

Aligned by ER McQuaid (Father of Tod McQuaid 1954 to 1990)

Author's introductory notes: This document requests creation of a study resolution for SB694 so the legislators review and revise it through the interim process. It is hoped that activity would give the bill a better chance of passage in 2009.

First, author created a simple cut and paste document from two West Virginia's codes. The WVC-§61-11A-(1) to WVC-§61-11A-(8) (WV Victim Protection Act of 1984 – vintage 2007*) is inserted by section into 18USC-§3771-(a). Thereby forcing together a best-fit of dissimilar elements state v federal. These two codes promise different victims' rights depending on the crime jurisdiction.

Format of comparison in the following pages has federal victim bill of rights code followed by related state code:

[FEDERAL Code copy first]

18 U.S.C. §3771 (a) – where (b) to (f) with compliance also found at: http://www.usdoj.gov/usao/eousa/vr/cvra/18_USC_3771.html

RIGHT OF CRIME VICTIMS.--A federal crime victim has this right:

[West Virginia Code copied below line because: There being no WV victim bill of rights to compare against the above federal right code; therefore, the selected WV code by 'Section' is aligned under the above federal victim right code as alternative.]

** Note: WV Code updated with legislation passed through [2007 2nd Extraordinary Session](#)*

These right comparisons illustrate the need for legislation to enforce denied victims' rights or resolve discriminatory victims' rights against West Virginia's state crime victims. This method implies need to create Victims' Rights Amendment for a “WV Victim Bill of Rights”.

Second, a note of interest, several Web pages claim different code as their version of a WV Victim Bill of Rights. Examples include:

- o <http://www.vwapwv.com/counties.html> (referral service for multi counties + pseudo victims' bill of rights)
- o <http://www.ncsl.org/programs/cj/victimrightsdb.cfm> (Nat. Conf. of State Legis. uses §61-11A-(6) as 'Statutory Victim Bill of Rights')

Third, a second feature of 18 USC Section 3771 is the compliance and enforcement code established therein that could not be found in the West Virginia Code §61-11A-(1) to §61-11A-(8).

The (1800s) case of Marbury v. Madison contains “The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.” Essentially (for West Virginians): 'A right without a remedy is no right at all' as proved to the McQuaids in Greenbrier County.

For these reasons, our Victimhood Petition signers are asking the WV legislature to use the federal 18USC-§3771 as a guide.

18 U.S.C. §3771 (a)(1) The right to be reasonably protected from the accused.

§61-11A-6. State guidelines for fair treatment of crime victims and witnesses in the criminal justice system.

(a) No later than the first day of July, one thousand nine hundred eighty-four, the attorney general shall promulgate rules and regulations in accordance with the provisions of chapter twenty-nine-a of this code, establishing guidelines for law-enforcement agencies and prosecuting attorneys' offices consistent with the purposes of this article. The attorney general shall seek the advice of the department of public safety and department of human services in preparing such rules and regulations. In preparing such rules and regulations, the following objectives shall be considered:

- (1) The arresting law-enforcement agency should ensure that victims routinely receive emergency social and medical services as soon as possible and are given information on the following
 - (A) Availability of crime victim compensation (where applicable);
 - (B) Community-based victim treatment programs;
 - (C) The role of the victim in the criminal justice process, including what they can expect from the system as well as what the system expects from them; and
 - (D) Stages in the criminal justice process of significance to a crime victim, and the manner in which information about such stages can be obtained.
- (2) The prosecuting attorney or his assistant should ensure that victims and witnesses receive information on steps that law-enforcement officers and prosecuting attorneys can take to protect victims and witnesses from intimidation.

18 U.S.C. §3771 (a)(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

§61-11A-6. State guidelines for fair treatment of crime victims and witnesses in the criminal justice system.

- (3) All victims and witnesses who have been scheduled to attend criminal justice proceedings should be notified by the prosecuting attorneys' offices as soon as possible of any scheduling changes which will affect their appearances.
 - (4) Victims, witnesses, and one member of the immediate family of those victims and witnesses should, if such persons provide the appropriate official with a current address and telephone number, receive prompt advance notification, if possible, of judicial proceedings relating to their case, from the prosecuting attorney's office, including:
 - (A) The arrest of an accused;
 - (B) The initial appearance of an accused before a judicial officer;
 - (C) The release of the accused pending judicial proceedings; and
 - (D) Proceedings in the prosecution of the accused (including the entry of a plea of guilty, trial, sentencing, and, where a term of imprisonment is imposed, the release of the accused from such imprisonment).
 - (6) Victims and other prosecution witnesses should, if practical, be provided prior to court appearance, a waiting area that is separate from all other witnesses.
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§61-11A-8. Notification to victim of offenders' release, placement, or escape from custody.

