IN THE SUPREME COURT OF OHIO

STATE OF OHIO *ex rel.* XX,	**:**	**Case No. XX**
Relator,	**:**	**Original Action in Mandamus**
v.	**:**	
XX, PROSECUTING ATTORNEY, XX COUNTY, OHIO, et al.,	**:**	
Respondents.	**:**	

BRIEF OF REAL PARTY IN INTEREST, A.A.

Elizabeth A. Well
No. 0087750
Ohio Crime Victim Justice Center
3976 North Hampton Drive
Powell, Ohio 43065
P: 614.848.8500
F: 614.848.8501
ewell@ocvjc.org

Counsel for Real Party in Interest, A.A.

H. Louis Sirkin
No. 0024573
600 Vine Street, Suite 2700
Cincinnati, Ohio 45202
P: 513.721.4450
F: 513.721.0109
hls@santenhughes.com

Counsel for Relator, XX

Drew C. Piersall*
No. 0078085
* *Counsel of Record*
17 South High Street, Suite 900
Columbus, Ohio 43215
P: 614.224.4411
F: 614.224.4433
dcp@zrlaw.com

Amy Ikerd
No. 0067067
Assistant Prosecuting Attorney, Mercer Co.
119 North Walnut Street
Celina, Ohio 48522
P: 419.586.8677
F: 419.586.8747
amy.ikerd@mercercountyohio.org

Counsel for Respondents, XX, Prosecuting Attorney, Mercer County, Ohio and XX, Sheriff, Mercer County, Ohio

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I. Introduction

A.A., the crime victim in the case *State v. XX*, Mercer County Common Pleas Case No. XX-CRM-XXX, respectfully requests that this Honorable Court dismiss Relator's complaint for a writ of mandamus and protect and enforce her constitutional privacy rights. The records sought by Relator implicate A.A.'s state and federal constitutional rights. The release of these records would further re-victimize A.A. and would frustrate the purpose of the state and federal constitutional privacy protections afforded to crime victims.

II. Statement of Facts

Relator, XX XX, is the father of XX XX ("Offender"). Offender is A.A.'s former teacher and coach, who pled guilty to, and was convicted of, nine counts of sexual battery for crimes committed against A.A. while she was a high school student. Relator's goal in seeking the records in this action is not, as Relator claims, to expose corruption in Mercer County, but instead, is to harass and humiliate A.A. Further, Relator's son, Offender XX XX, has sought to control public distribution of records in this matter to harass, humiliate, and degrade A.A. In email communications from prison, Offender attempts to delegate duties and control the flow and manner of records released in this matter. For instance, in a conversation with another former student of his, Offender directed this former student to obtain screenshots and other information from A.A.'s private social media page with the goal that "[h]opefully, enough people see that fruit crap to know that she was/is super crazy." (Email to Holly Brunswick, 4/23/18.) More recently, Offender wrote to his wife, expressing his desire that videos of A.A., which describe the intimate details of his crimes against her, be posted on CountyCoverUp.com. (Email to XX XX, 1/13/19.)

Offender has also exchanged numerous emails with his parents, the subject of which has been their attempts to attack and disparage A.A. For instance, after Relator's wife made several public posts releasing intimate details of the crimes Offender committed against A.A. in the form of text messages and police interviews, Relator's wife assured Offender: "People think she is a liar and she has made up quite a story with her written statement. Quit jumping to conclusions. I think most people aren't shocked by what they're reading about her. They know what kind of person she is." (Email from XX XX, 4/19/18.) After learning that the founder of CountyCoverUp.com, Jeffrey Rasawehr, had posted an ad asking A.A. to come forward to sue the school district due to Offender's crimes against her, Offender sent his mother (Relator's wife) an email, reiterating Offender's goal in releasing these records: "The best thing to do is expose [A.A.] as the liar that she is * * *." (Email to XX XX, 6/18/18.) In response to Rasawehr's actions, Offender also emailed Relator, stating: "It is insane that instead of showing videos trying to expose [A.A.], you want to help her get rich." (Email to Relator, 6/21/18.)

Offender went so far as to provide specific language to Relator and Relator's wife regarding how to frame their attacks on A.A. (Email to XX XX, 7/5/18) ("Mom, You may want to suggest to Dad, if he is still talking about putting the videos up, that he should quote her trial testimony. The state has talked about her 'moving' testimony. The papers made a huge deal of everything she said. People said it had to be the truth: why would she lie? It would be very powerful if he quoted that testimony and then said, 'This was her testimony that was coached for trial. Now let's see what she ACTUALLY told police when she originally went to see them, before they told her what to say. He could contrast the cutting crap with the fact that she said I never hurt her. He could also contrast other changes. I know that it would really bother people, and it would show she lied -- with police help! I just wanted to pass this along. He ignored my

last e-mail, which is fine. I ignored his last one. But I think that if you are going to put these videos up, they need to be contrasted with the lies she told at trial. Expect a gag order. I will talk to the lawyer about my concerns as soon as I can. Thanks, XX").

