

Nicholaus Podsiadlik, Bar No. 028885
Office of the Maricopa County Public Defender
620 West Jackson Street, Suite #4015
Phoenix, Arizona 85003
Telephone (602) 506-7711
ACE@mail.maricopa.gov
Attorney for Petitioner

M. Alex Harris, Bar No. 016942
1350 W. Center St.
Chino Valley, AZ 86323
Telephone (928) 899-6022
alexharrispc@gmail.com
Attorney for Intervenor/Petitioner Lanna Mesenbrink

IN THE SUPREME COURT

IN AND FOR THE STATE OF ARIZONA

STATE OF ARIZONA,

Appellee,

v.

RICHARD ALLEN REED,

Appellant.

No. CR-_____ -PR

Arizona Court of Appeals
No. 1 CA-CR 17-0620

Maricopa County Superior Court
No. CR2015-117844-001

JOINT PETITION FOR REVIEW

Oral Argument Requested

Appellant petitions this Court for review of the opinion of the Court of Appeals entered in the above cause on October 20, 2020, which newly declares that

Arizona allows private prosecutors.¹ The lower court’s opinion also opens the door to abuse of the criminal system by opportunistic lawyers and contradicts precedent. Further, the lower court has evaded this Court’s mandate by declaring itself powerless to correct the Superior Court’s imposition of an illegal lien on a third party’s property.

RESPECTFULLY SUBMITTED November 13, 2020,

MARICOPA COUNTY PUBLIC DEFENDER

By _____ /s/
Nicholaus Podsiadlik
Attorney for Appellant Richard Reed

By _____ /s/
M. Alex Harris
Attorney for Intervenor Lanna Mesenbrink

¹ Cited as “Op.,” attached as Appendix A, and available at <https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2020/CR17-0620%20-%20Reed.pdf>.

ISSUES

1. A court cannot impose restitution for consequential losses. Consequential losses are monetary losses that do not flow directly and immediately from the crime, or are temporally or factually attenuated from the crime. Mr. Reed was convicted of voyeurism, but the trial court awarded \$17,909.50 for the victim's attorney's fees for preparing the state's motions, trial theory, and witnesses; investigating the depth of Mr. Reed's pockets; and serving as a relay for communications between the state and the victim. Was this error?
2. A victim may recover only a reasonable amount of restitution for a loss. The victim's attorney, Craig Keller, claimed \$395-\$405 per hour versus the standard Maricopa County rate of \$77 per hour; he apparently double-billed certain items; and he took more time for trivial tasks than a new criminal-law attorney would take. Did the court err by blanket-approving all Keller's demands without examining them for reasonableness?
3. A victim's loss must be valued according to fair market rates for the particular object or service that was lost. Keller's hourly rate was the rate of a corporate attorney, not a criminal-law attorney. Did the court err by assigning a value to Keller's work that did not match the market value for that work?
4. Restitution may be awarded only for "loss." Neither the state nor victim presented any evidence that the victim contracted with Keller, paid him any money, or would be forced to pay the amounts he claimed. Did the court err by awarding restitution without proof of loss?
5. Our justice system does not allow private prosecution. Keller acted as a private prosecutor. Did the court err by forcing Mr. Reed to pay the victim for the victim's private prosecution of Mr. Reed?
6. For a century, Arizona has recognized that one spouse's community property cannot be encumbered for the other spouse's separate debt. Here, the Superior Court issued a criminal restitution order and the Clerk of the Superior Court, following its regular practice, recorded it to create a lien against Ms. Mesenbrink's community property. Did the lower court err by concluding that the spousal victims of this practice must all hire lawyers and bring separate, civil lawsuits to roll back these errors in every case?

BACKGROUND

A. Procedural History

This is the second time this case has come before this Court.

The first time, the lower court had dismissed Mr. Reed’s appeal of the award of restitution against him on the basis that he had passed away, but it allowed to stand, without challenge or analysis, the award of \$17,909.50 in “victim’s attorneys’ fees” that remained as an illegal lien against the house and vehicle of Mr. Reed’s widow, Lanna Mesenbrink.² This Court vacated the lower court’s decision and remanded for the lower court to determine “whether the restitution amount is correct” because “[t]his remains a controversy with a real-world impact on Reed’s wife, who must pay the restitution amount to remove the liens from her home and vehicle.”³

On remand, however, the lower court declared itself powerless to give relief to Ms. Mesenbrink.⁴ It also affirmed the award in its entirety, erasing all protections that Arizona courts have established to avoid making the criminal court “a collection

² *State v. Reed*, 246 Ariz. 138 (App. 2019) vacated by *State v. Reed*, 248 Ariz. 72 (2020).

³ 248 Ariz. at 81, ¶ 33.

⁴ Appx. 27, Op. ¶ 25. Citations to the appendix are to the sequential numbering of the brief and appendix as a whole. See Ariz. R. Crim. P. 31.11(d)(1).

agency with none of the requirements of due process found even in a civil money judgment proceeding.”⁵

B. Facts

Craig Keller, a corporate-law partner at a large law firm, had a grudge against Mr. Reed stemming from a business transaction.⁶ When Mr. Reed was charged with a class 5 felony, Keller learned about it and offered to represent the victim in that case, even though Keller was not a criminal lawyer.⁷ Keller racked up \$17,909.50 in “victim’s attorney’s fees” at his ordinary rate of about \$400 per hour.⁸ His fees comprised such charges as \$197.50 to read standard filings, \$3,604.50 to ghost-write a motion for the prosecutor, and about \$400 an hour to mediate communications between the victim, prosecutor, and victims’ rights advocate.⁹ He claimed fees for “trial preparation, attending trial and then seeking restitution” despite the fact that the Maricopa County Attorney’s Office was prosecuting the case.¹⁰

Mr. Reed stipulated to nearly all the victim’s requested restitution except for Keller’s fees.¹¹ Only Keller’s bare assertion provided evidence that the victim agreed

⁵ *State v. Reese*, 124 Ariz. 212, 215 (App. 1979).

⁶ Appx. 38, 41-42 (Reed Op. Br.).

⁷ Appx. 38, 90-95 (Keller bio and Gust Rosenfeld list of services).

⁸ Appx. 60-62, 81-88 (annotated table of Keller’s timesheet).

⁹ *Id.*

¹⁰ Appx. 20, Op. ¶ 3.

¹¹ Appx. 125-26 (trial court ruling).

to pay his fees or would ever actually need to pay them.¹² Nonetheless, the trial court awarded \$40.00 in restitution plus the entirety of the requested fees, \$17,909.50.¹³ The trial court provided no reasoning for the award.¹⁴

REASONS TO ACCEPT REVIEW

A. The lower court's decision creates two tiers of justice for crime victims

Keller acted as a private prosecutor in violation of due process.¹⁵ Keller, justifying his fees, stood before the trial court and took credit for the prosecution:

We helped [the victim] from day one in terms of analyzing the claim, describing what she can expect with the prosecutor, developing [a] list of questions for all the witnesses, contacting witnesses, preparing them for the trial, sitting through the trial, meeting with her and the prosecutor for strategy sessions at night, making sure that she understood what was expected of her, working to resolve factual details in the various stories and the defenses that would come up.¹⁶

This was unconstitutional. As the Supreme Court of Missouri has held, “the practice of allowing private prosecutors, employed by private persons, to participate

¹² Appx. 67-71; *see* Appx. 25, Op. ¶ 19; Appx. 158-60 (Keller's self-serving affidavit, the sole evidence that victim agreed to pay Keller).

¹³ Appx. 125-26.

¹⁴ *See id.*

¹⁵ *See State v. Harrington*, 532 S.W.2d 44, 48 (Mo. 1976); *Johnson v. Vederman in and for County of La Paz*, 2017 WL 2438059 (Ariz. App. June 6, 2017) (mem.) (adopting *Harrington*) (free via scholar.google.com).

¹⁶ Appx. 121-22.

in the prosecution of criminal defendants, is inherently and fundamentally unfair.”¹⁷ In contrast to prosecutors, who act as “ministers of justice” with “a duty to see that defendants receive a fair trial,” private attorneys are duty-bound to press the interests of their clients without regard to fairness or the public interest.¹⁸ Prosecutors are responsible to voters; private attorneys are answerable to no one other than their clients and, in extreme cases, the ethics authorities.¹⁹ Private attorneys who ride along with a prosecution do so only for their own profit. Their incentive is, by definition, “private gain” as opposed to “seeing that the criminal laws of the state are honestly and impartially administered.”²⁰ A private prosecutor will make money by developing a reputation of securing convictions, just as private defense attorneys justify their fees by pointing to past acquittals. Allowing private prosecution exposes the criminal justice system to “prejudicial influence.”²¹

The opinion harms the public interest. Wealthy victims can now hire white-shoe law firms to—as Keller did here—whip prosecutors, wrangle victims’ rights staff, find and prepare witnesses, draft cross-examination outlines, ghost-write

¹⁷ *Harrington*, 532 S.W.2d at 48.

¹⁸ *State v. Hughes*, 193 Ariz. 72, 80, ¶ 33 (1998); R. Sup. Ct. Ariz. 42, ER 1.2, 3.1 cmt. 1; *Harrington*, 532 S.W.2d at 48-49.

¹⁹ Ariz. Const. art 12, § 3 (requiring that the county attorney be elected); A.R.S. § 11-532(A) (“The county attorney is the public prosecutor of the county.”).

²⁰ *Harrington*, 534 S.W.2d at 49.

²¹ *Id.* at 50.

motions, prepare arguments, and strategize the prosecution throughout the case and trial. In more complex cases, elite private prosecutors will independently seek out and hire experts, conduct independent laboratory analyses, employ separate investigators to bolster the work of the police, and mount an entire shadow prosecution to pressure and ensure that the defendant is convicted. Such private prosecutors will be unrestrained by prosecutorial ethics, constitutional obligations such as *Brady*, and they may even expect—or be perceived as expecting—the state’s complicity if they violate laws against witness tampering, intimidation, and illegally obtaining evidence. This Court should take a moment to consider the worst thing that the least scrupulous lawyer has done for a civil victory and assume private prosecutors would do it secure a conviction.

If there are deficiencies in prosecution from a lack of resources, then the state should increase prosecutors’ resources. If there are deficiencies stemming from ethical or constitutional guards, then those are not deficiencies. In either case, the public is not served by creating two tiers of justice: one for victims who are poor, and one for victims who are rich.

B. The lower court’s decision invites wholesale abuse of the criminal process by attorneys seeking \$400 an hour to denigrate prosecutors while riding their coattails

If this Court affirms the lower court’s opinion, attorneys will stampede to charge \$400 an hour to practice criminal law as a lark, knowing that if they lose, nobody is worse off, and if they win, nobody will scrutinize their billing sheets too closely. Private attorneys will have every incentive to denigrate prosecutors and affirmatively seek out victims, and the readers of this brief can expect to see highway billboards like this:

“Victim” of a “Crime”?
Don’t leave It to the Prosecutor
Get a FIGHTER and Get REVENGE
Free No Fee! Make Them Pay!

Only attorneys like Keller will benefit from this system. Naïve victims who cannot afford elite private prosecutors will be prey to the most aggressive marketing,²² and the public will lose faith in the criminal process.

²² See, e.g., <https://www.antilawyer.com> (Arizona personal-injury attorney with billboards on I-10 wherein he poses in a suit with the sleeves torn off, wields a giant gavel with tattooed arms, and promises “no B.S.”); <https://www.facebook.com/theantilawyerlawyer/> (with the gavel).

C. The lower court’s decision erases every protection that Arizona courts have imposed on restitution

Arizona law requires: (1) Restitution may be awarded only for direct, economic losses immediately flowing from the crime. (2) Restitution must be reasonable. (3) Losses must be given a fair valuation. And (4) a victim must prove actual loss, or establish a future loss, to receive restitution for it.

The lower court’s opinion erases each of these requirements:

First, this Court has explained that “the criminal conduct must *directly* cause the economic loss.”²³ “Loss” means “being ‘out’ something as a result of a crime.”²⁴ It must “flow directly and immediately from the action of the [defendant].”²⁵ The loss cannot be factually or temporally attenuated.²⁶

Here, Keller’s fees flowed from the victim’s choices not to trust the prosecutor to do the job and not to communicate with the state or victims’ rights representatives herself. There was absolutely no need to hire a civil-law attorney at \$400 an hour to bolster the state’s efforts and existing victim support services. Keller’s fees were not

²³ *State v. Wilkinson*, 202 Ariz. 27, 29, ¶ 7 (2002).

²⁴ *Town of Gilbert Prosecutor’s Office v. Downie*, 218 Ariz. 466, 469, ¶ 11 (2008).

²⁵ *Id.*

²⁶ *State v. Guilliams*, 208 Ariz. 48, 53, ¶ 18 (App. 2004).

legal restitution under this Court’s tests, as the cases of *Streck*²⁷ and *Slover*²⁸ have demonstrated in factually similar situations.

But the lower court has now erased that test and substituted a new one. Victims’ attorneys’ fees are recoverable because, as far as the lower court’s reasoning can be discerned, “The fees awarded as restitution here were incurred because of Reed’s crime.”²⁹ This is, of course, *ipse dixit*. The lower court bolsters that analysis by asserting that Keller’s fees—in their entirety, apparently—were “incurred ... in asserting [the victim’s] rights,” but the opinion does not identify which rights were at jeopardy or how any portion of Keller’s work was necessary to secure them.³⁰

Second and third, the loss must be both reasonable and given a fair value. This means that, while a victim may claim loss for a taxi to get to the courthouse, the victim cannot claim loss for a private helicopter followed by a limousine ride at double the normal rate.³¹ The opinion evades this in three ways. First, it erroneously

²⁷ *State v. Streck*, 221 Ariz. 306 (App. 2009) (victim’s wife hired an attorney to assist in the prosecution of the defendant; like Keller, he admitted that he worked to bolster the state’s case and “encourage” the police and state to achieve conviction; held that the fees of such an “adjunct prosecutor” did not flow from the crime and were not allowable restitution).

²⁸ *State v. Slover*, 220 Ariz. 239 (App. 2009).

²⁹ Appx. 23, Op. ¶ 12.

³⁰ Appx. 23, Op. ¶ 13.

³¹ *Guilliams*, 208 Ariz. at 53; *State v. Madrid*, 207 Ariz. 296, 300, ¶ 13 (App. 2004).

refuses to take judicial notice of the rates paid to criminal defense attorneys and to judges.³² Second, the opinion misrepresents the facts. It refers to Keller's self-serving affidavit as support that his rates were reasonable for the work he did. But even Keller's avowal says only that he is "familiar with the current rates charged by law firms *engaged in general litigation practice* for attorneys of my experience."³³ Nothing in the affidavit shows that his rates were consonant with similar work by *criminal* attorneys with little or no *criminal* experience. This lack of evidence rendered the award infirm.³⁴ Finally, the lower court's opinion creates a test wherein any attorney may prove his fees are reasonable by avowing as much. That is novel.³⁵

Finally, the victim must prove that her loss is or will be realized. Here, the only evidence that the victim hired Keller for the case against Mr. Reed, agreed to pay Keller's rates, or would ever actually be obligated to pay those rates was, again, Keller's own self-serving affidavit.³⁶ This is shocking: It means a lawyer may insert himself into a criminal case, charge any fees at any rate he likes, and then tax those

³² See Ariz. R. Evid. 201(c)(2); *Sitton v. Deutsche Bank Nat. Tr. Co.*, 233 Ariz. 215, 218 (App. 2013) (records held by government agencies are appropriate for judicial notice).

³³ Appx. 158 (emphasis added).

³⁴ See *State v. Ellis*, 172 Ariz. 549, 551 (App. 1992) (trial court has a duty to determine the fair value of a victim's loss rather than simply accept the victim's proposed value).

³⁵ See authorities n.31; see also *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 187 (App. 1983) (multi-part test for reasonableness of attorneys' fees).

³⁶ Appx. 25, Op. ¶ 19; Appx. 67-71.

fees against the defendant with no more proof than his own say-so. This is not just a rubber stamp. This is taking the court’s rubber stamp and handing it to the victim’s attorney. Such a test strips the defendant of all possible defenses and will “reduce our system of justice to a potentially dangerous façade and convert the criminal court into a collection agency with none of the requirements of due process found even in a civil money judgment proceeding.”³⁷

D. The lower court evaded the mandate and affirmed the trial court’s regular practice of entering invalid liens for one spouse’s separate debt against community property

For almost a century, Arizona law has held that a court violates due process when it enforces a debt against community property shared by one spouse for the separate debt of the other spouse.³⁸ Here, the Superior Court entered a criminal restitution order against Mr. Reed, and the Clerk of the Superior Court—*sua sponte* as part of its regular practice of “enforcement”—recorded it, automatically creating liens against Ms. Mesenbrink’s community property.³⁹

³⁷ *Reese*, 124 Ariz. at 215.

³⁸ *Heinig v. Hudman*, 177 Ariz. 66, 80 (App. 1993); *Flexmaster Aluminum Awning Co., Inc. v. Hirschberg*, 173 Ariz. 83, 85-88 (App. 1992); *Cosper v. Valley Bank*, 28 Ariz. 373, 375-76 (1925) (disapproved on other grounds by *Mortensen v. Knight*, 81 Ariz. 325 (1956)). See generally Appx. 168-91 (Mesenbrink Op. Br.).

³⁹ Appx. 26-27, Op. ¶ 22. See Appx. 168 and attachments cited therein at Appx. 193-205.

The lower court does not disagree with this recounting of what happened or with the legal point that the resulting lien is illegal.⁴⁰ Instead, it claims that *this Court* has deprived it of jurisdiction to address Ms. Mesenbrink’s problem and that the Clerk of the Superior Court is not under the direction of either the Superior Court or Court of Appeals.⁴¹ It concludes that every defendant’s spouse who is injured by this regular and illegal practice of the Superior Court and Clerk of the Superior Court must hire a lawyer and bring a lawsuit to hold the Superior Court and Clerk to account.⁴²

The lower court’s premises are wrong. Its conclusion is unjust and inefficient.

The lower court is wrong that this Court’s remand precluded it from giving redress to Ms. Mesenbrink. This Court remanded the matter for decision solely because “whether the restitution amount is correct ... remains a controversy with a real-world impact on Reed’s wife, who must pay the restitution amount to remove the liens from her home and vehicle.”⁴³ Accordingly, the Court of Appeals had both the authority and a duty to consider redress for Ms. Mesenbrink’s injury.⁴⁴ “The

⁴⁰ Appx. 26-27, Op. ¶ 22.

⁴¹ Appx. 27, Op. ¶¶ 23-24.

⁴² Appx. 27-28, Op. ¶ 25.

⁴³ *Reed*, 248 Ariz. at 81, ¶ 32.

⁴⁴ *Vargas v. Superior Court of Apache Cty.*, 60 Ariz. 395, 397 (1943) (“The duty of the respondent court and judge to comply with the mandate may not be questioned or evaded. ... It is binding on the trial court and enforceable according to its true intent and meaning.”).

appellate court may reverse, affirm, or modify the action of a lower court, and it may issue any necessary and appropriate order in connection with its decision.”⁴⁵

The lower court is also wrong that the Clerk of the Superior Court is outside its authority or that of the Superior Court. “[T]he office of Clerk of the Superior Court is part of the judicial branch of government.”⁴⁶ The Court of Appeals in *Alberta Securities* did exactly what Ms. Mesenbrink asks by modifying the judgment to expressly protect one spouse’s property.⁴⁷ Both the Superior Court and Court of Appeals regularly direct the Clerk of the Superior Court to modify judgments or take other actions, and this situation is no different.⁴⁸

⁴⁵ Ariz. R. Crim. P. 31.19(c).

⁴⁶ *Royston v. Pima County*, 106 Ariz. 249, 250 (1970). *See also* A.R.S. § 12-283(A) (clerk’s duties defined by court rules); Ariz. R. Crim. P. 31.19(c).

⁴⁷ *Alberta Securities Com’n v. Ryckman*, 200 Ariz. 540, 550, ¶ 40 (App. 2001).

⁴⁸ *See, e.g., Connell v. Connell*, 2019 WL 302828, ¶ 27 (Ariz. App. Jan. 24, 2019) (mem.) (free at scholar.google.com) (“[W]e direct the superior court clerk to modify the dissolution decree as follows.”).

CONCLUSION

For these reasons, this Court is respectfully asked to accept review of this matter and vacate the lower court's opinion.

RESPECTFULLY SUBMITTED November 13, 2020,

MARICOPA COUNTY PUBLIC DEFENDER

By _____/s/_____
Nicholaus Podsiadlik
Attorney for Appellant Richard Reed

By _____/s/_____
M. Alex Harris
Attorney for Intervenor Lanna Mesenbrink

NPKL11122020P

APPENDIX

PETITION FOR REVIEW

From *State v. Reed*, 1 CA-CR-17-0620

Appendix Table of Contents

A – Lower Court Opinion..... 18

B – Reed Opening Brief..... 29

C – Excerpts from RT 7/21/17 119

D – Trial Ruling re: Restitution 125

E – State’s Motion with Keller Affidavit..... 127

F – Mesenbrink Opening Brief..... 168

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

RICHARD ALLEN REED, *Appellant*.

No. 1 CA-CR 17-0620

FILED 10-20-2020

Appeal from the Superior Court in Maricopa County

No. CR2015-117844-001

The Honorable Danielle J. Viola, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix

By Jillian B. Francis

Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix

By Nicholas Podsiadlik

Counsel for Appellant

M. Alex Harris, Chino Valley

Counsel for Intervenor Lanna Mesenbrink

STATE v. REED
Opinion of the Court

Arizona Voice for Crime Victims, Phoenix
By Colleen Clase, Kathryn Fuller
Co-Counsel for Amicus Curiae in support of Appellee

National Crime Victim Law Institute, Portland, Oregon
By Margaret Garvin
Co-Counsel for Amicus Curiae in support of Appellee

OPINION

Presiding Judge Samuel A. Thumma delivered the opinion of the Court, in which Judge Randall M. Howe and Judge James B. Morse Jr. joined.

T H U M M A, Judge:

¶1 This appeal is on remand from the Arizona Supreme Court, which specified that “the only issue” for this court to decide “is whether the restitution amount is correct.” *State v. Reed*, 248 Ariz. 72, 81 ¶ 33 (2020).

¶2 Defendant Richard Allen Reed, who challenged a criminal restitution order awarding the victim attorneys’ fees, died while this appeal was pending. This court then dismissed the appeal. *State v. Reed*, 246 Ariz. 138, 140 ¶ 5 (App. 2019) (rejecting constitutionality challenge and applying Arizona Revised Statutes (A.R.S.) Section 13-106(A) (2018),¹ which states “[o]n a convicted defendant’s death, the court shall dismiss any pending appeal.”). The Arizona Supreme Court vacated this court’s opinion, holding the Arizona Legislature “lacked authority” to enact Section 13-106(A). *Reed*, 248 Ariz. at 74 ¶ 2. In reinstating the appeal and remanding, the Supreme Court strongly suggested that this court permit Reed’s widow, Lanna Mesenbrink, to intervene. *Reed*, 248 Ariz. at 81 ¶ 31 (quoting Ariz. R. Crim. P. 31.19(b)). On remand, this court granted Mesenbrink’s motion to intervene, allowed supplemental briefing, has considered the arguments in the original and supplemental briefs, and now affirms the restitution award.

¹ Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

STATE v. REED
Opinion of the Court

FACTS AND PROCEDURAL HISTORY²

¶3 Reed was charged with voyeurism, a Class 5 felony committed against a co-worker in January 2015. The victim hired a law firm to represent her, assisting with determining and enforcing her rights as a victim. The law firm performed legal services for the victim, and the victim agreed to pay the firm for those services at established hourly rates. During a six-month period, the firm billed 37.6 hours of attorney time and 19 hours of paralegal time, totaling \$17,909.50. Most of that time was for trial preparation, attending trial and then seeking restitution, with the remainder reflecting miscellaneous tasks and client communication. The firm spent no time on civil litigation or other independent legal services.

¶4 The jury found Reed guilty as charged and the court later placed him on probation, leaving restitution open. A motion for restitution sought, among other things, \$17,909.50 for the victim's attorneys' fees. After an evidentiary hearing, the superior court issued a restitution order awarding the victim \$17,909.50 in attorneys' fees and granting in part and denying in part other requested restitution. Reed timely appealed the restitution order awarding the victim attorneys' fees. *See State v. French*, 166 Ariz. 247, 248 n.3 (App. 1990) (noting an "order of restitution is a separately appealable order").

DISCUSSION

I. The Request for Judicial Notice Is Denied.

¶5 Reed's counsel asks this court to take judicial notice of information about the victim's attorney and his law firm as well as compensation for public defenders, some of which was obtained from the Internet. None of that information, however, was provided to the superior court. Moreover, at the time of the restitution hearing, that information either was available to Reed's counsel (meaning, if relevant, it should have been provided to the superior court) or it was not available to Reed's counsel (meaning it could not have been considered by the court). Because the information was not provided to the superior court, it does not constitute adjudicative facts relevant to whether that court erred. *See Ariz.*

² Additional facts and procedural history are set forth in the prior decisions. *State v. Reed*, 246 Ariz. 138 (App. 2019), *vacated*, 248 Ariz. 72 (2020); *State v. Reed*, 1 CA-CR 16-0269, 2017 WL 1325647 (Ariz. App. Apr. 11, 2017) (mem. dec.) (affirming conviction and probation grant).

STATE v. REED
Opinion of the Court

R. Evid. 201(a). Accordingly, the request to take judicial notice of the information is denied. *See* Ariz. R. Evid. 201.

II. The Superior Court Properly Awarded the Victim Restitution for Attorneys' Fees She Reasonably Incurred.

¶6 Reed's counsel raises broad challenges to the restitution award that can be categorized as follows: (1) the fees were consequential losses that cannot be awarded as restitution; (2) the superior court did not determine whether the fees were reasonable; (3) there was no evidence the victim incurred any loss; and (4) the award violated due process because it forced Reed to pay the victim for his own prosecution. Mesenbrink does not challenge the restitution award but claims the Clerk of Court improperly recorded the restitution order with the County Recorder, resulting in an improper lien on the community property she owned with Reed. The court addresses these claims in turn.

¶7 This court reviews a restitution award for an abuse of discretion, *State v. Linares*, 241 Ariz. 416, 418 ¶ 6 (App. 2017), recognizing issues of statutory interpretation are reviewed de novo, *State v. Lantz*, 245 Ariz. 451, 453 ¶ 9 (App. 2018). Because restitution is neither an element of the offense nor punishment, it need only be established by a preponderance of the evidence. *State v. Lewis*, 222 Ariz. 321, 324 ¶ 7 (App. 2009). The superior court "has wide discretion in setting restitution based on the facts of each case." *State v. Dixon*, 216 Ariz. 18, 21 ¶ 11 (App. 2007) (citation omitted). "The court shall not consider the economic circumstances of the defendant in determining the amount of restitution." A.R.S. § 13-804(C). The superior court at the restitution hearing, not this court on appeal, properly resolves conflicting evidence; this court "view[s] the facts and all reasonable inferences therefrom in the light most favorable to" upholding a restitution award. *Lewis*, 222 Ariz. at 323, 324 ¶¶ 2, 5.

¶8 Although Reed's counsel challenges the restitution awarded, no contention is made that attorneys' fees cannot be the subject of a restitution award. Indeed, the Arizona Supreme Court has affirmed such an award, ruling the superior court "did not abuse its discretion" in awarding attorneys' fees as restitution. *State v. Leteve*, 237 Ariz. 516, 530 ¶ 58 (2015). The defendant in *Leteve* did not challenge the award on appeal, and the court "assume[d], without deciding, that attorney fees incurred to enforce victims' rights may be compensable in restitution." *Id.* This court has affirmed restitution awards of attorneys' fees incurred in probate proceedings of victims who were killed. *See State v. Spears*, 184 Ariz. 277, 292 (1996) (finding attorneys' fees incurred to close victim's estate "are

STATE v. REED
Opinion of the Court

proper restitutionary items” where no evidence indicates the fees incurred “were unreasonable or contrary to custom”); *State v. Baltzell*, 175 Ariz. 437, 439 (App. 1992) (“We believe that customary and reasonable attorney’s fees incurred to close the victim’s estate should be allowed” as restitution.). With this background, the court addresses the specific challenges asserted by Reed’s counsel to the restitution award in this case.

A. The Fees Awarded Were Economic Losses Recoverable as Restitution, Not Consequential Damages Exempt from Restitution.

¶9 A person convicted of a crime is required to make restitution “in the full amount of the economic loss as determined by the court.” A.R.S. § 13-603(C); accord A.R.S. § 13-804 (authorizing restitution award “to any person who suffered an economic loss caused by the defendant’s conduct”). Awarding restitution under A.R.S. § 13-603(C) is mandatory, while awarding restitution under A.R.S. § 13-804(A) “is discretionary but broad.” *State v. Leal*, 248 Ariz. 1, 3 ¶ 8 (App. 2019). The victim here sought restitution under both Sections 13-603 and 13-804.

¶10 “Economic loss” is defined as “any loss incurred by a person as a result of the commission of an offense,” including “losses that would not have been incurred but for the offense,” but excluding “consequential damages.” A.R.S. § 13-105(16). As Reed’s counsel notes, “consequential damages that are too attenuated from the crime” are not recoverable as restitution. *Linares*, 241 Ariz. at 418 ¶ 9. Accordingly, to be recoverable as restitution: “(1) the loss must be economic, (2) the loss must be one the victim would not have incurred but for the criminal conduct, and (3) the criminal conduct must directly cause the economic loss.” *Leal*, 248 Ariz. at 4 ¶ 12 (quoting *State v. Madrid*, 207 Ariz. 296, 298 ¶ 5 (App. 2004)); see also *State v. Wilkinson*, 202 Ariz. 27, 29 ¶ 7 (2002)).

¶11 Reed’s counsel argues the fees awarded were not economic losses but, instead, were nonrecoverable consequential damages. Reed’s counsel variously argues the fees awarded “had no nexus to the” crime; “were attenuated factually and temporally from the crime;” and did not “flow directly and immediately from the crime.” It is true the fees were not incurred at the scene of the crime and were incurred after the crime. Reed’s counsel, however, has cited no authority for the proposition that restitution is limited to services provided at the scene of the crime or other losses incurred before or at the time of the crime. In arguing Reed did not steal the fees, Reed’s counsel argues the victim could not seek reimbursement for the cost of services the victim incurred because of Reed’s crime. That argument,

STATE v. REED
Opinion of the Court

however, is contrary to Arizona law. *See State v. Morgan*, 248 Ariz. 322, 327 ¶ 18 (App. 2020) (“[T]he sentencing order’s contemplation of restitution for post-sentencing counseling expenses was not erroneous.”); *State v. Wideman*, 165 Ariz. 364, 369 (App. 1990) (“The trial court correctly awarded restitution for mental health counseling expenses.”). Indeed, Reed stipulated to pay for the cost of therapy the victim underwent after the crime.

¶12 Reed also asserts that the fees “had no reasonably foreseeable connection to the crime.” But Reed offers no authority suggesting that foreseeability, a concept found irrelevant to duty in civil negligence claims, *Gipson v. Casey*, 214 Ariz. 141, 144 ¶ 15 (2007), constrains statutory restitution in criminal cases. The fees awarded as restitution here were incurred because of Reed’s crime, after he committed that crime but before the restitution hearing. Accordingly, they had a nexus to the crime, and followed and flowed factually and temporally from Reed’s crime. The superior court, therefore, could conclude that they flowed “directly from the defendant’s criminal conduct, without the intervention of additional causative factors.” *Wilkinson*, 202 Ariz. at 29 ¶ 7.

¶13 The cases Reed’s counsel cites to argue that the fees are consequential damages are not on point. The victim here incurred the fees awarded as restitution in asserting her rights under the Victims’ Bill of Rights in Arizona’s Constitution. She actually incurred the fees; they were not a theoretical future loss. *Cf. State v. Sexton*, 176 Ariz. 171, 173 (App. 1993) (concluding loss “victims might suffer in the future as the result of having no homeowner’s liability insurance is too indirect to be the subject of restitution under the provisions of our statutes”); *State v. Pearce*, 156 Ariz. 287, 289 (App. 1988) (finding lost profits and breach of a lease were consequential damages not recoverable in restitution). Nor does the record support the argument by Reed’s counsel that the victim’s attorney impermissibly served as “an adjunct prosecutor.” *State v. Slover*, 220 Ariz. 239, 243 ¶¶ 8–9 (App. 2009) (vacating restitution award to victim’s wife for attorneys’ fees representing “tasks that were actually the state’s responsibility,” adding “[w]e do not address whether such fees would be proper restitution items under other factual circumstances, such as when the victim hires an attorney to assert a concrete right under the Victims’ Bill of Rights”). And Reed’s counsel has not shown the restitution awarded here is akin to the State’s seeking restitution “for costs of investigating an escape and recapturing the escapee” or where the “appellate court cannot determine the basis of the restitution order from the record.” *State v. Williams*, 208 Ariz. 48, 51, 56 ¶¶ 7, 27 (App. 2004); *accord Linares*, 241 Ariz.

