



The Long and Confusing Road of the Criminal Justice System After Conviction: Victims' Rights in Habeas Corpus Proceedings and Pardons

The plea bargain or criminal trial, and the attendant sentencing of the offender, are commonly understood to be the point of resolution in the criminal justice system. The reality, however, is quite different for most victims. In fact, victims' involvement with the justice system may continue long after the offender is sentenced. For example, many victims continue to have concerns with regard to an offender's escape, parole proceedings, restitution collection, and ultimate release. In addition, offenders' appeals of their convictions and sentences may result in many more years of victim interaction with the system. Fortunately, victims' rights and services extend to many of these "after conviction" realities.

This *Article* addresses two often difficult and perhaps unexpected "after conviction" realities victims may face—habeas corpus proceedings and pardons. It discusses the history of these aspects of the criminal justice system, identifies the rights victims have in each setting, and provides practice pointers for making victims' rights more meaningful in these contexts.

Crime Victims' Rights in Federal Habeas Corpus Proceedings

In 1985, Douglas Stewart Carter was convicted of the first degree murder of Eva Olesen and sentenced to death.¹ During the 16 years following his conviction, Carter unsuccessfully challenged his conviction on numerous grounds through Utah's direct appeals process and the state's post-conviction proceedings.² In 2002, Carter turned to the federal system and began the process of filing a habeas corpus petition in federal district court challenging his conviction.³ In 2011, 26 years after Carter's state conviction and almost 10 years after the commencement of his federal habeas action, he attempted to amend his federal habeas petition to add new claims, sought a stay of the federal action,⁴ and requested that the state court re-open his state post-conviction proceeding.⁵ In late 2012, both the state and federal courts dismissed Carter's habeas and post-conviction appeals—seeming to finally give Eva Olesen's family finality of the conviction.⁶ But once again, Carter appealed, this time arguing that the district court erred in denying him habeas relief.⁷ The court determined that the district court abused its discretion in refusing to allow Carter to supplement his habeas petition with claims based on newly-discovered evidence of prosecutorial misconduct and suppression of evidence. And so, more than thirty years after the murder, the battle for legal finality wages on.

The writ of habeas corpus, the legal procedure by which state prisoners can challenge their confinement in federal courts,⁸ is “one of the centerpieces of our liberties.”⁹ The writ plays a vital role in protecting individuals in times of political and social crisis against illegal detention by government officials and against gross abuses by state courts.¹⁰ “But the writ has potentialities for evil as well as for good,” and abuses of the procedure cause unnecessary delays that “may undermine the orderly administration of justice,”¹¹ add years of uncertainty for crime victims and their families, and unreasonably postpone hoped-for finality of convictions.

Under the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771(b)(2), crime victims in habeas proceedings explicitly have the rights “to be reasonably heard,” to “proceedings free from unreasonable delay,” and “to be treated with fairness and with respect for the victim’s dignity and privacy.”¹² Although the CVRA is silent on the right of victims to receive reasonable notice of habeas proceedings, it must be interpreted to include this right, for it is only with reasonable notice that victims can meaningfully exercise their other explicit rights.¹³

A. A brief history of the writ of habeas corpus.

The writ of habeas corpus, which has its roots in English common law, is a legal remedy by which a court may inquire if a prisoner is being unlawfully held and, if so, may order the prisoner’s release.¹⁴ Within the American justice system, under certain conditions, convicted state prisoners may file a petition under 28 U.S.C. § 2254 in federal district court and allege that their state conviction or sentence was obtained “in violation of the Constitution or laws or treaties of the United States.”¹⁵

Although habeas corpus cases are docketed as “civil” actions in federal court, courts have long recognized that the “[civil] label is gross and inexact.”¹⁶ Because these proceedings concern federal courts’ review of errors in criminal proceedings “with the potential of overturning” a prisoner’s criminal conviction or sentence, “habeas proceeding[s] necessarily assume[] part of the underlying case[s]’ criminal nature in the same sense.”¹⁷

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA), which amended the habeas corpus statutes to limit federal habeas review of state cases in an effort to “curb the abuse of the . . . writ of habeas corpus, and to address the acute problem of unnecessary delay[s].”¹⁸ Congress sought to “prevent ‘retrials’ on federal habeas, and to give effect to state convictions to the extent possible under law.”¹⁹ Three elements of AEDPA are of particular interest here. First, AEDPA limits the circumstances under which a court may consider previously-raised claims in a second or successive habeas petition under 28 U.S.C. § 2254.²⁰ Second, AEDPA imposes deadlines by which state prisoners must file their habeas petitions in federal court.²¹ Third, AEDPA reinforces the requirement that state prisoners seeking federal habeas review must first exhaust state remedies, *i.e.*, they must have presented and lost their claims in the state courts through all direct-appeal or post-conviction proceedings provided by state law.²²

However, implementation of the AEDPA amendments has not reduced the delay time between imposition of the state court judgment and the commencement of federal habeas proceedings.²³ On average, federal habeas petitions are filed approximately 6 years (for non-capital cases) or 7 years (for capital cases) after entry of the state court judgment.²⁴ Moreover, the amendments have neither curbed the numbers of state prisoners filing federal habeas petitions nor reduced the processing times of such petitions by federal district courts. Each year state prisoners file more than 18,000 habeas petitions in federal district courts, and although only a small fraction are ultimately granted, the average habeas petition remains pending for months or—as with capital cases—years.²⁵ Law and public policy rationales support an active role for crime victims in these federal habeas proceedings to ensure a timely conclusion of their cases and curtail abuse of the habeas process by convicted state prisoners.

