed, §13-4426(A) *already* granted victims the right to "present evidence, information and opinions that concern...*the need for* restitution." And A.R.S. §13-4410(C) *already* granted the right to be heard concerning "*the need for and extent of restitution.*" The addition of subsection (E) didn't alter these two subjects on which victims had a right to be heard. It altered the *means* and *method* through which these rights could be asserted, and expressly limited that to proceedings *determining* restitution.

Prior to *Lindsay R.,* the VRIA provided three means by which victims could exercise their right to present evidence on the two specific subjects authorized. They could present an oral statement, submit a written statement, or submit a form of media. A.R.S. §13-4428(B). That statute remains. In practice, the court received the evidence through the prosecutor. This is undoubtedly why, despite the victim's existing right to present evidence, *Lindsay R.* limited victim's counsel's role to "providing out-of-court assistance" to the prosecutor during the hearing.

Subsection (E) accomplished two things: It expanded the existing *means* to include a right "*to make an argument*"–but it didn't expand the two subjects about which argument could be made. It also clarified the *method,* cementing that the victim's evidence and argument could be presented *to the court*, by the victim "personally or through counsel". Because subsection (E) was expressly limited to proceedings "to determine the

amount of restitution pursuant to §13-804", it clearly was a legislative response to *Lindsay R.*'s preclusion of the victim's personal participation in restitution proceedings. It's equally clear that subsection (A)'s "belong to the victim" language was aimed at the same goal: Victims had a right to assert *their own* rights.

The takeaway is that in proceedings *determining* restitution, the victim's right to be heard concerning *the need for* restitution and *the extent of* the loss wasn't limited by subsection (E); but neither was their right to be heard on those subjects *expanded* to include matters beyond their scope. Victims *still* may not file substantive pleadings or make arguments to the court concerning the law or merits of any criminal action, control the proceedings, or usurp the role of a party. On these critical aspects, *Lamberton* and *Lindsay R.* remain unimpacted by the VRIA amendments, and are both controlling here.

Fay exerts considerable effort addressing the restitution proceedings that occurred.[36] But in direct violation of *Lamberton, Lindsay R.* and the VRIA, Fay's counsel didn't merely want to take part in the restitution proceedings, he wanted to take over–and did.[37] He filed substantive pleadings concerning the law of restitution, simultaneously avoiding disclosure of information critical to the court's and defense counsel's discernment of the actual amount owed. Despite Petitioners' penchant for interjecting Fay's "negotiations" and "agreements" with defense counsel during those proceedings, neither amount to anything since both were

---

[36] Fay PFR, pp. 4-6; Fay PFR Appx. Exhibits 1-15

[37] The State concedes Fay's counsel "handled the entire restitution proceedings; the State did not participate *at all*." (State PFR, p. 11, *emphasis* added).

premised on the selective facts Fay chose to disclose.[38]

What's more, unlike civil damages, criminal restitution is not subject to negotiation, nor may the law be circumvented by agreements.[39] All compensable economic losses *must* be paid by the defendant. As *Lindsay R.* observed, restitution is mandatory; victims may not usurp the prosecutor's role. While victims may now present evidence, information, opinion *and argument* concerning "the extent of any economic loss" and "the need for restitution", only the parties may argue the law. *Cf. State v. Robertson,* 249 Ariz. 256, ¶¶21, 24 (2020)(recognizing the State is generally in the better position to know the correct law; the prohibition on illegal sentences is well-settled). *The State* has the burden of proof, which includes establishing the claimed losses are compensable under the restitution statutes–*not the victim.* And because of *this,* only the State and the defendant may appeal a restitution order. A.R.S. §§13-4032, 13-4033.

Following *Lindsay R.* it should've been crystal clear that the prosecutor's role as minister of justice can't be obviated or delegated. Had the State participated, the prosecutor would've been required to disclose the relevant information Fay secreted. *See,* Rule 26.8. The VBR cannot act as "a sword in the hands of victims to thwart a defendant's ability to

---

[38] *Some* undisclosed facts were discovered through counsel's PCR investigation. Fay still refuses to disclose other relevant information. *See,* **Appendix hereto, Exhibit C** (refusing to disclose facts, documents and information relied on by her expert in his report(s) submitted to the court during the restitution proceedings).

[39] Fay insists the restitution orders aren't subject to review because Hanson's lawyer agreed to it. *See,* Fay PFR at: 2:22; 3:16; 4:8 and fn. 2; 5:1-20; 5:25; 6:5; 6:7; 6:13; 6:25; 6:28; 9:26. But "[t]he sentencing provisions enacted by our legislature are mandatory and may not be circumvented by agreements", *State v. Kinslow,* 165 Ariz. 503, 507 (1990); nor may a court apply the invited error doctrine to prevent review of a potentially illegal sentence, *State v. Robertson,* 249 Ariz. 256, ¶¶22-28 (2020).

effectively present a legitimate defense." *State ex rel. Romley v. Superior Court (Roper),* 172 Ariz. 232, 241 (App.1992). This is particularly true where, as here, Fay alone possessed the critical information.

The State excuses its abdication of its role in the restitution proceedings, or attempts to shift blame for it, through reference to a court order excusing the prosecutor from the proceedings. (State PFR, p. 4, n. 1).[40] Fay excuses her conduct through assertion of the victim's right to refuse all discovery requests, a position she continues to advance to this day. (*See,* **Appendix hereto, Exhibit C**). Neither excuse is acceptable. Both the prosecutor and Fay's counsel were required to abide by the law; neither did; Hanson's due process rights were violated because of it. The restitution awarded was illegal and amounts to fundamental error. *State v. Whitney,* 151 Ariz. 113, 115 (App.1985).

Like the victim's counsel in *Lamberton* **and** *Lindsay R.,* Fay's counsel *continues* to violate the law–this time, by pleading defenses to Hanson's claim for delayed appeal and seeking to do the same regarding his IAC claims. As a non-party, Fay may not "plead defenses". *Lamberton, supra.* The rules of criminal procedure make plain that only *the State* may respond to claims raised in petitions for post-conviction relief. *See,* Rule 32.9. Those rules are to be enforced as written. *See, State v. Salazar-Mercado,* 234 Ariz. 590, 592 ¶4 (2014)("If a rule's language is plain and unambiguous, we apply it as written without further analysis."); *Cf. Lamberton, supra.* (observing Rule 32.9(c)–now Rule 32.16(a)(1)--permits only an "aggrieved party" to file a Petition for Review; victims are not aggrieved parties).

---

[40] What actually transpired remains unknowable until the transcript is prepared.

C. Hanson's PCR claims do not implicate any victim right.

1) ***The general rights provided by the VBR*****:**

The VBR created certain rights "unique and peculiar" to victims. *State v. Reed,* 248 Ariz. 72, 456 P.3d 453, 459, ¶12 (2002). Among the rights afforded are the right to be treated with dignity and respect, along with the right of due process. However, these general rights are *not* "unique and peculiar" to crime victims.

The right of due process is similarly afforded criminal defendants by the state[41] and federal[42] constitutions, while the right to be "treated with fairness, respect and dignity" is afforded *all* participants in the civil and criminal process. *See,* R.Sup.Ct., 81, Canon 2, Rule 2.2 ("Impartiality and Fairness"); Rule 2.8(B) ("Decorum, Demeanor...."). Like the victim's right to speedy trial addressed in *State v. Brown,* these general rights asserted by Fay pre-existed the VBR; none are *unique* and *peculiar* to crime victims. 194 Ariz. 340, 343 ¶12 (1999). Unquestionably, "the judicial system as a whole is vitally interested in advancing the goal of prompt, fair resolution of all actions, including criminal cases, for the benefit of all participants as well as victims." *Ibid.*

Most significantly *sub judice*, a victim's right to fairness, dignity, respect and due process do "not create rights to any particular disposition." *State v. Reed,* 456 P.3d 453, 460 ¶24 (2020).

Although §2.1(A)(11) of the VBR facially grants a "right" to have *all rules* governing criminal procedure protect victims, in 1990 this Court "narrowly construed" the provision to "deal[ ] only with *procedural rules*

---

[41] *See,* Arizona Constitution, article 2, §§4, 24

[42] *See,* U.S. Constitution, Amend. 14

pertaining to victims", *Slayton v. Shumway,* 166 Ariz. 87, 92 (1990) (*emphasis* added). Claims brought under Rule 32.1(a) and 32.1(f) are simply *not* procedural rules "pertaining to victims."

