

IN THE SUPREME COURT

STATE OF ARIZONA

STATE OF ARIZONA,

Appellant,

vs.

VIVEK A. PATEL,

Appellee.

Arizona Supreme Court
No. CR-19-0366-PR

Court of Appeals Division One
No. 1 CA-CR18-0774

Maricopa County Superior Court
No. LC2018-000192

Phoenix Municipal Court
Complaint No. 14483182

AMICUS CURIAE BRIEF

Sabrina Ayers Fisher,
Maricopa County Public Advocate
Jennifer A. Ceppetelli,
State Bar No. 030580
Deputy Public Advocate
3131 W. Durango
Phoenix, Arizona 85009
Phone: (602) 372-9560
Fax: (602) 372-8918
Jennifer.Ceppetelli@Maricopa.Gov
Attorney for *amicus curiae*

Table of Contents

<u>Introduction</u>	1
<u>Argument</u>	2
<u>Conclusion</u>	14
<u>Certificate of Compliance</u>	15
<u>Certificate of Service</u>	16

Table of Citations

Constitutional Provisions

Arizona Constitution

Ariz. Const. art. II.....	4, 6, 7
---------------------------	---------

Statutes

Arizona Revised Statutes

A.R.S. § 8-344.....	6, 7
A.R.S. § 8-416.....	6
A.R.S. § 12-2505.....	10
A.R.S. § 13-803.....	4
A.R.S. § 28-672.....	1, 4, 8, 9, 10, 11, 12, 13

Cases

<i>Compare State v. Shumway</i> , 137 Ariz. 585, 672 P.2d 929 (1983).....	10
<i>Daou v. Harris</i> , 139 Ariz. 353, 678 P.2d 934 (1984).....	13
<i>In re Eric. L.</i> , 943 P.2D 842 (App. 1997).....	7
<i>In re Nickolas S.</i> , 226 Ariz. 182, 186, 245 P.3d 446, 450 (2011).....	11
<i>In re Ryan A.</i> , 202 Ariz. 19, 39 P.3d 543 (Ct. App. 2002).....	7
<i>In re William L.</i> , 211 Ariz. 236, 119 P.3d 1039 (Ct. App. 2005).....	7
<i>Knapp v. Martone</i> , 170 Ariz. 237, 823 P.2d 685 (1992).....	2
<i>Romley v. Superior Court In & For Cty. of Maricopa</i> , 172 Ariz. 232, 836 P.2d 445 (Ct. App. 1992).....	5

<i>State v. Hansen,</i> 215 Ariz. 287, 168 (2007).....	2
<i>State v. Lee,</i> 226 Ariz. 234, 919 (Ct. App. 2011).....	2
<i>State v. Patel,</i> No. 1 CA-CR 18-0774, 2019 WL 5382503, at *3 (Ariz. Ct. App. Oct. 22, 2019).	3
<i>State v. Pena,</i> 140 Ariz. 545, 683 P.2d 744 (App. 1983).....	5
<i>State v. Roscoe,</i> 185 Ariz. 68, 912 P.2d 1297 (1996).....	4
<i>State v. Superior Court for Maricopa Cty.,</i> 113 Ariz. 248, 550 P.2d 626 (1976).....	3
<i>State v. Watson,</i> 120 Ariz. 441, 586 P.2d 1253 (1978).....	12
<i>Thomas v. Klein,</i> 214 Ariz. 205, 150 P.3d 778 (Ct. App. 2007).....	5
<i>Town of Gilbert Prosecutor's Office v. Downie ex rel. Cty. of Maricopa,</i> 218 Ariz. 466, 189 P.3d 393 (2008).....	8, 9
<i>Williams v. Baugh,</i> 214 Ariz. 471, 154 P.3d 373 (Ct. App. 2007).....	10

Introduction

The Court of Appeals erred by finding that “prompt restitution” translates to “full restitution.” There is no basis for the Court of Appeals’ decision because the plain language and reading of the Victims’ Bill of Rights (VBR) does not confer any right to an amount of restitution, and the Constitution has never entitled victims to “full restitution,” either in adult or juvenile proceedings. The appellate court also improperly severed an inseverable statute and usurped the legislature’s power by rewriting the law.

Interest of *Amicus Curiae*

The Office of the Public Advocate (OPA) is an indigent representation office dedicated to the representation of juveniles between ages eight to seventeen accused of criminal conduct.