B. Victims' rights in federal habeas corpus proceedings.

In 2006, the CVRA was amended to include section 3771(b)(2), which provides that “[i]n a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).”²⁶ The explicitly enumerated habeas-specific rights are: the “right not to be excluded from any . . . public court proceeding”; the “right to be reasonably heard at any public proceedings involving release, plea, sentencing or any parole proceeding”; the “right to proceedings free from unreasonable delay”; and the “right to be treated with fairness and with respect for the victim’s dignity and privacy.”²⁷ These rights may be asserted by the crime victim, the crime victim’s lawful representative, or the Government’s attorney on the crime victim’s behalf.²⁸ Federal courts have a legal duty to grant victims their asserted rights.²⁹

Unfortunately, when state convictions are challenged in federal courts by way of habeas petitions under 28 U.S.C. § 2254, it is unclear how many crime victims receive notice of the proceedings such that they can meaningfully exercise their other CVRA rights. This uncertainty may be attributed, in part, to a lack of empirical data on victim notification of habeas petitions; it may also be attributed to the CVRA’s failure to explicitly charge any specific person or agency with providing notice or other assistance to a state crime victim in federal habeas proceedings.³⁰ Thus, on the surface there is a gap in the system. Nevertheless, because the federal courts are charged with “ensur[ing] that a crime victim is afforded [his or her] rights” under the CVRA,³¹ the federal courts in which the habeas petitions are pending are obligated to provide crime victims with the requisite notice of all proceedings.³²

In practice, state agencies are generally in a better position to provide notice to victims—at least with regard to the commencement of the federal habeas action—because they should already have the crime victims’ contact information or they can more easily locate this information. Several states appear to agree, as their state crime victims’ rights laws direct an agency or office to provide crime victims with notice of all post-conviction proceedings, which should include post-conviction proceedings in federal court unless otherwise stated.³³

In states in which the existing laws do not explicitly require a state agency or office to provide notice of post-conviction proceedings in federal courts, practitioners should urge state

prosecutors to adopt best practices affording victims notice until the laws can be changed. Key among these best practices are that at the outset, the prosecutors litigating the case in state court should: (1) inform the crime victims of the defendants' ability to pursue habeas corpus review of their state convictions in federal court; and (2) inform the crime victims that they may request ongoing involvement in all post-conviction proceedings, including federal habeas proceedings. Thereafter, the state attorney who is charged with responding to the prisoner's habeas petitions would be in a good position to provide the requisite notice to the victims. Once the crime victims have been informed of the existence of the federal case, they may also request that the court meet its duty to "ensure that" the victims are afforded their rights under the CVRA by ordering the parties to include the victims (or the victims' attorneys) on their service lists, which should help provide the victims with reasonable notice of developments in the case.

C. Enforcement of crime victims' rights can have an impact on federal habeas corpus proceedings and bring victims a step closer to securing finality of a conviction.

The Carter case highlighted above illustrates that state crime victims can obtain concrete results through the exercise of their rights under the CVRA. But it also demonstrates the limitations of victims' rights in the habeas context.³⁴

In Carter's federal habeas case, Eva Olesen's son—through legal counsel³⁵—diligently filed pleadings asserting his CVRA rights and requesting the court to resolve the case promptly.³⁶ In November 2011, a federal appellate court "agree[d] with Mr. Olesen that the more than nine-and-a-half-year delay [in federal court] is too long . . . and he has been prejudiced by the lengthy litigation[.]" and the court "encourage[d] the district court to hold firm to the briefing schedule and to decide the case promptly after briefing is completed."³⁷ However, in making that holding, the court also held that the victim did not have a right to mandamus relief directing the district court to reconsider its order denying the state's motion to dismiss the habeas petition, stating that "while the question is close, we cannot conclude at this juncture that the prejudice and delay overcome Carter's due process right to have his habeas case decided."³⁸

A month later, the district court granted Mr. Olesen's motion to strike Carter's motion to amend his habeas petition in part because it concluded that "disallowing amendment is necessary to protect [Mr. Olesen's] statutory right to a proceeding free from unreasonable delay and his right to be treated with fairness."³⁹ In January 2012, the district court denied Carter's motion for reconsideration and granted Mr. Olesen's request to warn Carter that any further attempts "to unduly delay the prompt disposition of the remaining claims may result in sanctions."⁴⁰ Finally, in September 2012, the district court denied Carter's petition for writ of habeas corpus and directed the clerk of the court to close the case.⁴¹

However, even with the victim doing all within his power to assert his legal rights under the CVRA, the process drags on. Carter appealed the decision to the Tenth Circuit. In that case, the victim filed a notice of intervention, which the Tenth Circuit rejected.⁴² Although the Tenth Circuit exercised its discretion in allowing the victim to file an amicus brief defending his rights, he was not allowed to present oral argument. On motion by the victim, the Tenth Circuit issued an order holding that the victim was not entitled to file a petition to the panel for rehearing. Mr.

