IN THE SUPREME COURT
STATE OF ARIZONA

LISA GILPIN, Petitioner, v. HON. DANIELLE HARRIS, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA in and for the County of Pinal, Respondent Judge, MARCOS JERELL MARTINEZ, Real Party in Interest.	Arizona Supreme Court No. CR-23-0252-PR Court of Appeals Division Two No. 2 CA-SA 2023-0067 Pinal County Superior Court No. CR 2018-00324

Real Party in Interest's Supplemental Brief

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I. A GEI Adjudication is not a Conviction that Triggers Restitution.

Crime victims do not have a right to criminal restitution from any person accused of a crime. First there must be a conviction. Ariz. Const. art. II, § 2.1A(8); A.R.S. § 13-603(C); A.R.S. § 13-804(A); Ariz. R. Crim. P. 26.10(a) & (v)(3). The Legislature, limited by due process and other constitutional constraints, decides the public policy of how to proscribe criminal conduct. *State v. Holle*, 240 Ariz. 300, 302, ¶ 9 (2016). This plenary authority includes the power to create affirmative defenses. *Id*. Consistent with centuries of legal tradition, the Legislature has deemed a person afflicted with a mental disease or defect so severe that he does not know a criminal act to be wrong may assert the affirmative defense of Guilty Except Insane. A.R.S. § 13-502(A); *Clark v. Arizona*, 548 U.S. 735, 748-749 (2006). Therefore, this Court must deny relief because a guilty except insane adjudication is not a criminal conviction. *State v. Heartfield*, 196 Ariz. 407 (App. 2000).

A. A GEI Affirmative Defense does not Result in a Conviction.

The plain language, history, context, and cases interpreting Arizona's Guilty Except Insane ("GEI") defense all compel the same conclusion: A successful GEI defense does not result in a criminal conviction.

1. The plain language of A.R.S. § 13-502(A) classifies a Guilty Except Insane defense as an affirmative defense.

This Court is obligated to interpret the law as it is written according to the plain meaning of "the words the legislature chose to use." *S. Arizona Home Builders Ass'n v. Town of Marana*, 254 Ariz. 281, 286, ¶ 31 (2023). The Legislature has chosen to define a GEI defense as "an affirmative defense." A.R.S. § 13-502(A). An "affirmative defense" is "a defense that is offered and that attempts to excuse the criminal actions of the accused." A.R.S. § 13-103(B). A successful affirmative defense means the "defendant must be found 'not guilty.'" *Holle*, 240 Ariz. at 305, ¶25. Therefore, an affirmative defense of GEI precludes the existence of a criminal conviction because, "That is precisely what an affirmative defense does." *Id*.

Applying the plain meaning of affirmative defense does not render "guilty" superfluous. Rather it avoids rendering "except" superfluous.

2. The plain meaning of "except" excludes the insane from culpability reserved for the "guilty."

Ms. Gilpin argues "guilty" would be rendered superfluous if successful defenses under A.R.S. §13-502 do not result in criminal convictions. (PFR at 7.) But this argument requires ignoring that the Legislature has defined GEI to be an "affirmative defense" and in doing so used the words "except insane" to exclude the insane from criminal culpability. A.R.S. § 13-502(A). Thus, the Surplusage Canon

requires "guilty" to be read in conjunction with "except insane" to avoid an interpretation that renders "except insane" insignificant. Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012). This is true even if "a provision seems to the court unjust or unfortunate." *Id*.

"Except" means "to exclude" or "omit." Brian A. Garner, *Garner's Modern American Usage* 326 (2d ed. 2003). By excepting the insane from the guilty, the Legislature plainly excused from criminal culpability those who do not know that their acts are wrong. A.R.S. § 13-502(A). In doing so, the Legislature increased the burden of proving the affirmative defense to clear and convincing evidence while also eliminating the first prong of the *M'naghten* test that had, up until 1993, always been part of Arizona's insanity defense scheme. *Clark*, 548 U.S. at 748-749. This exclusion of the insane maintained Arizona's adherence to the historical tradition of exempting the insane from all criminal liability.

