

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO,**

**CASE NO. 2021-1060**

**Plaintiff-Appellant,**

**D.H.,**

**Intervenor-Appellant**

**v.**

**On Appeal from the Butler County  
Court of Appeals, Twelfth  
Appellate District**

**KYLE BRASHER,**

**Court of Appeals  
Case No. 2020-08-094**

**Defendant-Appellee.**

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**MERIT BRIEF OF APPELLANT STATE OF OHIO**

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## INTRODUCTION

The Ohio legislature, and the people of the State of Ohio, have clearly spoken as to the recognition and protection of, as well as the enforcement of, victims' rights. R.C. Chapter 2930, Marsy's Law.

The law, court rules and now the Ohio Constitution aspire to protect and enforce victims' rights but only have succeeded in ostensibly providing victims a remedy, yet without any effective means to obtain it.

In the present case D.H. had her car stolen and effectively destroyed by Kyle Brasher in 2017. Though she tendered documentation to the trial court supporting her claim of "economic loss" no restitution was ordered, and Brasher was sentenced to prison. D.H. availed herself of the provisions of Marsy's Law; she sought and received a writ of mandamus in the Twelfth District Court of Appeals ordering the trial court to reopen sentencing in Brasher's felony case "... to allow relator to enforce her constitutional right of restitution." *State ex rel. Howery v. Powers*, 12th Dist. Butler CA2019-03-045, 2020-Ohio-2767, ¶ 20.

The trial court complied, and after months of delay (none occasioned by D.H.) the trial court conducted a hearing and on August 18, 2020 issued its decision and supplemental sentencing entry ordering Brasher to pay D.H. \$1,976.55 in restitution.

Brasher timely appealed. As discussed more fully *infra*, the Twelfth District concluded that 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 and the trial court's supplemental sentencing entry was void. *State v. Brasher*, 12th Dist. Butler No. CA2020-08-094, 2021-Ohio-1688, ¶ 22.

The interest of the public in the rights of victims, and enforcement of those rights, cannot be overstated. Ohio, in one form or another, has sought protection of victims and enforcement of their rights for decades, with Chapter 2930 of the Revised Code devoted to “Victim’s Rights”. R.C. 2929.11(A) explicitly requires a sentencing court to be guided by the overriding purposes of felony sentencing, and to consider the need for the offender to make restitution.

In 1994 Ohio elevated victims’ rights to a constitutional level, requiring, as Article I (Bill of Rights) Section 10a, that victims “\* \* \* be accorded fairness, dignity and respect in the criminal justice process” and be accorded rights to notice, information, access and protection as provided by the legislature, as well as “a meaningful role in the criminal justice process”. *Id.*

This constitutional provision was supplanted by Marsy’s Law, effective February 5, 2018. Described more fully infra, and as is particularly relevant herein, the amendment provided ten enumerated victim’s rights, “which shall be protected in a manner no less vigorous than the rights afforded to the accused” including the right “to full and timely restitution from the person who committed the criminal offense \* \* \*”. Ohio Const. Art I, Section 10a [eff. 2/5/2018].

The state is hard-pressed to conceive of a more substantial constitutional question than that of a criminal defendant’s rights versus a victim’s now-constitutional right to restitution, the victim’s right to restitution to be “protected in a manner no less vigorous than the rights afforded to the accused”. The state submits the Twelfth District’s decision effectively elevated the criminal defendant’s interests in finality of the judgment above those of the victim.

## STATEMENT OF THE FACTS

### **The Case**

The State of Ohio appeals the judgment of the Twelfth District Court of Appeals reversing the trial court's post-sentence entry ordering Brasher to pay \$1,975.55 in restitution to the victim of his crime, D.H. *State v. Brasher*, 12th Dist. Butler No. CA2020-08-094, 2021-Ohio-1688. The Twelfth District found Brasher's 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 (*Brasher* at ¶ 16), effectively holding that Brasher's interest in the finality of his judgment superseded D.H.'s now constitutional right to restitution. The state filed an application for en banc consideration on May 25, 2021; the Twelfth District denied the application on July 13, 2021.

The state filed a notice of appeal on August 26, 2021. Appx. 1. A "second" notice of appeal (Appx. 4), with memorandum in support, was filed by D.H. the same day, docketed under the same case number. This Court accepted the discretionary appeal on November 9, 2021. *State v. Brasher*, 2021-Ohio-3938.

