

IN THE SUPREME COURT
IN AND FOR THE STATE OF ARIZONA

STATE OF ARIZONA,

Respondent/Appellee,

v.

RICHARD ALLEN REED,

Petitioner/Appellant.

No. CR-20-0385-PR

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

Maricopa County Superior Court
No. CR2015-117844-001

**PETITIONER'S RESPONSE TO ARIZONA VOICE FOR CRIME
VICTIMS, INC.'S *AMICUS CURIAE* BRIEF**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	iii
ISSUE PRESENTED FOR REVIEW	vi
ARGUMENT.....	1

The victim’s attorney fees are not recoverable as criminal restitution in this case because [A.R.S. § 13-4437](#) requires that a victim bear the expense of counsel and implicitly recognizes that damages incurred to remedy the denial of a victim’s rights are caused by a governmental entity, not a defendant’s criminal conduct.

<i>Discussion</i>	1
<u>A. Arizona Law Mandates that Governmental Officials Respect Victims’ Rights.</u>	3
<u>B. Prosecutors are Publicly Funded Attorneys Obligated to Assert and Protect a Victim’s Rights.</u>	4
<u>C. Attorney’s Fees Incurred During the Course of Criminal Proceedings Are Not Economic Loss Directly Caused by an Offense.</u>	6
<u>D. AVCV’s and the Victim Attorney Briefing Undercuts the Victim’s Argument.</u>	10

TABLE OF CONTENTS – Continued

	<u>Page</u>
E. <u>Permitting a Victim to Retain and Pay for Counsel of Choice is not a “Punishment,” Rather it Reflects the Traditional “American Rule”</u>	13
F. <u>A Defendant’s Constitutional Rights Compel Reversal Here</u>	14
CONCLUSION	19

TABLE OF CITATIONS

Page

CASES

United States Supreme Court Cases

<i>Bordenkircher v. Hayes</i> , 434 U.S. 357 (1978).....	14
<i>Hensley v. Eckerhart</i> , 461 U.S. 424 (1983)	12
<i>Lafler v. Cooper</i> , 566 U.S. 156 (2012)	16
<i>Lagos v. United States</i> , 138 S.Ct. 1684 (2018).....	13
<i>United States v. Cronin</i> , 466 U.S. 648 (1984)	16
<i>United States v. Jackson</i> , 390 U.S. 570 (1968).....	17

Arizona Supreme Court Cases

<i>Associated Indem. Corp. v. Warner</i> , 143 Ariz. 567 (1985).....	16
<i>Fay v. Fox in & for County of Maricopa</i> , CR-20-0306-PR, 2021 WL 4259148 (Ariz. Sept. 20, 2021).....	15
<i>Marcus v. Fox</i> , 150 Ariz. 333 (1986)	1
<i>State Farm Ins. Companies v. Premier Manufactured Sys., Inc.</i> , 217 Ariz. 222 (2007).....	6
<i>State v. Spears</i> , 184 Ariz. 277 (1996)	6, 7
<i>State v. Wilkinson</i> , 202 Ariz. 27 (2002).....	9-11

Arizona Court of Appeals Cases

<i>Kaufmann v. Cruikshank</i> , 222 Ariz. 488 (App. 2009).....	1
<i>State v. Quijada</i> , 246 Ariz. 356 (App. 2019).....	12
<i>State v. Slover</i> , 220 Ariz. 239 (App. 2009).....	9
<i>State v. Streck</i> , 221 Ariz. 306 (App. 2009)	9

Other Jurisdiction Cases

<i>People v. Lyon</i> , 49 Cal. App. 4th 1521 (1996)	9, 14, 15
<i>State v. Hunziker</i> , 41 P.3d 880 (Kan. Ct. App. 2002).....	7, 8
<i>State v. Hunziker</i> , 56 P.3d 202 (Kan. 2002)	7-9
<i>State v. Johnson</i> , 167 Idaho 454 (App. 2020).....	14, 15
<i>Strout v. State</i> , 180 So.3d 1052 (Fla. 5th DCA 2015)	9

