

ARIZONA SUPREME COURT

STATE OF ARIZONA,
Appellee,
v.

RICHARD ALLEN REED,
Appellant,

No. 20-0385-PR
No. 1 CA-CR 17-0620
Maricopa County Superior Court
No. CR2015-117844-001

**BRIEF OF AMICUS CURIAE ARIZONA VOICE FOR CRIME VICTIMS,
INC. (AVCV) IN SUPPORT OF APPELLEE AND CRIME VICTIM¹**

Arizona Voice for Crime Victims, Inc.
111 East Taylor Street
Phoenix, AZ 85004
480-600-2661 (office)
480-789-9951 (cell)
colleen.avcv@gmail.com
Colleen Clase (AZ Bar #029360)

¹ Pursuant to Ariz. R. Civ. App. P. 16(b)(1)(A), AVCV has secured the consent of the Appellee, State of Arizona, and the Petitioner/Appellant to file a *Brief of Amicus Curiae*. The rule is unclear whether consent of the Crime Victim and the Intervenor are required. AVCV has received the consent of the Crime Victim. The Intervenor has not responded to AVCV's request. If consent is required, AVCV filed a *Notice of Appearance/Motion for Leave* under Ariz. R. Civ. App. P. 16(b)(1)(C)(iii) on September 28, 2021.

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
CONCLUSION	17

TABLE OF AUTHORITIES

PAGE

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI4

Ariz. Cons. art. II, § 2.1(A)(1)2, 14

Ariz. Const. art. II, § 2.1(A)(6) 14

Ariz. Const. art. II, § 2.1(A)(8)2, 14

Ariz. Const. art. II, § 2.1(D)2, 5, 12

Ariz. Const. art. II, § 244

STATUTORY PROVISIONS

A.R.S. § 13-114 4

A.R.S. § 13-603(C)..... 8

A.R.S. § 13-4403(C)6

A.R.S. § 13-4403(D)(1)6

A.R.S. § 13-441914

A.R.S. § 13-443114

A.R.S. § 13-4437(A)2, 3, 4, 5, 6, 7, 8, 11, 14, 17, 18

A.R.S. § 13-4437(C)4

A.R.S. § 28-672(G).....8

18 U.S.C. § 3509(h)6

RULE PROVISIONS

Ariz. R. Civ. App. P. 16(b)(1)(A) cover

Ariz. R. Civ. App. P. 16(b)(1)(C)(iii) cover, 11

Ariz. R. Crim. P. 6.1(b)4

Ariz. R. Crim. P. 39(d)(2)4

Ariz. R. Crim. P. 39(d)(3)5

E.R. 1.1.....13

E.R. 1.3.....13

E.R. 1.4.....13

E.R. 2.1.....13

E.R. 4.2.....13

CASES

Champlin v. Sargeant, 192 Ariz. 371 (Ariz. 1998).....5, 17

E.H. v. Slayton II, 249 Ariz. 248 (Ariz. 2020)9,17

E.H. v. Slayton III, 251 Ariz. 289 (Ariz. Ct. App. 2021)9

Fay v. Fox, ____ Ariz. ____ (Ariz. 2021)17

In re Erika V., 194 Ariz. 399 (1999)9

In re Ryan A., 202 Ariz. 19 (Ariz. Ct. App. 2002).....9

In the Matter of Martinez, 248 Ariz. 458 (Ariz. 2020)5

State ex rel. Montgomery v. Padilla, 238 Ariz. 560 (Ariz. Ct. App. 2015)17

<i>State ex rel. Romley v. Dairman</i> , 208 Ariz. 484, 488-89 (Ariz. Ct. App. 2004).....	6
<i>State ex rel. Thomas v. Klein</i> , 214 Ariz. 205 (Ariz. Ct. App. 2007).....	11
<i>State v. Cromwell</i> , 211 Ariz. 181 (Ariz. 2005)	4
<i>State v. Hampton</i> , 208 Ariz. 241 (Ariz. 2004)	4
<i>Robinson v. Hotham</i> , 211 Ariz. 165 (Ariz. Ct. App. 2005).....	4
<i>State v. Hughes</i> , 193 Ariz. 72 (Ariz. 1998).....	5
<i>State v. Jernigan</i> , 221 Ariz. 17 (Ariz. Ct. App. 2009)	7
<i>State v. Lamberton</i> , 183 Ariz. 47 (Ariz. 1995)	8
<i>State. v. Lee</i> , 226 Ariz. 234, 237 (Ariz. Ct. App. 2011).....	8
<i>State v. Lindsley</i> , 191 Ariz. 195 (Ariz. Ct. App. 1997)	10
<i>State v. Madrid</i> , 207 Ariz. 296 (Ariz. Ct. App. 2004).....	10
<i>State v. Patel</i> , 251 Ariz. 131 (Ariz. 2021)	8
<i>State v. Spears</i> , 184 Ariz. 277 (Ariz. 1996).....	10, 11
<i>State v. Wideman</i> , 165 Ariz. 364 (Ariz. Ct. App. 1990).....	10

