No. 2025-0030

IN THE SUPREME COURT OF OHIO

DISCRETIONARY APPEAL FROM THE
CUYAHOGA COUNTY COURT OF APPEALS,
EIGHTH APPELLATE DISTRICT,
CASE NO. CA-114516

STATE OF OHIO,
Plaintiff-Appellee,

v.

FREDERICK E. BARNES,
Defendant-Appellee.

MERIT BRIEF OF AMICUS CURIAE, THE OFFICE OF THE OHIO PUBLIC DEFENDER, IN SUPPORT OF APPELLEE, FREDERICK E. BARNES

Office of the Ohio Public Defender
BY: Stephen P. Hardwick, 0062932
Assistant Public Defender
250 E. Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
stephen.hardwick@opd.ohio.gov
Counsel for Amicus Curiae,
the Office of the Ohio Public Defender

Cullen Sweeney, 0077187
Cuyahoga County Public Defender
BY: Erika B. Cunliffe, 0074480
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, OH 44113-1513
(216) 443-7583
ecunliffe@cuyahogacounty.us
Counsel for Appellee, Frederick Barnes

Elizabeth Well, 0087750
Ohio Crime Victim Justice Center
P.O. Box 369
Powell, Ohio 43065
(216) 390-5800
ewell@ocvjc.org
Counsel for Appellant, M.S.

Michael C. O'Malley, 0059592
Cuyahoga County Prosecutor

By: Kristen Hatcher, 0093864
Assistant Prosecuting Attorney
Justice Center - 9th Floor
1200 Ontario Street
Cleveland, OH 44113
(216) 443-7800

Counsel for Appellee, State of Ohio

TABLE OF CONTENTS

Page No.

TABLE OF CONTENTS

Page No.

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

CASES:

TABLE OF AUTHORITIES

Page No.

CASES:

CONSTITUTIONAL PROVISIONS:

TABLE OF AUTHORITIES

Page No.

CONSTITUTIONAL PROVISIONS:

STATUTES:

RULES:

TABLE OF AUTHORITIES

Page No.

RULES:

OTHER AUTHORITIES:

TABLE OF AUTHORITIES

Page No.

OTHER AUTHORITIES:

STATEMENT OF INTEREST OF AMICUS

Amicus Curiae, the Office of the Ohio Public Defender is "responsible for providing legal representation and other services to people accused or convicted of a crime who cannot afford to hire an attorney."[1] The Office is supervised by the Ohio Public Defender Commission, whose mandate is "to provide, supervise, and coordinate legal representation at state expense for indigent and other persons." R.C. 120.01.

Part of the Office's role is an institutional role—to "[c]onsult and cooperate with professional groups concerned with … the administration of criminal justice." R.C. 120.04(C)(4). Further, one stated value of the Office is "Service," which means, "We will dedicate ourselves to protecting the rights of indigent individuals, and in so doing will protect the rights afforded to all citizens by the Constitution."[2] Another value is "Dignity…[w]e will treat all with respect."[3] It is in this mission-driven and institutional role that the Office of the Ohio Public Defender respectfully submits this amicus brief.

---

[1]Office of the Ohio Public Defender, *About OPD*, https://opd.ohio.gov/about-opd (accessed Jul. 16, 2025) [https://perma.cc/E4VE-RT7P]. Note: Counsel could not create Permalinks directly from "ohio.gov" websites, so counsel downloaded a pdf of each page cited in this brief, and then created a Permalink to that pdf. Each pdf was created on the date the citation indicates that undersigned counsel "accessed" the page.

[2] Office of the Ohio Public Defender, *Mission, Vision* & Values, https://opd.ohio.gov/about-opd/mission-vision-and-values (accessed Jul. 16, 2025) [https://perma.cc/F2J4-Z955].

[3] *Id.*

INTRODUCTION

I. Requested action—this Court should dismiss this procedurally flawed case as improvidently allowed; rulemaking is a more effective way to comprehensively address the issues surrounding the concerns that M.S. brings to this Court

Amicus Curiae, the Office of the Ohio Public Defender, asks this Court to dismiss this procedurally flawed case. This Court's rule-making process is the best place to address the substantive issue this case presents—how and when a victim may seek leave to file a delayed appeal. The rulemaking process provides an avenue toward allowing victims some opportunity to seek a delayed appeal when they did not receive timely notice of a judgment while still protecting the substantive and procedural rights of the accused.

