

**IN THE COURT OF APPEALS**

**STATE OF ARIZONA**

**DIVISION ONE**

STATE OF ARIZONA,	)	Court of Appeals No.
	)	1 CA-CR 18-0247 PRPC
Respondent,	)	
	)	Yuma County Superior Court
v.	)	No. S1400CR201201250
	)	
KANDICE DENISE QUIJADA,	)	
	)	
Petitioner.	)	
_____	)	

**BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER**

David J. Euchner, No. 021768  
[David.Euchner@pima.gov](mailto:David.Euchner@pima.gov)  
33 N. Stone Ave., 21<sup>st</sup> Floor  
Tucson, Arizona 85701  
(520) 724-6800

Attorney for **Arizona Attorneys for Criminal Justice**

# TABLE OF CONTENTS

Page

TABLE OF CASES AND AUTHORITIES .....	ii
INTERESTS OF AMICUS CURIAE.....	1
ARGUMENTS	
I. Arizona’s restitution scheme is punitive, not rehabilitative, and thus criminal defendants are entitled to basic constitutional protections .....	2
A. Restitution impacts the constitutional rights to jury trial and due process .....	3
B. The role of restitution in criminal sentencing .....	6
C. Recent Arizona cases have all but abandoned fundamental fairness in the process of determining restitution .....	9
D. In addition to being unconstitutional, denying a jury trial and due process to criminal defendants on issues related to restitution is bad public policy .....	11
1. Unlike civil defendants, criminal defendants may face a presumptive amount of restitution, which is found by a judge rather than a jury and may be based on evidence that would be inadmissible in a civil trial .....	12
2. Criminal defendants have few procedural avenues to gather information to defend him or herself in a restitution hearing .....	14
3. A criminal defendant is exposed to liability for the entire amount of the victim’s injury in a restitution hearing, even if only partially at fault for causing that injury .....	16
II. Victims do not have the right to thwart the court’s fact-finding mission .....	17

III. Procuring an alarm system to prevent future burglaries is not  
economic loss but consequential damages .....19

CONCLUSION.....21

## TABLE OF CASES AND AUTHORITIES

CASES	PAGES
<i>Alleyne v. United States</i> , 570 U.S. 99 (2013) .....	5
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....	4, 10, 11
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004).....	4-5, 10
<i>Brady v. Maryland</i> , 373 U.S. 83 (1973) .....	14
<i>Champlin v. Sargeant</i> , 192 Ariz. 371 (1998).....	18
<i>City of Phoenix v. Mubarek Ali Khan</i> , 72 Ariz. 1 (1951) .....	14
<i>Colgrove v. Battin</i> , 413 U.S. 149 (1973) .....	3
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004) .....	12
<i>Derendal v. Griffith</i> , 209 Ariz. 416 (2015).....	4, 9
<i>Dombey v. Phoenix Newspapers, Inc.</i> , 150 Ariz. 476 (1986).....	3
<i>Duncan v. Louisiana</i> , 391 U.S. 145 (1968) .....	4, 11
<i>Fisher v. Edgerton</i> , 236 Ariz. 71 (App. 2014).....	4
<i>Franco v. State</i> , 918 A.2d 1158 (Del. 2007).....	6
<i>Lewis v. N.J. Riebe Enterprises</i> , 170 Ariz. 384 (1992) .....	13
<i>In re Richard B.</i> , 216 Ariz. 127 (App. 2007).....	15
<i>Redewill v. Superior Court</i> , 43 Ariz. 68 (1934).....	6
<i>Schwab v. Matley</i> , 164 Ariz. 421 (1990) .....	4
<i>Seekings v. Jimmy GMC of Tucson, Inc.</i> , 130 Ariz. 596 (1982).....	19

