

Commission on Victims in the Courts

Friday, October 16, 2020; 10:00 a.m.

Virtual Meeting

Phone Access: (408) 792-6300 Access Code: 133 448 4923

[Commission on Victims in the Courts Home Page](#)

Time*	Agenda Items	Presenter
10:00 a.m.	Welcome, Opening Remarks, Thank you for Service, and Introductions	Judge Ron Reinstein, Chair
10:10	Approval of Minutes - June 12, 2020 <input type="checkbox"/> <i>Formal Action/Request</i>	All
10:15	Restitution Court Bench Book - General Jurisdiction	Dan Levey
10:30	Victims' Rights and Restitution Court Bench Book - Limited Jurisdiction	Kirstin Flores
10:35	National Sexual Assault Kit Initiative	Jim Markey
10:50	Intensive Probation Workgroup Proposal RE: Restitution Issues	Judge Reinstein & Rod McKone
11:00	Concussions in Victims of Intimate Partner Violence	Jonathon Lifshitz, PhD; Sean Murphy, PhD; & Hirsch Handmaker, MD
11:25	Rule 39 Restyling Committee	Judge Reinstein
11:35	Update on ARS § 12-116.08; \$9.00 Victims Rights Assessment Waiver/Mitigation	Don Jacobson
11:45	Arizona Caselaw and Court Opinions Update	Randy Udelman & Judge Reinstein
11:55	Good of the Order/Call to the Public	Judge Reinstein
12:00 p.m.	Adjournment	

Next Meeting

Friday, March 12, 2021; 10:00 a.m.
Conference Room 345 A/B
Arizona State Courts Building

2021 Meeting Dates

March 12
June 11
October 15

*All times are approximate and subject to change. The committee chair reserves the right to set the order of the agenda. For any item on the agenda, the committee may vote to go into executive session as permitted by Arizona Code of Judicial Administration § 1-202. Please contact *Teri Munn*, COVIC staff, at (602) 452-3815 with any questions concerning this agenda. Any person with a disability may request a reasonable accommodation, such as auxiliary aids or materials in alternative formats, by contacting Sabrina Nash at (602) 452-3849. TDD for hearing impaired or speech disable, please call (602) 452-3545. Requests should be made as early as possible to allow time to arrange the accommodation.

Commission on Victims in the Courts

Friday, June 12, 2020

10:00 a.m. to 12:00 p.m.

Virtual Meeting

1501 West Washington Street

Phoenix, Arizona 85007

Appearing virtually: Judge Ron Reinstein (chair), Timothy Agan, Michael Breeze, Kimberly Chichester, Colleen Clase, Judge Maria Elena Cruz, Sydney Davis, Judge Ronda Fisk (proxy for Judge Patricia Starr), Kirstin Flores, Vanessa Helm, Delia Hiser (proxy for Christina Spurlock), Leslie James, Judge Kellie Johnson, Sandra Klotz (proxy for Jennifer Runge), Captain John Leavitt, Dan Levey, Sergeant James Markey (ret.), Chief Rod McKone, Jane Nicoletti-Jones, Elizabeth Ortiz, William Owsley, Karen Rasile, Judge Antonio Riojas, Judge Richard Weiss

Absent: Jon Eliason, Judge Evelyn Marez

Presenters/Guests: Justice Bill Montgomery, Elise Kulik, Mark Perkovich, Judge Maria Elena Cruz, Kirstin Flores, Colleen Clase, Rosanna Cortez, Teri Munn, Cathy Clarich

Staff: Theresa Barrett, Sabrina Nash, Jennifer Albright, Administrative Office of the Courts (AOC)

I. REGULAR BUSINESS

- A. **Welcome and Opening Remarks** - With a quorum present, the June 12, 2020, meeting of the Commission on Victims in the Courts (COVIC) was called to order at 10:05 a.m. by Judge Ronald Reinstein, Chair.
- B. **Approval of Minutes** - The draft minutes from the March 13, 2020 meeting of the COVIC were presented for approval.

Motion: To approve the March 13, 2020 minutes. **Moved:** Colleen Clase.

Second: Michael Breeze. **Vote:** Passed unanimously.

II. BUSINESS ITEMS AND POTENTIAL ACTION ITEMS

A. Legislative Update

Elise Kulik, AOC Legislative Analyst, stated that in March the legislature passed a skinny budget with no new initiative funding beyond what was funded last year to enable agencies to continue to operate. She stated that the legislature is unsure of what the pandemic's impact will be on state general fund revenue. The legislature went sine die two weeks ago and unfortunately no AJC supported House Bills were approved and will need to be presented again next year. The only bill of interest to COVIC to pass the legislature is SB1441: Protection orders; modification; residence possession. This legislation allows the court to give a party in an order of protection exclusive use of the residence while the order of protection is in effect. If the party awarded exclusive use of the residence moves out, they are required to notify the court that they moved

within five days of the move. The other party, not granted exclusive use of the residence, can petition the court in writing for a hearing to determine possession of the residence. There is discussion that the governor may call for a special session to deal with COVID related legislation or the budget.

B. STRIVE – Sustainable Technology Resources & Interventions for Victim Empowerment

Mark Perkovich, Assistant Director, NAU-Family Violence Institute, provided a brief history. In 2018, the Family Violence Institute received a \$750,000.00 grant from the National Crime Victim Law Institute. Arizona created STRIVE whose purpose is to link crime victims in rural communities via technology. The National Crime Victim Law Institute funded three programs; STRIVE, Montana's Legal Services Association and South Carolina's Victim Assistance Network. STRIVE was set up in the rural communities of Santa Cruz, Cochise and Yuma counties. Our goal is to connect crime victims with low and pro bono representation in criminal court. Mr. Perkovich stated that they are currently applying for a new grant from the Office for Victims of Crime (OVC) of 1.5 million that will allow STRIVE to expand into Pima county and increase access to justice for crime victims throughout the rural communities in Arizona. AZPOINT has been a positive resource for our rural victims. STRIVE currently has a mobile app in beta testing to increase availability of services to victims. Mr. Perkovich briefly outlined the legal services provided and thanked their community partners.

C. Restitution Court Bench Book – General Jurisdiction

Judge Maria Elena Cruz, Court of Appeals, reported that a workgroup was created to develop a restitution court bench book for the general jurisdiction courts. Workgroup members are Judge Patricia Starr, Dan Levey, Kirstin Flores, Chief Rod McKone, Richard Jones and Randall Udelman. Meetings were held in April and May and the next meeting will be on June 26, 2020. The workgroup anticipates having a draft of the bench book completed and ready to share at the October COVIC meeting.

D. Victim's Rights Assessment; Waiver Concerns

Kirstin Flores explained that the AOC removed the Victim's Rights Program and the Arizona Criminal Justice Commission's Victim Compensation was removed from CJEF and a new fine/fee of \$9.00 was created that is assessed to remedy the reductions that were affecting the victim community. It has been recently noticed by the Attorney General's Office that the fee was being waived regularly in Pima. Concern was shared that this waiver of an important fee could be happening in other city/county courts. Two questions were discussed, (a) whether this is a practice statewide, and (b) whether the issue could be addressed so that these funds are not negatively impacted as these funds are a critical need for victim's services.

Discussion: included training judicial officers that the \$9.00 fee is available for mitigation only not community restitution and can be waived. The AOC list of priority fines and fees that can be adjusted to give higher priority to the \$9.00 fee to lessen the chances it will be waived. It was suggested perhaps legislation was needed to amend

the statutory fee to be non-waivable. COVIC members will continue to research this issue and report back at the next meeting.

E. Rule 39 Petition

Colleen Clase, Arizona Voice for Crime Victims (AVCV), reported that AVCV has filed a petition to amend the Arizona Rules of Criminal Procedure by fully integrating the rights guaranteed to victims by the Arizona State Constitution throughout each applicable rule provision. Rule 39 addresses victim's rights but does not adequately provide guidance to judges and criminal law practitioners on how the rules apply to various scenarios in criminal proceedings. AVCV believes that it would be extremely beneficial to judges and criminal law practitioners to know how a decision to continue a motion affects the rights of victims and impacts the duties of the defendant, victim and the courts within the criminal justice process and this could be accomplished by integrating various rights into procedural rules themselves. A clarification to the petition specifically states that victims are not parties in the case, which was a concern voiced in a prior rule petition seeking to make these same changes. The Chair, Judge Reinstein (ret.) sought COVIC's position on the petition to report to the Court for the August Rules Agenda. Ms. Clase made a motion.

Discussion: Whether concerns raised by AVCV are more of a training issue. The risk of unintended consequences if changes are made to the Criminal Rules of Procedure. This petition has been rejected four times in the past.

Motion: To support the petition as amended. **Moved:** Colleen Clase. **Vote:** 11 yes; 13 no.

F. Roundtable Discussion: COVID-19 and Impact on Victims in the Courts

Judge Ronda Fisk reported that Maricopa county superior court is holding weekly criminal justice stakeholder meetings. In addition, they have a criminal department COVID-19 task force that meets regularly to address issues that are brought to the attention of the task force. They are focusing on how to get victims access to hearings, they are currently using GoToMeeting and they are piloting a program with Microsoft and For the Record (FTR) that allow victims to appear in a proceeding virtually. While participating in the meeting there is a component that would allow the victim's right attorney to meet and confer with the victim. They are converting some appearance hearings into non-appearance hearings, unfortunately some pre-trial conferences have been vacated due to COVID-19 restrictions on in courthouse visits.

Kirstin Flores thanked Judge Fisk on ensuring that victim's rights are in the forefront in Maricopa County Superior Court's work. She received positive feedback on victims attending on the court's bridge line. Victim's advocates in Pima county are also expressing positive feedback. Issues that victims are experiencing are with the court calendar being erratic with cases being calendared and then falling off the calendar. Victims are concerned about homicide sentencing hearings; not getting notice of

hearings five days before and the hearings being continued the day before the hearing with little or no notice. This is having an impact on victims, caseload and travel. It was noted a large part of this issue is related to COVID-19 outbreaks in jails and the subsequent inability to transport an in-custody defendant. It was also noted there is a lack of clarity regarding whether advocates can attend hearings in person or virtually.

Rosanna Cortez stated her agency was running into similar experiences with the lack of consistency in superior courts. Some courts will call the victim to testify and others will ask the victim to call in, some judges indicate that only the victim can attend in person hearings and others are indicating that the victim and a support person can attend in person hearings.

Judge Kellie Johnson stated that she will bring the victims, victim advocates and homicide survivors concerns to the attention of Judge Liwski for consideration in the scheduling of hearings and continuances.

Judge Maria Elena Cruz asked if there was a database of all judges around the state assigned to criminal calendar? Judge Cruz proposed:

- The creation of a list of email addresses for criminal presiding judges and judges assigned to criminal cases, which is updated regularly to assist with disseminating information to criminal judges regarding victim's rights.
- COVIC create a letter to the courts on the impact victims are seeing due to the COVID-19 pandemic changes that are being made in the courts.

Judge Fisk thanked COVIC for the information about the impact COVID related changes are having on victims and stated that she would share the information with her court. She noted that judicial officers are also frustrated with the necessary COVID changes and the fluidity of the situation. She noted that every time there is an outbreak in a detention center it impacts the courts ability to hold hearings and therefore affects the court calendar.

Rod McKone stated that the chief probation officers meet weekly to discuss the impact COVID has had on how they operate. Primarily they contact probationers virtually or by phone. They have waived some of the draconian contact standards with good results. They are concerned about addicts on probation getting the support they need.

Bill Owsley stated that when they went to video hearings more juveniles participated in hearings as they are tech savvy and are not in school and easier to communicate with.

Jane Nicoletti-Jones noted that they are maintaining contact with victims via video chat or by phone. There are challenges for victims living in tribal communities who are still in lockdown or who have limited access to the telephone or internet.

John Leavitt stated that law enforcement is limiting the arrest of individuals if it is not a violent crime. Law enforcement is also concerned about substance abusers because the price of methamphetamine has doubled. Many addicts are switching to oxycodone which is really fentanyl, which is resulting in more deaths in Pima county. He noted for the first time in Pima County fentanyl-related deaths outpaced methamphetamine deaths.

