

THE CRIME VICTIM'S RIGHT TO ATTEND TRIAL: THE REASCENDANT NATIONAL CONSENSUS

by Douglas E. Beloof & Paul G. Cassell

Excerpted and edited from an article of the same title, Douglas E. Beloof & Paul G. Cassell, 9 Lewis & Clark Law School 481 (2005), and reprinted with permission of the authors and journal. As co-author, Professor Cassell intends no comment on any pending cases or legal issues before him. Footnotes and many citations have been omitted and can be found in the published article.

More than forty states and federal jurisdictions recognize a victim's right to attend a trial. While slightly more than half of these rights are qualified in some fashion, the qualifications are typically narrow and have not generally resulted in the exclusion of a victim. As a result, it seems safe to say that there is a reascendant national consensus that victims should have the right to attend criminal trials. This article identifies and discusses the right to attend and breaks down the discussion into four categories: 1) laws providing an unqualified right to attend; 2) laws providing a qualified right to attend; 3) the federal law on the right to attend; and 4) the right to attend in jurisdictions with no express right to attend.

Unqualified Rights to Attend Trial

Seventeen states have conferred on victims an unqualified right to attend trial. The Michigan constitutional provision typifies such unqualified right, providing that crime victims have "[t]he right to attend trial and all other proceedings the accused has the right to attend." MICH. CONST. art. I, § 24. Like Michigan, many states give victims a right to attend proceedings in a manner tied to the accused's right to attend. Given that the accused has a virtually unlimited right to attend the trial, this formulation presumably gives victims an unqualified right to attend trial. Some states give victims an unqualified right to attend, but qualify the remedies available to enforce such right; for example, many states provide that a victim does not have the right to seek a new trial for violation of her rights. See, e.g., UTAH CONST. art. I, § 28(b)(2).

Qualified Rights to Attend Trial.

About twenty-five states have given victims a qualified right to attend. The rights promulgated by these states may be conveniently categorized into six groups, in roughly the order in which they

protect victims. As detailed below, even though these rights are qualified, in the vast majority of cases victims will have the right to attend trial.

1) *The Right to Attend Subject to Exclusion for Interference with the Defendant's Constitutional Rights.*

Six states give victims the right to attend trial, qualified by exclusion for interference with a defendant's constitutional rights. Typical of these provisions is Florida's, which provides: "Victims of crime or their lawful representative . . . are entitled to the right . . . to be present . . . at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused." FLA. CONST. art. I, § 16(b). Such provisions give victims a very strong right to attend trial because it is unlikely that the defendant will be able to establish a violation of his rights from a victim attending trial. It is worth noting here that only one reported case has seemingly found a problem with allowing a victim to attend the trial under such a statute. See *State v. Heath*, 957 P.2d 449, 471 (Kan. 1998).

2) *The Right to Attend Subject to Exclusion if Necessary to Protect a Defendant's Fair Trial Rights.*

Six states give victims the right to attend trials subject to exclusion if necessary to protect a defendant's "fair trial" rights. For example, Ohio gives a victim a right to be present "whenever the defendant . . . in the case is present during any stage of the case against the defendant . . . that is conducted on the record, other than a grand jury proceeding, unless the court determines that exclusion of the victim is necessary to protect the defendant's . . . right to a fair trial . . ." OHIO REV. CODE ANN. § 2930.09 (West 2005).

The reference to “fair trial” rights appears to be a reference to the federal constitutional right to a fair trial. The United States Supreme Court explained that “[t]he right to a fair trial is a fundamental liberty” guaranteed by the Due Process Clause of the Fifth Amendment. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). A fair trial is “a trial whose result is reliable.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Thus, the Due Process Clause “always protects defendants against fundamentally unfair treatment by the government in criminal proceedings.” *Doggett v. United States*, 505 U.S. 647, 666 (1992) (Thomas, J., dissenting). There are certain “basic components” in the due process right to a fair trial, including, for example, the right to a presumption of innocence. *Estelle*, 425 U.S. at 503.

Circumstances in which a defendant’s fair trial rights would be implicated by a victim attending trial would be rare indeed and, in our view, nonexistent. We have been unable to locate any cases from these six states finding that a defendant’s fair trial rights were impinged from a victim attending trial.

3) *The Right to Attend Unless Testimony is Affected.*

Five states and the District of Columbia give victims the right to attend trials unless the court finds that their testimony would be affected. Most of these states give extremely strong protection to a victim’s right to attend. For instance, Connecticut, Illinois, Massachusetts, and Texas, joined by the District of Columbia, all require that a court find that a victim’s testimony “would be materially affected.” This standard is strongly protective of victims for two reasons. First, the court is not permitted to engage in speculation about whether a victim’s testimony might be affected by attending the trial. Rather, the standard is that a victim’s testimony “would be” affected. Second, not only must the court find an actual effect on testimony, but that effect must be “material.” A “material” effect is conventionally understood to be an effect that is significant or essential. BLACK’S LAW DICTIONARY 991 (8th ed. 1999). In light of these stringent requirements, it is unsurprising that no reported decision has yet concluded that a victim’s testimony “would be materially affected” from attending a trial.

