



# Office of the Ohio Public Defender

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*Timothy Young, State Public Defender*

## **Testimony in Opposition House Bill 610 Marsy's Law Implementation Statute Sponsor Representative Cupp**

Chairman Lang, Vice Chair Plummer, Ranking Member Leland, and members of the House Criminal Justice Committee, thank you for the opportunity to testify in opposition of House Bill 610 (HB610), Marsy's Law, on behalf of the Office of the Ohio Public Defender (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. However, OPD has some concerns with the bill.

Proponents testified that this legislation is necessary to stop defendants from using a victim's statement against them to suggest the victim has bias. 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 that this legislation is necessary to keep a defendant's defense team from investigating a victim's home, even if their home happens to be the crime scene. 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? HB610 was introduced to protect the rights of crime victims. However, victims are not protected by sending innocent people to prison.

Proponents of HB610 also pointed out in their testimony that the Marsy's law constitutional amendment passed overwhelmingly. While that is true, HB610 goes far beyond what Ohioans voted for in that amendment. Ohioans did not vote to have a defendant pay for a victim's attorney. Ohioans did not vote to toll the speedy trial clock every time a victim feels aggrieved by the trial court. Ohioans did not vote to prohibit a defendant from questioning a victim's bias. Even if the Ohio constitutional amendment had included such language, it would likely be found unconstitutional under the U.S.

Constitution's Sixth Amendment right to confront witnesses, as may be the fate of that provision in this bill. OPD is not being hyperbolic when we propose that provisions of HB610 are unconstitutional, under both the Ohio Constitution, as they go beyond the Marsy's law amendment, and the U.S. Constitution. OPD opposes HB610 because it is beyond the bounds of the Marsy's law constitutional amendment and will result in a swarm of state and federal litigation.

## **Discovery**

For a defendant to receive a fair trial, the defendant must be able to conduct an investigation of the alleged charges. This includes, not only the ability to view the crime scene and interview witnesses, but also subpoena records. The proposed bill effectively eliminates the defendant's ability to subpoena a significant amount of records from and about the victim that may be essential to his or her defense.

The proposed bill makes the "victim's address, telephone number, place of employment, or other locating information" confidential unless there is a "compelling" reason to disclose the information. Lines 4752 - 4758. If a defendant subpoenas any record that contains this confidential information, the defendant must show the "relevance, admissibility, and materiality" of the records. Lines 4859 - 4865. The bill creates an insurmountable standard because it is nearly impossible to prove the "compelling" reason(s) to gain admissibility without knowing what the document is or contains. Before the defendant receives the document, the court must perform an in-camera review of the subpoenaed records. Lines 4870 – 4871. The court can quash the defendant's subpoena or allow the prosecution and victim seven days to appeal the court's decision that due process requires disclosure of the records. Lines 4883 – 4887. This provision again inhibits the defendant's ability to defend themselves. First, convincing the court that due process requires unknown records be disclosed forces the defendant to reveal their trial strategy to the court and prosecutor so the defendant can make the argument that the records, the contents of which are unknown to the defendant, are essential to their strategy. Even if the defendant is successful in convincing the court, the defendant may then be obligated to defend the court's decision on appeal by the victim or prosecutor without knowing the nature or contents of the records. Every step of the process provided in the bill forces the defendant to achieve an impossible standard.



## Constitutional Issues

The proposed bill implicates several constitutional protections currently afforded to all defendants in our criminal justice system. Infringing on protections for defendants will result in a litany of litigation bogging down Ohio's legal system as courts are forced to determine the constitutionality of these provisions as drafted. For example, victims who feel the court has discounted any of their rights can file an interlocutory appeal or writ, which will stay the case in the trial court. Lines 5864 – 5868 and 6807 - 6809. The bill does not limit the number of interlocutory appeals or writs a victim can file while a case is pending. Interlocutory appeals or writs filed by victims will drag cases out for months or years, potentially in violation of a defendant's constitutional right to speedy trial. Meanwhile, witnesses' memories fade and the ability to gather relevant evidence diminishes.

Defendants are also constitutionally entitled to effective counsel. Counsel for the defense can be deemed ineffective if they do not interview witnesses in the case, including the victim.<sup>1</sup> The proposed bill, however, makes it nearly impossible for a defendant's attorney to conduct a meaningful interview of a victim because defense counsel may only schedule the interview through the prosecutor and the victim's attorney. Lines 4903 - 4907. Regardless of the victim's wishes, it is the prosecutor's prerogative to be present for the interview. Lines 4933 - 4935. The defendant is not even permitted to contact a victim about being a witness to a different offense. Lines 4893 – 4902. The bill allows victims to refuse to answer questions at depositions but allows depositions to be used at trial instead of testimony if the victim is under 16-years-old. Lines 1884 – 1899, 4922 – 4924, and 6103 – 6118. This could potentially infringe on a defendant's sixth amendment right to confront witnesses. Lines 4930 – 4932. The bill potentially infringes on a defendant's right to represent him or herself by allowing the court to require "standby counsel" to exam a child or disabled victim at trial.<sup>2</sup> Lines 6746 – 6754. Finally, the bill provides victims the ability "to reopen a plea or sentencing," potentially violating a defendant's right against double-jeopardy. Lines 5905 – 5907.

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<sup>1</sup> See generally, *Parrish Towns v. Smith*, 395 F.3d 251 (6th Cir. 2005).

