



Eastern Region Office  
PO Box 60173  
Philadelphia, PA 19102  
215-592-1513 T  
215-592-1343 F

Central Region Office  
PO Box 11761  
Harrisburg, PA 17108  
717-238-2258 T  
717-236-6895 F

Western Region Office  
PO Box 23058  
Pittsburgh, PA 15222  
412-681-7736 T  
412-681-8707 F

## MEMORANDUM

**TO:** The Pennsylvania House of Representatives

**FROM:** Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

**DATE:** June 12, 2018

**RE: OPPOSITION TO SB 1011 (Reschenthaler)**

Known as Marsy's Law, [SB 1011 \(PN 1824\)](#)<sup>1</sup> proposes an amendment to Article I of the Pennsylvania Constitution to establish a crime victims' 'bill of rights.' This resolution aims to grant crime victims comparable—and enforceable—rights to “justice and due process” equal to those provided to the accused and requires that their rights are “protected in a manner no less vigorous than the rights afforded to the accused” in criminal and juvenile proceedings.<sup>2</sup>

SB 1011 borrows language from model legislation proposed by the [Marsy's Law for All campaign](#).<sup>3</sup> California was the first state to amend its constitution to include Marsy's Law provisions in 2008. Since then, the [national campaign](#)<sup>4</sup> has added to its roster five additional states that have passed similar constitution amendments (although South Dakota may become the [first state to repeal Marsy's Law](#),<sup>5</sup> citing unintended legal and financial consequences after adopting it in 2016).

The criminal justice system absolutely owes victims the right to be treated with fairness and respect. Victims are owed the right to be notified of all court proceedings and to be heard at sentencing after the accused is convicted. But the focus on “balancing” victims' rights against the accused (and in support of the government's prosecutorial power) runs contrary to the reason why the Bill of Rights was enshrined in the Constitution – namely, to protect the accused, particularly those who are marginalized and unpopular, from government overreach. The state provides constitutional rights to the accused in criminal proceedings because the **state is attempting to deprive the *accused* – not the victim – of life, liberty, and property.**

**On behalf of the 59,000 members of the ACLU of Pennsylvania, I respectfully urge you to vote 'no' on Senate Bill 1011 for the following reasons:**

**A constitutional amendment severely inhibits ability to correct unforeseen consequences** [Pennsylvania's Crime Victims Act](#)<sup>6</sup> of 2007 not only enumerates many of the rights proposed in SB 1011, but it includes scores of additional, robust protections for crime victims. If the legislature intends to change or expand upon those rights, amending the statutory language is a far more prudent option. A constitutional amendment, if enacted, is not flexible. Should

<sup>1</sup> PA Senate Bill 1011, <http://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2017&sInd=0&body=S&type=B&bn=1011>

<sup>2</sup> PA Senate Bill 1011 P.N. 1824 § 9.1 (a) Rights of victims of crimes

<sup>3</sup> Marsy's Law for All, <https://marsyslaw.us/about-marsys-law>

<sup>4</sup> Felton, Emmanuel. “The Billionaire Funding Victims' Rights Campaigns Across the Country.” *Pacific Standard*, 17 Jan. 2018, <https://psmag.com/social-justice/billionaire-funding-victims-rights-campaigns-across-the-country>

<sup>5</sup> Smith, Kelley. “Marsy's Law passed in 6 states, South Dakota on track to repeal it.” *KSFY*, 26 Jan. 2018, <http://www.ksfy.com/content/news/Marsys-Law-passed-in-6-states-South-Dakota-on-track-to-repeal-it-471383263.htm>

<sup>6</sup> 18 P.S. § 11.101 et seq, [http://www.ova.pa.gov/AboutOVA/CrimeVictimsRights/Documents/crime\\_victims\\_act%5b1%5d.pdf](http://www.ova.pa.gov/AboutOVA/CrimeVictimsRights/Documents/crime_victims_act%5b1%5d.pdf)

unintended or unforeseen problems arise with implementation, application, or interpretation, amending the constitution (again) is an unduly burdensome, if not unrealistic, mechanism to make the necessary adjustments.

### **Victims' rights granted under SB 1011 likely conflict with due process rights afforded to defendants**

The full effect of this proposed amendment is difficult gauge because several of its provisions are dangerously broad or vaguely worded. This lack of clarity compounds a more fundamental concern, namely that the rights granted to victims may conflict with the accused's right to due process under the PA and U.S. Constitutions.

