

**ARIZONA SUPREME COURT**

STATE OF ARIZONA,

Appellee,

v.

RICHARD ALLEN REED,

Appellant.

Arizona Supreme Court Case  
No. CR-20-0385-PR

Arizona Court of Appeals  
No. 1 CA-CR 17-0620

Maricopa County Superior Court  
No. CR2015-117844-001

**BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR  
CRIMINAL JUSTICE (AACJ) IN SUPPORT OF APPELLANT**

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## INTRODUCTION

Richard Reed’s case has literally outlived the defendant. In *State v. Reed*, 248 Ariz. 72 (2020), this Court held that Reed’s appeal may proceed as to the restitution claim filed by the victim because the victim may obtain a lien against the estate. On remand, the court of appeals held that a victim of the crime of voyeurism is legally entitled to criminal restitution for the victim’s attorney fees of \$17,909.50. In permitting the restitution order to stand, the court continued the escalation of the “anything goes” approach toward criminal restitution, whereby courts no longer honor statutory limits on “economic loss” or due process rights of defendants.

The victim’s right to hire private counsel at her own expense, A.R.S. §13-4437(A), cannot be converted into a claim for restitution. Nowhere did the court even cite this statute, much less distinguish it. The order in this case is particularly egregious because the law specifically prohibits victims’ lawyers from becoming “an adjunct prosecutor,” *State v. Slover*, 220 Ariz. 239, 243 ¶¶8-9 (App. 2009), yet the court looked the other way (and created a conflict of law) when the victim’s lawyer claimed exorbitant fees for acting precisely in that manner. *Opinion* ¶¶13, 20-21. This Court’s action is necessary to remind lower courts that criminal restitution is statutorily circumscribed and must not be turned into a free-for-all.

## **INTEREST OF *AMICUS CURIAE***

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief because ensuring fairness in criminal restitution proceedings is squarely within AACJ's core mission. This case involves the latest in a litany of abuses of the criminal restitution law. The Legislature never intended criminal restitution to be a substitute for victims to pursue civil suits for damages, but that is exactly how it has been abused for many years—with the acceptance of the court of appeals. *E.g.*, *State v. Patel*, 247 Ariz. 482, 484 ¶8 (App. 2019), *review granted* (holding that the procedural right to “prompt” restitution is equal to the substantive right to “full” restitution); *State v. LaPan*, 249 Ariz. 540, 550-51 ¶¶35-37 (App. 2020), *review pending* (permitting victims to obtain economic windfall by claiming use of paid annual leave as “economic loss”); *State v. Quijada*, 246 Ariz.

356, 369 ¶44 (App. 2019) (permitting victim to demand restitution to restore intangible “equanimity” though victim refused to support claims with truthful evidence). This case shows the court of appeals recognizes few limitations on what can be claimed as restitution in a criminal case. AACJ asks this Court to restore the statutory and constitutional limits that have been so significantly eroded.

## ARGUMENTS

### **I. A.R.S. §13-4437 permits the victim to hire counsel “at the victim’s expense.” No statute permits that cost to be shifted to the defendant.**

#### **A. The opinion disregards the plain language of A.R.S. §13-4437(A).**

“To determine a statute’s meaning, we look first to its text. When a statute’s meaning is clear and unambiguous, courts apply the plain meaning and our inquiry ends.” *State v. Burbey*, 243 Ariz. 145, 147 ¶7 (2017). The relevant statute in this case is A.R.S. §13-4437, involving the victim’s right to enforce rights under the Victim’s Bill of Rights (VBR) and right to counsel in any proceedings.<sup>1</sup> Although the Legislature has added to and modified section 13-4437 several times since its original adoption in 1991, the language that is discussed below has not been altered since its original adoption. *See* Laws 1991, Ch. 229, §7.

Section 13-4437(A) reads:

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<sup>1</sup> A.R.S. §8-416 is identical to to §13-4437 and is the counterpart in juvenile delinquency proceedings.



