[Cite as *State v. Hughes*, 2019-Ohio-1000.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff	:	No. 107697
v.	:	
GARRETT HUGHES, JR.,	:	
Defendant-Appellee.	:	

[Appeal by C.M.]

JOURNAL ENTRY AND OPINION

JUDGMENT: DISMISSED
RELEASED AND JOURNALIZED: March 21, 2019

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-17-620674-A

Appearances:

Christopher D. Woeste; Margaret Garvin, Amy Liu, and Konrad Kircher, Amici; Michael C. O'Malley, Cuyahoga County Prosecuting Attorney; Katherine Mullin and Daniel T. Van, Assistant Prosecuting Attorneys, Amici, *for appellant*.

Joseph V. Pagano; Mark A. Stanton, Cuyahoga County Public Defender; John T. Martin and Cullen Sweeney, Assistant County Public Defenders, Amici, *for appellee*.

LARRY A. JONES, SR., P.J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. This appeal presents the question of whether the rights afforded to crime victims under Article I, Section 10a of the Ohio Constitution ("Marsy's Law") are enforceable by way of an appeal filed by a victim from an order issued in a criminal case. Alleged victim-appellant in this criminal matter, C.M., appeals from the trial court's order requiring her to provide medical provider names to the court so that her medical records for the previous three years can be subpoenaed by defense counsel. For the reasons that follow, C.M. lacks standing to pursue this appeal and we dismiss the appeal without reaching its merits.

{¶ 2} The following procedural history is relevant. In August 2017, defendant-appellee Garrett Hughes was charged with various crimes in the alleged rape and beating of C.M. In May 2018, Hughes filed a motion to secure C.M.'s psychiatric records from the state pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). On June 25, 2018, the trial court ordered the state to produce the records and deliver them to the court for an in camera inspection. Counsel for C.M. subsequently entered a notice of appearance and opposed Hughes's motion.

{¶ 3} The trial court scheduled a hearing for September 14, 2018, and ordered counsel for C.M. to bring "all records pertaining to the victim under seal for court review." During the hearing, the court stated that C.M. must

> disclose who her medical providers for medical psychiatric treatment have been for the last three years * * * by October 1st. That a subpoena will be prepared based upon that information for an in camera review of the records prior to anybody seeing the records as to determine whether or not there is any issue in those records that should be revealed to the defense.

The court further stated that it was giving C.M.'s attorney "an order [to] request from [C.M.] that information for the purposes of turning it over to the court so that we can prepare the appropriate subpoena to be issued and see what happens."

{¶ 4} The court then clarified that it was defense counsel that would subpoena the medical records:

> Court: I'll wait until October 1st to see the response [from C.M.] so [defense counsel] will have the opportunity to issue a subpoena to obtain the records. I will then perform an in camera inspection [of] the records [that] are forthcoming. If they're not forthcoming, we'll have to deal with it that way.
>
> Defense Counsel: Judge, that information if it's going to be provided will be provided to the court and I should get that information from the court to prepare the subpoena?
>
> Court: Right.

{¶ 5} The court's September 17, 2018 journal entry ordered, in part: "Hearing called on defendant's motion for specific *Brady* material, filed 5-21-2018. Court orders defendant and victim advocate attorney * * * to provide to court victim's medical information by 10-1-18. Failure to do so may result in sanctions."

{¶ 6} Thus, the court ordered C.M.'s attorney, not the state, to secure the names of C.M.'s medical providers for the last three years so that defense counsel could subpoena her records.

{¶ 7} C.M. filed a notice of appeal with this court and an emergency motion to stay with the trial court. The trial court granted C.M.'s motion to stay. Hughes filed a motion to reduce his bond with the trial court, which the court did not rule on. He also filed a motion for appellate bond, which this court denied. Hughes remains incarcerated.

