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IN THE
SUPREME COURT
FOR THE STATE OF ARIZONA

STATE OF ARIZONA,)	NO.
)	
Plaintiff/Respondent)	COURT OF APPEALS
)	No. 1 CA-CR 18-0774
VS.)	
)	MARICOPA COUNTY SUPERIOR COURT
VIVEK A. PATEL)	No. LC 2018-000192-001
)	
Defendant/Petitioner)	PETITION FOR REVIEW OF A
)	DECISION OF THE COURT OF APPEALS
_____)	

Pursuant to Rule 31.21, *Rules of Criminal Procedure*, Vivek A. Patel (“defendant”) petitions the Arizona Supreme Court for review of a decision of the Court of Appeals:

ISSUE DECIDED AND PRESENTED FOR REVIEW

The Court of Appeals, in a published decision, held that the provisions of A.R.S. § 28-672(G) are facially invalid as contravening the Victim’s Bill of Rights (“VBR”), *Ariz. Const. Art. 2, § 2.1(A)(8)*. Its *de novo* review concluded that A.R.S. § 13-603(C) governs the interpretation of the VBR in each and every case,

regardless of whether the Legislature has sought to regulate or differentiate between various classes of victims and crimes. *Slip Opinion*, at ¶ 7.

FACTS MATERIAL TO A CONSIDERATION OF THE ISSUES

Witness Rusty Robertson testified that on September 15, 2016, he and his work crew were on the Southwest corner of the intersection of Deer Valley Road and North Seventh Street in Phoenix (R.T. 6/20/17 at 17).¹ He heard victim's Harley Davidson motorcycle, traveling east on Deer Valley Road, come up behind him, enter the intersection, and impact defendant's vehicle. *At 18*.

Victim's wife stated that she was in front of her husband going eastbound on Deer Valley Road. *At 54*. She was in the lane closest to the curb. *Id.* A "big truck" was next to her in the center lane. *Id.* Victim was in the lane closest to the left turn, or median lane.²

Both wife and the truck driver came to a stop as the light for their direction of travel was about to turn yellow. *At 56*. She saw her husband veer from the median lane into the center lane when he crossed the crosswalk into the intersection. *At 57*. Because both wife and truck driver were stopped at the

¹ The trial transcripts of proceedings for 6/20/2017 and 11/6/2017 are contained in Appendices 1 and 2 of the State's Appellant's Opening Brief in the Court of Appeals.

²The parties eventually agreed with the investigating officer that the median lane was lane number 1, the center lane was number 2, and the curb lane number 3. *At 147*.

intersection, wife saw victim in a different lane other than the one he was in originally when he struck defendant's vehicle. *At 61.*

Justin Smith, a garbage truck driver for the City of Phoenix, was on the South East corner of North Seventh Street and Deer Valley Road, in the right-hand turn, sitting at the red light. *At 81-83.* Smith stated that the motorcycle looked as if it was in the lane closest to the curb when the impact with defendant's vehicle occurred. *At 91.*

Victim testified. *At 106.* As he entered the intersection, he changed lanes over to the center "middle" lane. *At 110.* He moved over, not because he saw a car coming at him, but rather, because he "normally moves over when he cross[es] intersections." *At 130.* He was the one who struck defendant's vehicle in the front quarter panel of the car. *Id.* He did not disengage his cruise control nor brake when he entered the intersection. *At 133.*

Phoenix Police Officer Steven Perrotta was given "basic collision instruction" at the Police Academy. *At 36.* State's Exhibit G, a pre-drawn template upon which the officer put his measurements, was introduced into evidence. *At 144.* The officer testified that he himself "would be braking" if he saw a vehicle about to turn in front of him. *At 155.* No one conducted any "crush distance" test to determine the speed of the victim's motorcycle at the time of the collision. *At*

162. The officer performed no available calculations that would have independently verified the witnesses' statements concerning speed. *At 164.*

Defense counsel argued that victim had violated several traffic statutes, and as such, defendant could not have "failed to yield." *At 173-176.* He also argued "intervening/superseding cause, failure to control speed on the part of the victim, and lack of causation in general. *At 197-207.*

The trial court held that "misbehavior" of the victim was not an excuse for defendant's liability, and since the parties had stipulated to "serious physical injuries," defendant would be found guilty. *At 210-211.* A restitution hearing date was then set. *At 211.*

Prior to the hearing, the parties submitted Memoranda on the question of whether the \$10,000 limitation of A.R.S. § 28-672(G) was constitutional, based on the Victim's Bill of Rights ("VBR"), Ariz. Const. Art. 2 § 2.1.