D.H. filed a merit brief on December 28, 2021 with the following proposition of law:

**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.

### **The Facts**

There is no dispute as to the facts of this case.

On December 3, 2017 Brasher stole, wrecked and ruined a 2002 Mazda 626 ES motor vehicle belonging to D.H. Indictment, R.C.P. 2, Bill of Particulars, R.C.P. 6.<sup>1</sup> The State's August 30, 2018 response to Brasher's request for discovery included photographs of damage to D.H.'s vehicle, a receipt for a replacement key, and a repair estimate. Discovery Response, R.C.P. 7.

On September 17, 2018, Brasher pled guilty as charged to one count of grand theft of a motor vehicle in violation of R.C. 2913.02, a fourth-degree felony. R.C.P. 9. On October 16, 2018 Brasher was sentenced to an 18-month prison term. R. 10. Although D.H. provided documentation in support of her claim for restitution, and there was no agreement as to restitution, a restitution hearing was not held and the trial court did not impose a restitution order as part of its sentence. *Id.*

On March 11, 2019, the victim, D.H., 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 (Marsy's Law). In her complaint D.H. 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, and on May 4, 2020, the Twelfth District issued a decision in *State ex rel. Howery v. Powers*, 12th Dist. Butler CA2019-03-045, 2020-Ohio-2767, granting D.H.'s complaint for a writ of mandamus and ordering the trial court to reopen sentencing in Brasher's felony case.

Brasher, having been released early from prison, was not located and brought before the trial court until July 27, 2020. Brasher's trial counsel filed, supplemented, then withdrew a motion challenging the constitutionality of the post-sentence restitution proceedings. R.C.P. 14, 16, 18.

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<sup>1</sup> References to the record are to the Court's November 18, 2021 Index of Record on Appeal. The Court of Appeals record is found in pages 1-9 of the Index; reference will be made to the interlineated (circled) index numbers as "R.C.A. \_\_\_\_". The Common Pleas records begin page 10, reference to made as "R.C.P. \_\_\_\_".

On July 27, 2020, the trial court held a restitution hearing in accordance with the Twelfth District's decision in *State ex rel. Howery*. During this hearing, D.H. and her husband, L.H., testified about the economic loss they had sustained as a result of Brasher's crime. T. July 27, 2020.

On August 18, 2020, the trial court issued a decision and supplemental sentencing entry ordering Brasher to pay D.H. \$1,976.55 in restitution. R.C.P. 19, Appx. 7. Prior to the trial court issuing that decision, however, Brasher was released from prison. As set forth herein the state submits Brasher's incarceration, and the court of appeals reliance on the same, is non sequitor as to the issues herein. For details of Brasher's incarceration and early release, please see Merit Brief of Victim-Appellant D.H., p. 2, fn. 1.

Brasher timely appealed the trial court's supplemental sentencing entry, asserting four assignments of error, claiming: the trial court violated appellant's constitutional due process rights; the trial court erred by violating appellant's constitutional right against double jeopardy; the trial court erred by granting restitution that the victim(s) failed to assert; and the trial court erred in ordering and determining restitution. Appellant's Brief, R.C.A. 17.

The court of appeals granted, without objection, D.H's motion to intervene in the appeal. R.C.A. 8, 16.

Determining Brasher's assignments to be interrelated, the Twelfth District specifically addressed Brasher's first assignment of error and found 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, concluding the trial court did not have authority to amend Brasher's completed sentence. *Brasher*, ¶ 16. Sustaining the first assignment of error, the court of appeals found Brasher's three remaining assignments moot (including his double jeopardy argument),



and ordered the common pleas judgment reversed and vacated Id., ¶ 22, 23; R.C.A. 25, Appx. 11.

The state filed an application for en banc consideration, which was denied by the court of appeals on July 13, 2021. R.C.A. 27, 28.

This appeal followed.

## ARGUMENT

### Proposition of Law 1:

Pursuant to Marsy’s Law a trial court retains jurisdiction to correct previous proceedings as to restitution following a defendant’s conviction and performance of his prison sentence; a trial court’s post-completion-of-prison-sentence supplemental sentencing entry ordering restitution is not void.

