

The Constitution Revision Commission
COMMITTEE MEETING EXPANDED AGENDA

DECLARATION OF RIGHTS
Commissioner Carlton, Chair
Commissioner Stemberger, Vice Chair

MEETING DATE: Tuesday, December 12, 2017
TIME: 8:00 a.m.—12:00 noon
PLACE: 110 Senate Office Building, Tallahassee, Florida

MEMBERS: Commissioner Carlton, Chair; Commissioner Stemberger, Vice Chair; Commissioners Donalds, Gainey, Johnson, Joyner, and Lester

TAB	PROPOSAL NO. and INTRODUCER	PROPOSAL DESCRIPTION and COMMITTEE ACTIONS	COMMITTEE ACTION
1	Workshop on Victims Rights		Discussed
2	Presentation on Grandparent Visitation Rights		Presented
3	P 64 Rouson	DECLARATION OF RIGHTS, Right of privacy; Section 23 of Article I of the State Constitution to specify that the right of privacy may not be construed to limit a grandparent's right to seek visitation of his or her grandchildren under certain circumstances. DR 12/12/2017 Temporarily Postponed JU	Temporarily Postponed
4	P 34 Carlton	DECLARATION OF RIGHTS, Right to bear arms; Pretrial release and detention; Prosecution for crime; offenses committed by children; Taxpayers' Bill of Rights; Claimant's right to fair compensation; Sections 8, 14, 15, 25, and 26 of Article I of the State Constitution to make technical and nonsubstantive revisions to improve the clarity and organization of the State Constitution and to delete provisions that have become obsolete or have had their effect. DR 12/12/2017 Temporarily Postponed	Temporarily Postponed
5	Other Related Meeting Documents		
NOTE: Public comment will be taken on all noticed agenda items.			

CONSTITUTION REVISION COMMISSION

2017 - 2018

WORKSHOP ON ARTICLE I, SECTION 16(B): VICTIMS' RIGHTS

DECLARATION OF RIGHTS COMMITTEE

December 12, 2017

8AM – 12 PM

110 Senate Office Building, Tallahassee, Florida

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Professor Mary Margaret Giannini, Florida Coastal School of Law	
Professor Paul G. Cassell, S.J. Quinney College of Law at the University of Utah	
The Honorable Stacy A. Scott, Public Defender for the Eighth Judicial Circuit of Florida	
Luke Newman, Esq.	
Jay Howell, Esq.	

Public Comment.....	Tab 4
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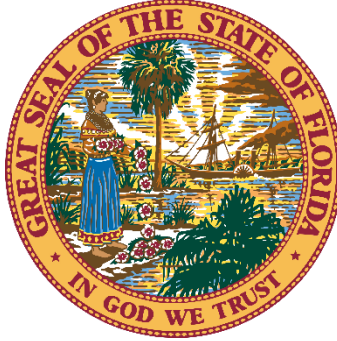


WORKSHOP PACKET

TAB 1

THE CONSTITUTION OF THE STATE OF FLORIDA

(as revised in 1968 and subsequently amended)



VICTIMS' RIGHTS PROVISIONS

ARTICLE I, SECTION 16: RIGHTS OF ACCUSED AND OF VICTIMS

SECTION 16. Rights of accused and of victims.—

(a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties the trial will take place. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

(b) Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

History.—Am. S.J.R. 135, 1987; adopted 1988; Am. proposed by Constitution Revision Commission, Revision No. 13, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

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WORKSHOP PACKET

TAB 2

By Commissioner Cerio

ceriot-00117-17

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1 A proposal to amend
2 Section 16 of Article I of the State Constitution to
3 revise and establish additional rights of victims of
4 crime.

5
6 Be It Proposed by the Constitution Revision Commission of
7 Florida:

8
9 Section 16 of Article I of the State Constitution is
10 amended to read:

11 ARTICLE I

12 DECLARATION OF RIGHTS

13 SECTION 16. Rights of accused and of victims.—

14 (a) In all criminal prosecutions the accused shall, upon
15 demand, be informed of the nature and cause of the accusation,
16 and shall be furnished a copy of the charges, and shall have the
17 right to have compulsory process for witnesses, to confront at
18 trial adverse witnesses, to be heard in person, by counsel or
19 both, and to have a speedy and public trial by impartial jury in
20 the county where the crime was committed. If the county is not
21 known, the indictment or information may charge venue in two or
22 more counties conjunctively and proof that the crime was
23 committed in that area shall be sufficient; but before pleading
24 the accused may elect in which of those counties the trial will
25 take place. Venue for prosecution of crimes committed beyond the
26 boundaries of the state shall be fixed by law.

27 (b) To preserve and protect the right of crime victims to
28 achieve justice, to ensure a meaningful role throughout the
29 criminal and juvenile justice systems for crime victims, and to
30 ensure that crime victims' rights and interests are respected
31 and protected by law in a manner no less vigorous than
32 protections afforded to criminal defendants and juvenile

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33 delinquents, every victim is entitled to the following rights,
34 beginning at the time of his or her victimization:

35 (1) The right to due process and to be treated with
36 fairness and respect for the victim's dignity.

37 (2) The right to be free from intimidation, harassment, and
38 abuse.

39 (3) The right to be reasonably protected from the accused
40 and any person acting on behalf of the accused.

41 (4) The right to have the safety and welfare of the victim
42 and the victim's family considered when setting bail, including
43 setting pre-trial release conditions that protect the safety and
44 welfare of the victim and the victim's family.

45 (5) The right to prevent the disclosure of information or
46 records that could be used to locate or harass the victim or the
47 victim's family, or which could disclose confidential or
48 privileged information of the victim.

49 (6) The right to privacy, which includes the right to
50 refuse an interview, deposition, or other discovery request by
51 the defense or anyone acting on behalf of the defendant and to
52 set reasonable conditions on the conduct of any such interaction
53 to which the victim consents.

54 (7) A victim shall have the following specific rights upon
55 request:

56 a. The right to reasonable, accurate, and timely notice of,
57 and to be present at, all public proceedings involving the
58 criminal conduct, including, but not limited to, trial, plea,
59 sentencing, or adjudication, even if the victim will be a
60 witness at the proceeding, notwithstanding any rule to the
61 contrary. A victim shall also be provided reasonable, accurate,

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62 and timely notice of any release or escape of the defendant or
63 delinquent, and any proceeding during which a right of the
64 victim is implicated.

65 b. The right to be heard in any public proceeding involving
66 pretrial or other release from any form of legal constraint,
67 plea, sentencing, adjudication, or parole, and any proceeding
68 during which a right of the victim is implicated.

69 c. The right to confer with the state attorney concerning
70 any plea agreements, participation in pre-trial diversion
71 programs, release, restitution, sentencing, or any other
72 disposition of the case.

73 d. The right to provide information regarding the impact of
74 the offender's conduct on the victim and the victim's family to
75 the individual responsible for conducting any pre-sentence
76 investigation or compiling any pre-sentence investigation
77 report, and to have any such information considered in any
78 sentencing recommendations submitted to the court.

79 e. The right to receive a copy of any pre-sentence report,
80 and any other report or record relevant to the exercise of a
81 victim's right, except for such portions made confidential or
82 exempt by law.

83 f. The right to be informed of the conviction, sentence,
84 adjudication, place and time of incarceration, or other
85 disposition of the convicted offender, any scheduled release
86 date of the offender, and the release of or the escape of the
87 offender from custody.

88 g. The right to be informed of all post-conviction
89 processes and procedures, to participate in such processes and
90 procedures, to provide information to the release authority to

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91 be considered before any release decision is made, and to be
92 notified of any release decision regarding the offender. The
93 parole or early release authority shall extend the right to be
94 heard to any person harmed by the offender.

95 h. The right to be informed of clemency and expungement
96 procedures, to provide information to the governor, the court,
97 any clemency board, and other authority in these procedures, and
98 to have that information considered before a clemency or
99 expungement decision is made; and to be notified of such
100 decision in advance of any release of the offender.

101 (8) The rights of the victim, as provided in subparagraph
102 (7)a., subparagraph (7)b., or subparagraph (7)c., that apply to
103 any first appearance proceeding are satisfied by a reasonable
104 attempt by the appropriate agency to notify the victim and
105 convey the victim's views to the court.

106 (9) The right to the prompt return of the victim's property
107 when no longer needed as evidence in the case.

108 (10) The right to full and timely restitution in every case
109 and from each convicted offender for all losses suffered, both
110 directly and indirectly, by the victim as a result of the
111 criminal conduct. All monies and property collected from any
112 person who has been ordered to make restitution shall be first
113 applied to the restitution owed to the victim before paying any
114 amounts owed to the government.

115 (11) The right to proceedings free from unreasonable delay,
116 and to a prompt and final conclusion of the case and any related
117 post-judgment proceedings.

118 a. The state attorney may file a good faith demand for a
119 speedy trial and the trial court shall hold a hearing within

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120 five days to schedule a trial within fifteen days unless the
121 trial judge enters an order with written findings of fact
122 justifying a trial date more than fifteen days after the
123 hearing.

124 b. All state-level appeals and collateral attacks on any
125 judgment must be complete within two years from the date of
126 appeal in non-capital cases and five years in capital cases.
127 Each year, the chief judge of any district court of appeal or
128 the chief justice of the supreme court shall report on a case-
129 by-case basis to the speaker of the house of representatives and
130 the president of the senate all cases where the court was unable
131 to comply with this subparagraph and the circumstances causing
132 the delay. The legislature may adopt legislation to implement
133 this subparagraph.

134 (12) The right to be informed of these rights, and to be
135 informed that victims can seek the advice of an attorney with
136 respect to their rights. This information shall be made
137 available to the general public and provided to all crime
138 victims in the form of a card.

139 (c) The victim, the retained attorney of the victim, a
140 lawful representative of the victim, or the office of the state
141 attorney upon request of the victim may assert and seek
142 enforcement of the rights enumerated in this section and any
143 other right afforded to a victim by law in any trial or
144 appellate court, or before any other authority with jurisdiction
145 over the case, as a matter of right. The court or other
146 authority with jurisdiction shall act promptly on such a
147 request, affording a remedy by due course of law for the
148 violation of any right. The reasons for any decision regarding

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149 the disposition of a victim's right shall be clearly stated on
150 the record.

151 (d) The granting of these rights enumerated in this section
152 to victims may not be construed to deny or impair any other
153 rights possessed by victims. The provisions of this section
154 apply throughout criminal and juvenile justice processes are
155 self-executing and do not require implementing legislation.

156 (e) As used in this section, a "victim" is a person who
157 suffers direct or threatened physical, psychological, or
158 financial harm as a result of the commission or attempted
159 commission of a crime or delinquent act or against whom the
160 crime or delinquent act is committed. The term "victim" shall
161 include their lawful representative, the parent or guardian of a
162 minor, or the next of kin of a homicide victim, except upon a
163 showing that the interest of such individual would be in actual
164 or potential conflict with the interests of the victim. The term
165 "victim" does not include the accused. The terms "crime" and
166 "criminal" include delinquent acts and conduct ~~Victims of crime~~
167 ~~or their lawful representatives, including the next of kin of~~
168 ~~homicide victims, are entitled to the right to be informed, to~~
169 ~~be present, and to be heard when relevant, at all crucial stages~~
170 ~~of criminal proceedings, to the extent that these rights do not~~
171 ~~interfere with the constitutional rights of the accused.~~

WORKSHOP ON ARTICLE I, SECTION 16(B): VICTIMS' RIGHTS

DECLARATION OF RIGHTS COMMITTEE

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WORKSHOP PACKET
TAB 3

CONSTITUTION REVISION COMMISSION

2017 - 2018

SPEAKER BIOGRAPHY



MARY MARGARET GIANNINI, ESQ.

Professor of Law, Florida Coastal School of Law (2008-Present) (Interim Dean 2015)

M.A., University of St. Andrews (Scotland)

M.L.S., University at Albany SUNY

J.D., Indiana University School of Law

Mary M. Giannini is a Professor of Law at Florida Coastal School of Law where she focuses her scholarship on constitutional law, civil rights litigation, and victim rights. Professor Giannini joined the Florida Coastal faculty in 2008, after serving as a Visiting Professor of Law at Robert H. McKinney School of Law at Indiana University, Indianapolis where she was selected as the best law school professor by the student body in 2006-2007. She also serves as a law clerk to Judge Marcia Morales Howard in the Federal District Court for the Middle District of Florida.

A recognized expert on victims' rights and constitutional law, Professor Giannini has served as a panelist and presenter at a number of legal conferences on the subject, including, the Indiana Attorney General's Criminal & Civil Summit, the Mayor's Crime Victim's Advisory Assistance Council, and the Annual Conference of the National Crime Victim Law Institute.

Professor Giannini is also the author of a number of authoritative works on the Federal Crime Victims' Rights Act, including *Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution and the Crime Victims' Rights Act* (Yale Law & Policy Review), and *Redeeming an Empty Promise: Procedural Justice, The Crime Victims' Rights Act, and the Victim's Right to be Reasonably Protected from the Accused* (Tennessee Law Review).

She earned her law degree from the Robert H. McKinney School of Law at Indiana University, Indianapolis, where she graduated first in her class. She also holds a Master's degree in Library Science (Archives Administration) from the University at Albany-SUNY, and a M.A. in Modern History from the University of St. Andrews, Scotland.

Florida Constitution Revision Commission
Workshop on Victims' Rights
Mary Margaret Giannini/gianninimm1@yaho.com

December 12, 2017

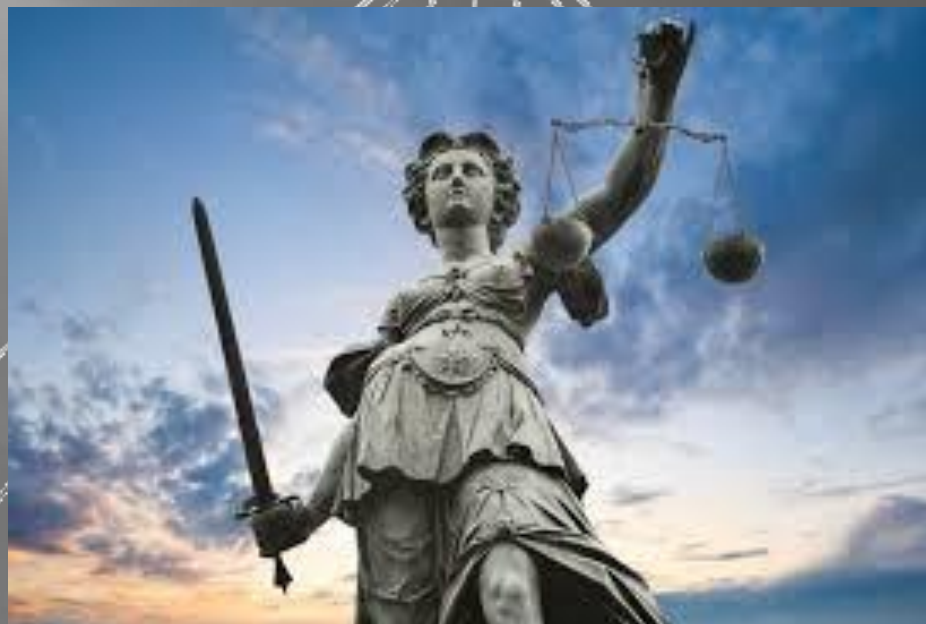
Presentation Overview

1. Introduction
2. Themes and imagery
 - a. Lady Justice
 - b. Scales
 - c. Swinging pendulums
3. History of Victims' Rights Movement
 - a. Moving from a state of nature to the social contract
 - b. Public prosecution model
 - c. Shifting the balance to include victims
4. Florida and victims' rights laws
 - a. Constitutional rights
 - b. Statutory Rights
 - c. Judicial Review
5. Marsy's Law
 - a. Nature of rights
 - b. Passage
 - c. Legal challenges
6. Returning to themes and imagery
7. Questions



CONSTITUTION REVISION COMMISSION

2017 - 2018



VICTIMS' RIGHTS WORKSHOP

Mary Margaret Giannini

Overview

- ❖ Introduction/disclaimers
- ❖ Themes and imagery
- ❖ History of the victims' rights movement
- ❖ Florida and victims' rights
- ❖ Marsy's Law
- ❖ Returning to themes and imagery
- ❖ Questions

Disclaimer

My words, and my words alone.



Moving from a state of nature to the social contract



Public Prosecution Model

State interests

*Crime
control
model*



*Due
process
model*

Defendant
interests

Where does the victim fit?

Shifting the balance . . .

- ❖ Warren Supreme Court increased protections for defendants
- ❖ Increased crime rates between 1970s and early 1990s
- ❖ Grass root movements



Shifting the balance . . .



PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME

Task Force Members

Lois Haight Herrington,
Chairman

Garfield Bobo
Frank Carrington
James P. Damos
Doris L. Dolan
Kenneth O. Eikenberry
Robert J. Miller
Reverend Pat Robertson
Stanton E. Samenow

FINAL REPORT

DECEMBER 1982

Shifting the balance . . .



Florida (constitutional rights)

❖ Art. 1, § 16(b)

Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, be present, and be heard when relevant, at all crucial states of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

WHO



WHAT

November 8, 1988

LIMITS

Florida (statutory rights)

- ❖ Title XLVII, Chapter 960 – Victim Assistance
 - Compensation 1977
 - Restitution 1994
 - Victim services/Dep't of Legal Affairs 1977,
1984,1988
 - Victim notification/education
2002
 - Speedy trial rights
2005
 - § 960.001**
- ❖ Title XLVII, Chapter 921 – Sentencing
 - Victim appearance/hearing at sentencing 1984
 - Victim impact statements at capital sentences 1992
- ❖ Title XLVII, Chapter 944 – State Correctional System
 - Victim notification of inmate offender release 1985¹¹

Judicial review

- ❖ Victim impact statements
- ❖ Victim right to be present
- ❖ Victim consultation with prosecution
- ❖ Balance of rights between victim and defendant

Marsy's Law

- ❖ Nature of rights

- ❖ Passage

 - California

 - Illinois

 - North Dakota

 - South Dakota

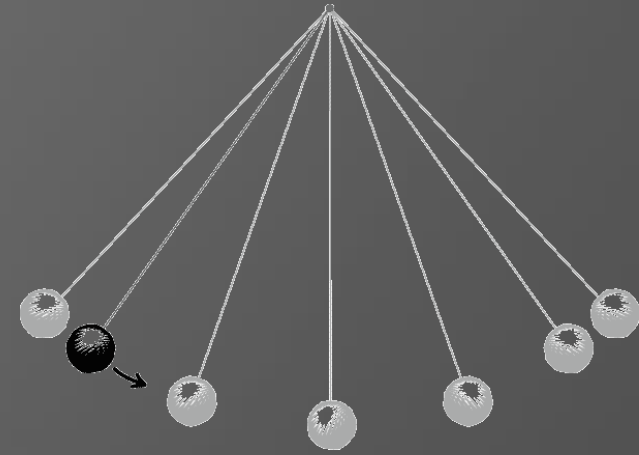
 - Montana

 - Ohio

- ❖ Legal challenges

 - California: *Gilman v. Brown*, 814 F.3d 1007 (9th Cir. 2016)

 - Montana: *Montana Assoc. of Counties ("MACo") v. Montana*, 404 P.3d 733 (Mont. 2017)



*Fierce sight,
scales,
and pendulums*



QUESTIONS

gianninimm1@yahoo.com

Florida Constitution Revision Commission
Workshop on Victims' Rights
Mary Margaret Giannini/gianninimm1@yaho.com

December 12, 2017

SELECT BIBLIOGRAPHY

FLORIDA MATERIALS

Statutory and constitutional provisions

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FLA. STAT. § 960 et seq. Victim Assistance

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§ 960.0015 Victim's right to a speedy trial; speedy trial demand by state attorney

§ 960.0021 Legislative Intent; advisement to victims

§ 960.045 Department of Legal Affairs; powers and duties

§ 960.05 Crime Victims' Services Offices

Fla. Stat. § 921 Sentencing

§ 921.141(7) Victim impact evidence at capital sentence

§ 921.143(1) Appearance of victim, next of kin, or law enforcement, correctional, or correctional probation officer to make statement at sentencing hearing; submission of written statement

Fla. Stat. § 944 State Correctional System

§ 944.605 Inmate release; notification; identification card

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Long v. Florida, 151 SO.3d 498 (Fla. 1st Dist. Ct. App. 2014) (victim supporters in courtroom verses defendant's right to fundamentally fair trial)

Barnett v. Antonacci, 122 So.3d 400 (Fla. 4th Dist. Ct. App. 2013) (victim right to be heard on charging decision)

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Florida v. Davidson, 753 So.2d 576 (Fla. 4th Dist. Ct. App. 1999) (noting limits of victim's right to be heard at sentencing where defendant has already entered into plea agreement setting defendant's sentence)

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Rigbar v. Bromme, 658 So.2d 1038 (Fla. 4th Dist. Ct. App. 1995) (noting limits of victim's rights in context of defendant guilty pleas)

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Hall v. Florida, 579 So.2d 329 (Fla. 1st Dist. Ct. App. 1991) (victim presence, victim consultation with prosecution)

MARSY’S LAW LITIGATION

California litigation: *Gilman v. Brown*, 814 F.3d 1007 (9th Cir. 2016) (upholding “Marsy’s Law” parole provisions against defendant *ex post facto* challenge)

Montana litigation: *Montana Assoc. of Counties (“MACo”) v. Montana*, 404 P.3d 733 (Mont. 2017) (deeming null and void “Marsy’s Law” as violating Montana constitutional revision process)

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CONSTITUTION REVISION COMMISSION

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SPEAKER BIOGRAPHY



PROFESSOR PAUL G. CASSELL

S.J. Quinney College of Law
University of Utah

Professor Paul G. Cassell is the Ronald N. Boyce Presidential Professor of Criminal Law and Distinguished University Professor of Law at the S.J. Quinney College of Law at the University of Utah. He currently teaches crime victims' rights, criminal law, and several other courses. He received his Bachelor of Arts from Stanford University in 1981 and graduated Order of the Coif from Stanford Law School in 1984 where he served as President of the *Stanford Law Review*.

