



# ENACTMENT NEWS

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## House Bill 343 Marsy's Law Implementation Effective April 6, 2023

On January 5, 2023, Governor DeWine signed House Bill 343 (Rep. Andrea White) into law. The bill seeks to implement victims' rights protections afforded under the Marsy's Law constitutional amendment. It takes effect on April 6, 2023.

Approved by voters in 2017, the Marsy's Law amendment enshrines in Ohio's constitution certain rights for victims of crime. Those rights include being treated with fairness and respect for the victim's safety, dignity, and privacy; timely notice of and the right to be present at all public proceedings regarding the offense; to be heard at proceedings involving offender release, sentencing, plea, or parole; full and timely restitution; and to refuse an interview, deposition, or other discovery request made by the accused. H.B. 343 seeks to provide guidance to those in the criminal justice system on how those rights are to be protected. This Enactment News will highlight those provisions relevant to the work of courts.

### Scope and definitions

The bill defines "criminal offense" to mean an alleged act or omission that is punishable by incarceration and is not eligible to be disposed of by the Traffic Violations Bureau. "Victim" means a person against whom the criminal offense or delinquent act is committed or who is directly and proximately harmed by the commission of the offense or act. If the victim is a minor, incapacitated, or deceased, any person designated by the victim, a member of the victim's family, or a victim advocate, or, if the victim is deceased, any other person designated by the deceased victim's family, may exercise the victim's rights as a representative. "Victim" or "victim representative" does not include the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor, or incapacitated victim.

### *Best interests of victim*

If the prosecutor or the court believe that a designated representative is not acting in the best interests of the victim, the prosecutor may file a motion, and the court hold a hearing to determine whether the victim's best interests are being represented. If the court finds by a preponderance of the evidence that the representative is not acting in the victim's best interests, the court must appoint a special advocate, guardian ad litem, or victim advocate.

### **Opting-in to Marsy's Law rights**

The bill requires victims or representatives to opt-in to receive most protections afforded under Marsy's Law. The Supreme Court shall create a victim-rights-request form, to be provided to all law enforcement agencies, prosecuting attorneys, municipal law directors, etc. Law enforcement must provide this form to all crime victims on its initial contact with the victim. The form is required to:

- Inform the victim of the rights that are automatically granted, and of the rights that are not automatically granted, and allow the victim to select which rights they wish to request. Elections of these rights can be changed at any time.
- Include a section for law enforcement to indicate that the victim did not or was not able to complete the form at the time of initial contact, in which case the victim is deemed to have requested all rights, until the prosecutor is able to contact the victim to provide an opportunity to request any rights not automatically conferred.
- Inform the victim that failure to affirmatively request the rights that are not automatically granted is a waiver of those rights, but rights may be asserted at any point.
- Provide a method for the victim to designate a representative, if so desired.
- Include a section for the victim to indicate whether they were the direct victim of the offense, or were directly and proximately harmed by the offense.
- Include the contact information for both the victim and the law enforcement officer, and reminding the victim of the responsibility to update current contact information with the law enforcement official.
- Advise the victim of their right to counsel.
- Include a statement that the victim's personal information on the form is not a public record.

### **Privacy of victim information**

Under the bill, a completed or partially completed victim's rights request form is not a public record, although the prosecutor, victim, or victim's representative shall be provided an unredacted copy of the form. The defendant and/or the defendant's attorney shall have access to the form except for the victim's address and other contact or identifying information, unless otherwise ordered by the court. When court documents are filed, any name or other identifying information of the victim must be filed on a separate page that is not a public record.

### **Victim right to counsel**

A victim of a criminal offense or delinquent act has the right to be represented by retained counsel. This does not create a right to counsel at public expense for a victim. If a victim is represented by counsel, the court must notify the victim's counsel in the same manner in which the parties are notified under applicable law or rule. Counsel for the victim must be included in all bench conferences, meetings in chambers, and sidebars with the trial court that

directly involve a decision implicating that victim's rights. This cannot be construed as making a victim a party to the case.

### **Rights to an interpreter**

Per the Americans With Disabilities Act, a victim with a disability has a right to a qualified or certified interpreter (subject to availability, but not subject to cost) at all court proceedings, meetings with the prosecutor, and all investigative contacts with law enforcement, probation departments, and DRC/DYS, at no cost to the victim and paid for by the court. If an agency is unable to provide an interpreter, it must maintain records of its efforts to comply with this requirement.

