

# FLORIDA’S MARSY’S LAW AND USE OF LETHAL FORCE CASES BY LAW ENFORCEMENT: WHO NEEDS A SHIELD WHEN YOU CAN HAVE A SWORD?

MARC CONSALO\*

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## I. INTRODUCTION

On March 30, 2021, two deputies from the Jacksonville Sherriff’s Office arrived at a domestic violence call at an area hotel.<sup>1</sup> There, they would encounter an individual identified as Michael Leon Hughes, a thirty-two-year-old African American man who was accused of forcing his way into a hotel room belonging to a female companion.<sup>2</sup> Upon arrival, Hughes refused to leave, so a struggle with law enforcement ensued.<sup>3</sup> Hughes obtained one of the deputies’ tasers during the commotion and shocked him.<sup>4</sup> In response, the officer discharged his firearm and killed Hughes.<sup>5</sup>

On May 27, 2020, approximately one year before the incident with Mr. Hughes, the Tallahassee Police Department encountered an African

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\* Marc Consalo is a faculty member at the University of Central Florida (“UCF”) in their legal studies department. He received his LL.M. in Trial Advocacy from Stetson University Law School in 2016, his J.D. from UCF in 1999, and his B.A. from Rollins College in 1996. He presently serves as a special magistrate for the Town of Oakland, Florida. In addition to his teaching duties, Professor Consalo works as a conflict attorney in and for the Ninth Judicial Circuit in Orange and Osceola Counties. At UCF, he teaches a variety of classes, including Criminal Law, Criminal Procedure, and Trial Advocacy

1. Marilyn Parker, *JSO Identifies Man Shot, Killed by Police at Argyle Forest Hotel*, NEWS4JAX, <http://www.news4jax.com/news/local/2021/03/31/jso-identifies-man-shot-killed-by-police-at-argyle-forest-hotel/> (last updated Mar. 31, 2021, 7:15 PM); Mindy Wadley & Robert Bradfield, *‘It Wasn’t Supposed to Go That Way’: Family of Man Killed by JSO at Jacksonville Hotel Demand Release of Video*, FIRST COAST NEWS (Apr. 6, 2021, 9:04 PM), <http://www.firstcoastnews.com/article/news/local/family-of-man-killed-jso-demands-answers/77-f0f90fec-9be9-4d36-86de-15938a893509>.

2. Parker, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

American woman.<sup>6</sup> This woman was Natosha Tony McDade, who was accused of stabbing another individual outside an apartment complex.<sup>7</sup> While reports differ, law enforcement officers asserted that McDade aimed a firearm at police upon their arrival.<sup>8</sup> When she refused to comply with requests to lower her weapon, officers opened fire and killed her.<sup>9</sup>

On their face, these two instances seem to share many similarities.<sup>10</sup> For instance, both cases involve individuals who died at the hands of law enforcement.<sup>11</sup> Both individuals were African American and both seemed to have suffered from mental illness.<sup>12</sup> Yet, while the similarities between the alleged perpetrators seem quite evident, what may not be as immediately apparent are the similarities of the law enforcement officers involved in both the shootings.<sup>13</sup> In both instances, the Tallahassee Police Department and the Jacksonville Sheriff's Office tried to prevent the identities of the officers and deputies from being divulged to the public under Florida's Crime Victim's Bill of Rights, more commonly known as, Florida's version of Marsy's Law.<sup>14</sup>

Currently pending before the Florida Supreme Court is a request from the City of Tallahassee, as well as numerous media groups, to accept jurisdiction over a First District Court of Appeal case specifically finding that the officers in these shootings are considered "victims" as defined by the Florida Constitution, and as such, they enjoy protections guaranteed to them under Marsy's Law, specifically preventing the disclosure of their identities to the public.<sup>15</sup>

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6. See Dara Kam, *Should Victims' Rights Law Shield Officer's Identity?*, NEWS4JAX (June 11, 2020, 8:20 PM), <http://www.news4jax.com/news/florida/2020/06/12/should-victims-rights-law-shield-officers-identity/>. It should be noted that while born a female, witnesses report that Ms. McDade self-identified as a male. *Id.*; Jeff Burlew, *Tallahassee Police Release Name of Person Shot and Killed by an Officer After Stabbing*, TALLAHASSEE DEMOCRAT., <http://www.tallahassee.com/story/news/local/2020/05/28/tallahassee-police-releases-name-natosha-tony-shot-and-killed-officer-after-stabbing/5272571002/> (last updated May 30, 2020, 8:18 PM).

7. Burlew, *supra* note 6; see also Kam, *supra* note 6.

8. Kam, *supra* note 6.

9. See Burlew, *supra* note 6; Kam, *supra* note 6.

10. See Kam, *supra* note 6; Parker, *supra* note 1.

11. Kam, *supra* note 6; Parker, *supra* note 1.

12. See Kam, *supra* note 6; Burlew, *supra* note 6; Wadley & Bradfield, *supra* note 1.

13. See Kam, *supra* note 6; Parker, *supra* note 1.

14. See Kam, *supra* note 6; Parker, *supra* note 1; FLA. CONST. art. I, § 16.

15. The News Serv. of Fla., *City of Tallahassee & Media Groups Urge Florida Supreme Court to Hear 'Marsy's Law' Case*, WFSU PUB. MEDIA (June 15, 2021, 12:00 PM), <http://news.wfsu.org/wfsu-local-news/2021-06-15/city-of-tallahassee-media-groups-urge-florida-supreme-court-to-hear-marsys-law-case>.

While the possibility that law enforcement officers may be the target of a crime is not uncommon, receiving the designation of “victim” after employing deadly force is a unique and confounding concept worthy of discussion.<sup>16</sup> As such, this Article will attempt to tackle this question and gauge the argument on both sides as to the applicability of Marsy’s Law in these scenarios.<sup>17</sup>

The Article will begin with a discussion of how the State of Florida has historically defined the term “victim” in criminal law over the years.<sup>18</sup> Next, a discussion follows about the history of Marsy’s law and how courts have interpreted its provisions.<sup>19</sup> This Article will then explain in greater detail the arguments for, and against, Marsy’s Law protecting police identities from disclosure, especially considering Sunshine Laws and the rights that citizens enjoy by obtaining access to information.<sup>20</sup> Ultimately, this Article attempts to predict if the Florida Supreme Court does choose to accept jurisdiction for cases that argue that law enforcement officers are victims under Marsy’s Law—how the justices will rule on the issues in the case and, moving forward, where lines will be drawn as to the degree of victimization police must establish to be protected under Florida’s Crime Victim Bill of Rights.<sup>21</sup>

## II. IN FLORIDA WHAT DOES IT MEAN TO BE A VICTIM?

The legal definition of what exactly a “victim” is in Florida jurisprudence is actually not that old of a concept.<sup>22</sup> One of the first explanations of the term comes from a 1969 Florida Fourth District Court of Appeal case, which involves defendants charged with assault and battery in Palm Beach County.<sup>23</sup> In the case, the appellants focused on the trial court judge’s use of the term “victim” during his final jury instruction before deliberation.<sup>24</sup> The instruction reads as follows: “One point I made in my Instructions, I said that—I emphasized you shouldn’t have any sympathy or compassion either individually or collectively for the defendant in this case, nor should you have any sympathy or compassion for the *victim* of this case.”<sup>25</sup>

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16. *See id.*

17. *See discussion infra* Part V.

18. *See discussion infra* Part II.

19. *See discussion infra* Part III.

20. *See discussion infra* Part IV.

21. *See discussion infra* Part V.

22. *See Lister v. State*, 226 So. 2d 238, 239 (Fla. 4th Dist. Ct. App. 1969).

23. *Id.* at 238.

24. *Id.* at 239.