STATE v. REED
Opinion of the Court

at 418 ¶ 9 (following *Guilliams*). Accordingly, the cases upon which Reed's counsel relies do not cast doubt on the restitution order.

¶14 Reed's counsel repeatedly suggests that awarding the victim fees as restitution constitutes an impermissible windfall. Reed's counsel has not shown how a restitution order reimbursing a victim for fees incurred because of a criminal voyeurism offense constitutes a windfall for the victim. This is not a case where the restitution award exceeded the victim's actual loss. *See State v. Ellis*, 172 Ariz. 549, 550 (App. 1992) (vacating restitution order where amount awarded was for purchase price, not fair market value, of personal property). Moreover, the suggestion that the victim here received a benefit because of Reed's criminal behavior, meaning restitution should be offset by those benefits, is baseless. *See Town of Gilbert Prosecutor's Office v. Downie*, 218 Ariz. 466, 467 ¶ 1 (2008) (finding "restitution to be paid by a defendant convicted of contracting without a license may be reduced by any value conferred on the homeowner").

¶15 On this record, Reed's counsel has failed to show the superior court erred in finding the attorneys' fees were economic loss and therefore recoverable as restitution. The court could properly conclude the attorneys' fees the victim sought were an economic loss she incurred "as a result of the commission" of the crime by Reed "that would not have been incurred but for the offense." A.R.S. § 13-105(16). Accordingly, Reed's argument to the contrary fails.

B. Reed's Counsel Has Not Shown the Superior Court Failed to Assess the Reasonableness of the Restitution Award.

¶16 Reed's counsel argues "[t]he court erred by blanket-approving all of [the fees requested as restitution] without examining them for reasonableness." This argument is not supported by the record. The court was not required to make specific findings of fact or conclusions of law in awarding restitution, and none were requested here. Moreover, "judges are presumed to know the law and to apply it in making their decisions." *State v. Trostle*, 191 Ariz. 4, 22 (1997) (quoting *Walton v. Arizona*, 497 U.S. 639, 653 (1990)). Nor has Reed's counsel pointed to anything in the record to suggest the court failed to assess the reasonableness of the restitution requested.

STATE v. REED
Opinion of the Court

¶17 Reed's counsel next argues that the hourly rates for the fees awarded (around \$400 per hour) were unreasonable. This argument, however, was not presented to the superior court. Indeed, Reed presented no evidence at the restitution hearing regarding the request for fees. The victim's attorney, by contrast, provided the court an affidavit, under oath, that the rates charged and the services performed were reasonable and consistent with fees customarily charged in the community where the services were performed. On this record, Reed's counsel has not shown the applicable hourly rate was "unreasonable or contrary to custom." *Spears*, 184 Ariz. at 292.

¶18 Reed argues that a \$400 hourly rate is higher than what "any judge, prosecutor, defense attorney, or any other government lawyer" is paid. Reed also argues the victim's attorney was "less efficient" than if the victim had retained an experienced criminal lawyer. But these arguments do not mean the applicable hourly rate, or the amount of the restitution award, was unreasonable. Simply put, Reed has not shown the lawyer's hourly rate, or the restitution awarded, impermissibly punished the defendant, provided the victim a windfall or was otherwise improper. *See Town of Gilbert Prosecutor's Office*, 218 Ariz. at 471-72 ¶ 25.

C. The Victim Was Obligated to Pay the Fees.

¶19 Reed's counsel argues there was insufficient evidence to show the victim paid or was required to pay the fees awarded as restitution. Not so. The evidence provided to the superior court included an affidavit stating the victim agreed to (and, accordingly, was obligated to) pay the attorneys' fees. The law firm the victim retained performed legal services on the victim's behalf and the affidavit included descriptions of the work performed. This record allowed the superior court to conclude the victim had a contract with the law firm to provide legal services, which obligated the victim to pay for such services, and that the law firm performed those services under that contract. Any uncertainty about whether the victim had already paid for those services does not, somehow, defeat a restitution award. *See, e.g., State v. Steffy*, 173 Ariz. 90, 95 (App. 1992) (holding superior "court did not err in ordering payment of restitution for the unpaid medical expenses to the victim even though future reimbursement may be paid by an insurer who has not sought reimbursement"); *State v. Howard*, 168 Ariz.

STATE v. REED
Opinion of the Court

458, 460 (App. 1991) (affirming restitution order awarding victim future medical expenses and future lost wages).³

D. The Victim’s Attorney Did Not Privately Prosecute Reed in Violation of Reed’s Due Process Rights.

¶20 Reed’s counsel suggests that the victim’s attorney “acted as a private prosecutor” and that “[i]t violates due process to allow a private attorney, who represents the victim in a criminal case, to help prosecute the criminal case.” The sole authority cited for this proposition is a Missouri Supreme Court opinion that condemned “the practice of allowing *private* prosecutors, employed by *private* persons, to participate in the prosecution of criminal defendants” as “inherently and fundamentally unfair.” *State v. Harrington*, 534 S.W.2d 44, 48 (Mo. 1976).

¶21 This issue was not raised with the superior court, and Reed’s counsel suggests it is not being raised in this appeal. Instead, Reed’s counsel states this argument will be raised in “post-conviction relief proceedings,” which are not a part of this appeal. To the extent this argument is raised here, the record is devoid of any participation by the victim’s counsel that would run afoul of Reed’s due process rights even if *Harrington* applied. The State (not the victim’s attorney) prosecuted the case against Reed, while the victim’s attorney represented the victim and her rights. This representation properly included offering evidence and argument at the restitution hearing, given “[t]he state does not represent persons who have suffered economic loss at the [restitution] hearing but may present evidence or information relevant to the issue of restitution.” A.R.S. § 13-804(G). Because Reed’s counsel has not shown the victim’s attorney improperly participated in the prosecution of the case in a way that violated Reed’s due process rights, this argument fails.

III. Mesenbrink Has Shown No Basis to Vacate the Restitution Award.

¶22 In supplemental briefing, Reed’s widow Mesenbrink does not challenge the restitution award itself. Instead, she challenges the fact that, after the court issued the restitution award, the Clerk of the Maricopa County Superior Court recorded the order with the Maricopa County Recorder. She argues the recording created a lien on community property

³ Reed’s counsel cites *Kohn v. Barker*, No. 015374, 2007 WL 1418514 (Mass. Super. Ct. Apr. 4, 2007) (mem.), but has not shown that citation to a state trial judge’s decision from another jurisdiction is proper, or that the case supports a contrary conclusion. See Ariz. R. Sup. Ct. 111(d).

STATE v. REED
Opinion of the Court

she owned with Reed. Without citing any applicable authority, Mesenbrink asks this court to order that (1) community property is not subject to the restitution order, (2) the lien be released and (3) the Clerk of the Superior Court record this court's decision with the County Recorder and the Arizona Department of Transportation.

¶23 These requests appear to exceed this court's authority on remand from the Arizona Supreme Court, which is limited to determining "whether the restitution amount is correct." *Reed*, 248 Ariz. at 81 ¶ 33. Given that limited remand, Mesenbrink has not shown how this court has jurisdiction to consider her request to seek relief beyond a challenge to the amount of restitution. *See State v. Healer*, 246 Ariz. 441, 448 ¶ 19 (App. 2019) (finding trial court did not have authority to reconsider consecutive sentences when remand was limited to whether a natural life sentence was appropriate); *see also State v. Young*, 109 Ariz. 133, 134 (1973) (holding that the "scope" of an appeal is limited to the issues on which the case was previously remanded).

¶24 In making these requests, Mesenbrink also misconstrues this court's jurisdiction in this criminal appeal. "Notwithstanding any other law, a restitution lien is created in favor of a victim of the defendant ordered to make restitution." A.R.S. § 13-804(L). Mesenbrink argues the restitution order was recorded with the Recorder's Office "by the Superior Court on its own initiative, through the Clerk of the Superior Court." However, the Clerk of the Superior Court and the County Recorder are authorized officers distinct from the Superior Court. *See* Ariz. Const. Art. 6, § 23 (Clerk of Superior Court); Art. 12, § 4 (county officers); *see also* A.R.S. §§ 12-281 to -290 (Clerk of Superior Court); A.R.S. §§ 11-461 to -484 (County Recorder as County Officer). Accordingly, Mesenbrink's suggestion that the Clerk of the Superior Court's recording the restitution order with the County Recorder was, in fact, the Superior Court's conduct is not supported by the record.

¶25 Nothing suggests that Mesenbrink has requested that the County Recorder or the Clerk of the Superior Court revoke or cancel the recording. Nor does it appear that Mesenbrink has sought such relief by filing an action in the Superior Court. Moreover, the case upon which she relies in seeking relief from this court in this criminal appeal—*Alberta Securities Commission v. Ryckman*, 200 Ariz. 540 (App. 2001) —arose out of a civil case filed in Superior Court seeking to enforce a foreign judgment. Finally, the County Recorder and the Clerk of the Superior Court have not been joined as parties to this appeal and Mesenbrink has not shown how this court would have jurisdiction to provide the relief she seeks. For all these reasons, the relief Mesenbrink requests is denied without prejudice to

STATE v. REED
Opinion of the Court

her seeking relief in an appropriate forum by filing an appropriate action naming and joining the necessary parties.

CONCLUSION

¶26 The restitution award is affirmed.



AMY M. WOOD • Clerk of the Court
FILED: AA

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

STATE OF ARIZONA,

Appellee,

v.

RICHARD ALLEN REED,

Appellant.

No. 1 CA-CR 17-0620

Maricopa County Superior Court
No. CR2015-117844-001

APPELLANT'S OPENING BRIEF

MARICOPA COUNTY PUBLIC DEFENDER

Nicholaus Podsiadlik

State Bar No. 028885

Deputy Public Defender

620 West Jackson, Suite 4015

Phoenix, Arizona 85003

Telephone (602) 506-7711

ACE@mail.maricopa.gov

Attorney for Appellant

TABLE OF CONTENTS

	<u>Page</u>
ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF FACTS AND THE CASE.....	3
SUMMARY	8
ISSUE 1	10

A court cannot impose restitution for consequential losses. Consequential losses are monetary losses that do not flow directly and immediately from the crime, or are temporally or factually attenuated from the crime. Mr. Reed was convicted of voyeurism, but the trial court awarded \$17,909.50 for the victim’s attorney’s fees for preparing the state’s motions, trial theory, and witnesses; investigating the depth of Mr. Reed’s pockets; and serving as a relay for communications between the state and the victim. This was error.

A. Restitution does not include consequential damages, only economic damages; “economic damages” means “losses directly and immediately flowing from the crime” and does not include losses that are temporally or factually attenuated from the crime	10
B. Keller’s attorneys’ fees were not economic damages: they had no nexus to the criminal conduct, were attenuated factually and temporally from the crime, and did not flow directly and immediately from the crime	13
C. Arizona cases show that, under Arizona law, Keller’s fees were not economic damages	18
D. Conclusion	22

TABLE OF CONTENTS – Cont’d

Page

ISSUE 223

A victim may recover only a reasonable amount of restitution for a loss. Keller claimed \$395-\$405 per hour versus the standard Maricopa County rate of \$77 per hour; he apparently double-billed certain items; and he took more time for trivial tasks than a new criminal-law attorney would take. The court erred by blanket-approving all of Keller’s demands without examining them for reasonableness.

ISSUE 329

A victim’s loss must be valued according to fair market rates for the particular object or service that was lost. Keller’s hourly rate was the rate of a corporate attorney, not a criminal-law attorney. The court erred by assigning a value to Keller’s work that did not match the market value for that work, and by awarding restitution for a corporate lawyer rather than a criminal-law lawyer.

ISSUE 432

Restitution may be awarded only for “loss.” Neither the state nor victim presented any evidence that the victim paid or would be forced to pay Keller the amounts he claimed. It was unclear what Keller was hired to do. The court erred by awarding restitution without proof of loss, and for awarding restitution without proof that the claimed expenses arose from Mr. Reed’s crime.

TABLE OF CONTENTS – Cont'd

	<u>Page</u>
ISSUE 5	37
Our justice system does not recognize private prosecution. Keller acted as a private prosecutor. The court erred by forcing Mr. Reed to pay the victim for the victim's private prosecution of Mr. Reed.	
CONCLUSION	44
APPENDIX A (Timesheet Objections) with verbatim narrative descriptions	
APPENDIX B Combined Keller & Gust Rosenfeld information	
APPENDIX C Office of Public Defense Services contract and fee schedule	

TABLE OF CITATIONS

Page

CASES

Federal Cases

<i>Turner v. Samsung Telecommunications Am., LLC</i> , 2013 WL 12126749 (C.D. Cal. Nov. 4, 2013)	3
<i>United States v. Vaknin</i> , 112 F.3d 579 (1st Cir. 1997)	13

Arizona Supreme Court Cases

<i>State v. Hughes</i> , 193 Ariz. 72 (1998)	38
<i>State v. Wilkinson</i> , 202 Ariz. 27 (2002)	12, 18, 20
<i>Town of Gilbert Prosecutor's Office v. Downie ex rel. Cty. of Maricopa</i> , 218 Ariz. 466 (2008)	12, 13, 17, 21, 24, 32

Arizona Court of Appeals Cases

<i>Goodman v. Physical Res. Eng'g, Inc.</i> , 229 Ariz. 25 (App. 2011)	35
<i>In re Stephanie B.</i> , 204 Ariz. 466 (App. 2003)	11
<i>Johnson v. Vederman in and for County of La Paz</i> , 2017 WL 2438059 (Ariz. App. June 6, 2017) (mem.)	38
<i>Schweiger v. China Doll Restaurant, Inc.</i> , 138 Ariz. 183 (App. 1983)	27
<i>State v. Ellis</i> , 172 Ariz. 549 (App. 1992)	11, 30, 31
<i>State v. Fancher</i> , 169 Ariz. 266 (App. 1991)	7
<i>State v. Ferguson</i> , 165 Ariz. 275 (App. 1990)	21
<i>State v. Guilliams</i> , 208 Ariz. 48 (App. 2004)	13, 20, 24
<i>State v. Lewis</i> , 222 Ariz. 321 (App. 2009)	11
<i>State v. Linares</i> , 241 Ariz. 416 (App. 2017)	10, 20, 21, 23, 29, 32, 37
<i>State v. Madrid</i> , 207 Ariz. 296 (App. 2004)	11
<i>State v. Pearce</i> , 156 Ariz. 287 (App. 1988)	20
<i>State v. Sexton</i> , 176 Ariz. 171 (App. 1993)	20
<i>State v. Slover</i> , 220 Ariz. 239 (App. 2009)	12, 15, 18, 19, 20
<i>State v. Snider</i> , 233 Ariz. 243 (App. 2013)	10, 22, 23, 28, 29, 32, 36, 37, 43
<i>State v. Streck</i> , 221 Ariz. 306 (App. 2009)	18, 19, 20
<i>State v. Zamora</i> , 2018 WL 1078464 (Ariz. App. Feb. 27, 2018) (mem.)	25
<i>State ex rel. Romley v. Superior Court</i> , 172 Ariz. 232 (App. 1992)	37

TABLE OF CITATIONS

Page

CASES – Cont’d

Other Jurisdiction Cases

State v. Harrington, 532 S.W.2d 44 (Mo. 1976)38, 39
Kohn v. Barker, 22 Mass. L. Rptr. 451, 2007 WL 1418514
(Mass. Super. Ct. April 4, 2007) (mem.)35

CONSTITUTIONAL PROVISIONS

Arizona State Constitution

Article 2, § 437
Article 6, § 97
Article 12, § 339

United States Constitution

Fifth Amendment37
Fourteenth Amendment 37

RULES

Arizona Rules of Evidence

Rule 201(b)3, 25
Rule 201(b)(1)25, 35

Arizona Rules of the Supreme Court, Rule 42

ER 1.239
ER 3.139

TABLE OF CITATIONS – Cont'd

Page

STATUTES

Arizona Revised Statutes

§ 11-532(A)	39
§ 12-120.21(A)(1)	7
§ 13-105(16)	12
§ 13-804(A)	11
§ 13-804(C)	11, 16
§ 13-804(G)	17
§ 13-4031	7
§ 13-4032(4)	17
§ 13-4033(A)	7

ISSUES PRESENTED FOR REVIEW

1. A court cannot impose restitution for consequential losses. Consequential losses are monetary losses that do not flow directly and immediately from the crime, or are temporally or factually attenuated from the crime. Mr. Reed was convicted of voyeurism, but the trial court awarded \$17,909.50 for the victim's attorney's fees for preparing the state's motions, trial theory, and witnesses; investigating the depth of Mr. Reed's pockets; and serving as a relay for communications between the state and the victim. Was this error?
2. A victim may recover only a reasonable amount of restitution for a loss. The victim's attorney, Craig Keller, claimed \$395-\$405 per hour versus the standard Maricopa County rate of \$77 per hour; he apparently double-billed certain items; and he took more time for trivial tasks than a new criminal-law attorney would take. Did the court err by blanket-approving all of Keller's demands without examining them for reasonableness?
3. A victim's loss must be valued according to fair market rates for the particular object or service that was lost. Keller's hourly rate was the rate of a corporate attorney, not a criminal-law attorney. Did the court err by assigning a value to Keller's work that did not match the market value for that work?
4. Restitution may be awarded only for "loss." Neither the state nor victim presented any evidence that the victim contracted with Keller, paid him any money, or would be forced to pay the amounts he claimed. Did the court err by awarding restitution without proof of loss?

5. **Our justice system does not allow private prosecution. Keller acted as a private prosecutor. Did the court err by forcing Mr. Reed to pay the victim for the victim's private prosecution of Mr. Reed?**

STATEMENT OF FACTS AND THE CASE

A. Pre-Trial

Through February and March 2015, a woman named C.C. pursued a police complaint against Mr. Reed, alleging that he had peered under the door leading into the bathroom in the office they worked in. [Index of Record on Appeal (“I”) 104 at 36, 65]

On April 3, 2015, Craig Keller, a business, construction, real estate, and probate lawyer with the law firm Gust Rosenfeld, sent C.C. a letter stating that C.C. had retained Keller to represent her for “stalking.” [I 119 at 5] Keller does not appear to present himself publicly as a criminal-law attorney, and Gust Rosenfeld does not advertise criminal law services.¹ Keller began, at the rate of

¹ Keller’s customized State Bar biography and law firm biography are attached as Appx. B, along with Gust Rosenfeld’s list of practice areas and litigation areas. These are available at <https://www.gustlaw.com/practice.tpl> and https://www.gustlaw.com/attorneys3.tpl?GustLaw=Craig_L_Keller and appropriate for judicial notice. Ariz. R. Evid. 201(b)(2). *See generally Turner v. Samsung Telecommunications Am., LLC*, 2013 WL 12126749, at *2 (C.D. Cal. Nov. 4, 2013) (gathering cases, observing that “[i]t is not uncommon for courts to take judicial notice of factual information found on the world wide web”).

\$395 and then \$405 an hour, logging what would ultimately become a total amount of \$17,909.50 claimed as restitution for attorneys' fees. [Appx. A² & I 74, Ex. G]

The first items on Keller's billing timesheet, from November 2, 2015, pertain to restitution, even though the trial was still months away. [Appx. A, Nos. 1, 3, 4] Months before trial, he investigated Mr. Reed's property ownership, professional licensing status, and claim of indigency. He claimed \$395-\$405 per hour for this investigation. [Appx. A, Nos. 14, 15, 45, 47, 49]

B. Trial

In February 2016, ten months after Keller sent C.C. the retention letter, Mr. Reed was tried before a jury. He argued that he had looked under the office's bathroom door because he thought C.C. was doing drugs, but the jury returned a guilty verdict for voyeurism. [I 66]

The state prevailed at trial, but Keller later told the court that it was he who had analyzed the case, "work[ed] with the prosecutor, develop[ed] lists of questions for all the witnesses, contact[ed] the witnesses, prepar[ed] them for trial," "resolve[d] factual details in the various stories and defenses," and met with

² For the Court's convenience, Appendix A retains the exact language, dates, and timekeeper initials from Keller's billing timesheet, which is in the record at I 74, Ex. G, while adding reference numbers and a key to Mr. Reed's line-by-line objections. The only change is that C.C.'s name has been replaced with "C.C."

“the prosecutor for strategy sessions at night” during the trial. [Reporter’s Transcript (“RT”) 7/21/17 at 42-43] He also claimed \$3,564 for attending trial for nine hours. [Appx. A, Nos. 62-63]

C. Post-Trial

After trial, the state filed a motion seeking restitution. [I 74] The defense filed a response (titled a “reply”) objecting that Keller had associated himself with the victim only because of his relationship to the victim, that the claimed restitution was unrelated to Mr. Reed’s crime, that the claimed costs were unreasonably high, that the state had not provided documentation of loss, that Keller’s work was duplicative of the work of the prosecutor and Victim’s Advocate, that there was no proof that C.C. actually hired Keller, and that Keller’s billing timesheet required scrutiny. [I 93]

The court held a hearing to determine the restitution. [RT 7/21/17] At the outset of the hearing, the state provided an email that the defense had not seen, including as an attachment a tabulation of restitution by the Victim Compensation Bureau. [*Id.* at 14-15; I 145, Ex. B at 43 *et seq.*] The court took a break to allow the defense to review the document, and, on returning to court, the defense stipulated to all but \$44.55 of the amount requested by the Victim Compensation Bureau. [RT 7/21/17 at 16-17] The parties then argued about the remainder—

Keller's \$17,909.50 in fees. The defense argued that the fees reflected double billing, unreasonable amounts of time spent on trivial and irrelevant tasks, and that the fees were exorbitant. [*Id.* at 45-46, 48] The defense argued that the work resulted from the decisions of Keller and his staff, not the crime. [*Id.* at 46] The defense argued that there was no proof that C.C. actually hired or paid Keller. [*Id.* at 47]

Mr. Reed's attorney and Keller also disputed whether Keller had associated himself with the victim—affirmatively offered his services to C.C.—because of Keller's prior animosity against Mr. Reed personally and Keller's prior relationship with C.C. [*Id.* at 27, 40-43] The defense argued that Keller wanted to punish Mr. Reed for a prior business transaction involving both Keller and Reed that cost Keller money. [*Id.* at 27] The court observed that the hearing had become "personal" and warned that "[t]his is not a hearing about personal vendettas." [*Id.* at 29] Keller denied that he had a "personal vendetta" and professed that he was "exercising my services . . . to present a cogent, well-supported claim for restitution." [*Id.* at 31, 40-43]

Keller took credit for drafting cross-examination questions for trial, contacting witnesses, preparing the witnesses for trial, sitting through the trial, conducting strategy sessions with the prosecutor, resolving factual issues with the

state's case, and addressing potential defenses. [*Id.* at 42-43] He took credit for the successful conviction. [*Id.* at 43-44] He asked the court to award restitution on the basis that the defense had impugned the character of C.C. and of Keller himself. [*Id.* at 43] He explained that he, in fact, had researched and written the motion for restitution—"replete with case law"—submitted under the state's name. [*Id.* at 49-50]³ He declared that "there is nothing nefarious whatsoever about the legal relationship between [C.C.] and Gust Rosenfeld and me as her dedicated attorney." [*Id.*]

The court took the matter under advisement without indicating its view on the requested restitution. [*Id.* at 50-53] The court then issued a minute entry summarily awarding Keller's requested \$17,909.50 in fees, without providing any analysis or rationale for its decision. [I 129]

Mr. Reed filed a timely notice of appeal. [I 130] This Court has jurisdiction under article 6, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031 and 13-4033(A). "Although piecemeal appeals are disfavored . . . [t]he order of restitution is a separately appealable order." *State v. Fancher*, 169 Ariz. 266, 266 (App. 1991) (internal quotation marks omitted).

³ He claimed \$3,604.50 for researching and writing the state's motion. [Appx. A, Nos. 70-71]

SUMMARY

Mr. Keller, who does not appear to present himself publicly as a criminal-law attorney but did have a former relationship with Mr. Reed, associated himself with the victim in this case and charged corporate-law rates to total \$17,909.50 in attorneys' fees. Keller's work appears to have resulted in three outcomes: (1) a successful prosecution, (2) the award of \$40—forty dollars—for the victim, which was the only amount not stipulated to by the parties as part of their agreement to \$3,083.61 in restitution for the victim, and (3) the award of \$17,909.50 for his own fees. The trial court approved the entirety of Keller's claim, over objection, and without explaining its decision.

The issues in this case are closely interrelated. The trial court's ruling violated nearly every rule limiting restitution awards. *First*, as a threshold matter, Keller's fees were not proper for an award of criminal restitution because they were not "economic damages" as defined in our law; they did not flow directly and immediately from Mr. Reed's conduct. Instead, Keller's work was redundant to the state's work or else tangential to the crime. *Second*, even taken on their own terms, the fees were unreasonable because Keller charged his usual hourly fee of \$395-\$405 versus the \$77 hourly fee earned by for most criminal-law attorneys. Even had the high fee been within the range of reasonable criminal-law rates, the

work as a whole was performed in a less-efficient manner than would reasonably be expected of a criminal-law attorney, and a disproportionate amount was performed by Keller rather than an associate or staff. *Third*, the trial court accepted Keller's valuation of his own work without question. But a victim or an entity providing services to a victim does not get to declare the fair value of the claimed services, and the court has an independent duty to consider whether a claimed amount reflects fair value. Keller's fees did not reflect the fair market value for the services of a criminal-law attorney. *Fourth*, neither the state nor Keller entered any evidence that C.C. actually retained Keller; that she retained Keller for his involvement in the crime for which Mr. Reed was convicted; or that C.C. would ever actually need to pay Keller. *Finally*, Arizona does not recognize or allow a victim to hire a private attorney to prosecute a case. The trial court here compensated the victim for the costs of private prosecution, which is neither permitted nor compensable.

ISSUE 1

A court cannot impose restitution for consequential losses. Consequential losses are monetary losses that do not flow directly and immediately from the crime, or are temporally or factually attenuated from the crime. Mr. Reed was convicted of voyeurism, but the trial court awarded \$17,909.50 for the victim's attorney's fees for preparing the state's motions, trial theory, and witnesses; investigating the depth of Mr. Reed's pockets; and serving as a relay for communications between the state and the victim. This was error.

Standard of Review

This Court reviews restitution orders for an abuse of discretion, which occurs if the trial court “misapplies the law or legal principles, or makes a decision unsupported by facts or legal policy.” *State v. Linares*, 241 Ariz. 416, 418 ¶ 6 (App. 2017). If the trial court awarded restitution in error, this would result in an illegal sentence, which is fundamental error. *State v. Snider*, 233 Ariz. 243, 247 ¶ 15 (App. 2013).

Argument

- A. Restitution does not include consequential damages, only economic damages; “economic damages” means “losses directly and immediately flowing from the crime” and does not include losses that are temporally or factually attenuated from the crime

When a defendant has been convicted of a crime, the trial court may order “restitution to be paid by the defendant to any person who suffered an economic loss caused by the defendant’s conduct.” A.R.S. § 13-804(A). The state has the burden of proving a restitution claim by a preponderance of the evidence. *In re Stephanie B.*, 204 Ariz. 466, 469-70 ¶ 15 (App. 2003). The purpose of restitution is to compensate the victim’s economic loss from the defendant’s crime, not to “give the victim a windfall.” *State v. Ellis*, 172 Ariz. 549 (App. 1992). Because restitution focuses on the victim’s economic loss, the court may not consider the defendant’s personal financial situation in determining the amount of restitution. A.R.S. § 13-804(C). Only an “economic loss” that is *directly* “caused by the defendant’s conduct” is recoverable. *State v. Lewis*, 222 Ariz. 321, 324 ¶ 7 (App. 2009). As this Court has repeatedly held:

A loss is recoverable as restitution if it meets three requirements: (1) the loss must be economic, (2) the loss must be one that the victim would not have incurred but for the criminal conduct, and (3) the criminal conduct must directly cause the economic loss.

Id. (quoting *State v. Madrid*, 207 Ariz. 296, 298 ¶ 5 (App. 2004)). “Economic loss” is defined to exclude consequential damages:

“Economic loss” means any loss incurred by a person as a result of the commission of an offense. Economic loss includes lost interest, lost earnings and other losses that

would not have been incurred but for the offense. Economic loss does not include losses incurred by the convicted person, damages for pain and suffering, punitive damages or consequential damages.

A.R.S. § 13-105(16).

Although this definition of “economic loss” uses the phrase “but for,” the Arizona Supreme Court has held that this does *not* encompass the broad “but for causation” test in certain areas of civil law. *State v. Wilkinson*, 202 Ariz. 27, 29 ¶ 7 (2002). “By eliminating consequential damages, the statutory scheme imposes a third requirement: the criminal conduct must *directly* cause the economic loss.” *Id.* Thus, damages cannot be awarded for any costs that do not “flow directly and immediately from the action of [the defendant].” *State v. Slover*, 220 Ariz. 239, 242-43 (App. 2009). Or, as the Arizona Supreme Court has also defined it, “the legislature contemplated a similar definition of ‘loss’ as being ‘out’ something as a result of a crime.” *Town of Gilbert Prosecutor's Office v. Downie ex rel. Cty. of Maricopa*, 218 Ariz. 466, 469 ¶ 11 (2008).

This Court has further defined “consequential damages” to mean losses that concur with the crime itself:

Consequential damages are such as are not produced without the concurrence of some other event attributable to the same origin or cause; such damage, loss, or injury as does not flow directly and immediately from the action

of the party, but only from the consequences or results of such act. The term may include damage which is so remote as not to be actionable.

Id. (emphasis added). If the claimed loss flows “only from the consequences or results” of the crime, then it may not be recovered as criminal restitution (although it may be recoverable in a civil suit). *See id.* The trial court errs by awarding restitution damages where there is an absence of a “nexus” between the crime and the loss. *State v. Guilliams*, 208 Ariz. 48, 53 ¶ 18 (App. 2004) (quoting and adopting *United States v. Vaknin*, 112 F.3d 579 (1st Cir. 1997)).

This Court has described such “remote” damages as “attenuated.” *Id.* It has held that a trial court may award restitution only if “the causal nexus between the [defendant’s] conduct and the loss is not too attenuated (either factually or temporally).” *Id.* Accordingly, the trial court should have asked whether there was a factual and temporal nexus between Mr. Reed looking underneath the bathroom door and Keller’s \$17,909.50 in claimed fees.

B. Keller’s attorneys’ fees were not economic damages: they had no nexus to the criminal conduct, were attenuated factually and temporally from the crime, and did not flow directly and immediately from the crime

Keller's work, and his fees, did not have a sufficient nexus to Mr. Reed's conduct. Keller's fees were factually and temporally attenuated from Mr. Reed's conduct. *See id.*

Keller's fees were factually attenuated. Mr. Reed looked underneath a bathroom door at the place where he and C.C. were employed, whereas Keller and his legal team performed legal research and writing in their law office. C.C. was seen inside a bathroom in the place where she and Mr. Reed were employed, far from Keller's place of employment. C.C. received therapy for her harm suffered by that conduct, which Mr. Reed paid for as part of the parties' stipulated restitution. [I 145, Ex. B at 43 *et seq.* (victim compensation requests); I 127; RT 7/21/17 at 15] Keller did not provide any sort of treatment for the harm suffered by C.C. from the conduct underlying the crime. Because his work was factually attenuated from the crime and its results, it was not proper for an award of criminal restitution.

Keller's work was temporally attenuated. The date of offense was January 29, 2015. [I 5] Keller wrote a letter referring to C.C.'s retention of his firm for "stalking" on April 3, 2015. [I 119 at 5] The date of his first claimed fees were November 2, 2015. [Appx. A, No. 1] His work, then, happened long after the crime, indicating that it was neither "concurrent" with the crime nor did it

“immediately” flow from the crime. *Slover*, 220 Ariz. at 242-43. Because his work was neither concurrent with the crime nor did it immediately and directly flow from the crime, it was not proper for restitution.

Keller’s specific tasks were all also factually and temporally attenuated from—i.e., had nothing to do with—the crime. As Appendix A demonstrates, his work falls into five categories: (1) primarily, he served as an expensive and unnecessary conduit between C.C. and the state entities working on behalf of C.C., which is Objection B in Appendix A; (2) he performed legal work attendant to the *prosecution* and *sentencing* for the crime, redundant to the prosecutor’s work, which is Objection C; (3) he sought to determine Mr. Reed’s finances, which had nothing to do with the crime, see Objections D and E; and (4) he researched and prepared arguments for the state to recover restitution, redundant to the prosecution’s responsibility to do so, which is also Objection C; and (5) he performed work regarding social media that has nothing to do with the crime, also Objections D and E. In short, none of Keller’s specific work was economic loss from Mr. Reed’s looking under a bathroom door. Instead, it was caused by C.C.’s apparent (though unproven, see Issue 4) choice to hire Keller for “stalking”; C.C.’s choice not to communicate with the state’s victims’ services and prosecution employees; either her or Keller’s own choice to redundantly perform the work

already being performed by the state's victims' services and prosecution employees; and, as regarded investigating Mr. Reed's finances and indigent status, Keller's apparent misunderstanding of restitution law, specifically A.R.S. § 13-804(C).

