

MARSY'S LAW - BACKGROUND MEMORANDUM

House Concurrent Resolution No. 3003 (2017) ([Appendix A](#)) provided for a study of the impact of Marsy's Law on the statutorily provided rights of crime victims and those alleged to have committed crimes, and the criminal procedures relating to the rights of victims and criminal defendants.

BACKGROUND

At the general election in November 2016, the voters of the state approved an initiated constitutional measure referred to as "Marsy's Law." Marsy's Law was named after Dr. Henry T. Nicholas' sister, Marsalee Nicholas, who was stalked and killed by her ex-boyfriend in 1983. Dr. Nicholas was the sole reported contributor to the campaign and contributed over \$2.3 million. Marsy's Law, codified as Section 26 of Article I of the Constitution of North Dakota, provides 19 rights afforded to victims. Any court in the state in which the criminal proceeding is being heard, the prosecuting attorney, and criminal justice agencies are subject to and must enforce Marsy's Law.

North Dakota Century Code Section 16.1-01-17 requires the Legislative Management to gather information on the estimated fiscal impact of initiated measures. At the September 29, 2016, meeting of the Legislative Management, the Office of Management and Budget estimated the fiscal impact of Marsy's Law to be \$1,156,846 for the remainder of the 2015-17 biennium and \$3,966,330 for the 2017-19 biennium.

Under the constitutional provision, a "victim" is defined as "a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed." Pursuant to Section 26, victims are entitled to the following rights, beginning at the time of victimization:

1. The right to be treated with fairness and respect for the victim's dignity.
2. The right to be free from intimidation, harassment, and abuse.
3. The right to be reasonably protected from the accused and any person acting on behalf of the accused.
4. The right to have the safety and welfare of the victim and the victim's family considered when setting bail or making release decisions.
5. The right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information about the victim, and to be notified of any request for such information or records.
6. The right to privacy, which includes the right to refuse an interview, deposition, or other discovery request made by the defendant, the defendant's attorney, or any person acting on behalf of the defendant, and to set reasonable conditions on the conduct of any such interaction to which the victim consents.
7. The right to reasonable, accurate, and timely notice of, and to be present at, all proceedings, involving the criminal or delinquent conduct, including release, plea, sentencing, adjudication, and disposition, and any proceeding during which a right of the victim is implicated.
8. The right to be promptly notified of any release or escape of the accused.
9. The right to be heard in any proceeding involving the release, plea, sentencing, adjudication, disposition, or parole, and any proceeding during which a right of the victim is implicated.
10. The right, upon request, to confer with the attorney for the government.
11. The right to provide information regarding the impact of the offender's conduct on the victim and the victim's family to the individual responsible for conducting any presentence or disposition investigation or compiling any presentence investigation report or recommendation regarding, and to have any such information considered in any sentencing or disposition recommendations.
12. The right, upon request, to receive a copy of any report or record relevant to the exercise of a victim's right, except for those portions made confidential by law or unless a court determines disclosure would substantially interfere with the investigation of a case, and to receive a copy of any presentence report or plan of disposition when available to the defendant or delinquent child.
13. The right, upon request, to the prompt return of the victim's property when no longer needed as evidence in the case.
14. The right to full and timely restitution in every case and from each offender for all losses suffered by the victim as a result of the criminal or delinquent conduct.

15. The right to proceedings free from unreasonable delay, and to a prompt and final conclusion of the case and any related post-judgment proceedings.
16. The right, upon request, to be informed of the conviction, adjudication, sentence, disposition, place, and time of incarceration, detention, or other disposition of the offender, any scheduled release date of the offender, and the release of or the escape by the offender from custody or commitment.
17. The right, upon request, to be informed in a timely manner of all post-judgment processes and procedures, to participate in such processes and procedures, to provide information to the release authority to be considered before any release decision is made, and to be notified of any release decision regarding the offender.
18. The right, upon request, to be informed in a timely manner of any pardon, commutation, reprieve, or expungement procedures, to provide information to the Governor, the court, the pardon board, and other authority in these procedures, and to have that information considered before a decision is made, and to be notified of such decision in advance of any release of the offender.
19. The right to be informed of these rights, and to be informed that victims can seek the advice of any attorney with respect to their rights.

