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Senator Van H. Wanggaard
WISCONSIN SENATE
313 South, State Capitol
Madison, Wisconsin 53707

RE: *Senate Joint Resolution 2, Substitute Amendment*

Dear Senator Wanggaard:

Thank you for considering this letter. I am submitting it on my own behalf and on behalf of the Wisconsin Justice Initiative, a non-profit organization that advocates for a more progressive justice system. I am on the WJI Board.

1. Briefly, I am a lawyer of 33 years' experience in Wisconsin, my birthplace. For a very short time, I was a federal prosecutor in Milwaukee. That followed a stint at a large Milwaukee civil firm, Reinhart Boerner Van Deuren, S.C. Since autumn 1988, I have practiced almost exclusively as a criminal defense lawyer, in both state and federal courts and at trial and appellate levels. My interest in the proposed victims' rights amendment to the Wisconsin Constitution is rooted in the fact that my professional identity and my life are tied to the fairness, safety, and reliability of the truth-seeking processes that our institutions of criminal justice employ in the assemblage that we refer to commonly as the "criminal justice system." I have a vital stake in the honesty, integrity, and reliability of the institutions that together compose that system. I and my colleagues in the defense bar fill one of many essential functions in that system, if it is to work honestly, reliably, and with integrity.

Specifically, my concern here is that any constitutional rights or promises extended to victims be honest, workable, and useful to victims of crime. Most victims, in my experience, understand implicitly that courts and the components of the criminal justice system must attempt to balance many competing demands: claims of victims, other witnesses, and criminal defendants; law enforcement

priorities; judicial, prosecutorial, and policing budgetary constraints; media access and public accountability; and sundry other interests. In short, most victims I have encountered know that the process cannot promise them everything. What seems to me especially important is that the system keep such promises as it does make to victims: that it not create false hopes or expectations, not lie to them, and not misuse them for the ambitions and gains of others. Many victims already have suffered misuse at the hands of others who are pursuing selfish gains or objectives of their own; those people who use victims for their own selfish gains or goals typically are criminals. The institutions of criminal justice should not add to the lies, misuse, and trickery that many victims already have endured.

2. Substantively, I want to reiterate at the outset a point that I have made to many of your Democratic colleagues and to some of your Republican colleagues: I consider the question of whether to elevate victims' rights to a constitutional level beyond my competence to comment helpfully. You and all of your colleagues understand, I presume, that constitutional rights affect only the citizen's relation to the state government, not the relation of one citizen to another. That is, a constitutional "right," correctly understood, may be negative: it may impose either a full or partial limitation on state power, such as the Third Amendment (no peacetime quartering of soldiers in private homes; a full limitation) and Fourth Amendment (only "reasonable" searches and seizures; a partial limitation) to the United States Constitution. Or it may be positive: it may bestow affirmative claims by the citizen or a person against the sovereign, such as the Second and Sixth Amendments to the United States Constitution (firearms and fair trial assurances, respectively). But in all events, constitutional rights do not permit a claim by Citizen A against Citizen B; they provide only possible claims by a person or citizen against the sovereign. Further, in Wisconsin, violations of constitutional rights carry a promise of an adequate remedy from the sovereign, as they should. WIS. CONST. Art. I, § 9.

Statutes, of course, may establish rights and claims as between citizens—there, Citizen A may sue Citizen B for violation of some statutory duty. Statutes also may be enacted, modified, and repealed more nimbly.

But again, the decision whether to elevate a policy goal from statutory to constitutional is beyond my ken. Elevating a claim by a citizen against the state to the constitution says something about priorities or importance; about fundamental values, in other words. And such judgments seem to me peculiarly within the province of legislators and, as to constitutional amendments, of citizen voters in the referendum that comes at the end of the constitutional amendment process.

So I offer no opinion on whether lodging victims' rights in the state constitution is wise or unwise. I note only some of the differences between a statutory locus and a constitutional locus, which I again presume you and your colleagues understand.

3. I turn now to the specific feasibility and honesty of the constitutional rights that Section 1 of the SJR would create. In overview, several of these are both good ideas and readily workable. Others are bad ideas—unconstitutional or misleadingly phrased—or infeasible, or both. Here I use the subsection lettering that Section 1 itself uses.

Initially, though, I note that Section 1 first asserts that victims have a right to "due process" in criminal prosecutions. Enacting this would open a whole panoply of claims to notice and to be heard, beyond even the expansive specific rights that SJR 2 would establish. This also would create a conflict, as a practical matter, with Section 5, which purports to forbid party status to a victim. People with due process rights in a given case are parties.