### **Notice to victims**

The bill requires the court to provide the prosecutor with oral or written notice of any court proceeding no less than ten days prior to the proceeding, unless the parties agree that a shorter period is reasonable under the circumstances. It is then the responsibility of the prosecutor to provide the victim with notice of the proceedings, as well as all decisions and orders issued by the court.

The bill does include certain requirements on the court pertaining to notice to victims. The court, or the court's designee, must, upon the request of a victim or victim's representative who has provided a current address or other contact information, notify the victim or representative of the following:

- A probation or community control revocation disposition proceeding, or any proceeding in which the court is asked to terminate community control
- Any hearing on a proposed modification on the terms of probation or community control
- The arrest of a person who is on supervised community control, pursuant to a warrant issued for a probation or community control violation
- The defendant's failure to successfully complete a diversion or similar program

### **Victim conferring with prosecutor**

The bill requires courts to inquire as to whether a victim or victim's representative has requested to confer with the prosecution prior to: the granting of pretrial diversion, amending or dismissing an indictment/information/complaint, or agreeing to a negotiated plea, trial, or adjudicatory hearing in juvenile court. If the victim or representative so requested, the court must inquire as to whether the prosecutor did in fact confer. The court is not to rule on any substantive issues that will implicate a victim's rights, accept a plea, or impose a sentence if it determines that reasonable efforts have not been made to confer with the victim, and must continue the proceeding for such time as is necessary for the conference to occur.

### **Right not to testify – personal information**

In any court proceeding, the victim or victim's representative has the right not to testify regarding the victim's address, phone number, place of employment, or other identifying information, unless the victim consents, or the court determines pursuant to an in-camera

review that the fundamental demands of due process in the fair administration of criminal justice prevails over the victim's rights to keep the information confidential.

### **Subpoenas**

A defendant seeking to subpoena records of or concerning the victim must serve a copy of the subpoena to the prosecutor, victim, and (if applicable), the victim's attorney. On a motion made promptly at or before the time specified in the subpoena for compliance, the court, pursuant to Crim.R. 17, may quash or modify the subpoena if compliance would be unreasonable or oppressive. Upon the filing of such a motion, the court is to conduct a hearing in which the subpoena's proponent must establish:

- That the documents are evidentiary and relevant
- That the documents are not otherwise procurable reasonably in advance of trial by exercising due diligence
- That the party cannot properly prepare for trial without such production and inspection in advance of trial, and that the failure to obtain such inspection may tend to unreasonably delay trial
- That the application is made in good faith, and is not a violation of the Rules of Criminal Procedure

If the court does not quash the subpoena, it must conduct an in-camera review of any records to which a right of privilege has been asserted, and if the court determines that any documents are privileged or constitutionally protected, the court must balance the victim's rights against the defendant's constitutional rights.

### **Interview/testimony of victim**

The bill provides that victims cannot be compelled to submit to an interview on any matter, including any charged criminal offense witnessed by the victim that occurred in the same occasion as the offense against the victim that is conducted by the defendant, could this be made clearer? unless the victim consents in writing. Victims are not permitted, however, to ignore or disregard a court-ordered deposition or subpoena issued pursuant to the Criminal Rules.

### **Right of victim to be present and heard**

Prior law already permitted a victim to be present whenever the defendant was present during any stage of the criminal case conducted on the record, unless the court determined that exclusion of the victim was necessary to protect the defendant's right to a fair trial. HB 343 removes: the requirement above that the victim can be present only when the defendant is also present, the requirement that the victim can be present only if the proceeding is being conducted on the record, and the court's authority to exclude the victim if that presence would infringe on the defendant's right to a fair trial. The victim, the victim's representative, or the victim's attorney have the right to be heard (orally, in writing, or both) at any proceeding in which any right of the victim is implicated.

If the victim or their representative is not present at a hearing where the victim's rights are at issue, the court must inquire to the prosecutor as to whether the victim requested notifications and actually was notified of the hearing, what attempts were made to provide that notice, whether the

victim was informed of the right to be present and heard at the hearing, and whether the victim was conferred with prior to the hearing. The court shall not rule on any substantive issue that impacts the victim's rights if it determines that the victim was not given timely notice of the hearing, informed of their right to be present/heard, or that the prosecutor failed to adequately confer with the victim prior, and the court shall continue the hearing so these may occur.