3. GEI verdicts are not implicitly criminal convictions.

Ignoring entirely the plain meaning of "affirmative defense" and "except" in A.R.S. § 13-502(A), Ms. Gilpin argues that the *expressiu unius* canon requires that A.R.S. §13-502(E) be interpreted to mean that a GEI verdict is a criminal conviction for all purposes other than use as prior convictions. (PFR at 9.) But the proper scope of this canon is limited by common sense. Antonin Scalia & Bryan Garner, *Reading*

Law: The Interpretation of Legal Texts 107 (2012). Just as a sign that reads "No dogs allowed" outside of a restaurant does not imply that all other animals may enter, the Legislature obviously did not mean GEI verdicts are treated like criminal convictions for all other purposes other than use as prior convictions. Otherwise, there would be no need for the extensive scheme governing the hospitalization and treatment of the insane. A.R.S §§ 13-3991 – 13-4001. Or the need to expressly authorize appeals from GEI verdicts. A.R.S. §13-4033(A)(1).

Moreover, the canon does not apply because there is no list in A.R.S. § 13-502(E) from which to "assume the exclusion of the items not listed." *State v. Sanitllanes*, 256 Ariz. 480, ¶ 21 (2024) (quoting *State v. Maestas*, 244 Ariz. 9, 13, ¶ 15 (2018).) Lastly, history and tradition support the conclusion that the Legislature has not abandoned the deeply rooted common law principle that the insane are not criminally culpable. Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 318 (2012) (explaining that "a statute will be construed to alter the common law only when the disposition is clear.").

4. A.R.S. § 13-502 reflects a deeply rooted legal tradition.

For nearly seven hundred years, our legal tradition has exempted the insane from criminal liability. Henry de Bracton wrote in his 13th-century treatise that a "madman . . . can no more commit an *injuria* or a felony" since such persons are

"without sense and reason" 2 Bracton on Laws and Customs of England 324, 424 (S. Thorn transl. 1968). In the 17th Century, Sir Edward Coke explained that "the act and wrong of a mad man shall not be imputed to him because he lacked "mind or discretion" and was akin to an "infant." 2 Institutes of the Laws of England § 405, p. 247b (1628). Sir Matthew Hale also likened the insane to infants under the age of 14 for whom there "can be no transgression, or just reason to incur the penalty or sanction that law instituted for the punishment of the crimes or offenses" 1 Pleas of the Crown, ch. 2, pp. 14–15, ch. 3, pp. 36-27 (1736). And Sir William Blackstone acknowledged that persons suffering from a "deficiency in will" arising from a "defective or vitiated understanding" were "not [criminally] chargeable for their own acts." 4 Commentaries on the Laws of England 24 (1769).

From the start, Arizona adhered to this historical tradition. The Howell Code exempted the insane from criminal culpability, who, like infants, did not "know the distinction between good and evil." Howell Code, Chapter X, First Division, *Persons Capable of Committing Crimes*, Sec. 3, p. 49 (1864). Laws in place since Arizona's inception as a state also declared that those "not knowing the wrongfulness of their acts," like the insane, are "not capable of committing crimes." *Troutner v. State*, 17 Ariz. 506, 511 (1916) (discussing Section 24 Penal Code of 1913.); *see also* Ariz. Pen. Code § 21 (1901); Ariz. Pen. Code §§ 4486, 4489 (1928)

(also exempting the insane from criminal liability); Ariz. Pen. Code §§ 43-111, 43-114 (1939) (same).

"In determining whether one accused of crime is relieved of the consequences thereof by mental aberration," this Court has repeatedly noted its reliance on "the test of insanity [set forth in] *M'Naghten's Case*, 8 Eng. Reprint, 718" *State v. Macias*, 60 Ariz. 93, 97 (1942); *State v. Schantz*, 98 Ariz. 200, 205-212 (1965). In 1977, the Legislature incorporated Arizona's reliance on the *M'Naghten* test into statute. A.R.S. § 13-502 (1978). In 1983, the Legislature put the burden on the accused to prove insanity by clear and convincing evidence. A.R.S. § 13-502(C) (1983). In 1993, the Legislature changed the name of the insanity defense to "Guilty Except Insane," but the only substantive change to the scheme was to eliminate the first prong of the *M'Naghten*. A.R.S. § 13-502 (1993); *Clark*, 548 U.S. 748-756.

More than century after *Troutner*, Arizona courts routinely recognize that insanity still bars criminal culpability where the accused does not know that the "act was wrong." A.R.S. § 13-502(A).

