

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. 2021-1060
PLAINTIFF-APPELLANT, : ON APPEAL FROM THE BUTLER
v. : COUNTY COURT OF APPEALS,
 : TWELFTH APPELLATE DISTRICT
KYLE BRASHER, :
DEFENDANT -APPELLEE, : COURT OF APPEALS
 : CASE NO. CA2020-08-094
(D.H., :
VICTIM-APPELLANT). :

MERIT BRIEF OF VICTIM-APPELLANT D.H.

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CONSTITUTION

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STATEMENT OF FACTS

On December 3, 2017, Victim-Appellant D.H.'s (hereinafter, "D.H.") vehicle was stolen and wrecked by Defendant-Appellee Kyle Brasher (hereinafter, "Brasher").

On June 27, 2018, as a result of the aforementioned conduct, Brasher was indicted for a violation of Revised Code Section 2912.02(A)(1)(B)(5), grand theft of a motor vehicle in Case No. CR2018050933. (*Indictment*, June 27, 2018). On September 17, 2018, Brasher was convicted of one count of grand theft of a motor vehicle, a felony of the fourth degree. (*Plea of Guilty and Jury Waiver*, September 17, 2018). On or before October 16, 2018, the State presented the trial court with D.H.'s written victim impact statement and request for restitution, which included receipts and estimates of the total damage to D.H.'s vehicle to prove her economic losses in support of her request for restitution. On October 16, 2018, the trial court held the original sentencing hearing where the trial court sentenced Brasher to eighteen months in the Ohio Department of Rehabilitation and Correction, the maximum time permitted by law. (*Judgment of Conviction Entry*, October 19, 2018). However, the trial court did not order full and timely restitution to D.H. as mandated by Ohio Constitution, Article I, Section 10a(A)(7), despite D.H.'s documentation proving her economic losses. (*Id.*)

On March 11, 2019, D.H. filed a complaint for a writ of mandamus requesting that the Twelfth District compel the trial court to reopen sentencing and order full and timely restitution to be paid to D.H. in *State ex rel. Howery v. Powers*, 2020-Ohio-2767, 154 N.E.3d 146 (12th Dist.). The trial court scheduled a restitution hearing for November 25, 2019, at a time when Brasher was still serving his sentence, but Brasher's trial counsel filed a dual Motion to Deny State's Motion for a Restitution Hearing and Motion to Vacate Hearing on November 22, 2019, preventing the restitution hearing from occurring. (*Order for a Restitution Hearing*, November

11, 2019; *Motion to Deny State’s Motion for a Restitution Hearing and Motion to Vacate Hearing*, November 22, 2019).

On February 17, 2020,¹ Brasher’s sentence expired. On May 4, 2020, following the expiration of Brasher’s sentence, the Twelfth District granted D.H.’s writ of mandamus in part, ordering the trial court to reopen sentencing to allow D.H. to assert her constitutional right to restitution. *See State ex rel. Howery v. Powers*, 2020-Ohio-2767, 154 N.E.3d 146, ¶ 20 (12th Dist.). Pursuant to the Twelfth District’s order, the trial court held a restitution hearing on July 27, 2020, where the trial court noted both the “COVID-19 epidemic,” as well as Brasher’s unavailability, as the reasons for the delay in holding the restitution hearing. (Restitution Hearing T.p. 3:14-19). On August 18, 2020, the trial court journalized an order compelling Brasher to pay restitution to D.H. in the amount of \$1,976.55. (*Judgment Entry of the Trial Court*, August 18, 2020). Brasher timely appealed this decision and entry. (*Notice of Appeal of Appellant Kyle Brasher*, August 25, 2020). Subsequently, D.H. filed to intervene in the appellate action, and on November 10, 2020, the Twelfth District granted D.H.’s unopposed Motion to Intervene as a real party in interest to the appellate case. (*Motion of Real Party in Interest Deborah Howery to Intervene*, September 18, 2020; *Entry Granting Motion to Intervene*, November 10, 2020).

On May 17, 2021, the Twelfth District issued a judgment entry and opinion reversing the trial court’s order of restitution, holding that the trial court did not have jurisdiction to amend Brasher’s sentence after his term of imprisonment expired on February 17, 2020, relying on *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382. *State v. Brasher*, 12th Dist. Butler No. CA2020-08-094, 2021-Ohio-1688, ¶ 19. On May 25, 2021, the State filed State of

¹ Brasher was released from prison on May 8, 2019, into a local treatment program at Talbert House and was subsequently released from Talbert House on January 3, 2020. However, the Twelfth District found that his sentence expired on February 17, 2020.

Ohio’s Application for En Banc Consideration, and D.H. filed Intervenor’s Motion in Support of State of Ohio’s Application for En Banc Consideration. (*Plaintiff Appellee State of Ohio’s Application for En Banc Consideration*, May 25, 2020; *Intervenor Appellee’s Motion in Support of Plaintiff-Appellee State of Ohio’s Application for En Banc Consideration*, May 25, 2020). On July 13, 2021, the Twelfth District issued a judgment entry denying en banc consideration. (*Judgment Entry Denying En Banc Consideration*, July 13, 2021). On August 26, 2021, both the State of Ohio and D.H. filed jurisdictional briefs before this Court. (*Notice of Appeal of Victim-Appellant D.H.*, August 26, 2020; *Notice of Appeal of Appellant State of Ohio*, August 26, 2020). On November 9, 2021, this Court accepted review of this case. (*Entry*, November 9, 2021).

ARGUMENT

Proposition of Law 1: Victims are constitutionally entitled to full and timely restitution, and must be provided an effective appellate remedy for violations of their right to restitution.

I. Standard of Review

Jurisdictional questions are reviewed de novo. *Pavilonis v. Cuyahoga Cty. Bd. of Revision*, 153 Ohio St.3d 18, 2018-Ohio-1480, 100 N.E.3d 403, ¶ 20. Because this matter involves the question of whether the trial court had jurisdiction to impose a restitution order once Brasher’s original sentence had expired—among additional questions of constitutional interpretation—this Court should review this matter under the de novo standard.