Minor children can and have been charged in delinquency proceedings under A.R.S. § 28-672. In fact, challenges to the restitution cap set forth under this statute have been brought to this Court. In 2017, this Court prudently dismissed a challenge to the restitution cap deeming review as improvidently granted after extensive briefing and oral argument. CV-16-0192 PR. Unfortunately, the Court of Appeals took a different approach and improperly deemed the cap unconstitutional and impermissibly rewrote the statute. Although the appellate court’s decision derived from an adult case, juveniles are still subject to the unjust result reached.

Argument

I. Restitution caps on civil-natured offenses do not violate the rights afforded to victims under the VBR.

A. Victims do not have a constitutional right to “full restitution”.

The legislature properly exercised its authority by enacting a restitution cap because the VBR does not afford “full restitution” rights as it would unlawfully provide individuals monetary windfall awards under the guise of legal protections.

This Court has previously clarified that prompt means timely as it relates to restitution. *State v. Hansen*, 215 Ariz. 287, 289, 160 P.3d 166, 168 (2007) (explaining that the VBR confers the right to prompt restitution); “To determine the meaning of the VBR and serve its purpose, we look first to its plain language and reject ad hoc exceptions to its protections. *Knapp v. Martone*, 170 Ariz. 237, 239, 823 P.2d 685, 687 (1992).” *State v. Lee*, 226 Ariz. 234, 238, 245 P.3d 919, 923 (Ct. App. 2011).

The Court reviewed a statute that the legislature enacted dictating that restitution shall not be stayed pending an appeal. *Hansen*, 215 Ariz. at 289. The Court found that this statute—which governed timing rather than the amount of restitution—advanced victims’ right to receive prompt restitution. *Id.* at 170.

Seemingly, no one disputes the meaning of the word prompt; however, the State and the Court of Appeals appear to find the use of the word meaningless despite basic canons of construction suggesting otherwise. *State v. Superior Court for Maricopa Cty.*, 113 Ariz. 248, 249, 550 P.2d 626, 627 (1976) (stating, “The law will be given, whenever possible, such an effect that no clause, sentence, or word is rendered superfluous, void, contradictory or insignificant.”).

The Court of Appeals’ decision dissected the VBR’s language, isolated the use of the word prompt, rendered the term useless and then proceeded to create verbiage that “restitution,” although modified by “prompt,” means “full restitution.” These actions defy and contradict principle tenets of interpretation. The decision, in part, was also supported by referring to the ballot materials circulated before the VBR was enacted and found that a “reference to payment for ‘any harm’” somehow equates to meaning “full restitution.” *State v. Patel*, No. 1 CA-CR 18-0774, 2019 WL 5382503, at *3 (Ariz. Ct. App. Oct. 22, 2019). In reality, the voter pamphlet is devoid of any discussion on the amount of restitution victims are entitled.

Even a reading of a right to restitution without any qualifying language would not confer an unfettered right to full all restitution requested because the plain meaning of restitution includes partial restitution awards. *See* RESTITUTION, Black's Law Dictionary (11th ed. 2019) (defining restitution as “full or partial compensation paid by a criminal to a victim”).

Furthermore, if restitution standing alone inherently means full restitution, the legislature would have had no need to use the term “full” in conjunction with the use of “prompt” as a qualifier when drafting the restitution statutes. Ariz. Rev. Stat. § 13-803 (E) (“The court shall make all reasonable efforts to ensure that all persons who are entitled to restitution pursuant to a court order *promptly* receive *full* restitution.”) (emphasis added). Thus, the legislature actually defined and expanded the rights conferred from the VBR by statutory conferring a right in adult court to full restitution awards. Ariz. Const. art. II, § 2.1 (D) (granting authority to the legislature to “define, implement, preserve, and protect the rights guaranteed to victims...”). Accordingly, the legislature was well within its discretion to limit restitution as applied under A.R.S. § 28-672.