Finally, Keller's role itself had no reasonably foreseeable connection to the crime. He entered the scene, not because of the crime, but because of C.C.'s apparent choice to hire a lawyer. Nothing about the voyeurism crime, or its conduct, required or compelled her to make that choice. This was a criminal case begun and pursued by the State of Arizona, not by C.C. Support from the time of the crime up to the point of prosecution was provided by the police. Thereafter, the state's Victim's Advocate and Victim Compensation Bureau provided support and guidance for C.C. to find treatment, remain involved in the case, catalogue all economic loss related to the crime, and collaborate with the prosecutor to recover all economic loss related to the crime. [See I 145, Ex. B at 43 *et seq.* (letter from the Victim Compensation Bureau to the prosecutor detailing the expenses incurred by C.C. as a result of the crime, "actively seeking restitution" for the amounts, and requesting the prosecutor's "help in securing restitution from this defendant")] The state's prosecutor and staff pursued and won a conviction, which is their job, and stood in a position to ably argue any non-stipulated restitution issues. *See*

A.R.S. §§ 13-804(G) (state may represent victim at restitution hearing), 13-4032(4) (state may appeal on behalf of victim). The only non-stipulated restitution issues were \$40 plus \$17,909.50 for Keller himself. Aside from the fees, all of the restitution, including the \$40, had already been documented and handed over to the prosecutor in a neat package, including a summary of legal authorities, by the Victim Compensation Bureau. [I 145, Ex. B at 43 *et seq.*] Functionally, Keller’s work benefited only himself.

This was not “loss” in the sense intended by our restitution law. “[T]he legislature contemplated . . . ‘loss’ as being ‘out’ something as a result of the crime.” *Town of Gilbert*, 218 Ariz. at 469 ¶ 11. Here, C.C. was not “out” Keller’s attorneys’ fees as a result of Mr. Reed’s conduct. She did not lose those fees; Mr. Reed did not take them or cause them to be incurred. C.C. did not need to spend the fees to make herself whole from Mr. Reed’s conduct or return something to her that she had before the crime but lost because of it. Keller’s fees were not economic “loss” because they were not “lost”—C.C. or Keller himself made a decision to do something unnecessary, to have a lawyer to perform those functions already performed by the state’s prosecutors and victim’s services employees.

C. Arizona cases show that, under Arizona law, Keller’s fees were not economic damages

Arizona case law demonstrates that Keller’s fees were consequential, not economic, damages under *Wilkinson* and *Slover*. The most directly applicable cases are *State v. Slover*, 220 Ariz. 239 (App. 2009) and *State v. Streck*, 221 Ariz. 306 (App. 2009).

Slover is squarely on point. In *Slover*, similarly to here, the victim’s wife hired an attorney to assist in the prosecution of the defendant, and the trial court awarded restitution to pay the attorney’s fees. 220 Ariz. at 242 ¶ 1. Just like Keller, the private attorney in *Slover* admitted that he had worked to bolster the state’s case and “encourage[e]” the police and state to win the prosecution. *Id.* at 243 ¶ 7. Like Keller, the *Slover* attorney “acted in the role of an adjunct prosecutor.” *Id.* ¶ 8. This Court reversed and held that the fees were not proper to award as restitution because they did not flow directly from the crime:

His fees did not flow directly from the defendant’s criminal conduct but rather arose from either the state’s inability to prosecute the case independently and competently or the wife’s mistrust that it would do so. Those factors constituted an additional cause, independent of Slover’s own criminal conduct, that resulted in the attorney fees at issue. . . . Those fees were therefore consequential rather than direct damages

arising from Slover's crime and not recoverable as restitution under Arizona statute.

Id. (citations omitted). In other words, like here, the hiring of a private attorney to act as *de facto* co-counsel to the state resulted, not from the crime, but from the belief that the state would do an inadequate job. But because that decision floats separately from the crime and the harm caused by the crime, it cannot be taxed against the defendant as criminal restitution.

Streck is also instructive. In *Streck*, the defendant stole a tractor, the victim conducted independent investigation to find the tractor, and the trial court ordered restitution for the victim's investigation expenses. 221 Ariz. at 308 ¶ 9. This Court reversed and held that the expenses were not properly awarded as restitution because they were consequential damages. *Id.* It cited *Slover* for the point that expenses that are "actually the state's responsibility . . . and not incurred as a direct result of the offenses" cannot be taxed against the defendant as restitution. *Id.* ¶ 10 (internal quotation marks and brackets omitted). Because, as in *Slover*, "the victim's costs arose from either the state's inability to investigate the case independently and competently or her mistrust that it would do so," the costs could not be said to have arisen from the crime and, therefore, were not properly awarded as restitution. *Id.* (internal quotation marks and brackets omitted).

Slover and *Streck* follow from the well-established principle that restitution is to deprive the defendant of any benefit of his acts and make the victim whole, but not to punish the defendant, give the victim a windfall unobtainable through a civil suit, or encompass expenses incurred through the action or inaction of others besides the defendant. *See also Wilkinson*, 202 Ariz. at 30 ¶ 14 (where a contractor secured a contract through fraud, contractor could not be made to pay restitution for his unworkmanlike conduct because that stemmed from the result of the fraud, not the fraud itself); *State v. Sexton*, 176 Ariz. 171, 173 (App. 1993) (damages resulting from defendant's conduct and action or inaction of others too indirect to recover in restitution); *State v. Pearce*, 156 Ariz. 287, 289 (App. 1988) (lost profits consequential damages of theft not flowing from the acts to which defendant pled guilty).

The same result is reached by applying Arizona's law of restitution pertaining to state expenses. The state cannot recover, as restitution, expenses incurred in the ordinary course of the investigation or prosecution of a crime. *See, e.g., Guilliams*, 208 Ariz. at 55 ¶ 23 (state cannot recover costs of investigating a crime, gathering evidence and testimony, and conducting interviews); *State v. Linares*, 241 Ariz. 416, 418 ¶ 9 (App. 2017) (same). Assuming for the sake of argument that Keller did not simply duplicate the efforts of the prosecutor,

Victim's Advocate, and Victim Compensation Bureau, then he performed work that those parties *should* have done, saving the state its ordinary costs. This would defeat the rule against state reimbursement by allowing the state to simply delegate its work to a private entity. This is forbidden. *See, e.g., Linares*, 241 Ariz. at 418 ¶ 9 (state cannot be reimbursed for examination performed by sexual assault nurse examiner who was under contract by the prosecutor's office and whose work was used in the prosecution).

And the same result can be reached a third way, by applying Arizona's rule that a restitution award must be reduced by the amount of benefits or recovery conferred on the victim by a third party. *See, e.g., Town of Gilbert*, 218 Ariz. at 471-72 ¶ 25 (where unlicensed contractor illegally performed work on victims' house, contractor could not be made to pay restitution for full amount paid because the contractor had actually worked on the house, conferring a benefit on the victim); *State v. Ferguson*, 165 Ariz. 275, 277-78 (App. 1990) (amount of restitution for stolen property must be reduced by value of items recovered and returned). Here, the state conferred the benefits of the Victim's Advocate to handle communication about the case and receive treatment for C.C.'s harm, the Victim Compensation Bureau to recover costs related to the harm, and the prosecutor to obtain a conviction and demand any non-stipulated restitution. Any

valid expenses represented by Keller would need to be reduced by the benefits conferred by the state.

D. Conclusion

Keller's fees did not flow directly and immediately from Mr. Reed's conduct. They were factually and temporally attenuated from the crime. Keller's work was not caused by Mr. Reed; rather, it was caused by C.C.'s or Keller's decision to have an attorney duplicate the work performed by two state agencies. For these reasons, the state failed to carry its burden of proving that Keller's fees represented economic loss, and the trial court erred by taxing Keller's fees against Mr. Reed as criminal restitution over the defense's objections. The error was not harmless. Further, it resulted in an illegal sentence and was, therefore, fundamental. *Snider*, 233 Ariz. at 247 ¶ 15. This Court should reduce the restitution awarded by the amount of Keller's fees, \$17,909.50. *See id.*

ISSUE 2

A victim may recover only a reasonable amount of restitution for a loss. Keller claimed \$395-\$405 per hour versus the standard Maricopa County rate of \$77 per hour; he apparently double-billed certain items; and he took more time for trivial tasks than a new criminal-law attorney would take. The court erred by blanket-approving all of Keller's demands without examining them for reasonableness.

Standard of Review

This Court reviews restitution orders for an abuse of discretion, which occurs if the trial court “misapplies the law or legal principles, or makes a decision unsupported by facts or legal policy.” *Linares*, 241 Ariz. at 418 ¶ 6. If the trial court awarded restitution in error, this would result in an illegal sentence, which is fundamental error. *Snider*, 233 Ariz. at 247 ¶ 15.

Argument

A victim may be awarded restitution for the costs to travel to trial. But if the victim chooses to hire a limousine by the hour, the limousine goes out of its way to pick up the prosecutor and case agent, and the driver ends up on a three-hour detour because he aimed for the wrong courthouse, then the defendant cannot be forced to pay the full cost of the victim's travel. The cost would have been unreasonably expensive for that trip, and, for restitution, “[t]he watchword is

reasonableness.” *Guilliams*, 208 Ariz. at 53; *see also State v. Madrid*, 207 Ariz. at 300 ¶ 13 (amount awarded for a compensable expense must be a reasonable amount). The rule that the amount awarded must be reasonable flows from the principle that restitution makes the victim whole but neither punishes the defendant nor grants a windfall to the victim or a third party. *See Town of Gilbert*, 218 Ariz. at 471-72 ¶ 25. It also reflects the distinction in restitution law between immediate and direct loss versus additional, unnecessary expenses incurred by the choices of someone other than the defendant. *See supra*, Issue 1.

Keller’s fees were unreasonable for the purposes of restitution because his rate was much higher than normal rates for the sort of work he performed, and because his work was performed less efficiently (and so more expensively) than the norm for work of its type. He charged \$395-405 per hour, which is normal for a senior partner at a large law firm doing the sort of corporate work Keller publicly presents himself as doing. But it is not normal for a criminal-law attorney. Contract defense attorneys receive a flat fee of \$1,000 to litigate a Class 5 felony and can request \$77 per hour beyond that amount, with justification. [Appx. C at 19 (Office of Public Defense Services contract and fee schedule)] *Capital* contract attorneys receive \$140 per hour. [*Id.*] Attorneys employed by Maricopa County, such as public defenders and prosecutors, can receive a maximum rate of \$60.74

per hour.⁴ Federal contract defense attorneys receive \$132 per hour for non-capital and \$185 for capital cases.⁵ If Keller’s rate is annualized at \$400 per hour, 40 hours per week, 50 weeks a year, it is \$800,000—far more than any judge, prosecutor, defense attorney, or any other government lawyer earns. Because his claimed rate far outstripped the highest rate that can be used as a metric of “reasonable compensation” for the Class 5 felony criminal-law work in this case, it was an unreasonable amount, and the trial court erred by awarding it in the absence of any proof by the state that it was reasonable. Under the same analysis, his associate’s and staff’s rates—\$230 and \$195 per hour—were also unreasonable on the facts of the case. [I 74 at 35 *et seq.*]

Keller’s specific charges for pieces of work were also unreasonable for the purposes of restitution because they were less efficient than would be expected by a court with general knowledge of Maricopa County criminal law practice. *See* Ariz. R. Evid. 201(b). For example, Keller repeatedly charged \$40, \$80, or more to read and write uncomplicated emails to state employees working on C.C.’s

⁴ *See* <https://www.maricopa.gov/1623/Compensation#A>. Such facts are appropriate for judicial notice. Insofar as this discussion involves the business of law, it is also appropriate, because all judges are lawyers. Ariz. R. Evid. 201(b)(1); *see State v. Zamora*, 2018 WL 1078464, *3 ¶ 11 (Ariz. App. Feb. 27, 2018) (mem.).

⁵ *See* <http://www.azd.uscourts.gov/attorneys/cja/rates>.

behalf. [See Appx. A, *passim*] He charged from \$55.50 to \$197.50 to read rote filings that any regular criminal-law attorney would need to literally only glance at. [Id., No. 19 (\$197.50 to read a minute entry continuing the state’s disclosure-and-request-for-disclosure and the defendant’s 15.2 disclosure); No. 30 (\$55.50 to summarize a trial continuance); Nos. 34, 35 and 38 (\$147.10 to determine the case schedule and defense’s list of witnesses); No. 40 (\$55.50 to “[r]eview case status”); No. 45 (\$162 to review a motion for indigent status); No. 47 (\$81 to read the minute entry for the indigency hearing); No. 58 (\$81 to read a minute entry for a pretrial conference); No. 75 (\$78 to again review the motion for indigent status)] He charged over \$3,000 to research and write the state’s motion for restitution that needed to be (and was) little more than boilerplate law with supporting attachments—both of which, even had the prosecutor never filed such a motion before, were provided in a neat packet by the Victim Compensation Bureau. [I 74 (motion for restitution); I 145 Ex. B at 43 *et seq.* (Bureau letter with legal authorities and itemized lists of compensable expenses)]

Even were Keller the partner overseeing a high-end criminal-law practice, the billing would be unexpected. Keller’s timesheet reflected the work of himself and two others. This resulted in some instances of apparent double billing. [See Appx. A, entries notated with Objection G] But it also leaves in question why so

much of the work was done by Keller himself, particularly the \$400-per-hour communications with state employees. The sorts of lawyers who charge \$400 per hour generally offload as much work as possible to associates to reduce the final bill and avoid a confrontation with the client over over-billing. Here, the situation—Mr. Reed’s status as an unsympathetic person, the lesser protections of a restitution hearing, and Mr. Reed’s lack of any leverage or consent—nullified this sort of concern about billing. But that does not mean that it is “reasonable” for the highest-billing person on a legal team to undertake work that would normally be done by an associate or paralegal. For this reason, the charges related to non-client communications, research, and writing are unreasonable for purposes of restitution.

Keller’s fees, and those of his staff, were not reasonable in light of the amount of other restitution at stake, the quality of work provided, and the kind and extent of work compensable by restitution law. *See Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 187 (App. 1983) (in civil context, “reasonable” attorneys’ fees to be determined by “the qualities of the advocate,” “the character of the work to be done,” “the work actually performed,” and “the result”). He does not appear to commonly practice as a criminal lawyer. The work was dead simple for any junior-to-mid-level prosecutor or defense attorney. The bulk of his work

was to serve as an expensive and unnecessary communications intermediary between C.C., the Victim's Advocate, and the prosecutor. And the result was to recover \$40 beyond what was stipulated to. Even ignoring the stipulation and assuming that the court, in Keller's absence, would completely have denied all the restitution demanded by the state and Victim Compensation Bureau, then Keller's total win would have been \$3,123 against the \$17,909 he charged to win it, a net loss of \$14,786 to his client. No rational person would hire a lawyer for such a scenario. No client would pay such fees absent an extreme markdown or a court order. The trial court erred by awarding \$17,909 without any analysis or proof that it was reasonable on the facts of the case. Because the award was unreasonable, it was impermissible and an illegal sentence that must be vacated. *See Snider*, 233 Ariz. at 247 ¶ 15.

ISSUE 3

A victim’s loss must be valued according to fair market rates for the particular object or service that was lost. Keller’s hourly rate was the rate of a corporate attorney, not a criminal-law attorney. The court erred by assigning a value to Keller’s work that did not match the market value for that work, and by awarding restitution for a corporate lawyer rather than a criminal-law lawyer.

Standard of Review

This Court reviews restitution orders for an abuse of discretion, which occurs if the trial court “misapplies the law or legal principles, or makes a decision unsupported by facts or legal policy.” *Linares*, 241 Ariz. at 418 ¶ 6. If the trial court awarded restitution in error, this would result in an illegal sentence, which is fundamental error. *Snider*, 233 Ariz. at 247 ¶ 15.

Argument

The issue of valuation is similar to the reasonableness of Keller’s fees. The two are not, however, identical. Keller’s fees were unreasonable in light of his apparent qualifications, the hourly rates incurred by other attorneys doing this sort of criminal-law work, the work actually performed, and the result achieved. But the court also erred by accepting his valuation of his own work rather than

applying the methodology required by Arizona’s law of restitution. This Court explained this methodology in *State v. Ellis*, 172 Ariz. 549 (App. 1992).

In *Ellis*, the defendant sold property belonging to the victim, and the trial court awarded restitution in the amount of the original purchase price of the property. 172 Ariz. at 550. This Court reversed, holding that the victim could receive restitution only for the fair market value of the property at the time of the loss. *Id.* To do otherwise would punish the defendant and give a windfall to the victim, rather than simply make the victim whole for the loss. *Id.* The Court also held that the rule was not inflexible and that a court had discretion to award more if necessary to make the victim whole—for example, where the loss was a brand new item that loses significant market value immediately upon sale, like a car. *Id.* at 551. But, absent this type of loss, the trial court has a duty to determine the fair market value of the victim’s loss rather than simply accept the victim’s proposed value. *See id.*

Even assuming that Keller’s fees were reasonable economic loss—which they were not, *see supra* Issues 1 and 2—the trial court did not inquire into, and had no evidence to conclude, that Keller’s hourly fees of \$395-405 per hour and his associate’s and staff’s fees of \$230 and \$195 per hour reflected fair market value. As demonstrated *supra*, in Issue 2, state contracted criminal defense

lawyers are paid \$77 per hour and federal contracted lawyers are paid \$132 per hour. Those rates represent the fair market value for one hour of work on a criminal case. Our economy does not—alas—treat legal work as fungible. Even in the realm of the largest commercial law firms with the most gigantic of clients, a partner cannot charge his hourly rate to review documents. Public interest attorneys generally earn far less than their private counterparts, even when performing the same legal work in the same field of practice. And out in the wild of small private practice, criminal lawyers generally command lower rates than commercial litigation or transactional attorneys. No lawyer would expect to earn the same rate when making money for large businesses as when grubbing in the fields of state criminal law. Compensating the victim for the hourly fee of a large law firm corporate attorney rather than the rate earned by the vast majority of criminal defense attorneys is like compensating a victim who lost a car, a 1988 Ford Escort, with the price of another car, a 2018 Ford Mustang, on the basis that both of these things are “a car.”

In sum, the trial court did not consider whether Keller’s rates represented the fair market value of his work in this particular case and for these particular legal issues. Keller’s rates did not represent the fair market value. This was error, and this Court should reverse. *See Ellis*, 172 Ariz. at 551.

ISSUE 4

Restitution may be awarded only for “loss.” Neither the state nor victim presented any evidence that the victim paid or would be forced to pay Keller the amounts he claimed. It was unclear what Keller was hired to do. The court erred by awarding restitution without proof of loss, and for awarding restitution without proof that the claimed expenses arose from Mr. Reed’s crime.

Standard of Review

This Court reviews restitution orders for an abuse of discretion, which occurs if the trial court “misapplies the law or legal principles, or makes a decision unsupported by facts or legal policy.” *Linares*, 241 Ariz. at 418 ¶ 6. If the trial court awarded restitution in error, this would result in an illegal sentence, which is fundamental error. *Snider*, 233 Ariz. at 247 ¶ 15.

Argument

“The concept that restitution compensates victims only for loss *actually suffered* is well established.” *Town of Gilbert*, 218 Ariz. at 469 ¶ 12 (emphasis added). Neither the state nor Keller entered evidence sufficient for the trial court to find, by a preponderance of the evidence, that C.C. actually suffered the loss of Keller’s fees for his work on Mr. Reed’s criminal case.

The best evidence to support the court’s implicit finding that C.C. actually suffered the loss of Keller’s fees is as follows:

- An affidavit by Keller stating that “[C.C.] has incurred the amount of \$17,909.50 in attorneys’ fees and costs to represent [her] as a victim and has been billed or will be billed.” [I 74 at 32-34]
- A letter from Keller to C.C. stating that “[i]t is our understanding that you have presently retained this firm to represent you with regard to the criminal matter of Stalking where you are the victim.” [I 119 at 5] This letter requests an initial retainer of \$500 and attaches the “Terms of Engagement for Legal Services,” which provides ranges of hourly rates that might be charged. [*Id.* at 7-10]

Certain evidence entered by Keller strongly suggests that C.C. did *not* agree to pay Keller’s fees related to the charges of voyeurism against Mr. Reed:

- Keller filed a declaration of C.C., evidently prepared by him given that it bears the same document-version stamp as Keller’s other filings. [*Id.* at 3-4] C.C.’s declaration affirms three kinds of expenses: lost wages, therapy, and movement costs. It does *not* state that C.C. hired Keller for any purpose or ever agreed to pay Keller for his claimed fees.

From this evidence, four conclusions must be drawn. First, there is no evidence to show that C.C. in fact retained Keller. There is no document with C.C.'s agreement either to retain Keller or to pay him the fees he later argued that Mr. Reed should pay. There is no evidence that the \$500 retainer was ever paid or that C.C. agreed to pay the rates Keller disclosed in his letter. C.C. did not testify at the restitution hearing. [I 127; RT 7/21/17] For all the evidence shows, Keller may have inserted himself into the case without C.C.'s agreement or acquiescence. For all the evidence shows, even if C.C. did acquiesce, she did not agree to pay Keller anything for the involvement. Thus, because neither the state nor Keller offered any evidence that C.C. agreed to Keller's rates, there was no evidence that C.C. entered into an obligation to pay, and so the trial court had no basis to conclude that C.C. had or would suffer the loss of Keller's fees. This basic axiom of the common law—the requirement of offer, acceptance, and consideration—is the law in Arizona:

For a valid contract to have been formed between them, there must have been an offer, acceptance of the offer, and consideration, and they must have intended to be bound by the agreement. An offer has no binding effect unless and until accepted by the offeree to whom the offer was directed.

Goodman v. Physical Res. Eng'g, Inc., 229 Ariz. 25, 28 ¶ 7 (App. 2011) (citations omitted). The trial court erred by presuming an agreement that was not in the record.

Second, there is no evidence that, even if C.C. had retained Keller, she retained him for Mr. Reed's criminal case. Keller's unilateral retention letter says that he was retained for "stalking." His timesheet reflects that he spent some time looking at and communicating about a LinkedIn screenshot and a posting on Facebook. [Appx. A, Nos. 8, 9, 50] Even if Keller's retention letter were presumed to reflect an agreement between C.C. and Keller, it pertained only to those few "stalking" related issues. As far as the record shows, the rest of Keller's work may have been a frolic.

Third, there is no evidence that Keller ever asked C.C. to pay his claimed fees. Keller's affidavit vaguely mentions that Keller either had or intended to submit the fees to C.C. for payment, but there was no evidence that he ever did, or that C.C. ever paid him. No demand for payment is in the record, nor is there any receipt of payment.

Finally, as any judge knows, attorneys rarely collect the full sum of their fees, and writeoffs are common. *See* Ariz. R. Evid. 201(b)(1); *Kohn v. Barker*, 22 Mass. L. Rptr. 451, 2007 WL 1418514, *5 (Mass. Super. Ct. April 4, 2007) (mem.)

“I believe that, under all the circumstances, the maximum *reasonable* charge for the legal services rendered would be \$150,000. In reaching this conclusion, I have in mind the common (albeit unpleasant) necessity that at one time or another afflicts every practitioner, viz., the need to ‘write off’ or ‘eat’ a portion—sometimes a large portion—of the ‘billable hours’ and their attendant fees.”). Even if Keller supposed that C.C. might actually pay him nearly \$18,000 for the recovery of \$40, or \$3,000, there is no reason to believe that C.C. would have ultimately paid anything like the fees on paper.

For these reasons, the trial court erred because it had no basis to conclude that C.C. suffered a loss in the amount of Keller’s fees. This resulted in restitution without supporting evidence, which is an illegal sentence that should be reversed. *See Snider*, 233 Ariz. at 247 ¶ 15.

ISSUE 5

Our justice system does not recognize private prosecution. Keller acted as a private prosecutor. The court erred by forcing Mr. Reed to pay the victim for the victim's private prosecution of Mr. Reed.

Standard of Review

This Court reviews restitution orders for an abuse of discretion, which occurs if the trial court “misapplies the law or legal principles, or makes a decision unsupported by facts or legal policy.” *Linares*, 241 Ariz. at 418 ¶ 6. If the trial court awarded restitution in error, this would result in an illegal sentence, which is fundamental error. *Snider*, 233 Ariz. at 247 ¶ 15.

Argument

A person accused by the state of a crime has the right to due process in the state's prosecution of the crime. Ariz. Const. art. 2, § 4; U.S. Const. amends. V and XIV. “Due process” includes “fundamental fairness.” *State ex rel. Romley v. Superior Court*, 172 Ariz. 232, 237 (App. 1992).

It violates due process to allow a private attorney, who represents the victim in a criminal case, to help prosecute the criminal case.⁶ *State v. Harrington*, 532 S.W.2d 44 (Mo. 1976) is on point. In *Harrington*, the victim’s family hired a private attorney to help prosecute the defendant. 532 S.W.2d at 48. The Supreme Court of Missouri, writing en banc, held that “the practice of allowing private prosecutors, employed by private persons, to participate in the prosecution of criminal defendants, is inherently and fundamentally unfair.” *Id.* The court held that the participation of private attorneys hired by victims in the prosecution of a case violated due process. The court’s reasoning applies to Arizona’s laws as much as Missouri’s, and this Court recently followed *Harrington* in an analogous case in an unpublished decision, *Johnson v. Vederman in and for County of La Paz*, 2017 WL 2438059 (Ariz. App. June 6, 2017) (mem.).

First, collaboration between a victim’s attorney and the state in a prosecution is ethically untenable. A prosecutor is a “minister of justice” who “has a duty to see that defendants receive a fair trial.” *State v. Hughes*, 193 Ariz. 72, 80 ¶ 33 (1998). A private attorney, by contrast, is duty-bound to press the interests of his

⁶ Had this information been available to counsel prior to Mr. Reed’s initial appeal from his conviction, it would have been raised in that appeal. Counsel has communicated with Matthew Brown, the attorney appointed for Mr. Reed’s post-conviction relief proceedings, and asked that the issue be raised at that stage.

client—the victim—without regard for the constitutional rights of the defendant. R. Sup. Ct. Ariz. 42, ER 1.2, 3.1 cmt. 1; *Harrington*, 532 S.W.2d at 48-49. The private attorney’s involvement “invites error from an excess of zeal which might well be avoided by leaving the conduct of a criminal prosecution entirely in the hands of the elected official upon whom such duty has been placed.” *Harrington*, 532 S.W.2d at 48. Whereas the private attorney must work purely for his client, presenting all facts and law to favor his client, “[i]t is [the public prosecutor’s] duty to show the whole transaction as it was, regardless of whether it tends to establish a defendant’s guilt or innocence.” *Id.* at 49. The criminal justice system is a balance between punishment and protection, because it serves the people—and “the people” includes the defendants. Allowing private prosecution would topple that balance.

Second, as in Missouri, Arizona requires that prosecutions be conducted by individuals who are responsible to the voters. Ariz. Const. art. 12, § 3 (requiring that the county attorney be elected); A.R.S. § 11-532(A) (“The county attorney is the public prosecutor of the county.”). This system means that prosecutors must, at some point, answer to the electors for any abuses of their power. “[The prosecutor] is not an advocate in the ordinary sense of the word, but is the people’s representative . . . The prosecutor is an officer of the state” *Harrington*, 534

S.W.2d at 49. Private attorneys, of course, are answerable to no one other than their clients, so long as they act within the ordinary rules of ethics. Allowing private prosecution creates an alternative system of criminal justice that is beyond the reach of the voters and beholden to nothing other than the private prosecutor's business interests.

Third, the criminal justice system risks the corruption of illegitimate influence if aggrieved individuals can pay money to an attorney for the explicit purpose of convicting their enemy. Unlike a prosecutor who is paid by the state, a private attorney is paid by the victim. His incentive is, by definition, "private gain" as opposed to "seeing that the criminal laws of the state are honestly and impartially administered." *Id.* A private attorney must think of his business. If a private attorney is allowed to take money to obtain convictions, then the attorney's livelihood will depend on building a reputation of obtaining convictions, just as a private defense attorney justifies his fee by pointing to past verdicts of "not guilty" or other favorable outcomes. Allowing private prosecution exposes the criminal justice system to "prejudicial influence." *Id.* at 50.

Here, Keller stood before the trial court and took credit for the prosecution:

We helped [C.C.] from day one in terms of analyzing the claim, describing what she can expect with the prosecutor, developing [a] list of questions for all of the witnesses, contacting witnesses, preparing

them for the trial, sitting through the trial, meeting with her and prosecutor for strategy sessions at night, making sure that she understood exactly what was expected of her, working to resolve factual details in the various stories and the defenses that would come up.

[RT 7/21/17 at 42-43]

He asked the trial court to give him the restitution because he had succeeded in the prosecution:

And so you could say: Look, you, as a private counsel, incurred or rendered services which led to a bill of nearly \$18,000. . . . [T]his is a direct, out-of-pocket expense . . . for which the victim in this case received services, benefits, and successfully made it through the system and is recovering.

[*Id.* at 43-44]

Keller asked the trial court to punish Mr. Reed through restitution based on his culpability, and because Mr. Reed had thrown mud at Mr. Keller's client and insulted Keller personally:

I ask you to consider seriously the perspective of this case. This was a throw-the-victim-under-the-bus case. . . . It was attack [*sic*] the personal character of the victim in this case. Now apparently it's attack the personal character of the victim's lawyer in this case

[*Id.* at 43]

Keller told the court that he had written the prosecutor's motion for restitution, praised that motion and his own dedication, and defended his reputation as an ethical biller in the third person:

And if you break down the mathematics of the [entries on Keller's timesheet] what the Court will see is the restitution motion that was ultimately filed that was replete with case law, and I did read and re-read and study and chart out all of the cases on restitution so that when I—when I came before this Court I could talk about those cases in good conscience and ethically and support my client's position as opposed to this broad brushstroke that says I, Keller, triple charges.

...

[T]here is nothing nefarious whatsoever about the legal relationship between [C.C.] and Gust Rosenfeld and me as her dedicated attorney.

[*Id.* at 49-50]

Keller's timesheet similarly reflects that a large part of his fees was for his involvement as a private prosecutor, including legal research, preparing a comprehensive strategy to present the state's witnesses and attack Mr. Reed's testimony, preparing the prosecutor for trial, preparing the evidence, drafting cross-examination questions, helping gather and analyze victim impact statements at behest of the prosecutor, and research and write the restitution issue to be submitted under the state's name. [Appx. A, Nos. 15, 21, 25, 42, 54, 56, 59, 61, 63-67, 70-71]

Private prosecution does not serve the interests of justice. It does not dignify the court. The trial court erred by awarding Keller's fees for his work as a private prosecutor. Keller's involvement was improper, and taxing Mr. Reed for the costs of Keller's private prosecution was also improper. This resulted in an unlawful order of restitution, which is an illegal sentence that should be reversed. *See Snider*, 233 Ariz. at 247 ¶ 15.

CONCLUSION

The trial court taxed Mr. Reed for the victim's attorney's claimed fees of \$17,909.50. The attorney's work did not flow directly and immediately from the crime. It arose from the victim's decision not to speak with the state's employees and apparent belief that the state would not do its job. The attorney, a corporate lawyer, charged an unreasonable amount in light of the work performed. The court did not question whether the attorney's fees reflected the fair market value of a criminal-law attorney's work. The state and victim provided no evidence of actual loss or a substantiated expectation of future loss. The court's award of attorneys' fees blessed the victim's attorney's role as a private prosecutor. In sum, the trial court's decision violated every limit on restitution. Mr. Reed respectfully asks this Court to reduce the order of restitution by the amount of the victim's attorney's fees, \$17,909.50.

Respectfully submitted,

MARICOPA COUNTY PUBLIC DEFENDER

By _____ /s/
Nicholaus Podsiadlik
Deputy Public Defender
Attorney for Appellant

SFNP032018P

Appendix A
(Timesheet Objections) with verbatim narrative descriptions

Appendix A: Table of Attorneys' Fees (I 74, Ex. A) and Objections

A key to these objections follows the table.

