Protecting, Enforcing and Advancing Victims' Rights

NCVLI News

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National Crime Victim Law Institute at Lewis & Clark Law School

In This Issue:

Pennsylvania v. Ritchie: Setting Limits on Defendants' Right to Discovery of Victims' Records

by Kim Montagriff

The difference between a defendant's constitutional right to discover information from the prosecutor and a defendant's right to production of personal records from a non-party – including victims, rape crisis centers or other providers of medical or mental health services – is not insignificant. The United States Supreme Court has not, however, fully outlined the contours of this difference.

This article is the second in a series to address a defendant's ability to obtain disclosure of a victim's records and the devices a victim may use to prevent such disclosure. The 2006 Spring/Summer edition of *NCVLI News* explored the differences between discovery – the process of disclosing information between the defendant and the prosecutor, and production – the defendant's right to receive information from a non-party.[1]

In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the United States Supreme Court concluded that in addition to a defendant's due process right to have the prosecutor disclose certain evidence in his or her possession, a defendant has a due process right to have other state agencies disclose similar evidence, even if that evidence is not in the possession or control of the prosecutor. Though this case is often cited to support defendant's request for disclosure of victims' privileged records, the *Ritchie* decision is narrow in scope and contains important principles that may be critical to a victim and his or her attorney in preventing or limiting disclosure of the victim's records.

Expanding Discovery Beyond the Prosecutor

In 1979, George Ritchie was charged with rape and other crimes against his 13-year-old daughter. *Id.* at 43. Defendant's daughter had reported the sexual abuse to the police, and the matter was referred to Children and Youth Services (CYS), the state agency charged with investigating cases of mistreatment. *Id.* Prior to trial, the defendant subpoenaed certain CYS records, including records that were not in the possession of the prosecution but were related to the events underlying the criminal charge. *Id.* CYS refused to disclose the records, claiming they were protected by a qualified statutory privilege. *Id.* Although CYS provided the records to the trial court, the court did not review them and declined to order pretrial disclosure. *Id.* at 44. At trial, defense counsel was

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Message From the Director
by Professor Doug Beloof

The Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, affords victims of federal offenses eight specific rights. The CVRA also provides explicit standing and enforcement provisions to allow victims to assert their rights in federal trial courts and to seek appellate review of any denial of their rights. History has taught us that even a well-crafted statute containing standing, remedy and review may not be enough to advance victims' rights. Rights move out of the realm of rhetoric and into reality only when they are given substantive meaning. This shift happens when victims assert their rights in courts and those courts enforce the rights.

To date, there are relatively few examples of victims asserting their rights in the federal criminal justice system, and fewer examples of courts affirmatively enforcing those rights. This is due in substantial part to two facts. First, the criminal justice system is a difficult place to navigate for a person who has recently been victimized by crime and who is not trained in law. Second, to date, there have been few legal advocates with sufficient knowledge of victims' rights to represent victims in the courts.

To ensure that the rights afforded in the CVRA are not relegated to mere rhetoric, in fall 2006, under a cooperative agreement with the Office for Victims of Crime, NCVLI launched the Crime Victims' Rights Enforcement Project (Enforcement Project). Under this Project, three *pro bono* legal clinics will help victims of crime assert and enforce their rights in the federal courts of the Fourth and Ninth Circuits. The Clinic in the Ninth Circuit will be housed within Arizona Voice for Crime Victims; the Clinics in the Fourth Circuit will be in two locations – the Maryland Crime Victims' Resource Center, and the South Carolina Victim Assistance Network. Each of these Clinics will have attorneys available to represent crime victims in federal district courts (trial level courts) and federal circuit courts (appellate level courts) as they seek to enforce the rights provided by the CVRA. These Clinics will also provide social services or referrals to appropriate social services for victims of crime, work closely with the United States Attorneys and advocates based within United States Attorneys' offices to ensure the best protection of victims' rights, and work to educate all participants in the criminal justice system about the substantive rights of victims of federal offenses and the benefits of victim participation in the criminal justice system.

The goal of the Enforcement Project is to breathe life into the carefully crafted rights found in the CVRA through legal enforcement of those rights. The long term hope of the Project is that enforcement of these rights will serve individual victims, and will lead to system-wide change within the federal criminal justice system resulting in recognition of the legitimacy of victims' legal interests, and the diminishment of the re-victimization of victims that so often occurs in the criminal justice system.

