

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). :

---

REPLY BRIEF OF VICTIM-APPELLANT D.H.

---

Elizabeth A. Well\* (0087750)  
Bobbie Yeager (0085165)  
Ohio Crime Victim Justice Center  
3976 North Hampton Drive  
Powell, Ohio 43065  
P: 614.848-8500  
F: 614.848.8501  
ewell@ocvjc.org  
byeager@ocvjc.org  
*Counsel for Victim-Appellant*  
\*Counsel of Record

Stephen P. Hardwick (0062932)  
Office of the Ohio Public Defender  
250 E. Broad Street, Suite 1400  
Columbus, Ohio 43215  
P: 614.466.5394  
F: 614.752.5167  
Stephen.hardwick@opd.ohio.gov  
*Attorney for Defendant-Appellee*

John Heinkel (0023157)  
Butler County Prosecutor's Office  
315 High Street, 11th Floor  
Hamilton, Ohio 45011  
P: 513.887.3474  
F: 513.887.3489  
heinkeljc@butlercountyohio.org  
*Attorney for State of Ohio-Appellant*

TABLE OF CONTENTS

	Page(s)
Table of Authorities .....	iii
Argument .....	1
Conclusion .....	8
Certificate of Service .....	9

TABLE OF AUTHORITIES

	Page(s)
<u>CASES</u>	
<i>State v. Brasher</i> , 12th Dist. Butler No. CA2020-08-094, 2021-Ohio-1688 .....	6
<i>State v. Halsey</i> , 2016-Ohio-7990, 74 N.E.3d 915 (12th Dist.) .....	7
<i>State v. Holdcroft</i> , 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382 .....	6-7
<i>State ex rel. Howery v. Powers</i> , 2020-Ohio-2767, 154 N.E.3d 146 (12th Dist.) .....	1-3
<i>State v. Hughes</i> , 2019-Ohio-1000, 134 N.E.3d 710 (8th Dist.) .....	3
<i>State v. Metcalf</i> , 2016-Ohio-4923, 68 N.E.3d 371 (12th Dist.) .....	6-7
<i>United States v. Pleitez</i> , 876 F.3d 150 (5th Cir.2017) .....	5
<i>State v. Rucker</i> , 1st Dist. Hamilton No. C-180606, 2019-Ohio-4490 .....	7
<i>State ex rel. Seawright v. Russo</i> , 8th Dist. Cuyahoga No. 108484, 2019-Ohio-4983 .....	1
<i>State ex rel. Suwalski v. Peeler</i> , 2020-Ohio-3233, 155 N.E.3d 47 .....	3
<u>CONSTITUTION</u>	
Ohio Constitution, Article I, Section 10a.....	<i>passim</i>
<u>STATUTES</u>	
Revised Code Section 2929.18 .....	1-2
Revised Code Chapter 2930.....	fn 1
Revised Code Section 2953.21 .....	4

## ARGUMENT

### **I. This appeal should not be dismissed as improvidently allowed, although Defendant-Appellee Brasher’s argument supports dismissal of his underlying appeal.**

Defendant-Appellee Brasher (hereinafter, “Brasher”) argues that the trial court’s supplemental sentencing entry is not a final, appealable order, and, therefore, this Court should dismiss this appeal. (Defendant-Appellee’s Merit Brief at 7.) This characterization is inaccurate because, by statute, trial courts are required to conduct supplemental restitution hearings if restitution is contested and journalize the results of those hearings. R.C. 2929.18(A)(1). Restitution is a critical portion of a complete sentence, especially given victims’ constitutional right to full and timely restitution. Ohio Constitution, Article I, Section 10a(A)(7).

However, the consequences of this Court finding that the trial court’s entry does not constitute a final, appealable order would necessarily include the dismissal of Brasher’s appeal in the Twelfth District Court of Appeals (hereinafter, “the Twelfth District”), an outcome Victim-Appellant D.H. (hereinafter, “D.H.”) would not contest.