{¶ 8} C.M., the prosecutor's office, and Hughes agree that C.M., as the alleged victim in this case, is not a party to the underlying criminal case, Cuyahoga C.P. No. CR-17-620674-A. Nonetheless, C.M. filed a notice of appeal, seeking redress under the provisions of Marsy's Law. On appeal, C.M. raises the following assignments of error:

> I. The trial court erred in its Discovery Order by compelling Victim C.M. to respond to a defense discovery request in violation of Article I, Section 10a(A)(1) and (6) of the Ohio Constitution.
>
> II. The trial court erred in its Discovery Order when it compelled Victim C.M. to waive attorney-client privilege and victim's counsel to disclose C.M.'s privileged medical information to the trial court in violation of Ohio Revised Code 2317.02(A) and (B) and the common law attorney-client privilege.

{¶ 9} As a threshold matter, we must address the issue of standing. The question of a victim's standing to appeal implicates this court's subject matter jurisdiction. Article IV, Section 4(B) of the Ohio Constitution vests courts with jurisdiction "over all justiciable matters." "A matter is justiciable only if the complaining party has standing to sue." *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 11, citing *Fed. Home Loan Mtge.*

Corp. v. Schwartzwald, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 41; *see also State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 701 N.E.2d 1002 (1998) ("Standing is a threshold question for the court to decide in order for it to adjudicate the action.").

{¶ 10} "Only litigants with standing are entitled to have a court determine the merits of the claims they have presented." *In re S.G.D.F.*, 10th Dist. Franklin Nos. 16AP-57 and 16AP-123, 2016-Ohio-7134, ¶ 11, citing *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 20. A party has standing when he or she has a "'right to make a legal claim * * *.'" *Ohio Pyro Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27, quoting *Black's Law Dictionary* 1442 (8th Ed.2004). "Similarly, a party who attempts to appeal a judgment must meet standing requirements to invoke the jurisdiction of the appellate court." *In re S.G.D.F.* at *id.*, citing *Ohio Contract Carriers Assn. v. Pub. Util. Comm. of Ohio*, 140 Ohio St. 160, 161, 42 N.E.2d 758 (1942).

{¶ 11} This court's appellate jurisdiction is limited to that provided by law to affirm, modify, or reverse judgments or final orders of courts of record inferior to the court of appeals. Ohio Constitution, Article IV, Section 3(B)(2). Our power to hear appeals, however, does not tell us who may perfect an appeal. *See United States v. Kovall*, 857 F.3d 1060, 1068 (9th Cir.2017).

{¶ 12} 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, ¶ 13; *Grubb v. Buehrer*, 10th Dist. Franklin No. 15AP-576, 2016-Ohio-4645, ¶ 20; *State v. Godfrey*, 3d Dist. Wyandot No. 16-12-06, 2013-Ohio-3396, ¶ 16; *State v. Williams*, 7th Dist. Mahoning No. 09 MA 11, 2010-Ohio-3279, ¶ 32; *State v. Sandlin*, 4th Dist. Highland No. 07CA13, 2008-Ohio-1392, ¶ 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.

{¶ 13} The constitutional amendment known as Marsy's Law became effective on February 5, 2018, and expands the rights afforded to victims of crimes. Marsy's Law provides that victims of crime have the right:

> (A)(1) to be treated with fairness and respect for the victim's safety, dignity and privacy;
>
> * * *
>
> (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;
>
> (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.

Ohio Constitution Article I, Section 10a.

{¶ 14} "Marsy's Law **does not** make a victim a party to a case. The victim's role in a criminal case will not change, they are simply a person with certain rights. The prosecutor remains in control of the case and handles all decision-making in the prosecution of the crime." (Emphasis sic.) Marsy's Law for Ohio, L.L.C., *Marsy's Law for Ohio Facts*, https://www.supremecourt.ohio.gov/Boards/Sentencing/Materials/2017/March/marsysLawFactSheet.pdf (accessed Feb. 12, 2019). Thus, while Marsy's Law expands the rights of victims, the law does not make a victim a party to a criminal action.

