IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellant, v. VIVEK A. PATEL, Appellee.	))))))))))	No. CR-19-0366-PR Court of Appeals No. 1 CA-CR 18-0774 Maricopa County Superior Court No. LC2018-000192 Phoenix Municipal Court No. 14483182

SUPPLEMENTAL BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE (AACJ), MARICOPA COUNTY OFFICE OF THE LEGAL DEFENDER (OLD), AND MARICOPA COUNTY OFFICE OF THE PUBLIC ADVOCATE (OPA) IN SUPPORT OF APPELLEE

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INTRODUCTION

Arizona Attorneys for Criminal Justice (AACJ), Maricopa County Office of the Legal Defender (OLD), and Maricopa County Office of the Public Advocate (OPA) have previously submitted *amicus curiae* briefs at the petition stage of this case explaining the legislative power and prerogative to require restitution resulting from criminal conduct—or not. *Amici* jointly file this supplemental *amicus curiae* brief to highlight two issues before this Court: whether A.R.S. § 28-672(G) violates the Victim's Bill of Rights (VBR) of the Arizona Constitution, and if so, whether that subsection can be severed from the remainder of the statute. For the reasons in this brief, the answer to both questions is no.

ARGUMENTS

I. This Court recently explained in *State v. Reed* that the Victim's Bill of Rights created procedural rights and did not guarantee a result for victims.

The State's argument and the court of appeals' holding rest upon the mistaken belief that the right to "prompt" restitution enshrined in the VBR, *see* Ariz. Const. art. 2, § 2.1(A)(8), means that a victim is entitled to "full" restitution, i.e., that the words "prompt" and "full" are synonymous. The fallacy of this argument is adequately demonstrated in earlier briefing. A recent opinion of this Court helps to shine light on such erroneous reasoning.

In *State v. Reed*, 248 Ariz. 72 (2020), this Court addressed the constitutionality

of a statute that was passed for the purpose of limiting a deceased defendant's right to appeal. Although the statute at issue in that case, A.R.S. § 13-106, bears no similarity to § 28-672, this Court's analysis in *Reed* is very informative as to the issue raised by the victim in this case.

In 2014, the Legislature passed § 13-106, which not only overruled prior Arizona case law that a defendant's conviction was abated *ab initio* if he died after verdicts were entered but also required any appeal to be dismissed. The defendant in *Reed* was convicted of voyeurism and sentenced, and later the trial court imposed nearly $18,000 in restitution for attorney fees owed to the victim. Reed's appeal of his convictions was unsuccessful, but while he was appealing the restitution order, he died and the court of appeals ordered the appeal dismissed pursuant to § 13-106(A). *Reed*, 248 Ariz. at 74-75 ¶¶ 3-5. Reed challenged both subsections of § 13-106 as unconstitutional; this Court agreed with Reed as to subsection (A) but not as to (B). *Id*. at 74 ¶¶ 1-2.

As to subsection (A), the Legislature encroached on the constitutional right to appeal in article 2, section 24 of the Arizona Constitution as well as the Court's prerogative to regulate the procedure for exercising that constitutional right. *Id*. at 77 ¶¶ 14-17. *Reed* then turned to the question whether subsection (A) was permitted under § 2.1(D) of the VBR, which authorizes the Legislature to "enact 'procedural laws to define, implement, preserve and protect the rights guaranteed to victims' by

the Victim's Bill of Rights." *Id*. at 76 ¶ 10, 78 ¶¶ 19-20. It determined that the statute was not authorized by the rulemaking power in the VBR because, among other reasons:

> Subsection (A)(8)'s declaration that victims must "receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury" is unique and peculiar to victims. But this 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 particular appellate disposition, § 13-106(A)'s required disposition does not affect a victim's right to payment of prompt restitution.

Id. ¶ 24 (citing *State v. Hansen*, 215 Ariz. 287, 290 ¶ 14 (2007); *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 343 ¶ 12 (1999)).

This excerpt from *Reed* importantly shows that § 2.1(A)(8) of the VBR creates a ***procedural*** right to receive prompt restitution. As explained in *Hansen*, 215 Ariz. at 290-91 ¶ 15, a law that affects the manner in which restitution is paid is within the power of the Legislature to make procedural laws to protect the enumerated rights in the VBR. In *Reed*, the constitutional infirmity with A.R.S. § 13-106(A) was that the statute did not directly affect the constitutional right at issue. Reed's victim was not arguing for "prompt" restitution, but for a particular result of the litigation, i.e., "full" restitution that would not be appealed after Reed's death.

Similarly, in this case, the person injured in Patel's automobile accident is seeking to use a procedural right to prompt restitution as a substantive right to a particular result. Absent any other constitutional concerns such as those described in

earlier briefing, the Legislature has the power to enact a substantive law that impacts the amount of restitution a victim is entitled to receive in criminal proceedings so long as it does not prevent that victim from seeking damages in civil proceedings. The court of appeals' contortion of the procedural right to prompt restitution into a substantive right to full restitution was not envisioned by the VBR. Thus, the court of appeals' opinion must be vacated and the trial court's ruling must be affirmed.