From 1984-85, Professor Cassell clerked for then-Judge Antonin Scalia while Justice Scalia was on the U.S. Court of Appeals for the D.C. Circuit and the following year for Chief Justice Warren E. Burger on the U.S. Supreme Court. He later served as an Associate Deputy Attorney General in the U.S. Department of Justice and as an Assistant U.S. Attorney in the Eastern District of Virginia, prosecuting many felony criminal cases.

In 1992, Professor Cassell began his tenure at the S.J. Quinney College of Law, publishing widely in leading academic journals on crime victims' and other criminal justice issues. He has filed briefs and orally argued on behalf of crime victims and allied organizations in the United States Supreme Court and other federal and state courts around the country. In 2002, Professor Cassell was confirmed by the U.S. Senate to serve as a U.S. District Court Judge for the District of Utah, a position he held until resigning in 2007 to return to law teaching. While on the District Court, Professor Cassell wrote many opinions that attracted significant attention, including several on crime victims' rights issues.

Professor Cassell is a co-author of *Victims in Criminal Procedure*, the only law school casebook on victims' rights. He also represents crime victims and crime victims' organizations on a pro bono basis in cases around the country.

Policy Paper: The Need to Enhance Victims' Rights in the Florida Constitution to Fully Protect Crime Victims' Rights

Paul G. Cassell* and Margaret Garvin†



* Ronald N. Boyce Presidential Professor of Criminal Law and University Distinguished Professor of Law, University of Utah S.J. Quinney College of Law, and policy advisor to Marsy's Law for All. Former Associate Deputy Attorney General, U.S. Dept. of Justice; former U.S. District Court Judge, District of Utah (2002-07).

† Executive Director, National Crime Victim Law Institute (NCVLI); Clinical Professor of Law, Lewis & Clark Law School; and policy advisor to Marsy's Law for All.

INTRODUCTION

In 1988, Florida amended its constitution to add rights for crime victims.¹ 90 percent of the voters approved this amendment. Passage of the constitutional provision was a significant effort aimed at re-integrating victims into criminal justice processes. Much has been learned in the nearly three decades since adoption of Florida's constitutional victims' rights amendment. Lessons regarding the scope, structure, and articulation of rights necessary to make the rights meaningful are the subject of this Policy Paper, which explains why it is time for Florida to revisit its state constitutional protections for crime victims.

With regard to the scope of rights, consensus has developed around the country that certain rights are necessary to secure a meaningful place for victims in criminal justice. Included among these are the rights to notice, presence and a voice throughout the process; to proceedings free from unreasonable delay; to consideration of the victims' safety throughout the process; to respect for victims' privacy; to protection from the accused, including from discovery requests; and to restitution. With regard to the structure and articulation of rights, it has become clear that explicit standing and remedies are necessary to ensure full protection of crime victims' interests in criminal justice.

Crime victims have compelling concerns in the criminal justice system. No system of criminal justice can gain broad community acceptance if it fails to attend appropriately to these concerns. Over the last 40 years, acting on a bipartisan basis, the vast majority of states – including, as mentioned, Florida – have adopted significant statutory and even constitutional protections for crime victims. These enactments rest on the widely shared premise that “[w]hile defendants have strong interests in fair trials, victims likewise have strong personal interests in being listened to and taken seriously.”² This Policy Paper looks carefully at the federal and state crime victims' rights protections that have become an important—but often underappreciated—part of the current architecture in American criminal justice. While these protections differ in detail from jurisdiction to jurisdiction, when examined as a group, many common features emerge.

These common features were not fully apparent in 1998 when Florida enacted its victims' right amendment. When considering Article I, Section 16(b) of the Florida Constitution it is clear that many of the consensus rights are not included and effective structure and articulation of the rights is lacking.

The goal of this Policy Paper is to distill from the victims' rights enactments around the country a core set of shared values for criminal justice—shared values reflected in what is now commonly referred to as “Marsy's Law.”³ This Policy Paper begins by briefly discussing the history of the crime victims' rights movement over the last several decades. It then reviews crime victims' enactments to identify the core set of values that have emerged. It finally offers some thoughts about what appears to be the most pressing current challenge for crime victims' rights: the need for effective enforcement. This Policy Paper concludes

¹ See Fla. Const., art. I, section 16(b).

² STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 91 (2012).

³ Similar shared values about the importance of victims' rights exist in foreign and international law as well. See, e.g., HUMAN RIGHTS WATCH, *MIXED RESULTS: U.S. POLICY AND INTERNATIONAL STANDARDS ON THE RIGHTS AND INTERESTS OF VICTIMS OF CRIME* (2008), <https://www.hrw.org/report/2008/09/23/mixed-results/us-policy-and-international-standards-rights-and-interests-victims> (discussing the many “international human rights instruments [that] address or touch on [crime] victims' rights”); cf. Marie Manikis, *Imagining the Future of Victims' Rights in Canada: A Comparative Perspective*, 13 OHIO ST. J. CRIM. L. 163 (2015); Michael K. Browne, *International Victims' Rights Law: What Can Be Gleaned from the Victims' Empowerment Procedures in Germany as the United States Prepares to Consider the Adoption of a “Victim's Rights Amendment” to its Constitution*, 27 HAMLINE L. REV. 15 (2004) (discussing German victims' law).

that a strengthened Florida state constitutional amendment offers the best path for ensuring that crime victims' interests are properly protected in Florida's criminal justice process.⁴

I. THE CRIME VICTIMS' RIGHTS MOVEMENT

While a comprehensive history of the treatment of crime victims in the system remains to be written, the broad outlines can be quickly sketched. This backdrop is useful to understanding Florida's existing victims' rights amendment.

At our country's founding, crime victims played an important role in criminal prosecutions, often bringing their own "private" prosecutions.⁵ Over time through the 19th century, a system of public prosecution steadily displaced victims.⁶ Ultimately, well into the 20th century, the system had moved to the point where it seemed fair to describe the victim as "the forgotten [person]" of the system.⁷

The Crime Victims' Rights Movement developed in the 1970s because of this displacement of victims. The victim's absence from criminal processes conflicted with "a public sense of justice keen enough that it ... found voice in a nationwide 'victims' rights' movement."⁸ Victims' advocates – who hailed from diverse movements including women's rights, civil rights and "law and order" – urged reforms to give more attention to victims' concerns, including protecting victims' rights to be notified of court hearings, to attend those hearings, and to be heard at appropriate points in the process.⁹

⁴ The issues discussed in this Policy Paper draw on some earlier articles by the authors also discussing victims' rights. See, e.g., Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-by-Clause Analysis*, 5 PHOENIX L. REV. 301 (2012); Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. U.L. REV. 599 (2010); Paul G. Cassell & Steven Joffe, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act*, 105 NW. U. L. REV. COLLOQUIY 164 (2010); Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861.

Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67 (2015); Meg Garvin & Megan McGill, *No Means No: The Need for Vigilance in Sexual Assault Law*, NAT'L CRIME VICTIM L. INST. NEWS AT LEWIS & CLARK L. SCH., Spring/Summer 2007.

⁵ William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649 (1976).

⁶ BIBAS, *supra* note 2, at 88; Abraham Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 1 (1982); Douglas E. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U.L. REV. 1135, 1138-42 (2007).

⁷ McDonald, *supra* note 5, at 650.


⁸ *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (internal quotations omitted). See generally DOUGLAS EVAN BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, *VICTIMS IN CRIMINAL PROCEDURE* 3-35 (3d ed. 2010); Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289; Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373 [hereinafter Cassell, *Balancing the Scales*]; Goldstein, *supra* note 5; William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37 (1996); Collene Campbell et al., *Appendix: The Victims' Voice*, 5 PHOENIX L. REV. 379 (2012).

⁹ See Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517. See generally BELOOF, CASSELL & TWIST, *supra* note 8, at 29-38; Douglas E. Beloof, *The Third Wave of Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255; Cassell, *Balancing the Scales of Justice*, *supra* note 8, at 1380-82.

The victims' rights movement received considerable impetus in 1982 when the President's Task Force on Victims of Crime reviewed the treatment of victims.¹⁰ In a report issued that year, the task force concluded that the criminal justice system "has lost an essential balance. ... [T]he system has deprived the innocent, the honest, and the helpless of its protection. ... The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed."¹¹ The task force advocated multiple reforms, such as prosecutors assuming the responsibility for keeping victims notified of all court proceedings and bringing to the court's attention the victim's view on such subjects as bail, plea bargains, sentences and restitution.¹² The task force also urged that courts should receive victim-impact evidence at sentencing, order restitution, and allow victims and their families to attend trials even if they would be called as witnesses.¹³ In its most sweeping recommendation, the task force proposed a federal constitutional amendment to protect crime victims' rights "to be present and to be heard at all critical stages of judicial proceedings."¹⁴

Realizing the difficulty of achieving the consensus required to amend the United States Constitution, advocates decided to try to initially enact state victims' amendments. They had considerable success with this "states first" strategy.¹⁵ To date, about 35 states have adopted victims' rights amendments to their state constitutions protecting a wide range of victims' rights.

These state constitutional amendments have passed in two waves, beginning with Rhode Island's enactment of a statement amendment in 1986.¹⁶ Florida's amendment was one of the very first in the nation, and approved in the next election cycle in 1988.¹⁷ The Florida provision is extremely brief and merely provides:



Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.¹⁸

In addition to these state constitutional amendments, during this first wave every state passed statutory protections for victims' rights. In many states these first wave rights lacked effective enforcement mechanisms to ensure that their rights were fully implemented. As Attorney General Janet Reno explained in 1997 after a Justice Department review of the landscape, these state efforts "failed to fully safeguard victims' rights."¹⁹

¹⁰ PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982), *available at* <https://www.ovc.gov/publications/presdntstskforcrprt/welcome.html>.

¹¹ *Id.* at 114.

¹² *Id.* at 63.

¹³ *Id.* at 72-73.

¹⁴ *Id.* at 114 (emphasis omitted).

¹⁵ See S. REP. NO. 108-191 (2003).

¹⁶ RHODE ISLAND CONST. art. I, § 23.

¹⁷ FLA. CONST., art. I, § 16(b).


¹⁸ *Id.*

¹⁸ *Id.*

¹⁹ *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the S. Comm. on the Judiciary*, 105th Cong. 64 (1997) (statement of Janet Reno, U.S. Att'y Gen.).

One way of improving enforcement of state crime victims' rights enactments is through strengthened state constitutional protections. In 2008, a second wave of state constitutional efforts began. In November 2008, California voters overwhelmingly approved Proposition 9 – Marsy's Law,²⁰ making California's amendment one of the strongest and most comprehensive in the country. Since then, similar Marsy's Law amendments have been added to the state constitutions of Illinois in 2014,²¹ North Dakota, and South Dakota in 2016,²² and Ohio in 2017.²³ Efforts are currently underway to add enhanced state constitutional protections for victims in not only Florida, but also Georgia, Idaho, Kentucky, Maine, Nevada, North Carolina, Oklahoma, and Wisconsin, among other states.²⁴

The provisions in the more recently-enacted constitutional provisions are much more comprehensive than the Florida provision adopted nearly thirty years ago. Strong model language has been drafted as a guide to how to best implement crime victims' rights.²⁵ An example of how Marsy's Law might look if added specifically to the Florida Constitution is as follows:

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- (b) To preserve and protect the right of crime victims to achieve justice, to ensure a meaningful role throughout the criminal and juvenile justice systems for crime victims, and to 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, every victim is entitled to the following rights, beginning at the time of his or her victimization:
 - (1) The right to **due process** and to be treated with **fairness and respect** for the victim's dignity.
 - (2) The right to be **free from intimidation, harassment, and abuse**.
 - (3) The right to be **reasonably protected** from the accused and any person acting on behalf of the accused.
 - (4) The right to have the safety and welfare of the victim and the victim's family considered when setting bail, including setting pre-trial release conditions **that protect the safety and welfare of the victim and the victim's family**.
 - (5) The right to **prevent the disclosure of information** or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information of the victim.
 - (6) The **right to privacy**, which includes the right to refuse an interview, deposition, or other discovery request by the defense or anyone acting on behalf of the defendant and to

²⁰ CAL. CONST. art. I, § 28.

²¹ ILL. CONST. art. I, § 8.1.

²² Respectively, N.D. CONST. art. I, § 25; and S.D. CONST. art. VI, § 29.

²³ OHIO CONST., art. I, § 10(a).

²⁴ See *About Marsy's Law*, *supra* note 19.

²⁵ <https://marsyslaw.us/wp-content/uploads/2017/02/Marsys-Law-Short-Form-Model-Language.pdf>

set reasonable conditions on the conduct of any such interaction to which the victim consents.

(7) A victim shall have the following specific rights upon request:

- a. The right to **reasonable, accurate, and timely notice of, and to be present at, all public proceedings involving the criminal conduct**, including, but not limited to, trial, plea, sentencing, or adjudication, even if the victim will be a witness at the proceeding, notwithstanding any rule to the contrary. A victim shall also be provided reasonable, accurate, and timely notice of any release or escape of the defendant or delinquent, and any proceeding during which a right of the victim is implicated.
- b. The right to **be heard in any public proceeding** involving pretrial or other release from any form of legal constraint, plea, sentencing, adjudication, or parole, and any proceeding during which a right of the victim is implicated.
- c. The right to **confer with the state attorney** concerning any plea agreements, participation in pre-trial diversion programs, release, restitution, sentencing, or any other disposition of the case.
- d. The right to **provide information regarding the impact of the offender's conduct on the victim and the victim's family** to the individual responsible for conducting any pre-sentence investigation or compiling any pre-sentence investigation report, and to have any such information considered in any sentencing recommendations submitted to the court.
- e. The right to **receive a copy of any pre-sentence report, and any other report or record relevant to the exercise of a victim's right**, except for such portions made confidential or exempt by law.
- f. The right to **be informed of the conviction, sentence, adjudication, place and time of incarceration, or other disposition of the convicted offender**, any scheduled release date of the offender, and the release of or the escape of the offender from custody.
- g. The right to **be informed of all post-conviction processes and procedures**, to participate in such processes and procedures, to provide information to the release authority to be considered before any release decision is made, and to be notified of any release decision regarding the offender. The parole or early release authority shall extend the right to be heard to any person harmed by the offender.
- h. **The right to be informed of clemency and expungement procedures**, to provide information to the governor, the court, any clemency board, and other authority in these procedures, and to have that information considered before a clemency or

expungement decision is made; and to be notified of such decision in advance of any release of the offender.

(8) The rights of the victim, as provided in subparagraph (7)a., subparagraph (7)b., or subparagraph (7)c., that apply to any first appearance proceeding are **satisfied by a reasonable attempt** by the appropriate agency to notify the victim and convey the victim's views to the court.

(9) The right to the **prompt return of the victim's property** when no longer needed as evidence in the case.

(10) The right to **full and timely restitution** in every case and from each convicted offender for all losses suffered, both directly and indirectly, by the victim as a result of the criminal conduct. All monies and property collected from any person who has been ordered to make restitution shall be first applied to the restitution owed to the victim before paying any amounts owed to the government.

(11) The right to **proceedings free from unreasonable delay**, and to a prompt and final conclusion of the case and any related post-judgment proceedings.

a. The state attorney may file a **good faith demand for a speedy trial** and the trial court shall hold a hearing within five days to schedule a trial within fifteen days unless the trial judge enters an order with written findings of fact justifying a trial date more than fifteen days after the hearing.

b. All state-level appeals and collateral attacks on any judgment must be complete within two years from the date of appeal in non-capital cases and five years in capital cases. Each year, the Chief Judge of any district court of appeal or the Chief Justice of the Supreme Court shall report on a case-by-case basis to the Speaker of the House of Representatives and the President of the Senate all cases where the court was unable to comply with this subparagraph and the circumstances causing the delay. The legislature may adopt legislation to implement this subparagraph.

(12) The right to be informed of these rights, and to be informed that victims can seek the advice of an attorney with respect to their rights. This information shall be made available to the general public and **provided to all crime victims in the form of a card**.

(c) The victim, the retained attorney of the victim, a lawful representative of the victim, or the office of the state attorney upon request of the victim **may assert and seek enforcement of the rights enumerated in this section** and any other right afforded to a victim by law in any trial or appellate court, or before any other authority with jurisdiction over the case, as a matter of right. The court or other

authority with jurisdiction shall act promptly on such a request, affording a remedy by due course of law for the violation of any right. The reasons for any decision regarding the disposition of a victim's right shall be clearly stated on the record.

(d) The granting of these rights enumerated in this section to victims may not be construed to deny or impair any other rights possessed by victims. The provisions of this section apply throughout criminal and juvenile justice processes, are self-executing and do not require implementing legislation.

(e) 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" shall include their 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. Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

Where does this extensive list of victims' rights come from? In the next section, we identify and analyze fundamental victims' rights that are being recognized around the country – rights that Florida should recognize in its Constitution.

II. FUNDAMENTAL CRIME VICTIMS' RIGHTS

When viewed together, the enactment of state crime victims' rights amendments across the country reveal an emerging consensus that certain victims' rights should be protected. This section briefly reviews a number of these rights,²⁶ making the case for each of them and then explaining how protection has been operationalized in the current state constitutional (and, in some cases, statutory) enactments around the country. Florida should amend its state constitution to explicitly include these important rights.