#### **A. Victims’ Rights.**

Ohio, in one form or another, has sought protection of victims and enforcement of their rights for decades, with Chapter 2930 of the Revised Code devoted to “Victim’s Rights”.

In 1994 Ohio elevated victims’ rights to a constitutional level, requiring, as Article I (the Ohio Bill of Rights) Section 10a, that victims “\* \* \* be accorded fairness, dignity and respect in the criminal justice process” and be accorded rights to notice, information, access and protection as provided by the legislature, as well as “a meaningful role in the criminal justice process”. Id.

This constitutional provision was supplanted by Marsy’s Law, effective February 5, 2018. Described more fully infra, and as is particularly relevant herein, the amendment provided ten enumerated victim’s rights, “which shall be protected in a manner no less vigorous than the rights afforded to the accused” including the right “to full and timely restitution from the person who committed the criminal offense \* \* \*”. Ohio Const. Art I, Section 10a. Appx. 16.

This constitutional amendment expands rights for victims of crime, including the following:

- (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.

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

More importantly, the above enumerated rights are preceded by the following:

- (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:* \* \* \*

(Emphasis added). *Id.*

## **B. Restitution**

Payment of court-ordered restitution is an obligation “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.” *State v. Pettis*, 133 Ohio

App.3d 618, 621, 729 N.E. 2d 449 (8th Dist.1999); quoting *Kelly v. Robinson*, 479 U.S. 36, 52, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986). It thus serves both remedial and punitive purposes. *State v. Aguirre*, 144 Ohio St.3d 179, 2014-Ohio-4603, 41 N.E.3d 1178, ¶ 23.

R.C. 2929.11(A) explicitly requires a sentencing court to be guided by the overriding purposes of felony sentencing, and to consider the need for the offender to make restitution.

R.C. 2929.18(A) sets forth the procedure for the trial court to follow in determining restitution, and provides in part:

(1) Restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss. If the court imposes restitution, the court shall order that the restitution be made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court. If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, the 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, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense... *If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount.* \* \* \* Emphasis added.

In sentencing Brasher without an order of restitution applicable provisions of the law were not met. As cited above, R.C. 2929.18(A)(1) requires the court to conduct a hearing if

restitution is disputed, with the state asserting in the absence of an agreement, or a record sufficiently clear to determine there is “no objection” to the restitution, restitution remained in dispute. As found by the Twelfth District in the related mandamus action:

...it is undisputed that relator is the victim of a crime and that she suffered economic loss from the offender through the commission of a criminal offense. Under the new provisions in Marsy's Law, there was a clear legal duty to provide for full and timely restitution. Ohio Constitution, Article I, Section 10a(A)(7).

*State ex rel. Howery v. Powers*, 2020-Ohio-2767, ¶ 12.

### **C. The Twelfth District’s Decision on Brasher’s Appeal**

The Twelfth District, in a decision seemingly contrary to the mandamus action, reversed the trial court’s decision (in compliance with the appellate court’s mandate in mandamus) found the trial court did not have authority to amend Brasher's completed sentence. *Brasher*, ¶ 16.

In finding the trial court’s supplemental sentencing entry void, the Twelfth District explicitly relied upon this Court’s opinion in *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014:

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. \* \* \*

*Brasher*, ¶ 21.

Neither the holding nor rationale of *Holdcroft* applies to a non-party victim's constitutional right to restitution. *Holdcroft* held at syllabus three:

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*. Emphasis added.

There is a logical nexus for prohibiting the addition of a term of postrelease control to a prison sentence after it has been served. As emphasized, the holding refers to the addition of the sanction for a *particular* offense.

No such logical nexus applies to depriving a victim of their now constitutional right to restitution. A "corrective" hearing and order on restitution does not "add time" to a sentence already performed. As noted by D.H. in her Merit Brief, the tying of victims' rights and remedies to completion of a sentence of incarceration leaves outstanding, and apparently "out-in-the-cold", the victims when the defendant receives no incarceration or credit for time served, or, as in the present case, is released substantially early from prison. *Id.*, p. 10.