<sup>2</sup> See generally, *Faretta v. California*, 422 U.S. 806 (1975).



These constitutional protections are imperative to ensure each defendant in Ohio receives a fair trial. The proposed language will unavoidably lead to a vast amount of litigation.

## **Restitution**

The proposed legislation states that victims can receive restitution as compensation for a broad array of economic losses, including, but not limited to, paying for the victim's attorney's fees, costs associated with monitoring the victim's credit score, and the cost of installing a security system in the victim's home. Under this bill, a defendant could be convicted of stealing \$2,000 worth of property from the victim during a robbery. However, the restitution order could include, not only the \$2,000 for the stolen property, but additionally tens of thousands of dollars in restitution related to the victim's attorney's fees, monitoring the victim's credit score, and installing a security system. The amount of restitution that can be ordered under HB610 is excessive and unrelated to the offense committed. Therefore, these provisions of HB610 are likely to run afoul of the 8<sup>th</sup> 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.'"<sup>3</sup>

The expansive restitution provisions in the bill will result in massive judgments for restitution that are unlikely to ever be paid. Approximately 70 percent of defendants receive court appointed attorneys because their financial circumstances do not permit them to hire their own counsel. However, the bill requires those same individuals to pay the victim's attorney and prohibits the court from considering the defendant's ability to pay. Lines 1768 - 1770, 1798 – 1799, 3892 – 3893, and 3921 - 3922. This will result in large restitution orders that most defendants will be unable to pay in a timely manner, if at all.

The proposed bill also requires the defendant to pay restitution for past and future medical expenses, including mental health counseling. Lines 1765 - 783 and Lines 3888 - 3906. A defendant has a right to the finality of their sentence, meaning the final total for restitution must be known and

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<sup>3</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).



ordered at sentencing.<sup>4</sup> Lines 2794 – 2795. As a result of the bill’s language, courts will be forced to speculate about future medical expenses the victim may incur. Restitution hearings will become long, complicated proceedings that require expert testimony from medical professionals predicting future medical expenses, including the impossible task of determining how long a victim may need mental health counseling. Moreover, the bill includes no mechanism for refunding a defendant if there is an overpayment of restitution. If the victim should complete their medical treatment earlier than predicted, the victim will receive a financial windfall. The inevitable and unequitable result is that some victims will receive less restitution than they are entitled to under the bill and some defendants will pay more restitution than is required.

The bill permits the court to order a restraining order or injunction to “ensure payment of restitution.” Lines 1820 – 1822 and 3947 – 3951. The language in the bill is overly vague and fails to specify the extent of the court’s authority to control the finances of each defendant. Inescapably, the bill forces common pleas and municipal courts to act as bankruptcy courts to determine how each defendant should spend their money. This level of detailed analysis for each defendant who is unable to pay a substantial restitution order will further increase the workload and expense on Ohio’s already overburdened judicial system. Importantly, the focus on restitution as required under the bill to determine every expenses that may be incurred by the victim will divert the courts’ attention from more important matters like pending cases and the ensuring the protection of every party’s constitutional rights.

As previously mentioned, the bill prohibits the court from considering the defendant’s ability to pay restitution. Lines 1768 – 1770; 3892 - 3893. Further exacerbating the problem, the bill makes it impossible for some defendants to be free of their restitution obligations. Discharge of the restitution order in bankruptcy court is prohibited, and the court is required to keep jurisdiction of the case until

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<sup>4</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.



restitution is paid in full. Lines 1846 – 1849, 3973 - 3975; 3977 – 3982. This is not only a financial anchor on defendants, but also on Ohio's communities. As Chief Justice O'Connor recently wrote in in her concurring opinion in *State v. Taylor*, requiring financial sanctions on a defendant that they cannot pay "creates other costs for the state in the form of the state's time and resources spent pursuing various methods of collecting the costs from the defendant."<sup>5</sup> Local governments will have to foot the bill for defendants lingering in the court system potentially for years with massive restitution orders hanging over their heads. While Chief Justice O'Connor was addressing paying court costs and not restitution, her concern about the collateral consequences of placing unrealistic financial sanctions on a defendant is applicable here. Failure to pay restitution can result in a community control violation.<sup>6</sup> As Chief Justice O'Connor pointed out, "a defendant's violation of community control conditions due to the defendant's inability to pay...might make the defendant ineligible for many important federal benefits and programs specifically designed to help the poor.... Sadly, a defendant's loss of eligibility to participate in these programs will not hurt just the defendant. Because some of these programs are designed to help families, the loss of eligibility will also hurt the defendant's family."<sup>7</sup>

## Conclusion

While protecting the rights of victims and defendants is vital for a fair and balanced criminal justice system, HB610 is too broad. The bill creates 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 in jeopardy, but HB610 places impossible burdens on defendants which will result in innocent people being convicted and sentenced to expensive jail and prison terms. OPD is also concerned that Ohio's already overburdened courts will be saddled with litigation as defendants are

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<sup>5</sup> 2020-Ohio-3514, ¶ 29.

<sup>6</sup> Restitution in Adult Court, Supreme Court of Ohio,  
<https://www.supremecourt.ohio.gov/Publications/JCS/adultRestitution.pdf>

<sup>7</sup> *Taylor*, at ¶ 31.



forced to challenge the potentially unconstitutional portions of the law to ensure justice, and that is why we oppose HB610.

