



Marsy's Law Response

Editor of the State Journal,

I am writing in response to the op-ed written in the State Journal on June 26, 2016, by Eileen Recktenwald of the Kentucky Association of Sexual Assault Programs. Ms. Recktenwald asserts that Kentucky should alter its state constitution to enshrine victims' rights therein. While on its face it may seem like a good idea and have a certain appeal, the Kentucky Association of Criminal Defense Lawyers believes it is both unnecessary and potentially damaging to our system of justice.

Marsy's Law is a solution without a problem. Our criminal justice system is often described as a three-legged stool—two advocates arguing about the facts and the law before an independent and neutral judge. One advocate, the criminal defense lawyer, represents the interests of the accused person. The other advocate, the prosecutor, represents the interests of the State, the victim, and justice itself. This system has worked well over centuries to discover the truth and to lead to a fair result.

Marsy's Law, however, seeks to add a fourth leg, and to place a thumb down squarely on the side of a victim. As a result, the advocate for the defense would face a prosecutor and an advocate for the victim, perverting the presumption of innocence and skewing the results. The consequences, intended or otherwise, would be more time spent in pretrial detention by defendants that are presumed innocent, with attendant negative effects on fair trials and on burgeoning jail populations, as well as more eligible defendants being denied probation, shock probation, and parole. Our bloated prisons would become filled to the brim, costing the Department of Corrections, with a budget of over \$500 million today, even more.

One would expect that a radical proposal such as this was precipitated by horror stories of injustice in which the courts are running roughshod over the interests of victims. There have been few of those stories. My experience as a criminal defense lawyer for 39 years has been that the criminal justice system by and large bends over backwards to respect the needs and interests of victims.

Unless the advocates for this constitutional amendment can produce multiple significant examples of injustice, we should not change the system that has been carefully balanced over time by permanently changing our constitution. If judges and prosecutors are acting in ways detrimental to victims, the remedy is at the ballot box, not by creating an entirely new criminal justice system with a victim's attorney sitting at a third table in the courtroom.

Kentucky already has significant provisions to ensure victims have rights in court. We now have a "Victim's Bill of Rights" in Kentucky. It can be found in KRS 421.500. It guarantees many rights to victims, including:

- The right to a "special advocate" if the victim is a minor or legally incapacitated.
- The right to information from law enforcement about protective, emergency, social, and medical services, crime victim compensation, community based treatment programs, the

criminal justice process, the arrest of the accused, and how to register to be notified when a person has been released from prison or jail.

- The right to be provided information from law enforcement and prosecutors on how they may be protected from intimidation, harassment, and retaliation.
- The right to information from prosecutors about when criminal justice proceedings are occurring, including scheduling changes.
- The right to information from prosecutors notifying them of judicial proceedings related to their case, including pretrial release, conditions of release, charges against an accused, the defendant's plea, the trial date, changes in custody status, changes in trial dates, the verdict, the sentencing date, notice of any parole board hearings, the appeal, and hearings related to shock probation or bail pending appeal.
- The right to make an impact statement for consideration by the court at the time of sentencing. This impact statement "shall be considered by the court prior to any decision on the sentencing or release, including shock probation, of the defendant." In her op-ed, Ms. Recktenwald stated that the victim in the Stanford rape case had a right "that many sexual assault victims here in Kentucky do not: the constitutional right to have her voice heard in court." What she doesn't say is that the only difference is between a constitutional right and a statutory right. And it is the placing of this right in the constitution that is so very dangerous and ill-considered.
- The right to information about how to register for notification of the defendant's release from jail, prison, or a psychiatric facility.
- The right to be consulted by the prosecutor on the disposition of the case including dismissal, release pending judicial proceedings, any conditions of release, a negotiated plea, and entry into a pretrial diversion program.
- The right to return of all property belonging to the victim.
- The right for law enforcement and prosecutors to inform employers of the need of the victim to attend court proceedings.
- The right to have a victim's advocate accompany the victim to court proceedings and to "provide moral and emotional support." Many prosecutors' offices have state-funded victims' advocates providing these and other services to victims.

Does this sound like victims do not have rights and that their interests are being ignored, such that a constitutional amendment is required?