III. **Good of the Order:**

Dan Levey noted that bill 1278 (Victim's right to privacy; confidential information) had passed the Senate and the House judiciary and was scheduled to be heard by the full house and is now on hold due to the pandemic. The bill will be resubmitted next year.

Collen Clase mentioned that the third habeas petition for Clarence W. Dixon, the defendant who murdered Leslie James' sister twelve years ago, was denied. He has exhausted all his appellate remedies and has is sitting on death row.

Justice Bill Montgomery, who attended the meeting to learn more about the Commission's work, thanked COVIC for letting him participate and thanked members for the work that they do on COVIC. Judge Reinstein suggested that Justice Montgomery come back and talk about himself in a future meeting.

Call to the Public: None present. Staff reported no emails requesting opportunity to speak were submitted.

Adjournment: Meeting adjourned at 12:09 p.m.

Next Meeting:

Friday, October 16, 2020
10:00 a.m. to 12:00 p.m.
State Courts Building, Room 119
1501 West Washington Street
Phoenix, AZ 85007

COMMISSION ON VICTIMS IN THE COURTS

Meeting Date: October 16, 2020	Type of Action Requested: <input type="checkbox"/> Formal Action/Request <input checked="" type="checkbox"/> Information Only <input type="checkbox"/> Other	Subject: GENERAL JURISDICTION RESTITUTION COURT BENCH BOOK
--	--	---

From: General Jurisdiction Restitution Court Bench Book Workgroup

Presenter: Dan Levey, Executive Director, Arizona Crime Victim Rights Law Group

Description of Presentation: Overview of the workgroup's composition, research process and final product.

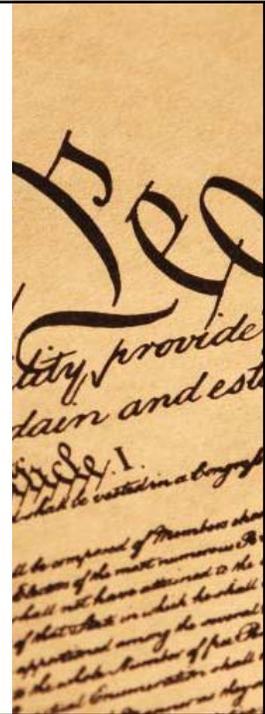
Recommended Motion: N/A

Commission on Victims In the Courts

General Jurisdiction Restitution
Court Bench Book Workgroup

Chair, Judge Maria Elena Cruz, Judge Patricia
Starr, Kirstin Flores, Richard Jones, Rod McKone,
Randy Udelman and Dan Levey

Arizona
Constitution
Article 2
section 2.1
(A)(8) A victim
has a right “to
receive
prompt
restitution”



Importance of Restitution for Victims

- Through predominantly financial restitution, offenders can replace or repair damaged or stolen property, compensate victims for expenses such as medical treatment and psychological counseling, and sometimes compensate for lost income, legal fees, and other costs directly related to the criminal offense.
- Promising restitution through court orders without collecting and disbursing the funds leads to dissatisfaction of victims.
- This study found that closer monitoring of offenders' payments increased their compliance with restitution orders. Further, regular updates to victims about the status of their restitution accounts helps them feel better informed (Davis & Smith, 1993).

General Jurisdiction Restitution Court Bench Book

Born out of Limited Jurisdiction Bench Book –Same Concept

Met several times over the last year- Revised and revised.

General Jurisdiction Restitution Court Bench Book

- Bench Book includes enforcement, definitions, when restitution must be ordered, manner of payment, restitution hearings, liens, priority of payment, CRO's, etc...
- Designed for Restitution Court Judges as quick reference but as noted in the introduction section of this book indicates that this book should be referenced in General Jurisdiction Court any time a restitution matter is in front of the judge.

GENERAL JURISDICTION

RESTITUTION COURT BENCHBOOK

Table of Contents

INTRODUCTION	3
ENFORCEMENT	3
DEFINITIONS	7
ECONOMIC LOSS	7
RESTITUTION.....	9
VICTIM.....	10
WHEN RESTITUTION MUST BE ORDERED	10
AMOUNT OF RESTITUTION.....	12
MANNER OF PAYMENT	13
RESTITUTION HEARING.....	14
RESTITUTION ORDER	15
RESTITUTION LIEN	16
PRE-CONVICTION RESTITUTION LIEN	16
CRIMINAL RESTITUTION ORDER	16
MODIFICATION OF THE ORDER.....	17
PRIORITY OF PAYMENT.....	17
PETITION TO REVOKE.....	17
PURSUING GARNISHMENT AS A CIVIL MATTER.....	18
POST-SENTENCE PROCEDURE.....	18
SUPREMACY CLAUSE ISSUE	18
QUICK LINKS	19

INTRODUCTION

The name *Restitution Court* reflects the purpose of this specialty court, which is to hold probationers accountable and secure payment of restitution. Restitution Court is not a probation violation court. It is a court that conducts post-sentencing, civil procedure order to show cause (OSC) hearings pursuant to Arizona Revised Statutes (A.R.S.) § 13-810 (C) and (D) to determine whether a probationer is in contempt for willful non-payment of restitution in their criminal case. This process seeks to bring before the court individuals most delinquent in restitution payments and those that have demonstrated long term “willful noncompliance” towards restitution. Restitution Court does not address court ordered financial delinquencies outside of restitution orders.

This bench book informs judicial officers of the statutorily established procedure in a Restitution Court OSC hearing. It includes pertinent victim restitution definitions as well as links to additional resources. This bench book should serve as a reference to judicial officers in general jurisdiction courts any time a restitution matter is before the judge.

ENFORCEMENT

ORDER TO SHOW CAUSE (A.R.S. § 13-810) – When a criminal defendant is in arrears in making restitution payments, the court, prosecutor or victim may petition the court for an OSC. The court shall require the defendant to appear and show cause why the failure to make payment(s) should not be treated as contempt.

In connection with an OSC Petition, the Court should consider Arizona Rule of Criminal Procedure (Rule) 26.12(c)(3), which states in part:

If the defendant fails to timely pay a fine, restitution, or other monetary obligation, or otherwise to comply with a court order, and fails to respond to a court notice informing the defendant of the consequences and resolution options, the court may issue an arrest warrant or a summons and require the defendant to show cause why he or she should not be held in contempt.

The court may consider starting the OSC process with a status conference to inform the defendant of consequences of non-payment and resolution options and following up later with a separate show cause evidentiary hearing. The purpose of an evidentiary hearing is to determine whether the defendant has either willfully failed to pay restitution or intentionally refused to make a good faith effort to obtain monies required to pay restitution. The clerk of the court, on request, shall make the defendant's payment history available to the prosecutor, victim, victim's attorney, probation department and court without cost. A.R.S. § 13-810(H).

A court may not incarcerate a defendant for nonpayment of a court-ordered legal financial obligation unless the court holds a hearing and makes one of two findings:

1. The failure to pay was willful and not due to an inability to pay; or
2. The failure to pay was due to an intentional failure to make bona fide efforts to pay.

At the OSC hearing:

Making the determination of willfulness...

Step 1—Confirm that adequate notice of the hearing was provided.

Notice should include the following information:

- a. Hearing date and time;
- b. Total amount claimed due;
- c. That the court will evaluate the defendant's ability to pay at the hearing;
- d. That the defendant should bring any documentation or information the court should consider in determining ability to pay;
- e. That incarceration may result if the court finds that the defendant had the ability to pay and willfully refused; and
- f. That a defendant unable to pay can request payment alternatives, including, but not limited to, community restitution or a time payment plan.

Step 2—Provide the defendant a meaningful opportunity to explain.

The defendant must have an opportunity to explain:

- a. Whether the amount due is incorrect; and
- b. The reason(s) for any nonpayment (e.g., inability to pay).

Step 3—Provide the victim an opportunity for cross-examination.

The victim, victim's attorney or the prosecutor on the victim's behalf, must have the opportunity to cross-examine the defendant regarding the ability to pay. ARS § 13-810(D).

Step 3—The following are factors the court should consider to determine willfulness:

- a. Whether defendant is receiving income-based public assistance, including, but not limited to, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), veterans' disability benefits, or other state based benefits provided through the Arizona Department of Economic Security (DES) (all such benefits are not subject to attachment, garnishment, execution, levy, or other legal process);
- b. Income, including whether income is at or below 130% of the Federal Poverty Level (FPL) 2;
- c. Financial resources, assets, financial obligations, and dependents;
- d. Whether the defendant is homeless, incarcerated, or resides in a mental health facility;
- e. Basic living expenses, including, but not limited to, food, rent/mortgage, utilities, medical expenses, transportation, and child support;
- f. The defendant's efforts to acquire additional resources, including any permanent or temporary limitations to secure paid work due to disability, mental or physical health, homelessness, incarceration, lack of transportation, or driving privileges;
- g. Other Legal Financial Obligation (LFO) owed to the court or other courts;
- h. Whether LFO payment would result in hardship to the defendant or his/her dependents; and
- i. Any other special circumstances that may bear on the defendant's ability to pay.

Step 4—The court should find on the record:

- a. A determination of willfulness or intentional failure to make bona fide efforts to pay.
- b. Any fine payment alternatives imposed in step 5 below.

Step 5—Alternative dispositions available:

I. Sanctions for those who have been found willful of nonpayment or intentionally failed to make a good effort to pay, after a finding of contempt, pursuant to A.R.S. § 13-810(D) & (E):

- a. Order the defendant to perform community restitution;
- b. Enter a criminal restitution order pursuant to A.R.S. § 13-805;
- c. Enter a writ of criminal garnishment pursuant to A.R.S. § 13-812. This does not discharge a defendant who is incarcerated for nonpayment until the amount owed or a portion of the amount owed is paid;
- d. Order the defendant incarcerated in the county jail until the LFO or a specified portion of it is paid.
- e. Refer for probation revocation conducted under Rule 27. Probation revocation cannot be determined at a § 13-810 OSC hearing.

II. Dispositions for those who have been found not willful in nonpayment, or have made a good faith effort to pay pursuant to A.R.S. § 13-810(F):

- a. Re-establish any original agreement regarding the payment of the LFO;
- b. Modify the manner in which the amount owed is to be paid. This may include an extension of time to pay, the establishment or the modification of a time payment plan, ordering community restitution or allowing credit for community restitution when permitted by A.R.S. § 13-824;
- c. Enter a criminal restitution order pursuant to A.R.S. § 13-805;
- d. Enter a writ of criminal garnishment pursuant to A.R.S. § 13-812. This does not discharge a defendant who is incarcerated for nonpayment until the amount owed or a portion of the amount owed is paid.

Adapted from Bench Card for A.R.S. § 13-810 Order to Show Cause Hearings. Also available [here](#).

DEFINITIONS

ECONOMIC LOSS

The term “economic loss” means any economic loss incurred by a person as a result of the commission of an offense. It 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).

Economic loss can include "lost profits," *State v. Young*, 173 Ariz. 287, 289, 842 P.2d 1300, 1302 (Ct. App. 1992); funeral expenses, *State v. Smith*, 171 Ariz. 501, 502 n.1, 831 P.2d 877, 878 n.1 (Ct. App. 1992); *State v. Blanton*, 173 Ariz. 517, 520, 844 P.2d 1167, 1170 (Ct. App. 1992); attorneys' fees incurred to close the victim's estate, travel, and lost wages, *State v. Baltzell*, 175 Ariz. 437, 439, 857 P.2d 1291, 1293 (Ct. App. 1992); moving expenses for the victim, *State v. Brady*, 169 Ariz. 447, 448, 819 P.2d 1033, 1033 (Ct. App. 1991); prepaid education class fees, *In re Andrew C.*, 215 Ariz. 366, 369–70, 160 P.3d 687, 690–91 (Ct. App. 2007); and costs for a security system, *State v. Quijada*, 246 Ariz. 356, 369–70, ¶ 44, 439 P.3d 815, 828–29, ¶ 44 (Ct. App. 2019).

Economic loss includes lost earnings. A.R.S. § 13-105(16). Lost earnings are not limited merely to lost wages. Earnings are something obtained during employment, and thus reasonably can extend to the employer-provided annual leave the brother had earned and used during the investigation, trial, and sentencing phases. *State v. LaPan*, 2020 WL 4592713 (App. Aug. 11, 2020).

