



Kentucky Association of Criminal Defense Lawyers

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January 4, 2018

Vote No on Marsy's Law

If Marsy's Law - a bill pre-filed in our Legislature is passed, Kentucky citizens will have a chance to weigh in on the following question that will determine whether the Kentucky Constitution is dramatically changed and whether every criminal case in the Commonwealth is altered substantially.

Are you in favor of providing constitutional rights to victims of crime, including the right to be treated fairly, with dignity and respect, and the right to be informed and have a role in the judicial process?

It is difficult to imagine any individual that would read that language voting no. The problem is that the language you see above conceals what would be a dramatic change in the Kentucky Constitution and alters nearly every criminal case being prosecuted in the Commonwealth. The most significant change in our Constitution that would be authorized by a yes vote involves granting a victim "standing" for themselves or their attorney to participate in a criminal case to enforce their rights. Standing is the right to have an attorney litigate a matter on your behalf in a Court due to your rights being affected. The proposed amendment has several important components, two of which say plainly that victims "shall have standing to enforce these rights" and the victim's rights shall be "protected by law in a manner no less vigorous than the protections afforded to the accused." This is extremely consequential to our justice system.

Among several others, the rights that victims, through their attorneys, would have "standing" to enforce include:

1. The right "to be heard in any public proceeding involving a release, plea, sentencing, or other matter" and
2. The right "to full and timely restitution"

At first, none of this sounds objectionable. However, consider the following results. First, if you have enough money to pay a lawyer to assert your rights as a victim then he or she, in addition to the prosecutor and defense lawyer, will have the right to be present and litigate whether the bond amount for a criminal defendant is appropriate, what conditions should be imposed on release, when trial should be set, or whether a plea agreement should be approved. This increases the number of lawyers present in every one of these proceedings by 50%. That is not typically a recipe for a timelier resolution of a case.

Second, consider the fact that if victims' rights are protected "no less vigorously than the rights of the accused" as required by this Constitutional Amendment, then just as criminal defendants have the right to publicly appointed and taxpayer-paid defenders pursuant to the landmark US Supreme Court case Gideon v. Wainwright, then it logically follows that all victims would be entitled to a taxpayer-paid lawyer to protect the victim's rights. Consider the financial consequences of this in an era of pension shortfalls, a desire for limited government, state budget shortfalls, and the need for tax reform. While the legislation attempts to prevent any basis for a lawsuit against the Commonwealth because of this Constitutional change, the legislature can't have it both ways.

Third, to complicate matters further, "victim" is defined broadly to include even the direct victim's spouse, parents, siblings, or children. A question that arises is whether each "victim," many of whom may have

competing interests, would each be entitled to their own representation in every proceeding as the criminal case moves through our courts? Further, while “victim” is defined as an “individual” the legislation does not specifically exclude a corporation or business from being a victim. In an age where corporations not only have individual rights such as the protection against unlawful search and seizure, but also to political speech, it seems clear that if a big box department store or a pay day lender were the victim of a substantial theft or other crime then they would at the very least attempt to assert the right to have their lawyers in court arguing on behalf of their corporate interests in the criminal prosecution of the person accused of the crime. Additionally, Judges and prosecutors are left with little guidance on what is to be done when this broad class of victims have competing interests and different desires for the outcome of a certain hearing or the case generally.

Fourth, providing standing to victims effectively takes the responsibility away from prosecutors and Judges to enforce the many rights that are already enumerated in the already existing Kentucky Crime Victim Bill of Rights and turns that responsibility over to the very victims who are sought to be protected. Readily available today is a 20-page booklet entitled “Kentucky Crime Victim Bill of Rights Handbook,” available online from the Attorney General’s office that makes clear victims’ rights, as well as the roles and responsibilities of law enforcement, prosecutors, and Judges in protecting those important rights. Like many states, Kentucky passed Victim Rights laws following the 1983 murder of Marsalee Nicholas in California after whom this current legislation is named.

Kentucky taxpayers already pay for Victim’s Advocates in many jurisdictions in our Commonwealth. These Victim Advocates are in addition to the hard-working prosecutors, Judges, and public defenders we have in every county. If the victim advocates are not keeping victims informed, not collecting victim impact information, or not helping crime victims access victim compensation funds, then the solution is providing consequences when they fail to do their job, not enacting a well-intentioned change to our Constitution that ultimately does nothing to protect Victims, but costs taxpayers dearly and shoves the burden of enforcement onto the victim.

The problem is that it is easier for legislators to back a Constitutional Amendment in the name of “Victims’ Rights” than it is to provide oversight, funding, and enforcement of the Victims’ Rights laws we already have.

To those who would say that no additional funds would be paid to staff a new bureaucracy or to pay private counsel for the poor, then setting the equal protection argument aside, this is effectively an argument for Victim’s Rights, but only for those who can pay an attorney to enforce them. That’s unconscionable.

The reason we have the procedural protection for the accused that we do is because our criminal justice framework rests on the presumption of the accused’s innocence and the fact that, occasionally, people that are accused of crime are not guilty. Identifying a “crime victim” at the outset of the proceeding presumes just the opposite. Take for example one category of cases - those involving self-defense. Do we really want a system where a person who claims this fundamental right of self-protection must defend themselves not only against the power of the State but also against the legal onslaught mounted by a victim who later, after a trial, turns out to be anything but?

We now have a system where victims can have their voices heard at trial, at sentencing, and before the parole board and to further be informed throughout the criminal justice process by prosecutors and Victim Advocates. This is the right balance.

You may be skeptical of an editorial written by the President of the Kentucky Association of Criminal Defense Lawyers. I encourage you to sit down with your local county attorney or commonwealth’s attorney and see what he or she thinks of this legislation. Victims’ rights are important, and Victims’ Advocates are equally important. That is why the former is already enshrined in Kentucky Law and the latter are paid for with our limited tax dollars and should be properly funded. Encourage your legislator to have the courage to vote no on this legislation that unnecessarily seeks to change our Constitution and is more about the appearance of action rather than the important work of upholding victims’ rights already enshrined in our law.

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