TABLE OF CITATIONS – Continued

Page

CONSTITUTIONAL PROVISIONS

United States Constitution

[6th Amendment](#)16

Arizona Constitution

[Art. 12, § 3](#)4

STATUTES

Arizona Revised Statutes

[A.R.S. § 11-532\(A\)](#)4

[A.R.S. § 13-105\(16\)](#) 11, fn 4

[A.R.S. § 13-4401](#)3

[A.R.S. § 13-4405](#)3

[A.R.S. § 13-4419](#)3

[A.R.S. § 13-4436](#)4

[A.R.S. § 13-4437](#)1

[A.R.S. § 13-4437\(A\)](#)vi, 1, 14

[A.R.S. § 13-4437\(B\)](#)4, 14, 17

[A.R.S. § 13-4437\(C\)](#)3

[A.R.S. § 41-191.06](#) 3, 5, fn 1

RULES

Arizona Rules of Criminal Procedure

[Rule 39\(d\)\(1\)](#) 3-5, 16

[Rule 39\(d\)\(2\)](#)3

[Rule 39\(d\)\(3\)](#)5

Arizona Rules of the Supreme Court

[Rule 42, ER 3.3](#)5

TABLE OF CITATIONS – Continued

Page

OTHER RESOURCES

Victims' Rights Program, Arizona Attorney General (available at <https://www.azag.gov/criminal/victim-services/victims-rights-program>)4

ISSUE PRESENTED FOR REVIEW

Are a victim's private attorney fees recoverable as criminal restitution, particularly considering [A.R.S. § 13-4437\(A\)](#), and if so to what extent?

ARGUMENT

The victim's attorney fees are not recoverable as criminal restitution in this case because [A.R.S. § 13-4437](#) requires that a victim bear the expense of counsel and implicitly recognizes that damages incurred to remedy the denial of a victim's rights are caused by a governmental entity, not a defendant's criminal conduct.

Discussion:

This Court should give little to no weight to the *amicus curiae* brief filed on behalf of Arizona Voice for Crime Victims, Inc. ("AVCV").

Arizona law requires that government entities protect, defend, and assert victims' rights during the course of a criminal proceeding. [A.R.S. § 13-4437\(A\)](#). Permitting victims to retain private counsel at their own expense is not "punishing" victims. (AVCV at 3).

Unless a statutory scheme provides a mechanism for authorizing the recovery of attorney's fees, the default standard is that each represented person bears the cost of counsel. [Marcus v. Fox](#), 150 Ariz. 333, 334 (1986); [Kaufmann v. Cruikshank](#), 222 Ariz. 488, 492, ¶ 16 (App. 2009) (acknowledging that Arizona law has exempted criminal cases from the statutory authorization of the recovery of attorney's fees.)

Every foreign jurisdiction cited by the parties in their supplemental briefs to this Court has uniformly decided that state criminal restitution statutes do not extend to attorney's fees of victims who choose to retain counsel during the course of criminal proceedings. (Pet-Supp. at 11-13); (Resp-Supp. at 18-19).

AVCV's *amicus curiae* brief provides nothing to the contrary.

Contrary to AVCV's emotional appeals (AVCV at 15-17), it is possible for this Court and the Arizona Legislature to respect the constitutional rights afforded to criminal victims by the Arizona Constitution, statutes, and the Arizona Rules of Criminal Procedure without chilling a criminal defendant's right to counsel, trial, and due process.

If affirmed, the lower court's opinion will haunt every criminal defendant in the state with the specter of thousands or tens of thousands of dollars in attorney fees bills each time defense counsel sends a prosecutor an email, negotiates a plea bargain, files a discovery motion, makes a constitutional objection concerning the admissibility of evidence, or a defendant otherwise submits to the criminal proceedings commenced by the State.

A. Arizona Law Mandates that Governmental Officials Respect Victims' Rights.

AVCV suggests that prosecutors are only obligated to assert a victim's rights "upon request." (AVCV at 4) (citing [A.R.S. § 13-4437\(C\)](#) and [Ariz. R. Crim. P. 39\(d\)\(2\)](#)).

But this is not the whole picture.

Arizona law requires that victims be given notice of their rights so they can choose how and whether to assert them. *See* [A.R.S. §§ 13-4405 – 13-4417](#). If a victim chooses to assert a particular right, s/he has "*the right* to the prosecutor's assistance in asserting rights enumerated" by this Court's rules or the Legislature's law. [Ariz. R. Crim. P. 39\(d\)\(1\)](#); [A.R.S. § 13-4419](#) (right to conference with prosecutor).

