

IN THE SUPREME COURT OF OHIO
2021

STATE OF OHIO,

Case No. 20-1392

Plaintiff-Appellant,

-vs-

On Appeal from
the Columbiana County
Court of Appeals, Seventh
Appellate District

JOHN D. YERKEY,

Court of Appeals
No. 19 CO 44

Defendant-Appellee.

**BRIEF OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS
ASSOCIATION IN SUPPORT OF APPELLANT STATE OF OHIO**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF AMICUS INTEREST	1
STATEMENT OF FACTS	2
ARGUMENT	2
Amicus Proposition of Law: The victim possesses a constitutional right to full restitution under Marsy’s Law – Article I, Section 10a, of the Ohio Constitution – including wages that are lost as a result of the victim’s attendance at court proceedings. Because Marsy’s Law is self-executing, this right exists independently of legislation and is awardable to the victim regardless of whether Ohio statutory law affords the victim the same level of restitution.	2
CONCLUSION	19
CERTIFICATE OF SERVICE	19

TABLE OF AUTHORITIES

CASES

<i>Bd. of Trustees of the Tobacco Use Prevention & Control Found. v. Boyce</i> , 127 Ohio St.3d 511, 2010-Ohio-6207	6
<i>Centerville v. Knab</i> , ___ Ohio St.3d ___, 2020-Ohio-5219.....	4, 6, 7
<i>Cincinnati v. Cincinnati Dist. Council 51</i> , 35 Ohio St.2d 197 (1973).....	8
<i>Citizens' Bank v. Parker</i> , 192 U.S. 73 (1904).....	15
<i>Hoffman v. Knollman</i> , 135 Ohio St. 170 (1939)	6
<i>People v. Garrison</i> , 495 Mich. 362, 852 N.W.2d 45 (2014)	9, 13
<i>People v. Moore</i> , 177 Cal.App.4th 1229, 99 Cal.Rptr.3d 555 (2009)	17
<i>Risner v. Ohio Dept. of Natural Resources</i> , 144 Ohio St.3d 278, 2015-Ohio-3731.....	15
<i>Robb v. Shockoe Slip Found.</i> , 228 Va. 678, 324 S.E.2d 674 (1985).....	5
<i>State ex rel. Howery v. Powers</i> , 2020-Ohio-2767, 154 N.E.3d 146 (12th Dist.).....	4
<i>State ex rel. Hunt v. Hildebrant</i> , 93 Ohio St. 1 (1915).....	5
<i>State ex rel. Ohio Roundtable v. Taft</i> , 76 Ohio St.3d 643 (1996)	6
<i>State ex rel. Vickers v. Summit Cty. Council</i> , 97 Ohio St.3d 204, 2002-Ohio-5583.....	5
<i>State ex rel. Weinberger v. Miller</i> , 87 Ohio St. 12 (1912).....	6
<i>State v. Carroll</i> , 2d Dist. No. 2015-CA-26, 2015-Ohio-4109.....	14
<i>State v. Gardner</i> , 118 Ohio St.3d 420, 2008-Ohio-2787.....	15
<i>State v. Guadagni</i> , 218 Ariz. 1, 178 P.3d 473 (App.2008)	17
<i>State v. Houser</i> , 155 Idaho 521, 314 P.3d 203 (App.2013)	17
<i>State v. Lindsley</i> , 191 Ariz. 195, 953 P.2d 1248 (App.1997)	17
<i>State v. Madrid</i> , 207 Ariz. 296, 85 P.3d 1054 (App.2004)	17