A. **Treatment with Dignity, Respect.** This is a good goal and workable as written.

B. **Privacy.** This is undefined and unworkable, at least as many victims would interpret the term "privacy." As a matter of due process, confrontation, and effective assistance of counsel, the names of victims and some of their personal identifying information will be included in police reports that are disclosed (and must be) to the defense. Victims will

have to testify in court and respond to relevant questions that may intrude upon privacy, especially as a victim may wish to define it. Other witnesses for the state or the defense may disclose information that a victim might wish to deem private. This will create false hopes and expectations for victims, and is a promise that the state cannot keep.

C. **No Unreasonable Delay.** Again, this broad and undefined aspirational goal does not explain the reality, which is that a victim never will be the person who decides what delay is "unreasonable." A judge will be that person and, as a practical matter, must be. This creates false hopes and expectations.

D. **Timely Disposition.** Again, by whose measure? Not the victim's. Further, I do not know what possible tangible remedy the state could offer for a disposition that is not "timely," whether by the victim's measure or even by a judge's. Should the case be dismissed if it is not resolved in a timely way? The defendant be found guilty without a trial? I cannot imagine that victims would prefer the former, and neither the state nor federal constitution would tolerate the latter.

E. **Presence "at All Proceedings."** This would create a constitutional right that no one really intends, I suspect. As written, it purports to guaranty actual presence, in court, "at all proceedings." That presumably means that District Attorney's offices or police agencies must furnish taxi fare, bus fare, or airfare for victims who lack transportation to attend every court appearance, no matter how insubstantial. It presumably means that judges must schedule court appearances only when victims are not working or otherwise occupied, including at night and on weekends as necessary to accommodate victims' schedules. This provision easily could

be made workable and honest by promising timely notice of and an opportunity to attend, if the victim chooses and is able, court appearances.

F. **Reasonable Protection from the Accused.** This idea is workable and honest. It is a good idea. Judges, of course, will decide what is "reasonable."

G. **Timely Notification Upon Request**. This is honest and altogether workable. It should supplant subparagraph (e), in my opinion.

H. **Conferences with Attorney for the Government.** This subparagraph is triggered only upon a victim's request, which is wise. Yet it is not entirely workable, because it promises time with the prosecutor—not just with a victim/witness coordinator or other employee of the District Attorney's office—upon request, and puts no limitation on how many such requests a victim may make. This state already has a shortage of Assistant District Attorneys, and their caseloads are unconscionably high in many counties. Realistically, they cannot interrupt other trials or their daily work every time a victim may want to confer. This would be unrealistically costly and in conflict with the other goals of timely disposition and elimination of unreasonable delay. It is a false promise and would create only false hopes. A fix would be fairly easy: for example, you might refer to the "prosecution," not to an attorney for the government, and limit consultation to that which is "reasonable given the prosecution's other legal obligations."

I. **Heard in Any Proceeding.** This is both unworkable and counterproductive. On its face, it would invite victims to speak at plea hearings, expungement, and many other proceedings on which lay people have no expertise useful to a

court. Indeed, as I read this, it would allow a victim to speak directly to the court at every proceeding, as I cannot think of any proceeding that would not "implicate[]" a "right of the victim" under this SJR. The likelihood of lengthier proceedings, and thus of unintended delay in that case and every other case on a court's docket on a given day, is obvious. More subtle, and the counterproductive effect of which you should be aware, is this: to the extent that a victim takes a position contrary to the prosecutor's position, the judge will hear dissension and chaos at the state's table, while he or she typically hears unison and coherence from the defense table (because only the defense lawyer speaks there, typically). In any adversarial process, the likelihood of success on a given point rises for the party that presents a coherent, clear position; the likelihood of success falls for the party that has an incoherent, conflicting, or confusing position. Quite unintentionally but foreseeably, then, this provision may lead to the defense prevailing on points that it otherwise would lose, because of a fractured and fractious presentation by the state, through competing voices of prosecutor and victim.

In that vein, too, bear in mind that a significant number of "victims," as this SJR defines them, want charges against the defendant reduced or dismissed. This is an unfortunately common occurrence in domestic violence cases. Both judge and prosecutor would be obliged to hear the victim express that view in every court appearance—and the defense would be free at trial to use the victim's statements in open court (indeed, any victim's statements) to impeach the victim's testimony at trial.

J. **Submit Information on Effects of Crime.** This is a good, workable idea.

K. **Timely Notice of Release or Escape.** This is a good, workable idea, sensibly limited to the victim's request.

L. **To Refuse Discovery Requests.** This is unconstitutional in part and thus unworkable and a false hope. Under the federal constitution, specifically the Sixth and Fourteenth Amendments, the accused in a state criminal case has a right to disclosure of exculpatory information, at a minimum. This provision would collide in part with those federal constitutional rights, and to that extent be unenforceable. It presents a measure of false hope or expectations to victims and is dishonest to that extent, too.