### **II. D.H. has the constitutional right to full and timely restitution and the trial court lacks “discretion” to deny this right.**

Victims are constitutionally entitled to full and timely restitution pursuant to Ohio Constitution, Article I, Section 10a(A)(7). This constitutional provision vests a clear legal right to restitution in a victim and places a clear legal duty on the court to order full and timely restitution if proven by competent, credible evidence. *See State ex rel. Howery v. Powers*, 2020-Ohio-2767, 154 N.E.3d 146, ¶ 12 (12th Dist.) (“Under the new provisions in Marsy’s Law, there was a clear legal duty to provide for full and timely restitution.”); *see also State ex rel. Seawright v. Russo*, 8th Dist. Cuyahoga No. 108484, 2019-Ohio-4983, ¶ 9.

Thus, Brasher’s argument that the trial court properly considered restitution and “exercised its discretion not to award restitution” lacks merit, as does his argument that trial courts have no clear legal duty to order restitution. (Defendant-Appellee’s Merit Brief at 3.)

**III. D.H. properly asserted her right to restitution in the trial court.**

Pursuant to Ohio Constitution, Article I, Section 10a(B)<sup>1</sup>,

[t]he 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.

(Emphasis added.)

In this case, D.H. asserted her constitutional right to full and timely restitution through the prosecutor’s submission of her documentary evidence, including estimates and receipts, to the court. This method of submitting restitution evidence is supported by statute. *See* R.C. 2929.18 (Emphasis added.) (“[T]he court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, *estimates or receipts indicating the cost of repairing or replacing property*, and other information[.]”).

**IV. Direct appeals are not the only available mechanism to seek appellate review under Ohio Constitution, Article I, Section 10a.**

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

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

---

<sup>1</sup> Defendant-Appellee asserts that victims had no “legal interests at stake” in criminal cases prior to the passage of Marsy’s Law, but this is incorrect. (Merit Brief of Defendant-Appellee at 1.) The previous iteration of Ohio Constitution, Article I, Section 10a and Revised Code Chapter 2930 provided victims constitutional and statutory rights prior to the passage of Marsy’s Law, in many cases, since the early 1990s.

was the appropriate vehicle to seek a remedy in this case. *See State ex rel. Howery v. Powers* at ¶ 15 (“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.

D.H. chose to assert her right to appellate review via extraordinary writ because the only case on point at the time held that victims had no right to appeal. *See State v. Hughes*, 2019-Ohio-1000, 134 N.E.3d 710 (8th Dist.). In fact, though this Court has held that victims have the right to appellate review via interlocutory appeals in some scenarios, as recently as last year, this Court, citing *Hughes*, stated:

And the fact that a victim has the right to petition the court of appeals under Article I, Section 10a(B) of the Ohio Constitution does not make the victim a party or provide her standing on which to assert an appeal.\* \* \* Additionally, unlike the circumstances involved in *State ex rel. Thomas v. McGinty*, 164 Ohio St.3d 167, 2020-Ohio-5452, 172 N.E.3d 824, ¶ 38-49 (lead opinion), in which the lead opinion determined that assault victims who had invoked Marsy’s Law had an adequate remedy in the ordinary course of the law to challenge the trial court’s discovery order in the underlying case, [the victim] was not the subject of a discovery order that required some action or acquiescence on her part.

*State ex rel. Suwalski v. Peeler*, 2020-Ohio-3233, 155 N.E.3d 47, ¶ 36-37, citing *Hughes* at ¶ 16.

Like the victim in *Peeler*, D.H. was not subject to an order that required action or acquiescence on her part. Thus, D.H.’s situation is closer to the victim in *Peeler* than the victim in *McGinty*, making a complaint for a writ an appropriate mechanism to seek appellate review.

This Court’s decision in *Peeler* is also instructive as regards Brasher’s suggestion that, rather than utilizing direct appeals, victims could simply “intervene for limited purpose.” (Defendant-Appellee’s Merit Brief at 11.) Firstly, victims need not “intervene” in trial courts to enforce their rights. *Peeler* at ¶ 17 (victim sufficiently asserted her rights by submitting a

statement to the trial court). To require anything more of a victim than an assertion of rights is contrary to the plain text of the constitution. Ohio Constitution, Article I, Section 10a(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.”).