A. THE RIGHT TO NOTICE OF CASE PROCEEDINGS

A crime victim's right to notice about criminal proceedings is an important right that is now broadly recognized. Because victims and their families are directly and often irreparably harmed by crime, they

²⁶ In this brief Policy Paper, not every right that might be considered fundamental or important to victims is discussed.

have a vital interest in knowing about any subsequent prosecution and any associated proceedings. Notice of proceedings is traditionally recognized as a core part of due process.²⁷ While victims may not suffer a loss of physical liberty through confinement as the result of a criminal proceeding, they certainly have strong claim to be kept fully informed about the progress of a criminal case. Knowing what is happening can, for example, greatly reduce a victim's anxiety about the process.²⁸ For reasons such as these, the President's Task Force on Victims of Crime urged that "[p]rosecutors should keep victims informed about the status of the case from the initial decision to charge or to decline prosecution."²⁹

To guarantee that victims will be kept informed about the progress of court cases, many state constitutional and statutory provisions promise crime victims that they will be notified about proceedings. The California Constitution, for example, guarantees crime victims "reasonable notice" of all public proceedings.³⁰ And the Texas Constitution promises "the right to notification of court proceedings ... on the request of a crime victim."³¹

Some state provisions spell out notification rights in more detail. For example, Utah has enacted the Utah Rights of Crime Victims Act, which provides that "[w]ithin seven days of the filing of felony criminal charges against a defendant, the prosecuting agency shall provide an initial notice to reasonably identifiable and locatable victims of the crime contained in the charges."³² The initial notice must contain information about "electing to receive notice of subsequent important criminal justice hearings."³³ In practice, Utah prosecuting agencies have provided these notices with a detachable postcard or, more recently, a computer-generated letter that victims simply return to the prosecutor's office to receive subsequent notices about proceedings. The return letter serves as the victims' request for further notices. In the absence of such a request, a prosecutor need not send any further notices.³⁴

Fortunately, with developing new electronic technologies, keeping victims informed about court hearings is becoming easier.³⁵ Automated victim-notification systems abound, most prominently the so-called VINE (Victim Information Notification Everyday) system.³⁶ Under such a system, a victim registers for notification through e-mail or phone call. Then, when court hearings are scheduled, a computerized notification is made.

In some cases (e.g., terrorist bombings or massive financial frauds), the large number of victims may render individual notifications impractical. In such circumstances, notice by means of a press release to daily newspapers in the area has been regarded as a reasonable alternative to actual notice sent to each victim at his/her/their residential address.³⁷ New technologies may also provide a way of affording reasonable notice. For example, some federal courts have approved notice by publication, where the

²⁷ See, e.g., *Dusenberg v. United States*, 534 U.S. 161, 167 (2002).

²⁸ PRESIDENT'S TASK FORCE, *supra* note 10, at 64 (quoting victim to this effect).

²⁹ *Id.*

³⁰ CAL. CONST., art. I, § 28(b)(7).

³¹ TEX. CONST. art. I, § 30 (order rearranged).

³² UTAH CODE ANN. § 77-38-3(1). See generally Cassell, *Balancing the Scales*, *supra* note 8.

³³ *Id.* § 77-38-3(2). The notice will also contain information about other rights under the victims' statute. *Id.*

³⁴ *Id.* § 77-38-3(8); see also Steven J. Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims' Rights in Arizona*, 47 ARIZ. ST. L.J. 421, 434 (2015) (discussing victim notification in Arizona).

³⁵ See BIBAS, *supra* note 2, at 150 ("With the advent of email, notifying victims . . . is even easier").

³⁶ See, e.g., VINE, APPRISS SAFETY, <https://apprissafety.com/solutions/vinel/>.

³⁷ *United States v. Peralta*, No. 3:08cr233, 2009 WL 2998050, at *1-2 (W.D.N.C. Sept. 15, 2009).

publication directs crime victims to a website maintained by the government with hyperlinks to updates on the case.³⁸

B. THE RIGHT TO ATTEND COURT HEARINGS

Victims also deserve the right to attend all proceedings related to a crime, as is recognized across the country. The President's Task Force on Victims of Crime articulated the basis for this right: "The crime is often one of the most significant events in the lives of victims and their families. They, no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule providing for the exclusion of witnesses, be permitted to be present for the entire trial."³⁹

Several strong reasons support such a right. As Professor Doug Beloof and one of this paper's authors have argued at length elsewhere,⁴⁰ the right to attend the trial may be critical in allowing the victim to recover from the psychological damage of a crime. It is widely recognized that the "victim's presence during the trial may also facilitate healing of the debilitating psychological wounds suffered by a crime victim."⁴¹

Moreover, without a right to attend the trial, "the criminal justice system merely intensifies the loss of control that victims feel after the crime."⁴² It should come as no surprise that "[v]ictims are often appalled to learn that they may not be allowed to sit in the courtroom during hearings or the trial. They are unable to understand why they cannot simply observe the proceedings in a supposedly public forum."⁴³ One crime victim put it more directly: "All we ask is that we be treated just like a criminal."⁴⁴ Defendants take full advantage of their right to be in the courtroom.⁴⁵

To ensure that victims can attend court proceedings, many state amendments extend to a crime victim an unqualified right to attend trial,⁴⁶ while others extend a qualified right to attend unless the victim's testimony would be materially affected by attendance.⁴⁷ Often such provisions give victims a right not to be

³⁸ See, e.g., *United States v. Skilling*, No. H-04-025-SS, 2009 WL 806757, at *1-2 (S.D. Tex. Mar. 26, 2009); *United States v. Saltsman*, No. 07-CR-641 (NGG), 2007 WL 4232985, at *1-2 (E.D.N.Y. Nov. 27, 2007); *United States v. Croteau*, No. 05-CR-30104-DRH, 2006 U.S. Dist. LEXIS 23684, at *2-3 (S.D. Ill. 2006).

³⁹ PRESIDENT'S TASK FORCE, *supra* note 10, at 80.

⁴⁰ See Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481 (2005).

⁴¹ Ken Eikenberry, *Victims of Crimes/Victims of Justice*, 34 WAYNE L. REV. 29, 41 (1987).

⁴² Deborah P. Kelly, *Victims*, 34 WAYNE L. REV. 69, 72 (1987).

⁴³ Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 WAYNE L. REV. 51, 58 (1987).

⁴⁴ *Id.* at 59 (quoting Edmund Newton, *Criminals Have All the Rights*, LADIES' HOME J., Sept. 1986).

⁴⁵ See LINDA E. LEDRAY, *RECOVERING FROM RAPE* 199 (2d ed. 1994) ("Even the most disheveled [rapist] will turn up in court clean-shaven, with a haircut, and often wearing a suit and tie. He will not appear to be the type of man who could rape.").

⁴⁶ See, e.g., ALASKA CONST. art. I, § 24 (right "to be present at all criminal ... proceedings where the accused has the right to be present"); MICH. CONST., art. I, § 24(1) (right "to attend the trial and all other court proceedings the accused has the right to attend"); OR. R. EVID. 615 (witness exclusion rule does not apply to "victim in a criminal case"); see also Beloof & Cassell, *supra* note 40, at 504-19 (providing a comprehensive discussion of state law on this subject).

⁴⁷ See, e.g., FLA. CONST. art. I, § 16(b) ("Victims of crime or their lawful representatives ... are entitled to the right ... to be present ... at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused"). See also Fla. Stat. Ann. § 960.001(1)(e) (re "guidelines") ("A victim, a victim's parent or guardian if the victim is a minor, a lawful representative of the victim or of the victim's parent or guardian if the victim is a minor, or a victim's next of kin

excluded from public proceedings. When the right is phrased in the negative—a right *not* to be excluded—it avoids the possible suggestion that a right “to attend” carried with it a victim’s right to demand payment from the government for travel to court.⁴⁸ Such an unqualified right does not interfere with a defendant’s right for the simple reason that defendants have no constitutional right to exclude victims from the courtroom.⁴⁹

C. THE RIGHT TO BE HEARD AT RELEVANT PROCEEDINGS

Many states have also recognized that crime victims deserve the right to be heard at points in the criminal justice process, thus allowing victims to participate directly in criminal justice. Allowing such victim participation can provide important information to judges. Having the actual victim speak is useful because “gauging the harm to a unique human being, not a faceless abstraction, requires evidence of how that particular victim suffered.”⁵⁰ And victim participation can lead to important therapeutic benefits. As Professor Bibas has explained at length in his important book *The Machinery of Criminal Justice*, “it is simple participation that helps to empower and heal victims. Participants see the law as more fair and legitimate when they have some control over the process and they have been heard, whether or not they control ultimate outcomes.”⁵¹ Hearing victim voices can be important regardless of any formal effect on criminal penalties, as recent experience with “reconciliation commissions” in other countries attests.⁵²

Recognizing such benefits, states have extended a right to participate in various ways. For example, the recently enacted constitutional provision in South Dakota promises crime victims the “the right to be heard in any proceeding involving release, plea, sentencing, adjudication, disposition or parole, and any proceeding during which a right of the victim is implicated.”⁵³ A number of states have similar provisions to their state constitutions guaranteeing victim participation.⁵⁴

may not be excluded from any portion of any hearing, trial, or proceeding pertaining to the offense based solely on the fact that such person is subpoenaed to testify, unless, upon motion, the court determines such person's presence to be prejudicial.”); Fla. Stat. Ann. § 90.616(2)(d) (re evidentiary rule on exclusion of witnesses) (“A witness may not be excluded if the witness is In a criminal case, the victim of the crime, the victim's next of kin, the parent or guardian of a minor child victim, or a lawful representative of such person, unless, upon motion, the court determines such person's presence to be prejudicial.”).

⁴⁸ Cf. ALA. CODE § 15-14-54 (right “not [to] be excluded from court . . . during the trial or hearing or any portion thereof . . . which in any way pertains to such offense”). This negative formulation may be excessive caution, because no right-to-be-present provision has been interpreted to require the State to pay for victims to travel.

⁴⁹ See Beloff & Cassell, *supra* note 40, at 520-34; see, e.g., *United States v. Edwards*, 526 F.3d 747, 757-58 (11th Cir. 2008).

⁵⁰ BIBAS, *supra* note 2, at 91; see also Laurence H. Tribe, *McVeigh's Victims Had a Right to Speak*, N.Y. TIMES, June 9, 1997, at A25.

⁵¹ BIBAS, *supra* note 2, at 151.


⁵² See, e.g., Mary Burton, *Custodians of Memory: South Africa's Truth and Reconciliation Commission* 32 INT'L J. LEGAL INFO. 417 (2004).

⁵³ S.D. CONST. art VI, § 29.

⁵⁴ See, e.g., ARIZ. CONST. art II, § 2.1(A)(4) (right to be heard at proceedings involving post-arrest release, negotiated pleas, and sentencing); COLO. CONST. art. II, § 16a (right to be heard at critical stages); ILL. CONST. art. I, § 8.1(4) (right to make statement at sentencing); KAN. CONST. art. 15, § 15(a) (right to be heard at sentencing or any other appropriate time); MICH. CONST. art. I, § 24(1) (right to make statement at sentencing); MO. CONST. art. I, § 32(1)(2) (right to be heard at guilty pleas, bail hearings, sentencings, probation revocation hearings, and parole hearings, unless interests of justice require otherwise); N.M. CONST. art. II, § 24(A)(7) (right to make statement at sentencing and post-sentencing hearings); R.I. CONST. art. I, § 23 (right to address court at sentencing); WASH. CONST. art. I, § 35 (right to make statement at sentencing or release proceeding); WIS. CONST. art. I, § 9m (opportunity to make statement to court at disposition); UTAH CONST. art. I, § 28(1)(b) (right to be heard at important proceedings).

The existing state amendments frequently recognize several points in the process as appropriate times for crime victims to be heard. First, the amendments commonly extend the right to be heard regarding any *release* proceeding—e.g., bail hearings. This right ensures the court can hear directly from the victim but nothing in these rights gives victims the ability to veto the release or detention of any defendant; the ultimate decision to hold or release a defendant remains with the judge. Similarly, when considering later release such as parole, victim statements to parole boards “can enable the board to fully appreciate the nature of the offense and the degree to which the particular inmate may present risks to the victim or community upon release.”⁵⁵

The right to be heard also typically extends to any proceeding involving a plea bargain. Under the present rules of procedure in most states, a plea bargain between the prosecution and a defendant must be submitted to the trial judge for approval.⁵⁶ If the judge believes that the bargain is not in the interests of justice, she may reject it.⁵⁷ Unfortunately in some states, a victim does not always have the opportunity to discuss a plea with the prosecution while it is being negotiated⁵⁸ or to present to the judge information about whether the plea is in the interests of justice. Indeed, it may be that in some cases, “keeping the victim away from the judge ... is one of the prime motivations for plea bargaining.”⁵⁹ Yet there are compelling reasons to afford victims a role in the plea bargaining process:



The victim's interests in participating in the plea bargaining process are many. The fact that they are consulted and listened to provide them with respect and an acknowledgment that they are the harmed individual. This in turn may contribute to the psychological healing of the victim. The victim may have financial interests in the form of restitution or compensatory fine. ... [B]ecause judges act in the public interest when they decide to accept or reject a plea bargain, the victim is an additional source of information for the court.⁶⁰

As with the right to be heard regarding release, victims have a voice in the plea bargaining process, not a veto. The judge is not required to follow the victim's suggested course of action on the plea, but simply has more information on which to base such a determination.

⁵⁵ Frances P. Bernat et al., *Victim Impact Laws and the Parole Process in the United States: Balancing Victim and Inmate Rights and Interests*, 3 INT'L REV. VICTIMOLOGY 121, 134 (1994); see also Laura L. Richardson, *The Impact of Marsy's Law on Parole in California*, 49 CRIM. L. BULL. 1091 (2013) (discussing changes in parole hearings after Marsy's law enactment); Kathryn M. Young, *Parole Hearings and Victims' Rights: Implementation, Ambiguity, and Reform*, 49 CONN. L. REV. 431 (2016).

⁵⁶ See generally BELOOF, CASSELL & TWIST, *supra* note 8, at 422 (discussing this issue).

⁵⁷ See, e.g., UTAH R. CRIM. P. 11(e) (“The court may refuse to accept a plea of guilty”); *State v. Mane*, 783 P.2d 61, 66 (Utah Ct. App. 1989) (following Rule 11(e) and holding “[n]othing in the statute requires a court to accept a guilty plea”).

⁵⁸ See Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 377 (2016) (discussing diversity in practice about victim involvement in plea negotiations).

⁵⁹ HERBERT S. MILLER ET AL., *PLEA BARGAINING IN THE UNITED STATES* 70 (1978).

⁶⁰ BELOOF, CASSELL & TWIST, *supra* note 2, at 423. See generally Elizabeth N. Jones, *The Ascending Role of Crime Victims in Plea-Bargaining and Beyond*, 117 W. VA. L. REV. 97 (2014) (discussing victims' rights during plea); Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301 (1987) (advancing reasons for victim participation in plea discussions); Michael M. O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 330-32 (2007) (victim involvement in plea bargains improves perception of fair treatment and increases public confidence in the process).

State amendments also typically extend to victims the right to be heard at proceedings for determining a sentence. Defendants, of course, have the right to directly address the sentencing authority before sentence is imposed.⁶¹ Victims' enactments typically extend the same basic right to victims.⁶² The reasons for this right are many.⁶³ It is important to emphasize that victims "are not reflexively punitive" and a number of "[e]mpirical studies find that participation by victims does not lead to harsher sentences."⁶⁴ Nor does the claim that victims' impact statements might be somehow "emotional" carry much weight, given that many other parts of the law recognize that it is proper to have such arguments.⁶⁵

Victims can exercise their right to be heard in any appropriate fashion, including making an oral statement at court proceedings or submitting written information for the court's consideration. Defendants can respond to the information that victims provide in appropriate ways, such as providing counter-information.⁶⁶

Finally, many state amendments extend to a victim a general right to be heard at any proceeding involving any right established by the amendment. This allows victims to present information in support of a claim of right under the amendments, consistent with ordinary due-process principles.⁶⁷

⁶¹ See, e.g., FED. R. EVID. 32(i)(4)(A); UTAH R. CRIM. P. 22(a).

⁶² See generally NORMA DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 349-58 (3d ed. 2013) (discussing victim impact statements). See also *Cozzie v. State*, No. SC13-2393, 2017 WL 1954976, at *9 (Fla. May 11, 2017) (recognizing that crime victims' state constitutional right to be heard at crucial stages supports the admission of victim impact evidence at sentencing).

⁶³ Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009) (collecting rationales for the right including that victim-impact statements provide information to the sentencer, have therapeutic and other benefits for victims, explain the crime's harm to the defendant, and improve the perceived fairness of sentencing, and noting that all 50 states provide victims the opportunity for a victim impact statement).

⁶⁴ BIBAS, *supra* note 2, at 91; see also Cassell, *supra* note 64, at 634-37 ("good evidence that victim impact statements generally lead to harsher sentences is lacking"); Edna Erez, *Who's Afraid of the Big Bad Victims? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, 1999 CRIM. L. REV. 545, 548 ("sentence severity has not increased following the passage of [victim impact] legislation"); Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306, 308 (2003) ("We find [no] significant relation between the introduction of [victim impact evidence] and sentencing outcomes."); EDWIN VILLMOARE & VIRGINIA N. NETO, NAT'L INST. OF JUSTICE, U.S. DEPT OF JUSTICE, EXECUTIVE SUMMARY, VICTIM APPEARANCES AT SENTENCING HEARINGS UNDER THE CALIFORNIA VICTIMS' BILL OF RIGHTS 61 (1987) ("[t]he right to allocution at sentencing has had little net effect ... on sentences in general"); Robert C. Davis & Barbara E. Smith, *The Effects of Victim Impact Statements on Sentencing Decisions: A Test in an Urban Setting*, 11 JUST. Q. 453, 466 (1994) (finding "no support for those who argue against [victim impact] statements on the grounds that their use places defendants in jeopardy"); ROBERT C. DAVIS ET AL., VICTIM IMPACT STATEMENTS: THEIR EFFECTS ON COURT OUTCOMES AND VICTIM SATISFACTION 68 (1990) (concluding that the result of the study "lend[s] support to advocates of victim impact statements" since no evidence indicates that these statements "put[] defendants in jeopardy [or] result in harsher sentences"); cf. Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 137 (2004) ("Victims do not want vengeance so much as additional rights to participate."); but cf. Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L.J. 1003, 1050 (2014) (discussing limitations of the current studies and making suggestions for future research); Susan A. Bandes & Jeremy A. Blumenthal, *Emotion and the Law*, 8 ANN. REV. L. & SOC. SCI. 161, 166-67 (2012) (arguing that mock jury research shows victim impact evidence leads to punitiveness).

⁶⁵ Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. U.L. REV. COLLOQUY 355, 356 (2008) ("Rather than bemoaning emotional reactions, reformers should acknowledge emotion as the legitimate battlefield of criminal justice."); Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims Rights Amendment*, 1999 UTAH L. REV. 479, 486-96 (victim impact statements convey information, not emotion).

⁶⁶ See generally Paul G. Cassell & Edna Erez, *Victim Impact Statements and Ancillary Harm: The American Perspective*, 15 CAN. CRIM. L. REV. 149, 175-96 (2011) (providing a fifty state survey on procedures concerning victim impact statements).

⁶⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) ("For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard." (internal quotation omitted)).