Economic loss is the "functional equivalent" of actual damages from the civil arena. *State v. Barrett*, 177 Ariz. 46, 47–48, 864 P.2d 1078, 1079–80 (Ct. App. 1993) (citing *State v. Morris*, 173 Ariz. 14, 17, 839 P.2d 434, 437 (Ct. App. 1992)).

The term economic loss includes reasonably anticipated future economic losses that are not confined to “easily measurable damages” such as future medical care and/or lost wages. *State v. Howard*, 168 Ariz. 458, 460, 815 P.2d 5, 7 (Ct. App. 1991) (quoting *In re Maricopa Cnty. Juv. Action J-96304*, 147 Ariz. 153, 155, 708 P.2d 1344, 1346 (Ct. App. 1985)). Restitution is proper for economic losses “that are the natural consequences of the defendant’s conduct or when the court determines that the losses were foreseeable, considering the nature

and character of [the] defendant's criminal actions." *State v. Morris*, 173 Ariz. 14 17–19, 839 P.2d 434, 437–39 (Ct. App. 1992). Restitution for economic losses to make a victim whole that reflect "the basic necessities of everyday life, such as shelter, food, medical care . . . should be the rule, not the exception." *Id.* at 19, 839 P.2d at 439.

Fair market value "[i]n most cases" realistically reflects a victim's actual loss. See *State v. Ellis*, 172 Ariz. 549, 551, 838 P.2d 1310, 1312 (Ct. App. 1992). However, fair market value will not always be the appropriate standard and the court has broad discretion to ensure the victim is made whole. A victim's economic loss is not limited to fair market value of a vehicle. Authority of trial court was not abused by awarding amount still owed on vehicle that exceeded the value paid by insurance proceeds. *In re William L.*, 211 Ariz. 236, 241, ¶ 17, 119 P.3d 1039, 1044, ¶ 17 (Ct. App. 2005). Fair market value of economic loss, whether for a vehicle or other losses, does not always apply and can instead involve original purchase price or replacement cost. *Ellis*, 172 Ariz. at 551, 838 P.2d at 1312.

If a victim has received reimbursement for the victim's economic loss from an insurance company, a crime victim compensation program funded pursuant to A.R.S. § 41-2407, or any other entity, the court shall order the defendant to pay the restitution to that entity. A.R.S. § 13-804(E); see also *State v. Merrill*, 136 Ariz. 300, 301–02, 665 P.2d 1022, 1023–24 (Ct. App. 1983) (upholding restitution award to insurance company).

Attorney hired by victim acted by assisting the prosecution or "prodding" the State to pursue the case. Court found attorneys' fees constituted consequential damages which were excluded under the definition of economic loss. *State v. Slover*, 220 Ariz. 239, 243, ¶¶ 7–8, 224 P.3d 1088, 1092, ¶¶ 7–8 (Ct. App. 2009). However, the court also left open the question of whether such fees would be appropriate in cases where the victim hires an attorney to assert a concrete right under the Victim's Bill of Rights. *Id.* at 243, ¶ 9, 224 P.3d at 1092, ¶ 9; see also *State v. Leteve*, 237 Ariz. 516, 530, ¶ 58, 354 P.3d 393, 407, ¶ 58 (2015) (without objection, affirming attorney fees incurred to enforce victim rights).

Economic loss does not include potential losses due to reduced insurance coverage, *State v. Sexton*, 176 Ariz. 171, 173, 859 P.2d 794, 796 (Ct. App. 1993); or loss to emotional and mental health, sorrow and neglect, *State v. Carbajal*, 177 Ariz. 461, 464, 868 P.2d 1044, 1047 (Ct. App. 1994).

Victim can include someone partially responsible for his/her own injuries, *State v. Clinton*, 181 Ariz. 299, 300, 890 P.2d 74, 75 (Ct. App. 1995); or a person suffering property damage in a DUI collision, *State ex rel. Romley v. Superior Ct. (Cunningham)*, 184 Ariz. 409, 411, 909 P.2d 476, 478 (Ct. App. 1995). However, restitution is required only where the harm is caused by the criminal conduct for which the defendant was convicted. See *Clinton*, 181 Ariz. at 300, 890 P.2d at 75.

Economic loss can include a variety of expenses including damages to a vehicle or other property belonging to the victim. See, e.g., *State v. Reynolds*, 171 Ariz. 678, 680, 832 P.2d 695, 697 (Ct. App. 1992).

Damages to a victim's vehicle could be considered economic loss. See *In re Stephanie B.*, 204 Ariz. 466, 469, ¶ 10, 65 P.3d 114, 117, ¶ 10 (Ct. App. 2003) (1. Victim must have suffered economic loss; 2. loss would not have occurred "but for" the criminal conduct; and 3. criminal conduct was a direct cause of the economic loss); see also *State v. Wilkinson*, 202 Ariz. 27, 29, ¶ 6, 39 P.3d 1131, 1133, ¶ 6 (2002); *State v. Baltzell*, 175 Ariz. 437, 439, 857 P.2d 1291, 1293 (Ct. App. 1992); *State ex rel. McDougall v. Superior Ct. (Martinez)*, 186 Ariz. 218, 220, 920 P.2d 784, 786 (Ct. App. 1996). Economic losses can include expenses to purchase and install a home security system. *State v. Quijada*, 246 Ariz. 356, 370, ¶ 47, 439 P.3d 815, 829, ¶ 47 (Ct. App. 2019).

Reasonable expenses associated with attendance at trial qualify as an economic loss. *State v. Madrid*, 207 Ariz. 296, 300, ¶ 10, 85 P. 3d 1054, 1058, ¶ 10 (Ct. App. 2004).

The statute mandating recovery for economic loss is broad and contemplates a wide variety of expenses caused by the conduct of persons convicted of crimes. *State v. Lindsley*, 191 Ariz. 195, 198, 953 P.2d 1248, 1251 (Ct. App. 1997) (citing *State v. Baltzell*, 175 Ariz. 437, 439, 857 P.2d 1291, 1293 (Ct. App. 1992)).

RESTITUTION

Restitution is the act of restoring or making the victim whole and rehabilitating the defendant. It is not meant to penalize the defendant. *State v. Iniguez*, 169 Ariz. 533, 536, 821 P.2d 194, 197 (Ct. App. 1991).

VICTIM

A victim is a person against whom the criminal offense has been committed, including a minor, or if the person is killed or incapacitated, the person's spouse, parent, child, grandparent or sibling, any other person related to the person by consanguinity or affinity to the second degree or any other lawful representative of the person, except if the person or the person's spouse, parent, child, grandparent, sibling, other person related to the person by consanguinity or affinity to the second degree or other lawful representative is in custody for an offense or is the accused. A.R.S. § 13-4401(19).

A legal entity victim is defined as:

1. A corporation, partnership, association or other legal entity which, except for its status as an artificial entity, would be included in the definition of victim in section 13-4401. A.R.S. § 13-4404.
2. An insurance company that had been required to pay a claim to the direct victim of an offense. *State v. Whitney*, 151 Ariz. 113, 113, 726 P.2d 210, 210 (Ct. App. 1985); *State v. Steffy*, 173 Ariz. 90, 94–95, 839 P.2d 1135, 1140–41 (Ct. App. 1992).
3. Any person or entity suffering economic loss as a result of the defendant's criminal activity, whether or not they are the direct victim of the crime. *State v. Merrill*, 136 Ariz. 300, 301–02, 665 P.2d 1022, 1023–24 (Ct. App. 1983). This included DES when it paid for psychological evaluation, counseling and a parent aide for a child molestation victim and the child's mother. *State v. Prieto*, 172 Ariz. 298, 299, 836 P.2d 1008, 1009 (Ct. App. 1992); see also *State v. Guilliams*, 208 Ariz. 48, 51–53, ¶¶ 9–15, 90 P.3d 785, 788–90, ¶¶ 9–15 (Ct. App. 2004) (court determined Arizona Department of Corrections to be a victim and awarded restitution).

WHEN RESTITUTION MUST BE ORDERED

Restitution is required to be ordered in full in all cases where there has been a judgment of guilt and when economic loss has occurred as a result of the commission of a crime defined in or outside Title 13. A.R.S. § 13-603(C).

Restitution for full economic loss is mandatory. *State v. Lindsley*, 191 Ariz. 195, 197, 953 P.2d 1248, 1250 (Ct. App. 1997). Restitution shall be ordered in accordance with this title unless otherwise provided by law. The burden of proof is by a preponderance of the evidence. *State v. Lewis*, 222 Ariz. 321, 324, ¶ 7, 214 P.3d 409, 412, ¶ 7 (Ct. App. 2009).

THE THREE-PART TEST

1. The loss must be ECONOMIC,
 2. The loss must not have occurred BUT FOR the defendant's conduct; and,
 3. The criminal conduct must DIRECTLY CAUSE the economic loss.
- State v. Madrid*, 207 Ariz. 296, 298, ¶ 5, 85 P.3d 1054, 1056, ¶ 5 (Ct. App. 2004); see also *State v. Wilkinson*, 202 Ariz. 27, 29, ¶ 7, 39 P.3d 1131, 1133, ¶ 7 (2002).

A.R.S. § 13-804 does not apply to traffic offenses, except for the following traffic offenses: A.R.S. § 28-661; A.R.S. § 28-662; A.R.S. § 28-693; A.R.S. § 28-1381; A.R.S. § 28-1382; or A.R.S. § 28-1383, or any local ordinance relating to the same subject matter as the above statutes. A.R.S. § 13-809(B). Causing Serious Physical Injury or Death by a moving violation under A.R.S. § 28-661 limits restitution as result of this section not to exceed one hundred thousand dollars. A.R.S. § 28-672(G); but see *State v. Patel*, 247 Ariz. 482, 485, ¶ 15, 452 P.3d 712, 715, ¶ 15 (Ct. App. 2019) (finding statutory cap violates Arizona Constitution), *review granted*.

Per A.R.S. § 13-4437(C), at the request of the victim, the prosecutor may assert any right to which the victim is entitled.

Per A.R.S. § 13-4437(E), the victim has the right to present evidence or information and to make argument to the court, personally or through counsel at any proceeding to determine the amount of restitution. The Arizona Supreme Court has held that including a cap on restitution in a plea agreement without the Victim's consent violates the Victim's right to full restitution. *E.H v. Superior Ct.* (Slayton), 2020 WL 4459283 (Ariz. Aug. 4, 2020).

THE "BUT FOR" TEST

The state or victim must prove the loss would not have occurred but for the conduct underlying the offense; and,

the causal nexus between the conduct and the loss is not too attenuated (whether factually or temporally). The watchword is reasonableness. A sentencing court should undertake an individualized inquiry; what constitutes sufficient causation can only be determined case by case, in a fact-specific probe.

State v. Williams, 208 Ariz. 48, 53, ¶ 18, 90 P.3d 785, 790, ¶ 18 (Ct. App. 2004) (quoting *United States v. Vaknin*, 112 F.3d 579, 590 (1st Cir. 1997) (*abrogated on other grounds by United States v. Anonymous Defendant*, 629 F.3d 68 (1st Cir. 2010))).

AMOUNT OF RESTITUTION

The Arizona Supreme Court modified *State v. Lukens*, 151 Ariz. 502, 729 P.2d 306 (1986), and *State v. Phillips*, 152 Ariz. 533, 733 P.2d 1116 (1987), to only be applied to vacate the entire plea in those cases in which the amount of restitution was unknown to the defendant and it was a relevant and material factor in the defendant's decision to plead. *State v. Grijalba*, 157 Ariz. 112, 155, 755 P.2d 417, 420 (1988). If the amount of restitution is not a relevant and material factor in the decision to plead, then *Lukens* and *Phillips* are applicable only to the restitution provision. *Id.*; see also *State v. Iniguez*, 169 Ariz. 533, 536, 821 P.2d 194, 197 (Ct. App. 1991) (noting A.R.S. § 13-807 credits the restitution amount paid against any civil damage award, but it does not address the converse); *but see E.H. v. Slayton*, 1 CA-SA 19-0004, 2019 WL 1220746 (Ariz. Ct. App. Mar. 14, 2019) (review granted to determine the plea agreement caps and the constitutionality of *Lukens* and *Phillips* in light of the Victims Bill of Rights), *rev'd*, CR-19-0118-PR (Ariz. Aug. 4, 2020).

