

IN THE SUPREME COURT

STATE OF ARIZONA

	)	Arizona Supreme Court
	)	No. CR-19-0366-PR
STATE OF ARIZONA)	
	)	Court of Appeals Division One
	)	No. 1 CA-CR 18-0774
Appellant,)	
	)	Maricopa County Superior Court
	)	No. LC2018-000192
)	
vs.	)	Phoenix Municipal Court
	)	No. 14483182
VIVEK PATEL,)	
	)	ARIZONA CRIME VICTIM
	)	RIGHTS LAW GROUP AND
Appellee	)	NATIONAL CRIME VICTIM
	)	LAW INSTITUTE <i>AMICI</i>
	)	<i>CURIAE</i> BRIEF IN SUPPORT
	)	OF APPELLANT

Randall Udelman (AZ Bar #014658)
(Counsel of Record)
Arizona Crime Victim Rights Law Group
P.O. Box 2323
Scottsdale, Arizona 85252-2323
Phone: 480-946-0832
Email: info@azvictimrights.org

National Crime Victim Law Institute
At Lewis & Clark Law School¹
1130 SW Morrison St., Suite 200
Portland, Oregon 97205
Co-Amici Curiae

¹ Lewis & Clark Law School is not amicus and is listed for location purposes only.

TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
STATEMENT OF FACTS AND PROCEDURAL HISTORY	4
STATEMENT OF ISSUES ON APPEAL	4
ARGUMENT	4
I. Standard of Review	4
II. All Arizona Victims Have Constitutional and Statutory Rights to Restitution for their Full Economic Losses Which Cannot be constricted by the Legislature.	4
A. Arizona Law Affords All Victims the Rights to Restitution for Their Full Economic Losses and to Be Treated with Fairness Dignity and Respect.	4
B. The Legislature Lacks Authority to Strip a Class of Crime Victim of their Right to Full Restitution.	6
C. Arizona’s Restitution Scheme Enhances the VBR but does not Punish a Defendant.	8
CONCLUSION.....	10

Table of Authorities

Page(s)

Cases

Gallardo v. State, 236 Ariz. 84, 336 P.3d 717 (2014).....4

J.D. v. Hegyi, 236 Ariz. 39, 335 P.3d 1118, (2014).....5

State v. Blanton, 173 Ariz. 517, 844 P.2d 1167 (App. 1992)8

State v. Cota, 234 Ariz. 180, 319, P.3d 242 (App. 2014).....9

State v. Freeman, 174 Ariz. 303, 848 P.2d 882 (App. 1993)5

State v Hansen, 215 Ariz. 287, 160 P.3d 166 (2007)6

State v. Howard, 168 Ariz. 458, 815 P.2d 5 (App. 1991).....7

State v Lee, 226 Ariz. 234, 245 P.3d 919 (App. 2011).....7

State v. Patel, 2019 Ariz. App. Lexis 946, 452 P.3d 712 (App. 2019)1

State v. Roscoe, 185 Ariz. 68, 912 P.2d 1297 (1996)6

State v. Wilkinson, 202 Ariz. 27, 39 P.3d 1131 (2002).....5

State v. Zaputil, 220 Ariz. 425, 207 P.3d 678 (App. 2008)2

State v. Zierden, 171 Ariz. 44, 828 P.2d 180 (1992)9

Statutes

A.R.S. §13-105(16).....2, 3, 7, 9

A.R.S. §13-4418.....2

A.R.S. §13-603(C)2, 3, 4, 5, 6, 8, 11

A.R.S. §28-672(A)7

A.R.S. §13-804(E).....9

A.R.S. §13-804(G)5

A.R.S. §13-805.....5

A.R.S. §13-807.....3

Other Authorities

2 J. Bishop, *Commentaries on Criminal Procedure* §§ 755-62, 359-61 (3d ed 1880).....9

Constitutional Provisions

ARIZ. CONST. Art, 2, §2.1(D)6

ARIZ. CONST. ART. 2, §2.1(A)(1)5

Ariz. Const. Art. 2, §2.1(A) (8).....4, 5, 11

Federal Cases

Apprendi v. New Jersey, 530 U.S. 466, 510 (2000).....9, 10

United States v. Cienfuegos, 462 F.3d 1160, (9th Cir. 2006)8

United States v. Fountain, 768 F.2d 790, 800, *opinion supplemented on denial of reh’g*,
777 F.2d 345 (7th Cir. 1985) 10