SOCIAL SCIENCE AUTHORITIES

Dean G. Kilpatrick & Ron Acierno, <i>Mental Health Needs of Crime Victims: Epidemiology and Outcomes</i> , 16 J. Traum. Stress 119 (2003).....	15
Dean G. Kilpatrick & Randy K. Otto, <i>Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning</i> , 34 Wayne L. Rev. 7 (1987).....	16
Jim Parsons & Tiffany Bergin, <i>The Impact of Criminal Justice Involvement on Victims’ Mental Health</i> , 23 J. Traum. Stress 182 (2010).....	15, 16

Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. Traum. Stress 159 (2003).....16

ONLINE RESOURCES

<https://www.abajournal.com/magazine/article/what-lawyers-earn>13

<https://www.azdps.gov/about/reports/crime> (last visited September 27, 2021).....7

<https://www.azdps.gov/services/enforcement/crime-victims>
(last visited September 28, 2021)7

<https://www.legalmatch.com/law-library/article/how-much-will-a-criminal-defense-lawyer-cost.html>12

<https://www.reaganlibrary.gov/archives/speech/executive-order-12360-presidents-task-force-victims-crime> (last visited September 27, 2021).....6

President’s Task Force on Victims of Crime,
<https://www.ojp.gov/pdffiles1/ovc/87299.pdf>
(last visited September 27, 2021)16

A Retrospective of the 1982 President’s Task Force on Victims of Crime,
https://www.ncjrs.gov/ovc_archives/ncvrw/2005/pg4d.html
(last visited September 27, 2021)6

INTEREST OF AMICUS CURIAE

Arizona Voice for Crime Victims, Inc. (AVCV) is an Arizona nonprofit organization that works to promote and protect crime victims' interests throughout the criminal justice process. To achieve these goals, AVCV empowers victims of crime through legal advocacy and social services. AVCV also provides continuing legal education to the judiciary, lawyers, and law enforcement. AVCV seeks to foster a fair justice system, which provides crime victims with resources and information to help them seek immediate crisis intervention; informs crime victims of their rights under the laws of the United States and Arizona; ensures that crime victims fully understand their rights; and promotes meaningful ways for crime victims to enforce their rights, including through direct legal representation. A key part of AVCV's mission is to provide information to the judiciary that may be helpful in the determination of important victims' rights issues. AVCV, as the first organization of its kind in the country to provide no cost legal and social services to victims of crime, has an interest in this case because this Court's decision may impact victims' constitutional and statutory rights to justice and due process, full restitution for all economic loss, and the right to counsel of choice.

STATEMENT OF THE CASE

AVCV accepts the facts and procedural history set forth by the Appellee, the State of Arizona.

SUMMARY OF THE ARGUMENT

To preserve and protect rights to justice and due process, Arizona’s Victims’ Bill of Rights (VBR) provides victims with the 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. II, § 2.1(A)(1). The VBR guarantees that victims will “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)(8). The VBR provides the legislature with authority to “enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims...” Ariz. Const. art. II, § 2.1(D). Pursuant to this authority, the Victims’ Rights Implementation Act (VRIA), Title 13, Chapter 40 of the Arizona Revised Statutes was adopted. Included in the VRIA is A.R.S. § 13-4437(A), which provides: “[i]n 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.” A.R.S. § 13-4437(A).

In providing victims the right to counsel, the legislature did not make publicly funded court-appointed victims’ right counsel available to victims. Unless the victim asks the prosecutor to assert rights on their behalf or has no cost counsel, usually from a non-profit organization funded by grants, they will likely incur the expense of private victims’ rights counsel. The legislature did not, and constitutionally

cannot, bar a victim from seeking a restitution award for legal fees associated with asserting and enforcing victims' rights as the authority under the VBR does not allow the legislature to limit rights. Recent decisions from this Court have affirmed that victims are constitutionally entitled to full restitution. Arizona's Courts, including this one, have consistently held that expenses victims incur in the voluntary exercise of victims' right are an economic loss that flows directly from the defendant's criminal conduct.