Chapters 12.1-34 and 12.1-35 also provide for the fair treatment of victims and witnesses and child victim and witness fair treatment standards. The 65th Legislative Assembly passed 2017 House Bill No. 1194, which amended Chapter 12.1-34 to be consistent with Marsy's Law. The definitions of "family member" and "victim" in Section 12.1-34-01 were amended to include a grandchild and any person with a relationship to the victim which is substantially similar to a relationship specified and to specify the term "victim" does not include the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor, or incapacitated victim.

Section 12.1-34-02 was amended in House Bill No. 1194 to provide a victim has the right to prevent the disclosure of confidential or privileged information about the victim or the victim's family and to be notified of any request for identifying information or confidential or privileged information about the victim or victim's family. This section was amended to specify a victim must be allowed to confer with the prosecuting attorney and victims and witnesses must be informed of the right to seek the advice of an attorney. House Bill No. 1194 also updated Section 12.1-34-06 to require the Attorney General to maintain a statewide automated victim notification system and to require the Attorney General to develop a Marsy's card ([Appendix B](#)), which is required under the constitutional amendment.

Implementation

A victim's "right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information about the victim and to be notified of any request for such information or records" has been the subject of an Attorney General opinion. In a December 2016 opinion, 2016-L-04 ([Appendix C](#)), the Attorney General concluded, "the constitutional and statutory provisions of the open records law must be read in conjunction with the constitutional provision of Marsy's Law, and statutory provisions on victim's rights, to harmonize and give meaning to the related provisions."

Section 6 of Article XI of the Constitution of North Dakota provides "unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies or the state or any political subdivisions of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours." Marsy's Law specifically provides a victim has the "right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information about the victim, and to be notified of any request for such information or records." In the December 2016 opinion, the Attorney General concluded only the names of victims of domestic violence, sexual offenses, sexual performance of a child, or human trafficking are protected from disclosure under a specific exclusion from the constitutional open records requirement. On January 9, 2017, the Attorney General published *Guidance on Marsy's Law* ([Appendix D](#)), to provide assistance to state and local law enforcement officials, prosecuting attorneys, and correctional facilities. In the *Guidance on Marsy's Law*, the Attorney General provides, "a victim must affirmatively assert his or her rights outlined in Marsy's Law" and the Attorney General further explains "an assertion of Marsy's Law rights by a victim should be documented for the record by the responding law enforcement officer or the prosecuting attorney." Page 4 of the *Guidance on Marsy's Law* provides specific instances in which the constitutional measure is reconciled with the state's open records law, such as information that can be used to locate a victim or victim's family, information that can be used to harass the victim or victim's family, information that would disclose privileged or confidential information about the victim, and the names of a victim or victim's family.

South Dakota voters passed the same version of Marsy's Law at the November 2016 general election. In response to a question relating to whether the disclosure of a victim's name and address by state and local entities is a violation of Marsy's Law, the South Dakota Attorney General concluded in a December 5, 2016, opinion ([Appendix E](#)), "the government is not automatically prohibited from releasing information or records . . . [r]ather, the government is prohibited from releasing certain information when a victim invokes his or her right to prevent disclosure." The South Dakota Attorney General also concluded, "all rights in the Amendment are applicable to every victim."

Other States

In 2008 Marsy's Law was first adopted in California through a ballot initiative known as Proposition 9. Dr. Nicholas has backed similar initiatives in at least 14 additional states. Illinois voters approved a Marsy's Law measure in 2014 after a similar measure did not make the ballot in 2012. A Marsy's Law initiative is on the 2017 ballot in Ohio. In April 2017 the Oklahoma State Legislature referred a Marsy's Law to the state ballot for an election in 2018. In June 2017 the Nevada State Legislature referred a Marsy's Law to the 2018 ballot.

Montana also passed Marsy's Law in 2016; however, a lawsuit was filed with the Montana Supreme Court in June 2017, alleging the victims' bill of rights is unconstitutional. The petitioners argue the measure amended multiple sections of the state Constitution and the new law is expensive to enact, costing about \$95,000 in some counties. As a result of the lawsuit, Marsy's Law did not become effective on July 1, 2017. The litigation is pending.

PROPOSED STUDY APPROACH

The committee should consider inviting the Attorney General, representatives of local law enforcement, prosecutors, and defense attorneys to provide insight on the implementation of Marsy's Law and the new procedures established in response to Marsy's Law. The committee should consider whether the right of a victim to prevent the disclosure of personal information extends, or should extend, to all victims regardless of the crime. The committee may desire to seek information regarding any additional cost to state and local governments to implement the law. Based upon that information, the committee may determine whether statutory or constitutional revisions are necessary.

ATTACH: 5