United States v. Serawop, 505 F.3d 1112, 1120 (10th Cir. 2007)8

INTRODUCTION

Victims of crime do not ask to participate in the criminal justice system; they are thrust into the system because somebody else committed a crime and they suffered harm. Thirty years ago Arizona voters granted crime victims constitutionally protected rights in the Victim Bill of Rights (VBR) and made these dependent on one thing only – whether someone was victimized by conduct criminalized by the legislature. These rights including the rights to be treated with fairness, dignity and respect and to receive prompt restitution from the person or persons that caused the victim’s loss or injury are uniform for all victims. The rights are not contingent on a class of crime, stature of the victim, or nature of the offense. Voters in Arizona intended to treat all victims equally, not to create separate classes of victims. Recognizing this, the Court of Appeals correctly concluded that the statute capping restitution only for vehicular crimes was unconstitutional because it treated a vehicular crime victim suffering economic loss differently from other crime victims suffering economic losses. The Court correctly held that “Patel's argument that the VBR only guarantees partial restitution as provided in A.R.S. § 28-672(G) would mean that a class of victims who suffered severe harm would not be entitled to restitution. Based on a plain reading of the Arizona Constitution and the authorities cited above, we reject this argument.” *State v. Patel*, 2019 Ariz. App. Lexis 946, 951-52, 452 P.3d 712, 714 (App. 2019).

This Court should uphold the Court of Appeals. Laws attempting to narrow the VBR's scope and application should be viewed with considerable skepticism. C.f. A.R.S. §13-4418 ("This chapter shall be liberally construed to preserve and protect the rights to which victims are entitled.") (emphasis added). Capping restitution for vehicular crimes flies in the face of the rights afforded to all crime victims and should not be enforced.

Nor should this Court dramatically alter Arizona's overall criminal restitution scheme by requiring trial by jury when considering the amount and manner of restitution. A criminal restitution award is not punishment but instead is remedial in scope. *See State v. Zaputil*, 220 Ariz. 425, 428, 207 P.3d 678, 681 (App. 2008) ("[O]ur case law is clear that restitution is not a punishment exacted by the state... Instead, its purpose is to make the victim whole.") (citations omitted); *see also* A.R.S. §13-603(C) ("If a person is convicted of an offense, the court shall require the convicted person to make restitution to the person who is the victim... in the full amount of the economic loss as determined by the court and in the manner as determined by the court or the court's designee..."). Criminal restitution is limited to awards for only a victim's economic loss designed to make them whole. Crime victims cannot seek criminal restitution awards for pain and suffering, punitive damages or consequential damages in criminal courts; these damages may only be sought in a separate civil case. *See* A.R.S. 13-105(16) ("Economic loss includes lost

interest, lost earnings and other losses that would not have been incurred but for the offense. Economic loss does not include losses incurred by the convicted person, damages for pain and suffering, punitive damages or consequential damages.”). A Defendant’s rights are fully protected by the right to trial by jury on the underlying criminal charges and their separate right to trial by jury in any civil proceeding to recover general, consequential and punitive damages and any damages “in excess of the amount of the restitution order that is actually paid.” A.R.S. §13-807. Eliminating the entire restitution process spelled out in A.R.S. §13-603(C), *et. seq.* and requiring jury trials for all restitution claims interferes with the orderly and remedial purpose for compensating crime victims, violates a victim’s due process rights, and undermines the VBR requirement that a victim receive “prompt restitution.”

For all the reasons set forth above, the legislature’s effort to cap economic losses simply because the weapon of choice was a car and not a gun infringes on victims’ rights and does not lead to a recovery of full economic loss for a specific class of crime victims; such treatment is not fair, dignified or respectful, nor is it constitutional. The Court of Appeal’s decision finding the statutory cap unconstitutional should be affirmed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The facts and procedural history have been appropriately spelled out by the parties. *Amici* does not repeat them here.