5. Prior decisions correctly identify GEI as an affirmative defense.

This Court has repeatedly recognized that Arizona's GEI scheme provides the means by which the accused may establish the affirmative defense of insanity. *State v. Mott*, 187 Ariz. 536, 541 (1997); *State v. Casey*, 205 Ariz. 359, 363, ¶ 14 (2003);

State v. Rose, 231 Ariz. 500, 506, ¶ 19 (2013); *State v. Fitzgerald*, 232 Ariz. 208, 216, ¶ 42 (2013); *State v. Leteve*, 237 Ariz. 516, ¶ 20 (2015); *State v. Malone*, 247 Ariz. 29, 31, ¶ 8 (2019); *Cruz v. Blair*, 255 Ariz. 335, ¶ 15 (2023). (Resp. to PFR at 13-14).

The Court of Appeals has reached similar conclusions. Most recently, Division 1 of the Arizona Court of Appeals upheld an order denying the prosecution the right to have mental health experts examine a defendant because the defendant had not asserted a "guilt phase, mental-status defense" or specific mental health condition for mitigation in the penalty phase of a capital case. *State ex rel. Mitchell v. Wein in & for Cnty. of Maricopa*, 255 Ariz. 313, ¶ 15 (App. 2023), *review denied* (Sept. 15, 2023). Also, recently, Division 2 of the Arizona Court of Appeals held that Ariz. R. Crim. P. 7.2 (c)(1)(A) does not require a court to "revoke the release of a defendant found guilty except insane" because the plain language of the rule only applies to a "sentence of imprisonment" not applicable to a commitment in a secure mental health facility. *Dominguez v. Metcalf in & for Cnty. of Pima*, 255 Ariz. 310, ¶¶ 5-11 (App. 2023). Other cases consistently acknowledge that GEI remains an affirmative defense that precludes criminal liability. *See State v. Romero*, 248 Ariz. 601, 605-608, ¶¶ 15-20 (App. 2020) (providing historical overview and reaffirming status as "an affirmative defense"); *State v. Millis*, 242 Ariz. 33, 39, ¶ 15 (App. 2017)

(same); *State v. Buot*, 232 Ariz. 432, 436, ¶ 19 (App. 2013) (distinguishing GEI defense from diminished capacity); *In re Natalie Z.*, 214 Ariz. 452, 455-456, ¶¶ 7-10 (App. 2007) ("boundaries of adult criminal culpability" limited by GEI apply to juveniles); *State v. Farley*, 199 Ariz. 542, 545, ¶ 15 (App. 2001) (GEI is affirmative defense); *State v. Bomar*, 199 Ariz. 472 (App. 2001) (presentence incarceration credit inapplicable to GEI commitment); *State v. Heartfield*, 196 Ariz. 407 (App. 2000) (criminal restitution not authorized from GEI verdict because it is not a criminal conviction).

It is evident that a GEI verdict is not a criminal conviction. It is also evident Arizona's criminal restitution scheme predicate restitution awards on the existence of a criminal conviction.

B. Criminal Restitution Requires a Criminal Conviction.

Arizona's constitutional and statutory scheme unambiguously require a criminal conviction before criminal restitution may be ordered. Ariz. Const. art. II, § 2.1(A)(8); A.R.S. § 13-603(C); A.R.S. § 13-804(A). The Legislature was aware of this baseline requirement when it amended Arizona's affirmative defense scheme for insanity in 1993. Legal fictions disclaiming criminal restitution as something other than a criminal penalty do not justify departing from the constitutional requirement that restitution be predicated on a criminal conviction.

1. Arizona's constitutional and statutory scheme plainly predicates criminal restitution on criminal convictions.

The Victims' Bill of Rights establishes the rights of victims to "restitution from the person or persons *convicted* of the criminal conduct that caused the victim's loss or injury." Ariz. Const. art. II, § 2.1(A)(8) (emphasis added). Arizona's statutory restitution scheme also predicates criminal restitution upon a criminal conviction. A.R.S. § 13-603(C) mandates that courts "require the *convicted* person to make restitution" to victims "if [the] person is convicted of an offense." (Emphasis added.) A.R.S. §13-804(A) authorizes courts to convert all or any portion of the fine imposed after "a defendant's *conviction* for an offense." (Emphasis added.) A.R.S. §13-804(C)(2) requires courts to issue a "criminal restitution order" upon the completion of probation, a sentence, or if the defendant absconds from probation. A.R.S. § 13-806(C) authorizes "preconviction restitution liens."

