STATEMENT OF

THE NATIONAL VICTIM CONSTITUTIONAL AMENDMENT NETWORK

ON THE VICTIMS' BILL OF RIGHTS AMENDMENT

BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

PRESENTED BY

ROBERT E. PRESTON

CO-CHAIRMAN OF THE

NATIONAL VICTIM CONSTITUTIONAL AMENDMENT NETWORK

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Background

My name is Robert Preston. I am Co-Chairman of the National Victims' Constitutional Amendment Network (NVCAN) and Co-Founder of Justice For Surviving Victims, Inc., a Florida-based victims advocacy organization.

My daughter, Wendy Preston, was murdered in 1977 at our Florida home. After first degree murder charges were filed, my wife and I were told that the State of Florida was the victim, and we would be notified if we were to be called as witnesses. After that, it became extremely difficult for us to get information about the case - the case that we regarded as our case. Ultimately, after a series of misadventures that I will not relate here, the murderer was allowed to plead to a second degree murder charge.

While, as part of the plea, he had agreed that he would not ask for or receive credit for time served in a mental institution, he immediately appealed on that basis and was given credit for time served. The Florida Supreme Court said that to not give him credit would "implicate significant constitutional rights." *TAL-MASON vs. FLORIDA*

(1987). David Tal-Mason, the murderer of my daughter, had constitutional rights. What, I wondered, were the constitutional rights of victims. There were none.

In 1979 we joined with other homicide survivors in a volunteer effort to seek legislation enabling crime victims to participate in the American justice process. We established Justice for Surviving Victims. Many well-intentioned bills were passed by the Florida legislature, attempting to do so something for victims. Yet our fear was that without constitutional guarantees, much of it would turn out to be "poetry."

It turned out that our fears were shared by a Presidential Task Force that held hearings around the country and investigated the treatment of crime victims in the courts of our country. Because that Task Force's recommendations are so important to understanding the Victims Bill of Rights that is before you today, it is useful to trace the history of the recommendation and its subsequent reception in some detail. I have drawn heavily on the research of my friend and colleague John Stein of the National Organization for Victim Assistance in recounting the history.

The history is important because it makes clear that the effort to secure the passage of a federal constitutional amendment protecting the rights of crime victims is not a slap-dash, last-minute effort. Instead, the amendment that you see before you today is the product of a recommendation from a Presidential Task Force, made more than a decade ago, that has been tested around the country in various

state constitutions. It is an proposal with long-standing roots. It is an proposal that makes sense. It is a proposal that we will keep fighting for until it is adopted.

The History of the Federal Amendment Effort

In 1982, the Presidential Task Force on Victims of Crime found that victims were subject to gross injustices and made 67 proposals to improve the treatment of crime victims. It also specifically proposed to amend the Sixth Amendment of the U.S. Constitution to read as follows:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense. *Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings*."

The Task Force emphasized that the proposed amendment contained no intent to "vitiate the safeguards that shelter anyone accused of crime," but that "the fundamental rights of innocent citizens cannot adequately be preserved by any less decisive action."

In 1985, the National Organization for Victim Assistance (NOVA) and Mothers Against Drunk Driving (MADD), with support from the U.S. Department of Justice, co-hosted the "SHARE" conference in Washington, D.C. That gathering ("Self-Help Associations Relating Experiences") was designed to enhance communication among the new, self-help groups that had been formed to promote mutual healing among victims of like crimes (such as chapters of Parents of Murdered Children) or to reform public policies (such as Protect the Innocent in Indiana), or both (like the New Mexico Crime Victims Organization and many MADD chapters). During an early plenary session of the conference, I put the Task Force's constitutional amendment idea before the participants. I explained that the central thrust of my efforts in Florida had been for the adoption of victim-impact and other victim-participation laws. The goal in all of these were to give victims a voice in the proceedings, thus gaining the right to be treated as legitimately-interested commentators in matters of transcendent interest to us. Participation rights also enabled victims to become consumer watchdogs within what is often a set of closed, crowded, not-well-coordinated, and mistake-prone justice agencies.

