

Use of the Term “Victim” In Criminal Proceedings

In the past thirty years there has been an explosion of state constitutional amendments and federal and state statutes that afford victims participatory rights in the criminal justice system. Notably, these legal rights to participation are only available to those who meet the relevant law’s definition of “victim.” While “victim” is a legal status that does not have any relationship to a defendant’s guilt or innocence, courts are often hesitant to permit the use of the term “victim” during trial. This hesitancy stems from a concern that the term “victim” conclusively states a crime has occurred; and, therefore, that its use is prejudicial, and violates a defendant’s constitutional due process right to a fair trial. This article discusses why “victim” is a legal status term and why other terms used to describe victims are inaccurate; analyzes the current state of the law surrounding use of the term at trial; and demonstrates how, when properly treated as a legal status term, “victim” can be used during criminal proceedings without violating a defendant’s fair trial rights.

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I. “Victim” is a Legal Term

In the criminal justice system, the term “victim” no longer merely describes a witness who the prosecution holds out to have suffered harm due to defendant’s criminal conduct. “Victim” now defines an individual who is an independent participant in the criminal case under federal or state victims’ rights laws.¹ Thus, the term “victim” denotes a person’s legal status and defines the level and extent of participation that the individual is entitled to in the criminal case. This status is significant because, just as constitutional protections attach once a person accused of a crime gains the legal status of “defendant,” a statutory and/or constitutional “victim” can exercise certain participatory rights unavailable to the general public. The criteria for obtaining victim status varies among jurisdictions; however, since many victims’ rights attach pretrial, if not pre-charging,² the determination of who is a “victim” cannot be a factual determination dependent on defendant’s guilt or innocence. For this reason, using the term “victim” during court proceedings is proper, as it accurately identifies a victim’s legal role in the proceeding.

II. The Improper Use of Alternative Terms to Identify Crime Victims

Defendants and courts have voiced concern that the use of the term “victim” may prejudice a defendant. For this reason, some courts suggest using terms

such as “alleged victim” or “complainant” to identify those who meet the relevant jurisdiction’s constitutional and/or statutory definition of victim.³ These alternative labels are inappropriate as they fail to recognize a victim’s legal status. Moreover, these labels are often legally incorrect and their use violates the right that many victims have under constitutional and state law: to be treated with fairness, dignity, and respect.

The use of “alleged victim” incorrectly asserts that victim status has not been determined. Similarly, “complainant” is over-broad and, based on the jurisdiction, often legally incorrect.⁴ More importantly, the use of these terms violates a victim’s right to be treated with fairness, dignity, and respect. Under federal law, as well as almost every state victims’ right constitutional amendment and/or statute, a victim has the right to be treated with fairness, dignity, and respect, or some version thereof.⁵ Synonyms for “alleged” include “dubious,” “questionable,” “suspect,” “suspicious,” and “so-called.”⁶ Referring to a victim in such a manner implies that the victim is not truly a victim, but is instead fabricating the charges. This connotation is a clear violation of a victim’s right to be treated with dignity and respect. For a victim to truly be a respected participant in the criminal justice system, a court must allow use of the term “victim” in court proceedings as acknowledgment that the individual occupies an important legal role in the process.

III. Common Objections to Use of the Term “Victim”

The most common objection to use of the term “victim” is that it presupposes that a crime has occurred.⁷ Since a jury or judge is charged with deciding the facts necessary to convict a criminal defendant, the argument is that the term’s use is premature, as the fact-finder has not yet determined that a crime was committed.⁸ Proponents of this position also argue that, because the word implies that the defendant has harmed the victim, it biases the fact-finder, thereby denying the defendant a fair trial.⁹

While courts have routinely upheld defendants’ convictions in the face of these objections,¹⁰ courts have also sympathized with these arguments, noting in dicta that the term “victim” is best avoided.¹¹ Significantly, while some courts disfavor the term, no appellate court has summarily barred its use in criminal prosecutions. And research has revealed only two cases in which the reviewing court found use of the term “victim” so prejudicial as to warrant a new trial: *State v. Cortes*¹² and *Talkington v. State*¹³.