The State presented evidence at the restitution hearing that victim had medical bills of approximately \$161,000, a net property damage claim of \$485, and that he had received \$100,000 from defendant's insurance company (R.T. 11/6/17 at 13; 24; 36). Thus, the amount requested as restitution was approximately \$61,000. *At 37.*

Defense counsel asked the court to limit the restitution to the \$10,000 set forth in A.R.S. § 28-672(G). *At 47-49.*

The trial court ruled that the “cap is unconstitutional,” and ordered payment of the amounts requested. *At 51.*

On appeal to the Maricopa County Superior Court, the Judge reversed the trial court’s order, concluding that the State’s argument erroneously

presupposes that victims are entitled to full restitution in all cases. Here, the general language of A.R.S. § 13-603 requiring payment of full restitution is modified by the more specific language in A.R.S. § 28-672(G) imposing a restitution cap. When interpreting text, specific statutory provisions are given preference over general statutory provisions when the provisions conflict (citations omitted).

(emphasis supplied) *Superior Court Decision*, at pages 3-4, *Appendix 3* of the State’s Appellant’s Opening Brief in the Court of Appeals.

REASONS WHY THE PETITION SHOULD BE GRANTED

The Victims’ Bill of Rights (“VBR”) specifies nothing about the *amount* of restitution recoverable. Instead, it leaves it to the Legislature to implement its provisions through “substantive and procedural laws”

The Court of Appeals correctly noted that statutes are presumed to be constitutional and “will not declare an act of the legislature unconstitutional unless we are satisfied beyond a reasonable doubt that the act is in conflict with the

federal or state constitutions.” *State ex rel. Thomas v. Foreman*, 211 Ariz. 153, ¶ 12, 118 P.3d 1117 (App.2005). The constitutionality of a statute is reviewed *de novo*. *State v. Russo*, 219 Ariz. 223, 225 ¶ 4, 196 P.3d 826 (App.2008).

See, Hernandez v. Lynch, 216 Ariz. 469, 472 ¶ 8, 167 P.3d 1264, 1267 (App. 2007) (noting, for facial challenges, “the party challenging the provision must demonstrate that no circumstances exist under which the regulation would be valid”) (citing cases).

Art. 2, § 2.1(A)(8) provides that a victim of a crime has the right

8. To receive *prompt* restitution from the person or persons convicted of the criminal conduct that caused the victim’s loss or injury.

(emphasis supplied)

“Prompt” (adj.) means just that: something “done, performed, delivered, etc., at once or without delay.” [www. dictionary.com/browse/prompt](http://www.dictionary.com/browse/prompt). *See, State v. Pena*, 235 Ariz. 277, ¶ 6, 331 P.3d 412, 414 (2014) (absent statutory definition, courts may look to dictionaries or common meanings).

No torture of the English language could possibly transform the word “prompt” into that of “full” or “unlimited.” Had the proponents of the Constitutional Amendment in 1990 intended that the VBR mandate *no* limitations on the amount of restitution recoverable in any and all criminal cases, they could

have easily said so. *Compare, Ariz. Const. Art 2, § 31* (damages recoverable for death or injury cannot be limited by statute); *See also, Ariz. Const. Art. 18 § 6* (right of action to recover damages and amount recoverable “shall not be subject to any statutory limitation”).

The Court of Appeals nevertheless determined that because A.R.S. § 13-603(C) was in effect at the time of its enactment in 1990, the voters would be “presumed” to be aware of its provision and therefore they “intended” that A.R.S. § 13-603(C) control. *Slip Opinion, at 8.*

This has it exactly backwards. The more logical explanation is that, given presumed awareness of the “full” restitution requirements of A.R.S. § 13-603(C), *the voters would have explicitly said so in the language itself*, instead of inserting a *different* modifier, or even any modifier at all, before the word “restitution.” That they did not is most telling, especially in view of *other* existing statutes that limit the right of restitution in Title 28 criminal cases, and in particular, the later-enacted juvenile restitution provisions. *Infra.*

State v. Roscoe, 185 Ariz. 68, 71, 912 P.2d 1297, 1300 (1996):

Were this court to accept defendant’s invitation to embark on the task of determining the alleged legislative intent behind the Victims’ Bill of Rights, we would do so at the expense of venerable principles of statutory construction. “[W]here a constitutional provision is clear, no judicial construction is required or proper.”