25. *Id.*

The jury returned a verdict of guilty of the offenses, and on appeal, the appellants argued that the trial judge created undue sympathy for the victim of the crimes by referring to him as a “victim.”<sup>26</sup> In denying their appeal and affirming the conviction, the appellate court wrote that the definition of a victim is simply “someone injured under any of various conditions.”<sup>27</sup> Citing Webster’s Dictionary, the court found that the term, in and of itself, was neither offensive nor emotion invoking.<sup>28</sup> It simply designated the status of a party in a lawsuit.<sup>29</sup>

Under this somewhat direct and uncomplicated definition, it is not surprising that little litigation exists about the term from the perspective of physical injury.<sup>30</sup> Instead, as time progressed, most cases regarding the concept focused on individuals seeking financial compensation from the illegal acts of an accused.<sup>31</sup> This would often result from those close to an individual who was the target of the crime making a claim for relief.<sup>32</sup> For instance, in a 1982 case from Florida’s Second District Court of Appeal, the son of a manslaughter victim sought review of a decision from the Bureau of Crime’s Compensation for payment of psychiatric bills resulting from his father’s death.<sup>33</sup> The parent had passed away as a result of injuries he sustained as the victim of a battery.<sup>34</sup> In dealing with the murder, the son experienced an exacerbation of a preexisting psychological issue, including a fixation on wanting to murder his father’s killer.<sup>35</sup>

Initially, the boy was denied benefits for his psychiatric treatment.<sup>36</sup> He appealed to a deputy commissioner who overturned the denial finding that the heir of the deceased was a victim under the law at the time, which was Florida’s Crime Compensation Act.<sup>37</sup> The Bureau appealed and ultimately persuaded the appellate court to rule in its favor.<sup>38</sup> In granting the appeal, the three-judge panel concluded that the appellee did not meet the requisite

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26. *Id.* at 238–39.

27. *Lister*, 226 So. 2d at 239–40.

28. *See id.* at 239.

29. *See id.*

30. *Cf. Div. of Workers’ Comp., Etc. v. Brevda*, 420 So. 2d 887, 889–90 (Fla. 1st Dist. Ct. App. 1982) (analyzing mental health injuries as a result of a physical injury).

31. *See Bureau of Crimes Comp., Etc. v. Traas*, 421 So. 2d 50, 51 (Fla. 2d Dist. Ct. App. 1982).

32. *See id.*; *Koile v. State*, 934 So. 2d 1226, 1229 (Fla. 2006).

33. *Traas*, 421 So. 2d at 51.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Traas*, 421 So. 2d at 51.

statutory definition of a victim because his injuries were not a “direct result of the crime.”<sup>39</sup> While much of the court’s reasoning centered on the difference between psychiatric benefits versus non-mental health-related payments,<sup>40</sup> a concern about the causation of the request being linked to the crime itself appeared germane in determining of victim status.<sup>41</sup>

Money also seemed to be the primary motivation for the Florida Supreme Court to finally begin to weigh in on the definition of the term “victim” in the 1992 case of *Battles v. State*.<sup>42</sup> In *Battles*, the court weighed in on a certified question from the district court, specifically, if a good faith purchaser of stolen goods could be considered a “victim” for purposes of restitution.<sup>43</sup>

In trial, Harry Battles, the appellant, was found guilty of selling a stolen firearm to Gary Murphy, whom the trial court believed had a good faith basis that the weapon belonged to Battles.<sup>44</sup> Murphy later learned that local law enforcement was investigating the disappearance of a gun belonging to Kelvin Jordan.<sup>45</sup> Having a reason to believe the firearm Battles sold him actually belonged to Jordan, Murphy turned the gun over to the police.<sup>46</sup> As part of his sentence, the court ordered Battles to pay Murphy forty-five dollars, the price he sold him the gun for.<sup>47</sup>

On appeal, Battles argued that Murphy was not a victim of the charge of dealing in stolen property, so the restitution award was improper.<sup>48</sup> The district court disagreed and affirmed the trial court’s sentence.<sup>49</sup> However, the First District Court asked the Florida Supreme Court to review the decision with the case posing a novel issue.<sup>50</sup>

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39. *Id.*

40. *Id.*; see also *Div. of Workers’ Comp., Etc. v. Brevda*, 420 So. 2d 887, 890 (Fla. 1st Dist. Ct. App. 1982). The issue of psychiatric benefits being reimbursable was further explored. See *id.* There, the First District Court of Appeal of Florida found that mental health benefits could be paid out by the victims’ compensation fund if a finding was made that such treatment was a direct result of the crime. *Id.* at 889–90. Competent substantial medical evidence could be provided to show that mental health injuries were also physical injuries under Florida Statute section 960.03. *Id.* at 890. This would also be in accordance with Florida Statute section 960.08 authorizing reimbursement for medical care. *Id.*

41. See *Traas*, 421 So. 2d at 51.

42. 602 So. 2d 1287 (Fla. 1992).

43. *Id.* at 1287.

44. See *id.*

45. *Id.*

46. *Id.*

47. *Battles*, 593 So. 2d at 1287.

48. *Id.* at 1288.

49. *Id.* at 1287.

50. *Id.*

In making their judgment to affirm the appellate court's ruling, the justices focused on Florida Statute section 775.089, which provides that "the court shall order the defendant to make restitution to the victim for damage or loss caused directly or indirectly by the defendant's offense unless it finds clear and compelling reasons not to order such restitution."<sup>51</sup> Subsection (1)(c) of the statute further defines the term victim as a "person who suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant's offense or criminal episode . . ."<sup>52</sup> The court found a good faith purchaser is, by the very nature of term, an "aggrieved party."<sup>53</sup> The only person that the individual can seek restitution from would be the individual guilty of dealing in stolen property.<sup>54</sup>

Jordan had been made whole when the firearm was returned to him by the police.<sup>55</sup> However, Murphy was still out of the forty-five dollars he purchased the gun for.<sup>56</sup> As such, the court wrote, "[i]f restitution is not imposed, we are left with the incongruent result of having Battles, a person convicted of a felony offense, retain the profits of his criminal enterprise at the expense of a good faith purchaser."<sup>57</sup> Therefore, with this ruling, we begin to see a further expansion of the term "victim," beyond those directly affected by a crime, and later to those individuals with a familial bond to the targeted prey.<sup>58</sup>

As time progressed and additional case law developed on the issue of the expansion of the term "victim," it is extremely important to point out that there is a litany of cases finding that law enforcement agencies are not victims in some Florida jurisdictions and, in a sense, these cases pull the reigns of the ever-expanding definition of the term "victim."<sup>59</sup>

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51. *Id.* at 1287–88; FLA. STAT. § 775.089(1)(a) (2021).

52. FLA. STAT. § 775.089(1)(c); *Battles*, 602 So. 2d at 1288.

53. *Battles*, 602 So. 2d at 1288.

54. *See id.*

55. *See id.*

56. *Id.*

57. *Id.*

58. *See Battles*, 602 So. 2d at 1288; FLA. STAT. § 775.089(1)(c) (2021).

59. *See e.g.*, *Seidman v. State*, 847 So. 2d 1144, 1146 (Fla. 4th Dist. Ct. App. 2003); *Sam v. State*, 741 So. 2d 1247, 1247 (Fla. 2d Dist. Ct. App. 1999) (per curiam); *Taylor v. State*, 672 So. 2d 605, 606 (Fla. 4th Dist. Ct. App. 1996) (per curiam).

For instance, in 1990, the Florida Fourth District Court of Appeal determined that an award of restitution was improper specifically because it was directed to a police agency which “[i]s not a ‘victim’ . . .” under the law.<sup>60</sup> A similar result occurred in the Second District Court of Appeal in 1994, where a Sheriff’s department was denied restitution under the statute.<sup>61</sup> In both these cases, it is important to note that these expenditures were reimbursable under Florida Statute section 939.01.<sup>62</sup> Yet, of importance to this discussion is the Florida Legislature’s responsibility to create an entirely new statute for the payment of these fees, as opposed to the court’s belief that it needed to use its discretion in expanding the term “victim.”<sup>63</sup>

Not surprisingly, Florida’s Fourth District Court of Appeal continued its retraction of the definition of “victim” in the early twenty-first century, beyond just law enforcement agencies, with the case of *P.H. v. State*.<sup>64</sup> The case questioned the validity of a restitution payment made to a mother of a battery victim who incurred lost wages in the amount of \$240.<sup>65</sup> In reversing a trial court’s order granting the state’s request for this amount to be considered restitution, the Florida Fourth District Court of Appeal determined that the mother of the battery victim was not a “victim” under the statute.<sup>66</sup> The court reviewed the statute at the time of the victim’s compensation, noting that it specifically read:

Each person who suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant’s offense or criminal episode, and also includes the victim’s estate if the victim is deceased, and the victim’s next of kin if the victim is deceased as a result of the offense. The term includes governmental entities and political subdivisions, as those terms are defined in s. 11.45, when such entities are a direct victim of the defendant’s offense or criminal episode and not merely providing public services in response to the offense or criminal episode.<sup>67</sup>

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60. *Bain v. State*, 559 So. 2d 106, 106 (Fla. 4th Dist. Ct. App. 1990) (per curiam); *see also* *Staudt v. State*, 616 So. 2d 600, 600 (Fla. 4th Dist. Ct. App. 1993) (per curiam) (reversing a trial court’s decision to award the City of Stuart’s police department restitution, concluding that investigative costs, while a byproduct of a crime, do not somehow make the investigative agency a victim under the statute).

