

ARIZONA SUPREME COURT

BETH FAY,

Petitioner,

v.

HON. DEWAIN D. FOX, JUDGE OF
THE MARICOPA COUNTY SUPERIOR
COURT,

Respondent Judge,

STATE OF ARIZONA ex rel. ALLISTER
ADEL, MARICOPA COUNTY
ATTORNEY, and JORDAN HANSON,

Real Parties in Interest

Arizona Supreme Court Case
No. CR-20-0306-PR

Arizona Court of Appeals
No. 1 CA-SA 20-0123

Maricopa County Superior Court
No. CR2015-005451-001

**BRIEF OF *AMICUS CURIAE*
ARIZONA ATTORNEYS FOR
CRIMINAL JUSTICE (AACJ)
IN SUPPORT OF REAL
PARTY IN INTEREST
JORDAN HANSON**

David J. Euchner, No. 021768
Pima County Public Defender's Office
33 N. Stone Ave. #2100
Tucson, Arizona 85701
(520) 724-6800
David.Euchner@pima.gov

Madeline A. Mayer, No. 035095
Maricopa County Public Defender's Office
620 W. Jackson, Suite 4015
Phoenix, Arizona 85003
(602) 506-7711
madeline.ann.mayer@gmail.com

Attorneys for *amicus curiae* Arizona Attorneys for Criminal Justice

TABLE OF CONTENTS

	Page
TABLE OF CASES AND AUTHORITIES	ii
INTRODUCTION	1
INTEREST OF <i>AMICUS CURIAE</i>	2
ARGUMENTS	
I. A.R.S. § 13-4437(E) does not permit the victim to hijack the power of the State to prosecute the criminally charged and convicted.....	3
A. The purpose of VBR is to permit victims to be heard, to be provided notice of proceedings, and to be treated fairly and respectfully. Victims’ rights to participate as litigants are carefully circumscribed.....	3
B. If a victim is entitled to litigate against a defendant’s Rule 32.1(f) Request for Delayed Appeal, then there is no limit to such authority	7
II. Arizona case law governing criminal restitution fails to protect the due process rights of criminal defendants. The VBR has been misinterpreted in a manner that allows further abuse of defendants’ rights.....	10
A. Criminal restitution is punitive and part of a criminal defendant’s sentence. Therefore, defendants must be afforded the right to a jury trial	11
B. Criminal restitution does not adequately protect defendants’ due process rights	16
CONCLUSION	20

TABLE OF CASES AND AUTHORITIES

CASES	PAGES
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	17
<i>Colgrove v. Battin</i> , 413 U.S. 149 (1973)	13
<i>Derendal v. Griffith</i> , 209 Ariz. 416 (2005).....	14, 15
<i>Dombey v. Phoenix Newspapers, Inc.</i> , 150 Ariz. 476 (1986).....	13
<i>E.H. v. Slayton</i> , 249 Ariz. 248 (2020)	4
<i>Fisher v. Edgerton</i> , 236 Ariz. 71 (App. 2014).....	13
<i>In re Richard B.</i> , 216 Ariz. 129 (App. 2007).....	17
<i>Lindsay R. v. Cohen</i> , 236 Ariz. 565 (App. 2015).....	5, 6
<i>Lynn v. Reinstein</i> , 205 Ariz. 186 (2003).....	7
<i>Redewill v. Superior Court</i> , 43 Ariz. 68 (1934).....	12
<i>Schwab v. Matley</i> , 164 Ariz. 421 (1990)	14
<i>Shenah v. Henderson</i> , 106 Ariz. 399 (1970).....	12
<i>Southern Union Company v. United States</i> , 567 U.S. 343 (2012).....	14
<i>State v. Blanton</i> , 173 Ariz. 517 (App. 1992)	10
<i>State v. Cummings</i> , 120 Ariz. 69 (App. 1978).....	12
<i>State v. Garner</i> , 115 Ariz. 579 (App. 1977)	15
<i>State v. Holmes</i> , -- Ariz. --, 2020 WL 7069523 (Ariz. Ct. App., Dec. 3, 2020)	10
<i>State v. Howard</i> , 168 Ariz. 458 (App. 1991)	11