Olesen sought review from the United States Supreme Court to address his rights as a victim, but the petition was denied.⁴³ And so the case remains pending, and Mr. Olesen waits for an end to the case that began with his mother's murder more than thirty years ago.

The Carter case perfectly encapsulates the frustration that victims can experience at the hands of the justice system. Ultimately, the court found that the district court abused its discretion in refusing to allow Carter to supplement his habeas petition with claims based on newly-discovered evidence. However, the victim's voice was heard, and Mr. Olesen was able to take an active role in the federal habeas proceedings. The victim's rights to be heard, to fairness, and to proceedings free from unreasonable delay were confirmed. The case revealed the tension between the victim's right to and need for finality, and the deference courts afford criminal defendants. However, with adequate notice of the proceedings, crime victims may exercise their CVRA rights and prompt courts to remember that needless delays and abuse of the habeas process do not merely cause an administrative hiccup; they inflict real personal harm on the victims.

Habeas Practice Pointer

The CVRA's failure to include an explicit victim notification provision creates a gap in the system that may interfere with the effectuation of victims' rights in habeas proceedings. For crime victims who cannot avail themselves of state laws providing for notice of habeas proceedings, they must rely on federal courts and states' attorneys to take reasonable steps to provide them this notice and ensure that they are afforded the opportunity to exercise their CVRA rights. This ad hoc approach to rights enforcement is far from ideal. Practitioners and lawmakers should examine their jurisdiction's existing victim notification procedures and practices and, where lacking, adopt procedures and practices designed to ensure that state victims receive notice of federal habeas proceedings so that their CVRA rights are not rendered meaningless.

Victims' Rights in the Pardon Process

Victims of crime may be shocked to learn that an offender has applied for—or has been granted—a pardon. Whether one views pardons as a “sign of forgiveness,”⁴⁴ as a necessary procedure to help guard against injustices or irregularities inflicted on individuals by the criminal justice system,⁴⁵ as a foreign policy tool, or an instrument of investigation,⁴⁶ it cannot be denied that victims of crime are directly affected by an executive decision to grant a petition for clemency. The impact of pardons on victims of crime has been highlighted in the media. In one well-publicized recent instance, Arnold Schwarzenegger was criticized for pardoning a teen who had pleaded guilty to stabbing a victim just ten years earlier, when neither the state nor the victim knew that the pardon was coming.⁴⁷ This is not an isolated event. Former Mississippi Governor Haley Barbour pardoned more than 200 individuals before he left office in January 2012.⁴⁸ Although the Mississippi Supreme Court upheld the validity of these pardons,⁴⁹ former Governor Barbour's actions prompted national discussion of victims' rights in the context of pardon proceedings.

A. *A brief history of pardons.*

The power to pardon has existed in some form since ancient times.⁵⁰ Originating in Roman law, the pardon power was incorporated into the British legal tradition and then adopted by the framers of the United States Constitution.⁵¹ In addition, every state constitution addresses executive clemency in some way.⁵²

Historically, the pardon power was held solely by the executive without restriction.⁵³ However, limitations on executive ability to grant pardons have been adopted over time. The federal pardon power, for example, does not extend to cases of impeachment,⁵⁴ and some states limit pardons to only those cases approved by a Board of Pardons or delegate pardon authority to the board.⁵⁵

B. *Victims' rights and the pardon process.*

Since the late 1970s, more than 30 states have amended their constitutions to afford victims' rights, and all 50 states, along with the District Columbia and the federal government, have enacted statutory and rule-based protections for victims.⁵⁶ Courts have recognized that these new rights mark a fundamental shift in the criminal justice system.⁵⁷ In line with this recent shift in criminal justice policy and law, and in recognition of the "significant concerns that many victims . . . have when offenders are considered for post-sentence release from confinement,"⁵⁸ many states have adopted statutes or regulations that explicitly provide for victims' rights in the pardon process.⁵⁹ These rights vary dramatically, however.

