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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Shawna Forde,

10 Petitioner,

11 v.

12 David Shinn,

13 Respondents.
14

No. CV-21-00098-TUC-SHR

ORDER

DEATH PENALTY CASE

15 Before the Court is Respondents' Motion To Preclude Victim Contact (Doc. 12),
16 which requests an order precluding Petitioner's counsel from directly contacting any victim
17 in this case and directing Petitioner's counsel to initiate any such contact through
18 Respondents' counsel. Petitioner opposes the motion. (Doc. 13.)

19 **I. Background**

20 Shawna Forde ("Petitioner") is an Arizona death row inmate seeking habeas relief
21 in this Court. She was convicted in Pima County Superior Court of two counts of first-
22 degree felony murder and six other felonies committed during a home invasion and
23 sentenced to death. *State v. Forde*, 315 P.3d 1200, 1209 (Ariz. 2014).

24 After her convictions and sentences were affirmed on appeal, Petitioner
25 unsuccessfully pursued post-conviction relief in state court. On March 9, 2021, she filed a
26 notice of intent to seek habeas corpus relief in this Court. (Doc. 1.) The Court appointed
27 counsel and set a deadline of August 10, 2021, for Petitioner to file her habeas petition.
28 (Docs. 5, 11.)

1 **II. Discussion**

2 Respondents assert the federal Crime Victims’ Rights Act (CVRA), 18 U.S.C. §
3 3771, mandates state crime victims receive “all rights due in a habeas case” and request
4 the court preclude Petitioner’s defense team from directly contacting any victim in this case
5 and instead order any such contact must be initiated through counsel for Respondents.
6 (Doc. 12 at 2.)

7 As discussed in greater detail below, the Court will deny the request because
8 Respondents, the Director of the Arizona Department of Corrections and the Warden at
9 The Arizona State Prison – Perryville Complex, lack standing to enforce the provisions of
10 the CVRA in these federal habeas proceedings. *See* 18 U.S.C. § 3771(b)(2)(B)(i). Even if
11 Respondents had standing, the requested relief is inconsistent with state law that provides
12 for the expiration of the requested protections at the conclusion of state court post-
13 conviction relief proceedings. *See* A.R.S. § 13-4402(A). Finally, Respondents
14 impermissibly ask for resolution of a dispute that has not and may never ripen¹, and ask
15 the Court to presume all direct contact with victims by Petitioner’s defense team violates a
16 victim’s rights to dignity and privacy. *Cf. United States v. Howard*, 793 F.3d 1113, 1114
17 (9th Cir. 2015) (Kozinski, J., concurring) (“Defendants should not be presumed to engage
18 in witness tampering or intimidation; only if there is actual proof of tampering or
19 intimidation should the district judge get involved.”).

20 **A. Standing**

21 The CVRA states that in federal habeas proceedings arising out of state court
22 convictions, the court shall ensure a crime victim is afforded “[t]he right not to be excluded
23 from any . . . public court proceeding”; “[t]he right to be reasonably heard at any public
24 proceeding in the district court involving release, plea, sentencing, or any parole
25 proceeding”; “[t]he right to proceedings free from unreasonable delay”; and “[t]he right to
26 be treated with fairness and with respect for the victim’s dignity and privacy.” 18 U.S.C. §
27 3771(a)(3), (4), (7), (8); (b)(2)(A).

28 ¹ *see United States v. Freuhauf*, 365 U.S. 146, 157 (1961) (declining to issue advisory
opinion)

1 Respondents, however, lack standing to enforce the provisions of Arizona law
2 through the CVRA. While the Government may assert a victim’s rights in a federal criminal
3 trial², only the crime victim or the crime victim’s lawful representative may enforce the
4 CVRA in federal habeas proceedings. 18 U.S.C. § 3771(b)(2)(B)(i). And in Arizona, “the
5 rule is well established that a prosecutor does not ‘represent’ the victim in a criminal trial.”
6 *State ex rel. Romley v. Superior Ct. In & For Cty. of Maricopa*, 891 P.2d 246, 250 (Ariz.
7 App. 1995).³ The Court cannot assume Respondents’ interests and the victims’ interests
8 are coextensive.

9 Though Petitioner does not challenge Respondents’ standing, the Court has an
10 independent duty to assure standing exists. *See Summers v. Earth Island Inst.*, 555 U.S.
11 488, 493 (2009). The Court finds Respondents do not have statutory authority to invoke
12 the CVRA on the state victim’s behalf. Petitioner correctly notes Respondents have not
13 asserted that any victim in this case has expressed a desire to avoid direct contact with
14 Petitioner’s counsel. Petitioner acknowledges every *victim* has the right to decline an
15 interview request. (Doc. 14 at 4.) Accordingly, the Court will deny Respondents’ motion
16 for lack of standing.

