

CRIMINAL RESTITUTION – VICTIM’S RIGHTS IN GENERAL:  
THE STATES’ ABILITY TO PUT THE VICTIM IN THE SAME  
POSITION AS THEY WERE IN BEFORE THE CRIME  
OCCURRED

State v. Conry, 2020 ND 247, 951 N.W.2d 226.

ABSTRACT

In *State v. Conry*, the North Dakota Supreme Court interpreted a North Dakota statute that impacts the state’s ability to provide restitution to victims of a criminal offense. The court held the State does not have a substantial right to appeal the lower court’s decision regarding the imposition of restitution on behalf of the victim in a criminal case. As a case of first impression in North Dakota, the court relied on Nebraska case law, which found a three-factor test practical. “[W]hether the State possesses a substantial right to restitution depends on: (1) whether an order affects the right to restitution with finality; (2) whether the right could otherwise effectively be vindicated; and (3) whether the right is significantly undermined or indefinitely lost without appellate review.” The court held the first factor indicated the prosecution’s restitution would be a substantial right of the state, and not the individual as it was an appeal from a final order. The second and third factors were found to disfavor the state having a substantial right to appeal a restitution decision from the lower court as victims can commence a civil case. As two out of the three factors indicated this was not a substantial right of the state, the court determined the prosecution did not have the right to appeal. The court did not have jurisdiction to hear the appeal brought forward from the prosecution questioning the decision of the lower court not to issue the restitution on behalf of the victim. The prosecution did not have the ability to mention the intersection of the statute regarding the rights of the state to appeal and the rights of the victim, as indicated in Marsy’s Law. Examining other states’ statutes to help determine substantial rights of the State, the North Dakota Supreme Court determined, with finality, the statute regarding the ability of the prosecution to appeal is applied to restitution. The application of North Dakota Century Code section 29-28-07 shows the statute supersedes Marsy’s Law regarding the state’s, not the victim’s, rights. Despite Marsy’s Law giving victims full right to restitution, the prosecution cannot use those rights as a way to circumvent the state’s limited right to appeal restitution decisions. As a case of first impression, *Conry* outlines the limits of what prosecutors can appeal after the addition of Marsy’s Law, which expands victims’ rights.

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## I. FACTS

In *State v. Conry*,<sup>1</sup> Conry had pled guilty in the district court to leaving the scene of an accident involving damage to a motor vehicle.<sup>2</sup> The prosecution and the defendant had stipulated to a deferred imposition of the sentence.<sup>3</sup> “In exchange for a deferred imposition of sentence, Conry agreed to adhere to several conditions including, ‘[r]estitution, if any, should be determined within ninety [90] days of Judgement.’”<sup>4</sup> The district court accepted the guilty plea and “imposed conditions on Conry according to the terms of the plea agreement.”<sup>5</sup>

The prosecution and the defendant did not come to an agreement on the amount of restitution owed prior to the district court’s acceptance of the plea agreement.<sup>6</sup> On February 18, 2019, Conry entered a plea of guilty in the

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1. 2020 ND 247, 951 N.W.2d 226.

2. *Id.* ¶ 2.

3. *Id.*

4. Brief of Appellant ¶ 6, *State v. Conry*, 2020 ND 247, 951 N.W.2d 226 (No. 20200101).

5. *Conry*, 2020 ND 247, ¶ 2, 951 N.W.2d 226.

6. *Id.*

district court.<sup>7</sup> Three months later on May 23, 2019, the prosecution entered a statement for restitution.<sup>8</sup> The district court restitution hearing took place on February 5, 2020.<sup>9</sup> The record did not indicate if the prosecution gave the defense an initial disclosure of an estimated amount that would be requested by the victim prior to the defendant's guilty plea.<sup>10</sup> The district court determined the language within the plea agreement that stated "[r]estitution, if any, should be determined within ninety [90] days of Judgment" allowed the court to order *any* amount of restitution the court felt appropriate for the crime.<sup>11</sup>