II. The procedural barriers in this case make it a poor vehicle to reach the issue that M.S. presents

The repeated and serious procedural flaws of this case make it a bad vehicle to create a general rule about the procedural rights of victims. Most notably, M.S.'s first appeal was timely and from the same judgment she now seeks a delayed appeal from, but she *voluntarily dismissed* that timely appeal to pursue an extraordinary writ, and she did so based on an incorrect interpretation of Eighth District case law. She sought a new restitution hearing based on that writ decision, which Mr. Barnes successfully challenged in a different appeal before she filed this delayed appeal of the same judgment she voluntarily dismissed an appeal from.

Those procedural flaws mean it will be difficult to reach M.S.'s proposition of law. But the procedural flaws of this case need not end the policy question—whether and how victims can seek a delayed appeal from the results of a proceeding they may not have even known was going to happen.

III. The potential unintended consequences from M.S.'s broad proposed rule suggest that this Court should use the more effective and precise tool of rulemaking

M.S.'s brief also hints at the broad and possibly unintended consequences of accepting her interpretation of the Marsy's Law language that says victims' rights "shall be protected in a manner no less vigorous than the rights afforded to the accused[.]" Ohio Const., art. I, § 10a(A). But this case cannot resolve the question of which other constitutional, statutory, and rule-based rights provided to criminal defendants are automatically incorporated by reference.

This Court's rulemaking process solves both the procedural problem and the unintended-consequences problem. First, the procedural irregularities of this case do not stand in the way of rulemaking. Second, through the rulemaking process, this Court can solve the discrete problem that this case presents—explaining to victims how to raise otherwise untimely appellate claims—without creating uncertainty in other substantive areas.

As part of its institutional role, and from its values of dignity and service, the Office of the Ohio Public Defender recognizes that rules should promote the fair and

reasonable adjudication of claimed rights, so this Office is willing to work collegially and professionally with interested parties and this Court's rules committees as they develop and propose an amendment to App.R. 5 that gives victims a way to seek leave to file a delayed appeal in at least some circumstances, while also protecting a defendant's right to finality, to notice, and to participate in the delayed-appeal decision.

IV. Victims have other, less-difficult routes to obtaining restitution

The lack of a free-standing, delayed-appeal right does not leave victims without a remedy. As explained in the lead opinion and one of the concurring opinions in *State v. Brasher*, 2022-Ohio-4703, victims can file civil actions to recover damages. *Brasher* at ¶ 27 (lead opinion), ¶ 38, n.8 (DeWine, J, concurring in judgment only); R.C. 2929.19(H). For claims under $6,000, like those of M.S., small claims court provides a remedy that is likely far quicker, easier, and cheaper than a direct appeal in a criminal case, and many courts provide forms and instructions for claimants to use. *See* R.C. Chapter 1925 and Cleveland Municipal Court, *How to File a Small Claim* (accessed July 3, 2025), https://clevelandmunicipalcourt.org/clerk-of-courts/civil-division/how-to-file-a-small-claim, [https://perma.cc/9S7D-3WEA]. Victims of violent crime can often obtain compensation up to $50,000 through the crime victims reparation fund. R.C. 2743.51.

This Court should dismiss this procedurally flawed case and address any concerns through its rulemaking authority.

STATEMENT OF THE CASE AND THE FACTS

I. A plea and a sentence that does not include restitution

More than six years ago, Federick Barnes pleaded guilty to two misdemeanors—one count of attempted breaking and entering, and a second count of petty theft. R.C. 2923.02, 2911.13, 2913.02(A)(1), Journal Entry (Oct. 10, 2018). During the plea colloquy, he was told that he faces a maximum of 180 days in jail and a $1,000 fine. T.p. 4 (Oct. 13, 2018). He was not informed that he may have to pay restitution. *Id.* After M.S. argued that the trial court should impose restitution on Mr. Barnes, the trial court sentenced him to time previously served in jail. Journal Entry (Nov. 11, 2018). The trial court did not impose any financial sanctions, including restitution. *Id.*