2) *No provision grants Fay a right to be heard below*:

No constitutional, statutory or rule-based right grants Fay a right to be heard on Hanson's claim for delayed appeal or claims of IAC.

Petitioners' heavy reliance upon the 2016 modifications to A.R.S. §13-4437(A) and (E) are unavailing. Any contention that the statute now permits victims to usurp the prosecutor's role in proceedings determining restitution, or to present substantive legal arguments concerning *what the law is or allows,* is an unmitigated stretch. Not only do Petitioners ignore the two subjects on which the VRIA expressly grants victims a right to address, they ignore the fact that the right to "make an *argument* to the court, personally or through counsel" on those subjects is *limited* to proceedings "to *determine* the amount of restitution pursuant to §13-804." A.R.S. §13-4437(E).

Hanson's Rule 32.1 claims don't involve a determination of the amount of restitution owed to Fay.[43] As Respondent Judge aptly observed:

> The issues before the Court in this post-conviction 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[s]. 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.

---

[43] Fay argued Hanson's PCR claims seek to "claw back every dollar of restitution"; "They are not conceding any restitution dollar is owed." (**Appendix hereto, Exhibit A,** 13:9-12). Actually, as Hanson said, his "PCR levied no claim for the return of restitution already paid; to be certain, *some* restitution is due the victim." (Hanson's Sur-Reply on Special Action, filed 6/30/20, 1:11-12).

(Fay PFR Appx., Exhibit 21, pp. 4-5). Subsection (E) doesn't apply to Hanson's PCR claims. *If* relief is granted and new proceedings ordered "to determine" restitution, Fay will *then* be heard. A.R.S. §13-4402(B).

Petitioners' insistence that Hanson's claims implicate Fay's right to receive prompt restitution, art. 2, §2.1(A)(8), is equally unavailing. The Arizona Department of Corrections continues to take monthly payments from Hanson's prison account pursuant to the restitution orders while the PCR is pending resolution. *Contrast, State v. Hansen,* 215 Ariz. 287 (2007).[44]

Regardless of how many times Fay reiterates her complaint that "a victim's right to prompt restitution *could be affected*" by resolution of Hanson's PCR claims[45], that doesn't convey a right "to be heard" on Hanson's Rule 32.1(f) or (a) claims. Ten months ago this Court made clear that a victim's right to receive prompt payment of restitution is not implicated by post-judgment review. *State v. Reed,* 248 Ariz. 72, ¶24 (2020).

Reed considered whether "a restitution order abates if, after the conviction and sentence have been affirmed [on appeal], the defendant dies pending a separate appeal from the restitution order." *Id.,* at ¶7. It held the legislature exceeded its restricted rulemaking authority in passing a statute directing dismissal of an appeal or post-conviction proceeding following the defendant's death. The statute was unauthorized under VBR, since "[f]irst, and most importantly, [the statute] does not affect rights 'unique and specific' to victims." *Id.,* at ¶¶ 23-24.

---

[44] Where a statute conflicted with a procedural rule, the statute prevailed because the rule directly impacted the right to receive prompt restitution. 215 Ariz., at 290, ¶14.

[45] Fay PFR, 9:21; 12:8; 12:11; 12:25; 13:6-8; 14:12

As *Reed* observed, a victim's right to receive prompt restitution "contemplates the entry of a restitution order that is subject to appellate scrutiny, which may result in reversal or modification of the order. Because [VBR] does not guarantee victims any particular appellate disposition", victim rights are unaffected by such review. *Id.,* at ¶24.

At bottom, in Rule 32 proceedings the rights *created by* the VBR are the right to notice of the proceedings, the right to be present, and the right *to be heard* "at any proceeding in which postconviction *release* from confinement is being considered". Article 2, §2.1(A)(9); *accord,* A.R.S. §13-4414(A); Rule 39(b)(7)(I). Hanson's claims don't involve his *release.* Had the legislature expanded a victim's "right to be heard" to include claims for *relief* unrelated to *release,* its effort would've been constitutionally unsound since it would've *created* a right to be heard on a matter falling outside the VBR. *See, Champlin v. Sargeant,* 192 Ariz. 371, 373 n. 2 (1998) (rulemaking power under VBR "extends only so far as necessary to protect rights *created by* the [VBR] and not beyond."); *State v. Hansen,* 215 Ariz. 287, 290, ¶¶11-13 (2007) (same); *Reed, supra.,* at 459, ¶20 (same).

As in *Lamberton*: "Here the proceedings to which the Victim objects deals with the post-conviction *relief* proceeding. Applying the plain language of the state constitution, [the rights afforded by the VBR] do[] not apply to this situation." *Id.,* at 50, citing *Knapp v. Martone,* 170 Ariz. 237, 239 (1992)(emphasizing 'that Arizona courts must follow and apply the plain language of [the VBR]').

As a non-party, Fay may not "plead defenses" to Hanson's claims, *id.,* at 49–only the State can. Rule 32.9.

D. Respondent Judge and the appellate court got it right–mostly.

As the appellate court recognized at oral argument, the question of whether a delayed appeal should be granted is one "just like almost any other question that's strictly an issue for the Defendant" about which a victim has no right "to intervene in." (**Appendix hereto, Exhibit A,** 11:20-12:3).

The State asserts the appellate court "found that the Victim did not need to weigh in on Hanson's Limited [PCR] on the issue of whether he should be afforded a delayed appeal".[46] In actuality, the court wrote: "[W]e 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.' *** *We discern no constitutional, statutory, or rule-based right for Fay to weigh in on whether Hanson is at fault for this delay*."

It's not that there was no "need" for Fay to weigh-in, it's that she had no *right* to do so. The State's chosen prose brings to mind Mark Twain's famous quote, "The difference between the *almost right* word and the *right* word is really a large matter. 'tis the difference between the lightning bug and the lightning."

Respondent's Order similarly explained why Fay was prohibited from pleading defenses to Hanson's claims of IAC. Those claims present a Sixth Amendment issue, *not a victim issue.* As the appellate court observed: "And as far as the ineffective assistance of counsel, isn't that strictly between the Defendant and his lawyer? That's not a victim issue." (**Appendix hereto, Exhibit A,** 13:18-21).

---

[46] State PFR, pp. 6 & 7

Petitioners are correct about one thing. The appellate court erred in finding Fay's challenge to Respondent's Order prohibiting her from responding to Hanson's IAC claims "unripe". Even so, the law governing that issue is the same as that governing Hanson's Rule 32.1(f) claim; the conclusion is also the same: No constitutional, statutory or rule-based right exists permitting Fay to weigh in on whether Hanson received IAC.

V. CONCLUSION/REQUESTED RELIEF:

Fay lacks any right to be heard on, or plead defenses to, Hanson's Rule 32.1(a) and (f) claims; only the State may respond. *See,* Rule 32.9.

Respondent Judge's ruling was correct; it should stand. This Court should also make clear that the boundaries imposed by *Lamberton* and *Lindsay R.* prohibiting lawyers representing non-parties from filing substantive pleadings relating to the merits of a criminal case, or usurping the role of either party in any way, remain steadfast.

RESPECTFULLY SUBMITTED this 9th day of October, 2020.

Treasure VanDreumel
Lori Voepel
Attorneys for RPI Hanson

APPENDIX

INDEX TO APPENDIX

EXHIBIT A

IN THE ARIZONA COURT OF APPEALS

BETH FAY, Petitioner, vs. THE HONORABLE DEWAIN D. FOX, 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.	Court of Appeals No. 1 CA-SA 20-0123 Maricopa County Superior Court No. CR2015-005451-001

Phoenix, Arizona
August 19, 2020
2:00 p.m.

BEFORE THE HONORABLE JENNIFER M. PERKINS
BEFORE THE HONORABLE DAVID B. GASS
BEFORE THE HONORABLE MICHAEL J. BROWN

TRANSCRIPT OF PROCEEDINGS

Oral Argument

Proceedings recorded by electronic sound recording; transcript produced by eScribers, LLC.

AUBREY A. HASLOW
Transcriptionist

ROSIE VAUGHN
Transcriptionist

I N D E X

August 19, 2020

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS	VD
None					

M I S C E L L A N E O U S

APPEARANCES

August 19, 2020

Justices: Jennifer M. Perkins

David B. Gass

Michael J. Brown

For the Petitioner:

Randall S. Udelman

Witnesses:

None

For the Real Parties in Interest:

Treasure L. VanDreumel

Lori Voepel

Witnesses:

None

Phoenix, Arizona

August 19, 2020

(The Honorable Jennifer M. Perkins, The Honorable David B. Gass, and The Honorable Michael J. Brown Presiding)

ORAL ARGUMENT:

JUDGE PERKINS: Thank you. Please be seated. Good afternoon, everyone, and thank you for accommodating us with argument. At the outset, I'll note that no one is required to, but if you're comfortable, you are free to remove your mask for these purposes here today.

