

ARIZONA SUPREME COURT

STATE OF ARIZONA,
Appellee,
v.
RICHARD ALLEN REED,
Appellant.

Arizona Supreme Court
No. CR–20–0385–PR

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

Maricopa County Superior Court
No. CR2015–117844–001

STATE OF ARIZONA’S RESPONSE TO AMICUS BRIEF OF ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

Mark Brnovich
Attorney General
(Firm State Bar No. 14000)

Linley Wilson
Deputy Solicitor General /
Section Chief of Criminal Appeals

Jillian B. Francis
Assistant Attorney General
Criminal Appeals Section
2005 N. Central Ave.
Phoenix, Arizona 85004
Telephone: (602) 542–4686
cadocket@azag.gov
(State Bar Number 030117)
Attorneys for Appellee

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	2
TABLE OF AUTHORITIES	3
ARGUMENT.....	4
CONCLUSION	12

TABLE OF AUTHORITIES

Cases

<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....	9
<i>City of Tempe v. Prudential Ins. Co. of America</i> , 109 Ariz. 429 (1973)	4
<i>Commonwealth v. Denehy</i> , 2 N.E.3d 161 (Mass. 2014)	10
<i>E.H. v. Slayton in and for County of Coconino</i> , 249 Ariz. 248 (2020).....	7
<i>Espinoza v. Superior Court In and For Pima Cty.</i> , 166 Ariz. 557 (1991).....	6
<i>People v. Wasbotten</i> , 169 Cal.Rptr.3d 878 (2014).....	9
<i>Ruiz v. Hull</i> , 191 Ariz. 441 (1998)	5
<i>Smith v. State</i> , 990 N.E.2d 517 (Ind. 2013)	10
<i>Southern Union Co. v. United States</i> , 567 U.S. 343 (2012)	9
<i>State v. Clapper</i> , 732 N.W.2d 657 (Neb. 2007).....	10
<i>State v. Huff</i> , 336 P.3d 897 (Kan. App. 2015)	10
<i>State v. King</i> , 157 Ariz. 508 (1988).....	5
<i>State v. Kinneman</i> , 119 P.3d 350 (Wash. 2005)	10
<i>State v. Leon</i> , 240 Ariz. 492 (App. 2016).....	9
<i>State v. Madrid</i> , 207 Ariz. 296 (App. 2004)	8
<i>State v. Slover</i> , 220 Ariz. 239 (App. 2009).....	7
<i>State v. Steffy</i> , 173 Ariz. 90 (App. 1992)	8
<i>State v. Streck</i> , 221 Ariz. 306 (App. 2009).....	7
<i>State v. Wilkinson</i> , 202 Ariz. 27 (2002).....	7, 8
<i>Town of Chino Valley v. City of Prescott</i> , 131 Ariz. 78 (1981).....	4

Constitutional Provisions

Ariz. Const. art. II, § 2.1(8).....	7
Ariz. Const. art. II, § 24	6

Rules

Ariz. R. Crim. P. 6.1(b).....	6
-------------------------------	---

Statutes

A.R.S. § 13–603(C)	5, 7–9
A.R.S. § 13–804.....	5, 8
A.R.S. § 13–4418.....	6
A.R.S. § 13–4437.....	4–6
A.R.S. § 13–4437(A)	7

Other Authorities

1991 Ariz. Legis. Serv. Ch. 229 (HB 2412)	5
---	---

ARGUMENT

The amicus brief filed by the Arizona Attorneys for Criminal Justice asserts new arguments that were never presented to the lower court or appellate courts. Amicus claim that A.R.S. § 13–4437 bars restitution for the recovery of victims’ attorneys’ fees; the Legislature’s silence regarding the recovery of attorneys’ fees in criminal cases means they are not recoverable; and restitution awards should be determined by a jury. Amicus veer completely away from the issues presented by Reed in the lower court and appellate courts, and this Court should decline to consider them. In any event, none of amicus’ arguments establish the court of appeals’ opinion was erroneous or that this case warrants this Court’s discretionary review.

I. None of amicus’ arguments were raised below or argued by the parties. The arguments should therefore be rejected.

It well-established that amici “are not permitted to raise new issues and their briefs may not create, extend, or enlarge issues beyond those argued by the parties.” *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 84 (1981); accord *City of Tempe v. Prudential Ins. Co. of America*, 109 Ariz. 429, 432 (1973). Amicus argue that A.R.S. § 13–4437 precludes crime victims from recovering restitution for attorneys’ fees, the Legislature’s silence regarding recovery of attorneys’ fees in criminal cases means they are not recoverable, and that juries should determine restitution awards. None of these arguments were raised by the

parties in the lower courts or in appellate proceedings. This Court, therefore, should decline to consider these new claims. *See Ruiz v. Hull*, 191 Ariz. 441, 446 (1998).

