



A Primer on the Right to Confer

The right to confer allows a victim both to gather and provide information about the crime to the prosecutor. The right to confer is not a right to control the prosecution, but it does require the prosecutor to hear the victim's concerns. The right to confer is protected by federal statuteⁱ and in a number of states, by constitution and statute.ⁱⁱ

This right is especially critical when exercised early in a case and regularly throughout. Early conferral allows victims' safety concerns to be heard and factored into the decision of how to charge the defendant, and what release conditions should be requested in a pre-trial release proceeding. It may also cause the prosecutor to avoid entering a plea deal that would otherwise eradicate certain protections for victims.ⁱⁱⁱ

In order for the right to confer to be a meaningful right, it must attach pre-trial and before the government reaches a binding plea deal. Several states have enacted statutory provisions making the timing of the right clear.^{iv} In addition, there is case law supporting the conferral right attaching pre-trial, including by at least one federal circuit.^v The remedy for a violation of a victim's right to confer prior to the plea may be undoing the plea agreement.^{vi}

It is critical that the conferral right remain meaningful throughout the trial. Significant research shows that the experiences of victims in the criminal justice system are shaped by the extent to which they feel heard and may have a direct impact on their willingness to participate at trial.^{vii} In addition, allowing victims the opportunity to enforce their right to confer can help victims regain agency and help with the healing process.^{viii} In contrast, victims who are floated the specter of their conferral rights, only to be denied these rights, are generally in a worse position than they would have been had they not been given the rights at all.^{ix}

Post-trial as well the conferral right remains significant for victims in that it can directly impact their ability to be meaningfully heard at sentencing. If the victim has had the opportunity to confer with the prosecution and understands the factors that the court is likely to consider at sentencing, the victim has a greater opportunity to adapt his or her victim impact statement so as to be most relevant to the court and have the greatest likelihood of impacting the sentencing decision.^x

For further resources on this, and other topics, please contact NCVLI.

ⁱ 18 U.S.C. §3771(a)(5) (providing victims with “the reasonable right to confer with the attorney for the Government in the case”); National Defense Authorization Act for Fiscal Year 2014, H.R. 3304, 113th Cong. § 806b(a)(5) (2013) (as passed both Senate and House) (granting victims the “reasonable right to confer with the counsel representing the Government” at certain proceedings).

ⁱⁱ *See, e.g.*, Alaska Const. art. I, § 24 (granting victims “the right to confer with the prosecution”); Ariz. Const. art. 2, § 2.1(A)(6) (granting victims the right to “confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed

of the disposition”); Idaho Const. art. I, §22(5) (granting victims the right to “communicate with the prosecution”); Ill Const. art. I, § 8.1(a)(3) (granting victims the right to “communicate with the prosecution”); Ind. Const. art. I, § 13(b) (granting victims the right to “confer with the prosecution”); La. Const. art. I, § 25 (granting victims the “right to confer with the prosecution prior to final disposition of the case”); Mich. Const. art. I, § 24(1) (granting victims the “right to confer with the prosecution”); N.M. Const. art. 2, § 24(A)(6) (granting victims the “right to confer with the prosecution”); N.C. Const. art. I, § 37(i)(h) (granting victims the “right as prescribed by law to confer with the prosecution”); Or. Const. art. I, § 42(1)(f) (granting victims the “right to be consulted, upon request, regarding plea negotiations involving any violent felony”); S.C. Const. art. I, §24(A)(7) (granting victims the right to “confer with the prosecution, after the crime against the victim has been charged, before the trial or before any disposition and informed of the disposition”); Tenn. Const. art. I, § 35(1) (granting victims the “right to confer with the prosecution”); Tex. Const. art. I, § 30(b)(3) (granting victims the “right to confer with a representative of the prosecutor’s office”); Va. Const. art. I, §8-A(7) (granting victims the “right to confer with the prosecution”); Wis. Const. art. I, § 9m (granting victims the “opportunity to confer with the prosecution”); *see also, e.g.*, Del. Code Ann. Titl. 11, § 9405; Ga. Code Ann. § 17-17-11; Haw. Rev. Stat. § 801D-4(a)(1); Neb. Rev. Stat. 29-120; N.Y. Exec. Law § 642(1).

ⁱⁱⁱ For instance, federal law prohibits an individual convicted of domestic violence from owning a firearm. No such prohibition exists if an individual is convicted of a lesser charge like disturbing the peace. 18 U.S.C. §922(g)(9). Thus, the right to confer may help ensure that a prosecutor does not inadvertently diminish victim protections by allowing a defendant to plead to a lesser charge that does not include dispossession.

