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IN THE SUPREME COURT OF ARIZONA

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.

No. CR-20-0307-PR

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

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

**PETITION FOR REVIEW OF
SPECIAL ACTION DECISION OF
THE COURT OF APPEALS**

Pursuant to Rule 8(c) of the Rules of Procedure for Special Actions and Rule 31.21 of the Arizona Rules of Criminal Procedure, Real Party in Interest, the State of Arizona, asks this Court to grant review and reverse the decision of the Arizona

Court of Appeals dated August 21, 2020. The Court of Appeals accepted special action jurisdiction but incorrectly denied relief by affirming the ruling of the trial court that precluded the Victim from being heard in pending post-conviction relief proceedings filed by Defendant Hanson (“Hanson”) on the subject of restitution. The Court of Appeals erroneously interpreted the trial court’s order, leading it to find the very question presented to it “unripe” for decision. The Court of Appeals also erred as a matter of law on the issue it did decide.

Even prior to the multiple amendments to the Victims’ Rights Implementation Act (“VRIA”) relevant to this issue, in *State v. Lamberton*, 183 Ariz. 47, 49-50 (1995), this Court held that crime victims had a right under the Victims’ Bill of Rights (“VBR”) to be heard during post-conviction relief proceedings when sentencing issues were involved. Such sentencing issues are involved here in the form of restitution arguments raised by both Hanson’s Limited Petition for Post-Conviction Relief (Delayed Appeal Request) and his Amended Petition for Post-Conviction Relief. Yet when the Victim responded to Hanson’s Limited PCR Petition and sought to respond to his Amended Petition, the trial court struck the Victim’s pleading and also specifically precluded her from responding in any way to the Amended PCR Petition. Despite being provided the record and holding oral argument, the Court of Appeals somehow missed that part of the trial court’s ruling in deeming the issue “unripe” for its special action consideration: “The [trial] court

explicitly did not rule on whether ... Fay may participate in the resolution of Hanson's pending Amended Petition for Post-Conviction Relief (Amended PCR)." The Court of Appeals also found that the Victim did not need to weigh in on Hanson's Limited PCR Petition even though it involved the issue of whether he could file a delayed appeal from the restitution order entered by the trial court. The decision of the Court of Appeals is attached to this Petition.

Aside from the fact that the Court of Appeals wrongly decided an important issue of law by somehow missing it, this Court should grant review because legislative amendments to the VRIA subsequent to *Lamberton* and following *Lindsay R. v. Cohen*, 236 Ariz. 565 (App. 2015) have changed the legal landscape. The lower courts, lawyers, litigants, and victims need this Court's guidance. The issue presented in this case is of statewide interest and public importance and will inevitably arise again.

I. ISSUES PRESENTED FOR REVIEW TO THIS COURT.

Did the Court of Appeals correctly decide that the trial court never ruled on the Victim's right to participate in post-conviction relief proceedings related to the Amended PCR Petition?

Did the Court of Appeals incorrectly rule that the Victim has no right to weigh in on the Limited PCR Petition, even though it involved the issue of whether the Defendant could file a delayed appeal from the restitution order entered by the trial court?

II. FACTS MATERIAL TO THE ISSUES PRESENTED FOR REVIEW.

Hanson was convicted of second-degree murder and sentenced to twelve years in prison. Fay is the deceased victim's mother. The trial court retained jurisdiction over restitution and Hanson waived his presence at any subsequent restitution hearing. (*See* Victim's Appendix to Petition for Review, Exhibit 1.) As described in detail in the Victim's Petition for Special Action in the Court of Appeals and in her Petition for Review, the restitution issues in this case were exclusively negotiated and litigated by the Victim's attorney; the State did not participate at all.¹ Hanson never appealed from the Criminal Restitution Order entered by the trial court. (*See* Victim's Appendix to Petition for Review, Exhibits 2-15.)

Eight months after the Criminal Restitution Order was entered, Hanson filed a "Limited Petition for Post-Conviction Relief (Delayed Appeal Request) and Request to Hold Further PCR Proceedings in Abeyance." (*See* Victim's Appendix to Petition for Review, Exhibit 16.)² After the Victim responded through counsel to Hanson's Limited Petition for Post-Conviction Relief, Hanson's counsel filed a

¹ The State asks this Court to take judicial notice of the Minute Entry dated October 19, 2018, in which State's counsel is excused from the courtroom and all other future matters related to restitution, which is part of the court record in CR2015-005451-001 pursuant to Ariz. R. Evid. 201.