{¶ 15} In the case at bar, C.M. filed her notice of appeal, alleging that Marsy's Law provided her a vehicle by which she could appeal the trial court's ruling that she disclose the names of her medical providers and medical records for in camera review. (The prosecutor's office did not file a notice of appeal in this case.)[1]

{¶ 16} Since the passage of the constitutional amendment, the Ohio legislature has not passed legislation related to Marsy's Law to include victims among those entitled to appeal, nor has it passed a new statute extending appellate rights to victims or conferring party status on them. Marsy's Law provides that a victim, the state, or the victim's representative may "petition" the court of appeals if

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[1]The prosecutor's office filed an amicus brief and was heard at oral argument in this matter.

the relief the victim seeks under Marsy's Law is denied by the trial court. "Our duty is to construe the meaning of the plain language of the Constitution." *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St.3d 322, 2009-Ohio-4900, 916 N.E.2d 462, ¶ 50. Although Marsy's Law does not define the term "petition," we find that the law does not confer standing to an alleged victim in a criminal case to file an appeal. The right a victim may have to "petition" an appellate court is not equivalent to that of a party with a right to appeal. *See generally* 18 U.S.C. 3771 (federal law provides that a victim of crime may "petition" for a writ of mandamus).

{¶ 17} Courts have a duty to construe constitutional provisions to avoid unreasonable or absurd results. *LetOhioVote.org* at *id.*, citing *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979. Absent specific legislation that extends the right to appeal to victims or confers party status on them, this court declines to expand the rights of victims to include full party status or the right to bring an appeal, especially, as in this case, in the middle of a criminal matter.

{¶ 18} C.M.'s construction of Marsy's Law would lead to an unreasonable and absurd result. That is, under C.M.'s construction, a victim may insert him or herself into criminal proceedings at any stage, and if the victim does not agree with a trial court's decision, the victim can delay due process simply by filing a notice of appeal. The citizens of Ohio could not have intended such an unreasonable result when they adopted Marsy's Law. Moreover, section (A)(8) of Marsy's Law provides that a victim shall have the right "to proceedings free from unreasonable delay and

a prompt conclusion of the case." That provision would be thwarted by a victim's ability to appeal at any point during the pendency of a criminal case if the victim decides his or her rights are implicated.

{¶ 19} In practice, extending to the victim a right to appeal in a criminal matter could result in extensive victim participation in the matter that might delay the criminal proceedings. In this case, the trial court's order was issued on September 17, 2018, and the defendant has remained incarcerated during the pendency of this appeal; thus, the criminal proceedings have already been delayed.

{¶ 20} 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.

{¶ 21} There is a distinct difference between criminal discovery pursuant to Crim.R. 16 and the mechanism to get information from third parties, like victims, under Crim.R. 17. Some of the confusion in this case stems from its procedural history. Hughes filed his initial motion seeking C.M.'s medical records as part of discovery, which is governed by Crim.R. 16. The court, in its September 17, 2018 order, directed the victim's attorney and defense counsel to secure medical provider names and records, which would indicate that the court was contemplating Crim.R. 17.

{¶ 22} Although not binding on this court, the Ohio Crime Victim Justice Center Marsy's Law Summary provides some guidance:

> 8. **The right to refuse an interview, deposition, or other discovery request by an accused, except as provided by Article I, Section 10 of Ohio's constitution.**
>
> 1. This provision preserves the balance between Criminal Rule 16 and Criminal Rule 17(c). The United States Supreme Court (and the Ohio Supreme Court) have been very clear that criminal discovery and the mechanism to get information from third parties, like victims, in the criminal justice process are distinct. Criminal Rule 17(c) dictates that prosecutors and defendants must use subpoenas to get information from victims and other third parties. This provision prevents the defense from circumventing Rule 17(c) and seeking private information from victims through improper discovery requests.

Marsy's Law Summary, https://ocvjc.org/marsys-law-summary (accessed Mar. 1, 2019).