#	Date	Initials	Amount	Task	Objections
1	11/2/15	CLK	\$39.50	"Review email from Julie Williams at Victim Services about restitution."	A, B
2	11/2/15	CLK	\$39.50	"Read and respond to email from Prosecutor Jennifer Carper."	B
3	11/2/15	CLK	\$79	"Draft email to C.C. about restitution claim and recent communications with Victims Services representative."	A, B
4	11/2/15	CLK	\$79	"Draft email letter to Julie Williams about recent plea offer and restitution claim."	A, B, C
5	11/3/15	CLK	\$79	"Read C.C.'s comments on proposed plea deal and draft email response."	B, C
7	11/3/15	CLK	\$158	"Draft email letter to Victims' Rights representative providing comments to proposed plea deal"	B, C
8	11/9/15	CLK	\$79	"Review LinkedIn screen shot; draft letter to Prosecutor about Rick Reed's attempts to"	D
9	11/19/15	CLK	\$118.50	"Email from Shelby Lile regarding Rick Reed's review of C.C.'s social media; reach C.C. via social media."	D
10	12/1/15	CLK	\$79	"Email to C.C.."	E
11	12/1/15	CLK	\$592.50	"Further review of standard terms of probation for sexual offenses and notes of last conversation with prosecutor."	B, C, F
12	12/1/15	CLK	\$237	"Telephone call to C.C. to discuss plea offer terms."	B, C, F
13	12/1/15	CLK	\$197.50	"Prepare letter to newly assigned Prosecutor about C.C.'s response to plea terms."	B, C, F
14	12/2/15	CLK	\$79	"Review email information provided by C.C. on Rick Reed's broker status."	D
15	12/3/15	CLK	\$79	"Review expenses and right to restitution."	A, C

16	12/4/15	CLK	\$79	"Conference with M. E. McAllister regarding restitution claim, back-up information."	A, F
17	12/7/15	CLK	\$158	"Conference with M. E. McAllister regarding counseling expenses and restitution claim; review claim letter."	A, F, G
18	12/9/15	CLK	\$79	"Revise letter to C.C. regarding restitution claims."	A, B, C
19	12/15/15	CLK	\$197.50	"Read Minute Entry dated 12/04/2015 continuing trial State's Notice of Disclosure and Request for Disclosure filed 6/23/2015, and Disclosure by Defense 15.2."	C, F
20	12/15/15	CLK	\$79	"Draft letter to C.C. about State's Disclosure and Defendant's Disclosure."	C
21	12/17/15	CLK	\$197.50	"Read several emails from C.C. and think about ramifications on case at trial."	B, C
22	12/17/15	CLK	\$158	"Telephone call to C.C.."	E, F
23	12/23/15	CLK	\$79	"Review and revise letter to prosecutor with update restitution claim."	A, B, C, G
(end page 1 of exhibit)					
24	11/5/15	SL2	\$132	"Draft status letter to C.C.."	C
25	12/2/15	MEM	\$240.50	"Work on substantiating client's expenses and strategize reimbursement issue for treatment going into the future."	A, C
26	12/3/15	MEM	\$148	"Review case file and correspondence from client for documentation and itemization of out-of-pocket expenses."	A, C, G
27	12/3/15	MEM	\$37	"Email exchanges with client regarding salary breakdown and hours away from work."	A, B, C
28	12/4/15	MEM	\$111	"Finalize comprehensive restitution letter to Prosecutor."	A, B, C, G
29	12/7/15	MEM	\$55.50	"Telephone conference with Victim Advocate J. Williams regarding status of proceedings and	A, B

				restitution information.”	
30	12/7/15	MEM	\$55.50	“Summarize information regarding Court’s action on 12-4-15 canceling current trial setting and associated details and provide to C. Keller.”	C, F
31	12/7/15	MEM	\$111	“Revise restitution letter to Prosecutor J. VanHelder itemizing C.C.’s mileage and therapy visit expenses.”	A, B, G
32	12/7/15	MEM	\$92.50	“Telephone calls with Julie Williams, Victim Advocate and the Court following up on new trial date in 2016, and communication protocol with prosecutor, court and victim compensation fund.”	B, F
33	12/8/15	MEM	\$74	“Telephone conference with D. Gonzales from Victims Compensation Board for restitution information.”	A, B
34	12/8/15	MEM	\$55.50	“Telephone conference with D. Schinaberger, Judicial Assistant to Judge Foster, regarding case status and to confirm rescheduled trial and request minute entry from court, and hearing procedures in the future.”	C, F
35	12/8/15	MEM	\$55.50	“Telephone conference Prosecutor’s paralegal requesting List of Witnesses from defendant, and to convey keeping us informed regarding court documents and schedule changes.”	B, C
36	12/9/15	MEM	\$148	“Summarize collective information from the Victims Compensation Board, Victims Advocate and the Prosecutor’s office and provide to C. Keller.”	C
37	12/9/15	MEM	\$259	“Draft comprehensive update letter to client with new information regarding her pursuit of restitution and status of the case State vs. Reed.”	A, B
38	12/14/15	MEM	\$37	“Telephone call to Nicole Hood at Prosecutor’s office regarding status of copies of Minute Entry	B, C

				and Defendant's Disclosure with List of Witnesses."	
39	12/15/15	MEM	\$37	"Telephone follow up with N. Hood, prosecutor's paralegal on getting copies of Minute Entry and List of Witnesses from Defendant."	B, C
40	12/17/15	MEM	\$55.50	"Review case status regarding most recent communications with client and prosecutor's office about defendant's disclosure."	C, F, G
41	12/17/15	MEM	\$148	"Analyze new information from client's forwarded e-mails exchanged with Rick T. on defendant's witness list and prepare for telephone conference with client."	C
(end of page 2 of exhibit)					
42	12/17/15	MEM	\$277.50	"Comprehensive telephone conference with client regarding each witness listed in the defendant's disclosure, their relationships with C.C. and with R. Reed and what each may testify to."	B, C
43	12/23/15	MEM	\$92.50	"Prepare letter to Prosecutor with additional information regarding restitution claim."	B, C
44	12/23/15	MEM	\$55.50	"Revise letter to Prosecutor with updated calculations for damages regarding restitution claim."	B, C, G
(end page 3 of exhibit)					
45	1/6/16	CLK	\$162	"Review motion for indigent status."	D, F, G
46	1/7/16	CLK	\$202.50	"Telephone call with Prosecutor regarding case status and preparations required for trial."	B, C, F
47	1/12/16	CLK	\$81	"Read minute entry on indigency hearing."	C, D, F
48	1/19/16	CLK	\$121.50	"Review information provided to Prosecutor"	C, E
49	1/20/16	CLK	\$162	"Review property information on Reeds' real estate ownership and	C, D

				indigency statements.”	
50	1/21/16	CLK	\$81	“Review posting on Facebook about Shannon Hershkowitz, email to client.”	C, D, F
51	1/26/16	CLK	\$202.50	“Conference with C.C. to address her questions about Reed trial.”	B, C
52	1/27/16	CLK	\$121.50	“Several emails and calls from Prosecutor and Victims’ Rights representative about trial.”	B, C
53	1/27/16	CLK	\$202.50	“Email to and from C.C. regarding trial date is firm and answering client’s questions.”	B, C
54	2/1/16	CLK	\$202.50	“Telephone from Julia VanHelder regarding trial preparation and evidentiary issues; email to Ms. VanHelder and client.”	B, C
55	2/1/16	CLK	\$81	“Telephone from C.C. to discuss my call with Prosecutor and preparation meeting.”	B
56	2/5/16	CLK	\$972	“Meeting with Prosecutor and Victim’s Rights Advocate to prepare for criminal trial.”	B, C
57	2/8/16	CLK	\$81	“Receive emails from Prosecutor that plea offer not accepted; email to C.C. about case status.”	B, F
58	2/9/16	CLK	\$81	“Read Minute Entry on Pretrial Conference.”	C, F
59	2/11/16	CLK	\$121.50	“Telephone to C.C. regarding Prosecutor’s question on facts of the incident; email to Prosecutor.”	B
60	2/16/16	CLK	\$243	“Several emails to/from Prosecutor and C.C. regarding Motions in Limine, trial issues and status.”	B, C
61	2/16/16	CLK	\$121.50	“Telephone call with Prosecutor regarding trial strategy and cross-examination potential topics.”	C
62	2/17/16	CLK	\$2,227.50	“Attend Richard Reed’s criminal trial; meeting with C.C., Prosecutor and Victim’s Rights Advocate”	C, F
63	2/18/16	CLK	\$1,336.50	“Attend Richard Reed’s criminal trial, day #2; telephone call with C.C. and conference with C.C. and Prosecutor about guilty verdict.”	C, F

64	2/26/16	CLK	\$121.50	"Review email from Prosecutor regarding victim impact statements; email from/to C.C. regarding need to complete victim impact statements."	B, C
65	3/17/16	CLK	\$121.50	"Read draft victim impact statement of Deborah Brinkman; re-read Arne Stenseth's statement."	C
66	3/17/16	CLK	\$283.50	"Telephone call to C.C. to discuss victim impact statement drafts and sentencing hearing."	B, C
67	3/25/16	CLK	\$162	"Read victim impact draft statements from Eric Smith and others."	C
68	3/30/16	CLK	\$121.50	"Review correspondence on revised restitution claim."	C, G
69	3/31/16	CLK	\$324	"Review emails to/from C.C. regarding restitution claim."	C, G
(end of page 4 of the exhibit)					
70	4/13/16	CLK	\$1,539	"Legal research on restitution claim; review draft Motion; call with C.C."	C
71	4/14/16	CLK	\$2,065.50	"Conclude legal research; draft and revise Motion for Restitution."	C
72	1/4/16	SL2	\$46	"Emails with C.C. and C. L. Keller regarding R. Reed."	E
73	1/5/16	SL2	\$23	"Review email from C.C."	B, E
74	1/11/16	SL2	\$92	"Review email from C.C.; emails with C. L. Keller and C.C."	B, E
75	1/21/16	MEM	\$78	"Review R. Reed's Motion for Indigent Status to identify his claims regarding any property ownership."	D, F, G
76	1/26/16	MEM	\$58.50	"Telephone conference with C. Keller to convey information from Prosecutor's office prior to meeting with C.C."	B, C
77	1/26/16	MEM	\$78	"Prepare summary of updates in case regarding Indigent Status of defendant; upcoming delay of current trial date; and status of evaluation conducted on	C

				defendant that was not accepted by Prosecutor.”	
78	3/30/16	MEM	\$117	“Work on draft of updated restitution letter for prosecutor.”	B, C, G
79	3/30/16	MEM	\$39	“Research current mileage rate for 2016 and consult with D. Gonzales from Victim’s Compensation regarding approved rate to use for C.C.’s travel.”	C, G
80	3/30/16	MEM	\$78	“Complete first draft of updated restitution letter and provide to attorney C. Keller for review.”	B, C, G
81	3/31/16	MEM	\$78	“Review food expenses and revise letter for restitution claim.”	C, F, G
82	3/31/16	MEM	\$156	“Review moving related expenses and receipts to include in restitution claim and revise letter.”	C, F, G
83	3/31/16	MEM	\$39	“Telephone call with C.C. regarding cost of therapy sessions and reimbursement to Victim’s Fund.”	B, C
84	3/31/16	MEM	\$117	“Multiple e-mails with C.C. forwarding several drafts of restitution letter for review.”	B, C
85	3/31/16	MEM	\$78	“Finalize updated restitution letter and figures and e-mail it to prosecutor J. VanHelder.”	C, G
86	3/31/16	MEM	\$19.50	“Respond to prosecutor J. VanHelder’s request for status on Victim’s Impact Statements.”	B, C
87	3/31/16	MEM	\$19.50	“Email C.C. to request status on Victim’s Impact Statements.”	B, C

Key to objections:

A: Premature (*pre-trial*) research and communication related to restitution.

B: Acting as an unnecessary and unreasonably expensive conduit between victim and prosecution, Victim’s Advocate, and Victim Compensation Board.

C: Unnecessary work on matters already performed by the prosecution, Victim’s Advocate, or Victim Compensation Board, such as reviewing the plea deal, “thinking about” and then litigating the trial by preparing witnesses, resolving problems in the state’s case, writing cross-examination outlines, tutoring

the prosecutor on trial strategy during the trial, preparing aggravation material for sentencing, drafting the prosecution's motion, and performing the state's argument at the restitution hearing.

D: Work has no relation to the crime or case.

E: Relevance to crime or case is unexplained.

F: Cost is facially unreasonable for work performed.

G: Apparent double billing (billing for work already done or done by another).

Appendix B

Combined Keller & Gust Rosenfeld information



GUST ROSENFELD

Attorneys Since 1921 P.L.C.

■ Phoenix 602.257.7422 ■ Wickenburg 928.684.7833 ■ Tucson 520.628.7070



Craig L. Keller

Craig Keller has been litigating business, construction, real estate, and probate and trust cases for more than 34 years. He has also been assisting businesses of all sizes to form corporations, limited liability companies, partnerships and joint ventures, asset acquisition and sale, and employment matters. Craig has argued appeals in the Ninth Circuit Court of Appeals, the Arizona Supreme Court, and the Arizona Court of Appeals.

Additionally, he has been involved in all areas of estate planning including wills and trusts, premarital agreements, business succession planning and trust and probate administration. He litigates claims involving trustees, personal representatives and for exploitation of vulnerable adults as well as for beneficiaries. His practice also includes representing multi-employer benefit plans for trades in the construction industry including pension trust funds.

Craig serves as a mediator and arbitrator in various commercial matters including business and corporate disputes, real estate disputes, and trust and estate matters. He is a former arbitrator of the American Arbitration Association.

Craig L. Keller
602.257.7663
CKeller@gustlaw.com



PRACTICE AREAS

Litigation and Appeals
Business/Corporate Law
Wills/Trusts/Estates and
Litigation
Real Estate
Transactions/Litigation
Alternative Dispute
Resolution

EDUCATION

University of Arizona (B.A. with highest distinction; Phi Beta Kappa, Phi Kappa Phi, 1979)
University of Arizona, College of Law (J.D., 1982)
Harvard Law School, Program of Instruction for Lawyers

ADMISSIONS

Arizona, 1982
United States District Court, District of Arizona, 1982
Ninth Circuit Court of Appeals, 2002
United States Supreme Court, 1987

PROFESSIONAL ASSOCIATIONS

Maricopa County Bar Association
Association for Conflict Resolution
Arizona Town Hall

PRESENTATIONS AND PUBLICATIONS

State Bar of Arizona, "Fees, Fee Agreements and the Forms You Need to Make Them Work" October, 2007

PET. APPENDIX 90

⚡ Gust Rosenfeld P.L.C.



Tempe Coalition to Reduce Underage Drinking and Drug Use, Coalition Chairman 2016 to present, Member 2012 to present, Public Policy Committee Member 2010 – 2013

Tempe Sister Cities, Student Delegate Selection Committee and current Chairman (2007 to present), Board Member (2014 to present)

Desert Caballeros Western Museum, Past President (1999 to 2000) and Board member (1985 to 2001; 2014 to present), Secretary (2014 to present)

Del E. Webb Center for the Performing Arts, President (2011 to 2014); Board Member (2008 to 2015)

South Tegner Street Redevelopment Committee, Wickenburg, AZ (2014)

University Club of Phoenix, Past President (1994 and 1995), Board Member (1992-1996)

Wickenburg Rotary Club, Past President (1994 and 1995) and Board Member (1993-1996), Member (1988 to present)

Wickenburg Town Manager Selection Panel (2017)

[Return to Attorneys](#)



[RECRUITMENT](#) | [OFFICES](#) | [DIVERSITY](#) | [LEGAL NOTICE](#)

©2017 All Rights Reserved Gust Rosenfeld P.L.C.

[SITE MAP](#)



Mr. Craig L Keller



Status: Active

Board Certified Specialization: None

Areas of Focus: Alternative Dispute Resolution, Litigation, Real Estate/Real Property

Section Membership: Construction Law Section, Trial Practice Section

Other Jurisdictions: 9th Circuit, Arizona, US Supreme Court

Other Languages: None

Professional Liability Insurance: Yes

Gust Rosenfeld PLC

One E Washington St Ste 1600

Phoenix, AZ 85004-2553

Maricopa County

602.257.7422

Fax: 602.254.4878

Email | Website

Discipline: None

More About Mr. Craig L Keller

Educated at U of Arizona, admitted to practice in 1982, admitted to the State Bar of Arizona October 23, 1982.

Craig Keller has been litigating business, construction, and real estate cases for more than 31 years. He has also been drafting documents for businesses of all sizes to form corporations, limited liability companies, partnerships and joint ventures, asset acquisition and sale, and employment matters. Craig has argued appeals in the Ninth Circuit Court of Appeals, the Arizona Supreme

Court, and the Arizona Court of Appeals. Additionally, he has been involved in all areas of estate planning including wills and trusts, premarital agreements, business succession planning and trust administration. His practice includes representing multi-employer benefit plans for trades in the construction industry including pension and vacation trust funds.


Craig serves as a mediator and arbitrator in various commercial matters including business and corporate disputes, real estate disputes, and trust and estate matters. He is a former arbitrator for the American Arbitration Association.

** The information in the "More About" section above is provided by the attorney and the State Bar does not guarantee nor warrant its accuracy. The State Bar does not endorse any particular attorney.*

ATTENTION MEMBERS OF THE PUBLIC:

Please **do not** email lawyers the details of your legal matter. Please contact them to make an appointment to discuss your matter in person. Lawyers have a duty to avoid conflicts and the lawyer you contact by email may already represent someone in your matter.

Copyright ©2004-2018 State Bar of Arizona

 Gust Rosenfeld P.L.C.



■ Phoenix 602.257.7422 ■ Wickenburg 928.684.7833 ■ Tucson 520.628.7070

Practice Areas

Gust Rosenfeld is a full-service law firm with a wide array of practice areas. A representative list of our practice areas include:

- Alternative Dispute Resolution
- Bankruptcy and Creditors' Rights
- Business/Corporate Law
- Commercial Finance
- Education Law
- Environmental Law
- Franchises and Franchising
- Health Care Law
- Insurance
- Intellectual Property
- Labor and Employment
- Litigation
- Public Finance
- Public Law
- Real Estate
- Taxation
- Trusts and Estates



[RECRUITMENT](#) | [OFFICES](#) | [DIVERSITY](#) | [LEGAL NOTICE](#)

©2017 All Rights Reserved Gust Rosenfeld P.L.C.

[SITE MAP](#)



GUST ROSENFELD

Attorneys Since 1921 P.L.C.

■ Phoenix 602.257.7422 ■ Wickenburg 928.684.7833 ■ Tucson 520.628.7070

Litigation

Gust Rosenfeld provides a broad range of litigation and other dispute resolution services. We resolve our clients' problems as quickly, efficiently and cost-effectively as possible. Our experienced attorneys deliver innovative solutions to achieve our clients' goals. We represent clients in jury and non-jury trials, appeals, mediation, arbitration and negotiation and before administrative agencies such as the U.S. Department of Labor and Equal Employment Opportunity Commission. Our litigation attorneys have extensive experience working on issues including:

- antitrust
- aviation
- bankruptcy and creditors' rights
- civil rights
- commercial torts
- condemnation and eminent domain
- construction and contractor liability
- education
- corporate law and commercial litigation
- environmental
- franchising
- insurance and bad faith
- intellectual property, copyright, trademark and trade secret
- labor and employment
- personal injury defense
- product liability and premises liability
- professional liability
- real estate and title insurance issues
- taxation, trusts and estates


Available Attorneys



RECRUITMENT | OFFICES | DIVERSITY | LEGAL NOTICE

©2017 All Rights Reserved Gust Rosenfeld P.L.C.

PET. APPENDIX 95

 Gust Rosenfeld P.L.C.



Appendix C

Office of Public Defense Services contract and fee schedule

SERIAL 09020 ROQ CONTRACT INDIGENT REPRESENTATION (ADULT CRIMINAL)
ATTORNEY SERVICES – OPDS

DATE OF LAST REVISION: October 25, 2016 CONTRACT END DATE: July 31, 2019

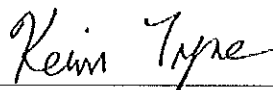
AMENDMENT #1 - (DTD 05/31/16) see changes to SECTION III WORK STATEMENT ADDITION OF #6 RESTITUTION HEARING AND SUBSEQUENT HEADING NUMBER CHANGES ONLY, SECTION IV CONSIDERATION COMPENSATION RATE CHANGES EFFECTIVE 6/1/16.

CONTRACT PERIOD THROUGH JULY 31, 2019

TO: All Departments
FROM: Office of Procurement Services
SUBJECT: Contract for CONTRACT INDIGENT REPRESENTATION (ADULT CRIMINAL)
ATTORNEY SERVICES – OPDS

Attached to this letter is published an effective purchasing contract for products and/or services to be supplied to Maricopa County activities as awarded by Maricopa County on July 22, 2009 (Eff. 08/01/2009)

All purchases of products and/or services listed on the attached pages of this letter are to be obtained from the vendor holding the contract. Individuals are responsible to the vendor for purchases made outside of contracts. The contract period is indicated above.



Kevin Tyne, Chief Procurement Officer
Office of Procurement Services

AS/at
Attach

Copy to: Office of Procurement Services
Christina Phillis, Office of Public Defense Services
Merri Plummer, Office of Public Defense Services

(Please remove Serial 04010-ROQ, 04011-ROQ, 04021-ROQ and 07046-ROQ from your contract notebooks)

SECTION I INTENT

1. INTRODUCTION

The intent of this Invitation for Solicitation (Review of Qualifications (ROQ)) is to establish a listing of qualified contractors to provide indigent representation attorney services for the Office of Public Defense Services. This solicitation effort shall encompass indigent representation specialty services for the following areas of practice:

- 1) Adult Felony (*current serial number 04010-ROQ*)
- 2) Homicide/Major Felony (*current serial number 04011-ROQ*)
- 3) Adult Criminal Appellate/PCR (*current serial number 04021-ROQ*)
- 4) Capital (*current serial number 07046-ROQ*)

This solicitation is intended to replace current contracts for the above noted areas of practice. **Current contractors MUST reapply in order to continue providing services to Maricopa County.** All assignments made to awarded contractors as a result of this solicitation shall be at the compensation schedule(s) found in this solicitation. Any assignment made by OPDS for any of these areas of practice prior to the effective date of this contract shall be at the fees/compensation schedule(s) effective at the time of that assignment.

Multiple awards (listing of qualified vendors) will be made. Maricopa County reserves the right to add providers to this agreement at any time as required to ensure both adequate competition and fulfillment of OPDS requirements. No guarantee is made regarding the frequency of any re-solicitation effort. Re-solicitation efforts may be made for one or more areas of practice at any time at the option of OPDS.

Contractors agree to fully comply with all terms and conditions of this solicitation for inclusion on the list of qualified Maricopa County vendors. The applicant shall register as a vendor with Maricopa County and shall fully agree with the requirements of vendor registration. Additionally, fees and compensation for each area of practice are pre-determined and are not negotiable.

Submission of an application in response to this solicitation shall signify full understanding and agreement with the terms and conditions of the solicitation. Applicants shall clearly designate the area or areas of practice and the preferred location of the service, if applicable, for which they are applying. No guarantee is made regarding the frequency of assignments or volume of work that any contractor may be offered.

At the option of OPDS and Office of Procurement Services, this solicitation may be determined to be “open and continuous”, **AFTER** the initial solicitation “opening date and subsequent contract award date”. In the event that OPDS requirements demand additional providers, this solicitation may be converted to “open and continuous” as a re-solicitation effort. Full response information will be provided in the event that determination is made.

2. GENERAL REQUIREMENTS

A. Minimum Qualifications.

Applicant shall be a graduate of a fully accredited law school. Applicant shall be member in good standing of the Arizona State Bar Association *and* shall be licensed by the Arizona State Bar Association, *and* shall maintain the same for the duration of any contract award.

Additionally, the applicant shall demonstrate the following minimum qualifications for the areas of practice described below:

- FELONY—At least one year of relevant experience in the area of criminal law in the State of Arizona.
- MAJOR FELONY—At least 2 years of relevant experience in the area of criminal law in the State of Arizona
- APPEALS AND PETITIONS FOR POST-CONVICTION RELIEF—At least 2 years relevant experience in the area of criminal law in the State of Arizona.
- CAPITAL—Qualified pursuant to Rule 6.8 of the Arizona Rules of Criminal Procedure as either lead or co-counsel.
- CAPITAL APPEALS—Qualified pursuant to Rule 6.8 of the Arizona Rules of Criminal Procedure.

B. Agreement to Provide Services

Applicant, by submission of an application to this solicitation, agrees to fully provide the services defined within at the pre-determined compensation schedule. Fees or compensation as stated within this solicitation are firm and not negotiable. Contract award does not guarantee any number of assignments or any other measure of work.

C. Performance Reviews

Contractors are advised that OPDS reserves the right to conduct periodic performance reviews. The results of these reviews may be used by OPDS to determine if any additional case assignments are to be made and also the type of cases that may be assigned to the contractor.

**SECTION II
GENERAL PROVISIONS**

1. DEFINITIONS

As used throughout the Contract, these terms shall have the following meanings unless the context requires otherwise:

- A. Board of Supervisors – Maricopa County Board of Supervisors.
- B. Billable Time – time spent for the benefit of the Client which substantially advances the case toward conclusion. Billable time may include court time, legal research, interviews of the Client and witnesses, and other work required to effectively represent the Client. Billable time does not include, for example, the following:
 - 1. non-substantive motions such as motions to continue, motions to withdraw or time spent reviewing a file prior to moving to withdraw;
 - 2. support services or overhead items that are compensated through Contractor’s Contract Rate including such things as secretarial services, typing, leaving messages, transmitting documents by facsimile, mailing letters and photo copying; or
 - 3. activity that does not substantially advance the Client’s case such as unanswered telephone calls, leaving messages, or setting up meetings or conferences.
- C. Client – a person who receives services from Contractor pursuant to an assignment by OPDS.
- D. Contract – this document and all attachments hereto.
- E. Contract Administrator – the agent designated by the County Administrative Officer to develop, administer and monitor the contracts for OPDS.
- F. Contractor – the person agreeing to provide services to Maricopa County and the client pursuant to this contract.
- G. County – Maricopa County and is synonymous with OPDS and OCC.
- H. Extraordinary compensation – the calculation of additional compensation beyond that provided by contract. Extraordinary compensation must be negotiated between the Contract Administrator and the Contractor, in writing, based on the facts of the individual case and Contractor’s overall compensation under the entire contract.
- I. Fiscal Year – the 12 consecutive months from July 1 to June 30, inclusive.
- J. OCC – the Office of Contract Counsel and is synonymous with Office of Public Defense Services and with Maricopa County
- K. OPDS – the Office of Public Defense Services and is synonymous with Office of Contract Counsel and with Maricopa County
- L. Parties or Party – OPDS, the County and Contractor as the context requires.
- M. Reimbursable Expenses – expenses which are (1) reasonable and necessary; (2) for the legal representation of a Client; and (3) approved in advance by the Contract Administrator. Reimbursable expenses do not include (1) items that are compensated through billable time; (2) secretarial expenses; (3) travel within Maricopa County; (4) expenses for stationery, postage, envelopes, transmission by facsimile, parking and supplies; or (5) other items that are an ordinary cost of doing business.

- N. Representation – the services that Contractor provides to a Client in a specific legal matter.
- O. Trial – participation in a court hearing at which jeopardy or preclusion attaches, witnesses are sworn and testimony is taken. A trial day is 5.0 or more hours of actual trial time; a half-day is less than 5.0 hours.

1. **TERM**

The contract awarded as a result of this solicitation shall be awarded for a period of ten (10) years from the initial effective or “Commencement Date”.

The Contract begins on August 1, 2009 (the “Commencement Date”) and expires on August July 31, 2019, unless extended, amended or terminated consistent with the provisions of the Contract.

2. **RIGHT TO EXTEND CONTRACT**

The County may, at its option and with the approval of Contractor, renew/extend the term of the Contract up to a maximum of ten (10) additional one (1) year periods, from the original expiration date. Contractor shall be notified in writing by Office of Procurement Services of the County's intention to extend the contract period at least 30 calendar days prior to the expiration of the original contract period. Nothing herein shall be construed to guarantee that the County will subsequently extend or award a Contract.

3. **DEFAULT, SUSPENSION AND TERMINATION**

A. The Contract Administrator may suspend, modify or terminate the Contract upon Contractor's failure to perform or upon the occurrence of an event that may cause or result in Contractor's failure to perform any requirement of the Contract. Failure of performance shall include failure by Contractor to fulfill the reporting requirements of the Contract. Additionally, Contractor's contract may be terminated due to economic events that may have an adverse effect on the Office of Public Defense Services' budget or a material change in circumstances including, but not limited to, reduction in the number of cases to be assigned at a given location of the Maricopa County Superior Court or any of its lower courts.

B. The County may terminate the Contract as follows:

- 1. No Cause: Upon thirty (30) days written notice to Contractor.
- 2. For Cause: Immediately upon written notice to Contractor.

C. Contractor may terminate this contract upon 30 days written notice to the Contract Administrator. Contractor's termination of a contract(s) does not terminate Contractor's duty to continue representing those cases/persons assigned to Contractor prior to the effective date of termination. See Section 6(D) below.

4. **NON-EXCLUSIVE STATUS**

OPDS may contract for the same or similar professional services through persons other than Contractor. This provision applies to OPDS only and does not confer upon any Contractor permission to substitute performance in any way without the express written consent of OPDS.

5. **CONTRACTOR'S RESPONSIBILITIES**

A. Effective Representation. Contractor shall effectively represent the Client including, but not limited to:

1. contacting and conferring with the Client concerning the representation within a maximum of 48 hours of Contractor's notice of appointment;
 2. maintaining reasonable contact with the Client until the representation is terminated;
 3. using reasonable diligence in notifying the Client of necessary court appearances including any court action that arises out of the Client's non-appearance;
 4. conducting such interviews and investigation as are appropriate;
 5. appearing in court on time at whatever time the court designates.
- B. Accept Assignments. Contractor shall accept all assignments made by the Contract Administrator unless Contractor is not ethically permitted to accept the representation pursuant to Rules of Professional Conduct.
- C. Replacement Representation. In the event Contractor is unable to complete an assignment and is allowed to withdraw, Contractor immediately shall report the circumstances to OPDS so that OPDS may appoint replacement counsel. OPDS may require Contractor to account for the time Contractor has actually expended and to return all or part of the payment for the representation where appropriate.
- D. Continuing Representation. Contractor has a continuing duty to represent the Client until the court has terminated the representation. Termination of the contract by either party does not terminate the Contractor's duty to provide services in those cases assigned prior to the effective date of termination.
- E. Removal for Failure of Performance. In the event a Court removes Contractor from representation due to any failure of performance relating to the representation, Contractor shall reimburse the County for any payment made to Contractor relating to the representation and provide a written explanation of the failure of performance.
- F. Determination of Indigence. Contractor shall notify the court and request a re-determination of the Client's indigence if reasonable grounds exist to believe that a Client is not indigent. In the event the court permits Contractor to withdraw from the representation, Contractor may not represent the Client for a fee arising out of that representation without prior written approval of the Contract Administrator. In the event the court permits Contractor to withdraw from the representation, Contractor shall notify OPDS of the determination that the client is not indigent and shall return any fees paid by OPDS and not earned by the contractor.
- G. No Additional Compensation. Contractor may not solicit or accept private or additional compensation of any kind, including attorney's fees, in any matter that relates to or arises out of a pending assignment or representation other than compensation as specified in the Contract unless approved in writing by the Contract Administrator.
- H. Records and Reports. Contractor shall create and keep detailed and accurate case logs, final disposition records and time sheets relating to the representation. Contractor will periodically report on a timely basis data and statistics to the Contract Administrator in the manner prescribed by OPDS. Failure to submit case logs, final disposition records and time sheets in the time and manner specified by OPDS will result in withholding compensation until the contractor is in compliance. Contractor shall make available for inspection and copying by the County all records and accounts relating to the work performed or the services provided under the Contract except any document that is privileged as an attorney-client communication. Contractor shall safeguard confidential and privileged information in accordance with all applicable laws, rules, and regulations.
- I. Cooperation. Contractor shall assist the County in monitoring Contractor's performance of the Contract. Contractor shall cooperate with other OPDS Contractors and staff and

shall carefully plan in order to perform duties under this contract timely and effectively. Contractor shall not commit or permit any act that will interfere with the performance of work by the Contract Administrator, any other Contract Attorney or their staffs. Contractor shall notify OPDS if any non-contract counsel enters an appearance on behalf of a criminal defendant on a Knapp v. Hardy or other basis.

J. Substitute Performance. This is a personal services contract between Contractor and the County. Contractor may, on occasion, allow substitute counsel to appear in court on behalf of the contractor. The substitute counsel must be an attorney who holds a contract with OPDS similar to the contractor's contract. If the substitute counsel represents another party in the case, the contractor shall not be paid for the appearance. Any other substitute counsel must be approved in advance by the Contract Administrator. Notwithstanding the foregoing, the Contractor shall remain primarily responsible for the performance of the contract.