State v. Palubicki, 727 N.W.2d 662 (Minn.2007).....17

State v. Patrick, ___ Ohio St.3d ___, 2020-Ohio-68036

State v. Reed, ___ Ohio St.3d ___, 2020-Ohio-425514

State v. Strom, 2019 ND 9, 921 N.W.2d 660.....9

United States v. Gonzales, 520 U.S. 1 (1997).....15

Wachendorf v. Shaver, 149 Ohio St. 231 (1948)15

White v. Clinton Cty. Bd. of Commrs., 76 Ohio St.3d 416 (1996).....9

STATUTES

R.C. 2929.01(L)14

R.C. 2929.18(A)(1)2, 7, 18, 19

R.C. 2929.18(D).....7

RULES

Crim.R. 12(L).....12

Crim.R. 3712

CONSTITUTIONAL PROVISIONS

Article I, Section 10a, Ohio Constitution.....2

Article I, Section 10a(A), Ohio Constitution12

Article I, Section 10a(A) & (A)(1), Ohio Constitution18

Article I, Section 10a(A)(2), Ohio Constitution.....10

Article I, Section 10a(A)(3), Ohio Constitution.....11

Article I, Section 10a(A)(4), Ohio Constitution.....11

Article I, Section 10a(A)(5), Ohio Constitution.....11

Article I, Section 10a(A)(7), Ohio Constitution.....3, 4, 8, 18

Article I, Section 10a(A)(8), Ohio Constitution.....11
Article I, Section 10a(A)(9), Ohio Constitution.....11
Article I, Section 10a(B), Ohio Constitution12
Article I, Section 10a(D), Ohio Constitution8
Article I, Section 10a(E), Ohio Constitution.....4, 19

STATEMENT OF AMICUS INTEREST

Founded in 1937, the Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit trade organization that supports the state's 88 elected county prosecutors. Its mission is to assist county prosecuting attorneys to pursue truth and justice as well as promote public safety. OPAA advocates for public policies that strengthen prosecuting attorneys' ability to secure justice for crime victims and serve as legal counsel to county and township authorities. Further, OPAA sponsors continuing legal education programs and facilitates access to best practices in law enforcement and community safety.

In light of these considerations, OPAA has a strong interest in the effective prosecution of felonies and the enforcement of full restitution for victims under Marsy's Law and under Ohio statutory law for the lost wages they suffer in attending proceedings in the prosecution that was necessitated by the defendant's criminal acts. Victims are integral to criminal prosecutions, and their attendance at court proceedings is a central feature of Marsy's Law. Such attendance should be strongly encouraged as a general matter and strongly enforced as a matter of constitutional law. Such enforcement would include recognizing that the victim should receive restitution for their lost wages in attending such proceedings.

Accordingly, in the interest of aiding this Court's review herein, amicus curiae OPAA offers the present amicus brief in support of appellant State of Ohio's effort to overturn the Seventh District's decision.

STATEMENT OF FACTS

Amicus OPAA adopts by reference the procedural and factual history as set forth in the State's brief and in paragraphs two through fourteen of the Seventh District's opinion.

ARGUMENT

Amicus Proposition of Law: The victim possesses a constitutional right to full restitution under Marsy's Law – Article I, Section 10a, of the Ohio Constitution – including wages that are lost as a result of the victim's attendance at court proceedings. Because Marsy's Law is self-executing, this right exists independently of legislation and is awardable to the victim regardless of whether Ohio statutory law affords the victim the same level of restitution.

The basic flaw in the Seventh District's analysis arises from its reliance on statutory language to seek to limit the victim's constitutional right to full and timely restitution under Marsy's Law. Using a statutory provision to limit a constitutional provision defies the normal relationship between constitutional law and statutory law, under which the constitutional provision should be paramount.

R.C. 2929.18(A)(1) authorizes the sentencing court to impose restitution. But, *in addition*, Marsy's Law itself creates an enforceable free-standing mandatory right for the victim to have "full and timely restitution", without regard to whether statutory law also authorizes it.

A.

Marsy's Law represents a sea-change in Ohio law governing victim rights. As this Court has recognized, Marsy's Law creates a panoply of self-executing constitutional rights, including a right to have full and timely restitution, which shall be enforced with

the same vigor as a defendant's constitutional rights.

{¶12} Known as Marsy's Law, the provision arose from a national victims'-rights movement. The website for the movement explains that it was started by an individual whose sister, Marsy, was killed by her ex-boyfriend. [citation omitted] Marsy's mother encountered the killer on the way home from Marsy's funeral service after he had been released on bail. The family was not notified of the ex-boyfriend's release because no law required that the court or law enforcement keep Marsy's family informed. The movement seeks to give crime victims constitutional rights that are equal to the rights of individuals accused of committing crimes.