The Twelfth District further relied on this Court's decision in *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, stating:

[In *Harper*] the Ohio Supreme Court "realigned" 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.*

As with *Holdcroft*, the appellate court's comparison of *Harper* to the instant case is

inapposite. The present case involves no “additional” sentence added to an already completed prison sentence. Any analogy or application of *Holdcroft* and *Harper* to the present case breaks down after one more question: what if Brasher had not been sentenced to prison?

In *State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776 (released October 7, 2020, approximately five months after the Twelfth District’s opinion in *Howery v. Powers*), this Court concluded:

\* \* \* that sentences based on an error, including sentences in which a trial court fails to impose a statutorily mandated term, are voidable [not void] if the court imposing the sentence has jurisdiction over the case and the defendant.

*Henderson* at ¶ 1.

In so ruling the Court let stand a definite sentence of 15 years in prison for the offense of murder, rather than the 15 years to life mandated by statute, “[b]ecause the state cannot challenge Henderson’s voidable sentence through a postconviction motion for resentencing.” *Id.*

Assuming (but not conceding) the applicability of *Henderson* to the present case, the short answer may very well be that no one has asserted the trial court lacked personal or subject matter jurisdiction over this case, the trial court’s sentencing entry of October 16, 2018 (ordering no restitution) was not void, yet arguably voidable (for failure to comply with R.C. 2929.18(A)); no appeal was filed by any party; and a voidable sentence cannot be challenged through a postconviction motion for resentencing. *Henderson* at ¶ 1.

However, the state finds itself aligned with the sentiments expressed by Chief Justice O’Connor in *Henderson*, concurring in judgment only:

\* \* \* As I wrote for the majority in *Fischer*, “Although the interests in finality of a sentence are important, they cannot trump the interests of justice, which require

a judge to follow the letter of the law in sentencing a defendant.” 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 33, at ¶ 23. And the res judicata doctrine is to be applied as a shield against repeated litigation of an issue, but “ ‘is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice,’ ” *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 25, quoting 46 American Jurisprudence 2d, Judgments, Section 522, at 786-787 (1994).

*Henderson* at ¶ 49.

The letter of the law, specifically R.C. 2929.18(A), was not followed in this case. But the interests and the ends of justice do not require D.H. to bear the brunt of errors made.

The state, under the constraint of *Henderson* and its antecedents, admittedly struggles to propose relief for D.H. and similarly situated victims. In no particular order, the state submits:

1. The initial underlying proceedings, culminating in Brasher’s sentence without a hearing on or order of restitution were incomplete, invalid, and void. “[A]n order of restitution imposed by the sentencing court on an offender for a felony is part of the sentence.” *State v. Danison*, 105 Ohio St.3d 127, 2005-Ohio-781, 823 N.E.2d 444, ¶ 8. “The sentence is the sanction or combination of sanctions imposed by the sentencing court on an offender who pleads guilty to or is convicted of an offense.” *Danison* at ¶ 6.

A judgment of conviction, entered in contravention of Marsy’s Law, is not a final appealable order.

Crim.R. 32(C), governing judgments in criminal actions, currently provides:

A judgment of conviction shall set forth the fact of conviction and the sentence. Multiple judgments of conviction may be addressed in one judgment entry. If the defendant is

found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

In *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, this Court held that a judgment of conviction is not a final, appealable order unless it sets forth “(1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court.” *Id.* at the syllabus; Crim.R. 32(C).

*State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, later modified *Baker* by holding that a judgment of conviction need not state the manner of conviction, a plea or a verdict, in order to be a final, appealable order. Instead, the judgment need only set forth (1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp by the clerk. *Id.* In construing Crim.R. 32(C) this Court stated:

All of these requirements relate to the essence of the act of entering a judgment of conviction and are a matter of substance, and their inclusion in the judgment entry of conviction is therefore required. *Without these substantive provisions, the judgment entry of conviction cannot be a final order subject to appeal under R.C. 2505.02.* Emphasis added.

Therefore, Brasher’s sentencing entry, in failing to comply with the statutory and now-constitutional victims’ rights mandates, was incomplete and not a final appealable order. See *In re Holmes*, 70 Ohio App.2d 75, 77, 434 N.E.2d 747, 749 (1st Dist.1980) “[t]he order appealed from was not a final appealable order, because it settled neither the amount of restitution nor the method of payment.”