II. Crime victims have the constitutional right to full and timely restitution.

Victims are constitutionally entitled to full and timely restitution pursuant to Ohio Constitution, Article I, Section 10a(A)(7). Victims are also entitled to appellate review of denials of their rights pursuant to Ohio Constitution, Article I, Section 10a(B) (“If the relief sought is denied, the victim or the victim’s lawful representative may petition the court of appeals for the

applicable district, which shall promptly consider and decide the petition.”). “ “[C]ourts must interpret the Constitution broadly in order to accomplish the manifest purpose of an amendment.’ ” *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 19, quoting *State ex rel. Swetland v. Kinney*, 69 Ohio St.2d 567, 570, 433 N.E.2d 217 (1982). “ “[T]he object of the people in adopting it should be given effect.’ ” *State v. Smith*, 80 Ohio St.3d 89, 103, 684 N.E.2d 668 (1997), quoting *Castleberry v. Evatt*, 147 Ohio St. 30, 67 N.E.2d 861 (1946), syllabus.

When a constitutional provision is clear and unambiguous, the plain meaning controls. *See Toledo City School Dist. Bd. of Edn. v. State Bd. of Edn.*, 146 Ohio St.3d 356, 2016-Ohio-2806, 56 N.E.3d 950, ¶ 16 (explaining that “in construing the Constitution, we apply the same rules of construction that we apply in construing statutes;” “[w]ords used in the Constitution that are not defined therein must be taken in their usual, normal, or customary meaning;” and “ “[w]here the meaning of a provision is clear on its face, we will not look beyond the provision in an attempt to divine what the drafters intended it to mean’ ”), *reconsideration denied*, 146 Ohio St.3d 1473, 2016-Ohio-5108, 54 N.E.3d 1271. “Courts must give effect to the words * * * and may not modify an unambiguous [provision] by deleting words used or inserting words not used.” *State v. Waddell*, 71 Ohio St.3d 630, 631, 646 N.E.2d 821 (1995).

Here, both the intent and the language are clear. The voters’ intent is manifest in the provision itself: crime victims are to be afforded rights to ensure that they receive “justice and due process throughout the criminal and juvenile justice systems.” Ohio Constitution, Article I, Section 10a(A). The rights that follow, including the constitutional right to full and timely restitution contained in Ohio Constitution, Article I, Section 10a(A)(7) and the right to appellate review when victims’ rights are denied pursuant to Ohio Constitution, Article I, Section 10a(B),

are clear and unambiguous. Under Marsy's Law, Ohio victims are constitutionally entitled to mandatory restitution and to appellate review of any denial of this right. It follows that victims must have a meaningful avenue to remedy violations of this constitutional right during sentencing hearings.

III. As a victim, D.H. must be afforded a meaningful appellate remedy for the violation of her constitutional right to restitution.

a. D.H. attempted to vindicate her rights to restitution and to appellate review through an avenue the Twelfth District held was appropriate.

On March 11, 2019, D.H. sought to assert her rights to restitution and to appellate review of the denial of her right to restitution by filing a complaint for a writ of mandamus, which the Twelfth District held was the appropriate vehicle to seek a remedy. *See State ex rel. Howery v. Powers*, 2020-Ohio-2767, 154 N.E.3d 146, ¶ 15 (12th Dist.) (“As a result, we find relator’s only adequate remedy for ‘full and timely restitution’ is through the grant of a writ of mandamus.”). Importantly, the filing date of D.H.’s complaint for a writ preceded Brasher’s early release from prison and his release from Talbert House, putting Brasher on notice that D.H. was challenging the validity of his sentence as to restitution.

Interpreting the constitutional right to restitution, the Twelfth District held that D.H. had the right to full and timely restitution and that the trial court, which previously failed to consider D.H.’s right to restitution, was required to conduct a restitution hearing to afford that right. *State ex rel. Howery v. Powers* at ¶ 20. Notably, this decision was rendered after the completion of Brasher’s sentence. Subsequently, the trial court held a restitution hearing, in compliance with the decision of the Twelfth District, and ordered Brasher to pay restitution. Brasher appealed the restitution order, and the Twelfth District held that Brasher’s due process rights were violated because the trial court no longer had jurisdiction over the matter since Brasher had served his full

prison term prior to the restitution hearing. *State v. Brasher*, 12th Dist. Butler No. CA2020-08-094, 2021-Ohio-1688, ¶ 21.

However, Brasher did not serve his full prison term. In fact, Brasher did not even serve half of his prison term. Brasher was sentenced by the trial court to the maximum sentence, which was eighteen months. Brasher only served six months and three weeks of this sentence in prison. Brasher was released from prison on May 8, 2019, into a local treatment program at Talbert House and was subsequently released from Talbert House on January 3, 2020—45 days earlier than his original release date. *Ohio Department of Rehabilitation and Correction Certification of Incarceration* (Attached as Appx. A-15).

It is not uncommon for offenders to be released from their imposed sentences early. Under the standard now set by the Twelfth District, this unpredictability in an offender's sentence length leaves victims like D.H. with very little time to pursue appellate remedies for rights violations occurring during a sentencing hearing because, whether victims file appeals or complaints for extraordinary writs, the appellate process is incredibly lengthy and it is likely that an offender is released before an appellate decision is reached.

b. Appellate delays, and not delays occasioned by D.H., resulted in the denial of D.H.'s constitutional right to restitution.

The Twelfth District took 420 days to issue D.H.'s writ of mandamus. D.H. did everything in her power to litigate her complaint for a writ of mandamus expeditiously. In fact, the only extension of time requested by D.H. was because opposing counsel had not responded to D.H.'s counsel regarding a stipulated statement of facts where both parties' contributions and agreement were mandated by the Twelfth District, a circumstance entirely out of D.H.'s control. The litigation of D.H.'s original action took approximately fourteen months, more than double Brasher's total time served in prison but less than the eighteen months he was sentenced to serve.

Thus, both the timing of the Twelfth District's decision and the Ohio Department of Rehabilitation and Correction's decision to release Brasher early made it impossible for D.H. to remedy the violation of her constitutional rights.

c. The case law supporting the Twelfth District's holding that Brasher's due process rights were violated is inapplicable to the case at bar.

