

IN THE SUPREME COURT OF FLORIDA

IN RE: FLORIDA RULE OF JUDICIAL
ADMINISTRATION 2.423

SC20-1128

NEWS MEDIA COALITION'S COMMENT RE: PROPOSED
RULE OF JUDICIAL ADMINISTRATION 2.423

The News Media Coalition submits this comment regarding Proposed Rule of Judicial Administration 2.423 (the "Proposed Rule"), filed with this Court on July 31, 2020.¹

The Proposed Rule seeks to implement a procedure for identifying and redacting those portions of court records containing "victim" information

referenced in Article I, Section 16 of the Florida Constitution (commonly

¹ The News Media Coalition consists of: (1) The Associated Press; (2) the First Amendment Foundation; (3) the Florida Press Association; (4) Gannett Co., Inc. (publisher of *USA TODAY* and whose Florida properties include the *Daily Commercial*, *Daytona Beach News-Journal*, *Florida Today*, *Herald-Tribune*, *Naples Daily News*, *Northwest Florida Daily News*, *Ocala Star Banner*, *Panama City News Herald*, *Pensacola News Journal*, *Tallahassee Democrat*, *TC Palm*, *The Destin Log*, *The Florida Times-Union*, *The Gainesville Sun*, *The Ledger*, *The News-Press*, *The Palm Beach Post*, *The Star*, *The Walton Sun*, and *Washington County News*); (5) Graham Media Group (WJXT-TV4 (Jacksonville), WKMG-TV6 (Orlando)); (6) The McClatchy Company (*Bradenton Herald* and *Miami Herald*); (7) New World Communications of Tampa, Inc. (WTVT FOX 13 Tampa Bay-St. Petersburg); (8) The New York Times Company; (9) Oregon Television, LLC (WOFL FOX 35 Orlando); (10) Scripps Media, Inc. (WFTS (Tampa Bay), WFTX (Fort Myers-Naples), WPTV (West Palm Beach), WSFL (Miami-Fort Lauderdale) and WTXL (Tallahassee)); (11) TEGNA Inc. (WTLV/WJXX (Jacksonville), and WTSP (Tampa)); (12) Times Publishing Company (publisher of the *Tampa Bay Times*); (13) Tribune Publishing Company (*Orlando Sentinel* and *South Florida Sun-Sentinel*); and (14) WP Company LLC (*The Washington Post*).

known as and referred to herein as “Marsy’s Law”), and as set forth in the Proposed Rule.²

After actively following the work of the joint subcommittee tasked with analyzing the issue and proposing a draft rule, the News Media Coalition submitted comments on the Proposed Rule to the Rules of Judicial Administration Committee (a copy of that comment can be found at Appendix E to the July 31, 2020 petition). At that time, it stressed that its overarching concern in implementing any court rule regarding Marsy’s Law was that it not result in public access delays, and that the public and news media be provided contemporaneous access to filed criminal court records.³

² Article I, Section 16(b)(5) of the Florida Constitution states that a crime “victim” has “[t]he 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.”

Marsy’s Law defines a “victim” 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. The term ‘victim’ includes the victim’s lawful representative, the parent or guardian of a minor, or the next of kin of a homicide victim, except upon a showing that the interest of such individual would be in actual or potential conflict with the interests of the victim. The term ‘victim’ does not include the accused. The terms ‘crime’ and ‘criminal’ include delinquent acts and conduct.” Art. I, Sec. 16(e), Fla. Const.

The Proposed Rule contains companion descriptions at 2.423(b)(1) and (b)(3).

³ Earlier this year, in Courthouse News Service v. Schaefer, 440 F.Supp.3d 532 (E.D. Va. 2020), *appeal filed* (No. 20-1290), the court laid out the constitutional access standard in the context of new civil actions: newly-filed

For the ease of this Court's review and consideration of the News Media Coalition's concerns, the key issues which were first raised in its comment to the RJAC are substantively incorporated herein. Part I of the instant comment addresses some of the News Media Coalition's overarching concerns related to Marsy's Law, including agencies' varied interpretations of the law, and how it – along with the Proposed Rule – could frustrate the public's broad constitutional and statutory rights to engage in government oversight and inspect public agency and court records. Part II then highlights the specific language revisions to the Proposed Rule, which bear upon maintaining ready public access to court records of public concern.

civil complaints are to be publicly available contemporaneously with their filing, which means “**on the same day of filing, insofar as practicable.**” *Id.* at *17 (emphasis in original).