Mercer County law enforcement are aware that Relator and his wife maintain a Facebook page designed to engage "in a pattern of harassing and stalking behavior against" A.A. (Affidavit of Megan Baker, ¶ 9.) Video posts to this page featuring images of A.A., designed to harass, intimidate, and humiliate A.A. include titles such as "sex during period." *Id.* at ¶ 13. The harassment and intimidation perpetrated by Relator and his wife are so severe that both have been charged with criminal offenses for this conduct. *Id.* at ¶ 19.

Relator's public release of videos and other case documents which describe the intimate details of the crimes committed against A.A. has had a profoundly negative impact on A.A. Specifically, A.A. was shocked by the content of the Facebook page and its disparaging nature. (Affidavit of A.A., ¶ 7.) A.A. has become depressed due to the constant reminders of her victimization. *Id.* at ¶ ¶ 9, 14. A.A. has been contacted and harassed by strangers who have viewed images and videos of her on Relator's Facebook page, and subsequently attempted to contact her online. *Id.* at ¶ 12. Relator's postings of A.A.'s images without her consent have caused her to continually relive the trauma of her victimization. *Id.* at ¶ 17. Relator's release of the intimate details of the crimes committed against A.A. has caused A.A. to question whether coming forward to report the crimes was "worth it." *Id.* at ¶ 21.

III. Argument

A. The records sought by Relator fall squarely within the Public Records Act exception for records the release of which would violate state or federal law.

The records sought in this case are of the utmost personal nature and are protected by federal and state privacy laws. Consequently, they are exempted from disclosure. Pursuant to

Revised Code Section 149.43(A)(1)(v), public records do not include records the release of which is prohibited by state or federal law. "Records protected under the U.S. Constitution's Fourteenth Amendment privacy right are '[r]ecords the release of which is prohibited by state or federal law,' and therefore excepted under the definition of 'public record' by R.C. 149.43(A)(1)(v)." *Narciso v. Powell Police Dep't*, Ct. of Cl. No. 2018-01195PQ, 2018-Ohio-4590, ¶ 39, citing *State ex rel. Enquirer v. Craig*, 132 Ohio St.3d 68, 2012-Ohio-1999, 969 N.E.2d 243, ¶ 13. Alleged public records such as photos of arrestees in their underwear were found to be unlawful to release under this standard. *See id.* at ¶ 43. The records sought by Relator are of a far more personal nature, revealing the intimate details of repeated sexual assaults perpetrated against A.A. These records are protected under state and federal privacy laws, and A.A. has asserted—and continues to assert—her privacy rights in these records. Consequently, these records should not be released.

B. The United States Constitution is a federal law that prohibits the release of any records containing the intimate details of the sexual assaults of A.A.

A.A.'s federal constitutional right to privacy would be violated by release of the records sought in this case as Relator seeks the most intimate information regarding A.A.'s victimization. *See Bloch v. Ribar*, 156 F.3d 673, 686 (6th Cir.1998) ("[A] rape victim has a fundamental right of privacy in preventing government officials from gratuitously and unnecessarily releasing the intimate details of the rape where no penalogical [sic] purpose is being served."). In *Bloch*, the Sixth Circuit determined that release of the intimate details of a sexual assault implicates the victim's fundamental, constitutional informational right to privacy. *See id.* at 683. The court reasoned that

> a historic social stigma has attached to victims of sexual violence. In particular, a tradition of 'blaming the victim' of sexual violence sets these victims apart from those of other violent crimes. Releasing the intimate details of rape will therefore

> not only dissect a particularly painful sexual experience, but often will subject a victim to criticism and scrutiny concerning her sexuality and personal choices regarding sex. This interest in protecting the victims of sexual violence from humiliation, among other injuries, has prompted states to pass rape shield laws and to advocate against the publication of rape victims' names.

Id. at 685. Therefore, "the right to prevent the dissemination of confidential and intimate details of a rape implicates a fundamental right * * *." *Id*. at 686. The Sixth Circuit concluded by ensuring that "public officials in this circuit will now be on notice that such a right to privacy exists." *Id.* at 687.