* * *

{¶14} Before Marsy's Law was adopted in Ohio, Article I, Section 10a of the Ohio Constitution established some general rights for crime victims. But it gave the General Assembly primary authority to define and provide those rights. Former Article 1, Section 10a of the Ohio Constitution (effective Nov. 8, 1994).

{¶15} When the Marsy's Law initiative was placed on the 2017 general-election ballot, the language informed voters that the proposed amendment would expand the rights of victims and require that those rights be protected as vigorously as the rights of the accused. It indicated that the purpose of the amendment was to ensure "due process, respect, fairness, and justice for crime victims and their families." * * *

{¶16} As adopted, Marsy's Law states that its express purpose is to secure justice and due process for victims and provide rights to victims that must be protected with the same vigor as an accused's rights. Article I, Section 10a(A), Ohio Constitution. It provides rights that mirror those outlined in the amendment's ballot language. At issue here, the provision gives a victim the right "to full and timely restitution from the person who committed the criminal offense or delinquent act against the victim." Article I, Section 10a(A)(7).

{¶17} Marsy's Law defines a victim as "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.” Article I, Section 10a(D). It excludes from the definition any “person whom the court finds would not act in the best interest of a deceased, incompetent, minor, or incapacitated victim.” *Id.* It does not define “person” or specify the type of harm that qualifies for restitution.

{¶18} Marsy’s Law also does not provide a procedural mechanism for ordering restitution. It merely states that a victim may assert his or her constitutional rights in any proceeding involving the underlying criminal act. Article I, Section 10a(B). The provisions of the amendment are self-executing and “supersede all conflicting state laws.” Article I, Section 10a(E).

Centerville v. Knab, ___ Ohio St.3d ___, 2020-Ohio-5219, ¶ 12-18. “Marsy’s Law focuses on private rights” for victims. *Id.* ¶ 27.

“Under the new provisions in Marsy’s Law, there [is] a clear legal duty to provide for full and timely restitution.” *State ex rel. Howery v. Powers*, 2020-Ohio-2767, 154 N.E.3d 146, ¶ 12 (12th Dist.).

B.

The prior version of Section 10a provided that victim’s rights would exist “as the general assembly shall define and provide by law”. Marsy’s Law expressly changed that approach by deleting the “provide by law” language and by insisting that the victim’s rights under Marsy’s Law “shall be self-executing”. Section 10a(E). Instead of being dependent on legislative adoption, Marsy’s Law rights exist as enforceable constitutional rights *without* any legislative action. And among the self-executing rights under Marsy’s Law is the right “to full and timely restitution from the person who committed the criminal offense or delinquent act against the victim”. Section 10a(A)(7).

The self-executing nature of Marsy’s Law is significant. “[T]he Constitution

expressly provides that this provision shall be self-executing in all cases * * *.” *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 11 (1915). “A constitutional provision is self-executing when it expressly so declares.” *Robb v. Shockoe Slip Found.*, 228 Va. 678, 324 S.E.2d 674, 676 (1985). There is “no authority to declare that a constitutional provision is not self-executing, when the constitution expressly provides that it is self-executing.” *Hunt*, paragraph two of the syllabus. By definition, the term “self-executing” means that the constitutional provision is effective immediately as a “self-executing constitutional grant [that] exists without the aid of legislation”. *State ex rel. Vickers v. Summit Cty. Council*, 97 Ohio St.3d 204, 2002-Ohio-5583, ¶ 31.

Although the right to full and timely restitution would not be dependent on legislative action or approval, the Seventh District sought to limit the Marsy’s Law right by reference to statutory law. The Seventh District contended that “the rights provided under Marsy’s Law do not exist in a vacuum and still must be construed within the valid and unchanged statutory framework for restitution set forth by the General Assembly.” Decision, ¶ 26.

There was no legal basis to “construe[.]” Marsy’s Law “within” the statutory framework. Again, a key feature of Marsy’s Law was to create enforceable constitutional rights that were *not* dependent on legislative action or approval; the former language in Section 10a creating such dependency had been stricken out as part of the constitutional amendment process. Under the Seventh District’s approach, however, the Marsy’s Law right to full restitution is subordinated and unenforceable unless the General Assembly approved of such restitution in such legislation.