I. **Concerns Over the Interpretation and Effect of Marsy's Law on Crime Records**

The Importance of Crime Records

Stated plainly, citizens have a right to know the when, where, and nature of any crime that occurs in their neighborhoods. Ironically, concealing crime-related records from the public can strip neighborhoods of the very information used to stay better informed of risks and take protective measures. Crime information also enables tracking and trend projections. Indeed, in the wake of Marsy's Law, Florida has witnessed significant restrictions in public access to routine crime information used for these purposes—such as basic details about a crime (something even Marsy's Law advocates have rejected⁴) and simple block-level information about where crimes occur.⁵

Aside from the right to know what is occurring in their neighborhoods, citizens equally possess the right to monitor government prosecutions and

⁴ See Press Release from Marsy's Law in regards to public crime data, *SpotCrime*, Sept. 20, 2019, reprinted and available at: <https://blog.spotcrime.com/2019/09/press-release-from-marsys-law-in.html>.

⁵ See, e.g., Police wait days before alerting public to dangerous home invasion, *WINK* (Fort Myers), May 15, 2019, available at: <https://www.winknews.com/2019/05/15/police-wait-days-before-alerting-public-to-dangerous-home-invasion/>; Brittany Suzsan, Without a trace: How a misfired Florida law makes crimes disappear, *Medium*, Feb. 4, 2020, available at: <https://medium.com/@UFbrechnercenter/without-a-trace-how-a-misfired-florida-law-makes-crimes-disappear-a6b7eb49d0f4>.

adjudications of crime, in both a timely and robust manner. As the Second Circuit has observed:

Transparency is pivotal to public perception of the judiciary's legitimacy and independence. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification.

U.S. v. Aref, 533 F.3d 72, 83 (2d Cir. 2008) (citations omitted).

The public's ability to observe court proceedings extends to records, with courts recognizing a First Amendment-based right of access. See, e.g., Associated Press v. U.S. Dist. Court for the Cent. Dist. of Cal., 705 F.2d 1143, 1145 (9th Cir. 1983) (finding First Amendment right of access to pre-trial criminal court records and noting that “the two principal justifications for the first amendment right of access to criminal proceedings”—that proceedings have been historically open and openness plays a role in the proper functioning of the judicial process—“apply, in general, to pretrial documents.”). Indeed, “[i]t is arguable that the right of access to records may be more important than the right to observe the judicial process because it allows examination of documents, pleadings, and transcripts which portray a more complete picture of the official development and resolution of a case.” Willie Nelson Music Co. v. Comm’r of Internal Revenue, 85 T.C. 914, 919 n. 15 (1985) (citation omitted).

Moreover, if the public is to stay meaningfully informed, timely access to records is also required. Florida courts, as well as courts around the nation, recognize this. See, e.g., Courthouse News Serv. v. Schaefer, 2020 WL 863516, *supra* note 3; Courthouse News Serv. v. Planet, 947 F.3d 581, 585 (9th Cir. 2020) (recognizing First Amendment right of access to newly-filed civil complaints and noting that “[t]he peculiar value of news is in the spreading of it while it is fresh”) (citation omitted); State ex rel. Miami Herald Publ’g Co. v. McIntosh, 340 So. 2d 904, 910 (Fla. 1976) (“News delayed is news denied.”). See also Associated Press, 705 F.2d at 1147 (vacating trial court orders imposing temporary seal on all pre-trial filings for court to review for potential fair trial impact of disclosure as violation of public’s First Amendment access rights).