I further argued that JSV's "successes" in passing victim-participation laws were disappointing. While some justice officials complied in good faith with the statutes, many failed to set up a system that insured victims even learned of their new participation rights, and sometimes, the victims who penetrated this wall of silence confronted a prosecutor or judge who did not welcome the victim's input. Worse were the justice officials who made known their philosophical disagreement with the statute in question and openly refused to comply with it.

I insisted that nothing less than a constitutional amendment would cure the problems. Only with constitutional status would victim rights gain recognition in the legal culture in which they are supposed to be implemented, or have a chance of getting a fair hearing whenever a defendant's resistance to the assertion of a victim right lays claim to the defendant's constitutional rights.

This line of argument seemed to parallel the practical, results-oriented thinking of the Task Force. But I tried to add in addition a different perspective - the symbolic justice of injecting the very word "victim" into a document that heretofore had expressed recognition only to "the accused." Victim advocates and trauma therapists have long understood that crime victims' quest for healing is typically manifested in a process of "ventilation and validation." Ventilation describes the impulse to put into words all the emotion-laden memories of the traumatic event that intrude into victims' minds. Just as it is personally therapeutic for victims' loved ones to encourage this kind of story-telling, so is it societally therapeutic when the justice system also encourages victims to speak their minds. A justice system that permits no voice to the victims

thwarts the universal need to ventilate.

"Validation," on the other hand, speaks to other needs. It requires that there be a listener prepared to give legitimacy to what the sufferer is expressing. The listener's job here is to respond with words that, in essence, say, while I cannot truly put myself in your shoes, I do believe that the intense emotionality you are describing is completely understandable, since most victims in your situation say something very similar.

A jurisprudence that is attuned to the power of words does more than convey equity (if not equal standing) when it inserts "victim" into its fundamental charter; it gives honored recognition to those whose status had been debased by the very criminal offender who enjoys protected status in our justice system.

The case for supporting a constitutional amendment found a responsive audience of victim/survivors at the SHARE conference. Disappointments with current statutory reforms were widely shared. Virtually all the participants had witnessed the same kind of spotty adherence to the duties imposed by the new laws, and all had been galled by the occasional reports of contempt for the statutes' provisions expressed by officials who had sworn to uphold the constitution and laws of their states.

Many participants were sold on the simple beauty of the Task Force proposal: through a single change in our national charter, every state and federal court would be held to a national standard of victim-participation rights, and not just in sentencing hearings but in hearings on guilty pleas and other proceedings. No longer would so-called victim rights expressed in statutory law be suborned to any official's reading of defendants' constitutional rights as vaguely traceable to the due process clause. No longer would victims be powerless to have their participation rights vindicated. And no more would they remain unnamed nonpersons in the nation's charter of citizens' rights.

Along with JSV Vice President Greg Novak and others, I persisted in advocating the amendment for the next three days. Our success can be measured in the final paragraph of the April, 1985, NOVA Newsletter:

> "Perhaps one of the most significant results of the conference was the formation of a steering committee for a 'Coalition for Victim Rights.' The passage of the constitutional amendment proposed by the President's Task Force for Victims of Crime was identified as the chief goal of that coalition."

In consultation with the steering committee members, NOVA agreed to host a January, 1986, national conference to debate the merits of such an amendment, at the end of which the conferees endorsed in principle the Task Force's proposal for a constitutional amendment. Perhaps the most consequential product of the conference was the decision of a number of participants to sustain the coalition, an informal group later calling itself the Victims' Constitutional Amendment Network, or Victims CAN, which, in a matter of months, decided to shift the initial focus of their work from lobbying for a federal constitutional amendment to lobbying for similar amendments in state constitutions.

The "states-first" approach drew the support of many victim advocates. Adopting state amendments for victim rights would make good use of the "great laboratory of the states," that is, it would test whether such constitutional provisions could truly reduce victims' alienation from their justice systems while producing no negative, unintended consequences. This experience could then be used in drafting an effective federal constitutional amendment.