<i>State v. Lamberton</i> , 183 Ariz. 47 (1995)	5, 6
<i>State v. Lewis</i> , 222 Ariz. 321 (App. 2009).....	16
<i>State v. Moore</i> , 156 Ariz. 566 (1988)	12
<i>State v. Patel</i> , 247 Ariz. 482 (App. 2019), <i>review granted</i>	3
<i>State v. Quijada</i> , 246 Ariz. 356 (App. 2019).....	3, 17
<i>State v. Reed</i> , 248 Ariz. 72 (2020).....	1, 7, 8
<i>State v. Skiles</i> , 146 Ariz. 153 (App. 1985).....	15
<i>State v. Smith</i> , 118 Ariz. 345 (App. 1978).....	12
<i>State v. Steffy</i> , 173 Ariz. 90 (App. 1992)	16
<i>State v. Whitman</i> , 234 Ariz. 565 (2014)	8
<i>State v. Wilkinson</i> , 202 Ariz. 27 (2002).....	11, 13, 14, 15
<i>State v. Zaid</i> , 249 Ariz. 154 (App. 2020).....	9
<i>Tanner Companies v. Superior Court</i> , 123 Ariz. 599 (1979).....	14
<i>United States v. Fountain</i> , 768 F.2d 790 (7th Cir. 1985)	11
<i>Varela v. Merrill</i> , 43 Ariz. 68 (1934)	12
<i>Winterbottom v. Ronan</i> , 227 Ariz. 364 (App. 2011).....	4
ARIZONA REVISED STATUTES	
§ 11-532.....	7
§ 12-711.....	19
§ 12-2506.....	18

§ 13-603.....	12, 13
§ 13-804.....	6, 16, 18
§ 13-2921.....	4
§ 13-4401 et seq.....	1
§ 13-4437.....	6

ARIZONA RULES OF CRIMINAL PROCEDURE

Rule 15.1(b).....	17
Rule 15.1(g).....	17
Rule 32.1(f).....	1, 8, 10

ARIZONA RULES OF CIVIL PROCEDURE

Rule 14	19
Rule 19	19
Rule 26.1	18
Rule 30	18
Rule 33	18
Rule 34	18
Rule 35	18
Rule 45	18

ARIZONA RULES OF EVIDENCE

Rule 403	16
----------------	----

Rule 404(b).....16

Rule 408(b).....16

Rule 40916

Rule 41016

Rule 70116

Rule 90116

ARIZONA CONSTITUTION

article 2, section 2.1 1, 4, 7, 9, 17

article 2, section 2313

article 2, section 2413

article 18, section 514

UNITED STATES CONSTITUTION

Sixth Amendment13

Seventh Amendment.....13

OTHER AUTHORITIES

Arizona Publicity Pamphlet: General Election, November 6, 1990, at 33,
<https://azsos.gov/sites/default/files/pubpam90.pdf> (last visited Dec. 2,
2020)4

Cortney E. Loller, *What is Criminal Restitution?*, 100 Iowa L. Rev. 93
(2014)11

INTRODUCTION

No mother should ever suffer the violent loss of her son, and Arizona’s criminal justice system ensures not only that the defendant receives due process of law but also that victims of crime will “be treated with fairness, respect, and dignity...” Ariz. Const. art. 2, § 2.1(A)(1). But the case before this Court is not about rights that are contained in the Victim’s Bill of Rights (VBR) or the Victim Rights Implementation Act (VRIA), A.R.S. §§ 13-4401 et seq. Instead, this case is the latest in an array of abuses of the procedural rules in an effort to expand the VBR beyond its text and purpose.