In *Cortes*, the judge, prosecutor, and numerous witnesses used the term “victim” at trial.¹⁴ The judge, in instructing the jury, used the term 76 times, and indicated that it would not provide a curative instruction to the jury on its use of the term.¹⁵ The *Cortes* court reasoned that, in cases where the fact that a crime has been committed is contested and the defendant has objected to the trial court’s use of the term “victim” without a subsequent curative instruction, a court’s use of the term may constitute reversible error.¹⁶ Limiting its holding to the particular circumstances of the case, the court found that use of the term was reversible error as it may have invaded the fact-finding of the jury. Subsequent cases have distinguished *Cortes* based on its extraordinary facts, and rejected arguments that use of the term constituted reversible error.¹⁷ In *Talkington*, the sole issue was whether the victim consented to sexual intercourse; all parties agreed that sexual intercourse had occurred.¹⁸ The reviewing court, relying on the provision of the state code of criminal procedure that barred judges from commenting on the evidence, held that for the court to use the term “victim” when the issue is whether she consented to sexual intercourse, was reversible error.¹⁹ Notably, *Talkington* predates most of the case law dealing with the issue of whether the term “victim” is prejudicial, as well as Texas’ crime victims’ rights laws.

IV. Survey of Case Law

When the use of the term “victim” is at issue, courts tend to distinguish cases in which it is

uncontested that a crime has occurred and only the identity of the perpetrator is at issue, from those cases that involve a question of whether a crime occurred at all.

A. *Identity of perpetrator at issue.*

Courts have consistently found that it is appropriate to use the term “victim” in a criminal trial where the commission of a crime is not contested.²⁰ In these cases, defendants’ objection to the term loses most, if not all, merit because it is clear that harm has occurred and there is a “factual” – as well as legal – victim. For this reason, courts have concluded that the term “victim” carries no more implication of defendant’s guilt than the facts of the crime, and have permitted its use accordingly.²¹

B. *Commission of crime contested.*

Use of the term “victim” is more controversial in cases where the defendant is contesting that a crime occurred. These cases generally involve sexual assault, where the defendant is arguing that the victim consented to the sexual act, or homicide, where the defendant claims the act at issue was committed in self-defense.²² Defendants in such cases argue that, since the jury is charged with determining whether the victim consented, using the term “victim” denies the defendant a fair trial as it assumes facts properly left to the jury. Reviewing courts’ analyses of this argument vary, depending on whether a witness, prosecutor, or court uses the term.

1. Witnesses’ use of the term “victim.”

Criminal defendants have a right under the Sixth Amendment of the United States Constitution to have a fair and impartial jury determine their guilt or innocence.²³ It is improper for a witness to give an opinion on a defendant’s guilt, as it invades the province of the jury and may violate this right.²⁴ Courts generally agree that when a police officer uses the term “victim”, there is little risk that such use will impermissibly sway the jury because jurors understand that, in this context, “victim” is a term of art synonymous with “complaining witness.”²⁵ Significantly, courts have found that any potential risk that

a witness’s use of the term might affect the jury’s deliberations is curable with standard jury instructions.²⁶

2. Prosecution’s use of the term “victim.”

Generally, a prosecutor may not express his or her personal opinion on a defendant’s guilt. Defendants often object to a prosecutor’s use of the term “victim”, arguing that it reflects the government’s belief that the defendant is guilty. Specifically, they argue that the jury will give special weight to this opinion based on the prestige of the prosecutor and the fact-finding facilities available to the office. However, courts have rejected this argument based on jurors’ knowledge of the criminal justice system and the role of prosecutors in the criminal trial.²⁷ Any reference by the prosecutor to a victim will be viewed as merely part of the state’s contention that, based on the state’s evidence, the complainant was a victim of the alleged crimes.²⁸ For these reasons, courts have concluded that it is not reasonably likely that a jury would interpret the prosecutor’s use of the term to reflect a personal belief in a defendant’s guilt. Even courts that have found that the prosecutor’s use of the term “victim” was in error have concluded that a standard jury instruction – that the comments of prosecutor are not evidence and should be disregarded – will remove any prejudice that may arise.²⁹

3. Courts’ use of the term “victim.”

It is improper for the judge to indicate his or her opinion as to the weight and sufficiency of any evidence in the case. When trial courts comment on the weight of the evidence during trial, they risk violating the defendant’s constitutional right to a fair and impartial jury. On this basis, defendants argue that the court’s use of the term “victim” improperly conveys to the jury the court’s belief that a crime was committed or that such use constitutes commentary on the weight of the evidence.³⁰

Courts most often use the term “victim” when giving jury instructions. When deciding if a challenged instruction prejudiced a defendant, reviewing courts examine whether, given the

entire charge, the instruction had a probable effect on the jury's finding of guilt.³¹ Appellate courts have found no error when the term "victim" is included in the challenged instruction, where the trial court used standard instructions, as promulgated by legislature.³² Courts have also found the use of "victim" harmless where the court issued a curative or standard jury instruction to inform regarding the presumption of defendant's innocence.³³ As case law makes clear, curative instructions provide courts with a means of allowing victims to exercise their rights while also addressing defendants' concerns regarding possible prejudice.