In finding that the trial court erred in ordering restitution, the Twelfth District relied on case law that predates Marsy's Law and, therefore, did not involve any balancing of a victim's constitutional rights. Specifically, the case addresses whether a trial court judge can resentence a defendant to add on a post-release control term once a defendant has already served his entire sentence of incarceration. *See State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382. *Holdcroft's* narrow holding addresses only situations regarding the imposition of post-release control. One key difference between *Holdcroft* and the present matter is that in *Holdcroft*, the State did not have a constitutional right to a term of post-release control for the offender. Additionally, the Twelfth District cited three other cases where the court applied the *Holdcroft* holding, all involving sexual offender classifications. *See State v. Brasher*, 12th Dist. Butler No. CA2020-08-094, 2021-Ohio-1688, ¶ 20. In these cases, the State did not have a constitutional right for the offender to be designated on the sex offender registry.

However, D.H. does have the constitutional right to restitution in the present matter for economic losses directly and proximately caused by Brasher's criminal offense and this right has been stripped from her due to litigation delays, and other delays such as the Covid-19 global health crisis, that were out of D.H.'s control.

Another key difference between the case law relied on by the Twelfth District and the present matter is in all the cases cited by the Twelfth District, the challenge to the sentencing entry in each case was made either after the sentence had expired or right before the sentence

expired. Conversely, in this case, D.H. challenged the trial court's failure to order restitution well in advance of the termination of Defendant's sentence, thus undermining any reasonable expectation in finality Defendant may claim.

For example, in *Holdcroft*, the defendant raised an argument about his expectation of finality because he had already served his entire prison sentence prior to the State's request that he be resentenced. *Holdcroft* at ¶ 3. Additionally, in *State v. Metcalf*, another of the cases relied upon by the Twelfth District, the defendant was resentenced only two days prior to his release after serving nearly five years in prison and successfully argued that he had an expectation of finality in his sentence at that point. *State v. Metcalf*, 2016-Ohio-4923, 68 N.E.3d 371, ¶ 4 (12th Dist.).

In another case cited by the Twelfth District, *State v. Halsey*, the defendant's probation was terminated prior to the State's request for a nunc pro tunc entry requesting the inclusion of a sex offender classification that was not journalized following the original sentencing hearing. *See State v. Halsey*, 2016-Ohio-7990, 74 N.E.3d 915 (12th Dist.). The Twelfth District held that the defendant had an expectation of finality in his sentence because his sentence had already been terminated when the State filed their request for a nunc pro tunc sentencing entry. *Id.* at ¶ 32. Lastly, in *State v. Rucker*, the offender was released from serving his entire prison term in January 2015, and the trial court did not correct the appropriate sex offender classification until October 2018, almost four years after the expiration of the defendant's sentence. *State v. Rucker*, 1st Dist. Hamilton No. C-180606, 2019-Ohio-4490, ¶16. Thus, the First District Court of Appeals ruled that the defendant had an expectation of finality in his sentence and vacated the sex offender classification in its entirety. *Id.* at ¶ 18. Notably, in *Rucker*, the trial court was put on notice that the defendant was classified incorrectly and could have fixed the mistake prior to

the expiration of the defendant's sentence, but failed to do so. *Id.* at ¶ 2. In each of these cases, there was no attempt to resolve the sentencing errors until the defendant had either minimal time remaining on their sentence or had served the entire sentence.

Critically, here, D.H. filed her original action at a time when Brasher had not even served five full months of his eighteen-month sentence. D.H. put Brasher on notice that his sentence was contested before he had even served a third of his original sentence. Application of *Holdcroft*, and the additional cases cited by the Twelfth District, to this case is inapposite and problematic, given that D.H.'s complaint in mandamus was filed well in advance of Brasher's release from custody, putting him on sufficient notice to question the finality of his sentence. In fact, Brasher acknowledges D.H.'s original action litigation in his Motion to Deny State's Motion for a Restitution Hearing and Motion to Vacate Hearing, arguing that the trial court should not hold a restitution hearing until the Twelfth District issued a final decision in the original action. *See Motion to Deny State's Motion for a Restitution Hearing and Motion to Vacate Hearing*, November 22, 2019. Thus, it is disingenuous for Brasher to argue that he had any expectation of finality in his sentence after presenting such arguments to the trial court.

Perhaps more concerning for victims like D.H. whose rights are violated at sentencing is another decision the Twelfth District alluded to, in which this Court recently "realign[ed] its void-sentence jurisprudence" in the context of post-release control. *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, ¶ 4. Subsequently, this Court extended *Harper* in *State v. Henderson* to include sentencing errors outside of post-release control. *See generally State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776. In *Henderson*, this Court held "*** sentences based on an error are voidable, if the court imposing the sentence has jurisdiction over the case and the defendant, including sentences in which a trial court fails to

impose a statutorily mandated term” and “a sentence is void only if the sentencing court lacks jurisdiction over the subject matter of the case or personal jurisdiction over the accused.” *Id.* at ¶ 27. While void sentences may still be challenged on collateral review, voidable sentences may only be challenged on direct appeal. *Id.* at ¶ 26. Here, under this new precedent decided after the Twelfth District issued its writ in this matter, Brasher’s sentence would likely be considered voidable, not void, making the collateral challenge used by D.H. no longer available, though the Twelfth District held that a collateral challenge was the only option available to D.H. *See State ex rel. Howery v. Powers*, 2020-Ohio-2767, 154 N.E.3d 146, ¶ 15 (12th Dist.).

When D.H. filed her complaint in mandamus to remedy the violation of her constitutional right to full and timely restitution, she utilized the only legal avenue available to her, an avenue supported by this Court’s precedent. Now, that precedent has shifted, ostensibly leaving D.H. with no remedy for the violation of her rights.

