

November 2017

Law and Justice Interim Committee (LJIC)  
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# COMMITTEE ISSUE: MARSY'S LAW 101

## Background

In late September 2017, the Law and Justice Interim Committee (LJIC) requested periodic updates from state agencies about implementation of CI-116, also known as Marsy's Law. Between the September meeting and the LJIC's November meeting, the Montana Supreme Court voided the initiative. This paper was intended to give background on the initiative and the legislative response to it as well as the legal challenge. The background information remains relevant in the sense that the LJIC might wish to recommend legislation to the 2019 Legislature to amend or remove statutory references to the now-voided constitutional section that contains Marsy's Law. A brief synopsis of the Montana Supreme Court opinion and copies of two 2017 bills that responded to the adoption of CI-116 are included at the end of this paper.

## Adopting CI-116

In November 2016, Montana voters approved CI-116, also known as Marsy's Law. The initiative amended the Montana Constitution to establish specific rights for crime victims in Article II, which contains the Declaration of Rights. Ballot language for CI-116 stated that the rights in the initiative "include the right to participate in criminal and juvenile justice proceedings, to be notified of major developments in the criminal case, to be notified of changes to the offender's custodial status, to be present at court proceedings and provide input to the prosecutor before a plea agreement is finalized, and to be heard at plea or sentencing proceedings, or any process that may result in the offender's release." The section also included "rights to restitution, privacy, to confer with the prosecuting attorney, and to be informed of [the victim's] rights."

After the election, two attorneys and a collection of groups representing local governments, county attorneys, and advocates for civil liberties petitioned the Montana Supreme Court to clarify when the initiative would be effective. The Montana Constitution provides that unless another day is specified in a successful initiative, the effective date of the initiative is July 1 after the election day. Although the ballot language printed for CI-116 stated the initiative would be effective immediately, the actual text of the initiative did not contain a specific effective date. After reviewing the petition and a brief filed by the Attorney General's Office, the court ruled that CI-116 would be effective July 1, 2017.

Marsy's Law was placed in Article II, section 36, of the Montana Constitution.

## Challenging CI-116

In June 2017, the Montana Association of Counties (MACo), the Lewis and Clark county attorney, an attorney who represents and advocates for crime victims, the Montana Association of Criminal Defense Attorneys, and the ACLU of Montana Foundation filed a petition with the Montana Supreme Court challenging the constitutionality of the enactment of Marsy's Law. The Attorney General and the Secretary of State were named as respondents to defend the State of Montana in the case. At the

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request of the parties, the court agreed to delay the implementation of Marsy's Law until after it ruled in the case. The court also agreed to hear the case on an expedited basis.

The petitioners questioned the legality of the initiative because they claim it violates the Montana Constitution's single-subject requirement (Article V, section 11) and its requirement for a separate vote for each amendment to the Constitution (Article XIV, section 11). Petitioners argue that even though Marsy's Law is contained in a single constitutional section, it amends at least eight other constitutional sections by implication, which they claim is a violation of the separate vote requirement of Article XIV, section 11. They also argue that while Marsy's Law claims to provide constitutional rights for crime victims, it also creates new rights for relatives of victims. That creation of new rights is what the petitioners believe violates the single-subject requirement in Article V, section 11.

Attorneys for the state responded that Marsy's Law doesn't "alter, add, delete, modify, or change the language" of other constitutional provisions, so it should survive the challenge to it based on the separate vote requirement in Article XIV, section 11. They argue that just because Marsy's Law affects rights listed in other constitutional sections doesn't mean it also amends those provisions.

The respondents defend against the claim of a violation of the single-subject requirement in Article V, section 11, by arguing that the single-subject rule applies only to legislation adopted by the Legislature not to constitutional initiatives. They also claim that even if that requirement does apply to constitutional initiatives, Marsy's Law doesn't create new rights for relatives of victims. Instead, it defines the term "victim," which is an inseparable part of delineating what rights crime victims possess. Because of that interconnection between the list of rights and the definition of "victim," the respondents believe that Marsy's Law meets the single subject requirement.

On November 1, 2017, the Montana Supreme Court ruled that the manner in which Marsy's Law was submitted to Montana voters violated the state constitutional requirement in Article XIV, section 11, for a separate vote on each proposed change to the constitution. Because of this violation, the court declared that CI-116 was void in its entirety.

## Responding to CI-116

During the 2017 session, legislators considered at least two bills to revise victims' rights laws in response to CI-116: House Bill No 600 carried by Representative Frank Garner (R-Kalispell) and Senate Bill No 250 carried by Senator Nels Swandal (Wilsall). Both bills refer specifically to Article II, section 36, of the Montana Constitution, which was the official placement of Marsy's Law, and both bills were enacted and codified into the Montana Code Annotated.

Because the bills created specific references to a constitutional provision that is now void, the LJIC might wish to recommend legislation to the 2019 Legislature to remove references to the now-voided Article II, section 36.

### House Bill No. 600 – Revising Laws Related to Victims' Rights

Rep. Garner carried HB 600 on behalf of a stakeholder working group that met to consider how to administer Marsy's Law. The group was composed of representatives from local governments, law enforcement, the courts, corrections, and victims' advocates.

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HB 600 requires the attorney general to develop a model card that lists a victim's rights as provided in Marsy's Law. Local government law enforcement agencies can adjust the card to provide additional information on local contact information and resources. In addition, HB 600 provides that certain sharing of victim information is not prohibited by Marsy's Law, such as giving information to a domestic violence shelter or a crisis line. It also grants the Department of Corrections rulemaking authority to create rules necessary to carry out the purposes of the constitutional amendment.

Marsy's Law defines "crime" as "an act defined as a felony, misdemeanor, or delinquency under state law." HB 600 provides that the terms "delinquency," "felony," and "misdemeanor" refer only to offenses listed in certain Montana code sections:

- Title 30 (Trade and Commerce, which includes offenses related to sales of securities and unfair trade practices);
- Title 41 (Minors, which includes the Youth Court Act that governs how juveniles are charged with offenses, the conduct of informal and formal juvenile court proceedings, and custody and placements of youth involved in the criminal justice system);
- Title 45 (Crimes, which includes most drug offenses and offenses against a person, property, public order, and public administration);
- Title 49 (Human Rights, which includes offenses related to violations of basic rights and discrimination in housing practices or against a person with disabilities); and
- Title 52 (Family Services, which includes offenses against older adults or persons with developmental disabilities, an offense related to helping a resident leave a youth correctional facility, and offenses related to operation of day-care facilities).

These titles do not include fish and wildlife, general traffic, or DUI offenses.

### Senate Bill No. 250 – Revising Laws Regarding Prosecutorial Immunity

The same working group that proposed the initial provisions of HB 600 also supported a second bill to address issues related to Marsy's Law: SB 250. The bill provides qualified immunity to prosecutors while performing administrative or investigatory functions and absolute immunity for actions made when the prosecutor is performing a judicial function (ie, while in court). Public safety officers are granted qualified immunity, and local governments and the state of Montana are immune from civil claims based on Marsy's Law. Because SB 250 provided immunity from suit to state and local government officials, it required a two-thirds vote of the members of each house.

Immunity means these officials are generally not liable in a civil action if they violate a crime victim's right that is enumerated in Marsy's Law. According to *Black's Law Dictionary*, "qualified immunity" means "immunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights." The same source defines "absolute immunity" as "a complete exemption from civil liability, usually afforded to officials while performing particularly important functions, such as a representative enacting legislation and a judge presiding over a lawsuit."

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## Sources Used

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