This Court rephrased the question in Beth Fay’s petition for review as follows: “Is a victim entitled to be heard on a Rule 32.1(f) Request for Delayed Appeal concerning restitution?” *Amicus curiae* Arizona Attorneys for Criminal Justice (AACJ) argues that the answer is an emphatic “no.” In answering this question, however, this Court must explain the scope of a victim’s ability to litigate substantive claims, both at trial and in appellate and post-conviction proceedings. Furthermore, this Court must make explicit in this case what it implied earlier this year in *State v. Reed*, 248 Ariz. 72, 79 ¶ 24 (2020), when it held that denying a defendant’s appeal of a restitution claim did not impact victim rights because the VBR “does not guarantee victims any particular appellate disposition.” Victims have a procedural avenue to bring the substantive claims in this case: a civil damages suit.

INTEREST OF *AMICUS CURIAE*

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.

Amicus AACJ offers this brief because ensuring fairness to all parties in the manner of proceeding is squarely within AACJ's core mission. This case involves a crime victim's attempt to hijack the role of the county attorney (apparently with the county attorney's consent) in pursuing a restitution order, even to the point of interfering with the defendant's right to appeal. This case represents the latest in a litany of abuses of the VBR in which advocates for victims allege that the right to "prompt" restitution means that courts must ignore defendants' rights to due process, to appeal judgments, and to fairly defend restitution claims. The plain text and purpose of the VBR is to ensure victims' procedural rights in the criminal justice process. The VBR was never intended to be a substitute for victims to pursue civil

suits for damages, but that is exactly how it has been abused for many years—often 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. Quijada*, 246 Ariz. 356, 369 ¶ 44 (App. 2019) (permitting victims to demand restitution to restore psychological “equanimity” while refusing to support claims with truthful evidence). Now that victim advocates are demanding the authority to stand in the place of public prosecutors in criminal proceedings, this Court should use this case to reject unequivocally these abuses of the VBR.

ARGUMENTS

I. A.R.S. § 13-4437(E) does not permit the victim to hijack the power of the State to prosecute the criminally charged and convicted.

A. The purpose of VBR is to permit victims to be heard, to be provided notice of proceedings, and to be treated fairly and respectfully. Victims’ rights to participate as litigants are carefully circumscribed.

The voters passed the VBR to ensure that victims would be treated with fairness, respect, and dignity and be free from intimidation, harassment, and abuse. Pre-VBR, horror stories abound of intimidation and abuse endured by victims and their families who lacked any legal recourse. Roger and Carol Fornoff, parents of a murdered daughter, received phone calls from the suspected murderer in jail and were never informed of a single court proceeding or updated on the status of the

case.¹ Other arguments supporting the VBR focused on victims not being informed of critical court proceedings, such as lack of notice that a murderer was released from prison. *Id.* at 36-40. After its passage by Arizona’s voters, the VBR ensured that victims would be part of the process and treated fairly. Ariz. Const. art. 2, § 2.1(A)(1). And it provided victims with specific constitutional rights, including the right to receive “prompt” restitution. *Id.* § 2.1(A)(8). Section 2.1(D) authorized the Legislature to implement the enumerated rights in the VBR.

Unsurprisingly, the parade of horrors described by supporters’ voter guide arguments never arise as a result of conduct by attorneys or judges, and defendants who harass victims may be prosecuted for harassment under A.R.S. § 13-2921 or other applicable offenses. No one disputes that victims deserve to be treated fairly and respectfully or that they should be notified of court proceedings and provided a reasonable opportunity to attend those proceedings. Of course, mistakes are made in any given case. And the contours of certain victim rights are properly explored through litigation. *E.g.*, *E.H. v. Slayton*, 249 Ariz. 248, 255-56 ¶¶ 23-25 (2020) (holding that victim’s counsel presumptively may sit in the well with prosecutors and defense counsel unless physical limitations require counsel to sit in the gallery with observers); *Winterbottom v. Ronan*, 227 Ariz. 364, 366 ¶ 6 (App. 2011)

¹ Arizona Publicity Pamphlet: General Election, November 6, 1990, at 33, <https://azsos.gov/sites/default/files/pubpam90.pdf> (last visited Dec. 2, 2020).

(holding that when the victim and the defendant enter into an agreement in a civil suit to divide proceeds of the defendant's legal malpractice suit against his criminal defense lawyer, the VBR does not shield the victim from deposition by the former defense lawyer whose interest is now adverse to his former client).