Critically, when *Holdcroft* and *Henderson* are read in conjunction, even if victims file direct appeals challenging violations of their rights at sentencing, a sentence of time served or mere fines would leave victims without a remedy for any violation of their rights at sentencing. This is precisely the circumstance presented in *State ex rel. Seawright v. Russo* where the case facts are strikingly similar to D.H. In *State ex rel. Seawright v. Russo*, the Eighth District granted a writ of mandamus to a victim holding that the victim had a constitutional right to restitution, ordering the trial court to impose a restitution order from the evidence presented at the sentencing hearing, or, alternatively, to hold a separate restitution hearing. *State ex rel. Seawright v. Russo*, 8th Dist. Cuyahoga No. 108484, 2019-Ohio-4983. Notably though, the offender in the *Russo* case was simply sentenced to pay a minimal fine and to time served and was not sentenced to any additional term of imprisonment or probation. *Id.* at ¶ 5. Thus, this new precedent will

make it nearly impossible for Seawright, and victims in similar positions, to recover rightfully owed, and constitutionally mandated restitution.

The Twelfth District decision not only leaves victims with piecemeal precedent on how to pursue violations of their constitutional right to restitution depending largely on the jurisdiction in which their rights are violated, but will also financially bar victims from recovering from offenders who are serving minimal sentences, or who are released early from their sentences, despite a victim's best efforts to litigate their constitutional rights violation expeditiously.

This will undoubtedly discourage crime victims from participating in the criminal justice process because it eliminates one incentive to their pursuit of justice when they cannot be made financially whole from the offender's criminal offense. The Twelfth District acknowledged that victims do not have any reasonable alternative avenues to recovering these losses. *See State ex rel. Howery v. Powers*, 2020-Ohio-2767, 154 N.E.3d 146, ¶ 15 (12th Dist.) (“We are likewise unpersuaded by the argument that relator could obtain reimbursement for her losses through other means, such as through private insurance, the Ohio Victim Compensation Fund, or a separate civil action.”). The Twelfth District even elaborated on the importance of restitution payments not being dischargeable in bankruptcy proceedings whereas a civil judgment could be. *Id.* The importance of making victims financially whole is of utmost importance to victims navigating the criminal justice process, and the current piecemeal case precedent is infringing upon victims' constitutional right to restitution. This Court must balance the interests of finality in sentencing for defendants with victims' constitutional right to restitution and provide a meaningful remedy for victims when this right is violated at the sentencing phase of the criminal justice process.

d. Victims are not the only participants in the criminal justice system that are harmed by the realignment of this Court's void/voidable jurisprudence.

Henderson is not only detrimental to D.H. and victims like her, but has also resulted in detrimental outcomes for defendants. In *State v. Jones*, the Sixth District Court of Appeals upheld an indefinite life sentence where the statute allowed for parole eligibility after 20 years because the defendant (notably, a juvenile bound over for prosecution as an adult) failed to appeal the sentence, stating “after *Henderson*, appellant herein may not have any other remedy to correct this arguably voidable sentencing error.” *State v. Jones*, 2020-Ohio-5443, 163 N.E.3d 675, ¶ 22 (6th Dist.). Judge Zmuda’s concurrence notes many implications of *Henderson*’s application, arguing that in that specific case, the statutorily improper, indefinite life sentence “* * * may run afoul of the Eighth Amendment protections against cruel and unusual punishment * * *.” *Id.* at ¶ 38 (Zmuda, concurring). Judge Zmuda further argues that the harsh application of *Henderson* “* * * opens the door to a trial court’s disregard of the legislature’s statutory mandate relative to criminal offenses and sentencing.” *Id.* at ¶ 40. “Once the time for appeal has run, the unlawful sentence will become lawful by operation of res judicata, applying the rule articulated in *Henderson*.” *Id.* Lastly, Judge Zmuda argues that the “one-size-fits-all” approach of *Henderson* precludes the courts from their traditional role of hearing and deciding a wide variety of issues that might arise in each unique case. *Id.* at ¶ 41.

In a similar case, the Eighth District Court of Appeals (hereinafter, “Eighth District”) ruled that “sentences that exceed statutory limitations, so long as the trial court had subject-matter jurisdiction over the case and personal jurisdiction over the defendant, are likewise voidable, not void.” *See State v. Stansell*, 8th Dist. Cuyahoga No. 109023, 2021-Ohio-2036, ¶ 7. Based on *Henderson*, the Eighth District upheld a sentence that exceeded statutory limitations,

allowing a defendant to be imprisoned for longer than legally permissible based on statute. *Id.* at ¶ 11.

In *State v. Starks*, the Eighth District upheld a life imprisonment sentence that improperly omitted language for parole eligibility because the offender did not challenge the sentence on direct appeal, again leaving a defendant imprisoned for longer than statutorily permitted. *State v. Starks*, 8th Dist. Cuyahoga No. 109444, 2020-Ohio-4306, ¶ 15. These are just three examples among many where the harsh application of *Harper* and *Henderson* have resulted in devastating outcomes for defendants.

The application of *Harper* and *Henderson* has also proven detrimental to the wrongfully incarcerated. In *State v. Sailor*, Sailor was exonerated of aggravated murder after serving over 14 years in prison. *See generally, State v. Sailor*, 8th Dist. Cuyahoga No. 109459, 2021-Ohio-2277. In March 2018, Sailor's conviction for aggravated murder was vacated when he pleaded guilty to perjury and obstructing justice, and was sentenced to five years on each count. *Id.* at ¶ 4. He was immediately discharged from prison in light of his time served. *Id.* However, in December 2019, the state filed a motion to vacate the sentence alleging that the maximum time Sailor could serve on each charge was actually three years, not five. *Id.* at ¶ 5. The trial court denied the motion holding the court had no jurisdiction over the closed case. *Id.* In a similar timeline of events to D.H., Sailor appealed this decision at a time when his sentence would have been considered void. However, after the briefing in the case was completed, but before the disposition of the appeal, this Court realigned the void versus voidable jurisprudence in *Harper* and *Henderson* making Sailor's then void sentence now only voidable. *Id.* at ¶ 6. Based on this realignment, the Eighth District held the trial court lacked jurisdiction to correct the sentencing errors because Sailor did not file a direct appeal from the original sentence for five years on each count, and had

already served the sentence in full. *Id.* at ¶ 25. This decision will be particularly problematic and unjust when and if Sailor pursues civil remedies against the State for compensation for time wrongfully incarcerated, effectively reducing his eligible compensation by four years.