We are here for oral argument in Case Number SA 20-0123, Fay v. The Honorable Fox, et al. As you all know, we record these proceedings, so please identify your name and the party that you represent when you begin. We do have you slated to argue from counsel table. I'll let you figure out how that's going to work over here.

You are responsible for maintaining your time. You have 20 minutes per side, as usual. We recognize there is no clock in front of you; it's at the podium, and it's a little bit difficult to see. So I encourage you to feel free to stand up, to lean over, to do what you need to do to track your time, and if you would like to ask, we would be happy to tell you what you have left at any time, particularly if you're attempting to reserve time. Please bear in mind that we've read the briefs, we've read the appendix, we have conferenced

and discussed the case.

And with that, you may proceed.

MR. UDELMAN: Good afternoon, Your Honor. I'm Randall Udelman. I represent the Petitioner, Beth Fay, who is a victim of a crime in this particular case. I will not go over the factual details because it sounds as though you've already read the briefs and conferenced the case.

I appreciate the opportunity to speak with you today. And my understanding based on reviewing the order from this Court is that you had requested further guidance on the applicability of both State v. Lamberton and Lindsay v. Cohen, especially after legislative changes to the statutes had occurred. And I -- I'll start there, members of the court.

Lindsay v. Cohen in 2015 is -- decided in 2015 is no longer good law because of the decisions that the state legislature made in 2016. Lindsay v. Cohen originally held that victims, through their own counsel or personally, cannot present evidence, information, or argument in support of restitution claims. The legislature, almost immediately after that decision came out, in the next legislative session passed -- and I believe it's House Bill 2376, making two very important changes to A.R.S. Section 33-4437 [sic]. And both of the changes in particular to that statute apply with equal vigor to this case before you today.

I'd like to start by saying that the Section A -- the

Court added -- or -- excuse me, the legislature added a sentence to the -- to Subsection A of 13-4437. That particular section confirmed that the rights spelled out in the Victim Bill of Rights, Article II, Section 2.1(A) are rights that belong to the victim. That is a very important issue that I am going to spell out a little bit further in my presentation. But also, the legislature in this House bill modified -- or -- excuse me, added Subsection E, and the important part of Subsection E allows victim, through counsel or individually, to make presentation of evidence, information, or argument on any determination involving restitution pursuant to 13-804.

These two particular legislative pronouncements make very clear that Lindsay v. Cohen is no longer good law and was -- or -- excuse me, legislatively overruled by the legislature. And in the Lindsay v. Cohen decision, you'll see a number of circumstances where the opinion writer indicated there's no provision in the statutes that allow for independent counsel to take the presentation and give evidence, information, and argument in support of a claim for restitution. Well, the legislature took that as an invitation to do so and passed the modification to 4437 and added Subsection E.

Respectfully, Lindsay originally prevented lawyers on behalf of their clients from presenting arguments, whether those arguments involved a determination of restitution at the

trial court post -- or post-sentencing level or when a determination of restitution is requested on it, respectfully, as here on a petition for post-conviction relief. The case may --

JUDGE PERKINS: Actually, I -- let's pause there --

MR. UDELMAN: Sure.

JUDGE PERKINS: -- for just a moment because I want to make sure that we understand exactly what's at issue. One of the things just procedurally in this case that I think we need to nail down is that the Defendant filed first a limited petition for post-conviction relief and in that document specifically only requested the ability to file an appeal. And presumably, the primary question there is a version of excusable neglect, was there a reason that justifies the filing of a delayed appeal. The Defendant subsequently filed an amended petition.

I guess at the outset, is it your understanding that because of the filing of the amended petition, that limited petition is no longer operative? That right now, the document that this Court is looking to in determining whether or not the victim has the right to file a brief in opposition -- the document we'd look to is the amended petition for post-conviction relief?

MR. UDELMAN: Your Honor, as I understand the factual record as it is right now, there was a motion for delayed

appeal and a separate amended petition for post-conviction relief, each of which ask for a remedy that calls into question now 4437A and E. The remedy that they ask for is that the Court vacate the criminal restitution order that was entered 15 months ago and as a result, all the accrued interest that is required to be accrued over the past 15 months -- the remedy they seek is to take that away entirely, and they are asking for a do-over.

Under the circumstances, whether it's the limited -- the request for limited PA -- PCR, whether it's an amended PCR, or whether it's a motion for delayed appeal, the procedural step doesn't matter as long as the Defendant is requesting that the Court vacate the criminal restitution order in --

JUDGE PERKINS: But in the limited PCR, the Defendant did not make that request.

MR. UDELMAN: I'm sorry, Your Honor.

JUDGE PERKINS: At least as I read it.

MR. UDELMAN: Right.

JUDGE PERKINS: The limited PCR -- and I don't have in front of me a motion for limited -- or --

MR. UDELMAN: Your Honor, that very well may be the case. My point is once the remedy that they request is that they asked the Court to vacate a criminal restitution order, 4437A and E kick in.

JUDGE PERKINS: Let's assume that I agree with you on

that. I guess what I'm trying to figure out is do we have sort of two streams of things happening here. One is the request for delayed appeal/limited PCR wherein the only thing requested is the ability to file a substantive delayed appeal. Recognizing --

MR. UDELMAN: Yes.

JUDGE PERKINS: -- that the merits that would eventually be raised have to do with restitution, but the issue -- the narrow issue there is only as to the Defendant's entitlement to this delayed appeal. So we have that.

MR. UDELMAN: Right.

JUDGE PERKINS: We have the amended PCR, which very clearly asks to vacate the entire criminal restitution order as the relief for that PCR. Are both of these still ongoing, or did the amended petition and that request for relief take the place of the earlier limited petition? What is your position on that?

MR. UDELMAN: My position is that everything is still pending, Your Honor.

JUDGE PERKINS: Okay.

MR. UDELMAN: And as a result, because of that, we should have an opportunity to be heard. And if I may explain, when I say the opportunity to be heard, as I understand defense counsel correctly, they're saying we don't have that opportunity because they request that the Court vacate the

criminal restitution order, pull back $70,000 of interest that's already accrued on that criminal restitution order, and give the party -- or give the prosecutor, the defense lawyer, and the victim counsel a do-over. And because we have the right when there's a do-over under 13-4437E to make arguments, present evidence, and --

JUDGE BROWN: So let's break that down.

MR. UDELMAN: Sure.

JUDGE BROWN: Again, delayed appeal -- let's only talk about the delayed appeal for a minute.

MR. UDELMAN: Okay.

JUDGE BROWN: Why is anything -- any substantive assertion that they might make in that motion -- again, with reference to motion, we can call it a motion, petition, whatever we want to call it. Why does that make any difference for purposes of this court, which we would be the ones to hear that appeal. We would hear the merits of that appeal. No superior court -- or am I way off base here?

If the direct appeal is granted, delayed appeal means that direct appeal -- that means that they -- that transcripts would be ordered, et cetera, proceed as a normal appeal. It would come directly to this court. And from that point on, we've got -- the victim has the right in that setting perhaps to file a brief under your argument. Is that essentially what you're saying? Because I'm missing the point, I guess, of why

it's essential to weigh in on the direct appeal -- I'm not talking about the PCR -- why it's essential to weigh in on the direct appeal right now when there is no appeal pending yet.

MR. UDELMAN: Your Honor, I appreciate the question, and the reason why is because the motion itself is requesting a remedy that affects the constitutional right to prompt payment of restitution, and we should be able to explain why it should not be granted.

There are rights that would come into play after the Court makes its decision. I certainly agree with that. But if we take that same analysis, Your Honor, then a defendant could argue any time a victim has a right to object to an evidentiary issue involving privacy rights, they wouldn't have the opportunity to make any comments or be heard because they have the right to elocute at sentencing after a defendant is convicted. Under these circumstances, victim rights occur throughout the litigation process, starting from indictment and ending after post-conviction and release and recovery of restitution.

JUDGE GASS: Well, Counsel, let me ask you a question, because as I see it, if the issue is only does the Defendant get to bring the appeal, that's just like almost any other question that's strictly an issue for the Defendant.

