



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

Chairman LaRe, Vice Chair Swearingen, Ranking Member Leland, and members of the House Criminal Justice 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). My name is Tim Young, I am the State Public Defender.

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. There remain a few areas where OPD has some concerns and suggestions for the bill.

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.¹ 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

¹ 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.² 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.**"³ [Emphasis added.]

Many of OPD's concerns regarding the discovery provisions of this bill have been resolved. We do have one outstanding concern that we think, not only has constitutional implications, but could also result in innocent people being convicted. 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*.⁴ 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 supports this portion of the bill. However, OPD is concerned about R.C. 2930.071(A)(4) in the bill which states that records disclosed to the prosecutor are not discovery, "unless the material is *known* by the prosecutor to be exculpatory in nature." [Emphasis added.]

² 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.

³ *State ex rel. Thomas v. McGinty*, Slip Op. 2020-Ohio-5452, ¶ 28.

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



This language falls short of the state's constitutional duty to provide evidence favorable to defendant that is material to either guilt or punishment. In other words, the language in HB343 is unconstitutional pursuant to the seminal case *Brady v. Maryland* and its progeny.⁵ By limiting the material to that which is *known* to be exculpatory, the bill is violating *Kyles v. Whitley*⁶, which held that the state has a "duty to learn of" and disclose all favorable material. The state is constitutionally obligated to investigate whether the material disclosed to them must be turned over to the defendant. The U.S. Supreme Court has further directed the prosecution stating that "the prudent prosecutor will resolve doubtful questions in favor of disclosure." *United States v. Agurs*,⁷.

If the state is involved in the in-camera review process and sees something that may qualify under *Brady*, they are constitutionally bound to investigate that material and provide all exculpatory and favorable information to the defense. That is why OPD suggests the bill specify that "the disclosure of any portion of the records to the prosecutor does not make the records subject to discovery, unless the material is such that due process requires it must be provided to the defendant pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963)."⁸ There is no universe where a court and prosecutor can see exculpatory evidence and not turn it over to the defense. What is the remedy if, at trial or hearing, a witness testifies to something that the court and prosecutor knows there is contradictory or exculpatory evidence that exists, but the defense doesn't know about it. This is exculpatory information - it is about innocence. This committee should not hesitate to ensure that information favorable to the defendant is provided to the defendant. We don't want to convict innocent people and let the real guilty party get away with the crime.

Restitution

⁵ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁶ *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

⁷ *United States v. Agurs*, 427 U.S. 97, 108 (1976).

⁸ Concern was expressed about citing a case in the Ohio Revised Code. However, *Brady v. Maryland* is already cited in R.C. 2743.48. Specifically, R.C. 2743.48(J)(1) states, "(J) (1) As used in division (A) of this section, "Brady Rule" means the rule established pursuant to the decision of the United States supreme court in *Brady v. Maryland* (1963), 373 U.S. 83." Additionally, the term "Brady Rule" used through the section.



The proposed legislation states that victims can receive restitution as compensation for a broad array of economic losses, including, 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, we understand that the Ohio Constitution entitles the victim to full and timely restitution and compromises 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 a few matters for the committee.

The 8th Amendment of U.S. Constitution which requires “economic sanctions ‘be proportioned to the wrong’ and ‘not be so large as to deprive [an offender] of his livelihood.’”⁹ OPD does have concern about a courts ability to determine the restitution for mental health counseling. 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.¹⁰ 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.

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 has two specific suggestions to improve the restitution portions of the bill. First, the bill should remove the provision that requires restitution not paid to the victim within 60 days to be the paid to the

⁹ *Timbs v. Indiana*, 586 U.S. ___ (2019), quoting *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989).

¹⁰ 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.



division of unclaimed funds.¹¹ 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 no one. Restitution that cannot be paid to the victim should be returned to the defendant.

Second, the bill permits courts to require the execution of a satisfactory performance bond to ensure payment of restitution.¹² This is extremely onerous, and likely an impossible condition for a defendant to meet. Very few companies would issue such a bond for someone convicted of a felony and required to pay restitution. Additionally, bonding companies are often able to bypass basic collection protections leaving the defendants vulnerable and without remedy.

Constitutional Issues

As previously stated, the victim's name and identifying information is privileged under this bill. However, there may be times when the defendant needs to include information about victim in motions, briefs, memorandum, or other court filings. For example, if the alleged offense occurred at the victim's home or place of employment, identifying that privileged information may be necessarily included in the filing so the court can make an informed ruling. The defendant should not be prohibited from putting forth a constitutionally guaranteed zealous defense. To resolve this issue, OPD simply asks that the bill state "Nothing in this division should be read to prohibit the defendant from including necessary information about the victim in filing with the trial court, court of appeals, or supreme court" at R.C. 2930.06(B) in the bill.

OPD's last recommendation for HB343 is an issue that has come up for some of our appellate attorneys. OPD requests that the bill explicitly permit defendants to respond and be represented by counsel in proceedings where the victim is pursuing an extraordinary writ. Because writs lie where is no adequate remedy at law, the bill needs to explicitly allow the defendant to respond, or courts may rule defendants do not have standing to protect their rights in the proceeding. OPD has provided Representative White and her staff with suggested language to address this concern.

¹¹ R.C. 2929.281(G).

¹² R.C. 2152.203(C)



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 also protected. We appreciate the work that has gone into this bill, and we appreciate Representative White's leadership. OPD hopes that our suggestions will be included in this bill. Thank you for the opportunity to testify as an interested party, I am happy to answer any questions at this time.