NCVLI is excited about this new Project and will keep you advised of its progress.

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not limited in cross-examining the victim, and the defendant was convicted of thecharges against him. *Id.* at 44-45.

On appeal, the Pennsylvania Supreme Court concluded that denying the defendant access to the full CYS file violated his Sixth Amendment rights to confrontation and compulsory process. *Id.* at 45. On *certiorari* to the United States Supreme Court, the defendant made two claims. First, the defendant asserted that because he did not have access to the CYS records, he could not effectively question his daughter and expose the weaknesses in her testimony, which violated his Sixth Amendment right to confrontation. *Id.* at 51. Second, the defendant claimed that the refusal to disclose CYS records violated his Sixth Amendment right to compulsory process. *Id.* at 54. On review, the Court framed the issue as "whether and to what extent a State's interest in the confidentiality of its investigative files concerning child abuse must yield to a criminal defendant's Sixth and Fourteenth Amendment right to discover favorable evidence." *Id.* at 42-43.

Confrontation Clause

In addressing the defendant's Confrontation Clause claim, the Court could not agree upon the parameters of the Sixth Amendment's right to confrontation. A plurality of the Court rejected defendant's claim, first explaining that the right to confrontation is a trial right "designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross examination." *Id.* at 52 (plurality opinion). The plurality concluded that because the trial court did not limit the defendant's cross-examination of the witnesses, including the victim, the defendant was afforded his right of confrontation. *Id.* at 54 (plurality opinion).

In a concurring opinion, Justice Blackmun disagreed that the Confrontation Clause protects only a defendant's rights at trial. *Id.* at 61-62 (Blackmun, J., concurring). Importantly, however, Justice Blackmun did conclude that because the trial court was ordered to conduct an *in camera* review of the CYS records to search for "material" evidence on remand, including impeachment evidence, that procedure was sufficient to protect the defendant's right to confrontation. *Id.* at 65.

Compulsory Process/Due Process

The defendant also claimed that the refusal to disclose CYS records violated his Sixth Amendment right to compulsory process. *Id.* at 54. The Court declined to analyze the defendant's compulsory process claim, explaining that "the applicability of the [Sixth Amendment's Compulsory Process Clause] to this type of case is unsettled . . . ." *Id.* at 56. Instead, because the Court's prior due process precedent established a clear framework for review, the Court explained it would analyze defendant's claims under the Due Process Clause of the Fourteenth Amendment. *Id.*

In resolving this issue, the Court cited *Brady v. Maryland*, 373 U.S. 83, 86 (1963), the seminal case which provided that a defendant has a due process right to have the prosecutor disclose evidence in his or her possession "that is both favorable to the accused and material to guilt or punishment." *Ritchie*,480 U.S. at 57. Without discussion, or even an acknowledgement that it was doing so, the Court then imported the *Brady* standard to circumstances where evidence is held by a governmental entity other than the prosecutor, and it imposed a review obligation on the trial court that is generally reserved for the prosecutor. *Compare Brady*, 373 U.S. at 86 (setting out prosecutor's obligation to disclose evidence that is material to guilt or punishment, and explaining that evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different") *with Ritchie*, 480 U.S. at 57-58 (concluding that the trial court must conduct an *in camera* review of CYS records to determine whether they "contain[] information that probably would have changed the outcome of [defendant's] trial"). While the Court's ruling may result in the disclosure of victims' privileged records that are held by a state agency other than the prosecutor, the *Ritchie* decision contains four important principles that may assist practitioners in maintaining the maximum allowable protection for privileged records.

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First, the Court declared that "compulsory process provides no *greater* protections in this area than that afforded by due process . . . ." *Id.* at 56 (emphasis in original). Because, under the Due Process Clause, a defendant is only entitled to evidence that is material to guilt or punishment, he is entitled to no greater information under the Compulsory Process Clause. Thus, the Court's holding in *Ritchie* does not entitle a defendant to engage in a broad-based search of privileged material with the hope of uncovering something useful.