In this case, the Sixth Circuit's reasoning for holding that victims possess a constitutional right to privacy in records containing intimate details of a sexual assault is particularly apt. The court's concern that release of these records would cause victims to relive the painful experience of a sexual assault is validated here, where Relator's release of the intimate details of the crimes committed against A.A. has caused A.A. to question whether coming forward to report the crimes was "worth it." *Id.* at ¶ 21. The court's concern that a victim of sexual violence would be blamed for her victimization and subjected to criticism and scrutiny is realized here, where Relator, Offender, and their family members are harassing and attacking A.A. on Facebook.

Regardless of the crimes to which Offender ultimately pled guilty, the Sixth Circuit's rationale and concerns would apply here. While Offender pled guilty to nine counts of sexual battery in two jurisdictions, the indictment included numerous counts of rape. The Sixth Circuit's reasoning in *Bloch* applies equally to all sex crimes, and especially those crimes including sexual conduct, like sexual battery. In fact, A.A.'s minor status at the time of crimes should militate further in favor of protection of her privacy. With this federal constitutional right to privacy at stake, the records sought fit squarely within the Public Records Act exception.

In reaffirming its holding in *Bloch*, the Sixth Circuit reiterated the importance of protecting the constitutional informational privacy rights of victims of sex crimes, stating that "to permit such an intrusion would be to strip away the very essence of her personhood." *Lambert v. Hartman*, 517 F.3d 433, 441 (6th Cir.2008), citing *Bloch* at 685. The court's recognition of this rationale for protecting victims' constitutional right is significant for this case because Relator seeks records for the purposes of attempting to humiliate, harass, and abuse A.A., thus stripping away the very essence of A.A.'s personhood.

C. Ohio Constitution, Article I, Section 10a is a state law that prohibits the release of any records containing the intimate details of the sexual assault of A.A.

A.A.'s state constitutional right to privacy would be violated by the release of the records sought in this case. This Court has embraced the significant state interests that are advanced by protecting victim privacy. *See State v. Gardner*, 59 Ohio St.2d 14, 17, 391 N.E.2d 337 (1979). In upholding the constitutionality of Ohio's rape shield law, this Court held: "First, by guarding the complainant's sexual privacy and protecting her from undue harassment, the law discourages the tendency in rape cases to try the victim rather than the defendant. In line with this, the law may encourage the reporting of rape, thus aiding crime prevention." *Id.* Subsequent to this Court's decision in *Gardner*, Ohio voters passed Marsy's Law, which explicitly provides crime victims with the constitutional right to privacy. Ohio Constitution, Article I, Section 10a(A)(1).

On November 7, 2017, an overwhelming 83% of Ohio voters passed Marsy's Law, a constitutional amendment for crime victims. Marsy's Law provides Ohio's victims[1] with concrete, enforceable rights. Specifically, Marsy's Law explicitly requires that victims be

[1] Pursuant to Article I, Section 10a(D) of the Ohio Constitution, " 'victim' means a person against whom the criminal offense or delinquent act was committed or who is directly and proximately harmed by the commission of the offense or act." As the person against whom XX XX committed sexual battery and rape, A.A. meets the constitutional definition of "victim."

"treated with fairness and respect for [their] safety, dignity, and privacy." *Id.* By its terms, Marsy's Law "supersede[s] all conflicting state laws," making these new constitutional rights superior to existing statutory laws or court rules. Ohio Constitution, Article I, Section 10a(E). These constitutional guarantees bolster and supplement the privacy protections this Court outlined in *Gardner*. Marsy's Law's constitutional privacy guarantees, like rape shield laws, are designed to protect victims and encourage crime reporting and prevention.

This Court has also embraced the general, constitutional right to privacy for all Ohio citizens. *See Housh v. Peth*, 165 Ohio St. 35, 38, 133 N.E.2d 340 (1956). In *Housh*, this Court cited a Georgia case's recapitulation of a law review article written by Samuel D. Warren and Louis Brandeis, stating:

> A right to privacy is derived from natural law, recognized by municipal law, and its existence can be inferred from expressions used by commentators and writers on the law as well as judges in decided cases. The right to privacy is embraced within the absolute rights of personal security and personal liberty.

As a minor victim of sex crimes, A.A.'s substantial, constitutional privacy interests should be given significant weight by this Court and should prevent disclosure of records containing the intimate details of the crimes committed against her. The public release of the documents sought in this case is exactly the type of infringement these rights are designed to prevent.

D. A.A. did not waive her constitutional rights simply by providing testimony in the related criminal matter.

Relator's assertion that A.A. voluntarily waived her constitutional rights to privacy by virtue of her testimony against Relator's son in the related criminal matter is unsupported by legal authority.