- (a) At the time a criminal prosecution is commenced by the filing of a complaint, if the complaint charges a person with committing an offense described in subsection (e) of this section, then in such case the prosecuting attorney is required to provide notice, in writing or by telephone, to the victim or a family member that he or she may request that they be notified prior to or at the time of any release of the accused from custody pending judicial proceedings.
- (b) If a person is convicted of an offense described in subsection (e) of this section, the prosecuting attorney is required to provide notice, in writing or by telephone, to the victim or a family member that he or she may request that they be notified prior to or at the time of sentencing if the convicted person will be placed on work release, home confinement or probation.
- (c) If a person is convicted of an offense described in subsection (e) of this section and is imprisoned in a state correctional facility or confined in a county or regional jail, the commissioner of corrections, the regional jail supervisor or the sheriff, as the case may be, is required to provide notice, in writing or by telephone, to the victim or a family member that he or she may request that they be notified prior to or at the time of:
 - (1) Releasing the convicted person from imprisonment in any correctional facility;
 - (2) Releasing the convicted person from confinement in any county or regional jail;

- (3) Placing the convicted person in a halfway house or other non-secure facility to complete his or her sentence; or
- (4) Any escape by the convicted person from a state correctional facility or a county or regional jail.
- (d) The notice shall include instructions for the victim or the victim's family member on how to request the notification.
- (e) Offenses which are subject to the provisions of this section are as follows:
 - (1) Murder;
 - (2) Aggravated robbery;
 - (3) Sexual assault in the first degree;
 - (4) Kidnapping;
 - (5) Arson;
 - (6) Any sexual offense against a minor; or
 - (7) Any violent crime against a person.
- (f) The commissioner of corrections, a regional jail supervisor, a sheriff or a prosecuting attorney who receives a written request for notification shall provide notice, in writing or by telephone, to the last known address or addresses or telephone number or numbers provided by the victim or a member of the victim's family, or in the case of a minor child, to the custodial parent of the child, in accordance with the provisions of this section. In case of escape, notification shall be by telephone, if possible.
- (g) If one or more family members request notification and if the victim is an adult and is alive and competent, notification shall be sent to the victim, if possible, notwithstanding that the victim did not request the notification.
- (h) If notification by telephone to a victim is attempted, notification is not complete unless it is given directly to the person requesting notification and after that person's identity has been verified. An attempted notification made to a voice mail or another recording device or to another member of the household is insufficient.
- (i) For the purposes of this section, the following words or phrases defined in this subsection have the meanings ascribed to them. These definitions are applicable unless a different meaning clearly appears from the context.
 - (1) "Filing of a complaint" means the filing of a complaint in accordance with the requirements of rules promulgated by the supreme court of appeals or the provisions of this code.
 - (2) "Victim" means a victim of a crime listed in subsection (e) of this section who is alive and competent.
 - (3) "Victim's family member" means a member of the family of a victim of a crime listed in subsection (e) of this section who is not alive and competent.

18 U.S.C. §3771 (a)(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(none found in West Virginia's code)

18 U.S.C. §3771 (a)(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

§61-11A-2. Testimony of crime victim at sentencing hearing.

- (a) For the purposes of this section, "victim" means a person who is a victim of a felony, the fiduciary of a deceased victim's estate or a member of a deceased victim's immediate family.
- (b) Prior to the imposition of sentence upon any defendant who has been found guilty of a felony or has pleaded guilty or nolo contendere to any felony, the court shall permit the victim of the crime to appear before the court for the purpose of making an oral statement for the record if the victim notifies the court of his desire to make such a statement after receiving notification provided in subsection (c) of this section. If the victim fails to so notify the court such failure shall constitute a waiver of the right to make an oral statement. In lieu of such appearance and oral statement, the victim may submit a written statement to the court or to the probation officer in charge of the case. Such probation officer shall forthwith file any such statement delivered to his office with the sentencing court, and the statement shall be made a part of the record at the sentencing hearing. Any such statement, whether oral or written, shall relate solely to the facts of the case and the extent of any injuries, financial losses and loss of earnings directly resulting from the crime for which the defendant is being sentenced.
- (c) Within a reasonable time, prior to the imposition of sentence upon such defendant, the (i) prosecuting attorney or assistant prosecuting attorney in charge of the case shall in writing (ii) advise the person who was the victim of such crime or in the case of a minor, the parent or guardian of such minor, or the fiduciary of his estate, if he be then deceased, of the date, time and place of the original sentencing hearing, and of the victim's rights to submit a written or oral statement to the sentencing court as herein above provided.
- (d) The oral or written statement given or submitted by any victim in accordance with the provisions of this section shall be in addition to and not in lieu of the victim impact statement required by the provisions of section three of this article.