² Hanson's current PCR counsel, Lori Voepel, also represented him on his direct appeal from his conviction and sentence. Although she received the appealable restitution orders while his direct appeal was pending in the same case, she "paid no attention" to them. (*See* Victim's Appendix to Petition for Review, Exhibit 16, note 2.)

motion to strike the Victim's response and further asked Respondent Judge to prohibit any future responsive filings by Victim's counsel in the post-conviction proceedings. (*See* Victim's Appendix to Special Action, Exhibit 17.) Hanson also filed an Amended Petition for Post-Conviction Relief, alleging various claims including a significant number of issues relating to the award of restitution to the Victim. (*See* Victim's Appendix to Petition for Review, Exhibit 18.)

The Victim responded to Hanson's Motion to Strike, and by Minute Entry dated January 28, 2020, the trial court denied the Motion to Strike, finding that pursuant to A.R.S. § 13-4402(A), victim's rights relating to restitution continue to be enforceable by the court until restitution is paid. (*See* Victim's Appendix to Petition for Review, Exhibits 19-20.)

On January 30, 2020, Hanson filed an objection, complaining that the trial court had denied his Motion to Strike before he had a chance to reply to the Victim's response, and further requested reconsideration of the trial court's ruling. By Minute Entry dated April 14, 2020, the trial court then reversed itself and found that nothing in any of the Arizona victims' rights laws gave the Victim the right to be heard in a post-conviction relief proceeding, even as to issues of restitution. The court then granted Hanson's request to strike the Victim's response to the Limited Petition for Post-Conviction Relief, and further precluded the Victim from filing any response to the Amended Petition for Post-Conviction Relief. (*See* Victim's Appendix to

Petition for Review, Exhibit 21.)

The Victim filed a special action and oral argument was held before the Court of Appeals on August 19, 2020. At the Victim's request, the State also filed a response to the special action. The Court of Appeals by Order dated August 21, 2020, accepted jurisdiction of the special action but denied relief, finding that the trial court had never ruled on whether the Victim should be able to participate in the resolution of Hanson's Amended Petition for Post-Conviction Relief. Therefore, the Court of Appeals found that the issue was "unripe." (Court of Appeals Order, dated 8/21/20. Attached to this Petition for Review.) The Court of Appeals further found that the Victim did not need to weigh in on Hanson's Limited Petition for Post-Conviction Relief on the issue of whether he should be afforded a delayed appeal from the restitution order.

III. THE REASONS THE PETITION SHOULD BE GRANTED.

This Petition for Review should be granted because it involves an important issue of statewide importance and public concern in Arizona that was incorrectly decided by the Court of Appeals. Despite being provided the record and holding oral argument, the Court of Appeals somehow missed that the trial court precluded the Victim from responding in any way to Hanson's Amended Petition for Post-Conviction Relief. The Court of Appeals stated: "The court explicitly did not rule on whether ... Fay may participate in the resolution of Hanson's pending Amended

Petition for Post-Conviction Relief (Amended PCR).” The Court of Appeals also found that the Victim did not need to weigh in on Hanson’s Limited Petition even though it involved the issue of whether he could file a delayed appeal from the restitution order entered by the trial court

Aside from the fact that the Court of Appeals wrongly decided an important issue of law by somehow missing it, this Court should grant review because legislative amendments to the VRIA subsequent to *Lamberton* and following *Lindsay R. v. Cohen*, 236 Ariz. 565 (App. 2015) have changed the legal landscape. The lower courts, lawyers, litigants, and victims need this Court’s guidance. The issue presented in this case is of statewide interest and public importance and will inevitably arise again.

This Court reviews issues of constitutional and statutory interpretation de novo. *E.H. v. Slayton*, ____ Ariz. ____, 468 P.3d 1209, 1213, ¶ 7 (2020). In order to preserve and protect victims’ rights to justice and due process, a victim of a crime has a right: “[t]o be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing” and “[t]o receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim’s loss or injury.” Ariz. Const. art. II, §§ 2.1(A)(4) and (8). A.R.S. § 13-4402(A) provides that “the rights and duties that are established by this chapter arise on the arrest or formal charging of the person or persons who are alleged to be responsible for a criminal

offense against a victim. The rights and duties continue to be enforceable pursuant to this chapter until the final disposition of the charges, including acquittal or dismissal of the charges, all post-conviction release and relief proceedings and the discharge of all criminal proceedings relating to restitution. If a defendant is ordered to pay restitution to a victim, the rights and duties continue to be enforceable by the court until restitution is paid.” Rule 39(a) of the Arizona Rules of Criminal Procedure further defines “criminal proceedings” to include “any post-conviction matter.”

A.R.S. § 13-4437(A) provides in relevant part that “[t]he victim has standing to seek an order, to bring a special action or to file a notice of appearance in a trial court or appellate proceeding, seeking to enforce any right or to challenge an order denying any right guaranteed to victims....In asserting any right, the victim has the right to be represented by personal counsel at the victim’s expense and the proceedings may be initiated by the victim’s counsel or the prosecutor.” Section 13-4437(B) states that “counsel for the victim shall be endorsed on all pleadings and, if present, be included in all bench conferences and in chambers meetings and sessions with the trial court that directly involve a victim’s right enumerated in article II, section 2.1, Constitution of Arizona.”

