

ARIZONA SUPREME COURT

E.H.,

Petitioner,

v.

HON. DAN SLAYTON, JUDGE OF THE
COCONINO COUNTY SUPERIOR
COURT,

Respondent Judge,

STATE OF ARIZONA, LILLIAN
HESTER, LENDA HESTER, and JASON
CONLEE,

Real Parties in Interest

Arizona Supreme Court Case
No. CR-24-0245-PR

Arizona Court of Appeals
No. 1 CA-SA 24-0034

Coconino County Superior Court
Nos. CR2016-00433
CR2016-00434
CR2016-00435

**BRIEF OF *AMICUS CURIAE*
ARIZONA ATTORNEYS FOR
CRIMINAL JUSTICE (AACJ)
IN SUPPORT OF REAL
PARTIES IN INTEREST**

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INTRODUCTION

J.H.'s death is truly a tragedy. With the conviction of Lillian Hester long ago upheld on appeal,¹ and the probationary terms of Lenda Hester and Jason Conlee long since completed,² the criminal justice system has served its purpose. The time has come to bring finality to these proceedings.

This Court denied review of the petition for review's second issue related to the adequacy of the proof of the restitution request. The only question before this Court is: "[w]hether the future lost wages of a murdered child are an economic loss as defined by A.R.S. § 13-105(16)?" *Amicus curiae* Arizona Attorneys for Criminal Justice (AACJ) argues that the answer is an emphatic "no."

E.H. asks this Court to rewrite clear statutes and instead adopt what she views to be the "public policy" of this state. Adopting their view would require not only overruling generations of case law and rewriting statutes, but it would also violate several provisions of the state and federal constitutions involving the right to a jury trial. Contrary to the implied assertion that denial of criminal restitution would deprive J.H.'s next of kin of any remedy, crime victims have an obvious procedural avenue to bring the claim in this case: a civil damages suit.

¹ *State v. Hester*, 1 CA-CR 18-0770, 2019 WL 7176316 (Ariz. App. 2019) (mem.).

² Arguably, this Court lacks jurisdiction over them. *But see State v. Zaputil*, 220 Ariz. 425, 429 ¶¶ 14-17 (App. 2008) (allowing trial court to maintain jurisdiction to order restitution but not as a condition of probation since probation term expired).

INTEREST OF *AMICUS CURIAE*

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 the accused. AACJ offers this brief because the process of imposing restitution as a criminal sentence is squarely within AACJ's core mission. Arizona's restitution laws were never intended to be a substitute for victims to pursue civil suits for damages, but that is exactly how it has been abused for many years. This Court drew a red line in *State v. Wilkinson*, 202 Ariz. 27 (2002), and again in *State v. Reed*, 252 Ariz. 328 (2022), holding that criminal restitution procedures cannot supplant civil suits for damages without violating constitutional rights. The time has come for that line to be brightened.

ARGUMENTS

I. E.H.'s entire argument conflates civil damages claims with criminal restitution and ignores the statutory prohibition on restitution for consequential damages.

“Economic loss” has a three-sentence statutory definition:

“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) E.H. quotes only the second sentence of this definition in its petition for review (page 12). And, though she quotes the entire statute in her

supplemental brief at page 7, she emphasizes only the first sentence to make the point that “[t]he Court need not look any further than the plain text of the statute to resolve this case.” There is irony in this statement: plain language resolves the case, but the third sentence, prohibiting consequential damages, settles the question.

On the question presented here, *Wilkinson* is abundantly clear.³ E.H. argues, “Of course, future ‘lost earnings’ would be a ‘loss incurred’ by J.H., a ‘person,’ and the loss would, of course, be ‘a result of the offense.’” E.H. Supp. Brief at 7. The opening salvo of *Wilkinson*’s analysis rebuts this false claim: “[B]ut 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.” 202 Ariz. at 29 ¶ 7 (quotation omitted).