A criminal defendant’s non-constitutional interest in the finality of his judgment



cannot supersede a victim's constitutional right to full and timely restitution from the person who committed the criminal offense.

2. The state finds it untenable that a non-party victim could be bound to the actions (or inactions) of the trial court, and consequently be foreclosed from the rights and remedies presumably afforded by statute and constitution. Following the enactment of Marsy's Law, Ohio courts continue to deny victims relief through the direct appeal of the underlying criminal case.

In granting D.H. mandamus relief, the Twelfth District cited *State v. Hughes*, 8th Dist. Cuyahoga No. 107697, 2019-Ohio-1000 at ¶ 14:

("while Marsy's Law expands the rights of victims, the law does not make a victim a party to a criminal action"). Appellate courts have original jurisdiction to hear actions in quo warranto, mandamus, habeas corpus, prohibition, procedendo, or "[i]n any cause on review as may be necessary to its complete determination." Ohio Constitution, Article IV, Section 3(B)(1).

*State ex rel. Howery v. Powers*, 2020-Ohio-2767, at ¶ 14.

In *Hughes* the Eighth District denied standing, and dismissed the appeal, of a victim asserting Marsy's Law:

Under Ohio law, the parties in a criminal case are the defendant and the state, not the victim. *State v. Roach*, 6th Dist. Lucas No. L-16-1303, 2017-Ohio-8511, 2017 WL 5192040, ¶ 13; *Grubb v. Buehrer*, 10th Dist. Franklin No. 15AP-576, 2016-Ohio-4645, 2016 WL 3522284, ¶ 20; *State v. Godfrey*, 3d Dist. Wyandot No. 16-12-06, 2013-Ohio-3396, 2013 WL 4007551, ¶ 16; *State v. Williams*, 7th Dist. Mahoning No. 09 MA 11, 2010-Ohio-3279, 2010 WL 2749598, ¶ 32; *State v. Sandlin*, 4th Dist. Highland No. 07CA13, 2008-Ohio-1392, 2008 WL 786859, ¶

29. Additionally, the state constitution specifically provides that all prosecutions shall be conducted by and in the name of the state of Ohio. Ohio Constitution, Article IV, Section 20. Thus, the appropriate parties in a criminal proceeding are the state and the defendant. Victims are not parties. *Williams* at ¶ 30. “It is not the victim's interests that are being represented in a criminal case, but rather those of the people of the State of Ohio.” *Id.* at ¶ 31.

\* \* \*

In sum, we do not read Marsy's Law to mean that crime victims are to be deemed parties to the criminal prosecution of the perpetrator, nor do we read the law as demonstrating the voter's intent to have crime victims file appeals whenever they are dissatisfied with a judge's weighing of their interests.

*Hughes*, 2019-Ohio-1000, at ¶ 12, 20.

3. The construction of and application of Marsy's Law, has been and will continue to be the subject of debate and litigation for years.

In *State ex rel. Thomas v. McGinty*, 164 Ohio St.3d 167, 2020-Ohio-5452, 172 N.E.3d 824, this Court affirmed the dismissal of the victims/appellants' prohibition action, who sought a writ of prohibition to prevent the court of common pleas judge from enforcing a discovery order allowing a criminal defendant (along with her defense counsel and expert witness) to have court-supervised access to inspect appellants' residence, the scene of the alleged crime. *Id.*, ¶ 1, 50.

As is relevant herein, the Court found it “... need not determine what ‘petition’ means in the context of all the Marsy's Law rights under Section 10a(A) that a crime victim may seek to protect under Section 10a(B).” *Id.*, at ¶ 42.

Yet the Court opined “[t]hus, the undefined term ‘petition’ in Section 10a(B) is broad

enough to encompass an original action or appellate review.” *Id.*, at 43.

However, subsequent to *Thomas* this Court affirmed a post-sentence writ of prohibition issued in favor of the victim (albeit in the context of a petition for relief from disability pursuant to R.C. 2923.14). *State ex rel. Suwalski v. Peeler*, Slip Opinion No. 2021-Ohio-4061.