M. **Full Restitution.** This creates an unintentionally broad constitutional right, and one that would be enormously expensive for taxpayers if it means what it says. If it does not mean what it says, then it misleads victims and creates false hopes and expectations. The fix would be easy. A constitutional right "to a restitution order as determined by law" and to "such remedies in collecting restitution as law provides" would be perfectly workable and a good idea. But as written, this gives the victim a claim against the state to "full restitution," regardless whether the defendant is ordered to make that restitution, and regardless whether he can make that restitution as a practical financial matter. Only the taxpayer would be left to fulfill this constitutional guaranty of "full restitution" if, for whatever reason, the defendant does not or cannot make restitution in full.

N. **Compensation as Provided By Law.** Again, this is a good, honest, workable idea.

O. **Timely Information About Outcome.** Although I would suggest adding the limitation "upon request," this is in essence a good, honest, workable idea.

P. **Timely Notice of Rights.** This is a perfectly good idea, and with a minor adjustment I think would be workable. The

adjustment I suggest is that this right not take effect until charging, so that the burden of notification is on a District Attorney's office, not on a police department. Police agencies operate 24 hours a day, but staffing is variable and depends upon the size of the department. Police officers also are less equipped to advise victims of a long list of constitutional rights than are prosecutors and their offices, which are under control of lawyers. Finally, in a meaningful number of cases, a prosecutor may determine that there was no crime, or at least no provable crime, and decline to issue charges. For all of these reasons, it will be more workable to put the onus of notice on a prosecutor's office, at the time it issues charges or shortly after.

4. Finally, I want to note the clear tension between Sections 3 and 4 of the SJR. The first, Section 3, promises that a court or other authority will "afford a remedy for the violation of any right of the victim." But then Section 4 purports to withhold or remove the possibility of money damages on the theory that the new constitutional amendment "does not create any cause of action for damages." There are at least three points of conflict or concern.

First, a victim may not need a new cause of action created by Section 4 to pursue a remedy under Section 3: his or her rights now have been elevated to a constitutional level, and their denial may well invoke pre-existing or long recognized causes of action for constitutional torts. So, in fact, Section 3 may make monetary damages available, if in fact the victim can point to a source of right to bring that monetary claim outside Section 4.

Second, if a victim really cannot recover damages from the state or its political subdivisions or state actors, then the Section 3 promise of a "remedy" for violations of many of these new rights really is illusory and empty; it is another false hope for victims or a trick played upon them. What possible remedy other than money

would there be, after the fact, for lack of a timely disposition, for unreasonable delay, for denial of a right to be heard, for inability to collect full restitution from the defendant, and for a number of these other rights? None. A wealthy victim might seek an injunction in advance against violation of these rights, but even there, the later remedy for violation of that injunction may not be damages that go to the victim, if Section 4 is interpreted broadly. And a poor victim will have no practical remedy at all.

Third, Section 3(b) seems to create for victims an automatic right to review, not just in our intermediate court of appeals but in the state supreme court, too. I know of no other situation in which a definitional non-party has a right to appellate review. Other than Foxconn, I know of no party in any situation that has a right to review by the Wisconsin Supreme Court, which aside from this proposed constitutional amendment has a purely discretionary docket. This SJR would seem to make one non-party, a "victim" as defined here, the only person who could demand that the Wisconsin Supreme Court actually hear his or her claim.

The potential increase in the state supreme court's workload would be incalculable. That court today gives full consideration to perhaps 80 cases a year, not including lawyer disciplinary matters. Because of the expansive definition of "victim" under this SJR, there would be one victim—at least—for many of the criminal cases filed in Wisconsin every year. For reference, according to CCAP, in calendar year 2016 Wisconsin courts opened 111,182 new criminal cases. If only .07% of those cases, well under 1 in 1,000, resulted in a victim seeking mandatory appellate review in the Wisconsin Supreme Court, it would double that court's current caseload.

In sum, setting aside as I do the question whether a constitutional amendment is wise or necessary, I view SJR as including a number of good, honest, and feasible ideas. I also view it as including several bad, overbroad, misleading or mistaken, and infeasible ideas. Creating false hopes or expectations for victims of crime, or providing "rights" that in truth have no adequate remedy, I think would be unconscionable treatment of victims, and unwise or even debasing public policy for the citizens of this state as a whole. The criminal justice system should be founded on honesty, integrity, and reliability in its goals

and outcomes. Anything dishonest, misleading, or unreliable—even unworkable—debases that system, which already struggles with legitimacy. If you decide in the end that a constitutional amendment is wise and necessary, my hope is that you and your colleagues can implement the good without including the bad.

Sincerely,
STRANGBRADLEY, LLC

Dean A. Strang