E.H. finds support for her argument on page 29 of *Wilkinson*, without specifying the paragraph (the only time in any of her pleadings where she fails to provide the paragraph citation). Petition at 12. Perhaps the lack of specificity is because *Wilkinson* undermines her argument.

A different result obtains, however, as to the expenses the victims incurred because Porter failed to complete the work he contracted to do or did so in a faulty manner. . . . Porter’s criminal conduct of contracting without a license did not cause these losses. ***These losses would not have occurred without the concurrence of a second causal event,*** Porter’s unworkmanlike performance. Therefore, the losses incurred as

³ *Wilkinson* lacks clarity on some issues, and this Court will need to revisit when jury trials are required. See **Argument III**, *infra*.

a result of Porter’s poor and unfinished work constitute indirect damages and cannot qualify for restitution.

202 Ariz. at 29 ¶ 10 (emphasis added). Here, for E.H. to recover any future lost earnings of J.H.—never mind the ludicrous \$3.3 million figure sought—there are several subsequent causal events that must occur.

1. Six-year-old J.H. must attend school (something that was not occurring at the time of his death);
2. J.H. must obtain full-time employment, and many areas of employment are limited to persons under age 16;⁴
3. J.H. must live a stable, crime-free life, and be responsible with money and not squander his income;
4. E.H. must survive J.H.; and
5. J.H. could never marry and/or have children, who would be the heirs to his estate before E.H. could inherit anything.⁵

The court of appeals correctly recognized that E.H. “did not—could not—present evidence” beyond pure speculation as to what J.H. would have earned in his lifetime.

Decision ¶ 12. But this is beside the point. If the purpose of criminal restitution is

⁴ See A.R.S. § 23-232(A) (prohibiting employment of persons under 16 years old in certain fields).

⁵ The court of appeals believed the trial court “inartfully used” the term “standing,” *Decision* ¶ 9, but the trial court correctly recognized that not every statutory victim gets to claim full restitution. As the court of appeals correctly recognized in *E.H. v. Slayton*, 245 Ariz. 331 (App. 2018), there is no limit to the number of people who can claim victim status in a homicide case so long as each person satisfies the statutory definition. But not every statutory “victim” can claim restitution; for example, a decedent’s parents do not have a claim to the estate if there are children and/or a spouse.

“making the victim whole,” *Town of Gilbert Prosecutor’s Office v. Downie*, 218 Ariz. 466, 469 ¶ 13 (2008), then E.H. must show direct damages.

The court of appeals’ decision was correct because “[t]he causal nexus between the defendants’ criminal conduct and J.H.’s future lost wages is simply too attenuated, both factually and temporally.” *Decision* ¶ 12 (citing *State v. Guilliams*, 208 Ariz. 48, 53 ¶ 18 (App. 2004)). *Guilliams* is instructive on this point. In that case, a state prisoner escaped and was recaptured two months later. The trial court imposed restitution of about \$50,000 against his accomplice, Guilliams, for the cost of additional security and the investigation, including post-capture work preparing the case for prosecution. 208 Ariz. at 54 ¶¶ 21-22. The court stated, “Although these ADOC investigators certainly would not have devoted these hours to Hummert’s case but for Guilliams’s criminal actions, many of these costs were attenuated from Guilliams’s criminal act, temporally if not factually.” *Id.* at 55 ¶ 23.

The concept of attenuation is well understood in the context of suppression of evidence. As with restitution, the test is not a simple “but for” causation. *See Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963) (“We need not hold that all evidence is ‘fruit of the poisonous tree’ simply because it would not have come to light but for the illegal actions of the police.”). *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975), provides a three-factor test for determining attenuation; the first two are the amount of time that elapsed and the presence of intervening events. These factors

can also guide in determining the propriety of a restitution award. For example, in this case, not only is the time factor overwhelmingly against E.H., but there are several intervening events that may occur to break the causation (J.H. might not be employable for many reasons).