These types of outcomes are the epitome of the concerns set forth in the concurring opinion in *State v. Henderson*. The concurrence expressed concern for situations where “sentencing mistakes are not revealed until after the time for direct appeal has passed.” *Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776, ¶ 47 (O’Connor, C.J., concurring in judgment only). It also expressed concern that “courts [will] elevate predictability and finality over fairness and substantial justice.” *Id.* at ¶ 48. These fears have now come to fruition as a result of *Harper* and *Henderson* for not only victims like D.H., but defendants as well.

This Court has consistently refused to elevate form over substance in its holdings. *See State v. Miller*, 159 Ohio St.3d 447, 2020-Ohio-1420, 151 N.E.3d 617, ¶ 21 (“to reach any other result would raise form over substance.”); *State v. Davidson*, 17 Ohio St.3d 132, 135, 477 N.E.2d 1141 (1985) (holding that regardless of how a motion was labeled, if it was a motion seeking the suppression of evidence, it would be considered a “motion to suppress” for purposes of R.C. 2945.67 and Crim.R. 12(J), and “any other result would improperly elevate form over substance.”). However, *Henderson* has caused courts to elevate form over substance, resulting in injustice for victims and defendants alike. This Court should reexamine *Henderson* and redefine void and voidable sentences to balance finality and substantial justice.

Here, D.H.’s constitutional right to restitution far outweighs Brasher’s interest in finality, especially because Brasher was well aware of D.H.’s original action and had no legitimate expectation of finality when he was released from prison. Brasher served minimal time in prison

for his offense before he was released and able to move on with his life. Meanwhile, D.H. is still empty-handed, with no reliable transportation or money to purchase a reliable vehicle, over four years after her vehicle was stolen and totaled due to Brasher's criminal offense. This is an unjust outcome resulting from the harsh application of case law that elevates form over substance.

CONCLUSION

For the aforementioned reasons, D.H. respectfully requests that this Court overturn the decision of the Twelfth District Court of Appeals and provide victims with an effective remedial avenue to protect and assert their constitutional right to full and timely restitution when this right is violated.

Respectfully submitted,

/s Morgan Keilholz

Morgan Keilholz (0097955)

Ohio Crime Victim Justice Center

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Attorney for Victim-Appellant

CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief was sent by electronic mail and/or ordinary U.S. mail on December 28th, 2021, to:

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/s Morgan Keilholz
Morgan Keilholz (0097955)

APPENDIX

FILED

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

2019 NOV 12 PM 4:12

STATE OF OHIO

CASE NO. CR2018-05-0933

MARY L. SWAIN
Plaintiff BUTLER COUNTY
CLERK OF COURTS

POWERS, J.

vs.

ORDER FOR A RESTITUTION HEARING

KYLE BRASHER

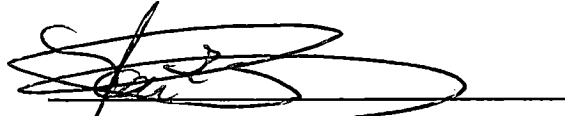
Defendant

It is **HEREBY ORDERED** that a hearing date, to determine Restitution the defendant will pay in this case, is set for November 25, 2019 at 1:30 pm.

APPROVED AS TO FORM:

ENTER

MICHAEL T. GMOSE
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO


Powers, J.

SDB/kch *SS*

November 6, 2019

**IN THE COMMON PLEAS COURT
GENERAL DIVISION
BUTLER COUNTY, OHIO**

FILED
MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS
08/18/2020 01:25 PM
CR 2018 05 0933

STATE OF OHIO,

*

Case No.: CR 2018-05-0933

Plaintiff,

*

JUDGE: NOAH E. POWERS II

vs.

*

**DECISION UPON MANDAMUS
REGARDING RESTITUTION
AND SUPPLEMENTAL
SENTENCING ENTRY**

**KYLE BRASHER
a.k.a KYLE BRASHEAR,**

*

*

Defendant.

*

This matter came before the Court upon a mandamus decision from the Twelfth District Court of Appeals, directing the court to reopen sentencing so as to allow Deborah Howery, the victim in the case, the opportunity to enforce her right to restitution. *State ex rel. Howery v. Powers*, 12th Dist. No. CA2019-03-045, 2020-Ohio-2767. On July 27, 2020, the Court reopened sentencing and conducted an evidentiary hearing concerning Howery's restitution. Present for the hearing were attorneys Morgan Keilholz, on behalf of Howery, Jeremy Evans, on behalf of Kyle Brasher, and Scott Bissell, on behalf of the State.

Sentencing originally took place in this matter on October 16, 2018. While restitution was discussed, no formal finding was entered, spawning the mandamus action. As the Court had not made a definite finding regarding restitution at the original sentencing hearing, the Court finds that any imposition of restitution found at this stage is not an imposition of additional or increase in restitution. See *State v. Stamper*, 12th Dist. No. CA2009-04-1115, 2010-Ohio-1939, ¶11. Under the new provisions contained in Marsy's Law, a victim is entitled "to full and timely restitution from the person who committed the criminal offense or delinquent act against the victim." Ohio Constitution, Article I, Section 10(a)(A)(7).

Judge
Noah E. Powers II
Common Pleas Court
Butler County, Ohio

R.C. 2929.18(A)(1) provides that the court may impose a financial sanction upon sentencing for restitution based on the victim's economic loss which is defined as "any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense and includes any loss of income due to lost time at work because of an injury caused to the victim, and any property loss..." R.C. 2929.01(L). It does not include "non-economic loss or any punitive or exemplary damages." *Id.*

The amount of restitution ordered must bear a reasonable relationship to the victim's actual loss to comport with due process. *Stamper* at ¶17. "Accordingly, a trial court must 'determine the amount of restitution to a reasonable degree of certainty, ensuring that the amount is support by competent, credible evidence.'" *Id.* citing, *State v. Foster*, 12th Dist. No. CA2005-09-415, 2006-Ohio-4830, ¶8.