As explained in Mr. Reed's Supplemental Brief, Arizona law sets forth a broad array of statutory obligations that various governmental entities must meet in order to ensure that a victim's rights are implemented in a particular case. (Pet-Supp at 5) (citing [A.R.S. §§ 13-4401 – 4443](#)). Arizona law also requires that the Attorney General create a "victims' rights program" charged with "assisting and monitoring state and local entities that *are required to implement and comply* with victims' rights." [A.R.S. § 41-191.06](#) (emphasis added); *see, also* Victims' Rights Program,

Arizona Attorney General (available at <https://www.azag.gov/criminal/victim-services/victims-rights-program>) (describing program and obligations).

Aside from the ability to hold an obligated governmental entity responsible through suit (A.R.S. § 13-4437(B)), Arizona law also authorizes victims to compel courts to reexamine proceedings in circumstances where a victim's rights have been violated. A.R.S. § 13-4436.

AVCV's suggestion that Arizona law does not adequately provide legal assistance to victims is simply incorrect, as is its assertion that there are no publicly funded attorneys tasked with defending victims' rights.

B. Prosecutors are Publicly Funded Attorneys Obligated to Assert and Protect a Victim's Rights.

Once a victim invokes statutory or constitutional rights, the prosecutor is legally obligated to assert those rights. [Ariz. R. Crim. P. 39\(d\)\(1\)](#) (“A victim has the right to the prosecutor's assistance in asserting rights enumerated in this rule or otherwise provided by law.”)

Prosecutors are publicly funded attorneys. [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.”).

Thus, victims have a right to publicly funded attorneys who assert and protect their rights. [Ariz. R. Crim. P. 39\(d\)\(1\)](#).

AVCV speculates that any conflict between a prosecutor and a victim must necessarily entail a prosecutor's duty to ensure a criminal defendant's rights are protected. (AVCV at 5) (citing [Ariz. R. Crim. P. 39\(d\)\(3\)](#)).

But [Ariz. R. Crim. P. 39\(d\)\(3\)](#) is not limited to conflicts between a victim's rights and those afforded to criminal defendants, as it entails "any conflict." Such conflicts could include, for example, scenarios where a victim demands that the prosecutor claim more in criminal restitution than the victim is legally entitled. [Ariz. R. Crim. P. 39\(d\)\(3\)](#). Under such a circumstance, the prosecutor would be ethically obligated to refrain from pursuing a frivolous claim and bound by a duty to not misrepresent the law. *See* [AZ ST S CT RULE 42 RPC ER 3.3](#).

Even if this Court were to embrace AVCV's premise – that Arizona law does not provide enough¹ publicly funded lawyers to victims – it does not establish an

¹ AVCV's own budget appears to be comprised mostly of "Government Grants." *See* AVCV 2018 IRS Form 990, Part II, Ln 9; Part VIII, ln 1(3) (available at https://www.causeiq.com/organizations/view_990/860900759/14fd50a1f1238bf5b835b10f015da914) (listing over one million dollars in "government grants"); *see, also*, A.R.S. § 41-191.06 (requiring Attorney General to audit "local entities that receive fund monies and other forms of assistance" ... "that are responsible for ensuring crime victims' access to justice.")

intention of the Arizona Legislature to expand the definition of criminal restitution by saddling criminal defendants with the cost of a victims' attorney's fees.

AVCV's policy-driven argument based on data which it claims to establish that public funding for victims' counsel is inadequate is appropriate for a lobbying effort at the Legislature; it is not a legal argument which merits this Court's expansion of criminal restitution. See *State Farm Ins. Companies v. Premier Manufactured Sys., Inc.*, 217 Ariz. 222, 228, ¶ 28 (2007) (explaining that public policy considerations are left to the Legislature, not this Court, when interpreting statutes).

C. Attorney's Fees Incurred During the Course of Criminal Proceedings Are Not Economic Loss Directly Caused by an Offense.

Both parties submitted extensive supplemental briefing which squarely addresses the issue before this Court: whether a victims' attorney's fees incurred during the course of the criminal proceedings is compensable as criminal restitution.

AVCV doesn't provide any additional support for the State's position other than acknowledging the State's briefing and *State v. Spears*, 184 Ariz. 277, 292 (1996). (AVCV at 10-11).

But *Spears* did not address the issue before this Court.

