

THE FUNDAMENTAL NATURE OF RIGHTS: ONLY THE PERSON TO WHOM A RIGHT ATTACHES CAN WAIVE THAT RIGHT*

As noted in a recent federal case, the criminal justice system has long “functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard.” *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1013 (9th Cir. 2006). Fortunately, victims are beginning to be heard as they assert and seek enforcement of their rights in criminal trial and appellate courts. Unfortunately, while courts are beginning to recognize victim standing to personally assert his or her rights, waiver of those same rights continues to be an area in which victims are improperly silenced. This silencing is the result of the system’s fundamental failure to understand the personal nature of rights. It is the very nature of rights that they inure to persons and those persons have the exclusive legal power over the rights: both their assertion and waiver.

Practitioners nationwide have identified that one of the most common examples of improper waiver occurs in the plea bargain/restitution context. Without victim involvement, plea agreements often fail to include legally sufficient restitution for the crime victim. When, upon learning of such deficiency, a crime victim moves the court for an order of restitution, courts often respond that any right to restitution was “waived” at the time the plea was accepted. This “waiver” is legally improper because it fails to recognize that the right to restitution is held by the victim, and therefore only the victim can waive such right.

Recognizing and fighting for the personal nature of rights in the context of waiver is critical to achieving the vision of the modern victims’ rights movement – the vision of victim as participant. This article identifies the evidence found within the texts of victims’ rights that make clear that the rights inure to the individual victim, and then discusses the implications of this evidence for the assertion and waiver of those rights.

EVIDENCE OF THE PERSONAL NATURE OF VICTIMS’ RIGHTS

The fact that victims’ rights inure to the victim is evidenced by the plain language of both the titles and texts of constitutional and statutory victims’ rights. See Douglas E. Beloof, *The Third Waive of Crime Victims’ Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255, 273 (2005). For example, the titles of most constitutional and statutory victims’ rights provisions include the words “Victims’ Rights” or “Rights of Crime Victims.”¹ While the title of a law is not legally a part of the law, well-accepted canons of construction dictate that a law’s title may, at times, properly be used to aid interpretation of the meaning of the law. See *Fairport, P. & E.R. Co. v. Meredith*, 292 U.S. 589, 594-95 (1934); 73 AM. JUR. 2d *Statutes* § 108. Thus, when analyzing to whom a right attaches, the word “victim” in the title of the constitutional amendment or statute is revealing.

Two aspects of the plain language of the texts of victims’ rights constitutional amendments and statutes also reveal that the rights attach to the victim. First, the provisions generally use explicit language mandating that

the affirmative assertion of the rights be made by person(s) legally defined as “victim.” For instance, language such as, “victims have the right to” or “victims are entitled to the following rights” is often used.² Second, many victims’ rights provisions have explicit language prohibiting someone other than the victim, most often the defendant, from benefiting from the rights provided.³

IMPLICATIONS OF THE PERSONAL NATURE OF RIGHTS: ASSERTION & WAIVER

Taken together, the titles and texts of victims’ rights provisions make clear that it is the victim, as defined by law, to whom the rights attach, and therefore, it is the victim who has the power to assert the rights.⁴ Courts have recognized that the power to assert victims’ rights is limited to these persons. *See, e.g., People v. Richardson*, 75 N.E.2d 1104, 1108 (Ill. 2001) (holding defendant lacked standing to raise violation of victims’ rights amendment on appeal because amendment was passed to serve “as a shield to protect the rights of victims” and should not be “used as a sword by criminal defendants seeking appellate relieve”); *State v. Herrera*, 24 S.W.3d 844 (Tex. Ct. App. 2000) (holding defendant convicted of assaulting his wife lacked standing on appeal to argue violation of victim’s rights); *People v. Smith*, 447 N.W.2d 847, 848 (Mich. Ct. App. 1989) (rejecting defendant’s argument that he was entitled to resentencing based upon alleged failure of prosecution to notify victim of right, noting that statute provided that “failure to provide a right, privilege, or notice to a victim under this article shall not be grounds for the defendant to seek to have the conviction or sentence set aside.”).

The flip side of the rights coin is waiver. Waiver is defined as:

[t]he voluntary relinquishment or abandonment – express or implied – of a legal right or advantage. The party alleged to have waived a right must have had both knowledge of the existing right and the intention of foregoing it.

