



# VICTIM RESTITUTION:

Its Real Money to Real People

With

Randall Udelman, Arizona Crime Victim Rights Law Group

Associate Presiding Judge Michael R. Bluff, Superior Court in Yavapai County

Kirstin Flores, Executive Director, Arizona Attorney General's Office of Victim Services

Moderated by

Judge Ron Reinstein (Ret.), Chair Commission on Victims in the Courts

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## Faculty

**RANDALL S. UDELMAN** is a native Arizona resident who was born and raised in Paradise Valley, Arizona and currently is in private practice at the law firm Udelman Firm, P.L.C. Randall is also President and staff attorney with the Arizona Crime Victim Rights Law Group, a 501(c)(3) organization providing crime victims with legal services at no cost to them. Randall has been an attorney in private practice since 1991 and a victim rights attorney since 2009. Currently, Randall is also a proud advisory board member with the National Crime Victim Law Institute, a member of the National Alliance of Victims' Rights Attorneys & Advocates and former member of the National Crime Victim Bar Association.

As a part of his victim practice, Randall regularly advocates for changes in Arizona law for the benefit of crime victims and often provides *amicus* support for various victim centric issues on appeal. In 2017, he received the Distinguished Service Award from the Arizona Attorney General's Office recognizing leadership on behalf of crime victims. And in the past, Randall and other victim organizations successfully advocated for new Arizona legislation creating a crime victim representation fund giving crime victims access to free legal services paid solely out of criminal fines, penalties and assessments. For further information about Randall's victim rights advocacy, click [here](#). And for more information about the Arizona Crime Victim Rights Law Group, the victim representation fund, and the collaborative legal and social services offered at no cost to crime victims in the past, click [here](#).

**JUDGE MICHAEL R. BLUFF**, Superior Court in Yavapai County, was appointed to the bench by Governor Napolitano in 2007, Judge Bluff serves as the Associate Presiding Judge for Yavapai County. Judge Bluff is assigned to the Verde Valley Judicial District in Camp Verde. For the past 9 years, Judge Bluff has been assigned to a criminal trial division. He also felony Initial Appearances and Extraditions matters held in the Superior Court. His previous assignments included Civil, Domestic and Probate matters.

Prior to his appointment to the Superior Court, Judge Bluff served as a part-time Pro-Tem Judge for the Justice Courts and several Municipal Courts throughout Yavapai County, including serving as the Presiding Judge for the Town of Camp Verde Magistrate Court from 2005 to 2007. Judge Bluff also served on the Clarkdale Town Council from 1996 to 2004, twice serving as the Town's Mayor.

Before beginning a legal career, Judge Bluff was a principal in his family's general engineering construction business constructing water and wastewater treatment facilities throughout Arizona, California, Colorado, New Mexico and Nevada. Judge Bluff earned a B.S. in Civil Engineering Technology from Northern Arizona University and a M.S. in Civil Engineering from Texas A&M University prior to attending law school at the University of Arkansas.

**KIRSTIN FLORES**, Executive Director, Office of Victim Services, AZ Attorney General's Office holds a BA in Sociology and a Master's of Arts in Organizational Management. After developing her administrative leadership skills in the public health sector, she was hired by the Attorney General's Office of Victim Services (OVS) as the State Victims' Rights Administrator in 2000. In that role she became well versed in victims' rights laws, implementation, best practices and compliance. In 2012, Kirstin moved into the role of Executive Director for the OVS where she oversees the victim advocacy component of the office, statewide victims' rights compliance, victims' rights training and administration of the Victims' Rights Fund. Her efforts were nationally recognized when the team she leads received the 2017 United States Department of Justice Crime Victims' Rights Award for "outstanding efforts to advance or enforce victims' rights." As a long-time member of the Arizona Coalition for Victim Services, the Governor's

Commission to Prevent Violence Against Women, the AZ Supreme Court's Commission on Victims in the Courts, the AZ Attorney General's Task Force Against Senior Abuse and the Chair of the Attorney General's Victims' Rights Advisory Committee, among others, Kirstin is continually working collaboratively to further compliance with victims' rights statewide.