D. THE RIGHT TO PROCEEDINGS FREE FROM UNREASONABLE DELAY

Many state provisions also extend to crime victims the right to “a speedy trial and a prompt and final conclusion of the case”⁶⁸ or to proceedings “free from unreasonable delay.”⁶⁹ Such provisions are designed to be the victim’s analogue to a defendant’s Sixth Amendment right to a speedy trial.⁷⁰ The defendant’s right is designed, among other things, “to minimize anxiety and concern accompanying public accusation” and “to limit the possibilities that long delay will impair the ability of an accused to defend himself.”⁷¹ The interests underlying a speedy trial, however, are not confined to defendants. The Supreme Court has acknowledged that “there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused.”⁷²

Victims often suffer significantly from delays in the criminal justice system.⁷³ For example, victims of violent crime frequently suffer from post-traumatic stress disorder (PTSD).⁷⁴ A connection between initial victimization and later depression, substance abuse, panic disorder, agoraphobia, social phobia, obsessive-compulsive disorder, and even suicide has also been reported in the academic literature.⁷⁵ Delays in the criminal process can then exacerbate these initial injuries. Indeed, a “common problem in the prosecution of crimes against victims is that the trial is typically delayed through scheduling conflicts, continuances, and other unexpected delays throughout the course of the trial.”⁷⁶ It thus is not surprising that multiple studies suggest “the negative effect on a victim’s healing process when there is a prolonged trial of the alleged attacker because the actual judicial process is a burden on the victim.”⁷⁷ And “[t]he long delay between reporting a crime to the police and the beginning of the trial represents [a] source of psychological stress for crime victims.”⁷⁸

Academic literature confirms the ways in which delays in the criminal justice system can compound the crime’s initial effects on a victim.⁷⁹ A victim’s experience with the justice system often “means the difference between a healing experience and one that exacerbates the initial trauma.”⁸⁰

⁶⁸ See, e.g., CAL. CONST., art. I, § 28(b)(9).

⁶⁹ See ARIZ. CONST. art. II, § 2.1(A)(10); CAL. CONST. art. I, § 29; ILL. CONST. art. I, § 8.1(a)(6); MICH. CONST. art. I, § 24(1); MO. CONST. art. I, § 32(1)(5); WIS. CONST. art. I, § 9m. The right may also exist in statute. See, e.g., Fla. Stat. Ann. § 960.001(1)(a)(7) (requiring law enforcement to inform victims of “[t]he right of a victim to a prompt and timely disposition of the case in order to minimize the period during which the victim must endure the responsibilities and stress involved to the extent that this right does not interfere with the constitutional rights of the accused”).

⁷⁰ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial”).

⁷¹ *Smith v. Hoey*, 393 U.S. 374, 378 (1969) (citing *United States v. Ewell*, 383 U.S. 116, 120 (1966)).

⁷² *Barker v. Wingo*, 407 U.S. 514, 519 (1972).

⁷³ See Brief of Amicus Curiae Arizona Voice for Crime Victims (AVCV) at 6-9, *Ryan v. Washington*, 137 S. Ct. 1581 (Feb. 2017) (No. 16-840) (collecting research). This section draws heavily on the research collected in the AVCV brief.

⁷⁴ See Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims’ Mental Health*, 23 J. TRAUM. STRESS 182, 182 (2010); Dean G. Kilpatrick & Ron Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. TRAUM. STRESS 119, 119 (2003).

⁷⁵ Parsons & Bergin, *supra* note 74, at 182.

⁷⁶ Mary Beth Ricke, *Victims’ Right to a Speedy Trial: Shortcomings, Improvements, and Alternatives to Legislative Protection*, 41 WASH. U. J. L. & POL’Y 181, 183 (2013).

⁷⁷ *Id.* at 193.

⁷⁸ Ulrich Orth & Andreas Maercker, *Do Trials of Perpetrators Retraumatize Victims?*, 19 J. INTERPERSONAL VIOLENCE 212, 215 (2004).

⁷⁹ Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUM. STRESS 159, 159 (2003).

⁸⁰ Parsons & Bergin, *supra* note 74, at 182; see also *Hill v. McDonough*, 547 U.S. 573, 585 (2006) (“Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.”); Douglas A. Berman, *Finding Bickel Gold in a Hill of Beans*, 2006 CATO SUP. CT. REV. 311, 322.

Delays in proceedings can also be particularly hard on child victims, who have difficulty healing until the anxiety of legal proceedings can be brought to an end.⁸¹

State provisions affording victims the right to proceedings free from unreasonable delay do not require courts to follow victims' demands for scheduling trial or for ending all delay, but rather insure against "unreasonable" delay.⁸² In interpreting these provisions, courts can look to the body of case law that already exists for resolving defendants' speedy-trial claims.⁸³

E. THE RIGHT TO PROTECTION FROM THE ACCUSED

The criminal justice system is intended, in part, to protect victims. Victims are usually in the best position to know what protections will and will not be effective, which means considering the victim's input regarding protection is absolutely critical as is timely communication regarding such protections to allow for execution of safety plans when necessary.

Defendants and convicted offenders who are released may pose a special danger to their victims. An unconvicted defendant may threaten or carry out violence to permanently silence the victim and prevent subsequent testimony. Or a convicted offender may later attack the victim in a quest for revenge. These dangers are particularly pronounced for victims of domestic violence and rape. For instance, Colleen McHugh obtained a restraining order against her former boyfriend Eric Boettcher on January 12, 1994.⁸⁴ Authorities soon placed him in jail for violating that order.⁸⁵ He later posted bail and tracked McHugh to a relative's apartment, where on January 20, 1994, he fatally shot both Colleen McHugh and himself.⁸⁶ No one had notified McHugh of Boettcher's release from custody.⁸⁷

In an attempt to prevent such travesties, in addition to the rights to be heard regarding release and to protection, a number of states have enacted constitutional provisions requiring notice to crime victims whenever an offender will no longer be in custody.⁸⁸ California's amendment, for example, gives victims, upon request, the right to be informed of "the scheduled release date of the defendant, and the release of or the

⁸¹ Cassell, *Balancing the Scales of Justice*, *supra* note 8, at 1402-07.

⁸² See, e.g., *United States v. Wilson*, 350 F. Supp. 2d 910, 931 (D. Utah 2005) (interpreting CVRA's right to proceedings free from unreasonable delay to preclude delay in sentencing).

⁸³ For example, in *Barker v. Wingo*, the United States Supreme Court set forth various factors that could be used to evaluate a defendant's speedy-trial challenge in the wake of a delay. 407 U.S. 514, 530-33 (1972) (describing factors such as: (1) the length of the delay; (2) the reason for the delay; (3) whether and when the defendant asserted his speedy-trial right; and (4) whether the defendant was prejudiced by the delay). See generally WAYNE R. LAFAVE, *CRIMINAL PROCEDURE* § 18.2 (4th ed. 2009 & 2017 Supp.).

⁸⁴ Jeffrey A. Cross, *The Repeated Sufferings of Domestic Violence Victims Not Notified of Their Assailant's Pre-Trial Release from Custody: A Call for Mandatory Domestic Violence Victim Notification Legislation*, 34 U. LOUISVILLE J. FAM. L. 915, 915-16 (1996).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See *id.* (providing this and other examples).

⁸⁸ While Florida does not have a constitutional provision regarding these rights there are statutory protections regarding notice of release. See, e.g., Fla. Stat. Ann. § 960.001(1)(e) (requiring notice to victims of "[t]he release of the accused pending judicial proceedings" and "when a term of imprisonment, detention, or residential commitment is imposed, the release of the defendant or juvenile offender from such imprisonment, detention, or residential commitment"); *id.* at § 960.001(1)(e) (requiring notice to victims of any escape from a state facility).

escape by the defendant from custody.”⁸⁹ Other states have comparable requirements.⁹⁰ These provisions ensure that victims are not surprised to discover that an offender is back on the streets. Generally, notice is provided in either of two circumstances: either a *release*, which could include a post-arrest release or the post-conviction paroling of a defendant or a pardon,⁹¹ or an *escape*. The administrative burdens associated with such notification requirements have recently been minimized by technological advances. As noted earlier in this paper, many states have developed computer-operated programs that can place a telephone call to a programmed number when a prisoner is moved from one prison to another or released.⁹²

F. THE RIGHT TO PROTECTION AND CONSIDERATION OF THE VICTIM'S SAFETY

Given the safety concerns of a crime victim in a criminal case, a number of states have also recognized a specific right for crime victims to have their safety considered during court proceedings. For example, about 15 states extend to victims the constitutional right to be reasonably protected from the accused—such as the California constitutional provision extending a right to victims to “be reasonably protected from the defendant and persons acting on behalf of the defendant” and to “have the safety of the victim and the victim’s family considered in fixing the amount of bail and release conditions for the defendant.”⁹³ Virginia extends to victims “[t]he right to protection from further harm or reprisal through the imposition of appropriate bail and conditions of release.”⁹⁴ Sometimes such enactments are supplemented by giving victims the right to be free from harassment.⁹⁵ Federal law, too, gives victims “[t]he right to be reasonably protected from the accused.”⁹⁶

These provisions are designed to require that a crime victim’s safety be considered by courts, parole boards, and other government actors in making discretionary decisions that could harm a crime victim.⁹⁷ For example, in considering whether to release a suspect on bail, a court following such a provision is required to consider the victim’s safety. This dovetails with the earlier-discussed provisions giving victims a right to speak at proceedings involving bail.⁹⁸ Once again, it is important to emphasize that nothing in these

⁸⁹ CAL. CONST. art. I, section 28(b)(12).

⁹⁰ See, e.g., ARIZ. CONST. art. II, § 2.1 (victim’s right to “be informed, upon request, when the accused or convicted person is released from custody or has escaped”); S.C. CONST. art. I, § 24 (“victims of a crime have a right to ... be reasonably informed when the accused or convicted is arrested, released from custody, or has escaped”); MICH. CONST. art I, § 24 (crime victims have the right to information about the conviction, sentence, imprisonment, and release of the accused”).

⁹¹ Mary Margaret Giannini, *Measured Mercy: Managing the Intersection of Executive Pardon Power and Victims’ Rights with Procedural Justice Principles*, 13 OHIO ST. J. CRIM. L. 89 (2015).

⁹² See, e.g., VINELINK, <https://www.vinelink.com>.

⁹³ CAL. CONST. art. I, § 28(b)(2)-(3).

⁹⁴ VA. CONST. art. I, § 8-A.

⁹⁵ See, e.g., CAL. CONST. art. I, § 28(b)(1) (victims have a right to “be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process”); TENN. CONST. art. I, § 35 (victims shall be entitled to the “right to be free from intimidation, harassment and abuse throughout the criminal justice system”); ILL. CONST. art. 1, § 8.1 (crime victims have the right to “right to be treated with fairness and respect for their dignity and privacy and to be free from harassment, intimidation, and abuse throughout the criminal justice process”).

⁹⁶ 18 U.S.C. § 3771(a)(1) (2006). See generally Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims’ Rights Act, and the Victim’s Right to be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 85-96 (2010).

⁹⁷ In the case of a mandatory release of an offender (e.g., releasing a defendant who has served the statutory maximum term of imprisonment), there is no such discretionary consideration to be made of a victim’s safety.

⁹⁸ See *supra* note 55 and accompanying text.

provisions binds a court. Rather, the provisions merely establish a requirement that due consideration be given to such concerns in the process of determining release.

G. THE RIGHT TO PROTECTION OF PRIVACY AND DIGNITY

Victims also have considerable privacy and dignity interests at stake in criminal proceedings.⁹⁹ Sexual-assault victims, for example, suffer the ultimate invasion of privacy from the crime, and run the risk of continued loss of privacy during the criminal justice process.¹⁰⁰ A criminal justice system should be structured so that it avoids unnecessary invasions of privacy and insults to dignity.¹⁰¹

Recognizing the legitimacy of protecting such victims' interests, about 20 states extend specific protections to crime victims for protection of their privacy and dignity interests. For example, California promises a victim a right "[t]o be treated with fairness and respect for his or her privacy and dignity."¹⁰² Arizona promises crime victims the right "[t]o be treated with fairness, respect, and dignity ... throughout the criminal justice process."¹⁰³ And Indiana extends to victims "the right to be treated with fairness, dignity and respect throughout the criminal justice process."¹⁰⁴ Federal law, too, guarantees crime victims "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy."¹⁰⁵

The precise scope of these general rights remains to be fully defined. At a minimum, such provisions provide constitutional dignity to various other enactments that help protect victim privacy. For example, some states have enacted so-called victim-counselor privilege laws, which enable victim counselors to maintain the confidentiality of information revealed to them by crime victims, subject of course to constitutional disclosure obligations.¹⁰⁶ Constitutional protection for victims' privacy may help to ensure that such statutes operate as intended.¹⁰⁷

As a way of developing the right of privacy, the proposed Florida amendment would specifically provide that the right of privacy "includes the right to refuse an interview, deposition, or other discovery request by the defense or anyone acting on behalf of the defendant and to set reasonable conditions on the conduct of any such interaction to which the victim consents." Other states have adopted virtually identical provisions.¹⁰⁸

⁹⁹ See generally Mary Graw Leary, *The Third Dimension of Victimization*, 13 OHIO ST. J. CRIM. L. 139 (2015).

¹⁰⁰ See Paul Marcus & Tora McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 S. CAL. L. REV. 1019 (1991).

¹⁰¹ Mary Margaret Giannini, *The Procreative Power of Dignity: Dignity's Evolution in the Victims' Rights Movement*, 9 DREXEL L. REV. 43 (2016).

¹⁰² CAL. CONST. art. I, § 28(b)(1).

¹⁰³ ARIZ. CONST. art. II, § 2.1.

¹⁰⁴ IND. CONST. art. I, § 13(b).

¹⁰⁵ 18 U.S.C. § 3771(a)(8).

¹⁰⁶ See, e.g., 735 ILL. COMPILED STAT. ANN. 5/8-802.1 (protecting confidentiality of statements made to rape crisis personnel). See generally Bonnie J. Campbell, *Preface to U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS: THE CONFIDENTIALITY OF COMMUNICATIONS BETWEEN SEXUAL ASSAULT OR DOMESTIC VIOLENCE VICTIMS AND THEIR COUNSELORS: FINDINGS AND MODEL LEGISLATION* (1995).

¹⁰⁷ See *People v. Turner*, 109 P.3d 639, 643 (Colo. 2005) (noting justifications for victim-counselor privilege); Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 907 (discussing victims' privacy interests).

¹⁰⁸ See, e.g., ARIZ. CONST., art. II, § 2.1(a)(5) (giving victims the right "[t]o refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant"); CAL. CONST., art. I, § 28(b)(5) (giving victims the right "[t]o refuse an interview, deposition, or discovery request by the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, and to set reasonable conditions on the conduct of any such

Florida law currently has an unusual procedure, in which victims in criminal cases can be deposed before trial.¹⁰⁹ Less than a dozen states allow victims to be deposed as a basic discovery procedure.¹¹⁰ In the vast majority of the states and in the federal system, the deposition is available in criminal cases primarily for the purpose of preserving the testimony of a witness likely to be unavailable at trial.¹¹¹ The proposed changes are a compromise approach, moving Florida law in the direction of the vast majority of other states. Under the proposed changes, a defendant would continue to be allowed to seek to depose a victim, but the victim would have the right to refuse that request or impose reasonable conditions on it.

H. THE RIGHT TO RESTITUTION

Finally, all states have recognized, to some degree, a crime victim's right to restitution,¹¹² and about 20 states have added a state constitutional right to restitution. For example, Illinois promises to a crime victim simply "[t]he right to restitution."¹¹³ North Carolina extends to a crime victim "[t]he right as prescribed by law to receive restitution."¹¹⁴ The California Constitution contains perhaps the most elaborate provision:

(A) It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.

(B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.

(C) All monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim.¹¹⁵

interview to which the victim consents."); S.D. CONST., art. I, § 29(6) (giving victims "[t]he right to privacy, which includes the right to refuse an interview, deposition or other discovery request, and to set reasonable conditions on the conduct of any such interaction to which the victim consents").

¹⁰⁹ Fla. R. Crim.P. 3.220(h).

¹¹⁰ See generally 5 WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 20.2(e) (4th ed. 2009 & 2017 Supp.).

¹¹¹ See *id.*; see, e.g., *Tharp v. State*, 362 Md. 77, 763 A.2d 151 (2000) (court has no authority to order deposition in criminal case except as authorized by statute or court rule, and rule here does not authorize discovery deposition); *McDole v. State*, 339 Ark. 391, 6 S.W.3d 74 (1999) (the ability to question adverse witnesses as mandated by the confrontation clause "does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony"; neither is there a denial of equal protection because depositions are available as to all witnesses in civil cases, as the procedural distinctions between the two classifications are "real and not feigned" and have a grounding relevant to the purpose for which classification is made).

¹¹² PEGGY M. TOBOLOWSKY ET AL., CRIME VICTIM RIGHTS AND REMEDIES 171 (3d ed. 2016). Notably, Florida does not afford a constitutional right to restitution but it does have a statutory provision. See Fla. Stat. Ann. § 775.089(1)(a) ("In addition to any punishment, the court shall order the defendant to make restitution to the victim for: 1. Damage or loss caused directly or indirectly by the defendant's offense; and 2. Damage or loss related to the defendant's criminal episode, unless it finds clear and compelling reasons not to order such restitution.").

¹¹³ MICH. CONST. art. I, §(a)(12). For discussion of Illinois' provision, see Jeffrey A. Parness, *The New Illinois Constitutional Crime Victim Restitution Right: A Revolutionary Amendment?*, 27 DCBA BR. 26 (2015).

¹¹⁴ N.C. CONST. art. I, § 37(1)(c).

¹¹⁵ CAL. CONST. art. I, § 28(b)(13).

Congress has also enacted broad restitution provisions in the federal system. In the Mandatory Victims Restitution Act,¹¹⁶ Congress required federal courts to enter a restitution order in favor of victims for crimes of violence. The law provides that “[n]otwithstanding any other provision of law, when sentencing a defendant convicted of [a crime of violence as defined elsewhere,] the court *shall* order ... that the defendant make restitution to the victim of the offense.”¹¹⁷ In justifying this approach, the Judiciary Committee explained that “the principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time.”¹¹⁸ While restitution is critically important, the committee also found that restitution orders were only sometimes entered and, in general, “much progress remains to be made in the area of victim restitution.”¹¹⁹ Accordingly, restitution was made mandatory for crimes of violence in federal cases.

The exact contours of these restitution provisions are yet to be defined. While some decisions interpret restitution provisions broadly to ensure that victims have been made whole,¹²⁰ other courts appear to be unwilling to give any real content to constitutional protections for a victim's right to restitution.¹²¹ And new crimes have posed particularly vexing challenges, such as the issues surrounding how to provide full restitution for victims of child-pornography crimes when many widely distributed offenders are responsible for the victims' losses.¹²²

Under restitution provisions, courts are often required to enter an order of restitution against the convicted offender. However, frequently offenders lack the means to make full restitution payments immediately. Accordingly, even in the face of full restitution orders, the courts can establish an appropriate repayment schedule and enforce it during the period of time in which the offender is under the court's jurisdiction.¹²³

In determining the contours of the victims' restitution right, well-established bodies of law can be examined.¹²⁴ Moreover, details are often explicated in implementing legislation accompanying state amendments. For instance, in determining the compensable losses, an implementing statute might rely on the current federal statute, which includes among the compensable losses medical and psychiatric services, physical and occupational therapy and rehabilitation, lost income, the costs of attending the trial, and in the case of homicide, funeral expenses.¹²⁵ It is important to understand that victims' interests and defendants' interests can sometimes align on restitution. A defendant who pays restitution may be able to raise a well-deserved claim for mitigation of other penalties, perhaps gaining a shorter term of

¹¹⁶ 18 U.S.C. §§ 3663A, 3664.

¹¹⁷ 18 U.S.C. § 3663A(a)(1) (emphasis added).

¹¹⁸ S. REP. NO. 104-179, at 12-13 (1995) (*quoting* S. REP. NO. 97-532, at 30 (1982)). This report was later adopted as the legislative history of the MVRA. See H.R. CONF. REP. NO. 104-518, at 111-12 (1996).

¹¹⁹ S. REP. NO. 104-179, at 13.

¹²⁰ See, e.g., *United States v. Kaplan*, 839 F.3d 795, 800-03 (9th Cir. 2016) (allowing restitution to capture “sentimental value” of destroyed property).