The district court ordered no restitution was to be awarded based upon the prosecution's choice to indict the defendant with leaving the scene of an accident per North Dakota Century Code section 12.1-32-08.<sup>12</sup> Section 12.1-32-08 allows restitution only when the crime the defendant pleads guilty to stems directly from the crime that produced the injury or damage.<sup>13</sup> Leaving the scene of an accident did not cause the damage to the vehicle, the accident caused the damage to the vehicle, and as such the district court concluded the damage did not stem from the charged crime.<sup>14</sup>

The prosecution appealed the restitution order to the North Dakota Supreme Court.<sup>15</sup> The prosecution submitted a brief to the court containing arguments related to contract law and an interpretation of the statute that bypasses North Dakota Century Code section 12.1-32-08 which concluded the district court abused its discretion.<sup>16</sup> The defense argued in its brief there was no abuse of discretion from the district court and no ambiguity of contract.<sup>17</sup> The defense did not go over jurisdictional rights.<sup>18</sup> The prosecution wrote in regard to jurisdiction of the court, "[h]ere, the substantial right of the State is the right to a judgement of restitution as a part of a criminal judgement."<sup>19</sup>

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7. Brief of Appellee ¶ 10, *State v. Conry*, 2020 ND 247, 951 N.W.2d 226 (No. 20200101).

8. *Id.* ¶ 13.

9. *Id.* ¶ 14.

10. *Id.* ¶ 30.

11. *Id.* ¶ 31.

12. Brief of Appellant, *supra* note 4, ¶ 20; N.D. CENT. CODE § 12.1-32-08(1) (2021) ("[i]n determining the amount of restitution, the court shall take into account the reasonable damages sustained by the victim or victims of the criminal offense, which damages are limited to those directly related to the criminal offense and expenses actually incurred as a direct result of the defendant's criminal action.").

13. N.D. CENT. CODE § 12.1-32-08(1) (2021).

14. Brief of Appellee, *supra* note 7, ¶ 33-34.

15. *Conry*, 2020 ND 247, ¶ 3, 951 N.W.2d 226.

16. Brief of Appellant, *supra* note 4, ¶¶ 23-24, 64-68.

17. Brief of Appellee, *supra* note 7, ¶¶ 22-23, 47-48.

18. *Id.* ¶¶ 19-22.

19. Brief of Appellee, *supra* note 7, ¶ 14.

## II. LEGAL BACKGROUND

Prior to determining if the language in the written plea agreement was determinative enough to force an exception to the restitution statute and make the restitution an agreed part of the sentence, the North Dakota Supreme Court had to see if the prosecution had the substantive right to bring an appeal regarding criminal restitution before them.<sup>20</sup> The court also had to ensure it had jurisdiction.<sup>21</sup> Some critical questions to consider when looking at how this decision impacts future cases include: (1) when restitution is requested, (2) what effect does Marsy's Law have on restitution requests, and (3) what are the prosecution's rights per North Dakota Century Code section 29-28-07 regarding restitution?<sup>22</sup>

### A. WHEN IS RESTITUTION REQUESTED?

At issue within *Conry* was whether or not the prosecution had a right to appeal a restitution decision made by the district court.<sup>23</sup> Both the prosecution and the victim have the right to obtain a restitution determination on behalf of the victim.<sup>24</sup> However, the prosecution has limitations on what they may appeal from in a criminal case.<sup>25</sup> The question at the forefront of this case is if a restitution determination should be a substantial right of the state.<sup>26</sup>

Federal statute 18 U.S.C. section 3663A mandates the court order the defendant pay restitution to the victim when there is an identifiable victim to a criminal act.<sup>27</sup> North Dakota Century Code section 12.1-32-08 requires a hearing be held prior to issuing restitution in criminal cases.<sup>28</sup> However, not all criminal cases with victims require restitution hearings.<sup>29</sup> The court does not need to hold a restitution hearing in a case where both parties agree on

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20. *Id.*

21. *Id.*

22. N.D. CENT. CODE § 29-28-07; *State v. Conry*, 2020 ND 247, ¶¶ 6, 8, 10, 951 N.W.2d 226.

23. *Conry*, 2020 ND 247, ¶ 5, 951 N.W.2d 226.

24. *Id.* ¶ 10.

