

Colleen Clase (AZ Bar # 029360)
Jessica Gattuso (AZ Bar # 025492)
Eric Aiken (AZ Bar # 032418)
Robert Swinford (AZ Bar # 030651)
Attorneys for Petitioner E.H.
Arizona Voice for Crime Victims
111 East Taylor Street
Phoenix, AZ 85004
480-600-2661
cclase@voiceforvictims.org
colleen.avcv@gmail.com

IN THE ARIZONA SUPREME COURT

E.H.,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE
OF ARIZONA, in and for the County of
COCONINO, THE HONORABLE
DAN SLAYTON, a judge thereof,

Respondent Judge,

STATE OF ARIZONA; JASON
CONLEE; LENDA HESTER; KIMMY
WILSON

Real Parties in Interest.

Supreme Court
No. CR 19-0118 PR

Court of Appeals
No. 1 CA-SA 19-004

Coconino County Superior Court
No. CR2016-00434
No. CR2016-00435
No. CR2016-00436

**PETITIONER'S
SUPPLEMENTAL BRIEF**

INTRODUCTION

Petitioner, E.H., by and through undersigned counsel, respectfully submits this *Supplemental Brief* for this Court's review.

SUPPLEMENTAL ARGUMENTS

I. This case is ripe for review.

A. The constitutional right to restitution belongs to E.H.; thus, only E.H. can waive her individual constitutional right.

1. Rights under the Victims' Bill of Rights are personal to victims.

When the state and a criminal defendant negotiate a restitution cap in a plea agreement over the objection of the victim, it constitutes an impermissible waiver of the victim's constitutional right to restitution—a right that belongs to the victim. Once restitution was capped over E.H.'s objections, this issue became ripe for review. The express language of Arizona's Victims' Bill of Rights (VBR), Ariz. Const. art. II, § 2.1, makes this clear: "To preserve and protect victims' rights to justice and due process, *a victim of a crime has a right...[t]o receive prompt restitution...*" Ariz. Const. art. II, § 2.1 (A)(8) (emphasis added).

Our legislature, vested with authority under the VBR "to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims[,]" has enacted A.R.S. § 13-4437(A), which further preserves and protects the personal nature of the VBR. "The rights enumerated in

the [VBR], article II, section 2.1, Constitution of Arizona, any implementing legislation or court rules *belong to the victim.*” A.R.S. § 13-4437(A). The statutory provision also provides that “the victim has the right to present evidence or information and make an argument to the court, personally or through counsel, at any proceeding to determine the amount of restitution...” *Id.* at § 13-4437(E).

2. Only a victim can waive their constitutional rights.

E.H. provided written argument regarding waiver of individual rights in her *Petition for Review*. See *E.H.’s Petition for Review* at 16-18. She supplements as follows below.

Waiver is an intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (discussing the definition of waiver of a right). The individual constitutional rights of criminal defendants are so revered that trial courts are generally required to make findings on the record before a defendant may waive a right. For example, when considering waiver of the Sixth Amendment right to counsel, the *Johnson* Court wrote:

The constitutional right of an accused to be represented by counsel invokes...the protection of a trial court...This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.

Johnson, 304 U.S. at 465. When a criminal defendant enters a guilty plea, trial courts are required to ensure they are making a knowing, intelligent, and voluntary waiver of their individual constitutional rights to a jury trial, to confront witnesses, and against self-incrimination. *Boykin v. Alabama*, 395 U.S. 238 (1966) (reversing an Alabama robbery conviction and death sentence when the trial judge accepted the guilty plea without an affirmative showing that it was intelligent and voluntary); *see also State v. Laurino*, 106 Ariz. 586, 588 (1971) (construing *Boykin v. Alabama* to extend procedural requirements of Rules 11 of the Federal Rules of Criminal Procedure to Arizona's state courts).

Not even counsel for the accused may waive their client's individual rights. *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018) (a criminal defendant has a Sixth Amendment right to insist their counsel refrain from admitting guilt as part of trial strategy; violation warranted a new trial). Even when defense counsel's trial strategy was to prevent his client from receiving a death sentence by conceding he committed the murders, but arguing the defendant's mental state prevented him from forming specific intent, the *McCoy* Court held that the defendant has a right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt. *McCoy*, 138 S.Ct at 1503. The Court reasoned that the defendant's "ability to decide whether to maintain his innocence should not displace counsel's, or the court's, respective trial management roles." *Id.* at 1509.

“Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called ‘structural[;]’ when present, such an error is not subject to harmless-error review.” *Id.* at 1511.

E.H. does not provide this authority to suggest a trial court conduct a colloquy in the event a victim decides to waive a constitutional right as that is not the question before this Court. Rather, E.H. simply points to this authority to demonstrate the importance of individual rights and who can waive them. Generally, the individual rights of a criminal defendant may only be waived by the criminal defendant. Much care is taken to ensure waiver is knowing, intelligent, and voluntary. Neither the government nor the trial court can waive, or otherwise violate, the rights of the accused without significant consequences. Yet, for victims in Arizona, there is a long held practice of capping restitution in plea agreements based on a series of cases that predate the Arizona VBR. *See State v. Lukens*, 151 Ariz. 501 (1986); *State v. Phillips*, 152 Ariz. 533 (1987); *State v. Crowder*, 155 Ariz. 477 (1987); *State v. Adams*, 159 Ariz. 168 (1988).¹ A negotiation by the state and criminal defendant that creates a cap on the amount of restitution a victim may seek amounts to an impermissible waiver of the victim’s right to restitution, which Arizona’s constitution and statutes make clear is a right that that belongs to the victim. Ariz. Const. art. II, § 2.1 (A)(8); A.R.S. § 13-

¹ Also referred to in this brief as the “the pre-VBR restitution cap cases.”

4437(A) & (E).

This impermissible waiver of victims' rights appears to pose no consequence to anyone except the victim. Victims are first harmed when another, without standing to waive a right personal to the victim, waives a victim's right only to have the impermissible waiver condoned by our criminal justice system. Victims are further harmed when they are placed at risk of exceeding a restitution cap and the only solution is that the court may allow the criminal defendant to withdraw from their plea agreement if the restitution ordered exceeds the cap. *E.H. v. Slayton*, 1 CA-SA 19004, 2019 WL 1220746 ¶ 5 (App. March 14, 2019). This solution is troublesome as it compounds the restitution cap issue by also implicating the victim's constitutional right to finality after conviction and sentence. Ariz. Const. art. II, § 2.1(A)(10).

B. A restitution order is not required to make this case ripe for review.

The Arizona Constitution does not have a case or controversy requirement, but this Court applies doctrines of standing and ripeness “as a matter of sound judicial policy.” *Bennett v. Napolitano*, 206 Ariz. 520, 524 (2003). Ripeness is a prudential doctrine that prevents a court from rendering a premature decision on an issue that may never arise. *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 ¶ 36 (September 16, 2019) citing *Winkle v. City of Tucson*, 190 Ariz. 413, 415 (1997). Without addressing the impermissible waiver of E.H.'s constitutional and

statutory rights, that only she can waive, the Court of Appeals declined jurisdiction over E.H.’s Petition for Special Action. *E.H. v. Slayton*, 1 CA-SA 19004, 2019 WL 1220746 ¶ 5 (App. March 14, 2019). The Court reasoned that unless E.H.’s claimed economic loss exceeds \$500,000, “it is not clear how she would be prejudiced by the restitution caps.” *Id.* Since then, the Court of Appeals held a statutory restitution cap for certain vehicular offenses unconstitutional in light of Arizona’s VBR and its guarantees to prompt and full restitution. *State v. Patel*, 1 CA-CR 18-0774, ¶¶1, 8 (App. October 22, 2019).²

The Real Parties also assert that because the trial court has not yet ruled on or rejected any restitution claim, E.H.’s petition is purely hypothetical. *Real Party State’s Response* at 10. Real Party further contends: “Nearly four years after J.H.’s death and seven months after sentencing Petitioner has not submitted any restitution request to the trial court or to the State, thereby giving the trial court no opportunity to issue a restitution order.”³ *Id.* at 12. The characterization of “nearly four years” after J.H.’s death is misleading. Under the express language of the VBR, a victim has a right to receive “prompt restitution from the person or persons *convicted* of the criminal conduct that caused the victim’s loss or injury.” Ariz.

