



# PACDL

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**TO: Pennsylvania Senate Judiciary Committee**  
**FROM: Pennsylvania Association of Criminal Defense Lawyers**  
**RE: Opposition to Senate Bill 149 and House Bill 275 (Marsy's Law)**  
**DATE: March 26, 2019**

The Pennsylvania Association of Criminal Defense Lawyers (PACDL) joins the ACLU Pennsylvania in opposing House Bill 276 and Senate Bill 149, commonly known as Marsy's Law, which proposes to amend the Pennsylvania Constitution to establish a "crime victims' bill of rights." While PACDL supports certain victims' rights, these bills suffer from a variety of substantial defects including undermining defendants' fundamental due process and constitutional rights such as the right to a presumption of innocence and right to a fair and impartial trial.

Pennsylvania's criminal justice system already affords victims' rights and has institutionalized fairness and respect via the Pennsylvania Crime Victims' Bill of Rights. Under Pennsylvania's existing statute, victims are required to be notified of all court proceedings and can be heard at sentencing, **after the accused is convicted**. Senate Bill 149 and House Bill 276 will involve some determination of a "victim" prior to a decision of whether there will be a conviction. This is at odds with the presumption of innocence which serves to place the burdens of production and persuasion on the government. The burden requires proof of acts denounced by statute as a crime, a culpable mental state, and the identity of the actor. Until a plea of guilty is entered or a jury verdict is returned, the presumption of innocence remains in effect.

Under the proposed constitutional amendment, the judge will have to find that a crime was committed and that an individual suffered loss as a result. It is not hard to anticipate a case in which the decision will be difficult. For example, under Pennsylvania's Castle Doctrine, self-protection may be asserted as a defense. A person is not guilty of a crime if physical force (even deadly force) was used by the defendant "if:

- (i) the actor has a right to be in the place where he was attacked;
- (ii) the actor believes it is immediately necessary to do so to protect himself against death, serious bodily injury, kidnapping or sexual intercourse by force or threat; and
- (iii) the person against whom the force is used displays or otherwise uses:
  - (A) a firearm or replica of a firearm as defined in 42 Pa.C.S. § 9712 (relating to sentences for offenses committed with firearms); or
  - (B) any other weapon readily or apparently capable of lethal use."

In such circumstances, the court would determine whether an individual is a "victim" prior to a determination whether a crime even occurred.

Additionally, these bills are based on a fallacy that the substantially different rights of victims and defendants can be equated. Defendants' rights are constitutionally guaranteed when the state seeks to deprive the accused of life, liberty, or property. The purpose of victims' rights is not to protect the victim from state abuses, but to protect the victim from another individual. This attempt to put

victims and defendants on the same footing does both a disservice and results in the weakening of rights constitutionally afforded to criminal defendants.

This attempt at balancing the rights of the accused and the victim, especially in the face of the government's vast resources and 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.

PACDL's primary concern about these bills involves one highly problematic assumption of Marsy's Law: the awarding of rights to individuals as "victims" at a pre-conviction stage where no crime has been proven beyond a reasonable doubt and, therefore, victimization has not been legally established. Based on this presumption, the bills undermine the presumption of innocence at the core of our criminal justice system and the Bill of Rights. The drafters of this legislation have provided no guidance for how courts should conduct the balancing of the constitutional rights of an accused: including the presumption of innocence, right to effective counsel, and due process, against those of the alleged victim. The legislation fails to provide for the effective enforcement of victims' rights without a correlating deprivation of constitutionally guaranteed rights of the accused.

In addition to the rights referenced above, Marsy's law would also result in the deprivation of an accused's constitutional right to confront witnesses and evidence against him or her. Marsy's law would give the victim the right to withhold potentially exculpatory evidence by refusing to be interviewed or deposed by the accused or a person acting on behalf of the accused. This right of refusal will deny the accused access to evidence arguably critical to the constitutional right to a fair trial. This would be a violation of the Sixth Amendment to the U.S. Constitution, which states: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor..." Depriving defendants of their right to confront witnesses would also deprive them of their constitutional right to due process.

Another concern surrounds the right of victims "to reasonable and timely notice of and to be present at all public proceedings involving the criminal or delinquent conduct." This right already exists in our Crime Victims' Bill of Rights. The proposed legislation, by creating a constitutional right to notice duplicative of existing protections, elevates the right to notice and creates confusion and ambiguity concerning the burden and costs associated with notice provisions and the existence or non-existence of legal remedies for failure to provide notice.

Supporters of Marsy's Law have declared hearings to be unnecessary citing the overwhelming support for its passage. We submit that the practical implications of the proposed constitutional amendment may not have been fully considered and urge the Senate Judiciary Committee to conduct hearings to fully explore questions and concerns about the bills, including discussing enforcement concerns and the costs and consequences of amending Pennsylvania's Constitution in this manner. If time is of the essence, then please vote "no" on these bills.