It seems to me if I take your argument, then you would have a right to intervene on -- if you were going to

appeal his conviction and move to set aside his guilt. That still could impact the victim's restitution, but it's not something that you'd -- the victim has a right to intervene in. Isn't it only when restitution is directly at issue that the statute is triggered? Or do you take a position that any time restitution could be affected -- and that would include when a defendant challenges guilt -- that that would trigger the victim's ability to participate?

MR. UDELMAN: Your Honor, I'm a victim rights lawyer, so I'm going to say at all times. But under these circumstances --

JUDGE GASS: Well, I want to talk about the statute.

MR. UDELMAN: I understand.

JUDGE GASS: Let's stay with that.

MR. UDELMAN: Absolutely. Your Honor, I would suggest that, respectfully, if we look at the motion for delayed appeal, they are very specifically touching on issues affecting restitution. And under those circumstances, they want an opportunity to explain the restitution-related issues, and we would like an opportunity to explain why these issues are not right for an appeal under these circumstances.

JUDGE GASS: So would you agree, then, if they were just seeking a regular delayed appeal, they hadn't specifically focused on restitution, that we might be in a very different set --

MR. UDELMAN: I would agree, Your Honor. But that's not the case here, and I would certainly explain under these circumstances we have multiple tracks. I certainly recognize that. And the petition for post-conviction relief that the defense has filed also raises issues that call into play the victim's right to be heard on standing related questions.

4437A issues, Your Honors, are certainly at play here. For example, the defense in the petition for post-conviction relief that they did file wants to vacate criminal restitution in its entirety. They are not conceding any restitution dollar amount is owed. They want to claw back every dollar of restitution and get a re-do. Under those circumstances, the victim right at issue now is the Article II, Section 2.1(A)(8) right to prompt payment of restitution. The promptness element of the VBR comes into play whenever the defense is seeking a delay or a re-do which will add further delay to the recovery of restitution.

JUDGE GASS: Let me ask you this, because let's say we get down that far. And as far as the ineffective assistance of counsel, isn't that strictly between the Defendant and his lawyer? That's not a victim issue. That's a -- as far as the -- I understand it may impact restitution. I don't discount that. But if ineffective assistance was provided, that's something that stands independent of the orders that follow, isn't it?

MR. UDELMAN: Well, I disagree, Your Honor, and the reason why is the only remedy that they can ask for on an ineffective assistance claim is to vacate -- or the only remedy they did ask for is to vacate the criminal restitution order. And under those circumstances, they -- the victim, because of the Article II, Section 2.1(A)(8) right, should have an opportunity to respond and explain that there are substantial time delays when they made this ineffective argument -- assistance argument and other issues concerning what is in the record and uncontested in the record about the negotiation that went on during this process.

The items that are already in the record, not in factual dispute -- the victim should be able to have an opportunity, because the right belongs to her, to contend these are the reasons why we oppose petition for post-conviction relief. We're not making comments about the effectiveness or ineffectiveness of counsel. But because a victim right is triggered here, Your Honor --

JUDGE PERKINS: Counsel, you have five minutes left, just to let you know.

MR. UDELMAN: Oh, I'm sorry. Because a victim right is triggered here, we have the absolute VBR right to be heard in response. And I'd like to, with the Court's permission, save the balance of my time for rebuttal. Thank you.

MS. VANDREUMEL: Good afternoon. I'm Treasure

VanDreumel. Next to me is Lori Voepel. We represent RPI Hanson. It's a pleasure to be here.

The issue in this case is whether the victims have a right to plead defenses to claims brought under Rule 32.1(f), request for delayed appeal, and 32.1(a), where that is invoked to allege ineffective assistance of counsel. In this case, we filed a request for a delayed appeal, not on the conviction because that had already proceeded through the courts. We filed a request for delayed appeal because the restitution award came down subsequently. We posited that his failure to appeal was through no fault of his own.

Victim's counsel filed a response saying, yes, it was fault, presumably he was told his right to appeal by his lawyer, presumably he was told his right to appeal by his parents. So they are defending against, pleading defenses against our request for a delayed appeal. They also added that his --

JUDGE BROWN: Counsel, was that a motion or the -- or it was an amended petition?

MS. VANDREUMEL: It's a Rule 32 -- it's a claim brought --

JUDGE BROWN: (Indiscernible) --

MS. VANDREUMEL: Yes.

JUDGE BROWN: -- document entitled limited petition?

MS. VANDREUMEL: Yes, Your Honor. And because there

is --

JUDGE PERKINS: Is there a separate motion at any point for delayed appeal?

MS. VANDREUMEL: No. It's just --

JUDGE PERKINS: It's just the document, okay.

MS. VANDREUMEL: That is the claim itself under Rule 32.1(f).

JUDGE BROWN: But to follow up on what we were asking other counsel earlier, what is the status of that limited petition? Because when you filed an amended petition, then the amended petition superseded --

MS. VANDREUMEL: It did not.

JUDGE BROWN: -- the limited.

MS. VANDREUMEL: The Arizona Supreme Court has said that amendments to PCR shall be liberally granted. And so all we did is amend our PCR to add the additional claim of ineffective assistance of counsel. Not only restitution counsel; trial counsel as well. We raised several claims with respect to IAC as to trial counsel. And --

JUDGE PERKINS: But Counsel, here's my concern. I'm going to read to you the entire relief requested in your amended petition. Strickland is satisfied as all of Petitioner's claims of ineffective assistance of counsel. Because trial counsel violated his Sixth Amendment rights, a new trial should be ordered. And because restitution counsel

did the same, the complained of restitution and CRO orders should be vacated.

MS. VANDREUMEL: Yes. That's what happens when you do the Sixth --

JUDGE PERKINS: That's the totality of the relief you've requested.

MS. VANDREUMEL: No. That is the amended aspect of the PCR. The first issue I raised was a request for delayed appeal, and I explained in that petition why the failure to appeal was through no fault of his own.

JUDGE PERKINS: And so maybe I'm misunderstanding. Could you point me where in the Supreme Court's rules or elsewhere that it clarifies that in this context, as contrasted to other areas of the law, when you file an amendment to a pleading, it merely supplements the prior pleading so that both remain operative?

MS. VANDREUMEL: I can't point you as I sit here in this moment, but I can tell you that that is the way it's done. We amended the petition to allege more than one claim, and here's why.

If we were denied a delayed appeal -- which is seldom the case; the State usually concedes. But on this occasion, we got an objection from the victim. So the thinking is if you're denied a delayed appeal, then you better get the claims in, the remainder of the claims. If it was just the State and the

defense and the State conceded that a delayed appeal should be granted, that appeal would take place, and it may answer a whole lot of questions vis-a-vis the claim of IAC with respect to the restitution proceedings. But we couldn't run that risk. We had to have the completed -- once the victims objected, we had to have the completed PCR filed so that all of the claims would be present before the Court for the response.

JUDGE BROWN: And in your view, is this how Judge Fox is viewing these two documents, the limited and the amended -- he's viewing those together?

MS. VANDREUMEL: Yes. He will transfer both to Judge Gates who will ultimately decide the issues raised in the PCR. And the reason why we interpret it that way is because we cited in the motion the Supreme Court's language that amendments shall be liberally granted, because --

JUDGE BROWN: Who is going to decide the request for delayed appeal?

MS. VANDREUMEL: Judge Gates. So the issue here, as I said, is whether or not they have a right to plead defenses to claims brought under Rule 32.1(f) or 32.1(a). Before -- I already explained how they said, no, you shouldn't get relief under 32.1(f). So after I filed the amended petition, I not only moved to strike that pleading as it was outside of victim's rights, but I also moved to strike -- or prohibit an anticipated pleading. That is to preclude them from offering

an explanation as to why Hanson didn't receive ineffective assistance of counsel under the Sixth Amendment. I agree with Your Honor; that is an issue between the Defendant and the Court based upon the defense lawyer's performance during the proceedings.

The procedural construct of the VRIA is virtually identical to the construct that governs lawyers who represent witnesses who have criminal exposure and can invoke their Fifth Amendment rights. As nonparties, they're precluded from submitting substantive pleadings other than those that are necessary to protect the witness's rights. Lamberton and Lindsay follow that construct, and the subsequent amendments as well as 13-4437 itself doesn't alter that construct in any way.

Lamberton is the great starting point in this case, and I appreciate the Court inviting us to look into it and address it primarily during this argument. Lamberton says first, victims aren't parties, because they have no right to control the proceedings, to plead defenses, or to examine or cross-examine witnesses.

As Lamberton observed, the VBR and the VRIA give victims the right to participate and be notified of certain criminal proceedings, but that doesn't make them parties.