II. An appeal, a petition, a second appeal, and a re-appeal of the first appeal

A. An appeal: M.S. timely appeals the judgment entry of conviction, but then she voluntarily dismisses her appeal based on a misreading of an Eighth District decision in another case

M.S. filed a timely appeal of the trial court's decision. Notice of Appeal (Dec. 6, 2018). She now claims, without evidentiary support, that she voluntarily dismissed her timely appeal because of the "binding" "holding" of *State v. Hughes*, 2019-Ohio-1000 (8th Dist.). But the language from *Hughes* that she cites was the opinion of only one judge, and the other two judges expressly rejected it. *Compare Hughes* at ¶ 27–28 (Opinion of Jones, P.J.) (victim lacks standing to file direct appeal of trial court decisions) with *Hughes at* ¶ 31 (Sheehan, J. joined by Keough, J., concurring in judgment

only) ("[t]he 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"). It is unusual for a court of appeals to label a one-vote opinion as the lead opinion when a two-vote opinion reaches the same result for different reasons, but the fact remains that the opinion of one judge remains the opinion of one judge, not a holding of the court. *See State ex rel. Pennington v. Bivens*, 2021-Ohio-3134, ¶ 30 ("four justices declined to join that per curiam opinion; therefore, that case is not binding on this court"), citing *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 2012-Ohio-5017, ¶ 29.

B. A Petition: An extraordinary writ in which the prosecutor and M.S. successfully prevent Mr. Barnes from participating

Treating Judge Jones' single-judge opinion in *Hughes* as if it were binding law, M.S. filed a petition for a writ of mandamus or prohibition, which resulted in the opinion *State ex rel. Seawright v. Russo*, 2019-Ohio-4983 (8th Dist.). Mr. Barnes attempted to intervene in that writ proceeding[4], but the Eighth District denied his motion[5] after

[4] *State v. Barnes*, 8th Dist. App. No. 108484, Motion of Frederick Barnes, Real Party in Interest, to Intervene as Respondent and Request for an Order from this Court Staying any Trial Court Proceeding on Restitution Until this Court Makes a Ruling on Relator's Complaint for a Writ (May 20, 2019), found in this case's record as the first exhibit to Motion to Continue Restitution Hearing Pending the Eighth District's Ruling on [S.W.'s] Complaint for Writ of Mandamus (May 20, 2019), filed in the trial court.

[5] *State v. Barnes*, 8th Dist. App. No. 108484, Journal Entry, (Jun. 12, 2019).

both the prosecutor's office (representing the trial judge)[6] and M.S.[7] opposed the motion, arguing that a criminal defendant had no interest in a writ seeking a hearing at which he could be forced to pay restitution.[8] The Eighth District then ordered the trial court to hold a second restitution hearing. *State ex rel. Seawright v. Russo*, 2019-Ohio-4983 (8th Dist.).

C. A second appeal: After the trial court set the case for a restitution hearing, Mr. Barnes appeals and wins, and this Court declines to hear M.S.'s appeal

At M.S.'s request, the trial court set the case for a restitution hearing. Entry (Apr. 27, 2023). Mr. Barnes timely appealed. Notice of Appeal (May 11, 2023). The Eighth District initially dismissed Mr. Barnes's appeal for want of a final order. Journal Entry (Jun. 14, 2023), but the court then reconsidered that decision and vacated the trial court's entry setting a new restitution hearing. *State v. Barnes*, 2024-Ohio-2184 (8th Dist.).

---

[6] *State v. Barnes*, 8th Dist. App. No. 108484, Respondent's Brief in Opposition to Frederick Barnes' Motion to Inter[]vene as a Respondent and to Request an Order Staying Scheduled Restitution Hearing (May 21, 2019).

[7] *State v. Barnes*, 8th Dist. App. No. 108484, Relator's Memorandum in Opposition to Motion [to] Intervene and Motion to Stay of Purported Real Party in Interest, Frederick Barnes (May 21, 2019).