K. Requests for Expenditures. Contractor shall submit for approval by the Contract Administrator all requests for payment of expert witness fees, travel expenses, publication of legal notices, investigators, mitigation specialists (in capital cases only), service of process, court transcript fees and other reasonable and necessary expenditures. Contractor may not incur any expense for the account of the County without prior approval of the Contract Administrator. Failure to obtain prior approval may result in non-payment for the expenditure and the debt shall become the personal responsibility of the Contractor. A copy of the approval must be given to the approved vendor for its billing purposes prior to the commencement of their work. If an approved vendor exceeds the OPDS approved amount for the expenditure, OPDS is not obligated to pay any such overage and it becomes the personal responsibility of the Contractor. When billing for reimbursement, receipts for all expenses must be included. All expenses must be approved by OPDS prior to being incurred. Bills for expenses incurred prior to approval by OPDS may not be honored or ratified.

OPDS will not reimburse Contractor for office supplies, secretarial or other staff services, transcripts of witness interviews or any other type of expense that involves the general cost of doing business including, but not limited to, long- distance telephone calls, unless approved in advance by the Contract Administrator as an extraordinary expense.

L. Investigators. Contractor shall submit for approval by the Contract Administrator any request for appointment of an investigator. Contractor will be responsible for reviewing and certifying the investigator's billings prior to payment by OPDS.

Conducting witness interviews arranged by the prosecution is not the responsibility of the investigator. Conducting these interviews is the responsibility of the assigned lawyer unless the lawyer cannot be present due to illness or other unforeseen emergency. Then, and only then, will investigators be permitted to bill for the time spent conducting this type of interview.

M. Mitigation Specialists. In capital cases only, Contractors may submit for preliminary approval by the Contract Administrator a request for appointment of a specific mitigation specialist. If the nominated mitigation specialist appears to be available to perform the requested work in a timely basis, OPDS will assign the mitigation specialist to the case. Contractor will be responsible for reviewing and certifying the investigator's billings prior to payment by OPDS. Failure to obtain prior approval for the work of a mitigation specialist will result in non-payment and the debt shall become the personal responsibility of the Contractor.

N. Appointment of Interpreters. Interpreters from Maricopa County's Office of Court Interpreters shall be used for non-English-speaking clients as necessary for all court proceedings and out-of-court matters.

- O. Requests for Court Authorization. Any request made of any Court for any order directing any action or payment by OPDS or Maricopa County must be served upon the Contract Administrator in compliance with the Rules of Civil Procedure regarding service and giving notice of motions. See also see Section II, Part 6, subsection R.
- P. Compliance with Law. Contractor will comply with all laws, including rules and regulations of all governmental accrediting and regulatory authorities, including the State of Arizona, relating to the licensure and regulation of attorneys. In the event the Contractor is suspended by the Arizona State Bar, on an interim or other basis, Contractor must immediately notify OPDS of this suspension so that appointment of cases may be stopped. Failure to comply with such notice will result in termination of Contractor's contract(s).
- Q. Technological Equipment. Contractor must possess the following equipment to meet the needs of OPDS appointment protocol:
 - 1. Desktop or laptop computer,
 - 2. Microsoft Office Suite Software and Adobe Reader; and other software as might be needed to allow contractor to conduct business electronically with OPDS,
 - 3. E-mail address; and
 - 4. Cellular telephone.
- R. Court Orders for additional compensation. In the event that a Contractor files a motion with any Court for additional compensation or any expenditure in addition to that provided for under the terms of the contract, Contractor must timely serve a copy of the motion upon OPDS. Failure to give OPDS notice of a motion for additional compensation or expenditure on a timely basis will result in either suspension or termination of the contract.
- S. Monthly Case Logs. All case logs must be returned via e-mail to OPDS by the date designated by OPDS. This includes all changes to case dispositions and hours-to-date. Failure to submit case logs by the designated date may result in the withholding of Contractor's monthly contract payment or other payments made by the department on a case-by-case basis until such documentation is provided.
- T. Reporting and Billing periods. Any claim for services must be submitted within 6 months of the service.
- U. Attorney Complaints. Complaints made about a Contractor may be forwarded to Contractor with a request for a response to the complaint. The Contractor must respond to the complaint in writing within 10 days.

6. AVAILABILITY OF FUNDS

Contractor and the County acknowledge that the continuation of any contract after the close of the County's fiscal year, (on June 30 of each year), is contingent upon the approval of a County budget that identifies such contract as an authorized expenditure. The County does not represent that any budget item will be adopted. The approval of such expenditures is the exclusive province of the Maricopa County Board of Supervisors at the time of the adoption of the budget.

7. INDEPENDENT CONTRACTOR

- A. Contractor's relationship to the County is that of an independent Contractor and not as an employee.

- B. This contract does not constitute, create, give rise to or otherwise recognize a joint venture, partnership, or employment relationship. The rights and obligations of the Parties shall be only those expressly set forth in the Contract.
- C. No persons or services utilized by Contractor in the performance of obligations under the Contract are considered to be County employees, and no rights of County civil service, retirement or personnel rules accrue to such persons. Contractor shall have complete responsibility for all salaries, wages, bonuses, retirement withholdings, worker's compensation, and other employee benefits and all taxes and premiums relating to such persons, and shall defend, indemnify and hold the County harmless for any and all claims, suits, liability and damages which the County may incur because of Contractor's failure to pay such taxes or obligations.

8. **RIGHTS IN DATA**

The County shall have the use of data and reports resulting from the Contract without cost or other restriction. The County shall have complete discretion to create or prepare reports or compilations of data relating to the Contract. The data and reports or compilations of data are public records under Arizona law.

9. **MALPRACTICE INSURANCE**

- A. Contractor shall provide to the Contract Administrator a declarations page for a current certificate of insurance for errors and omissions (professional malpractice) coverage in an amount not less than \$250,000/\$500,000. Errors and omissions coverage shall remain in force during the entire term of the Contract. In the event Contractor's insurance is terminated or suspended, Contractor shall immediately give written notice to the Contract Administrator. Failure to provide proof of errors and omissions coverage during any period of the contract shall result in its immediate termination for cause. Proof of errors and omissions coverage is due on the first day of the second month of the effective date of the contract.
- B. Contractor shall not be entitled to liability coverage or costs of defense from County or its Self-Insurance Trust from liability or any other claims arising from Contractor's performance under the Contract.
- C. Contractor agrees to defend the County and hold it harmless from any claim that may arise from Contractor's performance of the Contract.

10. **AMENDMENTS**

All amendments to the Contract shall be in writing and signed by both parties. Maricopa County Office of Procurement Services shall be responsible for approving all amendments for Maricopa County.

11. **STRICT COMPLIANCE**

Acceptance by OPDS of a performance that is not in strict compliance with the terms of the Contract shall not be deemed to be a waiver of any term or an acceptance of anything less than strict compliance with all other terms.

12. **LAWS, RULES AND REGULATIONS**

Performance under the Contract shall be accomplished in conformity with all applicable laws, ordinances, rules, regulations, and zoning restrictions.

13. **NON-DISCRIMINATION AND EQUAL EMPLOYMENT OPPORTUNITY**

Contractor in the performance of the Contract will not discriminate against any person based on race, religion, sex, national origin, or disability.

14. **RETENTION AND ADEQUACY OF RECORDS**

Contractor agrees to retain all books, records, and other documents relevant to the Contract for six (6) years after final payment or until after the resolution of any audit questions, whichever is longer. County auditors and any other persons duly authorized by the County shall have full access to, and the right to examine, copy and make use of all such materials.

OPDS will not pay for costs associated with the storage of any records or files created for, pertaining to, or arising from this contract.

15. **AUDIT AND AUDIT DISALLOWANCES**

Contractor shall reimburse the County for any service or expenditure that is not sufficiently documented in Contractor's books, records and other documents. In the event the County disallows any payment or request for payment pursuant to this section, OPDS shall notify Contractor in writing of the disallowance and the required course of action relating to the disallowance. OPDS may recover from Contractor any sums due through an action at law or as a setoff or counterclaim.

16. **DISPUTES**

Except as otherwise provided by law, any dispute arising under the Contract shall be processed according to the procedure identified in the relevant section(s) of the Maricopa County Procurement Code.

17. **WAIVER OF CLAIMS**

- A. Contractor accepts the compensation provided in the Contract in lieu of any other claim, demand, request or compensation for the services that Contractor provides pursuant to the Contract.
Contractor's obligations under this section, including the duty of continuing representation, shall survive the termination or expiration of the Contract.
- B. Any dispute concerning the reasonableness or adequacy of the compensation under the Contract shall be resolved by reference to the value of the Contract as a whole and not by reference to a single case or to a portion of the cases that Contractor has performed under the Contract. The value of the Contract as a whole shall be determined by reference to the following factors:
 - 1. County's average cost per case for all the services provided by Contractor under the Contract compared to the County's average cost per case for the same services performed by the Public Defender, Legal Defender, Legal Advocate, and other Contract Attorneys;
 - 2. County's average cost per hour of services provided by Contractor under the Contract, compared to the County's average cost per hour for the same services performed by the Public Defender, Legal Defender, Legal Advocate and, other Contract Attorneys; and
 - 3. Contractor's average hours per case, compared to the average hours per case for the same services performed by the Public Defender, Legal Defender, Legal Advocate and, other Contract Attorneys.

This section is not severable, in whole or in part, from any other provision of the Contract. In the event any portion of the Contract is found to be invalid or unenforceable, the Contract may be terminated at the sole discretion of the Contract Administrator.

18. **GOVERNING LAWS**

The Contract shall be governed and construed in accordance with the laws of Arizona. Any action to enforce or interpret the Contract shall be litigated in the Maricopa County Superior Court only after the exhaustion of administrative remedies.

19. **FURTHER ASSURANCES AND CORRECTIVE INSTRUMENTS**

The Parties will, from time to time, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, any corrective instruments as may be reasonably necessary to carry out the intent of the Contract.

20. **COMPLIANCE WITH APPLICABLE LAWS**

The Parties shall use reasonable efforts to comply with all applicable federal and state laws, rules and regulations.

21. **NOTICE**

All notices, demands and other communications to be given or delivered pursuant to the Contract shall be in writing, and shall be deemed delivered upon the following:

- A. personal delivery;
- B. one (1) business day from the transmission by electronic mail or telecopier; or
- C. five (5) business days from deposit in the United States mail, registered mail or certified mail, return receipt requested, with postage prepaid to the Notice Address or to the last known address of the Party who is to be given notice.

22. **RULES OF CONSTRUCTION**

- A. Incorporation of Definitions, Recitals and Exhibits. The Parties acknowledge the accuracy of the definitions and recitals set forth in the Contract. All exhibits to the Contract are incorporated into the Contract as if set out verbatim.
- B. Merger. All prior and contemporaneous contracts, agreements, statements and understandings with respect to the subject matter of the Contract, if any, among the Parties, or their agents, are merged into the Contract, and the Contract shall constitute the entire agreement among the Parties.
- C. Successors. The Contract shall be binding upon, and inure to the benefit of, and shall be enforceable by, the successors, assignees and transferees of the Parties.
- D. Third Party Beneficiaries; No Rights Conferred on Others. Any person who is entitled to indemnity 1.) by the terms of the Contract or 2.) by operation of law, is a third party beneficiary of the Contract to the extent only that such status is necessary to fulfill or enforce the indemnification.
- E. Severability; Blue Pencil. Each provision of the Contract shall be construed to preserve its validity and enforceability to the extent possible. If any provision of the Contract is declared void, invalid or unenforceable, the Party who would have enforced the provision may elect whether the provision shall be 1.) modified to the extent necessary to make it valid and enforceable or 2.) excluded from the Contract.

- F. Remedies Cumulative. Any remedy in the Contract is cumulative and is not exclusive of any other remedy, nor does it limit any other legal or equitable remedy that may be available to any Party.

23. MISCELLANEOUS

- A. Process Server. All expenditures for service of process must be approved by OPDS prior to incurring any such expense. In the event that Contractor does not request and receive OPDS's approval before incurring such an expense, Contractor shall be personally responsible for payment of the process server's service invoice. Contractor will use only a process server approved by OPDS.
- B. Court Reporters. Only appellate and post-conviction relief transcripts are paid directly by OPDS. Any other use of court reporters or transcriptionists must be approved in advance by way of a Request for Expenditure of Funds. It is the Contractor's responsibility to deliver the approval to the appropriate, approved vendor. If transcripts are requested during a trial (to impeach a witness, etc.), the court reporter should be informed that the request is for a transcript of the testimony only and that OPDS will pay \$2.50 per page for the original only and an additional \$0.30 per page for one copy.

If a motion for a new trial is granted, the County Attorney and all defense counsel should share the cost of the transcript of the original trial. RUSH (delivery within 5 days) and EXPEDITED (delivery within 10 days) transcription requests are strongly discouraged and likely to be rejected absent unforeseen exigent circumstances. OPDS requires that Contractor justify such requests with an explanation as to why additional expense was unavoidable. If the necessity for rush or expedited charges is the result of delay on Contractors part, Contractor will be required to pay any charges beyond the reporter's standard page rate.

- C. Audio and Video Tape Transcription. Transcriptions of tape recorded interviews must be approved in advance. The transcription will be done by a vendor approved by OPDS. It is the responsibility of each Contractor to make the request for approval and to deliver the tapes in time to take advantage of the Regular delivery rate of 20 calendar days. The Expedited delivery rate of 10 calendar days and the Rush delivery rate of 1 day will not be approved absent extraordinary circumstances.
- D. Travel. All travel for contractors, witnesses or expert witnesses must be pre-approved and scheduled or authorized through OPDS.
- E. Identification Badges. Identification badges are available to Contract Counsel at no charge.
- F. Change of Address/Firm. Contractor must advise OPDS promptly in writing of any changes to telephone numbers, e-mail addresses and business addresses. Any change of this type shall be accomplished by advising OPDS in writing and making the appropriate changes to Maricopa County Vendor Registration (see Exhibit 1).
- G. Weapons policy. No weapons, loaded or unloaded, props or real, are to be brought into the courthouse buildings. There are security lockers for storage of these items in the court buildings. Questions regarding this policy can be addressed to Court Administration at (602) 506-3070.
- H. Designation of Contract and Location. The contract applications include a cover sheet for applicants to rank their preferences for each of the contract categories and locations. Applicants may apply for more than one category of contract and more than one location, but no applicant is guaranteed an award of any, one, or multiple contract categories or a preferred location. If an applicant does not wish to be considered for one or more categories of the contract, the applicant shall clearly designate that category or those

categories. Applicants should not designate willingness to provide services for any of the specialty categories of which they do not meet the minimum qualifications of this solicitation, at the time of submission.

- I. Adult and Juvenile Contracts. Contractors shall not be awarded both adult and juvenile contracts with the exception of the appeals contracts. Adult Civil Contracts may be awarded with either adult or juvenile contracts.
- J. Appointments.
 1. Bench Appointments: Any and all appointments made from the bench without the consent of OPDS may result in non-payment for the case.
 2. Non-contract appointments: Appointments made, without the consent of OPDS, to counsel who have not been awarded the appropriate contract by the Maricopa County Board of Supervisors may result in non-payment for the case.
- K. Billing for Time.
 1. All Contractor invoices submitted for payment must contain an itemized statement of hours describing in detail in chronological order the following:

<u>Date</u>	<u>Description of Event</u>	<u>Time (in tenths of an hour)</u>
 2. This is a contract between Maricopa County and Contractor. Time for the services of secretaries, paralegals, legal assistants, caseworkers, or any other non-contract person will not be considered when considering hours worked by a Contractor on a case.
- L. Total Open Caseload.
 1. All Adult Contractors who hold contracts in the following areas are subject to a combined open/pending maximum caseload for all past and present contracts, regardless of contract type, of 100 OPDS-assigned clients (determined by primary case numbers):
 - a) Adult Felony;
 - b) Appeals/PCR;
 - c) Homicide/Major Felony;
 - d) Mental Health;
 - e) Probate; and
 - f) Adult Special Advocacy
 2. All Juvenile Contractors who hold contracts in the following areas are subject to a combined open/pending maximum caseload for all past and present contracts, regardless of contract types, of 260 OPDS-assigned clients (determined by primary case numbers):
 - a) Juvenile Appeals;
 - b) Juvenile Delinquency;
 - c) Juvenile Dependency;
 - d) Juvenile Drug Court; and
 - e) Juvenile Special Advocacy.
 3. In the event that Contractor’s caseload exceeds the applicable threshold, Contractor and the Contract Administrator will confer to examine the nature and quality of the caseload to determine if the Contractor should be assigned additional cases. The final decision on this issue shall be made by the Contract Administrator.

M. Office of Public Defense Services’ Policies and Procedures.

Throughout the contract period, OPDS reserves the right to implement new administrative policies and procedures in response to the demands of the Superior Court, its lower courts, the Office of Procurement Services of Maricopa County, the Department of Finance of Maricopa County, and the Board of Supervisors of Maricopa County.

24. VERIFICATION REGARDING COMPLIANCE WITH ARIZONA REVISED STATUTES §41-4401 AND FEDERAL IMMIGRATION LAWS AND REGULATIONS

A. By entering into the Contract, the Contractor warrants compliance with the Federal Immigration and Nationality Act (FINA using e-verify) and all other Federal immigration laws and regulations related to the immigration status of its employees. The contractor shall obtain statements from its subcontractors certifying compliance and shall furnish the statements to the Procurement Officer upon request. These warranties shall remain in effect through the term of the Contract. The Contractor and its subcontractors shall also maintain Employment Eligibility Verification forms (I-9) as required by the U.S. Department of Labor’s Immigration and Control Act, for all employees performing work under the Contract. Form I-9 is available for download at USCIS.GOV.

B. The County may request verification of compliance for any contractor or subcontractor performing work under the Contract. Should the County determine that the Contractor or any of its subcontractors is not in compliance, the County may pursue any and all remedies allowed by law, including, but not limited to: suspension of work, termination of the Contract for default, and suspension and/or department of the Contractor. All costs necessary to verify compliance are the responsibility of the Contractor.

~~25. VERIFICATION REGARDING COMPLIANCE WITH ARIZONA REVISED STATUTES §§35-391.06 AND 35-393.06 BUSINESS RELATIONS WITH SUDAN AND IRAN~~

~~A. By entering into the Contract, the Contractor certifies it does not have scrutinized business operations in Sudan or Iran. The contractor shall obtain statements from its subcontractors certifying compliance and shall furnish the statements to the Procurement Officer upon request. These warranties shall remain in effect through the term of the Contract.~~

~~B. The County may request verification of compliance for any contractor or subcontractor performing work under the Contract. Should the County determine that the Contractor or any of its subcontractors are not in compliance, the County may pursue any and all remedies allowed by law, including, but not limited to: suspension of work, termination of the Contract for default, and suspension and/or department of the Contractor. All costs necessary to verify compliance are the responsibility of the Contractor.~~

26. CONTRACTOR LICENSE REQUIREMENT

The Respondent shall procure all permits, licenses and pay the charges and fees necessary and incidental to the lawful conduct of his business. The Respondent shall keep fully informed of existing and future Federal, State and Local laws, ordinances, and regulations which in any manner affect the fulfillment of a Contract and shall comply with the same.

27. CERTIFICATION REGARDING DEBARMENT AND SUSPENSION

- A. The undersigned (authorized official signing for the Contractor) certifies to the best of his or her knowledge and belief, that the Contractor, defined as the primary participant in accordance with 45 CFR Part 76, and its principals:
1. are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal Department or agency;
 2. have not within 3-year period preceding this Contract been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
 3. are not presently indicted or otherwise criminally or civilly charged by a government entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (2) of this certification; and
 4. have not within a 3-year period preceding this Contract had one or more public transaction (Federal, State or local) terminated for cause of default.
- B. Should the Contractor not be able to provide this certification, an explanation as to why should be attached to the Contract.
- C. The Contractor agrees to include, without modification, this clause in all lower tier covered transactions (i.e. transactions with subcontractors) and in all solicitations for lower tier covered transactions related to this Contract.

**SECTION III
WORK STATEMENT**

1. **EFFECT**

This Work Statement shall control should there be any conflict between the General Provisions and Work Statement sections of this contract.

2. **DUTIES**

The contractor shall provide legal services as assigned in the following proceedings as determined by the areas of practice in which the contractor and Maricopa County agree and for which the contractor is deemed, by Maricopa County, to be qualified:

CAPITAL OFFENSES

- Lead Counsel as defined by Rule 6.8 of the Arizona Rules of Criminal Procedure
- Co-Counsel as defined by Rule 6.8 of the Arizona Rules of Criminal Procedure
- Capital Appeals as defined by Rule 6.8 of the Arizona Rules of Criminal Procedure

MAJOR FELONY OFFENSES

- First degree (non-capital) murder
- Second degree murder
- Manslaughter
- Negligent Homicide
- Any other felony proceeding which is designated by OPDS as not appropriate for the Felony Offense contract because of the seriousness or complexity of the case. The designation of “complex” by the court is indicative of, but not determinative of, the OPDS designation of complex for the purpose of this contract.

FELONY OFFENSES

- Any felony offense not included in the Major Felony Offense paragraph of this section.
- Probation Violation
- Witness Representation
- Misdemeanor cases, including those in Justice Courts

APPEALS and PETITIONS for POST-CONVICTION RELIEF

- Direct Appeals
- Petitions for Post-conviction Relief from trial and plea proceedings

Assignments within each area of practice shall be made, as much as practicable, on a rotating basis. The contractor’s case load and schedule as well as OPDS policies and the availability of the contractor for the next court date may affect the assignments.

3. **CLIENT'S FAILURE TO APPEAR**

- A. **Preliminary Hearing.** Contractor will not receive credit for any client who fails to appear for a preliminary hearing or first court appearance.
- B. **Post-Arrestment.** OPDS shall give Contractor credit for the case if the client fails to appear after the arrestment. Contractor shall resume the representation when the client appears for further proceedings whether or not the Contractor holds a contract at the time of the client's reappearance. Should the contractor be unable to resume the representation of the client due to ethical reasons or any other reason determined to be sufficient by the Contract Administrator, the contractor will return to OPDS any money paid for the representation of the client.

4. **CHARGES NOT FILED**

Contractor shall notify the Contract Administrator if a charging document is not filed against a client. Contractor shall not receive credit for the case unless a charging document is filed.

5. **WITNESS REPRESENTATION**

The contractor shall be paid pursuant to this contract for representation of a witness. In the event that the witness is subsequently charged with a crime related to the testimony given or sought, the contractor will continue to represent the client. In the event that charges are filed, the contractor shall be paid pursuant to the contract for the offense charged minus any money paid for representing the client as a witness. Representation of multiple witnesses in the same case shall be paid as a single witness.

6. **RESTITUTION HEARINGS**

Restitution hearings are considered to be a part of the sentencing process. The attorney representing the defendant at the time of the sentencing shall be responsible to represent the defendant at any subsequent restitution hearing, even if a Motion to Withdraw has been granted.

7. **DUTIES OF CO-COUNSEL IN CAPITAL CASES**

Contractor who is assigned as 2nd chair counsel in a capital case shall perform those duties delegated by lead counsel in conformity with the ABA Guidelines and Rule 6.8 of the Arizona Rules of Criminal Procedure.

8. **COMPLEX CASES**

Contractor may petition the Contract Administrator for additional compensation for any assignment that requires Contractor to expend an extraordinary amount of time. Additional compensation must be requested in writing and thereafter negotiated between the Contract Administrator and the Contractor. The designation by the court that a case is complex is not binding on OPDS for the purposes of determining whether or not a case qualifies for additional compensation. The Contract Administrator will consider the following factors in determining the amounts of additional compensation:

- o The complexity of the case;
- o The time within which the contractor must be prepared for trial or sentencing;
- o The duration of the case;

- The amount of time actually spent on the case by the contractor;
- The contractor's overall compensation under the entire contract; and
- Any other factor which, in the opinion of OPDS, should be considered.

9. APPELLATE CASES

When assigned to a direct appeal the contractor shall be responsible to represent the client throughout the proceedings including Petitions for Review or, in capital cases, Petitions for Writ of Certiorari to the United States Supreme Court. When assigned to a Petition for Post-conviction Relief, the contractor shall be responsible to represent the client throughout the proceedings including Petitions for Review.

SECTION IV CONSIDERATION

**** Effective June 1st, 2016 all NEW assignments will adhere to the new payment schedule. Any assignments prior to June 1st, 2016 will be compensated at the previous pricing fees. On cases being paid on an hourly basis, all work performed on June 1st, 2016 or after, will be compensated at the new rate.**

1. COMPENSATION

The following is the schedule of payments for each of the areas of practice and the cases within those areas of practice:

CAPITAL OFFENSES

- | | |
|----------------|----------------------|
| ○ Lead Counsel | \$125 \$140 per hour |
| ○ Co-Counsel | \$95 \$105 per hour |

MAJOR FELONY OFFENSES

- | | |
|------------------------|--------------------|
| ○ First Degree Murder | \$70 \$77 per hour |
| ○ Second Degree Murder | \$70 \$77 per hour |
| ○ Manslaughter | \$70 \$77 per hour |
| ○ Negligent Homicide | \$70 \$77 per hour |
| ○ All other Offenses | \$70 \$77 per hour |

FELONY OFFENSES

- | | |
|--------------------------|----------------|
| ○ Class 1, 2 and 3 | \$1,250 \$1375 |
| ○ Class 4, 5, and 6 | \$900 \$1000 |
| ○ Felony DUI | \$900 \$1000 |
| ○ Probation Violation | \$250 275 |
| ○ RCC/EDC | \$400 450 |
| ○ Misdemeanors | \$400 \$450 |
| ○ Witness representation | \$300 \$330 |

APPEALS and PETITION FOR POST-CONVICTION RELIEF

- | | |
|------------------------------------|-------------------------|
| ○ Capital Appeals | \$20,000 \$100 per hour |
| ○ Appeals | \$2,000 \$2200 |
| ○ Appeal of Misdemeanor Conviction | \$1,250 \$1375 |
| ○ PCR from Trial | \$2,000 \$2200 |
| ○ PCR from Plea | \$500 \$550 |

2. MULTIPLE CASES

If a contractor is assigned multiple cases for the same defendant, the contractor shall be paid for the case that would result in the highest payment. If the cases are resolved with plea agreements, either at the same time or different times, the contractor will be paid an amount equal to one-half

of the amount for the case that would result in the next highest payment. No additional payments will be made.

If the cases are resolved by separate trials, the contractor shall be paid individually for each case tried according to the schedule in paragraph one. Cases resolved by a plea agreement after a trial in another matter shall be treated according to the previous paragraph.

3. PROBATION VIOLATION CASES

If a contractor is assigned a probation violation case or cases for a defendant with a pending felony case that alleges a new criminal offense, no compensation in addition to that paid for the felony case shall be paid for the probation violation case or cases.

If the client is acquitted of the new felony offense at trial or the charge is dismissed and a probation violation hearing is held, at which a witness testifies, the contractor shall be paid for the violation case according to the schedule in paragraph 1 of this section.

4. REGIONAL COURT CENTERS

If a contractor is assigned to a case in a Regional Court Center (RCC) and the case is resolved in RCC, the payment shall be made according to the schedule in paragraph one of this section. If the case is not resolved in RCC, the case may be re-assigned to another contractor for proceedings after the RCC, at the election of OPDS. If OPDS elects to assign the same contractor to the case after the RCC proceedings, that contractor shall be paid according to the schedule in paragraph one minus any RCC payment that has been made. All appointments made in RCC courts must be made through OPDS or no payment will be made.

5. REMOVAL OF THE CONTRACTOR

In the event that the contractor is removed from a case for failure to perform or inability to perform, the contractor shall reimburse OPDS for the funds that have been paid on the case. This reimbursement, at the election of OPDS, may be made by OPDS withholding payments due to the contractor on other cases. Failure to perform includes, but is not limited to, failure to appear for a scheduled court appearance.

6. REPLACEMENT OF THE CONTRACTOR BY PRIVATE COUNSEL

In the event the client retains private counsel, the contractor shall be paid according to the schedule in paragraph one of this section if the contractor provides a billing statement to support the fact that the contractor spent the following amounts of time on the case:

- MAJOR FELONY Will be paid hourly
- FELONY 10 hours
- APPEAL 15 hours
- PCR TRIAL 15 Hours
- PCR PLEA 10 Hours

7. METHOD OF PAYMENT

- FELONY AND APPEALS/PCR

Subject to the availability of funds, OPDS will process and remit to the Contractor a warrant for payment each month during the term of the contract. Payment will be based on the number and type of cases assigned to the Contractor during the previous month, minus any adjustments.

○ MAJOR FELONY

The contractor will submit an invoice for payment on major felony cases with a billing statement indicating the number of hours that have been devoted to the case once at least 40 hours have been accumulated. Subject to the availability of funds, payment will be made once the invoice has been processed. In the event the contractor is removed from the case prior to its resolution (sentencing), the contractor will be required to reimburse Maricopa County pursuant to the provisions of paragraph 6 of this section.

○ CAPITAL

The contractor will submit a monthly billing statement indicating the number of hours that have been devoted to the case during the previous month. Subject to the availability of funds, payment will be made once the invoice has been processed.

○ ADDITIONAL COMPENSATION

Any request for compensation in addition to that which is provided in paragraph one of this section shall include a billing statement of all of the hours devoted to the case in question.

8. **ELECTRONIC BILLING**

In the event OPDS implements an electronic billing system, continued assignment of cases may be dependant upon the contractor agreeing to the terms established for that billing system.

9. **FAILURE TO PERFORM**

While no grounds are necessary to terminate the contract by either party, contractors are advised that failure to perform the duties of the contract is likely to result in termination of the contract. Missing scheduled court appearances or deadlines is, among other things, a failure to perform.

10. **TAXES AND BENEFITS**

Contractor assumes sole and exclusive responsibility for payment of any federal and state income taxes, federal social security taxes, unemployment insurance benefits, workman's compensation and other mandatory governmental obligation, if any, and any pension or retirement program. Contractor agrees to indemnify and hold the County harmless for any and all liability which the County may incur because of Contractor's failure to pay such taxes or obligation including any liability for any such taxes or obligations.

11. **REVIEW OF COMPENSATION SCHEDULE**

OPDS shall review compensation/fees schedule for each legal specialty found in this solicitation, on an annual+ basis (anniversary of contract award commencement date). Changes, if any to the Compensation Schedule are at the sole discretion of OPDS.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,)	
)	
Plaintiff,)	
)	
vs.)	CR 2015-117844-001
)	1-CA-CR 17-0620
RICHARD ALLEN REED,)	
)	
Defendant.)	
_____)	

BEFORE THE HONORABLE DANIELLE J. VIOLA

REPORTER'S TRANSCRIPT OF PROCEEDINGS
RESTITUTION HEARING

Phoenix, Arizona

July 21, 2017

1:36 p.m.

Prepared for: COURT OF APPEALS

ORIGINAL

By: Jovanna Roman, RPR
Certified Reporter
No. 50725

1 exactly what happened in this case.

2 And so under the very liberal standard under
3 the statute and our case law, the loss is caused by the
4 conduct of Rick Reed. The expenses are reasonable.
5 There's backup for the expenses and those amounts are a
6 direct out-of-pocket expense that Cynthia Carter incurred
7 in this case.

8 Now let's talk about what this claim --
9 apparently from what we saw today -- is really about and
10 that is some feigned animosity between me and Mr. Reed or,
11 you know, serving on the board of directors for seven
12 years and then the chairman position several times, which
13 had absolutely nothing to do, I can avow to this Court,
14 with Cynthia Carter in my exercise of duties on the board
15 of trustees and as chairman of the board of trustees.

16 I never had one instance in which I dealt
17 with Cynthia Carter. I don't believe I even knew her. I
18 didn't come in contact with her. I didn't socialize with
19 her. She was not a client of mine. There's -- there's no
20 connection whatsoever. There is no personal vendetta. I
21 am exercising my services as a trained and dedicated
22 attorney at law licensed before this Court to present a
23 cogent, well-supported claim for restitution after a
24 felony was committed on a client of mine.

25 And so this case is not about whatever

1 others think the relationship is between me and the board,
2 and me and Cynthia Carter. None of that stuff is
3 relevant. What is relevant is Cynthia Carter has no
4 criminal record. Cynthia Carter has not been before this
5 court or any other court for any criminal matter. She's
6 not even been before any other court for a civil matter.

7 She's totally unfamiliar with the court
8 process and she retained our office to analyze her rights,
9 to help her navigate the process, which was very confusing
10 to her, and to fill the gap between the State presenting
11 its best case, victim's rights, doing what it has the
12 budget, dedication and time to do, shepherding the matter
13 along through the system.

14 We participated, as the Court can see in the
15 China doll, very detailed summary of the time kept
16 contemporaneously with rendition of the services and with
17 the affidavit that complies with all of the ethical
18 requirements, including ER 1.5, that we submitted with
19 this restitution claim.

20 We helped her from day one in terms of
21 analyzing the claim, describing what she can expect
22 through the process, working with the prosecutor,
23 developing list of questions for all of the witnesses,
24 contacting witnesses, preparing them for the trial,
25 sitting through the trial, meeting with her and the

1 prosecutor for strategy sessions at night, making sure
2 that she understood exactly what was expected of her,
3 working to resolve factual details in the various stories
4 and the defenses that would come up.