In *Spears*, the trial court awarded “\$7865.26 and included phone, hotel, food, and gas charges, funeral expenses, probate attorney’s fees, tax preparation fees, and a payment to Michael Smith for funeral-related costs.” 184 Ariz. at 291. The “defendant objected only to the probate and tax costs and the payment to Michael Smith, all of which total \$800.” Thus, in *Spears*, this Court did not address whether the probate-related attorney’s fees were properly awarded. *Id.*

The only case cited in the State’s supplemental brief which supported an extension of criminal restitution awards to include victims’ attorney’s fees incurred during the course of a criminal proceeding was *State v. Hunziker*, 41 P.3d 880, 884 (Kan. Ct. App. 2002). But the Kansas Court of Appeals case is no longer good law in Kansas. As acknowledged in the State’s Notice of Errata,² the Kansas Supreme Court reversed its Court of Appeals on this issue in *State v. Hunziker*, 56 P.3d 202 (Kan. 2002).

The State’s assertion that the Kansas Supreme Court did not vacate the Kansas Court of Appeals’ “legal reasoning” is wrong. Notice of Errata at 1. The Kansas Court of Appeals reasoned that:

² Filed September 28, 2021.

retaining of an attorney to determine and to document Van Loenen's damages *was a reasonable and logical result of Hunziker's criminal conduct*. As a result, the trial court properly ordered Hunziker to pay Van Loenen's attorney fees as restitution in the criminal proceeding.

41 P.3d at 885 (emphasis added).

Whereas the Kansas Supreme Court reasoned:

We find that Van Loenen's retention of *an attorney was not a direct result of Hunziker's criminal conduct*. Here, there was no need to trace embezzled funds, recreate destroyed data, or recover stolen property. Because Van Loenen's private attorney fees only arose as an indirect or consequential result of Hunziker's crime, we reverse the order allowing \$700 in attorney fees as restitution.

56 P.3d at 210 (emphasis added).

Thus, the Kansas Supreme Court did vacate its Court of Appeals' *legal reasoning* by rejecting a legal conclusion that any time a victim retains counsel for representation during a criminal proceeding that the causal connection to the crime was direct and sufficient to permit a restitution award. *Compare State v. Hunziker*, 56 P.3d at 202, 210 (Kan. 2002) *with State v. Hunziker*, 41 P.3d 880, 884 (Kan. Ct. App. 2002).

Here, there was nothing ever offered to the trial court establishing that Keller's services were directly connected to the crime of Voyeurism. (*See* O.B. at 3-7, 14-17; O.B. App. A: Timesheet Objections).

Counsel was not retained by the victim until more than five months into the commencement of criminal proceedings. (O.B. at 39; O.B. App. A).

Furthermore, Keller's own summary of his services and his billing documents establish that his services were conducted to do the work of the prosecutor and to explain the work of the prosecutor to the victim, which, unsurprisingly, the prosecutor was already obligated to do. (R.T. 7/21/17 at 43).

Because none of the attorneys' fees were *directly caused by Mr. Reed's criminal conduct*, this Court should apply the third prong of the *Wilkinson*³ test and come to the same conclusion as Division Two of the Court of Appeals did in *Slover* and courts from Florida, Kansas, and California in holding that attorney's fees such as those in this case are not recoverable as criminal restitution. *State v. Slover*, 220 Ariz. 239, 243, ¶ 8 (App. 2009); *Strout v. State*, 180 So.3d 1052, 1055 (Fla. 5th DCA 2015); *Hunziker*, 56 P.3d at 210; *People v. Lyon*, 49 Cal. App. 4th 1521, 1524 (1996); *see, also State v. Streck*, 221 Ariz. 306, 308 (App. 2009) (investigation is

³ *State v. Wilkinson*, 202 Ariz. 27, 29, ¶ 7 (2002).

state's responsibility, thus "private cost associated with these tasks...were not properly included in the restitution award.")

D. AVCV's and the Victim Attorney Briefing Undercuts the Victim's Argument.

This Court's seminal case concerning the scope of criminal restitution in Arizona is *State v. Wilkinson*, 202 Ariz. 27 (2002). *Wilkinson* establishes the three-part test to determine if a request for restitution bears a sufficient relationship caused by the criminal offense. *Id.* at 29, ¶ 7.