[8] The memoranda opposing Mr. Barnes's participation in the writ, cited in this paragraph, are not in the record of this case, but this Court may take judicial notice of the docket in another case "to establish the fact of such litigation and related filings." *State ex rel. Coles v. Granville*, 2007-Ohio-6057, ¶ 20.

On the final order issue, the Eighth District followed this Court's decision in *State v. Anderson*, 2014-Ohio-542, ¶ 28–29, 43, 52–53, the Eighth District noted that a person's right to be free from Double Jeopardy includes the right not to "run the gauntlet" a second time, so the entry setting this case for a restitution hearing was immediately appealable. *Barnes*, 2024-Ohio-2184, at ¶ 18 (8th Dist.). The court also held that under *Brasher*, M.S. needed to raise her claim in a direct appeal from the original judgment entry of sentence, but M.S. had voluntarily dismissed that appeal. *Barnes* at 5, 23–24, citing *Brasher*, 2022-Ohio-4703, at ¶ 24–25. This Court denied M.S.'s request for a discretionary appeal. *State v. Barnes*, 2024-Ohio-4713.

D. M.S. files a motion for leave to file a delayed appeal which is, in substance, a motion for leave to re-appeal the same decision she previously appealed from and voluntarily dismissed

The case before this Court concerns M.S.'s unsuccessful motion to seek a delayed appeal from the original judgment entry of sentence—the same judgment she initially filed a timely appeal from. Notice of Appeal and Motion for Delayed Appeal (Oct. 31, 2024). The motion seeking leave contains *no* evidentiary support, merely the representations from M.S.'s counsel in the motion. *Id*.

In her motion for delayed appeal, M.S. asserted that the Eighth District's decision in *State v. Hughes*, 2019-Ohio-1000 (8th Dist.), "instructed" her to dismiss her timely direct appeal and to instead pursue an extraordinary writ. *Victim M.S.'s Motion for Leave*

to File a Delayed Appeal (Oct. 31, 2024), at 2. The court of appeals denied the motion for leave and M.S. filed this discretionary appeal.

ARGUMENT

Appellant's Proposition of Law: Victims have the constitutional right to seek a delayed appeal.

This court should dismiss this procedurally flawed case as improvidently allowed and, instead, invite the Commission on the Rules of Practice & Procedure to work with interested parties to submit a proposed rule for the court's consideration, a process in which the Office of the Ohio Public Defender will participate in good faith.

I. Procedural flaws make this a poor vehicle to resolve the issue presented

A. Res judicata from the original appeal bars this delayed appeal because the same substantive claims could have been raised in that appeal

As M.S. explains in her brief, she voluntarily dismissed her timely appeal in April 2019 based on her belief that the Eighth District's decision in *State v. Hughes*, 2019-Ohio-1000 (8th Dist.), required dismissal. She writes that a "holding" in *Hughes* "instructed" her to dismiss her appeal and pursue a writ. Brief of M.S. at 1. But she is wrong about the holding of the case, and even if she were correct, it wouldn't change the res judicata effect of her decision to forfeit the appeal instead of proceeding to a decision in the Eighth District and asking this Court to hear a discretionary appeal. *See State v. Perry*, 10 Ohio St.2d 175, 180 (1967) (res judicata bars claims that could have been raised on appeal).

The *Hughes* opinion M.S. relies on was not the judgment of the court—it was the opinion of a single judge, and the other two judges *expressly* rejected the language M.S. relies on. In *Hughes*, which concerned a pre-trial discovery order, only one judge opined that victims did not have "standing" to appeal trial court decisions, and only one judge suggested that a writ could be appropriate. *Hughes* at ¶ 28–29 (lead opinion of Jones, P.J.). But while the other two judges in *Hughes* agreed that the case should be dismissed, they stated that it should be dismissed *only* for want of a final order. In fact, those two judges stated that they "question[ed] whether an alleged victim in C.M.'s specific situation can invoke our original jurisdiction for the remedy she seeks in this case." *Hughes*, 2019-Ohio-1000, at ¶ 31 (8th Dist.). Sheehan, J., joined by Keough, J., concurring with judgment only.