The rights enumerated in the victims' bill of rights, article II, section 2.1, Constitution of Arizona, any implementing legislation, or court rules belong to the victim. The victim has standing to seek an order, to bring a special action or to file a notice of appearance in a trial court or an appellate proceeding, seeking to enforce any right or to challenge an order denying any right guaranteed to victims. A victim may not be charged a filing fee to file a special action or to seek an order pursuant to this subsection. ***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.

(Emphasis added.) Arizona Rule of Criminal Procedure 39(d) clarifies the procedure for counsel to assist the victim in enforcing the rights in the Victim's Bill of Rights (VBR). Rule 39(d)(2) places the responsibility upon the prosecutor to be the enforcer of those rights, but if a conflict between prosecutor and victim arises, then the prosecutor must inform a victim of the right to seek independent legal counsel pursuant to Rule 39(d)(3). In any case, Rule 39(d)(4) permits the victim to retain independent counsel to appear on her behalf.

A.R.S. §13-4437(B) creates a cause of action for the victim "to recover damages from a governmental entity for the...violation of the victim's rights..." This subsection may be invoked by victims who become unable to claim restitution in full or in part because of the prosecuting agency's negligence. *See In re Michelle G.*, 217 Ariz. 340, 344 ¶15 (App. 2008) ("This is not the first case we have reviewed in which the county attorney has failed in its duty to request restitution for a victim. This time, however, the courts cannot save the victim from the county attorney's negligence."). It defines the scope of a victim's right to pursue claims against the

prosecuting agency for failure to pursue a restitution claim competently and with adequate diligence.

A.R.S. §13-4437(C) states that “[a]t the request of the victim, the prosecutor may assert any right to which the victim is entitled.” Thus, under this statute and Rule 39(d)(2), the victim always has an attorney in the proceeding tasked with enforcing her rights. Purely from a procedural vantage point, the victim’s statutory right to counsel is not entirely dissimilar from the defendant’s constitutional right to counsel; just as the defendant has the right to appointed counsel unless he retains private counsel of choice, the victim’s right to counsel is protected through the prosecutor unless the victim exercises the right to retain private counsel.

Neither the parties nor the court of appeals cited section 13-4437; and the State makes only a passing reference to it before this Court before asserting (as did the court of appeals) that the trial court has “wide discretion.” Response at 8. But statutory interpretation is subject to *de novo* review, *Burbey*, 243 Ariz. at 146 ¶5, and the heart of the question here is whether attorney fees that are incurred “at the victim’s expense” pursuant to section 13-4437(A) may be assigned to the criminal defendant. By treating this issue as one of reviewing a discretionary act of the trial court, the court disregarded any boundaries to the type of claims that victims might make so long as the claimed amount “flowed factually and temporally from [the] crime.” *Opinion* ¶12.

As Reed argued below, the controlling cases are *Slover*, 220 Ariz. at 242-43 ¶¶4-9, and *State v. Streck*, 221 Ariz. 306, 308 ¶¶9-10 (App. 2009), which followed *Slover* in holding that a victim cannot claim restitution for investigative costs that are properly the responsibility of the police. Opening Brief at 18-19. Remarkably, the court barely mentioned *Slover* and did not cite *Streck*. In *Slover*, the homicide victim's wife retained counsel to investigate the case and prod the prosecutors to file charges, which the court distinguished from attorney fees related to settling the decedent's estate. 220 Ariz. at 243 ¶¶7-8 & n.4 (citing *State v. Spears*, 184 Ariz. 277, 292 (1996)).<sup>2</sup> The victim's attorney testified in Reed's case to performing tasks comparable to the tasks by attorney Harper in *Slover*, all of which are to be performed by the prosecutor:

We helped her from day one in terms of analyzing the claim, describing what she can expect through the process, working with the prosecutor, developing list of questions for all of the witnesses, contacting witnesses, preparing them for the trial, sitting through the trial, meeting with her and the prosecutor for strategy sessions at night, making sure that she understood exactly what was expected of her, working to resolve factual details in the various stories and the defenses that would come up.

