

**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 96

Relating to: DECLARATION OF RIGHTS, Rights of accused and of victims

Introducer(s): Commissioner Cerio and others

Article/Section affected:

Date: January 18, 2018

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

I. SUMMARY:

Article I, Section 16(b) of the Florida Constitution establishes the right of victims of crime, or their lawful representatives, including the next of kin of homicide victims, to be informed, to be present, and to be heard at all crucial states of criminal proceedings. These rights are subordinate to the constitutional rights of the accused to the extent that they would interfere with such rights. The Florida Legislature has also supplemented the rights provided to crime victims under Article I, Section 16(b) by general law.

This proposal expands the constitutional rights of crime victims in the criminal justice and juvenile justice systems, and the categories of persons entitled to such rights. The rights granted to crime victims by the proposal must be “protected by law in a manner no less vigorous than protections afforded to criminal defendants and juvenile delinquents,” thus the proposal appears to make constitutional crime victim rights equal, rather than subordinate, to the constitutional rights of the accused.

The constitutional crime victim rights established by the proposal duplicate many current statutory crime victim rights, while creating several additional rights, including:

- The right to be reasonably protected from the accused or persons acting on the accused’s behalf;
- The right to right to refuse an interview, deposition, or other discovery request by the defense or anyone acting on the defendant’s behalf; and
- The right to demand that all state-level appeals of the criminal case be completed within a specified period of time.

This proposal is similar to a victim’s rights proposal adopted in several other states known as “Marsy’s Law.”

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:

History of Crime Victims' Rights

At the birth of this Republic, victims were central participants in the criminal justice process. The first colonists imported the English common law tradition of private prosecutions in criminal matters, which gave the victim of a felony the right to initiate a criminal case against the offender. The aggrieved citizen served the dual role of witness and prosecutor, and could directly inform juries in court of the details and impact of crime.¹ As a result, at the time of the adoption and ratification of the Constitution and Bill of Rights, the framers of the Constitution probably saw little need for separate "victims' rights," because victims could act in their own interests.

Over time, public prosecutors gradually displaced the system of private prosecutions, as crime came to be seen as a wrong against all of public society, not only the victim. Crime victims were replaced by the state in their role as complainant in criminal cases. Instead, the primary role of crime victims transitioned to the reporting of crime to police for investigation and serving as witnesses if called in a criminal trial. In many ways, crime victims themselves benefited from these changes. They had the aid of public law enforcement, which was more skilled than the average victim in investigating the crime, and the aid of public prosecutors, who were more skilled than the average victim in pleading their case in court. No longer would the wealth of the violated party be a significant determinant as to whether justice was done.²

However, in the evolution of the nation's justice system, crime victims reported feeling increasing alienation. As a result, a movement began more than 30 years ago to re-create an independent participatory role for crime victims in criminal justice proceedings.³ The movement was based, in part, on the 1973 United States Supreme Court decision in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1972). In *Linda R.S.*, the Supreme Court considered whether an unmarried woman could seek to enjoin the prosecutors' office from discriminately applying a statute criminalizing the non-payment of child support by refusing to prosecute fathers of children born to unmarried women.⁴ In dicta, the Court acknowledged the then-prevailing view that a crime victim cannot compel a criminal prosecution because "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."⁵

In 1982, President Ronald Reagan convened the Presidential Task Force on Victims of Crime. After hearings held around the country and careful consideration of the issue, the Task Force concluded that the only way to fully protect crime victims' rights was by adding such rights to the

¹ John H. Langbein, *The Origins of Public Prosecution at Common Law*, *The American Journal of Legal History*, Vol. XVII, pg. 317, (1973), available at https://law.yale.edu/system/files/documents/pdf/Faculty/Langbein_Origins_of_Public_Prosecution_at_Common_Law.pdf (last visited Jan. 18, 2018).

² 106TH CONGRESS, *Senate Report 106-254 – Crime Victims' Rights Constitutional Amendment*, Apr. 4, 2000, available at <https://www.congress.gov/congressional-report/106th-congress/senate-report/254/1> (last visited Jan. 18, 2018).

³ NATIONAL CRIME VICTIM LAW INSTITUTE, *History of Victims' Rights*, available at https://law.lclark.edu/centers/national_crime_victim_law_institute/about_ncvli/history_of_victims_rights/ (last visited Jan. 18, 2018).

⁴ *Id.*

⁵ *Linda RS v. Richard D.*, 410 US 614, 619 (1973).

Constitution.⁶ The President's task force explained the need for a constitutional amendment in these terms:⁷

In applying and interpreting the vital guarantees that protect all citizens, the criminal justice system has lost an essential balance. It should be clearly understood that this Task Force wishes in no way to vitiate the safeguards that shelter anyone accused of crime; but it must be urged with equal vigor that the system has deprived the innocent, the honest, and the helpless of its protection.