**RON REINSTEIN** retired as a Judge of the Superior Court of Arizona after 22 years on the bench. He now works as a judicial consultant for the Arizona Supreme Court and was appointed by the Chief Justice as the Director of the Center for Evidence Based Sentencing. He received his B.A. from Indiana University in 1970, his J.D. from Indiana University School of Law in 1973 and was inducted into the School of Law's Academy of Law Alumni Fellows in 2002.

Judge Reinstein also serves as a consultant to the National Institute of Justice, National Center for State Courts, Center for Effective Public Policy, National Forensic Science Technology Center, and the Justice Department Office of Victims of Crime.

Judge Reinstein was a member of the National Commission on the Future of DNA Evidence, of which he chaired the Post-Conviction Issues Committee. He is the Chair of the Supreme Court Commission on Victims in the Courts, the Supreme Court Capital Case Oversight Committee, as well as the Chair of the Arizona Forensic Science Advisory Committee. He also serves on the Advisory Council of the National Crime Victim Law Institute, the Board of the Justice Management Institute, the Board of Justice System Partners, and the Advisory Board of the National Clearinghouse for Science, Technology, and the Law. He was appointed to the Interagency Working Group of the White House Subcommittee on Forensic Science and is a member of the Organization of Scientific Area Committees, where he serves as Vice Chair of the Legal Resources Committee.

Judge Reinstein also has served as a presenter and on the faculty of numerous judicial and legal education programs on various subjects including DNA evidence, forensic science, sentencing issues, pretrial justice, capital litigation, victims' rights, sex offender management, child sexual abuse, and trial advocacy.

Judge Reinstein has been the recipient of numerous awards, including the State Bar of Arizona Outstanding Judge Award, the Arizona Supreme Court Distinguished Service Award for Improving Public Trust and Confidence, the United States Attorney General National Crime Victims Service Award, the State Bar Judicial Award of Excellence, the United States Attorney General's Distinguished Service Award for DNA Commission, the Arizona Attorney General's Distinguished Service Award for Policy and Leadership, the Arizona Attorney General's Award as the Outstanding Sexual Assault Judicial Professional, the Outstanding Judge Award from the Maricopa County Bar Association, the Society of Professional Journalists Sunshine Award, and the "Empty Shoes" Award from Parents of Murdered Children. He was selected to the Maricopa County Bar Association Hall of Fame in 2015 and was recently named a Distinguished Fellow of the Morrison Institute for Public Policy at Arizona State University.

In 2017, Judge Reinstein received the Chief Justice's Outstanding Contribution to the Arizona Courts Award, and in 2019 was the recipient of the Judge Learned Hand Award for Public Service.

## Presentation Notes

### What is Restitution?

Ariz. Rev. Stat. Ann. [§13-105\(16\)](#), “Economic loss’ means any loss incurred by a person as a result of the commission of an offense. Economic loss includes lost interest, lost earnings and other losses that would not have been incurred but for the offense.”

Ariz. Rev. Stat. Ann. [§13-603\(C\)](#), Restitution order equals “... full amount of the economic loss *as determined by the court and in the manner as determined by the court...*” (emphasis added).

Purpose of restitution to make victim whole. [State v. Howard](#), 168 Ariz. 458, 459, 815 P.2d 5, 6 (App. 1991)

Mandatory Victim Restitution Act, [18 U.S.C. §3663A](#) (MVRA) mandatory restitution “to each victim in the full amount of each victim’s losses as determined by the court and without consideration of the economic circumstances of the defendant.” [18 U.S.C. §3664\(f\)\(1\)\(A\)](#). Court must determine amount. [18 U.S.C. §3664](#)

Other States have similar definitions. See Cal. Const. art. I, §28(b)(13); Cal. Penal Code §1202.4(f); Or. Rev. Stat. Ann. §137.106

### Economic Loss

Future medical care costs and lost earning capacity. [State v. Howard](#), 168 Ariz. 458, 460, 815 P.2d 5, 7 (App. 1991) (“[E]conomic loss includes .... losses reasonably anticipated to be incurred in the future as a result of the defendant’s actions.”)