7/21/17 RT 42-43 (Appendix C to Petition, ep 119-124). If the transcript did not show otherwise, a reasonable reader could only assume the prosecutor is speaking and not the victim's lawyer.

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<sup>2</sup> In relying on *Spears* to justify the restitution award, *Opinion* ¶8, the court here apparently failed to note this distinction from *Slover*.

*Slover* left open a possibility that restitution for attorney fees might be appropriate “when the victim hires an attorney to assert a concrete right under the Victims’ Bill of Rights.” 220 Ariz. at 243 ¶9. But such an order would be even more inappropriate, because the VBR and its corresponding implementing legislation constitute procedural rights. *See Reed*, 248 Ariz. at 76 ¶10. Moreover, if the victim hired an attorney because the prosecutor was inattentive or disrespectful, such would assist in asserting a “concrete right” under the VBR, but not due to the defendant’s conduct. Under the court’s logic in this case, such an award is still appropriate because the defendant’s conduct led to the prosecution. *Opinion* ¶15.

*State v. Leteve*, 237 Ariz. 516 (2015), does not support the court’s reasoning. *Opinion* ¶8. This Court included the parenthetical: “We assume, without deciding, that attorney fees incurred to enforce victims’ rights may be compensable in restitution, as Leteve has not raised that issue on appeal.” *Id.* at 530 ¶58. This statement is merely an invitation to revisit the issue in the future, without the Court’s suggestion as to the correct answer. Courts rely on the parties to identify the issues in an appeal, and, particularly in a death penalty case, the Court rightly does not shop for additional arguments such as the restitution claim in *Leteve*. *See State v. Holmes*, -- Ariz. --, ¶13, 2020 WL 7069523 (Ariz. Ct. App., Dec. 3, 2020) (prior case lacks precedential value when a point was conceded by all counsel and therefore not analyzed by the court).

While quoting A.R.S. §13-804(G), (“The state does not represent persons who have suffered economic loss at the [restitution] hearing but may present evidence or information relevant to the issue of restitution.”), *Opinion* ¶21, the court read out of existence the prosecutor’s duty to advocate for the victim upon request as stated in A.R.S. §13-4437(C) and Rule 39(d)(1). Because the court ignored the relevant statutes and cases, its reasoning was fundamentally flawed. Worse, its result would financially penalize defendants for the choices of victims that bear no relation to the crime charged.

B. Permitting victims to seek attorney fees against criminal defendants through criminal restitution violates the public policy choice of the Legislature to carefully circumscribe the availability of attorney fees.

“It is the generally accepted rule that attorney[] fees are not recoverable in either the same or subsequent suit unless specifically provided for by statute or by an agreement between the parties.” *Taylor v. Southern Pac. Transp. Co.*, 130 Ariz. 516, 523 (1981). Unsurprisingly, the criminal code provides no authority for recovery of attorney fees. “If reasonably practical...statutes which are *in pari materia*...should be read in connection with, or should be construed together with other related statutes, as though they constituted one law.” *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122 (1970). The civil code, however, specifies those types of cases permitting such recovery of attorney fees.

The primary examples are contracts and suits involving the government where

a government entity or its agency or representative was the losing party.<sup>3</sup> A.R.S. §12-341.01 outlines how—and why—the successful party in a contract dispute may obtain reasonable attorney fees. And A.R.S. §12-348 lays out the circumstances where fees may be recovered and limitations on such fees. Sprinkled throughout the civil code are other claims whereby a successful private actor may recover attorney fees. *See, e.g.*, A.R.S. §12-558.01(C) (nuisance claims involving firearms and archery); §12-1103(B) (quiet title claim); §12-1135 (action under Private Property Rights Protection Act); §12-2030 (mandamus actions); §12-1364 (dwelling actions); §12-1809(O) (discretionary in cases involving injunctions against harassment); §12-2411 (discretionary in cases involving provisional remedies that are quashed).