One common right is a victim's entitlement to notice that a defendant has applied for or is being considered for an executive pardon. Although some states require victims to "opt in" by requesting notice of any pardon application,⁶⁰ other states use an "opt out" approach that provides victims of crime with notice by default, irrespective of whether a separate request for notice has been made.⁶¹ Notably, some statutes specify the time frame within which notice must be given,⁶² although others do not.⁶³

Many jurisdictions also provide victims with the right to be heard in connection with pardon proceedings. The method by which a state permits a victim to be heard varies from state to state, with some states granting victims a broad right to make written and oral statements in connection with a pardon,⁶⁴ others specifying that victims may comment on the proceedings only through the submission of a written statement,⁶⁵ and still others permitting questioning of the victim in connection with his or her statement.⁶⁶ Some jurisdictions explicitly provide that these victim statements *shall* be considered by the Board of Pardons or the Governor before a pardon can be issued.⁶⁷ But even in those jurisdictions that do not explicitly require review of victim statements before granting a pardon, the structure of the laws implies that when a victim submits information as part of the pardon process, it should be given due consideration.⁶⁸

Conclusion

Victims are directly affected by the after-conviction developments in their cases—whether these developments relate to petitions for federal habeas review filed by state prisoners or to executive review of a petition for clemency and any decision to grant or deny such a petition. To achieve the fundamental shift envisioned by victims’ rights and recognized by courts, victims’ rights must extend in a meaningful way to reach these after-conviction realities of the criminal justice system and ensure that victims’ voices are heard.

Pardon Practice Pointers

- *General Victims’ Rights May Be Applicable in the Pardon Context.* If there is a statute or regulation on-point as to victims’ rights in the pardon context, that right should be asserted. However, don’t stop there. General victims’ rights, such as the rights to protection, to be treated with dignity and respect, and to be heard, may be drafted broadly enough to apply in post-conviction proceedings, including pardon proceedings. Because different rights afford different appellate review opportunities, raise all constitutional provisions possible.⁶⁹
- *Carefully Consider the Universe of Statutes and Regulations.* Look beyond the primary victims’ rights provisions to explore statutes and regulations in the sections of the jurisdiction’s legislative and administrative materials that address pardons. Victims’ rights in the pardon context may not be codified in the same section of the law that establishes the overarching victims’ rights provisions.
- *Be Mindful of the Impact of Pardons on Victims’ Other Rights.* Practitioners should be mindful of any potential impact of a pardon on the victims’ other rights, including the right to restitution. For example, the federal Office of the Pardon Attorney in 1995 adopted the position that a full pardon extends to criminal restitution “*not yet received* by the victim of the pardoned offender.”⁷⁰ Practitioners representing victims should be prepared to explore solutions, such as conditional pardons, which may require an offender to satisfy any outstanding restitution obligations.⁷¹
- *Be Alert for Enforceability Challenges.* Practitioners should be alert for potential challenges to the enforceability of victims’ rights in the pardon context, as states may incorporate provisions that purport to limit the enforcement of pardon-related victims’ rights.⁷²

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¹ *State v. Carter*, 888 P.2d 629, 632 (Utah 1995).

² *See, e.g., Carter v. Galetka*, 44 P.3d 626 (Utah 2001).

³ *See Carter v. Friel*, No. 2:02CV326TS, 2005 WL 1683689 (D. Utah July 18, 2005) (summarizing procedural history up to 2005).

⁴ *See Carter v. Bigelow*, No. 2:02-CV-326 TS, 2011 WL 5041202, at *1 (D. Utah Oct. 24, 2011); *Carter v. Bigelow*, 869 F. Supp. 2d 1322 (D. Utah 2012).

⁵ *See* Melinda Rogers, *High Court Hears Arguments In Case Of Death-Row Inmate Douglas Carter Yet Again*, Salt Lake City Tribune (Mar. 7, 2012), www.sltrib.com/sltrib/news/53660258-78/carter-court-brunker-case.html.csp.

⁶ *See Carter v. Bigelow*, No. 2:02-CV-326, 2012 WL 3964819 (D. Utah Sept. 11, 2012) (denying Carter's petition for habeas relief); *Carter v. State*, 289 P.3d 542 (Utah 2012) (affirming denial of Carter's successive petition for state post-conviction relief).

⁷ *Carter v. Bigelow*, 787 F.3d 1269 (10th Cir. 2015).

⁸ This Article focuses primarily on the writ as a remedy sought by state prisoners in federal courts under 28 U.S.C. § 2254.

⁹ *McCleskey v. Zant*, 499 U.S. 467, 496 (1991).

¹⁰ *See, e.g.,* Nancy J. King & Joseph L. Hoffmann, *Habeas for the Twenty-First Century: Uses, Abuses, and the Future of the Great Writ*, 4-10 (2011) (discussing the origins of the writ of habeas corpus and providing an overview of its role in American history).

¹¹ *McCleskey*, 499 U.S. at 496 (internal quotations omitted).

¹² See 18 U.S.C. § 3771(b)(2)(A). See also *Johnson v. Carroll*, Civ. Act. No. 05-237-KAJ, 2011 WL 12854409 (D. Del. Jan. 18, 2011) (ordering documents sealed in habeas proceeding to protect victim’s privacy under the CVRA).