*Shenah v. Henderson*, 106 Ariz. 399 (1970).....7

*Southern Union Co. v. United States*, 567 U.S. 343 (2012) .....5, 10, 12

*S.A. v. Superior Court*, 171 Ariz. 529 (App. 1992) .....18

*State v. Cummings*, 120 Ariz. 69 (App. 1978).....7

*State v. Fancher*, 169 Ariz. 266 (App. 1991) .....5

*State v. Garner*, 115 Ariz. 579 (App. 1977) .....8

*State v. Grier*, 146 Ariz. 511 (1985) .....5

*State v. Grijalva*, 242 Ariz. 77 (App. 2017) .....10

*State v. Guilliams*, 208 Ariz. 48 (App. 2004) .....9

*State v. Gunther & Shirley Co.*, 5 Ariz.App. 77 (1967) .....14

*State v. Holle*, 240 Ariz. 300 (2016) .....8

*State v. Leon*, 240 Ariz. 492 (App. 2016)..... 9-10

*State v. Lewis*, 222 Ariz. 321 (App. 2009).....9, 10, 12

*State v. Moore*, 156 Ariz. 566 (1988) .....7

*State v. Morris*, 173 Ariz. 14 (App. 1992).....19

*State v. Nuckols*, 229 Ariz. 266 (App. 2012) .....11

*State v. Sexton*, 176 Ariz. 171 (App. 1993) .....20

*State v. Skiles*, 146 Ariz. 153 (App. 1985).....9

*State v. Slover*, 220 Ariz. 237 (App. 2009).....20

*State v. Smith*, 118 Ariz. 345 (App. 1978).....7

<i>State v. Steffy</i> , 173 Ariz. 90 (App. 1992) .....	5, 12
<i>State v. Streck</i> , 221 Ariz. 306 (App. 2009) .....	20
<i>State v. Stutler</i> , 243 Ariz. 128 (App. 2017) .....	19
<i>State v. Wilkinson</i> , 202 Ariz. 27 (2002) .....	2, 3, 8, 9, 17
<i>State v. Zaputil</i> , 220 Ariz. 425 (App. 2008) .....	10
<i>State ex rel. Dean v. City Court of City of Tucson</i> , 173 Ariz. 515 (App. 1992) .....	18
<i>Tanner Companies v. Superior Court</i> , 123 Ariz. 599 (1979) .....	4
<i>Town of Gilbert Prosecutor’s Office v. Downie</i> , 218 Ariz. 466 (2008) .....	17, 21
<i>Townsend v. Burke</i> , 334 U.S. 736 (1948) .....	5
<i>United States v. Berk</i> , 666 F. Supp. 2d 182 (D. Maine 2009) .....	17
<i>United States v. Booker</i> , 543 U.S. 220 (2005) .....	12
<i>United States v. Sunrhodes</i> , 831 F.2d 1537 (10th Cir. 1987) .....	6
<i>United States v. Tucker</i> , 404 U.S. 443 (1972) .....	5
<i>Varela v. Merrill</i> , 51 Ariz. 64 (1937) .....	6

**ARIZONA REVISED STATUTES**

A.R.S. § 12-711 .....	16
A.R.S. § 12-2506 .....	16
A.R.S. § 13-105 .....	19
A.R.S. § 13-603 .....	3, 7, 8

A.R.S. § 13-804.....	12, 13, 16
A.R.S. § 13-901.....	6
A.R.S. § 13-1657 (repealed) .....	6
A.R.S. § 13-4433.....	17

**ARIZONA RULES OF EVIDENCE**

Rule 403 .....	13
Rule 404 .....	13
Rule 408 .....	13
Rule 409 .....	13
Rule 410 .....	13
Rule 701 .....	13
Rule 901 .....	13

**ARIZONA RULES OF CRIMINAL PROCEDURE**

Rule 15.1 .....	14
-----------------	----

**ARIZONA RULES OF CIVIL PROCEDURE**

Rule 14 .....	17
Rule 19 .....	17
Rule 26 .....	15
Rule 30 .....	15

Rule 33 .....	15
Rule 34 .....	15
Rule 35 .....	15
Rule 45 .....	15

**ARIZONA CONSTITUTION**

art. 2, §2.1.....	15, 17
art. 2, §23.....	3, 4
art. 2, §24.....	3, 4
art. 18, §5.....	4

**UNITED STATES CONSTITUTION**

Sixth Amendment .....	3, 5
Seventh Amendment .....	3, 4

**OTHER AUTHORITIES**

25 C.J.S., <i>Damages</i> , §2 (1966) .....	19
Black’s Law Dictionary (10th ed. 2014) .....	2
Cortney E. Loller, What is Criminal Restitution?, 100 Iowa L. Rev. 93 (2014)) .....	2
Judge William M. Acker, Jr., <i>The Mandatory Victims Restitution Act is Unconstitutional. Will the Courts Say So After Southern Union v. United States?</i> , 64 Ala. L. Rev. 803 (2013) .....	11

Jennifer S. Granick, Faking It: Calculating Loss in Computer Crime  
Sentencing, 2 I/S: J. L. & Pol’y Info Soc’y 207 (2006).....11

## **INTERESTS OF *AMICUS CURIAE***

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend them. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief because the issues presented concern the wrongful assessment of restitution against criminal defendants. AACJ is concerned that Arizona's case law, which continues to adhere to the belief that the restitution system is "rehabilitative" despite clear evidence proving it is punitive, has gradually devolved into an "anything goes" system where defendants' due process rights are ignored or cast aside. There are instances, for example, in which persons accused and *acquitted* of a crime have been nevertheless required to pay criminal restitution. Only through recognition of this dangerous and unconstitutional path can Arizona change direction.