A categorial bar on restitution awards for legal costs associated with exercising the right to counsel is unfair to victims who do not have a right to publicly funded court-appointed victims' rights counsel and may not have access to no cost counsel. Such a bar is also contrary to the constitutional right to full restitution and will have a punitive impact on victims who want to exercise the right to counsel of their choice. Established social science research demonstrates that the criminal process may be as traumatic victims as the crime itself, but that meaningful participation leads to healing. When victims feel punished for exercising rights, participation will be discouraged and healing will be impeded.

ARGUMENT

I. A.R.S. § 13-4437(A) provides victims a right to counsel of their choice. It is not a bar to making a victim economically whole.

For criminal defendants, court-appointed defense counsel is constitutionally required by the Sixth Amendment as well as Arizona's Constitution. U.S. Const.

amend. VI; Ariz. Const. art. II, § 24; *See also* A.R.S. § 13-114; Ariz. R. Crim. P. 6.1(b). It is firmly established that indigent criminal defendants do not have a right to choose their court-appointed counsel. *State v. Cromwell*, 211 Ariz. 181, 186 (Ariz. 2005); *State v. Hampton*, 208 Ariz. 241, 243 (Ariz. 2004). The fact that an indigent criminal defendant does not have a right to choose their court-appointed counsel does not preclude a defendant from retaining private counsel of their choice. *Robinson v. Hotham*, 211 Ariz. 165 (Ariz. Ct. App. 2005). “[I]ndigent criminal defendant possesses rights under the Sixth Amendment and Article 2, Section 24, to choose representation by non-publicly funded private counsel unless reasons of judicial administration, justice, or other special circumstances outweigh this right.” *Id.* at 169.

Victims do not have the same right to publicly funded court-appointed victims’ rights counsel; and thus, may be forced to retain private counsel if they want to exercise their right to counsel under A.R.S. § 13-4437(A). Petitioner and Amicus, Arizona Attorneys for Criminal Justice (AACJ), argue that victims’ rights are protected through the prosecutor. *AACJ’s Amicus* at 5; *Petitioner’s Supplemental Brief* at 5. Prosecutors may, upon request of the victim, assert victims’ rights. A.R.S. § 13-4437(C); Ariz. R. Crim. P. 39(d)(2). However, having a prosecutor assert rights is not analogous to having publicly funded court-appointed counsel who owes certain duties to clients. The prosecutor is not counsel for the victim, but a minister

of justice. *In the Matter of Martinez*, 248 Ariz. 458, 463 (Ariz. 2020) (noting the role of the prosecutor is not to seek convictions and sentences, but to seek justice). Even though prosecutors may assert victims’ rights at the victim’s request, and many do it well, they also have obligations to criminal defendants. *State v. Hughes*, 193 Ariz. 72, 80 (Ariz. 1998) (noting duty of prosecutors to ensure the defendant receives a fair trial). In some instances, such as when a conflict arises, the prosecutor has a duty to advise the victim of the victim’s right to seek independent legal counsel. Ariz. R. Crim. P. 39(d)(3).

Arizona’s VBR does not contain an express provision providing victims a right to counsel, but it does vest authority in the legislature “to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims...” Ariz. Const. art. II, § 2.1(D). In providing “victims with the basic rights of respect, protection, participation, and healing of their ordeals[,]” Arizona’s legislature afforded victims “the right to be represented by personal counsel at the victim's expense[.]” A.R.S. § 13-4437(A); *Champlin v. Sargeant*, 192 Ariz. 371, 375 (Ariz. 1998) quoting 1991 Ariz. Sess. Laws ch. 229, § 2 (noting the purpose of the VBR and VRIA). Notably, A.R.S. § 13-4437(A) does not provide victims with publicly funded court-appointed victims’ rights counsel.²

² AVCV does not assert that courts are without authority to appoint counsel or a *guardian ad litem* for a victim when necessary. A.R.S. §§ 14-4403(C) & (D)(1) contemplate instances will exist where a court may appoint another person to assert