So when the legislature in 2017 amended 13-4437D to require that the victim's counsel be endorsed on all pleadings, that doesn't make them parties; it simply gives effect to their

right to notice of the proceedings whereof counsel has appeared.

Second, Lamberton said that victims are not aggrieved by trial court rulings because trial court rulings determining outcomes do not operate to deny the victim some personal or property right. That hasn't changed. The recent decision in State v. Reed reinforces that fact. And because of that, in Lamberton -- Lamberton recognized that 13-4437A doesn't give the victim standing to argue before an appellate court, that the trial court's ruling in a criminal proceeding was error, or to bring the types of actions against a defendant that the State can bring. Their language, not mine.

Third, Lamberton came out and expressly recognized exactly what the statutory amendments to 13-4437 were designed to do, and that is that victims have a right to seek an order in the trial court or initiate a special action to enforce any right, or to challenge any order denying any right, guaranteed by the VBR, its implementing legislation, and court rules.

JUDGE GASS: So is your argument that the subsequent changes to the statute were codifying as opposed to attempting to make some shift in what came out in Lamberton and Cohen?

MS. VANDREUMEL: Yes. No, not Cohen. I'm getting to Cohen.

But as far as Lamberton goes, the legislature simply made clearer what Lamberton already said, and that is if a

trial court is not allowing a victim to assert their rights, a victim can file -- initiate, that's the added language -- a special action. They have to have an avenue to enforce their rights or their right is being denied by the trial court. And that's the import of Lamberton. And if we apply it to this case, what we end up with is that the Petitioner's attempt to plead defenses to Hanson's Rule 32.1(f) claim is unauthorized by the procedural rules.

Much like Lamberton recognized that Rule 32.9(c), which is now Rule 32.16(a)(1), permits only an aggrieved party to file a petition for review following a PCR proceeding, Rule 32.9 permits only the State to respond to claims raised on PCR, and 32.1(f) and 32.1(a) are both claims that are raised on --

JUDGE GASS: But, admittedly, our rules can't trump the statute. So if the statute gives the victim a right, then we can't trump that with our rule, correct?

MS. VANDREUMEL: I think the Supreme Court rules are the ones that govern the day in the event that there's a conflict. Because the legislature has --

JUDGE GASS: Well, when does the victim get the chance --

MS. VANDREUMEL: That's --

JUDGE GASS: -- to be heard on what is clearly a restitution issue? And they have under the Constitution a right to restitution, and the laws give them the right to be

heard on it. So when does that happen in this situation?

MS. VANDREUMEL: That's where Lindsay v. Cohen and the subsequent amendment comes in. Lindsay reaffirmed as good law the principles set forth in Lamberton, which is they're not parties to the criminal proceedings. Prosecutors still play an indispensable role in restitution proceedings; it has to be that way, not only for the reasons addressed in Lindsay, but because it's the prosecutor that has the burden of proof, and it's the prosecutor that has an obligation of disclosure, whereas the victims have a right to refuse any kind of discovery. And it's only the State and a defendant that may appeal a restitution order.

So any claim that the statute or subsequent amendment meant that prosecutors can be completely usurped, or done away with, is just unsupported by Lindsay and the statute itself.

JUDGE PERKINS: Isn't there a middle ground to being usurped or done away with?

MS. VANDREUMEL: There is.

JUDGE PERKINS: That -- okay. So let's play in that field --

MS. VANDREUMEL: Okay.

JUDGE PERKINS: -- because I think that's what the statute actually says.

MS. VANDREUMEL: Okay. After -- okay. Before -- after Lindsay, the statute changed in only one way that's

material here, and that is as to how victims' rights can be asserted during a restitution proceeding.

Before we get to how those rights can be asserted, we have to have a clear picture of what those rights are. Of course the VBR, subsection 4, gives the victims a right to be heard at sentencing. We all know that. But what does it mean?

Well, subsection D of the VBR says that the legislature gets to define and implement the rights, and they have done just that.

13-4426A then, as now, outlines the rights afforded victims during restitution proceedings, and that is the victim may present evidence, information, and opinions that concern the need for restitution. That's what it says. The statute was, and is, aligned with 13-4410C3, which then, as today, authorizes the victim to present an explanation of the extent of any economic loss or property damage, as well as an opinion of the need for and extent of restitution. So those are the rights that were, and are, afforded victims in conjunction with restitution.

Now, the problem in Lindsay is the court ruled that victims could only assert those rights by providing out-of-court assistance to the assigned prosecutor. That's where the wrinkle was. Because of that, at the time of Lindsay, and continuing today, the statute -- the VRIA -- said that those rights could be asserted this way, and I'm talking

about 13-4428B. They can be asserted through oral statement, submission of a written statement, or submission through audio or video media. That's why Lindsay came down like it did, because nothing said that they could actually stand up in court and present any argument on the --

JUDGE GASS: But since Lindsay, that's -- the statutes have changed a little.

MS. VANDREUMEL: That's what I'm saying --

JUDGE GASS: And --

JUDGE PERKINS: That's --

MS. VANDREUMEL: That's --

JUDGE GASS: Go ahead. The change that I'm looking at is the concept that -- and I'm sorry; I don't have my glasses, so I have to lean back. But notwithstanding any other law --

MS. VANDREUMEL: Right.

JUDGE GASS: -- the victim has a right to present evidence or information, and to make argument to the court at any proceeding to determine the amount of restitution pursuant to Section 13, and I think it's --

JUDGE PERKINS: 804.

JUDGE GASS: 804. Thank you.

MS. VANDREUMEL: I --

JUDGE GASS: So that's a pretty broad grant to the victim to be heard, present evidence, and to argue.

MS. VANDREUMEL: It's always been present evidence. 13-4426A: The victim may present evidence, information, and opinion that concern the need for restitution. You see? It's the subjects, not the methodology. So they can present evidence -- this statute has not changed. That's what it said at the time of Lindsay, and it still says that now.

JUDGE BROWN: But it also says make an argument.

MS. VANDREUMEL: Right. And that's what the statute --

JUDGE BROWN: That's new.

MS. VANDREUMEL: -- added.

JUDGE BROWN: That's new.

MS. VANDREUMEL: Right. Because --

JUDGE BROWN: So what -- Counsel, what does that mean?

MS. VANDREUMEL: Because Lindsay said he had to provide out-of-court assistance to the prosecutor. When the -- and so the -- our legislature said no. No, he can present argument. But they didn't expand the rights of what they could present argument on, nor could they; that would have rendered the statute unconstitutional. They can still present argument, statements, opinions, written, media, that goes to the need for restitution and the extent of any economic loss or property. Those are the two subjects that they're allowed to address the Court regarding.

How do we know that? Well, first of all, that's exactly what the words say. But secondly, if you look at Lindsay and we compare it to the 2016 amendment, Lindsay said this: Restitution is not a claim which belongs to the victim, but a remedial measure that the Court is statutorily obligated to employ.

The first sentence of the amendment says, the rights enumerated in the Victims' Bill of Rights, Article 2, Section 2.1, Constitution of Arizona, any implementing legislation or court rules belong to the victim.

JUDGE GASS: And isn't the right to restitution, and prompt restitution, granted in the Constitution? So that's --

MS. VANDREUMEL: The right --

JUDGE GASS: -- a victim's right at this point, not a State right.

MS. VANDREUMEL: The right to receive restitution, whether it's by statute or the constitutional right to receive prompt restitution, presupposes the entry of a restitution award. The right to receive isn't triggered until the award is entered. And Lindsay was talking about the remedial measure found in 13-603C, and that's not part of the VBR, the VRIA, or Rule 39.

JUDGE GASS: So the victim only has a right to be heard about how much interest they're going to get and how the payment plan's going to work, but not about the -- how much

it's going to be?

MS. VANDREUMEL: No.

JUDGE GASS: Because it's only about receipt is --

MS. VANDREUMEL: No.

JUDGE GASS: -- what you just argued.

MS. VANDREUMEL: No. They have an absolute right to present evidence or information and make argument to the Court, personally or through counsel, about the extent of the economic loss and the need for restitution. The extent is: How much money am I out? Here's proof that the property was mine, and I'm at a loss. And the need for restitution is that it -- I haven't been compensated by a secondary source.

JUDGE GASS: So now, one of the things for ineffective assistance of counsel that you need to prove is some level of prejudice.

MS. VANDREUMEL: Yeah. Yes, sir --

JUDGE GASS: So if they can come in and prove that the restitution amount was right, your client doesn't have a claim; am I right?