25. *Id.* ¶ 6.

26. *Id.* ¶ 7.

27. See 18 U.S.C. § 3663A(a)(1)-(c)(2) ("Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c)... that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.... In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.").

28. N.D. CENT. CODE § 12.1-32-08(1) (2019) ("Before imposing restitution . . . the court shall hold a hearing on the matter.... In determining the amount of restitution, the court shall take into account the reasonable damages sustained by the victim or victims of the criminal offense, which damages are limited to those directly related to the criminal offense and expenses actually incurred as a direct result of the defendant's criminal action.").

29. *Id.*

the amount owed in restitution.<sup>30</sup> When the amount of restitution is indeterminate and the parties need to present evidence, the court holds a hearing to determine “which damages are limited to those directly related to the criminal offense and expenses actually incurred as a direct result of the defendant’s criminal action.”<sup>31</sup>

In *State v. Tupa*,<sup>32</sup> the court determined the legislature narrowed criminal restitution to “reasonable damages.”<sup>33</sup> The defendants were convicted of criminal mischief and ordered to pay a portion of replacement costs rather than diminution of value.<sup>34</sup> The court found “[r]easonableness . . . cannot be reduced to any one formulation.”<sup>35</sup> The court held that if the North Dakota legislature had wanted a specific determination used, they would have incorporated that calculation into the statute or put into the statute that the criminal restitution amount should be limited to what a civil court would award.<sup>36</sup>

An exception to North Dakota Century Code section 12.1-32-08 allows an indeterminate amount of restitution to be ordered in sentences unrelated to the crime if the defendant previously agreed to be held liable for the restitution in the plea agreement.<sup>37</sup> Agreeing to a specific amount owed prior to being sentenced allows defendants to know exactly how much money they will owe to the victim, which is in sharp contrast with waiting for the court to order restitution in a criminal case. The court does not have to use a specific method when determining how to calculate restitution and has “greater flexibility in measuring damages in cases of criminal mischief.”<sup>38</sup>

In *State v. Steinolfson*,<sup>39</sup> the defendant was charged with leaving the scene of an accident and agreed in a stipulation agreement to pay for the victim’s medical costs and the damage to the victim’s vehicle without being given an exact amount owed.<sup>40</sup> The court found the defendant knew the damage he had caused to the vehicle, even if he did not know the exact dollar amount owed.<sup>41</sup> The court ordered the defendant to pay restitution since he had stipulated to do so even though leaving a scene of a crime did not create any damages.<sup>42</sup> The exact language of the *Steinolfson* stipulation was not

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30. *Id.*

31. *Id.*

32. 2005 ND 25, 691 N.W.2d 579.

33. *State v. Tupa*, 2005 ND 25, ¶ 8, 691 N.W.2d 579, 583.

34. *Id.* ¶ 1.

35. *Id.* ¶ 8.

36. *Id.* ¶ 12.

37. Brief of Appellant, *supra* note 4, ¶¶ 25-30.

38. *Tupa*, 2005 ND 25, ¶ 11, 691 N.W.2d 579.

39. 483 N.W.2d 182, 183 (N.D. 1992).

40. *Id.* at 183.

41. *Id.* at 185.

42. *Id.*

included in *Conry*.<sup>43</sup> In *Conry*, the district court considered the effect of the vague language “if any” to be detrimental to the prosecution’s case and separated it from the *Steinolfson* decision.<sup>44</sup>

Additionally, criminal courts must make findings on whether the defendant has the ability to pay the restitution ordered.<sup>45</sup> In the dissent of *State v. Blue*<sup>46</sup>, Justices Jensen and Tufte state that Marsy’s Law overrides the statute that require courts to issue only the amount of restitution that a defendant can pay in a criminal case and instead allows courts to issue the full amount of restitution owed.<sup>47</sup> The majority of the court instead ordered a “remand of this case to the district court for consideration of the defendant’s ability to pay[.]”<sup>48</sup>

