

STATEMENT
OF
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BEFORE THE CONSTITUTION SUBCOMMITTEE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
IN SUPPORT OF
H. J. RES. _____
VICTIMS' RIGHTS AMENDMENT
APRIL 25, 2013

Mr. Chairman and Distinguished Members:

As one who has served as a career prosecutor and victim rights advocate¹, I am grateful for your continuing work and that of Congressman Jim Costa on behalf of victims of crime. Together you recognize the reality that, in order to honor our pledge of “justice for all” regardless of where a fellow American is victimized by crime, an amendment to our Constitution is essential to protect victims of crime in our criminal justice system. Too often, the concern as to whether the rights of victims of crime should be given the protection of our Constitution has been premised on the false calculus that any rights accorded to a crime victim must necessarily result in fewer rights for a criminal defendant. I offer the following in support of the proposition that protecting all of our citizens in the course of criminal justice proceedings is a case not of either one or the other, but a case of being able to protect both the victim and the defendant.

My experience comes primarily from working in the Maricopa County Attorney’s Office; the fourth largest prosecution office in the United States with over 300 authorized prosecutors. Every day we pursue justice in each and every one of the over 35,000 felony cases we handle, on average, each year for the four million people in the

¹ I have also worked for Arizona Voice for Crime Victims as a staff attorney for the Victims Legal Assistance Project providing pro bono legal services for enforcement of victim rights under Arizona’s constitution and the Federal Enforcement Project for enforcement of victim rights under the Crime Victims’ Rights Act and currently serve on the Advisory Board for the National Organization for Victim Assistance.

country's fourth most populous county. I have had the privilege of leading this office since November of 2010 and previously served in the office as a line prosecutor handling hundreds of felony cases and also serving as a supervisor of auto theft prosecutions. I have also worked for crime victim advocacy organizations, appearing as attorney of record on behalf of crime victims in state and federal courts at the trial and appellate levels. It has been my distinct honor and privilege to protect the rights of victims of crime while successfully securing constitutionally-sound convictions without jeopardizing the Due Process rights of the accused.

For my entire career, Arizona crime victims have been cloaked with state constitutional protections and participatory rights, including standing to assert their rights in courts of review. Daily, I have witnessed the application of these rights in real cases – not merely discussed in hypotheticals pursuant to an esoteric intellectual exercise – real victims, real defendants, and real constitutional consequences. Nevertheless, state-level constitutional protections of rights for victims of crime sometimes fall short due to the lack of similar protections in our federal constitution.

For example, I have had trial court judges order me to not refer to the crime victim as a victim, despite a state constitutional definition, because a defense counsel objected, asserting it would unfairly prejudice her client whom the jury would be told was presumed innocent and could not be convicted absent the state proving each and every element of each offense beyond a reasonable doubt - as required by our federal constitution. I have had a trial court judge actually consider a defense counsel's objection over a victim asserting her right to tell the court what she thought a defendant should receive as a sentence, despite a state constitutional right to do so. Trial courts have ordered victims to move away from juries and sit towards the back of courtrooms

or order them to not display any emotion during testimony certain to evoke emotion from a human being absent complete disregard for the horror of a given crime. Defense attorneys have filed motions arguing that certain family members did not meet the definition of victim despite clear language to the contrary in an attempt to strip the victims of their rights under the Arizona Constitution. These cases involved the parents of child victims; certain family members in homicide cases; business victims. Each of these incidents is possible when a defendant can simply allude to federal constitutional rights to circumvent state constitutional rights and our Supremacy Clause provides fertile ground for such efforts.

Nevertheless, law enforcement, prosecutors and the courts in Arizona for over 20 years have endeavored to protect many of the same rights that are included in the proposed 2013 Victims' Rights Amendment, including such rights as the right "to fairness, respect, and dignity" ... "the right to reasonable notice of, and shall not be excluded from, public proceedings relating to the offense, to be heard at any release, plea, sentencing, or other such proceeding involving any right established by this article, ... to proceedings free from unreasonable delay, to reasonable notice of the release or escape of the accused, to due consideration of the crime victim's safety, and to restitution." For these rights our law provides that "the crime victim or the crime victim's lawful representative has standing to fully assert and enforce these rights in any court."