By virtue of its order soliciting supplemental briefing and participation of *amici curiae* such as AACJ,<sup>1</sup> this court recognizes that this case presents troubling constitutional issues related to Arizona’s criminal restitution scheme as a whole. This case is a classic example of abuse of the restitution system in Arizona, but it is hardly the most constitutionally egregious. As these issues continue to make their way through the courts, AACJ requests that this court keep this expanding doctrine in check and within its constitutional limits.

## ARGUMENTS

### **I. Arizona’s restitution scheme is punitive, not rehabilitative, and thus criminal defendants are entitled to basic constitutional protections.**

Restitution is defined as “compensation for loss; esp., full or partial compensation paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation.” Black’s Law Dictionary (10th ed. 2014). Criminal restitution was originally devised as a mechanism to divest an offender of any economic benefit gained from a crime. *State v. Wilkinson*, 202 Ariz. 27, 29 ¶9 (2002); Cortney E. Loller, *What is Criminal Restitution?*, 100 Iowa L. Rev. 93, 97 (2014). Because this “unjust enrichment”

---

<sup>1</sup> This brief presents the issues in a different manner than the court’s order, which listed five separate questions for the parties to answer.

model of restitution returned both parties to their original positions, it was far more restorative than punitive in nature.

Arizona expanded criminal restitution to include losses to the victim that did not translate into gains for the offender. A.R.S. §13-603(C) (mandating restitution “in the full amount of the economic loss as determined by the court”). Unlike a pure unjust enrichment model, this form of criminal restitution emphasizes not restitution’s restorative goals but punishing the accused, deterring crime, and reducing recidivism. *Wilkinson*, 202 Ariz. at 29 ¶9 (discussing restoration, punishment, rehabilitation, and retribution). Arizona cases have failed to recognize that the law of restitution has greatly evolved over the last century, and what used to be “rehabilitative” is now most certainly punitive. Simultaneously, courts have reduced constitutional protections for defendants designed to test the accuracy of restitution requests.

**A. Restitution impacts the constitutional rights to jury trial and due process.**

Financial reparation to victims implicates the procedural protections of the Sixth and Seventh Amendments to the United States Constitution and article 2, §§23 and 24 of the Arizona Constitution.<sup>2</sup> The state constitutional guarantee of a jury trial

---

<sup>2</sup> “[T]he Seventh Amendment is one of the few remaining provisions in the Bill of Rights which has not been held to be applicable to the States,” *Colgrove v. Battin*, 413 U.S. 149, 169 n.4 (1973). *But see Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 486 n.5, 724 P.2d 562, 572 n.5 (1986) (“analysis is the same” under

in civil damages cases exists because it existed in Arizona prior to statehood. *Derendal v. Griffith*, 209 Ariz. 416, 419 ¶8 (2005). Tort claims for negligence were triable to a jury under territorial law. *Tanner Companies v. Superior Court*, 123 Ariz. 599, 601 (1979) (citing 1901 statute stating, “In all cases, both at law and in equity, either party shall have the right to submit all issues of fact to a jury.”). Furthermore, article 18, §5 of the Arizona Constitution states: “The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.” *Id.*; *see also Schwab v. Matley*, 164 Ariz. 421 (1990) (statute limiting dramshop liability violates state constitutional guarantee of jury trial in contributory negligence claims).

The right to a jury trial in criminal cases is “fundamental to our system of justice.” *Duncan v. Louisiana*, 391 U.S. 145, 153 (1968). The jury is “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge,” and is meant to act as “further protection against arbitrary action.” *Id.* at 156. Any fact “that increases the penalty for a crime beyond the prescribed maximum must be submitted to a jury and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Subsequent cases require jury findings in order to increase the maximum sentence, *see Blakely v. Washington*,

---

Seventh Amendment and article 2, §24); *Fisher v. Edgerton*, 236 Ariz. 71, 81 ¶33, 336 P.3d 167, 177 (App. 2014) (citing *Dombey* but comparing article 2, §23 to Seventh Amendment).

