

IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellee,

v.

JEFFREY ALVAREZ,

Appellant.

No. CR-25-0199-PR

Court of Appeals
No. 1 CA-CR 24-0426

Maricopa County
Superior Court No.
CR2019-003621-001

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

Arizona Attorneys for Criminal Justice

David J. Euchner, No. 021768

Michelle DeWaelsche, No. 030626

3200 N. Central Ave., Ste. 2250

Phoenix, Arizona 85012

Phone: (602) 492-7999

David.Euchner@pima.gov

Michelle.DeWaelsche@gmail.com

Attorneys for *amicus curiae* AACJ

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INTRODUCTION

Nearly 100 years ago, this Court held that restitution as a condition of probation serves to rehabilitate the probationer. For the next half-century, this Court based its adherence to the principle that restitution is rehabilitative entirely on the premise that restitution may only be imposed as a condition of probation. Yet, for the last half-century, sentencing courts have been required to impose restitution for all convictions, regardless of the sentence—thus making it part of the punishment. Up until now, this Court has neglected to address this discrepancy, and in so doing it has endorsed wholesale constitutional violations.

Relevant to this case, restitution is part of the punishment, and any increase in the minimum and maximum punishments requires a jury finding beyond a reasonable doubt. The U.S. Supreme Court has applied the right to a jury trial not only to sentences of imprisonment, but also any other “serious” penalties such as exorbitant fines. This Court has applied that rule to non-imprisonment penalties such as eligibility for sex offender registration. There is no principled reason why trial judges may have *carte blanche* to determine the amount of restitution when dealing with high dollar figures but are bounded by constitutional rules in all other respects. It is time for this Court to end the constitutional chaos inherent in trial courts’ criminal restitution assessments by clarifying that restitution is a punishment requiring a jury trial.

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 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 Arizona's current criminal restitution procedures violate defendants' Sixth and Seventh Amendment rights—as well as the concomitant rights in article 2, sections 23 and 24 of the Arizona Constitution—by permitting judges, not juries, to find facts supporting a restitution award against a criminal defendant by a mere preponderance of the evidence. AACJ requests this Court grant review to reconcile inconsistent prior decisions and to clarify that since restitution is punitive, not rehabilitative, it requires a jury determination of facts because it increases a defendant's maximum punishment.

ARGUMENT

I. Arizona’s restitution scheme is punitive, not rehabilitative, and thus it implicates the right to jury trial.

As this Court has recognized, 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” model of restitution returned both parties to their original positions, it was far more restorative than punitive in nature.

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. For example, courts have expanded Arizona’s restitution scheme to require restitution for what have historically been considered victimless crimes, *State v. Guillams*, 208 Ariz. 48, 52 ¶ 14 (App. 2004); for crimes of which the defendant was acquitted, *State v. Lewis*, 222 Ariz. 321, 326 ¶ 16 (App. 2009); and to include lost future wages of child victims, *E.H. v. Slayton*, ___ Ariz. ___, 568 P.3d 377 (2025).

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 and 24 of the Arizona Constitution. This Court has routinely recognized the need to avoid encroaching on the jury-trial right. *Wilkinson*, 202 Ariz. at 29-30 ¶ 11; *Town of Gilbert Prosecutor's Office v. Downie*, 218 Ariz. 466, 469 ¶ 14 (2008); *State v. Reed*, 252 Ariz. 328, 330 ¶ 9 (2022). The time has come to flesh out the contours of a criminal defendant's right to jury trial in issues involving significant dollar figures.

Arizona cases have failed to recognize that the law of restitution has greatly evolved from "rehabilitative" to punitive while simultaneously reducing defendants' constitutional protections designed to test the accuracy of restitution requests. Instead, by repeating the erroneous mantra of restitution as rehabilitation, Arizona courts have reached absurd conclusions. Most notably, in *State v. Leon*, 240 Ariz. 492, 494 ¶¶ 2-4 (App. 2016), the jury found the defendant's theft was less than \$100,000 despite the victim's testimony that it exceeded \$200,000, and the trial court then ordered restitution for \$195,670—essentially overriding the jury's verdict of acquittal on that fact. This Court should grant review to breathe life into this important jury-trial right.

II. Criminal defendants are entitled to a jury trial under the Sixth and Fourteenth Amendments.

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. The Sixth Amendment right to a jury trial is “incorporated against the States under the Fourteenth Amendment.” *Ramos v. Louisiana*, 590 U.S. 83, 93 (2020).

The Sixth Amendment requires a jury determination of “facts that increase the prescribed range of penalties to which a criminal defendant is exposed.” *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). *Apprendi* established a “bright-line rule” prohibiting judges from imposing punishment beyond “the maximum sentence [he or she] may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (emphasis in original). The Court extended the *Apprendi* rule prohibiting judicial fact-finding to any fact that increased the mandatory minimum sentence. *Alleyne v. United States*, 570 U.S. 99, 115-16 (2013). Most recently, it dispensed with the concept that any attempt to label a part of sentencing as a “‘postjudgment sentence-administration proceeding’ can fare no better.” *United States v. Haymond*, 588 U.S. 634, 647 (2019).