In all of my years working with and in the criminal justice system, I cannot recall even one case where a defendant was granted a new trial as a remedy for a violation of his rights because a crime victim chose to exercise her rights as a crime victim. The recognition and protection of victim's rights in the United States Constitution would be

a concrete exhibit of Martin Luther King’s observation that “the arc of the moral universe is long but it bends towards justice.” If a victim is guaranteed a right to dignity and respect, it is simply farcical that somehow this right must violate the constitutional rights of the accused. This is simply not the case and a perverse view of what we endeavor to do on a daily basis in seeking justice and raises the question: are we willing to accept a criminal justice system that then, by default, permissibly denies dignity and respect to victims of crime?

With the passage of the Crime Victims’ Rights Act (CVRA), *Kenna v. Dist. Court for C.D.Cal.* 435 F.3d 1011 C.A.9 (Cal.) (2006) was the first landmark case recognizing the rights of federal crime victims to be heard at the sentencing of a defendant. Judge Kozinski eloquently summed up the role that crime victims endured for decades at the hands of our justice system:

The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard. The Crime Victims’ Rights Act sought to change this by making victims independent participants in the criminal justice process.

Id. at 1013.

I would qualify Judge Kozinski’s observation slightly. The Crime Victim’s Rights Act sought to simply *recognize* the participatory role of crime victims. In the State of Arizona, our constitution guarantees crime victims participatory status as well as a panoply of rights that have, for the most part, been effectively implemented without undermining the rights of criminal defendants. However, when judges engage in a constitutional calculus, the absence of federal constitutional rights for victims of crime ensures that there will be an imbalance in seeking to guarantee the rights of all

participants. Amending the United States Constitution is not some zero sum game as some may argue. A crime victim's rights and defendant's rights under the Constitution can coexist. Hard evidence demonstrates that enforcement of victim's rights gives a voice to the voiceless and effectuates the goals of the criminal justice system at every turn.

Neither is there an assault on or an impediment to the "presumption of innocence." Threshold determinations of reasonable suspicion and probable cause are untouched and the status of a criminal defendant as an accused is not changed through the simple and just acknowledgment that a fellow member of our community was harmed and is a victim of a crime. Nothing in the proposed amendment shifts the burden of the government to prove beyond a reasonable doubt that the accused is the one to be held accountable for the criminal conduct in question.

With respect to the impact on a prosecutor's ability to successfully prosecute a case in the face of the rights protected by the Victim Rights Amendment, let me deal with each in turn. First is the "rights of a crime victim to fairness, respect, and dignity." As a professional prosecutor, I have never had an issue with being able to conduct myself and exercise my duties and responsibilities while treating anyone - defendant, defense attorney, court staff, judge, or witnesses - with fairness, respect, and dignity; and especially someone who was a victim of a crime. Therefore, it is a disingenuous assertion that honoring a crime victim's federal constitutional right to fairness, respect, and dignity may somehow interfere with the successful prosecution of cases. To the contrary, honoring such a right cannot help but reinforce the confidence in our criminal justice system that we want victims of crime to have when we treat them with no less regard than we treat criminal defendants. This most basic right enshrined in our federal

constitution will ensure that criminal justice systems at the federal and state levels will give due consideration and equal consideration to victims of crime as we habitually do for criminal defendants.