STATEMENT OF ISSUES ON APPEAL

Does A.R.S. §28-672(G) violate the Victims' Bill of Rights, Ariz. Const. art. 2, §2.1(A)(8) by capping victim restitution?

Short Answer: Yes. Thirty years ago, Arizona voters decided that crime victims have the constitutionally protected right to recover prompt restitution from the criminal defendant. Voters did not limit this right simply because the defendant harmed his victim with a vehicle.

ARGUMENT

I. Standard of Review

A case challenging the constitutionality of a statute must be reviewed *de novo*. *Gallardo v. State*, 236 Ariz. 84, 87, 336 P.3d 717, 720 (2014). Here, the issue presented to this Court is whether the monetary cap on restitution for certain vehicular crimes passed by the legislature violates the VBR?

II. All Arizona Victims Have Constitutional and Statutory Rights to Restitution for their Full Economic Losses Which Cannot be Constricted by the Legislature.

A. Arizona Law Affords All Victims the Rights to Restitution for Their Full Economic Losses and to Be Treated with Fairness Dignity and Respect.

The VBR affords victims the right to “prompt restitution from the person or persons convicted of the criminal conduct that caused the victim’s loss or injury.” Ariz. Const. Art. 2, §2.1(A) (8). The purposes of this right “are both reparative and rehabilitative in nature: to make the victim whole . . . , and to make the offender recognize the specific consequences of his criminal activity and accept responsibility for those consequences.” *State v. Freeman*, 174 Ariz. 303, 306, 848 P.2d 882, 885 (App. 1993) (citations and quotations omitted); *accord State v. Wilkinson*, 202 Ariz. 27, 30, 39 P.3d 1131, 1134 (2002) (observing the “primary purposes of restitution” are “reparation to the victim and rehabilitation of the offender”). Further, the VBR affords victims the right to be treated with fairness, dignity and respect. Ariz. Const. Art. 2, §2.1(A)(1). *See also J.D. v. Hegyi*, 236 Ariz. 39, 41, 335 P.3d 1118, 1120 (2014) (construing VBR as broadly recognizing victims’ rights to be treated fairly, with respect and dignity).

To carry out the constitutional mandate regarding restitution in a manner that honors the constitutional right to be treated with fairness, dignity and respect, the legislature enacted a statutory scheme which requires courts to order restitution in the full amount of the victims’ economic loss in every case; authorizes courts to conduct separate restitution hearings to determine the full amount of loss; and imposes no explicit statutory time limit within which the trial court must order restitution. *See* A.R.S. §§ 13-603(C), 13-804(G), 13-805.

This obligation applies to all victims:

If a person is convicted of an offense, the court shall require the convicted person to make restitution to the person who is the victim of the crime ... *in the full amount of the economic loss* as determined by the court and in the manner as determined by the court....

A.R.S. §13-603(C) (emphasis added).

Restitution caps on any criminal behavior – let alone on an arbitrary class of criminal behavior – are at odds with these well-established rights.

B. The Legislature Lacks Authority to Strip a Class of Crime Victim of their Right to Full Restitution.

Capping the full amount of any victim’s economic losses with an arbitrary number impermissibly divests victims of their right to restitution whenever economic losses exceed the cap. Doing so only for a particular class of crime victim is a further violation. Such an outcome cannot withstand constitutional scrutiny.

The legislature has power to act on victims’ rights. ARIZ. CONST. Art, 2, §2.1(D) (“The legislature . . . ha[s] the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section...”). *See also State v. Roscoe*, 185 Ariz. 68, 73, 912 P.2d 1297, 1302 (1996). Notably, this authority does not invest in the legislature the power to strip victims of rights already constitutionally afforded. *See State v Hansen*, 215 Ariz. 287, 290, 160 P.3d 166, 169 (2007) (“The legislature’s power to promulgate rules under the VBR is *not* unlimited. . . [and includes] those rules that define, implement,

preserve and protect the specific rights unique and peculiar to crime victims, as guaranteed and created by the VBR.”) (emphasis added) (citations omitted). The Arizona legislature simply cannot roll back rights that the VBR has already granted. *See State v Lee*, 226 Ariz. 234, 237, 245 P.3d 919, 922 (App. 2011) (“neither the legislature nor court rules can eliminate or reduce rights guaranteed by the VBR.”).