First, this waiver argument frustrates the intent, and contradicts the unambiguous language, of Ohio Constitution, Article I, Section 10a. The voters' intent is manifest in the provision itself: crime victims are to be afforded the rights to ensure that they receive "justice and due process * * * ." Ohio Constitution, Article I, Section 10a(A). The rights that follow, including the constitutional right to privacy, are clear and unambiguous. Ohio Constitution, Article I, Section 10a(A)(1).

" '[C]ourts must interpret the Constitution broadly in order to accomplish the manifest purpose of an amendment.' " *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 19, quoting *State ex rel. Swetland v. Kinney*, 69 Ohio St.2d 567, 570, 433 N.E.2d 217 (1982). " '[T]he object of the people in adopting it should be given effect.' " *State v. Smith*, 80 Ohio St.3d 89, 103, 684 N.E.2d 668 (1997), quoting *Castleberry v. Evatt*, 147 Ohio St. 30, 67 N.E.2d 861 (1946), syllabus.

When a constitutional provision is clear and unambiguous, the plain meaning controls. *See Toledo City School Dist. Bd. of Edn. v. State Bd. of Edn.*, 146 Ohio St.3d 356, 2016-Ohio-2806, 56 N.E.3d 950, ¶ 16 (explaining that "in construing the Constitution, we apply the same rules of construction that we apply in construing statutes;" "[w]ords used in the Constitution that are not defined therein must be taken in their usual, normal, or customary meaning;" and " '[w]here the meaning of a provision is clear on its face, we will not look beyond the provision in an attempt to divine what the drafters intended it to mean' "), *reconsideration denied*, 146 Ohio St.3d 1473, 2016-Ohio-5108, 54 N.E.3d 1271. "Courts must give effect to the words * * * and may not modify an unambiguous [provision] by deleting words used or inserting words not used." *State v. Waddell*, 71 Ohio St.3d 630, 631, 646 N.E.2d 821 (1995). An interpretation of Marsy's Law wherein a victim waived constitutional rights by simply participating in the

criminal justice process would frustrate the intent of the constitutional amendment and would lead to a chilling effect on crime reporting.

Testimony provided pursuant to a subpoena cannot be deemed voluntary so as to act as a waiver of constitutional rights. *See In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1373 (D.C.Cir.1984) ("The distinction between voluntary disclosure and disclosure by subpoena is that the latter, being involuntary, lacks the self-interest which motivates the former."). In the related criminal matter, the public docket demonstrates that A.A. was subpoenaed to provide testimony at the trial of XX XX. Relator's suggestion that A.A.'s provision of testimony under penalty of contempt constitutes a waiver of all privacy rights to which A.A. is entitled under the state and federal constitutions is an unsupported assertion antithetical to these constitutional guarantees. The interpretation Relator urges this Court to embrace—that testimony compelled by a subpoena waives privacy rights—will necessarily cause victims secondary injuries and lead to a chilling effect on crime reporting. This is the exact result that this Court, and the Sixth Circuit have forewarned against in *Gardner*, *Bloch*, and their progeny.

IV. Conclusion

For the aforementioned reasons, A.A. respectfully requests that this Honorable Court dismiss Relator's complaint for a writ of mandamus and protect and enforce her constitutional privacy rights.

Respectfully submitted,

/s Elizabeth Well
Elizabeth Well (0087750)
Ohio Crime Victim Justice Center
3976 North Hampton Drive
Powell, Ohio 43065

P: 614-848-8500
F: 614-848-8501
ewell@ocvjc.org
Counsel for Real Party in Interest, A.A.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the following via the Supreme Court Electronic e-filing system and electronic mail, this 20th day of August 2019 upon:

Drew C. Piersall*
No. 0078085
* *Counsel of Record*
17 South High Street, Suite 900
Columbus, Ohio 43215
P: 614.224.4411
F: 614.224.4433
dcp@zrlaw.com

Amy Ikerd
No. 0067067
Assistant Prosecuting Attorney, Mercer Co.
119 North Walnut Street
Celina, Ohio 48522
P: 419.586.8677
F: 419.586.8747
amy.ikerd@mercercountyohio.org

Counsel for Respondents,
XX, Prosecuting Attorney,
Mercer County, Ohio and
XX, Sheriff, Mercer County, Ohio

H. Louis Sirkin
No. 0024573
600 Vine Street, Suite 2700
Cincinnati, Ohio 45202
P: 513.721.4450
F: 513.721.0109
hls@santenhughes.com

Counsel for Relator,
XX

/s Elizabeth Well
Elizabeth Well (0087750)