¹²¹ See, e.g., *A.B. v. Lynch*, No. CV-16-0192-PR (Ariz. 2017) (petition for review granted, and then later dismissed, regarding review of trial court decision upholding an artificial \$10,000 cap on restitution in certain traffic-related criminal cases despite Arizona constitutional provision guaranteeing right to “receive prompt restitution” from a convicted defendant).

¹²² See, e.g., *Paroline v. United States*, 134 S. Ct. 1710 (2014) (reversing order for full restitution to child pornography victim and ordering only proportional restitution).

¹²³ Cf. 18 U.S.C. § 3664 (establishing restitution procedures).

¹²⁴ See generally Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of Criminal Courts*, 30 UCLA L. REV. 52 (1982). Cf. RESTATEMENT (FIRST) OF RESTITUTION (2011) (setting forth established restitution principles in civil cases).

¹²⁵ See 18 U.S.C. § 3663A.


imprisonment or perhaps even no imprisonment at all so that he can continue to work and make restitution payments to victims.¹²⁶

III. THE FUTURE OF CRIME VICTIMS' RIGHTS IN FLORIDA

Given the emerging consensus concerning victims' rights as reflected in many state constitutions as well as in federal law, Florida should not simply rest on the nearly thirty-year-old provision currently in its constitution.¹²⁷ Instead, Florida should, through its established and recognized procedures, expand the protections contained in its provision to cover the rights reflected in provisions enacted across the country and reflected in Marsy's Law.

Looking at the roughly 35 states where victims' rights amendments currently exist, Florida's amendment is among the most limited. This is unsurprising since, as noted earlier, Florida was one of the very first states to adopt constitutional protections for crime victims in 1988. In the nearly three decades since, we have learned a great deal about protecting crime victims' rights – knowledge that should be imported into the Florida Constitution.

Related to these coverage limitations are implementation problems. Victims' rights advocates have long been concerned that current enactments “frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, [or] sheer inertia.”¹²⁸ As the Justice Department reported in 1997:



[E]fforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate. Victims[] rights advocates have sought reforms at the State level for the past 20 years and many States have responded with State statutes and constitutional provisions that seek to guarantee victims' rights. However, these efforts have failed to fully safeguard victims' rights. These significant State efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.¹²⁹

While more recent and comprehensive statistics are lacking, the general consensus appears to be that victims' rights “enforcement is wildly uneven.”¹³⁰ The limited statistics that are available present cause for concern. Consider, for example, one of the seemingly simplest rights to extend: the right to notice of court hearings. In the federal system, despite the CVRA extending a right to notice to crime victims (and the availability of federal resources), many victims continue to be unaware of that right. A GAO report, for

¹²⁶ Carissa Byrne Hessick & Douglas A. Berman, *Towards A Theory of Mitigation*, 96 B.U. L. REV. 161, 194 (2016) (reporting survey finding “strong agreement among judges that victim compensation could be mitigating”); see also Benji McMurray, *The Mitigating Power of a Victim Focused Sentencing*, 19 FED. SENT’G REP. 125 (2006); but cf. Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home*, 54 S.C. L. REV. 649, 673 (2003) (arguing that “the victim’s rights movement further imperils the traditional goals of sentencing in that it tends, by its nature, to serve only the goal of retribution”).

¹²⁷ See generally Paul G. Cassell, *The Maturing Victims’ Rights Movement*, 13 OHIO ST. J. CRIM. L. 1 (2015).

¹²⁸ Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5.

¹²⁹ *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the S. Comm. on the Judiciary*, 105th Cong. 64 (1997) (statement of Janet Reno, U.S. Att’y Gen.).

¹³⁰ BIBAS, *supra* note 2, at 90.

example, found that approximately 25 percent of the responding federal crime victims were unaware of their right to notice of court hearings.¹³¹ Even larger percentages of failure to provide required notices were found in a survey of (presumably less well-funded) state criminal justice systems.¹³² Distressingly, the same survey found that racial minorities were less likely to be notified than their white counterparts.¹³³

Against this backdrop, it would make sense to push for strengthening of prominence and enforcement of the crime victims' provision in the Florida Constitution. The Marsy's Law formulation adopted recently in other states contains clear enforcement mechanisms for crime victims, by directly providing standing to pursue judicial enforcement¹³⁴ as well as the right to a prompt trial-court decision and, if necessary, appellate review. Such clear provisions—lodged in state constitutions—offer the mechanism for fully vindicating crime victims' important interests.

RECOMMENDATION

To ensure appropriate protection for crime victims in the criminal justice process, Florida should amend its existing crime victims rights provision by adopting a more comprehensive "Marsy's Law" provision as soon as possible.

¹³¹ U.S. GOV'T ACCOUNTABILITY OFFICE, CRIME VICTIMS' RIGHTS ACT: INCREASING AWARENESS, MODIFYING THE COMPLAINT PROCESS, AND ENHANCING COMPLIANCE MONITORING WILL IMPROVE IMPLEMENTATION OF THE ACT 82 (Dec. 2008).

¹³² National Victim Center, *Comparison of White and Non-White Crime Victim Responses Regarding Victims' Rights*, in BELOOF, CASSELL & TWIST, *supra* note 8, at 631-34.

¹³³ *Id.*

¹³⁴ See Lawrence Schlam, *Enforcing Victims' Rights in Illinois: The Rationale for Victim "Standing" in Criminal Prosecutions*, 49 VAL. U.L. REV. 597 (2015).

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SPEAKER BIOGRAPHY



STACY A. SCOTT

Public Defender, Eighth Judicial Circuit of Florida

Stacy A. Scott was appointed Public Defender of the Eighth Judicial Circuit by Governor Charlie Crist in 2010, and was subsequently elected to the office in 2012 by the people of the Eighth Judicial Circuit. As Public Defender, Ms. Scott passionately defends the rights of indigent people accused of crimes and has dedicated her entire professional career to ensuring fairness and integrity in our criminal justice system.

Prior to becoming the elected Public Defender, she served as an Assistant Public Defender in the Eighth Judicial Circuit for over 10 years, including as the County Court Supervisor for the Public Defender's Office. In her role as County Court Supervisor, Ms. Scott was responsible for training and supervising all Assistant Public Defenders practicing in the misdemeanor divisions. She has also practiced in the juvenile division of the Public Defender's Office, advocating for the rights of children charged with crimes, and in the felony division. She has also served as an Assistant State Attorney, and worked in the private sector as a criminal defense attorney.

Ms. Scott is committed to the highest degree of ethics and professionalism in the practice of law. She has served on the Florida Bar Grievance Committee and the Florida Bar's Commission on Review of the Discipline System. She is currently an Adjunct Faculty member at the University of Florida Levin College of Law where she has served as the Intern Director for the school's Public Defender Clinic and an instructor in the Trial Practice program. As the coach of the UF Law Trial Team, she lead the team to two national civil rights championships in 2005 and 2007. She is also an instructor at the Gerald T. Bennett Prosecutor and Public Defender Trial Training Program.

Ms. Scott earned her Bachelor's Degree and her Juris Doctor, with Honors, from the University of Florida.



Florida Public Defender Association, Inc.

December 6, 2017

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*Blair Payne
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Twentieth Circuit*

**INTERIM EXECUTIVE
DIRECTOR**
Nancy Daniels

GENERAL COUNSEL
Robert Trammell

COMMENTS ON CRC PROPOSAL 96

The Public Defenders appreciate efforts to protect the victims of crime in our state. As active daily participants in our criminal justice system, we have extensive contact with victims and have great familiarity with the tremendous difficulties they experience. At the same time, as Public Defenders, we are charged with protecting the constitutional rights of all citizens by ensuring the fairness of our justice system and protecting its truth-seeking function. For that reason, we have serious and well-founded concerns about certain sections of Proposal 96.

Florida law already contains many of the same protections for victims

Florida has a long history of recognizing and protecting the rights of crime victims. In 1984, the legislature passed the Victim and Witness Protection Act which strengthened victims' right to be heard at sentencing and required courts to order restitution. It directed all criminal justice officials to develop and implement guidelines for the treatment of victims and witnesses, ensuring that they were informed about crime victim compensation, community treatment programs, and the availability of protection. In addition, victims were guaranteed the right to be notified of arrests, releases from imprisonment, court dates and appellate proceedings of the accused. State Attorneys were specifically required to consult with victims about plea agreements and pretrial diversion programs.

In 1988, the legislature proposed and voters approved a constitutional amendment to include rights of crime victims in Section 16 of Article I. That provision gives victims the right to be informed, to be present, and to be heard at all crucial stages of criminal proceedings to the extent these rights do not interfere with the constitutional rights of the accused.

There are many other provisions in statute and rules of procedure that protect victims. Florida Rule 3.131 requires courts to consider the probability of danger in setting pretrial release conditions for defendants. The discovery deposition rule allows the videotaping of sensitive witnesses and prohibits the presence of the defendant. Expungement of records for serious offenses is not allowed. Administratively, State Attorneys, Sheriffs

and Police Departments have victim assistance units that serve victims, accompany them during depositions and court proceedings, and assist them with compensation. Therapy dogs are used with children and other fragile victims. The Department of Offender Review has an extensive victim outreach program that assists victims who wish to testify at parole hearings. This year's legislature passed the Witness to Murder bill that protects the confidentiality of witness information except as necessary for court proceedings. In summary, there is already an extensive network of protections for victims in Florida.

Allowing victims to refuse depositions and block information requests would violate federal due process rights and confrontation rights of defendants

The federal constitution guarantees due process of law to every criminal defendant and contains the confrontation clause which grants a defendant the right "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 defence." Proposal 96 threatens these guarantees by giving victims the state constitutional right to "be reasonably protected from the accused and any person acting on behalf of the accused" and to "refuse an interview, deposition, or other discovery request by the defense." The longstanding federal rights of defendants and the proposed state constitutional rights for victims are largely incompatible. Reasonably balanced statutes and rules can and do exist to protect the safety and privacy of victims, but the federal confrontation clause requires that defendants be able to confront their accusers in court and obtain relevant statements and evidence about their cases.

Allowing victims to refuse interviews and depositions might actually increase the number of public hearings at which they will be required to testify

Florida's method of charging people with crimes is unique and requires transparency that would be compromised by the proposal. Most states require an indictment by a grand jury composed of citizens to charge a person with a crime. In contrast, Florida allows prosecutors to charge crimes without review by citizens in written documents called Informations. The courts have upheld this system only because our rules of procedure allow defendants pre-trial access to witness names and information. Changing current rules to allow victims to refuse depositions and prevent disclosure of relevant information would upset the balance of

our current system and return Florida to a system in which preliminary court hearings are required to detain a defendant. This would require witnesses to testify publicly at court hearings immediately after a defendant's arrest. Most victims currently do not have to testify in public proceedings because 96% of criminal cases are resolved by dismissals or plea bargains after full discovery takes place. Therefore, we believe this section of the proposal would be a step backwards for victims who are reluctant to testify in public hearings.

The provision requiring restitution to be the first payment in the distribution of court costs paid by defendants will disrupt the funding of trust funds that benefit crime victims and supplement State Attorney and Public Defender Offices

We share the belief that full restitution for crimes should be paid by defendants. However, we feel it is important to point out that other payments made by defendants support the Crime Compensation Trust Fund and other trust funds that benefit crime victims and law enforcement programs. In addition, State Attorney and Public Defender Offices are dependent on the share we receive from the court costs and fees paid by defendants.

All payments made by defendants are split between restitution and numerous other trust funds, including the Crime Compensation Trust Fund, State Attorney Revenue Trust Fund and the Indigent Criminal Defense Trust Fund. The legislature determines the budgets of State Attorneys and Public Defenders on the assumption that these trust funds will supplement our General Revenue appropriations. Because many defendants are indigent, however, only a fraction of the various costs are ever paid. It must be clearly understood that if the restitution provision of CRC proposal 96 becomes law and all payments go first to restitution, the Crime Compensation Trust Fund, other trust funds benefiting victims and law enforcement, and State Attorney and Public Defender budgets will be significantly reduced. As a necessary result, additional General Revenue funding will be needed to offset the resulting loss of funds.

The speedy trial provision in Proposal 5 goes further than similar provisions in other states and would threaten the fairness of trials in which defendants do not have adequate time to prepare

CRC Proposal 96 has a unique provision allowing the state to file a demand for a speedy trial within 15 days, irrespective of the defendant's degree of

preparation for trial. This goes further than the speedy trial language in other “Marsy’s Law” states. In California, for example, victims are given the right to “a speedy and a prompt and final conclusion of the case.” Montana and North and South Dakota’s provision are similar. In Illinois, the victim has the “right to timely disposition of the case following the arrest of the accused.” No state goes as far as allowing the state the constitutional right to force a defendant to trial no matter how unprepared the defense might be. We believe this provision is overbroad and would be subjected to immediate federal and state legal challenges.

There are already challenges to Marsy’s Law in other states

California’s version of this proposal was upheld against an ex post facto challenge but its courts have struggled with the restitution provisions. Other states that passed it have grappled with whether it applies to petty crimes and traffic offenses as well as serious crimes. The Montana legislature has now passed a statute limiting the constitutional provision to serious enumerated offenses. There is another challenge to the law pending in Montana; it has been stayed pending the outcome of the litigation. In North Dakota, the law was challenged under the Open Records law and limited to only a victim’s contact information.

Similarly, we believe that passage of this proposal would lead to protracted litigation in Florida that would take many years to resolve. For this reason, we do not believe it is advisable to put it forward, especially since established Florida law already provides many, if not most, of the same protections.

The section limiting the time periods for appeals and post-conviction motions goes further than other states, would likely be limited by the courts, and would have a tremendous fiscal impact on our state

Public Defenders support the idea of speeding up the appellate process, but we and other agencies that handle appeals and post-conviction litigation would need much more funding to accomplish that goal. Moreover, hard and fast deadlines like those set out in Proposal 96 have generally not been upheld by the courts.

None of the victim’s rights amendments adopted by other states set out specific time deadlines for the completion of appellate proceedings. As mentioned previously, victims in these states generally are guaranteed the

right to a prompt and final conclusion of the case, but no specific time limitations are required.

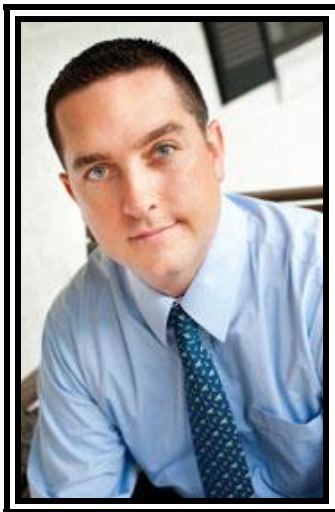
In 2000, the Florida legislature attempted a similar time limitation for capital cases in the Death Penalty Reform Act. Parts of this effort remain in law today. Postconviction motions must be filed within one year of affirmance on appeal. The Florida Supreme Court must annually report the status of each capital case pending more than 3 years to the legislature, and a rule of procedure imposes a 180-day time standard for the issuance of appellate decisions. In addition, circuit and district courts of appeal are required to report to the Chief Justice on cases that exceed the time standards. However, the courts did not uphold the hard time deadlines in the Act, finding that those provisions violated the separation of powers provisions of the Florida Constitution.

Even if allowed by the courts, we believe that a strict two-year limitation on noncapital appellate proceedings and a five-year limitation on capital appeals would not be achievable. There are many things that can slow down an appeal unintentionally, including delays by court reporters in preparing the trial transcripts, sentencing errors that must be corrected by the trial courts before the appeal can proceed, and case overloads that delay briefing by the state and the defense. Funding the judges, attorney general attorneys, public defenders and post-conviction attorneys necessary to implement this proposal would cost the state a great deal more money. In summary, we believe that creating a deadline that goes beyond the language in other states would face significant legal, practical, and fiscal challenges in our state.

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SPEAKER BIOGRAPHY



LUKE NEWMAN, ESQ.

Luke Newman, P.A.

Florida Association of Criminal Defense Attorneys, Director-at-Large

B.A., University of Texas

J.D., Florida State University College of Law

Luke Newman is a Florida Bar Board Certified Criminal Appellate Lawyer practicing in Tallahassee, Florida. Mr. Newman is an experienced defense attorney who began his practice in 2004 as part of a small law firm handling only criminal matters, from civil traffic infractions to murder appeals. In 2009, he opened his own law practice dedicated to criminal trial advocacy and criminal appeals.

Mr. Newman is the immediate-past Chair of the Florida Bar Criminal Law Certification Committee which tests and evaluates other attorneys (including prosecutors and judges) seeking criminal law board certification. He has also been elected by his peers to statewide leadership positions in the Florida Association of Criminal Defense Attorneys, serving as Director-at-Large and Chair of the Legislative Committee.

Mr. Newman frequently serves as a speaker on criminal defense practice at statewide seminars for other defense attorneys, including seminars on appellate preservation, preserving sentencing errors for review, and improper closing arguments. He has been awarded the “Superb” rating in the AVVO criminal defense attorney client assessment rankings.



Florida Association of Criminal Defense Lawyers Summary Comments Against Proposal 96

December 11, 2017

There are many concerns regarding Proposal 96, but there are three major ones: 1) the need for increased public expenditures; 2) increased public exposure of the victim; and 3) violations of the Constitutional protections afforded an accused.

Proposal 96 will result in a spike to the costs paid by the tax payers of Florida due to several factors. The requirement in Proposal 96 of restitution being paid prior to any money towards government costs or fees will take away the already limited funding to court clerks throughout the state. Without the flexibility of the judicial process, allowing time to complete full and meaningful discovery and factually based negotiations outside the courtroom, more cases will result in trial. Proposal 96 will allow the victim to prevent meaningful discovery, rendering negotiations less likely to occur. More state funding will be needed for judges, prosecutors, public defenders, court personnel and overtime pay for testifying law enforcement officers. Appellate costs covered by the tax payers of Florida will also rise due to challenges not only to this provision if approved, but also to the additional issues raised at trial in the appellate courts.

With the increase in trials, comes the increased exposure of victims to testimony and cross-examination at public trials and possible retrials ordered after appeal. A full and fair discovery process has a better chance of leading to negotiations, making the need for public exposure unnecessary.

Our judicial system is based upon the accused having a presumption of innocence, with this presumption of innocence important rights allow the accused protections from accusations brought for vengeful or selfish purposes. The well-established federal and state Constitutional rights, such as due process of law, are disregarded by Proposal 96. There are established protections for victims already within Florida law. The best manner to improve upon those protections or to provide more incentive to enforce those protections, are by means other than a constitutional amendment.

The protection of victim rights is a worthy goal, as is protection of the rights of the accused. Both deserve a fair justice system, as not all criminal defendants are guilty and not all victims are actual victims.

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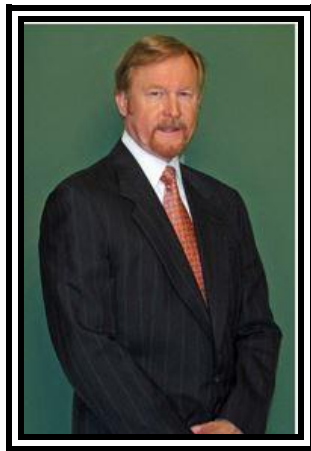
Tallahassee, FL 32302

OFFICE 850.385.5080/ FAX 850.385.6715

CONSTITUTION REVISION COMMISSION

2017 - 2018

SPEAKER BIOGRAPHY



JAY HOWELL, ESQ.

Jay Howell & Associates, Jacksonville, FL

Jay Howell is a Jacksonville attorney representing individuals who have been hurt in automobile accidents, those who have been victimized by drunk drivers, and children and adults who are victims of assaults, sexual crimes, child abuse and other criminal activity.