A constitutional amendment is the wrong mechanism for changing the law. As mentioned above, Kentucky passed a "Victim's Bill of Rights" back in 1986. It has been amended and expanded five times since then. The process of proposing changes to the rights victims have in court has been working to strengthen those rights based upon experiences in courtrooms across Kentucky. In contrast, if the state constitution is amended, that will be embedded law which will be difficult to change once enacted. The statutory process works fine.

There are unintended consequences to this proposal. Senate Bill 175 was Kentucky's version of Marsy's Law proposed in 2016. There are several dangerous provisions in that proposal that could produce unintended consequences. For example, one provision gives a right to be "respected and protected by law in a manner no less vigorous than the protections afforded to the accused in the criminal and juvenile justice systems to ... be heard in any proceeding involving release, plea, sentencing, disposition, parole, and any proceeding during which a right of the victim is implicated." Accompanying this provision is another one giving the victim's attorney the right to "seek enforcement of the rights

enumerated in this section and any other right afforded to the victim by law in any trial or appellate court with jurisdiction over the case. The court shall act promptly on such a request and afford a remedy for the violation of any right.” Does this mean that, if the judge sets a defendant’s bond in the amount of \$5000 as a condition of pretrial release, the victim’s attorney is allowed to argue against the bond, and then appeal the judge’s decision? Would the victim’s attorney be permitted to sit at counsel table during a trial and to give an opening and closing argument? Would they have a right to cross-examine witnesses? Would the victim’s attorney be able to oppose the prosecutor’s plea offer, or to argue against a prosecutor’s offer of probation? If the judge decides to put the defendant into treatment for a drug addiction, could the victim’s attorney argue against that in court and then appeal it for years to come in the appellate court if he loses? Would victims who didn’t have the resources to secure an attorney be eligible to retain one at taxpayer expense? Will we need to create a Department of Victims’ Advocacy with a multi-million dollar state budget?

What if a defendant’s attorney, perhaps a busy public defender, needs more time to prepare a defense? SB 175 would give the victim’s attorney a right to insist on a “prompt conclusion” of the case. In that case, the victim’s attorney could oppose a defendant’s motion for more time to prepare the defense, pitting the rights of the victim to a prompt resolution with the right of the defendant to a fair trial.

What Ms. Rechtenwald really wants is for victims to be able to litigate all actions in a criminal case so that decisions by a judge that the victim dislikes can be challenged and reversed. This reveals an unwarranted cynicism about the criminal justice system and gives a false impression that it is not working for a just outcome for all parties.

Often, the entire point of a trial is to determine who the perpetrator is and who the victim is. Because Marsy’s Law gives the rights to victims pretrial, that predetermines who a victim is. Yet, it is often the case that the jury is called upon to determine if a crime has occurred at all, or if it occurred, who the perpetrator is. Under Marsy’s Law, an innocent person erroneously charged with a crime who was asking to be released on bond, would be faced with a victim’s attorney arguing to keep the innocent person in jail pending trial.

This proposal is damaging to the office of prosecutor. Implicit in Ms. Reckenwald’s op-ed is that prosecutors are failing in their duties to protect and argue for victims. Prosecutors are charged with representing the interests of the Commonwealth and victims of crime. They have victims’ advocates in their offices supporting and assisting victims. They routinely stay in touch with victims and follow the bill of rights accorded them. Yet, implicit in Marsy’s Law, is dissatisfaction with the job they are doing. They want more. They want their own personal attorney to advocate for them and be in a position that is equal to and, in some situations, superior to the elected prosecutor.

This proposal would alter significantly the adversary system as we know it. Let there be no doubt about it. The system we have now in place, which has operated under the present Kentucky Constitution and functioned well since the late 1800s, would be turned on its head in ways we cannot imagine.

No one opposes providing redress to crime victims. However, Marsy’s Law is a radical proposal that is rife with potential conflicts and innumerable problems that do not serve the interests of justice for all. Our state constitution has served us well – let’s not tamper with it when there is no legitimate reason to do so.

Ernie Lewis is President of the Kentucky Association of Criminal Defense Lawyers and a resident of Frankfort.