5 And, Your Honor, I ask you to consider
6 seriously the perspective of this case. This was a
7 throw-the-victim-under-the-bus case. This was a case that
8 instead of saying I did this egregious conduct and it had
9 ramifications on the victim, this was a case where the
10 employer, who did the felony, says to the employee: I
11 think you were stealing office supplies, including
12 carrying cups, and so that's why I stuck a mirror under
13 the door and watched you. I thought you were doing drugs.

14 It was attack the personal character of the
15 victim in this case. Now apparently it's attack the
16 personal character of the victim's lawyer in this case,
17 which they have -- they somehow mistake for arguing the
18 law and arguing the facts in this case.

19 And so you could say: Look, you, as a
20 private counsel, incurred or rendered services which led
21 to a bill of nearly \$18,000. Isn't that what our State's
22 lawyers are to do in this case and didn't they do it in
23 terms of obtaining a conviction? And the answer to those
24 questions would be yes they did, but that is not the full
25 story in terms of is this victim entitled under ARS 13-603

1 as written and 13-804 as written by the legislature and
2 interpreted by our appellate courts as to whether this is
3 a direct, out-of-pocket expense that was causally
4 connected, tied to the criminal conduct for which the
5 victim in this case received services, benefits, and
6 successfully made it through the system and is recovering.

7 And so when you look at this in terms of but
8 for, you should apply the liberal view of the courts, the
9 purpose of the statute, the guidance provided by the
10 appellate courts, and also view this, Your Honor, finally
11 in the context of there's never been a complaint as to any
12 item of the many items of services over the time that we
13 represented Cynthia Carter in this matter that it wasn't
14 necessary, that it was excessive. There's no expert
15 testimony on that. There's not even -- there's not even
16 been any briefing or other evidence in writing that would
17 support an argument of that nature.

18 And so certainly the fees are reasonable,
19 documented, and the issue for the Court is is there a
20 connection, which we argue that there very much is under
21 the restitution statutes for you to make the order. Thank
22 you, Your Honor.

23 THE COURT: All right. Thank you.

24 Ms. Harris.

25 MS. HARRIS: Judge, in terms of the

1 requested restitution, there was testimony at the trial
2 that Cindy would take time off from work, but not write it
3 down on her time sheet and certainly not make up that time
4 so I would ask the Court to recognize that she did not get
5 deducted hours of wages or have to take vacation time for
6 the therapy from 7/17 to 8/17.

7 In terms of the travel to Surprise for the
8 order of protection and to meet with the judge, the part
9 that Mr. Keller forgot to bring up is the fact that she
10 withdrew that and she went to the effort to get it and
11 then withdrew it.

12 Judge, in terms of the request for travel to
13 Oregon, bringing her mother down, the U-haul, the food,
14 the lodging, there's been testimony that as far back as
15 2014 she intended to leave Wickenburg as soon as Hannah
16 graduated from high school and that's what she did. And
17 the fact that Hannah is at ASU and Cindy Carter is in
18 Oregon is the choice that Cindy made about whatever she
19 was going to move to.

20 Judge, in terms of attorney fees, it appears
21 that there is sufficient double billing and probably
22 triple billing in that request. Judge, if you go down
23 through by item by item, it takes two-tenths of an hour to
24 draft an e-mail to Cindy Carter about restitution claim
25 and recent communications with victim services. It takes

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-117844-001 DT

09/01/2017

HONORABLE DANIELLE J. VIOLA

CLERK OF THE COURT
M. Ortega
Deputy

STATE OF ARIZONA

JULIA C VANHELDER
CRAIG L KELLER

v.

RICHARD ALLEN REED (001)

M ALEX HARRIS

RFR

Under Advisement Ruling re Restitution

The Court held a hearing on July 21, 2017 regarding the State's Motion for Restitution and Order filed April 14, 2016. The Court notes that the requested restitution hearing was reset on a number of occasions at the request of the parties and/or the Court. The Court has considered the evidence and arguments presented at the hearing on July 21, 2017. The Court took the matter under advisement after having entered a partial order for restitution based on the parties' stipulations.

Upon consideration of the material presented on July 21, 2017, the State's Motion and attachments, and the Notice of Filing Declaration of Cynthia Catrice Carter, filed April 21, 2017, the Court finds that the requested moving expenses were not established by a preponderance of the evidence to be an economic loss flowing directly from the result of the crime committed. The Court finds that Ms. Carter incurred the moving expenses that were requested but her declaration in support of the request fails to establish that she moved as a result of the Defendant's crime or that the move was necessary to address her mental health concerns following the crime. Moreover, this case, unlike *State v. Brady*, did not involve any threats by Defendant to return to the victim's home or further threats of harm. Additionally, as to the claimed lost time from work at Edward Jones at the rate of \$16.42 per hour, the Court finds that such losses in the total amount of \$394.46 were not established by a preponderance of the evidence. Accordingly,

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-117844-001 DT

09/01/2017

IT IS ORDERED Defendant shall pay to Cynthia Carter as additional restitution the following amounts:

1. Process Server Fee for Order of Protection	\$40
2. Attorneys' Fees	<u>\$17,909.50</u>
	\$17,949.50

A corresponding Restitution Order shall be filed by the Court.

1 WILLIAM G. MONTGOMERY
2 MARICOPA COUNTY ATTORNEY

3 Julia VanHelder
4 Deputy County Attorney
5 Bar ID #: 031164
6 301 West Jefferson, 5th Floor
7 Phoenix, AZ 85003
8 Telephone: (602) 506-6483
9 MCAO Firm #: 00032000
10 mcaosvd@mcao.maricopa.gov
11 Attorney for Plaintiff

12 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

13 **IN AND FOR THE COUNTY OF MARICOPA**

14 **STATE OF ARIZONA,**

15 **Plaintiff,**

16 **v.**

17 **RICHARD ALLEN REED,**

18 **Defendant.**

CR2015-117844-001

**STATE'S MOTION FOR
RESTITUTION AND ORDER**

**(Assigned to the Honorable
Danielle Viola)**

19 The State, by and through undersigned counsel, respectfully requests this Court order
20 restitution in the amount of \$23,784.80 to the Victim, Cynthia Carter. Alternatively, or
21 regarding any remainder not ordered by the Court, the State requests that the Court notify the
22 Victim through undersigned counsel to schedule a Restitution Hearing pursuant to A.R.S.
23 §§ 13-603 and 13-804. The Victim has requested notification in lieu of setting a date and time
24 for the hearing, because Victim currently resides out of state, and all parties' schedules must be
25 coordinated. This Motion is made on the grounds and for the reasons set forth in the following
26 Memorandum of Points and Authorities and the Court's file in this matter.

PET. APPENDIX 127

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Background**

3 Defendant was an investment advisor at an Edward Jones office in Wickenburg,
4 Arizona. The Victim was the business office manager.

5 On January 29, 2015, the Defendant committed the sex crime of Voyeurism when he
6 used a mirror to look upon and leer at the Victim beneath a locked bathroom door, while the
7 Victim was urinating; the Defendant did this for the purpose of his own sexual stimulation.

8 On February 18, 2016, a jury of the Maricopa County Superior Court found the
9 Defendant Guilty of Voyeurism, a Class 5 Felony.

10 On March 31, 2016, the Victim submitted a Restitution Request to the State in the
11 amount of \$7,564.73, with an itemized description of each monetary request. The Victim's
12 economic loss as a direct result of Defendant's felonious conduct consisted of lost time from
13 work to obtain an Order of Protection, the expenses of therapy including travel expenses, the
14 costs of moving out of state away from Defendant and the small rural community where the
15 crime occurred, and attorneys' fees of her private attorney who assisted in protecting the
16 Victim's rights. The State has attempted to seek a resolution to this request with defense
17 counsel, without success (*see* Exhibits A, B, C, D & E).

18 On April 4, 2016, the State provided Defendant's counsel with a copy of the letter from
19 Victim's counsel dated March 31, 2016, seeking a stipulation as to restitution for the economic
20 losses. *See* Exhibits A and B. The same day defense counsel emailed the State declining any
21 stipulation on several grounds noting her outrage to the restitution claim. *See* Exhibit C. Nine
22 minutes after her first response, defense counsel emailed the Prosecutor a follow-up objection
23 "to every line of the summary" and alleged that the restitution request was "fraud at its worst."
24 Defense counsel then issued her edict that she would be "... asking for every piece of [the
25 Victim's] ... life to support your request for restitution." *See* Exhibit D. Two minutes after
26 the follow-up objection, defense counsel requested all receipts from the justice court action in

1 which the Victim obtained an Order of Protection against Defendant on or about May 4, 2015.
2 See Exhibits B and E. Victim’s revised Restitution Request dated April 14, 2016, is attached as
3 Exhibit F. Attached as Exhibit G is the Affidavit of Victim’s private counsel supporting the
4 Victim’s attorneys’ fees.

5 **II. Restitution to the Victim is Mandatory and Appropriate.**

6 Restitution of full economic loss to a victim of a crime is mandatory under Arizona’s
7 sentencing statutes. See Ariz.Rev.Stat. Ann. (“A.R.S.”) §§ 13-603(C), 13-804; *State v. French*,
8 166 Ariz. 247, 801 P.2d 482 (App.1990). The trial court “may impose restitution . . . on charges
9 for which a defendant *has been found guilty*, to which he has admitted, or for which he has
10 agreed to pay.” *State v. Garcia*, 176 Ariz. 231, 236, 860 P.2d 498, 503 (App. 1993) (emphasis
11 added). Citing *State v. Pleasant*, 145 Ariz. 307, 308, 701 P.2d 15, 16 (App. 1985), The trial
12 court has discretion to set the restitution amount according to the facts of the case in order to
13 make the victim whole. *State v. Lindsley*, 191 Ariz. 195, 953 P.2d 1248 (App. 1997) citing
14 *State v. Ellis*, 172 Ariz. 549, 441, 838 P.2d 1310, 1312 (App. 1992). On appeal of an order of
15 restitution the trial court will be upheld if the restitution award bears a reasonable relationship
16 to the victim’s loss. *State v. Wilson*, 185 Ariz. 254, 260, 914 P.2d 1346, 1352 (App. 1995).

17 Arizona courts have determined that the trial court has wide discretion in awarding
18 expenses to the victim because the restitution statute is expansive. Division 1 of the Court of
19 Appeals has stated, “The statute mandating recovery for economic loss is quite broad, and we
20 have allowed restitution for a wide variety of expenses caused by the conduct of persons
21 convicted of crimes.” *State v. Baltzell*, 175 Ariz. 437, 439, 857 P.2d 1291, 1293 (App. 1992).
22 An appropriate restitution award consists of monies for economic losses that flow directly from
23 or are the direct result of the crime committed. *State v. Morris*, 173 Ariz. 14, 17, 839 P.2d 434,
24 437 (App. 1992). The economic loss may be based on injuries caused as a result of the criminal
25 conduct. *Lindsley, supra*. The restitution award, however, may also be based on other economic
26 losses, such as losses due to attendance at court proceedings, whether voluntary or mandatory.

1 *Id.* The costs of moving to restore the victim’s mental health are an economic loss for which
2 restitution is allowed. *State v. Brady*, 169 Ariz. 447, 819 P.2d 1033 (App. 1991).

3 The courts have implemented the “but for” test set forth in A.R.S. § 13-105(16) in
4 determining whether an economic loss of the victim is caused by the crime and, therefore, a
5 proper subject of a restitution order. In *State v. Brady*, the victim moved out of her apartment
6 after a sexual assault where the Defendant threatened to return to the crime scene and harm her.
7 The court found the moving expenses were directly attributable to the sexual assault as moving
8 was necessary to restore the victim’s equanimity. *Id.* at 448, 1033. Pursuant to the Victim's
9 Bill of Rights, the Victim has the right “[t]o be present at . . . all criminal proceedings where
10 the defendant has the right to be present.” Ariz. Const. art. II, § 2.1(A)(3); Ariz. R.Crim. P. 39.
11 “But for defendant's criminal actions, the victim certainly would not have been present at the
12 proceedings.” *Lindsley at 1252*. “It is a direct result of a crime that the victim attends the
13 hearings and thus suffers wage loss.” *Id.* The court reasoned that denying a victim the right to
14 reimbursement for wages lost in attending court proceedings which he or she may attend by
15 right would result in some instances in denying that individual the opportunity to exercise that
16 right. *Id.*

17 Compensable expenses include reasonable attorneys’ fees incurred by the Victim as a
18 result of the commission of the criminal offense. See *Baltzell, supra*. (restitution allowed for
19 customary and reasonable attorney’s fees incurred to close the victim’s estate); see also *State v.*
20 *Spears*, 184 Ariz. 277, 292, 908 P.2d 1062, 1077 (1996) (no evidence that legal fees incurred
21 by the victim’s family were unreasonable or contrary to custom; restitution order upheld). As a
22 Victim of Defendant’s conduct, Ms. Carter is entitled to exercise any and all rights afforded
23 under the Victim’s Bill of Rights. See Ariz. Const. art. 11, § 2.1; A.R.S. § 13-4401, *et. seq.*
24 Ms. Carter personally retained Mr. Keller as private counsel to represent her in exercising and
25 protecting her constitutional rights, including her right to be present at court proceedings, her
26 right to confer with the prosecution, and her right to receive restitution from the Defendant.

1 Her participation in this case was a direct result of the Defendant's criminal actions.
2 Accordingly, restitution from the Defendant should properly include all attorneys' fees that the
3 Victim has incurred while asserting her rights. Attorneys' fees as a Victim's expense in
4 exercising her rights under the Arizona Constitution satisfy the "but for" test.

5 The determination of restitution is part of the sentencing function of the court, and does
6 not require proof beyond a reasonable doubt. *State v. Reynolds*, 171 Ariz. 678, 832 P.2d 695
7 (App. 1992) (citations omitted). In fact, the burden of proof applicable to restitution is proof by
8 a preponderance of the evidence. *In re Stephanie B.*, 204 Ariz. 466, 470, ¶ 15, 65 P.3d 114, 118
9 (App.2003). Proof by a preponderance of the evidence means "proof which leads the [trier of
10 fact] to find that the existence of the contested fact is more probable than its nonexistence." *In*
11 *re William L.*, 211 Ariz. 236, 238, 119 P.3d 1039, 1041 (Ct. App. 2005). A restitution award
12 simply must bear a *reasonable* relationship to the victim's loss. *Lindsley, supra* at 197, 1250.

13 **III. Conclusion**

14 In this case, a jury found the Defendant guilty of Voyeurism, a Class 5 felony on
15 February 18, 2016. The Victim's restitution request is based solely on the economic losses she
16 suffered as a direct result of the Defendant's actions. This loss includes: the cost of therapy the
17 Victim incurred for treatment of the emotional trauma resulting from the Defendant's actions;
18 lost wages the Victim incurred as a result of attending therapy; the cost of traveling to and from
19 therapy; traveling and service costs regarding an Order of Protection; moving expenses to
20 another state, since the Defendant used his influence to tarnish the Victim's character and
21 reputation in their small town of Wickenburg; and attorneys' fees.

22 The Victim is entitled to collect restitution for the loss she suffered. The State therefore
23 respectfully requests that the Court order restitution in the amount of \$23,784.80. This amount
24 does not include the additional fees that will be incurred including, without limitation, the
25 Victim's costs of traveling in from out of state, attorney's fees, and additional lost wages if a
26 restitution hearing is required. The State reserves all rights to request restitution in accordance

1 with Arizona law.

2 Respectfully submitted this 14th day of April 2016.

3 WILLIAM G. MONTGOMERY
4 MARICOPA COUNTY ATTORNEY'S OFFICE

5 BY /s/ Julia VanHelder
6 Julia VanHelder
7 Deputy County Attorney

8 Original filed this
9 14th day of April, 2016,
10 with the Clerk of Court

11 Copy emailed/delivered this
12 14th day of April, 2016, to:

13 The Honorable Danielle Viola
14 Maricopa County Superior Court
15 201 West Jefferson
16 Phoenix, AZ 85003

17 M. Alex Harris, Esq.
18 M. Alex Harris, P.C.
19 P.O. Box 1541
20 Chino Valley, AZ 86323
21 alexharrispc@gmail.com
22 *Attorney for Defendant*

23 Craig L. Keller, Esq.
24 Gust Rosenfeld, PLLC
25 One East Washington, Suite 1600
26 Phoenix, AZ 85004-2553
ckeller@gustlaw.com
Attorneys for Victim

BY /s/ Julia VanHelder
Julia VanHelder
Deputy County Attorney

EXHIBIT A

VanHelder Julia

From: VanHelder Julia
Sent: Monday, April 04, 2016 7:55 PM
To: 'Alex Harris' (alexharrispc@gmail.com)
Subject: Restitution Request- State v. Richard Reed
Attachments: Reed Richard_ Restitution Docs for defense.pdf

Re: State v. Richard Reed, CR2015-117844-001

Good evening Alex,

I hope this e-mail finds you well. I have received a restitution request from the Victim in this case, for \$7,564.73. I have attached an itemized list to this e-mail to support this request. Please let me know what amount Mr. Reed will stipulate to, if any. I'm sure all parties can agree that everyone would like to move forward from this event, so if we can come to an agreement before Sentencing, that would be preferable. If we cannot come to an agreement, we will need to set a Restitution Hearing with the Court, and have everyone come back to court another time after 4/15.

Please let me know if Mr. Reed is willing to stipulate to an amount, and I look forward to hearing from you.

Thank you in advance,

Julia VanHelder
Deputy County Attorney
Sex Crimes West Bureau
Maricopa County Attorney's Office



EXHIBIT B

**GUST
ROSENFELD**
ATTORNEYS SINCE 1921 P.L.C.

■ ONE E. WASHINGTON, SUITE 1600 ■ PHOENIX, ARIZONA 85004-2553 ■ TELEPHONE 602-257-7422 ■ FACSIMILE 602-254-4878 ■

Craig L. Keller
602-257-7663
ckeller@gustlaw.com

SENT VIA EMAIL:

vanheldj@mcao.maricopa.gov

March 31, 2016

Julia VanHelder, Esq.
West Sex Crimes Bureau
Maricopa County Attorney's Office
301 West Jefferson, 5th Floor
Phoenix, AZ 85003-2191

Re: State of Arizona v. Richard Reed
CR 2015-117844-001
Victim's Restitution Claim
Our File No. 027241-0001

Dear Ms. VanHelder:

This letter is in follow up to my December 23, 2015 letter providing you with economic damages information regarding our client Cynthia Carter, the victim in this case. The below table is updated through March 31, 2016, with additional entries in **bold**.

Description	Date/s	Monetary Loss
Lost Time from Work at Edward Jones \$16.42 per hour		
Travel to Surprise and Order of Protection	5/4/15	5 hrs. x 16.42 = \$82.50
Travel to Surprise to meet with Judge re Order of Protection	5/15/15	7 hrs. x 16.42 = \$114.92
Therapy	7/17/15	3 hrs. x 16.42 = \$49.26
Therapy	7/24/15	3 hrs. x 16.42 = \$49.26
Therapy	7/31/15	3 hrs. x 16.42 = \$49.26
Therapy	8/7/15	3 hrs. x 16.42 = \$49.26
Lost Time from Work at Current Employer \$17.30 per hour		
Therapy	8/14/15	3 hrs. x 17.30 = \$51.99
Therapy	8/21/15	3 hrs. x 17.30 = \$51.99
Therapy	8/28/15	3 hrs. x 17.30 = \$51.99
Therapy	9/4/15	3 hrs. x 17.30 = \$51.99
Therapy	9/11/15	3 hrs. x 17.30 = \$51.99
Therapy	9/25/15	4 hrs. x 17.30 = \$69.20
Therapy	10/2/15	3 hrs. x 17.30 = \$51.99

2506262.1

PET. APPENDIX 136

Therapy	10/15/15	4 hrs. x 17.30 = \$69.20
Therapy	10/30/15	4 hrs. x 17.30 = \$69.20
Therapy	11/6/15	4 hrs. x 17.30 = \$69.20
Therapy	11/13/15	4 hrs. x 17.30 = \$69.20
Therapy	11/20/15	4 hrs. x 17.30 = \$69.20
Therapy	12/4/15	3 hrs. x 17.30 = \$51.99
Therapy	12/11/15	4 hrs. x 17.30 = \$69.20
Therapy	12/18/15	3.5 hrs. x 17.30 = \$60.64
Therapy	1/22/16	4.5 hrs. x 17.30 = \$77.85
Therapy	1/29/16	3.5 hrs. x 17.30 = \$60.64
Therapy	2/12/16	3.5 hrs. x 17.30 = \$60.64
Therapy	2/19/16	3.5 hrs. x 17.30 = \$60.64
Therapy	2/26/16	3.5 hrs. x 17.30 = \$60.64
		TOTAL: \$1,623.84
Mileage \$0.57 per mile (standard business rate)		
Round trip from home to therapy is 84 miles	17 travel dates so far	17 trips @ 84 mi. each = 1428 1428 mi. x 0.57.5 = \$821.10
Travel	12/11/15	84 miles x 0.57.5 = \$48.30
Travel	12/18/15	84 miles x 0.57.5 = \$48.30
Travel	1/22/16	84 miles x 0.57.5 = \$48.30
Travel	1/29/16	84 miles x 0.57.5 = \$48.30
Travel	2/12/16	84 miles x 0.57.5 = \$48.30
Travel	2/19/16	84 miles x 0.57.5 = \$48.30
Travel	2/26/16	84 miles x 0.57.5 = \$48.30
		TOTAL: \$1,159.20
Therapy at Sonoran Life Solutions		
Twenty-four sessions (approx. 1 hr. each)	7/17/15 to 2/26/16	24 sessions at \$82.50 each TOTAL: \$1,980.00
Miscellaneous		
Process Server Fee for Order of Protection		\$40.00
Moving Expenses		
Southwest Airlines airfare to [REDACTED]	3/3/16	\$366.98
U-Haul rental	3/7/16	\$1,360.00
Gasoline	3/5/16	\$442.50
	3/6/16	

March 31, 2016

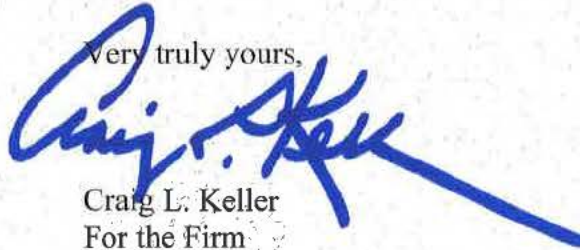
Food	3/4/16	\$230.35
Lodging	3/5/16	\$361.86
	3/6/16	
		TOTAL: \$2,761.69

Conclusion

My client's restitution claim to date totals **\$7,564.73**.

Thank you.

Very truly yours,



Craig L. Keller
For the Firm

CLK:mem
cc: Cynthia C. Carter

EXHIBIT C

VanHelder Julia

From: Alex Harris <alexharrispc@gmail.com>
Sent: Monday, April 04, 2016 8:31 PM
To: VanHelder Julia; Alex Harris
Subject: Re: Restitution Request- State v. Richard Reed

You have to be kidding. I would never stipulate to that There is no documentation to the claim. Get actual bills and justification for the location and for airfare. Until then no way. Also the attorney representing her is a board member where she works how does that play. I would be happy to go over every bill with a fine tooth comb and every counselor note. Oh by the way i will want every note from the counselor. Cindy waives her privilege with the request for restitution. And i also want to know all about her insurance co pay coverage every check ever written regarding her claims. And any reimbursement from any company for any claims on this request. Then i will need proof that the counselors in wickenburg could not meet with her and provide counseling and then i will want all her employment records for time off work. And so far that is just the beginning. When i get past my outrage i will think of the rest of the documentation i will need. See you next week. Have s nice evening.

Alex Harris
928-899-6022
PO Box 1541
Chino Valley AZ 86323

On Apr 4, 2016, at 7:54 PM, VanHelder Julia <vanheldj@mcao.maricopa.gov> wrote:

Re: State v. Richard Reed, CR2015-117844-001

Good evening Alex,

I hope this e-mail finds you well. I have received a restitution request from the Victim in this case, for \$7,564.73. I have attached an itemized list to this e-mail to support this request. Please let me know what amount Mr. Reed will stipulate to, if any. I'm sure all parties can agree that everyone would like to move forward from this event, so if we can come to an agreement before Sentencing, that would be preferable. If we cannot come to an agreement, we will need to set a Restitution Hearing with the Court, and have everyone come back to court another time after 4/15.

Please let me know if Mr. Reed is willing to stipulate to an amount, and I look forward to hearing from you.

Thank you in advance,

Julia VanHelder
Deputy County Attorney
Sex Crimes West Bureau
Maricopa County Attorney's Office

<image001.png>

<Reed Richard_ Restitution Docs for defense.pdf>

EXHIBIT D

VanHelder Julia

From: Alex Harris <alexharrispc@gmail.com>
Sent: Monday, April 04, 2016 8:40 PM
To: VanHelder Julia; Alex Harris
Subject: Re: Restitution Request- State v. Richard Reed

I have had a chance to look it over after printing it off my phone here at home. Needless to say i object to every line of the summary. I think the standard rate for mileage dropped can you check on that. Where did she fly why u haul rental what connection to this case.

Food gas and lodging??? What for.

Julia this is fraud at its worst. I will be asking for a hearing at sentencing and i will be asking for every piece of her life to support your request for restitution. Thanks.

Alex Harris
928-899-6022
PO Box 1541
Chino Valley AZ 86323

On Apr 4, 2016, at 7:54 PM, VanHelder Julia <vanheldj@mcao.maricopa.gov> wrote:

Re: State v. Richard Reed, CR2015-117844-001

Good evening Alex,

I hope this e-mail finds you well. I have received a restitution request from the Victim in this case, for \$7,564.73. I have attached an itemized list to this e-mail to support this request. Please let me know what amount Mr. Reed will stipulate to, if any. I'm sure all parties can agree that everyone would like to move forward from this event, so if we can come to an agreement before Sentencing, that would be preferable. If we cannot come to an agreement, we will need to set a Restitution Hearing with the Court, and have everyone come back to court another time after 4/15.

Please let me know if Mr. Reed is willing to stipulate to an amount, and I look forward to hearing from you.

Thank you in advance,

Julia VanHelder
Deputy County Attorney
Sex Crimes West Bureau
Maricopa County Attorney's Office

<image001.png>

<Reed Richard_ Restitution Docs for defense.pdf>

EXHIBIT E

VanHelder Julia

From: Alex Harris <alexharrispc@gmail.com>
Sent: Monday, April 04, 2016 8:42 PM
To: VanHelder Julia; Alex Harris
Subject: Re: Restitution Request- State v. Richard Reed

I will need all receipts from justice court action

Alex Harris
928-899-6022
PO Box 1541
Chino Valley AZ 86323

On Apr 4, 2016, at 7:54 PM, VanHelder Julia <vanheldj@mcao.maricopa.gov> wrote:

Re: State v. Richard Reed, CR2015-117844-001

Good evening Alex,

I hope this e-mail finds you well. I have received a restitution request from the Victim in this case, for \$7,564.73. I have attached an itemized list to this e-mail to support this request. Please let me know what amount Mr. Reed will stipulate to, if any. I'm sure all parties can agree that everyone would like to move forward from this event, so if we can come to an agreement before Sentencing, that would be preferable. If we cannot come to an agreement, we will need to set a Restitution Hearing with the Court, and have everyone come back to court another time after 4/15.

Please let me know if Mr. Reed is willing to stipulate to an amount, and I look forward to hearing from you.

Thank you in advance,

Julia VanHelder
Deputy County Attorney
Sex Crimes West Bureau
Maricopa County Attorney's Office

<image001.png>

<Reed Richard_ Restitution Docs for defense.pdf>

EXHIBIT F

**GUST
ROSENFELD**
ATTORNEYS SINCE 1921 P.L.C.

■ ONE E, WASHINGTON, SUITE 1600 ■ PHOENIX, ARIZONA 85004-2553 ■ TELEPHONE 602-257-7422 ■ FACSIMILE 602-254-4878 ■

Craig L. Keller
602-257-7663
ckeller@gustlaw.com

SENT VIA EMAIL:

vanheldj@mcao.maricopa.gov

April 14, 2016

Julia VanHelder, Esq.
West Sex Crimes Bureau
Maricopa County Attorney's Office
301 West Jefferson, 5th Floor
Phoenix, AZ 85003-2191

Re: State of Arizona v. Richard Reed
CR 2015-117844-001
Victim's Restitution Claim
Our File No. 027241-0001

Dear Ms. VanHelder:

This letter is in follow up to my March 31, 2016 letter providing you with economic damages information regarding our client Cynthia Carter, the victim in this case. Please see the attached documentation supporting Ms. Carter's damages. We will supplement her wage losses upon receipt of documentation we have requested from those employers. The below table is updated through April 14, 2016, with revised entries and additional information in **bold**.

Description	Date/s	Monetary Loss
Lost Time from Work at Edward Jones \$16.42 per hour		
Travel to Surprise and Order of Protection	5/4/15	5 hrs. x 16.42 = \$82.50
Travel to Surprise to meet with Judge re Order of Protection	5/15/15	7 hrs. x 16.42 = \$114.92
Therapy	7/17/15	3 hrs. x 16.42 = \$49.26
Therapy	7/24/15	3 hrs. x 16.42 = \$49.26
Therapy	7/31/15	3 hrs. x 16.42 = \$49.26
Therapy	8/7/15	3 hrs. x 16.42 = \$49.26
		TOTAL: \$394.46
Mileage \$0.57.5 per mile (2015 standard business rate) \$0.54 per mile (2016 standard business rate)		
Round trip from home to therapy at Sonoran Life Solutions is 81 miles (see Mapquest mileage calculation attached.)	17 travel dates so far	17 trips @ 81 mi. each =1377 1377 mi. x 0.57.5 = \$791.77

2650618.1

Travel	12/11/15	81 miles x 0.57.5 = \$46.57
Travel	12/18/15	81 miles x 0.57.5 = \$46.57
Travel	1/22/16	81 miles x 0.54 = \$43.74
Travel	1/29/16	81 miles x 0.54 = \$43.74
Travel	2/12/16	81 miles x 0.54 = \$43.74
Travel	2/19/16	81 miles x 0.54 = \$43.74
Travel	2/26/16	81 miles x 0.54 = \$43.74
		TOTAL: \$1,103.61
Therapy at Sonoran Life Solutions		
Twenty-four sessions (approx. 1 hr. each) See attached transaction ledger attached.	7/17/15 to 2/26/16	24 sessions at \$82.50 each TOTAL: \$1,980.00
Miscellaneous		
Process Server Fee for Order of Protection See Hassayampa Justice Court receipt attached [redacted]		\$40.00
Moving Expenses		
Southwest Airlines airfare one-way to Phoenix for Ms. Carter's mother. Her assistance was needed to drive Ms. Carter's car so Ms. Carter could drive the U-Haul truck to Ms. Carter's new home. See Southwest Airlines confirmation attached [redacted]	3/3/16	\$366.98
U-Haul rental See attached bank transaction [redacted]	3/7/16	\$1,360.00
Gasoline See attached bank transactions [redacted]	3/5/16 3/6/16	\$442.50
Food See attached bank transactions [redacted]	3/4/16	\$230.35
Lodging See attached bank transactions [redacted]	3/5/16 3/6/16	\$143.13 \$218.73
		TOTAL: \$2,761.69

Conclusion

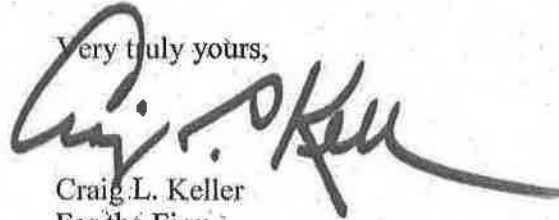
My client's restitution claim to date totals **\$5,885.30** plus attorneys' fees as supported by my affidavit of today's date.

Julia VanHelder, Esq.
Page 3

April 14, 2016

Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read "Craig L. Keller". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Craig L. Keller
For the Firm

Enclosures
CLK;mem
cc: Cynthia C. Carter



[Start Over](#)

Find Places

Where are you starting?
 51 Northridge Cir, Wickenburg, ,

Where are you going?
 13460 N 94th Dr, Peoria, AZ 85:

Get Directions

Add Stop Route Settings

Find hotel save!