Second, a statutory privilege that does not contain an explicit exception under which disclosure is allowed may be sufficient to absolutely shield records from disclosure, even when held by a government agency. *See id.* at 57. In *Ritchie*, the Court explained that though the public interest in protecting CYS records was "strong," *id.* at 57, and "compelling," *id.* at 60, the trial court's determination of whether the CYS records contained material evidence fit squarely within a statutory exception to the privilege which provided for disclosure of CYS records pursuant to a court order. *Id.* at 57. In *dicta*, the Court explicitly left open the question of whether a defendant would be constitutionally entitled to records that were protected by an absolute statutory privilege. *Id.* at 58 n.14. Distinguishing *Ritchie*, other courts have refused to order disclosure of records protected by an absolute privilege. *See, e.g., State v. Spath*, 581 N.W.2d 123, 126 (N.D. 1998) (rejecting defendant's confrontation clause claim and noting that although the evidentiary privilege at issue contained some limited exceptions, it did not contain a general exception for disclosure of records pursuant to court order); *Commonwealth v. Aultman*, 602 A.2d 1290, 1297 (Pa. 1992) (holding that defendant was not entitled to disclosure of victim's records held by a rape crisis center where those records were protected by an absolute statutory privilege); *Commonwealth v. Kyle*, 533 A.2d 120, 131 (Pa. Super. 1987) (refusing to compromise the absolute nature of the privilege at issue, and declining to require the trial court to conduct an *in camera* inspection of the records at issue).

Third, according to the Court's decision in *Ritchie*, a defendant must make a preliminary showing that he is entitled to an *in camera* review of any identified records. *See Ritchie*, 480 U.S. at 58 n. 15. Without a particularized showing identifying the information the defendant is seeking and that the desired records contain material evidence, a trial court is under no obligation to conduct even an *in camera* review of those records. *See Ritchie*, 480 U.S. at 58 n.15. *See also State v. Berube*, 775 A.2d 966, 976 (Conn. 2001) (rejecting defendant's claim that he was entitled to disclosure of confidential government records because, in part, he failed to meet "the requisite threshold that would require a court to undertake such a review"); *Commonwealth v. Barroso*, 122 S.W.3d 554, 564 (Ky. 2003) (explaining that in order to warrant an *in camera* review of a witness's psychotherapy records, a defendant must provide "evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence").

Finally, in *Ritchie*, the Court analyzed only whether investigative files held by a state must yield to a defendant's constitutional rights; nothing in the Court's analysis or holding entitles a defendant to an *in camera* review of records held by private parties. *See, e.g., State v. Spath*, 581 N.W.2d 123, 126-27 (N.D. 1998) (concluding that defendant was not entitled to privileged records held by a private party); *People v. Hammon*, 938 P.2d 986, 987 (Cal. 1997) (concluding that a trial court need not allow pretrial "review or grant discovery of privileged information in the hands of third party psychotherapy providers").

Conclusion

The Court's holding in *Ritchie* did not broaden the type of information to which a defendant is constitutionally entitled; instead, the Court merely imposed an ongoing duty on the trial court to determine whether privileged records held by a state investigative agency[2] other than the prosecutor contain *Brady*-type information. The Court's narrow holding in *Ritchie* does not entitle a defendant to an *in camera* review of records that are protected by an absolute privilege or held by a private agency. Finally, under *Ritchie,* a defendant is not relieved of the burden to demonstrate that the desired records are both evidentiary and material to the issue of guilt or punishment. ■

(Endnotes)
1 *See Discovery v. Production: There Is a Difference*, NCVLI News, Spring/Summer 2006, at 2.
2 In *Ritchie*, CYS was an agency charged with investigating suspected mistreatment and neglect and, in this case, that investigation addressed allegations of criminal behavior. Not presented in *Ritchie*, and unclear from the Court's holding, is whether and the extent to which a defendant's right to *Brady* information extends to other governmental agencies not involved in the investigation and prosecution of criminal behavior.

NCVLI's Technical Assistance & Brief Bank

As part of its mission to advance crime victims' rights, NCVLI litigates nationwide and provides research and educational material in response to requests from attorneys across the country. The following is a sampling of the issues NCVLI has addressed since our last newsletter. If you would like a copy of any of these materials, or if you are an attorney seeking technical assistance, please contact NCVLI at 503-768-6819, or at www.ncvli.org.