It is basic hornbook law that “the written constitution of the state is the paramount

law” and is “the supreme law written by the supreme power of the state, the people themselves.” *State ex rel. Weinberger v. Miller*, 87 Ohio St. 12, 26-27 (1912). “[I]t is the duty of the court to sustain the paramount law and refuse to enforce any and all legislation in contravention thereof.” *Id.* “[S]ubordinate authority must always yield to contrary paramount authority, i.e. the Ohio Constitution”. *State ex rel. Ohio Roundtable v. Taft*, 76 Ohio St.3d 643, 644 (1996). “[T]he Constitution is * * * subject to amendment only by the people, and neither the Legislature by legislative enactment, nor the courts by judicial interpretation, can repeal or modify such expression * * *.” *Hoffman v. Knollman*, 135 Ohio St. 170, 181 (1939).

To be sure, Marsy’s Law does not exist in a “vacuum”. But it still exists at the very top of the state-law legal hierarchy and would not be subordinated to a mere statute. While “we presume that the voters who approved it were aware of existing Ohio law” when they approved Marsy’s Law, see *Knab*, ¶ 28, the voters also would have understood that Marsy’s Law was creating rights of constitutional dimension that would control over mere statutes.

Nor would there be any requirement to read the statutory provision to be the exclusive means by which a victim would be able to obtain restitution. The statute does not indicate that it would be an exclusive restitution mechanism to the exclusion of later-enacted mechanisms, nor could it do so. *Bd. of Trustees of the Tobacco Use Prevention & Control Found. v. Boyce*, 127 Ohio St.3d 511, 2010-Ohio-6207, ¶ 16. In fact, the statute merely indicates that restitution is a sanction that a court “may” impose “under this section”, see R.C. 2929.18(A), and such language would not preclude other avenues of relief. See *State v. Patrick*, ___ Ohio St.3d ___, 2020-Ohio-6803, ¶ 17 (“under this

section” language “makes clear that it does not preclude other potential avenues of appellate review”).

Other language confirms that R.C. 2929.18(A)(1) should not be construed to be the exclusive restitution remedy for victims for financial loss. The statute specifies that the victim still has the ability to pursue a civil action, see R.C. 2929.18(A)(1), and further specifies that “[i]mposition of a financial sanction and execution on the judgment *does not preclude any other power of the court* to impose or enforce sanctions on the offender.” R.C. 2929.18(D) (emphasis added). “[A]ny other power of the court” would include the court’s constitutional power to impose full restitution under Megan’s Law.

As a general matter, the creation of one remedy does not preclude the creation of others later. This view is especially appropriate when the later provision is a constitutional amendment meant to *expand* rights and remedies for victims.

The free-standing and self-executing nature of Marsy’s Law rights is confirmed by this Court in *Knab*. This Court concluded under Marsy’s Law that the voters did not intend to include a municipal corporation within the scope of “victim”. This Court then further emphasized that “[o]ur decision today does not foreclose, and we expressly decline to address, the possibility that a municipality may receive restitution under other provisions of Ohio law.” *Knab*, ¶ 31. Whether restitution was available under other laws was not controlling of the reach of Marsy’s Law in *Knab*, and, likewise, the question of whether other laws might be applied to allow restitution would be judged under their own terms.

The Seventh District contended that restitution for lost wages could not satisfy the statutory definition of “economic loss” because such lost wages would not be “a direct

and proximate result of the commission of an offense”. Decision, ¶ 26. But, even if true, that conclusion would not control the availability of restitution as a matter of constitutional law. Marsy’s Law created a self-executing right “to full and timely restitution from the person who committed the criminal offense * * * against the victim”. Section 10a(A)(7). This language does not impose a “direct and proximate” requirement.