542 U.S. 296, 303, 308 (2004), or the minimum sentence, *see Alleyne v. United States*, 570 U.S. 99, 103 (2013). Furthermore, there is no “principled basis” for distinguishing criminal fines from punishments such as imprisonment or death. *Southern Union Company v. United States*, 567 U.S. 343, 349 (2012).

In *Southern Union*, the Court noted that “we have never distinguished one form of punishment from another. Instead, our decisions broadly prohibit judicial factfinding that increases maximum criminal ‘sentence[s],’ ‘penalties,’ or ‘punishment[s]’—terms that each undeniably embrace fines.” *Id.* at 350. Fines imposed under other statutes, much like restitution, are calculated by reference to “the amount of . . . the victim’s loss.” *Id.* at 349. It made clear that “in all such cases,” the facts required to determine the amount of the penalty must be found by a jury in order “to implement *Apprendi*’s ‘animating principle.’” *Id.* at 350. Thus, after *Southern Union*, there should be no question that the right to jury trial extends to monetary forms of punishment, whether they are called “fines” or “restitution.”

Finally, criminal defendants have a due process right to be sentenced based on correct and reliable information. *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *State v. Grier*, 146 Ariz. 511, 516 (1985). This includes restitution, which is ordinarily part of sentencing. *State v. Steffy*, 173 Ariz. 90, 93, 839 P.2d 1135, 1138 (App. 1992) (citing *State v. Fancher*, 169 Ariz. 266, 267 (App. 1991)). Many courts have held that Sixth Amendment

rights do not apply in a restitution hearing but that due process requires defendants be permitted to challenge the evidence through cross-examination. *See United States v. Sunrhodes*, 831 F.2d 1537, 1543 (10th Cir. 1987) (despite inapplicability of Confrontation Clause to restitution hearings, defendants are nevertheless entitled to a sentence, including a restitution determination, based on accurate information); *Franco v. State*, 918 A.2d 1158, 1162 (Del. 2007) (due process violated when trial court refuses cross-examination relevant to determine proper amount of restitution).

**B. The role of restitution in criminal sentencing**

In Arizona, the first appearance of criminal restitution was called “reparation.” In *Redewill v. Superior Court*, 43 Ariz. 68 (1934), a defendant convicted of failure to provide for his minor child was required as a condition of probation to make monthly payments “for the use and benefit of [his] son” in order to avoid future violations of the law. This Court accepted that financial orders such as this were legitimate conditions of probation under the general statute authorizing courts to place offenders on probation.<sup>3</sup>

*Redewill* was then cited in *Varela v. Merrill*, 51 Ariz. 64, 75–76 (1937), for the proposition that

the conditions imposed by the trial court upon a defendant, which he must observe if he does not wish to have the suspension of the sentence revoked, must be such that it can reasonably be said that they have some

---

<sup>3</sup> A.R.S. §13-1657 was repealed and replaced with A.R.S. §13-901 as part of Arizona’s adoption of the Model Penal Code in 1977.

bearing upon the protection of society against future crimes by either the offender or some other person, or upon reparation by the defendant for the injury he has caused by the particular offense already committed.

All other cases that discuss reparation to be made by criminal defendants apply the rule only to probationers. *See, e.g., Shenah v. Henderson*, 106 Ariz. 399, 400–01 (1970) (probationer convicted of vehicular manslaughter may have probation conditioned on “mak[ing] reparation in the amount of \$2500 to the deceased girl’s parents”); *State v. Smith*, 118 Ariz. 345, 347 (App. 1978) (“The probation statute has been held to authorize the imposition of restitution or reparations as a condition of probation . . . .”); *State v. Cummings*, 120 Ariz. 69, 70–71 (App. 1978) (“[I]t is well settled law that Arizona’s probation statute . . . authorizes the imposition of restitution or reparation as a condition of probation.”).

In 1977, the Legislature added A.R.S. §13-603(C) to require imposition of restitution. *See State v. Moore*, 156 Ariz. 566, 567 (1988) (“Recent statutory enactments have made the imposition of restitution mandatory.”). §13-603(C) makes no distinction between probationers and convicted persons sentenced to imprisonment, representing a sea change from Arizona’s history with conditioning probation on making reparation. Furthermore, §13-603(C) specifies that restitution “is a criminal penalty for the purposes of a federal bankruptcy involving the person convicted of an offense.” Thus, restitution is now part of the punishment.

