

IN THE COURT OF APPEALS OF MARYLAND

ALTHEA KANIOS,

Victim

v.

Petition No. _____

MATTHEW DAVID MARLOW

AND

SEPTEMBER TERM, 2012

STATE OF MARYLAND

Respondents

PETITION FOR WRIT OF CERTIORARI

COMES NOW the Victim¹, Althea Kanios, by and through her attorneys, Russell P. Butler, Esq. and Matthew S. Ornstein, Esq. of the Maryland Crime Victims' Resource Center, Inc., and respectfully petitions this Honorable Court to grant a Writ of Certiorari to the Circuit Court for Calvert County from its September 22, 2011, decision pursuant to Md. Code Ann. Cts & Jud. Proc. Art. § 12-305 and Maryland Rule 8-303, and for cause states as follows:

1. The action in the Circuit Court for Calvert County was captioned *Althea Kanios v. State of Maryland, et al.*, Case Number C-11-842.
2. The action has not been decided in the Court of Special Appeals.
3. The judgment of the circuit court has adjudicated all claims in the action in their entirety and the rights and liabilities of all parties to the action.
4. The judgment to be reviewed is the Order of the Circuit Court for Calvert County, dated September 22, 2011, as reflected in the Court's Docket Entry, which thereby

¹ For the purposes of Rule 8-111(c)(2), litigants in Ms. Kanios's position in the appellate court shall be designated as "Victim," not as a Petitioner or Respondent. *Hoile v. State*, 404 Md. 591, fn. 21 (2007).

dismissed Victim's appeal for lack of jurisdiction as well as denied the issues of Writ of Mandamus and Certiorari.

5. This action was transferred from the Court of Special Appeals to the Circuit Court for Calvert County on August 6, 2011.

QUESTION PRESENTED

Whether the Fourteenth Amendment of the United States Constitution, Article 19 of the Maryland Declaration of Rights, Article 47(a) of the Maryland Declaration of Rights, MD Code Ann. Crim. Proc. Art. ("CP") § 11-103(e)(1), or the common law require that the victim have an opportunity to seek judicial review to provide a remedy when the victim's property interest in restitution is inappropriately denied.

PERTINENT AUTHORITIES

The United States Constitution, Amendment XIV

The Maryland Declaration of Rights, Articles 19, 47(a)

MD. Code Ann. Crim. Proc. §§ 11-103, 11-603, 11-608

MD. Code Ann. Business Regulations § 8-601

MD. Code Ann. Cts. & Jud. Prod. §§ 12,401, 12-305

Maryland Rule 7-102, 8-111, 8-132, 8-303

MATERIAL FACTS

In and around June 2009, the Victim began seeking a licensed contractor to power-wash, stain, and seal the deck attached to her residence located in Calvert County, Maryland. Through a

friend, the Victim contacted the Defendant, Matthew David Marlow, who visited the Victim's residence on June 29, 2009, to provide an estimate.

After examining the Victim's deck, the Defendant advised the Victim that her driveway needed maintenance and that he could provide such services for a good price. The Defendant and the Victim corresponded over the following several days, and between July 3rd and 5th, 2009, the parties agreed that the Defendant would provide the driveway repairs in addition to power-washing, staining, and sealing the deck. The agreed price for the driveway treatment was six thousand five hundred dollars (\$6,500.00).

On July 12, 2009, the Defendant advised the Victim that all contracted work was completed and the Victim inspected the completed work. Upon inspection, the Victim noted that there appeared to be loose millings on the edges of the driveway, and that the garage entrance appeared to be at a lower elevation than the height of the millings in front of the garage. On July 13, 2009, the Victim relayed these concerns to the Defendant who returned to the Victim's residence to address her concerns and settle the bill. The Defendant advised that the Victim would not experience problems with water in the garage, and that he had actually lowered the elevation of the hill abutting the garage at no charge.

Over the next month, as a direct result of the Defendant's work, the Victim repeatedly experienced flooding as rain-water would pool between the garage entrance and the elevated height of the asphalt millings on the driveway. The Defendant refused to correct the grade and slope deficiency or otherwise remediate the problem. When the Victim requested that the Defendant furnish his contractor's license information, he refused. The Victim subsequently learned that the Defendant had misrepresented himself as a licensed contractor and in fact held no such licenses while he performed work on her premises.

On August 21, 2009, Victim hired Joseph Marini Asphalt Paving to repair the driveway and prevent future flooding. The cost for grading the millings and repairing the driveway was eleven thousand two hundred seventy dollars (\$11,270.00). The Victim paid this direct out-of-pocket loss in full.

Proceedings in the District Court for Calvert County

Defendant was charged with and received a probation before judgment for violating MD. Code Ann. Business Regulations Art. ("BR") § 8-601, Acting as a Contractor of Selling a Home Improvement without a License. The matter was captioned *State v. Matthew David Marlowe*, Case Number 5O00039919. A sentencing hearing was held on May 7, 2010, at which time the State sought, *inter alia*, that the Defendant pay restitution to Victim. Victim was not represented by counsel at this proceeding.