Further, even if M.S.'s view of *Hughes* were correct, she could have preserved her right to an appeal by arguing a "an extension, modification, or reversal of existing law." Prof.Cond.R. 3.1. If she lost, she could have asked this Court for review. It was unreasonable for her to rely on the decision of one member of a panel of one intermediate appellate court as final and binding precedent that cannot be challenged.

B. Any preclusive effect from the extraordinary writ M.S. obtained is barred because of her success in preventing Mr. Barnes from participating in that case, as well as this Court's superseding decision in *Brasher*

The Eighth District denied Mr. Barnes's request to intervene in the extraordinary writ, including barring him from even filing a brief in the petition for extraordinary

relief. *State v. Barnes*, 8th Dist. App. No. 108484, Journal Entry, (Jun. 12, 2019). So the opinion has no preclusive effect on Mr. Barnes. That's because the doctrine of claim preclusion, an aspect of res judicata, can preclude further litigation of an issue only when 1) the same parties were involved in each action, 2) the parties in the second action are in privity with those in the first, or 3) a party could have entered the proceeding but did not avail themselves of the opportunity. *Howell v. Richardson*, 45 Ohio St.3d 365, 367 (1989), citing *Wright v. Schick*, 134 Ohio St. 193 (1938), and *Hainbuchner v. Miner*, 31 Ohio St. 3d 133, 137 (1987).

Here, Mr. Barnes was not a party to the writ, neither the trial judge nor the victim had the same interest in preventing an award of restitution, and he tried to intervene, but his motion was denied. As a result, Mr. Barnes is entitled to re-litigate any issue that was or might have been resolved in the extraordinary writ action.[9]

Further, in *Brasher*, where the victim had also prevailed in an extraordinary writ without the defendant's participation, all seven justices on this Court agreed that the Twelfth District's decision reversing a restitution award should be affirmed. *Brasher*, 2022-Ohio-4703, at ¶ 26 (lead opinion of Bruner, J., joined by Fischer and Donnelly, J.J.) (lead opinion); *Id.* at ¶ 29 (O'Connor, C.J., concurring in judgment only); *Id.* at ¶ 33,

[9] The General Assembly has now expressly stated that criminal defendants have the right to participate in writs that challenge actions in their case. R.C. 2930.19(B)(2).

DeWine, J. (concurring in judgment only). The opinion states that Justices Kennedy and Stewart concurred in judgment only without filing a separate opinion.

II. M.S.'s proposition of law does not have any limiting principles as to how many other rights would be incorporated and what, if any, procedural rules victims would be required to follow

A. It's unclear how many other rights would be incorporated

1. M.S. admits her argument might require court-appointed counsel for victims

M.S. admits that her argument could require the appointment of counsel to victims, which would add a significant expense for state and county government. Brief of M.S. at 16, n.6. Specifically, M.S. argues that cases "holding often unrepresented victims to the same standards as defendants with the right to court-appointed counsel call into question whether access to court-appointed counsel may be required in some instances …." *Id*. In her brief, M.S. also asserts that "providing victims access to delayed appeal procedures would cost very little in government resources," but a ruling that created a right to government-paid counsel would cause local government to incur significant expense. Brief of M.S. at 16.

2. The caselaw M.S. criticizes show how far M.S.'s proposed holding could go

Based on the cases M.S. criticizes in in her brief, a holding from this Court incorporating all procedural rights afforded defendants would raise the question of whether:

1) the State should be granted the extra-statutory right to file an appeal-as-of-right on any Marsy's law issue;[10]
2) courts of appeals must decide moot appeals that will provide relief to no one;[11]
3) victims have the right to see the PSI when no one else would have been allowed to see it;[12]
4) victims can appeal rulings that a trial court did not make because the victims did not ask the court to make them, even though the court of appeals granted the relief the victims sought on the claim they did raise in the trial court.[13]

And in this appeal, M.S. asks this court to permit her to re-appeal from a judgment she previously appealed from, which would set a precedent for permitting alleged victims to appeal not only at any time, not only years later, but also after losing or dismissing an appeal (or appeals) from the same judgment or on the same question.

