ARIZONA SUPREME COURT

LISA GILPIN,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of PINAL, THE HONORABLE DANIELLE HARRIS, a judge thereof,

Respondent Judge,

MARCOS JERELL MARTINEZ,

Real Party in Interest.

Supreme Court
No. CR-23-0252-PR

Court of Appeals
No. 2 CA-SA 2023-0067

Pinal County Superior Court
No. CR201800324

PETITIONER'S SUPPLEMENTAL BRIEF

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INTRODUCTION

Petitioner, Lisa Gilpin, by and through undersigned counsel, respectfully submits this *Supplemental Brief* for this Court's consideration of the rephrased issue: "Is a victim entitled to restitution when a defendant is adjudged guilty except insane?" *Order,* No. CR-23-0252-PR, April 2, 2024.

After a criminal defendant is adjudged guilty except insane, full restitution is constitutionally required under Arizona's Victims' Bill of Rights (VBR) to preserve and protect victims' rights to justice and due process. Ariz. Const. art. II, § 2.1(A)(8); *State v. Patel*, 251 Ariz. 131, 135, ¶ 14 (2021) ("The right to restitution is thus a right to the full amount required to restore victims to the position they were in before the loss or injury caused by the criminal conduct."). When a criminal defendant is adjudged guilty except insane, it is a conviction and there is criminal liability. It does not have the effect of an acquittal under current Arizona law and cannot preclude or limit a victim's constitutional right to restitution. Unlike cases that end with an acquittal or a dismissal with prejudice, victims' rights are still applicable and enforceable. A.R.S. § 13-4402. A.R.S. § 13-502 is clear and unambiguous. A proper interpretation of A.R.S. § 13-502 does not preclude a victim from exercising any of their constitutional rights, including the right to restitution.

LEGAL ARGUMENTS

I. When a criminal defendant is adjudged guilty except insane, the effect is that of a conviction.

A. A guilty except insane adjudication is not an acquittal under current Arizona law.

Arizona's insanity defense once had the effect of an acquittal when a criminal defendant was found not guilty by reason of insanity. Michael Stroll, *Miles to Go Before We Sleep: Arizona's "Guilty Except Insane" Approach to the Insanity Defense and its Unrealized Promise*, 97 Geo. L.J. 1767, 1777 (2009). When codified in 1977, Arizona's insanity statute expressly removed any responsibility for criminal conduct. *State v. Tamplin*, 195 Ariz. 246, 248, ¶ 9 (App. 1999) citing 1977 Ariz. Sess. Laws, ch. 142, § 45 ("A person is *not responsible* for criminal conduct if at the time of such conduct the person was suffering from such a mental disease or defect as not to know the nature and quality of the act or, if such person did know, that such person did not know that what he was doing was wrong.") (emphasis added).

Given that a "wave of rampant insanity defense reform [] followed the acquittal of John Hinckley after his assassination attempt on President Reagan, it is no real surprise that the Arizona legislature enacted a law designed to curtail its insanity defense. . . ." Stroll, *supra* at 1768-69. Hinckley's acquittal, as well as two high profile Arizona insanity acquittals in the early 1980's, led the legislature

to amend the insanity defense statute by shifting the prosecutor's burden of proving a defendant's sanity beyond a reasonable doubt to the defendant prove insanity by clear and convincing evidence. *Id.* at *1777.*

"Laura's Law" was the impetus for the second wave of insanity reform in Arizona. Stroll, *supra* at 1778; RenEe MealnCon, *Arizona's Insane Response to Insanity*, 40 Ariz. L. Rew. 287, 290 (1998). After Laura Griffin-Austin's estranged husband brutally murdered her, he was acquitted by reason of temporary insanity and released just six short months later. Stroll, *supra* at 1778. "The public's reaction to these decisions can only be described as palpably irate." *Id*. When justice was denied to Laura's family, they worked with the legislature to further reform Arizona's insanity law. Stroll, *supra* at 1778; MealnCon, *supra* at 290.

"Laura's Law" eventually led to what is now "[c]alled the 'Guilty Except Insane' (GEI) statute, section 502 of the Arizona Criminal Code. . . ." Stroll, *supra* at 1769. "The new statute essentially abandoned the first prong of the *M'Naghten* test, limiting the availability of the insanity defense to a person who, at the time of the criminal act, was 'afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong.'" *Tamplin*, 195 Ariz. at 248, ¶ 10.

Under A.R.S. § 13-502(A), "a jury may find a defendant 'guilty except insane,' as opposed to simply guilty or not guilty by reason of insanity. . . ." Stroll, *supra* at 1769. Thus, under A.R.S. § 13-502, a guilty except insane adjudication no longer has the effect of an acquittal. The word "acquittal" nor the phrases "not guilty" and "not responsible" do not appear anywhere in the plain language of A.R.S. § 13-502 because the criminal defendant will still face criminal liability.

