

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2020-1392
Appellant,	:	
v.	:	On Appeal from the Columbiana County Court of Appeals Seventh Appellate District
JOHN D. YERKEY,	:	
Appellee.	:	Court of Appeals Case No. 19 CO 44

**MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN
SUPPORT OF APPELLEE JOHN D. YERKEY**

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TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	1
STATEMENT OF INTEREST OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER	1
ARGUMENT	2
PROPOSITION OF LAW OF AMICUS CURIAE:	
Because Marsy’s Law did not change the definition of “restitution,” defendants in criminal trials may not be required to pay the lost wages of accusers who attend trial-court proceedings	2
CONCLUSION	5
CERTIFICATE OF SERVICE	6

TABLE OF AUTHORITIES

Page No.

CASES:

Castleberry v. Evatt, 147 Ohio St. 30, 67 N.E.2d 861 (1946)2

City of Centerville v. Knab, Slip Opinion No. 2020-Ohio-52192,3

Niz-Chavez v. Garland, ___ S.Ct. ___, 2021 WL 1676619.....3

State v. Aguirre, 144 Ohio St.3d 179, 2014-Ohio-4603, 41 N.E.3d 11783

State v. Christian, 2d Dist. Montgomery No. 25256, 2014-Ohio-2672.....4

State v. Rahab, 150 Ohio St.3d 152, 80 N.E.3d 431, 2017-Ohio-14014

Wisconsin Central Ltd. v. United States, 585 U. S. ___, ___, 138 S.Ct. 2067, ___,
201 L.Ed.2d 490 (2018)3

CONSTITUTIONAL PROVISION:

Article I, Section 10, Ohio Constitution1,2,3,4

STATUTE:

R.C. 2929.183

STATEMENT OF THE CASE AND FACTS

For purposes of this brief, amicus curiae does not oppose the statements of the case and facts set forth by the parties in their respective briefs.

STATEMENT OF INTEREST OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender (OPD) is a state agency that represents indigent criminal defendants and coordinates criminal-defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. A primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect and defend the rights of indigent persons by providing and supporting superior representation in the criminal and juvenile justice systems.

As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle criminal cases in Ohio courts. This work includes representation at both the trial and appellate levels. The OPD has an interest in the present case because it involves a significant issue of first impression in this Court. As amicus curiae, OPD urges this Court to establish that Article I, Section 10a, of the Ohio Constitution does not alter the definition of restitution, as part of a criminal punishment, so as to include the lost wages of accusers who attend trial-court proceedings.

ARGUMENT

PROPOSITION OF LAW OF AMICUS CURIAE:

Because Marsy’s Law did not change the definition of “restitution,” defendants in criminal trials may not be required to pay the lost wages of accusers who attend trial-court proceedings.

Restitution in a criminal prosecution in Ohio has never been deemed by this Court to include the lost wages of accusers who attend trial proceedings. Thus, if Marsy’s Law, the constitutional amendment that was adopted in 2017 as Article I, Section 10a, of the Ohio Constitution, was intended to redefine “restitution” to significantly alter decades upon decades of how that aspect of criminal punishment is viewed in this state, then the language in that amendment would have explicitly done so. But it did not. And there are no convincing arguments made by the State or its amici that compel this Court to conclude that Marsy’s Law somehow implicitly redefined restitution. The Office of the Office Public Defender, therefore, contends that the prior practice in this state—excluding from restitution the lost wages of accusers who attend criminal trial-court proceedings—should and must be continued after the passage of Article I, Section 10a, of the Ohio Constitution.

This Court recently had occasion to construe Article I, Section 10a, in *City of Centerville v. Knab*, Slip Opinion No. 2020-Ohio-5219, and that case provides significant guidance regarding how, in general, to interpret the language of a constitutional provision brought into existence by a ballot measure. In *Knab* it was observed that “[i]n construing constitutional text that was ratified by direct vote, we consider how the language would have been understood by the voters who adopted the amendment.” *Knab* at ¶ 22, citing *Castleberry v. Evatt*, 147 Ohio St. 30, 33, 67 N.E.2d 861 (1946). Further,

[t]he court generally applies the same rules when construing the Constitution as it does when it construes a statutory provision, beginning with the plain language of the text, *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, 811 N.E.2d 68, ¶ 14, and considering how the words and phrases would be understood by the voters in their normal and ordinary usage, *District of Columbia v. Heller*, 554 U.S. 570, 576-577, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).

