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9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
10 **IN AND FOR THE COUNTY OF COCONINO**

11 STATE OF ARIZONA,
12
13 Plaintiff,

14 v.

15 JASON CONLEE,
16
17 Defendant,
18
19 E.H.
20
21 Crime Victim.

CR2016-00434

**CRIME VICTIM'S REQUEST
FOR RESTITUTION-FUTURE
LOST WAGES**

(Hon. Dan Slayton)

22 Crime Victim, E.H., respectfully requests this Court impose a criminal
23 restitution order in the amount of \$3,322,880.20 payable to J.H.'s estate. This figure
24 represents the future lost earnings of homicide victim J.H. E.H. additionally asks
25 that her counsel be permitted to present E.H.'s restitution claim in the event it is
contested by the Defendants Lenda Hester, Lillian Hester, or Jason Conlee. Further,
E.H. requests her counsel be served with all filings by the parties under A.R.S. § 13-

1 4437(D) and endorsed and provided with a copy of any minute entry or order from
2 this court and included in all scheduling conversations.

3 Respectfully submitted this 3rd day of December, 2019.

4 By: _____
5 Colleen Clase
6 Attorney for Crime Victim, E.H.

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8 **MEMORANDUM OF POINTS AND AUTHORITES**

9 **Facts**

10 E.H. is the sister of homicide victim, J.H., who died at the hands of family
11 members after six tortuous years. Upon his death, J.H. weighed only 29 pounds, was
12 severely malnourished, and was a victim of neglect and abuse. There were four
13 defendants charged in connection with J.H.'s murder.
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15 Defendant Jason Conlee pled guilty to Endangerment, a class 6 felony, and
16 was sentenced to probation for a period of three years. Defendant Lenda Hester
17 pled guilty to Child Abuse and was sentenced to probation for a period of four years.
18 Defendant Kimmy Wilson pled guilty to Endangerment, a class 6 felony, and was
19 sentenced to probation for one year, which has since been terminated. Defendant
20 Lillian Hester went to trial and was convicted of First Degree Murder, a class 1
21 felony, and was sentenced to life imprisonment.
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24 E.H. previously requested mileage in the amount of \$130.80. It is her
25 understanding that Defendant Kimmy Wilson made payment in the amount of

1 \$130.80 to satisfy the restitution request for mileage.¹ E.H. is not yet prepared to
2 present future counseling expenses. However, she has retained an expert and is
3 prepared to present a claim for J.H.'s future lost wages for this Court's
4 consideration.

6 **Argument**

7 **A. E.H. has standing through her own counsel to seek a restitution order.**
8 **As an initial matter, E.H. seeks an order from this Court clarifying**
9 **whether E.H.'s private counsel will be able to move forward**
10 **accordingly.**

11 The VBR defines a victim as a person against whom the criminal offense has
12 been committed or, if the person is killed or incapacitated, the person's spouse,
13 parent, child or other lawful representative, except if the person is in custody for an
14 offense or is the accused. Ariz. Const. art. II, § 2.1(C). The people, through their
15 legislative power, enacted the VBR. *State v. Roscoe*, 185 Ariz. 68, 72 (Ariz. 1996)
16 (noting that an extensive Victims' Rights Implementation Act (VRIA) was passed
17 in 1991). The VBR vested the Arizona legislature with the authority to enact
18 substantive and procedural laws to "define, implement, preserve, and protect" the
19 rights guaranteed to victims. Ariz. Const. art. II, §2.1(D); *Roscoe*, 185 Ariz. at 73;
20 *State v. Lee*, 226 Ariz. 234, 240 (Ariz. Ct. App. 2011) (noting that constitutional
21 mandate gave legislature authority to set forth the meaning of constitutional
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25 ¹ Despite opting in for post-conviction notification on E.H.'s behalf (Appendix 1), counsel for E.H. was not notified that Kimmy Wilson filed a petition for termination his probation.

1 provisions); *State v. Stauffer*, 203 Ariz. 551, 553 (Ariz. Ct. App. 2002) (noting that
2 VRIA expands on concepts set forth in the VBR).

