

**IN THE SUPREME COURT OF OHIO**

**STATE ex rel JAMIE SUWALSKI** :

**Relator-Appellee,** :

**v.** :

**JUDGE ROBERT W. PEELER,** :

**Respondent-Appellant.** :

**Case No. 2020-0755**

**On Appeal from the Warren County  
Court of Appeals, 12<sup>th</sup> Appellate District**

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**REPLY BRIEF OF INTERVENOR ROY EWING**

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## REPLY ARGUMENT

### I

#### **The victim's prohibition claim was unauthorized by Marsy's Law.**

#### **PROPOSITION OF LAW I**

Art. I, § 10a(B) requires a victim to seek specific relief in the trial court before petitioning the appellate court for an extraordinary writ.

The victim argues that Marsy's Law lacks the requirement to raise a claim in the trial court before seeking an extraordinary writ on that claim. According to the victim, this requirement is limited to appeals. And she posits it would be unfair to victims. Unlike a criminal defendant, a victim lacks a constitutional right to appointed counsel to frame, present, and exhaust her claims in the trial court. So, she reasons, the ordinary rules should be relaxed.

The victim's argument contradicts the plain text from Art. I, § 10a(B). That provision limits an extraordinary writ to when “\*\*\* the relief sought is denied” in the trial court. *Id.* This provision is unambiguous and must be applied—not ignored. The victim's argument disregards the text and instead complains of its unfairness.

What is more, exhausting a claim in the trial court is not a rule limited to appeals—it is the rule in Marsy's Law as a condition precedent to an extraordinary writ. Art. I, § 10a(B). And it is not true the lack of appointed counsel burdened the victim and advantaged Ewing, excusing exhaustion. The firearm-restoration proceeding was civil, not criminal, so there was no right to appointed counsel at all. R.C. 2923.14(E). And the victim could have hired counsel, as Ewing did, and moved to intervene below, as Ewing did in the appellate court, to frame, present, and exhaust her claims. She chose not to. Ewing and the victim faced equal burdens—not disparate ones. And Ewing met his.

Finally, the exhaustion issue under Art. I, § 10a(B) is a matter of first impression. No Ohio case has addressed it. So the victim's argument about the lack of cases for the exhaustion

rule is a product of Marsy's Law's recent enactment—not that exhaustion was rejected in other cases.

## **PROPOSITION OF LAW II**

A victim's right must be asserted in a § 10a(B) proceeding that i) involves the criminal offense or ii) where the victim's rights are implicated. A right is viable if enumerated in § 10a(A) or a statute. Before the victim can pursue extraordinary relief, she must have asserted a viable claim in a qualifying § 10a(B) proceeding below.

*First*, Marsy's Law limits the assertion of a § 10a(A) right to a proceeding for victim's rights. Some proceedings qualify, and some do not. The issue is whether a civil firearm-restoration proceeding under R.C. 2923.14 qualifies under Marsy's Law as a proceeding for victim's rights. If not, the victim lacks standing to bring the prohibition case. Art. I, § 10a(B).

In arguing the R.C. 2923.14 action was a qualifying proceeding for victim's rights, the victim ignores the proceeding itself. She instead contends that Ewing makes contradictory arguments about rights—first stating the victim lacked rights at the hearing and then stating the victim inadequately asserted her rights. She also speculates that Ewing would have objected to the victim's jurisdictional claim in the trial court, had it been made, because jurisdiction is not a § 10a(A) right.

None of these arguments address a proceeding. The point of Ewing's argument is to determine the proceedings contemplated by § 10a(B) for victim's rights that confer standing to the victim to seek extraordinary relief.

While the contours of a qualifying § 10a(B) proceeding are unclear in the text, Ewing completed his criminal sentence, the firearm disqualification was a collateral disability from federal law, and the R.C. 2923.14 action was a separate civil action. 18 U.S.C. § 922(g)(9); R.C. 2923.14(E). Thus, the civil firearm-restoration proceeding only indirectly involved the DV offense itself and § 10a(A) rights.

If a § 10a(B) proceeding is interpreted to include civil cases that indirectly implicate victim's rights or the criminal offense, Ohio law would be transformed. For example, a misdemeanor DV conviction imposes 255 state collateral disabilities—barring family placements, employment, volunteering, licenses, and contracts. See, [www.civicc.opd.ohio.gov](http://www.civicc.opd.ohio.gov). Under the victim's present theory, she had standing to seek an extraordinary writ in all 255 instances, disrupting the work of foster agencies, employers, state agencies, licensing boards, disciplinary panels, and contracting parties. This interpretation is unreasonable and extends Marsy's Law beyond any limits. Instead, this court must hold that a § 10a(B) proceeding is a criminal case on a criminal docket operating under the criminal rules. This construction provides the intended meaning for a § 10a(B) proceeding and prevents Marsy's Law's misapplication to civil matters.