V. Conclusion

"Victim" is a legal status term. This legal term of art precisely describes a victim's independent status in the criminal justice system. Other terms, such as "alleged victim" and "complainant" do not. A victim has the right to be treated with fairness, dignity and respect, and to call a legal victim something other than "victim" denigrates the victim's proper role in the criminal justice process and violates his or her legal rights. Once an individual is accused of a crime, he or she acquires the legal status of "defendant." Just as a jury is instructed that the legal status of "defendant," cannot be viewed as evidence of defendant's guilt,³⁴ a jury can also be instructed that the legal status of "victim" cannot be viewed as evidence of defendant's guilt. As shown by the majority of the case law on the subject, curative instructions are a simple and effective way of allowing a victim to exercise his or her rights in the criminal proceedings while eliminating prejudice to the defendant. Concealing a victim's legal status, or making the use of the term "victim" contingent on the defendant's choice of defense, is an improper and unnecessary way to protect a defendant's rights; it trivializes a victim's role in the criminal proceedings and inappropriately renders victims' constitutional and statutory rights dependent on defendants' litigation strategy. In order to fulfill the purpose of victims' rights laws, courts need to permit the use of the term "victim" as recognition of a victim's unique and important position in the criminal justice system.

Practice Pointers

Concealing a victim's legal status is an improper and unnecessary way to protect a defendant's rights as it trivializes a victim's role in the criminal proceedings. In order to fulfill the purpose of victims' rights laws, courts need to permit the use of the term "victim" as recognition of a victim's unique and important position in the criminal justice system.

¹ See, e.g., 18 U.S.C. § 3771(e) ("[T]he term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia"); Ariz. Rev. Stat. Ann. § 13-4401(19) ("'Victim' means a person against whom the criminal offense has been committed . . ."); Idaho Code Ann. § 19-5306(5) (a) ("'Victim' is an individual who suffers direct or threatened physical, financial or emotional harm as the result of the commission of a crime or juvenile offense.").

² Douglas E. Beloof, Paul G. Cassell & Steven J. Twist, *Victims in Criminal Procedure* 52 (2d Ed. 2006).

³ See, e.g., *State v. Frey*, No. 06-1081, 2007 WL 1827423, at *3 n.3 (Iowa Ct. App. June 27, 2007); *Commonwealth v. Alves*, No. 99-P-1559, 2001 WL 275346, at *1 (Mass. App. Ct. Mar. 20, 2001).

⁴ See generally 22 C.J.S. Criminal Law § 439 (2009) (detailing persons entitled to make a "complaint"). For instance, in some jurisdictions, only the prosecutor can be the complainant. *Id.*

⁵ See, e.g., 18 U.S.C. § 3771 (right to be treated with fairness and with respect for the victim's dignity and privacy"); Ariz. Const. art. 2, § 2.1(A)(1) (right to be treated with fairness, respect, and dignity); Tenn. Code Ann. § 40-38-102(a)(1) (right to be treated with dignity and compassion). Full collection of relevant state and federal laws on file with author.

⁶ <http://thesaurus.reference.com/browse/alleged?qsrc=2889>.

⁷ See, e.g., *State v. Nomura*, 903 P.2d 718, 721 (Haw.

Ct. App. 1995).

⁸ See, e.g., *State v. Warholic*, 897 A.2d 569, 583 (Conn. 2006).

⁹ See, e.g., *id.*

¹⁰ See, e.g., *State v. Robinson*, 838 A.2d 243, 246 (Conn. App. Ct. 2004); *Agee v. State*, 544 N.E.2d 157, 159 (Ind. 1989).

¹¹ See, e.g., *People v. Dudgeon*, Nos. E037537, E0395242006, WL 1305184, at *7 (Cal. Ct. App. May 12, 2006); *Birbeck v. State*, 665 S.E.2d 354, 364 (Ga. Ct. App. 2008); *State v. Devey*, 138 P.3d 90, 95 (Utah Ct. App. 2006).

¹² 851 A.2d 1230 (Conn. App. Ct. 2004).

¹³ 682 S.W.2d 674 (Tex. Ct. App. 1984).

¹⁴ *Cortes*, 851 A.2d at 1240.

¹⁵ *Id.*

¹⁶ *Id.* at 1241.

¹⁷ See, e.g., *State v. Rodriguez*, 946 A.2d 294, 305 (Conn. App. Ct. 2008); *State v. Sandiagno*, 917 A.2d 1051, 1063 n.10 (Conn. App. Ct. 2007).

¹⁸ *Talkington*, 682 S.W.2d at 675.

