



# Office of the Ohio Public Defender

---

*Timothy Young, State Public Defender*

## **Interested Party Testimony Regarding House Bill 343 Marsy's Law Implementation Statute Sponsor Representative White**

Chair Manning, Vice Chair McColley, Ranking Member Thomas, and members of the Senate Judiciary Committee, thank you for the opportunity to testify as an interested party of Substitute House Bill 343 (HB343), Marsy's Law, on behalf of the Office of the Ohio Public Defender (OPD). I am Niki Clum, legislative policy manager for OPD.

OPD appreciates the efforts of the bill sponsor and proponents to provide further guidance to courts regarding the implementation of the constitutional amendment by the same name. OPD thanks Representative White and her staff for all their work on this bill. Representative White has shown steadfast leadership in bringing the bill to this point. OPD is grateful that she has allowed us to be a part of the discussions and has considered our feedback. Her hard work is why OPD is here now as an interested party instead of a staunch opponent. There are a few remaining concerns that OPD wants to highlight for consideration of this committee.

### **Discovery**

HB343 was introduced to protect the rights of crime victims. However, victims are not protected by sending innocent people to prison. Last session, proponents testified that this legislation is necessary to stop defendants from using a victim's statement against them to suggest the victim has bias.<sup>1</sup> However, if an alleged victim is biased, has a reason to be less than accurate, or is using the criminal justice system to settle a personal vendetta, shouldn't the jury hear that information? Proponents of the bill testified this session that this legislation is necessary to keep a defendant's defense team from

---

<sup>1</sup> Ohio Crime Victim Justice Center, HB610 Proponent Testimony, May 19, 2020, 1:02:39, <https://www.ohiochannel.org/video/ohio-house-criminal-justice-committee-5-19-2020>. Suggesting it would be inappropriate to question a victim's credibility based on comments made on social media.

investigating a victim's home, even if their home is the crime scene.<sup>2</sup> Shouldn't a defense team have the right to investigate the location where the crime was allegedly committed to prepare their defense? If access to a crime scene could help a defendant prove they are innocent, isn't that information the jury should hear? To quote the Ohio Supreme Court on this topic, "Even though Section 10a(A)(6) grants to a crime victim the right to refuse the discovery request of an accused, it applies 'except as authorized by section 10 of Article I of this constitution,' which sets forth the state constitutional rights of an accused. Thus, a **victim's rights under Section 10a(A)(6) are not absolute.**"<sup>3</sup> [Emphasis added.]

Many of OPD's concerns regarding the discovery provisions of this bill have been resolved. HB343 requires defendants to serve victims with copies of subpoenas duce tectum that request information about the victim. The bill allows the victim to file a motion to quash the subpoena. The defendant has the burden of proving that they are entitled to the records pursuant to the test established by the U.S. Supreme Court in *U.S. v. Nixon*.<sup>4</sup> If the court does not quash the subpoena, the court shall conduct an in-camera review of any records as to which a right of privilege has been asserted. If the court determines that any of the records reviewed in-camera are privileged or constitutionally protected, the court must balance the victim's rights and privileges against the constitutional rights of the defendant. Privileged information includes the victim's address, telephone number, and other identifying information. OPD worked with Representative White to ensure that any exculpatory information reviewed in this process is turned over to the defendant pursuant to *Brady v. Maryland*<sup>5</sup> and its progeny.

## Restitution

This month, the Ohio Supreme Court provided more guidance about the constitutional requirements of restitution. In a case called *State v. Yerkey*, the Court held:

---

<sup>2</sup> Ohio Crime Victim Justice Center, HB343 Proponent Testimony, March 24, 2022, 1:30:00, <https://ohiochannel.org/video/ohio-house-criminal-justice-committee-3-24-2022>. Referring to a case where the defendant requested a court order to photograph the alleged crime scene, which was also the victim's home.

<sup>3</sup> *State ex rel. Thomas v. McGinty*, 164 Ohio St.3d 167, 2020-Ohio-5452 ¶ 28.

<sup>4</sup> *U.S. v. Nixon*, 418 U.S. 683, 699-700 (1974).

<sup>5</sup> *Brady v. Maryland*, 373 U.S. 83 (1983).



[W]e conclude that Marsy’s Law provides a right to “full and timely restitution” but did not alter the meaning of “restitution” in Ohio law. Restitution in Ohio is limited to economic losses suffered by the victim as a direct and proximate result of the commission of the offense. Therefore, unless the loss of wages is directly and proximately caused by the offense (as, for example, when a victim misses time at work because of an injury to the victim caused by the offense), lost wages are not compensable as restitution.<sup>6</sup>

HB343 also specifies that victims can receive restitution as compensation for economic losses. Economic loss is defined as the value of stolen or damaged property, medical expenses, mental health counseling expenses, and wages or profits lost due to injury or harm to the victim as determined by the court.

If we are totally honest, this is not the restitution statute OPD would written. That being said, OPD appreciates that the Ohio Constitution entitles the victim to full and timely restitution and compromise is necessary. Again, Representative White and her staff spent many hours on this section, and OPD believes they struck a good balance. While, overall, OPD is comfortable with this portion of the bill, we want to highlight one matter for the committee.