The District Court for Calvert County, the Honorable Gregory Wells presiding, denied restitution on the grounds that the Victim's injuries were not a "direct result" of the crime for which the Defendant was convicted. The District Court held it lacked the legal ability to order restitution pursuant to CP § 11-603.

Proceedings in the Court of Special Appeals

Victim obtained counsel for the first time in this matter and on June 7, 2010, she filed an Application for Leave to Appeal to the Court of Special Appeals pursuant to CP § 11-103. Therein, Victim alleged that the District Court for Calvert County committed an error of law when interpreting CP § 11-603 and holding that the District Court lacked the legal authority to order restitution because of Victim's injuries were not a "direct result" of the crime for which the Defendant was convicted. The matter was captioned *Althea Kanios v. State of Maryland, et al.*, No. 793 September Term, 2010.

On July 16, 2010, Victim sought to supplement her Application for Leave to Appeal by filing an Application for Leave to Appeal to the Court of Special Appeals, Appeal, or Petition for Writ of Mandamus. In part, this supplement was filed upon the realization that an Application for Leave to Appeal pursuant to CP § 11-103 refers only to victims of violent crimes. As such, Victim filed an amended pleading so the Court could consider alternative forms of relief.

On August 6, 2010, the Court of Special Appeals dismissed Victim's supplemental filing but granted the Application for Leave to Appeal and transferred the case to the appellate docket pursuant to Maryland Rule 8-204(f)(5). The Court of Special Appeals ordered the parties to fully brief the matter in the normal course but with specific instructions to address whether the Court had jurisdiction to conduct an appellate review of a victim's grievance about a lower court's non-restitution ruling if the offense for which the defendant was found guilty is not a "violent crime" as defined by CP § 11-103.

On August 16, 2010, Victim filed a Motion to Reconsider Part of the Court's Order Regarding Dismissal, or in the alternative, Transfer the Matter to the Circuit Court for Calvert County. Therein, Victim requested the Court of Special Appeals reconsider its decision to dismiss in part because the Victim's pleadings relating to mandamus relief on the basis that the judiciary maintains a common law and inherent authority to issue a Writ of Mandamus. In the alternative, Victim argued that the Circuit Court for Calvert County has jurisdiction to consider appeals from the District Court as well a petition for Writ of Mandamus or Certiorari. As such, Victim sought, as an alternative to dismissal, that the Court of Special Appeals transfer the matter to the Circuit Court pursuant to Maryland Rule 8-132 to determine the merits of her claim.

On April 5, 2011, the Court of Special Appeals denied in part and granted in part Victim's Motion to Reconsider. The Court of Special Appeals held that it does not have jurisdiction over appeals from the judgments of the District Court ² and transferred the action to the Circuit Court for Calvert County pursuant to Maryland Rule 8-132.

Proceedings in the Circuit Court for Calvert County

The appeal was docketed as a civil action and captioned *Althea Kanios v. State of Maryland, et al.*, Case Number C-11-842. Pursuant to Maryland Rule 7-102, the Clerk of the Circuit Court scheduled the matter for a *de novo* hearing for restitution on September 22, 2011.

Victim at the hearing argued that the Circuit Court may review the District Court's decision as either a direct appeal from the District Court, as a Petition for Writ of Mandamus, or as a Writ of Certiorari from the District Court. Preliminary to the *de novo* hearing, the defendant orally asked the Circuit Court to dismiss the appeal.. The Circuit Court granted the Defendant's request and dismissed Victim's appeal indicating that, pursuant to CP § 11-103, only a victim of a violent crime may file an application for leave to appeal from the court's denial or failure to consider a victim's right to restititon. ³The Circuit Court also denied the relief on the Mandamus or Certiorari requests indicating the the District Court heard the matter and that there was sufficient due process. The Circuit Court never considered the merits of Victim's claim, that the District Court affected an error of law when holding it lacked the legal authority to order restitution.

ARGUMENT

² The Court of Special Appeals' Order transferred the matter to the Circuit Court transferred for want of jurisdiction because the Victim sought appellate review of a District Court decision. The transfer order did not base its holding on whether the Victim was a victim of a "violent crime".

³ This result was contrary to the order of transfer where the Court of Special Appeals indicated that it could not hear any applications for leave to appeal from the District Court.

While not a party to the underlying criminal case before the District Court, in the Circuit Court, the Victim was the real party of interest who asserted her right to restitution in the Circuit Court. Maryland Rule, 2-201. As such, Victim is an appropriate person to petition this Court for certiorari as a petitioner. Even if, however, Victim was not considered a party before the Circuit Court, she is still entitled to petition this Court because Maryland Rule, 8-111 (c)(2) allows Victims in Maryland's appellate courts to "participate in the same manner as a party regarding the rights of the victim or victim's representative." Victim is therefore entitled to prosecute this petition in same manner as a defendant who was unsuccessful before the Circuit Court in an appeal from the District Court. Cts. & Jud. Proc. § 12-305.

