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SUPREME COURT OF ARIZONA

A.B., Petitioner, v. HON. STEVEN LYNCH, COMMISSIONER OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, Respondent-Commissioner, G.O., Real Party in Interest.	Arizona Supreme Court No. CV-16-0192-PR Court of Appeals Division One No. 1 CA-SA 16-0136 Maricopa County Superior Court No. JV599252

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF REAL PARTY IN INTEREST

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INTRODUCTION

The resolution of this particular case is simple: Affording victims "prompt restitution" under the constitution does not preclude the legislature from capping the amount of restitution victims may be awarded under certain circumstances. Statutes that limit the amount of restitution a court may impose are therefore constitutional. The broader concerns this case raises with regard to Arizona's criminal restitution scheme as a whole, however, are far more troubling.

Here, an inexperienced driver committed a simple moving violation. Yet the victim advocates seek $200,000 in unverified costs and expenses—never subject to a comparative fault analysis or even proof that the amount accurately represents the victim's alleged loss. While this is likely not the most egregious abuse of the restitution system—there are instances, for example, in which a person accused *and acquitted* of a crime have nevertheless been required to pay criminal restitution, *see State v. Lewis*, 222 Ariz. 321 (App. 2009)—as these issues continue to make their way to this Court, Arizona Attorneys for Criminal Justice (AACJ) requests that the Court continue to keep this expanding doctrine in check and within its constitutional limits.

INTEREST OF *AMICUS CURIAE*

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the

criminally accused and to those attorneys who defend the accused. 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. The issue in this case touches AACJ's core mission to protect the rights of those charged and convicted of crimes to be sentenced according to constitutional principles of due process and the right to a jury trial.

ARGUMENT

I. What is criminal restitution?

Restitution:

> 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).

When originally conceived, criminal restitution was 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) ("[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* 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.

Statutes in various jurisdictions, however, have 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"). Unlike a pure unjust enrichment model, this form of criminal restitution emphasizes, in addition to restitution's restorative goals, complementary goals of punishing the accused, deterring crime, and reducing recidivism. *Wilkinson*, 202 Ariz. at 29 ¶ 9 (discussing restoration, punishment, rehabilitation, and retribution).

The Petition, however, rejects the multifaceted nature of the modern criminal restitution process by focusing myopically on victims' financial interests in obtaining the largest award possible. It devises a notion that restitution is nothing but a means to restore victims, and from that premise assumes that "restitution" could not possibly mean anything less than full restitution. "Restitution" however, is about much more than fully restoring loss. It is also rehabilitative, a form of retribution, a deterrent, and a punishment. A word that encompasses such a broad range of policies cannot be interpreted to narrowly advance only victims' financial interests.

II. Because the definition of "restitution" encompasses both full and partial restitution, A.R.S. § 28-672 is constitutional.

The legislature has enacted statutes that permit courts to award less than full restitution. For violations of A.R.S. § 28-672, restitution is limited to $10,000. *Id.* § 28-672(G) ("Restitution awarded pursuant to § 13-603 as a result of a violation of this section shall not exceed ten thousand dollars."). In juvenile cases, a court may award a victim "full or partial restitution." A.R.S. § 8-344(A). The Victims' Bill of Rights (VBR), meanwhile, 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).

Two fundamental rules of statutory construction resolve any perceived conflict between the Arizona Constitution and A.R.S. § 28-672(G). First, "constitutional principles and jurisprudential considerations prevent us from ignoring the plain, unambiguous text of our constitution." *Fain Land & Cattle Co. v. Hassell*, 163 Ariz. 587, 594 (1990). Second, if possible, the Court must reconcile the text of a statute with relevant provisions of the constitution. *Kilpatrick v. Superior Court*, 105 Ariz. 413, 416 (1970).

Here, the statutes allowing for less than full restitution easily reconcile with the constitution's plain text. As noted above, the definition of restitution includes "full *or partial* compensation" for a loss. Black's Law Dictionary (10th ed. 2014). That definition is consistent with this Court's conclusion that restitution is a

monetary award designed to *reduce*—but need not always eliminate—the 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) (overbroad restitution awards may violate the Eighth Amendment).

Petitioner asks the Court to turn a blind eye to this simple resolution and instead take its word that Arizona voters intended, tacitly, that "prompt restitution" would actually mean "full restitution." As Justice Scalia and Bryan Garner explain, statutory interpretation "means (1) giving effect to the text that lawmakers have adopted and that the people are entitled to rely on, and (2) giving *no* effect to lawmakers' unenacted desires." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § I.B at 29 (2012). The Court should soundly reject Petitioner's attempt to "enter[] a crowded cocktail party and look[] over the heads of the guests for [his] friends." *Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 269 (1994) (quoting *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring)).

The VBR affords victims "prompt restitution" because it wanted victims to have *prompt* restitution. A court can promptly award a limited amount of restitution. Based on the plain text of these provisions, each is fully reconcilable with the other. If the VBR's lawmakers desired to mandate full restitution, they could easily have done so. There is no conflict between the constitution and these statutes, and the Court should decline to give weight to the fictional conflict Petitioner imagines.

III. Arizona case law that permits judges to impose restitution strips criminal defendants of important constitutional protections.

While this case is relatively simple, larger issues with the criminal restitution system are brewing beneath the surface. As currently designed and administered, Arizona's criminal restitution system violates the United States and Arizona Constitutions and is otherwise poor policy.