“The amount of restitution, assessments, incarceration costs and surcharges is not limited by the maximum fine that may be imposed under section 13-801 or 13-802.” A.R.S. § 13-808(C).

Arizona Supreme Court ruled that “determining a victim’s ‘loss’ requires consideration of any benefits conferred on the victim.” If value is conferred, the restitution amount must reflect the benefits received by the victim. *Town of Gilbert Prosecutor’s Office v. Downie*, 218 Ariz. 466, 472, ¶ 26, 189 P.3d 393, 399, ¶ 26 (2008).

Restitution must “bear[] a reasonable relationship to the victim’s [compensable] loss.” *In re Ryan A.*, 202 Ariz. 19, 20, ¶ 20, 39 P.3d 543, 544, ¶ 20 (Ct. App. 2002); see also *State v. Howard*, 168 Ariz. 458, 459–60, 815 P.2d 5, 6–7 (Ct. App. 1991) (noting purpose of mandatory restitution is to make victim whole, not to punish; amount must reasonably relate to loss and cannot always be easily measured).

Restitution can be awarded for crimes admitted but not charged. *State v. Cummings*, 120 Ariz. 69, 70–71, 583 P.2d 1389, 1390–91 (Ct. App. 1978); but see *State v. Zierden*, 171 Ariz. 44, 45–46, 828 P.2d 180, 181–82 (Ct. App. 1992) (finding restitution improper for uncharged crime allegedly admitted in post-arrest statements to police but not to court). Restitution may exceed amounts alleged in charging document. *State v. Fancher*, 169 Ariz. 266, 268, 818 P.2d 251, 253 (Ct. App. 1991). Restitution must be awarded to make the victim whole for their economic loss. *State v. Iniguez*, 169 Ariz. 533, 536, 821 P.2d 194, 197 (Ct. App. 1991). If the natural consequence of the defendant’s actions takes away the basic necessities of life that are the natural consequences of the defendant’s conduct, restitution must be awarded for those economic losses. *State v. Morris*, 173 Ariz. 14, 17–18, 839 P.2d 434, 437–38 (Ct. App. 1992).

MANNER OF PAYMENT

After determining the amount of the restitution, the court or a staff member designated by the court, including a probation officer, shall determine the manner of payment. In determining the manner of payment, the court shall consider the economic circumstances of the defendant and the views of the victim. A.R.S. § 13-804(E). The court must consider the defendant’s income, including worker’s compensation and social security benefits, assets, education, and obligation to support dependents, employment history, and prospects for future employment. The record must indicate that the decision was a proper discretionary choice and the court must make findings with respect to the defendant’s ability to pay. See A.R.S. § 13-804(H)(I); *State v. Lopez*, 175 Ariz. 79, 82–83, 853 P.2d 1126, 1129–30 (Ct. App. 1993).

If a defendant, state or victim entitled to restitution disagrees with the manner of payment established by the court or its designee, they may file a petition with the court seeking to change the manner of payment and the court shall give notice

and an opportunity to be heard to the victim, state and defendant. A.R.S. §13-804(M).

RESTITUTION HEARING

The court may hold a hearing to determine the total amount of the restitution the defendant owes the victims, the amount owed to each or the manner in which restitution is to be paid. A.R.S. § 13-804(G). Restitution is determined by the court as a part of sentencing. The burden of proof is by a preponderance of the evidence. *State v. Fancher*, 169 Ariz. 266, 268, 818 P.2d 251, 253 (Ct. App. 1991) (“[Restitution] is the act of restoring or making the victim whole and does not require proof beyond a reasonable doubt.”) It is separate from the trial phase in a criminal case and this does not need to be proven beyond a reasonable doubt. *In re Stephanie B.*, 204 Ariz. 466, 470, ¶ 15, 65 P.3d 114, 118, ¶ 15 (Ct. App. 2003) (“The burden of proof applicable to restitution is proof by a preponderance of the evidence.”) (citing *Benton v. State*, 711 A.2d 792, 797 (Del. 1998)).

Per A.R.S. § 13-805(A)(2), the trial court retains jurisdiction “for purposes of ordering, modifying, and enforcing the manner in which payments are made until paid in full.” See *State v. Howard*, 168 Ariz. 458, 460, 815 P.2d 5, 7 (Ct. App. 1991) (noting victim losses “cannot always be confined to easily measurable damages” and that award for future reasonably anticipated wage losses and medical expenses could be adjusted if medical costs or wage losses were different than anticipated (internal quotation omitted)). The court retains jurisdiction to adjust restitution numbers if a victim may have future losses but may also be unsure how to quantify them. See *State v. Unkefer*, 225 Ariz. 431, 433, ¶ 9, 239 P.3d 749, 752, ¶ 9 (Ct. App. 2010), *limited on other grounds by Hoffman v. Chandler*, 231 Ariz. 362, 365, ¶ 14, 295 P.3d 939, 942, ¶ 14 (2012).

As restitution for a victim’s economic loss is mandatory, *State v. Steffy*, 173 Ariz. 90, 93, 839 P.2d 1135, 1138 (Ct. App. 1992), the court in considering a delayed request for restitution, should consider the request in light of *State v. Pinto*, 179 Ariz. 593, 880 P.2d 1139 (Ct. App. 1994), the legislative intent in enacting the statute on restitution and the victim bill of rights. The following factors bear on the reasonableness of the timeliness of the restitution request:

[T]he totality of the circumstances which would include not only the length of the delay, but also the reason for the

delay, the parties responsible for the delay, the effect of the delay, any demonstrated prejudice suffered by the defendant, and . . . whether any prejudice can be mitigated or cured by, for example, shifting the burden of proving offsets to restitution to the State. . . . [T]he court should consider these factors in light of the purpose of restitution and the legislature's intent in enacting A.R.S. § 13-805.

State v. Unkefer, 225 Ariz. 431, 435, ¶ 17, 239 P.3d 749, 754, ¶ 17 (Ct. App 2010); see also *State v. Zaputil*, 220 Ariz. 425, 429, ¶ 16, 207 P.3d 678, 682, ¶ 16 (Ct. App. 2008) (finding three-year delay between guilty plea and restitution hearing not untimely).

A defendant is entitled to counsel at a restitution hearing as it is a proceeding in a criminal case. *State v. Guadagni*, 218 Ariz. 1, 7, ¶ 21, 178 P.3d 473, 479, ¶ 21 (Ct. App. 2008). A defendant is not entitled to counsel in post-conviction contempt proceedings filed pursuant to A.R.S. § 13-810. These matters should be considered civil contempt proceedings designed to assist victims seeking to collect on court ordered restitution rather than commission of a disrespectful act or acts directed at the court itself which obstructs justice and which forms a basis for criminal contempt. See *State v. Verdugo*, 124 Ariz. 91, 93, 602 P.2d 472, 474 (1979).

“[T]he victim has the right to present evidence or information and to make an argument to the court, personally or through counsel, at any proceeding to determine the amount of restitution” A.R.S. § 13-4437(E); see also A.R.S. § 13-4426(A) (“The victim may present evidence, information and opinions that concern . . . the need for restitution at any aggravation, mitigation, presentencing or sentencing proceeding.”).

RESTITUTION ORDER

“If a person is convicted of an offense, the court shall require the convicted person to make restitution to the person who is the victim of the crime . . . in the full amount of the economic loss” A.R.S. § 13-603(C).

Restitution shall be paid to the clerk of the court for purposes of disbursement to the victim. A.R.S. § 13-603(C).

The court shall enter an order of restitution setting forth the amount of restitution due each person, the total amount of restitution due, and the manner of payment. A.R.S. § 13-804(H)(1)–(3). If a defendant is sentenced to probation, the payment of restitution shall be made a condition of probation. A.R.S. § 13-808(B). The court may order all or a portion of the fine to be paid to the victim as restitution. A.R.S. § 13-804(A).

“If the court has ordered the prisoner to pay restitution pursuant to section 13-603, the director shall withdraw a minimum of twenty percent, or the balance owing on the restitution amount, up to a maximum of fifty percent of the monies available in the prisoner's spendable account each month to pay the court ordered restitution.” A.R.S. § 31-230(C).

RESTITUTION LIEN

Once restitution is ordered by a judicial officer, a restitution lien is created in favor of the victim. A.R.S. § 13-804(L). A restitution lien is perfected against interests in real property by the victim filing the lien with the county recorder of the county in which the real property is located. The lien must comply with the requirements of A.R.S. § 13-806 as to contents and procedure for perfection of the lien. Any monies owed by the state to a defendant including any tax refunds are subject to the lien created in favor of the victim. A.R.S. § 13-804(L).

PRECONVICTION RESTITUTION LIEN

“A prosecutor or a victim in a criminal proceeding in which there was an economic loss may file a request with the court for a preconviction restitution lien after the filing of a misdemeanor complaint or felony information or indictment.” A.R.S. § 13-806(C). “The court shall order the release of any preconviction restitution lien that has been filed or perfected if the defendant is acquitted or the state does not proceed with the prosecution.” A.R.S. § 13-806(K).

CRIMINAL RESTITUTION ORDER

A criminal restitution order (CRO) comes in one of two forms. The first form is a CRO for any unpaid restitution balance to *actual victims*, which MAY BE entered by the court at the time the defendant is ordered to pay restitution, but which MUST BE entered by the court upon the completion of the defendant's probation period or sentence (or if the defendant absconds). A.R.S. § 13-805(B), (C)(2). The second form is a CRO for unpaid balances of fines, fees, costs, incarceration

costs, surcharges or assessments imposed. This type of CRO must be, and can ONLY be, entered upon completion of a probation term, prison sentence, or if defendant absconds. A.R.S. § 13-805(C)(1).

The criminal restitution order is not a civil judgment; it is a criminal order that may be enforced through civil and criminal remedies. See A.R.S. §§ 13-810 to -820. The CRO does not expire until paid in full and may not be discharged in bankruptcy. A.R.S. § 13-805(C). Interest accrues at the rate of 10% per year. A.R.S. § 13-805(E). “The clerk of the court shall notify each person who is entitled to restitution of the criminal restitution order.” A.R.S. § 13-805(D).

MODIFICATION OF THE ORDER

The state, victim, or defendant may petition the court at any time for a modification of the manner of payment. A.R.S. § 13-804(M). A restitution order survives a defendant's death although the defendant's estate may continue any pending appellate challenges to restitution if the defendant dies before appellate review has completed. *In re The Matter of the Estate of Vigliotto*, 178 Ariz. 67, 69, 870 P.2d 1163, 1165 (Ct. App. 1993); see also *State v. Reed*, 246 Ariz. 138, 146, ¶ 31, 435 P.3d 1044, 1052, ¶ 31 (Ct. App. 2019); *vacated* 248 Ariz. 72, 456 P.3d 453 (2020). It is not a dischargeable obligation in a bankruptcy proceeding. A.R.S. § 13-805(I); *State v. West*, 173 Ariz. 602, 608–09, 845 P.2d 1097, 1103–04 (Ct. App. 1992).

PRIORITY OF PAYMENT

Payment and enforcement of restitution must take priority over payment of the fine and other sums due the state. A.R.S. § 13-809(A). Payment and enforcement of restitution take priority over payment to the state. A.R.S. § 13-809(A). Any monies received from the defendant ordered to pay restitution shall first be applied to satisfy the restitution order. A.R.S. § 13-804(L).

PETITION TO REVOKE

Caselaw requires that a hearing be held, and a finding made, that a defendant had the ability to pay but refused to do so before probation can be revoked. *State v. Currie*, 150 Ariz. 59, 61, 721 P.2d 1186, 1188 (Ct. App. 1986); *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983); *State v. Wilson*, 150 Ariz. 602, 605, 724 P.2d 1271, 1274 (Ct. App. 1986); *State v. Hovey*, 175 Ariz. 219, 220, 854 P.2d 1205, 1206 (Ct. App. 1993).

PURSUING GARNISHMENT AS A CIVIL MATTER

The Arizona Supreme Court's Self-Service Center forms webpage contains a section on garnishments. It also contains forms for judicial officer use. See: <https://www.azcourts.gov/selfservicecenter/Self-Service-Forms/Garnishment-of-Earnings>

Garnishment as a criminal matter:

Similar procedures govern garnishment in a criminal case but are guided by A.R.S. §§ 13-812 to -820.