B. Defendants who are adjudged guilty except insane still face criminal liability.

Petitioner has not disputed that the guilty except insane defense is classified as an affirmative defense. A.R.S. § 13-502(A). An "affirmative defense means a defense that *attempts* to excuse the criminal actions of the accused." A.R.S. § 13-103(B) (emphasis added). Affirmative defenses are a matter of avoidance of culpability even if the State can meet its burden of proof. *State v. Holle*, 240 Ariz. 300, 304, ¶ 22 (2016). Affirmative defenses, if successful, may result in an acquittal of the criminal charges allowing the defendant a complete avoidance of criminal liability. The guilty except insane affirmative defense is different. A defendant who is adjudged guilty except insane will still face criminal liability under the express provisions of A.R.S. § 13-502.

A defendant who is adjudged guilty except insane will receive a suspended sentence. A.R.S. § 13-502(D) ("If the finder of fact finds the defendant guilty except insane, the court shall determine the sentence the defendant could have

received . . . or the presumptive sentence the defendant could have received . . .if the defendant had not been found insane, and the judge shall suspend the sentence . . . .”). Consistent with A.R.S. § 13-502(D), Real Party Martinez’s plea agreement required Respondent Judge to determine what his sentence would have been if he had not been found insane. *Petition for Review*, APP-017. At sentencing, Respondent Judge advised Real Party Martinez of his suspended sentence. *Petition for Review*, APP-142.

A defendant adjudged guilty except insane will also remain under the jurisdiction of the Superior Court. A.R.S. § 13-502(D) (“the judge . . . shall order the defendant to be placed and remain under the jurisdiction of the superior court and committed to a secure state mental health facility . . . .”); A.R.S. § 13-3992(D) (“If the court finds that the person’s act caused the death of or serious physical injury to or the threat of death or serious physical injury to another person, the court shall retain jurisdiction over the person for the entirety of the commitment term.”). Real Party Martinez remains under the jurisdiction of the Superior Court of Arizona. *Petition for Review*, APP-017 and APP-052.

Unlike an acquittal, a defendant adjudged guilty except insane will be placed in the custody of the State. A.R.S. § 13-502(D) (the court “shall order the defendant . . . committed to a secure state mental health facility . . . for the length of [the] sentence.” If a person is adjudicated guilty except insane, the state

department of health services "shall assume *custody* of the person . . . ." A.R.S. § 13-3992(E) (emphasis added). Real Party Martinez went into state custody after sentencing. *Petition for Review*, APP-053.

If a hearing is requested under A.R.S. §§ 13-3995, 3996, or 3997, by the terms of his plea agreement, Real Party Martinez could eventually be transferred to the Arizona Department of Corrections, Rehabilitation, and Reentry for the remainder of his natural life if the court determines that he no longer needs treatment for a mental disease or defect and is dangerous. A.R.S. § 13-3994(B)(4); *Petition for Review*, APP-017 and APP-053. If he is deemed not dangerous, Real Party Martinez could be placed on supervised probation for the remainder of his natural life. A.R.S. § 13-3994(B)(2); *Petition for Review*, APP-017 and APP-053. In other words, if Real Party Martinez ever leaves the Arizona State Hospital, he will serve his suspended criminal sentence.

II. Unlike cases that end with an acquittal or a dismissal with prejudice, victims' rights are still applicable after a guilty except insane adjudication.

A defendant adjudged guilty except insane is convicted for purposes of restitution and other victims' rights. Victims' rights arise upon "arrest or formal charging of the person alleged to be responsible for a criminal offense against a victim." A.R.S. § 13-4402(A). Generally, "[t]he rights and duties continue to be enforceable . . . until the final disposition of the charges, including acquittal or

dismissal of the charges, all post-conviction release and relief proceedings and the discharge of all criminal proceedings relating to restitution." *Id*. Unlike cases that result in an acquittal or dismissal with prejudice, victims may continue to exercise enforceable constitutional and statutory rights after a guilty except insane adjudication. *See* Ariz. R. Crim. P. 1.3(v) ("Although not a party to a criminal proceeding, a victim has a right to participate in the proceeding pursuant to the rights provided by law . . . .").

After a criminal defendant is adjudged guilty except insane, whether by a plea or jury verdict, a victim may exercise their constitutional right to be "heard at [the] sentencing" proceeding. Ariz. Const. art. II, § 2.1(A)(4); A.R.S. §§ 13-4426, 4426.01. "Within fifteen days after sentencing the prosecutor's office shall, on request, notify the victim of the sentence imposed on the defendant." A.R.S. § 13-4411(A).