MS. VANDREUMEL: They -- victims --

JUDGE GASS: And that's part of --

MS. VANDREUMEL: No.

JUDGE GASS: -- what we're talking about, so that's what I'm struggling with.

MS. VANDREUMEL: Okay.

JUDGE GASS: How do they not get that chance to say it's the right amount? They're -- even if you're right that the attorney did wrong, the amount is right, so there's no prejudice.

MS. VANDREUMEL: Oh. I think I agree with you, Your Honor. They can -- they can -- they have an absolute right to talk about the extent of the economic loss. So if they're coming in, saying, this is how much I'm out, they can do that. What they can't do is argue substantive issues, like, this is compensable under 603(C) and this is not. This is constitutional, and this is not.

JUDGE GASS: Well, that's part and parcel of whether or not it's restitution and whether they're legally outed as far as restitution.

MS. VANDREUMEL: I think there's a difference. I think the legislature chose their words very carefully. Because the parties argue the law, and the victim provides the factual basis for how much money they're out and the fact that they haven't received it from anybody else, which translates to the need for restitution.

There's a reason the legislature didn't say that they could argue substantive issues under the law. That's what parties do, and that's why, I believe, they chose their words so carefully. And those words haven't changed since Lindsay. The only thing that changed after Lindsay was that they were no

longer relegated to spectators who had to sit by and watch the proceedings, or assert their claims through an oral statement --

JUDGE PERKINS: Counsel, you have a minute and a half.

MS. VANDREUMEL: Thank you. Submission of a written statement or submission of media. The legislature -- the legislative clapback was no, they can present arguments to the court regarding their rights. And I've just repeated too many times the two statutes where those rights exist.

In our view, at the resolution of what they can argue about during restitution proceedings might better be left for another day.

JUDGE GASS: So I just want to be clear. Your client isn't claiming that the amount is wrong because the amount -- because of the dollar amount. Your client is claiming things were put in that should not have been restitution? Because if it's broader than that, I don't see how they don't get to play.

MS. VANDREUMEL: Yes. Our claim is that they were -- ineffective assistance of counsel, because the victims were awarded things that are not compensable under the victims' --

JUDGE GASS: So you're not --

MS. VANDREUMEL: -- under their --

JUDGE GASS: -- challenging the entire award. You're only challenging --

MS. VANDREUMEL: No.

JUDGE GASS: -- the piece that's not constitutional.

MS. VANDREUMEL: Yes.

JUDGE GASS: So have you ever identified the amount that is?

MS. VANDREUMEL: No. We're not doing that in this proceeding. We have presented --

JUDGE GASS: So we're going to start over at zero?

MS. VANDREUMEL: Yes. That's what --

JUDGE GASS: Which means money that you even would agree the victim is owed is going to be at issue again.

MS. VANDREUMEL: Well, I mean, the State -- yeah, the State has to prove it, but she's definitely entitled to compensation for, like, missed work for --

JUDGE GASS: So --

MS. VANDREUMEL: -- court appearances and things like that --

JUDGE GASS: So why --

MS. VANDREUMEL: Definitely.

JUDGE GASS: -- don't they get to play in this field, to say, we really think she's owed all of it, and here's all of the money that we're talking about?

MS. VANDREUMEL: Because the VRIA says what rights they have, and arguments as to substantive law belongs to the parties, not to the victim. They can say how much they're out,

and they can say that they haven't been compensated by other sources, which, in this case, they have been. And so -- then the Court gets to decide, based on the parties' arguments, what's compensable, what's not, what's a windfall, et cetera. And once the Court resolves that, then the victim will receive full and fair restitution for their economic loss.

But that statute that we're talking about applies only to 13-804, and that's not what either one of our claims goes to. Once --

JUDGE PERKINS: Your time has run, Counsel --

MS. VANDREUMEL: Oh.

JUDGE PERKINS: -- once you have --

JUDGE GASS: No, I'm fine.

JUDGE PERKINS: -- no other questions. Okay. Thank you.

You have four minutes and 43 seconds.

MR. UDELMAN: Thank you.

What I just heard is what I would call an absurd recitation of the Victims' Bill of Rights. It goes so far to restrict a crime victim's right to be heard that the case of United States v. Kenna comes to mind, where what I hear Defense arguing is that crime victims should be treated like true Victorian children -- seen but not heard.

Under the circumstances before this Court, we heard today that they are asking for the Court to vacate an entire

criminal restitution order despite agreeing that the victim here is entitled to restitution. And they want to silence their victim from commenting on that.

The victim has a right, here, and what I didn't hear any recitation to is the Victim Bill of Rights, Subsection -- or Article 2, Section 2.1, subsection (D) and (E), as well as 13-4418, all of which say the Victim Bill of Rights, and its implementing statutes and rules, shall be construed liberally to advance victims' rights.

What they're asking is the Court interpret the rules to contract rights. They didn't talk in as much detail, which I would have hoped to hear a concession that 4437E, after Lindsay v. Cohen, I believe, Your Honor, Judge Brown, you made reference to the fact that the word "argument" should have significance here. We should be able to argue, once they say, no restitution now, it -- on PCR, we should have the right to be heard. We should have the right to be heard about why there should be restitution; we should have the right to argue, as one -- a victim that has standing under 4437, both A and E, to make an argument about what is appropriately considered economic loss, as defined under the criminal statutes.

Under these circumstances, once they say, zero restitution, we start over again, the prompt issue comes into play under Article 2, Section 2.1(A)(8). Once that happens, we should have the right to be heard. We have standing to

challenge, but how can you say to a victim, you have standing, but you can't be heard on -- in response to a petition.

JUDGE BROWN: Counsel, explain to me how Judge Fox has taken away that right at this very -- at this -- as we stand today. It's my -- explain to me the footnote that says that he's not considering whether, on the merits, the victim has the right to restitution.

MR. UDELMAN: All right --

JUDGE BROWN: Okay. In that order. How do you expect -- so has he -- how has he taken away all the victim's rights here to weigh in on restitution?

MR. UDELMAN: Well, the -- Your Honor, the judge below effectively is preventing us from filing and striking a response, at least to the motion that we have responded to --

JUDGE BROWN: Understood. But does that mean you cannot file any further pleadings?

MR. UDELMAN: I take it to mean that, yes, Your Honor.

JUDGE BROWN: You're taking it on appeal, or in the PCR, or --

MR. UDELMAN: No, I -- let me -- I take it to mean any pleadings that are filed in front of Judge Fox, at this point, I cannot respond to. In other words, the response to the petition for post-conviction relief that asked the Court to vacate the criminal restitution order, I take it to mean I

can't respond to that, Your Honor. And I should, because they're saying, take away restitution We want to say, here's why restitution is proper in the prejudice suffered, if you do grant -- in the Article 2, Section 2.1(A)(8) right that comes into play.

JUDGE BROWN: But you're assuming that -- there's been no order prohibiting you from filing that under PCR.

MR. UDELMAN: What I take Judge Fox's minute entry to mean is that it affects our right to respond.

JUDGE PERKINS: You have 30 seconds left.

MR. UDELMAN: Okay. Your Honor, I would just ask, under these circumstances, for the Court to accept jurisdiction and grant relief that we have requested and give the victim an opportunity to be heard. That victim, in any case, should have an opportunity to be heard, no matter when the issues are presented, as long as it touches on an enumerated right spelled out in our Constitution Victim Bill of Rights.

Appreciate the opportunity to speak today.

JUDGE PERKINS: Thank you, Counsel, for your argument. We will take the matter under advisement, issue a decision in due course. Court is now adjourned.

(Proceedings concluded at 2:43 p.m.)

CERTIFICATE

eScribers has a current transcription contract with the Maricopa County Superior Court under contract # 13010-001, as such, eScribers is an "authorized Transcriber".

We, AUBREY A. HASLOW, ROSIE VAUGHN, court-approved transcribers, do hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of our professional skills and abilities.