¹⁹ *Id.*

²⁰ See, e.g., *Cortes*, 851 A.2d at 1240; *State v. Chism*, No. 54895-6-I, 2005 WL 3529123, at *3 (Wash. Ct. App. Dec. 27, 2005); *Jackson v. State*, 600 A.2d 21, 24 (Del. Super. Ct. 1991).

²¹ See, e.g., *State v. Wolfe*, No. 20534, 2005 WL 742506 (Ohio Ct. App. Apr. 1, 2005); *Agee*, 544 N.E.2d at 159.

²² See, e.g., *Jackson*, 600 A.2d at 24; *Mason v. State*, 692 A.2d 413 (Del. Super. Ct. 1997) (table).

²³ U.S. Const. amend. VI.

²⁴ See, e.g., *State v. Brightman*, 151 Wash. App. 1030, at *8-9 (Wash. Ct. App. 2009).

²⁵ See, e.g., *Jackson*, 600 A.2d at 24-25; *State v. Richards*, 821 N.W.2d 777, at *3-4 (Iowa Ct. App. 2012) (table); *James v. State*, No. 57178, 2012 WL 5378147, at *6 (Nev. Oct. 31, 2012); *State v. Then*, No. 04-12-1728, 2009 WL 815453, at *18 (N.J. Super. Ct. App. Div. Mar. 31, 2009).

²⁶ See, e.g., *State v. Silao*, No. 27044, 2007 WL 1874792, at *1 (Haw. Ct. App. June 28, 2007).

²⁷ See, e.g., *Rodriguez*, 946 A.2d at 307; *People v. Mata*, No. B193922, 2007 WL 4216867, at *7

(Cal. Ct. App. Nov. 30, 2007); *State v. Jackson*, No. 32397-4-II, 2006 WL 331373, at *6 n.3.

²⁸ See, e.g., *Gillard v. Glebe*, No. C14-5026 RJB, 2014 WL 1910001, at *8-9 (W.D. Wash. May 12, 2014); *Mata*, 2007 WL 4216867, at *7; *State v. Cillo*, --- A.3d ---, 314 Conn. 28, at *54-55 (Conn. 2014); *People v. Gillam*, No. 266893, 2007 WL 2189056, at *3 (Mich. Ct. App. July 31, 2007); *Renteria-Novoa v. State*, No. 61865, 2014 WL 4804213, at *2 (Nev. Sept. 24, 2014); *Weatherly v. State*, No. 09-07-00407-CR, 2008 WL 5780705, at *3 (Tex. Crim. App. April 1, 2009); *Warholic*, 897 A.2d at 584.

²⁹ See, e.g., *Reed v. State*, No. A-10970, 2014 WL 1887722, at *4-5 (Alaska Ct. App. May 7, 2014); *Mata*, 2007 WL 4216867, at *7; *State v. Garcia-Dorantes*, No. 239306, 2003 WL 22416511, at *2 (Mich. Ct. App. 2003); *State v. Sobir*, No. 56295-9-I, 2006 WL 2126333, at *4 (Wash. Ct. App. July 31, 2006); *State v. High*, 129 Wash. App. 1001, at *3-4 (Wash. Ct. App. 2005).

³⁰ See, e.g., *State v. Brewer*, Nos. W2012-02281-CCA-R3-CD & W2012-02282-CCA-R3-CD, 2014 WL 1669807, at *13-15 (Tenn. Crim. App. Apr. 24, 2014); *Devey*, 138 P.3d at 96 n.5; *State v. McCarroll*, 445 S.E.2d 18, 22 (N.C. 1994).

³¹ See, e.g., *Burns v. State*, 76 A.3d 780, 788-89 (Del. 2013).

³² See, e.g., *United States v. Washburn*, 444 F.3d 1007, 1013 (8th Cir. 2006); *State v. Walker*, 737 N.W.2d 325, at *3 (Iowa Ct. App. 2007) (table); *State v. Henderson*, 574 S.E.2d 700, 704 (N.C. Ct. App. 2003); *State v. Richardson*, 434 S.E.2d 657, 663 (N.C. Ct. App. 1993).

³³ See, e.g., *Robinson*, 838 A.2d at 246-247; *Nomura*, 903 P.2d at 722; *State v. Ricker*, No. 97APC01-96, 1997 WL 606861, at *9 (Ohio Ct. App. Sept. 30, 1997); *McCarroll*, 445 S.E.2d at 22.

³⁴ See, e.g., 3rd Cir. Model Criminal Jury Instructions 1.11 (2009).

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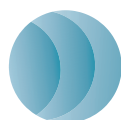
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