A victim may support her loss through documentary evidence or testimony. *State v. Collins*, 12th Dist. No. CA2014-11-135, 2015-Ohio-3710, ¶33 (Citations Omitted). As a restitution hearing is part of sentencing, the Court is not restricted by the Rules of Evidence in making it determination. *Id.* In this case, the Court originally, without making a definite finding, considered the victim impact statement. When "the amount of loss reverenced in a victim impact statement appears doubtful or uncertain, 'documentary or other corroborating evidence may be required to verify the loss or expense.'" *Id.*

The Court, at the July 27, 2020 *Restitution Hearing*, took into evidence additional testimony and documentation that has allowed it to make a determination of the victim's loss. While Howery submitted a number of estimates and presented testimony regarding the repair of the vehicle at question in this matter, the vehicle was ultimately not repaired. Instead, she and her husband sold the vehicle for \$200, and later purchased a vehicle for \$2000.


The Court notes that testimony was offered by both Howery and her husband as to a \$3021.00 value for of the damaged automobile, that value did not necessarily reflect the fair

market value of the same as it included sentimental value of the vehicle, the automobile having been left to her by her deceased sister. But, the Court discounts that valuation because as mentioned above, it is limited to ordering restitution for economic losses only.

As such, the Court finds that the actual economic loss regarding the vehicle itself is \$1800.00. This figure is the amount recovered after the sale of the returned vehicle subtracted from the cost of purchasing a new vehicle. The Court took into consideration the fact that the vehicle replaced, if not in disrepair, would have been comparable in price to the vehicle purchased as a replacement. In addition to the costs incurred for the replacement of the vehicle, Howery demonstrated that she incurred economic losses from towing the vehicle and making it available for inspection, so as to ultimately determine the cost for repair. That figure was \$176.55 paid to Jake Sweeney Mazda West on January 25, 2018.

Based on the foregoing, the Court finds that Deborah Howery, as the victim in this case, is entitled to restitution in the amount of \$1976.55.

SO ORDERED:



NOAH E. POWERS II, JUDGE

Document e-Filed.

Judge
Noah E. Powers II
Common Pleas Court
Butler County, Ohio

FILED

2021 MAY 17 AM 10:16

MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,

Appellee,

- vs -

KYLE BRASHER AKA KYLE
BRASHEAR,

Appellant.

FILED BUTLER CO.
COURT OF APPEALS

MAY 17 2021

MARY L. SWAIN
CLERK OF COURTS

CASE NO. CA2020-08-094

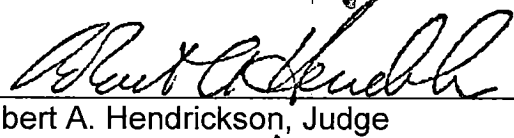
JUDGMENT ENTRY

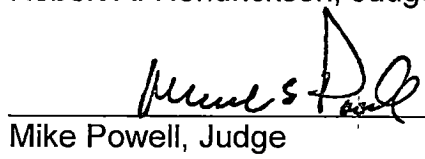
The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, reversed and vacated consistent with the Opinion filed the same date as this Judgment Entry.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.


Robin N. Piper, Presiding Judge


Robert A. Hendrickson, Judge


Mike Powell, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,

Appellee,

- vs -

KYLE BRASHER AKA KYLE
BRASHEAR,

Appellant.

:

:

:

:

:

:

CASE NO. CA2020-08-094

OPINION
5/17/2021

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2018-08-0933

Michael T. Gmoser, Butler County Prosecuting Attorney, John C. Heinkel, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for appellee

Engel & Martin, LLC, Mary K. Martin, 4660 Duke Drive, Suite 101, Mason, Ohio 45040, for appellant

Ohio Crime Victim Justice Center, Morgan Keilholz, 2300 Montana Avenue, Suite 238, Cincinnati, Ohio 45211, for intervenor-appellee

HENDRICKSON, J.

{¶1} Appellant, Kyle Brasher, appeals the decision and supplemental sentencing entry of the Butler County Court of Common Pleas ordering him to pay \$1,976.55 in restitution to one of the victims of his crime, Deborah Howery. For the reasons detailed below, we reverse the trial court's decision.

{¶2} On September 17, 2018, Brasher pled guilty to one count of grand theft of a motor vehicle in violation of R.C. 2913.02, a fourth-degree felony. Finding Brasher had entered his plea knowingly, intelligently, and voluntarily, the trial court found him guilty. The trial court thereafter sentenced Brasher to an 18-month prison term. There is no dispute that the trial court did not impose a restitution order as part of its sentence.

{¶3} On March 11, 2019, the victim, Howery, filed a complaint for a writ of mandamus asserting that she was a victim entitled to certain rights under Article I, Section 10a of the Ohio Constitution, commonly referred to as Marsy's Law. In her complaint, Howery sought an order to compel the trial court to reopen Brasher's sentencing in order to enforce her constitutional right to restitution under Marsy's Law.

{¶4} On May 4, 2020, this court issued a decision in *State ex rel. Howery v. Powers*, 12th Dist. Butler CA2019-03-045, 2020-Ohio-2767, granting Howery's complaint for a writ of mandamus and ordering the trial court to reopen sentencing in Brasher's case, *State v. Brasher*, Butler C.P. 2018-05-0933.

{¶5} On July 27, 2020, the trial court held a restitution hearing in accordance with our decision in *Powers*. During this hearing, Howery and another victim, Lawrence Hammon, testified about the economic loss they had sustained as a result of Brasher's crime.

{¶6} On August 18, 2020, the trial court issued a decision and supplemental sentencing entry ordering Brasher to pay Howery \$1,976.55 in restitution. Prior to the trial court issuing that decision, however, Brasher was released from prison having served his entire 18-month prison sentence.

{¶7} Brasher now appeals from the trial court's supplemental sentencing entry, raising the following four assignments of error for review.

{¶8} Assignment of Error No. 1:

{¶9} THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL DUE PROCESS RIGHTS.

{¶10} Assignment of Error No. 2:

{¶11} THE TRIAL COURT ERRED BY VIOLATING APPELLANT'S CONSTITUTIONAL RIGHT AGAINST DOUBLE JEOPARDY.