---

[10] *State v. Ndubueze* , 2024-Ohio-1414 (12th Dist.).
[11] *State v. Anderson*, 2025-Ohio-1226, ¶ 16 (5th Dist.), in which, the Fifth District provided relief to the victim on their constitutional claim, but declined to review the statutory claims because they weren't preserved and could not have provided any relief even if the victims prevailed.
[12] *State v. Evans*, 2024-Ohio-5996, ¶ 12–13 (10th Dist.).
[13] *Anderson* at ¶ 16 (5th Dist.).

3. What other rights are implicated?

Part of M.S.'s theory is that because defendant's have the rule-based right to delayed appeals, victims must have the constitutional right to the same thing because victims' rights must be "protected in a manner no less vigorous than the rights afforded to the accused[.]" *See* Brief of M.S. at 5–6. But that leaves open the question of what other procedural rights a decision in this case would create.

How much duplication of the Rules of Criminal Procedure and Appellate Procedure would a ruling in this case create? M.S. does not say. The right to reopen an appeal based on ineffective assistance of counsel, App.R. 26(B)? Discovery, Crim.R. 16? A bill of particulars, Crim.R. 7(E)? Deposition, Crim.R. 15? Would victims have the right to seek joinder of charges to better accommodate their schedules? Crim.R. 8. If the accused have the right to have a jury decide guilt, can victims override a jury waiver? Crim.R. 23 and 24. In her brief, M.S. does not give this Court any guidance about how the rule she seeks in this case would affect these and other rights.

B. It's unclear whether *any* procedural rules could apply to victim's challenging a judgment on appeal

M.S. writes that no time limit should apply to victim appeals, and she suggests that a victim's failure to follow the procedural rules that apply to appeals should always be excused. Brief of M.S. at 4 ("the Ohio Constitution places no time limitation on when a victim may exercise the right to seek appellate review."). That quote only asks this Court to hold that no time limits can apply, but M.S. drops a footnote explaining that

potentially no procedural limits can apply. Brief of M.S. at 4, n.2, quoting *State ex rel. Thomas v. McGinty*, 2020-Ohio-5452, ¶ 65 (Kennedy, J., dissenting) (Marsy's Law "leaves no room for the General Assembly to restrict the constitutional remedy by which victims of crime assert their rights."); *but see*, *Bibb v. Am. Elec. Power*, 2024-Ohio-1930, ¶ 7 (Deters, J., concurring, joined by Fischer, DeWine, and Donnelly, JJ., approving, in the context of original actions to this Court, the enforcement of "[f]iling requirements" such as affidavits, fees, and security deposits, as well as vexatious litigator restrictions under Rule 4.03(B)).

III. Rulemaking allows the creation of comprehensive standards

A. The rulemaking process allows this Court to balance competing interests, and it would create a better, more precise result with fewer unintended consequences

As then-Justice Kennedy explained in *State v. Athon*, 2013-Ohio-1956, this Court's rule-making authority is the most effective way to balance competing concerns where a current court rule doesn't cover a scenario that it possibly should. *See Id.* at ¶ 26 (Kennedy, J., dissenting).

In *Athon*, this Court addressed how to respond to the fact that the text of Crim.R. 16 did not state that a defendant's use of a public records request triggered a duty to provide reciprocal discovery to the State. Justice Kennedy explained that she was "sympathetic to the concerns of the state," but she correctly believed formal rulemaking, not a merits opinion, was the correct way to address the competing

concerns. In that case, Justice Kennedy wrote that "any amendments to Crim.R. 16(A) should be made through our rule-making authority under Ohio Const., art. IV, § 5. With today's holding, the court is bypassing its Commission on the Rules of Practice & Procedure, which engages in extensive committee work. The court then seeks public comment before amending its most important rules." Likewise, any changes to App.R. 5 should be made through the formal rule-making process instead of "bypassing" this Court's rule-making process.

Case law resolves larger issues piece-by-piece over time, but with this issue, that incremental approach will lead to uncertainty and confusion. Systemic problems can often be better addressed through this Court's rulemaking process than through a decision of this Court in a procedurally flawed case. Rulemaking allows all interested parties to craft a *systematic* solution that resolves related issues not addressed in this case, and a rule can address potential unintended consequences.