The guiding principle that provides the focus for constitutional liberties is that government must be restrained from trampling the rights of the individual citizen. The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed. To that end it is the recommendation of this Task Force that the sixth amendment to the Constitution be augmented.

Following that recommendation, proponents of crime victims' rights decided to seek constitutional protection in the States initially before undertaking an effort to obtain a Federal constitutional amendment.⁸ The 'states-first' approach drew the support of many victim advocates. Adopting state amendments for victim rights would make good use of the 'great laboratory of the states.'⁹ A total of 33 states,¹⁰ in widely different versions, have amended their state constitution to address crime victims' rights, and the remaining states have passed crime victims' rights legislation.¹¹

Crime Victim Rights Pursuant to the Florida Constitution

On January 3, 1989, the State of Florida became the first state in the nation to amend its constitution to include the rights of crime victims. Article I, Section 16(b) of the Florida Constitution provides, in relevant part:

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.

⁶ *Supra* note 2.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ See Ala. Const. amend. 557; Alaska Const. art. I, Sec. 24; Ariz. Const. art. II, Sec. 2.1; Cal. Const. art. I, Sec. 12, 28; Colo. Const. art. II, Sec. 16a; Conn. Const. art. I, Sec. 8(b); Fla. Const. art. I, Sec. 16(b); Idaho Const. Art. I, Sec. 22; Ill. Const. art. I, Sec. 8.1; Ind. Const. art. I, Sec. 13(b); Kan. Const. art. 15, Sec. 15; La. Const. art. 1, Sec. 25; Md. Decl. of Rights art. 47; Mich. Const. art. I, Sec. 24; Miss. Const. art. 3, Sec. 26A; Mo. Const. art. I, Sec. 32; Neb. Const. art. I, Sec. 28; Nev. Const. art. I, Sec. 8; N.J. Const. art. I, Sec. 22; New Mex. Const. art. 2, Sec. 24; N.C. Const. art. I, Sec. 37; Ohio Const. art. I, Sec. 10a; Okla. Const. art. II, Sec. 34; R.I. Const. art. I, Sec. 23; S.C. Const. art. I, S 24; Tenn. Const. art. 1, Sec. 35; Tex. Const. art. 1, Sec. 30; Utah Const. art. I, Sec. 28; Va. Const. art. I, Sec. 8-A; Wash. Const. art. 2, Sec. 33; Wis. Const. art. I, Sec. 9m. These amendments passed with overwhelming popular support.

¹¹ *Supra* note 3.

Crime Victim Rights Pursuant to Florida Law

The Florida Legislature has supplemented the rights provided to crime victims¹² under the Florida Constitution. Chapter 960, F.S., commonly referred to as the “Victim Rights Act,” relates generally to the treatment of victims and witnesses in the criminal justice and juvenile justice system. Multiple agencies, including the Department of Legal Affairs, state attorneys, correctional agencies, the State Courts Administrator, the Department of Law Enforcement, and every sheriff’s department, police department, or other law enforcement agency are required to develop and implement guidelines in compliance with the Victims’ Rights Act. Information about the victim services provided by these agencies can generally be found on their website.¹³

A victim, or the State Attorney’s Office with the consent of the victim, has standing to assert any of the legal rights provided under the constitution or by general law. The rights guaranteed to crime victims in the criminal justice and juvenile justice system under ch. 960, F.S., include:

- The right to receive information on available crisis intervention services and local community services to include counseling, shelter, legal assistance, or other types of help, depending on the particular circumstances.
- The right to receive information regarding the role of the victim in the criminal or juvenile process, including what the victim may expect from the system as well as what the system may expect from the victim.
- The right of a victim or witness with autism or an autism spectrum disorder or his or her parent or guardian to request a psychiatrist, psychologist, mental health counselor, special education instructor, clinical social worker, or related professional is present at all interviews of the individual. The defendant must reimburse the victim for all expenses related to the attendance of the professional at the interview, in addition to other restitution or penalties provided by law, upon conviction of the offense of which the individual is a victim.
- The right to receive information regarding the stages of the criminal or juvenile justice process and the manner in which information about such stages may be obtained.
- The right to be informed, present, and heard when relevant, at all crucial stages of a criminal or juvenile proceeding, to the extent the right does not interfere with the constitutional rights of the accused.
- The right, if incarcerated, to be informed and submit written statements at all crucial stages of the criminal and juvenile proceedings.

¹² Victim services also include the victim’s parent or guardian if the victim is a minor, the lawful representative of the victim or the victim’s parent or guardian if the victim is a minor, and the next of kin of a homicide victim. s. 960.001(7), F.S.