Pinetop–Lakeside Sanitary Dist. v. Ferguson, 129 Ariz. 300, 302, 630 P.2d 1032, 1034 (1981); *see also State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993) (“If the language [of the statute] is plain, we need look no further.”).

(emphasis supplied)

The problem with the State’s argument and the Court of Appeals’ Decision is that these would rewrite the VBR to state that victims have an “unlimited” right to restitution, unhampered by any statutory directive. However, the word “prompt” simply does not mean that.³ What the State and Court of Appeals have essentially done is engraft the “full” restitution requirement of a existing *general statutory provision*, A.R.S. § 13-603(C) onto the VBR and summarily declared it to be the meaning of “prompt.”

In short, “prompt restitution” must mean something different than “full restitution,” else this particular language of the VBR is superfluous. *See, Nicaise v. Sundaram*, 245 Ariz. 566, ¶11, 432 P.3d 925 (2019) (“A cardinal principle of statutory interpretation is to give meaning, if possible to every word and provision so that no word or provision is rendered superfluous.”)

³ The Court, much less the parties, cannot add words to what the legislation has stated. *Williams v. Baugh*, 214 Ariz. 471, 154 P.3d 373 (App.2007)

The VBR, section (D), allows the Legislature (or the people, by initiative or referendum) to implement the VBR by enacting “substantive and procedural laws,” and it has done so

State v. Hansen, 215 Ariz. 287 ¶ 11, 160 P.3d 166 (2007):

¶ 11 In 1990, the voters amended the Arizona Constitution to include the VBR. *See* Ariz. Const. art. 2, § 2.1; *State v. Roscoe*, 185 Ariz. 68, 70, 912 P.2d 1297, 1299 (1996). Two provisions of the VBR permit the legislature to enact procedural rules in the context of victims’ rights. Article 2, Section 2.1(A) 11 of the Arizona Constitution provides that “a victim of crime has a right” to “have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims’ rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights.” *Article 2, Section 2.1(D) provides that “[t]he 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.”*

(emphasis supplied)

Hansen held that to implement the “prompt” requirement of the VBR (not expand its meaning), the Legislature could enact A.R.S. § 13-804(D), prohibiting any stay of payment of restitution on appeal, even though this contravened then-Criminal Rule 31.6, promulgated by this Court itself. *At* ¶ 17.

This Court has thus recognized that the VBR grants victims only the rights enumerated in it, and that the Legislature may supplement these with “substantive and procedural laws.”

The Legislature has done so: *See*, A.R.S. §§ 13-603(C)/13-804, providing *generally* for “full” restitution in the amount of economic loss; A.R.S. § 8-344(A), allowing the juvenile court to impose *either* “full” *or* “partial” restitution after an adjudication of delinquency, and finally, A.R.S. § 13-809(B), *exempting* A.R.S. § 28-672 *entirely from the “full” restitution requirements of A.R.S. §§ 13-603(C)/13-804(B)*.

A.R.S. § 13-809 has been around in various iterations since 1986. In the case of juvenile restitution, the Legislature did not enact the “partial” restitution section until 1997, some seven years *after* approval of the VBR. Laws 1997, Chapter 220, §38. Renumbered as 8-344 by the same, § 56. *At the very least, then, the Legislature did not consider the “prompt restitution” language of the VBR to be of any impediment to its consideration and regulation of the juvenile restitution statute and Title 28 criminal offenses.* That in and of itself undercuts the supposed “intent” attributed by the Court of Appeals to the VBR.

