

*Victim Law Position Paper**

LEGAL PUBLICATIONS PROJECT OF THE NATIONAL CRIME VICTIM LAW INSTITUTE AT LEWIS & CLARK LAW SCHOOL**

Oregon Crime Victims Maintain Victim Status and Attendant Rights Even if Charges are Dismissed Pursuant to a Plea Agreement

*Position Papers are essays in which NCVLI details its positions on cutting-edge victims' rights issues to help ensure vigorous assertion and enforcement of victims' rights.

A majority of criminal cases, and a growing number of juvenile cases, are resolved by plea agreements.¹ Plea agreements generally involve dismissal of some charges pending against a defendant or juvenile without any determination of whether the criminal conduct underlying those charges occurred.² Instead, the State's decision to enter into a plea bargain is often based on practical reasons, such as judicial economy, efficiency in criminal and juvenile justice systems, and wanting an alternative correctional measure for the defendant or juvenile.³ Although these may be necessary or even laudable goals, they should not eclipse the fact that maintaining victim status and the attendant rights may be crucial to a victim's recovery and sense of justice,⁴ and necessary for the State to fulfill its obligation to "accord crime victims due dignity and respect and to ensure that criminal and juvenile court delinquency proceedings are conducted to seek the truth as to the defendant's innocence or guilt[.]"⁵

I. Oregon Law Does Not Divest Victim Status When Charges Are Dismissed Pursuant to a Plea Agreement

Based upon the plain language and the purpose of Oregon's victims' rights laws, neither victim status nor attachment of the attendant rights is contingent upon the outcome of a criminal prosecution of a perpetrator; concomitantly, neither is divested when a plea agreement results in the dismissal of charges of which the person was a victim.

When interpreting an amended constitutional provision⁶ or statute, the goal is to discern the intent of the drafters.⁷ The best evidence of the drafter's intent is the text of the law in question.⁸ Article I, Section 42 of the Oregon Constitution⁹ guarantees crime victims a number of rights in criminal and juvenile court proceedings.¹⁰ To be entitled to these rights, an individual must be a "victim"; "victim" is defined as "any person determined by the prosecuting attorney or the court to have suffered direct financial, psychological or physical harm as a result of a crime and, in the case of a victim who is a minor, the legal guardian of the minor."¹¹

Under a plain reading of Oregon's constitutional provision and statute defining

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a crime victim, people attain legal status as victims when (1) a crime is perpetrated against them; and (2) the prosecuting attorney or the court determines they suffered harm as a result of that crime.¹² Significantly, there is no qualifying language requiring that the criminal conduct be formally charged or that a prosecution result, nor is there language indicating that victim status terminates when charges are dismissed. Therefore, the plain language of Oregon's Constitution and statute dictates that a victim retains his or her status and attendant victims' rights even if charges are dismissed pursuant to a plea agreement.

This interpretation comports with the purpose of victims' rights in Oregon, which is:

To preserve and protect the right of crime victims to justice, to ensure crime victims a meaningful role in the criminal and juvenile justice systems, to accord crime victims due dignity and respect and to ensure that criminal and juvenile court delinquency proceedings are conducted to seek the truth as to the defendant's innocence or guilt, and also to ensure that a fair balance is struck between the rights of crime victims and the rights of criminal defendants in the course and conduct of criminal and juvenile court delinquency proceedings[.]¹³

If victims are stripped of their victim status based solely on the dismissal of charges pursuant to a plea agreement, the victims' role in the justice system following the acceptance of the plea would be diminished or completely nonexistent. This outcome conflicts with the constitutional directive to ensure victims have a "meaningful role" in the criminal justice system and to create a "fair balance" between the rights of victims and defendants. Victims would also be divested of a number of post-conviction rights, including:

the right to receive prompt restitution;¹⁴ the right, upon request, to obtain information about imprisonment and future release from physical custody of the criminal defendant or convicted criminal and equivalent information regarding the alleged youth offender or youth offender;¹⁵ and the right to the prompt and final conclusion of the criminal or juvenile delinquency proceeding in any related appellate or post-judgment proceeding.¹⁶

These negative consequences of divesting victim status are all the more troubling given that there is no explicit requirement for prosecutors to give specific consideration to victims' rights when engaging in plea negotiations.¹⁷ For these reasons, a proper interpretation of Oregon's law—one that comports with the plain language and purpose of Oregon's Constitution and statute—is that a victim maintains victim status and the attendant rights when a plea agreement is reached, even when charges pursuant to which he or she is a victim are dismissed.