17 **B. Arizona State Law**

18 Even if Respondents’ had standing to enforce the CVRA, and the Court “liberally
19 construed” the CVRA to include the right to be free from unsolicited, direct contact with a
20 prisoner’s agents “consistent with Arizona law,” the statutory provision Respondents seek
21 to enforce expires at the conclusion of state court proceedings.

22 The “Arizona law” at issue, A.R.S. § 13-4433(B), is one of several statutory
23 provisions enacted to implement Arizona’s Victims’ Bill of Rights (“VBR”), known as the
24 Crime-Victims’ Rights Implementation Act, A.R.S. § 13-4401 *et seq.* (“CVRIA”). The
25 VBR consists of twelve specific rights to “preserve and protect victims’ rights to justice

26 ² *see* 18 U.S.C. § 3771(a) and (d)(1)

27 ³ Under Rule 39, Arizona Rules of Criminal Procedure, a state prosecutor does have
28 standing to assert any of the rights a victim is entitled to in any criminal proceeding upon
the victim’s request. *See* Ariz. R. Crim. P. 39(d)(2). The Rule acknowledges that conflicts
may arise between the prosecutor and the victim in asserting the victim’s rights and
provides a mechanism for resolving them. *See* Ariz. R. Crim. P. 39(d)(3).

1 and due process,” including the right of a crime victim “[t]o be treated with fairness,
2 respect, and dignity, and to be free from intimidation, harassment or abuse, throughout the
3 criminal justice process.” Ariz. Const. Art. 2, § 2.1(A)(1); *see State ex rel. Romley v. Hutt*,
4 987 P.2d 218, 221 (Ariz. App. 1999) (discussing provisions of Arizona’s Victims’ Bill of
5 Rights and implementing legislation). Section 13-4433(B) states defense counsel⁴ may
6 contact the victim or the victim’s immediate family only through the prosecutor. The latter
7 provision is not a right provided to victims by the Arizona Constitution.

8 Contrary to Respondents unsupported assertion that “the Arizona Legislature has
9 specifically directed that Arizona’s victims’ rights protections apply until a case’s final
10 disposition, including *during related federal court litigation*,” (Doc. 12 at 4) (emphasis
11 added), the statutory provisions of the VBR contemplate the expiration of the rights and
12 duties established under A.R.S. § 13-4433(B) at the conclusion of state court proceedings.
13 *See* A.R.S. § 13-4402(A); *see also* Ariz. R. Crim. P. 39(a)(3)(“A victim retains the rights
14 provided in these rules until the rights are no longer enforceable under A.R.S. §§ 13-4402,
15 13-4402.01, and 13-4433.”). The rights and duties established under A.R.S. § 13-4433(B)
16 continue to be enforceable until the “final disposition of the charges,”⁵ all “post-conviction
17 release and relief proceedings and the discharge of all criminal proceedings relating to
18 restitution.”⁶ *Id.* Respondents incorrectly argue CVRIA’s definition of ‘appellate
19 proceedings’ somehow insinuates a continuation of protections through related federal
20 litigation. However, Section 4402(A)—which provides for the cessation of § 4433’s
21 protections—does not contain the term “appellate proceedings”; thus, Respondents’
22 suggestion the term somehow applies to § 4433 is misleading.

23 Unlike the definition of the term “appellate proceedings,” there is no reason to
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25 ⁴ References to defense counsel in this order are intended to encompass a defendant’s
26 attorney or any other agent of the defendant, including other members of the defense team
27 such as investigators or paralegals.

28 ⁵ “Final disposition” is defined in the CVRIA to mean “the ultimate termination of the
criminal prosecution of a defendant by a trial court, including dismissal, acquittal or
imposition of a sentence” A.R.S. § 13-4401(1).

⁶ Neither party has indicated whether any victim is owed restitution in this matter. Because
the Court finds Respondents lack standing to enforce the CVRA in any event, evidence of
restitution owed to any victim would not make a difference to the Court’s final decision.

1 believe the term “postconviction relief proceedings,” in the relevant section includes
2 federal habeas review. *See* A.R.S. § 13-4401(15) (“‘Post-conviction relief proceeding’
3 means a contested argument or evidentiary hearing that is held in open court and that
4 involves a request for relief from a conviction or sentence.”) In contrast, § 13-4433(H)
5 specifically states a victim’s right to refuse an interview remains enforceable “beyond a
6 final disposition” as prescribed in § 13-4402(A). If all the statutory protections in § 13-
7 4433 remained viable after conclusion of state court proceedings, § 13-4433(H) would be
8 superfluous. Moreover, § 13-4433(H) demonstrates the Arizona Legislature was cognizant
9 of the need to address the cessation of certain protections, and concomitant with the right
10 to refuse interviews afforded victims by the Arizona Constitution, chose to enact legislation
11 to protect a victim’s right to refuse an interview even after the final disposition of the
12 charges, but not the right to contact by a defendant’s or petitioner’s defense team only
13 through a prosecutor’s office. *Cf. Delgado v. U.S. Att’y Gen.*, 487 F.3d 855, 862 (11th Cir.
14 2007) (“[W]here Congress knows how to say something but chooses not to, its silence is
15 controlling.” (quotations omitted)).