² At the time that the Patel case the statutory cap was \$10,000, but later amended to \$100,000. *Patel* at ¶ 1. The victim’s restitution award was \$ 61,191.99. *Id.* at ¶ 2. The Court of Appeals notes that the discussion in *Patel* regarding the power of the legislature under the VBR is in contrast to restitution caps in plea agreements. *Id.* at ¶ 13, n. 4.

³ A.R.S. § 13-603 “is silent as to when restitution must be assessed.” *State v. Grijalva*, 242 Ariz. 72, 74 (App. 2017) (quoting *State v. Holguin*, 177 Ariz. 589, 591 (App. 1993)).

Const. art. II, § 2.1(A)(8) (emphasis added). The constitutional right to prompt restitution does not extend to the criminally accused, only the convicted. *Id.* E.H. would not have been able to seek a restitution order prior to any of the convictions in this case. The State was well aware that E.H. had been in the custody of the Arizona Department of Child Safety (DCS) since the time of J.H.'s murder. During that time, E.H. was not in a position to seek restitution as it is not a function of DCS to seek restitution for the economic losses of child-victims in their care. Additionally, the State was aware that E.H. was still in DCS custody when the sentencing hearings for each defendant were held and, at that time, the adoption date was unknown. *E.H.'s Petition for Review Appendix 4* at 21. Despite being aware of E.H.'s circumstances, the State still asked for the court to leave restitution open for 60 days for Defendant Conlee. *E.H.'s Petition for Review Appendix 4* at 31. The trial court, however, left restitution open for the duration of Conlee's probation. *Id.* at 35, lines 9-14.

This Court's consideration of *Brush & Nib Studio, LC*, 448 P.3d 890, undercuts both the reasoning of the Court of Appeals in declining jurisdiction over E.H.'s *Petition for Special Action* and the State's ripeness argument. In *Brush & Nib Studio, LC v. City of Phoenix*, this Court considered a case brought by two Christian artists who design custom wedding invitations as part of their business. *Brush & Nib Studio, LC*, 448 P.3d 890 at ¶¶ 2-4. The artists sought to enjoin the

City of Phoenix from enforcing its 2013 Human Relations Ordinance that prohibits the discrimination against those in protected classes, including a person's sexual orientation, *against them in the future*, as well as to obtain a declaration that the ordinance violates their right to free speech under article 2, section 6 of the Arizona Constitution, and their free exercise right under FERA, § 41-1493.01. *Id.* at 22 (emphasis added). Part of the ordinance made it unlawful to post any statement publicizing that any services will be refused because of a person's status. *Id.* at 19. As part of their requested declaratory relief, Plaintiffs requested an order allowing them to post a statement on their website announcing their intention to refuse requests to create "any custom artwork that demeans others, endorses racism, incites violence, contradicts our Christian faith, or promotes any marriage except marriage between one man and one woman." *Id.*

At the time this opinion was issued, the City had not cited the Plaintiffs for violating the ordinance. *Id.* at ¶ 22. The City argued this case was not ripe because the action was filed before any same sex couple requested custom wedding invitations from the artists; thus, the lawsuit was based on speculative claims about how the ordinance might apply to a hypothetical customer's request. *Id.* at ¶ 33 ("Because none of these abstract legal claims may ever arise, the City contends that Plaintiffs' action...is not ripe and should be dismissed.").

This Court did not agree with the City's assertion that the case was not ripe

and concluded that an actual case and controversy existed between the parties to the extent the artists claim was based on the custom wedding invitations. *Id.* at ¶¶ 39 & 41. This Court noted the artists faced a real threat of being prosecuted for violating the Ordinance by refusing to create such invitations for a same-sex wedding. *Id.* at ¶ 39 (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 300–01 (1979) (finding standing despite the lack of a concrete factual situation or criminal enforcement of the statute against the challenger because the threshold issue, whether the challengers' activity was protected as free speech, was justiciable)).