II. Oregon District Attorneys and the Oregon Youth Authority Should Adopt Best Practices for Integrating Victims' Rights into Plea Agreements

Although victims retain victim status following a plea agreement, certain precautions should be taken to make this explicit and avoid litigation regarding post-plea rights, particularly with respect to the victims' rights to be heard at sentencing and to restitution. Specifically, government agencies involved in criminal prosecutions and juvenile adjudications should have guidelines for negotiating plea agreements when there is a victim of charged criminal conduct. The guidelines should require a provision in the plea agreement acknowledging the victim status of individuals of to-be-dropped charges and retention of their post-plea rights under Oregon victims' rights laws. These rights include the right to be heard at the sentencing

or disposition, the right to receive prompt restitution,¹⁸ and the right, upon request, to obtain information about future release from physical custody of the criminal defendant or convicted criminal and equivalent information regarding the alleged youth offender or youth offender.¹⁹ Similarly, when an indictment contains charges for which restitution attaches, and charges for which restitution is not applicable, prosecutors should require either a plea to a restitution charge, or obtain an admission by the defendant—either on the record or in the plea agreement—that he or she committed the criminal conduct giving rise to the restitution claim.²⁰ Such guidelines are an important step in ensuring victims' rights are protected and minimizing the need for post-plea litigation to enforce these rights.

¹ See Rebecca Hollander-Blumoff, *Getting to "Guilty": Plea Bargaining As Negotiation*, 2 Harv. Negot. L. Rev. 115, 116-17 and n.7 (1997) ("By most accounts, plea bargaining disposes of approximately ninety percent of all criminal cases in the United States"); Robert E. Shepherd, Jr., *Plea Bargaining in Juvenile Court*, 23 Crim. Just. 3 (2008), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_23_3_shepherd.authcheckdam.pdf (discussing how plea bargaining in juvenile delinquency cases has become more important).

² See, e.g., Or. Rev. Stat. Ann. § 135.405 (3)(b) (authorizing the district attorney when reaching a plea agreement to agree "[t]o seek or not to oppose dismissal of the offense charged if the defendant enters a plea of guilty or no contest to another offense reasonably related to the defendant's conduct"); *State ex rel. Juvenile Dep't of Multnomah Cnty. v. Tyree*, 33 P.3d 729, 731 (Or. 2001) (describing the facts of a case in which a plea agreement resulted in the dismissal of allegations in a delinquency petition alleging that the youth engaged in acts that, if committed by an adult, would constitute two counts of first-degree rape and two counts of first-degree sexual abuse in exchange for the youth admitting to conduct

that would constitute one count of first-degree rape).

³ See *State v. Heisser*, 249 P.3d 113, 118-19 (Or. 2011) (citing William F. McDonald, *Plea Bargaining: Critical Issues and Common Practices* 4 (1985)) ("The ability to resolve criminal charges through plea agreements offers numerous benefits both to the criminal justice system as a whole and to criminal defendants in particular. Some benefits of the use of plea agreements include: 'It eases the administrative burden of crowded court dockets; it preserves the meaningfulness of the trial process for those cases in which there is a real basis for disputes; it furnishes defendants a vehicle to mitigate the system's harshness, whether the harshness stems from callous infliction of excessive punishment or from the occasional inequities inherent in a system of law based upon general rules; and it affords the defense participation in and control over an unreviewable process that often gives the appearance of fiat and arbitrariness.'"); *State v. McDonnell*, 794 P.2d 780, 784 (Or. 1990) (stating that plea negotiations "must be guided by the statutory criteria and other relevant considerations involving the public's interest in an effective administration of criminal justice"). See also Shepherd, *supra* note 1, at 61 (explaining that one reason for the increase in juvenile plea bargains is "[t]he growth in caseloads for juvenile public defenders and prosecutors"). In fact, Oregon has codified a number of these factors in a statute that controls plea negotiations. Or. Rev. Stat. Ann. § 135.415. See also *McDonnell*, 794 P.2d at 782 (noting that the Oregon Legislature in 1973 adopted recommendations to formally organize and control plea negotiation practice that included Oregon Revised Statutes Section 135.415). Section 135.415 describes a non-exclusive list of criteria for plea negotiations, providing that "[i]n determining whether to engage in plea discussions for the purpose of reaching a plea agreement, the district attorney may take into account, but is not limited to, any of the following considerations:

- (1) The defendant by the plea of the defendant has aided in insuring the prompt and certain applications of correctional measures to the defendant.

(2) The defendant has acknowledged guilt and shown a willingness to assume responsibility for the conduct of the defendant.

(3) The concessions made by the state will make possible alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction.

(4) The defendant has made public trial unnecessary when there are good reasons for not having the case dealt with in a public trial.

(5) The defendant has given or offered cooperation when the cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct.

(6) The defendant by the plea of the defendant has aided in avoiding delay in the disposition of other cases and thereby has increased the probability of prompt and certain application of correctional measures to other offenders.

⁴ See Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. of Traumatic Stress 182, 183 (2010) (reviewing research showing that sexual assault victims' negative interactions with law enforcement and prosecutors were associated with increased post-traumatic stress); see also Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. of Traumatic Stress 159, 162-63 (2003) (discussing research that shows that victims'

"overall satisfaction with the criminal justice system was directly related to their sense of inclusion and empowerment" and victims who were given a chance to participate in the criminal justice process "appeared to have better mental health outcomes"); Dean J. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7, 17 (1987) (explaining why giving victims input into the criminal justice system proceedings and providing them with information about the justice process helps to increase victims' perceptions of control, decrease their feelings of helplessness, and reduce psychological distress); Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 Social Justice Research 313, 315-16, 319, 321 (2002) (finding the victims' perception of procedural and interactional justice—*i.e.*, whether the victims perceived they were treated with fairness and respect and whether there were victim blaming attitudes, behaviors and practices—was a "powerful predictor[] of secondary victimization"); Pamela Tontodonato & Edna Erez, *Crime, Punishment, and Victim Distress*, 3 Int'l R. of Victimology 33, 36 (1994) (observing that research indicates that "[v]ictim participation in the criminal justice process reduces feelings of alienation developed when victims believe that they have neither control over, nor 'standing' in, the process"); *Poly-victims: 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.), Mar. 2013, at 1-2.

⁵ Or. Const. art. I, § 42 (1) (stating purpose of granting rights to crime victims in Oregon's criminal and juvenile court systems).

⁶ Article I, Section 42, of the Oregon Constitution was proposed by House Joint Resolution 87 in 1999, and adopted at election Nov. 2, 1999. It was subsequently amended by House Joint resolution 49 in 2007 (Ballot Measure 51, approved May 20, 2008) and effective June 19, 2008.

⁷ See *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228, 238-239 (Or. 2000) (discussing the interpretive

methodology for constitutional provisions and concluding that “[constitutional] provisions or amendments created through either legislative referral or initiative petition are adopted by the people against the backdrop of an existing constitutional framework. It follows that, with respect to the latter provisions, it is the people’s understanding and intended meaning of the provision in question—as to which the text and context are the most important clue—that are critical to our analysis.”); *State v. Gaines*, 206 P.3d 1042, 1050 (Or. 2009) (discussing statutory interpretation); *PGE v. Bureau of Labor and Indus.*, 859 P.2d 1143, 1146 (Or. 1993) (same).