North Dakota Century Code section 32-03-09.2 allows a victim of a criminal act to bring their own case in civil court.<sup>49</sup> This statute allows for any person who participated in “criminal mischief” to be held responsible for any “actual damages” and allows the victim compensation for all actual damages.<sup>50</sup> In *State v. Tupa*, the court stated, “[t]he Legislature chose the broader term ‘actual damages’ because it sought to ensure that criminal victims and courts would have greater flexibility in measuring damages in cases of criminal mischief.”<sup>51</sup> Thus, the civil cases, which allow for diminution and repair costs instead of actual damage have a greater ability to make victims whole than criminal proceedings.<sup>52</sup>

North Dakota Century Code section 28-20-13 allows the prosecution to request a lien to be placed upon the defendant’s real property by recording a lien on the judgment docket where the lien remains active for either ten years if ordered prior to August 1, 2021, or for twenty years if ordered after August 1, 2021.<sup>53</sup> Victims who prove their damages under section 32-03-09.2 may collect on their judgment without bankruptcy discharging the debt or section 32-03-09 cancelling their debt.<sup>54</sup>

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43. Brief of Appellee, *supra* note 7, ¶ 39.

44. *Id.* ¶ 43.

45. *State v. Blue*, 2018 ND 171, ¶ 20, 915 N.W.2d 122.

46. *Id.* ¶¶ 35-46.

47. *Id.*

48. *Id.* ¶ 35.

49. N.D. CENT. CODE § 32-03-09.2 (2021) (“Any person convicted of criminal mischief shall be responsible for the actual damages to real and personal property and such damages may be recovered in a civil action in a court of competent jurisdiction . . .”).

50. *Id.*

51. *State v. Tupa*, 2005 ND 25, ¶ 11, 691 N.W.2d 579.

52. *Id.*

53. N.D. CENT. CODE § 28-20-13 (2021).

54. N.D. CENT. CODE § 32-03-09.2 (2021).

## B. MARSY'S LAW

The court in *Conry* addressed Marsy's Law through a brief statement regarding *State v. Kostelecky*.<sup>55</sup> Marsy's Law states the victim has "[t]he right to *full and timely* restitution in every case[.]"<sup>56</sup> The *Kostelecky*<sup>57</sup> case provides guidance on how the court may apply Marsy's Law to criminal restitution in order to stay in keeping with the other two statutes.<sup>58</sup> The court awards restitution to make the victim whole.<sup>59</sup>

In *State v. Pagenkopf*,<sup>60</sup> the court considered Marsy's Law regarding the court's ability to order restitution despite the victim not making themselves whole or in other words, not repairing or replacing the items in question.<sup>61</sup> The victim was made whole by an insurance payout that was not associated with the damage the defendant caused to the victim's vehicle.<sup>62</sup> The concurrence in the *Pagenkopf* case written by Justice McEvers states, "a victim may sustain damages without incurring an expense."<sup>63</sup> Under the *Pagenkopf* court's explanation, when the court considers what restitution amount to award, the court only needs to determine a reasonable repayment amount for the damages the defendant caused; the court does not need to consider the acts the victim took to make themselves whole after the incident took place.<sup>64</sup> "The fact that the victim did not incur any actual expenses because [they] chose not to repair the damages or could not afford to repair the damages is not dispositive of whether [they] sustained damages and is entitled to restitution."<sup>65</sup>

The State of North Dakota amended its constitution in 2016 to read in part, "[t]he victim . . . or the attorney for the government upon request of the victim may assert . . . any other right afforded to a victim by law . . . before any other authority *with jurisdiction over the case*."<sup>66</sup> It goes on to outline nineteen individual rights for victims.<sup>67</sup> The rights of victims are not explicitly written to circumvent the rights of the state.<sup>68</sup> The right in question in *Conry* is subsection (n), stating victims have "[t]he right to full and timely

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55. *Conry*, 2020 ND 247, ¶ 10, 951 N.W.2d 226.

56. N.D. CONST. art. I, § 25(1)(n) (emphasis added).

57. 2018 ND 12, 906 N.W.2d 77.

58. *State v. Kostelecky*, 2018 ND 12, ¶¶ 7-12, 906 N.W.2d 77.

59. *Id.*

60. 2020 ND 33, 939 N.W.2d 2.