The Legislature’s silence on this point in other types of cases means attorney fees may not be recovered. But in the case of crime victims, the Legislature was not merely silent; it stressed in section 13-4437(A) that such counsel would be “at the victim’s expense.” The court of appeals’ ruling in this case, therefore, constitutes a usurpation of legislative prerogative.

## **II. Arizona case law erroneously labels restitution “rehabilitative” rather than punitive.**

When originally conceived, criminal restitution was devised as a mechanism to divest an offender of any economic benefit gained from a crime. *State v.*

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<sup>3</sup> A.R.S. §12-349, permitting the court to assess attorney fees if the attorney or party engages in misconduct, brings or defends frivolous claims, etc., is not at issue here.

*Wilkinson*, 202 Ariz. 27, 29 ¶9 (2002) (“[T]he original conception of restitution, and the form with the most direct link to criminal conduct, is that ‘of forcing the criminal to yield up to his victim the fruits of the crime.’”) (quoting *United States v. Fountain*, 768 F.2d 790, 800 (7th Cir. 1985)); see also Cortney E. Loller, *What is Criminal Restitution?*, 100 Iowa L. Rev. 93, 97 (2014). Because this “unjust enrichment” model of restitution returned both parties to their original positions, it was considered restorative rather than punitive.

The first appearance of criminal restitution in Arizona was “reparation,” which allowed the probation department, pursuant to the general statute authorizing probation, to order a probationer to make restorative payments to a victim as a condition of probation, but did not apply to criminal defendants sentenced to prison. See *Redewill v. Superior Court*, 43 Ariz. 68 (1934) (defendant convicted of failure to provide for his minor child was required as a condition of probation to make monthly payments “for the use and benefit of [his] son.”); *Varela v. Merrill*, 51 Ariz. 64, 75-76 (1937) (“the conditions imposed by the trial court upon a [probationer]...must be such that it can reasonably be said that they have some bearing upon the protection of society against future crimes...or upon reparation by the defendant for the injury he has caused by the particular offense already committed); see also *Shenah v. Henderson*, 106 Ariz. 399, 400-01 (1970); *State v.*

*Smith*, 118 Ariz. 345, 347 (App. 1978); *State v. Cummings*, 120 Ariz. 69, 70-71 (App. 1978).

In contrast to Arizona’s history of conditioning probation with reparation, in 1977 Arizona expanded criminal restitution to include losses to the victim that did not translate into gains for the offender. A.R.S. §13-603(C) (mandating restitution “in the full amount of the economic loss as determined by the court”). *See State v. Moore*, 156 Ariz. 566, 567 (1988) (“Recent statutory enactments have made the imposition of restitution mandatory.”). Section 13-603(C) does not distinguish probationers and convicted persons sentenced to prison; instead, it specifies that restitution “is a criminal penalty for the purposes of a federal bankruptcy involving the person convicted of an offense.” Thus, restitution is now part of the punishment and is no longer purely rehabilitative. Unlike the previous pure unjust enrichment model, criminal restitution now emphasizes complementary goals of punishing the accused, deterring crime, reducing recidivism, and restoring the victim. *Wilkinson*, 202 Ariz. at 29 ¶9 (discussing restoration, punishment, rehabilitation, and retribution). Because restitution is now classified as punishment and is part of every criminal sentence, financial reparation to victims implicates a criminal defendant’s procedural protections under the Sixth and Seventh Amendments to the United States Constitution and article 2, sections 23-24 of the Arizona Constitution.<sup>4</sup>

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<sup>4</sup> “[T]he Seventh Amendment is one of the few remaining provisions in the Bill of



If there is no “principled basis” for distinguishing criminal fines from punishments such as imprisonment or death, *Southern Union Company v. United States*, 567 U.S. 343, 349 (2012), then there should be no question that the right to jury trial extends to monetary forms of punishment, whether they are called “fines” or “restitution.” Even if jury trials in restitution is to be limited to cases where the amount of restitution is exceedingly high, this case should meet that standard.