There is no constitutional infirmity with §13-603(C) because the Legislature is authorized to set punishments. *State v. Holle*, 240 Ariz. 300, 302 ¶9 (2016). But the statutes provide no procedure for assessing restitution. That is the role of the courts—and the state and federal constitutions. Yet, in spite of this history, Arizona case law has altogether failed to recognize how its view of restitution as “rehabilitative” and not “punitive” is based in pre-MPC cases holding that the source of authority to order restitution derives from the general probation statute. Arizona case law has failed to recognize its violation of the right to a jury trial on restitution.

In *Wilkinson*, the Court separately asked the parties to brief whether the procedure for ordering criminal restitution violates the right to a civil jury trial on damages. The Court determined that the Legislature struck a balance between assessing defendants in the restitution process for the direct damages while preserving the right to jury trial for consequential damages. 202 Ariz. at 29-30 ¶11. The Court acknowledged that “[t]he sentencing phase of a criminal case is not the idea forum for the disposition of a [civil] case. Both parties are deprived of a jury; the defendant may be limited in showing causation or developing a defense of contributory negligence or assumption of risk.” *Id.* at 30 ¶12 (quoting *State v. Garner*, 115 Ariz. 579, 581 (App. 1977)). “Requiring [a defendant] to pay restitution for damages that resulted directly from the criminal conduct serves to rehabilitate . .

. . The penalty thus fits squarely within the goals of criminal punishment and does not deprive him of a civil trial to which he might otherwise be entitled.” *Id.* ¶13.

While dutifully explaining why assessment for consequential damages has no place in a criminal sentencing, *Wilkinson* altogether fails to conduct any analysis as to whether a defendant’s rights are adequately protected as to direct damages. In fact, the “crime” for which the defendant in *Wilkinson* was convicted, contracting without a license, is a misdemeanor for which there is no jury trial right under *Derendal*. The Court noted the court of appeals’ dissenting judge’s point that a broken window is not an element of burglary, *id.* ¶14; but this point cannot be stretched to validate a penalty of nearly \$50,000 for an offense for which conviction bears no relation whatsoever to causation of actual damages. In fact, *Wilkinson* contradicts an earlier case that held that a conviction for a statute that does not require a finding of fault for a victim’s injuries cannot be used as the basis for ordering restitution. *State v. Skiles*, 146 Ariz. 153, 154 (App. 1985).

**C. Recent Arizona cases have all but abandoned fundamental fairness in the process of determining restitution.**

More recently, this court has extended the requirement to pay “full restitution,” including “investigation costs” to victimless crimes, *see State v. Guilliams*, 208 Ariz. 48 (App. 2004), to crimes for which the defendant was acquitted, *see State v. Lewis*, 222 Ariz. 321 (App. 2009), and even to amounts of restitution exceeding a jury determination of the amount of theft, *see State v. Leon*,

240 Ariz. 492 (App. 2016). In *Lewis*, the defendant was convicted of drive-by shooting but acquitted of aggravated assault against A., but the trial court imposed restitution as to A.’s medical expenses. The court noted the difference in the burden of proof needed to establish a restitution award (preponderance of the evidence) versus that required for a finding of guilt (beyond a reasonable doubt), as well as the potential for a compromise verdict in the case. 222 Ariz. at 325–26 ¶¶10, 14. In *Leon*, the victim of the defendant’s embezzlement claimed the defendant stole more than \$200,000, but the jury affixed the amount of loss between \$25,000 and \$100,000. 240 Ariz. at 493 ¶1. Despite this clear jury verdict, the trial court disregarded the jury verdict and imposed restitution in the amount requested by the victim, and this court affirmed the award in spite of *Apprendi*, *Blakely*, and *Southern Union*. *Id.* at 495-96 ¶12.

Furthermore, this court has held that restitution, although technically part of sentencing, may be imposed at any time after sentencing: “Although [restitution] has been recognized as ‘part of the sentencing process’ in some contexts, ‘restitution is not a penalty or a disability.’” *State v. Grijalva*, 242 Ariz. 72, 74 ¶10 (quoting *State v. Zaputil*, 220 Ariz. 425, 428 ¶11 (App. 2008)). In *Zaputil*, the rationale for allowing an untimely imposition of restitution focused on the fact that the defendant was placed on probation. In *Grijalva*, where the defendant had been sentenced to prison, the court abandoned that rationale entirely. At this point, there is no law that would

prevent the State from bringing a new restitution claim decades after sentencing. *But see State v. Nuckols*, 229 Ariz. 266 (App. 2012) (trial court does not abuse discretion in disallowing State from bringing untimely restitution claim).