Some victims may benefit from no cost counsel, to assert and enforce rights in criminal prosecutions, provided by non-profit organizations who receive grant funding to provide victim services.³ In 1984, Congress passed the Victims of Crime Act (VOCA) in an effort to implement recommendations made by the President’s Task Force on Victims of Crime. Ronald Reagan Presidential Library and Museum, <https://www.reaganlibrary.gov/archives/speech/executive-order-12360-presidents-task-force-victims-crime> (last visited September 27, 2021); *A Retrospective of the 1982 President’s Task Force on Victims of Crime*, https://www.ncjrs.gov/ovc_archives/ncvrw/2005/pg4d.html (last visited September 27, 2021). “Each year, millions of dollars are deposited into this fund from criminal fines, forfeited bail bonds, penalty fees and special assessments collected by the US Attorney’s Offices, US Courts and the Bureau of Prisons. These dollars all come from offenders convicted of federal crimes.” Arizona Department of Public Safety, <https://www.azdps.gov/services/enforcement/crime-victims> (last visited September

rights on behalf of a victim who is a minor or vulnerable adult. *State ex rel. Romley v. Dairman*, 208 Ariz. 484, 488-89 (Ariz. Ct. App. 2004) (holding “that the Victims’ Bill of Rights in Arizona’s constitution preserves the equitable power of a trial court that allows for, and in fact requires, the appointment of such a separate representative when a minor’s legal guardian is unable or unwilling to adequately represent the minor victim’s interests.”). Likewise, the federal system allows for the appointment of a *guardian ad litem* “for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child.” 18 U.S.C. § 3509(h).

³ A.R.S. § 13-4437(A) does not require a victim to first seek no cost counsel before retaining private counsel.

28, 2021). Despite the availability of funds for victim services, there is simply not enough to provide no cost victims' rights counsel to every single victim.⁴ There were 193,353 crime index offenses reported in Arizona between January 1, 2019 and December 31, 2019. Crime in Arizona Reports, <https://www.azdps.gov/about/reports/crime> (last visited September 27, 2021). Of the reported offenses, 27,118 were violent crimes that included 320 murders, over 3,100 rapes, and over 17,000 assaults. *Id.* More than 11,000 people were arrested for committing violent offenses during the reporting period. *Id.* Because of the disproportionate number of victims to available funding to provide for services that include no cost victims' rights counsel, it is inevitable that some victims will incur legal expenses when they exercise their right to counsel.

A.R.S. § 13-4437(A) does not prohibit victims from being made economically whole when they incur expenses associated with exercising their right to counsel of their choice. The primary objective in statutory interpretation is to determine legislative intent by considering statutes as a whole and giving harmonious effect to all sections. *State v. Jernigan*, 221 Ariz. 17, 20 (Ariz. Ct. App. 2009). A.R.S. § 13-4437 should be construed in harmony with other victims' rights statutes including A.R.S. § 13-603(C) ("If a person is convicted of an offense, the court shall require

⁴ A.R.S. § 13-4437(A) gives the victims the choice of counsel. It does not require a victim to choose no cost counsel.

the convicted person to make restitution to the person who is the victim of the crime or to the immediate family of the victim if the victim has died, in the full amount of the economic loss as determined by the court...”).

The legislature cannot constitutionally enact statutory provisions that eliminate or reduce rights guaranteed by the VBR. *State v. Lee*, 226 Ariz. 234, 237 (Ariz. Ct. App. 2011) (holding that victims’ constitutional right to refuse a defense interview extends to civil proceedings) citing *State v. Lamberton*, 183 Ariz. 47, 50 (Ariz. 1995) (noting that statutes and court rules cannot eliminate or narrow victims’ constitutional rights). Interpreting A.R.S. § 13-4437(A) to preclude or limit a restitution award would impermissibly waive a victim’s constitutional right to full restitution in cases where victims choose to exercise their right to counsel. “...The constitutional right to receive restitution guaranteed by the VBR is a right to receive the full amount of economic loss or injury caused by a defendant's criminal conduct.” *State v. Patel*, 251 Ariz. 131 (Ariz. 2021) (holding the limit on a restitution award imposed by A.R.S. § 28-672(G) unconstitutional). Under the rationale in *Patel*, A.R.S. § 13-4437(A) cannot preclude a victim from seeking restitution for expenses incurred for retained counsel.