Other costs incurred as a direct result of crime such as mileage to/from court, burial costs, property cleanup costs

See Cal. Penal Code §1202.4(f)(3) (“To the extent possible, the restitution order ... shall be of a dollar amount that is sufficient to fully reimburse .... For every determined economic loss incurred...”) (Property loss, medical expenses, mental health counseling, wages or lost profits, **non-economic losses** including but not limited to psychological harm for victims of certain child sexual assault cases, post-sentencing interest at ten percent, actual and reasonable attorney fees and other costs of collection, relocation costs, residential security costs, costs to retrofit a home or vehicle, credit monitoring)

Victim attorney fees (to exercise victim rights but not to “prod” the state into filing charges). See [State v. Slover](#), 220 Ariz. 239, 243, 204 P.3d 1088, 1092 (App. 2009)

### Non-Economic Loss

Pain and suffering. A.R.S. [§13-105\(16\)](#); *but see* Cal. Penal Code §1202.4(f)(3) (pain and suffering damages allowable for certain types of child sexual assault cases)

Attorney fees to convince prosecutor to file charges or to help investigate or support charge (adjunct prosecutor). [State v. Slover](#), 220 Ariz. 239, 243, 204 P.3d 1088, 1092 (App. 2009)

Punitive damages (designed to punish not to make victim whole). A.R.S. [§13-105\(16\)](#)

Consequential damages. *Id.* (indirect economic losses)

Mandatory Victim Restitution Act limits. *See* 18 U.S.C. §3663A voluntarily incurred costs of a private investigation are not recoverable as “expenses incurred during participation in the investigation or prosecution of the offense.” *See* [Lagos v. United States](#), 584 U.S. \_\_\_, \_\_\_ (2018).

### Setting up for Success... Manner of Payment

Court must determine amount of restitution. A.R.S. [§13-603\(C\)](#)

Court must determine manner of payment. A.R.S. [§13-804\(E\)](#)

Victim views shall be considered. A.R.S. [§13-804\(E\)](#)

Restitution lien versus criminal restitution order (CRO)? A.R.S. §§[13-805\(B\)](#) (CRO), [-806\(A\)](#) (lien)

- Pre-conviction restitution lien to preserve status quo if assets available? May be requested by victim or state. A.R.S. [§13-806\(C\)](#)
- Restitution lien does not earn interest but preserves status quo; CRO earns ten percent interest annually. A.R.S. [§13-805\(E\)](#)

Consider all assets and income including worker’s compensation benefits and social security benefits. *Id.*; *but see* [42 U.S.C. §407\(a\)](#) (social security benefits shall not “be subject to execution, levy, attachment, garnishment, or other legal process.”) (emphasis added); *In re Lampart*, 306 Mich. App. 226, 234, 856 N.W.2d 192, 200 (2014)

Court may conduct a hearing on the manner of payment. A.R.S. [§13-804\(G\)](#)

Victim disagrees with the manner of payment? May file a petition at any time to change the manner of payment. A.R.S. [§13-804\(M\)](#)

### Collecting Restitution

Defendant incarcerated? Arizona Department of Corrections shall withdraw between 20-50% of a prisoner’s spendable account balance for payment of restitution and to comply with the manner of payment ordered. A.R.S. [§31-230\(A\) & \(C\)](#)

Defendant on probation? Work with probation department to ensure compliance with manner of payment ordered

Federal law *see* [18 U.S.C. §3664\(m\)\(1\)\(B\)](#) (At the request of a victim ... the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing or indexing such abstract ... the abstract of judgment shall be a lien on the property of the defendant... in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.”)

Enforcement as a civil judgment. *See* Tex. Crim. P. Code Ann. § art. 42.037(m) (“An order of restitution may be enforced by the state or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.”)