Since this Court decided *State v. Lamberton*, 183 Ariz. 47 (1995), however, it has been abundantly clear that victims may not assume the role of the State, whether in addition to the prosecutor or instead of the prosecutor. This Court held that victims' right to be "heard" is not equal to the right to "control the proceedings, plead defenses, or to examine or cross-examine witnesses." *Id.* at 49. The right to be heard is limited to the implementing legislation that defines the right to be heard. *Id.* at 50.

In *Lindsay R. v. Cohen*, 236 Ariz. 565, 567 ¶ 6 (App. 2015), the victim sought to control a restitution hearing by examining witnesses and formally presenting evidence. The court acknowledged the victims' right to receive restitution and participate in restitution proceedings, but this right did not entitle them to litigate restitution through private counsel. *Id.* Relying on *Lamberton*, the court reasoned that victims are not parties to a criminal proceeding and thus cannot "usurp the prosecutor's unique role." *Id.* ¶ 8. Victim's counsel may only advocate for a victim to the extent the victim may be heard; the victim may not take the prosecutor's place and essentially convert a restitution hearing into a civil damages trial. *Id.* at 567-68 ¶ 10. The court concluded that nothing in the VBR or VRIA authorized victim's

counsel to privately litigate at a restitution proceeding. *Id.*

After *Lindsay R.* was decided, the Legislature enacted A.R.S. § 13-4437(E), which states: “Notwithstanding any other law and without limiting any rights and powers of the victim, the victim has the right to present evidence or information and to make an argument to the court, personally or through counsel, at any proceeding to determine the amount of restitution pursuant to § 13-804.” This statute overrules one piece of the *Lindsay R.* reasoning, i.e., that no statute permitted victim’s counsel to participate in the restitution hearing. But it ignores the crux of *Lindsay R.*—that “[t]he VBR does not make victims ‘parties’ to the prosecution, and does not allow victims to usurp the prosecutor’s unique role.” 236 Ariz. at 567 ¶ 8 (citing *Lamberton*, 183 Ariz. at 49). The Legislature’s authority to enact laws in the VRIA is limited in scope by the VBR, and section 13-4437(E) exceeds that scope insofar as it might be interpreted as allowing the victim to take over the proceeding.²

In any event, nothing in section 13-4437 permits a victim, either personally or through counsel, to engage the court in any other proceeding except to the extent that an enumerated right in the VBR is affected. Although the victim is statutorily entitled to receive restitution, because restitution is part of the sentence for a criminal

² *Amicus* notes that the materials in the parties’ appendices reflect an intent on the part of the prosecutor to delegate responsibility for prosecution of the restitution matter to victim’s counsel. This special action does not require this Court to decide the propriety of this conduct under section 13-4437(E) and *Lamberton*.

offense, only the county attorney may represent the State in that proceeding. *See* A.R.S. § 11-532(A)(1) (“The county attorney is the public prosecutor of the county and shall ... [a]ttend the superior and other courts within the county and conduct, on behalf of the state, all prosecutions for public offenses.”). A victim’s right to be heard as to restitution is fundamentally no different than the right to be heard as to the defendant’s sentencing.³ Nothing in the VBR or the information in the publicity pamphlet indicates any intention to allow victims to hijack the prosecutor’s responsibility for litigating restitution claims. In the absence of statutory or constitutional authority to the contrary, Fay’s claims must fail.

B. If a victim is entitled to litigate against a defendant’s Rule 32.1(f) Request for Delayed Appeal, then there is no limit to such authority.

The question presented in this case was implicitly answered earlier this year in *State v. Reed*, 248 Ariz. 72 (2020). In the context of a statute that required dismissal of appeals if the defendant died prior to disposition, this Court rejected the claim that the victim’s right to prompt restitution guaranteed by article 2, section 2.1(A)(8) of the Arizona Constitution justified forfeiture of the defendant’s right to appeal. *Id.* at 79 ¶ 24. This Court explained:

[T]his right contemplates the entry of a restitution order that is subject to appellate scrutiny, which may result in reversal or modification of the order. Because subsection (A)(8) does not guarantee victims any

³ *But see Lynn v. Reinstein*, 205 Ariz. 186 (2003) (holding that the Eighth Amendment prohibits the victim from advocating for a particular sentence in a capital jury sentencing).

particular appellate disposition, § 13-106(A)'s required disposition does not affect a victim's right to payment of prompt restitution.