Interpretive Concerns

The News Media Coalition remains concerned with certain aspects and potential consequences of the Proposed Rule, initially discussed in its previous comment to the RJAC. For instance, the Proposed Rule does not address one of the most contentious issues surrounding Marsy’s Law – whether it is an “opt-in” provision that requires victims to affirmatively assert a right to confidentiality or instead is an “automatic” right that is triggered by virtue of being a qualifying “victim.” The Proposed Rule has been presented

as being agnostic to this particular issue, leaving it up to the filer to determine whether Marsy's Law protections should apply to a particular piece of information. This, of course, inevitably leads to a confrontation with the varying manner with which state agencies apply Marsy's Law. That is, as an opt-in or automatic provision.⁶ Any automatic invocation of Marsy's Law rights, regardless of whether the information sought to be protected is already in the public domain or whether the subject "victim" even wants such information withheld from the public, only serves to further bog down timely Clerk records processing and potentially requires judicial intervention to correct. The News Media Coalition thus reserves its rights to monitor and challenge how any interpretation of Marsy's Law as an "automatic" right impacts timely access. It also recommends the Proposed Rule include language, discussed in Part II below, that provides for quick and economical means to challenge inappropriate or mooted designations of Marsy's Law confidentiality in court records.

As law develops, another aspect of Marsy's Law which will inevitably confront Clerks is what exact information is actually protected, under what

⁶ To be clear, the News Media Coalition maintains that "the right to prevent the disclosure of information or records" as set forth in the operative constitutional provision (Article I, Section 16(b)(5)) necessarily means the right is one that needs to be affirmatively exercised, thus making it an "opt-in" provision.

circumstances, and whether filers are adhering to court rulings on such matters. One current and ongoing way this issue has manifested itself is whether law enforcement personnel can claim Marsy's Law "victim" status resulting from alleged crimes committed against them for actions occurring while on duty as an agent of government.⁷ According to one recent investigation, at least half of Florida's 30 largest police agencies apply Marsy's Law to shield the names of on-duty police officers who claim victim status in use-of-force cases where they claim the suspect was the aggressor, even when the officers sustain no injuries.⁸ This practice is, of course, incompatible with the public's broad constitutional and statutory rights to engage in oversight and inspect the public records related to state law enforcement's use of force against citizens that include the involved officers' names.

⁷ See Kenny Jacoby, How Cops Who Use Force and Even Kill Can Hide Their Names From the Public, ProPublica (Oct. 29, 2020), <https://www.propublica.org/article/how-cops-who-use-force-and-even-kill-can-hide-their-names-from-the-public>; FOP seeks Marsy's Law protection for JSO officers, *News4Jax*, Jan. 10, 2020, available at: <https://www.news4jax.com/news/local/2020/01/09/fop-seeks-marsys-law-protection-for-jso-officers/>; Florida cops who use force keep names secret with Marsy's Law, *Tampa Bay Times*, Feb. 6, 2020, available at: <https://www.tampabay.com/news/2020/02/06/florida-cops-who-use-force-keep-names-secret-with-marsys-law/>.

⁸ Jacoby, supra note 7.

Florida's First District Court of Appeal is currently considering an appeal addressing this exact issue in the course of two officer-involved shootings that resulted in the deaths of two civilians. See Fla. Police Benevolent Ass'n v. City of Tallahassee, No. 1D20-2193.⁹ The appeal, filed by the Florida Police Benevolent Association and two unnamed "Doe" Tallahassee police officers, challenges a July 24, 2020 Leon County Circuit Court order finding that officers acting on behalf of the government cannot be "crime victims" under Marsy's Law and that the "explicit language of Marsy's Law was not intended to apply to law enforcement officers when acting in their official capacity." Fla. Police Benevolent Ass'n v. City of Tallahassee, No. 2020-CA-1011, at 3 (Fla. Cir. Ct. July 24, 2020) (A copy of that order is attached to this comment at **Appendix A**). Thus, consistent with the City of Tallahassee's position in the litigation, the officers' names cannot be withheld from public records related to the shooting incidents. The trial court found that the case involved balancing victims' rights with the "public's right to hold government accountable by inspecting state records." Id. at 4. Importantly, the trial court also found that individual crime victim names are also not protected under Marsy's Law. Id. at 5 ("[T]here is no

⁹ Certain members of the News Media Coalition intervened in the matter. They include the First Amendment Foundation, the Florida Press Association, Gannett Co., Inc., the Miami Herald Media Company, and The New York Times Company.

specific exemption in Marsy's Law that allows for the protection of a name. Art. 1, § 16(b)(5), Fla. Const., states 'information or records that could be used to locate or harass the victim' may be protected from disclosure. Victims' names are not specifically protected.") The News Media would anticipate many filings claiming Marsy's Law protection will seek to shield such information.¹⁰

The above litigation illustrates the need for filers to be keenly aware of the contours of Marsy's Law interpretation as it develops. The Proposed Rule should not be implemented in any manner that either implicitly sanctions overzealous confidentiality designations or those otherwise contrary to law, or places significant onus and expense on the public to combat such errant designations. Both speed of access and the burdens to undue designations that do not qualify for Marsy's Law must be considered.