Tax intercepts. See Md. Code Ann., Crim P. §11-616; Mont. Code Ann. §46-18-244(7) (“If full restitution has not been paid, the department of revenue shall... intercept any state tax refunds and any federal tax refunds, as provided by law, due the offender and transfer the money.... For disbursement to the victim.”)

## Defendants on Probation

Probation officer shall notify court when defendant has not paid restitution for a minimum of four months. A.R.S. [§13-804\(N\)](#).

- Notice shall include reasons for non-payment, expected duration of non-payment, and recommendation for further action if any. *Id.*
- Department must provide notice to the victim and state (if victim has requested notice). *Id.* If victim or state objects to probation recommendations, either can request a hearing.
- Court must hold a review hearing if requested or on its own to evaluate probation department findings and recommendations. A.R.S. [§13-804\(O\)](#).

Victim may still file a Petition for Order to Show cause re civil contempt and request that probation officer serve defendant at a separate meeting with defendant; remedy of incarceration with a purge order, probation revocation, garnishment order or levy or community restitution. A.R.S. [§13-810\(B\)](#)

- Willful non-payment? A.R.S. [§13-810\(D\)](#)
- Intentional refusal to make good faith effort to obtain monies required to make payment? A.R.S. [§13-810\(D\)](#)

Can victim take discovery? Compare A.R.S. [§13-810\(A\)](#) (“In addition to any other remedy provided by law including a writ of execution or other civil enforcement...”) with A.R.S. [§13-810\(C\)](#) (“At any hearing... a person entitled to restitution may examine the defendant under oath concerning the defendant’s financial condition, employment and assets or on any other matter relating to the defendant’s ability to pay restitution.”); see also A.R.S. [§13-804\(E\)](#) (“The court shall make all reasonable efforts .... The court may enter any reasonable order necessary...”).

If not willful or intentional refusal to make good faith efforts, modify manner of payment, take other steps to ensure payment or allow levy or garnishment. A.R.S. [§13-810\(E\)\(1\)-\(3\)](#)

## Defendants off Probation

On discharge from probation or release from prison, criminal restitution order must issue if not done at sentencing. A.R.S. [§13-805\(C\)\(2\)](#)

File criminal restitution order with county recorder (lien on real property), department of motor vehicles (lien on automobiles), and secretary of state (lien on personal property). A.R.S. [§13-806\(E\) and \(F\)\(1\)-\(3\)](#)

Seek leave to serve interrogatories, requests for production, request for debtor’s exam using criminal case number seeking information about income and expense. A.R.S. [§13-804\(E\)](#) (reasonable orders); A.R.S. [§13-810\(A\)](#) (contempt available “[i]n addition to any other remedy provided by law...”).

## Discovery

### Income and assets

- Employment
- Family support
- House (Is home equity subject to a homestead exemption?)
- Cash value in insurance

Expenses (does defendant prioritize cable TV, or smart phone service over restitution obligations?)

[Ariz. Const. Art 2, §2.1\(A\)\(8\)](#) (crime victim has a right “[t]o receive **prompt** restitution from the person or persons convicted of the criminal conduct that caused the victim’s loss or injury.”) (emphasis added)

- Basic obligations
- Rent
- Utilities (cell, cable)

## Enforcement Options

After receiving discovery, negotiate a payment plan with consequences for non-payment. Require judicial oversight, late fees for non-payment, regular employment and address updates, and waiver of service of process of an OSC petition in case of non-compliance

Petition for order to show cause re contempt in same manner without probation department assistance. A.R.S. [§13-810\(B\)](#)

Request a writ of criminal garnishment of earnings, property or non-earnings. A.R.S. [§13-812\(B\)\(1\)-\(6\)](#)

## Fair Debt Collection Practices Act Should NOT Apply to Restitution Collection Efforts

Fair Debt Collection Practices Act prohibits certain practices used to collect “any obligation ... of a consumer to pay money arising out a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment.” [Zimmerman v. HBO Affiliate Group](#), 834 F.2d 1163, 1167 (3<sup>rd</sup> Cir. 1987)

Restitution obligations are not “debts” and instead can be considered damage obligations thrust upon a defendant as a result of criminal conduct. *See, e.g., Turner v. Cook*, 362 F.3d 1367, 1371 (9<sup>th</sup> Cir. 2004) (FDCPA inapplicable to collection efforts against a defendant arising out of a tort action).