The first state constitutional amendment on victims of crime was adopted just before the Task Force report was issued, in the November, 1982, elections, when California voters passed Proposition 8, "The Crime Victims' Bill of Rights." That citizens' initiative was a collection of both statutory and constitutional provisions, most of them dealing with the adjudication of offenders. It also contained several victim-centered statutory provisions - like a right to file a victim impact statement and to speak at sentencing - but the only victim-focused change to the state constitution was one requiring convicted offenders to pay restitution to their victims. Most analysts do not count that California amendment as an expression of the Task Force's ideas - not so much because it was adopted before the Task Force spoke, but because the

jurisprudential values it elevated to constitutional status did not involve victims' participation rights. (Also bypassed in most such tally-sheets is the Georgia amendment needed to overcome a constitutional bar to creating a victim compensation program.)

There is even some ambiguity about the victim-centered amendment to the Rhode Island constitution adopted in 1986, which was part of a larger rewrite of the state constitution, since there is no evidence that the drafters took the Task Force proposal into account when it crafted this section:

> "A victim of crime shall, as a matter of right, be treated by agents of the state with dignity, respect and sensitivity during all phases of the criminal justice process. Such person shall be entitled to receive, from the perpetrator of the crime, financial compensation for any injury or loss caused by the perpetrator of the crime, and shall receive such other compensation as the state may provide. Before sentencing, a victim shall have the right to address the court regarding the impact which the perpetrator's conduct has had upon the victim."

The reason most victim advocates place this amendment on their "Task Force tally sheet" is that the broad provision calling for victims to -be treated with dignity, respect, and sensitivity" directly promotes victim participation rights. In its totality, the first right enunciated in the Rhode Island amendment seems to elevate the victim of crime beyond the status of other prosecution witnesses in the justice process, signaling that the victim is someone who must be respectfully talked to at critical junctures, to be given a voice, if not a veto, by all the agents of the state. Thus, the legal norms the Rhode Island Constitution prescribes are exactly those the Task Force sought to express.

The reason the Rhode Island language is significant is that variants of it now appear in the constitutions of Arizona ("fairness, respect, and dignity"), Alaska ("dignity, respect, and fairness"), Idaho ("fairness, respect, dignity, and privacy"), Illinois ("fairness and respect for their dignity and privacy"), Maryland ("dignity, respect, and sensitivity"), Michigan ("fairness and respect for their dignity and privacy"), New Jersey ("fairness, respect, and compassion"), Ohio ("fairness, dignity, and respect"), Texas ("with fairness and with respect for the victim's dignity and privacy"), Utah ("fairness, respect, and dignity"), Washington ("due dignity and respect"), and Wisconsin ("fairness, dignity, and respect for their privacy").

To return to the chronology of the adoption of state amendments:

In 1988, I was actively involved in the campaign that ultimately saw Florida voters adopt an amendment very much designed on the Task Force model. Our effort was a totally grass roots effort, supported by a coalition of 38 local grass roots organizations - such as Justice for Surviving Victims. These were not high powered lobbying groups or well-funded public interest groups. Instead, they were simply groups of citizens that banded together in the wake of tragedy. The support we received was considerable. While many people deserve recognition, this Committee might be interested in knowing that then-Dade County States Attorney Janet Reno played an important role in securing the passage of the amendment (and had long been involved in efforts to improve the treatment of crime victims in her office). We received support from many members of the defense bar, who knew first hand the importance of rights for their clients and thought that victims deserved equal treatment. The Florida ACLU supported our amendment. They felt that the amendment created new set of liberties to defend. Ultimately, 90% of Florida's voters approved the amendment. Also in 1988, Michigan's voters adopted a much longer amendment, one that echoed its preexisting statutory Bill of Rights.

In the elections of 1989 through 1994, aided by Victims CAN activists and allies, sixteen more states voted to change the status accorded crime victims in their constitutions. By one count, over 20 million voters in these states have approved amendments to their state constitutions, similar to the one being presented to this committee. Today amendment efforts are actively underway in a number of other states, including, according to the National Victim Center, Arkansas, Georgia, Indiana, Iowa, Kentucky, Louisiana, Nebraska, Nevada, North Carolina, Oregon, South Carolina, Tennessee, and Virginia.