§61-11A-3. Victim impact statement; when required; contents; use; right of defendant to review and present evidence.

- (a) In every case in which a presentence report is ordered by the court, such presentence report shall contain a victim impact statement unless the court orders otherwise, if the defendant, in committing a felony or misdemeanor, caused physical, psychological or economic injury or death of the victim.
- (b) The victim impact statement shall be prepared by the probation officer and shall include the identity of the victim, an itemization of any economic loss suffered by the victim as a result of the offense, a description of the nature and extent of any physical or psychological injury suffered by the victim as a result of the offense, the details of any change in the victim's personal welfare, lifestyle or family relationships as a result of the offense, whether there has been any request for psychological or medical services initiated by the victim or the victim's family as a result of the offense and such other information related to the impact of the offense upon the victim as may be required by the court.
- (c) If the court does not order a presentence investigation and report, the prosecuting attorney may request that the probation officer prepare a victim impact statement. The victim impact statement shall be considered by the court as a factor in determining the appropriate sentence.

Additionally, the statement may be utilized for the determination of claims by victims of crimes pursuant to the provisions of article two-a, chapter fourteen of this code.

(d) In cases that involve child victims of offenses defined in section twelve, article eight of this chapter or article eight-b or eight-d of this chapter, any victim impact statement in a presentence report may include a statement from a therapist, psychologist or physician who is providing treatment to the child as to the recommendations regarding the effect that possible disposition may have on the child.

(e) A victim impact statement prepared in accordance with the provisions of this section, other than for claims by victims of crimes pursuant to the provisions of article two-a, chapter fourteen of this code, shall be made available to the defendant, and his counsel if he is so represented, at least ten days prior to the date set for pronouncement of his sentence. The court shall, upon motion by or on behalf of the defendant, grant the defendant a hearing, whereby he may introduce testimony or other information related to any alleged factual inaccuracies in the statement.

18 U.S.C. §3771 (a)(5) The reasonable right to confer with the attorney for the Government in the case.

§61-11A-6. State guidelines for fair treatment of crime victims and witnesses in the criminal justice system.

(5) The victim of a serious crime, or in the case of a minor child or a homicide, the family of the victim, shall be consulted by the prosecuting attorney in order to obtain the views of the victim or family about the disposition of any criminal case brought as a result of such crime, including the views of the victim or family about:

- (A) Dismissal;
- (B) Release of the accused pending judicial proceedings;
- (C) Plea negotiations; and
- (D) Pretrial diversion program.

(8) A victim or witness who so requests should be assisted by law-enforcement agencies and prosecuting attorneys in informing employers that the need for victim and witness cooperation in the prosecution of the case may necessitate absence of that victim or witness from work. A victim or witness who, as a direct result of a crime or of cooperation with law-enforcement agencies or attorneys for the government, is subjected to serious financial strain, should be assisted by the appropriate state agencies in dealing with creditors.

(b) Nothing in this section shall be construed as creating a cause of action against the state of West Virginia or any of its political subdivisions.

18 U.S.C. §3771 (a)(6) The right to full and timely restitution as provided in law.

§61-11A-4. Restitution; when ordered.

(a) The court, when sentencing a defendant convicted of a felony or misdemeanor causing physical, psychological or economic injury or loss to a victim, shall order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense, unless the court finds restitution to be wholly or partially impractical as set forth in this article.

If the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor.

(b) The order shall require that the defendant:

(1) In the case of an offense resulting in damage to, loss of, or destruction of property of a victim of the offense:

(A) Return the property to the owner of the property or someone designated by the owner; or

(B) If return of the property under subparagraph (A) is impossible, impractical or inadequate, pay an amount equal to the greater of: (i) The value of the property on the date of sentencing; or (ii) the value of the property on the date of the damage, loss or destruction less the value (as of the date the property is returned) of any part of the property that is returned;

(2) In the case of an offense resulting in bodily injury to a victim:

(A) Pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric and psychological care, including non medical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) Pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) Reimburse the victim for income lost by the victim as a result of the offense;

(3) In the case of an offense resulting in bodily injury that also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) In any case, if the victim (or if the victim is deceased, the victim's estate) consents, or if payment is impossible or impractical, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.