This constitutional and statutory scheme is plainly evident, consistent, and clear. There must be a criminal conviction before Arizona law authorizes criminal restitution. Ariz. Const. art. II, § 2.1(A)(8); *State v. Reed*, 248 Ariz. 72, 79, ¶ 24 (2020) (conviction requirement for restitution does create a right of any particular disposition). Thus, there is no need for further judicial construction. *Planned Parenthood, Inc. v. Mayes*, 2024 WL 1517392 at ¶ 15. Nor is there a need for a "cosmic search for legislative intent," because the words chosen by the Legislature

and the electorate are the law, and this Court has a constitutional obligation to apply it as written. *State ex rel. Arizona Dep't of Revenue v. Tunkey*, 254 Ariz. 432, 437, ¶ 26 (2023) (Bolick, J. concurring with Beene, J, Montgomery, J. and King, J.) (citing Ariz. Const. art. VI, § 26 and A.R.S. § 38-231).

But if this Court looks past plain language to question whether Arizona's restitution scheme may be ordered upon something less than a criminal conviction, the historical context before and after *State Heartfield*, 196 Ariz. 407 (App. 2000), confirms that the Legislature has never authorized restitution short of a conviction.

2. Historical context before and after *Heartfield* establish that *Heartfield* was correctly decided.

Arizona law has always required a criminal conviction before restitution may be authorized by law. Known as "reparations," Arizona's first criminal restitution scheme was subject to the discretion of the court in setting terms of probation. *Redewill v. Superior Court of Maricopa County*, 43 Ariz. 68, 78 (1934)(citing Sec. 5105 Ariz. Penal Code (1928)). But a court's authority to issue restitution was not absolute. *Id*. at 79. The limits stemming from the 1928 Penal Code hinged on 1.) the discretion of the court being confined to "some reasonable relation to the purposes of punishment," and 2.) not contravening the Legislature's statutory defined limits for restitution. *Id*. Applying these principles, *Redwill* overturned the portion of the trial court's restitution award that required the defendant to "support and educate his

child for some three years after he reached his majority" because the Legislature had never imposed duties on parents to support their adult children. *Id*. at 80-81. In doing so, *Redwell* noted, "A court cannot do something not authorized by law, because it may think it is 'just as good,' or even better than the thing which the law does sanction." *Id*. at 81.

Restitution as a condition of probation persisted as the sole statutory basis by which a court could order restitution until 1977.*Shenah v.Henderson*,106 Ariz. 399, 400 (1970) (citing A.R.S. § 13-1657 and *Redewill*, 43 Ariz. at 68.) After 1977, laws created two pathways by which criminal restitution may be ordered. *State v. King*, 157 Ariz. 508, 509 (1988). The first is mandatory restitution pursuant to A.R.S. § 13-603(C). *Id*. The second is the allocation of a fine pursuant to A.R.S. § 13-804(A).[1] *Id*. But the universal theme remained; a criminal conviction is required. A.R.S. § 13-603(C); A.R.S. § 13-804(A).

In 1990, Arizona voters constitutionalized the right of victims to criminal restitution following a criminal conviction. Ariz. Const. art. II, § 2.1(A)(8). Rather than grant victims a constitutional right to restitution short of a criminal conviction, voters required that the defendant be "convicted." *Id*. Voters were presumably aware that insanity was an affirmative defense. *See State v. Patel*, 251 Ariz. 131, 135, ¶ 15

1 A.R.S. §13-803(A) was renumbered as § 13-804(A) in 1978.

(2021) (Voters and legislature are presumably aware of the law when enacting statutes). The Legislature, too, was presumably aware in 1993 (when it amended A.R.S. §13-502 and left in place the designation of insanity as an "affirmative defense.") that, since 1977, its own statutes required a criminal conviction for restitution, and that from 1991 on the Arizona Constitution also required a criminal conviction for restitution. *Patel*, 251 Ariz. 135, ¶ 15.