Additionally, there are other post-conviction rights that victims may exercise after sentencing of a defendant adjudged guilty except insane. "The prosecutor's office shall provide the victim with a form that allows the victim to request post-conviction notice of all post-conviction review and appellate proceedings, all post-conviction release proceedings, all probation modification proceedings that impact the victim, all probation revocation or termination proceedings, any decisions that arise out of these proceedings, all releases and all escapes." A.R.S.

§ 13-4411(B). If the victim has opted in for post-conviction notification, "the prosecutor's office that is responsible for handling any post-conviction or appellate proceedings immediately shall notify the victim of the proceedings and any decisions that arise out of the proceedings." A.R.S. § 13-4411(D). Upon request, this Court and Arizona's Court of Appeals must also provide the victim or their counsel "a copy of the memorandum decision or opinion . . . concurrently with the parties." A.R.S. § 13-4411(E).

Victims may continue to exercise their constitutional right "[t]o be informed, upon request, when the accused or convicted person is released from custody or has escaped." Ariz. Const. art. II, § 2.1(A)(2). "If the victim has made a request for notice, a mental health treatment agency shall mail to the victim at least ten days before the release or discharge of the person accused or *convicted* of committing a criminal offense against the victim, notice of the release or discharge of the person who is placed by court order in a mental health treatment agency pursuant to section 13-3992 . . . ." A.R.S. § 13-4416(A) (emphasis added). In the event that a defendant adjudged guilty except insane escapes from the mental health treatment agency, the victim shall receive, from the mental health treatment agency, "notice of the escape or subsequent readmission of the person who is placed by court order in a mental health treatment agency pursuant to section 13-3992 . . . ." See also A.R.S. § 13-4416(B) ("A mental health treatment

agency shall mail to the victim immediately after the escape or subsequent readmission of the person accused or convicted of committing a criminal offense against the victim, notice of the escape or subsequent readmission of the person who is placed by court order in a mental health treatment agency pursuant to section 13-3992 . . . .").

Victims may continue to exercise their constitutional right "[t]o be heard at any proceeding when any post-conviction release from confinement is being considered." Ariz. Const. art. II, § 2.1(A)(9); *See also* A.R.S. § 13-3992(B) ("If the person's act did not cause the death or serious physical injury of or the threat of death or serious physical injury to another person, the court shall set a hearing within seventy-five days after the person's commitment to determine if the person is entitled to release from confinement or if the person meets the standards for civil commitment pursuant to title 36, chapter 5. The court shall notify the medical director of the secure mental health facility, *the victim* and the parties of the date of the hearing…") (emphasis added).

Constitutional rights provided under Arizona's VBR and its implementing legislation continue to be applicable and enforceable in criminal cases where a defendant is adjudged guilty except insane. Yet, despite these numerous constitutional and statutory provisions, an "ad hoc" exception was made by *Heartfield*. *State v. Heartfield*, 196 Ariz. 407 (App. 2000). The plain language of

A.R.S. § 13-502 does not preclude restitution. This Court warned that if courts are permitted to make "ad hoc exceptions to the constitutional rule based on the perceived exigencies of each case, the harm that the [VBR] was designed to ameliorate will, instead, be increased." *Knapp v. Martone*, 170 Ariz. 237, 239 (Ariz. 1992). Because of *Heartfield's* unconstitutional "ad hoc" exception, victims in cases where the defendant has been adjudged guilty except insane have been deprived of their constitutional right to restitution. This unconstitutional practice has gone on for more than two decades and cannot be permitted to continue. It is this Court's absolute duty to protect constitutional rights, including victims' rights. *Patel*, 251 Ariz. at 138, ¶ 26.

III. A proper interpretation of A.R.S. § 13-502 does not preclude victims from exercising their constitutional right to full restitution.

A. A.R.S. § 13-502 is clear and unambiguous.

Courts will "interpret statutes 'in view of the entire text, considering the context and related statutes on the same subject.'" *Planned Parenthood Arizona, Inc. v. Mayes, et al.*, ____ Ariz. ____, ____ P.3d ____, ¶ 15 (2024) citing *Nicaise v. Sundaram*, 245 Ariz. 566, 568 ¶ 11 (2019). Statutory interpretation starts with looking to the language of the statute to determine whether it is clear. *Planned Parenthood Arizona, Inc. v. Mayes, et al.*, at ¶ 15 citing *Janson ex rel. Janson v. Christensen*, 167 Ariz. 470, 471 (1991). When the language is clear, judicial

construction is not required. *Parenthood Arizona, Inc. v. Mayes, et al.*, at ¶ 15 citing *Perini Land & Dev. Co. v. Pima County*, 170 Ariz. 380, 383 (1992).