I. The District Court erred as a matter of law when holding that it did not have the authority to order restitution on the basis that the Victim's losses were not a "direct result" of the crime for which the Defendant was convicted.

The underlying basis of Victim's Petition is the the District Court incorrectly determined as a matter of law that it lacked legal authority to order restitution which denied her property interest in restitution against the Defendant. Maryland law is clear in providing restitution to victims of crime:

(a) A court may enter a judgment of restitution that orders a defendant or child respondent to make restitution in addition to any other penalty for the commission of a crime or delinquent act, if:

- (1) as a **direct result of the crime or delinquent act**, property of the victim was stolen, damaged, destroyed, converted, or unlawfully obtained, or its value substantially decreased;
- (2) as a **direct result of the crime or delinquent act**, the **victim suffered**:
 - (i) actual medical, dental, hospital, counseling, funeral, or burial expenses or losses;
 - (ii) **direct out-of-pocket loss**;
 - (iii) loss of earnings; or
 - (iv) expenses incurred with rehabilitation;

(b) A **victim is presumed to have a right to restitution** under subsection (a) of this section if:

- (1) the victim or the State requests restitution; and
- (2) the court is presented with competent evidence of any item listed in subsection (a) of this section. (Emphasis added).

CP §11-603(b)(emphasis added).

The two most prominent Maryland cases interpreting the “direct result” language of CP § 11-603 are *Pete v. State*, 384 Md. 47 (2004) and *Goff v. State*, 387 Md. 327 (2005). In *Pete*, the Defendant Pete entered the apartment of Susan Raickle, argued with her, and struck her on the back of the head. *Pete*, at 51. Ms. Raickle then alerted the police, who thereafter broadcasted an alert for Pete along with a description of his vehicle. *Id.* Two hours later, a police officer patrolling in a marked cruiser identified Pete as Pete was driving the identified vehicle. *Id.* When the officer attempted to effectuate a stop, the Defendant sought to elude capture and accelerated to a high rate of speed. The chase ended when Pete abruptly slammed on the brakes before entering a busy intersection *Id.* at 52. The officer was unable to stop in time to avoid striking the rear of Pete’s vehicle, causing damage to cruiser. *Id.*

Pete was ultimately convicted of second degree assault for the attack upon Ms. Raickle and reckless driving for his unsuccessful attempts to avoid arrest. Pete’s sentence included, *inter alia*, an order of restitution for the damage caused to the police cruiser. Since, however, reckless driving is not a “crime” for the purposes of the restitution subtitle; the restitution order was reversed on appeal “because the damage to Patrolman Chessman’s cruiser did not arise as a “direct result” of the second degree assault on Ms. Raickle.” *Id.* at 57.

When the *Pete* Court interpreted the meaning of “direct result”, the court considered several methodologies for making its determination, including the Defendant’s theory that the

court should employ a proximate cause analysis. *Pete*, at 60. Ultimately, however, the Court rejected such an approach:

We need not engage in a tort causal relationship analysis, nor weigh the persuasion quotient of an attenuated nexus between the damages to Patrol Chessman’s police cruiser and the assault on Ms. Raickle. The General Assembly has required a direct result between the qualifying crime committed and the damages inflicted before restitution may be ordered. Any attempt by a court to craft a proximate causation, mere nexus, or single charging document substitute would be clearly contrary to the plainly-worded intent of § 11-603.

Id. at 61.

In *Goff*, 387 Md. 327, the Defendant Goff was charged with breaking into the apartment of Patrick Hadley and assaulting him. During the course of the ensuing brawl the combatants moved into the bathroom and damaged the shower in the process. *Goff*, at 333. Goff ultimately pleaded guilty to second degree assault, was sentenced to pay restitution for the damage done to the shower, and thereafter appealed the restitution order on the grounds, *inter alia*, that the damage to the shower was not a “direct result” of the second degree assault. *Id.* at 340. The Court of Appeals disagreed, holding:

The natural and ordinary meaning of the term “direct result” most certainly includes the damage done to the shower in the instant case. It is clear that Mr. Goff damaged the shower **during and because of** the assault on Mr. Hadley. No intervening agent or occurrence caused the damage. Additionally, no time lapsed between the criminal act and the resulting damage caused. That leads us to conclude, considering the plain language of the statute, that the damage to the shower was a direct result of the crime for which Mr. Goff was convicted. Therefore, the order to pay restitution was proper.

Id. at 344 (footnotes omitted)(emphasis added).

In *Pete* and *Goff*, the plain language interpretation of “direct result” requires the court to employ a common-sense approach, that is to say, where the commission of a crime results in damages directly stemming from the criminalized conduct – the damages are a “direct result” of the crime.