¹³ See, e.g., Florida Attorney General Webpage - <http://myfloridalegal.com/pages.nsf/Main/E14E8F70D7DFE31F8525749C005012E4> (last visited Jan. 18, 2018); Office of the State Attorney of the 15th Judicial Circuit - <http://www.sa15.state.fl.us/stateattorney/VictimWitness/indexRights.htm> (last visited Jan. 18, 2018); University of Florida Police Department - <http://www.police.ufl.edu/victim-services/florida-state-statute-960crime-victim-bill-of-rights/> (last visited Jan. 18, 2018).

- The right to a prompt and timely disposition of the case as long as it does not interfere with the constitutional rights of the accused.
- The right to be notified of the arrest and release of the offender, including release to community control and/or work release. When an arrest is made in a reported case, the victim, witnesses, relatives of minor victims and witnesses and relatives of homicide victims, where those persons have provided current addresses and telephone numbers, must be notified.
- The right to receive information on the steps available to law enforcement and the State Attorney's Office to protect the victim from intimidation and/or harassment.
- The right of the victim of domestic violence to be informed of the address confidentiality program administered through the Attorney General's Office.¹⁴
- The right of each victim or witness who has been scheduled to attend a criminal or juvenile justice proceeding to be notified as soon as possible by the agency or person scheduling his/her appearance of any change in scheduling which will affect the victim's appearance.
- The right to receive advance notification of judicial and post judicial proceedings relating to the case.¹⁵
- The right to not be excluded from any portion of any hearing, trial or proceeding pertaining to the offense based solely upon the fact that such person is subpoenaed to testify, unless the court determines otherwise.
- The right, if the victim of a felony involving physical or emotional injury or trauma, or in a case in which the victim is a minor child or in a homicide, to be consulted by the State Attorney in order to obtain the views of the victim or family about the disposition of any criminal or juvenile case brought about as a result of such crime.
- The right to review certain portions of a pre-sentence investigation report for adult and youthful offenders prior to the sentencing of the accused.
- The right to a prompt return of property unless there is a compelling law enforcement need to retain it.
- The right to request that the State Attorney or law enforcement agency help explain to employers and creditors that the victim may face additional burdens by taking time off from work to assist law enforcement and undergo serious financial strain either because of the crime or by cooperating with authorities.

¹⁴ Pursuant to ss. 741.401 - 741.465, F.S., the Address Confidentiality Program (ACP) provides a substitute mailing address for relocated victims of domestic violence, with the Office of the Attorney General serving as legal agent for receipt of mail and service of process.

¹⁵ Includes proceedings and hearings related to arrest, release, and prosecution or petition for delinquency.

- The right to submit an oral or written impact statement to the court, pursuant to s. 921.143 F.S., prior to sentencing of the offender.
- The right to receive reasonable consideration and assistance from employees of the State Attorney's Office, Sheriff's Office, or Police Department.
- The right to be notified when the offender escapes from custody.
- The right of the victim to request that a victim advocate be permitted to attend and be present during any deposition.
- The right of the victim of a sexual offense to have the courtroom cleared, with certain exceptions during his or her testimony, regardless of the victim's age or mental capacity.
- The right to request, in certain circumstances that the offender be required to attend a different school than the victim or siblings of the victim.
- The right of the victim who is not incarcerated to not be required to attend discovery depositions in any correctional facility.
- The right that any information gained pursuant to ch. 960, F.S., regarding any case handled in juvenile court, may not be revealed to any outside party, except as reasonably necessary in pursuit of legal remedies.
- The right to know in certain cases and at the earliest possible opportunity, if the person charged with an offense has tested positive for human immunodeficiency virus (HIV) infection. In such cases, upon request of the victim or the victim's legal guardian, or the parent or legal guardian of the victim if the victim is a minor, the court shall order such person to undergo HIV testing.
- The right of a victim or the victim's legal guardian, or the parent or legal guardian of a victim, if the victim is a minor, to request that a person who is charged with any offense enumerated in section 775.0877(1)(a)-(n)¹⁶, Florida Statutes, that involves the transmission of body fluids from one person to another, undergo hepatitis and HIV testing.
- The right to request, for specific crimes, that the victim's home and work telephone numbers, home and work addresses, and personal assets not be disclosed to anyone.
- The right of a victim of a sexual offense to request the presence of a victim advocate during the forensic medical examination.

¹⁶ Such offenses include sexual battery, incest, lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age, assault, aggravated assault, battery, aggravated battery, child abuse, aggravated child abuse, abuse of an elderly person or disabled adult, aggravated abuse of an elderly person or disabled adult, sexual performance by person less than 18 years of age, prostitution, donation of blood or plasma or organs, and human trafficking.

- No law enforcement officer, prosecuting attorney, or government official shall ask or require a victim of a sexual offense to submit to a polygraph examination or other truth-telling device as a condition of the investigation.