B. Defendants have a right to the appointment of counsel when an appeal by the State or a victim could add to the punishment imposed

1. Right to counsel, United States Constitution

One competing interest that rulemaking can address is the right of the defendant to participate in the delayed appeal process with the assistance of counsel. Criminal defendants have the right to counsel to defend themselves in any "critical stage." *See Coleman v. Alabama*, 399 U.S. 1, 7 (1970). The question of whether a proceeding is a

"critical stage" where the right to counsel attaches depends on "whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice." *Coleman* at 9, quoting *United States v. Wade*, 388 U.S. 218, 227 (1967).

A victim's appeal that attempts to add or increase a defendant's restitution is a critical stage because the appeal seeks to increase punishment. As far as your Amicus's research shows, no other state has created a right to delayed appeal for a victim, so there is no directly on-point precedent on the right to counsel to defend against such appeals, but in the context of prosecution appeals from suppression motions, other courts have found that a state's appeal from a trial court's decision suppressing evidence, which will also reinstate prosecutions, is a critical stage. The Sixth Circuit noted that the Ohio Attorney General's Office did not even contest that a defendant has the right to counsel on a state's appeal of a suppression issue. *Fields v. Bagley*, 275 F.3d 478, 484 (6th Cir.2001), fn. 4. And the Seventh Circuit and Massachusetts Supreme Court have held that a prosecution appeal of a suppression decision triggers the right to appellate counsel. *United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1014 (7th Cir.1988); *Commonwealth v. Goewey*, 452 Mass. 399, 403 (2008), citing *Roe v. Flores-Ortega*, 528 U.S. 470, 481–484 (2000); *Penson v. Ohio*, 488 U.S. 75, 88–89 (1988); *United States v. Cronic*, 466 U.S. 648, 657–659 (1984).

2. The Ohio Constitution provides a broader right to counsel

The Ohio Constitution also protects the right to counsel to defend against a prosecution appeal. As Justice Fischer has explained, the text of the Ohio Constitution can lead to a right to counsel that's even larger than the United States Constitution. *State v. Hackett*, 2020-Ohio-6699, ¶ 33 (Fischer, J., concurring). Here, the Ohio Constitution is even more specific than the United States Constitution. Article I, Section 10 states that in "any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel." This Court should be cautious about defining a new right for delayed appeals for victims through case law, which cannot address the competing right comprehensively. A rule could address related concerns better than an advisory opinion.

C. The rulemaking process would allow this Court to balance other competing concerns, such as procedural defenses and the determination of whether someone is a "victim" as defined by Marsy's Law

Through the rulemaking process, this Court could adopt a rule similar to App.R. 5 that addresses issues of a defendant's right to counsel, and that gives defendants an opportunity to raise procedural and constitutional defenses such as res judicata, law of the case, forfeiture, agreed resolutions, service upon defendants who may have moved on with their lives and may be difficult to find, and the reasonable expectation of finality.

A rule could also include a mechanism to screen out cases filed by people who aren't victims. This Court recently dismissed an original action by a purported victim because, after this Court gave the purported victim an opportunity to brief his claim, he failed to do so. *State ex rel. Harvey v. Olender*, 2025-Ohio-1965 (order for expedited briefing) and 2025-Ohio-2085 (dismissal for want of prosecution).[14]

In *Harvey*, the petitioner argued that he was a victim in an illegal gambling case by virtue of being a part owner of the building in which the gambling allegedly took place.[15] In her response to the petition, Judge Olender wrote that the petitioner was a disbarred attorney who was not, in her view, a "victim" in the cases he had been requesting relief in. Merit Brief of Respondent Hon. Lori L. Olender, *State ex rel. Harvey v. Olender*, Case No. 2025-0740 (June 9, 2025), 1–6.[16] *State ex rel. Harvey v. Olender*, Ohio Sup. Ct. No. 2025-0740.[17] So far, such filings appear to be thankfully rare, but if this

---

[14] The Office of the Ohio Public Defender lacks the information to state whether Petitioner Harvey is a "victim," but the pleadings in the case raise a reasonable question as to whether he is.