Note that the definition of “crime victim” in the context of habeas proceedings is more circumscribed than the default definition of “crime victim” under the CVRA. In a habeas proceeding, a crime victim is defined as “the person against whom the State offense is committed or, if that person is killed or incapacitated, that person’s family member or other lawful representative.” 18 U.S.C. § 3771(b)(2)(D). See also, generally, *In re Smalls*, 612 Fed. Appx. 181 (4th Cir. 2015) (per curiam) (stating that the CVRA “does cover federal habeas corpus proceedings arising out of a state conviction” but that the perpetrator of the crime was not a crime victim entitled to CVRA protections).

¹³ See *Chichakli v. Grondolsky*, No. 16-12258-GAO, 2016 WL 7209665 (D. Mass. Dec. 12, 2016) (stating that the respondent to the habeas petition must include in the answer or other responsive pleading “a statement notifying this Court of the existence of any victim or victims as defined by 18 U.S.C. § 3771”).

¹⁴ King & Hoffmann, *supra* note 10, at 4. The form of habeas corpus that is most commonly known is formally called “habeas corpus *ad subjiciendum*,” which literally means “you have the body, to submit to.” *Id.* (internal quotations omitted). It is a writ issued by a court that directs the person with custody over the prisoner to produce the body of the prisoner for the purpose of determining the legal basis for that prisoner’s custody. *Id.*

¹⁵ See 28 U.S.C. § 2254(a).

¹⁶ *Harris v. Nelson*, 394 U.S. 286, 293-94 (1969).

¹⁷ *O’Brien v. Moore*, 395 F.3d 499, 505-06 (4th Cir. 2005).

¹⁸ H.R. Conf. Rep. No. 104-518, at 111 (1996), reprinted in 1996 U.S.C.C.A.N. 944, 944.

¹⁹ *Williams v. Taylor*, 529 U.S. 362, 386 (2000).

²⁰ 28 U.S.C. § 2244(b).

²¹ 28 U.S.C. § 2244(d)(1). There is a one-year period of limitation for applying for a writ of habeas corpus. This date generally begins on the date on which the judgment became final, although it can also be triggered by the recognition of a new right by the Supreme Court, the date of discovery of the factual predicate for the claim, or the date on which the impediment to filing an action created by state action is removed. See *id.*

²² See 28 U.S.C. § 2254(b)(1)(A).

²³ Nancy J. King, Fred Cheesman & Brian Ostrom, *Habeas Litigation in U.S. District Courts: Final Technical Report: Habeas Litigation in U.S. District Courts* 9, 55, 62 (2007), www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf (comparing data from habeas cases filed before and after AEDPA).

²⁴ See *id.*

²⁵ *Id.* at 9, 45, 54-61.

²⁶ 18 U.S.C. § 3771(b)(2)(A).

²⁷ 18 U.S.C. § 3771(a)(3), (4), (7), (8). Although under the CVRA state crime victims have the right to be reasonably heard and to be present at federal habeas proceedings, 18 U.S.C. § 3771(b)(2)(A), (a)(3)-(4), as one federal court has acknowledged, “[m]ost habeas cases are resolved on the pleadings without in-court hearings.” *Pann v. Warren*, No. 5:08-CV-13806, 2010 WL 2836879, at *4 (E.D. Mich. July 19, 2010). Therefore, in federal habeas cases, crime victims’ exercise of their rights to be present and to be heard must be construed to include the right to submit written pleadings and to have their submissions fully considered before the court issues a decision. *See id.* (affording the crime victims their right to be heard by accepting their filings for review in the habeas proceeding); *see also Brandt v. Gooding*, 636 F.3d 124, 136-37 (4th Cir. 2011) (concluding that the “habeas petition initiated a ‘public proceeding’ within the meaning of the” CVRA and the district court afforded the victim her “right to be reasonably heard by construing her submissions as amicus briefs” where the district court ruled based solely on the written submissions). Otherwise, “[t]o preclude crime victims from submitting documents to the court in support of their right to be heard in a habeas proceeding would effectively preclude them from being [present and] heard at all in most cases.” *Pann*, 2010 WL 2836879, at *4.

²⁸ *See* 18 U.S.C. § 3771(b)(2)(B) (“These rights [in the CVRA relating to habeas proceedings] may be enforced by the crime victim or the crime victim’s lawful representative in the manner described in paragraph[] (1) . . . of subsection (d).”); *see also* 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).”).

²⁹ 18 U.S.C. § 3771(b)(1) (providing that “the court shall ensure that a crime victim is afforded [his or her] rights”).

³⁰ The CVRA exempts “personnel of any agency of the Executive Branch of the Federal Government” from “any obligation or requirement” in such habeas proceedings. 18 U.S.C. § 3771(b)(C).

³¹ 18 U.S.C. § 3771(b)(2).