#### *Negotiated plea hearings*

The bill further provides that victims have the right to be present and heard at any negotiated plea hearing. The court cannot accept a negotiated plea agreement when the victim is not present unless all of the following apply:

- The prosecutor informs the court that the prosecutor conferred with the victim prior to requesting and accepting the negotiated plea
- The prosecutor made reasonable efforts to give notice to the victim of the plea proceedings, and to inform the victim of the right to be present and heard, and discloses to the court any and all attempts made to provide the victim with notice of the proceeding and the terms of the plea agreement
- The prosecutor informs the court of any objection to the agreement from the victim
- The prosecutor advises the court that, to the best of the prosecutor's knowledge, the Marsy's Law notice requirements have been complied with

#### *Sentencing*

Existing law allows victims or their representative to "make a statement" at sentencing. The bill clarifies that this can be done orally or in writing, and provides that an oral statement is not subject to cross-examination.

#### *Other hearings*

The bill also specifically provides that victims, or their representative, have the right to be present and heard (orally, in writing, or both) at hearings on post-arrest release and hearings to terminate, revoke, or modify the terms of community control or probation. Again, we don't need both "probation" and "community control"

### **Standing to assert/Appeals of denials of Marsy's Law rights**

The bill provides that a victim, or a victim's attorney or representative, has standing as a matter of right to assert, or challenge an order denying, the rights of the victim provided by law. The court must act promptly on requests to enforce, or on a challenge to an order denying, such a right: the court must hear the matter within ten days of the assertion of the victim's rights, and the reasons for any decision denying relief must be clearly stated on the record or in the judgment entry.

If the court denies the relief sought, the court must provide the victim and the parties with notice of the decision and a copy of the judgment entry, and provide the victim with notice of the option to appeal or seek an extraordinary writ (see below). If the court denies the relief sought, the victim may appeal, or, if no remedy available on appeal, may seek an extraordinary writ from the court of appeals or Supreme Court.

### *Timeline for appeals*

If an interlocutory appeal is sought while the case is still pending in the trial court, the victim must initiate such appeal within 14 days after the notice was provided. If the appeal is sought after 14 days, the court shall dismiss it as untimely. A victim's direct appeal after the defendant is sentenced must be filed within 30 days after the sentencing entry.

Upon the filing of an interlocutory appeal, the trial court must, within five business days, transmit to the court of appeals those portions of the transcript necessary for consideration of the issues the court of appeals is to consider. Once the court of appeals has received the transcript, the party initiating the appeal has eight days to file a merit brief, and the appellant has an additional eight days to file a response brief. The court of appeals shall decide the appeal not later than 35 days following the filing of the appeal, unless the parties agree, with the court's approval, on a different schedule.

If the victim seeks an extraordinary writ with the court of appeals or the Supreme Court, the trial court must, within five business days, transmit to the court of appeals or the Supreme Court those portions of the transcript necessary for consideration of the issues the court is to consider. The court must enter a judgment within 45 days after the petition for the extraordinary writ is filed.

### *Speedy trial tolling*

The bill allows the defendant's speedy-trial rights to be tolled while any appeal or petition for an extraordinary writ is pending.

## **Restitution**

Marsy's Law guarantees to victims the right to full and timely restitution, and H.B. 343 enacts several provisions to clarify this right. The bill requires restitution ordered in juvenile delinquency proceedings and criminal proceedings to be made to a survivor of the victim or the victim's estate if the victim is deceased, instead of only to a survivor of the victim. A victim has a right not to seek restitution.

For minor misdemeanors, prior law prohibits the imposition of restitution. HB 343, however, requires the court to sentence the offender to make restitution if the offender is being sentenced for a criminal offense, including a minor misdemeanor.