Other language in Marsy’s Law confirms that full restitution under Marsy’s Law would not be dependent on showing a “direct and proximate” connection. In defining “victim”, Marsy’s Law recognizes that there are two groups of victims: first, “a person against whom the criminal offense * * * is committed”, and, second, a person “who is directly and proximately harmed by the commission of the offense”. Section 10a(D). In using “direct[] and proximate[]” as to one group of victims, but not as to the first group of victims, and in *not* using “direct and proximate” language as to the right to full and timely restitution, Marsy’s Law was plainly signaling that “direct and proximate” should not be a controlling restitution standard.

The Seventh District’s incorporation of a “direct and proximate” standard from a mere statute cannot be justified as part of “constru[ing]” Marsy’s Law.

C.

The phrase “full and timely restitution” readily reaches lost wages owing to the victim’s attendance at court proceedings. “While at common law restitution denoted return of a specific thing or condition, modern usage of that term includes restoration to its rightful owner and also compensation for loss or injury caused to another.” *Cincinnati v. Cincinnati Dist. Council 51*, 35 Ohio St.2d 197, 208 (1973). Lost wages fit within this broad concept of restitution as compensation for loss caused by the offender. The victim

would have had no reason to miss work to attend hearings in the criminal case but for the defendant's commission of the crimes.

It is also clear that the word "full" establishes the broadest possible reach for the restitution to be ordered under Marsy's Law. "Full" is defined as "containing all that can possibly be placed or put within" and as "containing all details: complete." *White v. Clinton Cty. Bd. of Commrs.*, 76 Ohio St.3d 416, 422 (1996). "The plain meaning of 'restitution' is an amount calculated to make the victim whole. The addition of the modifier 'full . . . restitution' underscores the point that the amount must make the victim whole by restoring the victim to his position prior to the offense. To award less than the amount required to make the victim whole would not be 'full' restitution." *State v. Strom*, 2019 ND 9, 921 N.W.2d 660, ¶ 7 (citations omitted).

For example, in the context of a statute requiring "full restitution," "the plain meaning of the word 'full' is 'complete; entire; maximum[.]'" *People v. Garrison*, 495 Mich. 362, 368, 852 N.W.2d 45 (2014). The word "full" in such a statute therefore "impose[s] a duty on sentencing courts to order defendants to pay restitution that is maximal and complete." *Id.* "[O]rder[ing] defendants to pay complete, entire, and maximum restitution effectuates this goal of fair compensation." *Id.* A "full restitution" requirement effectuates a "broad restitution mandate for victims, declaring that courts must order defendants to pay them full restitution, i.e., restitution that is complete and maximal." *Id.* at 372.

The Seventh District contended that lost wages should not be awarded because such losses "arise solely from the prosecution of the offense, and not from its commission." Decision, ¶ 26. But, again, the court was improperly burdening the

Marsy's Law right to full restitution with a would-be statutory distinction between "prosecution" and "commission". Marsy's Law allows the victim to receive full restitution "from the person who committed the offense". On its face, this self-executing restitution provision broadly allows recovery *against the offender* without regard to whether the losses were narrowly traceable to the commission of the offense or whether the losses were traceable to the prosecution of the offense as well.

D.

This Court should reject any suggestion that the victim's appearances at court proceedings are somehow not traceable to the offense because the victim's appearance is "voluntary". "Voluntary" or not, such appearances are still traceable to the crime(s) committed by the offender, without which there would have been no reason at all for the victim to come to court. The victim's attendance is a readily foreseeable result of the crime(s) the offender committed.

Any claim of "voluntary" attendance also misunderstands the reach and scope of Marsy's Law. Marsy's Law makes it clear that the victim is not a mere bystander to criminal justice in Ohio. Marsy's Law creates an interconnected system of rights tied to the victim being in a position to enforce his or her rights, all of which presuppose a victim who would attend the proceedings and be alert to seeking the protection of his or her rights.

The presence of the victim is a central feature of the Marsy's Law system of constitutional rights. The victim has a right to reasonable and timely notice of public proceedings upon request, *and* the right "to be present at all such proceedings". Section 10a(A)(2). By having notice and by being present, the victim can follow the proceedings

first-hand in real time. The victim can also request the right to confer with the prosecutor when time allows during breaks in those proceedings. Section 10a(A)(9).