Id. If the VBR does not justify a statute that requires dismissal of appeals of restitution claims, it necessarily follows that it cannot justify allowing the victim to oppose a request for a delayed appeal under Rule 32.1(f).

If the Court were to find that a victim has the right to litigate against a request for delayed appeal, the Court would be opening up a Pandora's Box and would not be able to limit victims from litigating any other claims. Victims would next claim the authority to challenge the defendant's right to file a timely notice of appeal, since the only circumstance in which Rule 32.1(f) is implicated is when the failure to file a timely notice was not the defendant's fault. *See State v. Whitman*, 234 Ariz. 565, 568 ¶ 20 n.2 (2014) (noting the remedy under Rule 32.1(f) when defense counsel fails to file a timely notice of appeal). Fay has explicitly argued that the appellate process itself thwarts a victim's right to prompt restitution,⁴ in flagrant disregard of *Reed*.

Victim advocates will not stop at demanding the right to argue against the defendant's right to appeal. They will then file responses against a motion to dismiss

⁴ Hanson attached as an exhibit to his response to the petition for review the transcript from the oral argument in the court of appeals. Fay's counsel explicitly stated: "the motion [for delayed appeal] itself is requesting a remedy that affects the constitutional right to prompt payment of restitution, and we should be able to explain why it should not be granted." Exhibit A to Response, at 11.

(whether filed by the defendant or the State), because the consequence of dismissal may be the defendant's release and thereby implicate the victim's right "to be heard at any proceeding involving a post-arrest release decision." Ariz. Const. art. 2, § 2.1(A)(4). If a defendant seeks to present evidence about a victim to show the victim was the initial aggressor in support of a justification defense, *e.g.*, *State v. Zaid*, 249 Ariz. 154, 159-60 ¶¶ 18-21 (App. 2020), then victims will demand the authority to file motions in limine in an effort to prevent the jury from hearing that evidence, claiming as authority the right to "be treated with fairness, respect, and dignity..." Ariz. Const. art. 2, § 2.1(A)(1).

Victim advocates will demand the right to participate actively in appeals, as Fay does here, but future cases will not be limited to restitution claims. If a defendant raises on appeal a claim that the trial court imposed an illegal sentence, victims will demand the right "to be heard at any proceeding involving ... sentencing," *id.* § 2.1(A)(4), and file a substantive answering brief on the merits of the legality of the sentence, a task that is properly the role of the Attorney General. The same would be true for post-conviction relief proceedings alleging ineffective assistance of counsel, newly discovered evidence, or actual innocence. In fact, in this case, Fay's counsel went so far as to argue to the court of appeals that Hanson should have no right to bring a claim of ineffective assistance of counsel. Exhibit A to Response, at 13-14.

This Court rephrased and narrowed the questions presented in Fay's petition to focus on a victim's right to litigate against a claim raised under Rule 32.1(f). In most circumstances, even the State will have little to say about the issue and will concede that the defendant should be able to pursue a delayed appeal. This Court should hold that the VBR protects a victim's ability to present evidence supporting a restitution claim, and nothing more. Anything more than that is tantamount to an endorsement of Fay's sweeping claims of authority to usurp the role of the county attorney and prosecute any claims that have a tangential connection to a proceeding in which victims have a right to be heard.

II. Arizona case law governing criminal restitution fails to protect the due process rights of criminal defendants. The VBR has been misinterpreted in a manner that allows further abuse of defendants' rights.

