

ALLISTER ADEL
MARICOPA COUNTY ATTORNEY
Lisa Marie Martin
Deputy County Attorney
Bar ID No. 010668
Firm ID No. 00032000
225 West Madison Street, Third Floor
Phoenix, Arizona 85003
Telephone: (602) 506-7422
appeals@mcao.maricopa.gov
Attorneys for Real Party in Interest

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-20-0306-PR

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

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

**REPLY IN SUPPORT OF
PETITION FOR REVIEW OF
SPECIAL ACTION DECISION OF
THE COURT OF APPEALS**

Real Party in Interest, the State of Arizona, in accordance with this Court's Order dated September 21, 2020, hereby replies to Hanson's Combined Response to the Petitions for Review and asks this Court to grant review and reverse the decision

of the Arizona Court of Appeals dated August 21, 2020. The Court of Appeals erroneously 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 Hanson on the subject of restitution. While Hanson correctly concedes in his Response that the Court of Appeals was mistaken in finding one of the issues raised in the special action ‘unripe’ and therefore agrees that this Court should accept review and decide the issues in this case, there any semblance of reasonableness ends. The remainder of Hanson’s Combined Response to the Petitions for Review consists of a litany of unsupported supposed material facts, mischaracterizations of the record, and repeated and obvious misinterpretations of authority. In these respects, Hanson’s Response to the Petitions for Review is disappointing and certainly not helpful to this Court’s review of the important issues in this case.

I. HANSON AGREES THAT THIS COURT SHOULD GRANT REVIEW AND ACKNOWLEDGES THAT THE COURT OF APPEALS ERRED IN FINDING THE ISSUE “UNRIPE.”

In his Combined Response to the Petitions for Review, Hanson concedes that the Court of Appeals erroneously interpreted the trial court’s order, leading it to find that one of the very questions presented to it was “unripe” for decision. Specifically, Hanson acknowledges that he did indeed not only seek to strike Fay’s response to his “Limited Petition for Post-Conviction Relief” requesting a delayed appeal of the restitution order but also requested, and was granted, that Fay be prohibited from

filing any response to his Amended Petition for Post-Conviction Relief. Therefore, Hanson agrees that the Court of Appeals incorrectly ruled that the trial court had failed to rule on the victim's right to participate in post-conviction relief proceedings related to the Amended Petition. (Hanson's Combined Response to Petition for Review at 6, 26.)

Hanson also agrees that this Court should grant review because the issues presented in the Petitions for Review are of statewide and public importance and will inevitably arise again. (*Id.* at 1, 8, 26.) Where the parties differ greatly are on the facts material to this Court's grant of review and the governing law. This Court should consider the true facts and law, and confirm that the victim has the right to be heard in post-conviction relief proceedings on the subject of restitution.

II. HANSON REPEATEDLY MISSTATES THE FACTS AND LAW; THE TRUE FACTS AND CONTROLLING LAW SUPPORT THE VICTIM'S RIGHT TO BE HEARD IN POST-CONVICTION RELIEF PROCEEDINGS ON RESTITUTION ISSUES.

Hanson's Combined Response identifies a number of "facts" material to the issues presented to this Court for review for which it provides no record citation or other support. Rule 31.21(d)(1)(B) of the Arizona Rules of Criminal Procedure states that no evidentiary matter should be included in the statement of facts if not material to a proper consideration of the issues. And, if an evidentiary matter is material, the party must include a reference to the record where that evidence appears. In a number of instances, Hanson's Response violates this rule. For example, he claims without

citation to the record that “[b]ecause Fay’s counsel lacked the responsibilities and obligations of a prosecutor, Fay secreted from the court and defense counsel relevant information concerning restitution.” (Hanson’s Combined Response at 2.)

Hanson also seriously mischaracterizes his own pleadings filed in the trial court. He flatly denies that his Limited PCR requesting a delayed appeal implicates any restitution issues. Likewise, he denies that his Amended PCR Petition raises a significant number of issues relating to the award of restitution to the victim. Hanson maintains that his Amended PCR only raised two claims: whether defense trial counsel rendered ineffective assistance, and whether defense restitution counsel rendered ineffective assistance. (*Id.* at 4, 22.) In fact, both the Limited PCR and the Amended PCR Petition raise issues relevant to sentencing, restitution, and the right to receive prompt restitution—issues on which the victim has a right to be heard. Indeed, the Amended PCR Petition, filed on January 20, 2020, of which this Court may take judicial notice, spends 24 pages on restitution issues, including claims that parts of the restitution award to the victim are duplicative of amounts awarded in a related civil wrongful death action, that other categories of restitution awarded are not legally compensable under Arizona restitution law and constitute a “windfall,” and that the entry of a criminal restitution order accruing legal interest while Hanson is incarcerated is unconstitutional. In terms of relief, Hanson’s Amended PCR Petition asks that the criminal restitution order be vacated in its entirety. Yet,

according to Hanson none of these issues implicate restitution or the amount of restitution that the victim may be awarded.