Equally so, by being in attendance, the victim would be in a position to enforce the victim's right to be heard, which is another of the Marsy's Law group of rights. The victim has a right "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." Section 10a(A)(3).

The victim also has a right "to proceedings free from unreasonable delay and a prompt conclusion of the case". Section 10a(A)(8). By attending, the victim would be in a position to be heard if a continuance is being discussed and the victim believes that the delay would be unreasonable.

It should also be noted that hearings in criminal cases are fluid and dynamic and can quickly change in scope. For example, a hearing on a motion to suppress can become a bail-release hearing if the defense makes an oral motion for a change in bond. The victim has a right to be heard on any release decision, see Section 10a(A)(3), the right to reasonable protection from the defendant, see Section 10a(A)(4), and the right to reasonable notice of any release. Section 10a(A)(5). By attending, the victim can be heard on these important matters whenever they might come up.

Pretrial hearings can also implicate the victim's other statutory or constitutional rights. The defense might be seeking the discovery of the victim's privileged medical records, or might be seeking "inspection" of the victim's property or residence. Attending such proceedings gives the victim the opportunity to be heard on these matters and to seek to protect the victim from invasive discovery.

Attendance ensures knowledge, and knowledge empowers the victim to make decisions. Marsy's Law creates constitutional rights *and* creates a mechanism by which the victim can seek the enforcement of those rights. Section 10a(B) provides, as follows:

(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.

Attending the proceedings puts the victim in a position, *then and there*, to assert the victim's rights or to request that the prosecutor, *then and there*, assert those rights for the victim.

The Marsy's Law enforcement tool assumes a victim who is fully informed and who can pivot to asserting the victim's rights as soon as possible, including making in-person requests to the prosecutor and to the court as appropriate, none of which would be possible if the victim were not in attendance. Notably, the Criminal Rules recognize the victim's ability to assert rights and to seek relief, including through motion practice. Crim.R. 12(L); Crim.R. 37.

The victim's Marsy's Law rights, including the right to attend, "shall be protected in a manner no less vigorous than the rights afforded to the accused". Section 10a(A). In addition, the Marsy's Law right to attend and right to receive full restitution are both designed "[t]o secure for victims justice and due process throughout the criminal and juvenile justice systems". *Id.*

The right to full restitution under Marsy’s Law does not exist in a vacuum. It exists within a system of rights, including the right to notice, the right to attend, the right to be heard, and the right to enforce rights, all of which are designed to ensure that the victim is fully informed about the proceedings. Given the integral nature of the victim’s attendance, the right to full restitution readily extends to authorize restitution for lost wages owing to such attendance.

E.

Even if the awarding of full restitution under Marsy’s Law were saddled with the “direct and proximate” standard created by mere statute, the “direct” and “proximate” requirements would be satisfied.

There is little doubt that the “proximate” standard would be met. The Seventh District conceded as much by contending that the lost wages were losses that arose from the prosecution of the offenses. Decision, ¶ 26. When a person commits offenses, it is readily foreseeable that the victim will attend the prosecution of those offenses on the various date(s). Attending court hearings would be “a natural consequence of defendant’s criminal activity” and would be a “direct result” of that activity, all of which is in keeping with a duty to provide full restitution. *Garrison*, 495 Mich. at 373-74. It is plain that there is a proximate relationship between the offenses, and the resulting prosecution, and the resulting inconvenience and loss of wages for the victim.

Even so, the Seventh District apparently concluded that the lost wages would not be a “direct” result of the commission of offenses. The word “direct” is not defined in the statutory definition of “economic loss”, but it is clear that the mere existence of volition on the part of the victim or the victim’s family should not remove an economic

detriment from being “direct”.

Statutory law currently defines “economic loss” in a way that does not exclude “voluntary” choices from possible restitution. “Economic loss” 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 any injury caused to the victim, any property loss, medical cost, or funeral expense incurred as a result of the commission of the offense, and the cost of any accounting or auditing done to determine the extent of loss if the cost is incurred and payable by the victim. “Economic loss” does not include non-economic loss or any punitive or exemplary damages.