{¶ 23} The trial court should have directed the state to produce C.M.'s medical providers' names and records, and the state could have filed a motion on behalf of C.M. to protect her right to privacy under Crim.R. 17(C). As stated above, the right to refuse a discovery request "prevents the defense from circumventing Rule 17(C) and seeking private information from victims through improper discovery requests." Nevertheless, it was the victim, not the state, who filed the notice of appeal in this case.

{¶ 24} We are cognizant of a case from the Ninth Appellate District that allowed a victim of a crime to file an appeal in a criminal matter. *State v. Hendon*, 2017-Ohio-352, 83 N.E.3d 282 (9th Dist.). In *Hendon*, which was decided before

the passage of Marsy's Law, the alleged victim appealed the trial court's order requiring her to (1) turn over certain medical records to defense counsel, and (2) communicate personal information to her attorney, who was then compelled to disclose that information to the trial court and a third party. *Id.* at ¶ 10.

{¶ 25} The *Hendon* court considered whether the trial court's orders were properly before the court as final, appealable orders. The court determined that the trial court's orders were final and appealable, but the appeal was moot because the requested information had already been turned over to the court. The court dismissed the appeal. *Id.* at ¶ 25.

{¶ 26} The *Hendon* court did not consider whether it had jurisdiction even though the victim was the one appealing the trial court's orders; the court did not consider the victim's standing to appeal. Instead, the court allowed the appeal to proceed and determined it had jurisdiction because the trial court's orders were final orders.

{¶ 27} The issue of jurisdiction under R.C. 2505.02 and nonparty appellate rights are distinct. R.C. 2505.02 constrains what may be appealed, not who may bring such appeals. The *Hendon* court did not analyze whether a nonparty may appeal in a criminal case. Here, the threshold issue is whether C.M., the alleged victim, has standing to appeal the trial court's ruling in a criminal case. We find she does not. Thus, *Hendon* is not persuasive.

{¶ 28} We reiterate that Marsy's Law provides expanded rights for victims of crime. A victim may "petition" the appropriate appellate court for relief. 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). As an example, the federal Crime Victims' Rights Act, 18 U.S.C. 3771, allows alleged victims to challenge trial court decisions through a writ of mandamus.[2]

{¶ 29} Accordingly, C.M. lacks standing to appeal the trial court's order.

{¶ 30} Appeal dismissed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, SR., PRESIDING JUDGE

MICHELLE J. SHEEHAN, J., CONCURS IN
JUDGMENT ONLY WITH SEPARATE OPINION ATTACHED;
KATHLEEN ANN KEOUGH, J., CONCURS IN JUDGMENT
ONLY AND CONCURS WITH THE SEPARATE OPINION

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[2]The Crime Victims' Rights Act, 18 U.S.C. 3771(d)(3), provides that "if the district court denied the relief sought, the movant may petition the court of appeals for a writ of mandamus" and gives a reviewing court 72 hours to decide the petition.

MICHELLE J. SHEEHAN J., CONCURRING IN JUDGMENT ONLY:

{¶ 31} I concur with the lead opinion's conclusion that this appeal should be dismissed, but for different reasons. The appeal should be dismissed not because C.M. does not have standing to file this appeal but because the trial court's order is not a final appealable order pursuant to *Daher v. Cuyahoga Community College Dist.*, Slip Opinion No. 2018-Ohio-4462. In addition, I question whether an alleged victim in C.M.'s specific situation can invoke our original jurisdiction for the remedy she seeks in this case. I also want to emphasize that guidance from the General Assembly is necessary for the constitutional amendment known as Marsy's Law to be carried into effect. For these reasons, I write separately.