Knab at ¶ 22. And this Court’s approach parallels that of the Supreme Court of the United States, which very recently noted that it takes a similar common-sense approach when analyzing a federal statute: “[w]hen called on to resolve a dispute over a statute’s meaning, this Court normally seeks to afford the law’s terms their ordinary meaning at the time Congress adopted them.” *Niz-Chavez v. Garland*, ___ S.Ct. ___, 2021 WL 1676619, *4, citing *Wisconsin Central Ltd. v. United States*, 585 U. S. ___, ___, 138 S.Ct. 2067, ___, 201 L.Ed.2d 490 (2018).

“Restitution” has traditionally and statutorily been defined in Ohio to address economic loss incurred by a victim due to a criminal offense. *See* R.C. 2929.18(A)(1). What this traditional definition does not include is indirect costs incurred by an accuser simply because a defendant has elected to pursue pretrial motion practice and/or exercise his or her constitutional right to a trial by jury. And the text of the ballot for Marsy’s Law, as quoted in *Knab*, in no way suggests that the voters were presented with language intended to change the definition of “restitution” in Ohio: “The ballot language then listed the rights the proposed amendment would provide to victims: * * * the right to restitution.” *Knab* at ¶ 15. There is simply no basis to conclude that the traditional definition of restitution was meant to be altered by the constitutional amendment that became Article I, Section 10a, of the Ohio Constitution.

And the fact that Ohio has historically *not* extended restitution to cover lost wages of accusers who attend criminal trial-court proceedings is not merely incidental or somehow due to an oversight. That is because restitution is part of a convicted defendant’s criminal punishment. *See, e.g., State v. Aguirre*, 144 Ohio St.3d 179, 2014-Ohio-4603, 41 N.E.3d 1178, ¶ 23 (restitution

is “rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a *criminal sanction* intended for that purpose.”) (Emphasis added.) And it is axiomatic that no defendant should ever have to incur a punishment for exercising constitutional rights to defend him- or herself against felony charges.

Further, although the informal term “trial tax” is commonly understood to involve a harsher prison sentence being imposed on a defendant because they did not plead guilty, *see State v. Rahab*, 150 Ohio St.3d 152, 80 N.E.3d 431, 2017-Ohio-1401, ¶ 1, the approach urged by the State and its amici would be a literal trial tax in future cases where defendants elect to go to trial: money that a defendant must pay, *as a part of his or her punishment*, for the mere exercise of his or her constitutional rights. Although it is understandable that accusers would wish to be compensated for attending trial proceedings, that wish simply must yield to the fundamental constitutional principle that an accused cannot be punished for simply choosing not to plead guilty. *See Rahab* at ¶ 8 (“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort * * *.”)

To the extent that victims’ rights advocates seek to have restitution redefined to include lost wages associated with attendance at court proceedings, they may pursue that goal in the General Assembly. Courts often note that government entities and other stakeholders—which are unsuccessful in their litigation for expanded criminal punishments—may look to the General Assembly for enhanced criminal punishments. *See, e.g., State v. Christian*, 2d Dist. Montgomery No. 25256, 2014-Ohio-2672, ¶ 128. To be sure, the Ohio Public Defender and other entities would strenuously oppose such efforts on the constitutional due-process and right-to-trial grounds set forth above; but if restitution is to be redefined at all, it must be done explicitly, either legislatively or by further constitutional amendment.

CONCLUSION

Because the 2017 amendment to the Ohio Constitution did not redefine “restitution,” and because increasing a defendant’s punishment for exercising his or her due-process and/or right-to-trial rights violates fundamental constitutional principles, Amicus Curiae Office of the Ohio Public Defender respectfully urges this Court to affirm the Seventh District Court of Appeals and hold that restitution does not encompass lost wages associated with trial-court attendance by accusers. Such a holding is consistent both with longstanding practice in this state and the ordinary meaning of the language used on the Marsy’s Law ballot and in Article I, Section 10a, of the Ohio Constitution, and—as is critically important—ensures compliance with the United States Constitution, as well.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was forwarded by e-mail to Tammy Riley Jones, Counsel of Record for Appellant, at tjones@columbianacountyprosecutor.oh.gov; Gregg A. Rossi, Counsel for Appellee, at garossi@ameritech.net; Steven L. Taylor, Counsel for Amicus Curiae OPAA, at taylor@ohiopa.org; and Christopher Woeste, Counsel for Amici Curiae NCVLI, et al., at cwoeste@ocvjc.org, on this 7th day of May, 2021.

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