4) *The Right to Attend “If Practicable.”*

Two states give victims the right to attend where practicable. Maryland provides that “a victim of crime shall have . . . the right to . . . if practicable . . . attend . . . a criminal justice proceeding. . . .” MD. CONST. Decl. of Rights, art. 47. Similarly, North Carolina law provides that “the court shall make every effort to permit the fullest attendance possible by the victim in the proceedings.” N.C. GEN. STAT. § 15A-832(e) (2005).

These provisions appear to give victims a very strong right to attend by essentially creating a presumption in favor of victim attendance. Legislative history and case law state this presumption. *See, e.g., Wheeler v. State*, 596 A.2d 78, 87 (Md. 1991).

5) *The Right to Attend Subject to the Discretion of the Court.*

Another group of five states gives victims the right to attend in the discretion of the court. Set forth below are the three constitutional examples of this right.

- Georgia: “The victim of a criminal offense may be entitled to be present in any court exercising jurisdiction over such offense. It shall be within the sole discretion of the judge to implement the provisions of this Code section and determine when to allow such victim to be present . . . and . . . to determine the order in which the testimony of such victim shall be given.” GA. CODE ANN. § 24-9-61.1.
- New Jersey: A “victim of a crime shall not be denied the right to be present at public judicial proceedings except when, prior to completing testimony as a witness, the victim is properly sequestered in accordance with law or Rules Governing the Courts of the State of New Jersey” N.J. CONST. art. I, ¶ 22. In turn, the court rule provides that “[a]t the request of a party or on the court’s own motion, the court may, in accordance with law, enter an order sequestering witnesses.” N.J. R. EVID. 615.

• Washington: “Upon notifying the prosecuting attorney, a victim of a crime charged as a felony shall have the right to be informed of and, subject to the discretion of the individual presiding over the trial or court proceedings, attend trial and all other court proceedings the defendant has the right to attend . . .” WASH. CONST. art. I, § 35. This right is further implemented by the requirement that a court make a “reasonable effort . . . to ensure that victims . . . be physically present in court during trial or, if subpoenaed to testify, to be scheduled as early as practical in the proceedings in order to be physically present during trial after testifying and not to be excluded solely because they have testified.” WASH. REV. CODE. § 7.69.03 (2005).

Under each of these provisions, we would assume that courts will virtually always exercise discretion to allow a victim to attend a trial. Only one reported case appears to have analyzed a discretion-of-the-court provision. A Wyoming Supreme Court decision affirmed a trial court’s decision to admit a victim at trial, briefly noting that the victim had given a lengthy pre-trial statement and would be the first witness called in the case. *See Gabriel v. State*, 925 P.2d 234, 236 (Wyo. 1996).

6) *The Right to Attend after Testifying.*

Finally, in a category by itself, there is Vermont in which a victim “shall be entitled to be present during all proceedings subject to the provisions of Rule 615 of the Vermont Rules of Evidence.” VT. STAT. ANN. tit. XIII, § 5309 (2003). In 1989, the Vermont rule was amended to include a provision designed to improve access for crime victims: “however, the witness may remain in the courtroom, even if the witness subsequently may be called upon by the other party or recalled in rebuttal, unless a party shows good cause for the witness to be excluded.” VT. R. EVID. 615.

Federal Law

Federal Rule of Evidence 615 provides that “a person authorized by statute to be present cannot be excluded.” The Recent Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771, provides that victims

have the right to attend a proceeding “unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard any other testimony at that proceeding.” The legislative history of the CVRA provides for “allow[ing] crime victims in the vast majority of cases to attend the hearings and trial of the case involving their victimization. This is so important because crime victims share an interest with the government in seeing that justice is done in a criminal case” 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl). Under this new statute it will be virtually unheard of for the victim to be excluded from trial.

Jurisdictions With No Express Right To Attend

It is worth remembering that even in states without a victim’s right to attend trial, victims still may be admitted where their presence is essential to the prosecution. Contrary to the position suggested by some opponents of victim attendance, sequestration has no corner on the market of truthfinding. As the Justice Department has concluded: “the presence of victims in the courtroom can be a positive force in furthering the truth-finding process by alerting prosecutors to misrepresentations in the testimony of other witnesses.” Furthermore, there are ample ways to respond to testimony tailoring – cross-examination foremost among them – while there is no other way to convey a victim’s information to a prosecutor other than having the victim at hand attending trial. If anything, the search for truth demands that victims be allowed in the courtroom rather than kept outside.

Conclusion

In recent years, victims’ right to attend trials is reascendant around the country, as most states and Congress have recognized that victims have compelling reasons for being inside rather than outside courtrooms. Nothing in the Constitution should hinder this trend. To the contrary, as a simple matter of fairness, victims deserve the right to see whether justice is being done in the criminal trial of their victimizer. ■