/s/
_____

AUBREY A. HASLOW, Transcriber — September 10, 2020

/s/
_____

ROSIE VAUGHN, Transcriber — September 10, 2020

EXHIBIT B

ARIZONA CRIME VICTIM RIGHTS LAW GROUP
rudelman@azvictimsrights.org
RANDALL S. UDELMAN, SBN 014685
P.O. Box 2323
Scottsdale, Arizona 85252-2323
(480) 946-0832
Counsel for Victim Beth Fay

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. JORDAN MICHAEL HANSON, Defendant.	No. CR2015-005451-001 DT **OBJECTION TO PETITIONER/DEFENDANT'S REQUEST FOR ORDER DIRECTING DISCLOSURE** (Assigned to the Honorable Dewain D. Fox)

Victim Beth Fay, by and through counsel undersigned files her opposition to Petitioner's Request for an order compelling disclosure of her written agreement with her victim rights lawyer. By insisting on discovery of a representation agreement, defense attorneys continue their unbridled assault on the rights afforded a crime victim in the VBR, play fast and loose with both the facts and the law and demonstrate precisely why an immediate stay is appropriate. With a stay in place, the state, the defense and the victim can receive appellate guidance on precisely how and why the VBR applies to these PCR proceedings. The issue involving a crime victim's standing to raise VBR issues in PCR proceedings raises questions of statewide importance. And these issues are compounded

further by the defendant's most recent pleading seeking disclosure of a victim rights attorney's representation agreement with his victim client.[1]

A PCR does not allow a defendant to ignore and sidestep the Arizona Constitution, the Victim Rights Enabling Act and our Rules of Criminal Procedure. For the first time in this case, the defense seeks unfettered access to a representation agreement between a crime victim and her victim rights attorney for the expressed purpose of showing how his restitution defense counsel acted ineffectively. The request for non-party access to a representation agreement is not remotely relevant and should be considered highly suspect. The Defendant tries to first concoct a false narrative about purported efforts to double recover restitution and then somehow weaves this narrative into an alleged financial motivation to force disclosure of a representation agreement to which he is not a party. The representation agreement runs far afield of the crime committed by the Defendant or the allegedly ineffective performance of his restitution attorneys. His demands should be considered nothing more than a fishing expedition and an improper attempt to harass and intimidate a crime victim simply because she chose to have a separate victim rights attorney represent her in the criminal case. These discovery demands are neither fair, dignified nor respectful, and instead cry out for the very protections first afforded to victims by the VBR thirty years ago. The VBR expressly contemplates that a crime victim has the right "[t]o

---

[1] Despite facing yet another anticipated motion to strike, undersigned counsel nevertheless must file this Response to make a complete record, to prevent a subsequent claim of waiver, and because the Defendant chooses to implicate a victim's separate rights to privacy as well as other VBR rights. It appears that without further guidance, defendant's efforts to chip away at this victim's VBR rights will continue unabated.

refuse an interview, deposition, *or other discovery* request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant." ARIZ. CONST. Art. 2, §2.1(A)(5) (emphasis added). This constitutional right does not say that the right exists "unless the defendant files a PCR." The VBR protections do not vanish because a criminal defendant insists on access to attorney-client written communication on irrelevant and collateral matters for the very first time in a PCR. And before allowing a VBR right to yield, courts must first consider the victim's VBR rights and then balance them against some alleged constitutional right belonging to the defendant. *See State v Riggs*, 189 Ariz. 327, 330, 942 P.2d 1159, 1162 (1997) ("[I]f, in a given case, the victim's state constitutional rights conflict with a defendant's federal constitutional rights to due process and effective cross-examination, the victim's rights must yield.") (citation omitted). The Defendant made no such proffer here suggesting which alleged constitutional right he loses absent an order compelling discovery of the victim's written agreement with her lawyer. And the Defendant also did not even propose that this irrelevant discovery first occur in camera as a way to try to allegedly balance respective interests.

Instead, he contends that a comparatively small amount of the victim's overall economic losses ordered by the Court on stipulation was improper despite first reaching some agreements on economic loss and then leaving to the Court resolution of remaining contested issues. And he apparently contends that the only way to show alleged ineffectiveness by his former restitution attorneys is by reading the representation agreement between the crime victim and her victim rights attorney. Compromise happens

regularly when considering an award of restitution pursuant to A.R.S. §13-603(C). As long as restitution bears "a reasonable relationship to the victim's loss, ... it cannot always be confined to 'easily measurable damages.'" *State v. Howard*, 168 Ariz. 458, 460, 815 P.2d 5, 7 (App. 1991) (citations omitted). The claim for restitution belongs to the victim and the pleadings in the criminal case show that compromise occurred and joint agreements reached between defendant and victim; the process was neither flawed nor unusual and involved give and take on each side. *See* A.R.S. §13-4437(A) ("The rights enumerated in the victims' bill of rights, article II, section 2.1, Constitution of Arizona, any implementing legislation or court rules belong to the victim."). Counsel for victim and the Defendant's restitution counsel compromised on some claims leaving to the court resolution of other remaining contested issues for which the defense and victim were unable to agree. The defendant fails to explain how these efforts somehow breached any of his constitutional rights opening the door to discovery of a representation agreement between the crime victim and her victim rights lawyer. And he fails to explain how access to an agreement to which he was not a party somehow shows how his own privately retained restitution counsel allegedly acted ineffectively. His efforts to seek access to completely irrelevant and private information trample on a victim's VBR rights; this defendant simply ignores them when filing his discovery motion. But courts should never compel access to representation agreements between victims and victim rights attorneys anytime a victim and defendant negotiate a restitution award that is not easily measurable.

Defendant also contends that the civil court awarded the same damages in a civil

wrongful death judgment that had been sought in the criminal case. But the civil verdict involved punitive and general damages and he fails to explain what amount of damages he contends were allegedly awarded twice. He does not support this contention about alleged double recovery with anything other than conclusory allegations about what the jury apparently considered at trial and what the victim's separate civil attorneys presented before the civil jury rendered its verdict. He must provide something other than mere conjecture and conclusory statements before a court should ever even consider allowing unfettered access to a separate representation agreement between victim and her criminal victim rights attorney in the criminal case. Also, the statute, A.R.S. §13-807 allows a crime victim to file a separate lawsuit against the criminal defendant proving "damages in *excess* of the amount of the *restitution order that is actually paid.*" (emphasis added). This defendant has not produced anything other than conjecture to show that: 1. The civil jury considered and awarded actual economic loss rather than general and punitive damages[2] and 2. That he actually paid his restitution award for economic loss. This defendant must concede that he has paid only a few hundred dollars toward this economic loss award and nothing close to the full amount of economic loss actually awarded to his victim. So any arguments about alleged double recovery fail and cannot be used as a back door effort to

---

[2] "'Economic loss' means any loss incurred by a person as a result of the commission of an offense. Economic loss includes lost interest, lost earnings and other losses that would not have been incurred but for the offense. Economic loss *does not* include losses incurred by the convicted person, damages for pain and suffering, punitive damages or consequential damages." A.R.S. §13-015(16). The Defendant has not made any showing to suggest that the civil jury awarded damages for anything other than pain and suffering, punitive damages or consequential damages; these damages were not double recovery.

access an irrelevant representation agreement. And this defendant has not shown why access to a representation agreement to which he was not a party furthers any alleged claim of ineffective assistance by his separately retained private restitution counsel.

The federal cases cited in Defendant's supplemental pleadings have nothing to do with victim rights granted under either federal or state law. Instead, the supplemental authority cited by this Defendant concern efforts undertaken by the comptroller of the currency to obtain attorney billing information, or efforts by the government to obtain a fee agreement in a collateral criminal case or efforts by the Internal Revenue Service to obtain specific billing records which would otherwise be included in several IRS tax forms. But none of the federal cases cited by the Defendant are relevant to efforts undertaken by defense attorneys to compel discovery of a separate victim rights attorney-client representation agreement in connection with a criminal case. Such efforts must fail because they run afoul of the statutory rights granted to federal crime victims through the Crime Victim Rights Act, 18 USC §3771(a)(8) ("The right to be treated with fairness and with respect for the victim's dignity and *privacy*.") (emphasis added).