### *Amount of restitution*

HB 343 requires the court to order full restitution for any expenses related to the victim's economic loss due to the criminal offense, and the amount of restitution is to be reduced by any payments to the victim for economic loss under an insurance policy or government program. The bill provides that "economic loss" includes, but is not limited to:

- Full or partial payment for the value of stolen or damaged property, which shall be the replacement cost of the property or the actual cost of repairing the property
- Medical expenses
- Mental health counseling expenses
- Wages or profits lost due to injury or harm to the victim as determined by the court, including lost commission income and base wages. Commission income shall be established by evidence of commission income during the twelve-month period prior to the

date of the crime for which restitution is being ordered, unless good cause for a shorter time period is shown

- Expenses related to making a vehicle or residence accessible to the victim if the victim is permanently disabled as a result of the offense

### *Juvenile Restitution*

The bill modifies R.C. 2152.20 to eliminate prior language on restitution alternatives, such as repair work, labor and community service work, and to enact a preponderance of the evidence standard for determining “full restitution.” The bill clarifies that community service can still be utilized for restitution for minor misdemeanors if it generates funds (R.C. 2152.20). This language is intended to allow juvenile courts to continue community service program partnerships with D.Y.S.

The bill creates a new juvenile restitution statute (R.C. 2152.203) that clarifies the procedure for calculating full restitution and defines “economic loss.” The bill also clarifies that the juvenile court retains jurisdiction over the restitution order, even if a period of community control ends, until the offender reaches the age of 21 (R.C. 2152.203). After age 21, a civil action must be filed in the county or municipal court of the offender or victim’s residence (R.C. 2152.203).

### **Reparations Fund**

Existing law requires courts in which a person is convicted of a criminal offense, other than a traffic offense that is not a moving violation, to order the defendant to pay costs in the amount of \$30 for a felony and \$9 for a misdemeanor, to be deposited into the Reparations Fund. HB 343 prohibits the court from waiving this cost.

### **Testimony by child or person with developmental disability**

If a child or person with a developmental disability testifies in open court, the bill provides that person with the following rights that may be enforced by the court through its contempt power, on its own motion or through a motion or notice by any attorney involved in the proceeding:

- To be asked questions in a manner that is easily understandable, including a child-friendly oath
- To be free of harassment or intimidation tactics
- To have an advocate or victim’s representative of their choosing<sup>1</sup> present in the courtroom and in a position clearly visible and in close proximity
- To have the courtroom or hearing room adjusted to ensure the comfort and protection of the child or person with a developmental disability
- To have flexibility in the formalities of the proceedings in an effort to ensure the comfort of the child or person with a developmental disability;

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<sup>1</sup> If the court or prosecutor has reasonable basis to believe that the victim’s representative is not acting in the interests of the victim who is a child or a person with a developmental disability, the bill requires the prosecutor to file a motion setting forth the reasonable basis for this belief and the court must hold a hearing to determine whether the victim’s representative is acting in the interests of the victim. The court must make this determination by a preponderance of the evidence. If the court finds that the victim’s representative is not acting in the interests of the victim, the court must appoint a court-appointed special advocate, guardian ad litem, or a victim advocate to act as the victim’s representative in lieu of the previously appointed victim’s representative.

- To permit a comfort item to be present inside the courtroom or hearing room and to accompany the child or person with a developmental disability throughout the hearing;
- To permit the use of a properly constructed screen that would allow the judge and jury in the courtroom or hearing room to see the child or person with a developmental disability but would obscure the child's or person with a developmental disability's view of the defendant or alleged juvenile offender or the public or both;
- To have a secure and comfortable waiting area provided for the child or person with a developmental disability during the court proceedings and to have a support person of the child's or person with a developmental disability's choosing stay with the child or person with a developmental disability while waiting (except as provided below);
- To have an advocate or victim's representative inform the court about the child's or person with a developmental disability's ability to understand the nature of the proceedings, special accommodations that may be needed for the child's or person with a developmental disability's testimony, and any other information relevant to any of the rights provided by the bill for a child or person with a developmental disability who testifies in open court.

#### *Juvenile victim depositions*

The bill expands use of depositions in lieu of live trial testimony in juvenile court for any juvenile victim or victim with a developmental disability who prove by a preponderance of the evidence that they will suffer "serious emotional trauma" if required to provide live trial testimony.

The Ohio House passed the bill by a vote of 90-1 on May 18, 2022, and the Senate passed the bill by a vote of 32-0 on December 14, 2022. The House voted to concur in Senate amendments by a vote of 89-0 the same day.