61. *Knaus v. State*, 638 So. 2d 156, 156 (Fla. 2d Dist. Ct. App. 1994).

62. *See id.*; *Staudt*, 616 So. 2d at 600.

63. *Staudt*, 616 So. 2d at 600.

64. 774 So. 2d 728 (Fla. 2d Dist. Ct. App. 2000).

65. *Id.* at 729.

66. *Id.*

67. *Id.*; FLA. STAT. § 775.089(1)(c)(1) (2021).

Nowhere in the statute does there appear to be any inclusion of parents' expenses under restitution.<sup>68</sup> Interestingly, the court remarked that if an argument had been made that the mother's expenses could have been "attributed to" her daughter, then a different result may have been reached.<sup>69</sup> While the desire to help the mother seemed apparent, the method was not present in the arguments before the court.<sup>70</sup> This final statement by the judges provides insight into an overarching theme in this Article's inquiry.<sup>71</sup>

Perhaps the question is not whether there is a desire among the court to expand or contract how Florida defines the term "victim."<sup>72</sup> Rather, maybe the more appropriate examination is whether the courts will follow a strict constructionist approach and look to the plain meaning of the word, as opposed to reading something into the term that is not there.<sup>73</sup> Assuming this as a possible guiding principle, the Florida Supreme Court decision in *Koile v. State*<sup>74</sup> may provide the reader with the most ample guidance of all.<sup>75</sup> In *Koile*, a defendant charged with murder entered into a plea agreement with the state during his trial.<sup>76</sup> The defendant agreed to serve time in prison and pay an undetermined amount of restitution.<sup>77</sup> The trial court subsequently held a restitution hearing wherein the deceased's father testified.<sup>78</sup> While evidence was presented regarding burial expenses and costs associated with the funeral, the father also explained that he lost \$12,000 in income in order to testify and attend the trial.<sup>79</sup> The deceased's mother made a similar plea for lost income, except in the amount of \$1,500.<sup>80</sup>

The decedent's estate made an additional restitution claim for lost wages on behalf of the murder victim himself.<sup>81</sup> He was a first officer for an

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68. See FLA. STAT. § 775.089(1)(c)(1).

69. *P.H.*, 774 So. 2d at 729.

70. See *id.*

71. See *id.*

72. See *id.*; FLA. STAT. § 775.089(1)(c).

73. See *Koile v. State*, 934 So. 2d 1226, 1230–31 (Fla. 2006).

74. 934 So. 2d 1226 (Fla. 2006).

75. See *id.* at 1230–31.

76. *Id.* at 1228; see also Willoughby Mariano, *Convict in Murder Plot Loses Appeal-Bond Plea*, S. FLA. SUNSENTINEL (Nov. 13, 2003), <http://www.sun-sentinel.com/news/fl-xpm-2003-11-13-0311121452-story.html>.

77. *Koile*, 934 So. 2d at 1228.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*



airline and anticipated being promoted to captain soon.<sup>82</sup> Ultimately, he would have earned over three million dollars if he had lived to the age of sixty.<sup>83</sup>

The trial judge granted both parents' requests for lost wages.<sup>84</sup> Further, an order was entered awarding the decedent's estate just over two million dollars in lost wages.<sup>85</sup> The defendant appealed to the Fifth District Court of Appeal, which reversed both awards.<sup>86</sup> However, the appellate court recognized the importance of the decision it faced and certified two questions to the Florida Supreme Court.<sup>87</sup> The first was: "Does section 775.089, Florida Statutes (2003), authorize a restitution award for the lost wages of a next of kin voluntarily attending the murder trial of the person accused of killing the victim?"<sup>88</sup> The second was: "Does section 775.089, Florida Statutes (2003), authorize a restitution award for the estate of a murder victim of an amount consisting of the lost future income of the victim?"<sup>89</sup>

After concluding that the standard of review in the case was *de novo*, the court decided that it was appropriate to follow strict constructionism and did not need to expand beyond the statute's plain language.<sup>90</sup> The court first pointed out that the statute reads, "the term 'victim' includes not only the person injured by the defendant, but also the person's estate if he or she is deceased, as well as the person's next of kin if he or she is deceased as a result of the offense."<sup>91</sup> As such, both the decedent's estate and the decedent's parents would be eligible for restitution in this scenario.<sup>92</sup> The court then continued reviewing the text of the statute.<sup>93</sup>

Accordingly, reading section 775.089(2)(a)(3) by using the full definition of "victim" if a crime results in bodily injury, a court must "reimburse the victim [including his estate and next of kin] for income lost by the victim [including his estate and next of kin] as a result of the offense."<sup>94</sup>

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82. *Koile*, 934 So. 2d at 1228.
  83. *Id.* at 1228–29.
  84. *Id.* at 1229.
  85. *Id.*
  86. *Id.*
  87. *Koile*, 934 So. 2d at 1229.
  88. *Id.* at 1228.
  89. *Id.* (emphasis omitted).
  90. *Id.* at 1229, 1230–31.
  91. *Id.* at 1231.
  92. *See Koile*, 934 So. 2d at 1231.
  93. *See id.*
  94. *Id.*

While the court ultimately sustained the Fifth District Court of Appeal's decision to deny the parents their lost wages,<sup>95</sup> it did conclude the decedent's estate was a victim, and as such, entitled to an award of lost wages nonetheless.<sup>96</sup>

### III. MARSY'S LAW IN FLORIDA

Voters in 2018 took to the polls to strengthen victims' rights in the state with the passage of Amendment 6 to the Florida Constitution.<sup>97</sup> The Amendment was passed with support by more than sixty percent of the state's population.<sup>98</sup> Touted as Florida's Crime Victim's Bill of Rights, Article 1 Section 16 of the Florida Constitution adopted the language of Marsy's Law to prevent disclosing the identities of victims to stop others from "harass[ing] the victim or the victim's family, or [records] which could disclose confidential or privileged information of the victim" being made public.<sup>99</sup>

Marsy's law originated from a case in California involving an individual named Marsalee Nicholas who was then a college student.<sup>100</sup> In 1983, Ms. Nicholas' ex-boyfriend murdered her, and years later bumped into Ms. Nicholas' family at a local grocery store.<sup>101</sup> The family had no idea that the alleged murderer had been released, causing them a great deal of distress upon seeing him in the store.<sup>102</sup> Since February 2020, voters across the country have approved versions of Marsy's Law in California, Illinois, North Dakota, Ohio, Florida, Georgia, North Carolina, Nevada, Oklahoma, and South

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95. *Id.* at 1234. The decision to deny the lost wages claim was not based on a finding that the parents were not victims under the statute. *See id.* Rather, the issues focused on the parents choosing to be present for the entirety of the three-week trial. *See Koile*, 934 So. 2d at 1234. The court concluded that had the mother and father been subpoenaed to attend the whole event, the result may have been different. *See id.* However, because of the voluntary nature of their attendance, no causal link existed between the crime and the costs. *See id.* Interestingly, the possible other outcome may have been a reduction in the amount of the award, at least for the father, as there was evidence that his testimony was required for a small part of the event. *See id.*

96. *Id.*

97. *Amendment 6/Marsy's Law for Florida Approved by Florida Voters*, MARSY'S L. FOR FLA., [http://www.marsyslawforfl.com/amendment\\_6\\_marsy\\_s\\_law\\_for\\_florida\\_approved\\_by\\_florida\\_a\\_voters](http://www.marsyslawforfl.com/amendment_6_marsy_s_law_for_florida_approved_by_florida_voters) (last updated Dec. 6, 2018).

98. *Id.*

99. FLA. CONST. art. I, § 16(b)(5).

100. *Amendment 6/Marsy's Law for Florida Approved by Florida Voters*, *supra* note 97.