Here the statute at issue involves victims who suffer “serious physical injury or death.” A.R.S. §28-672(A). There can be no doubt that these victims suffer significant economic losses from their victimization. In fact, victims who suffer in these ways often find themselves facing substantial future medical care needs, past and future lost earnings, and lost earning capacity; financial losses that fit easily within the definition of economic loss. *See* A.R.S. §13-105(16) (‘Economic loss’ means any loss incurred by a person as a result of the commission of an offense... [and] includes lost interest, lost earnings and other losses that would not have been incurred but for the offense.”); *see also State v. Howard*, 168 Ariz. 458, 460, 815 P.2d 5, 7 (App. 1991) (“While the award of restitution must ‘bear [] a reasonable relationship to the victim’s loss,’ it cannot always be confined to ‘easily measurable damages.’ . . . [T]he full amount of a victim’s economic loss includes not only those losses incurred at the time of sentencing, but also those losses reasonably anticipated

to be incurred in the future as a result of the defendant's actions.") (citations omitted).²

There can simply be no doubt that crimes – including vehicular crimes – involving serious physical injury or death may involve economic losses in excess of the arbitrary \$100,000 cap that the legislature enacted. The legislature's attempt to cap the rights of a particular class of victims impermissibly violates their rights to receive their full economic losses and to be treated with fairness, respect and dignity throughout the criminal justice process. Consequently, 28-672(G)'s attempt to cap restitution should be held unconstitutional.

C. Arizona's Restitution Scheme Enhances the VBR Without Punishing a Defendant.

Arizona's restitution scheme requires the Court to set not only the amount of restitution but also the manner of restitution payments after a conviction. *See* A.R.S. §13-603(C) ("the court shall require the convicted person to make restitution... in the full amount of the economic loss as determined by the court *and* in the manner as determined by the court [or court designee]") (emphasis added); *see also* A.R.S.

² Notably, the economic losses of this class of victims can include lost earning capacity even if the crime causes the death of a victim. *See State v. Blanton*, 173 Ariz. 517, 520, 844 P.2d 1167, 1170 (App. 1992) (restitution includes future lost wage claims in a vehicular homicide case); *see also, e.g., United States v. Serawop*, 505 F.3d 1112, 1120 (10th Cir. 2007) (holding that full restitution includes future lost income resulting from homicide of a three month old victim *United States v. Cienfuegos*, 462 F.3d 1160, 1164 (9th Cir. 2006) ("[I]t is plain that the statute [Mandatory Victim Restitution Act] allows a representative of the victim's estate or another family member to assume the victim's rights to collect restitution for future lost income.")).

13-804(E) (“After the court determines the amount of restitution, the court or a staff member ... shall specify the manner in which the restitution is to be paid.”). Restitution is designed to make the victim whole “in the full amount of the economic loss as determined by the court and in the manner as determined by the court or the court’s designee...” A.R.S. §13-603(C).

Like restitution itself, the manner of payment of restitution to a victim has nothing to do with punishment or penalty. *See State v. Zierden*, 171 Ariz. 44, 45, 828 P.2d 180, 181 (1992); *State v. Cota*, 234 Ariz. 180, 184, 319, P.3d 242, 246 (App. 2014) (purpose for restitution is to make victim whole for their losses suffered as a result of the crime). Historically, restitution has been recognized as remedial in nature. *See Apprendi v. New Jersey*, 530 U.S. 466, 510 (2000) (Thomas, J., concurring) (*citing* 2 J. Bishop, *Commentaries on Criminal Procedure* §§ 755-62, 359-61 (3d ed 1880)).