The Success of State Victims Rights Amendments

In addition to the 19 amendments adopted since 1982, virtually every state has passed legislation that purports to confer on victims rights to information, notification, and participation in the criminal justice system. However, without exception, the most far-reaching of these statutory schemes are ones expressly designed to implement a constitutional amendment. Typically, they affix responsibility on named offices or officeholders to perform specific duties in a specified time frame.

Statutes having no constitutional backup are all too often not implemented, whereas those designed to implement an amendment generally produce the systemic reform victim advocates seek.

I can report personally on our experience in Florida. My strong impression, as one actively involved in the victims movement in Florida after the passage of the amendment, is that the amendment made a considerable difference. Victims now frequently attend trial and are kept informed about the progress of cases. I have received many reports of judges at sentencing hearings asking if the victim present and, if not, whether the prosecutor had requested a statement from victim. If not, judges have postponed sentencing hearings to make sure that victims are heard. All this has been done, it should be added, without appreciable impact on the rights of the accused. Nor has the amendment been used by criminal defendants as a means to seek appellate review to overturn their sentences, as a few predicted when the amendment was under consideration.

A personal experience of mine will illustrate why, in Florida, "before and after" the amendment the treatment of crime victims differed as night does from day. In Florida, convicted defendants, like the man who murdered my daughter, are entitled to a parole hearing - not once, but twice every year. I make it a point to attend those hearings to see that justice is done. Before the Florida Victims Rights Amendment passed, I did not have a formal right to receive notice of those hearings. Along with my wife, we worked informally with friends to try to monitor when hearing would be held. One time, I was at the National Victim Center in Fort Worth where I was delivering a speech. A friend of mine saw a printout of who was up for parole the next morning and was startled to see my daughter's murderer on the list. She tracked me down in Texas and placed an urgent phone call to me. I was literally called off podium to take this call. She told me what was happening and said you have got to be in Tallahassee tomorrow at nine. I quickly returned to Tallahassee and spoke in opposition to parole. Parole was denied, but it was a fortuity that I received notice and was able to attend. Since the passage of the Florida Victims Rights Amendment, I regularly receive notice of the parole hearings and make it a point to attend.

My impressions on the effectiveness of the Florida amendment are shared by others. Jay Howell, an attorney active in the original campaign to adopt an amendment (and in the work of NVCAN), and one who now specializes in civil litigation in behalf of victims, has seen the positive changes first hand. Mr. Howell does get referrals (albeit rarely) from victims or their advocates complaining that their constitutional and statutory rights were violated, and while he indicates that some have had merit, none reaches the kind of defiant rejection of victim rights that he encountered before the amendment passed. The amendment has definitely increased the attention given to victims throughout the system and the extent of victim participation in the process. In turn, the increased participation has resulted in more the citizen and public awareness and understanding about the criminal justice system itself. While a few suggested that the amendment itself would represent an unreasonable burden to the criminal justice or would slow down the wheels of justice, the actual experience in Florida is directly to the contrary. In short, Howell concludes, Florida, the fourth largest state, and the state with the highest per-capita crime incidence has effectively accommodate the amendment into the inner workings of the justice process.

I can also report on the experience in Colorado, a state to which I moved following my retirement. Along with many other persons, including NVCAN Co-Chair Mary McGhee, I was involved in the successful effort to bring a constitutional amendment protecting victims to Colorado. In 1992 the voters overwhelmingly approved a victims amendment and the legislature adopted an implementing statute.

Colorado's implementing statute has what is perhaps a more cogent system of redress than others, and its

experience is telling. Any victim with a complaint must first take it to a an advisory board of the Governor, which is charged with hearing such complaints; those that they cannot resolve informally are to be referred to the Governor for possible referral to the Attorney General and appropriate injunctive action. Of the first 19 such cases heard by the committee, all have been informally resolved. Again, it is my impression that, because of such implementation, Coloradans have improved confidence in their criminal justice system.