{¶12} Assignment of Error No. 3:

{¶13} THE TRIAL COURT ERRED BY GRANTING RESTITUTION THAT THE VICTIM(S) FAILED TO ASSERT.

{¶14} Assignment of Error No. 4:

{¶15} THE TRIAL COURT ERRED IN ORDERING AND DETERMINING RESTITUTION.

{¶16} Because they are interrelated, we will address Brasher's four assignments of error together. In his first assignment of error, Brasher argues his constitutional due process rights were violated when the trial court imposed restitution after he had already completed the entirety of his 18-month prison term. Following review, we agree and find that the trial court did not have authority to amend Brasher's completed sentence.

{¶17} A court has jurisdiction to correct a judgment that is void at any time. *State v. Crawford*, 1st Dist. Hamilton No. C-190497, 2020-Ohio-4897, ¶ 6, citing *State ex rel. Cruzado v. Zaleski*, 111 Ohio St. 3d 353, 2006-Ohio-5795, ¶¶ 18-19. Recently, in *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, the Ohio Supreme Court "realign[ed]" its void-versus-voidable jurisprudence with the "traditional understanding of what constitutes a void judgment." *Id.* at ¶ 4. That is to say, the Ohio Supreme Court clarified its prior decisions discussing the void/voidable conundrum and explicitly stated that "[w]hen a case is within a court's subject-matter jurisdiction and the accused is properly before the court, any error in the exercise of that jurisdiction in imposing postrelease control renders the court's judgment

voidable," not void. *Id.*

{¶18} We recognize that this matter has had a confusing procedural posture involving a new constitutional amendment and a subsequent action for a writ of mandamus. So, given this unusual case history, we pause to address the jurisdictional implications. In this case, unlike in a void judgment, the trial court plainly had jurisdiction in its initial sentencing entry. Brasher appeared before the trial court under indictment for one count of grand theft of a motor vehicle. The trial court acted within its subject-matter jurisdiction in sentencing Brasher for that offense. Consequently, any error in the imposition of that sentence rendered the sentence voidable, not void. *Id.*

{¶19} However, that determination is separate from the issue presently before this court. As noted above, Brasher was released from prison on February 17, 2020, having served his entire prison sentence.¹ At that point, we find the trial court lost jurisdiction to modify Brasher's sentence pursuant to the decision in *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014.

{¶20} In *Holdcroft*, the Ohio Supreme Court held that "[a] trial court does not have the authority to resentence a defendant for the purpose of adding a term of postrelease control as a sanction for a particular offense after the defendant has already served the prison term for that offense." *Id.* at paragraph three of the syllabus. Although *Holdcroft* involved the imposition of postrelease control, this court, and our sister district, have applied this holding in other contexts. See, e.g., *State v. Metcalf*, 12th Dist. Warren No. CA2015-03-022, 2016-Ohio-4923, ¶ 20 and *State v. Halsey*, 12th Dist. Butler No. CA2016-01-001, 2016-Ohio-7990, ¶ 30 (Tier III sexual offender classification); *State v. Rucker*, 1st Dist. Hamilton No. C-180606, 2019-Ohio-4490, ¶ 18 (Tier II sexual offender classification).

1. We note that Brasher was released into a local treatment program prior to February 17, 2020, however for purposes of this appeal we will utilize the February 17, 2020 date consistent with the sentencing entry.

{¶21} The rationale for this holding is to preserve a legitimate expectation of finality in sentencing. *Holdcroft*, at ¶ 16. Put another way, "when the entirety of a prison sanction has been served, the defendant's expectation in finality in his sentence becomes paramount, and his sentence for that crime may no longer be modified." *Id.* at ¶ 18. Therefore, in this case, since Brasher had completed his sentence in full, the trial court lacked jurisdiction to order restitution or issue its supplemental sentencing entry. *Id.* at ¶ 19. See, e.g., *State v. Starnes*, 9th Dist. Lorain Nos. 19CA011580 thru 19CA011584, 2021-Ohio-885, ¶ 4; *State v. Thompson*, 3d Dist. Marion No. 9-20-19, 2021-Ohio-642, ¶ 16. Accordingly, applying the Ohio Supreme Court's holdings in *Harper* and *Holdcroft*, we find the trial court's supplemental sentencing entry is void.

{¶22} In so holding, we note that while this court is sympathetic to Howery and all victims of crime, this court cannot ignore the dictates from the Ohio Supreme Court. Therefore, contrary to the arguments advanced by the state and Howery herein, we find the Ohio Supreme Court's decision in *Holdcroft*, as well as the new "realignment" in the void-versus-voidable jurisprudence outlined in *Harper*, compels the result in this case. Applying those principles to the case at bar, we find the trial court did not have authority to impose restitution after Brasher was released from prison following the completion of his 18-month prison sentence. Therefore, for the reasons outlined above, the trial court's supplemental sentencing entry is void and is hereby vacated. Brasher's first assignment of error is sustained, thereby rendering Brasher's three remaining assignments of error moot.

{¶23} Judgment reversed and vacated.

PIPER, P.J., and M. POWELL, J., concur.

FILED

IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO
2021 JUL 13 PM 1:47

MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS

STATE OF OHIO,	:	CASE NO. CA-2020-08-094
	:	REGULAR CALENDAR
Appellee,	:	
vs.	:	<u>ENTRY DENYING APPLICATION</u>
	:	<u>FOR EN BANC CONSIDERATION</u>
KYLE BRASHER	:	
AKA KYLE BRASHEAR,	:	FILED BUTLER CO.
	:	COURT OF APPEALS
Appellant.	:	JUL 13 2021
	:	MARY L. SWAIN
	:	CLERK OF COURTS

The above cause is before the court pursuant to an application for en banc consideration filed by counsel for appellee, the State of Ohio, on May 25, 2021. Also before the court is a motion in support of the application filed by counsel for intervenor-appellee, Deborah Howery, on May 25, 2021. Appellees contend that this court's decision in the present case is in conflict with a previous decision by this court, *State ex rel. Howery v. Powers*, 12th Dist. Butler No. CA2019-03-045, 2020-Ohio-2767.