Your Route

via US-60 E
53min 40.5mi

Current Traffic: Light

[View Route Directions >](#)

Transaction Ledger for Cynthia Carter

Date	Amount	Total Charge	Patient	Billable Party	Transaction Type
7/17/2015	\$82.50	\$220.00	Cynthia Carter		Session
7/24/2015	\$82.50	\$200.00	Cynthia Carter		Session
7/31/2015	\$82.50	\$200.00	Cynthia Carter		Session
8/7/2015	\$82.50	\$200.00	Cynthia Carter		Session
8/14/2015	\$82.50	\$200.00	Cynthia Carter		Session
8/21/2015	\$82.50	\$200.00	Cynthia Carter		Session
8/28/2015	\$82.50	\$200.00	Cynthia Carter		Session
9/5/2015	\$82.50	\$200.00	Cynthia Carter		Session
9/11/2015	\$82.50	\$200.00	Cynthia Carter		Session
9/25/2015	\$82.50	\$200.00	Cynthia Carter		Session
10/2/2015	\$82.50	\$200.00	Cynthia Carter		Session
10/19/2015	\$82.50	\$200.00	Cynthia Carter		Session
10/23/2015	(\$660.00)		Cynthia Carter	Victim Compensation Prog	Payment
10/30/2015	\$82.50	\$200.00	Cynthia Carter		Session
11/6/2015	\$82.50	\$200.00	Cynthia Carter		Session
11/13/2015	\$82.50	\$200.00	Cynthia Carter		Session
11/20/2015	\$82.50	\$200.00	Cynthia Carter		Session
12/4/2015	\$82.50	\$200.00	Cynthia Carter		Session
12/9/2015	(\$660.00)		Cynthia Carter	Victim Compensation Prog	Payment
12/11/2015	\$82.50	\$200.00	Cynthia Carter		Session
12/18/2015	\$82.50	\$200.00	Cynthia Carter		Session
1/2/2016	\$82.50	\$200.00	Cynthia Carter		Session
1/29/2016	\$82.50	\$200.00	Cynthia Carter		Session
2/10/2016	(\$412.50)		Cynthia Carter	Victim Compensation Prog	Payment
2/12/2016	\$82.50	\$200.00	Cynthia Carter		Session
2/19/2016	\$82.50	\$200.00	Cynthia Carter		Session
2/26/2016	\$82.50	\$200.00	Cynthia Carter		Session
3/10/2016	(\$247.50)		Cynthia Carter	Victim Compensation Prog	Payment
	\$0.00	\$4,820.00			

<Filter is Empty>

Sale Transaction

MARICOPA COUNTY
HASSAYAMPA JUSTICE COURT
14264 WEST TIERRA BUENA LANE
SURPRISE, AZ 85374
602-372-2000

05/05/15 09:37 AM
TERMINAL : HSYJC00001
Payment Type : VISA
XXXXXXXXXX [REDACTED] Exp: XXXX

Account ID : 3642107930
Ac Code : 033712
Account for : TREASURER
Account number : 2015077301
Payment amount : \$ 40.00

Convenience Fee : \$ 0.00
Transaction Total : \$ 40.00

CUSTOMER COPY



Thanks for choosing Southwest® for your trip.

[Log in](#) | [View my itinerary](#)

Southwest

[Check In Online](#)

[Check Flight Status](#)

[Change Flight](#)

[Special Offers](#)

[Hotel Offers](#)

[Car Offers](#)

Ready for takeoff!



Thanks for choosing Southwest® for your trip. You'll find everything you need to know about your reservation below. Happy travels!

Upcoming Trip: moving Cindy



[Air itinerary](#)

AIR Confirmation: [REDACTED]

Confirmation Date: 02/22/2016

Passenger(s)	Rapid Rewards #	Ticket #	Expiration	Est. Points Earned
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Rapid Rewards points earned are only estimates. Visit your (MySouthwest, Southwest.com or Rapid Rewards) account for the most accurate totals - including A-List & A-List Preferred bonus points.

Date	Flight	Departure/Arrival
Thu Mar 3	[REDACTED]	[REDACTED]

- ✓ **Check in for your flight(s):** 24 hours before your trip on [Southwest.com](#) or your mobile device to secure your boarding position. You'll be assigned a boarding position based on your check-in time. The earlier you check in within 24 hours of your flight, the earlier you get to board.
- ✓ **Bags fly free®:** First and second checked bags. Weight and size limits apply. One small bag and one personal item are permitted as carryon items, free of charge.
- ✓ **30 minutes before departure:** We encourage you to arrive in the gate area no later than 30 minutes prior to your flight's scheduled departure as we may begin boarding as early as 30 minutes before your flight.

Save up to 30%
Plus earn up to 2,400 Rapid Rewards® points.

Budget

EarlyBird Check-In

Let us take care of check-in for you.

[Get it now](#)



[Add a hotel](#)

- ✓ Earn Rapid Rewards® points
- ✓ Best rate guarantee
- ✓ Free cancellation

[Book a hotel >](#)



[Add a rental car](#)

- ✓ Earn Rapid Rewards® points
- ✓ Best rate guarantee
- ✓ Free cancellation

L **10 minutes before departure:** You must obtain your boarding pass(es) and be in the gate area for boarding at least 10 minutes prior to your flight's scheduled departure time. If not, Southwest may cancel your reserved space and you will not be eligible for denied boarding compensation.

i **If you do not plan to travel on your flight:** In accordance with Southwest's No Show Policy, you must notify Southwest at least 10 minutes prior to your flight's scheduled departure if you do not plan to travel on the flight. If not, Southwest will cancel your reservation and all funds will be forfeited.

Air Cost: 366.98

Fare Rule(s): 5262185548234: NONREF/NONTRANSFERABLE/STANDBY REQ UPGRADE TO Y
Valid only on Southwest Airlines. All travel involving funds from this Confirmation Number must be completed by the expiration date. Unused travel funds may only be applied toward the purchase of future travel for the individual named on the ticket. Any changes to this itinerary may result in a fare increase. Failure to cancel reservations for a Wanna Get Away fare segment at least 10 minutes prior to travel will result in the forfeiture of all remaining unused funds.

PDX WN PHX328.26BLN7PNR 328.26 END ZPPDX XFPDX4.5
AY5.60\$PDX5.60

[Book a car >](#)

Travel more for less.

Exclusive deals on your favorite destinations

[Sign up and save >](#)

Southwest
Rapid Rewards

- ✓ Unlimited reward seats
- ✓ No blackout dates
- ✓ Redeem for International flights

[Enroll now >](#)

[Learn about our boarding process >](#)

[Learn about inflight WiFi & entertainment >](#)

Cost and Payment Summary

AIR PDS512

Base Fare	\$ 328.26
Excise Taxes	\$ 24.62
Segment Fee	\$ 4.00
Passenger Facility Charge	\$ 4.50
September 11th Security Fee	\$ 5.60
Total Air Cost	\$ 366.98

Payment Information

Payment Type: Visa XXXXXXXXXXXX [REDACTED]
Date: Feb 22, 2016
Payment Amount: \$366.98

Useful Tools

- [Check In Online](#)
- [Early Bird Check-In](#)
- [View/Share Itinerary](#)
- [Change Air Reservation](#)
- [Cancel Air Reservation](#)
- [Check Flight Status](#)
- [Flight Status Notification](#)
- [Book a Car](#)
- [Book a Hotel](#)

Know Before You Go

- [In the Airport](#)
- [Baggage Policies](#)
- [Suggested Airport Arrival Times](#)
- [Security Procedures](#)
- [Customers of Size](#)
- [In the Air](#)
- [Purchasing and Refunds](#)

Special Travel Needs

- [Traveling with Children](#)
- [Traveling with Pets](#)
- [Unaccompanied Minors](#)
- [Baby on Board](#)
- [Customers with Disabilities](#)



Wells Fargo Business Online®

Account Activity

Activity Summary

Current Posted Balance

Pending Withdrawals/ Debits

Pending Deposits/ Credits

Available Balance



Transactions

Show: for Last 90 Days

Date	Description	Deposits / Credits	Withdrawals / Debits
------	-------------	--------------------	----------------------

Pending Transactions Note: Debit card transaction amounts may change

No pending transactions meet your criteria above.

Posted Transactions



03/07/16	PURCHASE AUTHORIZED ON 03/03 UH*U-HAULJONES FO WICKENBURG AZ S286083698080840 CARD 5916		-\$1,380.00
----------	-----------------------------------------------------------------------------------------	--	-------------



Deposit products offered by Wells Fargo Bank, N.A. Member FDIC. Wells Fargo Bank, N.A. is a banking affiliate of Wells Fargo & Company.

Equal Housing Lender

© 1995 - 2016 Wells Fargo. All rights reserved



Wells Fargo Business Online™

Account Activity



Payment Due Information

Minimum Payment [Redacted]
Automatic Payments [Redacted]

Balance Summary

Total Credit Limit [Redacted]
Outstanding Balance [Redacted]
Available Credit [Redacted]
Last Statement Balance 03/13/10

Transactions

Trans Date	Posting Date	Description	Amount	Running Balance
------------	--------------	-------------	--------	-----------------

Posted Transactions

03/13/16 ENDING BALANCE



03/06/16	03/06/16	CHEVRON 0098846 CASTELLA CA <REFERENCE 2469216EJ00QYLZA6>	\$64.68	[Redacted]
03/06/16	03/06/16	CHEVRON 0209748 ELK GROVE CA <REFERENCE 2469216EJ00ASBR0M>	\$28.00	[Redacted]
03/06/16	03/06/16	CHEVRON 0209748 ELK GROVE CA <REFERENCE 2469216EJ00ASURBY>	\$40.91	[Redacted]
03/06/16	03/06/16	HOLIDAY INN EXP ELK GROVE/ELK GROVE CA <REFERENCE 2461043EK03VE90L1>	\$218.73	[Redacted]



03/06/16	03/06/16	SEVEN FEATHERS TRUCK & CANYONVILLE OR <REFERENCE 2442733EKLMBMVL20>	\$25.00	[Redacted]
03/06/16	03/06/16	SEVEN FEATHERS TRUCK & CANYONVILLE OR <REFERENCE 2442733EKLMBMVL2G>	\$47.48	[Redacted]



03/05/16	03/05/16	COMFORT SUITES BARSTOW CA <REFERENCE 2469216EJ0092MFBW>	\$143.13	[Redacted]
03/05/16	03/05/16	CHEVRON 0005697 LAKE HAVASU CAZ <REFERENCE 2469216EH00DRNLR5>	\$31.04	[Redacted]
03/05/16	03/05/16	PILOT Barstow CA <REFERENCE 2462801E110053953V>	\$28.24	[Redacted]
03/05/16	03/05/16	PILOT Barstow CA <REFERENCE 2462801EH005393MP>	\$55.38	[Redacted]
03/05/16	03/05/16	ASHIAN VALERO FRESNO CA <REFERENCE 2442733EJ3FRQ6RQV>	\$83.52	[Redacted]

Trans Date	Posting Date	Description	Amount	Running Balance
03/04/18	03/04/16	WOODY'S FOOD STORE # 108 WICKENBURG AZ <REFERENCE 2405523EHRBG11H362>	\$80.25	

Deposit products offered by Wells Fargo Bank, N.A. Member FDIC. Wells Fargo Bank, N.A. is a banking affiliate of Wells Fargo & Company.

 Equal Housing Lender

© 1995 - 2016 Wells Fargo. All rights reserved.

EXHIBIT G

STATE OF ARIZONA)
) ss. Affidavit of Craig L. Keller
County of Maricopa)

Craig L. Keller, after first being duly sworn on his oath, deposes and says:

1. I am a Partner with the law firm of Gust Rosenfeld, PLC (“Gust Rosenfeld”), involved in the representation of Cynthia Catrice Carter (“Carter”) as the victim in connection with Maricopa County Superior Court Case Number CR2015-0117844-0001-DT.

2. I was admitted to the practice of law in the state of Arizona in October 1982 and have remained in good standing since admission.

3. Since 1982, I have been actively engaged in a general litigation practice handling primarily civil matters and criminal matters on occasion.

4. I am familiar with the current rates charged by law firms engaged in general litigation practice for attorneys of my experience, education and skill.

5. Before November 2, 2015, Carter engaged the law firm of Gust Rosenfeld to represent her as the victim in this matter assisting with determining and enforcing her rights as a victim under Arizona law.

6. Gust Rosenfeld performed legal services for Carter, and Carter agreed to compensate this law firm for such services at my hourly rate of \$405.00 per hour. Changes before January 1, 2016 were billed at the maximum rate of \$395.00 per hour.

7. Attached to this Affidavit as Exhibit “A” is a Time and Expense Details Summary, excluding any confidential information, of the computer printouts, in substantially the same form, which contain a description of time recorded by the attorneys related solely to the representation of Carter as the victim in connection with the above captioned case, which have been or will be sent to her for payment.

8. I have personal knowledge of the legal services performed and set forth in Exhibit "A".

9. The computer printouts are based on individual time sheets maintained by the attorneys and/or paralegals of the law firm of Gust Rosenfeld on a daily basis and provide a description of the services performed, the initials or name of the attorney or paralegal performing the services, and the amount of time expended in tenths of hours. The computer printouts also describe in detail litigation-related expenses incurred.

10. After a review of all the computer printouts, I have determined that all of the entries are related to representing Carter as the victim in this case.

11. The following is a summary of time spent and the billing rate by attorney and/or paralegal of the law firm of Gust Rosenfeld in connection with the above-referenced matter:

<u>Attorney/Paralegal</u>	<u>Hours Billed</u>	<u>Billing Rate</u>
Prior to January 1, 2016:		
Craig L. Keller (Attorney)	7.8	\$395.00/hour
Shelby Lile (Attorney)	0.6	\$220.00/hour
Marty McAllister (Paralegal)	14.1	\$185.00/hour

Post January 1, 2016:

Craig L. Keller (Attorney)	28.5	\$405.00/hour
Shelby Lile (Attorney)	0.7	\$230.00/hour
Marty McAllister (Paralegal)	4.9	\$195.00/hour

Note: There are several "No Charge" entries; time entries reflect hours, but no amount.

12. I believe that these sums are in the range of fees customarily charged in the geographic area where the services were performed.

13. The services described in the attached Summary were necessary in representing Carter and that the time expended in performing such services was reasonable and appropriate.

14. As shown by the Summary, Carter has incurred the amount of \$17,909.50 in attorneys' fees and costs to represent Carter as a victim and has been billed or will be billed.

15. I believe the amount of attorneys' fees is reasonable and in accordance with the guidelines set forth in ER 1.5, Arizona Rules of Professional Conduct.

DATED this 14th day of April, 2016.



Craig L. Keller

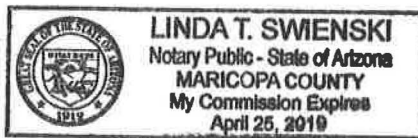
SUBSCRIBED and SWORN to by Craig L. Keller before me, the undersigned notary public, this 14th day of April, 2016.



Notary Public

My Commission Expires:

April 25, 2019



Gust Rosenfeld, PLC

Time And Expense Details

Report ID: OT2025 - 118693
 Thursday, April 14, 2016

Printed By KBJ
 Page 1

Client	Client Reporting Name	Matter	Date [11/01/2015 - 04/14/2016] Matter Reporting Name	Billing Timekeeper
027241	Carter, Cynthia	00001		Keller, Craig L.

Time	Date	Timekeeper	Hours Worked	Hours To Bill	Rate	Amount	Task	Activity	Narrative
	11/2/2015	CLK	0.10	0.10	395.00	\$39.50			Review email from Julie Williams at Victim Services about restitution.
	11/2/2015	CLK	0.10	0.10	395.00	\$39.50			Read and respond to email from Prosecutor Jennifer Carper.
	11/2/2015	CLK	0.20	0.20	395.00	\$79.00			Draft email to Cynthia Carter about restitution claim and recent communications with Victims Services representative.
	11/2/2015	CLK	0.20	0.20	395.00	\$79.00			Draft email letter to Julie Williams about recent plea offer and restitution claim.
	11/3/2015	CLK	0.20	0.20	395.00	\$79.00			Read Cynthia Carter's comments on proposed plea deal and draft email response.
	11/3/2015	CLK	0.40	0.40	395.00	\$158.00			Draft email letter to Victims' Rights representative providing comments to proposed plea deal
	11/9/2015	CLK	0.20	0.20	395.00	\$79.00			Review LinkedIn screen shot; draft letter to Prosecutor about Rick Reed's attempts to
	11/19/2015	CLK	0.30	0.30	395.00	\$118.50			Email from Shelby Lile regarding Rick Reed's review of Cynthia Carter's social media; reach Cynthia Carter via social media.
	12/1/2015	CLK	0.20	0.20	395.00	\$79.00			Email to Cynthia Carter.
	12/1/2015	CLK	1.50	1.50	395.00	\$592.50			Further review of standard terms of probation for sexual offenses and notes of last conversation with prosecutor.
	12/1/2015	CLK	0.60	0.60	395.00	\$237.00			Telephone call to Cynthia Carter to discuss plea offer terms.
	12/1/2015	CLK	0.50	0.50	395.00	\$197.50			Prepare letter to newly assigned Prosecutor about Cynthia Carter's response to plea terms.
	12/2/2015	CLK	0.20	0.20	395.00	\$79.00			Review email information provided by Cynthia Carter on Rick Reed's broker status.
	12/3/2015	CLK	0.30	0.20	395.00	\$79.00			Review expenses and right to restitution.
	12/4/2015	CLK	0.20	0.20	395.00	\$79.00			Conference with M. E. McAllister regarding restitution claim, back-up information.
	12/7/2015	CLK	0.40	0.40	395.00	\$158.00			Conference with M. E. McAllister regarding counseling expenses and restitution claim; review claim letter.
	12/9/2015	CLK	0.20	0.20	395.00	\$79.00			Revise letter to Cynthia Carter regarding restitution claims.
	12/15/2015	CLK	0.50	0.50	395.00	\$197.50			Read Minute Entry dated 12/04/2015 continuing trial, State's Notice of Disclosure and Request for Disclosure filed 6/23/2015, and Disclosure by Defense 15.2.
	12/15/2015	CLK	0.20	0.20	395.00	\$79.00			Draft letter to Cynthia Carter about State's Disclosure and Defendant's Disclosure.
	12/17/2015	CLK	0.50	0.50	395.00	\$197.50			Read several emails from Cynthia Carter and think about ramifications on case at trial.
	12/17/2015	CLK	0.20	0.20	395.00	\$0.00	NC		Brief conference with M. E. McAllister regarding Cynthia Carter's emails. (No Charge).
	12/17/2015	CLK	0.40	0.40	395.00	\$158.00			Telephone call to Cynthia Carter.
	12/23/2015	CLK	0.20	0.20	395.00	\$79.00			Review and revise letter to prosecutor with update restitution claim.
TOTAL				7.8		2,962.50			

EXHIBIT A

Gust Rosenfeld, PLC

Time And Expense Details

Report ID: OT2025 - 118693
 Thursday, April 14, 2016

Printed By KBJ
 Page 1

Client	Client Reporting Name	Matter	Date [11/01/2015 - 04/14/2016]	Matter Reporting Name	Billing Timekeeper	
027241	Carter, Cynthia	00001			Keller, Craig L.	
11/5/2015	SL2	0.60	0.60	220.00	\$132.00	Draft status letter to C. Carter.
11/9/2015	SL2	0.20	0.20	220.00	\$0.00 NC	Review LinkedIn screenshot; emails with C. Carter and C. L. Keller. (No Charge).
11/18/2015	SL2	0.10	0.10	220.00	\$0.00 NC	Phone call from C. Carter; emails with C. Carter and C. L. Keller regarding second LinkedIn profile view. (No Charge). think about what can be done.
TOTAL			0.6		132.00	
12/2/2015	MEM	1.30	1.30	185.00	\$240.50	Work on substantiating client's expenses and strategize reimbursement issue for treatment going into the future.
12/3/2015	MEM	0.80	0.80	185.00	\$148.00	Review case file and correspondence from client for documentation and itemization of out-of-pocket expenses.
12/3/2015	MEM	0.20	0.20	185.00	\$37.00	Email exchanges with client regarding salary breakdown and hours away from work.
12/4/2015	MEM	1.40	0.60	185.00	\$111.00	Finalize comprehensive restitution letter to Prosecutor.
12/7/2015	MEM	0.30	0.30	185.00	\$55.50	Telephone conference with Victim Advocate J. Williams regarding status of proceedings and restitution information.
12/7/2015	MEM	0.30	0.30	185.00	\$55.50	Summarize information regarding Court's action on 12-4-15 canceling current trial setting and associated details and provide to C. Keller.
12/7/2015	MEM	1.50	0.60	185.00	\$111.00	Revise restitution letter to Prosecutor J. VanHelder itemizing C. Carter's mileage and therapy visit expenses.
12/7/2015	MEM	1.30	0.50	185.00	\$92.50	Telephone calls with Julie Williams, Victim Advocate and the Court following up on new trial date in 2016, and communication protocol with prosecutor, court and victim compensation fund.
12/8/2015	MEM	0.40	0.40	185.00	\$74.00	Telephone conference with D. Gonzales from Victims Compensation Board for restitution information.
12/8/2015	MEM	0.30	0.30	185.00	\$55.50	Telephone conference with D. Schinaberger, Judicial Assistant to Judge Foster, regarding case status and to confirm rescheduled trial and request minute entry from court, and hearing procedures in the future.
12/8/2015	MEM	0.30	0.30	185.00	\$55.50	Telephone conference Prosecutor's paralegal requesting List of Witnesses from defendant, and to convey keeping us informed regarding court documents and schedule changes.
12/9/2015	MEM	0.80	0.80	185.00	\$148.00	Summarize collective information from the Victims Compensation Board, Victims Advocate and the Prosecutor's office and provide to C. Keller.
12/9/2015	MEM	1.40	1.40	185.00	\$259.00	Draft comprehensive update letter to client with new information regarding her pursuit of restitution and status of the case State vs. Reed.
12/14/2015	MEM	0.20	0.20	185.00	\$37.00	Telephone call to Nicole Hood at Prosecutor's office regarding status of copies of Minute Entry and Defendant's Disclosure with List of Witnesses.
12/15/2015	MEM	0.20	0.20	185.00	\$37.00	Telephone follow up with N. Hood, prosecutor's paralegal on getting copies of Minute Entry and List of Witnesses from Defendant.
12/15/2015	MEM	0.70	0.70	0.00	\$0.00	(No Charge) Review and analyze Court's Minute Entry, Defendant's First Disclosure, and State's Notice of Disclosure and provide to C. Keller.
12/17/2015	MEM	0.30	0.30	185.00	\$55.50	Review case status regarding most recent communications with client and prosecutor's office about defendant's disclosure.
12/17/2015	MEM	0.80	0.80	185.00	\$148.00	Analyze new information from client's forwarded e-mails and Rick T. on defendant's witness list and prepare for telephone conference with client.

Gust Rosenfeld, PLC

Time And Expense Details

Report ID: OT2025 - 118693
 Thursday, April 14, 2016

Printed By KBJ
 Page 1

Client	Client Reporting Name	Matter	Date [11/01/2015 - 04/14/2016]	Matter Reporting Name	Billing Timekeeper	
027241	Carter, Cynthia	00001			Keller, Craig L.	
12/17/2015	MEM	1.50	1.50	185.00	\$277.50	Comprehensive telephone conference with client regarding each witness listed in the defendant's disclosure, their relationships with C. Carter and with R. Reed and what each may testify to. (No Charge) Telephone call with prosecutor's paralegal to determine best way to share information regarding defense witnesses with the prosecutor and advise C. Keller. Prepare letter to Prosecutor with additional information regarding restitution claim. Revise letter to Prosecutor with updated calculations for damages regarding restitution claim.
12/18/2015	MEM	0.40	0.40	0.00	\$0.00	
12/23/2015	MEM	0.50	0.50	185.00	\$92.50	
12/23/2015	MEM	0.30	0.30	185.00	\$55.50	
TOTAL			14.1		2,146.00	

Gust Rosenfeld, PLC

Time And Expense Details

Printed By KBJ
Page 1

Report ID: OT2025 - 118693
Thursday, April 14, 2016

Client	Client Reporting Name	Matter	Date [11/01/2015 - 04/14/2016]	Matter Reporting Name	Billing Timekeeper				
027241	Carter, Cynthia	00001			Keller, Craig L.				
Time	Date	Timekeeper	Hours Worked	Hours To Bill	Rate	Amount	Task	Activity	Narrative
	1/6/2016	CLK	0.40	0.40	405.00	\$162.00			Review motion for indigent status.
	1/7/2016	CLK	0.50	0.50	405.00	\$202.50			Telephone call with Prosecutor regarding case status and preparations required for trial.
	1/11/2016	CLK	0.30	0.30	405.00	\$0.00	NC		Read and respond to email from S. Lile about Richard Reed's use of the LinkedIn to find client; think about client's options based on prior call with Prosecutor. (No Charge).
	1/12/2016	CLK	0.20	0.20	405.00	\$81.00			Read minute entry on indigency hearing.
	1/19/2016	CLK	0.30	0.30	405.00	\$121.50			Review information provided to Prosecutor.
	1/20/2016	CLK	0.40	0.40	405.00	\$162.00			Review property information on Reeds' real estate ownership and indigency statements.
	1/21/2016	CLK	0.20	0.20	405.00	\$81.00			Review posting on Facebook about Shannon Hershkowitz, email to client.
	1/26/2016	CLK	0.50	0.50	405.00	\$202.50			Conference with Cynthia Carter to address her questions about Reed trial.
	1/27/2016	CLK	0.30	0.30	405.00	\$121.50			Several emails and calls from Prosecutor and Victims' Rights representative about trial.
	1/27/2016	CLK	0.50	0.50	405.00	\$202.50			Email to and from Cynthia Carter regarding trial date is firm and answering client's questions.
	2/1/2016	CLK	0.50	0.50	405.00	\$202.50			Telephone from Julia VanHelder regarding trial preparation and evidentiary issues; email to Ms. VanHelder and client.
	2/1/2016	CLK	0.20	0.20	405.00	\$81.00			Telephone from Cynthia Carter to discuss my call with Prosecutor and preparation meeting.
	2/5/2016	CLK	2.40	2.40	405.00	\$972.00			Meeting with Prosecutor and Victim's Rights Advocate to prepare for criminal trial.
	2/8/2016	CLK	0.20	0.20	405.00	\$81.00			Receive emails from Prosecutor that plea offer not accepted; email to Cynthia Carter about case status.
	2/9/2016	CLK	0.20	0.20	405.00	\$81.00			Read Minute Entry on Pretrial Conference.
	2/11/2016	CLK	0.30	0.30	405.00	\$121.50			Telephone to Cindy Carter regarding Prosecutor's question on facts of the incident; email to Prosecutor.
	2/16/2016	CLK	0.60	0.60	405.00	\$243.00			Several emails to/from Prosecutor and Cynthia Carter regarding Motions in Limine, trial issues and status.
	2/16/2016	CLK	0.30	0.30	405.00	\$121.50			Telephone call with Prosecutor regarding trial strategy and cross-examination potential topics.
	2/17/2016	CLK	5.50	5.50	405.00	\$2,227.50			Attend Richard Reed's criminal trial; meeting with Cynthia Carter, Prosecutor and Victim's Rights Advocate.
	2/18/2016	CLK	3.30	3.30	405.00	\$1,336.50			Attend Richard Reed's criminal trial, day #2; telephone call with Cynthia Carter and conference with Cynthia Carter and Prosecutor about guilty verdict.
	2/26/2016	CLK	0.30	0.30	405.00	\$121.50			Review email from Prosecutor regarding victim impact statements; email from/to Cynthia Carter regarding need to complete victim impact statements.
	3/17/2016	CLK	0.30	0.30	405.00	\$121.50			Read draft victim impact statement of Deborah Brinkman; re-read Arne Stenseth's statement.
	3/17/2016	CLK	0.70	0.70	405.00	\$283.50			Telephone call to Cynthia Carter to discuss victim impact statement drafts and sentencing hearing.
	3/25/2016	CLK	0.40	0.40	405.00	\$162.00			Read victim impact draft statements from Eric Smith and others.
	3/30/2016	CLK	0.30	0.30	405.00	\$121.50			Review correspondence on revised restitution claim.
	3/31/2016	CLK	0.80	0.80	405.00	\$324.00			Review emails to/from Cynthia Carter regarding restitution claim.

Gust Rosenfeld, PLC

Time And Expense Details

Report ID: OT2025 - 118693
Thursday, April 14, 2016

Client	Client Reporting Name	Matter	Date [11/01/2015 - 04/14/2016]	Matter Reporting Name	Billing Timekeeper	
027241	Carter, Cynthia	00001			Keller, Craig L.	
4/13/2016	CLK	3.8	3.8	405.00	\$1,539.00	Legal research on restitution claim; review draft Motion; call with Cynthia Carter
4/14/2016	CLK	5.1	5.1	405.00	\$2,065.50	Conclude legal research; draft and revise Motion for Restitution.
TOTAL			28.5		11,542.50	
1/4/2016	SL2	0.20	0.20	230.00	\$46.00	Emails with C. Carter and C. L. Keller regarding R. Reed.
1/5/2016	SL2	0.10	0.10	230.00	\$23.00	Review email from C. Carter.
1/11/2016	SL2	0.40	0.40	230.00	\$92.00	Review email from C. Carter; emails with C. L. Keller and C. Carter.
1/21/2016	SL2	0.10	0.10	230.00	\$0.00 NC	Emails with C. Carter. (No Charge).
2/18/2016	SL2	0.30	0.30	230.00	\$0.00 NC	Update on criminal trial from C. L. Keller. (No Charge).
TOTAL			0.7		161.00	
1/21/2016	MEM	0.40	0.40	195.00	\$78.00	Review R. Reed's Motion for Indigent Status to identify his claims regarding any property ownership.
1/26/2016	MEM	0.30	0.30	195.00	\$58.50	Telephone conference with C. Keller to convey information from Prosecutor's office prior to meeting with C. Carter.
1/26/2016	MEM	0.40	0.40	195.00	\$78.00	Prepare summary of updates in case regarding Indigent Status of defendant; upcoming delay of current trial date; and status of evaluation conducted on defendant that was not accepted by Prosecutor.
1/26/2016	MEM	0.30	0.30	0.00	\$0.00	(No Charge) Telephone conference with N. Hood at Prosecutor's Office for status of trial setting and defendant's indigency claim and evaluation.
3/30/2016	MEM	0.60	0.60	195.00	\$117.00	Work on draft of updated restitution letter for prosecutor.
3/30/2016	MEM	0.20	0.20	195.00	\$39.00	Research current mileage rate for 2016 and consult with D. Gonzales from Victim's Compensation regarding approved rate to use for C. Carter's travel.
3/30/2016	MEM	0.40	0.40	195.00	\$78.00	Complete first draft of updated restitution letter and provide to attorney C. Keller for review.
3/31/2016	MEM	0.40	0.40	195.00	\$78.00	Review food expenses and revise letter for restitution claim.
3/31/2016	MEM	0.80	0.80	195.00	\$156.00	Review moving related expenses and receipts to include in restitution claim and revise letter.
3/31/2016	MEM	0.20	0.20	195.00	\$39.00	Telephone call with C. Carter regarding cost of therapy sessions and reimbursement to Victim's Fund.
3/31/2016	MEM	0.60	0.60	195.00	\$117.00	Multiple e-mails with C. Carter forwarding several drafts of restitution letter for review.
3/31/2016	MEM	0.40	0.40	195.00	\$78.00	Finalize updated restitution letter and figures and e-mail it to prosecutor J. VanHelder.
3/31/2016	MEM	0.10	0.10	195.00	\$19.50	Respond to prosecutor J. VanHelder's request for status on Victim's Impact Statements.
3/31/2016	MEM	0.10	0.10	195.00	\$19.50	Email C. Carter to request status on Victim's Impact Statements.

Gust Rosenfeld, PLC

Time And Expense Details

Printed By KBJ
Page 1

Report ID: OT2025 - 118693
Thursday, April 14, 2016

Client	Client Reporting Name	Matter	Date [11/01/2015 - 04/14/2016] Matter Reporting Name	Billing Timekeeper
027241	Carter, Cynthia	00001		Keller, Craig L.
TOTAL		4.9	955.50	

TOTAL FEES **\$17,899.50**

Expenses Date	Amount	Exp. Code	Narrative
11/5/2015	\$0.60	COPP	Photocopies 3
12/1/2015	\$1.60	COPP	Photocopies 8
12/15/2015	\$0.40	COPP	Photocopies 2
12/15/2015	\$1.80	COPP	Photocopies 9
12/15/2015	\$5.60	COPP	Photocopies 28

TOTAL COSTS **\$10.00**

GRAND TOTAL **\$17,909.50**

1 WILLIAM G. MONTGOMERY
2 MARICOPA COUNTY ATTORNEY

3 Julia VanHelder
4 Deputy County Attorney
5 Bar ID #: 031164
6 301 West Jefferson, 5th Floor
7 Phoenix, AZ 85003
8 Telephone: (602) 506-6483
9 MCAO Firm #: 00032000
10 mcaosvd@mcao.maricopa.gov
11 Attorney for Plaintiff

12 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
13 **IN AND FOR THE COUNTY OF MARICOPA**

14 **STATE OF ARIZONA,**
15 **Plaintiff,**
16 **v.**
17 **RICHARD ALLEN REED,**
18 **Defendant.**

CR2015-117844-001

**ORDER RE: RESTITUTION TO
VICTIM**

**(Assigned to the Honorable
Danielle Viola)**

19 Upon Motion by the State, it is ordered that the Defendant, Richard Allen Reed,
20 shall pay restitution in the amount of \$_____ to the Victim, Cynthia Carter.