## Civil Remedies

Defendant estopped from challenging essential allegations of the criminal offense in a separate civil action. A.R.S. [§13-807](#)

- Damages must exceed economic loss. Victim cannot recover economic losses twice as restitution and in a separate civil action. But victim can recover general damages, pain and suffering and punitive damages
- Civil judgments are dischargeable in bankruptcy. Consider insurance coverage. Homeowners insurance? Auto insurance? Umbrella? Business or commercial liability? D&O or fiduciary duty claims?

Restitution orders are non-dischargeable in bankruptcy. A.R.S. [§13-805\(l\)](#)

### Statewide Restitution Efforts

- COVIC workgroup
  - Clarifying statutes
  - Ensuring enforcement measures are clearly available
  - Ensuring collection measures are consistently applied
  - Website instructions for victims
- Attorney General's Office
  - Statewide education of advocates
  - Advocate referrals to victims' rights attorneys for restitution orders and enforcement
  - Review of victims' rights complaints

### Websites

- AZ Victims Center - <https://www.azcourts.gov/selfservicecenter/AZ-Victims-Center>
- Restitution Lien Instructions and Forms - <https://www.azcourts.gov/cscommittees/Victim-Restitution/Restitution-Lien-Instructions-and-Forms>
- Request for Pre-Conviction Lien - <https://www.azcourts.gov/Portals/74/COVIC%20Restitution%20Webpage/FORMS/02.RequestforPreConvictionLienPDF.pdf?ver=2018-07-30-093454-407>

### Victims' Rights Violation Investigations

- Case example
  - Prosecutor did not request an order for restitution at sentencing
  - Victim had provided information on \$2000 in losses
  - Prosecutor requested restitution hearing
  - Judge denied because request made after 120 days
  - Defendant on probation for 3 years
  - Judge Reinstein involvement

- Victims’ rights violation to the courts
  - ARS §13-603(C) and AZ Const. art §2.1(A)(8)
  - ARS §13-805 (courts retain jurisdiction over restitution until payments made in full or the defendant’s sentence expires)
- Referral to victims’ rights attorney
  - Restitution hearing conducted
  - Restitution ordered
  - Restitution paid half at restitution hearing and ordered to make monthly payments

### Statewide Priorities

- Increasing awareness of tools
- Advocates and victims
- Increasing focus on solving systemic barriers
- Statistical tracking needs
- We rely on the courts (YOU) to get this right for victims

## Collecting Victim Restitution – *The Court's Role*

Hon. Michael R. Bluff

*In many ways collecting victim restitution is no different than collecting any type of monetary or financial obligation imposed by the Court in a criminal case. They are all considered court-ordered legal financial obligations.*

*The fines, fees, surcharge and assessments are all part of the sanction or penalty imposed on criminal convictions, payable to the state, county, or local City or Town. But victim restitution is the financial component that seeks to make a crime victim whole. As the title to this session explains, this is real money to real people.*

*I'd like to take a few minutes to share with you my experience in collecting restitution. Not because what I do or how I do it is the best way or the only way, it's just what I have found to be effective in my court. My Division handles approximately 1/3 of all criminal case in Yavapai County. So, I think the type of cases that are involve and the defendants I see is typical of most court.*

*Collecting victim restitution can be frustrating for the crime victim and the Court for a couple of reasons. Often, the amount of restitution is so large that from a practical standpoint, a defendant will never be able to repay the full amount. Also, it's been my experience that defendants who own victim restitution generally are the folks least able to pay it. They are not employed full time at a job where they have enough income to pay restitution.*

*There is no way the Court can address the first issue. Sometimes the restitution figure is simply too large. But, I think the Court can be instrumental in addressing the second. What I mean by that is I believe Judges can work with defendants by empowering them to make victim restitution a priority in their monthly budget so that they are paying as much as possible towards victim restitution.*

## Step 1: Establishing a Restitution Amount

### 1) At Sentencing

- If amount is *undetermined*, retain jurisdiction to order restitution up to the cap set forth in the plea agreement.
- Court can set reasonable time period within which victim must present restitution claim.
- If amount has been *determined* (Victim's Statement of Financial Loss) and is uncontested, include amount in the Judgment and Sentence Order.