Mr. Howell began his legal career as a criminal defense attorney in Dallas, Texas. He later served for four years as an Assistant State Attorney in Jacksonville, Florida, specializing in cases involving sexual crimes and child abuse. In 1981, he was appointed Chief Counsel to the United States Senate Subcommittee on Investigations and Oversight where he conducted Senate investigations and drafted federal legislation and policy papers addressing the issues of missing children, child kidnaping, child pornography, and the investigation and apprehension of serial murderers. He also founded, and served as the first Executive Director of, the National Center for Missing and Exploited Children.

In 1990, Mr. Howell was appointed by Governor Bob Martinez to the Florida State Crime Commission to represent the viewpoint of crime victims. He has also served as a member of the American Bar Association's Task Force on Child Witnesses, the Board of Advisors for the Florida Council Against Sexual Violence, the Florida Network of Victim/Witness Services, and chaired the Florida Bar Crime Victims Subcommittee on the Rights of Women and Children. For the past twenty years, he has conducted annual training seminars for the Office of the Florida Attorney General on the rights of the victims of child abuse and other crimes.

Mr. Howell has received the National Crime Victims Service Award, and been recognized for his work with crime victims by the ABA Criminal Justice Section, the National Crime Victim Law Institute, and the National Organization For Victim Assistance among others.

WORKSHOP ON ARTICLE I, SECTION 16(B): VICTIMS' RIGHTS

DECLARATION OF RIGHTS COMMITTEE

December 12, 2017

8 AM – 12PM

110 Senate Office Building, Tallahassee, Florida



WORKSHOP PACKET
TAB 4



Florida Police Chiefs Association

Quality Law Enforcement for the Sunshine State

December 11, 2017

Tashiba Robinson, Staff Director
Declaration of Rights Committee
Florida Constitution Revision Commission

RE: Proposal 96, Declaration of Rights, Rights of Accused and of Victims

Dear Director Robinson:

While the Florida Police Chiefs Association (FPCA) is extremely concerned for and supportive of victim rights, we do have concerns with proposal 96 as currently presented. Our Attorney reviewed the proposal and offers the following items for consideration as you workshop this important issue and proposal.

Paragraph (3) at line 39: this provides for the constitutional right to be “reasonably protected.” This is very problematic because it establishes a duty for law enforcement to protect crime victims. What does that mean? It is undefinable. It also completely abrogates existing law regarding the government’s duty to protect individual citizens. Generally, the government (including law enforcement) does not have a duty to protect individual citizens. Its duty runs to the population as a whole. Therefore, the police cannot be held liable for not preventing crime. The law currently allows for exceptions where there is a “special relationship” between the police and the citizen. The two most common involve circumstances where: (1) the government puts a citizen in a foreseeable zone of risk; and (2) where the citizen detrimentally relies on the affirmative representation of the government. An example of the first: An officer conducts a traffic stop and directs the driver to stand between his car and the motorist’s car. The officer’s car is rear-ended by another motorist which injures the stopped driver. The officer/agency has a duty to that person because he was detained and because the officer told him to stand in a dangerous area (between the two cars). An example of the second: A caller phones 911 and says he is on the way to the ER with an injured person. The dispatcher tells him to stop and wait for the ambulance and he complies, but the ambulance is never sent. The caller detrimentally relied on the representations of the 911 operator, thereby resulting in harm. Here, this provision suggests that a crime victim – if again victimized – could result in negligence claims against law enforcement for failing to “reasonably protect” the victim. I strongly recommend the association oppose because this opens the door to a myriad of factual circumstances where agencies or officers could be sued for failing to protect crime victims. Short of putting an officer with the victim, and even then, it is a nearly impossible standard.

Paragraph (5) at line 45: this provision provides a victim the right to prevent disclosure of information that could be used to locate or harass the victim or the victim’s family. This contradicts Chapter 119 and is inconsistent with Florida’s broad public records laws. Additionally, it is extremely overbroad and undefined. Does this right extend to the right to prevent law enforcement from providing this information to the State Attorney? If yes, then it would effectively preclude the prosecution of crimes in cases where the victim invokes this right.

Paragraph (6) at line 49: this provision provides the “right to privacy” and specifically includes the right to refuse to be interviewed, deposed or participate in any discovery by a defense attorney. Again, this would effectively prevent the prosecution of the crime resulting in the victimization.

Page 2: Proposal 96, Declaration of Rights, Rights of Accused and of Victims

Constitutional requirements provide the right to confront one's accuser, and the State's inability to compel a victim/witness to participate in the legal process would result in the offender going free.

Paragraph (7)(a) at line 56: this provision provides the victim the right to notice and the ability to be heard at all public proceedings, including but not limited to the trial. This is problematic for several important reasons. First, if there was an error or oversight and the victim was not notified, it would constitute a constitutional violation. Second, and perhaps more concerning is the victim's right to testify at trial. The rules of evidence are very narrow for trials and the improper mentioning of several factors can result in a mistrial. To provide a victim the unilateral right to address the jury will have serious detrimental effects on the administration of justice. Again, this runs the risk of setting accused free.

These concerns are not shared with other proceedings that occur in front of the judge only because he or she can give the statement the weight it deserves and can disregard inadmissible evidence.

Paragraph 7(g) at line 88: this provision provides the victim rights regarding post-conviction proceedings. This will result in a significant burden to the state, whether the prosecutor or the AG's office to notify victims of post-conviction appellate proceedings. Even more concerning is the proposed right to "participate in the processes." This is so broad it would permit the victim to file papers in court during an appeal. While there is little risk the courts would consider the non-legal merits of the filings, it may complicate and delay the proceedings.

Paragraph 10 at line 108: this provision provides the right to full and timely restitution for crime victims and prioritizes payments to them over the government. This will have disastrous consequences because the State and the Courts would not be permitted to allow someone to plea without full restitution. The requirement to full and timely restitution will result in a significant number of violations of probation, a tremendous drain on the system, and a dramatic increase in the imprisonment of those who cannot pay restitution. This is counter-intuitive anyway, because if someone is in prison, they cannot earn money to pay restitution. Also, if all restitution must be paid before the government receives its share, then all of the clerk of court costs, probation costs, monitoring fees will go unpaid and the system will likely shut down. The courts, Department of Corrections and the probation departments rely on the offenders paying fees, and this would effectively eliminate that revenue stream.

Paragraph (11) at line 115: this provision provides the right to proceedings free from unreasonable delay and prompt and final adjudication. This conflicts with the Defendant's constitutional rights to prepare for trial and to assert any post-conviction motions and appeals as legally permissible. This is an unenforceable provision because the rights of the accused will take precedence. (notwithstanding the provision at line 31 that equates the victim's rights with the accused's.

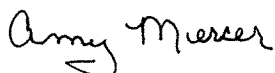
Paragraph 11(b) at line 124: this provides a 2-year deadline for all post-conviction appeals. They would need to double the size of the appellate courts. Additionally, this would implicate the rules of procedure, over which the Florida Supreme Court has exclusive jurisdiction. In my opinion, compliance with this provision is an impossible goal.

Paragraph 12 at line 134: this specifies that all victims be notified of their rights in the form of a "card." This is yet another administrative burden to a system that is already taxed beyond reason.

Paragraph (c) at line 139: this section provides that a victim can intervene in any legal proceeding as a matter of right. This will cause an explosion of litigation and will result in significant delays to the adjudication of cases.

If I may offer additional information, please contact me at 850-219-3631 or by email to amercer@fpca.com.

Sincerely,



Amy Mercer, Executive Director

Cc: FPCA Board of Director and Members

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

12/12/2017

Meeting Date

Proposal Number (if applicable)

*Topic ~~Prop~~ Victims' Rights Amendment

Amendment Barcode (if applicable)

*Name Mary Margaret Giannini

Address 33 W. 3rd St.

Phone

Street

Jacksonville

FL

32206

Email

City

State

Zip

*Speaking: ☐ For ☐ Against ☒ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☒ No

If yes, who?

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

*Required

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

12/12/17

Meeting Date

96

Proposal Number (if applicable)

*Topic Victims Rights Workshop

Amendment Barcode (if applicable)

*Name Luke Newman, Esq.

Address c/o Luke Newman P.A.

Phone 850-224-4444

Street

City

Tallahassee, FL

State

Zip

Email luke@lukenewmanlaw.com

*Speaking: ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☐ No

If yes, who? FL Assoc of Criminal Defense Lawyers

Are you a registered lobbyist? ☐ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☐ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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*Required

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

12/12/17
Meeting Date

96
Proposal Number (if applicable)

*Topic Victims Rights Workshop

Amendment Barcode (if applicable)

*Name Ms. Stacy A. Scott

Address Public Defender, 8th Judicial Circuit Phone 352 338 7370
Street

Gainesville, FL
City State Zip

Email scotts@pdo8.org

*Speaking: ☐ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☐ No

If yes, who? FL Public Defender Association

Are you a registered lobbyist? ☐ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☐ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

*Required

CONSTITUTION REVISION COMMISSION
APPEARANCE RECORD
(Deliver completed form to Commission staff)

Meeting Date _____

Proposal Number (if applicable) _____

*Topic

Victims Rights

Amendment Barcode (if applicable) _____

*Name

Jay Howell

Address

644 CANARY BLVD #250

Phone

904-680-1234

Street

JACKSONVILLE FL 32211

Email

jay@jayhowell.com

City

State

Zip

*Speaking: ☐ For ☐ Against ☒ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☒ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

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***Required**

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

12-12-17

Meeting Date

96

Proposal Number (if applicable)

*Topic

Marsy's Law

Amendment Barcode (if applicable)

*Name

Paul Cassell

Address

Univ. of Utah College of Law

Phone

801-585-5202

Street

Salt Lake City

UT

84112

City

State

Zip

Email

Cassellp@law.utah.edu

*Speaking:

☒ For

☐ Against

☐ Information Only

Waive Speaking:

☒ In Support

☐ Against

(The Chair will read this information into the record.)

Are you representing someone other than yourself?

☒ Yes

☐ No

If yes, who?

Marsy's Law for FL

Are you a registered lobbyist?

☐ Yes

☒ No

Are you an elected official or judge?

☐ Yes

☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

*Required

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

12/12/17

Meeting Date

96

Proposal Number (if applicable)

*Topic

Workshop on victims rights

Amendment Barcode (if applicable)

*Name

Richard A. Greenberg

Address

101 N. Monroe St. Suite 120

Phone

850. 222. 6550

Street

Tallahassee

FL

32301

Email

rgreenberg@rumber.com

City

State

Zip

*Speaking:

☐

For

☐

Against

☐

Information Only

Waive Speaking:

☐

In Support

☒

Against

(The Chair will read this information into the record.)

Are you representing someone other than yourself?

☒

Yes

☐

No

If yes, who?

Florida Assoc. of Criminal Defense Lawyers;

Criminal Lgn
Section The
Florida Bar

Are you a registered lobbyist?

☐

Yes

☒

No

Are you an elected official or judge?

☐

Yes

☒

No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

*Required

CONSTITUTION REVISION COMMISSION
APPEARANCE RECORD

(Deliver completed form to Commission staff)

12-12-17

Meeting Date

96

Proposal Number (if applicable)

*Topic

Victims Rights Const. Amend

*Name

Becky Barlow

Address

PO Box 1528

Phone

850385 5080

Street

Tallahassee

FL 32301

Email

becky@facdl.org

City

State

Zip

*Speaking:

☐

For

☐

Against

☐

Information Only

Waive Speaking:

☐

In Support

☒

Against

(The Chair will read this information into the record.)

Are you representing someone other than yourself?

☒

Yes

☐

No

If yes, who?

FL Assoc Criminal Defense Lawyers

Are you a registered lobbyist?

☐

Yes

☒

No

Are you an elected official or judge?

☐

Yes

☒

No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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*Required

CONSTITUTION REVISION COMMISSION
APPEARANCE RECORD

(Deliver completed form to Commission staff)

12/12/2017

Meeting Date

Proposal Number (if applicable)

*Topic Marcy's Law

Amendment Barcode (if applicable)

*Name Michael J Liles

Address 94 East 59th Street

Phone 904-655-3733

Jacksonville FL 32208
City State Zip

Email mjliles@justicecoalition.org

*Speaking: ☒ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☒ Yes ☐ No

If yes, who? Victims in Jacksonville of violent crime

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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***Required**

CONSTITUTION REVISION COMMISSION
APPEARANCE RECORD

(Deliver completed form to Commission staff)

12/12/2017

Meeting Date

96

Proposal Number (if applicable)

*Topic

MARSY'S LAW

Amendment Barcode (if applicable)

*Name

JENNIFER L. DRITT

Address

4320 N. PARK AVE, STE 100

Phone

(850) 297-2000

Street

MILWAUKEE

FL

32301

City

State

Zip

Email

jdritt@marsys.org

*Speaking:

☒ For

☐ Against

☐ Information Only

Waive Speaking:

☐ In Support

☐ Against

(The Chair will read this information into the record.)

Are you representing someone other than yourself?

☒ Yes

☐ No

If yes, who?

FLORIDA COUNCIL AGAINST SEXUAL VIOLENCE

Are you a registered lobbyist?

☒ Yes

☐ No

Are you an elected official or judge?

☐ Yes

☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

*Required

CONSTITUTION REVISION COMMISSION

2017 - 2018

PRESENTER BIOGRAPHY



SHANNON L. NOVEY, ESQ.

Managing Partner, Novey Law Firm

B.A., Florida State University

J.D. (with honors), Florida State University

Ms. Shannon L. Novey, is the Managing Partner of the Novey Law Firm in Tallahassee, Florida, and a Florida Bar Board Certified Marital and Family Law Practitioner. In 2015, the Novey Law Firm was honored as Best Law Firm for Family Law in the Tallahassee Metro area and ranked tier 1 by U.S. News and World Report Best Lawyers.

Prior to joining Novey Law, Ms. Novey was an Assistant Chief Counsel with the Pension Benefit Guaranty Corporation, representing the agency's interests across the country in corporate reorganizations under Chapter 11 of the Bankruptcy Code and in ERISA litigation. She has applied her prior experience in corporate financial and regulatory transactions to complex family matters relating to property division, alimony, and custody and support of children.

She is a fellow in the American Academy of Matrimonial Lawyers, a member of the Florida Bar Family Law Section Certification Committee, and a former adjunct professor at the FSU College of Law where she taught Florida Family Law Practice. Ms. Novey was selected by her peers for inclusion in the Best Lawyers of America from 2013-2016 (Tallahassee Family Law Lawyer of the Year for 2014-2015), named Florida Trend's Florida Legal Elite from 2013-2016, and selected as a Florida Super Lawyer in 2015.

Ms. Novey is a member of the Florida Bar, District of Columbia Bar, the Tallahassee Women Lawyers, and the William H. Stafford American Inn of Court (Master Lawyer).

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

12/12/17

Meeting Date

64

Proposal Number (if applicable)

*Topic Grandparent Visitation Rights

Amendment Barcode (if applicable)

*Name Shannon L. Novey, Esq.

Address 40 Novey Law

Phone 850-224-4000

Street

City

Tallahassee, FL

State

Zip

Email Shannonnovey@noveylaw.com

*Speaking: ☐ For ☐ Against ☒ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☐ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☐ No

Are you an elected official or judge? ☐ Yes ☐ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

*Required

**Constitution Revision Commission
Declaration Of Rights Committee
Proposal Analysis**

(This document is based on the provisions contained in the proposal as of the latest date listed below.)

Proposal #: P 64

Relating to: DECLARATION OF RIGHTS, Right of privacy

Introducer(s): Commissioner Rouson

Article/Section affected: Article I, Section 23 – Right of privacy.

Date: December 11, 2017

	REFERENCE	ACTION
1.	DR	Pre-meeting
2.	JU	

I. SUMMARY:

Article I, Section 23 of the Florida Constitution, Florida’s Privacy Clause, protects the fundamental right of fit parents to direct the care, custody, and control of their children free from unreasonable governmental interference. Any law that infringes this right is subject to the highest level of judicial scrutiny and must serve a compelling state interest through the least intrusive means.

The Florida Supreme Court has held that Grandparent visitation statutes, which authorize a court to order visitation with a grandchild over parental objection when in the “best interests of the child,” fail to demonstrate a compelling state interest unless the state acts to prevent demonstrable harm to the child. As a result, grandparents may petition for visitation with a grandchild under very limited circumstances in Florida.

This proposal amends Article I, Section 23, Florida’s Privacy Clause, to provide that the right of privacy may not be construed to limit the right of grandparents to seek visitation with their grandchildren if there is a compelling state interest relating to the best interests of the child. The proposal appears to abrogate the current requirement that demonstrable harm to the child be shown to demonstrate a compelling state interest. Thus, the proposal may increase the circumstances under which a court may order grandparent visitation with a grandchild over the objection of parents.

If approved by the Constitution Revision Commission, the proposal will be placed on the ballot at the November 6, 2018, General Election. Sixty percent voter approval is required for adoption. If approved by the voters, the proposal will take effect on January 8, 2019.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

American jurisprudence has a long history of preserving a fit parents' power over the care, custody, and control of their children. Pursuant to this power parents may raise their children as they see fit, free from unreasonable government interference. Judicial affirmation of such broad parental rights is rooted in the desire to preserve parental autonomy and the presumption that fit parents will act in their child's best interest.¹

However, the evolving structure of the American family has created a friction between these well-established parental rights and the interests of extended family members who maintain, or desire to maintain, a significant relationship with a child over the objection of the child's parents. Nowhere has this emerging conflict been demonstrated more clearly than in the legal landscape of grandparent-grandchild visitation rights. Grandparent visitation rights, established by state statutes in all 50 states, have been challenged on the grounds that they interfere with a parent's constitutional rights. The result of such challenges had led to varied decisions around the country regarding the constitutionality of such statutes and ongoing controversy between supporters of parental rights and advocates for grandparents.²

Development of Grandparent Visitation Rights

The development on nonparent visitation statutes, which allow grandparents to petition courts for the right to visit their grandchildren, begin in the late 1960s.³ Before the passage of these statutes, grandparents – like all other nonparents – had no right to sue for court-ordered visitation with children.⁴ The common law rule against visitation by nonparents sought to preserve parental autonomy, as a value in and of itself, as a means of protecting children and to serve broader social goals:⁵

- Courts historically expressed reluctance to undermine parents' authority by overruling their decisions regarding visitation and by introducing outsiders into the nuclear family.
- Courts presumed that fit parents act in the child's best interests and recognized that conflicts regarding visitation are a source of potential harm to the children involved.
- Common law tradition understood parental authority as the very foundation of social order. Courts generally relied on ties of nature to resolve family disagreements rather than imposing coercive court orders.

The enactment of grandparent visitation statutes responded primarily to two trends: demographic changes in family composition and an increase in the number of older Americans and the concurrent growth of the senior lobby.⁶ Grandparent visitation resonated with the public as well,

¹ *Grandparent Visitation Rights: Interim Report 2009-120*, THE FLORIDA SENATE COMMITTEE ON JUDICIARY (October 2008), available at http://archive.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-120ju.pdf.

² Sarah Elizabeth Culley, *Troxel v. Granville and its Effect on the Future of Grandparent Visitation Statutes*; *Legislative Reform*, JOURNAL OF LEGISLATION, Vol. 27:1, at 238, available at <http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1151&context=jleg>.

³ Fla. S. Comm. On Judiciary, SB 368 (2015) Staff Analysis 2 (Mar. 25, 2015), available at <http://flsenate.gov/Session/Bill/2015/368/Analyses/2015s0368.pre.cf.PDF>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

who responded to sentimental images of grandparents in the popular media and the conclusions of social scientists who focused on the importance of intergenerational family ties. During the 1990s, many Americans also focused on drug abuse problems of parents, significant poverty levels, and increasing numbers of out-of-wedlock children. Americans began to look less to traditional social institutions, such as churches, and more toward the legal system as a way to solve family disputes.⁷

By the early 1990s, all states had enacted grandparent visitation laws that expanded grandparents' visitation rights. Today, the statutes generally delineate who may petition the court and under what circumstances and then require the court to determine if visitation is in the child's "best interests."⁸ These statutes have led to a number of constitutional concerns.