NCVLI staff attorneys have recently analyzed these and other legal issues:

- Whether a victim's civil settlement with defendant, which included a release of claims, precludes the victim from recovering restitution in the criminal case.
- The state of the nation regarding a victim's right to an interpreter in criminal proceedings.
- Whether a victim has the right to have her attorney present at the pretrial interview of the victim.
- The scope of a victim's rights to be heard and to confer with the prosecutor where a defendant is diverted to boot camp.
- How to challenge a court's acceptance of a plea where the crime victims were not notified, present, or heard.
- Whether a victim has the right to access the defendant's presentence report and submit a sentencing memorandum under federal law.
- The scope of the definition of "crime victim" under the CVRA for purposes of determining who has the right to allocute at sentencing.
- What protections exist for a victim when a *pro se* defendant seeks to independently cross-examine him or her.

- Whether a victim has the right to oppose a defendant's request to be sentenced in civilian clothing.
- The extent to which a victim's right to restitution, under federal law, survives a defendant's death that occurs post-conviction but pending appeal where his estate moved to vacate the conviction *ab initio*.
- Whether restitution can include non-economic losses under California law.

Case Spotlight

Nasci v. Pope, No. 29,878 (N.M. November 8, 2006) (unpublished order).

An attorney for the minor victim of sexual abuse and her mother (who is also a victim under New Mexico law), filed a motion *in limine* asserting that the victims had state constitutional and statutory rights to attend all public court proceedings, including defendant's trial. Defendant, relying on a local sequestration rule, argued that the victims should be barred from the trial and the trial court agreed. The court further concluded that the victims lacked trial level standing to seek enforcement of their rights. The victims' attorney filed a Petition for Writ of Superintending Control. After considering the parties' briefs, *amici curiae* briefs, and hearing oral arguments, the court unanimously ruled from the bench that the victims had trial level standing to enforce their right to be present at trial. The court then remanded to the trial court for further proceedings.

Abatement *Ab Initio* and a Crime Victim's Right to Restitution

by Greg Rios

On December 30, 1994, John Salvi fired multiple shots into two abortion clinics in Brookline, Massachusetts, killing two women and wounding many others. *See* Barry A. Bostrom, *John Salvi III's Revenge from the Grave: How the Abatement Doctrine Undercuts the Ability of Abortion Providers to Stop Clinic Violence*, 5 N.Y. City L. Rev. 141, 145-47 (2002). Rejecting his insanity defense, a jury convicted him. *See id.* at 148. After Salvi committed suicide in prison pending his appeal, a Massachusetts court erased Salvi's convictions. *See id.* at 149.

On October 17, 2006, a federal district court wiped out Ken Lay's multiple Enron-related fraud and conspiracy convictions after he died of a heart attack prior to his sentencing. *See United States v. Lay*, 456 F. Supp. 2d 869 (S.D. Tex. 2006). The effect – 44 million dollars that the government was seeking to compensate victims defrauded in the stock scandal was lost. *See* Kris Axtman, *An Enron Twist: Convicted But Not Guilty?*, The Christian Science Monitor, Aug. 28, 2006. How could either of these results occur? Both John Salvi and Ken Lay were posthumous beneficiaries of the doctrine of abatement *ab initio*.

Abatement *ab initio* (meaning "from the beginning") is a sweeping judicial action that can have a devastating impact on the rights of crime victims. The common law doctrine, applied when a criminal defendant dies pending appeal, operates to extinguish all criminal proceedings initiated against that defendant from indictment through conviction. Courts cite two policy rationales in support of the doctrine: 1) it is unfair to maintain a conviction against a deceased defendant which is untested by appellate review; and 2) the primary justifications for pursuing criminal proceedings – to punish and/or rehabilitate the defendant – no longer apply after the defendant's death. Both of these rationales are flawed because they fail to acknowledge the legal rights of the crime victims, the individuals injured by the deceased defendant's conduct. While abatement *ab initio* can have an adverse impact on a broad array of crime victims' rights, this article focuses on how the doctrine nullifies a victim's interest in restitution to demonstrate its fundamental lack of fairness.

Abatement *ab initio* (meaning "from the beginning") is a sweeping judicial action that can have a devastating impact on the rights of crime victims.