One example in particular is instructive. When the family of one victim complained to the committee, the committee considered the matter serious enough that it asked the family members to meet with them and with representatives of the state patrol. Observers described the meeting as initially tense, even hostile, when the relatives told their story. At the conclusion of these remarks, attorneys for the state patrol began a defense of the department's conduct, but they were cut off by the police superintendent who spoke directly to the family to say that, while he could not rectify the mistakes made in their case, he would do his best to insure that they were not repeated. He then invited the family members to advise the department on setting up those procedures. They accepted, and have since satisfied themselves that their appeal has been vindicated.

One last report about the success of state victims rights amendments (and their are many) comes from Michigan. Senator Van Regenmorter is seen by Michigan advocates not only as the father of their core statute and amendment but also as their powerful if informal ombudsman (especially since his elevation to the chair of the Senate Judiciary Committee). He too reports that the absence of complaints is what most impresses him.

The Effort to Seek a Federal Amendment

Generally encouraged by the successes achieved in the states, members of Victims CAN met three times in 1995 to consider more closely the language being used in some state amendment proposals and to plan the next steps in returning to Congress for action on a federal constitutional amendment.

The first meeting took place in Colorado on April 10-12, 1995. Much of the meeting pursued the basic question, What are the core values that victims and their advocates want to elevate to constitutional status? At the conclusion of the meeting, we agreed to form a new organization - the National Victim Constitutional Amendment Network or NVCAN - to promote the passage of a federal amendment. We also drafted a possible federal amendment to circulate for suggestions. Our group started drafting a model implementation statute, and to begin ask members of Congress about sponsoring a resolution in support of a federal amendment.

Two three-hour workshops at NOVA's annual conference, held in Hawaii, August 16, 1995, were essentially an expanded NVCAN meeting with others invited to join in the search for "core values" and how to express them. Dozens of suggestions were made, which, in combination with other feedback received by NVCAN members, were the grist of the third Victims CAN meeting, September 14 and 15, 1995, again in Colorado, which again worked on language. Our group met March 2 and 3, 1996 at NOVA in Washington, D.C., to produce further refinements to language. Discussions with Congressional staff and others knowledgeable in constitutional and criminal law produced the language you see now.

The Benefits of a Federal Victims Rights Amendment

Perhaps the most important reason for a federal amendment protecting crime victims is the fact that victims are the injured parties of crime, and thus should have a voice (not a veto) in the management of the investigation and prosecution of the accused, and in the sanctioning of the convicted offender. This is the bedrock justification for granting constitutional recognition and rights to victims. In a justice system that increasingly seeks to assess the harm done to the victim as a tool for fixing fair and proportionate punishment, the victim - the person harmed - wants to be heard. And a justice system that seeks always to treat equitably the legitimate concerns of all those in its sway must in the end answer the haunting plea for procedural equity voiced by a New Yorker who spoke for other families of murder victims: "All we ask is to be treated like criminals."

Moreover, voluntary compliance with victim rights appears to escalate when they are raised to constitutional status. That is the near universal report from victims groups around the country that have experience with victim rights amendments. So does the impulse to enforce those rights - from victims and attorneys alike - quicken when the rights are enunciated in a state's constitution. To consider the same dynamics in a different context, one may applaud the decades-long striving of the NAACP Legal Defense Fund to achieve the victory of *Brown v. Board of Education* in 1954 - but would there have been a persistent and successful campaign to live up to the promise of the 13th and 14th Amendments had their prescriptions not been in the federal constitution, but rather had been merely statutory or even state constitutional in nature?

Victims sense - accurately according to many knowledgeable reports - that the culture of the legal system is hostile to accommodating the interests of outsiders, and that mere statutes (or even state amendments) might not fully change that culture quickly or painlessly. It has been said that the criminal justice rarely functions on an adversarial "due process" model but mostly on a collegial "administrative" model; that was part of the thesis of the first champion of victim rights to venture into the law journals. In 1972, Michael Ash used his experience as a career prosecutor in the Milwaukee District Attorney's office to describe the clubby culture of the lawyers - prosecutors, defense lawyers, and judges - wherein outsiders like victims were to be treated as aliens to be manipulated to serve the culture's needs (Ash, "On Witnesses: A Radical Critique of Criminal Court Procedures," 48 Notre Dame Law Review 386 1972).