Second, the “rights to reasonable notice of, and shall not be excluded from, public proceedings relating to the offense” present no hindrance to successful prosecutions and do not implicate any Due Process right of an accused. Providing notice to a victim of a crime has not prevented me from successfully prosecuting any case; having crime victims present in a courtroom has actually assisted in prosecuting a case because they are often essential to the truth seeking function we serve. Moreover, criminal defendants who counted on fear and intimidation to keep a crime victim from cooperating have had to reassess their trial strategy, often resulting in a plea agreement ahead of trial. In no case has the victim’s right to be present throughout a trial resulted in an appellate court finding that a defendant in Arizona was denied the right to a fair trial. Amending our federal constitution to guarantee notice to and attendance of a victim of crime will ensure a fair and consistent balancing of the interests of all involved in a criminal matter.

Third, the right “to be heard at any release, plea, sentencing, or other such proceeding involving any right established by this article” is actually a fundamental necessity that cannot fairly be said to impose on a Due Process right of an accused. Given that decisions to release a criminal defendant, to accept a plea agreement, or to sentence a defendant are all premised on considerations of the impact of any given offense to the crime victim, why shouldn’t a victim provide such information firsthand? Rather than complicate or frustrate the prosecution of any given case, the involvement and participation of a crime victim has afforded me important insight into the impact of

a crime on the individual, their family, and their larger community, the very community prosecutors and courts presume to represent in resolving criminal cases. Given our criminal justice system's recognition of the value of in court testimony, a right to be heard for a victim of a crime is invaluable and crucial. Absent protections in our federal constitution of this right, assaults on common sense do occur and have required further litigation to defend as noted in the *Kenna* case above.

Fourth, the right "to proceedings free from unreasonable delay" does not impede prosecutions and is a right complimentary to an accused's right to a speedy trial. Unreasonable delay should be the foundation of any consideration in setting conferences or trials in any given criminal case. As a prosecutor, I sometimes have had to request delays in prosecuting a case due to the need to obtain additional evidence or interview witnesses. Accommodating a crime victim's right to a speedy trial and ensuring my proper preparation for a case does not conflict. A crime victim, with a steadfast interest in seeing justice done, simply does not force a prosecutor to trial when more time is needed at the risk of jeopardizing a conviction or inviting error that can raise a due process argument on appeal. Nor would the language of the proposed amendment allow such a result. Delays required for legitimate trial preparation are not "unreasonable," and hence would not provide a basis for a victim's objection. In my state, victims have had the constitutional right to a speedy trial for the last 22 years and the right has never formed the basis to force either the state or a defendant to trial without adequate time to prepare. In my experience, victims of crime understand the necessary amount of time to ready a case for trial. However, crime victims do not understand and neither do I when a court entertains a motion to continue a homicide trial so a defense attorney can go on an annual shopping trip to buy shoes.

Consequently, a state-level constitutional guarantee is not as effective as a guarantee to be found in our federal constitution.

Fifth, the right “to reasonable notice of the release or escape of the accused” cannot seriously be opposed. As a prosecutor, I cannot fathom a rational objection to be informed of a security threat to the victim’s person. It is actually a recognition of our criminal justice system’s failures that gives rise to the need to enshrine this right in our Constitution in the first place.

Sixth, the right “to due consideration of the crime victim's safety” is simple recognition of what prosecutors endeavor to do on a regular basis. Our criminal justice system should equally endeavor to ensure the safety of a crime victim and of the community in which the defendant committed his crime(s). Protecting this right will not hinder successful prosecutions but, instead, should keep the criminal justice system focused on correct priorities in the due administration of justice.

Seventh, the right “to restitution” is a basic right for victims of crime. I have been involved in numerous matters involving the litigation of restitution for victims of crime. The majority of the information is provided at the outset of a case when I first make contact with a crime victim and discuss the anticipated course of the case and ask questions about the degree of harm suffered, which necessarily includes economic loss resulting from the crime. Rather than complicate a prosecution, protecting a crime victim’s right to be made economically whole due to the conduct the criminal is convicted of provides for a more holistic redress of the harm any given victim has suffered.