- **Right to prevent disclosure to defense:** SB 1011 provides victims the right to “refuse an interview, deposition or other discovery request made by the accused or any person acting on behalf of the accused.” This broad language risks, if not invites, refusals that deny the defense [access to legitimate discovery](#).<sup>7</sup> Additionally, this provision provides no guidance for how judges should resolve conflicts between a victim's right to refuse and the accused's right to disclosure. What should a judge do when a victim's right to refuse discovery and depositions runs up against a defendant's constitutional right to evidence that could prove their innocence? Whose rights should a judge favor if such discovery requests were necessary to provide the accused with a fair trial? In the absence of legal clarity, we risk inconsistencies and injustice.
- **Right to be heard at criminal proceedings:** SB 1011 provides victims enforceable rights to notice of essentially all proceedings in a criminal case and the right to be heard at those proceedings – before the accused has even been convicted. Specifically, it includes the rights to:
  - Be notified of pretrial disposition of the case;
  - Reasonable notice of any release or escape of an accused;
  - With the exception of grand jury proceedings, to be heard in any proceeding where a right of the victim is implicated, including but not limited to, release, plea, sentencing, disposition, parole and pardon;
  - Reasonable and timely notice of and to be present at all public proceedings involving the criminal or delinquent conduct;
  - Be notified of all parole procedures, to participate in the parole process, to provide information to be considered before the parole of the offender, and to be notified of the parole of the offender; and
  - Be informed of all enumerated rights.

In and of themselves, these rights do not affect the due process rights of the accused. However, if critical proceedings (such as bail hearings) are delayed for the purpose of providing notice to the victim, the rights of the accused may be infringed. Similarly, if the victim's right “to be heard” translates to the right to “prevent” release, setting of bail, or resolution of the case through a plea bargain, then the provisions would substantially infringe on the due process rights of the accused.

- **Right to a speedy trial and prompt conclusion:** SB 1011 grants victims the right to “proceedings free from unreasonable delay and a prompt conclusion of the case.” We are again confronted by two competing sets of enforceable rights: the victim's right vs. a defendant's right to a speedy trial as guaranteed by Article I, Section 9 of the Pennsylvania Constitution and the Sixth Amendment to the U.S. Constitution. How is this conflict resolved? Does a victim's right to be free from unreasonable delay take precedence over the accused's need for more time to develop their defense? And while Pennsylvania's [Rule 600](#)<sup>8</sup> defines when a defendant must be brought to trial, SB 1011 offers neither a definition of “unreasonable delay” nor any criteria for judges to use in determining what constitutes “unreasonable” – a worrisome invitation to arbitrary decision-making.

<sup>7</sup> 234 Pa. Code Rule 573. Pretrial Discovery and Inspection, <https://www.pacode.com/secure/data/234/chapter5/s573.html>  
 Pennsylvania courts are bound by the PA Rule of Criminal Procedure 573 and the decision in Brady v. Maryland, 373 U.S. 83 (1963), which held that prosecutors must disclose materially exculpatory evidence in the government's possession to the defense; failure to disclose such evidence violates the due process rights of the accused, commonly referred to as a ‘Brady violation.’

<sup>8</sup> 234 Pa. Code Rule 600. Prompt Trial, <https://www.pacode.com/secure/data/234/chapter6/s600.html>

**SB 1011 will increase costs to the state and will amount to an unfunded mandate for counties**

The [fiscal impact](#)<sup>9</sup> of SB 1011 is estimated at \$1 million - \$1.5 million in FY 2018-2019, based solely on the costs associated with the advertising required to notify the public about a proposed constitutional amendment.<sup>10</sup> Not included in this estimate are any costs to the state resulting from the rights provided to crime victims in the proposed amendment, namely the cost of increased notification requirements and delays in criminal proceedings. By way of comparison, Marsy's Law was estimated to [cost North Dakota roughly \\$2 million per year](#)<sup>11</sup> due in part to notification requirements and hearing delays.

And, of course, what also remains unclear is the additional expense to counties for criminal defense services. Because Pennsylvania remains the only state that does not provide state-level funding for indigent defense, [counties are strapped with 100% of the costs](#)<sup>12</sup> associated with defending its poorest residents. As a result, SB 1011 will likely function as an unfunded mandate to be borne exclusively by Pennsylvania counties.

Our criminal justice system is, of course, imperfect – people are wrongfully accused of crimes and sometimes wrongfully convicted. But on balance, we trust that an adversarial system that protects and enforces the constitutional rights of the accused against the power of the state is the best way to ensure justice is served. Yet, in making victims' rights equal to that of the accused, Marsy's Law threatens to upset that adversarial balance by limiting the rights of a defendant precisely at the moment when the government is attempting to use its law enforcement power to deprive the accused of liberty and property. **The victims' rights enumerated in SB 1011 are not designed to check the power of the state; in fact, they do just the opposite – they enhance the power of the state at the expense of the accused.**

**For these reasons, we ask you to vote “no” on Senate Bill 1011.**

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<sup>9</sup> SB 1011 P.N. 1402 Fiscal Note, Senate Appropriations Committee, January 2, 2018, <http://www.legis.state.pa.us/WU01/LI/BI/SFN/2017/0/SB1011P1402.pdf>

<sup>10</sup> Pennsylvania requires that legislation proposing to amend the Constitution be passed by the General Assembly in two consecutive legislative sessions. The fiscal note only accounts for public advertising costs during one of the two required legislative sessions.

<sup>11</sup> Nowatzki, Mike. “Marsy's Law cost estimated at \$2M per year.” *Dickinson Press*, 16 Sept. 2016, <http://www.thedickinsonpress.com/news/4126084-marsys-law-cost-estimated-2m-year>

<sup>12</sup> The Sixth Amendment Center: Know Your State – Pennsylvania, <http://sixthamendment.org/know-your-state/pennsylvania/>