**D. In addition to being unconstitutional, denying a jury trial and due process to criminal defendants on issues related to restitution is bad public policy.**

The right to a jury is meant to act as “further protection against arbitrary action.” *Duncan*, 391 U.S. at 156. The judge, on the other hand, may exercise discretion only “within fixed statutory or constitutional limits.” *Apprendi*, 530 U.S. at 482 (citations omitted). By leaving restitution to judges who often rely heavily, if not exclusively, on presentence reports prepared by probation officers in making restitution-related decisions, Arizona has implemented a restitution scheme with inadequate protections for defendants. While the presentence report is not binding on the trial judge, practice has shown that “court[s] will simply rubberstamp the probation officer’s report.” Judge William M. Acker, Jr., *The Mandatory Victims Restitution Act is Unconstitutional. Will the Courts Say So After Southern Union v. United States?*, 64 Ala. L. Rev. 803, 819 (2013); *see also* Jennifer S. Granick, *Faking It: Calculating Loss in Computer Crime Sentencing*, 2 I/S: J. L. & Pol’y Info Soc’y 207, 221 (2006) (finding that sentencing courts often matched the government’s suggested restitution award).

This is immensely problematic; such reports are “bureaucratically prepared” and “hearsay-riddled.” *United States v. Booker*, 543 U.S. 220, 304 (2005) (Scalia, J., dissenting). In recommending restitution amounts, probation officers rely heavily on victims’ own estimates of their losses. And probation officers are not easily able to remedy any inaccuracies or false statements in a victim’s report. The surest way to test the veracity and accuracy of a claim of restitution is the same as any other evidence: “by testing it in the crucible of cross-examination,” *Crawford v. Washington*, 541 U.S. 36, 61 (2004), and having it “confirmed by the unanimous suffrage of twelve of his equals and neighbours,” *Southern Union*, 567 U.S. at 356 (internal quotations omitted).

**1. Unlike civil defendants, criminal defendants may face a presumptive amount of restitution, which is found by a judge rather than a jury and may be based on evidence that would be inadmissible in a civil trial.**

“The amount of a victim’s loss is normally determined as part of sentencing, and that is where the objection may be made, or a restitution hearing requested.” *Steffy*, 173 Ariz. at 93. Thus, although “[t]he state has the burden of proving a restitution claim,” *Lewis*, 222 Ariz. at 324 ¶7, the trial court presumes the correctness of the victim’s request until the defendant proves the contrary. The judge may base the presumptive award on evidence that would be inadmissible under the Rules of Evidence, including hearsay in presentence reports. *See* A.R.S. §13-804(I) (allowing the judge to support a restitution order with “evidence or information introduced or

submitted to the court before sentencing” or “any evidence previously heard by the judge during the proceedings”).

In a civil trial, the plaintiff receives no such presumption. To prevail in a civil trial, “the evidence supporting the propositions which a party has the burden of proving must outweigh the evidence opposed to it.” *Lewis v. N.J. Riebe Enterprises, Inc.*, 170 Ariz. 384, 398 (1992). The civil defendant may test the plaintiff’s evidence, including contemporaneous objections, to contest the amount of damages while the plaintiff is attempting to establish it. Conversely, A.R.S. §13-804(I) allows the judge to consider information that would never see the light of day at trial. *Compare* A.R.S. §13-804(I) (allowing the judge to consider “any evidence” heard) *with, e.g.*, Ariz.R.Evid. 403 (excluding evidence presenting risk of unfair prejudice substantially outweighing probative value); Rule 404(b) (excluding other crimes, wrongs, or acts as proof of character); Rule 408(a) (excluding evidence of compromise offers and negotiations to prove the amount of a claim); Rule 409 (excluding evidence of offers or promises to pay medical expenses); Rule 410 (excluding statements made during plea discussions); Rule 701 (excluding witness testimony not “rationally based on the witness’s perception”); Rule 802 (excluding hearsay); Rule 901 (excluding evidence lacking adequate foundation). Finally, even if the judge in a restitution hearing is not permitted to consider inadmissible evidence, reviewing courts may simply presume that the judge ignored any

inadmissible evidence. *See State v. Gunther & Shirley Co.*, 5 Ariz.App. 77, 84 (1967) (presuming judge “ignored or disregarded all inadmissible evidence”). In a civil proceeding, a jury would not be permitted to consider this inadmissible evidence. *See, e.g., City of Phoenix v. Mubarek Ali Khan*, 72 Ariz. 1, 8 (1951) (finding reversible error where plaintiff’s damages were established in part by a witness’s inadmissible speculation).