R.C. 2929.01(L). While this definition includes a list of examples of allowable items of “economic loss”, the list is illustrative and not exhaustive. See *State v. Reed*, ___ Ohio St.3d ___, 2020-Ohio-4255, ¶ 15. “[D]etermining whether something is an economic loss pursuant to R.C. 2929.01(L) does not depend on whether it falls into one of the categories after the conjunction, but rather, is dependent on whether the loss is an economic detriment suffered by the victim that is the proximate result of the offense at issue.” *State v. Carroll*, 2d Dist. No. 2015-CA-26, 2015-Ohio-4109, ¶ 12. While the list is not exhaustive, it is nevertheless informative as to what is meant by the general terms of the definition. *Reed*, ¶ 15.

Without limiting what could qualify as “any economic detriment”, the definition currently mentions at least two items in its illustrative list that are volitional. Most significantly, the holding of a funeral and other expenses related thereto is often a matter of personal preference. But this statutory language *as a matter of law* defines “any * * * funeral expense” as being within the general concept of being a “direct” expense.

The same could be said of “any * * * medical cost” owing to the commission of the offense. Whether to undergo a medical procedure can be a highly-personal decision, but this definition – without any second-guessing of the victim’s choice – includes such costs within the general concept of being a “direct” expense.

Also, effective October 2, 2020, the definition was specifically amended to include within the concept of “direct” the incurrence of “any” expense related to auditing or accounting to determine the extent of the loss. The scope of any such auditing or accounting, and the relative expense of using one accountant as opposed to another, would often reflect the personal preferences of the victim. But the definition of “economic loss” places those expenses within the general concept of being a “direct” result of the commission of the offense.

The repeated use of the word “any” in the definition of “economic loss” casts a wide net. “Any” means “all”, i.e., “without limitation”. *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *Wachendorf v. Shaver*, 149 Ohio St. 231, 239-40 (1948). “The word *any* excludes selection or distinction.” *Citizens’ Bank v. Parker*, 192 U.S. 73, 81 (1904).

In *Risner v. Ohio Dept. of Natural Resources*, 144 Ohio St.3d 278, 2015-Ohio-3731, ¶ 18, this Court addressed the statutory phrase “any other section of the Revised Code” and emphasized that the word “[a]ny” means “all” and that such “broad, sweeping language” must be accorded “broad sweeping application.”

In *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, ¶ 33, this Court addressed the phrase “any criminal offense” and recognized that, “Given the General Assembly’s use of the term ‘any’ in the phrase ‘any criminal offense,’ we presume that it intended to encompass ‘every’ and ‘all’ criminal offenses recognized by Ohio.”

The victim's decision to attend court proceedings is no less "direct" in relation to the offense than the victim's choices in terms of medical care and funeral expense. The decision to attend the proceedings is just as "direct" as the victim's decision whether to pursue a more-costly medical approach rather than pursuing a more-conservative approach. The decision to attend is just as "direct" as the decision of the victim's family to choose a costlier funeral option rather than a basic option or rather than choosing to have no funeral at all.

As Arizona courts have recognized, attendance at court proceedings is a "direct" result of the commission of the offense:

The fact that the victim was in court at all was a direct result of defendant's crime. She did not "choose" to attend the hearings as a disinterested bystander might, but because she was the victim of defendant's actions and, thus, unavoidably entwined in the criminal proceedings. But for defendant's criminal actions, the victim certainly would not have been present at the proceedings. It is a direct result of a crime that the victim attends the hearings and thus suffers wage loss. We believe it makes no difference whether the victim attended pursuant to subpoena or not.

To deny a victim the right to reimbursement for wages lost in attending court proceedings which he or she may attend by right would be tantamount in some instances to denying that individual the opportunity to exercise that right. Pursuant to the Victim's Bill of Rights, a victim has the right "to be present at . . . all criminal proceedings where the defendant has the right to be present." Ariz. Const. art. II, § 2.1(A)(3); Ariz. R. Crim. P. 39. "All criminal proceedings at which the defendant has the right to be present" means precisely that and includes both proceedings at which a victim's attendance is required by court mandate and those which the victim "chooses" to attend.