In *Pete*, the plain language interpretation of “direct result” could not sustain a connection between the cruiser damage and the crime Pete committed – second degree assault on Ms. Raickle. This conclusion follows common logic since the damage to the cruiser did not occur during the course of Pete’s assault on Ms. Raickle nor did the damage occur because of the assault on Ms. Raickle. In *Goff*, on the other hand, the plain language interpretation does sustain a connection between the shower damage and the crime Goff committed – second degree assault on Patrick Hadley. This conclusion follows common logic since the damage to the shower did occur during the course of Goff’s assault on Mr. Hadley and the damage occurred because of the assault on Mr. Hadley

In this case, the plain language interpretation of “direct result” sustains a connection akin to that found in *Goff*. The damage to the Victim’s garage and driveway occurred during the course of the Defendant’s crime **and** the damage only occurred because of the Defendant’s crime – acting as a contractor without a license.

A. "Direct Result" does not require proximate cause

When the *Pete* and *Goff* Courts practically applied the “direct result” test to their respective fact patterns, although the semantics may differ, the applied methodology was functionally similar to the more traditional “but for” relationship test found in other contexts. This is not a novel approach as other jurisdictions have used the term “direct” to specifically reference a similar concept. For example, under the federal Crime Victims’ Rights Act (“CVRA”), 18 USCA § 3771, the CVRA defines a victim as a person “directly and proximately harmed as a result” of a crime for which restitution may be ordered. Federal courts have interpreted the “direct” harm component of the CVRA to require a “but for” causation analysis:

The CVRA's “directly and proximately harmed” language imposes dual requirements of cause in fact and foreseeability. A person is directly harmed by the commission of a

federal offense where that offense is a but-for cause of the harm. A person is proximately harmed when the harm is a reasonably foreseeable consequence of the criminal conduct.

In re Fisher, 2011 WL 1744189 (5th Cir. 2011); *See also In re Rendon Galvis*, 564 F.3d 170, 175 (2nd Cir. 2009)(“The requirement that the victim be ‘directly and proximately harmed’ encompasses the traditional ‘but for’ and proximate cause analyses.”)(internal citations omitted).

The Maryland “direct result” test is less stringent than federal law since CP § 11-603 only requires that the victim’s losses are a “direct result” of the crime as opposed to “direct and proximate.” Because *Pete* specifically rejected a proximate cause analysis, and because both *Pete* and *Goff* apply the term “direct result” in a fashion functionally similar to the traditional “but for” causation concept, the term “direct result” connotes a causal relationship between the Defendant’s conduct and the Victim’s injury that is beyond the mere abstract but less than proximate cause. It is a linear, plain-meaning, analysis: had the defendant not violated BR § 8-601 by acting as contractor and selling home improvements without a license, the Victim would not have paid the Defendant \$6,500.00 to improperly treat her driveway and the Victim would not have suffered \$11,270.00 in out-of-pocket losses to repair the damage caused by the improper treatment.

In analyzing whether the Defendant’s conduct directly resulted in the Victim’s damages, the question is not whether the same injuries could have occurred even if the Defendant was licensed; the issue is whether the injuries would have occurred even if the Defendant had not acted as a contractor or sold a home improvement without a license.

The *Pete* and *Goff* Courts answered this question by examining the linear sequence of events, the nature of the crime committed, the manner of the losses sustained, and from that examination determined whether, under a plain-meaning application of “direct result,” if there was a clear link between the defendant’s crimes and the sustained damages.

Thus, to follow such reasoning: the purpose of the BR § 8-601 is not to burden the populace with an antiquated procedural ordinance or abstract technicality, the licensing process is the State’s mechanism for regulating an activity that requires a trained professional to properly execute. Maryland Courts have found that the Maryland Home Improvement Law⁴ “is a regulatory statute for the protection of the public and is not merely a revenue measure,” and as such, in the interest of public policy, the contracts between home owners and offending non-licensed contractors are not enforceable in court. *Berenter v. Berman*, 258 Md. App. 290, 295 (1970); *see Alcoa Concrete & Masonry v. Stalker Bros.*, 191 Md. App. 596, 600 (2010).

By acting as a contractor, without a license, when treating the Victim’s driveway, the Defendant violated the Maryland Home Improvement Act as well as public policy. The results were disastrous: the Victim was deceived into hiring an unlicensed individual acting as a legitimate contractor to provide her with products and services that require the skill and expertise of a licensed contractor to perform and install. Unsurprisingly, the work was not properly performed or installed and the Victim was forced to expend even more financial resources to correct the newly created flooding problem.

But for the Defendant’s criminal conduct, and under the natural and ordinary meaning of the term “direct result,” the Victim’s losses were a direct result of the Defendant’s criminal conduct.

II. A remedy for the violation of a constitution interest in property must exist under the United States Constitution and the Maryland Constitution.

Crime victims face a legal quagmire when their rights to restitution are denied and ignored. To crime victims, it matters not whether the problems have been caused by the General Assembly, the judiciary, or by both the legislature and the courts. What matters to crime victims

⁴ Codified as BR §§ 8-601 – 8-702.

is that they are denied access to justice and the rule of law. For a country of laws this result is intolerable, especially considering our State and federal constitutional due process and equal protection requirements.

A. Remedy of Victim Through Statutory Appeals Process

Victim sought to have the Circuit Court determine the error of the District Court by appeal as statutorily authorized under Cts. & Jud. Proc. § 12-401. There is no appellate authority addressing whether victims whose restitution rights were denied by the District Court may appeal to the Circuit Court.