Hanson's Combined Response also continues to misstate the law while accusing the State and the victim of ignoring "longstanding precedent." Hanson stubbornly maintains that both *State v. Lamberton*, 183 Ariz. 47 (1995) and *Lindsay R. v. Cohen*, 236 Ariz. 565 (App. 2015) are still good law and virtually unaffected by multiple subsequent amendments to the Victims' Rights Implementation Act ("VRIA"). Hanson also persists in twisting the language of *Lamberton*; this time even doctoring a supposed quotation from the case to support his erroneous argument. (Hanson Combined Response at 1, 10-20, 24.) Hanson is wrong.

Even prior to the multiple amendments to the VRIA relevant to this issue, in *Lamberton*, 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. *Lamberton*, 183 Ariz. at 48-50. While the victim in *Lamberton* also 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. Moreover, *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 any 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). Thus, Hanson’s claim that A.R.S. § 13-4437 is identical today to the way it read at the time of *Lamberton* and still restricts the victim to only bringing or participating in appellate matters in the form of special actions, is absolutely false. (Hanson’s Combined Response at 14.)

And, although this Court in *Lamberton* specifically stated that the issue of post-conviction release from confinement was not implicated in the case, Hanson continues to insist that it was and even misleadingly edited a quote from *Lamberton* in an attempt to support that erroneous interpretation. On page 24 of the Combined Response, Hanson states, “As in *Lamberton*: ‘Here the proceedings to which the Victim objects deal 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.” Hanson purports to cite page 50 of *Lamberton* for this quotation. What *Lamberton* actually says is: “Here, the proceeding to which the Victim objects

deals with sentencing and the post-conviction relief proceeding. Applying the plain language of the state constitution, article 2, § 2.1(A)(9) does not apply to this situation.” *Lamberton*, 183 Ariz. at 50. The accurate quotation belies Hanson’s mantra that *Lamberton* involves post-conviction release and that post-conviction release is the only issue that victims may be heard on in post-conviction proceedings. (Hanson Combined Response at 12.)

Hanson also disputes that the legislature essentially abrogated the holding in *Lindsay R.* a year after it was decided in 2016. Hanson concedes only that the amendments to A.R.S. § 13-4437 after *Lindsay R.* expanded the victim’s right to make an argument and then only in the original restitution hearing to determine the necessity and amount of restitution under A.R.S. § 13-804. (Hanson Combined Response at 15-17.) Hanson goes on to state that both *Lamberton* and *Lindsay R.* are still controlling law and bar a victim from pleading defenses, filing pleadings concerning the merits of any criminal action, or usurping the role of the prosecutor. Thus, Hanson concludes that the State and the victim’s counsel in this case acted in “direct violation” of *Lamberton* and *Lindsay R.* in allowing the victim’s counsel to handle the restitution proceedings, and having done so, the victim continues to have no rights to respond to the merits of Hanson’s post-conviction claims which, as apparent to anyone who can read, largely involve the issues of restitution. (Id. at 16-19.) In 2015, the Arizona Court of Appeals decided *Lindsay R. v. Cohen*, 236 Ariz.

565 (App. 2015).

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.

Hanson believes that even though the victim in this case has counsel, she can just convey any responses she has his to PCR petitions to the State who can then convey those positions. In fact, however, regardless of any standing of the prosecutor to assert the victim’s rights upon request, the victim has a right under the VBR, the VRIA, and Rule 39 to be heard on any matter involving restitution and any matter involving sentencing. And in the case of a conflict, acting through the prosecutor is just not good enough. Rule 39(d)(3) of the Arizona Rules of Criminal Procedure provides:

Conflicts. If any conflict arises between the prosecutor and a victim in asserting the victim’s rights, the prosecutor must advise the victim of the right to seek independent legal counsel and provide contact information for the appropriate state or local bar association.

Suppose, for example, in this case, in responding to Hanson’s PCR petitions, the State does not agree with the victim’s position as to whether certain categories of restitution were properly ordered. That would be a conflict of interest and in the

usual case, according to Rule 39(d)(3), the prosecutor would be required to advise the victim to obtain counsel to present the victim's position. Here, the victim already has counsel; indeed, the victim's counsel handled the restitution proceedings in this case. Yet, Hanson maintains that the victim has no right to be heard through counsel in the PCR proceedings even on issues of restitution. That cannot be right.

III. CONCLUSION.

For all the reasons in the State's Petition for Review as well as this Reply, the State asks this Court to grant review and reverse the decision of the Arizona Court of Appeals dated August 21, 2020. This Court should find that the Victim has a right to be heard in post-conviction relief proceedings on restitution issues.

Submitted October 15, 2020.

ALLISTER ADEL
MARICOPA COUNTY ATTORNEY

BY /s/
Lisa Marie Martin
Deputy County Attorney