3 Generally, the provisions of the VRIA are in accord with this Court's
4 interpretation of the powers the VBR intended to grant to the legislature. *Roscoe*,
5 185 Ariz. at 73. Vested with authority under the VBR to further define, implement,
6 preserve and protect the rights guaranteed to victims under the VBR, a victim is
7 further defined as follows:
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9 "Victim" means a person against whom the criminal
10 offense has been committed, including a minor, or if the
11 person is killed or incapacitated, the person's spouse,
12 parent, child, grandparent or sibling, any other person
13 related to the person by consanguinity or affinity to the
14 second degree or any other lawful representative of the
15 person, except if the person or the person's spouse, parent,
16 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.

17 A.R.S. § 13-4401.19.

18 The VRIA further defines, implements, preserve and protects the rights
19 enumerated in the VBR. The VRIA expressly gave victims standing to seek an
20 "order" and the right to be represented by their own counsel. A.R.S. § 13-4437(A)
21 reads as follows:
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23 The rights enumerated in the victims' bill of rights, article
24 II, section 2.1, Constitution of Arizona, any implementing
25 legislation or court rules belong to the victim. *The victim
has standing to seek an order*, to bring a special action or

1 to file a notice of appearance in an appellate proceeding,
2 seeking to enforce any right or to challenge an order
3 denying any right guaranteed to victims. *In asserting any*
4 *right, the victim has the right to be represented by*
5 *personal counsel at the victim's expense.*

6 A.R.S. §13-4437(A) (emphasis added). The statutory provision also provides that
7 “the victim has the right to present evidence or information and make an argument
8 to the court, personally or through counsel, at any proceeding to determine the
9 amount of restitution...” *Id.* at § 13-4437(E); *see also State ex. rel. Romley v.*
10 *Gottsfeld (Roper)* 172, Ariz. 232, 237 (Ariz. Ct. App. 1992) (noting “[f]or the first
11 time in American jurisprudence, victims have standing in criminal cases” to assert
12 rights); *State v. Lamberton*, 183 Ariz. 47 (Ariz. Ct. App. 1995) (although holding
13 that the victim was not a party, the Arizona Supreme Court recognized that “the
14 VBR and the VRIA give victims the right to participate); *State ex rel. Montgomery*
15 *v. Padilla*, 238 Ariz. 560, 566 (Ariz. Ct. App. 2015) (victims’ counsel has standing
16 to seek an order on behalf of a victim).

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19 E.H. is a victim under Arizona law with standing to assert and enforce her
20 rights and therefore has standing to seek restitution. When E.H. submitted her
21 restitution request for mileage, the parties entered into a stipulation without
22 communication with E.H.’s counsel. While E.H. appreciated prompt payment of
23 restitution, E.H. has retained private counsel as permitted by law to handle her
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1 restitution claim. Thus, E.H. seeks an order from this Court that E.H.'s counsel will
2 be permitted to proceed accordingly.

3 **B. J.H.'s future lost earnings should be awarded to his estate.**

4 The express language of Arizona's Victims' Bill of Rights (VBR), Ariz.
5 Const. art. II, § 2.1, makes this clear: "To preserve and protect victims' rights to
6 justice and due process, a victim of a crime has a right...[t]o receive prompt
7 restitution..." Ariz. Const. art. II, § 2.1 (A)(8). The purpose of restitution is to make
8 victims whole. *State v. Lindsley*, 191 Ariz. 195, 197 (Ct. App. 1997). The scope of
9 restitution includes "all losses caused by the criminal offense or offenses for which
10 the defendant has been convicted." A.R.S. §13-804(B). Trial courts have wide
11 discretion to set the restitution amount based on the facts of the case to make the
12 victim whole. *State v. Ellis*, 172 Ariz. 549, 551 (Ct. App. 1992). Appellate courts
13 will uphold a restitution award if it bears a reasonable relationship to the victim's
14 loss. *Lindsley*, 191 Ariz. at 197. Criminal restitution is a loss that is (1) economic,
15 (2) a loss that would not have incurred but for the criminal conduct, and (3) a loss
16 that was caused by the criminal conduct. *See State v. Wilkinson*, 202 Ariz. 27, 29
17 (Ariz. 2002).