This Court, however, in *Lopez-Sanchez v. State*, 388 Md. 214 (2005), addressed the ability of crime victims to appeal restitution determinations from the Circuit Court sitting as a Juvenile Court. In *Lopez-Sanchez*, the victim of a juvenile delinquent, Antonio Lopez-Sanchez, sought judicial review from the denial of his right to restitution under Maryland law. Pointing the blame at the General Assembly, this Court found no relief was possible because the legislature had rejected legislation that would have granted the victims of delinquent acts the right to appeal or seek leave to appeal. Therefore, this Court held that the right to appeal or to seek leave to appeal must originate from the legislature:

Victims' rights have received considerable attention in recent years, and rightfully so. On both the federal and state levels, legislatures have expressed the strong public policy that victims should have more rights and should be informed of the proceedings, that they should be treated fairly, and in certain cases, that they should be heard. These rights, provided by the Maryland Legislature and the Maryland Constitution, are to be followed and respected. If, however, the prosecutor or the trial court does not follow the law with respect to a victim's rights in a juvenile proceeding, the Legislature has not given to the victim the general right to appeal that decision.

In the instant case, the victim is not a party to the delinquency proceeding and therefore cannot appeal. The General Assembly considered and rejected legislation that would have conferred such a right on the victims of delinquent

acts. Any right of the victim to appeal, or to file an application for leave to appeal, must originate from the General Assembly, not from this Court.

Id. at 229-230.

In response to this Court's holding in *Lopez-Sanchez*, the General Assembly expanded CP § 11-103 to expressly permit a victim whose rights to restitution were not considered or denied to seek an application for leave to appeal to the Court of Special Appeals. The legislature, in the same enactment, also included "delinquent acts" within the provision:

In response to our holding in *Lopez-Sanchez*, the General Assembly enacted Chapter 260 of the Acts of 2006.

Hoile v. State, 404 Md. 591, 607 (2008). In pertinent part, CP § 11-103(b) provides:

Although not a party to a criminal or juvenile proceeding, a victim of a violent crime for which the defendant or child respondent is charged may file an application for leave to appeal to the Court of Special Appeals from an interlocutory or final order that denies or fails to consider a right secured to the victim ... § 11-603 of this title

The problem, however, is that while the victims of non-violent crimes have the same right to receive restitution as victims of violent crimes under CP § 11-603, there is no ability for this subset of victims to seek leave to appeal when a court denies or fails to consider their rights. Moreover with the transfer order of the Court of Appeal indicating that the Court of Special Appeals lacks jurisdiction to hear any leave to appeal cases from the District Court and the Circuit Court indicating that they will not review District Court cases, victims whose restitution rights that are denied have no place for redress for a violation of a property interest in restitution. Victim in this case is in the same murky predicament of where to turn for judicial review as was the victim in *Lopez-Sanchez*.

In this case, because of the violent crime language of CP § 11-103(b), Victim alternatively asked the Court of Special Appeal to transfer the action to the Circuit Court for

Calvert County. The Circuit Court is a Court of general jurisdiction and the District Court is a court of limited jurisdiction, as well as an inferior tribunal to the Circuit Court. As such, in the normal course, the Circuit Court would exercise judicial review over the decisions from the District Court.

Although restitution is part of a criminal action between the State and the defendant, between a victim and defendant, an order for restitution between a victim and a defendant is civil in nature as it provides for a civil money judgment in favor of the victim and against the defendant. CP § 11-608. Cts. & Jud. Proc. § 12-401 is silent regarding actions by victims when their right to restitution is denied or there is a failure to consider their rights by the District Court. Considering, however, the civil nature of a restitution order between a victim and defendant, an appeal by a victim from the non-ordering of restitution would be in the nature of a civil appeal between a victim and a defendant. In this case, the Clerk of the Circuit Court considered Victim's appeal as a civil appeal and scheduled a *de novo* hearing on restitution pursuant to Rule 7-102.

At the oral request of the Defendant, however, the Circuit Court summarily determined and dismissed the appeal and Victim never had the requisite *de novo* hearing to determine whether the District Court committed an error of law when denying restitution.⁵ The Victim has been prejudiced by the failure of the Circuit Court to consider the merits of the alleged legal errors committed by the District Court. The General Assembly has never considered an amendment to Cts. & Jud. Proc. § 12-401, and therefore the "considered and rejected legislation that would have conferred such a right on the victims of delinquent acts" that defeated the victim's ability to appeal in *Lopez-Sanchez* does not similarly apply to victim appeals from the District Court to the Circuit Court. . *Lopez-Sanchez v. State*, 388 Md. 214, 229-230 (2005).

⁵ The Victim also did not receive an on the record appeal by the Circuit Court.

This Court should resolve whether a victim can appeal under Cts. & Jud. Proc. § 12-401.

B. Remedy of Victim Through Common Law Writs

Assuming, *arguendo*, that Victim cannot seek relief through the statutory appeals process, the courts may provide relief through its historic and inherent power to issue common law writs. This power to issue writs includes circumstances where there is no statutory provision permitting litigants to appeal from the decision of an inferior tribunal.