Crimes Compensation Trust Fund

The Florida Attorney General's Office administers a trust fund that provides financial assistance to victims of crime and are experiencing hardship. In some cases, crime victims may be eligible for compensation. Victim compensation assists with treatment expenses (i.e. medical, prescriptions eyeglasses, dentures, prosthetic devices); funeral expenses; professional mental health and grief counseling; loss wages or support; disability assistance because of the crime; domestic violence, sexual battery or human trafficking relocation.

B. EFFECT OF PROPOSED CHANGES:

The proposal expands the constitutional rights of crime victims in the criminal justice and juvenile justice systems to:

- Preserve and protect the right of crime victims to achieve justice;
- Ensure a meaningful role throughout the criminal and juvenile justice systems for crime victims; and
- Ensure that crime victims' rights and interests are respected and protected by law in a manner no less vigorous than protections afforded to criminal defendants and juvenile delinquents (proposal repeals subordination of crime victim rights to rights of criminal defendants when such rights are in conflict).

The proposal defines a "victim" entitled to the rights enumerated below as 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. Such persons include a victim's lawful representative, the parent or guardian of a minor, or the next of kin of a homicide victim unless the interest of such individual would be in actual or potential conflict with the interests of the victim.

Information regarding the constitutional rights of crime victims, as established by the proposal, must be made available to the general public and provided to all crime victims in the form of a card.

It should be noted that many of the constitutional rights established by the proposal currently exist under Florida law.

Crime Victim Rights

The proposal provides that crime victims are entitled to the following rights which vest at the time of victimization:

- The right to due process and to be treated with fairness and respect for the victim's dignity;
- The right to be free from intimidation, harassment, and abuse;
- The right to be reasonably protected from the accused and any person acting on the accused's behalf;

- 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;
- 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;
- The right to privacy, which includes the right to refuse an interview, deposition, or other discovery request by the defense or anyone acting on the defendant's behalf, and to set reasonable conditions on the conduct of any such interaction to which the victim consents;
- The right to the prompt return of the victim's property when no longer needed as evidence in the case;
- 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;
- The right to proceedings free from unreasonable delay, and to prompt and final conclusion of the case and any related post-judgment proceedings;
 - The state attorney may file a good faith demand for a speedy trial and the trial court must 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.
 - All state-level appeals and collateral appeals 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 Florida Supreme Court must report to the Speaker of the House of Representatives and the President of the Senate all cases where the court was unable to comply with the time requirements and the circumstances causing the delay.
- The right to be informed of the constitutional rights of crime victims and of the right to seek legal advice with respect to such rights.

The proposal establishes the following additional constitutional rights of crime victims which vest only upon the victim's request (the proposal does not specify to whom a request must be made or if an independent request must be made to invoke each right):

- The right to reasonable, accurate, and timely notice of, and to be present at, all public proceedings involving the criminal conduct, even if the victim will be a witness at the proceeding, notwithstanding a rule to the contrary;
- The right to 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;
- The right to confer with the state attorney concerning any plea agreements, participation in pretrial diversion programs, release, restitution, sentencing, or any other disposition of the case;
- 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 the

- information provided considered in any sentencing recommendations submitted to the court;
- 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 portions that are confidential;
 - The right to be informed of the conviction, sentence, adjudication, place and time of incarceration, or other disposition of the convicted offender, and the release or escape of the offender from custody;
 - 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, and to be notified of any release decision. The parole or release authority must extend the right to be heard to any person harmed by the offender (appears to apply to persons other than victims of crime, or of the crime at issue); and
 - 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 the release of the offender.

The proposal provides that a reasonable attempt by the appropriate agency to notify the victim and convey the victim's views to the court in any first appearance proceeding is sufficient to comply with certain specified rights of the victim applicable to such proceedings.

Enforcement of Crime Victim Rights

The victim, the victim's attorney, the victim's lawful representative, or the office of the state attorney upon request of the victim, may assert and seek enforcement of the constitutional rights afforded to crime victims by the proposal and any other rights afforded to crime victim by other laws, in any trial or appellate court, or before any other authority with jurisdiction over the criminal matter. The court or other authority with jurisdiction must act promptly on a request to enforce such rights and afford 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 must be clearly stated on the record.

Implementation of Crime Victim Rights

The provisions of the proposal are self-executing and do not require implementing legislation; except that the Legislature may adopt legislation to implement the time requirements and reporting requirements for the completion of judicial appeals.

Effective Date and Applicability

If approved by the voters, the proposal will take effect on January 8, 2019.¹⁷ The proposal is silent with regard to retroactivity or applicability to pending cases in the criminal or juvenile justice system.

¹⁷ 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.")

C. FISCAL IMPACT:

The fiscal impact on state and local government is indeterminate.

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.