

To: Senator Gilbert Keith-Agaran, Chair- Senate Committee on Judiciary and Labor;
Senator Maile Shimabukuro, Vice Chair; and members of the Committee

From: Nonohe Botelho, Parents of Murdered Children (POMC)

Date: Thursday, February 26, 2015

Re: **Senate Bill 679:** Proposing an Amendment to Article I of the Constitution of the State Of Hawaii
Relating To the Rights of Victims of Crime

Aloha, my name is Nonohe Botelho. I am the Hawaii Contact Person for the National Organization of Parents of Murdered Children (POMC). I became affiliated with Parents of Murdered Children in 2011 after my son, Joel Kealiinoa Botelho, was gunned down and executed in front of our home in Kaneohe. I am here today in support of Senate Bill 679, relating to the Basic Rights of Victims of Crime.

When my son was murdered in 2011, my whole family became victims of a violent crime. Within hours of the shooting we also became traumatized by the criminal justice system, starting from the moment my son's lifeless body was taken away by ambulance. At the time I was told that I could not hold or touch my son because his body was "evidence" that needed to be "processed." In a split second, Joel was no longer my child, the son I had raised, he was EVIDENCE. I had to wait seven days to see my son's body again. To this day, I am haunted by the fact that I could not hold my son or kiss his warm face just one more time.

During the weeks and months that followed my family experienced anguish so profound that it has changed our lives forever. Not only did we have to bury my son we had to prepare ourselves for a criminal trial that we quickly discovered was not "JUST". Time does not permit me to tell you of the intense conditions we found ourselves subjected to, but I will tell you that although we got a conviction, we were continually traumatized in the process. Sadly, my story is not unique. I have heard many stories of mistreatment of victims and their families.

For example, in the case of murder victim, Albert Myers; after a misunderstanding, the family was told that they were not allowed to attend court for the reading of the verdict. They were told to stay away from the courthouse completely. They could not even wait in the hallway! All they could do was file a grievance. They never got a response.

In the case of murder victim, Kollin Eldert's; the family agreed to accept a lesser manslaughter charge, if necessary. Unfortunately, as we all sat in the courtroom as the judge read the jury instructions it became painfully clear that the lesser manslaughter was NOT included. The family was never informed of the change and was devastated by the decision. The manslaughter charge, or the lack thereof, has been a point of contention in this case from the beginning. This case is now scheduled to go to trial for the third time.

Most disturbing was the case of a young man named Jamil. Jamil was bludgeoned, had his throat cut and then his body was dismembered. The media choose to air a small clip of the defense attorney calling the victim a "homegrown terrorist". Jamil's was of middle-eastern decent and his last name happened to be, Khan, K-H-A-N. He was NOT a terrorist!

I'd like to sit here and say that this is the exception and not the rule, but this is simply not the true. All too often victims are sidelined and relegated to the back of the room. We are not seen as a meaningful part of the process. Instead we are traumatized and re-victimized by well-meaning people. Currently, in the State of Hawaii, victims and their families have no recourse or mechanism to ensure that our rights are not only protected, but enforceable. By amending Article I of the Constitution of the State of Hawaii you will give us such a mechanism.

Today, I speak to you not as a "Victim", but a Survivor. Collectively, we are not asking to get "special" treatment; we are asking to be treated fairly and with dignity. We are asking for the same rights as the defendant, nothing more and nothing less.

Thank you for your time and consideration.

DATE: March 2, 2015

TO: The Honorable Gilbert S.C. Keith-Agaran, Chair
The Honorable Maile S.L. Shimabukuro, Vice Chair
Senate Committee on Judiciary and Labor

FROM: Ruby Mata-Viti

RE: Testimony in **Strong** Support of S.B. 679, Proposing an Amendment to Article I of the
Constitution of the State of Hawaii Relating to Rights of Victims of Crime

Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Committee on Judiciary and Labor:

Thank you for the opportunity to submit testimony in strong support of S.B. 679.

My name is Ruby Mata-Viti.

In November 1996 my husband was killed by a hit-and-run driver, which left me a widow at age 37, raising our 5-year old son alone.

The perpetrator turned himself in after a couple of weeks, and after two years of delays, he was brought to trial and sentenced to 10 years in prison. Part of his sentence was that he was to pay \$18,000 in restitution.

He was released 2 years early on parole, and I was never notified. I only found out by happenstance when I moved and called to give the state my new mailing address for any restitution checks. While he was serving time, I had been receiving restitution checks sporadically, in varying amounts, totaling less than \$2000.