E.H. criticizes the court of appeals' characterization of her future lost earnings claim as one for consequential damages, E.H. Supp. Brief at 9-10, but nowhere does she explain the distinction between direct and consequential damages that *Wilkinson* directs is statutorily required. Nor does she acknowledge that the court of appeals' refusal to impose restitution for consequential damages was statutorily mandated. Instead, E.H. bemoans that "if this Court upholds Respondent Judge's sweeping revision of the state's restitution statutes as including an exclusion of losses that can be deemed to be 'consequential,' then many crime victims will be left without recompense." E.H. Supp. Brief at 10-11. This statement is false. As *Wilkinson* explains, E.H. may bring a civil tort claim against the defendants for the same high amounts. And she would not be limited in the amount she could seek. *See* Ariz. Const. art. 2, § 31 ("No law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person.").

E.H. also argues: "If an economic tortfeasor may not profit from his own wrong, the same principle applies, *a fortiori*, to a murderer or other violent criminal." E.H. Supp. Brief at 22. Notwithstanding the lack of explanation about what monetary

“profit” any of the defendants in this case achieved from J.H.’s death, it is unsurprising that E.H. can only cite civil cases to support this argument, because *Wilkinson* forecloses it: “Potential problems arise if we too broadly combine civil liability with criminal sentencing. . . . The penalty [of direct damages] 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.” 202 Ariz. at 30 ¶¶ 12-13.

E.H. cites *State v. Morris*, 173 Ariz. 14, 18 (App. 1992), for support, based on language that restitution is appropriate for damages that are “foreseeable.” But E.H. ignores that *Morris* first distinguished direct damages from consequential damages:

Consequential damages are often contrasted with “actual damages,” defined as “damages in satisfaction of, or in recompense for, loss or injury sustained; such compensation or damages for an injury as follow from the nature and character of the act, and will put the injured party in the position which he was in before he was injured.”

Id. at 17 (quoting 25 C.J.S., Damages § 2 at 615).

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. (quoting 25 C.J.S., Damages § 2 at 617). J.H.’s future lost earnings would not make his relatives whole. Therefore, *Morris* defeats E.H.’s claim.

E.H.’s reliance on *State v. Howard*, 168 Ariz. 458 (App. 1991) is similarly misplaced. There, the *employed* car-accident victim was entitled to lost wages until

he recovered from the injuries sufficiently to return to work; because recovery was not complete at the time of sentencing, the court estimated restitution at \$12,000, with the caveat that the amount would be adjusted downward if the victim could return to work earlier than anticipated. *Id.* at 459-60. The lost wages were suffered by the victim directly, and they were limited. *Howard* makes sense, not only as to future medical costs but also as to future lost wages, and its holding is necessary to avoid the absurd result that a defendant could avoid restitution by pleading guilty at the initial appearance. Had that victim sought future lost income in the amount of \$3.3 million, on the other hand, *Howard* surely would have come out differently.

II. The California decision in *Runyan* is better suited to Arizona law than the inapposite federal statute. Division Two's decision in *Hanson* is poorly reasoned in part for its reliance on federal law.

To the extent that E.H. relies on federal cases such as *United States v. Serawop*, 505 F.3d 1112 (10th Cir. 2007),⁶ E.H. fails to recognize that the federal Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, is a significantly different statute. The MVRA specifies certain kinds of lost income that can be recovered as criminal restitution, but nowhere does it contain the kind of limitation against restitution for consequential damages that appears in A.R.S. § 13-105(16). It

⁶ E.H. also cites an earlier decision by the district judge in this case even though the conviction was then reversed. E.H. Supp. Brief at 14 (citing *United States v. Bedonie*, 317 F. Supp. 2d 1285, 1319 (D. Utah 2004), *reversed on other grounds*, *United States v. Serawop*, 410 F.3d 656 (10th Cir. 2005)). *Bedonie* and *Serawop* were co-defendants, so this is essentially the same case.

is in part for this reason that the California Supreme Court rejected the application of federal law: “*Serawop* had no occasion to analyze a mandatory restitution statute against the backdrop of analogous provisions of civil law which, as in California, limit tort recovery on the personal behalf of a decedent to predeath damages.” *People v. Runyan*, 279 P.3d 1143, 1154 n.8 (Cal. 2012).

