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Honorable Trent Franks
Chairman, House Subcommittee on the Constitution
7121 W. Bell Road, Suite 200
Glendale, AZ 85308

Dear Congressman Franks:

As one who has served as a career prosecutor and as a victim rights advocate, I am grateful for your work and that of Congressman Jim Costa. Together, you recognize that, in order to honor our pledge of "justice for all," an amendment to our Constitution is essential to protect victims of crime in our criminal justice system. After being apprised of testimony offered by the ACLU and questions regarding the ability of prosecutors to effectively carry out our duties and responsibilities alongside the rights to be protected by the Victim Rights Amendment, I offer the following.

The Maricopa County Attorney's Office is the fourth largest prosecution office in the United States with over 300 prosecutors, serving the four million people of Maricopa County; the fourth most populated county in the United States. Every day we pursue justice in each and every one of the over 35,000 felony cases we handle, on average, each year. I have had the privilege of leading this office since November of 2010 and previously served the office as a line prosecutor, personally prosecuting hundreds of felony cases, and as a supervisor of auto theft prosecutions. I have also worked on behalf of crime victim advocacy organizations, appearing as attorney of record on behalf of crime victims in state and federal courts at the trial and appellate levels. It has been my distinct honor and privilege to protect the rights of victims of crime while successfully securing constitutionally-sound convictions without jeopardizing the Due Process rights of the accused.

For my entire career, Arizona crime victims have been cloaked with constitutional protections and participatory rights, including standing to assert their rights. Daily, I have witnessed the application of these rights in real cases – not merely discussed in hypotheticals pursuant to an esoteric intellectual exercise – real victims, real defendants, and real constitutional consequences. Unfortunately, state-level

constitutional protections of rights for victims of crime sometimes fall short due to the lack of similar protections in our federal constitution. Nevertheless, law enforcement, prosecutors and the courts in Arizona for over 20 years have endeavored to protect many of the same rights that are included in the 2012 Victims' Rights Amendment, including such rights as the right "to fairness, respect, and dignity" ... "the right to reasonable notice of, and shall not be excluded from, public proceedings relating to the offense, to be heard at any release, plea, sentencing, or other such proceeding involving any right established by this article, ... to proceedings free from unreasonable delay, to reasonable notice of the release or escape of the accused, to due consideration of the crime victim's safety, and to restitution." For these rights our law provides that "the crime victim or the crime victim's lawful representative has standing to fully assert and enforce these rights in any court."

Jesselyn McCurdy's, Senior Legislative Counsel for the ACLU, written statement before the House Committee on the Judiciary, Subcommittee on the Constitution Hearing on "Victims' Rights Amendment" on Thursday, April 26, 2012 is stunningly inaccurate, obsolete, and presents a false choice: rights for victims of crime or rights for the criminal defendant. Besides parading out the same cast of decades old arguments with little basis in fact or analysis, the ACLU continues to ignore the decades of evidence indicating that the sky will not fall if our Constitution is amended to provide crime victims with minimal protections to ensure that our criminal justice system is just for all involved throughout our land.

In all of my years working with and in the criminal justice system, I cannot recall even one case where a defendant was granted a new trial as a remedy for a violation of his rights because a crime victim chose to exercise her rights as a crime victim. The ACLU would like to portray the advancement of victim's rights as a vilification of the United States Constitution. If a victim is guaranteed a right to dignity and respect, somehow this right must violate the constitutional rights of the accused. This is simply not the case and a perverse view of what we endeavor to do on a daily basis in seeking justice and raises the question: are we willing to accept a criminal justice system that then, by default, permissibly denies dignity and respect to victims of crime?

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

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

Id. at 1013.

I would qualify Judge Kozinski's observation slightly. The Crime Victim's Rights Act sought to simply *recognize* the participatory role of crime victims. In the State of Arizona, our constitution guarantees crime victims participatory status as well as a panoply of rights that have, for the most part, been effectively implemented without undermining the rights of criminal defendants. However, when judges engage in a constitutional calculus, the absence of federal constitutional rights for victims of crime ensures that there will be an imbalance in seeking to guarantee the rights of all participants. Amending the United States Constitution is not some zero sum game as the ACLU argues. The ACLU, an organization that markets itself as being dedicated to the principles of "equality and justice" ... fails its mission by not supporting the VRA. With little research, the ACLU would find that indeed crime victim's rights and defendant's rights under the Constitution can coexist. This should be a banner issue for the ACLU were it to be true to its stated mission. Hard evidence demonstrates that enforcement of victim's rights gives a voice to the voiceless and effectuates the goals of the criminal justice system at every turn.

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

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

Second, the "rights to reasonable notice of, and shall not be excluded from, public proceedings relating to the offense" present no hindrance to successful prosecutions and do not implicate any Due Process right of an accused. Providing notice to a victim of a crime has not prevented me from successfully prosecuting any case; having crime victims present in a courtroom has actually assisted in prosecuting a case because they are often essential to the truth seeking function we serve. Moreover, criminal defendants who counted on fear and intimidation to keep a crime victim from

cooperating have had to reassess their trial strategy, often resulting in a plea agreement ahead of trial. In no case has the victim's right to be present throughout a trial resulted in an appellate court finding that a defendant in Arizona was denied the right to a fair trial. Amending our federal constitution to guarantee notice to and attendance of a victim of crime will ensure a fair and consistent balancing of the interests of all involved in a criminal matter.

Third, the right "to be heard at any release, plea, sentencing, or other such proceeding involving any right established by this article" is actually a fundamental necessity that cannot fairly be said to impose on a Due Process right of an accused. Given that decisions to release a criminal defendant, to accept a plea agreement, or to sentence a defendant are all premised on considerations of the impact of any given offense to the crime victim, why shouldn't a victim provide such information firsthand? Rather than complicate or frustrate the prosecution of any given case, the involvement and participation of a crime victim has afforded me important insight into the impact of a crime on the individual, their family, and their larger community, the very community prosecutors and courts presume to represent in resolving criminal cases. Given our criminal justice system's recognition of the value of in court testimony, a right to be heard for a victim of a crime is invaluable and crucial. Absent protections in our federal constitution of this right, assaults on common sense do occur and have required further litigation to defend as noted in the *Kenna* case above.

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

Fifth, the right "to reasonable notice of the release or escape of the accused" cannot seriously be opposed. As a prosecutor, I cannot fathom a rational objection to be informed of a security threat to the victim's person. It is actually a recognition of our

criminal justice system's failures that gives rise to the need to enshrine this right in our Constitution in the first place.

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

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

Eighth, and certainly not least in importance is the recognition that "[t]he crime victim or the crime victim's lawful representative has standing to fully assert and enforce these rights in any court." What a cruel comedy it would be to set forth basic protections for victims of crime in our criminal justice system and then afford no means of calling attention to even inadvertent failures to honor these rights. As a professional prosecutor, I have no more room to object to someone having standing to assert rights that enhance the criminal justice system than I have room to complain about the number of criminal defense attorneys retained on any given case. For rights to have meaning, a crime victim has to have the ability to raise issues to a court. Since these rights and issues are in the narrow category of those addressing a victim of a crime, rights and issues that our criminal justice system should welcome the opportunity to address to fulfill the promise of "justice for all," there can be no real objection by a prosecutor just as there has been no real impediment to prosecutions.

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

Sincerely,


Bill Montgomery
Maricopa County Attorney