101. *Id.*

102. *See id.*

Dakota.<sup>103</sup> Marsy's Law was also passed, but later overturned, in Montana and Kentucky.<sup>104</sup> Additionally, seventy-four percent of the electorate approved the law in Pennsylvania; however, those results have not yet been certified because the Amendment's constitutionality is in litigation.<sup>105</sup> A similar situation now exists in Wisconsin.<sup>106</sup>

Though it has only been around for a short period of time, there has already been litigation surrounding Florida's version of Marsy's Law and its implementation in the Sunshine State.<sup>107</sup> For instance, in 2019, the Fourth District Court of Appeal struggled to see with how Marsy's Law changed the state's role in advocating for restitution for a victim in the case of *Morrill v. State*.<sup>108</sup> In *Morrill*, the defendant pled guilty to a charge of dealing in stolen property.<sup>109</sup> One of the items that was alleged to have been pawned was a necklace belonging to the victim.<sup>110</sup> During a restitution hearing, the trial court ordered \$2,200 be paid to the victim for the stolen jewelry.<sup>111</sup>

The defendant appealed the trial court's valuation based on a failure to follow the *Hawthorne* test.<sup>112</sup> *Hawthorne* requires that certain factors be employed to arrive at a fair determination.<sup>113</sup> These factors include: "(1) original market cost; (2) [the] manner in which the item was used; (3) the

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103. *State Efforts*, MARSY'S L., <http://www.marsyslaw.us/states> (last visited Jan. 10, 2021).

104. Katie Meyer, *Marsy's Law Explained: What You Need to Know About the Victims' Rights Amendment on the Nov. 5 Ballot*, WITF, <http://www.witf.org/2019/10/28/marsys-law-explained/> (last updated Nov. 5, 2019, 8:40 AM).

105. *See id.*

106. Marco Kirchner, *State Used Wrong Standard in "Marsy's Law" Defense*, WIS. JUST. INITIATIVE: BLOG (Mar. 22, 2021), <http://www.wjiinc.org/blog/category/marsys-law>.

107. *See Toole v. State*, 270 So. 3d 371, 374 (Fla. 4th Dist. Ct. App. 2019). It should be noted that while Marsy's Law was only implemented in 2019, case law that predates its passage plays an important role in understanding its content. *See id.* For instance, in the case of *Barnett v. Antonacci*, the appellate court concluded that a prosecutor's decision to enter a Nolle Prosequi is not a "stage" in the proceeding within the meaning of the constitutional provision guaranteeing victims of crime the right to be informed, present, and to be heard. 122 So. 3d 400, 406 (Fla. 4th Dist. Ct. App. 2013). As such, Marsy's Law would not be applicable in these instances. *Id.* Therefore, this decision holds great significance in the discussion of who a would-be victim would be under the law, as it clearly creates precedent that courts may look to before 2019 in determining this question and need not attempt to extrapolate beyond previous case law should guidance already exist. *See id.*; FLA. CONST. art. I, § 16(b).

108. 268 So. 3d 160 (Fla. 4th Dist. Ct. App. 2019).

109. *Id.* at 161.

110. *Id.*

111. *Id.* at 161–62.

112. *See id.* at 162.

113. *Morrill*, 268 So. 3d at 162.

general condition and quality of the item; and (4) the percentage of depreciation.”<sup>114</sup> In this case, the state failed to follow these requirements and only provided hearsay regarding value.<sup>115</sup>

However, the court did express concern regarding how Marsy’s Law may have reduced the burden on victims in establishing restitution amounts, and in fact, the court imposed a new requirement upon prosecutors.<sup>116</sup> The appellate court cited its own recent decision in *Toole v. State*,<sup>117</sup> where it recognized that “proving restitution continues to be difficult for victims, and receiving compensation for their loss continues to be elusive.”<sup>118</sup> Further, the court proposed that under Marsy’s Law, the state must *now* provide assistance in establishing the condition and quality of stolen property to determine the replacement cost.<sup>119</sup>

In *Morrill*, the court acknowledged that the State had not provided this assistance.<sup>120</sup> In fact, it went as far as to say that the State took no steps to meet its potential burden to the victim under Marsy’s Law.<sup>121</sup> While it maintained its final ruling in favor of the appellant, it also provided clear dicta that Marsy’s Law may have created mandates on Florida state prosecutors to advocate more rigorously for victims’ rights.<sup>122</sup>

One finds similar advice in a case from Florida’s Third District Court of Appeal called *Alvarez-Hernandez v. State*.<sup>123</sup> While this case could be viewed as a cautionary tale regarding vindictive sentencing, it holds equal relevance to Marsy’s Law in admonishing courts to ensure victims’ have input in plea negotiations.<sup>124</sup> The defendant—charged with second-degree murder with a deadly weapon, aggravated battery with great bodily harm or with a

114. *Id.*

115. *Id.*

116. *See id.* at 163.

117. 270 So. 3d 371 (Fla. 4th Dist. Ct. App. 2019). Ultimately, the court in *Toole v. State* certified the following question to the Supreme Court of Florida:

Is *Hawthorne’s* formula for determining restitution based on the fair market value of the victim’s property still viable after the passage of Amendment 6 (Marsy’s Law), or should a trial court no longer be bound by fair market value as the sole standard for determining restitution amounts, and instead exercise such discretion as required to further the purposes of restitution, including consideration of hearsay?

*Id.* at 375. Unfortunately, the Supreme Court of Florida dismissed the question as moot due to defendant’s death. *State v. Toole*, No. SC19-456, 2019 WL 2275025, at \*1 (Fla. May 29, 2019).

118. *Toole*, 270 So. 3d at 374; *Morrill*, 268 So. 3d at 163.

119. *Morrill*, 268 So. 3d at 163.

120. *Id.*

121. *Id.*

122. *See id.*

123. 319 So. 3d 121 (Fla. 3d Dist. Ct. App. 2021).

124. *Id.* at 123.

deadly weapon, and aggravated assault with a deadly weapon—appealed his sentence of twenty-five years in prison followed by ten years of probation.<sup>125</sup> During a pretrial conference, the state attorney offered the defendant eleven years in prison.<sup>126</sup> The defendant rejected this offer in open court.<sup>127</sup> Defense counsel also alerted the judge, in chambers, that the previously assigned trial judge had offered the defendant a six-year prison sentence, followed by five years of probation.<sup>128</sup> That too had been spurned by the defendant.<sup>129</sup> The sitting judge then re-extended the six-year offer to the defendant, who again refused it.<sup>130</sup> The defendant argued on appeal that the court's twenty-five-year (300 months) sentence, which was over double the minimum sentence on his criminal code scoresheet, was vindictive.<sup>131</sup>

While the opinion focused on whether indeed the trial court's disposition order constituted vindictive sentencing for exercising one's right to go to trial, the appellate court expressed its displeasure that the victim was not present for the in-chambers plea negotiations.<sup>132</sup> “[W]e are concerned by the in-chambers, off-the-record plea discussions engaged in by the predecessor judge, and take this opportunity to caution trial judges . . . .”<sup>133</sup> The appellate court further explained that the right for a victim to be present, informed, and provide input is sacred, especially with the passage of Marsy's Law.<sup>134</sup>

This record requirement is all the more important in light of the provisions of Marsy's Law, which in 2018 amended Article I, Section 16 of the Florida Constitution to, *inter alia*, “preserve and protect the right of crime victims to achieve justice, ensure a meaningful role throughout the criminal and juvenile justice systems for crime victims, and ensure that crime victims' rights and interests are respected and protected by law in a manner no less vigorous than protections afforded to criminal defendants and juvenile delinquents.”<sup>135</sup>

But perhaps one of the best examples of how powerful victims' rights are under Marsy's Law can be seen in a recent 2021 case from Florida's Fourth

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125. *Id.* at 122.

126. *Id.*

127. *Id.*

128. *Alvarez-Hernandez*, 319 So. 3d at 122.

129. *Id.*

130. *Id.* at 123.

131. *Id.* at 122–23.

132. *Id.* at 123, 125.

133. *Alvarez-Hernandez*, 319 So. 3d at 125.

134. *Id.*

135. *Id.* (quoting FLA. CONST. art. I § 16(b)).