16 Respondents next assert several Courts in this District have granted relief similar to
17 that requested here. (Doc. 12 at 2–3); *see also Johnson v. Shinn*, CV 18-00889-PHX-MTL
18 (Doc. 15 at 4–6) (compiling cases). None of the cases relied upon by Respondents hold
19 that A.R.S. § 13-4433 directly applies to federal habeas proceedings; in those cases, the
20 court exercised discretion to apply A.R.S. § 13-4433 for purposes of effectuating the
21 CVRA, finding that it furthers the goal of respecting a crime victim’s dignity and privacy
22 without unduly burdening the petitioner. *See id.* Although the Court is cognizant of the role
23 the traditional notions of comity and federalism play in habeas proceedings, Respondents
24 have failed to show such notions require application of the CVRIA—whose protections
25 relevant to this order have expired by its own terms—as a state law governing this Court’s
26 management and oversight of federal habeas counsel. *Cf. Armstrong v. Shinn*, CV 15-
27 00358-PHX-RM (Doc. 123 at 3). The federal CVRA, rather than the VBR, applies to these
28 federal habeas proceedings. To the extent Respondents invoke the CVRA to preclude

1 victim contact in these proceedings, they lack standing to do so. *See* 18 U.S.C. §
2 3771(b)(2)(B)(i).

3 Citing *State v. Lee*, 245 P.3d 919 (Ariz. App. 2011), Respondents assert the
4 dissipation of a victim’s rights under state law after the conclusion of state-court
5 proceedings would “render those rights meaningless.” (Doc. 12 at 2.) In *Lee*, an Arizona
6 Appellate Court held a trial court judge in a civil forfeiture case proceeding parallel to a
7 criminal proceeding had erred by compelling pre-trial depositions of the crime victims
8 because “the right to refuse to be deposed is immediately and completely defeated if the
9 defendant can compel a victim to submit to a deposition in a separate proceeding.” *Id.* at
10 924, ¶ 13. But the forfeiture proceedings in *Lee* were concurrent with the criminal
11 proceedings, and as the court explained, the purpose underlying a victim’s right to refuse
12 a pretrial interview is to protect the victim’s privacy and minimize contact with the
13 defendant prior to trial. *Id.* (citing *State v. Riggs*, 942 P.2d 1159, 1162 (1997)). *Lee* also
14 cited *Champlin v. Sargeant In and For County of Maricopa*, 965 P.2d 763 (Ariz. 1998),
15 that states an additional purpose of the VBR includes the victim’s right to be free from
16 retraumatization during the pretrial process, but also emphasizes that nothing in the VBR
17 or § 13-4433 “supports the argument that victims have a blanket right to be shielded from
18 all contact with defendants or their attorneys.” *Id.* at 767. The cases cited by Respondents
19 further emphasize the purpose of the § 3344(B) protection is to minimize unwelcome
20 contact with a defendant *prior to trial*. (*See* Doc. 12 at 3–4) (citing *J.D. v. Hegyi*, 335 P.3d
21 1118, 1121 (2014) (“[T]he right to refuse a defense interview allows a victim to avoid
22 contact with the defendant before trial. The right also respects the victim’s privacy, at least
23 in the sense of preventing unwelcome questioning by the defense *before the victim testifies*
24 *in court*. Such contact or questioning by the defense could subject the victim to further
25 trauma.”) (quotations omitted); *State v. Riggs*, 942 P.2d 1159, 1162 (1997) (“A victim’s
26 right to refuse a pretrial interview ... stems from ‘the desire to protect a victim’s privacy
27 and minimize contact with the defendant *prior to trial*.’”)) (emphasis added).