The State attempts to support its argument against the statutory cap by citing case law limiting who may be deemed a victim and cites to a law that previously excluded a class of victims. State’s Response to Petition for Review, Page 9. The terminology restitution is distinguishable because the plain meaning of victim does not exclude a certain class of persons, like police officers, from the definition. *See State v. Roscoe*, 185 Ariz. 68, 71, 912 P.2d 1297, 1300 (1996) (finding the term “victim” is unambiguous and clearly defined within the VBR); Ariz. Const. art. II, § 2.1 (defining victim as “a person against whom the criminal offense has been committed...”). The same analysis applies when assessing and restricting the

meaning of what constitutes a “criminal offense”—the phrase does not, on its face, distinguish between different classes of crimes. *State ex rel. Thomas v. Klein*, 214 Ariz. 205, 208, 150 P.3d 778, 781 (Ct. App. 2007) (stating criminal defense is defined as a violation of a criminal statute and restricting the meaning of the term crime was improper). Conversely, the plain meaning of restitution includes both full and partial restitution options. Thus, the State’s argument fails.

To the extent there is any doubt as to the meaning of the word restitution on its face, the appellate court was required to afford any doubt in favor of criminal defendants. *See State v. Pena*, 140 Ariz. 545, 549-50, 683 P.2d 744, 748-49 (App. 1983) (“When a statute is susceptible to more than one interpretation, the rule of lenity dictates that any doubt should be resolved in favor of the defendant.” (internal quotations and citation omitted)); *See also State ex rel. Romley v. Superior Court In & For Cty. of Maricopa*, 172 Ariz. 232, 240–41, 836 P.2d 445, 453–54 (Ct. App. 1992) (“Victim's Bill of Rights must yield to the federal and state constitutions' mandates of due process of law...”).

Ultimately, the only sound interpretation is that the VBR confers victims’ the right to receive timely restitution without undue delay. Prompt restitution does not also mean full restitution. Nor does the definition of restitution only encompass full restitution. Rather, the right to full restitution has been statutorily created by the

legislature in adult criminal actions and is an expansion of victims' constitutional rights.

B. Analysis of the VBR as applied to juvenile cases is instructive because partial restitution awards are permitted under the juvenile statutory code.

The VBR is statutorily conferred to juvenile court cases and the application of the VBR was properly limited by the legislature as it relates to juvenile restitution. The VBR explicitly confers to the legislature the ability to adopt or not adopt any provisions of the VBR in juvenile court:

The legislature, or the people by initiative or referendum, have the authority to 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)(emphasis added).

The legislature exercised its authority and created A.R.S. § 8-416 that says, "The rights enumerated in the victims' bill of rights, article II, section 2.1, Constitution of Arizona, any implementing legislation or court rules belong to the victim." Ariz. Rev. Stat. § 8-416. However, in juvenile matters, the courts are required to consider the nature of the offense, age, physical and mental condition, and earning capacity of the juvenile before ordering an award of restitution. Ariz. Rev. Stat. § 8-344(A). Partial restitution awards are also permissible. Ariz. Rev. Stat. § 8-344(A). These statutes were enacted after, but in light of, the VBR. *See*

Ariz. Const. art. II § 2.1 (enacted on November 6, 1990); *In re Eric. L.*, 943 P.2D 842, 846 (App. 1997).

In *In re Ryan A.*, the appellate court applied the VBR's right to prompt restitution in synchrony with A.R.S. § 8-344 which mandates juvenile courts to order either full or partial restitution. In that case, the appellate court intentionally added emphasis to words "prompt restitution" and noted,

The legislature has *likewise* provided: "If a juvenile is adjudicated delinquent, the court ... shall order the juvenile to make full or partial restitution to the victim of the offense for which the juvenile was adjudicated delinquent...."

In re Ryan A., 202 Ariz. 19, 23–24, 39 P.3d 543, 547–48 (Ct. App. 2002) (emphasis added). The use of the word *likewise* by the court shows that the courts do not interpret restitution to automatically mean full. Thus, the requirement for prompt restitution when read together with all other statutory provisions applicable to juvenile matters cannot be interpreted to mean full restitution.

Although the State's response relies on *In re William L.* for the notion that restitution is for the purpose of making victims whole, the State neglects to point out that the case still goes on to note that full or partial restitution is permissible in juvenile court.¹ *In re William L.*, 211 Ariz. 236, 239, 119 P.3d 1039, 1042 (Ct. App. 2005) (stating that juvenile offenders are required to make "full or partial restitution

¹ State's Response to Petition for Review, Page 5.

to the victim of the offense for which the juvenile was adjudicated delinquent.”).