POST-SENTENCE PROCEDURE

A.R.S. § 13-804(D) takes precedence over Arizona Rule of Criminal Procedure 31.6 (now 31.7) regarding staying restitution payments during appeal. The restitution may be paid and held by the court until the appeal is resolved. *State v. Hansen*, 215 Ariz. 287, 288, ¶ 1, 160 P.3d 166, 167, ¶ 1 (2007).

Defendant agreed to pay restitution as a term in a plea agreement. The Court retains jurisdiction to order restitution after conviction even though a set aside under A.R.S. § 13-907 was granted and probation terminated. *State v Zaputil*, 220 Ariz. 425, 429, ¶¶ 15, 18, 207 P.3d 678, 682, ¶¶ 15, 18 (Ct. App. 2008).

If a defendant on probation has not paid restitution for a minimum of four consecutive monthly payments, the probation department shall notify the court having jurisdiction over the case and shall include a reason for arrearages, the expected duration and a recommendation to the Court for further action if any. A copy of the recommendation shall be provided to the state and victim if the victim has requested post-conviction notice pursuant to A.R.S. § 13-4415. A.R.S. § 13-804(N). The State or victim may file an objection to the probation department recommendations and the Court shall hold a review hearing if requested or may hold a review hearing on its own motion. The hearing shall occur within forty-five days of the request. A.R.S. § 13-804(O).

SUPREMACY CLAUSE ISSUE

One issue that comes up surprisingly often in a restitution enforcement context is the issue of defendants who are receiving Social Security benefits. State law commands the court to consider all of a defendant's assets and income, including

Social Security benefits. A.R.S. § 13-804(E). And, for defendants who have sources of income in addition to their Social Security benefits, those other sources of income may be attached or garnished, and a defendant may be jailed for willful failure to pay court-ordered restitution. However, when it comes to the Social Security Benefits themselves, federal law makes this income immune to "execution, levy, attachment, garnishment, or other legal process." 42 U.S.C. § 407(a) (emphasis added). While there is no case law from Arizona directly on point for the criminal system, three other states have considered the issue and held that Social Security benefits may not be taken by a state for nonpayment of restitution or mandatory fines. See *In re Lampart*, 856 N.W.2d 192, 200 (Mich. Ct. App. 2014); *Montana v. Eaton*, 99 P.3d 661, 665–66 (Mont. 2004); *Washington v. Catling*, 438 P.3d 1174, 1180 (Wash. 2019).

This issue may only arise in the context of ordering the manner of payment of restitution and not the amount of restitution. A.R.S. § 13-804(C) ("The court shall not consider the economic circumstances of the defendant in determining the amount of restitution."). Moreover, this issue may only arise when a defendant only receives social security benefits without any other assets or income.

For defendants who have only Social Security benefits, the court may still consider the facts and circumstances of the case, the victim's views on repayment, and "shall make all reasonable efforts to ensure that all persons who are entitled to restitution pursuant to a court order promptly receive full restitution." A.R.S. § 13-804(E). Moreover, the Court "may enter any reasonable order necessary to accomplish this." *Id.* Depending on the facts and circumstances, the court may consider and attribute income to the defendant as courts do in domestic relations matters to comply with the Victim's Bill of Rights constitutional obligation to 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).

QUICK LINKS

[Victim's Bill of Rights](#)

[Criminal Rule 39](#)

[A.R.S. § 13-4401 series](#)

[ACJA § 4-301 and § 5-204](#)

[AZ Supreme Court – Victim Restitution Resources webpage](#)

COMMISSION ON VICTIMS IN THE COURTS

Meeting Date: October 16, 2020	Type of Action Requested: <input type="checkbox"/> Formal Action/Request <input checked="" type="checkbox"/> Information Only <input type="checkbox"/> Other	Subject: LIMITED JURISDICTION RESTITUTION COURT BENCH BOOK
--	--	---

From: Kirstin Flores, Director Victims Services, Office of the Arizona Attorney General

Presenter: Kirstin Flores, Director Victims Services, Office of the Arizona Attorney General

Description of Presentation: Update on the limited jurisdiction restitution court bench book.

Recommended Motion: N/A

Table of Contents

WHEN RESTITUTION MUST BE ORDERED	25-1
VICTIM DEFINED	25-1
ECONOMIC LOSS DEFINED	25-2
AMOUNT OF RESTITUTION.....	25-3
MANNER OF PAYMENT	25-4
RESTITUTION HEARING.....	25-4
RESTITUTION ORDER	25-5
RESTITUTION LIEN	25-5
PRE-CONVICTION RESTITUTION LIEN.....	25-6
CRIMINAL RESTITUTION ORDER	25-6
MODIFICATION OF THE ORDER.....	25-6
PRIORITY OF PAYMENT	25-6
ENFORCEMENT	25-6
PETITION TO REVOKE.....	25-7
POST-SENTENCE PROCEDURE.....	25-8
QUICK LINKS	25-8
JUDGE’S RESTITUTION GUIDE	25-9
OSC NOTICE – FAILURE TO PAY (SAMPLE)	25-13
OSC-NOTICE – PETITION TO DISCHARGE (SAMPLE)	25-14

WHEN RESTITUTION MUST BE ORDERED

Restitution is required to be ordered in all cases where there has been a judgment of guilt and when economic loss has occurred as a result of the commission of a crime defined in or outside Title 13 ([A.R.S. § 13-603\(C\)](#)) Restitution shall be ordered in accordance with this title unless otherwise provided by law.

[A.R.S. § 13-804](#) does not apply to traffic offenses, except for the following traffic offenses: [A.R.S. § 28-661](#); [A.R.S. § 28-662](#); [A.R.S. § 28-693](#); [A.R.S. § 28-1381](#) or [A.R.S. § 28-1382](#); [A.R.S. § 28-1383](#), or any local ordinance relating to the same subject matter as the above statutes [A.R.S. § 13-809\(B\)](#). Causing Serious Physical Injury or Death, ([A.R.S. § 28-661](#)), by a moving violation limits restitution as result of this section not to exceed one hundred thousand dollars. ([A.R.S. § 28-672\(G\)](#)).

Per [A.R.S. § 13-4437\(C\)](#), at the request of the victim, the prosecutor may assert any right to which the victim is entitled.

VICTIM DEFINED

Victim is defined as:

A person against whom the criminal offense has been committed, including a minor, or if the person is killed or incapacitated, the person's spouse, parent, child, grandparent or sibling, any other person related to the person by consanguinity or affinity to the second degree or any other lawful representative of the person, except if the person or the person's spouse, parent, child, grandparent, sibling, other person related to the person by consanguinity or affinity to the second degree or other lawful representative is in custody for an offense or is the accused ([A.R.S. § 13-4401.19](#)).

A legal entity victim is defined as:

1. A corporation, partnership, association or other legal entity which, except for its status as an artificial entity, would be included in the definition of victim in section 13-4401. ([A.R.S. § 13-4404](#)).
2. An insurance company that had been required to pay a claim to the direct victim of an offense. [State v. Whitney, 151 Ariz. 113, 726 P.2d 210 \(Ct. App., 1985\)](#); [State v. Steffy, 173 Ariz. 90, 839 P.2d 1135 \(Ct. App., 1992\)](#).
3. Any person or entity suffering economic loss as a result of the defendant's criminal activity, whether or not they are the direct victim of the crime. [State v. Merrill, 136 Ariz. 300, 301-02, 665 P.2d 1022, 1023-24 \(App. 1983\)](#). This includes the Department of Economic Security when they paid for psychological evaluation, counseling and a parent aide for a child molestation victim and the child's mother. [State v. Prieto, 172 Ariz. 298, 836 P.2d 1008 \(Ct. App., 1992\)](#); Arizona Department

of Corrections determined to be a victim and awarded restitution. [State v. Williams, 208 Ariz. 48, 90 P. 3d 185 \(Ct. App., 2004\).](#)

ECONOMIC LOSS DEFINED

The term “economic loss” means any economic loss incurred by a person as a result of the commission of an offense. It 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\(16\)](#)).

Economic loss can include "lost profits," [State v. Young, supra](#); funeral expenses, [State v. Smith, 171 Ariz. 501, 831 P.2d 877 \(Ct. App., 1992\)](#); [State v. Blanton, 173 Ariz. 517, 844 P.2d 1167 \(Ct. App., 1992\)](#); attorney's fees incurred to close the victim's estate, travel, and lost wages, [State v. Baltzell, 175 Ariz. 437, 857 P.2d 1291 \(Ct. App., 1992\)](#); moving expenses for victim, [State v. Brady, 169 Ariz. 447, 819 P.2d 1033 \(Ct. App., 1991\)](#), prepaid education class, [In re Andrew, 215 Ariz. 366, 160 P.3d 687 \(Ct. App.2007\)](#), costs for a security system, [State v Quijada, 439 P.3d 815 \(App. 2019\)](#).

Victim's economic loss not limited to fair market value of a vehicle. Authority of trial court not abused by awarding amount still owed on vehicle that exceeded the value paid by insurance proceeds. [In re William 211 Ariz. 236, 119 P.3d 1039 \(Ct. App., 2005\)](#). Fair market value of economic loss whether for a vehicle or other losses does not always apply and can instead involve original purchase price or replacement cost. [State v. Ellis 172 Ariz. 549, 551, 838 P. 2d 1310, 1312 \(App. 1992\)](#).

If a victim has received reimbursement for the victim's economic loss from an insurance company, a crime victim compensation program funded pursuant to [A.R.S. § 41-2407](#) or any other entity, the court shall order the defendant to pay the restitution to that entity ([A.R.S. § 13-804\(E\)](#)); see also [State v Merrill, 136 Ariz. 300, 301-02, 665 P.2d 1022, 1023-24 \(App. 1983\)](#) (upholding restitution award to insurance company).

Attorney hired by victim acted by assisting the prosecution or “prodding” the State to pursue the case. Court found attorney fees constituted consequential damages which were excluded under the definition of economic loss, [State v. Slover, 220 Ariz. 239, 224 P.3d 1088 \(Ct. App 2009\)](#). Attorney fees to further victim rights may be proper; fees required to establish probate, conservatorship or possible restitution collection costs may also be appropriate. [State v. Baltzell, 175 Ariz. 437, 439, 857 P.2d 1291, 1293 \(App. 1992\)](#). Economic loss does not include potential losses due to reduced insurance coverage, [State v. Sexton, 176 Ariz. 171, 859 P.2d 794 \(Ct. App., 1993\)](#); or loss to emotional and mental health, sorrow and neglect, [State v. Carbajal, 177 Ariz. 461, 868 P.2d 1044 \(Ct. App., 1994\)](#). Victim can include someone partially responsible for his/her own injuries - [State v. Clinton, 181 Ariz. 299, 890 P.2d 74 \(Ct. App., 1995\)](#), or a person suffering property damage in a DUI collision - [State ex rel. Romley v. Superior Court \(Cunningham\), 184 Ariz. 409, 909 P 2d 476 \(Ct. App., 1995\)](#). However, restitution is required only where the harm is caused by the criminal conduct for which the defendant was convicted.

Economic loss can include a variety of expenses including damages to a vehicle or other property belonging to the victim. See, e.g., [State v. Baltzell, 175 Ariz. 437, 439, 857 P.2d 1291, 1293 \(App. 1992\)](#).

Damages to a victim's vehicle could be considered economic loss - See [In re Stephanie B., 204 Ariz. 466, 469, 65 P.3d 114, 117 \(App. 2003\)](#). (1. Victim must have suffered economic loss, 2. Loss would not have occurred "but for" the criminal conduct and 3. Criminal conduct was a direct cause of the economic loss); see also [State v. Wilkinson, 202 Ariz. 27, 29, 39 P.3d 1131, 1133 \(2002\)](#); see also [State v. Baltzell, 175 Ariz. 437, 439, 857 P.2d 1291, 1293 \(App. 1992\)](#); see also [State ex rel. McDougall v. Superior Court \(Martinez\), 186 Ariz. 218, 920 P. 2d 784 \(Ct. App., 1996\)](#). Economic losses can include expenses to purchase and install a home security system. [State v. Quijada, 439 P.3d 815, 828 \(App. 2019\)](#).