**2. Criminal defendants have few procedural avenues to gather information to defend him or herself in a restitution hearing.**

The defendant’s access to information to contest this presumptive amount of restitution is far more limited than it would be in the context of civil litigation. For example, the criminal defendant is only entitled to disclosure of information held by the State. *Cf. Ariz.R.Crim.P.15.1(g)* (disclosure by other persons compelled only upon discretionary court order, and only after defendant shows “substantial need” for material). Because Arizona case law does not view restitution as a criminal penalty, it is unclear that the State is even required to reveal all information that is helpful to the defendant in determining the proper amount of restitution; the Criminal Rules only require a prosecutor to reveal “information that *tends to mitigate or negate the defendant’s guilt* as to the offense charged, or which would *tend to reduce the defendant’s punishment* therefor.” Ariz.R.Crim.P. 15.1(b)(8) (emphasis added); *see also Brady v. Maryland*, 373 U.S. 83 (1963). Furthermore, criminal defendants are prohibited from compelling the victim to provide information. The victim has

the constitutional right “[t]o refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant.” Ariz. Const. art. 2, §2.1(A)(5). In this way, the Victim’s Bill of Rights (VBR) becomes a shield and a sword. Moreover, defendants are commonly denied adequate opportunity to prepare for a restitution hearing. *See In re Richard B.*, 216 Ariz. 127, 129 ¶¶5–6 (App. 2007) (restitution hearing held seven days after the State submitted its request for restitution).

In civil cases, on the other hand, the defendant would have access to any information that would help him or her contest the amount of restitution. The person claiming injury must disclose much of this information without any action by the defendant, including: information about any known witnesses or people with knowledge of the claim; information about any known statements that have been made regarding the claim; a detailed computation of damages and any documents that were used to support that computation; a description and location of any known relevant documents or electronic records; and information about any relevant insurance. *See Ariz.R.Civ.P.* 26.1(a). The civil defendant can compel the person claiming injury to answer written questions; depose the plaintiff and other witnesses; compel production of relevant documents or evidence; and, if personal injuries are claimed, require the person to submit to a medical examination. *See Ariz.R.Civ.P.* 30, 33, 34, 35, 45.

**3. A criminal defendant is exposed to liability for the entire amount of the victim's injury in a restitution hearing, even if only partially at fault for causing that injury.**

A criminal defendant's amount of restitution will generally be for the whole amount of the victim's injury, even if the defendant is only partially responsible for the injury. *See* A.R.S. §13-804(B) ("In ordering restitution for economic loss...the court shall consider all losses caused by the criminal offense or offenses for which the defendant has been convicted."); §13-804(F) (co-defendants jointly and severally liable for restitution). Criminal defendants have no procedure to limit their own exposure to anything less than liability for the full amount of the victim's damages, or to get contributions from other parties responsible for the victim's injury.

In contrast, in civil actions, Arizona has abolished joint and several liability. Generally, "the liability of each defendant for damages is several only," A.R.S. §12-2506(A), unless multiple responsible parties were acting in concert or one was the agent of another, §12-2506(D)(1)-(2). Defendants are entitled to have their liability proportionally reduced by the proportion of fault of others, even if those others are not joined in the litigation. §12-2506(B). And, if the plaintiff was at least 50% responsible for the event leading to his or her own injury, the jury may award the plaintiff nothing at all, even though the defendant is partially at fault. §12-711. In some situations, civil litigation requires third parties to be brought into the litigation, for example when the defendant's situation leaves them "subject to a substantial risk

of incurring double, multiple, or otherwise inconsistent obligations.” Ariz.R.Civ.P. 19(a)(1)(B)(ii). And Ariz.R.Civ.P. 14(a)(1) allows civil defendants to join defendants from whom they are entitled to contribution.

## **II. Victims do not have the right to thwart the court’s fact-finding mission.**

The VBR provides in relevant part that victims may “receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim’s loss or injury.” Ariz. Const. art. 2, §2.1(A)(8). That definition is consistent with this Court’s conclusion that restitution is a monetary award designed to make victims whole, rather than confer enrichment beyond the actual loss suffered. *See Town of Gilbert Prosecutor’s Office v. Downie*, 218 Ariz. 466, 469 ¶13 (2008). In fact, courts err on the side of awarding less than full restitution because overbroad awards raise procedural and constitutional concerns. *See, e.g., Wilkinson*, 202 Ariz. at 30 ¶¶12–14 (overbroad awards of restitution run the risk of improperly depriving parties of protections and procedures afforded in civil tort actions); *United States v. Berk*, 666 F. Supp. 2d 182, 188 & n.5 (D. Maine 2009) (warning that overbroad restitution awards may violate Eighth Amendment).