In the present case, the initial harm to E.H. occurred when the State and criminal defendants negotiated a cap on restitution over her objections, resulting in an impermissible waiver of E.H.'s individual constitutional and statutory rights to restitution. This was condoned by the trial court and occurred during a time when E.H.'s circumstances prevented her from attempting to determine an actual economic loss. Allowing the practice of capping restitution in plea agreements, even over the victim's objection, chills the victim's perception of how Arizona court's view victims' individual constitutional rights. Beyond this chilled perception, capping restitution in plea agreements creates a real threat that E.H. and any other victim who seeks restitution may exceed the cap; thereby, risking not being made whole as our VBR and implementing legislation demands.

II. A departure from the doctrine of *stare decisis* is required to prevent further harm to victims.

The common law doctrine of *stare decisis* arose from the desire for certainty and continuity in the law. Jon D. Noland, *Stare Decisis and the Overruling of Constitutional Decisions in the Warren Years*, 4 Val. U. L. Rev. 101, 102 (1969) citing Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 Harv. L. Rev. 409 (1924). “[T]herefore[,] we should generally follow precedent.” *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 606 (Ariz. 2017). Through its tendency to preserve tradition, the strict adherence to the doctrine may prevent law from keeping pace with changing conditions and work unnecessary hardship in particular cases. Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 Harv. L. Rev. 409, 413 (1924). A *stare decisis* analysis accords reduced deference to precedents that have “def[ie]d practical workability.” Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 Wash. & Lee L. Rev. 411, 421 (2010) citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992); see also, e.g., *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088 (2009) (“[T]he fact that a decision has proved ‘unworkable’ is a traditional ground for overruling it.”); *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion) (“Eighteen years of essentially pointless litigation have persuaded us that [the applicable precedent] is incapable of principled application.”); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 64 (1996) (“Since it was issued, [the applicable precedent] has created confusion

among the lower courts that have sought to understand and apply the deeply fractured decision.”); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985) (“We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is ‘integral’ or ‘traditional.’”); *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (“[W]e do not find [the applicable precedent] to be unworkable or confusing.”). *Contra John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (“[T]he earlier cases lead, at worst, to different interpretations of different, but similarly worded, statutes; they do not produce ‘unworkable’ law.” (quoting *United States v. IBM Corp.*, 517 U.S. 843, 856 (1996))). The question courts should ask is whether an opinion has become too difficult to apply for courts, attorneys, and other stakeholders. Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 Wash. & Lee L. Rev. 411, 422 (2010).

Respect for precedent demands that there be compelling reasons to overrule a prior decision. *State v. Hickman*, 205 Ariz. 192, 200 (Ariz. 2003) citing *Lowing v. Allstate Ins. Co.*, 176 Ariz. 101, 107 (Ariz. 1993). The doctrine of *stare decisis* is not a rigid requirement, but any departure from precedent requires a special justification. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (noted by the United States Supreme Court in declining to overrule a previous decision). The judicial

oath is to the constitution and not to any particular doctrine. *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. at 607. While courts have strong respect for the doctrine of stare decisis, “[it] should not prevail when a departure is necessary to avoid the perpetuation of pernicious error.” *Id.*

The pre-VBR restitution cap cases create workability issues, something recognized early on by Justice Moeller:

I am mindful that precedents of the court should not lightly be overruled and certainly not for reasons so inconsequential as a change of personnel on the court. We now have enough experience with *Phillips* to know that it is creating great mischief in Arizona's criminal justice system. The instant case is but one example of that mischief. In an effort to be scrupulously fair, the court in *Phillips* announced a wide-ranging rule which has now proven to be both unworkable and unnecessary. I perceive no infirmity whatsoever under either the constitution or Rule 17 in imposing restitution upon a defendant who has been advised that the law requires it, who has agreed to it, and who has the right to have a hearing relative to the amount and manner of its payment. For these reasons, I respectfully suggest that we should revisit *Phillips* now and withdraw the broad rule there announced, rather than attempt to limit its effect in a piecemeal fashion.

State v. Crowder, 155 Ariz. 477, 483 (1987) (concurrency in part).