^{iv} *See, e.g.*, Del. Code Ann. Titl. 11, § 9405 (“The prosecutor shall confer with a victim before amending or dismissing a charge or agreeing to a negotiated plea or pretrial diversion”); Ga. Code Ann. § 17-17-11 (“The prosecuting attorney shall offer the victim the opportunity to express the victim’s opinion on the disposition of an accused’s case, including views of the victim regarding: (1) Plea or sentencing negotiations”); Neb. Rev. Stat. 29-120 (“Prior to reaching a plea agreement with defense counsel, a prosecuting attorney . . . shall consult with or make a good faith effort to consult with the victim regarding the content or and reasons for such plea agreement”).

^v *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008) (holding that the government’s failure to consult with victims of a refinery explosion prior to entering plea with defendant violated the victim’s right to confer); *United States v. Heaton*, 458 F. Supp. 2d 1271 (D. Utah 2006) (holding that a prosecutor’s failure to confer with the victim prior to moving to dismiss a charge was inconsistent with the victim’s right to be treated with fairness and respect because it denied the court the opportunity to take into consideration the victim’s view when ruling on the request for dismissal); *Doe v. United States*, ---F.Supp.2d---, No. 08-80736-CiV-MARRA, 2013 WL 3089046 (S.D. Fla. June 19, 2013) (holding that a non-prosecution agreement should be treated like a plea agreement, and could be set aside if it was reached prior to consultation with the victims.)

^{vi} *See, e.g. State v. Munger*, No. 2 CA-SA 2012-0034, 2012 WL 2859991 (Ariz. Ct. App. July 12, 2012) (finding it did not violate defendant’s rights when state withdrew a plea agreement after speaking to the father of a victim of a hit-and-run accident); *State v. Means*, 926 A.2d 328 (N.J. 2007) (explaining that where a victim’s right to be notified about and comment on a proposed plea are violated, the sentencing court should postpone sentencing to allow the prosecutor to confer with the victim and inform the victim of the right to be heard at sentencing). *See generally Doe v. United States*, ---F.Supp.2d---, No. 08-80736-CiV-MARRA, 2013 WL 3089046 (S.D. Fla. June 19, 2013) (holding that a non-prosecution agreement should be treated like a plea agreement, and could be set aside if it was reached prior to consultation with the victims).

^{vii} Margaret E. Bell, *Battered Women's Perceptions of Civil and Criminal Court Helpfulness: The Role of Court Outcomes and Processes*, 17 *Violence Against Women* 17, 79 (2011) (stating that many victims found it frustrating in working with prosecutors when their voices got “lost in the process”); Lauren Bennett, *Systemic Obstacles to the Criminal Prosecution of a Battering Partner, A Victim Perspective*, 14 *Journal of Interpersonal Violence* 761, 766 (1999) (stating that domestic violence victims’ confusion and lack of follow-up from prosecutors and court personnel may cause them to be reluctant to cooperate with the prosecution); Deborah P. Kelly, *Victims’ Perceptions of Criminal Justice*, 11 *Pepp. L. Rev.* 15, 19 (1983) (“Victims . . . want better legal representation of their interests. . . . [T]he more frequently victims heard from the prosecutor and were consulted about the case, the more satisfied they were with prosecutors’ services.”)

^{viii} Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 *N.Y.U. L. Rev.* 911, 929 (2006) (stating that participating “makes victims feel empowered and helps them to heal emotionally. More generally, citizens report that participating in the legal system increases their respect for the system and empowers them”); Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 *Wayne L. Rev.* 7, 19 (1987) (“Providing victims with services and offering them rights that allow the opportunity for increased participation in the criminal justice system proceedings are methods that could reduce victims’ perceptions of inequity, thereby reducing the potential for further psychological harm. In contrast, failure to provide victim services or offer the right of participation should result in increased feelings of inequity on the part of victims, with a corresponding increase in crime-related psychological harm.”).

^{ix} See, e.g., *Polyvictims: Victims’ Rights Enforcement as a Tool to Mitigate ‘Secondary Victimization’ in the Criminal Justice System*, NCVLI Victim Law Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), March 2013; Kilpatrick & Otto, *supra*, at 19 (predicting that “victim perceptions of helplessness and lack of control are maximized by raising the expectation that a right of participation exists, the victim electing to exercise that right, and then being denied that right”); Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 *Journal of Traumatic Stress* 159, 163 (2003) (“[D]issatisfaction appears to be highest among victims who are denied a chance to participate in the legal system, in spite of their expressed wish to do so.”).

^x See generally *Fundamentals of Victims’ Rights: A Summary of 12 Common Victims’ Rights*, NCVLI Victim Law Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), November 2011.

