

# LATEST DEVELOPMENTS REGARDING MARSY'S LAW

Sam Morley, FPA Gen. Counsel

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*Here are some suggestions/resources that may help newsrooms respond to law enforcement agencies that withhold victim information in arrest reports, affidavits, and other crime records based on Marsy's Law. Also, addressed are a couple of recent developments regarding the application of the law in the context of 1) redacting police officer identities and 2) judicial records containing victim information.*

## VICTIM INFORMATION IN GENERAL

As mentioned in earlier e-bulletins, law enforcement agencies around the state have been withholding victim identity information based a variety of interpretations of Marsy's Law. Some LEAs (including some SOs) are reading the Marsy's Law language quite broadly and redacting information without any action/request from the victim. Others are taking a narrower approach, requiring some sort of proactive opt-in by the victim to claim secrecy. These conflicting approaches have resulted in confusion and is an ongoing problem around the state.

In terms of advice, I would note that if your LEA independently redacts information in arrest or other records, you can point out that this runs counter at least in part to what the Florida Sheriffs Association has recommended. [Here](#) is last year's memo where the Association says (beginning at p. 1 very bottom) "at the very least, Amendment 6 [Marsy's Law] requires the victim to take some action to invoke its protections..." Further, Miami-Dade County issued a [memo](#) that is helpful in this regard.

Hopefully, these documents will provide some push-back against overboard interpretations of ML. In the meantime, we continue to follow the issue and will distribute guidance as more clarifying information becomes available

## WITHHOLDING LAW ENFORCEMENT OFFICER NAMES AS "VICTIM"

A recent case in Tallahassee involves the application of ML to keep police officers' identities secret in two separate police shootings of suspects brandishing deadly weapons. The Florida Police Benevolent Association filed suit against the City attempting to prevent disclosure of records identifying the officers, asserting that the names should not be disclosed because the two officers were ML crime victims. The City (and intervenors, including FPA, with excellent representation from Mark Caramanica and others at the Thomas & LoCicero law firm) claimed the officers were not covered under these circumstances and the names should be produced pursuant to the public records law.

The court issued its straight-to-the-point ruling last Friday, holding that the records should be produced identifying the officers. The court said ML was not intended to apply in these circumstances: the officers were not victims seeking protection from a would-be accused (who, in this case, were dead, killed by the officers in the line of duty) but instead from possible retribution from unknown persons in the community. The court said this type of protection was outside the scope of ML and inconsistent with its purpose. While acknowledging how difficult and important a police officer's job is, the court said the public has a right to evaluate the conduct of officers as they are empowered to arrest and use deadly force. Therefore, the court ordered the City to disclose the records.

After the order was issued, the PBA/Does filed a notice of appeal and claimed the automatic stay provisions in the appellate rules apply. As of Tuesday morning, the judge had not ruled on the motion.

This is an important case in that it is the first ruling that clearly signals that some lower courts at least will reign in the use of ML in situations they deem not consistent with its intended purposes.



## JUDICIAL RECORDS AND MARSY'S LAW

There has been movement regarding how clerks of court will handle victim information contained in court filings and records. A recent proposed court rule (2.423) provides identification and redaction procedures that attempt to strike a balance between victim privacy and public access. [Important comments were filed on behalf of media interests by the Thomas & LoCicero firm].

The rule is quite long but the basic idea is to leave the responsibility for identifying Marcy's Law information to filers, not the clerks, who do not have the time or resources to review, filter and redact filings. Specifically, the rule says if the initial filer of the criminal charges "indicates the existence of confidential crime victim information, the clerk of the court shall designate and maintain the confidentiality of any such information contained within the initial charging document."

Further, victims will be allowed to file a confidentiality notice at any time to protect their information, and the rule spells out the confidentiality notice form to be used and how clerks should identify and protect the affected information.

The rule is scheduled to be filed with the Supreme Court by the end of July.

## A FINAL TIP

Keep in mind as you consider the implications of Marcy's Law, that it is only intended to limit what the government can do, not what a newspaper can report. That means the government (via Marcy's Law or otherwise) cannot prevent you from publishing truthful information of public concern (including victim identifying information) that the newspaper obtains, (even if unlawfully acquired), provided the publisher did not participate in the unlawful conduct.