Abatement in the Federal Courts

To date the United States Supreme Court has issued two opinions addressing the doctrine of abatement *ab initio*; unfortunately neither offers any guidance as to how to address the interests of crime victims in the abatement context. In *Durham v. United States*, 401 U.S. 481, 483 (1971), the United States Supreme Court upheld the lower court's application of the doctrine where a defendant died while his petition for writ of *certiorari* was pending. Five years later, the Court limited its application of the doctrine to situations where a defendant dies while pursuing an appeal of right, not a discretionary appeal. *Dove v. United States*, 423 U.S. 325, 325 (1976). Without clear direction from the Court, the lower federal courts that have wrestled with the issue have reached differing conclusions as to the ultimate disposition of a crime victim's restitution when a defendant dies prior to the resolution of his appeal. The courts' approaches are informed by the respective justifications for abatement—that punishment has no purpose after defendant dies and that a conviction untested by appeal should not stand.

The Punitive/Compensatory Distinction vs. the Finality Principle

Three major approaches have emerged in the federal courts in response to the problem of how to address restitution where a defendant's conviction has been abated. Two of those approaches involve looking at whether restitution is meant to punish or compensate. The third approach disregards the penal/compensatory inquiry entirely, reasoning that because convictions and their attendant restitution orders are not final if they are untested by

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appellate review, they are subject to abatement.

Based on the fact that it is futile to punish a deceased defendant, the Third, Fourth, and Eleventh Circuit Courts look at whether restitution is punitive or compensatory when deciding whether it abates, and these courts have arrived at different conclusions. The Third and Fourth Circuit Courts have held that the purpose of restitution is to compensate crime victims, not to punish defendants, and have therefore abated the deceased defendant's conviction but not the attendant restitution orders. *See United States v. Christopher*, 273 F.3d 294, 299 (3d Cir. 2001) (holding that restitution was "an equitable remedy . . . intended to reimburse a person wronged by the actions of another" and that abating restitution would grant defendant's estate "an undeserved windfall"); *United States v. Dudley*, 739 F.2d 175, 177 (4th Cir. 1984) (stating that "an order of restitution, even if in some respects penal, also, has the predominantly compensatory purpose of reducing the adverse impact on the victim"). In contrast, the practice of the Eleventh Circuit is to abate restitution along with conviction when applying the doctrine because, in the court's opinion "though restitution resembles a judgment for the benefit of a victim, it is penal rather than compensatory." *United States v. Logal*, 106 F.3d 1547, 1552 (11th Cir. 1997).

The Fifth Circuit, in *United States v. Estate of Parsons*, 367 F.3d 409, 415 (5th Cir. 2004) (*en banc*), rejected the punitive/compensatory analysis, and adopted "the finality principle." The "finality principle" is based on the idea that a conviction untested by appeal is inherently unreliable, or not yet final. *Id.* According to the Fifth Circuit, because of this unreliability it is unfair to maintain an un-reviewed conviction against a deceased defendant, and all prior proceedings initiated against that defendant must be erased, including restitution. *Id.*

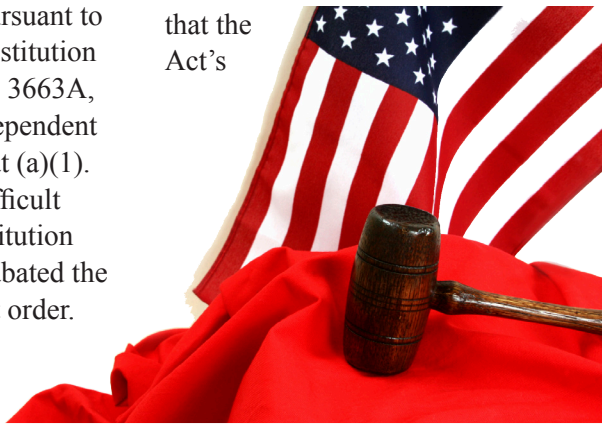
The Failure of the Federal Approaches

All of the federal approaches described above are flawed because they continue to subscribe to some form of the abatement doctrine. Even the approach followed by the Third and Fourth Circuits, which is seemingly beneficial to victims in that it preserves their restitution rights while abating the defendant's conviction, is inadequate because it rests on a legal fiction. Pursuant to the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, mandatory restitution is dependent upon conviction. *See id.* at (a)(1). Under the MVRA, it is difficult to justify preserving a restitution order when the court has abated the conviction underlying that order.

The CVRA reinforces and expands existing restitution law and grants victims explicit, enforceable rights, including the right to be treated with fairness, dignity, and respect . . . .