II. The restitution cap in A.R.S. § 28-672 cannot be severed from the remainder of the statute because the cap is integral to the statute's existence.

Reed is also a classic demonstration of the point that it is unnecessary to strike down an entire statute merely because one subsection is unconstitutional. In *Reed*, this Court did not engage in a severability discussion, likely because neither party raised the issue.[1] *See Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 331 (2006) (noting a previous case where severability analysis not conducted because parties did not request it). Also, the two provisions in *Reed* were passed as part of the same law, but they are obviously able to function independently.

Just as the party challenging the statute bears the burden of proving its unconstitutionality, *see Reed*, 248 Ariz. at 76 ¶ 12, that party similarly bears the burden of proving that any unconstitutional provision within a law can be severed

[1] Neither party in *Reed* had incentive to raise the issue; Reed was arguing both provisions were unconstitutional, and the State sought to uphold both provisions.

from the whole. The U.S. Supreme Court has laid out three factors to consider when determining whether an unconstitutional provision can be severed:[2]

> First, we try not to nullify more of a legislature's work than is necessary, for we know that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people. It is axiomatic that a statute may be invalid as applied to one state of facts and yet valid as applied to another. Accordingly, the normal rule is that partial, rather than facial, invalidation is the required course, such that a statute may be declared invalid to the extent that it reaches too far, but otherwise left intact.
>
> Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting state law to conform it to constitutional requirements even as we strive to salvage it. Our ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly we have already articulated the background constitutional rules at issue and how easily we can articulate the remedy. . . . making distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a far more serious invasion of the legislative domain than we ought to undertake.
>
> Third, the touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature. After finding an application or portion of a

[2] Severability is at its core an issue of separation of powers; and unlike the federal constitution, article 3 of the Arizona Constitution explicitly provides for separation of powers among co-equal branches of government. *Amici* have identified no Arizona authority for a different severability jurisprudence apart from that of the U.S. Supreme Court—and this Court's cases point to the U.S. Supreme Court for guidance. *See Millett v. Frohmiller*, 66 Ariz 339, 342-43 (1948) (citing, *inter alia*, *Hill v. Wallace*, 259 U.S. 44 (1922), and *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929), for the proposition that "[t]he law concerning the severability of statutes is well settled."). *But see State v. Maestas*, 244 Ariz. 9, 15 ¶ 27 (2018) (Bolick, J., concurring) (noting Arizona's political-question jurisprudence is borrowed from U.S. Supreme Court cases and questioning the wisdom of such in light of textual differences between the two constitutions).

> statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all? All the while, we are wary of legislatures who would rely on our intervention, for it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside to announce to whom the statute may be applied. This would, to some extent, substitute the judicial for the legislative department of the government.

Ayotte, 546 U.S. at 329-30 (internal quotations and alterations omitted).

In this case, the Legislative process is not only "murky," but A.R.S. § 28-672 clearly was the product of compromise. Thus, the second factor in the *Ayotte* analysis is paramount here. In exchange for making a civil traffic offense into a class 3 misdemeanor without requiring proof of a culpable mental state, *see Phoenix City Prosecutor's Office v. Nyquist*, 243 Ariz. 227 (App. 2017), the Legislature required a trade-off that restitution be capped at $10,000.00. The penalty of restitution clearly induced the Legislature's enactment of § 28-672 because there is no criminal conduct that this strict liability statute seeks to proscribe. The statute, when read completely, demonstrates the Legislature's unambiguous intention that restitution will not go above a specific amount. Therefore, the restitution cap is so intimately connected to the whole statute that the conclusion that the statute would not have been enacted but for this cap is the only sound outcome.

The State is asking this Court to ignore the Legislature's unequivocal intent that the restitution cap is a key element of the statute. The State's argument overlooks two critical facts that plainly show that the restitution is the spirit of the statute. First,

the trial court must dismiss any charges brought forward under § 28-672 if the parties appear before trial and present that a monetary settlement has been made. Second, the Legislature had an opportunity to completely remove the restitution cap, but instead chose to raise the cap.

Looking first to the mandatory dismissal of the charges, the State argues that the compromise statute serves the same purpose as § 28-672(F). However, the State offers no sound statutory analysis to support this claim. "We interpret statutory language in view of the entire text, considering the context and related statutes on the same subject." *Nicaise v. Sundaram*, 245 Ariz. 566, 568 ¶ 11 (2019). The "legislature is presumed, when it passes a statute, to know the existing laws." *Daou v. Harris*, 139 Ariz. 353, 357 (1984).

The compromise statute allows a trial court, in its discretion, to dismiss certain misdemeanor offenses if satisfaction of payment is demonstrated. A.R.S. § 13-3981(C) (…the court ***may***, on payment of the costs incurred, order prosecution dismissed…) (emphasis added). On the other hand, § 28-672(F) directs that "…the court ***shall*** order that the prosecution be dismissed" (emphasis added). "'Shall' usually indicates a mandatory provision …" *Arizona Downs v. Arizona Horsemen's Found.*, 130 Ariz. 550, 554 (1981) (use of the word "shall" was directory in one portion of a statute, but mandatory in another). The Legislature understood that the compromise statute gave the court the discretion to dismiss a charge and therefore it

explicitly chose to mandate dismissal under § 28-672(F) upon payment to the other party.