In *Blanton v. City of North Las Vegas, Nevada*, 489 U.S. 538, 543 (1989), the Court held that any offense for which the maximum statutory penalty is less than six months incarceration is presumptively a petty offense to which the right of trial by jury

does not attach, but the presumption can be rebutted when the legislature “packs an offense it deems ‘serious’ with [other] onerous penalties.” In determining the offense at issue was “petty,” the Court noted Congress’s \$5,000 threshold for fines for petty offenses was in step with national standards. *Id.* at 544-45.

The rule was further extended to criminal fines because the Court could not find a “principled basis” to distinguish fines from other punishments such as imprisonment or death. *Southern Union Co. 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.”

The nation’s high court has not yet extended *Apprendi*’s holding to restitution.

But,

[a]s 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 founding, juries found the facts needed to justify criminal restitution awards.

Rimwali v. United States, 145 S.Ct. 518 (2025) (mem.) (Gorsuch, J., dissenting) (quoting *Southern Union Co.*, 567 U.S. 343 (2012)). At the time the United States Constitution was drafted, criminal offenders were routinely required to pay restitution to their victims as punishment at common law. Dating back to colonial times, restitution was regularly imposed and regarded as part of punishment. See Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 303–16 (2014); Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIST. 326, 343, 351 (1982). Because juries, not judges, found facts necessary to determine restitution awards at the time of the nation’s founding, the drafters of the constitution would have understood restitution to require a jury determination.

III. Restitution also triggers a defendant’s Seventh Amendment right to a jury trial.

The Seventh Amendment guarantees the right to jury trial “[i]n Suits at common law.” Justice Gorsuch has noted that considering restitution to be non-punitive, and therefore not subject to the bright-line rule established in *Apprendi* and its progeny, would trigger the protections of the Seventh Amendment. *Hester v. United States*, 586 U.S. 1104, 1107 (2019) (mem.) (Gorsuch, J., dissenting from denial of certiorari). The Seventh Amendment has not yet been incorporated to the states. *Colgrove v. Battin*, 413 U.S. 149, 169 n.4 (1973). However, those same rights are protected by article 2,

section 23 and 24 of the Arizona Constitution. *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, ¶33 (App. 2014) (citing *Dombey* but comparing article 2, § 23 to Seventh Amendment). And, as this Court has recognized, Arizona’s criminal restitution procedures can conflict with the constitutional right to a civil jury trial under the Arizona Constitution. *Wilkinson*, 202 Ariz. at 29-30 ¶ 11 (citing ARIZ. CONST. art 2, § 23).

In *Wilkinson*, this Court noted that the right to a jury trial in civil cases existed “when Arizona’s constitution was adopted.” *Id.* (citing *Hoyle v. Superior Court*, 151 Ariz. 224, 228 (App. 1989)). *See also Derendal*, 209 Ariz. at 419 ¶ 8. Under territorial law, parties in cases involving damages for negligence were entitled to demand a jury trial. *Tanner Companies v. Superior Court*, 123 Ariz. 599, 601 (1979). *See also* ARIZ. CONST. art. 18, § 5 (“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.”).

Nearly every criminal offense for which a victim may claim restitution has a corresponding common law tort. *United States v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999). Murder is the tort of battery. Theft is conversion. Kidnapping is false imprisonment. In addition, tort law covers both intentional and negligent behavior. Thus, a civil remedy is available for any crime committed against victims and would

provide defendants with the right to a jury. Legislative creativity in placing such torts and other common-law suits under the aegis of criminal law for which restitution can be assessed is permitted as a matter of substantive law. *State v. Reed*, 248 Ariz. 72, 76 ¶ 10 (2020). But as a matter of procedural law, such matters must still be tried to a jury. *Id.* ¶ 13 (noting “procedural law is that which prescribes the method of enforcing the right”). Using criminal restitution proceedings before a judge as a stand-in for civil suits before a jury strips defendants of constitutional protections.

IV. Significant restitution assessments implicate the right to jury trial guaranteed in *Derendal*.

The Arizona Constitution also guarantees the right to a jury trial “[i]n criminal prosecutions.” ARIZ. CONST. art. 2, § 24. Arizona courts have construed the language of section 24 to guarantee the right to jury trial consistently with the federal constitution to preserve the right to jury trial only for “serious” as opposed to “petty” offenses. *Derendal v. Griffith*, 209 Ariz. 416, 420 ¶ 13 (2005) (citations omitted). “As a result, the ‘test for jury eligibility in this state requires an inquiry into the seriousness of the offense.’” *Id.* at 419 ¶ 8 (quoting *Benitez v. Dunevant*, 198 Ariz. 90, 92 ¶ 4 (2000)). In *Derendal*, this Court adopted a “modified *Blanton*” test for determining the seriousness of an offense, and it established a rebuttable presumption that maximum sentences beyond six months incarceration are petty. *Id.* at 422 ¶ 21. It then created a three-prong test for determining whether the offense is serious: any penalties considered in rebutting the presumption “must arise directly from statutory Arizona law,” it “must be severe,”

and “we will consider only those consequences that apply uniformly to all persons convicted of a particular offense.” *Id.* at 422-23 ¶¶ 23-25.