And A.R.S. § 13-4437(E) further provides: “Notwithstanding any other law and without limiting and rights and powers of the victim, 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 § 13-804.”

Here, the Victim exercised her rights, through counsel, to present evidence and information to the trial court on restitution. The right to be heard on matters of sentencing and the right to receive prompt restitution are rights guaranteed to victims by the Arizona Constitution. And to the extent that Hanson is seeking to now challenge the restitution that he was ordered to pay to the Victim, she has the right to respond. The Victim has a right to seek any order, whether in the trial or appellate court, to enforce any right guaranteed to victims, including the right to be heard on matters of sentencing and the right to the prompt payment of restitution. A.R.S. § 13-4437(D); *State ex rel. Montgomery v. Padilla*, 238 Ariz. 560, 566, ¶ 21 (App. 2015). This includes in post-conviction proceedings. *See* Ariz. R. Crim. P. 39(a)(1).

Restitution is part of the sentencing process. *State v. Zaputil*, 220 Ariz. 425, 428, ¶ 11 (App. 2008). A post-judgment restitution order is part of the sentence. *Hoffman v. Chandler ex rel. County of Pima*, 231 Ariz. 362, 364, ¶¶ 9-11 (2013). Indeed, A.R.S. § 13-4401(15) defines “post-conviction relief proceedings” as actions requesting relief from a conviction or sentence. The trial court’s determination that a post-conviction request to file a delayed appeal from a restitution order has nothing to do with determining the amount of restitution, cannot

withstand scrutiny. This Court has already held 25 years ago that a victim has the right to be heard, including the right to file pleadings in post-conviction proceedings, on sentencing issues. *Lamberton*, 183 Ariz. at 48-50. While the victim in *Lamberton* argued that she had the right to be heard because a post-conviction release decision was being made, this Court specifically found that section inapplicable and held that her right to be heard in the post-conviction proceedings in the trial court rested on the fact that the proceedings involved a challenge to the defendant's sentence. *Id.* at 50.³ Moreover, Rule 39(d)(4) of the Arizona Rules of Criminal Procedure specifically provides that “[a]t any proceeding to determine restitution the victim has the right to present information and make argument to the court personally or through counsel.” It does not limit such proceedings to those held under A.R.S. § 13-804, as the trial court incorrectly held.

In 2015, the Arizona Court of Appeals decided *Lindsay R. v. Cohen*, 236 Ariz. 565 (App. 2015). In *Lindsay R.*, the Court of Appeals held that restitution is not a

³ *Lamberton*'s holding that a Victim does not have the right to file a petition for review from the trial court's granting of post-conviction relief also does not appear to survive 2005 amendments to A.R.S. §§ 13-4401 and 13-4437(A), expanding the definition of “appellate proceeding” and allowing victims to file a notice of appearance in an appellate proceeding seeking to enforce any right or challenge an order denying any right guaranteed to victims. 2005 Ariz. Legis. Serv. Ch. 260 (SB1433). The latter amendment provided that a victim has standing to intervene in an appeal, a petition for review, or any other appellate proceeding seeking to enforce or challenge that victim's rights. S. Fact Sheet for SB 1433, 1st Reg. Sess. (Ariz. Feb. 18, 2005).

claim that belongs to the victim and that nothing in the VBR, VRIA, or the criminal rules authorizes victims or victims' counsel to participate in the restitution process. *Id.* at 566-568, ¶¶ 1, 10. But *Lindsay R.* has been legislatively overruled. In 2016, the Arizona Legislature amended A.R.S. § 13-13-4437(A) to announce that the rights enumerated in the VBR, the VRIA, and any implementing court rule, do belong to the victim. The amendment also added a new section 13-4437(E) which 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 section 13-804. S. Fact Sheet for SB 2376, 2nd Reg. Sess. (Ariz. Mar. 11, 2016).

Here, the Victim's counsel handled the entire restitution proceedings; the State did not participate at all. Yet, when Hanson is challenging the restitution, as he has a right to do, the Victim has been denied her due process and her right to be heard on matters of sentencing guaranteed by the Arizona Constitution and further implemented by Arizona statutes and court rules. This was already a violation of the 25-year-old ruling by this Court in *Lamberton*; since *Lamberton*, it is even more clear that the Victim should have a right to be heard in the post-conviction relief proceedings in this case on matters related to restitution.

IV. CONCLUSION.

The State of Arizona asks this Court to grant review and reverse the decision

of the Arizona Court of Appeals dated August 21, 2020. The Arizona Court of Appeals decision both misinterprets the extent of the trial court's order and erroneously affirms it, thereby violating the Victim's rights.

Submitted September 21, 2020.

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BY /s/
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