District Court of Appeal, where the appellate court found that a victim's right to be present trumps a defendant's right to have witnesses sequestered.<sup>136</sup> In that case, the defendant and the victim were siblings who got into an altercation at a family event.<sup>137</sup> The defendant found a knife and stabbed the victim during the squabble, ultimately killing him.<sup>138</sup>

At trial, the State invoked the rule of sequestration and requested the defendant's father—who was also the decedent victim's father—to wait outside the courtroom before testifying for the defense.<sup>139</sup> The trial court judge agreed, and ordered the father to leave the courtroom.<sup>140</sup> After the completion of several witnesses' testimony, the defendant requested that the father be permitted to return to the courtroom.<sup>141</sup> The trial court denied this request.<sup>142</sup> Ultimately, the jury convicted the defendant of a lesser included offense, and the judge sentenced him to thirty years in prison.<sup>143</sup>

On appeal, the defendant brought forth three issues for review.<sup>144</sup> However, the appellate court focused on whether the trial court had violated the father's right as the decedent victim's next of kin to be present under Marsy's Law.<sup>145</sup> While the appellate court quickly found that any potential error in excluding the father was harmless error, it still discussed the importance of the rights of a victim versus the rights of a defendant.<sup>146</sup>

The court's analysis referenced a Florida Supreme Court case from 2000 called *Booker v. State*.<sup>147</sup> In that case, similar to *Butler v. State*,<sup>148</sup> the defendant argued that the victim's great-niece should have been present during the sentencing phase of a murder trial.<sup>149</sup> However, even though the Florida Supreme Court found that it was an error to exclude the great-niece, the court found that the defendant suffered no prejudice, and as such, the error was harmless.<sup>150</sup> Therefore, while the appellate court alluded that the *Butler* trial judge incorrectly excluded the father, no harm had occurred, and the

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136. See *Butler v. State*, 315 So. 3d 30, 34 (Fla. 4th Dist. Ct. App. 2021).

137. *Id.* at 32.

138. *Id.*

139. See *id.* at 33.

140. See *id.*

141. *Butler*, 315 So. 3d at 32–33.

142. *Id.* at 33.

143. *Id.*

144. *Id.* at 32.

145. See *id.* at 33.

146. *Butler*, 315 So. 3d at 33.

147. *Id.* at 33–34; 773 So. 2d 1079 (Fla. 2000).

148. 315 So. 3d 30 (Fla. 4th Dist. Ct. App. 2021).

149. *Booker*, 773 So. 2d at 1086–87.

150. *Id.* at 1095–96.

conviction was affirmed.<sup>151</sup> But in doing this, the appellate court created a precedent that Marsy's Law trumps a defendant's rights in certain circumstances.<sup>152</sup>

Perhaps, however, one of the Florida Court of Appeals' most important pronouncements as to Marsy's Law comes not from the analysis of what the law does but rather what it fails to do.<sup>153</sup> In 2020, the Florida First District Court of Appeal concluded that in the fervor of creating stronger rights for victims, the legislature had failed to include a method to implement and protect these rights for the very people the law was meant to protect.<sup>154</sup> In the case of *L.T. v. State*,<sup>155</sup> the appellate court observed "[a]s written, Marsy's Law does not provide procedures to implement and enforce the victim's rights set forth in the law or remedies for failure to recognize those rights."<sup>156</sup> In the case, L.T., a juvenile crime victim, claimed the trial court violated her rights under Marsy's Law when it failed to notify her regarding certain stages in the delinquency process.<sup>157</sup>

After being arrested for the alleged molestation of L.T., the juvenile defendant attended a detention hearing, where over the state attorney's objection, he was released to home detention.<sup>158</sup> The victim never received notice of the detention hearing; however, the Department of Juvenile Justice did alert L.T. of the court's final decision after it had occurred.<sup>159</sup> The victim's mother then filed a Notice of Appearance on behalf of the victim.<sup>160</sup> A month later, a second attorney filed a Notice of Appearance indicating she would be acting as co-counsel for the victim.<sup>161</sup> Shortly thereafter, the victim's attorneys filed a pleading notifying the court, the State, and the defense of the victim's intent to exercise her rights under Marsy's Law.<sup>162</sup>

Counsel for the defense moved to strike all pleadings filed on behalf of L.T., citing a lack of standing as she was not a party to the case.<sup>163</sup> During a hearing, the trial court granted the defense's request.<sup>164</sup> In doing so, the court

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151. *Butler*, 315 So. 3d at 34.

152. *See id.*

153. *See L.T. v. State*, 296 So. 3d 490, 499 (Fla. 1st Dist. Ct. App. 2020).

154. *See id.* at 499–500.

155. 296 So. 3d 490 (Fla. 1st Dist. Ct. App. 2020).

156. *Id.* at 499.

157. *Id.* at 492.

158. *Id.*

159. *Id.*

160. *L.T.*, 296 So. 3d at 493.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 494.

pronounced, “there is no express language contained in [Marsy’s Law] that allows the victim or the victim’s representative to file a Notice of Appearance on behalf of the victim and become a party to criminal proceedings.”<sup>165</sup>

On appeal, attorneys for the victim asserted that under Marsy’s Law, the legislature envisioned granting victims of crimes similar rights and protections afforded to defendants in the criminal process.<sup>166</sup> Yet, the appellate court believed that a careful balance between the rights of both entities needs to occur “without impacting the basic constitutional foundations of the criminal justice system.”<sup>167</sup> While the court believed Marsy’s Law provided a framework for victims to have a “legally cognizable interest in a criminal proceeding,” this was not equivalent to elevating them to the status of a party in the case.<sup>168</sup> As such, the appellate court concluded that there was no error in striking the victim’s pleadings, as she still had meaningful input in the case pursuant to the requirements of Florida’s Constitution.<sup>169</sup>

In closing, the District Court of Appeals opined that trial courts lacked the authority to create a system to implement victims’ rights under Marsy’s Law.<sup>170</sup> Instead, this responsibility rested squarely with the legislature and its rulemaking authority.<sup>171</sup> In response, the Florida Bar created a joint subcommittee charged with addressing this lack of guidance regarding the execution of the law.<sup>172</sup> Born from that subcommittee, Rule 2.423 of Judicial Administration has been proposed.<sup>173</sup> Rule 2.423 provides three procedures for the invocation of victim rights.<sup>174</sup> The first falls to the filer of the report.<sup>175</sup> This could be either the initial law enforcement agency or the intake unit for the state attorney’s office.<sup>176</sup> However, the option provides for the victims themselves to file a request.<sup>177</sup>

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165. *L.T.*, 296 So. 3d at 494.

166. *Id.* at 495.

167. *Id.*

168. *Id.* at 497.

169. *See id.* at 497, 499.

170. *L.T.*, 296 So. 3d at 499–500.

171. *Id.*

172. *See Rule of Judicial Administration Amendment Concerning Marsy’s Law*, FLA. BAR (Mar. 24, 2020), <http://www.floridabar.org/the-florida-bar-news/rule-of-judicial-administration-amendment-concerning-marsys-law/>.

173. *Id.*

174. *See id.*

175. *Id.*

176. *See id.*

177. *Rule of Judicial Administration Amendment Concerning Marsy’s Law*, *supra* note 172.



Unfortunately, the subcommittee focused only on the confidentiality right of Marsy's Law and not the privileges found within the document.<sup>178</sup> The Florida Supreme Court held oral arguments regarding the proposed rule on June 2, 2021.<sup>179</sup> Yet, since writing this Article, no further guidance has been provided.<sup>180</sup> As such, much remains uncertain regarding the interpretation and realization of Marsy's Law moving forward.<sup>181</sup>

IV. FLORIDA POLICE BENEVOLENT ASS'N, INC. V. CITY OF TALLAHASSEE, 314 SO. 3D 796 (FLA. 1ST DCA 2021)

Perhaps one of the greatest debates arising from the text of Marsy's Law itself is the self-contained definition of the term "victim."<sup>182</sup> Specifically, section 16(b)(11)(e) of the Florida Constitution reads in relevant part:

As used in this section, a "victim" is 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.<sup>183</sup>

This definition may sufficiently encompass all possible parties protected under the law; however, like with most instances of newly passed legislation, a new debate is on the horizon as one turns to the issue of whether

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178. *See id.*

179. *6/2/21 Florida Supreme Court Oral Arguments: In Re: Amendments to Florida Rule of Judicial Administration 2.423 SC20-1128*, FLA. CHANNEL, <http://thefloridachannel.org/videos/6-2-21-florida-supreme-court-oral-arguments-in-re-amendments-to-florida-rule-of-judicial-administration-2-423-sc20-1128/> (last visited Jan. 10, 2022) [hereinafter *Oral Arguments*].