In *Suwalski* this Court noted:

The availability of an appeal typically constitutes an adequate remedy. See *State ex rel. LTV Steel Co. v. Gwin*, 64 Ohio St.3d 245, 248, 594 N.E.2d 616 (1992). But an appeal was not available to Suwalski. She was not a party to the application proceeding in the common pleas court. 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. See *State v. Hughes*, 2019-Ohio-1000, 134 N.E.3d 710, ¶ 16 (8th Dist.). Although the state could have appealed Judge Peeler's order, it did not represent Suwalski's interests; it even erroneously stipulated that Ewing was eligible to obtain relief from his federal firearms disability under R.C. 2923.14.

*Id.*, at ¶ 36. In distinguishing *Suwalski* from *Thomas*, the Court continued:

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, Suwalski was not the subject of a discovery order that required some action or acquiescence on her part. Judge Peeler's order is also unlike a discovery order in general, which is

an exercise of a court's broad discretion for which a writ of prohibition generally will not issue to correct even an abuse of that discretion. See *State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, 2007-Ohio-6754, 881 N.E.2d 224, ¶ 11. The error here is not that Judge Peeler abused his discretion in applying R.C. 2923.14 to Ewing's fitness to be relieved of his firearms disability, but that R.C. 2923.14 did not provide a legal basis for the relief that Ewing sought as a matter of law.

*Suwalski* at ¶ 37.

While appreciating neither case represents controlling authority on the issues at bar, *Suwalski* is much more applicable to the present case than *Thomas*. The present case does not involve an interlocutory, discovery-related matter, with potential appellate relief pursuant to R.C. 2505.02(B)(4). *Thomas* at ¶ 42. *Suwalski* involved a post-sentence invocation of Marsy's Law, confirming the victim was not a party to the underlying criminal proceeding 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." *Id.*, at ¶ 36.

### **CONCLUSION**

There is nothing inherent in the Ohio laws or Constitution that prohibits the post-sentence compliance with the letter and intent of Marsy's Law. D.H. did what was required yet was denied relief (by hearing and/or order of restitution) in the trial court. She availed herself (initially with success) of her right to petition the court of appeals, only to be denied ultimate relief by the same court. The delays inherent in the judicial system, as well as those in this particular case, cannot be laid at D.H.'s door.

Restitution is a part of sentencing. The trial court's failure to comply with the requirements of R.C. 2929.18 and Marsy's Law resulted in an entry, incomplete as to sentencing,

and therefore not a final appealable order. Inasmuch as the victim was not a party to the underlying criminal action the “void/voidable” determinations of *Henderson* and its antecedents do not apply to D.H.

In the absence of statute establishing the right to appeal by a victim, with concomitant rules promulgated for the effective and timely enforcement of those rights (e.g., notice of appealable order, expedited/accelerated briefing and determination of issues) D.H. pursued the rights and remedies provided by the Ohio Constitution, ultimately, and in direct contravention of Marsy’s Law, to see a defendant’s non-constitutional right to “finality of judgment” elevated above her now-constitutional rights as a victim. Otherwise the Marsy’s Law requirement that the victim’s rights, including restitution, “*shall be protected in a manner no less vigorous than the rights afforded to the accused*” stands for naught.

The Appellant State of Ohio therefore respectfully requests the following:

- A. That this Court accept the state’s proposition of law, or modify it to the extent as justice and the law requires;
- B. In conjunction therewith or in the alternative, this Court determine Brasher’s Judgment of Conviction, entered without compliance with statutory and constitutional mandates, was not a final appealable order, and that this case be remanded for entry of a “complete” sentence, including compliance with the applicable statutes and Marsy’s Law;
- C. That this Court determine Marsy’s Law requirement that the victim’s rights, including restitution, “*shall be protected in a manner no less vigorous than the rights afforded to the accused*” supersedes a defendant’s interest, if any, in the finality of his judgment;

- D. Appreciating this Court does not render advisory opinions, if the ultimate conclusion is, pursuant to *State v. Henderson*, 2020-Ohio-4784 and its antecedents, that sentences based on an error, including the failure to comply with statutory, and now constitutional rights of victims, renders the sentence voidable, not void, and in the absence of a timely direct appeal the judgment stands, let it be said now, with the message, express or implied, to the powers that be, including the legislature and rule-making authorities, that regardless of the well-meant intentions of Marsy's Law further action is necessary to afford victims meaningful rights and redress; and
- E. For such relief as deemed proper by the Court in this cause.