61. *State v. Pagenkopf*, 2020 ND 33, ¶ 11, 939 N.W.2d 2.

62. *Id.* ¶ 12.

63. *Id.* ¶ 20.

64. *Id.* ¶ 10-14, 939 N.W.2d 2.

65. *Id.* ¶ 11.

66. N.D. Const. art. I, § 25(1) (popularly known as Marsy's Law) (emphasis added).

67. *Id.*

68. *Id.*

restitution in every case and from each offender for all losses suffered by the victim as a result of the criminal or delinquent conduct . . . .<sup>69</sup> In *Conry*, the court determined this amendment could not override a statute written by the North Dakota Legislature.<sup>70</sup>

### C. NORTH DAKOTA CENTURY CODE SECTION 29-28-07

The North Dakota Supreme Court looked to how other states have handled similar issues regarding restitution and found a recurring theme that other states did not allow criminal restitution appeals by the prosecution unless their appeal statutes had specific statutory rights outlined.<sup>71</sup> The court specifically mentioned persuasive authority from Florida, Georgia, Tennessee, and Utah courts, which all treated criminal restitution appeals from the prosecution as unworkable without statutory allowances.<sup>72</sup> The appeal statute in North Dakota does not give the prosecution the right to appeal a restitution order determined by a district court in a criminal matter.<sup>73</sup> Section 29-28-07 states, “[a]n appeal may be taken by the state from . . . [a]n order made after judgment affecting any substantial right of the state.”<sup>74</sup> The court found “no state has determined whether restitution is a substantial right of the state[.]”<sup>75</sup>

In *State v. Jefferson Park Books, Inc.*,<sup>76</sup> the court determined specific appeals are statutory rights and can be considered *sua sponte* to determine the validity of the right to appeal.<sup>77</sup> Similarly in *Conry*, the prosecution did not provide arguments regarding their ability to bring this appeal in their brief, the North Dakota Supreme Court considered the validity of the right to appeal *sua sponte*.<sup>78</sup>

## III. COURT’S ANALYSIS

In *State v. Conry*, the North Dakota Supreme Court was unable to delve into the merits of the prosecution’s or the defense’s arguments as it held the court did not have jurisdiction to hear the case.<sup>79</sup> The court examined the extent of the prosecution’s substantive right to appeal a district court’s order

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69. *Id.*

70. *Conry*, 2020 ND 247, ¶ 10, 951 N.W.2d 226.

71. *Id.* ¶ 8.

72. *Id.*

73. *Id.*

74. N.D. CENT. CODE § 29-28-07 (2019).

75. *Conry*, 2020 ND 247, ¶ 8, 951 N.W.2d 226.

76. 314 N.W.2d 73 (N.D. 1981).

77. *Id.* at 75.

78. *Conry*, 2020 ND 247, ¶ 5, 951 N.W.2d 226; *see* Brief of Appellant, *supra* note 4, ¶ 14.

79. *Conry*, 2020 ND 247, ¶ 11, 951 N.W.2d 226.



regarding a restitution amount in a criminal case based on their statutory rights.<sup>80</sup>

#### A. THE MAJORITY OPINION

On November 19, 2020, the North Dakota Supreme Court decided the prosecution did not have a substantial right to appeal from the district court determination regarding the issuance of restitution in a criminal case.<sup>81</sup> The court did a thorough analysis of what the prosecution can argue based on what the state's substantial rights include.<sup>82</sup> Based on this analysis, the court dismissed the appeal.<sup>83</sup> Justice Crothers wrote the opinion for the North Dakota Supreme Court.<sup>84</sup>

##### *1. What is a Substantial Right of the State?*

The issue regarding what qualifies as a substantial right of the state was considered *sua sponte* by the North Dakota Supreme Court.<sup>85</sup> The prosecution's brief argued that restitution was a substantial right of the state; however, no justification was provided, and thus was not compelling to the court.<sup>86</sup>