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### MEMORANDUM

To: Matt Dunagan, Deputy Executive Director of Operations

From: Wayne Evans, FSA General Counsel

January 7, 2019

Re: Amendment 6 to the Florida Constitution - Victims' Rights

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At your request, I have summarized Amendment 6 as it impacts sheriffs' offices and their operational procedures concerning the arrest and incarceration of suspects. This amendment takes effect January 8, 2019. A copy is attached for your convenience.

Essentially, Amendment 6 expands the rights of victims as set forth in Article 1, section 16 of the Florida Constitution and under the Florida Statutes. It establishes basic rights that inure to the victim at the time the crime is being committed and other rights that are available upon request.

The following are the rights that begin at the time of victimization: (1) The right to due process and 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, within the judicial process, to be reasonably protected from the accused and any person acting on behalf of the accused. However, this right is not intended to create a special relationship between the crime victim and any law enforcement agency or office absent a special relationship or duty as defined by Florida law. (4) The right to have the safety and welfare of the victim and the victim's family considered when setting bail, including setting pretrial release conditions that protect the safety and welfare of the victim and the victim's family, or which could disclose confidential or privileged information of the victim. (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 of the victim.

Of these five rights, the fifth right regarding the prevention of the disclosure of information or records that could be used to locate or harass the victim or victim's family is the most ambiguous and subject to interpretation. It does not appear that this provision creates an exemption or confidentiality as in the case of section 794.024, Florida Statutes, which provides for the confidentiality of photographs, names, and addresses of victims of sexual battery or child abuse. Rather, at the very least, Amendment 6 requires the

victim to take some action to invoke its protections and ensure that any record will be redacted to exclude emails, phone numbers and addresses that could locate the victim or the victim's family.

There is no consensus as to whether an oral or written request is sufficient for the agency to redact or a court order is necessary. Sheriffs should consult with their legal advisors as to whether a victim may be required to obtain a court order directing the sheriff's office to redact such information or if they will redact merely upon a verbal or written request by the victim.

If the sheriff has no counsel available, I recommend that the sheriff review the constitutional provision and as a matter of policy decide what course of action should be taken. Either approach is defensible. A sheriff may rely upon an apparent intent of Amendment 6 to protect the victim such that in the case of a public records request, and upon specific request by the victim, the email addresses, phone numbers and work and business addresses of the victim and victim's family will be withheld. In such a case, there should be some flexibility to provide unredacted reports to other agencies, e.g. the state attorney's office and the Department of Children and Families, for law enforcement related purposes. If a sheriff is concerned that the amendment is too vague, and that any redaction of a public record should occur only after a court has so directed, then the sheriff may require the victim to seek an order from the court.

Additionally, Amendment 6 provides for other rights that are available upon request. These rights are numerous, and do not need to be repeated verbatim in this overview. Of these rights that are available upon request, the amendment requires that the victim be provided reasonable, accurate, and timely notice of any release or escape of the suspect, and any proceeding during which a right of the victim is implicated. If such a request is made by the victim, and the sheriff operates a jail, it should be noted in an inmate's file so that the victim is contacted upon release (or escape). The victim could also be notified of accessing VINELINK if available through an agency's website.

Amendment 6 also provides for the right to be heard in any public proceeding regarding pretrial release. Significantly, the amendment provides that the rights with respect to first appearance proceedings are satisfied by a reasonable attempt by the appropriate agency to notify the victim and convey the victim's views to the court.

Obviously, the question arises as to who is the appropriate agency. In some counties the state attorney's office may be able to provide the necessary notification. If the sheriff decides to take on this responsibility, and circumstances permit, the arresting deputy could inform the victim that if the suspect does not post bond then the suspect will be seen by the judge at first appearance, which the victim may attend. As an alternative to attending first appearance the victim could give a statement to the deputy regarding the suspect's release or conditions of release which could be documented in the probable cause affidavit that the court would review at first appearance.

Of course, in some cases this may not be possible because the deputy may have no contact with victim at the time of the arrest. For example, if a driver stopped for a traffic offense is arrested on an outstanding warrant from another county, the deputy would not know the identity of the victim or have the opportunity to contact the victim about first appearance.

Upon request the victim is entitled to the prompt return of the victim's property. When such a request is made for the property which is held as evidence, the sheriff's office should contact the state attorney's office to confirm that the property may be released.