Restitution does not become punishment in a criminal case simply because a victim may receive an award for some but not all of their losses.³ Awards for

³ *See* A.R.S. §13-105(16) (excluding noneconomic, consequential and punitive damages from the definition of economic loss subject to an award of restitution). So recovery for actual economic loss within these parameters cannot be considered as punishment or a windfall to a crime victim. Of course a victim can choose to file a separate civil lawsuit seeking recovery of these types of damages and a criminal defendant certainly has the right to a jury trial. But after conviction of a crime, a victim can only seek a restitution award for economic loss resulting from the crime to make them whole. Having the court set the amount and manner of restitution attempts to make the victim whole but does not enhance the criminal penalty.

economic loss to make the victim whole simply do not implicate any constitutional right to trial by jury. While restitution for economic loss can certainly overlap with civil tort law giving victims a partial compensatory outcome, the fundamental purpose to make a victim whole does not transform a victim's economic loss into one requiring trial by jury. *See, e.g., United States v. Fountain*, 768 F.2d 790, 800, *opinion supplemented on denial of reh'g*, 777 F.2d 345 (7th Cir. 1985) (federal restitution statute does not violate defendant's Seventh Amendment right to jury trial) ("The fact that tort law may also have deterrent purposes ... does not make every payment to the victim of crime a tort sanction; it just shows that tort and criminal law overlap."). Because compensating for economic loss suffered by crime victims does not enhance criminal penalties and instead helps make a victim whole, jury mandates spelled out in *Apprendi* and its progeny do not apply to Arizona's restitution scheme. *Apprendi*, 530 U.S. at 490 (jury must consider evidence beyond a reasonable doubt for any fact increasing a penalty for a crime).

In fact, granting a defendant a jury trial right to establish the amount and manner of restitution would infringe on a victim's VBR right to prompt adjudication and payment of their economic loss claims.

CONCLUSION

The VBR grants victims the right to prompt restitution from the offender and the longstanding statutory mandate requires courts to order full restitution in order

to make this right meaningful. ARIZ. CONST. ART. 2, §2.1(A)(8); A.R.S. §13-603(C). Limits on full restitution based on the type of crime furthers no constitutionally permissible purpose. A.R.S. §28-672(G) should be stricken as unconstitutional and the Arizona Court of Appeals Opinion affirmed.

RESPECTFULLY SUBMITTED this 7th day of April, 2020.

/s/ Randall Udelman
RANDALL UDELMAN (AZ Bar # 014685)
(*Counsel of Record*)
ARIZONA CRIME VICTIM RIGHTS LAW GROUP
P.O. Box 2323
Scottsdale, Arizona 85252-2323

And

National Crime Victim Law Institute
At Lewis & Clark Law School
1130 SW Morrison St., Suite 200
Portland, Oregon 97205
Co-Amici Curiae

Phone: 480-946-0832

Email: rudelman@azvictimrights.org

CERTIFICATE OF SERVICE

ORIGINAL of the foregoing e-filed with the Clerk of the Court
this 7th day of April, 2020:

Undersigned certifies that on this 7th Day of April, 2020,

COPIES of the Proposed *Amici* Curiae Brief in Support of Appellant and
Proposed Brief have been electronically delivered this 7th day of April, 2020, to:

Amy Offenberg, Esq.
Assistant Phoenix City Prosecutor
appeals.law@phoenix.gov
P.O. Box 4500
Phoenix, Arizona 85030-4500
Attorneys for Appellant State of Arizona

Michael J. Dew, Esq.
dewme@cox.net
LAW OFFICES OF MICHAEL J. DEW
6501 N. Central Avenue
Phoenix, Arizona 85012-1139
Attorneys for Appellee Vivek Patel

David J. Euchner
David.Euchner@pima.gov
Pima County Public Defender's Office
33 N. Stone Avenue, 21st Floor
Tucson, Arizona 85701
Attorney for *Amicus* Arizona Attorneys for Criminal Justice

/s/ Randall Udelman_____

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 31.12(a)(4) and (5), Rules of Criminal Procedure, I certify that the Brief of *Amici Curiae* uses a proportionately spaced type of 14 points or more, is double-spaced with a roman font, and contains 3,346 words.

Dated this 7th Day of April, 2020.

/s/ Randall Udelman (SBN #014685)
Arizona Crime Victim Rights Law Group
P.O. Box 2323
Scottsdale, Arizona 85252-2323
(480) 946-0832/(480) 970-5626 (fax)
rudelman@azvictimrights.org
Attorneys for Arizona Crime Victim Rights Law Group
and National Crime Victim Law Institute