Final Appealable Order

{¶ 32} In this case, the alleged victim, C.M., appeals from the trial court's September 17, 2018 journal entry, which ordered C.M.'s counsel to provide the court with C.M.'s "medical information." This entry was issued after the trial court held a hearing on the defendant's request for *Brady* materials. Although the journal entry is unclear as to the nature of the "medical information," the transcript of the hearing makes it clear that the trial court was ordering C.M. to disclose the name(s) of her provider(s) for psychiatric treatment for the last three years. The transcript also reflects that the trial court directed C.M.'s attorney to obtain the name(s) of the provider(s) from C.M. and provide them to the court. The court intended to give the information to the defense counsel for the purpose of preparing a subpoena to C.M.'s

provider(s) for her medical records regarding her psychiatric treatment. The medical records would presumably be delivered directly to the court under seal. In addition, the transcript reflects that the trial court would conduct an in camera review of the medical records prior to their disclosure to determine if there was any basis for the production of the records.

{¶ 33} Pursuant to Article IV, Section 3(B)(2) of the Ohio Constitution, the appellate courts have jurisdiction "to review and affirm, modify, or reverse judgments or final orders." If a lower court's order is not final, this court does not have jurisdiction to review the matter and the appeal must be dismissed. *Gen. Acc. Ins. Co. v. Ins. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989). For an order to be final and therefore appealable, it must satisfy the requirements of R.C. 2505.02.

{¶ 34} Orders regarding discovery are interlocutory in nature and in general not immediately appealable. Such an order is appealable only if it qualifies as a final order as defined by R.C. 2505.02. In a recent decision from the Supreme Court of Ohio, *Daher*, Slip Opinion No. 2018-Ohio-4462, the court considered a factual scenario similar to this case. The plaintiff in that case served a subpoena upon the Cuyahoga County court reporter to turn over transcripts of grand-jury proceeding pertaining to a related indictment against the plaintiff. The court reporter moved to quash the subpoena, contending the materials were secret and privileged. The trial court held the court reporter's motion in abeyance and ordered the submission of

the requested grand-jury materials for in camera review. The court reporter appealed the trial court's order.

{¶ 35} The Supreme Court of Ohio held that such an order is not "final" as defined in R.C. 2505.02(B) because the order did not order disclosure of privileged information to parties but only in camera review of the information by the court. The Supreme Court of Ohio explained that a trial court's in camera review does not cause any claimed privileged materials to be disclosed to the parties — the purpose of in camera inspection is to give the trial court an ability to review materials without compromising the confidentiality of the information. *Daher* at ¶ 11. Indeed, the trial court has inherent authority to use in camera review as a tool to resolve discovery disputes. *Id.* at ¶ 12, citing *State ex rel. Grandview Hosp. & Med. Ctr. v. Gorman*, 51 Ohio St.3d 94, 95, 554 N.E.2d 1297 (1990).

{¶ 36} Applying R.C. 2505.02(B)(4), the Supreme Court of Ohio explained in *Daher* that the trial court's order must involve a "provisional remedy" to be a final order. Pursuant to R.C. 2505.02(B)(4), while an order mandating the *production* of confidential materials is a final order because it grants a "provisional remedy," an order for an in camera *inspection* of the confidential materials is not an order that grants a "provisional remedy," and therefore, not a final order. *Id.* at ¶ 16. The Supreme Court of Ohio emphasized that an order for in camera review is not a final appealable order because a private review by the trial court prior to an order for the production of documents to an adverse party does not compromise the protection

of privileged materials because the judges are entrusted to keep confidential information confidential. *Id.* at ¶13. Only when the trial court orders production of the confidential material will there be a final appealable order. *Id.*

{¶ 37} Similarly here, the trial court has not ordered the production of C.M.'s psychiatric medical records. The trial court only required her to disclose the name(s) of her provider(s) so that her medical records could be made available to the trial court for an in camera review. Pursuant to *Daher*, Slip Opinion No. 2018-Ohio-4462, therefore, the trial court's September 17, 2018 order is not a final appealable order capable of invoking this court's appellate jurisdiction under the existing case law and statutory authority. The victim's privacy rights protected by Marsy's Law are not implicated by the order because the trial court has not yet ordered the production of her medical records. If a victim in C.M.'s situation claims Marsy's Law grants more protections and rights beyond the existing statutory and case law authority, it behooves the General Assembly to effectuate those rights by amending R.C. 2505.02 and expanding the scope of our jurisdiction. Until then, we are bound by the existing law governing appellate jurisdiction.