In 2000, *Heartfield* squarely addressed the issue presented here, considered the history and context of Arizona's insanity defense, and concluded that a GEI adjudication is not a criminal conviction. 196 Ariz. at 408-410, ¶¶ 4-10. Because Arizona law requires a criminal conviction for there to be criminal restitution, *Heartfield* correctly concluded that criminal restitution is not a legal consequence of a GEI adjudication. *Id*. In the 24 years since *Heartfield* was decided, the Legislature has amended statutes concerning its restitution scheme at least eighteen times[2] and its GEI scheme at least four times.[3] Yet, the Legislature has not attempted to expand

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2 A.R.S. § 13-603 (2x) (Laws 2001, Ch. 334, § 6; Laws 2018, Ch. 203, § 1); A.R.S 13-804 (2x) (Laws 2013, Ch. 19, § 1; Laws 2018, Ch. 226, § 1.); A.R.S. § 13-805 (7x) (Laws 2005, Ch. 260, § 6; Laws 2011, Ch. 99, § 4; Laws 2011, Ch. 263, § 1; Laws 2012, Ch. 269, § 1; Laws 2015, Ch. 238, § 1; Laws 2017, Ch. 229, § 8; Laws 2018, Ch. 237, § 5) A.R.S. §13-806 (3x) (Laws 2010, Ch. 94, § 1; Laws 2013, Ch. 19, § 2; Laws 2017, Ch. 229, § 9; Laws 2022, Ch. 9, § 3).

3 A.R.S. § 13-502 (4x) Laws 2007, Ch. 138, § 1; Laws 2008, Ch. 301, § 14; Laws 2021, Ch. 390, § 4; Laws 2021, Ch. 390, § 5).

criminal restitution to include the insane. *Id*. This inaction is consistent with the penological theories of punishment despite courts' inconsistent descriptions.

3. The legal fiction that criminal restitution is not a criminal punishment has caused confusion and warrants correction.

Ms. Gilpin argues that restitution may be awarded without a conviction under the guise that criminal restitution is not a punishment. (PFR at 1). But punishment is **"**a penalty inflicted on an offender through judicial procedure." *Punishment,* M-W.com (available at https://www.merriam-webster.com/dictionary/punishment) (last accessed Apr. 12, 2024); *Punishment*, Black's Law Dictionary (11th ed. 2019) ("A sanction — such as a fine, penalty, confinement, or loss of property, right, or privilege — assessed against a person who has violated the law."). And a penalty is "the suffering in person, rights, *or property* that is annexed by law or judicial decision to the commission of a crime or public offense." *Penalty*, M-W.com available at https://www.merriam-webster.com/dictionary/penalty) (last accessed Apr. 12, 2024.) Restitution is plainly a penalty imposed on property following conviction; thus, it is a punishment. Yet, Arizona courts have wrongly asserted that restitution is not a punishment. *State v. Zaputil*, 220 Ariz. 425, 428, ¶ 11 (App. 2008).

a. State action is essential to criminal restitution.

The suggestion that criminal restitution is not "punishment exacted by the state" ignores the extensive state apparatus required enforce Arizona's criminal

restitution scheme. *Compare State v. Reese*, 124 Ariz. 212, 215 (App. 1979) (asserting restitution is not punishment but recognizing that due process requires finding of criminal responsibility) *with State v. Moore*, 156 Ariz. 566, 567-568 (1988) (noting extensive state apparatus used to achieve restitution's rehabilitative and reparative goals as "part of criminal justice system for a long time"). Prosecutors are state actors obligated to enforce Arizona's criminal restitution laws. *State v. Reed*, 252 Ariz. 328, 333, ¶ 22 (2022); A.R.S. § 13-10(B). So are courts. A.R.S. § 13-804(B). As are probation officers. A.R.S. § 13-804(N). And state entities profit by collecting interest when enforcing restitution collection. AZ ST CJA § 5-205(H).

Without state action, Arizona's criminal restitution scheme would not exist because criminal prosecution and state enforcement are essential to its administration. *See, e.g. Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264 (1989)(distinguishing criminal fines from punitive damages). Restitution's purpose is also consistent with that of punishment.

b. Penological theories embrace multiple purposes for punishment achieved by criminal restitution.