### 2) At Restitution Hearing

- If the amount is contested or prosecutor files *Motion to Amend Judgment & Sentence Order* after sentencing, set a restitution hearing.
  - Defendant entitled to notice and an opportunity to be heard at hearing, even if in prison
  - Notice to Victim and prior counsel (P.D. or Private)
  - APD notifies victim if Defendant is on probation
- Prosecutor DOES NOT represent the victim.
  - Prosecutor presents evidence supporting victim's restitution claim. ARS 13-804(G)
- Court must NOT consider Defendant's economic circumstances in determining **AMOUNT** of restitution. ARS 13-804(C)
- Court can consider any evidence before the Court. ARS 13-804(I)

3) Co-Defendants - Joint & Several Liability (ARS 13-804(F))

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

**Step 2: Establishing Manner of Payment – “*Setting up for Success*”**

1) What the law requires

- Court **MUST** consider Defendant’s economic circumstances in determining the **MANNER** of 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. ARS 13-804(E)

2) What the Court should do

- If possible, **DO NOT** delegate to Court Staff/Probation
- Encourage Personal Responsibility
  - This is about Defendant taking personal responsibility for their action
- Create a Partnership
  - How can the Court and Defendant work together to reimburse the victim?
  - 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 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 part of 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

- Set first Review Hearing at Sentencing/Disposition
  - Set first hearing within 6 months.
  - Similar to theory of therapeutic court (lets Defendant know the Court takes victim restitution seriously)
  - Explain potential for OSC hearing and possible consequences
- Review Hearing after Notice of Arrearages
  - Per ARS 13-810(B), the Clerk of Court must notify prosecutor and Court on monthly basis if Defendant defaults in restitution payment.
  - Per ARS 13-804(N), Probation Officer shall notify the Court if Defendant's monthly restitution payments are four months in arrears. Probation Officer must report the reason and expected duration of the arrearage and a recommendation on appropriate Court action. State and victim are entitled to notice of any recommendations and can file objections thereto. ARS 13-804(N)

- Review Hearings are NOT Evidentiary Hearings
  - Counsel is not present and no testimony is taken.
  - Court cannot modify payment condition of probation.
  - Ariz.R.Crim.P. 27.3 addresses who can request a modification and whether a hearing should be held.

## 2) Enforcing Payment Obligations During Probation

- OSC Hearing (ARS 13-810(B))  
(See Bench Card *Sentencing: Order to Show Cause*)
  - Anytime Court becomes aware of arrearages  
(See *Sample OSC - Rule 26.12*)
  - On *Petition to Terminate Probation*  
(See *Sample OSC – Petition to Discharge*)
  - If FTP is “willful” make a contempt finding and set Purge Review Hearing
  - If FTP is NOT “willful” – Court can modify payment method after opportunity for input from victim.
  - New rules and procedures established by the Fair Justice Task Force for mitigating of fines, fees, surcharges and assessments DO NOT apply to victim restitution.
  
- Purge Review Hearing
  - Court cannot order incarceration without giving Probationer opportunity to remedy or purge the contempt.
  - Rule 26.12(c)(4) requires Court to make certain findings before incarceration.

- If victim restitution still owed after original probation term ends, Court can extend probation for up to 5 additional years.
  - Consider unsupervised probation with mandatory Review Hearings to avoid month probation service fees

### 3) Ordering Payment in Prison

- At Sentencing or Disposition
  - Pursuant to ARS 31-230(C), order DOC to withhold a minimum of 20% up to 50% of monies available in Defendant's (i.e. "offender") spendable account to be applied towards victim restitution.
  - Director of DOC decides percentage, not the Court
- Upon release from prison, Probation/Community Supervision officer notifies offender of their outstanding financial obligations owed to the Court.