{¶ 38} In this connection, it is worth noting that an in camera review comports with the exception clause written into the constitutional amendment. The pertinent portion of Section 10a of Article I of the Ohio Constitution states that a victim shall have the right "*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 * * *." (Emphasis added.) Section 10 of Article I enumerates various trial rights of the accused, including the right "to demand the nature and cause of the accusation against him," "to meet the witnesses face to face," and "to have compulsory process to procure the attendance of witnesses in his behalf." Whether the defendant's right for exculpatory information is encompassed within Section 10 of Article I or Marsy's Law prohibits the production is first for the trial court's determination.

{¶ 39} The insertion of the exception clause referencing the accused's trial rights indicates that the victim's rights are not absolute when discovery is involved. In certain instances, state enactments must give way to the rights of the accused bestowed by the United States Constitution through the Due Process Clause of the Fourteenth Amendment or the Confrontation clauses of the Sixth Amendment. *See, e.g.*, *Crane v. Kentucky*, 476 U.S. 683, 690-691, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). The drafters of the constitutional amendment appear to be cognizant of the accused's due process right to a fair trial vis-a-vis the rights of the victim and contemplate a balancing of the two. The trial court here, by invoking its inherent authority for in camera review of the claimed privileged materials, is in the best position to balance the defendant's right to *Brady* materials and the rights conferred to a victim under Marsy's Law.

Availability of This Court's Original Jurisdiction

{¶ 40} The lead opinion holds that the instant matter should be dismissed because an alleged victim such as C.M. lacks standing to pursue an appeal because she is not a party to the criminal case. The lead opinion then alludes to the word "petition" in Article I, Section 10a(B) of the Ohio Constitution and suggests that she may assert her right by invoking this court's original jurisdiction. While the term "petition" is not defined within the constitutional amendment, it has generally been defined simply as "a formal written request presented to a court." *See State v. Barr*, 8th Dist. Cuyahoga No. 81904, 2003-Ohio-2652, ¶ 12; *Black's Law Dictionary* (10th Ed.2014). The lead opinion suggests that because the term "petition" is typically used in applications invoking this court's original jurisdiction, that avenue is potentially available to a victim asserting her rights under Marsy's Law.

{¶ 41} While the statutes use the word "petition" in applications for a writ of mandamus (R.C. 2731.04) and a writ of habeas corpus (R.C. 2725.04), it is unclear if a victim in C.M.'s position could be provided meaningful relief through invocation of this court's original jurisdiction. I recognize an appellate court original action may conceivably be appropriate in certain instances for an enforcement of a victim's rights under Marsy's Law. Of the five enumerated types of original actions (quo warranto, mandamus, habeas corpus, prohibition, and procedendo) provided in Section 3(B)(1), Article IV of the Ohio Constitution, mandamus and procedendo could be appropriate avenues for the victim to assert certain rights under Marsy's

Law, if the victim can demonstrate that she has a clear legal right to the relief sought and the trial judge has a clear legal duty to proceed or provide the relief sought, and that there is no adequate legal remedy at law. *State ex rel. Culgan v. Collier*, 135 Ohio St.3d 436, 2013-Ohio-1762, 988 N.E.2d 564, ¶ 7. Therefore, for example, if a trial court is not providing timely notice of court proceedings to the victim as required by Article I, Section 10a(A)(2) of the Ohio Constitution, or if the prosecutor refuses to confer with the victim as required by Article I, Section 10a(A)(9), a writ of procedendo or mandamus may be an appropriate vehicle to enforce these rights.