Just because criminal restitution serves rehabilitative goals does not mean it is not a criminal punishment. "The most widely recognized objectives of punishment are deterrence, incapacitation of the offender, reform or rehabilitation, and retribution." Model Penal Code Commentaries Part I. §4.01 Mental Disease or

Defect at p. 168, fn. 12 (1985). "Certainly, any society considered civilized by Western standards stresses rehabilitation in its penological system. " *State v. Christopher*, 133 Ariz. 508, 510 (1982). But, as this Court has noted, "Proper punishment and treatment can be imposed only if rehabilitation is balanced and considered along with the other goals of punishment—retribution, restraint, and deterrence." *Id*. at 511. And this Court noted that restitution is limited by proper goals of punishment long ago. *Redewill*, 43 Ariz. at 81; *see also State v. Contreras*, 180 Ariz. 450, 454, (App. 1994) (recognizing right to restitution does not belong solely to victim but is mandated to rehabilitate the defendant in noting criminal jurisdiction during duration of sentence requires courts to order restitution).

Ms. Gilpin points to *State v. Steffy*, 173 Ariz. 90, 94 (App. 1992), to assert that criminal restitution is not punishment because it is not "punitive." (SA Pet. at 7.) But a description of restitution as "non-punitive" does not mean that criminal restitution is not a criminal punishment. Rather it is consistent with this Court's acknowledgement that criminal restitution must be limited in scope to avoid constitutional infirmity and "preserves the proper place and function of a civil jury to determine a victim's actual damages, including damages for pain and suffering, punitive damages, and consequential damages" *Town of Gilbert Prosecutor's Office v. Downie ex rel. Cnty. of Maricopa*, 218 Ariz. 466, 469, ¶ 14 (2008). Moreover,

punitive damages (as opposed to compensatory damages for economic loss) are awarded in civil trials if a civil jury finds, by clear and convincing evidence, that the wrongdoer had engaged in egregious misconduct intended to cause severe harm. *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 332, (1986); *but see Patel*, 251 Ariz. 131, ¶ 19 (preponderance of the evidence standard for criminal restitution.).

Punishment has multiple goals, and criminal restitution is a long-recognized aspect of punishment under Arizona's criminal justice system. *Redewill*, 43 Ariz. at 81. By limiting criminal restitution as a penalty for a criminal conviction, the Legislature has ensured that Arizona's criminal restitution scheme is constitutional.

C. The Legislature Requires a Criminal Conviction for Criminal Restitution for Constitutional Reasons.

1. Arizona's restitution scheme does not violate the right to a civil or criminal jury trial because restitution is a criminal penalty limited by statute.

Arizona Courts haves recognized that the right to a jury trial is under Arizona Constitution is equivalent to that of the Seventh Amendment. *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, ¶ 33 (App. 2014) (citing *Dombey* but comparing article 2, §23 to Seventh Amendment). This Court has acknowledged that the statutory scheme limiting criminal restitution prevents it from violating Arizona's constitutional rights trial by jury. *Town of*

Gilbert Prosecutor's Office, 218 Ariz. at 469, ¶ 14. Federal courts have recognized that the federal restitution scheme comports with the Sixth Amendment because restitution awards determined by judges do not increase the statutory maximum penalty for a crime. *See United States v. Green*, 722 F.3d 1146, 722 F.3d 1146, 1150-1151 (9th Cir. 2013) (collecting cases noting that "there is no prescribed statutory maximum in the restitution context" to trigger's *Apprendi's* jury requirement.) Implicit within the federal analysis is that criminal restitution is a penalty that, if limited by statute, would trigger jury trial rights under the Sixth Amendment. *Id*. *Green* thus posits a Catch-22 implicating Due Process and the Eighth Amendment. Either restitution is a criminal penalty requiring a criminal conviction. Or restitution is not a criminal penalty, requiring a civil jury trial.

2. Criminal restitution without criminal culpability would violate Due Process and the Eighth Amendment.

Arizona's own traditions may require recognition of due process rights not recognized under the federal constitution. *See Willis v. Bernini in & for Cnty. of Pima*, 253 Ariz. 453, 459, ¶ 22 (2022) (relying on a 1967 case to affirm state due process right of accused to challenge grand jury proceedings). Although federal due process does not require a specific formulation of insanity from the states, the United States Supreme Court has suggested it may be violated if states abandon all exemptions from criminal liability for the insane. *Powell v. State of Tex.*, 392 U.S.