### 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. ARS 13-805(A)(2). Not the same for fines and fees.

## BENCH CARD FOR ARS §13-810 ORDER TO SHOW CAUSE HEARINGS (OSC), LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS

*Court-ordered legal financial obligations (LFOs) include all local or state, discretionary and mandatory fines, costs, fees, surcharges, assessments, restitution and other court ordered financial sanctions in criminal cases. Willful failure to comply with court-ordered LFOs may result incarceration, except in civil traffic cases.<sup>1</sup>*

*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 the following 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.*

### **To make the determination of willfulness, the court should:**

#### **Step 1—Confirm that adequate notice of the hearing to determine ability to pay 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 meaningful opportunity to explain at the hearing.**

*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—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 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)<sup>2</sup>;
- 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 LFOs 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.

<sup>1</sup> Order to Show Cause hearings under ARS §13-810 are not used in civil traffic cases.

<sup>2</sup> U.S. Dep't of Health & Human Servs., Poverty Guidelines, Jan. 26, 2017, <https://aspe.hhs.gov/poverty-guidelines>

**Step 4—At the hearing, 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 5 below.

**Step 5—Consider alternative sanctions for both those who have been found willful and not willful of nonpayment pursuant to ARS §13-810(D) & (E).**

The options for those defendants who willfully failed to pay, or intentionally failed to make a good faith effort to pay, after a finding of contempt include:

- a. Order the defendant to perform community restitution;
- b. Enter a criminal restitution order pursuant to ARS §13-805;
- c. Enter a writ of criminal garnishment pursuant to ARS §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 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 of the Rules of Criminal Procedure. Probation revocation cannot be determined at a §13-810 OSC hearing.

The options for those defendants who were not willful in nonpayment, or have made a good faith effort to pay include:

- 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 ARS §13-824;
- c. Enter a criminal restitution order pursuant to ARS §13-805;

Enter a writ of criminal garnishment pursuant to ARS §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.

**2017 Federal Poverty Level (FPL) Income Based on Family Size**

<i>Family Size</i>	<i>130% of FPL</i>	<i>200% of FPL</i>
<i>Individual</i>	<i>\$15,678</i>	<i>\$24,120</i>
<i>Household of 2</i>	<i>\$21,112</i>	<i>\$32,480</i>
<i>Household of 3</i>	<i>\$26,546</i>	<i>\$40,840</i>
<i>Household of 4</i>	<i>\$31,980</i>	<i>\$49,200</i>
<i>Household of 5</i>	<i>\$37,414</i>	<i>\$57,560</i>
<i>Household of 6</i>	<i>\$42,848</i>	<i>\$65,920</i>

**Courts must impose “the full amount of the economic loss to the victim as determined by the court and in the manner as determined by the court or the court’s designee,” as required by ARS §§13-603(C) and 13-804(C) & (E). Restitution is exempt from any payment alternatives imposed for other types of financial obligations, but may be the subject of a time payment plan.**

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

STATE OF ARIZONA,  <p align="center">Plaintiff,</p> <p align="center">-vs-</p> <p align="center">,</p> <p align="center">Defendant.</p>	<b>Case No.</b>  <b>ORDER TO SHOW CAUSE</b> (Rule 26.12 - Failure to Pay)	<p align="center"><b>FILED</b></p> DATE: _____ _____ O'Clock _____ .M.  <p align="center"><b>DONNA MCQUALITY, CLERK</b></p> BY: _____ <p align="center">Deputy</p>
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<b>HONORABLE: Judge Name</b>	<b>BY:</b> Jane Doe Judicial Assistant
<b>DIVISION No.</b>	<b>DATE:</b> May 15, 2019

The Court has been informed that Defendant is in arrearage on his/her monthly financial obligations. According to the Clerk of Court, the arrearage amount is \$\_\_\_\_\_.