{¶ 42} In this case, however, at a minimum, it would be difficult for C.M. to demonstrate that the trial court has a "clear legal duty" to provide the relief she sought, i.e., to *deny* the defendant's request for the disclosure of her providers' names or any production of her medical records. This is because neither procedendo nor mandamus can be used to control judicial discretion; in other words, although a writ of procedendo or mandamus can order the trial court to render a judgment, it will not issue to control *what* the judgment should be. *State ex rel. Sevayega v. Gallagher*, 8th Dist. Cuyahoga No. 104225, 2016-Ohio-5421, ¶ 2-3. Despite the use of the word "petition," an original jurisdiction may not be available to C.M. for the relief she seeks in this case.

Standing

{¶ 43} Regarding the issue of whether a victim in a criminal case has standing to pursue an appeal, undoubtedly the victim of a crime is not a party to the

criminal case. However, that is not the end of the inquiry. The question presented here is whether the constitutional amendment confers a victim such as C.M. standing to bring an appeal, despite her nonparty status.

{¶ 44} The Supreme Court of Ohio has defined standing as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27, citing *Black's Law Dictionary* 1442 (8th Ed.2004). As Article I, Section 10a(B) of the Ohio Constitution grants the victim a right to present her claim before the court of appeals, it would not be unreasonable to construe the constitutional amendment as conferring a victim, albeit a nonparty in a criminal case, a right to appeal where none existed before, especially in light of the unavailability of our original jurisdiction in many instances as discussed above.[1] Therefore, a victim's nonparty status may not necessarily be an impediment to her right to appeal. In the

[1] Although rare, the courts have on occasion allowed a nonparty to appeal in a criminal case. In *Cincinnati v. Neff*, 1st Dist. Hamilton Nos. C-130411, C-130511, C-130512, 2014-Ohio-2026, the First District found that the Ohio Department of Health could appeal an adverse ruling on their motion to quash a subpoena in a criminal case. In *State v. Jeffery*, 2d Dist. Montgomery No. 24850, 2012-Ohio-3104, the Second District found a witness could appeal the denial of a motion to quash and rejected an argument that the witness should have brought her claim through a writ. In *In re Tracy M.*, 6th Dist. Huron No. H-04-028, 2004-Ohio-5756, the Sixth District noted the following: "'Subpoenaed non-party witnesses have standing to file motions to quash the subpoenas' in the trial court. If that motion to quash is granted and the subpoenaing party files an appeal, it stands to reason that the subpoenaed non-party must be able to defend the judgment in its favor in the appellate court." *Id.* at ¶ 4, quoting *N. Olmsted v. Pisani*, 8th Dist. Cuyahoga Nos. 67986 and 67987, 1995 Ohio App. LEXIS 5204 (Nov. 22, 1995).

instant case, we are compelled to dismiss the appeal not because of C.M.'s non-party status but because of our lack of jurisdiction to review a nonfinal order.

{¶ 45} Finally, I would point out that although the constitutional amendment states that the provisions under the amendment are self-executing, the conundrum we face in this case underscores the necessity of legislative action to implement the rights granted to the victims and carry them into effect. Regarding whether a constitutional provision is self-executing, the United States Supreme Court has stated the following:

> A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Thus * * * if [a constitutional provision] fails to indicate its range, and to provide proper machinery, it is not * * * self-executing, and legislation is essential.

Davis v. Burke, 179 U.S. 399, 403, 21 S.Ct. 210, 45 L.Ed. 249 (1900).

{¶ 46} Article I, Section 10a of the Ohio Constitution simply directs victims of crimes to "petition" the court of appeals to enforce their rights. That direction provides little guidance as to how a victim is to present her claim to the court of appeals. As discussed in the foregoing, a victim may not be able to demonstrate the trial court's "clear legal duty" necessary for the issuance of a writ, yet her status as a nonparty might also prevent her from invoking our appellate jurisdiction. Until there is further guidance from the legislature, I would dismiss this appeal for a lack of final appealable order pursuant to *Daher*.

{¶ 47} Respectfully, I concur in judgment only.