II. **The Proposed Rule**

¹⁰ The court's order in Fla. Police Benevolent Ass'n is consistent with North Dakota's attorney general's determination that "there is nothing under [its state's Marsy's Law, which mirrors Florida's,] that protects the name of a victim or the victim's family." See North Dakota Office of Att'y Gen., Guidance On Marsy's Law, at 4 (Aug. 1, 2017), <https://attorneygeneral.nd.gov/sites/ag/files/documents/MarsysLaw-Guidance.pdf>. However, the case of North Dakota illustrates the need for formal legislative or judicial interpretation of Marsy's Law's reach, as police departments, with the support of Marsy's Law for All, have disregarded the Attorney General guidance and have thwarted efforts to keep public police departments accountable for their actions. See Jacoby, supra note 7.

The Proposed Rule was drafted assuming the constitutionality of Marsy's Law and prior to the resolution of key legal issues related to its interpretation. Until the constitutionality, scope, and proper application of Marsy's Law have been resolved by the courts, the Joint Subcommittee took a practical approach in drafting the Proposed Rule.¹¹ While the News Media Coalition reserves all rights related to challenging Marsy's Law, it recognizes that the Proposed Rule reflects the Joint Subcommittee's efforts to avoid automatic and draconian closures that an overly broad interpretation of Marsy's Law would effect. The News Media Coalition's primary concern is with delays in access to, and over-redaction of, critical criminal records that might nonetheless remain.

The Proposed Rule should be implemented as drafted, ensuring Clerks are relieved from any responsibility to hunt for or redact "victim" information that a filer claims is protected under Marsy's Law. That responsibility rightfully falls squarely, and solely, on the filer. It should relieve the Clerks of the impossible burden of analyzing court filings line-by-line. To require so would grind Clerk operations to a halt and effectively shut down ready public access, flipping the public's presumptive right of access to court records.

¹¹ As previously mentioned, mainly, the Proposed Rule was drafted with the intent to avoid having to confront the disagreement as to whether Article I, Section 16(b)(5) is an "opt-in" or "automatic" right.

The News Media Coalition's Suggested Revisions to Proposed Rule

In order to address some of its key concerns, the News Media Coalition proposes the following revisions to the Proposed Rule.¹²

First, the News Media Coalition recognizes that as to “initial charging document[s],” the language of Section (d)(1) of the Proposed Rule does not require filers of such documents to specifically identify what information is claimed as protected under Marsy’s Law by filing a “Notice of Confidential Crime Victim Information within Court Filing.” That notice requirement, found in Section (d)(2), applies to all subsequent filings. Section (d)(1) merely requires the filer to “indicate the existence” of such information in that filing. Indeed, these records are akin to civil complaints, which, as mentioned above, courts have held should be available the same day as filing to the extent practicable. The News Media Coalition therefore expects that access to such case-initiating documents will not slow should the Proposed Rule ultimately be approved. Accordingly, **Section (d)(1)** of the Proposed Rule should be amended as follows:

The filer of an initial charging document shall ~~indicate~~ identify the existence of confidential crime victim information pursuant to article I, section 16 of the Florida Constitution. If the filer ~~indicates~~ identifies the existence of confidential crime victim

¹² A mark-up of the full Proposed Rule text (excluding Appendix A to the rule), incorporating all of the News Media Coalition’s suggested revisions, is attached at **APPENDIX B**.

information, the clerk of the court shall designate and maintain the confidentiality of any such information contained within the initial charging document.

The above revision is consistent with the construction of the Proposed Rule as set forth in the petition materials (see Appendix at G-2) and helps better ensure that filers of initial charging documents—documents which are incredibly newsworthy as they often are the public’s first insight into the details of an alleged crime—have a meaningful role in identifying the information that is to be kept confidential (e.g., by identifying the specific page number(s) in the filing where confidential victim information appears). This would also help streamline clerk duties to maintain confidentiality while also helping ensure timely public access.