II. The court of appeals correctly awarded the victim restitution for attorneys' fees.

This Court should deny review of Reed's claims. The appellate court followed well-established law regarding restitution, and the main contention of amicus—that victims' attorneys' fees should not be recoverable as restitution—was never raised in the superior court. The court of appeals properly affirmed the restitution awarded to the victim and the arguments of amicus fall short of establishing error in the court of appeals' opinion.

A. A.R.S. § 13–4437 does not preclude restitution for attorneys' fees.

Even if the issues raised by amicus were properly before this Court, the arguments do not demonstrate that the court of appeals' opinion was erroneous. Amicus contend that A.R.S. § 13–4437 precludes crime victims from recovering restitution for attorneys' fees. This is not so.

The relevant statutes for awarding restitution are A.R.S. § 13–603(C) and § 13–804, not § 13–4437. *See State v. King*, 157 Ariz. 508, 509–510 (1988) (restitution may be ordered under A.R.S. 13–603(C) or 13–804). Section 13–4437 was adopted in 1991 as part of the Victims' Rights Implementation Act. *See* 1991 Ariz. Legis. Serv. Ch. 229 (HB 2412). The statute provides many rights to victims,

including the right “to be represented by personal counsel at the victim’s expense.” A.R.S. § 13–4437 (also providing victims with standing to bring a special action and appear in trial or appellate proceedings, right to recover damages from a governmental entity for a violation of victims’ rights, right to request the prosecutor assert rights on behalf of the victim, right to be endorsed on all pleadings, and right to present evidence during restitution proceedings).

The Legislature’s use of the language “at the victims’ expense” means that the government will not provide court-appointed counsel for an indigent victim as is constitutionally required for indigent criminal defendants. *See Espinoza v. Superior Court In and For Pima Cty.*, 166 Ariz. 557, 560 (1991) (state and federal constitutions require provision of government-appointed counsel for indigent defendants); Ariz. R. Crim. P. 6.1(b); Ariz. Const. art. II, § 24.

Section 13–4437 empowers the victim of a crime to retain private counsel to have a voice in the proceedings if the victim chooses. It says nothing about precluding restitution for attorneys’ fees. In fact, amicus’ reliance on the statute to conclude that victims are precluded from receiving restitution for attorneys’ fees is contrary to the requirement that statutes implementing the Victims’ Bill of Rights be “liberally construed to preserve and protect the rights to which victims are entitled.” A.R.S. § 13–4418.

Reimbursement for attorneys' fees remains subject to judicial determination at a restitution hearing. A person convicted of a criminal offense is required to pay restitution to any victim "in the full amount of the economic loss as determined by the court." A.R.S. § 13-603(C); *see also* Ariz. Const. art. II, § 2.1(8). To be recoverable, an economic loss must "flow directly from the defendant's criminal conduct, without the intervention of additional causative factors." *State v. Wilkinson*, 202 Ariz. 27, 29, ¶ 7 (2002). If a crime victim can make this showing, they are entitled restitution.

Amicus also suggest that there is no need for a crime victim to hire private counsel because the prosecutor owes certain duties to the victim. Amicus Brief, at 3-5. This is immaterial because the victim of a crime has a right to retain private counsel. A.R.S. § 13-4437(A); *E.H. v. Slayton in and for County of Coconino*, 249 Ariz. 248, 255, ¶ 23 (2020) ("A victim may hire an attorney to protect her rights.").

Amicus cite to *State v. Slover*, 220 Ariz. 239 (App. 2009), and *State v. Streck*, 221 Ariz. 306 (App. 2009), to suggest that Keller, the victim's attorney, acted as a private prosecutor, and thus, his fees should not be recoverable as restitution. Amicus Brief, at 6-7. The claim that Keller acted as a private prosecutor was not raised before the trial court, although Reed was aware of Keller's involvement throughout the proceedings. R.O.A. 13 (Notice of

Appearance); R.O.A. 37 (showing Keller’s appearance at pre-trial conference); Answering Brief, at Appendix B, at 22 (showing Keller’s appearance at trial). In any event, this claim is contrary to the record. OP at 6, ¶ 17 (stating the record does not support the argument “that the victim’s attorney impermissibly served as ‘an adjunct prosecutor’”).

B. The Legislature has not barred restitution for recovery of attorneys’ fees.

Amicus asserts that the Legislature has not specifically provided authority for recovery of attorneys’ fees in criminal cases, and this silence means that the fees may not be recovered. Amicus Brief, at 8–9. But, the Legislature has generally provided for victims to recover their economic losses, which may include attorneys’ fees, under A.R.S. § 13–603(C).

Our restitution statutes do not categorically bar the recovery of certain types of fees. They do, however, mandate that restitution for full economic loss is required. *See State v. Steffy*, 173 Ariz. 90, 93 (App. 1992) (citing A.R.S. §§ 13–804 and –603(C) as support for proposition that restitution for full economic loss to crime victim is mandatory). Our courts determine whether an expense is recoverable by asking whether the economic loss “flow[s] directly from the defendant’s criminal conduct, without the intervention of additional causative factors.” *Wilkinson*, 202 Ariz. at 29, ¶ 7; *see State v. Madrid*, 207 Ariz. 296, 298, ¶ 5 (App. 2004) (loss is recoverable as restitution if (1) loss is economic,

(2) the victim would not have incurred the loss but for the criminal conduct, and (3) the criminal conduct directly caused the economic loss).