The North Dakota Supreme Court looked to a Nebraska court decision regarding how to break down the substantial rights of the state in criminal proceedings.<sup>87</sup> In *State v. Fredrickson*,<sup>88</sup> the prosecution appealed a district court order allowing a defense attorney to be appointed to represent an indigent defendant despite evidence provided by the prosecution that the defendant was not indigent.<sup>89</sup> The court considered numerous factors, including if the right being appealed was substantial and if the court's actions would impact that substantial right.<sup>90</sup> It also considered if there was finality in the appealed decision that would not be able to be changed in some other manner, or if a delay in rendering a decision by approaching the issue in a different realm would affect the outcome of the case.<sup>91</sup> The Supreme Court of Nebraska held the decision to appoint counsel on behalf of an indigent person is

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80. *Id.*

81. *Id.* ¶¶ 9-10.

82. *Id.*

83. *Id.* ¶ 11.

84. *Id.* ¶ 1.

85. *Id.* ¶ 5.

86. Brief of Appellant, *supra* note 4, ¶ 14.

87. *Conry*, 2020 ND 247, ¶ 9, 951 N.W.2d 226.

88. 939 N.W.2d 385 (Neb. 2020).

89. *Id.* at 390.

90. *Id.*

91. *Id.*

not a substantial right of the state and could not be appealed by the prosecution.<sup>92</sup>

The North Dakota Supreme Court applied the same factors to determine what rights constitute a substantial right of the state in North Dakota.<sup>93</sup> The court determined it must gauge the finality of the order, if there were other means of justice that could be pursued, and if lack of action would be detrimental to the case.<sup>94</sup> These factors help define what substantial rights of the state are.<sup>95</sup>

## 2. *Is Restitution a Substantial Right of the State?*

Whether restitution fit into the substantial rights of the state was an issue of first impression in North Dakota.<sup>96</sup> The North Dakota Supreme Court used three factors to determine what a substantial right of the state was: “(1) whether an order affects the right to restitution with finality; (2) whether the right could otherwise effectively be vindicated; and (3) whether the right is significantly undermined or indefinitely lost without appellate review.”<sup>97</sup> The court explained the first factor weighed in favor of restitution being a substantial right because the district court’s denial of restitution was a final order of the criminal court.<sup>98</sup> “[A]n order for restitution affects with finality the State’s ability to obtain recompense for a crime victim.”<sup>99</sup> The second factor weighed against restitution being a substantial right because the victims could effectively vindicate their right through civil court as well as criminal court.<sup>100</sup> The victim is not precluded from commencing an action on their own concurrently or consecutive to the criminal case.<sup>101</sup> Applying the same reasoning used in the second factor, the third factor weighed against restitution being a substantial right as well.<sup>102</sup> The ability to start a civil action means the right cannot be undermined or lost based only on the criminal action.<sup>103</sup> “Because the victim can maintain a civil action seeking recovery of damages . . . the state does not have a substantial right to vindicate on appeal.”<sup>104</sup> When considered as a whole, two out of the three factors weighed against restitution

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92. *Id.* at 391.

93. *State v. Conry*, 2020 ND 247, ¶ 9, 951 N.W.2d 226.

94. *Id.*

95. *Id.*

96. *Id.* ¶ 7.

97. *Id.* ¶ 9.

98. *Id.* ¶ 10.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

being a substantial right of the state.<sup>105</sup> The Court determined because restitution is not a substantial right, the appeal must be dismissed, and therefore, the court could not consider the merit of the argument brought forward by the prosecution.<sup>106</sup>

#### IV. IMPACT OF THE DECISION AND APPLICATION TO NORTH DAKOTA LAW

*Conry* will undoubtedly affect future negotiations between defense attorneys and prosecutors. Though there was not a statute allowing the prosecution to appeal a restitution order, North Dakota Constitution article I, section 25, popularly called Marsy's Law, made victims' rights a key topic of the North Dakota Legislature in 2016.<sup>107</sup> Through *Conry*, the North Dakota Supreme Court determined a judgment for restitution is only a substantial right for victims, not the state, and further determined the state is not allowed to appeal a criminal restitution order on behalf of the victim.<sup>108</sup>