When I called, I was shocked to discover that he been out for about a year or so, two years earlier than sentenced, and then felt compounded grief realizing that since I had not been notified, I was not given a chance to speak at the parole hearing not only for myself but on behalf of my son and my late husband.

While he was out on parole, had I been properly informed of his release, I would have notified the state that he was in parole violation because he was not sending me checks on a regular basis. All I received was a \$50 check dated a few months after his release. While he was on parole, it seems he could have tried to get a personal loan from his family or a loan from a bank that his family member could have co-signed in order pay in full and satisfy the restitution part of his sentence to keep him on parole status. But I knew nothing until far too late.

I would not wish what I have been going through on anyone, and it's uncomfortable opening myself up this way, but because I have been going through this I share my experience with you in hopes to foster change that might help others.

When this first happened in 1996, I was advised not to file a civil suit because the state is bringing this man to trial and the state would take care of it. I was advised that I should spend all my energy and resources to take care of our son.

But it was alarming to find that the courts would hand down a sentence and then release the man without letting me know and THEN in the matter of restitution, left me in a position where I basically felt abandoned — feeling what's the point of issuing a restitution sentence if it's not automatically enforced. The victims are left to try and navigate the system to have the restitution enforced.

I had to try to find a collections attorney to help me collect the money. And it is not about the money, it is part of trying to heal — to know that I am doing everything that I possibly can. No collections attorney would touch my case unless I paid them up front and I did not have the resources. They advised against pursuing, saying that I'd end up with little or nothing minus attorney's fees and could even end up paying more than owed, and they said that the person I was trying to collect from probably didn't have money anyway.

In talking to the attorney who finally did make time to help me, he said collections laws were written with big corporations in mind, corporations who have lots of money to spend to go after people and make them pay, and not written for regular people like me.

It would seem appropriate — if the person who committed the crime does not make a good faith effort to satisfy the restitution within a certain timeframe — that there be an automatic judgment placed on that person once released, so that the victims would not have to find a collections attorney or go through the process of paperwork and have to suffer pain of constantly reliving the past when they have to go to court or do paperwork to collect. Once the person is out of prison, there should be automatic judgment/garnishment placed on that person until the restitution is satisfied.

Doing so would help ease the burden on those who are already suffering.

I urge the committee to support the constitutional amendment for crime victims' rights so other victims and surviving family members receive the notification and restitution to which they are entitled. I humbly ask that the committee take my testimony into consideration going forward.

Testimony of Cynthia M. Hora
Assistant Attorney General
Office of the Illinois Attorney General
In Support of SB 679 Proposing an Amendment to Article I of the State of
Hawaii Relating to the Rights of Victims of Crime

Before the Senate Committee on the Judiciary
March 3, 2015

Thank you for the opportunity to testify in support of Senate Bill 679 which proposes a constitutional amendment that would guarantee victims of crime certain enumerated rights and the ability to assert and enforce those rights. When passed, Hawaii will become the 33rd state to afford crime victims constitutional rights.

By way of background, I have spent most of my legal career working with crime victims, first as a prosecutor in Alaska for almost 20 years. During the first ten years, victims had statutory rights. During the second decade, victims of crime were afforded constitutional rights. I am currently an Assistant Attorney General in the Office of the Illinois Attorney General who spent several years advocating for the passage of Marsy's Law in Illinois. During that time, our office and victim advocates answered questions and addressed concerns raised by prosecutors, courts, the defense bar and the bar association. Many of you may share those concerns. The bill proposing Marsy's Law passed the Illinois House by a vote of 111-2-0, and unanimously passed the Senate with 59 votes. On November 4, 2014, more than 76% of the voters approved the constitutional amendment.

My testimony has three parts. First, is a brief history of the role of crime victims in criminal proceedings and the victims' rights movement to provide the context in which Marsy's Law has been proposed. The second part focuses on why a constitutional amendment is necessary to ensure that victims have enforceable rights. The final part addresses how victims' rights can co-exist with defendants' rights and prosecutorial authority and discretion.

The Role of the Victim

When our nation was formed more than 200 years ago, there were no public prosecutors. Crime was viewed primarily as harming individuals, so victims investigated and prosecuted their criminal cases. There was no need for a constitutional provision protecting victims' rights in criminal proceedings. Over time, society came to view crime as harming not only the individual victim, but also the state. The prosecution of crime shifted to prosecutors who represented the state, not the victim. The role of the victim diminished and the victim was often excluded from proceedings, including the trial. Victims felt victimized by a criminal justice system that gave them the legal status of a witness or a piece of evidence.