My friend John Stein summarizes the Ash critique this way:

> -Prosecutors and defense lawyers are somewhat like professional athletes in the sense that they compete hard during the game, but then share beers afterward in the knowledge that they are insiders who admire each other's prowess. But the picture of a fraternity of respectful competitors does not quite apply to these legal "adversaries," given that they resolve nine out ten of their competitions in a compromise, that is, a plea bargain. And note that the referees in this putative competition - mostly onetime players themselves - are usually happy to sanction this pretrial form of conflict resolution.

As a result, Stein suggests, -compliance with precepts of victim rights might come if one were prepared to nudge, time after time, herds of lawyers with the rubber prods of statutes; but merely brandish a constitutional swagger stick, and the herd moves briskly in the direction of compliance."

Compliance, voluntary or not, increases mightily with the adoption of amendments, but not, it must be said, because victims are thereby free to sue for damages when their rights are breached. Eight of the 19 amendments by their very terms bar such damage suits, and others do so in their implementing laws. The sole exception to this is the Arizona implementation statute, which permits financial recovery from "a governmental entity responsible for the intentional, knowing or grossly negligent violation of the victim's [constitutionally-grounded] rights." Even in Arizona, however, damage actions remain quite rare.

Nor can it be said that victims rights amendments have proven costly. It is true that several legislatures have added a funding scheme to their implementation statutes, mostly aimed at supporting victim/witness services in prosecutors' offices, on which the burdens of administering victims' constitutional victim rights falls heaviest. But the dollars involved are not substantial, and even in states where no new state funds accompanied the new burdens, victim advocates have not reported prosecutors or others seeking emergency appropriations from their county commissions or other funding body. Most of the decencies victims seek may be measured in the cost of a phone call or a postage stamp.

Establishing rights for the victim also establishes a foundation for balancing the rights of the accused with the rights of the general public. It injects the "communitarian" precept that the assertion of individual rights deserves challenge in certain circumstances, so that, for example, convicted offenders at sentencing should no longer enjoy a monopoly on the right of allocution and the constitutionally-hallowed ideal of a "speedy trial" accorded the accused may be of equal or greater value to the victim.

Finally, while state amendments have achieved some of the goals of the crime victims seeks, there remains the need for a federal constitutional amendment. To begin with, today the citizens of about 30 states are without even state constitutional protection for their rights. While we can confidently predict that more states will adopt state victims- rights amendments in the future, only a federal amendment will establish a nationwide protection for crime victims. The "great laboratories of the states" are already producing excellent test results on the effectiveness of the victim rights amendments, and as we approach seeing a majority of states adopting such amendments, it is none too soon to consider a national, federal "floor" by which constitutional victim rights are to be implemented.

Even in those states with victims rights amendment, the overall protection of victims is varied and uneven. For instance, the Florida amendment that I worked on (one of the first in the country) protects a victims- rights "to be informed, to be present, and to be heard." It does not, however, protect a victims- right to a speedy trial, to full restitution for a convicted offender, or to notice when an offender has escaped. All of these rights are protected in the proposed federal amendment. Only a federal amendment can guarantee these constitutional rights in Florida, and in many other states with limited victims rights amendments.

In addition, without federal protection, victims rights are always subject to being automatically trumped by defendant's rights. Virtually every time a defendant raises a claim that victims- rights conflict with his rights, it turns out that there is no real conflict with legitimate and established rights of the defendant. Yet when defendant's breath a word about violation of their -due process" rights, courts accustomed to responding to constitutional claims all too often reflexively grant the defendant what he seeks - be it exclusion of the victim from the courtroom or denial of the victims' right to speak - without carefully considering ways to protect both a defendant's and a victim's interests. A federal victims rights amendment would force courts to find successful solutions for protecting the rights of both defendants and victims. In other words, it would restore balance of our American justice system.

I urge you to give speedy consideration of and approval to the proposed Victims- Bill of Rights.