180. *See id.* (noting that a hearing regarding Rule 2.423 by Florida's Supreme Court has been the last official conduct on the matter).

181. *See* The News Serv. Of Fla., *supra* note 15.

182. *See* FLA. CONST. art. 1, § 16, cl. (b)(11)(e).

183. *Id.*

law enforcement officers—in use of force cases—are considered potential victims under Marsy’s Law.<sup>184</sup>

After two different encounters, law enforcement in Florida shot and killed criminal suspects who endangered Tallahassee police officers.<sup>185</sup> Following these two events, the City of Tallahassee announced it would release the names of the officers involved in the shootings.<sup>186</sup> In response, the officers sought to prevent the disclosure of their names through their bargaining agency—the Police Benevolent Association.<sup>187</sup> In doing so, the Association cited Marsy’s Law, arguing that the officers were victims under Florida Law and enjoyed the right of confidentiality.<sup>188</sup>

At the trial court level, the judge found that the officers were not protected under the confidentiality provision of Marsy’s Law.<sup>189</sup> Further, the trial court judge concluded that this outcome existed for the police even if they were “victims” under the legislation.<sup>190</sup> In doing so, the judge specifically concluded that “a law enforcement officer acting in his official capacity could not be a victim under [A]rticle I, [S]ection 16.”<sup>191</sup> The trial court’s rationale focused on the purpose of Marsy’s Law being to protect victims from harassment and threats from assailant-defendants.<sup>192</sup> Here, with their assailants dead, the officers were not seeking protection from them but from others in the community who would view the shootings as immoral or excessive.<sup>193</sup> This was not meant to be the purpose of Marsy’s Law.<sup>194</sup> The judge also asserted that the safeguards of the law exist only once “a criminal proceeding begins.”<sup>195</sup>

On appeal, the First District Court of Appeal began with a reading of the plain language of the Florida Constitution.<sup>196</sup> In doing so, it found that the trial court judge improperly relied on Article I, Section 24 of the Florida Constitution when denying the officers’ request, instead of focusing solely on

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184. *But see* Fla. Police Benevolent Ass’n v. City of Tallahassee, 314 So. 3d 796, 799 (Fla. 1st Dist. Ct. App. 2021).

185. *Id.* at 797.

186. *Id.*; *see also* The News Serv. Of Fla., *supra* note 15.

187. *Fla. Police Benevolent Ass’n*, 314 So. 3d at 797.

188. *Id.*

189. *Id.*

190. *Id.* at 797–98.

191. *Id.* at 799.

192. *Fla. Police Benevolent Ass’n*, 314 So. 3d at 801.

193. *See id.* at 799.

194. *Id.*

195. *Id.*

196. *Id.* at 799–80.

the four corners of the document.<sup>197</sup> Article I, Section 24 of the Florida Constitution speaks to the public's right to information and access to meetings.<sup>198</sup> Although at the trial court level, the judge found Marsy's Law and this constitutional section to be in conflict, the appellate court disagreed.<sup>199</sup> It determined that no conflict existed, and there was no need to venture beyond the text of Marsy's Law to begin with.<sup>200</sup>

When ruling in this fashion, the appellate court quickly pointed out that Marsy's Law represented a clear edict from the Florida citizenry.<sup>201</sup> This was not an occasion where a partisan legislature or a rogue judge diverted from the clear intent of an already existing law.<sup>202</sup> In passing Amendment 6, the state's people voiced their belief in how important victim's rights should be.<sup>203</sup> Additionally, Article I, Section 24 of the Florida Constitution includes language that specifically says:

Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, *except with respect to records exempted under this section or specifically made confidential by this Constitution.*<sup>204</sup>

Therefore, no conflict between the two constitutional provisions existed.<sup>205</sup>

The appellate court next discussed whether a police officer who is threatened with deadly force falls within the definition of a "victim" under Marsy's Law.<sup>206</sup> As stated previously, the Amendment's text defines the term "victim."<sup>207</sup> The appellate court noted that it specifically states, "[a] . . . victim is a 'person who suffers direct or threatened physical, psychological, or financial harm . . .'"<sup>208</sup> Thus, a law enforcement officer who is threatened on the job with deadly force clearly suffers "direct or threatened physical" harm

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197. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 800.

198. FLA. CONST. art. I, § 24(a).

199. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 800.

200. *Id.*

201. *See id.*

202. *See id.*

203. *See id.*

204. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 801 (emphasis added) (quoting to FLA. CONST. art. I, §24(a)).

205. *Id.*

206. *Id.*

207. FLA. CONST. art. I, § 16(e); *see discussion supra* Part IV.

208. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 801 (quoting to FLA. CONST. art. I, § 16(e)).

and is, therefore, a victim.<sup>209</sup> Acting in self-defense or killing the perpetrator before he or she kills the officer in no way negates this status.<sup>210</sup>

In making this determination, the appellate court acknowledged the importance of public interest in holding law enforcement officers responsible for misconduct while on duty.<sup>211</sup> However, the court found that other avenues could be utilized to hold officers accountable without necessarily revealing their identities.<sup>212</sup> This included procedures such as internal affair investigations and grand jury proceedings.<sup>213</sup> The court also conceded that Florida's Sunshine Laws intend to grant public-wide and unhindered access to information.<sup>214</sup> Despite this clear intent, the court remarked it was not the judicial branch's prerogative to impute into constitutional text greater breadth than what exists.<sup>215</sup>

The appellate court then moved to discuss the trial court's determination that one does not become a victim until the criminal process commences.<sup>216</sup> Again, the appellate court found this interpretation was not the clear wording of Marsy's Law's.<sup>217</sup> Instead, the document reads that those rights begin at the time of "victimization."<sup>218</sup> Furthermore, there is no requirement that a prosecution case be filed for rights to apply in the law itself.<sup>219</sup> While many of the protections found in Marsy's Law apply to different proceedings throughout the court process, the appellate court determined that the trial judge moved beyond the plain language to establish a requirement that did not exist.<sup>220</sup>

Lastly, the appellate court addressed the trial court's belief that Marsy's Law applied only to "information" and "records" and not necessarily the identity of the person's name.<sup>221</sup> It quickly rejected this argument stating that "information . . . that could be used to locate or harass the victim or the victim's family includes records that could reveal the victim's name or

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209. *Id.*

210. *Id.*

211. *Id.* at 802.

212. *See id.*

213. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 802.

214. *Id.*

215. *Id.* at 802–03.

216. *See id.* at 803.

217. *Id.*

218. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 803.

219. *Id.*

220. *See id.* at 802–04.

221. *Id.* at 804 (emphasis added) (citing FLA. CONST. art. I, § 16(b)(5)).

identity.”<sup>222</sup> To rule otherwise would create a result contrary to the clear intent of the Amendment’s passage to begin with.<sup>223</sup>

## V. ANALYSIS

Beginning in 2015, The Washington Post started to keep track of every individual who was killed by law enforcement in the United States.<sup>224</sup> As of September 30, 2021, that number was over 5,000 individuals.<sup>225</sup> While most of the individuals killed were Caucasian, African Americans were disproportionately killed in larger numbers.<sup>226</sup> In 2019, out of the top twenty law enforcement agencies with the most killings caused by police, two resided in Florida.<sup>227</sup> The Miami-Dade Police Department was fourteenth in the nation, and the Jacksonville Sheriff’s Office was sixteenth.<sup>228</sup>

Since 2005, there have been forty-two officers arrested for murder in the United States.<sup>229</sup> Of those arrested, only five were convicted of murder.<sup>230</sup> The most prevalent conviction was for manslaughter, with eleven convictions.<sup>231</sup> However, the list of resolutions run the gamut from improper discharge of a firearm to involuntary manslaughter.<sup>232</sup>

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222. *Id.*

223. *Fla. Police Benevolent Ass’n*, 314 So. 3d at 804.

224. *925 People Have Been Shot and Killed by Police in the Past Year*, WASH. POST, <http://www.washingtonpost.com/graphics/investigations/police-shootings-database/> (last updated Jan. 10, 2022) [hereinafter *Shot by Police in 2021*].