514 (1968) (plurality opinion); *Clark v. Arizona*, 548 U.S. 735, 752, fn. 20 (2006). Mr. Martinez asserts that imposing criminal restitution upon the insane would violate the Due Process Clause of the Fourteenth Amendment because the insane have never been deemed criminally liable under in our nation's deeply rooted traditions and history. *See Kahler v. Kansas*, 140 S.Ct. 1021, 1039 (recognizing "hundreds of years" of jurisprudence concerning the effect of insanity.)

Arizona's constitutional substantive due process protections under Ariz. Const. art. 2, §4 must be even broader than that of the Fourteenth Amendment. The exemption of the insane from criminal culpability under Arizona's criminal justice system has remained unbroken from its territorial days and thus "is implicit in the concept of ordered liberty in Arizona." *Samiuddin v. Nothwehr*, 243 Ariz. 204, 209 ¶ 13, (2017). Insanity has always hinged on whether the accused knew the wrongfulness of their conduct. Howell Code at 49; Ariz. Pen. Code § 21 (1901); Ariz. Penal Code § 24 (1913) Ariz. Pen. Code §§ 4486, 4489 (1928) (also exempting the insane from criminal liability); Ariz. Pen. Code §§ 43-111, 43-114 (1939) A.R.S. § 13-502 (1977); A.R.S. § 13-502 (1993). This unbroken history exempting the insane from culpability establishes that ordering those adjudicated insane to pay criminal restitution would violate due process under the Arizona Constitution. Given that it would also violate the Eighth Amendment, such orders would also

violate the Due Process Clause of the Fourteenth Amendment. *See Nelson v. Colorado*, 581 U.S. 128 (2017) (Keeping fees, court costs, and restitution exacted despite overturned convictions violated the Fourteenth Amendment.)

The Eighth Amendment bars criminal punishment that either was "condemned by the common law in 1789" or violates "fundamental human dignity" as reflected in "objective evidence of contemporary values." *Ford v. Wainwright*, 477 U.S. 399, 405-06 (1986). In holding that the Eighth Amendment bars execution of the insane, *Ford* also quoted Blackstone's observation that "idiots and lunatics are not chargeable for their own acts." *Id*. (quoting 4 W. Blackstone, Commentaries, 24-25.); *Kahler*, 140 S.Ct. at 1058, Fn. 4 (leaving undecided the issue of whether states violate the Eighth Amendment by eliminating the moral incapacity defense.)

Our nation's longstanding exemption of the insane from criminal culpability compels the conclusion that ordering criminal restitution from the insane would violate the Eighth Amendment's ban on excessive fines. *See Timbs v. Indiana*, 139 S. Ct. 682, 690 (2019) (Excessive Fine Clause incorporated against the states); *Kelco Disposal, Inc.*, 492 U.S. at 264 (prosecution of criminal case is predicate to "fine').

D. Constitutional Limits Preclude this Court from Adopting a New Criminal Restitution Policy.

Public policy is for the Legislature, not this Court. *Holle*, 240 Ariz. at 310, ¶ 48. And this court exceeds its constitutional authority when it displaces plain

meaning of statutes with legislative intent. *Tunkey*, 524 P.3d at 818, ¶ 27 (Bolick, J.) "[T]he insanity defense represents a public policy adopted by this state which exonerates the defendant from guilt." *State v. Turrentine*, 152 Ariz. 61, 65 (App. 1986). Exoneration from guilt means there is no criminal conviction justifying criminal restitution. A.R.S. § 13-603(C). The plain meaning of the statutory scheme does not establish otherwise. Even if it were deemed ambiguous, lenity should preclude a new public policy from this Court.

The Rule of Lenity "is perhaps not much less old than construction itself." *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L.Ed. 37 (1820) It requires courts to interpret ambiguous "penal laws," including those concerning sentencing, in favor of liberty, not punishment. *Ibid*. *United States v. Batchelder*, 442 U.S. 114, 121 (1979). Lenity protects vital due process interests, as well, by ensuring all individuals fair notice of the consequences of their actions. *United States v. Lanier*, 520 U.S. 259, 266 (1997). It is plainly evident these statutes don't authorize restitution, but if not plain, lenity nonetheless requires this Court to avoid an interpretation of the ambiguous.

II. Conclusion

GEI verdicts are not criminal convictions for which criminal restitution may be awarded.

Respectfully submitted this 26th day of April, 2024.

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