³² *See Chichakli v. Grondolsky*, No. 16-12258-GAO, 2016 WL 7209665, at *3 (D. Mass. Dec. 12, 2016) (stating that the respondent to the habeas petition must include in the answer or other responsive pleading “a statement notifying this Court of the existence of any victim or victims as defined by 18 U.S.C. § 3771”).

³³ *See, e.g.,* Ariz. Rev. Stat. Ann. § 13-4411 (providing that “[o]n request of the victim, the prosecutor’s office that is responsible for handling any post-conviction or appellate proceedings immediately shall notify the victim of the proceedings and any decisions that arise out of the proceedings”); Ark. Code Ann. § 16-90-1108 (providing that “[i]f the defendant appeals or pursues a post-conviction remedy, the Attorney General, as to cases handled by the Attorney General, shall promptly inform the victim of: (1) That fact; (2) The date, time, and place of any hearing; and (3) The decision”); Vt. Stat. Ann. tit. 13, § 5315 (providing that “[i]f the defendant appeals or pursues a post-conviction remedy, the prosecutor’s office shall promptly inform the victim of a listed crime of that fact, shall explain the significance of such

a proceeding and shall promptly notify the victim of the date, time and place of any hearing and of the decision”).

³⁴ It is important to note that courts that have addressed the CVRA in the context of habeas rights do not generally approve of the victim’s ability to intervene in the case. However, the victim must be permitted to be heard through other means. *See Brandt v. Gooding*, 636 F.3d 124 (4th Cir. 2011) (finding that the crime victim did not have a right to intervene in a habeas proceeding, but that the victim did have a right to be heard; allowing the victim to be heard through written amicus submissions was sufficient: “The district court’s review of [the victim’s] submissions as amicus briefs was fully commensurate with [the purpose of the CVRA] and provided [the victim] a full and fair opportunity, under the CVRA, to provide information and communicate her views to the court”); *Habeas Corpus Res. Ctr. V. U.S. Dep’t of Justice*, No. C13-4517 CW, 2013 WL 6157321 (N.D. Cal. Nov. 22, 2013) (stating that the victim could not file a motion to intervene before a habeas corpus petition had even been filed, but noting that had a habeas petition been filed, the CVRA prescribes specific mechanisms for enforcing a crime victim’s right to proceedings free from unreasonable delay).

³⁵ Mr. Olesen was represented by attorneys at the Maryland Crime Victims’ Resource Center.

³⁶ *In re Olesen*, No. 11-4190, 447 F. App’x 868, 869 (10th Cir. 2011) (noting that Mr. Olesen asserted his CVRA rights “in numerous pleadings filed from 2008 through 2011”).

³⁷ *Id.* at 871. Notwithstanding this agreement, the court of appeals denied Mr. Olesen’s request for a writ of mandamus that would direct the district court to reconsider its order denying the state’s motion to dismiss Carter’s remaining habeas claims. *Id.* at 870-71. The court found that it was bound by Tenth Circuit precedent to review CVRA mandamus petitions under a “clear and indisputable” standard, and it concluded that Mr. Olesen’s right to mandamus relief was not clear and indisputable given the number and complexity of the remaining issues, and the fact that the district court had both acknowledged “the need to dispose the case as expeditiously as possible” as well as imposed a briefing schedule indicating a final ruling may be forthcoming after this remaining round of briefing. *Id.* at 871.

³⁸ *Id.*

³⁹ *Carter*, 869 F. Supp. 2d at 1328.

⁴⁰ *Id.* at 1331.

⁴¹ *Carter*, 2012 WL 3964819, at *50.

⁴² *See* Petition for Writ of Certiorari, *In re: Olesen*, No. 15-44, 2015 WL 4148728 (July 8, 2015).

⁴³ *Olesen v. Carter*, 136 S. Ct. 190 (2015).

⁴⁴ Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 Tex. L. Rev. 561, 581 (2001).

⁴⁵ Kristen H. Fowler, *Limiting the Federal Pardon Power*, 83 Ind. L.J. 1651, 1653 (2008).

⁴⁶ *Id.* at 1653-54.

⁴⁷ See “Arnold Schwarzenegger’s Last Act as Governor Still Follows the Terminator,” CNN.com (July 7, 2015), <https://www.cnn.com/2015/07/07/us/arnold-schwarzenegger-clemency/index.html>.

⁴⁸ See, e.g., *Mississippi Governor Haley Barbour Frees Murderer Who Was Recently Denied Parole*, FoxNews.com (Jan. 09, 2012), www.foxnews.com/politics/2012/01/09/mississippi-governor-haley-barbour-frees-murderer-who-was-recently-denied/; Sevil Omer, *Slaying Victim’s Sister to Barbour: “I Want Answers,”* Msnbc.com (Jan. 12, 2012, 3:55 PM), http://usnews.msnbc.msn.com/_news/2012/01/12/10140989-slaying-victims-sister-to-barbour-i-want-answers?lite.

⁴⁹ See *In re Hooker*, 87 So. 3d 401 (Miss. 2012).