The victim in this case was entitled to and received a judicial determination of the amount of her economic loss. *E.H. v. Slayton III*, 251 Ariz. 289 (Ariz. Ct. App. 2021) (trial courts have an affirmative duty to determine the amount of the victim's

economic loss and to order restitution in that amount). Provided that the victim has proven the restitution claim to the trial court by a preponderance of the evidence and the defendant has the right to “the right to be present, be represented by counsel, and challenge any request for restitution[,]” there is not due process violation. *E.H. v. Slayton II*, 249 Ariz. 248, 253 (Ariz. 2020) (prohibiting caps on restitution in plea agreement without the consent of the victim; overruling pre-VBR cases that required restitution caps in plea agreements).

II. Expenses incurred by victims in the voluntary exercise of victims’ rights are an economic loss that flow directly from the defendant’s criminal conduct.

Arizona’s Courts have regularly held that expenses incurred by victims in the voluntary exercise of victims’ rights are economic losses that flow directly from the defendant’s criminal conduct. When victims, or victim representatives, have exercised the constitutional right to be present, restitution awards for lost wages have been upheld. *In re Ryan A.*, 202 Ariz. 19 (Ariz. Ct. App. 2002) (affirming restitution award for value of lost annual leave time when parent used vacation time to exercise the constitutional right to be present on behalf of a minor victim); *In re Erika V.*, 194 Ariz. 399 (1999) (affirming restitution award for lost wages when parent missed work to exercise the constitutional right to be present on behalf of minor victims); *State v. Lindsley*, 191 Ariz. 195 (Ariz. Ct. App. 1997)(noting the statutory definition of economic loss includes lost earnings, affirming restitution order for lost wages

when victims missed work to voluntarily exercise the constitutional right to be present at trial). Restitution awards for travel expenses incurred by victims when exercising the constitutional right to be present have also been upheld. *State v. Madrid*, 207 Ariz. 296 (Ariz. Ct. App. 2004) (reasonable expenses including travel, lodging, and meals for murder victim’s children, also victims, to voluntarily attend trial are economic losses, restitution order affirmed).

Madrid declined to follow *State v. Wideman*, 165 Ariz. 364 (Ariz. Ct. App. 1990), existing authority that predated Arizona’s VBR and did not allow for travel costs associated with attending trial to be awarded in criminal restitution. *Id.* at. 299. The *Wideman* court “characterized the expenses as consequential losses because they resulted from the family members' “desire” to attend the court hearings[.]” *Madrid* at 299 citing *State v. Wideman*, 165 Ariz. 364, 369 (Ariz. Ct. App. 1990). *Madrid* further noted that the VBR and VRIA included a statement of legislative intent emphasizing that the constitutional rights of “innocent persons [who] suffer economic loss” should be fully protected. *Id.* This Court has also upheld restitution awards for expenses incurred by victims to travel to Arizona to exercise their constitutional right to be present at trial. *State v. Spears*, 184 Ariz. 277, 292 (Ariz. 1996) (upholding, among other things, hotel, gas, and food expenses incurred when victims voluntarily exercised the right to be present at trial).

Authority exists to support an award for restitution when a victim voluntarily exercises victims' rights. There is not a distinction to be made when a victim incurs an expense while voluntarily asserting a constitutional right, such as the right to be present, versus voluntarily asserting a statutory right, such as the right to counsel of the victim's choice under A.R.S. §13-4437(A). The purpose of the VRIA is to address the procedural and substantive issues that may accompany the VBR. *State ex rel. Thomas v. Klein*, 214 Ariz. 205, 209 (Ariz. Ct. App. 2007) (noting application of VBR cannot be restricted). When a person has been given constitutional rights, it is reasonable to want to enforce those rights through counsel of their own choice.

This Court has upheld restitution awards for legal expenses incurred in parallel proceedings. *State v. Spears*, 184 Ariz. 277, 292 (Ariz. 1996) (upholding a restitution order that included a probate attorney's fees incurred by a murder victim's family, fees were customary and reasonable to close out the murder victim's estate.).⁵ This Court noted that had it not been for the criminal offense, the "customary and reasonable" attorney's fees incurred to close the victim's estate would not have been incurred; thus, they were an economic loss and properly awarded in restitution. *Id.* Likewise, had it not been for the Petitioner's criminal conduct, the victim in the present case would not need to assert and seek enforcement

⁵ This issue was briefed thoroughly by the State of Arizona and the Crime Victim. AVCV cites to discuss what may be customary and reasonable for a victims' rights attorney. Ariz. R. Civ. App. P. 16(b)(1)(C)(iii).

of constitutional and statutory victims’ rights that include the right to counsel. The reason the victim chose to exercise the right to counsel is immaterial.⁶ It is a right that our legislature was authorized to provide, under the VBR, to preserve and protect victims’ constitutional rights. Ariz. Const. art. II, § 2.1(D).