A. Constitutional rights generally

When a person is alleged to have caused harm to another in a manner that requires financial reparations, the constitutional rights implicated are the Sixth Amendment to the United States Constitution and Article 2, Sections 23 and 24 of the Arizona Constitution.[1] The state constitutional guarantee of a jury trial in civil

[1] "[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

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. *See, e.g.*, *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. Such protections are similarly afforded by Article 2, §§ 23 and 24 of the Arizona Constitution. *Derendal*, 209 Ariz. at 425 ¶¶ 36-37. The Supreme Court has held that any fact other than a prior conviction "that increases the penalty for a crime beyond the prescribed maximum must be

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Amendment and Article 2, § 24); *Fisher v. Edgerton*, 236 Ariz. 71, 81 ¶ 33 (App. 2014) (citing *Dombey* but comparing Article 2, § 23 to Seventh Amendment).

submitted to a jury and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). This is because the constitutional protection afforded by the right to trial by jury is "of surpassing importance." *Id.* at 476. The foundation for that right "extends down centuries into the common law," when the right was "understood to require that 'the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours.'" *Id.* at 477 (citations omitted). Subsequent cases require jury findings in order to increase the maximum sentence, *see Blakely v. Washington*, 542 U.S. 296, 303, 308 (2004), or the minimum sentence, *see Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013). Furthermore, there is no "principled basis" for distinguishing criminal fines from punishments such as imprisonment or death. *Southern Union Co. v. United States*, 132 S. Ct. 2344, 2350 (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 2351. The Court further acknowledged that fines imposed under other statutes, much like restitution, are calculated by reference to "the amount of . . . the victim's loss." *Id.* at 2350-51. 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 2351. Thus, after *Southern Union*, there should be no question that monetary forms of punishment, whether they are called "fines" or "restitution," cannot be exempted from protections of the Sixth Amendment or Article 2, Section 24 of the Arizona Constitution.

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.[2]

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 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.

[2] 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.

All other cases that discuss reparation to be made by a criminal defendant 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 § 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."). Section 13-603(C) makes no distinction between probationers and convicted persons sentenced to imprisonment, which is a sea change from Arizona's history with conditioning probation on making reparation. Furthermore, the statute 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 either §§ 13-603(C) or 8-344(A); the legislature is authorized to set punishments, *State v. Holle*, 240 Ariz. 300, 302 ¶

9 (2016), but the statutes are silent as to the 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. And for this reason, Arizona case law has failed to recognize its violation of the right to a jury trial on restitution.

In *Wilkinson*, this Court separately asked the parties to brief whether the procedure for ordering criminal restitution violates the right to a civil jury trial on damages. This 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. This 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*. This 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* is contradicted by an earlier Court of Appeals case which 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, the court of appeals has now extended the requirement to pay "full restitution" to victimless crimes including "investigation costs," *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 as to the amount of theft, *see State v. Leon*, 240 Ariz. 492 (App. 2016), *review pending*, No. CR-16-0387-PR.

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. *Lewis*, 222 Ariz. at 325–26 ¶¶ 10, 14. While it is no doubt true that the jury's failure to convict Lewis of aggravated assault does not mean that he cannot be civilly responsible for A.'s medical expenses, it does not logically follow that, therefore, Lewis can be held responsible without more information from the jury.

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. *Id.* Leon challenged the restitution order on appeal based on *Apprendi*, *Blakely*, and *Southern Union*, but the court of appeals held that restitution awards are not criminal in nature and it refused to "anticipate how [the] Supreme Court may rule in the future." *Id.* at 495–96 ¶ 12 (citing *State v. Keith*, 211 Ariz. 436,

437 ¶ 3 (App. 2005)). *Leon* is a textbook case demonstrating the inadequacy of a restitution hearing to protect the rights of a criminal defendant against arbitrary rulings and why a jury trial is necessary.

D. In addition to being unconstitutional, denying a jury trial to criminal defendants on the issue of 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. 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*, 132 S. Ct. at 2354 (internal quotes 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.

"A defendant has a due process right to contest the information on which the amount of a restitution order is based." *State v. Steffy*, 173 Ariz. 90, 93 (App. 1992). "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." *Id.* 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 is afforded 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 plaintiff's evidence may be tested by the defendant, including contemporaneous objections, to contest the amount of damages while the plaintiff is attempting to establish it. 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. The criminal defendant has 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 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 a discretionary court order, and only after the defendant shows a "substantial need" for the 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).

Information outside of the prosecutor's possession or control is not subject to any mandatory disclosure requirement under Rule 15 or any other rule in the Criminal Rules. Yet, the criminal defendant is entirely precluded 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 VBR becomes a shield and a sword. Defendants also have very little time 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 (depositions), 33 (interrogatories), 34 (requests for production), 35 (physical and mental examinations), 45 (subpoenas).

3. A criminal defendant is exposed to liability for the entire amount of the victim's injury in a restitution hearing, even if the defendant is 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, regardless of whether 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."); A.R.S. § 13-804(F) (co-defendants jointly and severally liable for restitution). The criminal defendant has no procedure to limit his or her own exposure to anything less than liability for the full amount of the victim's damages, or to get contributions from other parties who may be partially 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). A defendant is entitled to have his or her liability proportionally reduced by the proportion of fault of others, even if

those others are not joined in the litigation. *Id.* § 12-2506(B). And, if the plaintiff was at least 50 percent 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. *Id.* § 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 Rule 14(a)(1) allows the civil defendant to join defendants from whom he or she is entitled to contribution.

In sum, not only does Arizona's current implementation of criminal restitution raise grave constitutional concerns, it is poor public policy that deprives criminal defendants of the procedures and protections that should be available to ensure the amount of restitution owed is fair and accurate.

CONCLUSION

AACJ requests that this Court hold that the legislature is not precluded by the VBR from appropriately limiting restitution awards under certain circumstances and implores this Court to continue its vigilance as other problems with Arizona's criminal restitution system make their way to the Court's door.

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RESPECTFULLY SUBMITTED this 30th day of March, 2017.

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