⁵⁰ Fowler, *supra* note 45, at 1653.

⁵¹ Paul J. Haase, “*Oh My Darling Clemency*”: *Existing or Possible Limitations on the Use of the Presidential Pardon Power*, 39 Am. Crim. L. Rev. 1287, 1290 (2002).

⁵² See Fowler, *supra* note 45, at 1662 n.90.

⁵³ Haase, *supra* note 51, at 1291 (discussing how the structure of the federal pardon power, which is held exclusively by the President and not subject to legislative consent, was thought to be superior to alternative schemes, as it “is not to be doubted, that a single man of prudence and good sense is better fitted, in delicate conjunctures, to balance the motives which may plead for and against the remission of the punishment, than any numerous body whatsoever”) (quoting *The Federalist* No. 74 (Alexander Hamilton)).

⁵⁴ U.S. Const. art. II, § 2 (“The President shall . . . have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”).

⁵⁵ See, e.g., Delaware Const. art. VII, § 1 (“The Governor shall have power to . . . grant . . . pardons, except in cases of impeachment; but no pardon . . . shall be granted . . . except upon the recommendation in writing of a majority of the Board of Pardons after full hearing; and such recommendation, with the reasons therefor at length, shall be filed and recorded in the office of the Secretary of State, who shall forthwith notify the Governor thereof.”); Neb. Const. art. IV, § 13 (“The Governor, Attorney General and Secretary of States, sitting as a board, shall have the power to . . . grant . . . pardons . . . in all cases of conviction for offenses against the laws of the state, except treason and cases of impeachment.”); Okla. Const. art. VI, § 10 (“The Governor shall have the power to grant, after conviction and after favorable recommendation by a majority vote of the said Board, commutations, pardons and paroles for all offenses, except cases of impeachment. . . .”); Tex. Const. art. IV, § 11 (“In all criminal cases, except treason and impeachment, the Governor shall have power, after conviction . . . on the written signed recommendation and advice of the Board of Pardons and Paroles, or a majority thereof, to grant . . . pardons . . .”).

⁵⁶ See *Fundamentals of Victims’ Rights: A Brief History of Crime Victims’ Rights in the United States*, NCVLI Victim Law Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), Nov. 2011, at 2, <http://law.lclark.edu/live/files/11822-fundamentals-of-victims-rights-a-brief-history-of>.

⁵⁷ See, e.g., *Kenna v. U.S. Dist. Court for C.D. Cal.*, 435 F.3d 1011 (9th Cir. 2006) (observing that the federal Crime Victims’ Rights Act “was enacted to make crime victims full participants in the criminal

justice system”); *see also* *United States v. Stevens*, 239 F. Supp. 3d 417, 419 (D. Conn. 2017) (discussing the evolving role of victims’ rights and noting that “the pendulum” has begun “to swing back again in favor of victims”); *People v. Superior Court*, 77 Cal. Rptr. 3d 352 (Ca. Ct. App. 2008) (noting that the California citizens wanted comprehensive reforms to restore balance and fairness to the criminal justice system and made findings that “the rights of crime victims are too often ignored by our courts and by our State Legislature”); *State v. Williams*, 960 A.2d 805, 813 (N.J. Super. Ct. App. Div. 2008) (internal citation omitted) (recognizing that the Victims’ Rights Amendment was the culmination of efforts in New Jersey to afford victims status in the courtroom and to “enhance and protect the necessary role of crime victims and witnesses in the criminal justice process”).

⁵⁸ Wash. Rev. Code § 7.69.032.

⁵⁹ *See, e.g.*, Ala. Code § 15-23-79; Ariz. Rev. Stat. § 13-4414; Del. Code Ann. tit. 11, § 9416; Ind. Code § 11-9-2-2; Iowa Code § 915.19; La. Rev. Stat. § 46:1844(O); 120 Mass. Code Regs. 400.04; Minn. Stat. § 638.06; Miss. Code Ann. § 99-43-43; Neb. Rev. Stat. § 81-1850(6); N.C. Gen. Stat. § 15A-838; N.D. Cent. Code § 12.1-34-02(16)-(18); Ohio Rev. Code Ann. § 2967.12; 37 Pa. Code § 81.226; Utah Admin. Code R671-315-1; Vt. Stat. Ann. tit. 13, § 5305; Wash. Rev. Code § 7.69.032.

⁶⁰ *See, e.g.*, Ark. Code Ann. § 16-93-204(d)(2)(A) (“Before considering an application for a pardon . . . the board shall notify the victim of the crime . . . if he or she files a request for notice with the prosecuting attorney.”); Md. Code Ann., Corr. Servs. § 7-805(a) (“If the victim made a written request to the Department for notification and maintains a current address on file with the Department . . . the department shall notify the victim . . . in writing that an inmate sentenced to the Division of Correction is being considered for a . . . pardon.”); Nev. Rev. Stat. § 213.095 (providing for notice that a pardon was granted to victims “if the victim so requests in writing and provides his or her current address”); *see also* N.D. Cent. Code § 12.1-34-02(16) (requiring the prosecuting attorney to explain the pardon process to the victim and “advise the victim of the necessity of advising the custodial authority and the parole board and the pardon clerk of the victim’s address in order for the victim to receive further information under other provisions of this chapter”).