Black’s Law Dictionary 1574 (7th ed. 1999). It is well-recognized that the holder of a right is also the one with the legal capacity to waive that right. *Cf In re Alton D.*, 994 P.2d 402, 406 (Ariz. 2000) (noting that requiring timely assertion of a right to avoid waiver is not a new concept in rights analysis and can properly be applied to victims’ rights).

The issue of proper waiver of victims’ rights was discussed on the Senate floor during debate on the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771. Subsection (d)(1) of the CVRA provides, in part, “[t]he crime victim or the crime victim’s lawful representative, and the attorney for the Government may assert the rights described in subsection (a).” In addressing this provision, Senator Jon Kyl noted that while the provision explicitly allows the government to assert the rights,

the provision does not mean that the government’s attorney has the authority to compromise or co-opt a victim’s right. Nor does the provision mean that by not asserting a victim’s right the government’s attorney has waived the right. The rights provided in this bill are personal to the individual crime victim and it is that crime victim that has the final word regarding which of the specific rights to assert and when. Waiver of any of the individual rights provided can only happen by the victim’s affirmative waiver of that specific right.

150 Cong. Rec. S10911-12 (statement of Sen. Kyl). Similarly, Judge Wilner of the Maryland Court of Appeals poignantly discussed the proper waiver of victims’ rights in *Lopez-Sanchez v. State*, 879 A.2d 695 (Md. Ct.

App. 2005). In concurrence Judge Wilner stated that there is “nothing in the law that allows the State to waive a victim’s right to restitution for his /her own injury and loss. . . . the statutory right to seek restitution belongs to the victim, not the State. . . . To imply [that the state has the authority to waive a victim’s right] would run counter to the entire thrust of [the victims’ right.]”

A handful of other courts have also recognized the principle. See *People v. Rubio*, 2007 WL 1248495 (Cal. Ct. App. 2007) (holding that the state’s failure to raise the victim restitution issue at the sentencing did not waive the victim’s rights); *Red People v. Giordano*, 132 Cal. App. 4th 958 (Cal. Ct. App. 2006) (noting that “the prosecution cannot waive the victim's right to be reimbursed for economic losses resulting from the defendant's criminal conduct); *People v. Sherman*, (Cal. Ct. App. 2004) (noting that “the right to restitution inures to the victim, the People’s failure to object to the trial court’s restitution order cannot constitute a waiver of the victim’s right to restitution”); *State v. Robinson*, 2003 WL 21694412 (Minn. Ct. App. 2003) (noting that the victim’s right to present an impact statement is statutorily authorized and “[t]hat the right is therefore not susceptible to waiver by the prosecutor or related to the state’s obligation to remain silent during sentencing pursuant to the plea agreement.”).

Unfortunately, the examples cited above are the exception rather than the rule of daily criminal court practice. Anecdotal evidence reveals that victims, kept in the dark regarding the prosecution of their cases and the steps of the criminal justice process, are routinely unable to fully participate at critical junctures and the response of the system is that they therefore “waived” their rights. Thus, particularly in the restitution context, “waivers” of rights occur routinely and are simply left unchallenged.

CONCLUSION

The personal nature of victims’ rights ensures that the individual victim has standing to assert and enforce rights in trial and appellate courts. Fighting for this aspect of rights has been a cornerstone of recent victims’ rights efforts nationwide. Equally important, however, is the idea that the personal nature of victims’ rights dictates that it is the victim who has exclusive authority to waive his or her rights. Victims and their attorneys must aggressively advocate against illegal waiver of victims’ rights. This fight requires vigilance in criminal cases and routine appellate challenge to any loss of rights. Failure to insist on full control of the rights risks losing through the backdoor of waiver the very rights the movement has worked so hard to establish.