⁸ *Stranahan*, 11 P.3d at 239 (“As always, we begin [our constitutional interpretation] with the text of the constitutional provision at issue.”); *PGE*, 859 P.2d at 1143 (noting that an examination of the text of the provision of law is “the best evidence of the legislature’s intent.”).

⁹ In criminal prosecutions, the Oregon Constitution also grants victims the right to protection from the criminal defendant. See Or. Const. art. I, § 43.

¹⁰ The Oregon Constitution grants crime victims the following rights in criminal and juvenile court proceedings:

- (a) The right to be present at and, upon specific request, to be informed in advance of any critical stage of the proceedings held in open court when the defendant will be present, and to be heard at the pretrial release hearing and the sentencing or juvenile court delinquency disposition;
- (b) The right, upon request, to obtain information about the conviction, sentence, imprisonment, criminal history and future release from physical custody of the criminal defendant or convicted criminal and equivalent information regarding the alleged youth offender or youth

- offender;
- (c) The right to refuse an interview, deposition or other discovery request by the criminal defendant or other person acting on behalf of the criminal defendant provided, however, that nothing in this paragraph shall restrict any other constitutional right of the defendant to discovery against the state;
- (d) The right to receive prompt restitution from the convicted criminal who caused the victim’s loss or injury;
- (e) The right to have a copy of a transcript of any court proceeding in open court, if one is otherwise prepared;
- (f) The right to be consulted, upon request, regarding plea negotiations involving any violent felony; and
- (g) The right to be informed of these rights as soon as practicable.

Or. Const. art. I, § 42(1) (a)-(g).

¹¹ Or. Const. art. I, § 42 (6)(c); see also Or. Rev. Stat. Ann. § 147.430 (7) (same).

¹² See cases cited *supra* note 8.

¹³ Or. Const. art. I, § 42(1).

¹⁴ Or. Const. art. I, § 42(1)(d).

¹⁵ Or. Const. art. I, § 42(1)(b).

¹⁶ Or. Rev. Stat. Ann. §147.430(1)(b).

¹⁷ See *supra* note 3 providing text of Or. Rev. Stat. Ann. § 135.415.

¹⁸ Oregon courts have not addressed whether Article I, Section 42 (1)(d), of the Oregon Constitution—granting victims “[t]he right to receive prompt restitution from the convicted criminal who caused the victim’s loss or injury”—provides a substantive

right or is merely procedural. *See State v. Algeo*, 311 P.3d 865, 873 (Or. 2013) (resolving the issue before it without deciding whether “the constitutional right to ‘receive prompt restitution’ is purely procedural or instead carries a substantive element and requires restitution in some amount or as measured by some standard”). If the right is substantive, courts may have authority to order restitution for criminal conduct that is not the offense of conviction, so long as it does not violate a defendant’s or a juvenile’s federal constitutional rights. *See Or. Const. art. I, § 42 (2)* (“Nothing in this section reduces a criminal defendant’s rights under the Constitution of the United States.”). If the right is found to be merely procedural, however, “a court’s authority to impose restitution [based upon] unconvicted conduct hinges on the defendant’s admission of criminal conduct. As a result, to support restitution, the record must clearly reflect that the defendant admitted to unconvicted conduct that constitutes a criminal offense.” *State v. Thorpe*, 175 P.3d 993, 996 (Or. Ct. App. 2007).

¹⁹ Or. Const. art. I, § 42 (1)(a), (b), (d).

²⁰ Such guidelines would not be unusual. *See United States Attorneys’ Manual*, tit. 9-16.320, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/16mcrm.htm (advising, *inter alia*, that (1) “even when restitution is not mandatory, federal prosecutors should give careful consideration to seeking full restitution to all victims of all charges contained in the indictment or information as part of any plea agreement”; and (2) “when an indictment contains both charges for which restitution is mandatory, and charges for which restitution is not mandatory, prosecutors should give careful consideration to requiring either a plea to a mandatory restitution charge, or an acknowledgement by the defendant in the plea agreement that a mandatory restitution charge gave rise to the plea agreement, which acknowledgement will trigger the mandatory restitution provisions of 18 U.S.C. § 3663A.”).

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