##### A. FORCED CIVIL CASES

There is limited recourse for victims who feel as though they did not receive adequate compensation for the damages inflicted upon them. One method of recourse would be for the victims to start their own civil case.<sup>109</sup> The victims can then either act as their own attorney or hire an attorney at their own expense. Some victims may not have the ability to proceed with a civil case based on time or financial constraints. Another route would be for the victim to try to collect repayments through the restitution collection assistance program provided by the State of North Dakota. This fund can be used by victims to assist with medical expenses, wages lost, and the funeral expenses of a homicide victim.<sup>110</sup> The restitution collection assistance fund does not compensate for property losses.<sup>111</sup> Because of this limitation, there are victims that would be forced to proceed to civil litigation.

North Dakota allows victims who file separate civil litigation claims stemming from a criminal violation to merge the awarded restitution amounts; this prevents the defendant from having to pay restitution twice.<sup>112</sup> The main difference between collecting money from a criminal restitution

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105. *Id.*

106. *Id.* ¶¶ 10-11.

107. N.D. CONST. art. I, § 25(1).

108. *Id.*; *Conry*, 2020 ND 247, ¶¶ 10-11, 951 N.W.2d 226.

109. *Conry*, 2020 ND 247, ¶¶ 10-11, 951 N.W.2d 226.

110. *Crime Victims Compensation*, N.D. CORR. AND REHAB. (August 20, 2021, 4:20 P.M.), <https://www.docr.nd.gov/crime-victims-compensation>.

111. *Id.*

112. N.D. CENT. CODE § 12.1-32-08 (2021).

judgment and a civil restitution judgment is the state monitors the collection of restitution in criminal cases, and the victim must monitor the collection of restitution in civil cases while potentially dealing directly with the person or people who victimized them.<sup>113</sup>

#### B. THE LIMITATIONS OF MARSY'S LAW

Marsy's Law does not supplant the long-held division between state rights and victim rights.<sup>114</sup> Marsy's Law solidified the state's determination to keep victims apprised about what was happening after a defendant was formally charged with violating a victim's rights.<sup>115</sup> Marsy's Law did not change the criminal and civil restitution laws, according to *Conry*.<sup>116</sup> The *Conry* decision acknowledges victims can start their own civil case while the criminal case is still proceeding.<sup>117</sup> The victims can opt in to get phone calls or text messages regarding when the defendant has criminal hearings. This allows the victim to know when the defendant is likely to appear for the criminal hearing and may be available for a civil hearings.

As there is no longer a question regarding if Marsy's Law changed the prosecution's ability to appeal a restitution order, getting defense attorneys to agree to a particular amount owed in restitution without a restitution hearing will become more difficult. Defense attorneys are the only ones able to appeal from a district court's decision regarding criminal restitution. *Conry* made the final determination regarding section (1)(n) of North Dakota Constitution article 1, section 25, to the effect that the victims' right to have the prosecution fight for full restitution is completely separate from prosecution right to appeal.<sup>118</sup>

#### V. CONCLUSION

In *State v. Conry*, the North Dakota Supreme Court held the prosecution does not have the right to appeal a district court's order regarding criminal restitution.<sup>119</sup> Pursuant to this holding, courts must dismiss all appeals brought forward from the prosecution regarding a restitution determination made by a district court.<sup>120</sup> Since the North Dakota Supreme Court looked to other state court decisions, it follows that they will continue to rely upon the three-factor test to determine what might be a substantial right of the state

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113. *Id.*

114. N.D. CONST. art. I, § 25(1).

115. *Id.*

116. *Id.*; *Conry*, 2020 ND 247, ¶ 10, 951 N.W.2d 226.

117. *Conry*, 2020 ND 247, ¶ 10, 951 N.W.2d 226.

118. *Id.*

119. *Id.* ¶¶ 10-11.

120. *Id.*

again in the future for other, non-restitution, centered appeals.<sup>121</sup> This decision will impact future appeals that will be brought before the Court, how prosecution and defense attorneys approach criminal negotiations, and if victims will proceed to civil court rather than waiting for the criminal case to finish, potentially creating duplicative court proceedings.

*Caitlin Baker\**

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121. *Id.* ¶¶ 5-11.

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