

# Ohio Judicial Conference

## PRELIMINARY GUIDELINES

### MARSY'S LAW (EFFECTIVE DATE FEBRUARY 5, 2018)

Marsy's Law is a victim rights amendment to the Ohio Constitution that makes several significant changes to the criminal justice system in this state. This document is meant to explore the two areas of Marsy's Law that will most impact the courts and judges – namely, the constitutional definition of “victim” and the resulting entities that can assert rights under Marsy's Law; and the requirement that restitution to a victim be mandatory, “full, and timely.” Other requirements of Marsy's Law, such as notifications to a victim, are responsibilities of law enforcement, prosecutors, the Ohio Department of Youth Services, and the Ohio Department of Rehabilitation and Corrections and do not directly impact the courts.

This document is meant to be neither an exhaustive analysis of Marsy's Law nor legal advice on its application. Some possible constitutional conflicts remain unresolved and some questions remain unanswered. Legislation clarifying the implementation of Marsy's Law is being drafted and may alter some of the statements made in this document.

Marsy's Law defines victim as “the person against whom the criminal act is committed or the person directly and proximately harmed by the criminal offense.”

#### WHAT CHANGES?

- Under RC 2930.01(H), “victim” means either of the following: (1) A person who is identified as the victim of a crime or specified delinquent act in a police report or in a complaint, indictment, or information that charges the commission of a crime; or (2) A person who receives injuries as a result of a vehicle, streetcar, trackless trolley, aquatic device, or aircraft accident that is proximately caused by an OVI violation and who receives medical treatment.
- The federal Crime Victims' Rights Act may provide guidance as it defines “victim” similarly to the Marsy's Law definition: someone “directly and proximately harmed by the criminal offense.” Under federal law, a person does not have to be the target of the crime, but the requirement that the harm be “direct” requires that the named victim is closely related, not just tangentially linked, to the offense. Note: a victim must be both directly *and* proximately harmed to be a victim under Marsy's Law. In some cases, this will broaden the pool of victims and in others it will limit it.
- Federal courts, in determining whether someone is eligible to assert rights under the federal Crime Victims' Rights Act, must (1) identify the behavior constituting the commission of the offense; (2) identify the direct *and* proximate effects of that behavior on parties other than the government; and (3) determine whether the criminal behavior causes a party direct and

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proximate harmful effects. (*In re McNulty*, 597 F.3d 344 (6th Cir. 2010); *In re Wellcare Health Plans, Inc.*, 754 F.3d 1234 (11th Cir. 2014)).

### WHAT STAYS THE SAME?

- Current practice in Ohio resembles that of South Dakota’s legislative implementation of a Marsy’s Law constitutional amendment, where the State’s Attorney was tasked with identifying and naming the victim for each case. Courts were tasked with ensuring that, if a victim was asserting rights under Marsy’s Law, that victim was identified on the record.
- Marsy’s Law explicitly does not provide a civil cause of action for damages for an alleged violation of a victim’s rights. This is in line with current law.
- There can be more than one victim and a victim can be a non-human entity.

Marsy’s Law requires reasonable and timely notice of all public proceedings involving the criminal offense against the victim & to be present at all such proceedings, upon request of the victim.

### WHAT CHANGES?

- Upon request, a victim is to be notified when a suspect is arrested or released, of any court dates, and of case results. The requirement to notify the victim could delay pre-trial release decisions significantly.

### WHAT STAYS THE SAME?

- Victim notification of suspect arrest, court dates, and case results remains the responsibility of the relevant law enforcement agency and prosecutor, respectively.

Marsy’s Law requires “full and timely restitution from the offender.”

### WHAT CHANGES?

- Currently, restitution *may* be ordered pursuant to RC 2929.18(A)(1) – Marsy’s Law says restitution *must* be ordered.
- Currently, a third party cannot collect restitution. (*State v. Wagner*, 2015-Ohio-5502). The definition of a third party may change, as the definition of victim could be broader.
- Currently, the court can but is not required to consider many factors in determining the amount of restitution, including the recommendation of the victim – if the definition of victim is broadened, it will impact who can provide a recommendation for restitution.
- Does “timely” restitution require a determination in the context of the defendant’s ability to pay?

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### WHAT STAYS THE SAME?