The VBR also permits the victim “to refuse an interview, deposition, or other discovery request by the defendant, the defendant’s attorney, or other person acting on behalf of the defendant.” Ariz. Const. art. 2, §2.1(5). *See also* A.R.S. §13-4433(A). The canon of statutory construction called *expressio unius est exclusio*

*alterius* states that “the expression of one or more items of a class indicates intent to exclude omitted items of the same class.” *Champlin v. Sergeant*, 192 Ariz. 371, 374 ¶16 (1998). Because VBR’s limitation on the ability to question victims in advance of trial does not specify any form of in-court testimony, VBR does not insulate victims from giving such testimony, nor does it give quarter to victims who refuse to testify. *See S.A. v. Superior Court*, 171 Ariz. 529, 530 (App. 1992)) (trial proceedings); *State ex rel. Dean v. City Court of City of Tucson*, 173 Ariz. 515, 516 (App. 1992) (neither constitution nor implementing statutes permits victim to refuse to testify at pretrial hearings).

If victims could refuse to come to court to give testimony, then they would be licensed to thwart the fact-finding mission of the court. In the nearly three decades since VBR was enacted by voters, no appellate decision has ever come close to authorizing the action taken by the trial court in this case, where the victim has submitted a suspiciously high demand while refusing to provide verification. Rather than recognize the victim was seeking unjust enrichment, the trial court refused to authorize the prosecutor’s subpoena for the victim’s testimony and then signed off on the victim’s entire request.

### **III. Procuring an alarm system to prevent future burglaries is not economic loss but consequential damages.**

A.R.S. §13-105(16) defines “economic loss” as

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.

“At common law, ‘consequential’ or ‘special’ damages are those damages caused by a breach of contract or warranty that can reasonably be supposed to be within the contemplation of the parties at the time of the contracting.” *Seekings v. Jimmy GMC of Tucson, Inc.*, 130 Ariz. 596, 601 (1982). In the criminal context, this court has defined “consequential damages” as damages that “do not flow directly from the criminal activity.” *State v. Morris*, 173 Ariz. 14, 17 (App. 1992). “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 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.* (quoting 25 C.J.S., *Damages* §2, at 617 (1966)).

In *State v. Stutler*, 243 Ariz. 128 (App. 2017), the defendant was convicted of aggravated assault for attacking the mother of his child, who operated a bakery. Because the defendant visited the bakery after the assault, a police officer advised her to stay away from work for a week, during which time the victim was unable to

complete orders worth \$900. On the other hand, this court has held that victims who hire an attorney to be an “adjunct prosecutor” for the purpose of nudging the prosecutor are not entitled to restitution. *State v. Slover*, 220 Ariz. 239, 243 ¶8 (App. 2009); *State v. Streck*, 221 Ariz. 306, 308 ¶¶9-10 (App. 2009) (victim’s investigative work locating the missing tractor was police work that was not compensable as “economic loss”).

Under these authorities, there can be no doubt that the installing of an alarm system constitutes consequential damages. Its connection to Quijada’s conduct is tenuous at best—indirect, but certainly not direct. This is essentially the flip-side of *State v. Sexton*, 176 Ariz. 171, 172 (App. 1993), where a defendant’s action caused the victim to lose homeowner’s insurance, leading the trial court to order restitution for “any loss that occurs to the victim[s] within the next three years that would have been covered under the old insurance policy, but not under the new policy.” This court held that “the loss which these 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.” *Id.* at 173. Burglary victims understandably feel violated to the point that they need extra security for peace of mind; but awarding restitution for peace of mind is essentially compensating

emotional distress, which is expressly disallowed as “economic loss.”<sup>4</sup> For these reasons, this court should find that the alarm system is consequential damages.

### CONCLUSION

AACJ asks this Court to hold that defendants have constitutional rights in restitution hearings and that Quijada’s rights were violated here.

RESPECTFULLY SUBMITTED this 26th day of November, 2018.

ARIZONA ATTORNEYS FOR  
CRIMINAL JUSTICE

By /s/ David J. Euchner

David J. Euchner  
33 N. Stone Ave. 21<sup>st</sup> Floor  
Tucson, AZ 85701

Attorney for **Arizona Attorneys for  
Criminal Justice**

---

<sup>4</sup> Installing an alarm system might be considered the type of unjust enrichment that *Downie* disallows. Although an alarm is preventative and does not confer value in and of itself, it increases the value of a home when the victim ultimately sells the home.