Reasonable expenses associated with attendance at trial qualifies as an economic loss - [State v. Madrid, 207 Ariz. 296, 85 P. 3d 1054 \(Ct. App., 2004\)](#).

AMOUNT OF RESTITUTION

The Arizona Supreme Court modified [Lukens](#) and [supra](#) to only be applied to vacate the entire plea in those cases in which the amount of restitution was unknown to the defendant and it was a relevant and material factor in the defendant's decision to plead. [State v. Grijalba, 157 Ariz. 112, 755 P.2d 417 \(1988\)](#). If the amount of restitution is not a relevant and material factor in the decision to plead, then [Lukens](#) and [Phillips](#) are applicable only to the restitution provision. [State v. Iniguez, 169 Ariz. 533, 821 P.2d 194 \(Ct. App., 1991\)](#). [A.R.S. § 13-807](#) credits the restitution amount paid against any civil damage award, but it does not address the converse.

[A.R.S. § 13-808\(C\)](#) - The amount of restitution, assessments, incarceration costs and surcharges is not limited by the maximum fine that may be imposed under section 13-801 or 13-802.

Arizona Supreme Court ruled that "determining a victim's loss requires consideration of any benefits conferred on the victim." If value is conferred, the restitution amount must reflect the benefits received by the victim. [Town of Gilbert Prosecutor's Office v Downie \(Matykiewicz, real party in interest\) 218 Ariz. 466 \(2008\)](#).

Restitution must "bear a reasonable relationship to the victim's [compensable] loss." [In re Ryan A., 202 Ariz. 19, 20, 39 P.3d 543, 544 \(App. 2002\)](#); see also [State v. Howard, 168 Ariz. 458, 459-60, 815 P.2d 5, 6-7 \(App. 1991\)](#) (purpose of mandatory restitution is to make victim whole, not to punish; amount must reasonably relate to loss and cannot always be easily measured). Restitution can be awarded for crimes admitted but not charged. [State v. Cummings, 120 Ariz. 69, 70-71, 583 P.2d 1389, 1390-91 \(App. 1978\)](#); but see [State v. Zierden, 171 Ariz. 44, 45, 828 P.2d 180, 181 \(App. 1992\)](#) (restitution improper for uncharged crime allegedly admitted in post-arrest statements to police but not to court). Restitution may exceed amounts alleged in charging document. [State v. Fancher, 169 Ariz. 266, 268, 818 P.2d 251, 253 \(App. 1991\)](#).

MANNER OF PAYMENT

After determining the amount of the restitution, the court or a staff member designated by the court, including a probation officer, shall determine the manner of payment. In determining the manner of payment, the court shall consider the economic circumstances of the defendant and the views of the victim ([A.R.S. § 13-804\(E\)](#)). The court must consider the defendant's income, including worker's compensation and social security benefits, assets, education, and obligation to support dependants, employment history, and prospects for future employment. The record must indicate that the decision was a proper discretionary choice and the court must make findings with respect to the defendant's ability to pay.

If a defendant, state or victim entitled to restitution disagrees with the manner of payment established by the court or its designee, they may file a petition with the court seeking to change the manner of payment and the court shall give notice and an opportunity to be heard to the victim, state and defendant. [A.R.S. §13-804\(M\)](#).

RESTITUTION HEARING

The court may hold a hearing to determine the total amount of the restitution the defendant owes the victims, the amount owed to each or the manner in which restitution is to be paid ([A.R.S. § 13-804\(G\)](#)). Restitution is determined by the court as a part of sentencing. The burden of proof is by a preponderance of the evidence. [State v Fancher, 169 Ariz. 266, 268, 818 P.2d 251, 253 \(App. 1991\)](#) (Restitution "is the act of restoring or making the victim whole and does not require proof beyond a reasonable doubt.") It is separate from the trial phase in a criminal case and this does not need to be proven beyond a reasonable doubt. [In re Stephanie B., 204 Ariz. 466, 470, 65 P.3d 114, 118 \(App 2003\)](#) ("The burden of proof applicable to restitution is proof by a preponderance of the evidence.") (citing [Benton v. State, 711 A. 2d 792, 797 \(Del. 1998\)](#)).

Per [A.R.S. § 13-805\(A\)\(2\)](#), the trial court retains jurisdiction "for purposes of ordering, modifying, and enforcing the manner in which payments are made until paid in full." See [State v. Howard, 168 Ariz. 458, 460, 815 P.2d 5, 7 \(App. 1991\)](#) (victim losses "cannot always be confined to 'easily measurable damages.'" Award for future reasonably anticipated wage losses and medical expenses could be adjusted if medical costs or wage losses were different than anticipated). The court retains jurisdiction to adjust restitution numbers if a victim may have future losses but may also be unsure how to quantify them. See [State v. Unkefer, 225 Ariz. 431, 435, 239 P.3d 749, 754 \(App. 2010\)](#), limited on other grounds, [Hoffman v. Chandler, 231 Ariz. 362, 365, 295 P.3d 939, 942 \(2012\)](#).

As restitution for a victim's economic loss is mandatory ([State v. Steffy, 173 Ariz. 90, 93, 839 P.2d 1135, 1138 \(App. 1992\)](#)), the court in considering a delayed request for restitution, should consider the request in light of [State v. Pinto, 179 Ariz. 593, 880 P.2d 1139 \(Ariz. App. 1994\)](#) the legislative intent in enacting the statute on restitution and the victim bill of rights. The following factors bear on the reasonableness of the timeliness of the restitution request:

[T]he totality of the circumstances which would include not only the length of the delay, but also the reason for the delay, the parties responsible for the delay, the effect of the delay, any demonstrated prejudice suffered by the defendant, and, [], whether any prejudice can be mitigated or cured by, for example, shifting the burden of proving offsets to restitution to the State. . . . [T]he court should consider these factors in light of the purpose of restitution and the legislature's intent in enacting [A.R.S. § 13-805](#). *State v. Unkefer*, 225 Ariz. 431, 239 P.3d 749 (Ariz. App 2010). See also *State v. Zaputil*, 220 Ariz. 425, 429, 207 P.3d 678, 682 (App. 2008) (three year delay between guilty plea and restitution hearing not untimely).

A defendant is entitled to counsel at a restitution hearing as it is a proceeding in a criminal case. *State v. Guadagni*, 218 Ariz. 1, 7, 178 P.3d 473, 479 (App. 2008). A defendant is not entitled to counsel in post-conviction contempt proceedings filed pursuant to [A.R.S. §13-810](#). These matters should be considered civil contempt proceedings designed to assist victims seeking to collect on court ordered restitution rather than commission of a disrespectful act or acts directed at the court itself which obstructs justice and which forms a basis for criminal contempt. *State v. Verdugo*, 124 Ariz. 91, 93, 602 P.2d 472, 474 (1979).

The victim has the right to present evidence or information and to make an argument to the court, personally or through counsel, at any proceeding to determine the amount of restitution ([A.R.S. § 13-4437\(E\)](#)); see also §13-4426(A) (“The victim may present evidence, information and opinions that concern . . . the need for restitution at any aggravation, mitigation, presentencing or sentencing proceeding.”).

RESTITUTION ORDER

“If a person is convicted of an offense, the court shall require the convicted person to make restitution to the person who is the victim of the crime... in the full amount of the economic loss” ([A.R.S. § 13-603\(C\)](#)).

Restitution shall be paid to the clerk of the court for purposes of disbursement to the victim ([A.R.S. § 13-603\(C\)](#)).

The court shall enter an order of restitution setting forth the amount of restitution due each person, the total amount of restitution due, and the manner of payment ([A.R.S. § 13-804\(H\)\(1\)-\(3\)](#)). If defendant is sentenced to probation, the payment of restitution shall be made a condition of probation ([A.R.S. § 13-808\(B\)](#)). The court may order that all or a portion of the fine to be paid to the victim as restitution ([A.R.S. § 13-804\(A\)](#)).

RESTITUTION LIEN

Once restitution is ordered by a judicial officer, a restitution lien is created in favor of the victim ([A.R.S. § 13-804\(L\)](#)). A restitution lien is perfected against interests in real property by the victim filing the lien with the county recorder of the county in which the real property is located. The lien must comply with the requirements of [A.R.S. § 13-806](#) as to contents and procedure for perfection of the lien.

PRE-CONVICTION RESTITUTION LIEN

A prosecutor or a victim in a criminal proceeding in which there was an economic loss may file a request with the court for a pre-conviction restitution lien after the filing of a misdemeanor complaint or felony information or indictment ([A.R.S. § 13-806\(C\)](#)). The court shall order the release of any pre-conviction restitution lien that has been filed or perfected if the defendant is acquitted or the state does not proceed with the prosecution ([A.R.S. § 13-806\(K\)](#)).

CRIMINAL RESTITUTION ORDER

A **Criminal Restitution Order (CRO)** is entered by the court after the completion of the defendant's probation period or sentence (or if the defendant absconded) when there is an unpaid balance of any restitution order. [A.R.S. §13-805\(C\)\(1\) & \(2\)](#). The law also allows the court to enter a CRO at the time the defendant is ordered to pay restitution ([A.R.S. § 13-805\(B\) and \(C\)](#)). The criminal restitution order is not a civil judgment; it is a criminal order that may be enforced through civil and criminal remedies. See [A.R.S. §§13-810](#) to -820. Interest accrues at the rate of 10% per year ([A.R.S. § 13-805\(E\)](#)). The clerk of the court shall notify each person who is entitled to restitution of the criminal restitution order ([A.R.S. § 13-805\(D\)](#)).

MODIFICATION OF THE ORDER

The state, victim, or defendant may petition the court at any time for a modification of the manner of payment ([A.R.S. § 13-804\(M\)](#)). A restitution order survives a defendant's death. [In re The Matter of the Estate of Vigliotto, 178 Ariz. 67, 870 P.2d 1163 \(Ct. App., 1993\); see also State v. Reed, 246 Ariz. 138, 146, 435 P.3d 1044, 1052 \(App. 2019\)](#). It is not a dischargeable obligation in a bankruptcy proceeding. [A.R.S. §13-805\(I\); State v. West, 173 Ariz. 602, 845 P.2d 1097 \(Ct. App., 1992\)](#).

PRIORITY OF PAYMENT

Payment and enforcement of restitution must take priority over payment of the fine and other sums due the state ([A.R.S. § 13-809\(A\)](#)). Payment and enforcement of restitution take priority over payment to the state ([A.R.S. § 13-809\(A\)](#)). Any monies received from the defendant ordered to pay restitution shall be applied first to satisfy the restitution order ([A.R.S. § 13-804\(K\)](#)).

ENFORCEMENT

In the criminal case:

ORDER TO SHOW CAUSE ([A.R.S. § 13-810](#)) – When a defendant is in arrears in making restitution payments, the court, prosecutor or victim may move/petition the court for an OSC. The court shall require the defendant to appear and show cause why the failure to make payment(s) should not be treated as contempt.

In connection with an OSC Petition, the Court should consider Rule 26.12((c)(3) which states:

”If the defendant fails to timely pay a fine, restitution, or other monetary obligation and fails to respond to a court notice informing the defendant of the consequences and resolution options, the court may issue an arrest warrant or a summons and require the defendant to show cause why he or she should not be held in contempt for non-payment.”

The court may consider starting the OSC process with a status conference to inform the defendant of consequences of non-payment and resolution options following up later with a separate show cause evidentiary hearing. The purpose for an evidentiary hearing is to determine whether the defendant has either willfully failed to pay restitution or intentionally refused to make a good faith effort to obtain monies required to pay restitution.

At the hearing:

If the court finds the defendant willfully failed to pay restitution or intentionally refused to make a good faith effort to obtain the monies required for the payment, the court shall find the defendant in contempt and may:

- Order the defendant jailed until the restitution (or part of it) is paid (a purge order)
- Revoke the defendant’s current release status and sentence him/her to prison
- Issue a writ of criminal garnishment ([A.R.S. § 13-812 and § 13-813](#))

If the court finds the defendant’s default is not willful and the defendant cannot pay despite good faith efforts, the court may:

- Modify the manner in which restitution is to be paid
- Enter any reasonable order that would assure compliance with payment
- Issue a writ of criminal garnishment ([A.R.S. § 13-812 and § 13-813](#))

Click [Here](#) for Bench Card for [A.R.S. § 13-810](#) Order to Show Cause Hearings

PETITION TO REVOKE

Caselaw requires that a hearing be held, and a finding made, that a defendant had the ability to pay but refused to do so before probation can be revoked. [State v. Currie, 150 Ariz. 59, 721 P2d 1186 \(Ct. App. 1986\)](#); [Bearden v. Georgia, 461 US 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 \(1983\)](#); [State v. Wilson, 724 P2d 1271, 150 Ariz. 602 \(Ct. of App. 1986\)](#); [State v. Hovey, 175 Ariz. 219, 854 P2d 1205 \(Ct. App. 1993\)](#).