- RC 2929.18 authorizes the order of restitution for felony convictions and RC 2929.28 authorizes the order of restitution for misdemeanor convictions
- Currently, restitution may be ordered in an amount based on the victim's economic loss that is a direct and proximate result of the commission of the offense. (*State v. Maurer*, 2016-Ohio-1380; *State v. Newman*, 2015-Ohio-4283; *State v. Conley*, 2015-Ohio-2553; *State v. Ganguby*, 2015-Ohio-845; RC 2929.01(L)).
- Currently, the court can but is not required to consider many factors in determining the amount of restitution, including the recommendation of the victim, recommendation of the offender, the PSI, receipts, and estimates. (*State v. Lalain*, 2013-Ohio-3093; *State v. Nitsche*, 2016-Ohio-3170). Marsy's Law may change who is considered a victim and therefore who can provide a recommendation for restitution.
- Currently, restitution must be supported by competent, credible evidence from which the court can discern the amount of restitution to a reasonable degree of certainty. (*State v. Newman*, 2015-Ohio-4283; *State v. Shiflett*, 2010-Ohio-3587; *State v. Leeper*, 2005-Ohio-1957).
- The amount of restitution must be limited to the actual economic loss caused by the illegal conduct for which the defendant was convicted.
- State bears burden to prove restitution amount.
- RC 2929.19(B)(6), when read in conjunction with RC 2929.18(A)(1), the provision authorizing restitution, does not require a court to find that a defendant has the ability to pay the full amount of restitution ordered before the court orders restitution.
- Currently, either party can request a hearing to object to restitution prior to sentencing. RC 2929.18(A)(1).
- Absent sufficient evidence in the record, the trial court must hold an evidentiary hearing to determine the appropriate amount of restitution. (*State v. Carrino*, 1995 Ohio App. LEXIS 1950, 1995 WL 277103; *State v. Wohlgenuth* (1990), 66 Ohio App.3d 195). The trial court is also required to hold an evidentiary hearing where the defendant disputes the amount of restitution (*State v. Preztak*, 2009-Ohio-621; failure to do so ruled abuse of discretion in *State v. Foster*, 2009-Ohio-6213).
- Currently, if a named victim has been reimbursed, he has not suffered economic loss and is not entitled to restitution. Marsy's Law does not change this. (*State v. Harris*, 2015 Ohio 4412).
- RC 2929.18(A)(1) requires the amount of restitution to be determined when restitution is ordered, if ordered at sentencing – there is no continuing jurisdiction to increase the financial sanction; the trial court retains authority to impose a more restrictive financial sanction only if the defendant violates the conditions of his community control under RC 2929.15(B).
- RC 2929.15(C) allows the judge to modify the payment terms of any restitution.
- An exact amount must be stated on the record and on the restitution order. (*State v. Downie*, 2009-Ohio-4643).

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- Restitution can be a condition of probation and willful nonpayment of restitution can be a violation of probation that results in incarceration – however, to prevent indigent defendants from being imprisoned solely because of their inability to pay, when an alleged violation of probation is for failure to pay restitution, the State must adduce evidence of the probationer’s ability to pay and may have to consider alternative methods of penalizing the defendant.
- An order of restitution is a final order. (*State v. Danison*, 2005-Ohio-781).
- Restitution is not dischargeable in bankruptcy.

The victim, in any proceeding involving the criminal offense or delinquent act against the victim or in which the victim's rights are implicated, may assert Marsy’s Law rights.

### WHAT CHANGES?

- If the relief sought by the victim is denied, the victim may petition the court of appeals. The language of the Ohio Constitution now requires prompt review and decision at the appellate level.
- Will a petition to the court of appeals invoke the right to counsel?

### WHAT STAYS THE SAME?

- Marsy’s Law explicitly does not provide a civil cause of action for damages for an alleged violation of a victim’s rights. This is in line with current law.

Under Marsy’s Law, a victim has a right, upon request, to confer with the attorney for the government.

### WHAT CHANGES?

- RC 2930.06 already provides victims with the right to confer with the prosecutor, but only “to the extent practicable.” Marsy’s Law requires the prosecutor to confer with a victim, if that victim requests it.

### WHAT STAYS THE SAME?

- Marsy’s Law does not guarantee a victim an attorney and does not require that indigent victims receive court-appointed attorneys. Victims have a right to confer with the attorney for the government, but no other attorney is mentioned in the enumeration of rights. Elsewhere in Marsy’s Law the possibility of a victim’s lawful attorney (as distinct from the attorney for the government) is mentioned, but that right is clearly and deliberately absent from the list of rights created by Marsy’s Law.