The Crime Victims' Right movement evolved from the Civil Rights movement. In 1972, the United States Supreme Court in *Linda R.S. v. Richard D.*, 410 U.S. 614, recognized that Congress could "enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." Ten years later, President Ronald Reagan created the President's Task Force on Victims of Crime to address the needs of the millions of individuals and their families who are victimized by crime every year. The Final Report of the Task Force recognized the importance of the victim in criminal proceedings and concluded that the criminal justice system, which treated victims with "institutionalized disinterest," had become "appallingly out of balance." In addition to recommending that victims be provided services and assistance, recommended that laws be passed to increase the victim's participation in criminal proceedings. The recommendations included: provide for the protection of victims and witnesses from intimidation; develop and implement guidelines for the fair treatment of crime victims and witnesses; allow victims the opportunity to make impact statements at sentencing and requiring restitution in all cases. Following the issuance of the report, states, including Hawaii, passed laws creating statutory rights for victims of crime.

The Need for a Constitutional Amendment

Our nation has a hierarchy of laws. Statutes provide considerable protection, but the constitution is the supreme law of the state. The passage of the Federal Bill of Rights illustrates this principle. Those who ratified the Constitution thought it necessary to enshrine various rights in the Constitutions and passed amendments guaranteeing, among others, the right to exercise one's religious beliefs, the right to freedom of the press, the right to be free from unreasonable searches and seizures and the rights of the accused to counsel and a speedy trial and the right not to incriminate one's self.

Experience reveals that statutory rights for crime victims are ignored or denied. This may lead to revictimization. The elevation of crime victims' rights to constitutional stature produces a noticeable change in practice and procedure that leads to the enforcement of rights

Co-existence with Defendants' Rights and Prosecutorial Authority

Prosecutors, defense counsel, judges, members of state legislatures and others may express concern that constitutional rights for crime victims will undermine or violate a defendant's constitutional rights. An examination of the rights proposed in Senate Bill 679 and the experience of states that have constitutional victims' right amendments demonstrates that the accused and the victim can both exercise their rights without violating the right of the other.

Many of the proposed rights do not implicate a constitutional right of the accused. For example, the right to be advised of services, the right to timely notice of public court proceedings, the right to confer with the prosecutor, the right to have property returned when it is no longer needed as evidence and the right to notification of a change in the offender's custodial status do not conflict with the accused right to counsel, right to speedy trial, the right to present and cross-examine witnesses, or other constitutional rights.

A victim's right to be heard at plea, sentencing and a proceeding where the right of victim is at issue does not undermine the rights of the accused. For example, a victim's right to be heard at plea does not encompass the right to veto a plea agreement. The right to make an impact statement at sentencing is the right to tell the court how the crime has affected the victim. The judge considers what weight to give this information in fashioning an appropriate sentence.

There will be times when a judge will be required to determine the scope of the rights of the accused and the victim. Judges across the state and across the nation make these determinations every day courts are in session. Judges determine whether the accused's right to present and cross-examine witness allows defense counsel to call a particular witness or allows defense counsel to ask a witness about information contained in confidential or privilege records.

Judges will also at times be called upon to balance the rights of the accused and the victim but this does not mean the judge's ruling will violate the right of the accused. For example, when the media opposes the accused's request to seal court records or objects to the closing of a proceeding, the judge must balance the media's constitutional rights and the accused's constitutional rights. That the judge may determine that the court record will not be sealed or that the media will be allowed to attend the proceeding is not a violation of the accused's rights. Similarly, when a judge denies a defendant's request for a police officer's personnel record when the officer has objected, the judge does not violate the defendant's rights.

Prosecutors in other states have been concerned that their authority and discretion will be usurped by the victim. This has not occurred. A victim's right to confer with the prosecutor about plea does not encompass the right to veto a plea agreement, nor does it encompass the right to dictate the terms of the plea agreement. The prosecutors retain their authority over charging decisions, plea decisions and trial strategy.

Affording victims constitutional rights does not give victims party status or the right to participate in every aspect of the case. The victim's standing and participation are limited to those rights enumerated in the Constitution. The victim can assert the right to be heard when a judge is considering conditions of release, when the accused enters a plea and at sentencing. The victim does not have standing to object to a motion to suppress evidence, to object to the presentation of evidence at trial, to cross-examine witnesses, or to speak to the jury.

Conclusion

The rights proposed in Senate Bill 679, Marsy's Law, are similar to the constitutional rights of victims in other states. These states have not experienced a parade of horrors or an adverse impact on the administration of justice. Victims did not choose their role, it was thrust upon them. They suffer physical harm, financial harm and emotional harm. Civil society should treat those who have been harmed with courtesy, dignity and respect and afford them constitutional rights that lead to justice.