OPD is concerned about a courts ability to determine the restitution for mental health counseling. The 8<sup>th</sup> Amendment of U.S. Constitution requires “economic sanctions ‘be proportioned to the wrong’ and ‘not be so large as to deprive [an offender] of his livelihood.’”<sup>7</sup> If, in one session, the victim and their counselor discuss the offense against the victim, the victim’s childhood, and the victim’s overbearing mother, does the defendant have to pay for the full session? A defendant has a right to the finality of their sentence, meaning the final total for restitution must be known and ordered at sentencing.<sup>8</sup> OPD fears restitution hearings will become long, complicated proceedings that require expert testimony from medical and mental health professionals regarding which expenses can be attributed to the defendant.

---

<sup>6</sup> *State v. Yerkey*, Slip Opinion No. 2022-Ohio-4298 at ¶ 1.

<sup>7</sup> *Timbs v. Indiana*, 586 U.S. \_\_\_ (2019), quoting *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989).

<sup>8</sup> Restitution in Adult Court, Supreme Court of Ohio, <https://www.supremecourt.ohio.gov/Publications/JCS/adultRestitution.pdf>; see generally, *State v. Holdcroft* (2013), 137 Ohio St. 3d. 526.



This was also a concern of the Ohio Supreme Court in *Yerkey*. The Court stated that making restitution too expansive “risk[s] mutating sentencing hearings throughout the state into civil trials of all grievances the victim may have against the offender, regardless of their relation to the crimes at issue.”<sup>9</sup> In the subsequent footnote, the court noted that “this is exactly what could have occurred in this case because in addition to lost wages, the victim sought (but was not awarded) nearly \$20,000 in attorney fees, medical bills, and counseling bills...”<sup>10</sup>

It is important to keep in mind that approximately 70 percent of defendants receive court appointed attorneys because their financial circumstances do not permit them to hire their own counsel. Therefore, most defendants will be unable to pay these large restitution orders in a timely manner, if at all. OPD also suggests an improvement to the restitution portions of the bill would be the removal of the provision that requires restitution not paid to the victim within 5 years to be paid into the Attorney General’s Crime Victims Fund.<sup>11</sup> This provision runs contrary to the purpose of restitution which is to make the victim whole. This provision imposes a potentially arduous financial burden for the benefit of someone potentially not connected to the case. Restitution that cannot be paid to the victim should be returned to the defendant.

## **Constitutional Issues**

The Ohio Constitution allows victims to “petition the court of appeals for the applicable district” if the trial court denies the victim the relief they sought.<sup>12</sup> There has been a lot of debate and some litigation regarding the term “petition.” Does petition mean an appeal, an extraordinary writ, or something else entirely? OPD is supportive of the process spelled out in HB343 for handling these issues. The bill provides reasonable timelines that expedite these issues at the appellate level, but also give parties and the court sufficient time to properly litigate these matters. However, OPD has a lingering concern about whether a victim is required to bring a writ or an appeal.

---

<sup>9</sup> *State v. Yerkey*, Slip Opinion No. 2022-Ohio-4298 at ¶ 18.

<sup>10</sup> *State v. Yerkey*, Slip Opinion No. 2022-Ohio-4298 at Footnote 4.

<sup>11</sup> Lines 3545 -3551

<sup>12</sup> Ohio Constitution, Article I, Section 10a(B)



A prior version of HB343 in the House specified that “the victim or the victim's attorney, if applicable, or the prosecutor on request of the victim, may appeal or, if the victim has no remedy on appeal, petition the court of appeals or supreme court for an extraordinary writ.”<sup>13</sup> In May of this year, the language was amended to include the phrase, “and the victim has standing to assert a right of limited appeal as it pertains to the decisions impacting the rights of the victim.”<sup>14</sup> Unfortunately, OPD did not realize this language was added into the bill until recently. At that time, OPD raised the issue with the bill sponsor. In fairness to Representative White and her staff, it was OPD’s mistake for not raising the matter earlier, particularly, because Representative White provided other opportunities to raise outstanding concerns. However, I do want to address this matter now for the committee since there is relevant Ohio Supreme Court precedent.

Every single decision in a criminal trial “impacts the rights of victims,” even if those rights are impacted incidentally/indirectly. The additional language added in May is very broad. With this language, what is left for extraordinary writs? Every objection of the victim’s will be an interlocutory appeal that divests the trial court of jurisdiction over that issue, resulting in delayed justice for victims and defendants and longer pretrial detention. Additionally, this language is inconsistent with Ohio Supreme Court precedent that held writs are the appropriate remedy when the victim does not have the ability, in ordinary course of law, to bring an interlocutory appeal under R.C. 2505.02(B)(4).<sup>15</sup> The language OPD previously agreed to is consistent with this Ohio Supreme Court decision.

## **Conclusion**

While protecting the rights of victims and defendants is vital for a fair and balanced criminal justice system, we do not want to create a system where the victim’s rights are paramount, and the defendant’s rights become questionable. Defendants are supposed to be presumed innocent as it is their liberty that is in jeopardy. HB343 has come a long way in ensuring the rights of defendants are

---

<sup>13</sup> HB343 Marsy’s Law 1397-2, Lines 6129 – 6133.

<sup>14</sup> Lines 7105 – 7107.

<sup>15</sup> *State ex rel. Thomas v. McGinty*, 164 Ohio St.3d 167, 2020-Ohio-5452 ¶ 50.



also protected. We appreciate the work that has gone into this bill, and we appreciate Representative White's leadership. OPD hopes our few remaining suggestions will be considered by this committee and potentially put forth as a floor amendment. Thank you for the opportunity to testify as an interested party, I am happy to answer any questions at this time.