In *Wilkinson*, this Court determined that the Legislature struck a balance between assessing defendants in the restitution process for direct damages while preserving the right to jury trial for consequential damages. 202 Ariz. at 29-30 ¶11. The state constitutional guarantee of a jury trial in civil damages cases exists because it existed in Arizona prior to statehood. *Derendal v. Griffith*, 209 Ariz. 416, 419 ¶8 (2005). Tort claims for negligence were triable to a jury under territorial law. *Tanner Companies v. Superior Court*, 123 Ariz. 599, 601 (1979). Furthermore, article 18, section 5 of the Arizona Constitution states: “The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.” *See also Schwab v. Matley*, 164 Ariz. 421 (1990)

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Rights which has not been held to be applicable to the States,” *Colgrove v. Battin*, 413 U.S. 149, 169 n.4 (1973). *But see Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 486 n.5 (1986) (“analysis is the same” under Seventh Amendment and article 2, §24); *Fisher v. Edgerton*, 236 Ariz. 71, 81 ¶33 (App. 2014) (citing *Dombey* but comparing article 2, §23 to Seventh Amendment).

(statute limiting dramshop liability violates state constitutional guarantee of jury trial in contributory negligence claims).

There are distinct limitations on the parties in the sentencing phase. “The sentencing phase of a criminal case is not the ideal forum for the disposition of a [civil] case. Both parties are deprived of a jury; the defendant may be limited in showing causation or developing a defense of contributory negligence or assumption of risk.” *Wilkinson*, 202 Ariz. at 30 ¶12 (quoting *State v. Garner*, 115 Ariz. 579, 581 (App. 1977)). “Requiring [a defendant] to pay restitution for damages that resulted directly from the criminal conduct serves to rehabilitate . . . . The penalty thus fits squarely within the goals of criminal punishment and does not deprive him of a civil trial to which he might otherwise be entitled.” *Id.* ¶13.

While dutifully explaining why assessment for consequential damages has no place in a criminal sentencing, *Wilkinson* altogether fails to analyze whether defendants’ rights are adequately protected as to direct damages. Importantly, the “crime” at issue in *Wilkinson*, contracting without a license, is non-jury-triable under *Derendal*, and the imposition of nearly \$50,000 in restitution was upheld even though the offense bore no relation whatsoever to causation of actual damages. In so doing, *Wilkinson* contradicts an earlier case that held that a conviction for a statute that does not require a finding of fault for a victim’s injuries cannot be used as the basis for ordering restitution. *See State v. Skiles*, 146 Ariz. 153, 154 (App. 1985).

Although in civil cases attorney fees are within the province of the court to determine, Reed’s case exemplifies the problem with Arizona’s restitution cases. Allowing a judge vested with “wide discretion” to impose restitution without a meaningful hearing at which evidence is tested in the crucible of cross-examination inevitably leads to absurd results such as this case. There is a strong undercurrent in Arizona cases in favor of adopting the victim’s request without any scrutiny, often not even from defense counsel. It is unquestionable that the absurd award in this case—\$18,000 for a corporate lawyer with no criminal law experience to explain the VBR—was not carefully scrutinized. If treated as a criminal penalty, the court—or a jury, more appropriately, would have scrutinized this claim. At the least, this Court should accept review to set standards for judicial evaluation of victim restitution claims and remind lower courts not to rubber stamp such claims.

## CONCLUSION

AACJ requests that this Court grant review and resolve this recurring issue of statewide importance so that it may instruct lower courts that criminal restitution is carefully circumscribed and is not a substitute for a civil damages trial.

RESPECTFULLY SUBMITTED this 4th day of January, 2021.

By /s/ David J. Euchner

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