Respectfully submitted,

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This is to certify that a copy of the foregoing Merit Brief of Appellant State of Ohio was served upon the following by electronic transmission this 18th day of January, 2022:

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**APPENDIX**

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellant,

v.

KYLE BRASHER,

Defendant-Appellee.

CASE NO. \_\_\_\_\_

On Appeal from the Butler County  
Court of Appeals, Twelfth  
Appellate District

Court of Appeals  
Case No. 2020-08-094

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NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

---

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State of Ohio

**NOTICE OF APPEAL OF APPELLANT STATE OF OHIO**

Appellant State of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Butler County Court of Appeals, Twelfth Appellate District, entered in said Court of Appeals Case No. 2020-08-094 on May 17, 2021. On May 25, 2021 the State of Ohio filed an application for en banc consideration pursuant to App.R. 26(A); on July 13, 2021 the Twelfth Appellate District denied the application.

Respectfully submitted,

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This is to certify that a copy of the foregoing notice of appeal was sent to the following by regular U.S. mail postage prepaid this 26th day of August, 2021:

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
 :  
 PLAINTIFF-APPELLANT, : ON APPEAL FROM THE BUTLER  
 : COUNTY COURT OF APPEALS,  
 v. : TWELFTH APPELLATE DISTRICT  
 :  
 KYLE BRASHER, :  
 : COURT OF APPEALS  
 DEFENDANT -APPELLEE. : CASE No. CA-2020-08-0094  
 :  
 (D.H., :  
 :  
 VICTIM-APPELLANT). :

---

NOTICE OF APPEAL OF VICTIM-APPELLANT D.H.

---

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**NOTICE OF APPEAL OF VICTIM-APPELLANT D.H.**

Victim-Appellant, D.H., hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Butler County Court of Appeals, Twelfth Appellate District, entered in *State of Ohio v. Kyle Brasher*, Court of Appeals Case No. CA-2020-08-0094 on May 17, 2021. On May 25, 2021, the State of Ohio filed an Application for En Banc Consideration, and Victim-Appellant filed a Motion in Support of Application for En Banc Consideration. The Twelfth Appellate District denied en banc consideration on July 13, 2021.

This case is a matter of public or great general interest and raises a substantial constitutional question.

Respectfully submitted,

/s Morgan Keilholz

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**CERTIFICATE OF SERVICE**

I certify that a copy of this Notice of Appeal was sent by electronic mail and/or ordinary U.S. mail on August 26th, 2021, to:

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**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.	*	<u>DECISION UPON MANDAMUS</u>
KYLE BRASHER	*	<u>REGARDING RESTITUTION</u>
a.k.a KYLE BRASHEAR,	*	<u>AND SUPPLEMENTAL</u>
Defendant.	*	<u>SENTENCING ENTRY</u>

\*\*\*\*\*

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

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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

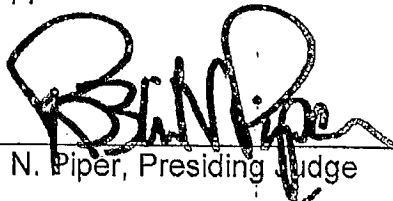
CASE NO. CA2020-08-094

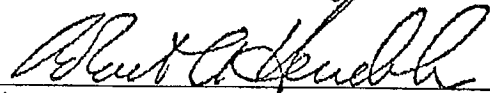
JUDGMENT ENTRY

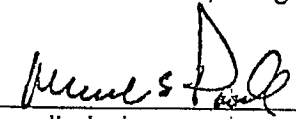
The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, reversed and vacated consistent with the Opinion filed the same date as this Judgment Entry.

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, : CASE NO. CA2020-08-094  
- vs - : OPINION  
: 5/17/2021  
: KYLE BRASHER AKA KYLE  
BRASHEAR, :  
Appellant. :

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

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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.<sup>1</sup> 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).

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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 Howerly 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 Howerly 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.

## Oh. Const. Art. I, § 10a

Archived code versions

Current through January 1, 2021

### § 10a Rights of victims of crime.

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(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;
- (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.

## History

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Adopted November 8, 1994; amended by Ballot Issue 1 on November 7, 2017, effective Feb. 5, 2018.

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