The News Media Coalition also believes Section (d)(5)(B) is unnecessary and should be stricken. That section states that a Notice of Confidential Crime Victim Information within Court filing “Shall be confidential to the extent it contains crime victim information pursuant to article I, section 16.” The proposed notice included within the Proposed Rule does not contemplate any substantive information that is claimed confidential be included on the actual notice. Rather, it only requires the filer to identify exactly where the information is found in the subject filing.

The News Media Coalition therefore proposes two revisions to Section (d)(5). First, **Section (d)(5)(B)** should be replaced with language affirmatively prohibiting filers from including substantive information claimed protected under Marsy's law in such notices. For example:

(B) ~~Shall be confidential to the extent it contains crime victim information pursuant to article I, section 16. Shall not contain any information claimed to be subject to confidentiality under article I, section 16(b)(5) of the Florida Constitution.~~

Second, additional language should be added to affirmatively state that a Notice of Confidential Crime Victim Information with Court filing "Shall not itself be confidential." Always keeping the notice public will allow for greater public oversight in making sure Marsy's Law redactions are appropriately tailored and properly applied.

The News Media Coalition also suggests this Court consider a revision to **Section (e)** of the Proposed Rule:

Duration of Confidentiality. In accordance with article 1, section 16(b)(3) of the Florida Constitution, a crime victim is entitled to be reasonably protected from the accused and any person acting on behalf of the accused within the judicial process. Therefore, once the information claimed to be subject to confidentiality is either divulged by the victim or otherwise made public, or the court has made a final determination that it is no longer reasonable for the information to be maintained as confidential, the provisions of this rule no longer apply.

As written, the Proposed Rule requires courts, in every instance, to make a final determination that claimed confidential Marsy's Law information should no longer be maintained as confidential. This is so even in cases where the information has clearly already been made public or a "victim" has no interest in maintaining any confidentiality (particularly under an "automatic" interpretation of Mary's Law). This inevitably invites unnecessary and costly motion practice, slows access, and requires unneeded judicial labor. The News Media Coalition's suggested revision to this section would help streamline access, ensuring the public need not intervene to litigate the unsealing of Marsy's Law information that has been made public in every case where such information exists.

The provision as written works as a de facto, perpetual seal that likely would require third-party motion practice to unwind. The remedy for continued sealing set forth in the Proposed Rule should not be the sole avenue for the public to challenge records closures. It is also consistent with

the principle that the state cannot maintain information exempt if the information has already been made public. See, e.g., Staton v. McMillan, 597 So. 2d 940, 941 (Fla. 1st DCA 1992), *review dismissed sub nom.*, Staton v. Austin, 605 So. 2d 1266 (Fla. 1992) (criminal investigative public records exemption did not apply to already public information); Downs v. Austin, 522 So. 2d 931, 935 (Fla. 1st DCA 1988) (once state has gone public with information which could have been previously protected from disclosure under Public Records Act exemptions, no further purpose is served by preventing full access to the desired information).

Finally, the News Media Coalition also suggests the Court consider whether the filer of information containing information protected by Marsy's Law that requires a notice under Section (d)(2) should also file a version of the document already in redacted form that conforms to the specific Marsy's Law designations identified. This should help relieve the Clerks of the additional step of having to redact documents, so that a redacted form of the record is contemporaneously available to the public. Much like the duty to minimize information in accordance with Rule 2.425, filers could take the additional step of submitting the redacted version of the subject record along with the unredacted version and notice as contemplated under the Proposed Rule. We understand individual Clerk records processing and document

management systems may impact the ability to implement such a procedure but nonetheless believe the issue is worthy of consideration.

* * *

The News Media Coalition appreciates the opportunity to comment on the Proposed Rule and thanks the Court for considering its views. Again, it remains hopeful that any Proposed Rule facilitates constitutionally required timely access rights. We are available to respond to any questions or to discuss the Proposed Rule in greater detail if that would be helpful to the Court.

Dated: January 4, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of January, 2021, I caused a true and correct copy of the foregoing to be served electronically upon counsel of record by e-mail via the Florida Courts E-Filing Portal to:

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