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¹ See, e.g., Ala. Const. art. I, § 601 (“Basic Rights for Crime Victims”); Alaska Const. art. I, § 24 (“Rights of Crime Victims”); Ariz. Const. art. II, § 2.1 (“Victims' Bill of Rights”); Cal. Const. art. I, § 28 (“Legislative findings and declaration; rights of victims; restitution; safe schools; truth-in-evidence; bail; prior convictions”); Colo. Const. art. II, § 16a (“Rights of crime victims”); Conn. Const. art. I, § 8(b) (“Rights of victims of crime”); Fla. Const. art. I, § 16(b) (“Rights of accused and victims”); Idaho Const. art. I, § 22 (“Rights of crime victims”); Ill. Const. art. I, § 8.1 (“Crime Victim's Rights”); Kan. Const. art. XV, § 15 (“Victims' rights”); La. Const. art. I, § 25 (“Rights of a Victim”); Md. Const. art. 47 (“Crime Victims' Rights”); Mich. Const. art. I, § 24 (“Rights of crime victims; enforcement; assessment against convicted defendants”); Miss. Const. art. III, § 26A (“Victims' rights; construction of provisions; legislative authority”); Mo. Const. art. I, § 32 (“Crime victims' rights”); Neb. Const. art. I, § 28 (“Crime victims; rights enumerated; effect; Legislature; duties”); Nev. Const. art. I, § 8(2) (“rights of victims of crime”); N.J. Const. art. I, § 22 (“Rights of victims of crimes”); N.M. Const. art. II, § 24 (“Rights of crime victims”); N.C. Const. art. I, § 37 (“Rights of victims of crime”); Ohio Const. art. I, § 10a (“Rights of victims of crimes”); Okla. Const. art. II, § 34 (“Rights of victims”); Or. Const. art. I, § 42 (“Rights of victim in criminal prosecutions, juvenile court, and delinquency proceedings”); R.I. Const. art. I, § 23 (“Rights of victims of crime”); S.C. Const. art. I, § 24 (“Victims' Bill of Rights”); Tenn. Const. art. I, § 35 (“Rights of victims of crimes”); Tex. Const. art. I, § 30 (“Rights of crime victims”); Utah Const. art. I, § 28 (“Declaration of the rights of crime victims”); Va. Const. art. I, § 8A (“Rights of victims of crime”); Wash. Const. art. I, § 35 (“Victims of Crimes--Rights”); Wis. Const. art. I, § 9m (“Victims of crime”).

² *See, e.g.*, 18 U.S.C. § 3771 (“a victim of crime has the following rights”); Ala. Const. art. I, § 601 (“Crime victims . . . are entitled to the right to be informed, to be present, and to be heard when authorized, at all crucial stages of criminal proceedings”); Fla. Const. art. I, § 16(b) (same); Kan. Const. art. XV, § 15 (“Victims of crime, as defined by law, shall be entitled to certain basic rights”); Miss. Code Ann. § 99-36-5 (“A victim, guardian of a victim, or close relative of a deceased victim is entitled to the following rights within the criminal justice system”); N.C. Const. art. I, § 37 (“Victims of crime, as prescribed by law, shall be entitled to the following basic rights”); Haw. Rev. Stat. § 801D-4 (“Upon written request, victims and surviving immediate family members of crime shall have the following rights”); N.J. Stat. Ann § 52:4B-36 (“The Legislature finds and declares that crime victims and witnesses are entitled to the following rights”).

³ *See, e.g.*, 18 U.S.C. § 3771(d)(1) (“a person accused of a crime may not obtain any form of relief under this chapter”); Colo. Rev. Stat. §§ 24-4.1-303 (“A defendant or person accused or convicted of a crime against the victim shall have no standing to object to any failure to comply with this article”); Mass. Gen. Laws Ann. ch. 258B, § 13 (“A defendant or person convicted of a criminal or delinquency offense against the victim shall have no standing to object to any failure to comply with this chapter, and the failure to provide a right, privilege or notice to a victim under this chapter shall not be grounds for the defendant or person convicted of a criminal or delinquency offense to seek to have the conviction or sentence set aside.”)

⁴ Many victims’ rights provisions explicitly authorize someone other than the victim to assert the rights in addition to the victim. *See, e.g.*, 18 U.S.C. § 3771(d)(1) (“The crime victim or the crime victim’s lawful representative, and the attorney for the Government may assert the rights described in subsection (a)”); Miss. Code Ann. § 99-36-5 (“A victim, guardian of a victim, or close relative of a deceased victim is entitled to the following rights within the criminal justice system”). The inclusion of *additional* persons authorized to assert a right on behalf of the victim does not diminish the individual victim’s control over such assertion, nor does it infringe upon control of waiver.