The Defendant relies on the Arizona case *State v. Slover*, 220 Ariz. 239, 243, 204 P.3d 1088, 1092 (App. 2009) to suggest that the victim may not recover attorneys fees that are incurred for services rendered to further the prosecution or act as "adjunct prosecutor by "'prodding' the state to pursue the case...". But that is not what occurred here; none of the economic losses specifically enumerated in the pleadings sought restitution for

attorneys fees.[3]

And reliance on the other Arizona case cited by the Defendant is similarly misplaced. He cites *Lindsay R. v. Cohen*, 236 Ariz. 565, 567-68 (App. 2015) to suggest that a victim rights attorney has no ability to take the lead in a contested restitution hearing and that the VBR implementing legislation does not allow "privatized restitution proceedings." But just one year after the *Lindsay R.* decision, the Arizona State Legislature legislatively overruled *Lindsay* by amending A.R.S. §§13-4437(A) and (E) clarifying that victim rights belong to the crime victim and that victims may in fact take the lead and present evidence supporting their restitution requests. *See* A.R.S. §13-4437(E) ("Notwithstanding any other law and without limiting any rights and powers, the victim has the right 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 section 13-804."). In HB2376, the legislature's declaration of intent clarified that:

It is the intent of the legislature to protect the rights of crime victims,

---

[3] But the law does not restrict a victim from filing a separate request for attorneys fees depending on the circumstances. *See, e.g., State v. Baltzell*, 175 Ariz. 437, 439, 857 P.2d 1291, 1293 ("We believe that customary and reasonable attorney's fees incurred to close the victim's estate should be allowed [as restitution]."). Also, the Court in *Slover* did not address "whether [attorney's fees] fees would be proper restitution items under other factual circumstances, such as when the victim hires an attorney to assert a concrete right under the Victims' Bill of Rights." *Id.* Restitution is one such concrete right. The victim has a concrete and enumerated right under the Victims' Bill of Rights to "receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury." ARIZ. CONST. Art. 2, §2.1(A)(8). *Slover* did not address an award of attorney fees incurred to assert a specific enumerated VBR right and courts have not prohibited such awards. *See, e.g., State v. Leteve*, 237 Ariz. 516, 530, 354 P.3d 393, 407 (2015) (affirming attorney fees incurred to enforce victim rights). Victim counsel made no such request here.

> including the right to receive prompt restitution from the person who is convicted of the criminal conduct that caused the victim's loss or injury. The legislature finds that crime victims in this state have constitutional rights to justice and due process, to be treated with fairness, to restitution and to have all rules governing criminal procedure protect victims' rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights. The legislature has the constitutional authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims. Section[] 13-4437, Arizona Revised Statutes, as amended by this act, [is] amended pursuant to these rights and this constitutional grant of authority.

The victim rights before this Court have nothing to do with whether a comptroller of currency should access attorney information or whether the Internal Revenue Service can obtain attorney records. Instead, on a PCR a crime victim still has the VBR right to be treated with "fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, *throughout the criminal justice process*." ARIZ. CONST. Art. 2, §2.1(A)(1) (emphasis added). And the victim still has the VBR right "[t]o refuse an interview, deposition, *or other discovery* request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant." ARIZ. CONST. Art. 2, §2.1(A)(5) (emphasis added). The Defendant has not identified any separate constitutional right at issue on this PCR discovery request which would require further balance to determine whether the victim's VBR rights should yield to this discovery demand. None exist and the Defendant cannot rely on supposition to artificially create a right. Forcing his victim to turn over a completely irrelevant and unfairly prejudicial document that has nothing to do with the allegedly ineffective performance of his restitution attorneys cannot be considered fair, dignified or respectful. Therefore, the Defendant's demand for access to an irrelevant

third-party attorney-client representation agreement must yield to the victim's VBR rights and this discovery request must be denied.

Submitted May 6th, 2020.

ARIZONA CRIME VICTIM RIGHTS LAW GROUP

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

ORIGINAL of the foregoing E-filed this 6th day of May 2020.

COPIES of the foregoing
E-mailed on this 6th
day of May, 2020 to:

The Honorable Dewain D. Fox
Maricopa County Superior Court

Lisa Marie Martin
Deputy County Attorney
225 West Madison Street, Third Floor
Phoenix, AZ 85003
martinl@mcao.maricopa.gov
Attorney for the State

Lori L. Voepel
Jones, Skelton & Hochuli, PLC
40 North Central Avenue, Suite 2700
Phoenix, AZ 85004
lvoepel@jshfirm.com

Treasure VanDreumel
Law Office of Treasure VanDreumel, PLC
801 North First Avenue
Phoenix, AZ 85003
vandreumellaw@gmail.com
Attorneys for Defendant

BY:/s/ Randall Udelman

EXHIBIT C

ARIZONA CRIME VICTIM RIGHTS LAW GROUP
rudelman@azvictimsrights.org
RANDALL S. UDELMAN, SBN 014685
P.O. Box 2323
Scottsdale, Arizona 85252-2323
(480) 946-0832
Counsel for Victim Beth Fay

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. JORDAN MICHAEL HANSON, Defendant.	No. CR2015-005451-001 DT **OBJECTION TO PETITIONER/DEFENDANT'S REQUEST FOR ORDER DIRECTING DISCLOSURE OF COMMUNICATIONS BETWEEN VICTIM'S COUNSEL AND HER EXPERT WITNESS, AND DISCLOSURE OF THE EXPERT'S RAW DATA** (Assigned to the Honorable Dewain D. Fox)

On September 22, 2020, the Arizona Supreme Court issued a partial stay of PCR proceedings in the above-entitled action ruling that the stay order "shall be inapplicable to any discovery motion pending in the post-conviction proceedings as of the date of this order." *See* Exhibit "A." Defendant has previously made a discovery request directed to Victim Beth Fay which is currently outstanding. As a result, counsel undersigned files her opposition to Petitioner's Request for an order compelling disclosure of communications between victim counsel and an economist expert concerning calculation of economic loss. By continuing to insist on discovery from a crime victim in PCR proceedings, defense

attorneys failed to consider that VBR rights and duties owed to a victim continue to be enforceable by the court through and including final disposition of the case ... all post-conviction release and relief proceedings have completed and until restitution is paid in full. A.R.S. §13-4402(A). One of these VBR rights at issue is the right:

> [T]o refuse an interview, a deposition *or any other discovery request* related to the criminal case involving the victim by the defendant, the defendant's attorney or any other person acting on behalf of the defendant.

A.R.S. §13-4433(H) (emphasis added). The legislature has clarified that this right "remains enforceable beyond a final disposition of the charges." *Id.* Therefore, the Defendant's discovery request and demand for access to communications with an economist expert must yield to the victim's VBR rights and this discovery request must be denied.

Submitted September 22nd, 2020.

ARIZONA CRIME VICTIM RIGHTS LAW GROUP

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

ORIGINAL of the foregoing E-filed this 22nd
day of September, 2020.

COPIES of the foregoing
E-mailed on this 22nd
day of September, 2020 to:

The Honorable Dewain D. Fox
Maricopa County Superior Court

Lisa Marie Martin
Deputy County Attorney
225 West Madison Street, Third Floor
Phoenix, AZ 85003
martinl@mcao.maricopa.gov
Attorney for the State

Lori L. Voepel
Jones, Skelton & Hochuli, PLC
40 North Central Avenue, Suite 2700
Phoenix, AZ 85004
lvoepel@jshfirm.com

Treasure VanDreumel
Law Office of Treasure VanDreumel, PLC
801 North First Avenue
Phoenix, AZ 85003
vandreumellaw@gmail.com
Attorneys for Defendant

BY:/s/ Randall Udelman

EXHIBIT "A"

SUPREME COURT OF ARIZONA

BETH FAY, Petitioner, v. HON. DEWAIN D. FOX, 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.	)	Arizona Supreme Court No. CR-20-0306-PR Court of Appeals Division One No. 1 CA-SA 20-0123 Maricopa County Superior Court No. CR2015-005451-001 **FILED 09/21/2020**

ORDER GRANTING STAY IN PART

On September 17, 2020, petitioner Beth Fay filed her "Petition for Review and Request to Stay Proceedings," accompanied by a "Motion for Stay of Petition for Review Pending Decision for Petition for Review," in which she requested a stay of all post-conviction proceedings in Superior Court pending this Court's disposition of her Petition for Review. Upon consideration,

IT IS ORDERED construing the stay order issued by the Court of Appeals on July 10, 2020 as expiring upon the disposition of petitioner's Special Action by the Court of Appeals on August 21, 2020;

IT IS FURTHER ORDERED staying all post-conviction proceedings in Superior Court pending this Court's disposition of the Petition for

Review, provided that this stay order shall be inapplicable to any discovery motion pending in the post-conviction proceedings as of the date of this order;

IT IS FURTHER ORDERED that Respondents/Real Parties in Interest may file Responses to the Petition for Review no later than October 9, 2020. Any reply shall be filed no later than October 15, 2020. The matter will be considered at the Court's November 3, 2020 Petition for Review agenda.

DATED this 21st day of September, 2020.

/s/
Ann A. Scott Timmer
Duty Justice

TO:
Michael O'Toole
Lisa Marie Martin
Randall S Udelman
Treasure L VanDreumel
Lori L Voepel
Thomas E Lordan
Colleen Clase
Hon Dewain D Fox
Amy M Wood