"If the statutory language is ambiguous—if 'it can be reasonably read in two ways'—we may use alternative methods of statutory construction, including examining the rule's historical background, its spirit and purpose, and the effects and consequences of competing interpretations." *Parenthood Arizona, Inc. v. Mayes, et al.*, at ¶ 17 (2024) citing *State v. Salazar-Mercado*, 234 Ariz. 590, 592 ¶ 5 (2014); *State v. Aguilar*, 209 Ariz. 40, 47 ¶ 23(2004). "'A statute is not ambiguous merely because the parties disagree about its meaning,' it is ambiguous if the 'meaning is not evident after examining the statute's text as a whole or considering statutes relating to the same subject or general purpose.'" *Parenthood Arizona, Inc. v. Mayes*, at ¶ 17 (2024) citing *Glazer v. State*, 244 Ariz. 612, 614 ¶ 12 (2018).

A.R.S. § 13-502 is clear and unambiguous. Its meaning is evident from the plain language. It provides the test for the insanity defense, procedures for commitment and evaluation, specifies that the defendant has the burden by clear and convincing evidence, details the consequences of a guilty except insane adjudication, and prohibits use of a guilty except insane adjudication for sentencing enhancement purposes. A.R.S. § 13-502. The lack of an express provision allowing for restitution in A.R.S. § 13-502 does not render it

ambiguous. The legislature did not need, nor would it have been logical, to expressly provide for restitution in A.R.S. § 13-502 because the right to restitution already exists in VBR. Further, our legislature may "enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section, including the authority to extend any of these rights to juvenile proceedings." Ariz. Const. art. II, § 2.1(D). Both A.R.S. § 13-804 and A.R.S. § 13-603(C) already "define, implement, preserve and protect" the constitutional right to restitution.[1]

Had the legislature intended for A.R.S. § 13-502 to expressly exclude restitution when a defendant is adjudged guilty except insane, it would have amounted to an unconstitutional limitation on victims' rights. *Patel,* 251 Ariz. at 137-38, ¶ 26 (holding A.R.S. § 28-672(G) unconstitutional limitation of a crime victim's right to receive prompt restitution); *State v. Roscoe*, 185 Ariz. 68, 69 (1996) (holding unconstitutional the legislative amendment to A.R.S. § 13-

[1] Notably, restitution is commonly ordered by juvenile courts when juvenile offenders have been adjudicated delinquent despite the express statutory provision that "an order of the juvenile court . . . shall not be deemed a conviction of a crime." 8-207(A); *David G. v. Pollard ex rel. Pima County*, 207 Ariz. 308, 312, ¶ 19 (2004) ("[A]n adjudication of delinquency is not deemed a criminal conviction . . . ."). The legislature acted to preserve and protect victims' rights, including the right to restitution, in juvenile cases. A.R.S. § 8-381.A juvenile court "has an obligation to impose restitution to compensate victims for economic loss." *In re Joe S.*, 193 Ariz. 559, 561, ¶ 5 (App. 1999).

4433 that denied victim status to peace officers while acting in the scope of their official duties.).

B. The Rule of Lenity does not apply to A.R.S. § 13-502.

Under the rule of lenity an "ambiguous criminal statute should be strictly construed in favor of the criminal defendant and against the government." Hon. Samuel Thumma, *State Anti-Lenity Statutes and Judicial Resistance: "What A Long Strange Trip It's Been*," 28 Geo. Mason L. Rev. 49, 51 (2020). Because A.R.S. § 13-502 is not ambiguous, the rule of lenity does not apply. *State v. Fell*, 203 Ariz. 186, 189, ¶ 10 (App. 2002) (internal citations omitted). Further, applying the rule of lenity to A.R.S. § 13-502 so that it will be construed in favor of a criminal defendant would not mean that it is necessarily construed against the government. Rather, it would be construed against victims and result in an impermissible waiver of the constitutional right to restitution. E.H. v. *Slayton*, 249 Ariz. 248, 256, ¶ 26 (2020).

CONCLUSION

For the reasons set forth in this *Supplemental Brief* and the in the *Petition for Review*, Petitioner respectfully asks this Court to overrule *Heartfield* and find that: 1) a guilty except insane adjudication is a conviction; 2) victims are constitutionally entitled to restitution; and 3) A.R.S. § 13-502 does not, and cannot, preclude a victim from seeking restitution.

RESPECTFULLY SUBMITTED this 26th day of April, 2024.

By: _____/s/_____
Colleen Clase
Attorney for Petitioner