These juvenile statutes and cases clearly illustrate that restitution encompasses both full or partial restitution. The legislation and precedent also harmoniously comport with the VBR because nothing in the VBR proscribes certain limitations on restitution awards. This is particularly true when analyzing strict liability statutes that deal with offenses that do not carry typical criminal components, like *mens rea*, but merely seek to penalize civil infractions more heavily.

C. Restitution caps are appropriate where a civil forum is available and best suited to apportion damages.

A.R.S. § 28-672 is a civil natured, strict liability misdemeanor. The statute does not have any criminal or delinquent intent element. Any law-abiding, licensed driver can be charged with and convicted of this offense if he or she commits a routine traffic violation that results in serious physical injury.

“The sentencing phase of a criminal case is not the ideal forum for the disposition of a [civil] case.” *Town of Gilbert Prosecutor's Office v. Downie ex rel. Cty. of Maricopa*, 218 Ariz. 466, 472, 189 P.3d 393, 399 (2008). That is because “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.” *Id.*

This Court has already recognized that the legislature has acted within its powers by offering full restitution for actual economic losses, but restricting victims from being compensated for other damages like punitive and consequential damages by way of criminal restitution. *Downie ex rel. Cty. of Maricopa*, 218 Ariz. at 469 (recognizing the legislature's ability to limit a victim's restitution in certain scenarios to avoid blurring the distinction between criminal restitution and damage claims protected by a civil jury trial). Proper limitations on criminal restitution awards also serves as a mechanism to balance the risk of windfall awards. *Id.*

Well-insured parties charged under this statute can avoid prosecution by reaching a settlement agreement with the injured party any time before trial. No other criminal offense mandates a prosecutor's dismissal of a charge upon the victim's receipt of a monetary settlement. However, civil cases routinely settle in such a manner.

The civil nature of this offense is expounded upon further in subsection (F) of the statute:

If the person who suffers serious physical injury as a result of a violation of this section appears before the court in which the action is pending at any time before trial and acknowledges receipt of satisfaction for the injury, on payment of the costs incurred, the court shall order that the prosecution be dismissed and the defendant be discharged.

Ariz. Rev. Stat. § 28-672 (F).

Individuals charged under the statute cannot put forward any meaningful defense despite being entitled to such in a civil arena. “The defense of contributory negligence generally is not recognized as a defense to criminal conduct.” *Williams v. Baugh*, 214 Ariz. 471, 475, 154 P.3d 373, 377 (Ct. App. 2007) Compare *State v. Shumway*, 137 Ariz. 585, 588, 672 P.2d 929, 932 (1983) (finding that contributory negligence is not a defense to negligent homicide, but a defense can include the victim’s conduct to determine whether the defendant was criminally negligent).² However, a civil defendant may allege contributory negligence or seek to reduce his percentage of comparative fault. A.R.S. § 28-672 would not otherwise be excluded from a comparative negligence defense because there is no intentional act required. See Ariz. Rev. Stat. § 12-2505 (barring the defense by a claimant who has “intentionally, willfully or wantonly caused or contributed to the injury or wrongful death”). Cases like these can be and often are settled civilly and therefore the civil implications cannot be ignored.

Restitution is purely punitive for purposes of A.R.S. § 28-672 because the statute deals with non-criminal conduct. There is no criminal behavior that this statute can rehabilitate or repair nor is there any criminal intent element to the statute.

² Although contributory negligence has evolved into a comparative negligence analysis, the general analysis is unchanged as it relates to restitution. Ariz. Rev. Stat. § 12-2505. Under this statute, the full damages must be reduced in proportion to the relative degree of the claimant’s fault.

Rather, the statute sought to punish individuals for traffic offenses such as failure to yield by creating a criminal avenue for further penalties where the civil arena did not allow. Ariz. Senate Fact Sheet for H.B. 2208, 47th Leg., 2d Reg. Sess. (2006). The penalties included in the statute included a requirement the possibility of jail time and restitution up to \$10,000. *Id.* In 2018, the legislature increased the penalties for the offense from a class three misdemeanor to a class one and increased restitution tenfold.

Before 2006, this offense would have been handled civilly and both parties would have an opportunity to present the issue of damages. For that reason, capping restitution was rational because contributory negligence is not a defense afforded in either criminal or delinquency adjudications.