18 Here, J.H.'s future lost wages are economic in nature as they are wages he
19 would have earned had he not been abused and murdered as a result of the criminal
20 conduct of the defendants. There is no indication from DCS that J.H. had any
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1 condition or special need outside of his victimization that would have prevented him
2 from becoming a typical adult with the ability to earn a living. Also, because J.H.'s
3 biological parents abandoned him and left him in the hands of family members who
4 would ultimately murder him, E.H., as his sibling and next closest relative who is
5 not a criminal defendant in this case, is the appropriate person to make this claim on
6 behalf of J.H.'s estate.
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8 Restitution claims for future lost wages of homicide victims are not unheard
9 of. In *State v. Blanton*, a defendant convicted of negligent homicide conceded that
10 he would have owed restitution for the future lost wages of a deceased victim had a
11 civil settlement not been reached. 173 Ariz. 517, 520 (Ariz. Ct. App. 1992). The
12 defendant argued, unsuccessfully, that he should not be forced to reimburse an
13 insurance carrier via criminal restitution for the settlement paid in a civil suit for
14 future lost wages.. *Id.* The Court of Appeals, however, could not reconcile this logic
15 with Arizona's restitution statutes and ordered the defendant to reimburse the
16 insurance carrier. *Id.*
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19 Similarly, in federal prosecutions, the mandatory victims restitution act
20 (MVRA) has authorized district courts to order criminal defendant's to restitution
21 for the future lost wages of homicide victims. *U.S. v. Serawop*, 505 F.3d 1112 (10th
22 Cir. 2007). In *Serawop*, the defendant was indicted for second-degree murder for
23 the death of his 3 month old daughter. *Serawop*, 505 F.3d at 1114. However, a jury
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1 convicted him of the lesser included offense of voluntary manslaughter. The district
2 court sua sponte appointed an economist to determine the future lost wages to be
3 paid to the homicide victim's estate, which was determined to be \$325,751 for the
4 future lost wages of the victim. *Serawop*, 505 F.3d at 1115. The district court
5 rejected the defendants contentions that the projections was speculative and that lost
6 income could not include income lost at a future time. *Id.* at 1115-1116. On appeal,
7 the Tenth Circuit also rejected the defendant's arguments. *Id.* at 1120-1121.

9 To determine an estimate of J.H.'s future lost wages, an expert, Sheena Yoon,
10 was retained from the University of Utah's Department of Economics. Appendix
11 2. Ms. Yoon's qualificators are attached. *Id.* Ms. Yoon discusses the methodology
12 used as well as the assumption that had J.H. not been murdered, he would have
13 grown up and been gainfully employed. Appendix 3. There is not any indication
14 from DCS reports that J.H. had a special need or disability that would have prevented
15 him from working between the ages of 21 and 67. Another assumption was made
16 that J.H., like most Americans would work at least a 40-hour work week. *Id.*
17 Additionally, adjustments were made for necessary increases/wage gains that were
18 expected to occur in the future in the American economy. *Id.*

19 Equations were applied in a calculation to account for the real interest rate,
20 real wage growth rate, and inflation rate to determine the net present value (NPV) of
21 J.H.'s lost income. Appendix 3, Section 2.2. The starting point annual income is
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1 \$68,517.72 in what would have been J.H.'s first estimated working year, 2031. It is
2 based on 2018's U.S. mean income of \$50,413 per year at an average growth rate of
3 2.59%. Appendix 3, Section 3. Table 2 demonstrates the calculations bases on this
4 methodology. Appendix 3, Table 2. A summary of the NPV by year, a total, and
5 the equation is also attached. Appendix 4.
6

7 **Conclusion**

8 As an initial matter, E.H. requests a ruling from this Court on whether E.H.'s
9 private counsel will be permitted to bring forth E.H.'s restitution claim and question
10 witnesses if there is a contested restitution hearing. Additionally, J.H.'s future lost
11 wages should be awarded to J.H.'s estate in criminal restitution. They are economic
12 in nature, the loss is a direct result of J.H.'s murder, and the loss would not have
13 occurred but for the criminal offense.
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16 Respectfully submitted this 3rd day of December, 2019.

17 By: _____
18 Colleen Clase
19 Attorney for Crime Victim, E.H
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1 ORIGINAL sent to be filed this 3rd day of December, 2019
with the Clerk of the Court

2
3 COPIES of the foregoing e-mailed/delivered
this 3rd day of December 2019 to:

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