Also, § 28-672(C)(1) gives the trial court discretion to suspend a person's driving privileges if the moving violation results in death, but subsection (C)(2) strips away that discretion and mandates the court to suspend driving privileges for a second or subsequent violation of the statute. The choice to use "may" in one section versus "shall" in the next makes the Legislature's intention clear and unambiguous that the words hold different meanings as applied under this statute. Any other reasoning renders the use of the Legislature's words meaningless and that result would be wholly unsound.

Looking to the second point, the State argues that the Legislature's decision in 2018 to raise the statutory cap "diminishes any significance that the cap … plays … as a whole." *State's Supplemental Brief*, at 16. This conclusory statement is offered with no supporting justification and fails to pass the application of basic canons of statutory construction.

"A statute's own words provide the best and most reliable indicator of the legislature's intent; accordingly, we generally follow the text as written when it is plain and unambiguous." *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 177 Ariz. 526, 529 (1994). "We give words their usual and commonly understood meaning unless the legislature clearly intended a different meaning." *State v. Korzep*, 165

Ariz. 490, 493 (1990).

If the Legislature intended to remove the restitution cap, it would have done so, as opposed to increasing the cap from $10,000 to $100,000. Laws 2018, Ch. 310, § 1.[3] Far from diminishing the cap's significance, it instead illuminates the Legislature's intention to limit criminal restitution while still permitting those harmed to seek full redress in civil proceedings.

Interestingly, the State cites *State Comp. Fund v. Symington*, 174 Ariz. 188 (1993), in support of its argument against severability, yet that case directly supports the inference that § 28-672 is non-severable. In *Symington*, this Court analyzed two provisions of a bill related to a "State Compensation Fund" that involved a federal equivalency tax and an alternative minimum tax. *Id.* at 191. This Court held, that the federal equivalency tax and minimum tax, although separate provisions, were not severable because the Legislature would not have enacted one without the other. *Id.* at 196. The bill also contained remaining provisions that impacted other state agencies—unrelated to the specific fund at issue and this Court found those unrelated portions severable. *Id.*

[3] When initially introduced, H.B. 2522 did remove the restitution cap altogether; however, the Legislature rejected that proposal and instead raised the cap to $100,000. *See* Debate in Senate Transportation and Technology Committee, H.B. 2522, 53rd Leg., 2nd Reg. Sess. (Ariz. 2018), available at http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=20791&meta_id=512106 (last visited April 6, 2020).

This analysis is directly on point to A.R.S. § 28-672. The Legislature was not merely aware of the civil traffic code prior to enacting § 28-672: it directly references specific traffic statutes. The Legislature converted these infractions into a class 3 misdemeanor only for the purpose of creating an avenue by which persons injured seriously or killed as a result would be entitled to a specific amount of restitution. If money is no longer an issue at trial, there is no longer an offense under the statute. Thus, the Legislature would not have enacted this statute without these other pivotal provisions.

Maintaining a cap also makes sense. *Cf. State v. Gray*, 239 Ariz. 475, 477 ¶ 6 (2016) (statutory language controls unless an absurdity results). As *amici* have noted in their previous briefing, limits on criminal restitution resulting from a traffic infraction enable the parties to fully litigate defenses related to damages in a civil proceeding. For example, a driver can cause an accident where a motorcyclist is seriously injured, but the extent of the injuries (and corresponding medical bills) is more a product of the motorcyclist's refusal to wear a helmet and thereby failing to mitigate damages.[4] By requiring proof beyond a reasonable doubt for a criminal

[4] These were the facts in a case argued before this Court in 2017 where OPA represented the juvenile driver and AACJ appeared as *amicus*. This Court dismissed the case as improvidently granted because the juvenile reached age of majority during the proceedings and the lower court order was never stayed, thereby divesting the courts of jurisdiction to modify the order. *See A.B. v. Lynch*, Ariz. S. Ct. No. CV-16-0192-PR, oral argument April 25, 2017, *dismissed as improvidently granted*.

conviction, however, the Legislature can save the aggrieved party the effort of proving liability in a civil damages case.

For these reasons, § 28-672(G) cannot be severed from the rest of the statute. With that said, *amici* would welcome a finding that the entire statute must be struck down as unconstitutional, because *Nyquist* was incorrectly decided.

CONCLUSION

Amici ask this Court to hold that the right to "prompt" restitution in the Victim's Bill of Rights does not dictate that victims have the right to a particular result. To the extent that any part of A.R.S. § 28-672 is unconstitutional, *amici* ask this Court to find that no part of the law is severable and thus the entire statute must be struck down.

DATED: April 7, 2020.

By /s/ David J. Euchner

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