*Second*, Marsy's Law requires the victim to assert a § 10a(A) right. The victim concedes that jurisdiction and the scope of R.C. 2923.14 are not § 10a(A) rights. She argues, though, a right to challenge jurisdiction and the scope of R.C. 2923.14 because those issues are conditions precedent that lead to § 10a(A) rights. This distorts Marsy's Law by including terms that do not exist. Because jurisdiction and statutory construction are not § 10a(A) rights, the victim lacked standing to bring the prohibition case. Art. I, § 10a(B).

### **III**

#### **An error in the exercise of jurisdiction differs from a lack of jurisdiction**

Prohibition is not an error-correction device. It is instead an extraordinary writ available for a patent and unambiguous lack of jurisdiction with no adequate legal remedy. *State ex rel. Tubbs Jones, Pros. Atty. v Suster*, 84 Ohio St.3d 70, 74 (1998). The victim confuses error correction with jurisdiction throughout her brief. This point is relevant to both res judicata and

the prohibition elements. The victim seeks to avoid res judicata because she believes the trial court lacked jurisdiction to issue a final judgment restoring Ewing's firearm rights; and she believes that prohibition lies for the same reason.

A trial court had jurisdiction over a murder case and did not lose jurisdiction when it imposed an unlawful, determinate sentence. *State v. Henderson*, \_\_ Ohio St.3d \_\_, 2020-Ohio-4784, ¶34. That court erred in the exercise of its jurisdiction because an indeterminate sentence was mandated, and the State's remedy was an appeal rather than a collateral attack after final judgment. *Id.* And PUCO had jurisdiction over a rate dispute and did not lose jurisdiction when a utility claimed the imposed rate was unlawful. *Pilkington N. Am., Inc. v. Toledo Edison Co.*, 145 Ohio St.3d 125, 2015-Ohio-4797, ¶22. At best, PUCO erred in the exercise of its jurisdiction over rates. *Id.* Likewise, the trial court had jurisdiction under R.C. 2923.14(A)(1) to adjudicate Ewing's firearm petition. The victim disputes the exercise of that jurisdiction to DV offenders. But there is no question the General Assembly conferred the power to the trial court to apply the R.C. 2923.14(D) elements to decide the case. The victim repeatedly misses this distinction. Her prohibition case concerns the exercise of jurisdiction under R.C. 2923.14 to DV offenders—not the patent and unambiguous absence of jurisdiction to act under R.C. 2923.14.

#### **IV**

#### **Prohibition is unavailable where there is a debatable exercise of jurisdiction**

To make the case that R.C. 2923.14 clearly excluded DV offenders for prohibition, the victim argues the General Assembly's uncodified law reforming the restoration statute must be ignored as unsettled. But this argument conflicts with precedent. This court examined uncodified law to decide whether a bifurcation statute was procedural or substantive, finding the General Assembly's uncodified law revealed its intent. *Havel v. Villa St. Joseph*, 131 Ohio St.



235, 2012-Ohio-552, ¶29. Likewise, R.C. 2923.14 does not mention DV offenders in division (A)(2), which excludes offenses from restoration, or in division (D)(2), which directs the trial court to determine whether “[t]he applicant is not otherwise prohibited by law from acquiring, having or using firearms.” The General Assembly’s uncodified law explains its intent for federal disabilities. Thus, in § 3 of 2011 HB 54, the General Assembly expressed its aim for R.C. 2923.14 to remove “\*\*\* the uniform federal ban on possessing any firearms at all.” (Citations omitted.) This clarified that the firearm-restoration statute reached federal disabilities. And it is evidence the General Assembly intended rights restoration for DV offenders—which detracts from the victim’s argument that DV offenders are patently and unambiguously excluded from relief. This uncodified law was central to the stipulation between the prosecutor and defense attorney that Ewing’s DV offense was eligible under R.C. 2923.14.

What is more, Congress authorized states to relieve the DV firearm disability if state law removed an important civil right upon conviction and the right was later reinstated. 18 U.S.C. § 921(a)(33)(B)(ii). In Michigan, misdemeanor DV defendants are relieved from the DV firearm disability if they receive a jail term because they are ineligible to vote during incarceration, but that right is restored upon release. *United States v. Wegrzyn*, 305 F.3d 593, 595 (6<sup>th</sup> Cir. 2002). And DV defendants that receive no jail term are also relieved from the DV firearm disability because it would be unconstitutional to impose a firearm disability on a less culpable offender. *Id.* Ewing was also unable to exercise his civil rights while incarcerated, but those rights were restored upon his release; and he lost his right to conceal-carry under Ohio law with the DV conviction, but had that civil right returned when the trial court restored his firearm rights. So it is at least debatable that Ewing came within § 921(a)(33)(B)(ii)—again detracting from the victim’s argument that jurisdiction was patently and unambiguously absent.

## CONCLUSION

This court must reverse the 12<sup>th</sup> District's judgment issuing a writ of prohibition. The victim's prohibition claim was unauthorized by Marsy's Law. It was procedurally barred by res judicata. And it fails on the merits because the victim had an adequate remedy at law and the trial court had debatable jurisdiction to afford Ewing relief from his federal disability.

To the court, this reply brief is

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## CERTIFICATE OF SERVICE

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