Eighth, and certainly not least in importance is the recognition that “[t]he crime victim or the crime victim's lawful representative has standing to fully assert and

enforce these rights in any court.” What a cruel comedy it would be to set forth basic protections for victims of crime in our criminal justice system and then afford no means of calling attention to even inadvertent failures to honor these rights. As a professional prosecutor, I have no more room to object to someone having standing to assert rights that enhance the criminal justice system than I have room to complain about the number of criminal defense attorneys retained on any given case. For rights to have meaning, a crime victim has to have the ability to raise issues to a court. Since these rights and issues are in the narrow category of those addressing a victim of a crime, rights and issues that our criminal justice system should welcome the opportunity to address to fulfill the promise of “justice for all,” there can be no real objection by a prosecutor just as there has been no real impediment to prosecutions.

The question may still be asked, though: Why do we need to amend our federal constitution? Shouldn't we endeavor to ensure more robust enforcement at the state level or insist on better enforcement of federal statutory rights? The straightforward answer is also a question: would we tolerate disparate enforcement of a criminal defendants' rights across our 50 states? Would we permit differing levels of enforcement for the right to counsel, the right against self-incrimination, or the right to be secure in one's person, house, papers, and effects, against unreasonable searches and seizures? Then why do we tolerate such a situation for fellow Americans who have been harmed because of the criminal acts of another?

Another way to illustrate the present situation crime victims face around our country is to compare the circumstances of victims of recent tragedies and what they would face if the perpetrators of each horrific instance were tried in either their state court or federal court in the state in which tragedy struck. Most immediately, what

rights would a victim of the Boston Marathon bombing have if the case went to trial in a Massachusetts state court? To begin with, they would have **no** constitutional rights to assert whatsoever. Because of that fact, the Supreme Judicial Court of Massachusetts was able to state that a crime victim “has no judicially-cognizable interest in the prosecution of another.” *Hagen v. Com.*, 437 Mass. 374, 375, 772 N.E.2d 32, 34 (2002). Given the relative weight accorded to constitutional rights versus statutory rights, any colorable assertion of federal constitutional rights vis-a-vis victim state statutory rights means victims lose. Even if a case were to be tried in federal court, the protections afforded by the Crime Victims’ Rights Act are not constitutional and will be found wanting in the balance when measured against the constitutional protections afforded a criminal defendant.

What about the parents of children lost in the tragedy of Newtown? What if the perpetrator had been tried in state court? There, they would be able to assert state constitutional rights, unlike in Boston just 149 miles away in an adjoining state. However, they have no avenue to seek appellate review of a denial of any of their rights. As noted by the Supreme Court of Connecticut in reviewing the Connecticut constitution, “[t]urning first to the constitution, a review of the language of the victim’s rights amendment discloses that the amendment, while establishing many substantive rights for crime victims, does not include a right to appeal.” *State v. Gault*, 304 Conn. 330, 339, 39 A.3d 1105, 1111 (2012).

Arizona has suffered her share of horror, as well, with the loss of life in Tucson from a shooting that also affected a former member of this House. In a somewhat more poignant irony, had the perpetrator gone to trial in federal court, the crime victims would have had fewer guaranteed rights than if the case had been tried in one of our

state courts given the difference in weight between federal statutory rights and state constitutional rights. Nevertheless, any balancing test between state constitutional rights for a crime victim and federal constitutional rights for the accused would have had the same result as any similar balancing in any other court; in a contest of rights between an accused and a victim, the victim loses. Because there are no comparative rights for equal treatment in our criminal justice for a criminal defendant and a crime victim, there is no charge to treat each fairly.

Passage of the Victim Rights Amendment to protect basic rights for victims of crime will provide the balance in our criminal justice system that many Americans may incorrectly presume exists already. Sadly, it does not and maddeningly varies from state to state. Even with robust state laws, without providing the protections afforded by the VRA through words to be read clearly in our Constitution at all levels of our criminal justice system, the mirage of “justice for all” will go on.