Grandparent Visitation Rights under the U.S. Constitution

The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."⁹ The U.S. Supreme Court has consistently held that the "liberty" protected by the due process clause includes a parents interest in the nurture, upbringing, companionship, care, and custody of their children.¹⁰ In fact, this interest is "perhaps the oldest of the fundamental liberty interests recognized" by the Court.¹¹ Thus, the Court has held that:

So long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Under this clear precedent, the U.S. Supreme Court considered the constitutionality of Washington's nonparental visitation statute in *Troxel v. Granville*, 530 U.S. 57 (2000). The Washington nonparental visitation statute permitted any person to petition a court for visitation rights with a minor child at any time, and authorized a court to grant such visitation rights whenever "visitation may be in the best interests of the child."¹² Pursuant to the statute, paternal grandparents

⁷ *Id.* at 3.

⁸ Although there is no standard definition of "best interests of the child," the term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child as well as who is best suited to take care of a child. "Best interests" determinations are generally made by considering a number of factors related to the child's circumstances and the parent or caregiver's circumstances and capacity to parent, with the child's ultimate safety and well-being the paramount concern. See U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, *Determining the Best Interests of the Child*, available at https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

⁹ U.S. CONST. amend. XIV

¹⁰ See e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that the liberty protected by the Due Process Clause includes the rights of parents to establish a home and bring up children and to control the education of their own); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that the liberty of parents and guardians includes the right to direct the upbringing and education of children under their control); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (stating that "the history and culture of Western Civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Quillon v. Walcott*, 434 U.S. 246 (1978) (stating that the court has recognized on numerous occasions that the relationship between parent and child is constitutionally protected).

¹¹ *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

¹² *Id.* at 60.

petitioned to expand visitation rights with their deceased son's children after the children's biological mother (who had remarried) reduced visitation from every weekend to once a month.

In holding that the statute unconstitutionally infringed on the mother's fundamental parental rights as applied, the Court noted that the statute was "breathtakingly broad" and subjected any decision by a parent concerning visitation of their children to state-court review:¹³

The Washington Statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests.¹⁴

The Court determined that no consideration had been given to the mother's decision regarding visitation nor was there any allegation she was an unfit parent. Further, the court noted that no weight had been given to the fact the mother had assented to some visitation.¹⁵ The Court explained that the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made.¹⁶

However, the court explicitly refrained from deciding whether the Due Process Clause requires *all* nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation, stating:

Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.¹⁷

Post-*Troxel*, debate continues in state courts regarding grandparent visitation due, in part, to the lack of clear guidance from the U.S. Supreme Court. Florida, however, has consistently construed its Constitution to require a showing of harm or potential harm to the child as a condition of granting grandparent visitation over parental objection. This standard has proved fatal to most grandparent visitation statutes enacted in the state.

¹³ *Id.* at 67.

¹⁴ *Id.*

¹⁵ *Id.* at 71.

¹⁶ *Id.* at 72.

¹⁷ *Id.* at 73-74.

Grandparent Visitation Rights under the Florida Constitution

Development of Grandparent Visitation Rights in Florida

Prior to 1978, Florida law afforded grandparents no avenue through which to seek visitation of their grandchildren if the child's parents opposed the visitation.¹⁸ That year, the Florida legislature amended s. 61.13, F.S.,¹⁹ to allow a court to award grandparent visitation as part of a dissolution of marriage proceeding, as well s. 68.08, F.S., in circumstances involving the death or desertion of a parent.²⁰ However, in practice, the change did not produce the intended effect because Florida courts ruled that grandparents, for the most part, did not have standing to petition for visitation because they were not parties to the divorce proceeding.²¹ Essentially grandparents had to interject themselves into the divorce proceedings in order to petition for visitation.²²

Grandparent visitation rights expanded significantly in Florida in 1984 when the Florida Legislature enacted stand-alone visitation relief for grandparents, ch. 752, F.S., entitled "Grandparental Visitation Rights." Chapter 752, F.S., gave grandparents standing to petition the court for visitation in certain situations. At its broadest, s. 752.01(1), F.S., required visitation to be granted when the court determined it to be in the "best interests of the child" and one of the following situations existed:

- One or both of the child's parents were deceased;
- The parents were divorced;
- One parent had deserted the child;
- The child was born out of wedlock; or
- One or both parents, who were still married, had prohibited the formation of a relationship between the child and the grandparent(s).²³

In 1993, the Florida Legislature further amended ch. 61, F.S., adding a provision that awarded reasonable grandparent visitation in a dissolution of marriage proceeding if the court found that the visitation would be in the child's best interest.

In the ensuing years, the Florida Supreme Court has struck down all the grandparent visitation provisions in ch. 61, F.S., and almost all the provisions in ch. 752, F.S., as unconstitutional under Article I, Section 23 of the Florida Constitution, the Right of Privacy.²⁴

Grandparent Visitation Statutes and Article I, Section 23-Right of Privacy

In *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996), the Court held s. 752.01(1)(e), F.S., which authorized grandparent visitation over the objection of a child's intact family if visitation was in

¹⁸ See *Parker v. Gates*, 103 So. 126 (Fla. 1925).

¹⁹ Chapter 61, F.S., governs dissolution of marriage and parental responsibility for minor children.

²⁰ Ch. 78-5, Laws of Fla.

²¹ See e.g. *Shuler v. Shuler*, 371 So. 2d 588 (Fla. 1st DCA 1979).

²² *Supra* note 1, at 2.

²³ See ch. 93-279, Laws of Fla. (s. 752.01, F.S. (1993)). Subsequent amendments by the Legislature removed most of these criteria.

²⁴ See *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996)(striking down visitation where married parents prohibited formation of relationship); *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998)(striking down visitation where one parent deceased); *Saul v. Brunetti*, 753 So. 2d 26 (Fla. 2000)(striking down visitation where child born out of wedlock); *Richardson v. Richardson*, 766 So. 2d 1036 (Fla. 2000)(striking down custodial rights of grandparents in custody or dissolution of marriage proceedings); *Sullivan v. Sapp*, 866 So. 2d 28 (Fla. 2004)(striking down request of grandparental visitation in paternity suit).

the “best interests of the child”, facially unconstitutional under Article I, Section 23 of the Florida Constitution.

The Court recognized the fundamental liberty interest of parents in determining the care and upbringing of their children free from the heavy hand of government paternalism, and declared that such fundamental interest is specifically protected by Article I, Section 23 of the Florida Constitution.²⁵ The Court announced the standard of review applicable when deciding whether a state’s intrusion into a citizen’s private life is constitutional:

The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least restrictive means.²⁶

The Court found that the imposition by the state of grandparental visitation rights implicates a parent’s privacy rights under Article I, Section 23 of the Florida Constitution. Based upon Article I, Section 23, the Court held that the State may not intrude upon a parent’s fundamental right to raise their children except in cases where child is threatened with harm, and any best interest test without such requirement does not demonstrate a compelling state interest.²⁷

Two years later, in *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998), the Court struck down s. 752.01(1)(a), which permitted visitation when one or both parents were deceased, on the same grounds. The Court explained the inherent problem with utilizing a best interest analysis as the basis for government interference in the private lives of a family, rather than requiring a showing of demonstrable harm to the child:

It permits the State to substitute its own views regarding how a child should be raised for those of the parent. It involves the judiciary in second-guessing parental decisions. It allows a court to impose "its own notion of the children's best interests over the shared opinion of these parents, stripping them of their right to control in parenting decisions."²⁸

The Court acknowledged that there may be many beneficial relationships for a child, but firmly held that it is not for the government to decide with whom the child builds those relationships.²⁹ In fact, the court found it “irrelevant to the constitutional analysis that it might in many instances be ‘better’ or ‘desirable’ for a child to maintain contact with a grandparent.”³⁰ The unassailable proposition, according to the Court, is that “otherwise fit parents ... who have neither abused,

²⁵ *Beagle v. Beagle*, 678 So. 2d 1271, 1275 (Fla. 1996).

²⁶ *Id.* at 1276.

²⁷ *Id.*

²⁸ *Von Eiff v. Azicri*, 720 So. 2d 510, 516 (Fla. 1998)

²⁹ *Id.*

³⁰ *Id.*

neglected, or abandoned their child, have a reasonable expectation that the state will not interfere with their decision to exclude or limit the grandparents' visitation.”³¹

The Court has also struck down two provisions in ch. 61, F.S., which granted grandparents custodial rights in custody or dissolution of marriage proceedings, on the same grounds.³² In *Richardson v. Richardson*, 766 So. 2d 1036 (Fla. 2000), the Court recognized that when a custody dispute is between two fit parents, it is proper to use the best interests of the child standard. However, when the dispute is between a fit parent and a third party, there must be a showing of detrimental harm to the child in order for custody to be denied to the parent.³³ The Court held that s. 61.13(7), F.S., “is unconstitutional on its face because it equates grandparents with natural parents and permits courts to determine custody disputes utilizing solely the “best interest of the child” standard without first determining detriment to the child.”³⁴ The Court found this statutory provision to be even more intrusive on a parent’s right to raise his or her child than the grandparent visitation statute in ch. 752, F.S.³⁵

Nevertheless, Grandparents have been successful in enforcing visitation orders established in other states.³⁶ The Florida Supreme Court recently held that the Full Faith and Credit Clause of the United States Constitution requires enforcement of another state’s judgment ordering grandparent visitation with minor children despite the fact that a similar order by a Florida court would be may be prohibited under Article I, Section 23.³⁷

Current Florida Grandparent Visitation Rights

The Florida Supreme Court’s vigilant protection of childrearing autonomy under Article I, Section 23 of the Florida Constitution still provides avenues for grandparent visitation under Florida law. Primarily, in accordance with *Ledoux-Nottingham v. Downs*³⁸, Florida courts will enforce another state’s judgment ordering grandparent visitation with minor children despite the fact entry of a similar judgment by a Florida Court under the same circumstances may be prohibited by the Florida Constitution.³⁹

Additionally, in 2015, the Florida Legislature substantially revised ch. 752, F.S., relating to grandparent visitation. The revision repealed grandparent visitation provisions declared unconstitutional by the Florida Supreme Court and crafted a new limited Florida grandparent visitation statute within the framework provided by the controlling case law.⁴⁰

Currently, under s. 752.011, F.S., a grandparent⁴¹ may petition a Florida court for visitation with a minor grandchild if:

³¹ *Id.* at 515.

³² See *Richardson v. Richardson*, 766 So. 2d 1036 (Fla. 2000); *Sullivan v. Sapp* 866 So. 2d 28 (Fla. 2004).

³³ *Richardson v. Richardson*, 766 So. 2d 1036, 1039 (Fla. 2000).

³⁴ *Id.* at 1043.

³⁵ *Id.* at 1040.

³⁶ See *Ledoux-Nottingham v. Downs*, 210 So. 3d 1217 (Fla. 2017).

³⁷ *Id.* at 1223.

³⁸ 210 So. 3d 1217 (Fla. 2017).

³⁹ *Id.* at 1223.

⁴⁰ Ch. 2015-134, Laws of Fla.

⁴¹ The term “grandparent” includes great-grandparents. s. 752.001(1), F.S.

- Both parents of the child are deceased, missing,⁴² or in a persistent vegetative state⁴³; or
- One parent of the child is deceased, missing, or in a persistent vegetative state and the other parent has been convicted of a felony offense of violence evincing behavior that poses a substantial threat of harm to the minor child's health or welfare.

The grandparent must make a preliminary showing that the remaining parent is unfit or that there has been significant harm to the child; and if made, the court must direct the family to mediation and move toward a final hearing.⁴⁴ The court may award a grandparent reasonable visitation with a minor grandchild if the court finds by clear and convincing evidence that a parent is unfit or that there is significant harm to the child, that visitation is in the best interest of the minor child, and that the visitation will not materially harm the parent-child relationship.⁴⁵

In assessing the "best interests of the child", the court must consider the totality of the circumstances affecting the mental and emotional well-being of the minor child, including:⁴⁶

- The love affection, and other emotional ties existing between the minor child and the grandparent;
- The length and quality of the previous relationship between the child and the grandparent;
- Whether the grandparent established ongoing personal contact with the child prior to the death, vegetative state, or disappearance of the parent;
- The reasons cited by the surviving parent to end contact or visitation;
- Whether there has been significant and demonstrable mental or emotional harm to the minor child as a result of the disruption in the family unit, whether the child derived support and stability from the grandparent, and whether the continuation of such support and stability is likely to prevent further harm;
- The existence or threat to the child of mental injury;
- The present mental, physical, and emotional health of the child and the grandparent;
- The recommendations of the child's guardian ad litem, if one is appointed;
- The results of any psychological evaluation of the child;
- The preference of the child;
- A written testamentary statement by the deceased parent regarding visitation with the grandparent (absence of such a statement is not evidence of an objection to grandparent visitation); and
- Such other factors as the court considers necessary in making its determination.

⁴² "Missing" means having whereabouts which are unknown for a period of at least 90 days and not being able to be located after a diligent search and inquiry. Such search and inquiry for a missing person must include, at a minimum, inquiries of all relatives of the person who can reasonably be identified by the petitioner, inquiries of hospitals in the areas where the person last resided, inquiries of the person's recent employers, inquiries of state and federal agencies likely to have information about the person, inquiries of appropriate utility and postal providers, a thorough search of at least one electronic database specifically designed for locating persons, and inquiries of appropriate law enforcement agencies. s. 752.001(2), F.S.

⁴³ "Persistent vegetative state" means a permanent and irreversible condition of unconsciousness in which there is the absence of voluntary action or cognitive behavior of any kind; and an inability to communicate or interact purposefully with the environment. s. 765.101(15), F.S.

⁴⁴ s. 752.011, (1)-(2), F.S.

⁴⁵ s. 752.011(3), F.S.

⁴⁶ s. 752.011(4), F.S.

In determining material harm to the parent-child relationship, the court must consider the totality of the circumstances affecting the parent-child relationship, including:⁴⁷

- Whether there have been previous disputes between the grandparent and the parent over childrearing or other matters related to the care and upbringing of the child;
- Whether visitation would interfere with or compromise parental authority;
- Whether visitation can be arranged in a manner that does not detract from the parent-child relationship, including the quantity of time available for enjoyment of the parent-child relationship, and any other consideration related to disruption of the schedule and routines of the parent and the minor child;
- Whether visitation is being sought for the primary purpose of continuing or establishing a relationship with the child with the intent that the child benefit from the relationship;
- Whether the requested visitation would expose the child to conduct, moral standards, experiences, or other factors that are inconsistent with influences provided by the parent;
- The nature of the relationship between the parent and the grandparent;
- The reasons that the parent made the decision to end contact or visitation between the child and the grandparent which was previously allowed by the parent;
- The psychological toll of visitation disputes on the child; and
- Such other factors as the court considers necessary in making its determination.

An order granting grandparent visitation may be modified if a substantial change of circumstances has occurred and the modification is in the best interest of the child.⁴⁸ A stepparent or close relative who adopts the minor child may also petition the court to terminate an order granting visitation that was in place before the adoption.⁴⁹ The court may terminate the order unless the grandparent shows that the criteria authorizing visitation continue to be satisfied.⁵⁰

A grandparent may only file an action for visitation once in a two-year period, unless a real, substantial, and unanticipated change of circumstances has occurred relating to the mental or emotional harm caused by the parental decision to deny visitation between the minor and grandparent.⁵¹

Florida appellate courts have not yet considered the constitutionality of this new limited grandparent visitation statute.⁵² Thus it is currently a valid mechanism to award grandparent visitation.

B. EFFECT OF PROPOSED CHANGES:

This proposal amends Article I, Section 23, Florida's Privacy Clause, to provide that the right of privacy may not be construed to limit the right of grandparents to seek visitation with their grandchildren if there is a compelling state interest relating to the best interests of the child. The proposal appears to abrogate the current requirement that demonstrable harm to the child be shown

⁴⁷ s. 752.011(5), F.S.

⁴⁸ s. 752.011(8), F.S.

⁴⁹ s. 752.071, F.S.

⁵⁰ *Id.*

⁵¹ s. 752.011(9), F.S.

⁵² See *Ledoux-Nottingham v. Downs*, 210 So. 3d 1217, FN 3 (Fla. 2017) (stating "We have not considered the constitutionality of the current limited grandparent visitation provision, section 752.011, Florida Statutes (2015)).

to demonstrate a compelling state interest. Thus, the proposal may increase the circumstances under which a court may order grandparent visitation with a grandchild over the objection of parents.

If approved by the voters, the proposal will take effect on January 8, 2019.⁵³

C. FISCAL IMPACT:

The bill does not appear to have a fiscal impact on state or local government.

III. Additional Information:

A. Statement of Changes:

(Summarizing differences between the current version and the prior version of the proposal.)

None.

B. Amendments:

None.

C. Technical Deficiencies:

It is unclear if the proposal is intended to relate to the “right to seek visitation”, which implicates procedural rights, or the “right to visitation” which would implicate substantive rights.

D. Related Issues:

None.

⁵³ See Article XI, Sec. 5(e) of the Florida Constitution (“Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.”)

By Commissioner Rouson

rousond-00050-17

201764__

A proposal to amend

Section 23 of Article I of the State Constitution to specify that the right of privacy may not be construed to limit a grandparent's right to seek visitation of his or her grandchildren under certain circumstances.

Be It Proposed by the Constitution Revision Commission of Florida:

Section 23 of Article I of the State Constitution is amended to read:

ARTICLE I

DECLARATION OF RIGHTS

SECTION 23. Right of privacy.—Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law. This section shall not be construed to limit a grandparent's right to seek visitation of his or her grandchildren when a compelling state interest exists relating to the best interest of the child.

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

Meeting Date _____

64
Proposal Number (if applicable) _____

*Topic Right of Privacy Amendment

Amendment Barcode (if applicable) _____

*Name Amanda Simon

Address Founder - AGA, Inc.

Phone _____

Street Naples FL

Email info@AGA-FL.org

City _____ State _____ Zip _____

*Speaking: ☒ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☐ No

If yes, who? Grandparents

Are you a registered lobbyist? ☐ Yes ☒ No

Alienated Grandparents
Anonymous, Inc.

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

*Required

CONSTITUTION REVISION COMMISSION
APPEARANCE RECORD
(Deliver completed form to Commission staff)

64

Meeting Date _____

Proposal Number (if applicable) _____

*Topic

Grandparent Visitation Rights

Amendment Barcode (if applicable) _____

*Name

James Karl, Esq.

Address

Street

Marco Island

City

State

Zip

Phone

239 642 9988

Email

jkalaws@yahoo.com

*Speaking:

☒

For

☐

Against

☐

Information Only

Waive Speaking:

☐

In Support

☐

Against

(The Chair will read this information into the record.)

Are you representing someone other than yourself?

☐

Yes

☐

No

If yes, who? _____

Are you a registered lobbyist?

☐

Yes

☒

No

Are you an elected official or judge?

☐

Yes

☒

No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

*Required

CONSTITUTION REVISION COMMISSION

APPEARANCE RECORD

(Deliver completed form to Commission staff)

12/12/17
Meeting Date

#64
Proposal Number (if applicable)

*Topic Con R# 64

Amendment Barcode (if applicable)

*Name Yvonne Stewart

Address 557 Guy Ct

Phone 407 716 9716

Street Geneva State FL Zip 32732

Email yststrandzsalon@yahoo.com

*Speaking: ☒ For ☐ Against ☐ Information Only

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Are you representing someone other than yourself? ☐ Yes ☒ No

If yes, who? _____

Are you a registered lobbyist? ☐ Yes ☒ No

Are you an elected official or judge? ☐ Yes ☒ No

While the Commission encourages public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

Information submitted on this form is public record.