In *Criminal Injuries Compensation Bd. v. Gould*, 273 Md. 486 (1975), this Court considered a victim's ability to seek judicial review from a finding by the Criminal Injuries Compensation Board ("CICB") despite the fact that the General Assembly expressly that there would be no judicial review of such decisions. Commenting on the legislature's intent to prevent judicial review of CICB findings, this Court indicated:

The Legislature cannot, of course, interfere with the judicial process by depriving litigants from raising questions involving their fundamental rights in any appropriate judicial manner, nor can it deprive the courts of the right to decide such questions in an appropriate proceeding.

Id. at 500. (internal citations omitted).

This Court determined that the Circuit Court should have considered the *Gould* victim's appeal as a request for mandamus or certiorari if an appeal was not available to the victim. *Id.* at 513. In this case, the Victim alternatively sought to have her right to restitution considered as a request for mandamus or certiorari in the event the court determined the statutory appellate process was unavailable. In accord with *Gould*, the Circuit Court should have considered Victim's request rather than summarily denying the requests for certiorari and mandamus. The Circuit Court erred in that it never considered the merits of the Victim's contention, that the District Court affected an error of law when holding that the Victim's injuries were a direct result of the crime committed by the Defendant.

The scope of a victim's certiorari and mandamus petitions before the Circuit Court from a District Court's denial of restitution to a nonviolent offense are also questions of first impression which this Court should decide.

Overlaid on these issues of first impression are the federal and State constitutional violations that will occur if the Circuit Court lacks the ability to request a writ of certiorari to correct errors of law committed by the District Court. *Swann v. Mayor & Common Councilmen of Cumberland*, 8 Gill 150, 155 (1849) (Certiorari is the appropriate and well known mode by which superior courts examine the authority of an inferior tribunal). A recent example on the use of the certiorari to consider when it is permissible to challenge a determination regarding restitution was this Court's decision in *Silver v. State*, 420 Md. 415, 428 (2011).⁶ In *Silver*, this Court granted a writ of certiorari to the Circuit Court for Baltimore County to determine if the inferior tribunal had the legal authority to order restitution as a direct result of the crime the defendants had committed. The Circuit Court, in this case, should have likewise addressed the merits of whether the District Court had the legal authority to issue restitution in this case upon Victim's request. If the District Court had the authority to order restitution and improperly held that it did not, the Circuit Court should have issued a writ of certiorari to the District Court for to consider restitution.

Additionally, Victim's request for mandamus should have been addressed. As the District Court is an inferior tribunal to the Circuit Court, the Circuit Court may compel the

⁶ It is similarly a violation of law for a court to reject provisions of law allowing the suspension of part of a sentence where the law, in fact, gave the court such authority. *Williamson v. State*, 284 Md. 212, 215 (1979). Likewise, a court commits a violation of the law if the court rejects a provision of the law allowing it to order restitution where the law, in fact, gave the court such authority.

District Court to order restitution on the basis that the Victim maintained an established right to restitution under Maryland law.

"The **common law writ of mandamus** . . . is an original action, as distinguished from an appeal,' . . . [and] is . . . 'an extraordinary remedy[.]' *Ipes v. Board of Fire Commissioners of Baltimore*, 224 Md. 180, 183, 167 A.2d 337, 339 (1961), 'that . . . will not lie if [there is] any other adequate and convenient remedy[.]' [It is] generally used 'to **compel inferior tribunals**, public officials or administrative agencies to perform their function, or perform some particular duty imposed upon them which . . . is imperative and to the performance of which . . . **the [applicant] has a clear legal right.**' *Criminal Injuries Compensation Board v. Gould*, 273 Md. 486, 514, 331 A.2d 55, 72 (1975). . . . [It] does not lie where the action to be reviewed is discretionary or depends on personal judgment." *Gisriel v. Ocean City Bd. of Election*, 345 Md. 477, 497 (1997) (Emphasis added)

In *Harvey v. Marshall*, 158 Md. App. 355, 380-381 (2004), the Court of Special Appeals discussed the function of mandamus as applicable to the case before this Court:

The Court of Appeals has explained that that the writ of mandamus "'is a summary remedy for the want of a specific one, where there would otherwise be a failure of justice. It is based upon reasons of justice and public policy, to preserve peace, order and good government.'" The Court of Appeals has explained that the writ of mandamus "'is a summary remedy for the want of a specific one, where there would otherwise be a failure of justice. It is based upon reasons of justice and public policy, to preserve peace, order and good government.'"

The Circuit Court should have determined whether the District Court erred as a matter of law and if so should have compelled the District Court to accord Victim her right of restitution by issuing a writ of mandamus.