Petitioner asserts that the victim’s attorney’s hourly rate of \$395 to \$405 per hour is unreasonable because the standard rate for a criminal attorney in Maricopa County is \$77 per hour. *Petition for Review* at 3. Holding a victim to an hourly rate for publicly funded court-appointed counsel, a right of criminal defendants that is generally not available to victims who choose to exercise their right to counsel, is unfair. When publicly funded court-appointed victims’ rights counsel is unavailable to a victim, the standard rate of \$77 cannot be considered “customary and reasonable.” If this Court requires a comparison of hourly rates to determine whether the victim’s attorney’s rate of \$395-\$405 is customary and reasonable, it is appropriate to compare to the hourly rates of private counsel.⁷

⁶ The record shows that the victim in this case was subject to intimidation and harassment from the defendant. Appellee’s Response at 9-10.

⁷ A search on Legal Match indicates a range of \$150-\$700 per hour for a criminal defense attorney. <https://www.legalmatch.com/law-library/article/how-much-will-a-criminal-defense-lawyer-cost.html> (last visited September 28, 2021). AVCV does not assert that legalmatch.com provides binding or persuasive authority. It is simply readily available information from a service that helps those in need of legal counsel find an attorney. <https://www.abajournal.com/magazine/article/what-lawyers-earn> (noting “[o]utside of the for-profit legal market, public lawyers—defenders, prosecutors, legal aid and nonprofit attorneys—are making significantly less money.”)(last visited September 29, 2021).

Petitioner also objects to the activities performed by victim's counsel. *Petition for Review* at 3. Petitioner has categorized objections to the work that victim's counsel provided as: premature research and communication related to restitution, acting as an unnecessary advocate/conduit between the victim and the prosecutor, victim advocate, and victim compensation board, work done by the prosecution (such as reviewing the plea agreement), work unrelated to the case, etc... *Appendix to Petition for Review* at 80-87. However, the Petitioner cannot tell the victim's attorney how to advocate or to not advocate for the victim. That would be akin to providing criminal defendants standing to assert or waive rights on behalf of victims.

Attorneys, even victims' rights attorneys, owe a number of ethical duties to their clients including a duties of competence and diligence. E.R. 1.1; E.R. 1.3. Attorneys must communicate with their clients and give advice. E.R. 1.4; E.R. 2.1. Unless consent has been given, attorneys and their staff generally cannot communicate with a represented person. E.R. 4.2. In some circumstances, this may include a victim who is exercising their right to counsel.⁸ Reading Arizona's ethical rules along with the VBR and VRJA, the work performed on behalf of the victim in this case is customary and are tasks a victims' rights attorney may take on.

⁸ AVCV's practice is to advise the prosecutor and their staff at the start of the representation whether communication with the victim outside of the presence of AVCV staff will be permitted. Each decision depends on the case, whether a conflicts exists between the prosecutor/their staff and the victim, and the needs of the victim.

When a victim exercises their right to retain private counsel, under A.R.S. § 13-4437(A), to assert and enforce victims' rights, it is customary for the victim's attorney to communicate with the prosecutor and victim advocate about the case or to facilitate communication, whether through a phone call or meeting, when the victim wants to exercise their right to confer. This is especially important when it relates to the resolution of the case. Ariz. Const. art. II, §§ 2.1(A)(6) (right to confer); A.R.S. § 13-4419 (victim conference with prosecuting attorney). It is also customary for a victim's attorney to become involved when a defendant has attempted contact, whether it is direct or through another, that may be in violation of conditions of release. Ariz. Const. art. II, § 2.1(A)(1) (right to be treated with fairness, respect, and dignity and to be free from intimidation, harassment, or abuse); A.R.S. § 13-4431 (minimizing victim contacts with defendant, the defendant's family, and defense witnesses). Communications about restitution between victims' attorneys and victims are appropriate at any time. It is customary that a victims' rights attorney will advise a victim of their right to restitution and advise the victims to save receipts early on in the representation. Ariz. Const. art. II, § 2.1(A)(8) (right to restitution); A.R.S. §13-603(C) (right to full restitution for economic loss).