(c) If the court decides to order restitution under this section, the court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(d) The court shall impose an order of restitution to the extent that the order is as fair as possible to the victim and the imposition of the order will not unduly complicate or prolong the sentencing process.

(e) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for loss to the extent that the person paid the compensation. An order of restitution shall require that all restitution to victims under the order be made before any restitution to any other person under the order is made.

(f) The court may require that such defendant make restitution under this section within a specified period or in specified installments. The end of the period or the last installment shall not be later than: (i) The end of the period of probation, if probation is ordered; (ii) five years after the end of the term of imprisonment imposed, if the court does not order probation; and (iii) five years after the date of sentencing in any other case. If not otherwise provided by the court under this subsection, restitution shall be made immediately.

(g) If the defendant is placed on probation or paroled under this article, any restitution ordered under this section shall be a condition of the probation or parole unless the court or Parole Board finds restitution to be wholly or partially impractical as set forth in this article. The court may revoke probation and the Parole Board may revoke parole if the defendant fails to comply with the order. In determining whether to revoke probation or parole, the court or Parole Board shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(h) An order of restitution may be enforced by the state or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.

(i) Notwithstanding any provision of this section to the contrary, the court may order, in addition to or in lieu of, restitution, that a defendant be required to contribute monetarily, or through hours of service, to a local crime victim's assistance program or juvenile mediation program which meets the following requirements:

(1) The program is approved by a circuit judge presiding in the judicial circuit; and

(2) The program is a nonprofit organization certified as a corporation in this state, and is governed by a board of directors.

§61-11A-5. Restitution; procedure for issuing order.

(a) The court, in determining whether to order restitution under this article, and in determining the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such factors as the court deems appropriate.

(b) The court may order the probation officer of the court to obtain information pertaining to the factors set forth in subsection (a) of this section. The probation officer of the court shall include the information collected in the report of presentence investigation or in a separate report, as the court directs.

(c) The court shall disclose to both the defendant and the prosecuting attorney all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

18 U.S.C. §3771 (a)(7) The right to proceedings free from unreasonable delay.

(none found in West Virginia's code)

18 U.S.C. §3771 (a)(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

§61-11A-1. Legislative findings and purpose.

(a) The Legislature finds and declares that without the cooperation of victims and witnesses, the criminal justice system would cease to function, yet too often these individuals are either ignored by the criminal justice system or simply used as tools to identify and punish offenders. ... (etc.) ...

(b) The Legislature declares that the purposes of this article are to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process and to ensure that the state and local governments do all that is possible within the limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant.

§61-11A-2a. Notification of crime victims compensation fund.

Whenever the prosecuting attorney's office presents a case to a grand jury or proceeds in the circuit court on an information, the prosecutor or assistant prosecutor shall within thirty days following said presentment or information notify in writing each victim of the alleged offense of the existence and basic provisions of article two-a, chapter fourteen of this code. Nothing in this section shall be construed as precluding the prosecuting attorney's office from other notification to victims of crime, or as creating a cause of action for damages against any prosecuting attorney or their staff, or against the state of West Virginia or any of its political subdivisions.

§61-11A-7. Sever ability.

The provision of subsection (cc), section ten, article two, chapter two of this code shall apply to the provisions of this article to the same extent as if the provision of said subsection were set forth in extension herein.

§2-2-10-(cc). (cc) Unless there is a provision in a section, article or chapter of this code specifying that the provisions thereof shall not be severable, the provisions of every section, article or chapter of this code, whether enacted before or subsequent to the effective date of this subdivision, shall be severable so that if any provision of any such section, article or chapter is held to be unconstitutional or void, the remaining provisions of such section, article or chapter shall remain valid, unless the court finds the valid provisions are so essentially and inseparably connected with, and so dependent upon, the unconstitutional or void provision that the court cannot presume the Legislature would have enacted the remaining valid provisions without the unconstitutional or void one, or unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent: *Provided*, That if any such section, article or chapter of this code has its own severability clause, then such severability clause shall govern and control with respect to such section, article or chapter in lieu of the provisions of this subdivision. The provisions of this subdivision shall be fully applicable to all future amendments or additions to this code, with like effect as if the provisions of this subdivision were set forth in extenso in every such amendment or addition and were reenacted as a part thereof, unless such amendment or addition contains its own severability clause.