Neither the Court of Appeals nor the State addressed this argument. If indeed the Court of Appeals is correct, then A.R.S. § 13-809 and A.R.S. § 8-344 are both unconstitutional, and this Court should say so. ⁴

See also, State v. Reed, 246 Ariz. 138, ¶ 22, 435 P.3d 1044 (App.2019) (A.R.S. § 13-106, providing for no abatement of restitution at death of defendant, is a valid exercise of legislative power under VBR):

Applying *Hansen*, Section 13-106 does not exceed the authority granted to the Legislature by the Arizona Constitution because it affects “rights unique and specific to victims;” was enacted in response to *Glassel* (which noted concerns by amicus curiae filed on behalf of victims) and “advances victims’ rights.” See *Hansen*, 215 Ariz. at 290-91 ¶¶ 12-18, 160 P.3d at 169-70.

As a result, A.R.S. § 13-809(B) is most important in the consideration of the case at bar: As in the juvenile restitution statute, the Legislature in the exercise of its power has specifically declined to extend the reach of its “full” restitution requirements of A.R.S. §§ 13-603(C)/13-804 to A.R.S. § 28-672, capping the amount of restitution in what is essentially a civil traffic offense, *infra*. In short, the *specific* controls over the *general*. See, *State v. Ray*, 209 Ariz. 429, ¶ 5, 104

⁴ This Court previously, if briefly, considered the constitutionality of A.R.S. § 8-344 and its allowance of “partial” restitution in juvenile cases. In CV-16-0192 PR, this Court granted review, conducted oral argument, then declined review on 5/3/2017 as “improvidently granted.”

P.3d 160 (App.2004), and *State v. Cesar*, 241 Ariz. 66 ¶ 7, 383 P.3d 1140 (App.2016) (when there is a conflict in statutes, the specific statutory mandate controls over the general one).

The history of A.R.S. § 28-672 also militates against the argument that the VBR was intended to supplant legislative regulation of Title 28 crimes. Prior to 2006, A.R.S. § 28-672 was strictly a civil traffic offense. *See, 2006 Ariz. Legis. Serv. Ch. 297 (H.B. 2208)*, Appendix 4 to the State's Appellant's Brief in the Court of Appeals. The Legislature amended the violation of an otherwise civil traffic offense to that of a Class 3 Misdemeanor, and more importantly, in reference to the "general" restitution law of A.R.S. § 13-603, determined that it would not be applicable in its entirety. Rather, that because of the nature of civil traffic offenses and accidents, the Legislature concluded that, up to a certain point, the parties were best left to their civil remedies.

In that respect, note that amended Subsection (F) of A.R.S. § 28-672 *retained* virtually the same language as the Misdemeanor Compromise Statute, A.R.S. § 13-3981, encouraging parties to settle matters as in civil lawsuits.

This implementation of the VBR by the Legislature was entirely within the parameters of subsection (D) of the Act. *Hansen, supra*. The Legislature could have rationally found that what would otherwise be a civil traffic violation,

wherein *no* restitution would be awardable, *see State ex rel. McDougall v. Superior Court*, 186 Ariz. 218, 920 P.2d 784 (1996), was unduly harsh, and could be ameliorated somewhat by changing the violation to a criminal offense. Yet, at the same time, the Legislature could have rationally concluded that its “full” restitution requirement of A.R.S. § 13-603 was not necessary where the parties had civil remedies available, *including the language of the Misdemeanor Compromise statute*, which could “*promptly*” process restitution. Hence, the result reached was entirely within the Legislature’s plenary power. *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, ¶ 5, 982 P.2d 815 (1999) (“In Arizona, the legislature is endowed with the legislative power of the State, and has plenary power to consider any subject within the scope of government unless the provisions of the Constitution restrain it.”).

The fact that the Court of Appeals, in footnote 3 of its Opinion indicated *other* Title 28 statutes require “full restitution,” only underscores the Legislature’s power to determine applicability of restitution to different crimes and differently situated victims. *Some* Title 28 criminal offenses *specifically* require “full” restitution, while in others it is *specifically* prohibited. Once again, the specific controls over the general, *supra*.

Here, not only does the VBR *not* restrain the Legislature, it affirmatively *empowers* it in subsection (D) to promulgate restitution commensurate with differing situations, in order to effectuate the “*prompt*” payment mandate of the VBR.⁵

The trial court’s refusal to adhere to the cap imposed by the Legislature had the effect combining too broadly civil liability with criminal sentencing

The Statement of Facts sets forth the objections defense counsel made to the charge. However, because §28-672 has been determined to be a strict liability offense with no jury trial afforded, *Phoenix City Prosecutor’s Office v. Nyquist*, 243 Ariz. 227, 404 P.3d 255 (App.2017), defendant could not raise *any* justification defenses or otherwise challenge the conduct of the victim.