[15]Beau Harvey, *Petition for Writ of Mandamus in Violation of Victim's Rights, Article I, Section* 10a and R.C. 2930 (accessed Jul 3, 2025), https://www.supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=984743.pdf&subdirectory=2025-0740\DocketItems&source=DL_Clerk [https://perma.cc/J969-BDUK].

[16]Hon. Lori L. Olender, *Merit Brief of Hon. Lori L. Olender* (accessed Jul. 3, 2025), https://www.supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=985065.pdf&subdirectory=2025-0740\DocketItems&source=DL_Clerk [https://perma.cc/BX4N-UC3E]. *See also Toledo Bar Assn. v. Harvey*, 2017-Ohio-4022.

[17] The Supreme Court of Ohio, *Case Information, State of Ohio ex rel. Beau Harvey v. Honorable Judge Lori Olender* (viewed Jul. 3, 2025), https://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2025/0740 [https://perma.cc/2Q77-UGE8].

Court creates a Marsy's Law exception to the standard rules all other litigants follow, unscrupulous non-victims will foreseeably attempt to use Marsy's Law inappropriately.

In this procedurally flawed case, it would be difficult to address concerns about verification of victim status, procedural and substantive defenses, service, right to counsel, and others. But rulemaking can address all issues comprehensively.

IV. No other state has held that Marsy's Law incorporates by reference all statutory and rule-based procedural rights afforded to criminal defendants

The Office of the Ohio Public Defender hasn't been able to find any other state that has a Marsy's Law that has even considered using its "no less vigorous" language to incorporate all procedural and substantive rights afforded to criminal defendants. *See* Fla.Const., art. I, § 16; KY Const § 26A; N.D.Const., art. I, § 25; Okla.Const., art. II, § 34; S.D.Const., art. VI, § 29; Wis.Const., art. I, § 9m. The closest Amicus has found is that the South Dakota Supreme Court exercised its statutory discretion to forgive the non-jurisdictional error of filing of a timely notice of appeal in the wrong court. *State v. Waldner*, 2024 S.D. 67, ¶ 35, applying S.D.Const., art. VI, § 29. But that was an exercise of discretion that was already part of the South Dakota appellate system, so it created no new right.

V. The lack of a delayed appeal does not deny victims the right to restitution

The General Assembly has provided all victims two ways to seek restitution—the criminal case and a civil case. As Justice DeWine noted in *Brasher*, 2022-Ohio-4703,

the General Assembly has not limited a victim's remedies to R.C. 2929.19. To the contrary, the General Assembly expressly allows victims to file civil remedies:

> The imposition of restitution as a criminal sanction does not preclude a victim from filing a separate civil action against the offender. R.C. 2929.18(H). This appeal involves an order of restitution imposed as part of a criminal case, so we have no occasion to consider whether the constitutional right to restitution has any application in the civil context."

Brasher at ¶ 38 (DeWine, J., concurring). Victims of violent crime can generally seek restitution up to $50,000 from the crime victims' reparation fund. R.C. 2743.51. And as explained above on page 4 of this brief, for claims under $6,000, victims can file a complaint in small claims court. *See* R.C. Chapter 1925. A suit in small claims court is likely far quicker, easier, and cheaper than a direct appeal in a criminal case.

CONCLUSION

This Court should dismiss this procedurally flawed case as improvidently allowed. This Court should then invite interested parties to participate in the process to create a right to delayed appeal for victims that respects a defendant's right to finality, to notice, and to participate in the delayed-appeal decision.

Respectfully submitted,

Office of the Ohio Public Defender

/s/ Stephen P. Hardwick
By: Stephen P. Hardwick (0062932)
Assistant Public Defender

250 E. Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
stephen.hardwick@opd.ohio.gov

Counsel for Amicus Curiae,
the Office of the Ohio Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2025, a copy of the foregoing Merit Brief of Amicus Curiae, The Office of the Ohio Public Defender, in Support of Appellee, Frederick E. Barnes, was sent by electronic mail to: Erika Cunliffe, ecunliffe@cuyahogacounty.us; Elizabeth Well, ewell@ocvjc.org; and Kristen Hatcher, khatcher@prosecutor.cuyahogacounty.us.

/s/ Stephen P. Hardwick
Stephen P. Hardwick (0062932)
Assistant Public Defender

#2426965