225. *Id.*

226. *Id.* While African Americans account for only thirteen percent of the United States’ population, they make up one-quarter of all police shootings. *Id.*; Joe Fox et al., *What We’ve Learned About Police Shootings 5 Years After Ferguson*, WASH. POST (Aug. 9, 2019), <http://www.washingtonpost.com/nation/2019/08/09/what-weve-learned-about-police-shootings-years-after-ferguson/>. Additionally, over one-third of the unarmed victims of police shootings were also African American. Fox et al., *supra*. In fact, an African American man is four times more likely to be shot by police than their white counterparts. *Id.*

227. *See id.*

228. *See id.*

229. Statista Rsch. Dep’t, *Number of NonFederal Police Officers Arrested for Murder Who Have Been Convicted Between 2005 and 2020, by Charge*, STATISTA (June 10, 2020), <http://www.statista.com/statistics/1123386/convictions-police-officers-arrested-murder-charge-us/>.

230. *Id.*

231. *Id.*

232. *Id.*

Noting these statistics, it would be remiss not to point out the political climate at the time this Article is being written.<sup>233</sup> Names like George Floyd and Breonna Taylor will forever live in infamy as individuals whose deaths began a conversation about police accountability.<sup>234</sup> Equally important are names like Derek Chauvin and the role public pressure played in demanding justice in his trial.<sup>235</sup> One cannot help but ponder—if Derek Chauvin’s name was not made public when it was, would a similar result have been reached? While examples of public pressure assisting in accountability are available, so too are examples of when the will of the people thwarted the smooth pursuit of justice.<sup>236</sup>

With these realities in mind, predicting that the Florida Supreme Court will accept jurisdiction over *Florida Police Benevolent Ass’n v. City of Tallahassee*<sup>237</sup> seems plausible.<sup>238</sup> While our highest court may wish to avoid controversy, it seems evident that with the First District Court’s decision, more Florida law enforcement agencies will soon follow suit.<sup>239</sup> And with media companies leading the charge for disclosure, there appears to be both people and money behind both sides.<sup>240</sup>

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233. See Julie Pierce Onos, *How Journalists Cover Police Brutality Is a Matter of Life and Death*, MEDIA DIVERSITY INST. (June 9, 2020), <http://www.media-diversity.org/how-journalists-cover-police-brutality-is-a-matter-of-life-and-death/>.

234. *Id.*; *Black Lives Taken: George Floyd, Breonna Taylor, and Ahmaud Arbery*, DOSOMETHING.ORG, <http://www.dosomething.org/us/articles/black-lives-taken> (last visited Jan. 10, 2022).

235. See *Black Lives Taken: George Floyd, Breonna Taylor, and Ahmaud Arbery*, *supra* note 234; Onos, *supra* note 233.

236. See *Promoting Accountability*, OPPORTUNITY AGENDA, <http://transformingthesystem.org/criminal-justice-policy-solutions/create-fair-and-effective-policing-practices/promoting-accountability/> (last visited Dec. 29, 2021); *Importance of Accountability in Law Enforcement*, POWERDMS (Dec. 22, 2020), <http://www.powerdms.com/why-powerdms/law-enforcement/importance-of-accountability-in-law-enforcement>. Kim Potter was charged with the death of Daunte Wright in Minneapolis, Minnesota when she claimed she mistook her firearm for her taser. N’dea Yancey-Bragg, *Prosecutor Assigned to Case of Ex-cop Charged in Daunte Wright’s Death Resigns Over ‘Vitriol’ and ‘Partisan Politics’*, USA TODAY, <http://www.usatoday.com/story/news/nation/2021/05/25/prosecutor-assigned-to-kim-potterdaunte-wright-case-resigns/7426386002/> (May 25, 2021, 11:48 AM). The prosecutor resigned after ten years of service to his community because of the public pressure surrounding the case. *Id.* His resignation letter which was made public cited that “‘vitriol’ and ‘partisan politics’ made it difficult to pursue justice.” *Id.*

237. 314 So. 3d 796 (Fla. 1st Dist. Ct. App. 2021).

238. *Id.* at 803–04.

239. See *id.* at 804.

240. See Onos, *supra* note 233.

Surely, the Florida Supreme Court recognizes that striking a balance between two of the most sacred principles will need to occur.<sup>241</sup> On the one hand, we have a sharp mandate that victims' rights are of paramount importance in our communities.<sup>242</sup> On the other hand, transparency and access have been hallmarks of Florida from very early on.<sup>243</sup> The existence of our Sunshine Laws reflect a desire by the public to hold government officials accountable for misconduct while granting citizens access to information.<sup>244</sup> Assuming the Florida Supreme Court does eventually weigh in on the case, how can one predict what the outcome will be?<sup>245</sup>

Perhaps, in foretelling the outcome, previous Florida Supreme Court cases acknowledging the deference that the court provides the will of people is instructive.<sup>246</sup> Indeed, a long line of precedent establishes the court's willingness to bend to the desires of its citizenry to the point of permitting votes, in some circumstances, to overwrite technical or minor defects in the Amendment process itself.<sup>247</sup>

With this in mind, all courts that have weighed in on Marsy's Law agree that the will of the people was to extend the rights of victims in the State of Florida.<sup>248</sup> Therefore, it would be consistent with this goal not only to extend the rights of victims, but also who may be considered a victim, to appease the will of the electorate.<sup>249</sup>

Yet, it is important to recognize the slippery slope that could occur should law enforcement officers involved in lethal force cases be granted this status.<sup>250</sup> For instance, would the same argument not apply to officers who are involved in shootings where the perpetrators do not die?<sup>251</sup> In both cases, the law enforcement officer is "a person who suffers direct or threatened physical, psychological, or financial harm . . . ." <sup>252</sup> For that matter, cases involving charges of battery on a law enforcement officer or resisting an officer with

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241. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 799, 802.

242. *See id.* at 802–04.

243. Joseph T. Eagleton, *Walking on Sunshine Laws: How Florida's Free Press History in the U.S. Supreme Court Undermines Open Government*, FLA. B.J., Sept.–Oct. 2012, at 23–24.

244. *Id.* at 24, 26.

245. *See id.* at 31–32; *Fla. Police Benevolent Ass'n*, 314, So. 3d at 803–04.

246. *See* Eagleton, *supra* note 243, at 31–32.

247. *See id.* at 31–32; *Sylvester v. Tindall*, 18 So. 2d 892, 895 (Fla. 1944).

248. *See Morrill v. State*, 268 So. 3d 160, 162–63 (Fla. 4th Dist. Ct. App. 2019).

249. *See id.* at 163.

250. *See* Kam, *supra* note 6.

251. *See Fla. Police Benevolent Ass'n, v. City of Tallahassee*, 314 So. 3d 796, 801 (Fla. 1st Dist. Ct. App. 2021).

252. *Id.*

violence all potentially possess legitimate legal arguments that Marsy's Law is applicable.<sup>253</sup> If the Florida Supreme Court does affirm the decision in *Florida Police Benevolent Ass'n v. City of Tallahassee*, a potential plethora of battery and assault cases may emerge, insulating police from disclosure.<sup>254</sup>

However, even if this were to pass, it is necessary to remind ourselves that the criminal justice system is built on a foundation to protect the rights of the accused, not the media nor the public's right to information.<sup>255</sup> If, indeed, law enforcement is no longer the subject of public scrutiny, ultimately, this could have very little impact on a defendant accused of a crime.<sup>256</sup> Marsy's Law refers to public disclosure.<sup>257</sup> This does not necessarily equate to private disclosure to a defense attorney.<sup>258</sup> It does not prevent a defense attorney from taking a deposition, subpoenaing employment records, or cross-examining a witness.<sup>259</sup> It simply requires additional steps to keep this information private.<sup>260</sup>

As such, should the Florida Supreme Court affirm the ruling when it potentially will have little, if any, effect on our criminal justice system as a whole.<sup>261</sup> So, the question remains: how important is knowing who these officers are to Floridians?<sup>262</sup> For many, the answer may simply be: not that much.<sup>263</sup> In a recent article from 2019, Florida was in the top twenty-five states to be a police officer in.<sup>264</sup> Florida is considered to be quite conservative by many, which some equate to meaning pro-law enforcement.<sup>265</sup> Therefore, the average Floridian may not care if officer names are disclosed or not.<sup>266</sup>

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253. *See id.*

254. *See id.*

255. *See* Eagleton, *supra* note 243, at 26.

256. *See Fla. Police Benevolent Ass'n*, 314 So. 3d at 802.

257. *See* FLA. CONST. art. I, § 16.