Secondly, D.H. agrees that victims should be permitted to intervene in pre-existing appeals to assert their rights. Ohio Constitution, Article I, Section 10a(B) (victim may assert rights in “any proceeding involving the criminal offense \* \* \* or in which the victim’s rights are implicated \* \* \*”). However, victims cannot, constitutionally, be required to wait for a party to initiate an appeal to then intervene. 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.”).

Additionally, Brasher’s arguments that allowing victims to file extraordinary writs regarding sentencing issues is “confusing” and prohibited by R.C. 2953.21 are unavailing. Sentencing entries denying restitution should be required to include an explanation as to why restitution was denied because full and timely restitution is a constitutional right. Ohio Constitution, Article I, Section 10a(A)(7). And Revised Code Section 2953.21, by its plain language, applies to, and restricts, only criminal defendants, while the constitution is controlling as to victim appellate remedies. *See* R.C. 2953.21(A)(1)(a).

*b. D.H.’s counsel was not ethically permitted to ensure that Brasher was aware of D.H.’s mandamus action, but Brasher’s counsel was ethically obligated to inform Brasher to allow him the opportunity to intervene.*

Brasher argues that D.H. proceeding by writ was inappropriate because “[t]here is no evidence that [he] personally knew of the writ D.H. filed, and he never waived his right to counsel at that critical stage.” (Defendant-Appellee’s Merit Brief at 4.) However, Brasher concedes that his trial counsel at the time was aware of the writ action. (*Id.* at 14.) Professional Conduct Rule 4.2 prohibited D.H.’s counsel or the state from ensuring that Brasher was personally informed of the writ action by contacting him directly. Brasher’s counsel, on the other hand, was ethically bound to advise him of the action. There is nothing in the record to suggest that Brasher was denied the right to counsel in the writ action. The fact remains that, though his trial counsel was made aware of the action, Brasher failed to intervene and *did not request counsel* in the writ action. To say that Brasher was denied his right to counsel overreaches, given these uncontested facts.

Further, because Brasher did not claim that his trial counsel was ineffective, the rationale of *United States v. Pleitez* does not apply. *See United States v. Pleitez*, 876 F.3d 150, 156-157 (5th Cir.2017). Brasher’s failure to seek counsel and failure to intervene do not constitute denial of counsel at a critical stage. Indeed, Brasher was provided counsel in each sentencing and restitution hearing, as required in *Pleitez*. *See id.* at 157.

Because Brasher could have intervened in D.H.’s writ action, but failed to do so, claim preclusion should act to prevent him from relitigating issues from the writ action. *See Howell v. Richardson*, 45 Ohio St.3d 365, 544 N.E.2d 878 (1989).

*c. Brasher lacked a reasonable expectation of finality in his sentence, making case law prohibiting collateral attacks on sentences inapplicable.*

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 served his 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 acknowledged 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.

Therefore, D.H. was permitted to raise a collateral attack regarding the failure to award restitution in Brasher's sentence.

### 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 Elizabeth A. Well

---

Elizabeth A. Well (0087750)  
Bobbie Yeager (0085165)  
Ohio Crime Victim Justice Center  
3976 North Hampton Drive  
Powell, Ohio 43065  
P: 614-848-8500  
F: 614-848-8501  
ewell@ocvjc.org  
byeager@ocvjc.org  
*Counsel for Victim-Appellant*

**CERTIFICATE OF SERVICE**

I certify that a copy of this Reply Brief was sent by electronic mail and/or ordinary U.S. mail on March 29th, 2022, to:

Stephen P. Hardwick (0062932)  
Office of the Ohio Public Defender  
250 E. Broad Street, Suite 1400  
Columbus, Ohio 43215  
P: 614.466.5394  
F: 614.752.5167  
Stephen.hardwick@opd.ohio.gov  
*Attorney for Defendant-Appellee*

John Heinkel (0023157)  
Butler County Prosecutor's Office  
315 High Street, 11th Floor  
Hamilton, Ohio 45011  
P: 513.887.3474  
F: 513.887.3489  
heinkeljc@butlercountyohio.org  
*Attorney for State of Ohio-Appellant*

/s Elizabeth A. Well  
Elizabeth A. Well (0087750)