Instead, this Court should follow California’s decision in *Runyan*, not only because it is well reasoned but also because California statutes are more akin to Arizona’s in this regard. The court first noted that its state constitution (like Arizona’s) guaranteed restitution to victims of crime, and thus “a decedent’s personal representative, acting in that capacity, can receive restitution to which the decedent was entitled for losses he or she personally sustained prior to death as a victim of the defendant’s crimes.” *Id.* at 1145-46. But it rejected the claim to post-death income:

[A]fter the actual victim has died, he or she does not incur, or continue to incur, personal economic loss subject to mandatory restitution. Thus, postdeath diminution in the value of the decedent’s property, and the expenses of administering the decedent’s estate, are not recoverable by the decedent’s representative, on the decedent’s behalf, as losses the decedent personally incurred because of the defendant’s crime. Our determination is consistent with well-established principles of the law of civil damages, and we discern no purpose of the statutory or constitutional provisions governing mandatory restitution to depart fundamentally from these principles.

Id. at 1146 (emphasis in original). The court reasoned that even though a decedent’s estate can receive the restitution that the decedent is owed, it is the decedent who is

the “*victim of crime who incurs ... economic loss.*” *Id.* at 1149 (emphasis in original).

Runyan recognized that a decedent’s close family member is a victim (as in Arizona), but it “discerned no constitutional or statutory provisions suggesting, contrary to the principles applicable in civil law, that a person against whom a crime was committed, or the estate of a victim wrongfully killed as the result of criminal conduct, is a direct and continuing crime ‘victim’ entitled to restitution for economic losses that accrue after the victim has died.” *Id.* at 1154. This is consistent with Arizona’s definition of “economic loss” as well as this Court’s statements in *Wilkinson* and *Reed* that hold that restitution cannot supplant civil jury trials.

Runyan dispatched of the argument (similar to E.H.’s argument here) that the defendants are literally “getting away with murder.” “[G]iven the increased penal sanctions for death-producing criminal conduct, there is little chance that the possibility of reduced restitution to an instantly deceased victim who leaves no survivors will encourage criminal homicide.” *Runyan*, 279 P.3d at 1154.

E.H. notes a recent Division Two memorandum decision—decided only 15 days after Division One decided this case—upheld an award of future lost wages. Petition at 5 (citing *State v. Hanson*, 2 CA-CR 2023-0151, ¶¶ 19-27, 2024 WL 3930828 (Ariz. App., Aug. 23, 2024) (mem.)). *Hanson* was wrongly decided for several reasons. First, throughout its reasoning, it relies on dictionary definitions of “lost earnings” without ever addressing the issue of consequential damages. Second,

it mistakenly believed that its conclusion was consistent with *Howard* and created a slippery slope argument. Third, it relied on a federal case, which, as discussed above, is inapposite because the MVRA does not restrict consequential damages. Fourth, it suggests that violent criminals will prefer to dispatch their victims to avoid restitution, but *Runyan* shows why this fear is overblown and unrealistic. Finally, *Hanson* acknowledges *Wilkinson*'s statement that criminal restitution must not cross the line into an area properly reserved for civil jury trials, and it then proceeds to completely ignore *Wilkinson*.

What E.H. really wants is loss of consortium, which our civil law makes abundantly clear that this is a derivative claim. *Barnes v. Outlaw*, 192 Ariz. 283, 285-86 ¶ 8 (1998) (citing *Villareal v. State Dept. of Transp.*, 160 Ariz. 474, 481 (1985)). Nothing would stop E.H. from filing a civil suit for that claim.

III. Myriad constitutional problems arise from allowing judges to make determinations of large-dollar restitution amounts.

A. Criminal restitution is punitive and part of a criminal defendant's sentence. Therefore, defendants must be afforded the right to a jury trial.