This Court applied *Derendal*’s “modified *Blanton*” test in *Fushek v. State*, 218 Ariz. 285 (2008), where it held that article 2, sections 23 and 24 of the Arizona Constitution guarantee a jury trial for a misdemeanor defendant when the State alleges sexual motivation pursuant to A.R.S. § 13-118. The parties agreed that the penalty was statutory. *Id.* at 289 ¶ 12. Although ordering sex offender registration was discretionary, the statute equally applied to all persons convicted of the offense, which satisfied the uniformity prong. *Id.* at 289-90 ¶¶ 13-16. It also found the threat of registration “severe.” *Id.* at 291-93 ¶¶ 23-30.

With restitution, there can be no dispute that the requirement is statutory and uniform; severity is the only question. As noted in *Blanton*, the monetary threshold for a fine permissible in petty offenses is dispositive of the question of whether the dollar figure at issue is “serious.” The maximum fine that may be imposed for a misdemeanor offense is \$2,500. A.R.S. § 13-802(A). Thus, the Arizona legislature has determined that a fine of over \$2,500 is too severe a penalty to be imposed for a misdemeanor offense. The legislature not only requires every criminal defendant to pay restitution, § 13-603(C), but it has allowed “that all or any portion of [a] fine imposed be allocated as restitution to be paid by the defendant.” § 13-804(A). The restitution in this case exceeds that amount. As such, even if Alvarez was convicted of only a misdemeanor

offense, a restitution request exceeding \$2,500 would warrant a jury trial.

Additionally, the Arizona legislature has established significant penalties for a failure to pay restitution, signaling an intent that restitution is a penal sanction. A court can order a warrant for a defendant's arrest for nonpayment of restitution and nonpayment of fines equally. A.R.S. § 13-810(A)-(B). Moreover, even if granted probation, defendants who are unable to pay full restitution by the end of their probation term *must*, under § 13-902(C), have their probationary period significantly extended, resulting in continued disenfranchisement, continued court supervision, and a continued threat of re-incarceration. As such, the conclusion that restitution is not a criminal penalty subject to jury-trial protections is at odds with Arizona law.

V. A victim's right to receive restitution under the Arizona Constitution is not compromised by requiring a jury to act as the fact finder for criminal restitution claims.

Requiring a jury to find facts supporting a restitution award beyond a reasonable doubt does not deprive victims of their constitutional right to receive "prompt restitution" under the Victims' Bill of Rights (VBR). ARIZ. CONST. art. 2, § 2.1. After trial, asking the same jury that rendered a verdict to also find facts supporting a claim of restitution could be done as quickly and easily as asking the jury to find aggravating circumstances, which is routinely done after trial. Nor would a jury determination of restitution prevent victims from receiving full restitution. *State v. Patel*, 251 Ariz. 131, 135 ¶ 14 (2021). Victims would still have "standing in criminal proceedings to "enforce any right or to challenge an order denying any right guaranteed to victims," including

presenting evidence and arguments at a restitution hearing, without having to pay a filing fee.” *Reed*, 252 Ariz. at 331 ¶ 14.

Nor would a jury trial on restitution be more onerous on victims than a restitution hearing. Victims can be subpoenaed to testify at a restitution hearing. *State v. Quijada*, 246 Ariz. 356, 367 ¶ 33 (App. 2019). They can be subject to cross-examination at a restitution hearing. *State ex rel. Dean v. City of Tucson*, 173 Ariz. 515, 516 (App. 1992). They must present evidence to support restitution requests. *State v. Iniguez*, 169 Ariz. 533, 538 (App. 1991). And the trier of fact—whether judge or jury—determines credibility. *State v. Stutler*, 243 Ariz. 128, 131 ¶ 8 (App. 2017).

Even if this Court finds that requiring a jury to determine facts supporting restitution awards would, in some way, curtail victims’ rights under the VBR, this Court has held that when victims’ rights conflict with defendants’ constitutional rights, the defendant’s constitutional rights prevail. *R.S. v. Thompson*, 251 Ariz. 111, 118 ¶ 20 (2021) (citing *State ex rel Romley v. Superior Court (Roper)*, 172 Ariz. 232, 236 (App. 1992)).

CONCLUSION

For the reasons stated above, this Court should accept review to clarify that restitution is punitive and that defendants are entitled to a jury determination of restitution. This right is guaranteed by the Sixth and Seventh Amendments to the federal constitution as well as the jury-trial guarantees of the state constitution.

RESPECTFULLY SUBMITTED on this 24th day of September, 2025.

ARIZONA ATTORNEYS FOR
CRIMINAL JUSTICE

By /s/ David J. Euchner
David J. Euchner
Michelle DeWalsche
Attorneys for *Amicus Curiae* AACJ