The purpose of an en banc proceeding is to resolve conflicts of law that arise within a district. Intradistrict conflicts develop when different panels of judges hear the same issue but reach different results. Resolution of intradistrict conflicts promotes uniformity and predictability in the law and a larger appellate panel

provides the best possible means of resolution. *State v. Forrest*, 136 Ohio St. 3d 134, 2013-Ohio-2409; *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914.

On March 11, 2019, Howery, the victim of an auto theft committed by appellant Kyle Brasher, filed a complaint for writ of mandamus asserting that she was a victim entitled to restitution under Article I, Section 10a of the Ohio Constitution, commonly referred to as Marsy's Law. This court granted the writ of mandamus and ordered the trial court to reopen sentencing. *State ex rel. Howery v. Powers*.

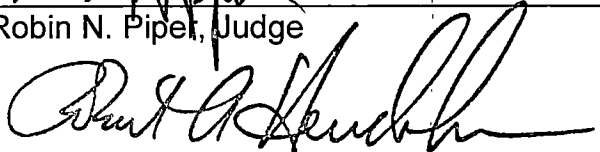
On July 27, 2020, the trial court held a restitution hearing as ordered and on August 18, 2020 issued a decision and supplemental sentencing entry ordering Brasher to pay Howery \$1,976.55 in restitution. Before the trial court issued that decision, however, Brasher was released from prison, having served his entire 18-month prison sentence.

Brasher appealed and argued that his sentencing hearing was improperly reopened and restitution improperly awarded. This court reversed the restitution decision, finding that the trial court lost jurisdiction to modify Brasher's sentence following his release from prison. This court relied in part upon an Ohio Supreme Court decision where the court realigned void-versus-voidable jurisprudence to reflect the "traditional understanding of what constitutes a void judgment." See *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913.

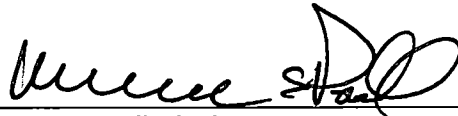
There is no conflict between the present case and *Howery* on the same issue. The present case involved a trial court's authority to impose restitution after the defendant has served his sentence and been released from prison; *Howery* involved the entitlement of a victim to restitution under Marsy's Law. The application for en banc consideration is DENIED.



Robin N. Piper, Judge



Robert A. Hendrickson, Judge



Mike Powell, Judge



Department of Rehabilitation & Correction

Mike DeWine, Governor

Annette Chambers-Smith, Director

CERTIFICATION OF INCARCERATION

I, PATRICIA R DONITHAN, Bureau of Records Management, duly authorized custodian of the Ohio Department of Rehabilitation and Correction records, certify the following incarceration dates pertaining to **KYLE BRASHER / A748391**, **KYLE BRASHER / A549134** to be a true and accurate copy from the record, which is on file in my office.

Inmate Number:	A748391
DOB:	05/15/1986
Admitted:	10/23/2018
County:	BUTLER
Case:	CR2018050933
Offense(s):	THEFT
Sentence:	1 year 6 months TERM
TT Release – Talbert House	05/08/2019
EXPIRATION OF STATED TERM (NO PRC)	01/03/2020

Inmate Number:	A549134
DOB:	05/15/1986
Admitted:	05/16/2007
County:	HAMILTON \ HAMILTON
Case:	B0702734 \ B0702734
Offense(s):	TAMPER W/EVIDENCE \ DRUG TRAFFICKING
Sentence:	1 year TERM
EXPIRATION OF STATED TERM (NO PRC)	03/24/2008

In testimony whereof, I subscribe my name and affix the seal of the Ohio Department of Rehabilitation and Correction, this 21st day of December, 2020.

Patricia Donithan

PATRICIA R DONITHAN

A-15

**Bureau of Records Management
Ohio Department of Rehabilitation &
Correction**



Article I, Section 10a | Rights of victims of crime

[Ohio Constitution](#) / [Article I Bill of Rights](#)

[◀ Previous](#)[Next ▶](#)

Effective: 2017

(A) To secure for victims justice and due process throughout the criminal and juvenile justice systems, a victim shall have the following rights, which shall be protected in a manner no less vigorous than the rights afforded to the accused:

- (1) to be treated with fairness and respect for the victim's safety, dignity and privacy;
- (2) upon request, to reasonable and timely notice of all public proceedings involving the criminal offense or delinquent act against the victim, and to be present at all such proceedings;
- (3) to be heard in any public proceeding involving release, plea, sentencing, disposition, or parole, or in any public proceeding in which a right of the victim is implicated;
- (4) to reasonable protection from the accused or any person acting on behalf of the accused;
- (5) upon request, to reasonable notice of any release or escape of the accused;
- (6) except as authorized by section 10 of Article I of this constitution, to refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused;
- (7) to full and timely restitution from the person who committed the criminal offense or delinquent act against the victim;
- (8) to proceedings free from unreasonable delay and a prompt conclusion of the case;
- (9) upon request, to confer with the attorney for the government; and
- (10) to be informed, in writing, of all rights enumerated in this section.

(B) The victim, the attorney for the government upon request of the victim, or the victim's other lawful representative, in any proceeding involving the criminal offense or delinquent act against the victim or in which the victim's rights are implicated, may assert the rights enumerated in this section and any other right afforded to the victim by law. If the relief sought is denied, the victim or the victim's lawful representative may petition the court of appeals for the applicable district, which shall promptly consider and decide the petition.

(C) This section does not create any cause of action for damages or compensation against the state, any political subdivision of the state, any officer, employee, or agent of the state or of any political subdivision, or any officer of the court.

(D) As used in this section, "victim" means a person against whom the criminal offense or delinquent act is committed or who is directly and proximately harmed by the commission of the offense or act. The term "victim" does not include the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor, or incapacitated victim.

(E) All provisions of this section shall be self-executing and severable, and shall supersede all conflicting state laws.

(F) This section shall take effect ninety days after the election at which it was approved.

[◀ Previous](#)[Next ▶](#)