Pursuant to A.R.S. § 13-810(A)&(B) **IT IS ORDERED** setting an Order to Show Cause Hearing for \_\_\_\_\_, \_\_\_\_\_, **2019** at **4:00 p.m.** before the Court, Division 7 Courtroom, Room 140, Verde Valley Judicial District, 2840 North Commonwealth Drive, Camp Verde, Arizona 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. 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. A defendant who can establish to the Court's satisfaction an inability to pay can request payment alternatives, including community restitution.

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

**IT IS FURTHER ORDERED** the Adult Probation Department shall serve the Defendant with a copy of this Order.

**IT IS FURTHER ORDERED** the Adult Probation Department shall contact any opted-in victims and advise them of the hearing.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2019.

\_\_\_\_\_  
 Hon. Michael R. Bluff

cc: County Attorney (e)  
 APD (e)  
 VS (e)

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

STATE OF ARIZONA,  <p align="center">Plaintiff,</p> <p align="center">-VS-</p> <p align="center">,</p> <p align="center">Defendant.</p>	<b>Case No.</b>  <b>ORDER TO SHOW CAUSE</b> (Petition to Discharge)	<p align="center"><b>FILED</b></p> DATE: _____ _____ O'Clock _____ M.  <p align="center"><b>DONNA MCQUALITY, CLERK</b></p> BY: _____ <p align="center">Deputy</p>
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<b>HONORABLE: Judge Name</b>	<b>BY:</b> Jane Doe Judicial Assistant
<b>DIVISION No.</b>	<b>DATE:</b> May 15, 2019

This matter came before the Court on a *Petition to Discharge Probation* and for *Criminal Restitution Order*. The Court notes Defendant's probation is expected to expire \_\_\_\_\_ and Defendant has significant unpaid restitution, fines, fees and assessments. According to the Clerk of Court, the outstanding balance owed by the Defendant is \$\_\_\_\_\_.

Pursuant to A.R.S. § 13-810(A)&(B) **IT IS ORDERED** setting an Order to Show Cause Hearing for \_\_\_\_\_, \_\_\_\_\_, **2019 at 4:00 p.m.** before the Court, Division 7 Courtroom, Room 140, Verde Valley Judicial District, 2840 North Commonwealth Drive, Camp Verde, Arizona 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. 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. A defendant who can establish to the Court's satisfaction an inability to pay can request payment alternatives, including community restitution.

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

**IT IS FURTHER ORDERED** the Adult Probation Department shall serve the Defendant with a copy of this Order.

**IT IS FURTHER ORDERED** the Adult Probation Department shall contact any opted-in victims and advise them of the hearing.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2019.

\_\_\_\_\_  
Hon. Michael R. Bluff

cc: County Attorney (e)  
APD (e)  
VS (e)

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## 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](#)). 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\(G\)](#)).

## 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, supra](#). 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. Guilliams, 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 \(Ct. App., 2007\)](#).

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 \(Ct. App., 2005\)](#).

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\(E\)](#)).

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 \(Ct. App. 2009\)](#).

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 \(Ct. App., 1996\)](#).

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 \(2008\)](#)

## 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.

## 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. 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, \(App 2003\)](#) (citing [State v. Reynolds, 171 Ariz. 678, 832 P.2d 695 \(Ct. App., 1992\)](#)).

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 \(Ariz. App 2010\)](#).

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, \(App. 2008\)](#).

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\(E\)](#)).

## 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\(H\)](#)). 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. 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 remedies. 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 \(Ct. App., 1993\)](#). It is not a dischargeable obligation in a bankruptcy proceeding. [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 hearing.

### **At the hearing:**

If the court finds the defendant willfully failed or intentionally refused to pay restitution, the court shall find the defendant in contempt and may:

- Order the defendant jailed until the restitution (or part of it) is paid
- 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>

## **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 may be 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. § 13-440 series](#)

[ACJA § 4-301 and § 5-204](#)

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