258. *See* Meyer, *supra* note 104.

259. *See id.*

260. *See id.*

261. *See id.*

262. *See Amendment 6/Marsy's Law for Florida Approved by Florida Voters*, *supra* note 97.

263. *See id.*

264. D'Ann Lawrence White, *What State Can Beat Being a Beat Cop in Florida?*, PATCH, <http://patch.com/florida/southtampa/how-does-florida-rank-careers-law-enforcement> (last updated May 14, 2019, 2:33 PM).

265. *See* Emily Ekins & Matthew Feeney, *Why Liberals and Conservatives Disagree on Police: Column*, USA TODAY (Apr. 20, 2017, 4:34 PM), <http://usatoday.com/story/opinion/policing/2017/04/20/why-liberals-and-conservatives-disagree-police-column/97827888/>.

266. *See Fla. Police Benevolent Ass'n v. City of Tallahassee*, 314 So. 3d 796, 800 (Fla. 1st Dist. Ct. App. 2021).



Ultimately, in deciding whether or not the Florida Supreme Court decides to address the decision, what the public does or does not want may not be all that germane to their conclusion.<sup>267</sup> The First District Court of Appeal provided a very rational and logical analysis in employing the plain language test to the text in Marsy's Law.<sup>268</sup> This strict construction analysis was consistent with the approach that multiple courts have used in Florida for over fifty years when defining the term "victim."<sup>269</sup> The District Court of Appeals also recognized the traditional role of the judiciary and did not extend its authority by creating new law, rather, the court simply interpreted the existing law.<sup>270</sup> As the appellate court wrote, should the public wish to exclude officers from Marsy's Law, mechanisms already exist to accomplish that very goal.<sup>271</sup> These include a proposal of a joint resolution of the legislature, a constitution revision commission, a citizen initiative petition, a constitutional convention, or a taxation and budget reform commission.<sup>272</sup> But having judges discern exclusions into already existing laws would be improper.<sup>273</sup> Simply stated, it does not fall on the courts to read an exclusion into a portion of the Florida Constitution when one clearly does not exist there to begin with.<sup>274</sup> Why would the Florida Supreme Court, therefore, engage in such a practice, when instead they could continue the time-honored practice of using strict constructionism and follow the document's plain language?<sup>275</sup>

## VI. CONCLUSION

At the time of writing this Article, the Florida Supreme Court has yet to decide if it will accept jurisdiction over the case of *Florida Police Benevolent Ass'n v. City of Tallahassee*.<sup>276</sup> The court may be waiting to see if other district courts weigh in on the issue and if a conflict between jurisdictions

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267. See The News Serv. of Fla., *supra* note 15.

268. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 803–04.

269. *Id.* at 802; see, e.g., *L.T. v. State*, 296 So. 3d 490, 499 (Fla. 1st Dist. Ct. App. 2020); *Koile v. State*, 934 So. 2d 1226, 1231 (Fla. 2006).

270. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 802–03.

271. *Id.* at 803.

272. *Id.*

273. See, e.g., Eagleton, *supra* note 243, at 32 (criticizing a Florida judge's decision to hold The Miami Herald in contempt for publishing a cartoon that was critical of the judicial system). *Id.* (“[T]he conduct of the judges in the case represented both an abuse of power and a constraint on the core liberty enshrined in the First Amendment”).

274. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 802–03.

275. See *id.* at 804 (finding the trial court's construction of Article I, Section 16 of the Florida Constitution incorrect and straying from the plain meaning of the words).

276. The News Serv. of Fla., *supra* note 15.

arises.<sup>277</sup> On the other hand, the court may simply be deciding if the case is truly worthy of review, depending on the amount of public outcry.<sup>278</sup> In either scenario, Marsy's Law may ultimately be a cautionary tale for people to be careful what they wish for, or rather, the electorate to be careful what they vote for.<sup>279</sup>

As stated previously, Amendment 6—Marsy's Law—passed in 2018, with over sixty-one percent of the electorate voting “yes.”<sup>280</sup> In a state where thirty-six percent of voters identify as Republican and thirty-six percent as Democrats, the Amendment appeared to have bipartisan support.<sup>281</sup> Of course, billed as a victim's bill of rights, few, if any, could have foreseen the proposal as a tool to hide the identities of officers in fatal shootings.<sup>282</sup> But even if this outcome was unforeseeable, it may not necessarily matter to many.<sup>283</sup>

While the role of the press in identifying certain law enforcement misconduct is undeniable, it may not always be understood.<sup>284</sup> In a June 2020 article composed by Julie Pierce Onos for Media Diversity Institute, the author wrote, “[f]or Black people, media coverage of police brutality is a matter of life and death.”<sup>285</sup> The article surmises that the role of the press in shining a light on the injustices suffered by African Americans at the hands of law enforcement is undeniable.<sup>286</sup> In fact, the author argues if the press had not been so slow to recognize its role in supporting minorities, many past injustices may have been resolved differently.<sup>287</sup> But while the public is now waking up to the vital role the press plays in exposing police brutality, this arousal is only recent.<sup>288</sup> As such, many do not realize how the press's inability

277. *See id.*

278. *See id.*

279. *Amendment 6/Marsy's Law for Florida Approved by Florida Voters, supra* note 97.

280. *Marsy's Law for Florida Passes!*, MARSY'S L. FOR FLA., <http://www.marsylawforfl.com/> (last visited Dec. 29, 2021).

281. *Voter Registration by Party Affiliation*, FLA. DIV. ELECTIONS, <http://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-reportsxlsx/voter-registration-by-party-affiliation/> (last visited Dec. 29, 2021); *Amendment 6/Marsy's Law for Florida Approved by Florida Voters, supra* note 97.

282. The News Serv. of Fla., *supra* note 15.

283. *See id.* (explaining that the interpretation of Marsy's Law is a question which turns on state constitutional interpretation and thus the “Supreme Court is the *final arbiter*”).

284. Phil Sudo, *The News Media: Fourth Branch of Government*, SCHOLASTIC UPDATE, Sept. 8, 1989, at 15, 15.

285. Onos, *supra* note 233.

286. *See id.*

287. *Id.*

288. *See id.*

to report on these matters could impact justice in these cases.<sup>289</sup> This may result in numerous Floridians not recognizing the role the media plays in obtaining justice for minorities when identifying individual officers in fatal shootings.<sup>290</sup>

Ultimately, the effect of Marsy's Law in protecting the identity of law enforcement in use of force cases may already reflect the will of most Floridians.<sup>291</sup> However, if this comes at the cost of allowing the public to supervise potentially the most powerful branch of government, for some, the cost may be too high.<sup>292</sup> If the Florida Supreme Court does weigh in on the issue, the justice who submits their opinion will most likely affirm the First District's decision.<sup>293</sup> In doing so, the outcome may do a little more than retrace the well-thought-out and reasoned opinion of the lower court.<sup>294</sup> Additionally, this approach will be consistent with precedent in following strict constructionism and adhering to the plain language of the text.<sup>295</sup> But in doing so, the outcome may forever weaken what some call the fourth branch of government—the press.<sup>296</sup> For if the press cannot ultimately provide oversight in these cases, is the public ready for the police to police their own?<sup>297</sup>

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289. *See id.*

290. *See* Onos, *supra* note 233; *Amendment 6/Marsy's Law for Florida Approved by Florida Voters*, *supra* note 97.

291. *See Amendment 6/Marsy's Law for Florida Approved by Florida Voters*, *supra* note 97.

292. *See* The News Serv. of Fla., *supra* note 15; *Rule of Judicial Administration Amendment Concerning Marsy's Law*, *supra* note 172.

293. *See* The News Serv. of Fla., *supra* note 15.

294. *See* Fla. Police Benevolent Ass'n v. City of Tallahassee, 314 So. 3d 796, 804 (Fla. 1st Dist. Ct. App. 2021).

295. *See id.* at 803–04.

296. *See id.*; Sudo, *supra* note 284, at 15.

297. *See* Ann C. Hodges & Justin Pugh, *Crossing the Thin Blue Line: Protecting Law Enforcement Officers Who Blow the Whistle*, 52 U.C. DAVIS L. REV. ONLINE 1, 39 (2018). For those interested in the police's ability to police itself, this is an excellent law review article detailing the legal ramifications when officers report fellow officers for misconduct and the potential blowback they face. *See id.* at 1–2.