⁶¹ *See, e.g.*, Ind. Code § 11-9-2-2(b)(1)(B) (providing for notification of victims “unless the victim has made a written request not to be notified”); 37 Pa. Code § 81.226(c) (providing that the Board will make “every reasonable effort” to notify victims if a public hearing on a pardon is granted).

⁶² *See, e.g.*, Iowa Code § 915.19(1) (providing for notice “not less than forty-five days prior to issuing a decision on the application”); 120 Mass. Code Regs. 400.04(1) (providing for notice 30 days before the pardon hearing).

⁶³ *See, e.g.*, Vt. Stat. Ann. tit. 13, § 5305(a) (requiring that notice be provided “as expeditiously as possible”); Mont. Code Ann. § 46-24-212(3) (requiring that the applicable agency “promptly” inform the victim of a decision of the board of pardons and parole and of any decision to grant executive clemency).

⁶⁴ *See, e.g.*, La. Rev. Stat. Ann. § 46:1844(O) (providing that the “victim or the victim’s family shall have the right to make written and oral statements as to the impact of the crime at any hearing before [the Board of Pardons or the committee on parole] and to rebut any statements or evidence introduced by the inmate or defendant”); 37 Pa. Code § 81.226(d) (providing that a victim’s “[c]omment [on a pardon application] may be submitted in writing or presented orally in person.”).

⁶⁵ See, e.g., N.C. Gen. Stat. Ann. § 15A-838 (providing notice to victims that they have the right “to present a written statement to be considered by the [Governor’s Clemency] Office before the . . . defendant is pardoned”).

⁶⁶ See, e.g., Mich. Admin. Code R. 791.7760(6) (providing victims with “an opportunity to address and be questioned by the parole board or if a public hearing is conducted, to submit written testimony” in connection with an application for pardon). Similarly, the confidentiality protections given to victim statements vary by jurisdiction. Compare, e.g., Md. Code Ann., Corr. Servs. § 7-805 (b)(2) (“The Commission shall make the victim impact statement and recommendation available for review by the inmate [subject to certain conditions].”), with 37 Pa. Code § 81.226(d) (“Written communications with the Board will be confidential.”).

⁶⁷ See, e.g., Minn. Stat. § 638.04 (providing that the “board must consider the victim’s . . . statement when making its decision on the application [for a pardon]”); Ohio Rev. Code Ann. § 2967.12(B) (providing that “if the authority receives any written statement prior to recommending a pardon . . . the authority will consider the statement before it recommends [the] pardon”); Wash. Rev. Code § 9.95.260(3) (“The board shall consider written, oral, audio, or videotaped statements regarding the application for pardon received, personally or by representation, from the individuals who receive notice pursuant to this section.”).

⁶⁸ See, e.g., Ark. Code Ann. § 16-93-204(d)(2)(B) (requiring that when notice is provided, the board “shall solicit the written or oral recommendations of the victim . . . regarding the granting of a pardon”); La. Rev. Stat. Ann. § 46:1844(O) (providing that the “victim or victim’s family shall have the right to make written and oral statements as to the impact of the crime at any hearing . . . and to rebut any statements or evidence introduced by the inmate or defendant”); N.C. Gen. Stat. Ann. § 15A-838 (providing notice to victims that they have the “right to present a written statement to be considered by the [Governor’s Clemency] Office before the . . . defendant is pardoned”); Wis. Stat. § 304.10(2) (providing that, upon “receipt of any such statement [from a victim], the governor shall place the statement with the other pardon application papers”).

⁶⁹ See, e.g., Or. Rev. Stat. § 147.537(16) (providing for expedited decisions on appeals relating to violations of victims’ rights).

⁷⁰ Walter Dellinger, U.S. Dep’t of Justice, Office of Legal Counsel, *Effects of a Presidential Pardon: Memorandum for the Pardon Attorney* (June 19, 1995), www.justice.gov/olc/pardon3.19.htm.

⁷¹ See, e.g., *Bradford v. United States*, 228 U.S. 446, 453 (1913) (noting in the recitation of facts that the petitioner’s “pardon was granted, but upon terms. He was to make restitution for his wrongdoing”); Dellinger, *supra* note 63, at n.8 (“Clearly, the President may grant a pardon on the condition that the offender pay any court-ordered restitution imposed before the pardon was issued. However, the President must expressly state any limitation or condition that he wishes to impose because a pardon is presumed to reach all punishment resulting from an offense.”).

⁷² See, e.g., Wash. Rev. Code § 9.95.260(3) (providing that “[n]othing in this section is intended or may be relied upon to create a right or benefit, substantive or procedural, enforceable at law by any person.”).