When originally conceived, criminal restitution was devised as a mechanism to divest an offender of any economic benefit gained from a crime. *See Wilkinson*, 202 Ariz. at 29 ¶ 9 (“[T]he original conception of restitution, and the form with the most direct link to criminal conduct, is that ‘of forcing the criminal to yield up to his victim the fruits of the crime.’”) (quoting *United States v. Fountain*, 768 F.2d 790,

800 (7th Cir. 1985)); *see also* Courtney E. Loller, *What is Criminal Restitution?*, 100 Iowa L. Rev. 93, 97 (2014). Because this “unjust enrichment” model of restitution returned both parties to their original positions, it was considered restorative rather than punitive.

The first appearance of criminal restitution in Arizona was “reparation,” which allowed the probation department, pursuant to the general statute authorizing probation, to order a probationer to make restorative payments to a victim as a condition of probation but did not apply to criminal defendants sentenced to prison. *See Redewill v. Superior Court*, 43 Ariz. 68 (1934) (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.”); *Varela v. Merrill*, 51 Ariz. 64, 75-76 (1937) (“the conditions imposed by the trial court upon a [probationer]...must be such that it can reasonably be said that they have some bearing upon the protection of society against future crimes...or upon reparation by the defendant for the injury he has caused by the particular offense already committed); *see also Shenah v. Henderson*, 106 Ariz. 399, 400-01 (1970); *State v. Smith*, 118 Ariz. 345, 347 (App. 1978); *State v. Cummings*, 120 Ariz. 69, 70-71 (App. 1978). 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.”).

In contrast to Arizona’s history of conditioning probation with reparation, Arizona has since expanded criminal restitution to include losses to the victim that did not translate into gains for the offender. *See, e.g.*, A.R.S. § 13-603(C) (mandating restitution “in the full amount of the economic loss as determined by the court”). Moreover, section 13-603(C) does not distinguish probationers and convicted persons sentenced to prison; instead, it 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 and is no longer purely rehabilitative. *See* Edward F. Novak & Blaize Boles, *Restitution as Punishment?*, ARIZ. ATT’Y, Oct. 2024, p.20, Unlike the previous pure unjust enrichment model, criminal restitution now emphasizes complementary goals of punishing the accused, deterring crime, reducing recidivism, and restoring the victim. *Wilkinson*, 202 Ariz. at 29 ¶ 9 (discussing restoration, punishment, rehabilitation, and retribution).

Because restitution is now legislatively classified as punishment and is part of every criminal sentence, financial reparation to victims implicates a criminal defendant’s procedural protections under the Sixth and Seventh Amendments to the United States Constitution and article 2, sections 23-24 of the Arizona Constitution.⁷

⁷ “[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 (1986) (“analysis is the same” under Seventh Amendment and article 2, § 24); *Fisher v. Edgerton*, 236 Ariz. 71, 81 ¶ 33 (App. 2014) (citing

This Court recognized the need to avoid encroaching on the jury-trial right in *Wilkinson*, again in *Downie*, 218 Ariz. at 469 ¶ 14, and most recently in *Reed*, 252 Ariz. at 330 ¶ 9. The time has come to flesh out the contours of a criminal defendant’s right to jury trial in issues involving significant dollar figures.

If 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), then there should be no question that the right to jury trial extends to monetary forms of punishment, whether they are called “fines” or “restitution.” Even if limiting the jury-trial right to cases where the amount of restitution is exceedingly high, there can be no doubt that E.H.’s \$3.3 million restitution request meets that standard.