21 DATED April ____, 2016.

22
23 _____
24 Honorable Danielle Viola
25 Judge of the Superior Court

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

STATE OF ARIZONA,

Appellee,

v.

RICHARD ALLEN REED,

Appellant.

No. 1 CA-CR 17-0620

Maricopa County Superior Court
No. CR2015-117844-001

OPENING BRIEF OF INTERVENOR LANNA MESENBRINK

M. Alex Harris

State Bar No. 016942

1350 W. Center St.

Chino Valley, AZ 86323

Telephone (928) 899-6022

alexharrispc@gmail.com

Attorney for Intervenor Lanna Mesenbrink

TABLE OF CONTENTS

	<u>Page</u>
ISSUE PRESENTED FOR REVIEW	1
NOTICE OF ADOPTION BY REFERENCE	2
STATEMENT OF FACTS AND THE CASE	3
ISSUE	4
A creditor with a judgment against one spouse for that spouse’s separate liability cannot enforce the judgment against community property. The lower court erred by entering a restitution judgment against Mr. Reed for his separate crime, entering that judgment as a CRO, and then recording the CRO, automatically creating a lien against the community’s property, e.g., Ms. Mesenbrink’s house.	
<i>Standard of Review</i>	4
<i>Argument</i>	4
A. Summary	4
B. In Arizona, a creditor cannot reach community property for one spouse’s separate debt, and due process affords each spouse an independent right to litigate any claim against the community	6
C. The Superior Court violated Arizona’s law by executing the criminal judgment against the Reed-Mesenbrink community property	13

TABLE OF CONTENTS – Continued

	<u>Page</u>
D. To remedy the error, this Court should either clarify the CRO and clear the lien, or else vacate the restitution judgment and CRO in their entirety	17
CONCLUSION.....	19

TABLE OF CITATIONS

Page

ARIZONA SUPREME COURT CASES

Cosper v. Valley Bank, 28 Ariz. 373 (1925).....7, 8

Mortensen v. Knight, 81 Ariz. 325 (1956).....7

Royston v. Pima County, 106 Ariz. 249 (1970).....15

Shaw v. Greer, 67 Ariz. 223 (1948)..... 8-10, 13

Selby v. Savard, 134 Ariz. 222 (1982).....10

ARIZONA COURT OF APPEALS CASES

Alberta Securities Com’n v. Ryckman, 200 Ariz. 540 (App. 2001)17

Flexmaster Aluminum Awning Co., Inc. v. Hirschberg,
173 Ariz. 83 (App. 1992)..... 11-14, 16

Gerow v. Covill, 192 Ariz. 9 (App. 1998)16

Heinig v. Hudman, 177 Ariz. 66 (App. 1993) 12-14, 16

Howe v. Haught, 11 Ariz. App. 98 (1969).....9

In re United States Currency in the Amount of \$26,980.00,
193 Ariz. 427 (App. 1998).....4

Schilling v. Embree, 118 Ariz. 236 (App. 1977)10

Wallace v. Shields, 175 Ariz. 166 (App. 1992)16

TABLE OF CITATIONS – Continued

Page

OTHER JURISDICTION CASES

Nelson v. Colorado, 137 S.Ct. 1249 (2017).....16

RULES

Arizona Rules of Civil Procedure

Rule 19(a)16

Arizona Rules of Criminal Procedure

Rule 31.10(i)2

STATUTES

Arizona Revised Statutes

§ 13-805(B).....14

§ 13-805(E).....14

§ 25-215(B).....10

§ 33-961 5, 15 fn 3

§ 33-961(A)15, 16

§ 33-964(A)15, 16

§ 33-96817

OTHER SOURCES

Daniel J. McAuliffe & Shirley J. McAuliffe, 2b Ariz. Prac.,
Civil Rules Handbook Rule 69 (April 2020).....15

ISSUE PRESENTED FOR REVIEW

A creditor with a judgment against one spouse for that spouse's separate liability cannot enforce the judgment against community property. Did the lower court err by entering a restitution judgment against Mr. Reed for his separate crime, entering that judgment as a criminal restitution order (CRO), and then recording the CRO, automatically creating a lien against the house owned by Mr. Reed's spouse?

NOTICE OF ADOPTION BY REFERENCE

Intervenor, Lanna Mesenbrink, adopts by reference the opening and reply briefs filed by the appellant, Richard Reed, as allowed by Rule 31.10(i) of the Arizona Rules of Criminal Procedure.

STATEMENT OF FACTS AND THE CASE

Intervenor, Lanna Mesenbrink, adopts and relies upon the statement of facts and the case in the opening brief filed by the appellant, Richard Reed. Ms. Mesenbrink adds the following:

- After the lower court entered the restitution judgment against Mr. Reed as a criminal restitution order (“CRO”), the Clerk of the Superior Court recorded the CRO with the Maricopa County Recorder’s Office. (Appx. A.)
- Ms. Mesenbrink is the surviving spouse of Mr. Reed. (Appx. B.)
- The Clerk’s recording of the CRO automatically, by function of statute, created a lien against Ms. Mesenbrink’s home, which was the family home. (Appx. B.)
- The Clerk also placed a lien against her vehicle, which she owned as community property with Mr. Reed. (Appxs. B, C.)¹

¹ Appendix C is an email from the Clerk of the Superior Court to Mr. Reed’s counsel confirming that the Clerk seeks to enforce CROs as liens by recording the CROs with the recorder and with the Arizona Department of Transportation.

ISSUE

A creditor with a judgment against one spouse for that spouse's separate liability cannot enforce the judgment against community property. The lower court erred by entering a restitution judgment against Mr. Reed for his separate crime, entering that judgment as a CRO, and then recording the CRO, automatically creating a lien against the community's property, e.g., Ms. Mesenbrink's house.

Standard of Review

This Court reviews matters of law and mixed questions of law and fact de novo. *In re United States Currency in the Amount of \$26,980.00*, 193 Ariz. 427, 429, ¶ 5 (App. 1998).

Argument

A. Summary

The criminal process in the trial court converted Mr. Reed's separate money liability into a community debt. Nearly a century of Arizona case law holds that this is impermissible.

The more complicated questions are when precisely the separate liability was converted into a community debt and what remedy this Court should provide. The following diagram illustrates one possible understanding of when the separate liability was impermissibly converted into a community debt:

Court Proceeding	
1. State began restitution proceedings against Mr. Reed without notifying Ms. Mesenbrink.	Here, the debt remained separate against Mr. Reed.
2. Court entered judgment against Mr. Reed as part of his sentence.	
3. Court creates a criminal order of restitution (“CRO”) against Mr. Reed.	
4. Clerk of Superior Court recorded the CRO with the Maricopa County Recorder’s Office.	Here, the debt became a community liability.
5. By operation of A.R.S. § 33-961, the act of recording automatically created a lien against the community property.	

If Ms. Mesenbrink is correct that steps 4 and 5 impermissibly converted Mr. Reed’s separate debt into a community liability, then the remedy focuses merely upon releasing the lien. This Court should order *nunc pro tunc* that the CRO does not touch the community property of Ms. Mesenbrink, order the liens released, and

instruct the Clerk of the Superior Court to record that order with the Maricopa County Recorder's Office and Arizona Department of Transportation.

If, however, this Court believes that the Superior Court did not err by recording the CRO and creating the lien, then constitutional issues arise. To the extent that the beginning of the process—*viz.*, restitution proceedings without notice to Ms. Mesenbrink—ineluctably leads to the end of the process—*viz.*, a lien burdening the community—then Ms. Mesenbrink's due process rights have been violated. If the process must be taken together, then it is altogether invalid, and this Court should vacate the CRO.

B. In Arizona, a creditor cannot reach community property for one spouse's separate debt, and due process affords each spouse an independent right to litigate any claim against the community

Our rule protecting the community from one spouse's separate debt is rooted in the modern recognition of women's equal rights. We adopted this rule from pride of being one of the free western states, "the newer states, whose institutions had not yet crystallized into form" denigrating women's agency:

Development of the community property law of the western states has gone hand in hand with the general emancipation of women from the economic bonds which have so long burdened them. While under the common law the husband and wife were 'one,' and he was always the

‘one,’ the world has of recent years gone a long way toward recognizing that even a married woman was a human being, with most of the rights of such, and that the status of marriage partook more of the nature of a partnership than that of master and servant, or guardian and ward. Naturally this movement has gone further in the newer states, whose institutions had not yet crystallized into form under archaic ideas of the subjection of the female sex, than in the older commonwealths, whose laws reflect the views of the generation which founded them.

Cosper v. Valley Bank, 28 Ariz. 373, 375-76 (1925) (disapproved on other grounds by *Mortensen v. Knight*, 81 Ariz. 325 (1956)).

In *Cosper*, our supreme court distinguished Arizona from the older states, writing that, a wife “cannot, in those states, protect her feeble interests in any manner while the marriage exists, and the husband may convey or incumber the community property at will.” *Id.* at 376. In contrast to those “archaic ideas,” the law of Arizona was developed “to give the wife in this marital community an equal dignity.” *Id.* at 377. The law, then and now, “recognizes that the wife in her station is as much [an] agency in the acquisition as the husband, and is entitled to just as great an interest.” *Id.* Necessarily, then, community property is not owned or disposable by either spouse separately, and “each one may be regarded as owning all the property.” *Id.* “[U]nder the law of Arizona, community property is liable only for community debts, except as otherwise expressly provided in the statutes.” *Id.* at 382.

The 1948 case of *Shaw v. Greer* applied *Cosper* in a situation closely similar to Ms. Mesenbrink's. 67 Ariz. 223 (1948). In *Shaw*, the plaintiff won civil damages against the defendants in tort and then sought an order to garnish the defendants' wages. *Id.* at 225. The Arizona Supreme Court held that the plaintiff could not garnish the defendant's wages for the damages they caused because their wages were community property with the defendants' wives. *Id.* at 228 (“[H]is employment is for gain, which gain is community property.”) The defendants had not acted for the community in committing their torts. *Id.* at 229. Of relevance here, the Court said that the separate tort was like a separate crime, and, not being for the benefit of the community, could not be recovered from the assets of the community:

It seems to us that the malicious tort committed by these defendants, not committed in connection with the management of the community property, may be likened to a separate crime of one of the spouses. In *Newbury v. Remington*, 184 Wash. 665, 52 P.2d 312, it was held that the marital community was not liable for an assault committed by a husband motorist who was angered because he thought plaintiff ran through an arterial highway without stopping. The court reasoned that the tort was committed by the defendant as an aggressor and not for the benefit of the community nor connected with the husband's management thereof.

Id. Here, of course, the order of restitution *did* arise from a crime. *Shaw* says that the same reasoning, however, applies. Because the order of restitution resulted from an

act that did not benefit the community, it cannot be executed against the community property.

The Court of Appeals reaffirmed *Shaw* a quarter-century later in *Howe v. Haught*, 11 Ariz. App. 98 (1969). In *Howe*, the defendant-husband assaulted the plaintiff. The plaintiff sued both the defendant-husband and his wife, and the plaintiff sought to recover damages from the defendant spouses' community property. The Court of Appeals, applying *Shaw*, held that the plaintiff could sue both spouses and recover from the community only if the defendant-husband's assault was committed "in pursuance of community affairs." *Id.* at 100. Because no evidence showed this, the plaintiffs were limited to suing the husband and recovering from his separate property. *Id.* at 101.

In 1973, the Arizona Legislature passed a statute to allow an exception to the general rule protecting community property from one spouse's separate debt. The statute permits creditors to recover from *part* of the community property for a spouse's separate *premarital* debt:

The community property is liable for the premarital separate debts or other liabilities of a spouse, incurred after September 1, 1973 but only to the extent of the value of that spouse's contribution to the community property which would have been such spouse's separate property if single.

A.R.S. § 25-215(B). As the statute says, even here, the creditor may reach only that portion of the community property contributed by the liable spouse, i.e., “only to the extent of the value of that spouse’s contribution . . . which would have been such spouse’s separate property if single.” *Id.*

The purpose of the 1973 statute was to solve the problem of “the two-dollar bankruptcy,” which was the price of a marriage license at that time. *Schilling v. Embree*, 118 Ariz. 236, 238 (App. 1977). But it did not otherwise alter the general rule that community property cannot be reached to satisfy the separate debt of one spouse: “[W]e believe the manifest purpose of the statute was to prevent avoidance of *existing obligations* by the voluntary act of marriage, and that it does not affect liability of the community property for separate obligations of any kind incurred thereafter.” *Id.* at 239.

Accordingly, the general rule of *Shaw* remained and remains unbroken. *See Selby v. Savard*, 134 Ariz. 222, 229 (1982) (where husband defamed the plaintiff, plaintiff could not successfully sue the wife or recover from the community property; holding that “In the area of intentional torts, the community is not liable for one spouse’s malicious acts unless it is specifically shown that the other spouse consented to the act or that the community benefited from it,” citing *Shaw*).

More recent cases have grounded this rule in the due process rights of the non-liable spouse. The non-liable spouse has a due process right to protect the community property from liability even when that liability arose *prior* to marriage. In *Flexmaster Aluminum Awning Co., Inc. v. Hirschberg*, the husband accrued liability, then got married, and then discharged his pre-marital liability in bankruptcy. 173 Ariz. 83, 85-86 (App. 1992). This Court held that the husband’s separate pre-marital debt ceased to exist once discharged, and, therefore, the plaintiff could not recover on it from the couple’s community property. *Id.* at 86. Further, even if the plaintiff did seek to collect on the husband’s premarital debt from community property, it would need to join the wife in a lawsuit:

A creditor must join both spouses as defendants before the creditor may obtain and execute a judgment against the community. A.R.S. § 25–215(D) (“[I]n an action on [a debt against the community] the spouses shall be sued jointly....”). In *Eng v. Stein*, 123 Ariz. 343, 599 P.2d 796 (1979), our supreme court held a judgment against a husband and wife was not enforceable against the wife or the community because she had never been named or served in the lawsuit. The court relied on Justice Struckmeyer’s dissent in *King v. Uhlmann*, 103 Ariz. 136, 156, 437 P.2d 928, 948 (1968), to void the judgment against the wife and the community. Justice Struckmeyer wrote, “[t]hat an in personam judgment may not be rendered against one who has never been a party to the litigation would seem so obvious that citation of authority should be unnecessary.” *Id.* at 156, 437 P.2d at 948. *See also Spudnuts, Inc. v. Lane*, 139 Ariz. 35, 36, 676 P.2d

669, 670 (App. 1984) (judgment against only one spouse does not bind the community).

Id. at 88. The wife had a due process right to litigate *both* the underlying debt *and* the extent of the husband's post-marriage contribution to the community, which was the only portion reachable by the creditor:

We hold that the wife has a due process right to litigate both the premarital debt and the value of the husband's contribution to the community property. Due process considerations and judicial economy favor obtaining the judgment against the community in the same suit in which the creditor obtains the judgment against the debtor-spouse.

Id. at 89.

This Court reaffirmed the due process basis of *Flexmaster* in *Heinig v. Hudman*, 177 Ariz. 66 (App. 1993). In *Heinig*, the plaintiff won a judgment against the husband-defendant in arbitration and later sought to enforce the judgment against both husband and wife, arguing that the husband's liable actions were for the benefit of the community. 177 Ariz. at 89. This Court held that due process barred the plaintiff's attempt to win the judgment without involvement of the defendant's wife and yet then enforce it against her:

[T]he judgment against [the husband-defendant] cannot be converted into one against both [the husband-defendant] and [his wife] without regard for [the wife's] right to procedural due process. As Article 2, Section 4 of the

Arizona Constitution provides, “No person shall be deprived of life, liberty, or property without due process of law.” *See also* U.S. Const. amend. XIV (“nor shall any State deprive any person of life, liberty, or property, without due process of law ...”). Under the Arizona and federal constitutions, [the wife] must have an opportunity to be heard at a meaningful time and in a meaningful manner before governmental power can be employed to deprive her of property. *See Morrison v. Shanwick Int'l Corp.*, 167 Ariz. 39, 42, 804 P.2d 768, 771 (App. 1990). The claim against her husband was decided in an arbitration to which [the wife] was not a party.

Id. at 70. To enforce the judgment against the community, it would not be enough to prove that the defendant-husband’s actions benefited the community. Due process required giving the wife the opportunity to litigate both the substantive claim and the community nature of the defendant-husband’s actions. *Id.* at 71.

C. The Superior Court violated Arizona’s law by executing the criminal judgment against the Reed-Mesenbrink community property

Applying *Shaw* and *Flexmaster* and their progeny, it is clear that the prosecution and Superior Court erred in their treatment of Ms. Mesenbrink. They violated her due process “right to be heard before being subjected to liability.” *Heinig*, 177 Ariz. at 70, n.2 (citing *Flexmaster*).

The prosecution began restitution proceedings against Mr. Reed without joining Ms. Mesenbrink, even though Ms. Mesenbrink’s community property would

ultimately be burdened by Mr. Reed's liability. Even if it were permissible to burden the community property with Mr. Reed's liability, which an unbroken line of case law from 1925 says is impermissible, *Flexmaster* and *Heinig* show that she should have been given the opportunity to litigate that underlying liability.

The Superior Court next imposed judgment without regard for its effect on Ms. Mesenbrink. Whether this was an error depends on whether the imposition of judgment against Mr. Reed can be decoupled from the execution of judgment against the community property. That, in turn, depends on whether this Court approves of the Superior Court's process.

Here, the Superior Court immediately entered the restitution judgment as a CRO, which is permitted by A.R.S. § 13-805(B). (Electronic Record on Appeal, Indexes 128, 129.) A CRO "is enforceable as any civil judgment." A.R.S. § 13-805(E).

Once the judgment was converted to a CRO, the Superior Court on its own initiative, through the Clerk of the Superior Court, executed the judgment against the community. It did so by recording the CRO with the Maricopa County Recorder. (Appx. A (CRO as it is currently recorded with the Recorder's Office, stating that it was "Recorded at the Request of The Clerk of the Superior Court In and for

Maricopa County, AZ, Michael K. Jeanes, Clerk”).² This immediately and automatically created a lien on Mr. Reed’s and Ms. Mesenbrink’s real property by operation of A.R.S. §§ 33-961(A) and 33-964(A).³

The Clerk’s error was the Superior Court’s error. “[T]he office of Clerk of the Superior Court is part of the judicial branch of government.” *Roylston v. Pima County*, 106 Ariz. 249, 250 (1970). The Superior Court knew that Mr. Reed was married. (I 2 at 4; Reporter’s Transcript 2/18/16 at 8.) The only point of recording a CRO with the County Recorder is to create a lien on real property. *See* A.R.S. §§ 33-961(A) & 33-964(A). Creating a lien is a manner of executing judgment. *See generally* Daniel J. McAuliffe & Shirley J. McAuliffe, 2b Ariz. Prac., Civil Rules Handbook Rule 69 (April 2020). As explained above, Argument subsection B, a judgment against one spouse for a separate debt may not be executed against the community.

² The Recorder’s Office has made this record publicly available at <https://recorder.maricopa.gov/RecDocData/GetRecDataDetail.aspx?rec=20170665126>.

³ “On recording in substantial compliance with [the filing requirements], the judgment becomes a lien on the real property of the judgment debtor, including any part of the real property of the judgment debtor as otherwise provided by law.” A.R.S. § 33-961(A). “[F]rom and after the time of recording as provided in § 33-961, a judgment shall become a lien” A.R.S. § 33-964(A).

To the extent that the Superior Court did not err, then the prosecution erred. If beginning proceedings against Mr. Reed permissibly and predictably led to executing the judgment of restitution against Ms. Mesenbrink's community property, then the state needed to join Ms. Mesenbrink. *See Flexmaster*, 173 Ariz. at 89. Failure to join an indispensable party is not waivable and may be raised for the first time on appeal. *Gerow v. Covill*, 192 Ariz. 9, 14, ¶ 19 (App. 1998). A judgment entered in violation of due process or the absence of an indispensable party should be reversed. *See Ariz. R. Civ. P. 19(a); Heinig*, 177 Ariz. at 70.

The lien is separately infirm because it was entered in accordance with A.R.S. §§ 33-961(A) and 33-964(A), which are unconstitutional as applied to Ms. Mesenbrink. A statute is unconstitutional as applied to a particular party if it deprives them of their property without a hearing. *See Wallace v. Shields*, 175 Ariz. 166, 176 (App. 1992). Here, these statutes mandated that a lien be imposed against Ms. Mesenbrink's community property without allowing Ms. Mesenbrink her due process right to challenge either the judgment or the lien. Therefore, the statutes were unconstitutional as applied and the resulting lien void. *See id.; cf. Nelson v. Colorado*, 137 S.Ct. 1249, 1252 (2017) (state violates due process by using the criminal process to take property from individuals absent a valid conviction).

D. To remedy the error, this Court should either clarify the CRO and release the lien, or else vacate the restitution judgment and CRO in their entirety

If this Court determines that any portion of the CRO should be left standing but agrees that it should not encumber Ms. Mesenbrink's community property, then Ms. Mesenbrink asks it to expressly modify the judgment and CRO *nunc pro tunc* to make clear that "The community property of Richard Reed and Lanna Mesenbrink shall not be liable to satisfy the judgment and criminal restitution order." This Court allowed a similar remedy in *Alberta Securities Com'n v. Ryckman*, 200 Ariz. 540 (App. 2001), although in that case this Court modified the judgment only to protect the wife's separate property.

Ms. Mesenbrink would also ask this Court to order that the liens are released and to direct the Clerk of the Superior Court to record this Court's orders with the Maricopa County Recorder's Office and Arizona Department of Transportation. This would be similar to the remedy provided by A.R.S. § 33-968 for persons whose property is wrongly burdened when a judgment creditor records a money judgment that creates a lien on the real property of a person who is not the judgment debtor.

In the alternative, this Court should hold that the state and Superior Court erred by failing to give Ms. Mesenbrink notice and an opportunity to dispute the liability of her community property at the restitution hearing. It should then vacate

the judgment and CRO in their entirety. The state could attempt to request another restitution hearing, or the victim could begin civil proceedings as appropriate.

CONCLUSION

For these reasons, the state and lower court erred by imposing judgment and creating a lien against Ms. Mesenbrink's community property. She respectfully asks this Court to vacate the judgment and CRO in their entirety. In the alternative, she asks this Court to:

- Modify the judgment *nunc pro tunc* to clarify that the community property of Richard Reed and Lanna Mesenbrink shall not be liable for the restitution judgment against Mr. Reed.
- Order that the liens against Ms. Mesenbrink's house and car be released.
- Direct the Clerk of the Superior Court to record these orders with the Maricopa County Recorder's Office and Arizona Department of Transportation, and to take any other action it deems necessary to correct the error.

Respectfully submitted,

By _____ /s/
M. Alex Harris
Attorney for Intervenor Lanna Mesenbrink

Appendix

Appendix A (Criminal Restitution Order)APPX 01
Appendix B (Affidavit from L. Mesenbrink)APPX 06
Appendix C (Email with Clerk of Superior Court).....APPX 10

Appendix A

Unofficial 20 Document

Recorded at the Request of
The Clerk of the Superior Court
In and for Maricopa County, AZ

CR.
Yo

Michael K. Jeanes, Clerk

CRIMINAL RESTITUTION ORDER

FILED
9/11/17 4:15pm
MICHAEL K. JEANES, CLERK
By M. Ortega
M. Ortega, Deputy

SUPERIOR COURT OF THE STATE OF ARIZONA
COUNTY OF MARICOPA

THE STATE OF ARIZONA,

Plaintiff,

vs.

Richard Allen Reed

Defendant.

No. CR 2015-117844-001

CRIMINAL RESTITUTION ORDER

Honorable Danielle Viola

This matter having been presented to this Court as an application for criminal restitution order pursuant to A.R.S. §13-805 and evidence having been presented that:

The defendant was convicted before this Court. As a consequence of the conviction, the Court has imposed certain financial sanctions as a condition of the sentence; and

IT IS ORDERED pursuant to A.R.S. §13-805:

That certain victim(s) as set forth in the above dated order is/are entitled to a criminal restitution order against the Defendant for the unpaid balance of the restitution imposed as set forth below, together with INTEREST thereon pursuant to A.R.S. § 44-1201 from the date of this order.

IT IS FURTHER ORDERED: This criminal restitution order ^{Unofficial Document} does not expire until paid in full, and may be recorded and enforced as any civil judgment. Any collection fees incurred by the Court in connection with enforcement of this Order are the responsibility of the Defendant and will be added to the original restitution amount. In addition, a criminal restitution order is a criminal penalty for the purposes of a federal bankruptcy involving the defendant. All payments are payable to the Clerk of the Superior Court.

Restitution

\$ 21,033.11
\$ _____
\$ _____
\$ _____
\$ _____

Total Amount Due:

\$ 21,033.11*

* May not reflect money paid to date

IT IS FURTHER ORDERED: That the defendant shall maintain with the Clerk of the Superior Court, the current address of the Defendant for billing and collection purposes, until all payments pertaining to this Order is/are paid in full.

Done on:

9/11/17

[Signature]
Judge of the Superior Court

This Criminal Restitution Order is entered and effective as of: _____ . (If left blank, this order takes effect on the date signed by the Court).

Collection fees shall be imposed as of: _____ . (If left blank, collection fees shall be imposed as of the date this order is signed by the Court).

RESTITUTION LEDGER REQUEST FORM

DEFENDANT: Richard Allen Reed

DOB: 06-03-1952

CR#: 2015-117844-001

DATE OF CRIME: 01-29-2015

DR#: 150143

AGENCY: Wickenburg PD

VICTIM'S NAME: Cynthia Carter

CONTACT INFORMATION:

AMOUNT OF RESTITUTION: _____

VICTIM'S NAME: _____

CONTACT INFORMATION: Unofficial Document

AMOUNT OF RESTITUTION: _____

VICTIM'S NAME: _____

CONTACT INFORMATION:

AMOUNT OF RESTITUTION: _____

MONTHLY PAYMENT: _____

DEFENDANT SENTENCED TO: DOC: _____ PROBATION: 3 years

INFORMATION STATEMENT OF JUDGMENT CREDITOR

(To be attached to Judgment per mandate A.R.S. § 33-967, as of January 1997)

(Complete Social Security Number removed pursuant to A.R.S. 44-1373G)

JUDGMENT DEBTOR(S): Richard Allen Reed
(Defendant)

CASE NUMBER: CR2015-117844-001

ADDRESS (IF KNOWN): 32946 W Photo View Road
Wickenburg, AZ 85390

ADDRESS AT WHICH JUDGMENT DEBTOR RECEIVED SUMMONS:

N/A

JUDGMENT CREDITOR: State of Arizona

MAILING ADDRESS: County Collections Unit
c/o County Finance Department
Unofficial Document
301 West Jefferson Street
Phoenix, Arizona 85003-2111

TOTAL AMOUNT OF JUDGMENT(S): \$ _____

JUDGMENT DEBTOR'S:

SOCIAL SECURITY NUMBER: XXX-XX- 0680

DATE OF BIRTH: 06-03-1952

DRIVER LICENSE NUMBER: A00720947

(If Available)

State of Enforcement has been ordered: Yes No

If Yes, Date The Stay Expires: _____

Appendix B

M. Alex Harris #016942
M. Alex Harris, P.C.
P.O. Box 1541
Chino valley, AZ 86323
alexharrispc@gmail.com 928-899-
6022
Attorney for Defendant/Appellant-Intervenor

IN THE COURT OF APPEALS STATE OF ARIZONA DIVISION ONE

STATE OF ARIZONA,

Appellee,

RICHARD REED,

Appellant.

No. 1 CA-CR 17-0620

Maricopa County Superior Court

No. CR2015-117844-001

DECLARATION OF LANNA
MESENBRNK

I, Lanna Mesenbrink, under penalty of perjury, state:

1. I am the surviving spouse of Richard Reed, the appellant in Court of Appeals matter number 1 CA-CR 17-0620.
2. I was recently informed by the Arizona Department of Transportation, Motor Vehicle Services, that a lien has been placed against the vehicle that I owned as community property with Richard Reed.

3. I was recently informed by a real estate agent that the attached Criminal Restitution Order entered against Richard Reed has been recorded as a lien on my home, which was our family home.
4. I have an economic interest in challenging that order of restitution because I have an ownership interest in the vehicle and house.
5. I believe that the proceedings against my husband were conducted in error and had a legally incorrect, unjust result.
6. I have a personal interest in protecting my husband's reputation by challenging the award of restitution entered against him.
7. I desire to become a party to this appeal if that is necessary to challenge the award of restitution.

8. I am the personal representative for Richard Reed.
9. The family home is community property.
10. The vehicle (2003 Chevrolet Avalanche) is community property and is titled Richard Reed OR Lanna Mesenbrink.

11. Richard Reed filed bankruptcy on his debts and assets.
12. At the time of his death, Richard Reed had less than \$10.00.

I so declare on this 16 day of November, 2018.

Signed,

 Mesenbrink

Lanna Mesenbrink

Appendix C

Nick Podsiadlik (OPD)

From: Michael Nimtz (COC)
Sent: Friday, May 22, 2020 10:04 AM
To: Jeff Fine (COC); Nick Podsiadlik (OPD)
Cc: Jessica Fotinos (COC); Nancy Rodriguez (COC)
Subject: RE: COSC's recording of orders of restitution in criminal cases

Good morning Mr. Podsiadlik,

Filing liens against current and future property is a process by which Maricopa County enforces CROs. As cited, this is provided for in ARS 13-805 (E), but not mandated further by administrative order or court rule. Liens are filed against real property with the Maricopa County Recorder's Office and against motor vehicles with the Arizona Department of Transportation (ADOT). Once CROs are paid in full, the Maricopa County Collections Unit release liens and holds placed with the Recorder's Office and ADOT.

Please let me know if we may provide any additional information.

Thank you,

Mike

Michael Nimtz

Deputy Director



Clerk of the Superior Court

620 W. Jackson St., Suite 3052
Phoenix, AZ 85003
Phone: 602-372-3890

From: Jeff Fine (COC)
Sent: Friday, May 22, 2020 9:10 AM
To: Nick Podsiadlik (OPD) <Nick.Podsiadlik@Maricopa.Gov>
Cc: Michael Nimtz (COC) <Michael.Nimtz@Maricopa.Gov>; Jessica Fotinos (COC) <Jessica.Fotinos@Maricopa.Gov>; Nancy Rodriguez (COC) <Nancy.Rodriguez@Maricopa.Gov>
Subject: Re: COSC's recording of orders of restitution in criminal cases

Mr. Podsiadlik,

Good morning. Thank you for your inquiry. I am forwarding it to Mr. Michael Nimtz and Ms. Jessica Fotinos of my executive team who possess expertise in the matter presented. They are copied in the distribution of this message and you should hear from one of them with a response as soon as they are able. Wishing you all the best for a great day and holiday weekend.

With Best Regards,

Jeff Fine

Sent from my iPhone

On May 22, 2020, at 8:48 AM, Nick Podsiadlik (OPD) <Nick.Podsiadlik@maricopa.gov> wrote:

Dear Mr. Fine,

I am an attorney at the Public Defender's Office. I have noticed that the COSC will record criminal restitution orders (CROs) with the Maricopa County Recorder's Office. I have attached an example of a CRO marked by the Recorder as "Recorded at the Request of the Clerk of the Superior Court In and for Maricopa County, AZ."

Is there an administrative order, court rule, or statute that mandates this practice? I am trying to find the source for the COSC's initiative in recording CROs. ARS § 13-805(E) generally permits CROs to be recorded, but I have been unable to find any rule that directs the COSC to do so.

If you could direct me to the rule, or let me know if the COSC does this on its own initiative, I would appreciate it.

I sent this email to the COSC's general email address (see below), but did not receive a response.

Thank you,

Nick Podsiadlik

From: Nick Podsiadlik (OPD)
Sent: Wednesday, May 20, 2020 1:04 PM
To: cocustomerrelations@mail.maricopa.gov
Subject: COSC's recording of orders of restitution in criminal cases

Hello,

I am an attorney at the Public Defender's Office. I have noticed that the COSC will record criminal restitution orders (CROs) with the Maricopa County Recorder's Office.

Is there an administrative order, court rule, or statute that mandates this practice? I am trying to find the source for the COSC's initiative in recording CROs. ARS § 13-805(E) generally permits CROs to be recorded, but I have been unable to find any rule that directs the COSC to do so.

If you could direct me to the rule, or let me know if the COSC does this on its own initiative, I would appreciate it.

Thank you,

Nick Podsiadlik

Nick Podsiadlik, Deputy Public Defender
Maricopa County Public Defender's Office
620 W. Jackson St., Suite 4015
Phoenix, AZ 85003
602-506-7711 x33497

<CRO recorded at request of the COSC on Sept 8, 2017.pdf>