Amendment 6 also requires that victims be informed of their rights and that they may seek the advice of an attorney with respect to the rights. This information shall be made available to the general public and provided to all crime victims in the form of a card or by other means intended to effectively advise the victims of their rights.

Currently, section 960.001, Florida Statutes, requires law enforcement personnel to distribute a victim's rights information card or brochure at the crime scene. The information on this card should be updated to include the additional rights provided by Amendment 6. Some agencies are providing an insert to the current card explaining the Amendment 6 rights and others are revising their card or pamphlet.

A sample notification brochure prepared by the Seminole County Sheriff's Office is attached as an example. Note that the brochure provides first appearance information and informs the victim of how the victim may learn the time and date of first appearance as well as other court dates through accessing the clerk of the court's website. The brochure also refers the victim to the agency's website which would allow the victim to check the status of the suspect's incarceration. Sheriffs may wish to provide similar contact information in their victim's rights cards or pamphlets.

It is quite apparent that Amendment 6 affects not only the arresting agency, but also the clerk of the court and the state attorney's office as well. This overview highlights the most significant impacts which could directly impact a sheriff's office. Sheriffs should closely coordinate with their state attorney and clerk of court to comply with this amendment.

# Memorandum

MIAMI-DADE  
COUNTY

Date: March 5, 2019  
To: Distribution B+  
From: Janet Lewis, Commander  
Kimberly Redmon-Jones, Police Legal Advisor  
Police Legal Bureau  
Subject: Victim's Rights - Marcy's Law

*Janet Lewis*  
*Kimberly Redmon-Jones*

## LEGAL NOTE 2019-02

On November 6, 2018, Florida voters passed Amendment 8 to the Florida Constitution, also known as Marcy's Law, expanding the rights of crime victims in Florida. In addition to outlining the basic rights afforded to victims at the time a crime is committed, Marcy's Law also affords other rights to victims, upon request. All crime victims now have 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 of the victim." This right is not automatic, and must be requested by the victim.

As a law enforcement agency required by law to preserve the rights of victims of crimes and comply with Florida's Public Records Law, the Miami-Dade Police Department (MDPD) must develop a procedure to accept the requests of victims to prevent the disclosure of their information, and ensure that future requests for records are properly reacted in accordance with these requests. Until a permanent solution is developed, the following procedure will be implemented when a victim of a crime requests that his/her information be protected from disclosure:

- At the request of a crime victim (whether or not an arrest is made), the officer shall note in the narrative of the A-Form and/or on the Offense Incident Report, "Request from Victim - Do Not Release Personal Information." If there are multiple crime victims, the MDPD officer shall note all of the victims that requested that their information be protected (for example, "Request from Victims V1 and V2 - Do Not Release Personal Information.")
- If notified at any time other than during the arrest, the officer shall make the above described notations in a Supplemental report.
- MDPD personnel, (i.e., police officer, MDPD victim advocate, etc.) shall note the victim's name and police case number and send that information to the e-mail address [marcyslaw@mpd.com](mailto:marcyslaw@mpd.com).
- Based upon the e-mail received, staff at Central Records Bureau will flag the victim's request on MDPD records, allowing the proper redactions to be made when processing public records requests.

This constitutional amendment leaves many questions unanswered. A draft bill was filed to amend related sections of the Florida Statutes to provide clarification. If enacted, additional procedural changes may be needed in the near future. Accordingly, the Police Legal Bureau will monitor this matter and provide appropriate updates.

Personnel are reminded that Florida law requires that law enforcement agencies distribute a victim's rights brochure to all crime victims at their earliest possible opportunity. Section 900.001(1)(a), Fla. Stat.

Consequently, the MDPD recently revised its "Information for Victims of Crime" brochure to reflect additional rights for victims created as a result of the passage of Amendment 6.

Accordingly, MDPD officers should provide victims with a copy of the updated MDPD brochure which delineates all of their rights pursuant to the Florida Constitution and state law. The brochure is also available in an on-line format on the Miami-Dade County webpage at: <https://www8.miamidade.gov/government/police/rights-of-the-victim.page>. In the absence of a paper brochure, officers should refer victims to the on-line resource.

MDPD officers having questions regarding this Legal Note should contact the Police Legal Bureau at 305-471-2550. As policies differ among police agencies, officers from other law enforcement agencies are strongly urged to contact their respective legal advisors prior to taking action based upon this Legal Note.

JJKRJ