The U.S. Supreme Court has not yet decided this question, though Justice Gorsuch has suggested such a jury-trial right exists. *See Hester v. United States*, 586 U.S. 1104, 1106-07 (2019) (mem.) (Gorsuch, J., dissenting from denial of certiorari) (“statutory maximum” punishment of restitution for jury trial purposes is zero dollars); *Rimwali v. United States*, 145 S. Ct. 518 (2025) (mem.) (Gorsuch, J., dissenting from denial of certiorari) (“As this Court has recognized, ‘the scope of the constitutional jury right must be informed by the historical role of the jury at common law.’ And more than a little evidence suggests that, at the time of the

Dombey but comparing article 2, § 23 to Seventh Amendment).

finding, juries found the facts needed to justify criminal restitution awards.”) (quoting *Southern Union*, 567 U.S. at 353). Justice Gorsuch also noted that considering restitution as a civil rather than criminal penalty would trigger the Seventh Amendment’s protections. *Hester*, 586 U.S. at 1107. Heretofore Arizona has neglected to apply the jury-trial guarantee to restitution. *E.g.*, *State v. Leon*, 240 Ariz. 492 (App. 2016) (affirming \$195,000 restitution award when jury found theft was between \$25,000-100,000). This Court should rectify this constitutional error.

Additionally, the state constitutional guarantee of a jury trial 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). Furthermore, article 18, section 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 sentencing phase of a criminal case is not the ideal forum for the disposition of a [civil] case. Both parties are deprived of a jury; the defendant may be limited in showing causation or developing a defense of contributory negligence or assumption of risk.”” *Wilkinson*, 202 Ariz. at 30 ¶ 12 (quoting *State v. Garner*,

115 Ariz. 579, 581 (App. 1977)). Nevertheless, this Court reasoned that “[r]equiring [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.

As explained in the previous argument, *Wilkinson* dutifully explains why assessment for consequential damages has no place in a criminal sentencing. But it altogether fails to conduct any analysis as to whether a defendant’s constitutional rights are adequately protected as to direct damages. Importantly, the “crime” at issue in *Wilkinson*, contracting without a license, is a non-jury-triable offense under *Derendal*, and the idea of imposing nearly \$50,000 in restitution was upheld even though the offense bore no relation whatsoever to causation of actual damages. Not until *Downie*, 218 Ariz. at 469 ¶ 14, did this Court require the reduction of the value of the work provided to avoid a windfall.

B. Criminal restitution inadequately protects defendants’ due process rights.

“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.” *State v. Steffy*, 173 Ariz. 90, 93 (App. 1992). Thus, although “[t]he state has the burden of proving a restitution claim,” *State v. Lewis*, 222 Ariz. 321, 324 ¶ 7 (App. 2009), 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. *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 or bad 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).

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 even though restitution is plainly a part of a criminal sentence, it is unclear whether 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 “material or information that tends to mitigate or negate the defendant’s guilt or would tend to reduce the defendant’s punishment.” Ariz. R. Crim. P. 15.1(b)(8); *see also Brady v. Maryland*, 373 U.S. 83 (1963). Furthermore, article 2, section 2.1(A)(5) of the Arizona Constitution prohibits a criminal defendant from compelling the victim to provide discovery in advance of a hearing. *State v. Quijada*, 246 Ariz. 356, 368-69 ¶¶ 37-39 (App. 2019) (victim who submits restitution request but refuses to testify or provide supporting documentation suffers no consequence except an adverse inference). 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, including mandatory disclosure of witnesses and statements, detailed computations of damages and supporting documents, description and location of known documents and records, and information about 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*.

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 victim's full damages, or to get contributions from other parties responsible for the victim's injury.

In contrast, in civil actions, "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 another's agent, § 12-2506(D)(1)-(2). Defendants are entitled to have their liability proportionally reduced by the proportion of fault of others, even if 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. § 12-711. In some situations, third parties must 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 a contribution.

The facts of this case show the inherent unfairness of using criminal restitution proceedings as a stand-in for a civil damages suit. This abuse of the restitution system is a necessary consequence of case law that fails to place any restrictions on the way that restitution claims are established.

CONCLUSION

For these reasons, *amicus curiae* AACJ requests that this Court hold that Arizona statutes and constitutional law prohibits homicide survivors from collecting future lost income of the victim in criminal restitution proceedings. Nothing stops them from filing a civil suit, and that is the appropriate forum for such claims.

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