*Required

**Constitution Revision Commission
Declaration Of Rights Committee
Proposal Analysis**

(This document is based on the provisions contained in the proposal as of the latest date listed below.)

Proposal #: P 34

Relating to: DECLARATION OF RIGHTS, Right to bear arms; Pretrial release and detention;
Prosecution for crime; offenses committed by children; Taxpayers' Bill of Rights;
Claimant's right to fair compensation

Introducer(s): Commissioner Carlton

Article/Section affected: Article I, Section(s) 8, 14, 15, 25 and 26.

Date: December 8, 2017

	REFERENCE	ACTION
1.	<u>DR</u>	<u>Pre-meeting</u>

I. SUMMARY:

This proposal amends several provisions of Article I of the Florida Constitution – the “Declaration of Rights”. The amendments are technical and non-substantive revisions identified by the Declaration of Rights Committee to improve the clarity and organization of Article I of the Florida Constitution. The amended provisions are intended to have the same substantive meaning currently accorded to them.

If passed by the Constitution Revision Commission, the proposed technical and non-substantive revisions will be placed on the ballot at the November 6, 2018, General Election. Sixty percent voter approval is required for adoption. If approved by the voters, the proposed technical and non-substantive revisions will take effect on January 8, 2019.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Article I of the Florida Constitution, the “Declaration of Rights,” comprises the basic liberties and rights guaranteed to persons in the state of Florida. The Declaration of Rights Committee, as established by the 2017-2018 Constitution Revision Commission (CRC), has the authority to examine issues and consider proposed constitutional revisions arising under or related to Article I, the Declaration of Rights.

In furtherance of the CRC constitutional mandate to “examine the state constitution,”¹ on October 3, 2017, the Declaration of Rights Committee met to identify and discuss potential technical and non-substantive revisions to Article I that would improve its clarity and organization.² The technical and non-substantive amendments identified and discussed by the Declaration of Rights Committee are attached hereto as “**Attachment A.**”

B. EFFECT OF PROPOSED CHANGES:

This proposal adopts the following Article I technical and non-substantive amendments identified and discussed by the Declaration of Rights Committee on October, 3, 2017 (see **Attachment “A”**):

- Article I, Section 8 – Right to bear arms: This section is amended to re-organize provisions relating to the mandatory three-day waiting period for handgun purchases. Subsections (b) and (d) are combined.
- Article I, Section 14 – Pretrial release and detention: This section is amended to move the dependent clause, “unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great,” to the end of the first sentence of the section rather than the beginning.
- Article I, Section 15 – Prosecution for crime; offenses committed by children: This section is amended to re-organize provisions relating to the juvenile justice system.
- Article I, Section 25 – Taxpayers’ Bill of Rights: This section is amended to remove the effective date from the text of the Florida Constitution.
- Article I, Section 26 – Claimant’s right to fair compensation: This section is amended to remove duplicative title language and the effective date from the text of the Florida Constitution.

The Article I amendments made by this proposal are intended only as technical and non-substantive revisions to improve the clarity and organization of Article I of the Florida Constitution. The amended provisions are intended to have the same substantive meaning currently accorded to them.

If approved by the voters, the proposed technical and non-substantive revisions will take effect on January 8, 2019.³

¹ FLA. CONST. art. XI, s. 2 (1968).

² *Meeting Packet*, FLORIDA CONSTITUTION REVISION COMMISSION DECLARATION OF RIGHTS COMMITTEE, October 3, 2017, available at http://flcrc.gov/PublishedContent/Committees/2017-2018/DR/MeetingRecords/MeetingPacket_46.pdf.

³ See FLA. CONST. art XI, s. 5(e) (1968) (“Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.”)

C. FISCAL IMPACT:

The proposal does not appear to have a fiscal impact on state or local government.

III. Additional Information:

A. Statement of Changes:

(Summarizing differences between the current version and the prior version of the proposal.)

None.

B. Amendments:

None.

C. Technical Deficiencies:

None.

D. Related Issues:

None.

Attachment “A”

ARTICLE I
THE DECLARATION OF RIGHTS
TECHNICAL REVISIONS FOR COMMITTEE CONSIDERATION

SECTION 8. Right to bear arms.—

(a) The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.

(b) There shall be a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun. The mandatory 3-day waiting period shall not apply to the trade in of another handgun or to holders of a concealed weapon permit as prescribed in Florida law.

(1) For the purposes of this subsection ~~section~~, “purchase” means the transfer of money or other valuable consideration to the retailer, and “handgun” means a firearm capable of being carried and used by one hand, such as a pistol or revolver. ~~Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph.~~

(2) ~~(e)~~ The legislature shall enact legislation implementing subsection (b) of this section, effective no later than December 31, 1991, which shall provide that anyone violating the provisions of subsection (b) shall be guilty of a felony.

~~(d)—This restriction shall not apply to a trade in of another handgun.~~

Section 8 Revision Note: Combines all provisions relating to the mandatory 3-day waiting period for handgun purchases into one subsection – subsection (b).

SECTION 14. Pretrial release and detention.~~—Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, Every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions~~ except persons charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.

Section 14 Revision Note: Stylistic and grammatical changes to clarify provisions regarding pretrial release and detention.

SECTION 15. Prosecution for crime; offenses committed by children.—

(a) No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

(b) When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases. A child found delinquent shall be disciplined as provided by law. Any child charged with a violation of law as an act of delinquency, so charged shall, upon demand made as provided by law before a trial in a juvenile proceeding, be tried in an appropriate court as an adult. ~~A child found delinquent shall be disciplined as provided by law.~~

Section 15 Revision Note: Stylistic and grammatical changes to clarify provisions regarding juvenile justice system.

SECTION 17. Excessive punishments; death penalty.—

(a) Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. ~~The death penalty is an authorized punishment for capital crimes designated by the legislature.~~ The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.

(b) The death penalty is an authorized punishment for capital crimes designated by the legislature. Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. This section shall apply retroactively.

Section 17 Revision Note: Revises catchline of the section to include the death penalty. Places death penalty provisions in separate subsection.

SECTION 23. Right of privacy.—

(a) Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

(b) Notwithstanding a minor's right of privacy provided in subsection (a), the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification. The Legislature shall not limit or deny the privacy

right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court.

Section 23 Revision Note: Transfers Article X, § 22 to Article I, § 23 to combine constitutional privacy provisions.

SECTION 25. Taxpayers' Bill of Rights.—By general law the legislature shall prescribe and adopt a Taxpayers' Bill of Rights that, in clear and concise language, sets forth taxpayers' rights and responsibilities and government's responsibilities to deal fairly with taxpayers under the laws of this state. ~~This section shall be effective July 1, 1993.~~

Section 25 Revision Note: Removes effective date from the text of the constitution.

SECTION 26. Claimant's right to fair compensation.—

~~(a) Article I, Section 26 is created to read "Claimant's right to fair compensation." In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first \$250,000.00 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of \$250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation.~~

~~(b) This Amendment shall take effect on the day following approval by the voters.~~

Section 26 Revision Note: Removes duplicative title language and the effective date from the text of the constitution.

~~SECTION 27. Marriage defined.—Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.~~

Section 27 Revision Note: Invalidated by Obergefell v. Hodges, 135 S. Ct. 2584 (2015)

By Commissioner Carlton

carlton1-00037B-17

201734__

A proposal to amend

Sections 8, 14, 15, 25, and 26 of Article I of the State Constitution to make technical and nonsubstantive revisions to improve the clarity and organization of the State Constitution and to delete provisions that have become obsolete or have had their effect.

Be It Proposed by the Constitution Revision Commission of Florida:

Sections 8, 14, 15, 25, and 26 of Article I of the State Constitution are amended to read:

ARTICLE I

DECLARATION OF RIGHTS

SECTION 8. Right to bear arms.—

(a) The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.

(b) There shall be a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun. The mandatory three-day waiting period does not apply to the trade in of another handgun or to holders of a license to carry a concealed weapon or firearm as prescribed in Florida law. For the purposes of this subsection ~~section~~, the term "purchase" means the transfer of money or other valuable consideration to the retailer, and the term "handgun" means a firearm capable of being carried and used by one hand, such as a pistol or revolver. ~~Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph.~~

Page 1 of 3

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

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201734__

(c) The legislature shall enact legislation implementing subsection (b) of this section, effective no later than December 31, 1991, which shall provide that anyone violating the provisions of subsection (b) shall be guilty of a felony.

~~(d) This restriction shall not apply to a trade in of another handgun.~~

SECTION 14. Pretrial release and detention. ~~Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great,~~ Every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.

SECTION 15. Prosecution for crime; offenses committed by children.—

(a) No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

(b) When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements

Page 2 of 3

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

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201734__

62 applicable to criminal cases. A child found delinquent shall be
63 disciplined as provided by law. Any child charged with a
64 violation of law as an act of delinquency ~~so charged~~ shall, upon
65 demand made as provided by law before a trial in a juvenile
66 proceeding, be tried in an appropriate court as an adult. ~~A~~
67 ~~child found delinquent shall be disciplined as provided by law.~~

68 SECTION 25. Taxpayers' Bill of Rights.—By general law, the
69 legislature shall prescribe and adopt a Taxpayers' Bill of
70 Rights that, in clear and concise language, sets forth
71 taxpayers' rights and responsibilities and government's
72 responsibilities to deal fairly with taxpayers under the laws of
73 this state. ~~This section shall be effective July 1, 1993.~~

74 SECTION 26. Claimant's right to fair compensation.—

75 ~~(a) Article I, Section 26 is created to read "Claimant's~~
76 ~~right to fair compensation."~~ In any medical liability claim
77 involving a contingency fee, the claimant is entitled to receive
78 no less than 70% of the first \$250,000.00 in all damages
79 received by the claimant, exclusive of reasonable and customary
80 costs, whether received by judgment, settlement, or otherwise,
81 and regardless of the number of defendants. The claimant is
82 entitled to 90% of all damages in excess of \$250,000.00,
83 exclusive of reasonable and customary costs and regardless of
84 the number of defendants. This section provision is self-
85 executing and does not require implementing legislation.

86 ~~(b) This Amendment shall take effect on the day following~~
87 ~~approval by the voters.~~

PREAMBLE

We, the people of the State of Florida, being grateful to Almighty God for our constitutional liberty, in order to secure its benefits, perfect our government, insure domestic tranquility, maintain public order, and guarantee equal civil and political rights to all, do ordain and establish this constitution.

ARTICLE I

DECLARATION OF RIGHTS

Sec.

1. Political power.
2. Basic rights.
3. Religious freedom.
4. Freedom of speech and press.
5. Right to assemble.
6. Right to work.
7. Military power.
8. Right to bear arms.
9. Due process.
10. Prohibited laws.
11. Imprisonment for debt.
12. Searches and seizures.
13. Habeas corpus.
14. Pretrial release and detention.
15. Prosecution for crime; offenses committed by children.
16. Rights of accused and of victims.
17. Excessive punishments.
18. Administrative penalties.
19. Costs.
20. Treason.
21. Access to courts.
22. Trial by jury.
23. Right of privacy.
24. Access to public records and meetings.
25. Taxpayers' Bill of Rights.
26. Claimant's right to fair compensation.
27. Marriage defined.

SECTION 1. Political power.—All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

SECTION 2. Basic rights.—All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

History.—Am. S.J.R. 917, 1974; adopted 1974; Am. proposed by Constitution Revision Commission, Revision No. 9, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

SECTION 3. Religious freedom.—There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

SECTION 4. Freedom of speech and press.—Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

History.—Am. proposed by Constitution Revision Commission, Revision No. 13, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

SECTION 5. Right to assemble.—The people shall have the right peaceably to assemble, to instruct their representatives, and to petition for redress of grievances.

SECTION 6. Right to work.—The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

SECTION 7. Military power.—The military power shall be subordinate to the civil.

SECTION 8. Right to bear arms.—

(a) The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.

(b) There shall be a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun. For the purposes of this section, "purchase" means the transfer of money or other valuable consideration to the retailer, and "handgun" means a firearm capable of being carried and used by one hand, such as a pistol or revolver. Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph.

(c) The legislature shall enact legislation implementing subsection (b) of this section, effective no later than December 31, 1991, which shall provide that anyone violating the provisions of subsection (b) shall be guilty of a felony.

(d) This restriction shall not apply to a trade in of another handgun.

History.—Am. C.S. for S.J.R. 43, 1989; adopted 1990.

SECTION 9. Due process.—No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.

History.—Am. proposed by Constitution Revision Commission, Revision No. 13, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

SECTION 10. Prohibited laws.—No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.

SECTION 11. Imprisonment for debt.—No person shall be imprisoned for debt, except in cases of fraud.

SECTION 12. Searches and seizures.—The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

History.—Am. H.J.R. 31-H, 1982; adopted 1982.

SECTION 13. Habeas corpus.—The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety.

SECTION 14. Pretrial release and detention.—Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.

History.—Am. H.J.R. 43-H, 1982; adopted 1982.

SECTION 15. Prosecution for crime; offenses committed by children.—

(a) No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

(b) When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases. Any child so charged shall, upon demand made as provided by law before a trial in a juvenile proceeding, be tried in an appropriate court as an adult. A child found delinquent shall be disciplined as provided by law.

SECTION 16. Rights of accused and of victims.

(a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties the trial will take place. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

(b) Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

History.—Am. S.J.R. 135, 1987; adopted 1988; Am. proposed by Constitution Revision Commission, Revision No. 13, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

SECTION 17. Excessive punishments.—Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be

lawfully executed by any valid method. This section shall apply retroactively.

History.—Am. H.J.R. 3505, 1998; adopted 1998; Am. H.J.R. 951, 2001; adopted 2002.

SECTION 18. Administrative penalties.—No administrative agency, except the Department of Military Affairs in an appropriately convened court-martial action as provided by law, shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law.

History.—Am. proposed by Constitution Revision Commission, Revision No. 13, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

SECTION 19. Costs.—No person charged with crime shall be compelled to pay costs before a judgment of conviction has become final.

SECTION 20. Treason.—Treason against the state shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort, and no person shall be convicted of treason except on the testimony of two witnesses to the same overt act or on confession in open court.

SECTION 21. Access to courts.—The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

SECTION 22. Trial by jury.—The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.

SECTION 23. Right of privacy.—Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

History.—Added, C.S. for H.J.R. 387, 1980; adopted 1980; Am. proposed by Constitution Revision Commission, Revision No. 13, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

SECTION 24. Access to public records and meetings.—

(a) 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 pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

(b) All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public

and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

(c) This section shall be self-executing. The legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, except that each house of the legislature may adopt rules governing the enforcement of this section in relation to records of the legislative branch. Laws enacted pursuant to this subsection shall contain only exemptions from the requirements of subsections (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.

(d) All laws that are in effect on July 1, 1993 that limit public access to records or meetings shall remain in force, and such laws apply to records of the legislative and judicial branches, until they are repealed. Rules of court that are in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed.

History.—Added, C.S. for C.S. for H.J.R.'s 1727, 863, 2035, 1992; adopted 1992; Am. S.J.R. 1284, 2002; adopted 2002.

SECTION 25. Taxpayers' Bill of Rights.—By general law the legislature shall prescribe and adopt a Taxpayers' Bill of Rights that, in clear and concise language, sets forth taxpayers' rights and responsibilities and government's responsibilities to deal fairly with taxpayers under the laws of this state. This section shall be effective July 1, 1993.

History.—Proposed by Taxation and Budget Reform Commission, Revision No. 2, 1992, filed with the Secretary of State May 7, 1992; adopted 1992.

Note.—This section, originally designated section 24 by Revision No. 2 of the Taxation and Budget Reform Commission, 1992, was redesignated section 25 by the editors in order to avoid confusion with section 24 as contained in H.J.R.'s 1727, 863, 2035, 1992.

SECTION 26. Claimant's right to fair compensation.—

(a) Article I, Section 26 is created to read "Claimant's right to fair compensation." In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first \$250,000.00 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of \$250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation.

(b) This Amendment shall take effect on the day following approval by the voters.

History.—Proposed by Initiative Petition filed with the Secretary of State September 8, 2003; adopted 2004.

SECTION 27. Marriage defined.—Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.

History.—Proposed by Initiative Petition filed with the Secretary of State February 9, 2005; adopted 2008.

ARTICLE II

GENERAL PROVISIONS

Sec.

1. State boundaries.
2. Seat of government.
3. Branches of government.
4. State seal and flag.
5. Public officers.
6. Enemy attack.
7. Natural resources and scenic beauty.
8. Ethics in government.
9. English is the official language of Florida.

SECTION 1. State boundaries.—

(a) The state boundaries are: Begin at the mouth of the Perdido River, which for the purposes of this description is defined as the point where latitude 30°16'53" north and longitude 87°31'06" west intersect; thence to the point where latitude 30°17'02" north and longitude 87°31'06" west intersect; thence to the point where latitude 30°18'00" north and longitude 87°27'08" west intersect; thence to the point where the center line of the Intracoastal Canal (as the same existed on June 12, 1953) and longitude 87°27'00" west intersect; the same being in the middle of the Perdido River; thence up the middle of the Perdido River to the point where it intersects the south boundary of the State of Alabama, being also the point of intersection of the middle of the Perdido River with latitude 31°00'00" north; thence east, along the south boundary line of the State of Alabama, the same being latitude 31°00'00" north to the middle of the Chattahoochee River; thence down the middle of said river to its confluence with the Flint River; thence in a straight line to the head of the St. Marys River; thence down the middle of said river to the Atlantic Ocean; thence due east to the edge of the Gulf Stream or a distance of three geographic miles whichever is the greater distance; thence in a southerly direction along the edge of the Gulf Stream or along a line three geographic miles from the Atlantic coastline and three leagues distant from the Gulf of Mexico coastline, whichever is greater, to and through the Straits of Florida and westerly, including the Florida reefs, to a point due south of and three leagues from the southernmost point of the Marquesas Keys; thence westerly along a straight line to a point due south of and three leagues from Loggerhead Key, the westernmost of the Dry Tortugas Islands; thence westerly, northerly and easterly along the arc of a curve three leagues distant from Loggerhead Key to a point due north of Loggerhead Key; thence northeast along a straight line to a point three leagues from the coastline of Florida; thence northerly and westerly three leagues distant

from the coastline to a point west of the mouth of the Perdido River three leagues from the coastline as measured on a line bearing south 0°01'00" west from the point of beginning; thence northerly along said line to the point of beginning. The State of Florida shall also include any additional territory within the United States adjacent to the Peninsula of Florida lying south of the St. Marys River, east of the Perdido River, and south of the States of Alabama and Georgia.

(b) The coastal boundaries may be extended by statute to the limits permitted by the laws of the United States or international law.

SECTION 2. Seat of government.—The seat of government shall be the City of Tallahassee, in Leon County, where the offices of the governor, lieutenant governor, cabinet members and the supreme court shall be maintained and the sessions of the legislature shall be held; provided that, in time of invasion or grave emergency, the governor by proclamation may for the period of the emergency transfer the seat of government to another place.

SECTION 3. Branches of government.—The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

SECTION 4. State seal and flag.—The design of the great seal and flag of the state shall be prescribed by law.

SECTION 5. Public officers.—

(a) No person holding any office of emolument under any foreign government, or civil office of emolument under the United States or any other state, shall hold any office of honor or of emolument under the government of this state. No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, taxation and budget reform commission, constitutional convention, or statutory body having only advisory powers.

(b) Each state and county officer, before entering upon the duties of the office, shall give bond as required by law, and shall swear or affirm:

"I do solemnly swear (or affirm) that I will support, protect, and defend the Constitution and Government of the United States and of the State of Florida; that I am duly qualified to hold office under the Constitution of the state; and that I will well and faithfully perform the duties of (title of office) on which I am now about to enter. So help me God.",

and thereafter shall devote personal attention to the duties of the office, and continue in office until a successor qualifies.