While the workability issues Arizona's courts faced in 1987 may have been limited to issues presented by criminal defendants who wanted to withdraw from their plea agreements, today's workability issues include the fact that crime victims have

constitutional and statutory rights to prompt and full restitution. Ariz. Const. art. II, § 2.1(A)(8); A.R.S. § 13-804; *State v. Patel*, 1 CA-CR 18-0774 (App. October 22, 2019) (holding statutory restitution cap under A.R.S. § 28-672(G) unconstitutional in light of the Arizona VBR). Because of the pre-VBR restitution cap cases, victims' individual constitutional and statutory rights to restitution are being impermissibly waived by prosecutors and criminal defendants as a negotiation tool in matters that resolve by plea agreement. For nearly thirty years, this issue has not gone unnoticed, but has remained unresolved.

There is another compelling reason and special justification for this Court to overrule the pre-VBR restitution cap cases—the Arizona Victims' Bill of Rights, Ariz. Const. art. II, § 2.1 and its implementing legislation. At the time of the pre-VBR restitution cap cases in 1986, 1987, and 1988, victims did not have constitutional and statutory rights to prompt and full restitution. Thus, it would have been impossible for this Court to have been able to thoroughly analyze the implication of restitution caps in plea agreements on crime victims. In light of the VBR, our Court of Appeals recently held a statutory restitution cap of \$100,000 under A.R.S. § 28-672(G) unconstitutional at it violated the victim's right to prompt and full restitution. *State v. Patel*, 1 CA-CR 18-0774, ¶¶ 1, 8 (App. October 22, 2019) (holding statutory restitution cap under A.R.S. § 28-672(G) unconstitutional in light of the Arizona VBR).

The present case presents an opportunity for this Court to reconsider its previous authority predating the VBR. *E.H. v. Slayton*, 1 CA-SA 19004, 2019 WL 1220746 ¶¶ 8-9 (App. March 14, 2019). The pre-VBR restitution cap cases requiring a defendant to know the precise amount of restitution at the time of a guilty plea, specifically *Phillips*, were analyzed under federal due process applicable by the Fourteenth Amendment. *E.H. v. Slayton*, 1 CA-SA 19004, 2019 WL 1220746 ¶ 10 (App. March 14, 2019); *State v. Phillips*, 152 Ariz. 533 (1987). “In federal criminal proceedings involving guilty pleas, the court must advise criminal defendants of their rights in a manner similar to our procedures under Arizona Rule of Criminal Procedure 17.2...[u]nlike our rule, which does not explicitly address restitution, Federal Rule of Criminal Procedure 11(b)(1)(K) requires the Court to inform the defendant of ‘the court’s authority to order restitution’ before accepting a guilty plea.” *E.H. v. Slayton*, 1 CA-SA 19004, 2019 WL 1220746 ¶ 12 (App. March 14, 2019). Informing federal defendants that restitution may be ordered, without capping restitution, before accepting a guilty plea has not been held to violate the due process rights of a criminal defendant. *E.H. v. Slayton*, 1 CA-SA 19004, 2019 WL 1220746 ¶ 12 (App. March 14, 2019) citing *Dolan v. United States*, 560 U.S. 605, 608-609 (2010).

The pre-VBR restitution cap cases can be overruled and victims’ constitutional rights preserved and protected without harm to the due process rights

of Arizona's criminal defendants. Knowing that restitution is a consequence of committing a criminal offense and that a victim is constitutionally entitled to seek restitution is enough. None of the pre-VBR restitution cap cases expressly requires a criminal defendant to know the exact amount of restitution before signing a plea agreement as a matter of state due process. *See generally E.H.'s Petition for Review* at 9-16. Otherwise, a criminal defendant's due process rights will be complied with as it relates to restitution when the criminal defendant is given the chance to contest the amount of restitution, present relevant evidence, and be heard at a restitution hearing. *State v. Fancher*, 169 Ariz. 266, 268 (App. 1991); *State v. Lewus*, 170 Ariz. 412, 414 (App. 1992) (absent a waiver, a criminal defendant must be afforded a hearing and be present); *In re Stephanie B.*, 204 Ariz. 466, 470 (App. 2003) (restitution must be proven by a preponderance of the evidence).

III. While trial courts have the authority to manage their courtrooms, they cannot take action that violates the due process rights of any individual, including crime victims.