Nevertheless, in terms of the issue presented in this appeal, those same objections to the conduct of the victim are indeed relevant to the question of “economic loss.” Yet, because the trial court alone determined the victim’s loss, its erroneous application of the VBR deprived defendant of what would otherwise have been, in a civil lawsuit, his panoply of constitutional rights to a jury trial and its concomitant procedural defenses. *See, Ariz. Const. Art. § 5* (contributory negligence shall, in all cases, be left to the jury). This includes “comparative”

⁵ If the law has a “rational relationship” to a legitimate legislative objective, its constitutionality will be upheld. *Gallardo v. State*, 236 Ariz. 84, 36 P.3d 717 (2014).

negligence, A.R.S. § 12-2506 *et. seq. Hall v. A.N.R. Freight System, Inc.* 149 Ariz. 130, 717 P.2d 434 (1986). *See also*, A.R.S. § 13-807 (“An order of restitution...does not preclude...bringing a separate civil action and proving in that action damages in excess of the amount of the restitution order.”).

As this Court stated in *State v. Wilkinson*, 202 Ariz. 27, ¶¶ 11-12, 39 P.3d 1131 (2002):

¶ 11 Our conclusion that the restitution statutes encompass only damages directly caused by the criminal conduct involved not only remains faithful to the statutory language, *but also prevents the restitution statutes from conflicting with the right to a civil jury trial preserved by Arizona Constitution Article II, Section 23.* Article II, Section 23 protects the right to a jury trial as it existed when Arizona’s constitution was adopted. *Rothweiler v. Superior Court*(R.T. 2//17 at) , 100 Ariz. 37, 41, 410 P.2d 479, 482 (1966); *see also Hoyle v. Superior Court*, 161 Ariz. 224, 228, 778 P.2d 259, 263 (App.1989) (discussing the extent of the common law right to jury trial in 1910).

¶ 12 *Potential problems arise if we too broadly combine civil liability with criminal sentencing. As the court of appeals has noted:*

If reparations as a condition of probation are to include elements beyond mere “special damages” we believe a trial court must use great caution. *The sentencing phase of a criminal case is not the ideal forum for the disposition of a [civil] case. 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.

State v. Garner, 115 Ariz. 579, 581, 566 P.2d 1055, 1057 (App.1977).

(emphasis supplied)

See also, Town of Gilbert Prosecutor's Office v. Downie, 218 Ariz. 466,

¶14, 189 P.3d (2008):

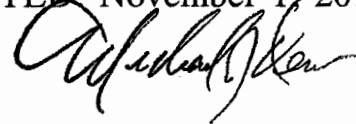
¶ 14 Limiting the victim's restitution to the amount necessary to recompense direct losses comports with the language of the restitution statutes, makes practical sense, and preserves the proper place and function of a civil jury to determine a victim's actual damages, including damages for pain and suffering, punitive damages, and consequential damages. *See* A.R.S. §§ 13-807 (2001) (providing that a restitution order "does not preclude [a victim] from bringing a separate civil action and proving in that action damages in excess of the amount of the restitution order"); 13-804(G) (recognizing that restitution is not a substitute for civil litigation because "[t]he state does not represent persons who have suffered economic loss"); *Wilkinson*, 202 Ariz. at 29-30, ¶ 11, 39 P.3d at 1133-34 (interpreting the restitution statute to avoid a conflict with Arizona's civil jury trial right). *To hold otherwise would upset the relationship among reparation, retribution, and rehabilitation, and blur the distinction between criminal restitution and recovery for ancillary damages protected by the civil jury trial. It might also provide a windfall to the victim and encroach into punishment for the defendant.*

(emphasis supplied)

The VBR “must yield to the federal and state constitutions’ mandates of due process of law....” *State ex rel. Romley v. Superior Court*, 172 Ariz. 232, 240-241, 836 P.2d 445, 453-454 (App.1992). “Interpreting” the plain language of the VBR to reach an untoward result is just such transgression.

Defendant respectfully requests that the Petition for Review be granted, and the Order of the Superior Court affirmed.

RESPECTFULLY SUBMITTED: November 1, 2019.



MICHAEL J. DEW