C. Remedy under the 14th Amendment of the United States Constitution

This Court has recognized the constitutional aspect to a victim's right to restitution. *Lopez-Sanchez v. State*, 388 Md. 214, 226 (2005) (Indicating the anomaly that "The victim is not a party to the proceeding and acts only as a witness, although vested with statutory and constitutional rights to restitution.") *See also Chaney v. State*, 397 Md. 460, 471 (2007) (If a victim or the State requests restitution, CP § 11-603(b) creates a presumption that he or she is

entitled to it, provided that "the court is presented with competent evidence" of the items for which restitution is sought.); *Lafontant v. State*, 197 Md. App. 217, 227 (2011) (Subsection (b) of CP § 11-603 makes it clear that restitution is in fact a right held by victims in a criminal proceeding.)

The prohibitions of the Fourteenth Amendment apply to legislative, executive, and judicial authorities in a state. *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 234 (1897). A lack of redress by a Victim is contrary to the notion of justice in our country.

The ability to vindicate one's legal rights in court is the heart of the constitutional right to Due Process of law. The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Congressional interpretations of the Fourteenth Amendment have held that the "protection of the laws" in the Equal Protection Clause included the right to a remedy, as under Magna Carta, chapter 40. *See* Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON CIV. RTS. L.J., online available at <http://ssrn.com/abstract=1100121>, at 25-27, 66-68.

The Supreme Court has held that the Fourteenth Amendment required "access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs." *Barbier v. Connolly*, 113 U.S. 27, 31 (1885); *see also Truax v. Corrigan*, 257 U.S. 312, 334 (1921); *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U.S. 26, 29 (1889) (The Equal Protection Clause required at a minimum "equal accessibility to the courts for the prevention or redress of wrongs, and the enforcement of rights.") The judiciary's obligation is the protection of the laws. Those provisions and obligations do not discriminate and thus cannot only provide remedies for defendants and not to victims. If the Defendant was ordered to pay restitution and

he contested the ability of the trial court to order restitution, the Defendant can seek judicial review of that determination. Likewise, because of a victim's right to restitution, when a victim does not receive restitution because the trial court determines it has no authority to order restitution, the Victim must similarly be able to challenge that determination. Like the defendant in *Silver v. State*, 420 Md. 415 (2011), the Victim, before the Circuit Court and in this Court, should receive similar due process and equal protection ability to challenge whether her rights were violated by an inferior court's legally incorrect determination that it lacked the legal authority to order restitution.

According to the United States Supreme Court, for an individual to have a "property" interest for purposes of the Due Process Clause, the interest must "have some ascertainable monetary value." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 766 (2005). (Restraining order was not a property interest). Victim in this case had an ascertainable monetary value regarding her right to restitution based upon the statutory restitution damages available - i.e. the value of the damages caused by the defendant as a direct result of his crime. The right to restitution under Maryland law is a property interest protected by the 14th Amendment and therefore due process and equal protection of the law is mandated under the federal constitution. This Court must provide a remedy when a victim's property interests in restitution is denied.

D. Remedy under Article 19 and Article 47(a) of the Declaration of Rights and CP § 11-103 (e)(1).

Maryland, however, need not look to the United States Constitution for its obligation to provide a remedy for a victim regarding the victim's property interest in restitution that was denied or not considered. A remedy is expressly required under the Maryland Constitution in

Article 19 of the Declaration of Rights.⁷ In conjunction, Articles 19 and 47(a)⁸ of the Maryland Declaration of Rights and CP § 11-603(b) clearly show the State's obligations to victims when their property rights are violated.

Oregon has a provision in its constitution similar to Article 19 that expressly relates to the rights of crime victims. Ore. Const. Art. I, § 42 (3)(a) provides that every victim⁹ as shall have a remedy by due course of law for the violation of a right established by the constitutional provision. That right is not unlimited, as there are other rights, including the federal rights of defendants that may prevent a remedy to a victim. Recently for example, the Oregon Supreme Court determined that if a remedy for a victim can be effectuated without violating the Double Jeopardy Clause, the Oregon constitution required that the victim obtain a remedy. *State v. Barrett*, 350 Ore. 390, 407 (2011). If there were any doubts of the obligations of a Maryland court, including this Court, Maryland law as of June 1, 2011, was modified to include language specifically stating that the courts shall ensure that the victim is in fact afforded the rights provided to victims by law. CP § 11-103 (e)(1).

The violation of a crime victim's right to restitution must have a remedy, otherwise those rights are meaningless. A District Court judge cannot intentionally or unintentionally eliminate an established right without an applicable judicial review process to provide due process as well as equal protection of the laws.

A legislature may not circumvent the system of checks and balances which guarantee that no branch of government, however designated, may be granted an untrammelled right arbitrarily to grant or withhold that which is derived from the

⁷ Md. Dec. of R. art. 19 provides that “That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land.”

⁸ Md. Dec. of R. art. 47 (a) provides that “A victim of crime shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process.”