Pursuing Garnishment as a civil matter:

The Arizona Supreme Court's Self-Service Center forms webpage contains a section on Garnishments. It also contains forms for judicial officer use. See:

<https://www.azcourts.gov/selfservicecenter/Self-Service-Forms/Garnishment-of-Earnings>

Garnishment as a criminal matter:

Similar procedures govern garnishment in a criminal case but are guided by [A.R.S. §§13-812](#), et. seq.

POST-SENTENCE PROCEDURE

[A.R.S. § 13-804\(D\)](#) takes precedence over [Arizona Rules of Criminal Procedure, Rule 31.6](#) (now 31.7) regarding staying restitution payments during appeal. The restitution maybe paid and held by the court until the appeal is resolved. [State v Hansen, 215 Ariz. 287, 160 P.3d 166 \(2007\)](#).

Defendant agreed to pay restitution as a term in a plea agreement. The Court retains jurisdiction to order restitution after conviction even though a set aside under [A.R.S. § 13-907](#) was granted and probation terminated. [State v Zaputil, 220 Ariz. 425, 207 P.3d 678 \(Ct App. 2008\)](#).

QUICK LINKS

[Victim's Bill of Rights](#)

[Criminal Rule 39](#)

[A.R.S. § 13-4401 series](#)

[ACJA § 4-301 and § 5-204](#)

[AZ Supreme Court – Victim Restitution Resources webpage](#)

JUDGE'S RESTITUTION GUIDE

Step 1: Establishing **Amount** of Restitution

1) At Sentencing

- If amount has been *determined*, and *uncontested*, include Order in the Judgment and Sentence document.
- If amount is *undetermined*, retain jurisdiction to order restitution up to the cap in plea agreement.
- Avoid Setting Deadlines for Submitting Restitution Claims

2) At Restitution Hearing

- If the amount is contested, set a restitution hearing.
 - Defendant entitled to notice and an opportunity to be heard at hearing, even if in jail or prison.
 - Notice to Victim and defense counsel (if Defendant was represented by counsel at sentencing)
- Prosecutor DOES NOT represent the victim.
 - Prosecutor presents evidence supporting victim's restitution claim. [A.R.S. § 13-804\(G\)](#)
- Court must NOT consider Defendant's economic circumstances in determining **amount** of restitution. [A.R.S. § 13-804\(C\)](#)
- Court can consider any evidence before the Court. [A.R.S. § 13-804\(I\)](#)

3) Co-Defendants - Joint & Several Liability (A.R.S. § 13-804(F))

- Ensure all co-defendants have reciprocal restitution orders as part of their Judgment & Sentence orders.

Step 2: Establishing **Manner** of Payment

1) What the law requires

- Court MUST consider Defendant's economic circumstances in determining the **manner** of payment, i.e, monthly payment.
- Court must make factual findings on the record regarding Defendant's ability to pay without causing a substantial hardship.
(See *Bench Card – Sentencing Ability to Pay*)

- Court staff, Probation Officers or Community Supervision Officers can perform this function. [A.R.S. § 13-804\(E\)](#)

2) Best Practices

- If possible, do not delegate this function to Court Staff/Probation. It is more effective if the Defendant makes a commitment to the Judge
- Encourage Personal Responsibility
 - Emphasize this is about Defendant taking personal responsibility for their actions that caused a financial loss to the victim
 - Help Defendant understand that restitution simply puts the victim back in the financial position they would have been in if the crime had not been committed. Reimbursing a victim is the very least they can do.
- Set Expectations High
 - Restitution needs to be paid in full (or a significant portion) within the probation term.
 - May require Defendant obtain employment or additional employment to pay restitution. Restitution payments must be a priority in their monthly budget.
- Get a Commitment
 - Discuss the amount Defendant can realistically pay each month and have them commit to that. It's a partnership, make them part of the solution.

Step 3: Collecting Restitution

1) Monitoring Payments during Probation

- Review Hearing set by the Court
 - Set 1st Review Hearing w/in 3 to 6 months of Sentencing/Disposition. This lets a Defendant know that collecting victim restitution is a priority for the Court. It also reassures the victim know the Court is actively ensuring restitution is paid.
 - Review Hearings are NOT Evidentiary Hearings. Counsel is not present and no testimony is taken.
 - Explain potential for OSC hearing and possible consequences
 - Set Subsequent Review Hearings every 6 months to a year as needed

- Review Hearing set after Notification by Probation - [A.R.S. § 13-804\(N\)](#)¹
 - Probation Officer shall provide written notification to the Court if Defendant's restitution payments are four months in arrears.
 - Notification must include reasons for the arrearages, the expected duration and a recommendation on appropriate Court action (Take no action or set Review Hearing)
 - State and victim are entitled to notice of any recommendations and can file objections thereto.
 - Court must set Review Hearing within 45 days after notification if requested by State or Victim

2) Enforcing Payment Obligations During Probation - (A.R.S. § 13-810(B))

Rule 26.12(c)(3) requires the Court to provide an initial Notice to Defendant that payments are in arrears. If Defendant does not respond to the Notice, the Court can set an Order to Show Cause (OSC) and have it served by summons or warrant.

- Order to Show Cause (OSC) Hearings
 - Set anytime Court becomes aware of arrearages
(See *Sample OSC - Rule 26.12*)
 - Set on *Petition to Terminate Probation*
(See *Sample OSC – Petition to Discharge*)
 - Best Practice – Follow Bench Card
(See Bench Card *Sentencing: Order to Show Cause*)
 - If Failure to Pay is “willful” - Make a contempt finding and set Purge Review Hearing
 - If Failure to Pay is NOT “willful” – Court can modify payment method after opportunity for input from victim.
 - Unlike fines, fees, surcharges and assessments, Court ***cannot*** waive or reduce (mitigate) victim restitution.
- Purge Review Hearing
 - Court cannot order incarceration (as a sanction for contempt) without giving Defendant an opportunity to remedy or purge the contempt.

¹ Limited Jurisdiction Courts generally do not have Probation Officers so monitoring restitution payments is done by Court staff.

- Rule 26.12(c)(4) requires Court to make certain findings before incarceration.
- Court can extend probation for unpaid restitution.
 - Felony – 5 additional years
 - ✓ Consider unsupervised probation with mandatory Review Hearings to avoid monthly probation service fees
 - Misdemeanor – 2 additional years

3) Ordering Payment in Prison

- At Sentencing or Disposition
 - Pursuant to [A.R.S. § 31-230\(C\)](#), order Department of Corrections (“DOC”) to withhold a minimum of 20% up to 50% of monies available in Defendant’s spendable account to be applied towards victim restitution.
- Upon release, Parole/Community Supervision officer notifies Defendant of outstanding victim restitution, fines & fees owed to the Court.

Step 4: Court’s Continuing Jurisdiction

- Completion of Probation or Prison
 - Court retains jurisdiction to monitor and enforce victim restitution payments even after completion of a sentence, i.e., probation or release from prison. [A.R.S. § 13-805\(A\)\(2\)](#).
 - Does not apply to unpaid fines and fees.

OSC NOTICE – FAILURE TO PAY (SAMPLE)

SUPERIOR COURT, STATE OF ARIZONA, IN AND FOR THE COUNTY OF

STATE OF ARIZONA, Plaintiff, -vs- _____, Defendant.	Case No. NOTICE SETTING ORDER TO SHOW CAUSE HEARING (Failure to Pay – Rule 26.12)	<p style="text-align: center;">FILED</p> DATE: _____ _____ O'Clock _____ M. _____, CLERK BY: _____ Deputy
---	--	--

HONORABLE _____ DIVISION # _____	BY: Jane Doe Judicial Assistant DATE: December 23, 2019
---	---

It has come to the Court's attention that Defendant is in arrears in the payment victim restitution previously ordered by the Court. According to the Clerk of Court, the outstanding balance owed by the Defendant is \$_____.

Pursuant to A.R.S. § 13-810(B), **IT IS ORDERED** setting an Order to Show Cause (OSC) Hearing for [Date] at [Time] in Courtroom _____, [Address] for the purposes of determining Defendant's ability to pay and whether Defendant should be held in contempt for not paying Court ordered financial obligations. At the end of the OSC hearing, the Court may also take any action authorized by A.R.S. § 13-810(E), including incarceration.

IT IS FURTHER ORDERED Defendant shall bring to the hearing documentation or other information showing proof of monthly income and expenses. If a defendant can establish to the Court's satisfaction an inability to pay, the Court can take any action authorized by A.R.S. § 13-810(F), including modifying the manner of payment or issuing a writ of garnishment.

IT IS FURTHER ORDERED Defendant shall appear in person. The [State] [Adult Probation Department] may but are not required to attend.

IT IS FURTHER ORDERED the [State] [Adult Probation Department] shall contact any victims who have "opted-in" and advise them of the hearing.

DATED this ____ day of _____, 2019.

Hon.

cc: County Attorney
 Adult Probation Department
 Victim Services

OSC NOTICE – PETITION TO DISCHARGE (SAMPLE)

SUPERIOR COURT, STATE OF ARIZONA, IN AND FOR THE COUNTY OF

STATE OF ARIZONA, <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">-vs-</p> <p style="text-align: center;">_____</p> <p style="text-align: center;">Defendant.</p>	Case No. _____ <p style="text-align: center;">NOTICE SETTING ORDER TO SHOW CAUSE HEARING</p> <p style="text-align: center;">(Petition to Discharge)</p>	<p style="text-align: center;">FILED</p> DATE: _____ _____ O’Clock _____ M. _____, CLERK BY: _____ <p style="text-align: center;">Deputy</p>
---	---	---

HONORABLE: Judge Name	BY: Jane Doe Judicial Assistant
DIVISION No.	DATE: December 23, 2019

This matter came before the Court on a *Petition to Discharge Probation* filed by the [Adult Probation Department] [Probationer]. The Court notes Defendant’s probation will expire on and there is significant unpaid victim restitution. According to the Clerk of Court, the outstanding balance owed by the Defendant is \$ _____.

Pursuant to A.R.S. § 13-810(B) **IT IS ORDERED** setting an Order to Show Cause (OSC) Hearing for [Date] at [Time] in Courtroom _____, [Address] for the purposes of determining Defendant’s ability to pay and whether Defendant should be held in contempt for not paying Court ordered financial obligations. At the end of the OSC hearing, the Court may take any action authorized by A.R.S. § 13-810(E), including incarceration.

IT IS FURTHER ORDERED Defendant shall bring to the hearing documentation or other information showing proof of monthly income and expenses. If a defendant can establish to the Court’s satisfaction an inability to pay, the Court can take any action authorized by A.R.S. § 13-810(F), including modifying the manner of payment or issuing a writ of garnishment.

IT IS FURTHER ORDERED Defendant shall appear in person. The [State] [Adult Probation Department] and the Victim(s) may but are not required to attend.

IT IS FURTHER ORDERED the [State] [Adult Probation Department] shall contact any victims who have “opted-in” and advise them of the hearing.

DATED this _____ day of _____, 2019.

Hon.

cc: County Attorney
 Adult Probation Department
 Victim Services

COMMISSION ON VICTIMS IN THE COURTS

Meeting Date: October 16, 2020	Type of Action Requested: <input type="checkbox"/> Formal Action/Request <input checked="" type="checkbox"/> Information Only <input type="checkbox"/> Other	Subject: UPDATE ON SAKI
--	--	-----------------------------------

From: Jim Markey

Presenter: Jim Markey

Description of Presentation: Update: The National Sexual Assault Kit Initiative (SAKI)

Recommended Motion: Information Only



Sexual Assault Kit Initiative: National Update

Jim Markey, *Senior Law Enforcement Specialist, RTI International*

This project was supported by Grant No. 2019-MU-BX-K011 and awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the U.S. Department of Justice's Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the SMART Office. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.