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C. Ripeness and the Court's Inherent Authority

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2 Finally, citing 28 U.S.C. § 2254(b)(1)(a) and *Cullen v. Pinholster*, 563 U.S. 170,
3 185 (2011)), Respondents assert Petitioner has no right to discovery in habeas and therefore
4 has no “right” to interview victims or anyone else, and should not need to interview anyone
5 because she may raise only claims that were exhausted in state court based only on the
6 facts the state court considered. (Doc. 12 at 4.) However, Petitioner has not asked the Court
7 for formal discovery; thus, Respondents are seeking a Court order precluding informal
8 investigation. Additionally, Respondents have oversimplified and overstated the
9 controlling law. *Pinholster* holds only that when a claim has been adjudicated in state court,
10 the federal court must confine its review to the state-court record in analyzing whether the
11 petitioner can overcome the limitations of 28 U.S.C. § 2254(d)(1). 563 U.S. at 170. There
12 are situations in which a petitioner may investigate, discover, and present new evidence to
13 overcome the procedural default of a previously exhausted claim, *see Detrich v. Ryan*, 740
14 F.3d 1237 (2013) (en banc) (“In deciding whether to excuse the state-court procedural
15 default, the district court thus should, in appropriate circumstances, allow the development
16 of evidence”), present a new claim that may not have been previously discovered
17 through the exercise of due diligence, *see* 28 U.S.C. § 2254(E)(2)(A), or may overcome
18 procedural hurdles to present new evidence directly in support of the merits of a previously
19 defaulted claim, *see Ramirez v. Ryan*, 937 F.3d 1230 (9th Cir. 2019), and *Jones v. Shinn*,
20 943 F.3d 1211 (9th Cir. 1211), *consolidated and cert granted sub nom. Shinn v. Ramirez*,
21 NO. 20-1009, 2021 WL 1951793 (U.S. May 12, 2021).

22 Respondents assert, and the Court agrees, it has the inherent authority to regulate
23 the proceeding and enter orders necessary to achieve the orderly and expeditious resolution
24 of its docket, *see Nat. Gas Pipeline Co. of Am., Inc. v. Energy Gathering, Inc.*, 86 F.3d 464,
25 467 (5th Cir. 1996). It does not necessarily follow the Court has the inherent authority to
26 proscribe otherwise lawful conduct outside the courtroom by Petitioner’s defense team
27 beyond the statutorily authorized protections provided to victims under federal law. Federal
28 law does not bar a defense team from contacting victims. *See* 18 U.S.C. §

1 3771(b)(2)(B)(A). A “statute’s carefully crafted and detailed enforcement scheme provides
2 ‘strong evidence that Congress did *not* intend to authorize other remedies that it simply
3 forgot to incorporate expressly.” *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993)
4 (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985)). *See also In re*
5 *Kenna*, 453 F.3d 1136, 1137 (9th Cir. 2006) (*Kenna II*) (rejecting victim’s argument that
6 the CVRA “confers a general right for crime victims to obtain disclosure of the
7 [presentence report]” after “[f]ailing to find support for [the victim’s] argument in either
8 the language of the statute or the legislative history.”). Nor may this Court judicially graft
9 new rights into the statute. *See Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444
10 U.S. 11, 19 (1979) (“It is an elemental canon of statutory construction that where a statute
11 expressly provides a particular remedy or remedies, a court must be chary of reading others
12 into it.”).

13 Even if the Court has inherent authority to grant the requested relief, it is not
14 necessary at this time. Respondents assert that incorporating the VBR’s restrictions would
15 promote victims’ interest in fairness, respect and dignity. The federal CVRA, however,
16 already specifically singles out state crime victims in federal habeas cases and provides
17 them “[t]he right to be treated with fairness and with respect for the victim’s dignity and
18 privacy.” 18 U.S.C. §§ 3771(a)(8), (b)(2)(A). The Court does not accept Respondents’
19 position that all contact with surviving victims is per se disrespectful and violative of a
20 victim’s privacy and dignity. If that were the case, defendants and petitioners could never
21 contact victims in federal court under the CVRA. The Court finds Respondents have not
22 demonstrated how the CVRA’s protections are insufficient to protect state crime victims
23 during federal habeas proceedings. The victims themselves have not requested such
24 protections. Accordingly, the Court declines to directly apply the VBR’s restrictions in
25 these proceedings, or to overlay the VBR’s restrictions onto the federal CVRA.

26 This is not to say counsels’ conduct regarding victims is without constraint.
27 Arizona’s rules of ethics are made applicable to counsel in this case by Local Rule of Civil
28 Procedure 83.2(e). Arizona’s Rules of Professional Conduct prohibit counsel from using

1 “means that have no substantial purpose other than to embarrass, delay, or burden any other
2 person, or use methods of obtaining evidence that violate the legal rights of such a person.”
3 Ariz. R. Sup. Ct. 42, E. R. 3.5. As previously discussed, the victims in this case are entitled
4 to the “right to be reasonably protected from the accused” and to be “treated with fairness
5 and with respect for the victim’s dignity and privacy.” 18 U.S.C. § 3771(a)(8). The Court
6 expects all counsel in this case to abide by these provisions.

7 Accordingly,

8 IT IS HEREBY ORDERED Respondents’ Motion to Preclude Victim Contact
9 (Doc. 12) is DENIED.

10 Dated this 22nd day of June, 2021.

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Honorable Scott H. Rash
United States District Judge