Yet, AVCV does not cite *Wilkinson*, state the rule announced by *Wilkinson*, explain how it fits the award in this case, or argue that it should be distinguished on the facts or overruled.

Despite the assistance offered by Keller in drafting its restitution motion filed before the trial court, the State similarly failed to provide the trial court with *Wilkinson* as the controlling authority, let alone distinguish it. (I. 74 at 2-5). Instead, the State's restitution motion misstated the law concerning the role of but-for

causation in determining criminal restitution. (*Compare* I. 74⁴ at 4 with *Wilkinson*, 202 Ariz. at 29, ¶ 7⁵).

The victims' supplemental brief filed by Arizona Crime Victim Rights Group (ACVRG) did include an enunciation of the test established by *Wilkinson*. (ACVRG at 7). But ACVRG failed to engage meaningfully on the merits of the third prong, which prohibits consequential damages where the economic loss is caused by "the intervention of additional causal factors." *Wilkinson*, 202 Ariz. at 29, ¶ 7.

AVCV points to existing ethical restraints applicable to all lawyers as a basis for upholding the attorney's fees here. (AVCV at 13-14).

But the briefing provided to the trial court and this Court on behalf of the victim and the victims' bar reinforces Mr. Reed's argument that criminal restitution should not be expanded to include a wide net for all legal advice rendered to victims during the course of criminal proceedings. (Pet-Supp. at 18-19). If this Court adopts the lower court's analysis, then criminal defendants would become financially liable

⁴ "The courts have implemented the "but for" test set forth in A.R.S. § 13-105(16) in determining whether an economic loss of the victim is caused by the crime and, therefore, a proper subject of a restitution order."

⁵ "As the court of appeals noted, however, "but for" causation does not suffice to support restitution, for if it did, restitution would extend to consequential damages. Yet our criminal code expressly provides the contrary."

for all irrelevant, incompetent, and inefficient expenditures that a victim could possibly make in retaining counsel. Cf. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (holding that statutory attorney’s fees are subject to limitations and that counsel should make “good faith effort to exclude” “excessive, redundant, or otherwise unnecessary” billing based on the “results obtained.”)

The record here establishes that there were no limits imposed by Keller or the trial court in assessing the reasonableness or ethical limit of the requested attorney’s fees. Rather, the trial court expressly rejected Mr. Reed’s request to permit him to present evidence or argument on the issue. (R.T. 7/21/17 at 27-29).

This Court should not authorize the rubber-stamping of excessive and unreasonable attorney’s fees under the guise that criminal restitution provides a framework to abandon all ethical inquiries into the propriety of the fees. To uphold the conclusory and untested award of attorney’s fees here would run afoul of Arizona precedent holding that Due Process requires the trial court to consider a defendant’s argument and evidence concerning the propriety of a restitution award. *State v. Quijada*, 246 Ariz. 356, 364, ¶ 2 (App. 2019).

Rather than turn every restitution hearing into a complicated assessment of whether a victim’s time spent charging \$400 to read emails, prepare motions for the

prosecutor, review evidence in tandem with the prosecutor, discuss strategy with the prosecutor, and provide advice to a victim which the prosecutor is compelled to provide were reasonable charges, superfluous to the outcome, or risked forcing a criminal defendant to forego viable defenses or otherwise assert constitutional rights, this Court should reach the same conclusion as the United States Supreme Court in *Lagos v. United States*, 138 S.Ct. 1684, 1689 (2018) and decline to expand the definition of criminal restitution to include a victims' attorney's fees incurred during the course of criminal proceedings.

E. Permitting a Victim to Retain and Pay for Counsel of Choice is not a “Punishment,” Rather it Reflects the Traditional “American Rule”.

AVCV asserts that victims will “feel punished” for asserting victims' rights if they are permitted to retain and pay for their own counsel during the course of criminal proceedings. (AVCV at 2). AVCV does not refute that the American Rule is the standard for our justice systems. It does not explain how other litigants in other contexts, who appear legally without mandated government assistance, are “punished” when they choose to retain counsel.

By empowering victims the right to retain attorneys at their own expense, Arizona law does not “punish” victims. (AVCV at 3). The Legislature afforded victims a right that would not otherwise exist for victims in criminal proceedings.

Rather than “punish” victims, the Legislature has evinced an intention to ensure that the governmental entities responsible for protecting and enforcing victims’ rights may be held accountable by victims themselves through the retention of private counsel at a victim’s own expense. [A.R.S. § 13-4437\(A\)–\(B\)](#).