It is apparent from Fay's pleadings that Fay is concerned about the ability to appeal the restitution order because the restitution ordered is so clearly illegal. The only Arizona case Fay cited in support of a homicide victim's family being entitled to future wages is *State v. Blanton*, 173 Ariz. 517, 520 (App. 1992), but in *Blanton*, the appellant conceded he owed the restitution; the legal question was only whether the victim's insurance company could stand in the place of the victim to receive the restitution. *Id.*; see also *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). Fay's reliance on

State v. Howard, 168 Ariz. 458 (App. 1991) is similarly misplaced. There, the victim was entitled to lost wages until he recovered from the injuries caused by the appellant sufficiently to return to work; because the victim had not recovered from his injuries by the time of sentencing, the court estimated restitution in an amount of \$12,000, with the caveat that the amount would be adjusted downward if the victim was able to return to work earlier than anticipated. *Id.* at 459-60. In cases where defendants either plead guilty or have a speedy trial, victims may not have had an opportunity to settle all medical expenses, thus *Howard* merely avoids an absurd result of prohibiting restitution because the criminal case resolved quickly.

The proceedings below demonstrate myriad fallacies about criminal restitution that merit review. Fay's demand for more than a half million dollars may be appropriate in a civil damages suit, but it has no place in criminal restitution.

A. Criminal restitution is punitive and part of a criminal defendant's sentence. Therefore, defendants must be afforded the right to a jury trial.

When originally conceived, criminal restitution was devised as a mechanism to divest an offender of any economic benefit gained from a crime. *State v. 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 1977, the Legislature added A.R.S. § 13-603(C) to require imposition of restitution. *See State v. Moore*, 156 Ariz. 566, 567 (1988) (“Recent statutory enactments have made the imposition of restitution mandatory.”).

In contrast to Arizona’s history of conditioning probation with reparation, Arizona has since expanded criminal restitution to include losses to the victim that

did not translate into gains for the offender. *See, e.g.*, A.R.S. § 13-603(C) (mandating restitution “in the full amount of the economic loss as determined by the court”). Moreover, 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.⁵

⁵ “[T]he Seventh Amendment is one of the few remaining provisions in the Bill of 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).

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, there can be no doubt that Fay’s restitution request, exceeding a half million dollars, meets 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.” *Id.*; see also *Schwab v. Matley*, 164 Ariz. 421 (1990) (statute limiting dramshop liability violates state constitutional guarantee of jury trial in contributory negligence claims).

However, because there are distinct limitations on the parties in the sentencing phase, this Court acknowledged in *Wilkinson* that “[t]he 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.” 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 conduct any analysis as to whether a defendant’s rights are adequately protected as to direct damages. Importantly, the “crime” at issue in *Wilkinson*, contracting without a license, is a non-jury-triable offense 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).

B. Criminal restitution does not adequately protect defendants' due process rights.

“The amount of a victim’s loss is normally determined as part of sentencing, and that is where the objection may be made, or a restitution hearing requested.” *State v. Steffy*, 173 Ariz. 90, 93 (App. 1992). Thus, although “[t]he state has the burden of proving a restitution claim,” *State v. Lewis*, 222 Ariz. 321, 324 ¶ 7 (App. 2009), the trial court presumes the correctness of the victim’s request until the defendant proves the contrary. The judge may base the presumptive award on evidence that would be inadmissible under the Rules of Evidence, including hearsay in presentence reports. *Compare* A.R.S. § 13-804(I) (allowing the judge to consider “any evidence” heard), *with, e.g.*, Ariz. R. Evid. 403 (excluding evidence presenting risk of unfair prejudice substantially outweighing probative value); Rule 404(b) (excluding other crimes or bad acts as proof of character); Rule 408(a) (excluding evidence of compromise offers and negotiations to prove the amount of a claim); Rule 409 (excluding evidence of offers or promises to pay medical expenses); Rule 410 (excluding statements made during plea discussions); Rule 701 (excluding witness testimony not “rationally based on the witness’s perception”); Rule 802 (excluding hearsay); Rule 901 (excluding evidence lacking adequate foundation).