Thus, if a victim is able to make the requisite showing that his or her attorneys' fees amounted to an economic loss, the fees are recoverable and provided for under A.R.S. § 13-603(C).

C. No authority requires a jury determination of the restitution award.

Amicus additionally argue that restitution is a punishment, and as such, defendants should have a jury determine the restitution award. Amicus Brief, at 11-14. This argument was not raised by the parties and should be rejected on this basis alone. Amicus argues that its view should be the law, but presents no authority holding that jury trials are required in determining restitution. *Id.*

Moreover, similar arguments that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Southern Union Co. v. United States*, 567 U.S. 343 (2012),¹ require restitution to be determined by a jury have been rejected by a number of courts. *State v. Leon*, 240 Ariz. 492, 495-96 (App. 2016) (rejecting defendant's argument that *Apprendi* might apply to restitution); *see also People v. Wasbotten*, 169

¹ In *Southern Union Co.*, the Supreme Court held that the *Apprendi* rule requiring a jury determination of factual issues applied to the imposition of criminal *finer*, not *restitution*. 567 U.S. at 360.

Cal.Rptr.3d 878, 879–80 (2014); *Smith v. State*, 990 N.E.2d 517, 521–22 (Ind. 2013); *State v. Huff*, 336 P.3d 897, 901 (Kan. App. 2015); *Commonwealth v. Denehy*, 2 N.E.3d 161, 174–75 (Mass. 2014); *State v. Clapper*, 732 N.W.2d 657, 663–64 (Neb. 2007); *State v. Kinneman*, 119 P.3d 350, 355, ¶ 19 (Wash. 2005).

D. The court of appeals correctly affirmed the victim’s restitution award.

Amicus suggest that “the problem with Arizona’s restitution cases” is judges with “‘wide discretion’ to impose restitution without a meaningful hearing,” which “leads to absurd results, such as this case.” Amicus Brief, at 14. Amicus is apparently unfamiliar with the complete history of this case.

There *was* a restitution hearing in Reed’s case where Reed appeared and was represented by counsel. The fault in Reed’s and amicus’ position is that Reed failed to raise his claims to the superior court during the restitution hearing. He now blames the superior court for failing to *sua sponte* determine that attorneys’ fees are not recoverable as restitution the appellate court for affirming the award.

The restitution award is further justified in this case because it was directly caused by Reed’s conduct. This is because of the contentious nature of the proceedings supporting the victim’s need for private counsel to protect her rights. Reed’s defense and trial strategy was to malign the victim’s character. *See* R.O.A. 16 (defense disclosure statement, listing witnesses who would purportedly testify to the victim’s “dishonesty,” “preoccupation with accusing [a witness] of sexual

matters,” “her affair with a married male customer,” and “running up credit card debt prior to termination”). His defense to the charge of voyeurism was that he watched the victim urinate because he allegedly believed she was a drug user. R.T. 2/17/16, at 28–33 (opening statement). The State moved pretrial to preclude Reed from eliciting testimony regarding the victim’s sexual activity—which did not appear to be relevant to Reed’s defense. R.O.A. 41 (“Between November 2015 and January 2016 during discussions with defense counsel, counsel made numerous arbitrary statements regarding Victim’s past sexual history and accused her of having a proclivity for sexual relationships with men.”). Reed continued to harass the victim after court proceedings began by contacting her over social media, which was in violation of the release condition that he not contact the victim. R.T. 4/15/16, at 17.

The State attempted to negotiate restitution with Reed for therapy, travel expenses, and moving expenses. R.O.A. 74, at Exh. A. Reed was unwilling to negotiate, and instead suggested that “every piece of [the victim’s] life” would be relevant at the restitution hearing. R.O.A. 74, at Exhibits D (“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.”).

Here, the victim did not choose to be involved in litigation with Reed; instead, she was the victim of Reed’s criminal conduct and faced an unfamiliar

system where Reed attacked her character. She was hired counsel as a direct consequence of Reed's behavior. There was a clear and sufficient nexus between Reed's criminal conduct and the attorneys' fees incurred, and the trial court had an "affirmative duty" to require Reed to make full restitution for the victim's economic loss.

CONCLUSION

This Court should deny review of Reed's claims. None of amicus's arguments establish the court of appeals opinion was erroneous or that this case warrants this Court's discretionary review.

Respectfully submitted,

Mark Brnovich
Attorney General

Linley Wilson
Deputy Solicitor General /
Section Chief of Criminal Appeals

/s/ _____
Jillian B. Francis
Assistant Attorney General

Attorneys for Appellee