E.H. has provided written arguments regarding her right to have her own counsel represent her from the well of the courtroom. *See E.H.'s Petition for Review* at 22-29. She supplements those arguments below.

E.H. does not dispute that trial courts generally have discretion to control the courtroom and trial proceedings. *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, 91 (App. 1998) (noting control of courtroom and proceeding lies with judge). "We

will not interfere in matters within [the trial court's] discretion unless we are persuaded that the exercise of such discretion resulted in a miscarriage of justice or deprived one of the litigants of a fair trial.” *O’Rielly Motor Co. v. Rich*, 3 Ariz.App. 21, 27 (1966). “It has been repeatedly stated under a variety of circumstances that representation by one’s duly constituted attorney is fundamental to our system and administration of justice.” *Arizona State Dep’t. of Welfare v. Barlow*, 80 Ariz. 249, 252, 296 (1956) (citing *Powell v. State of Alabama*, 287 U.S. 45) (other internal citations omitted). The denial of the right to effective participation of counsel constitutes a denial of due process of law so gross as to lack a necessary attribute of a judicial determination. *Barlow*, 80 Ariz. at 253 (citing *In re Frinzl*, 152 Ohio St. 164, 87 N.E.2d 583; *Phoenix Metal Corporation v. Roth*, 79 Ariz. 106). To comport with due process, trial courts shall allow attorneys retained to assert and enforce rights to advocate for their clients. *Brenda D. v. Dep’t of Child Safety*, 243 Ariz. 437 (2018) (upholding court of appeals decision finding violation of due process when trial court limited attorney to questioning weight of evidence, not its admissibility).

Here, among a number of other constitutional rights, the VBR guarantees E.H. rights to justice and due process. Ariz. Const. art. II, § 2.1 (A)(1). The implementing legislation defines, implements, preserves and protects the constitutional right to justice and due process by providing victims a statutory right

to have their own counsel. A.R.S. § 13-4437(A). There are a number of rights that E.H. may assert at sentencing through her own counsel. *See* A.R.S. § 13-4437 (A)-(E); A.R.S. § 13-4426; A.R.S. § 13-4426.01. Instead, E.H.'s counsel was directed to sit in the gallery of the courtroom and only able to make a record when the trial court wanted to hear from her during a hearing that was fluid. *See generally E.H.'s Petition for Review Appendix 4.* The trial court then turned to the prosecutor to address issues within the purview of E.H.'s counsel. *See E.H.'s Petition for Review* at 26-27. The trial court required this and the state complied despite existence of a conflict between E.H. and the Coconino County Attorney's Office. *See* Ariz. R. Crim. P. 39(d)(3).

Allowing E.H.'s counsel to represent her client from the well of the courtroom where she can participate in a non-jury⁴ proceeding that is fluid would not prejudice the state or the criminal defendant in any way. It does, however, prejudice the victim to not afford a victim's counsel the opportunity to address matters within the scope of A.R.S. § 13-4426 and A.R.S. § 13-4426.01 regarding a victim impact statement made on behalf of E.H. It sends a disheartening message to victims and victim representatives who choose to retain their own counsel

⁴ AVCV's practice is to sit in the back row of chairs along the bar within the well of the courtroom during pre-trial, sentencing, restitution, post-conviction, and other non-trial proceedings. Generally, during trial, AVCV's practice is to sit with the victims in the gallery. Depending on the circumstances of each case and the individual needs of each victim, there have been times in other cases when AVCV's attorneys have sat in the well of the courtroom during a victim's direct and/or cross-examination at trial.

exercise rights in Coconino County– that rights may only be asserted at the Court’s discretion.

CONCLUSION

For the reasons set forth in E.H.’s *Petition for Review and Supplemental Brief*, E.H. respectfully requests this Court overrule their prior decisions requiring restitution caps in plea agreements and hold that victims’ rights counsel may assert and enforce victims’ rights from the well of the courtroom where they will be able to fully participate in matters within the scope of victims’ constitutional and statutory rights during hearings that are often fluid.

Respectfully submitted this 22nd day of October, 2019.

By: _____/Colleen Clase/_____
Attorney for Crime Victim, E.H.