Any suggestion that the right to obtain and pay for private counsel is somehow a punishment to victims must be rejected.

F. A Defendant’s Constitutional Rights Compel Reversal Here.

Generally, a criminal defendant’s Due Process rights are violated if the defendant is punished for asserting a right to which s/he is entitled. [Bordenkircher v. Hayes, 434 U.S. 357, 363 \(1978\)](#) (“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.”)

California has recognized that awarding a victim the cost of attorney’s fees incurred during the course of the criminal proceedings would violate a defendant’s constitutional rights. [People v. Lyon, 49 Cal. App. 4th 1521, 1524 \(1996\)](#). Idaho has expressed similar concerns over the propriety of permitting a victim’s attorney to conduct a criminal restitution proceeding. [State v. Johnson, 167 Idaho 454, 460 \(App. 2020\)](#).

Recently, Vice Chief Justice Timmer, joined by Chief Justice Brutinel, expressed concerns that this Court’s jurisprudence is trending toward an unfair elevation of victims to the status of “second prosecutors” in criminal cases. *Fay v. Fox in & for County of Maricopa*, CR-20-0306-PR, 2021 WL 4259148, at *6 (Ariz. Sept. 20, 2021) (Timmer, VCJ, dissenting,). In the same case, a majority of this Court recognized the importance of permitting victims to be heard in criminal proceedings while expressly acknowledging that the right to be heard does not conflict or impede upon a criminal defendant’s constitutional rights. *Id.* at ¶ 17.

This case presents a clear boundary between the rights of victims and criminal defendants. As both California and Idaho have acknowledged, expanding the definition of criminal restitution to include attorney’s fees for advice or representation given to victims during the course of criminal proceedings would infringe on a criminal defendant’s constitutional rights. *Lyon*, 49 Ca. App. 4th at 1526; *Johnson*, 167 Idaho at 460.

Arizona’s statutory scheme concerning the recovery of attorney’s fees in contract disputes provides for an exception to the recovery of fees where the fear of incurring liability for substantial amounts of an attorney’s fees award would discourage other parties with tenable claims or defenses from litigating or defending

legitimate contract issues. *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570 (1985). Limitations on attorney's fees also exist in contract cases where the successful party's efforts were superfluous in achieving the result. *Id.*

Both of these concerns are applicable here and in other criminal cases.

And this protective framework should resonate more in criminal cases than contractual cases, given the liberty issues at stake and the importance that the 6th Amendment places on the adversarial system in uncovering the truth. See *United States v. Cronin*, 466 U.S. 648, 656 (1984) ("the adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate' . . . to require the prosecution's case to survive the crucible of meaningful adversarial testing."); *Lafler v. Cooper*, 566 U.S. 156, 165 (2012) ("The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice.").

Once criminal proceedings have begun, prosecutors bear a legal obligation to ensure that a victim's rights are protected and respected. *Ariz. R. Crim. P. 39(d)(1)*. Prosecutors are liable if they fail to carry out this obligation to respect and protect a

victim's rights. [A.R.S. § 13-4437\(B\)](#). Therefore, any expansion of criminal restitution to include a victim's attorney fees is unnecessary.

If a criminal defendant is subjected to the specter of a substantial increase in financial liability for a victim's attorney's fee award each time the trial court issues a minute entry, holds a pretrial hearing, or permits the parties to file notices of witnesses, conduct a settlement conference, or a defendant pursues discovery, negotiates a plea agreement, or if the defendant asserts a right to trial, such a fear of financial liability will undoubtedly chill a criminal defendant's exercise of constitutional rights, undermine the reliability of the adversarial system, and produce unjust results. *See [United States v. Jackson](#), 390 U.S. 570, 582 (1968)* (holding the Federal Kidnapping Act unconstitutional because it needlessly penalized the assertion of a constitutional right.)

Thus, even if this Court concludes that a victim's attorney's fees incurred to provide representation to a victim during the course of criminal proceedings amounts to an economic loss directly flowing from the charged conduct, this Court should nonetheless decline to hold that criminal defendants may be liable for those attorney's fees under Arizona's existing criminal restitution scheme given the

chilling effect such a scheme would have on the assertion of a criminal defendant's constitutional rights.