The expenses incurred when a victim chooses to retain counsel of their choice to assert and enforce rights under the VBR is an economic loss that flows directly from the defendant's criminal conduct. Although a criminal defendant may be

dissatisfied with the restitution order, as well as the hourly rate and the activities performed, they cannot be permitted to direct victim's counsel on how to represent a victim including whether activities such as legal research, responding to questions and information a victim may want to provide, and communicating with prosecuting agency are reasonable. The activities of the victim's attorney (*Appendix to Petition for Review* at 80-87) appear to be activities related to the constitutional and statutory rights of the victim as well as those required under the ethical rules. When compared to the average hourly rate of a private attorney who practices criminal defense, the rate charged by victim's counsel may be "customary and reasonable."

III. Interpreting A.R.S. § 13-4437(A) to preclude victims from being made economically whole will discourage both victim participation and exercise of the right to counsel, ultimately impeding healing.

Victims suffer emotionally, physically, and financially in the aftermath of crime. The most consistently documented consequence of violent crime is posttraumatic stress disorder (PTSD). Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. Traum. Stress 182, 182 (2010); Dean G. Kilpatrick & Ron Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. Traum. Stress 119, 119 (2003). Sufferers of PTSD experience intense fear, helplessness, and horror. Kilpatrick & Acierno at 125-27. Studies also suggest a connection between initial victimization and later depression, substance abuse, panic disorder, agoraphobia, social phobia,

obsessive-compulsive disorder, and even suicide. Parsons & Bergin at 182. The psychological consequences of victimization are difficult to bear and, for those who have been untouched by crime, often hard to understand. President’s Task Force on Victims of Crime, <https://www.ojp.gov/pdffiles1/ovc/87299.pdf> (last visited September 27, 2021).

The intense and painful consequences of initial victimization are compounded by a difficult experience with the criminal-justice system. Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. Traum. Stress 159, 159 (2003). A victim’s experience with the justice system often “means the difference between a healing experience and one that exacerbates the initial trauma.” Parsons & Bergin at 182. Participation in the criminal justice system proceedings may reduce victims’ perceptions of inequity, thereby reducing the potential for further psychological harm. Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7, 19 (1987). Dissatisfaction appears to be highest among victims who are denied a chance to participate in the legal system, in spite of their expressed wish to do so. Judith Lewis Herman at 163.

This Court, as well as Arizona’s Court of Appeals, have recognized and supported participation in the criminal process by victims, including victims represented by counsel. *Fay v. Fox*, ____ Ariz. ____ (Ariz. 2021) (holding that

victims have “a constitutional and statutory right to be heard on the merits of a defendant's motion for a delayed appeal of a restitution order.”); *E.H. v. Slayton II*, 249 Ariz. 248 (Ariz. 2020) (holding victims’ counsel “has a presumptive right to sit in front of the bar in the courtroom during a proceeding where a victim's constitutional or statutory rights are at issue.”); *State ex rel. Montgomery v. Padilla*, 238 Ariz. 560 (Ariz. Ct. App. 2015) (minor victim’s mother, through counsel, has standing to make an objection to the trial court). These rulings are conducive to healing. They allowed victims to participate through counsel of the victim’s choice, have facilitated meaningful participation, and provide a sense of fairness to victims.

Interpreting A.R.S. § 13-4437(A) to bar a victim from being made economically whole is inconsistent with the spirit and purpose of victims’ rights and contrary to this Court’s recent victims’ rights rulings that have encouraged and upheld participation through counsel. The relief that Petitioner seeks amounts to a punitive impact that is inconsistent with the need, under *Champlin* to provide “the basic rights of respect, protection, participation, and healing of their ordeals.” *Champlin* at 375. To protect victims’ rights to justice and due process, the constitutional and statutory rights to full restitution must be protected.

CONCLUSION

This Court should hold that legal expenses incurred when a victim exercises their right to retain counsel, to assert and enforce victims’ rights, under A.R.S. § 13-

4437(A) are an economic loss that flows directly from the defendant's conduct and affirm the decision of the Arizona Court of Appeals.

Respectfully Submitted this 29th day of September, 2021

_____/s/_____
Colleen Clase
Arizona Voice for Crime Victims, Inc. (AVCV)