The victim's lost wages in attending court proceedings in this case were a direct result of defendant's actions. We affirm the trial court's order requiring defendant to reimburse the victim in the amount of \$ 140 for wages lost because of attendance at court hearings.

State v. Lindsley, 191 Ariz. 195, 199, 953 P.2d 1248 (App.1997); *State v. Madrid*, 207 Ariz. 296, 299, 85 P.3d 1054 (App.2004) (following *Lindsley*); *State v. Guadagni*, 218 Ariz. 1, 6, 178 P.3d 473 (App.2008) (citing *Lindsley* and *Madrid* – “Wages lost due to voluntary attendance at trial are recoverable, as are a victim's travel expenses”).

Other states agree that a victim's lost income from attending proceedings is directly related to the crime(s). “[T]he victim's attendance at the pretrial and trial proceedings, and the costs associated with that attendance, were a direct result of defendant's criminal behavior. That the victim's attendance was not mandated by statute, that he was not required to address the court at those hearings, and that he chose to attend the proceedings of his own volition, do not relieve defendant from the responsibility to compensate him for the loss attributable to defendant's criminal conduct.” *People v. Moore*, 177 Cal.App.4th 1229, 1233, 99 Cal.Rptr.3d 555 (2009); *State v. Palubicki*, 727 N.W.2d 662, 667 (Minn.2007). The victim's choice to attend is not an intervening, superseding cause that severs the causal link between the criminal behavior and the victim's loss of wages from attending. *State v. Houser*, 155 Idaho 521, 528, 314 P.3d 203 (App.2013).

The availability of restitution under the statutory definition or under Marsy's Law should not turn on the defendant's second-guessing of the victim's choices in regard to attending proceedings. The defendant's commission of the offense(s) is what

necessitated the proceedings, and the victim's attendance at such proceedings is highly foreseeable. While a defendant might hope that the victim might be indifferent to the prosecution, a defendant certainly has no right to expect that the victim will be indifferent.

"Full and timely restitution" under Marsy's Law should not be governed by an "indifferent victim" baseline that would treat anything above the level of indifference as some sort of extravagance on the victim's part. The opposite should be true, as the victim's attendance at court proceedings should be highly expected under the system of interconnected rights created by Marsy's Law and as part of the broad goals under Marsy's Law "[t]o secure for victims justice and due process" and to treat victims "with fairness and respect for the victim's safety, dignity, and privacy". Section 10a(A) & (A)(1).

F.

In light of the foregoing, this Court would not be faced with a "conflict" between Marsy's Law and R.C. 2929.18(A)(1). Whether or not restitution can be awarded under R.C. 2929.18(A)(1), the statute does not purport to limit the availability of restitution under the full-and-timely-restitution provision under Section 10a(A)(7) of Marsy's Law, and the latter constitutional provision is an additional remedy in relation to whatever is afforded by the statute. Moreover, because restitution for lost wages for attending court would qualify under the "direct and proximate result" standard of the statute, there would be no conflict in that regard either, as both the statute and Section 10a(A)(7) would allow restitution in this instance.

In the absence of a conflict, there is no need to reach the question of whether

Marsy's Law invalidates R.C. 2929.18(A)(1).

But if this Court would conclude that the statute sets forth the exclusive means by which restitution can be awarded, and if this Court would further conclude that the statute purports to limit the ability to award full and timely restitution under Marsy's Law, then a conflict would exist. And, as Marsy's Law itself provides, Section 10a "shall supersede all conflicting state laws." Section 10a(E). The conflicting statute would give way to the paramount constitutional law requiring full and timely restitution.

CONCLUSION

For the foregoing reasons, amicus curiae OPAA urges that this Court reverse the judgment of the Seventh District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was e-mailed on April 6, 2021, to the following counsel of record: Tammie Riley Jones, Assistant Prosecuting Attorney, Columbiana County Courthouse, 105 South Market Street, Lisbon, Ohio 44432, tjones@columbianacountyprosecutor.oh.gov, counsel for plaintiff-appellant; Gregg A. Rossi, Rossi & Rossi Co., 26 Market Street, 8th Floor, P.O. Box 6045, Youngstown, Ohio 44501, garossi@ameritech.net, counsel for defendant-appellee.

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