⁹ "Victim" in this context refers to victims as defined by Ore. Const. Art. I, § 42 (6)(c).

people, be it due as a matter of right, sought as an aspiration, or bestowed as largess. A democracy does not recognize such monarchical discretion. *State Dep't of Assessments & Taxation v. Clark*, 34 Md. App. 136, 145 (1976)

This Court addressed the duty of interpreting a power when stating:

"In the interpretation of a power," says Judge Story, "all the ordinary and appropriate means to execute it are to be deemed a part of the power itself," (sec. 430.) "If the end be legitimate and within the scope of the Constitution, all the means which are appropriate and which are plainly adapted to that end, and which are not prohibited, may be constitutionally employed to carry it into effect," (sec. 432.) "Whenever a general power to do a thing is given, every particular power necessary for doing it is included," (sec. 434.) It is in fact but the time-honored maxim of the common law, "ubi jus, ibi remedium," expanded into the proportions which belong to a canon of constitutional construction.

Groome v. Gwinn, 43 Md. 572 (1876).

While this Court may not have the ability to create a right to appeal or an application for leave to appeal, it has the power to modify existing common law writs or to create new common law writs. To avoid problems of constitutional significance, this Court should exercise that authority.

While concurring with the result in *Lopez-Sanchez*, Judges Wilner and Harrell noted both their reluctance and the resulting prejudice to Mr. Lopez-Sanchez:

With great reluctance, I concur in the judgment. After years of effort on the part of victims' rights organizations and general direction in a 1994 Constitutional Amendment (Md. Decl. of Rts. Art. 47), the Legislature, through the enactment of the Victims' Rights Act of 1997, confirmed and expanded the right of victims, in both criminal and delinquency proceedings, to be present in court, to address the court at an appropriate time, to request restitution, and, if the facts warrant, to have the court order restitution. The statutes in that regard are clear and not really in dispute.

The Court concludes, however, and correctly so, that, notwithstanding that supposed beneficence to victims, the Legislature has not afforded victims the right to appeal if those basic rights are denied. Presumably as a matter of rationally considered public policy, the General Assembly has therefore made those hard-won rights largely illusory. Although disciplinary proceedings conceivably may

be brought against a judge who wilfully violates clear statutory rights, there seems to be no efficient remedy for a victim, like Mr. Lopez-Sanchez, if a judge, whether in good or bad faith, denies the victim the rights the Legislature has conferred. *Lopez-Sanchez v. State*, 388 Md. 214, 230-231 (2005).

...

What happened here was wrong, however, and, even though this Court is powerless to correct the error, I think it important to make clear that there was, in fact, error - deeply prejudicial error..

Id. at 251.

A democracy does not allow for the trampling of rights so as to make rights illusory and to create a travesty in the denial of justice. Judges should not be able to make legal errors or worse “wilfully violate clear statutory rights” without being subject to judicial review. The dismissal of the appeal and denial of the request to issue writs of certiorari and mandamus are highly prejudicial to Victim as it destroys her property interest to restitution. While the request for relief beyond the express statutory provisions may not have been made in *Lopez-Sanchez*, it is raised and it is before this Court. This case provides as opportunity for this Court to eliminate the injustice provided to crime victims by failing to provide the possibility of an appropriate remedy to crime victims when their rights to restitution are denied by the District Court.

Only by this Court using it discretion to grant certiorari in this case will there be the potential for due process and equal protection of the laws to the Victim in this case, as well as future victims in future cases. The Court of Special Appeals indicated it cannot review District Court judgments while at the same time the Circuit Court indicated that the Court of Special Appeals can review applications when the victim was a victim of violent crime. By clarifying whether appeals from the District Court to the Circuit Court are authorized, and if and how victims can seek extraordinary writs when their property interests in restitution are denied, this

Court will show that access to justice is for all and eliminate the shell game of which court to seek relief. Our State's constitution, the United States Constitution, and the common law demand this Court to clarify which court can review legal errors denying victims their vested property right in restitution. If there is not an existing remedy, this Court should exercise its lawful power to define a new common law remedy. The issues presented in the Petition were not raised in *Lopez-Sanchez*. This Court should clarify the incorrect perception under its *Lopez-Sanchez* opinion which perpetuated the illusory aspect of the enforcement of rights to restitution by crime victims. While the legislature may not have dotted all of "I"s and crossed all of the "T"s, this Court should not abdicate its constitutional duties and point to the legislature. In this case, the common law powers of this Court, the Court's constitutional obligations, and the newly legislative enactment of CP § 11-103 (e)(1).are now squarely before it. Now is the time to clarify that all victims' rights are not illusory in Maryland.

CONCLUSION

For the special circumstances as set forth in this Petition rendering it desirable and in the public interest that the decision of the Circuit Court of Calvert County be reviewed, that this Court grant this Petition for Certiorari and schedule this matter for hearing before the Court.

Respectfully submitted,

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ATTACHED DOCUMENTS

1. Circuit Court for Calvert County Docket Entry, dated September 22, 2011.
2. Order of the Court of Special Appeals transferring the action to the Circuit Court for Calvert County, dated April 5, 2011.
3. Order of the Court of Special Appeals granting Victim's Application for Leave to Appeal and placing the matter on the Court's appeal docket, dated August 6, 2010.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of _____, 2011, a copy of the foregoing Petition for Writ of Certiorari was sent *via* first-class mail to:

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