II. The Court of Appeals improperly invaded the legislature's domain by rewriting A.R.S. § 28-672.

A.R.S. § 28-672 is non-severable because the statutory cap is an integral part of the law and the appellate court unlawfully rewrote legislation.

“Although courts properly construe statutes to uphold their constitutionality, courts cannot salvage statutes by rewriting them because doing so would invade the legislature's domain.” *In re Nickolas S.*, 226 Ariz. 182, 186, 245 P.3d 446, 450 (2011).

“Severability is a question of legislative intent.” *State v. Watson*, 120 Ariz. 441, 445, 586 P.2d 1253, 1257 (1978). The court generally will not disturb the valid portion of the law if the valid and invalid portions are independent. *Id.* However, if the invalid portions are intimately connected and raise the presumption that the legislature would not have enacted one without the other and the invalid portion was the inducement of the act, the entire law fails. *Id.*

The strongest indicator that this statute is not severable is demonstrated in subsection “F.” This portion of the statute mandates the dismissal of a charge brought forward should the victim appear any time before trial and acknowledge receipt of satisfaction for the injury, by way of payment for costs incurred. Ariz. Rev. Stat. § 28-672 (F). The heart of the statute is very clearly to penalize individuals for civil traffic accidents up to \$100,000 in restitution. The penalty is null and an individual’s criminal record unscathed should that individual reach some sort of settlement with the injured party prior to trial.

Consequently, striking the statutory cap is striking an essential element of the statute, which removes and destroys the legislative intent. As previously stated, the statutory cap is integral as it relates to the civil nature of the offense, but there are other important factors that further support the conclusion that the statute is not severable. For example, the fact that the legislature increased the cap on restitution indicates that the legislature believed the limit on restitution was important. The

public policy rationale behind such a penalty serves as an incentive to encourage drivers to carry more than the bare minimum insurance coverage. Those with ample coverage avoid criminal sanctions where those who do not face a plethora of potential consequences. Thus, increasing the penalty creates harsher consequences for those charged under the statute, but still allows for the proper forum, civil courts, to adequately handle amounts of damages exceeding the limit.

The “legislature is presumed, when it passes a statute, to know the existing laws.” *Daou v. Harris*, 139 Ariz. 353, 357, 678 P.2d 934, 938 (1984). Therefore, the legislature is presumed to have known that generally, criminal restitution is statutorily defined to include the right to full restitution. The legislature then proceeded to set a limit on criminal restitution under the narrow application of A.R.S. § 28-672. Given this presumption, restitution cap induced the enactment of the statute and if the cap was meaningless, there would have been no need to set a limit nor enact a clause that mandates dismissal upon satisfaction of monetary judgment.

The court of appeals striking the restitution cap without any discussion as to whether the statute was severable was improper. The striking of the cap was done without striking the statute entirely and defeated the legislative intent behind the statutory scheme.

Conclusion

The Court of Appeals decision invaded the legislature's authority by striking an integral portion of a statute and improperly found that the VBR entitles victims to windfall restitution awards, no matter the circumstances. Therefore, OPA requests that this Court accept review and reverse the appellate court decision.

Respectfully submitted this 13th day of December, 2019

/s/ _____
Jennifer A. Ceppetelli
Deputy Public Advocate
Attorneys for *amicus curiae*

Certificate of Compliance

Pursuant to Ariz. R. Crim. P. 31.15(d)(1), undersigned counsel hereby certifies that Attorney for Office of the Public Advocate complies with Rules 31.6(b) and 31.21(g) as follows: the brief is double-spaced, uses 14 point Times New Roman typeface, and is 3,080 words.

/s/ _____
Jennifer A. Ceppetelli
Deputy Public Advocate
Attorney for *amicus curiae*

Certificate of Service

We hereby certify that one copy of this Amicus Curiae Brief electronically filed with the Court, was served by Turbo Court e-service on December 13, 2019, to:

Law Office of Michael J. Dew
dewme@cox.net
Attorney for Defendant/Petitioner for Vivke A. Patel

Amy Offenber
Jennifer Booth
Assistant Phoenix City Prosecutors
Attorneys for the Appellant
Appeals.law@phoenix.gov

Respectfully submitted this 13th day of December, 2019

/s/ _____
Jennifer A. Ceppetelli
Deputy Public Advocate
Attorney for *amicus curiae*