The defendant’s access to information to contest this presumptive amount of restitution is far more limited than it would be in the context of civil litigation. For example, the criminal defendant is only entitled to disclosure of information held by

the State. *Cf.* Ariz. R. Crim. P. 15.1(g) (disclosure by other persons compelled only upon discretionary court order, and only after defendant shows “substantial need” for material). Because Arizona case law does not view restitution as a criminal penalty even though restitution is plainly a part of a criminal sentence, it is unclear whether the State is even required to reveal all information that is helpful to the defendant in determining the proper amount of restitution; the Criminal Rules only require a prosecutor to reveal “material or information that tends to mitigate or negate the defendant’s guilt or would tend to reduce the defendant’s punishment.” Ariz. R. Crim. P. 15.1(b)(8); *see also Brady v. Maryland*, 373 U.S. 83 (1963). Furthermore, article 2, section 2.1(A)(5) of the Arizona Constitution prohibits a criminal defendant from compelling the victim to provide discovery in advance of a hearing. *Quijada*, 246 Ariz. at 368-69 ¶¶ 37-39 (victim who submits restitution request but refuses to testify or provide supporting documentation suffers no consequence except an adverse inference). Moreover, defendants are commonly denied adequate opportunity to prepare for a restitution hearing. *See In re Richard B.*, 216 Ariz. 127, 129 ¶¶ 5-6 (App. 2007) (restitution hearing held seven days after the State submitted its request for restitution).

In civil cases, on the other hand, the defendant would have access to any information that would help him or her contest the amount of restitution, including mandatory disclosure of witnesses and statements, detailed computations of

damages and supporting documents, description and location of known documents and records, and information about insurance. *See* Ariz. R. Civ. P. 26.1(a). The civil defendant can compel the person claiming injury to answer written questions; depose the plaintiff and other witnesses; compel production of relevant documents or evidence; and, if personal injuries are claimed, require the person to submit to a medical examination. *See* Ariz. R. Civ. P. 30, 33, 34, 35, 45.

A criminal defendant's amount of restitution will generally be for the whole amount of the victim's injury, even if the defendant is only partially responsible for the injury. *See* A.R.S. § 13-804(B) ("In ordering restitution for economic loss...the court shall consider all losses caused by the criminal offense or offenses for which the defendant has been convicted."); § 13-804(F) (co-defendants jointly and severally liable for restitution). Criminal defendants have no procedure to limit their own exposure to anything less than liability for the victim's full damages, or to get contributions from other parties responsible for the victim's injury.

In contrast, in civil actions, "the liability of each defendant for damages is several only," A.R.S. § 12-2506(A), unless multiple responsible parties were acting in concert or one was another's agent, § 12-2506(D)(1)-(2). Defendants are entitled to have their liability proportionally reduced by the proportion of fault of others, even if not joined in the litigation. § 12-2506(B). And, if the plaintiff was at least 50% responsible for the event leading to his or her own injury, the jury may award

the plaintiff nothing at all. § 12-711. In some situations, third parties must be brought into the litigation: for example, when the defendant's situation leaves them "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." Ariz. R. Civ. P. 19(a)(1)(B)(ii). And Ariz. R. Civ. P. 14(a)(1) allows civil defendants to join defendants from whom they are entitled to contribution.

The facts of this case show the inherent unfairness of using criminal restitution proceedings as a stand-in for a civil damages suit. Fay has sought to use the VBR and VRIA as both a shield and a sword by demanding restitution based on expert evidence while simultaneously refusing to comply with disclosure demands on the ground that such is prohibited by the VBR. *See* Exhibits B and C to Response to Petition. This abuse of the restitution system is a necessary consequence of case law that fails to place any restrictions on the way that restitution claims are established. Fundamental fairness and due process demand that Fay must not be allowed to have it both ways.

//

//

CONCLUSION

For these reasons, *amicus curiae* AACJ requests that this Court reject Fay's arguments that victims may litigate appellate and post-conviction claims on behalf of and in the place of the prosecutor.

RESPECTFULLY SUBMITTED this 9th day of December, 2020.

By /s/ David J. Euchner

David J. Euchner & Madeline A. Mayer
Attorneys for *amicus curiae*
Arizona Attorneys for Criminal Justice