History

- BJA solicitation offered in 2015
- Grew out of national inquiry of untested kits
 - NIJ Detroit and Houston Backlog Projects
- 3-year up to 2 million
- Original 20 sites
- Current focus areas

Grant Information

- Eligible
 - State law enforcement agencies
 - Units of local government
 - Federally recognized Indian tribal governments
 - Governmental non-law enforcement agencies acting as their fiscal agents
 - Prosecutor's offices
- Purpose areas
 - Purpose area 1: Comprehensive approach to unsubmitted sexual assault kits
 - Purpose area 2: SAKI for small agencies (including rural and tribal agencies)
 - Purpose area 3: Expansion of DNA databases to assist with sexual assault investigations and prosecutions: collection of lawfully owed DNA from convicted offenders and arrestee DNA collections
 - Purpose area 4: Investigation and prosecution of cold case sexual assaults

The National Sexual Assault Kit Initiative (SAKI)

Leading the Way in Sexual Assault Response Reform

SAKI is a BJA funded national program designed to support sexual assault response reform, reduce violent crime and improve public safety.

- Create a coordinated community response to cold case sexual assault and other violent crimes
- Build jurisdictional capacity to prevent the accumulation of unsubmitted SAKs in the future and address current cases
- Support the investigation and prosecution of sexual assault and violent crime cases
- Develop sustainable, evidence-based TTA resources which facilitate the implementation of national recommendations and best practices
- Visit the SAKI Toolkit: <https://sakitta.org/toolkit/index.cfm>

Fundamental Grantee Responsibilities



INVENTORY ALL
SAK'S



IDENTIFY
TESTING PLAN



IDENTIFY/ASSIGN
RESOURCES



CREATE VICTIM
NOTIFICATION
POLICY



CREATE
INVESTIGATIVE
POLICIES AND
STANDARDS



CREATE A
WORKING
GROUP

MANAGE
YOUR
INFORMATION

SAKI National Impact

22 Statewide Sites
 25 Citywide Sites
 12 Countywide Sites
 3 Multi-County Sites
 1 District

63 active SAKI sites plus a
 National Reach



Current Total Investment

SAKI Sites >\$177Million
 SAKI TTA > \$18 Million

SAKI Impact:

State
 Legislative
 Response
 and
 Reforms



One-time inventory/audit



Annual/reoccurring inventory



Mandatory kit submission



Tracking of Kits



Mandatory training

Why SAKI Matters

From September 2015 to December 2019:

- 111,390 SAKs Inventoried
- 61,994 SAKs Sent for Testing
- 54,700 SAKs Tested to Completion
- 20,005 DNA Profiles Uploaded to CODIS
- 9,892 CODIS Hits (Serial sex offender CODIS hits 1,363)
- 11,398 Investigations
- 1,393 Cases Charged
- 775 Convictions (includes Plea Agreements)

Offenders Off the Streets



State of Arizona

- Grantees:
 - Maricopa County
 - City of Phoenix
 - Pima County
- Total kits inventoried: 4,500
 - 97% have been tested
 - Results: ?

SAKI Research: Detroit

Tested approximately **12,000** previously unsubmitted SAKS.

- About **4 in 10** sexual assault offenders (39%) identified as serial sexual offenders¹
- Both stranger & non-stranger SAKs are valuable to test (**17%** of non-stranger SAKs hit to serial offenders)²
- SAKs past the statute of limitations are valuable to test³

1. Serial sexual offenders through forensic DNA evidence. *Psychology of Violence*.

2. Campbell, R., Pierce, S. J., Sharma, D. B., Feeney, H., & Fehler-Cabral, G. (2016). Should rape kit testing be prioritized by victim-offender relationship? Empirical comparison of forensic testing outcomes for stranger and nonstranger sexual assaults. *Criminology & Public Policy*, 15(2), 555-583.

3. Campbell, R., Pierce, S. J., Sharma, D. B., Feeney, H., & Fehler-Cabral, G. (2016). Developing empirically informed policies for sexual assault kit DNA testing: Is it too late to test kits beyond the statute of limitations? *Criminal Justice Policy Review*.

SAKI Research: Cuyahoga County (Ohio)

Tested approximately **8,000** previously unsubmitted SAKS

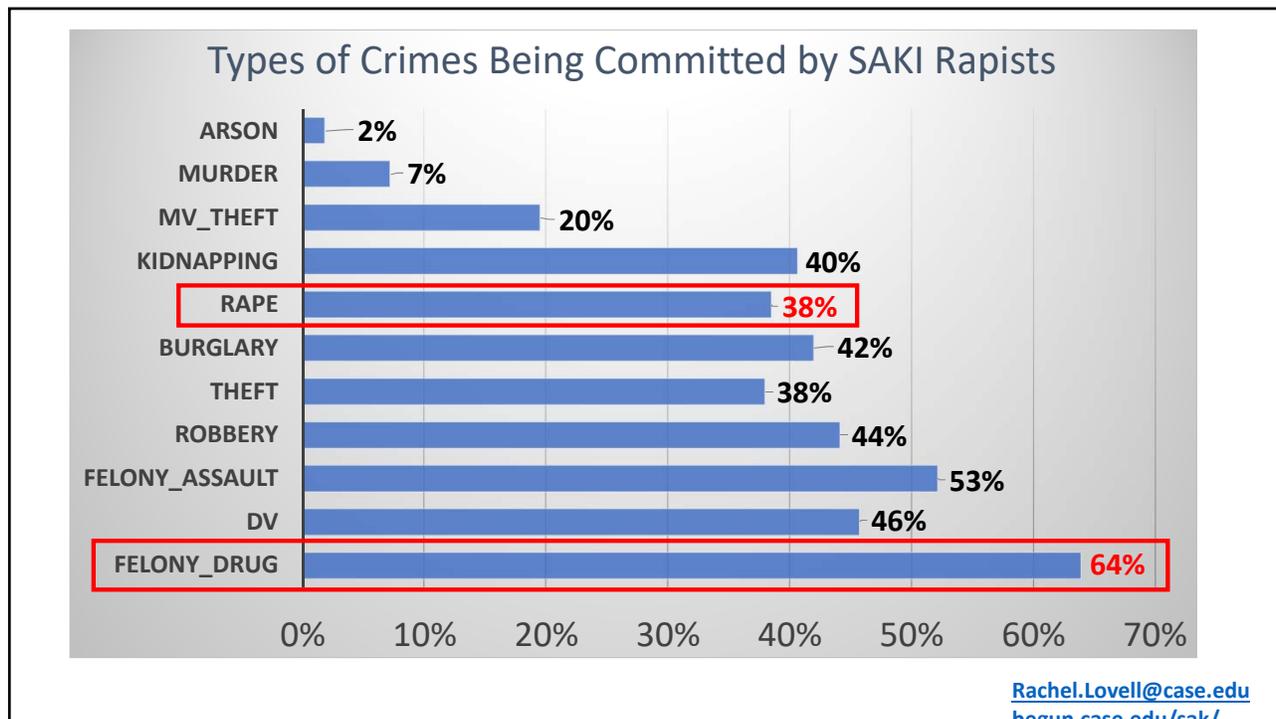
- About **4 in 10** sexual assault offenders (38%) identified as serial sexual offenders¹
- Serial sex assault offenders averaged **9.5 arrests**, which included a variety of violent and non-violent crimes¹
- Over **one-third** of crimes committed by serial sex assault offenders occurred **after** the sexual assault for which a SAK was collected and shelved¹

1. Lovell, R., Luminais, M., Flannery, D. J., Overman, L., Huang, D., Walker, T., & Clark, D. R. (2017). Offending patterns for serial sex offenders identified via the DNA testing of previously unsubmitted sexual assault kits. *Journal of Criminal Justice*, 52, 68-78.

SAKI Research – Crime Prevention?

- Serial sexual assault offenders
 - Commit a high volume of crime (e.g., small % of offenders commit most offenses)
 - Are often “generalists” – rape is one of many crimes they commit (e.g., homicide, domestic violence, theft)
 - Are arrested for more crimes (including rape) on average, than non-serial sexual assault offenders
 - Serial sex offender avg: 9.9 arrests
 - Non serial sex offender avg: 6.6 arrests
- May sexually assault both stranger and non-stranger victims
- Resource: Sexual Assault Response: A Pillar of Law Enforcement Agencies Violent Crime Reduction Strategy
 - <https://sakitta.org/toolkit/index.cfm?fuseaction=tool&tool=143>

Research content on this slide was provided by Wayne County Prosecutor's Office (MI), and Case Western University Begun Center



Initial Pushback



Addressing Areas for Reform



Specialized training
in sexual assault



Victim centered
approach



Properly resource
your SA units



Supervisory
oversight and
investigative
standards



Evidence tracking
and accountability

Questions and Resources

- WWW.SAKITTA.ORG

Det. Sgt. Jim Markey (Retired)

Senior Law Enforcement Specialist

RTI International

(919) 541-8878

jmarkey@rti.org

COMMISSION ON VICTIMS IN THE COURTS

Meeting Date: October 16, 2020	Type of Action Requested: <input type="checkbox"/> Formal Action/Request <input checked="" type="checkbox"/> Information Only <input type="checkbox"/> Other	Subject: CONCUSSIONS IN VICTIMS OF INTIMATE PARTNER VIOLENCE
--	--	---

From: Jon Eliason, Deputy Attorney, Maricopa County Attorney's Office

Presenter: Jonathon Lifshitz, PhD; Sean Murphy, PhD; and Hirsch Handmaker MD

Description of Presentation: 1) Traumatic brain injury (TBI) from assault;
2) Epidemiology of TBI related to IPV in AZ; and
3) The Maricopa Collaboration on Concussions from Domestic Violence (MC3DV) approach.

Recommended Motion: Information Only

COMMISSION ON VICTIMS IN THE COURTS

Meeting Date: October 16, 2020	Type of Action Requested: <input type="checkbox"/> Formal Action/Request <input checked="" type="checkbox"/> Information Only <input type="checkbox"/> Other	Subject: IMPOSITION AND MITIGATION OF THE VICTIM RIGHTS ASSESSMENT
--	--	---

From: Don Jacobson, Sr. Special Project Consultant, Court Services Division

Presenter: Don Jacobson, Sr. Special Project Consultant, Court Services Division

Description of Presentation: Update on the imposition and mitigation of the \$9.00 Victim Rights Assessment (ARS § 12-116.08).

Recommended Motion: Information Only



Supreme Court of Arizona
Administrative Office of the Courts
Court Services Division
1501 West Washington, Suite 410
Phoenix, AZ. 85007

MEMORANDUM

To: Superior Court Presiding Judges
Presiding Limited Jurisdiction Judges
Superior Court Administrators
Limited Jurisdiction Court Administrators
Superior Court Clerks
Limited Jurisdiction Chief Clerks
Field Trainers
Caseflow Managers

From: Marcus W. Reinkensmeyer, Director, Court Services Division

Date: September 9, 2020

Re: Imposition and Mitigation of the Victim Rights Assessment

This memo is to clarify the imposition of and the authority to mitigate the Victim's Rights Assessment in ARS §12-116.08. Please keep the following in mind as your work with defendants in relation to this assessment.

If any monetary obligation including an assessment, such as the probation assessment pursuant to ARS §12-114.01 and the various assessments listed in ARS §12-116 et seq., is imposed and collected the court should also impose the Victim's Rights Penalty Assessment of \$9 pursuant to ARS §12-116.08. The assessment cannot be waived or mitigated.

We hope this helps in the clarification of the application of this Assessment. Should you have further questions, please contact Donald Jacobson at djacobso@courts.az.gov.

Thank you.

Marcus W. Reinkensmeyer
Director, Court Services Division
1501 W. Washington
Phoenix, AZ 85007
602.452.3334

602.452.3480 (fax)

Wanda Roberson

Administrative Assistant III
Court Services Division
Arizona Supreme Court
1501 W. Washington, Ste. 410
Phoenix, AZ 85007
(602) 452-3196
wroberson@courts.az.gov

Cc: Court Services Division
Support Staff
Dave Byers
Mike Baumstark
Jerry Landau
Jennifer Greene
David Withey