The Fifth Circuit's "finality" approach is also problematic because its premise – that maintaining a conviction untested by appellate review is inherently unfair – is not grounded in constitutional principles. There is no federal due process right to appeal. *See Herrera v. Collins*, 506 U.S. 390, 399 (1993) (stating that "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears"); *United States v. Burns*, 433 F.3d 442, 445 (5th Cir. 2005) (explaining that a federal criminal defendant's right to appeal is not constitutional in dimension). Instead, a defendant's right to appeal is statutorily based. *See* 18 U.S.C. § 3742(a). Thus, the Fifth Circuit appears to be adopting a policy choice that elevates a defendant's statutory right to appeal over a victim's statutory right to restitution. That choice is questionable in light of the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, passed in fall 2004.

The CVRA reinforces and expands existing restitution law and grants victims explicit, enforceable rights, including the right to be treated with fairness, dignity, and respect. *See* 18 U.S.C. § 3771(a)(6), (a)(8). The CVRA's legislative history indicates that the Act's



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fairness provision "includes the notion of due process." *See* 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). Summarily erasing a crime victim's statutory right to restitution seems to violate the CVRA's fairness guarantee. Unfortunately, the one federal case that has addressed the abatement doctrine since Congress enacted the CVRA minimized its applicability.

In the Lay case, a crime victim who was defrauded opposed the Estate of Ken Lay's motion to vacate his conviction. The trial court vacated Lay's convictions without addressing the victim's argument that the CVRA's fairness guarantee precluded abatement. *See United States v. Lay*, ___ F. Supp. 2d ___, 2006 WL 2956273 (S.D. Tex. Oct. 17, 2006). The victim sought mandamus review of that decision, which the Fifth Circuit denied after concluding that, because a victim's right to restitution under the CVRA accrues at conviction, that right abates with conviction. *See In re: Russell P. Butler*, No. 06-20848, slip op. at 5 (5th Cir. Nov. 1, 2006) (unpublished).

[D]espite the substantive victims' rights conferred by the CVRA, abatement continues to be the rule in the federal courts. The states, on the other hand, are leading the way in acknowledging the rights of crime victims and rejecting abatement *ab initio*.

In short, despite the substantive victims' rights conferred by the CVRA, abatement continues to be the rule in the federal courts. The states, on the other hand, are leading the way in acknowledging the rights of crime victims and rejecting abatement *ab initio*.

How States are Leading the Way

While a slight majority of the states that have addressed abatement still follow the doctrine, there has been a growing trend towards abrogating abatement. *See, e.g., Washington v. Devin*, 142 P.3d 599 (Wash. 2006); *Alabama v. Wheat*, 907 So.2d 461 (Ala. 2005); *Idaho v. Korsen*, 111 P.3d 130 (Idaho 2005); *Michigan v. Peters*, 537 N.W.2d 160 (Mich. 1995). There are other courts that have adopted the so-called "moderation approach," meaning they refuse to automatically abate defendant's conviction but may permit a third party to pursue an appeal on deceased defendant's behalf. *See, e.g., Surland v. Maryland*, 895 A.2d 1034 (Md. 2006); *New Mexico v. Salazar*, 945 P.2d 996 (N.M. 1997); *Hawaii v. Makaila*, 897 P.2d 967 (Haw. 1995); *Ohio v. McGettrick*, 509 N.E.2d 378 (Ohio 1987). Most of the state courts rejecting abatement have cited the interests of crime victims as the reason for doing so, even extending their discussion of victims' rights beyond the realm of restitution. For instance, the Idaho Supreme Court observed that, considering the state's constitutional and statutory victims' rights, the "abatement of the conviction would deny the victim of the fairness, respect and dignity guaranteed by these laws by preventing the finality and closure they are designed to provide." *Korsen*, 111 P.3d at 135.

Conclusion

The doctrine of abatement *ab initio* dates back to the 19th Century, leading one state court to refer to the rule as "one of antiquity." *People v. Ekinici*, 743 N.Y.S.2d 651, 657 (N.Y. Sup. Ct. 2002). Since the origin of the abatement doctrine, the landscape of the criminal justice system has fundamentally changed in regards to rights of crime victims.

Considering the legislative protections gained by crime victims in recent years, the doctrine of abatement is outmoded and unjust. The death of a defendant, found guilty in a court of law, should not erase the rights of the victims left behind.

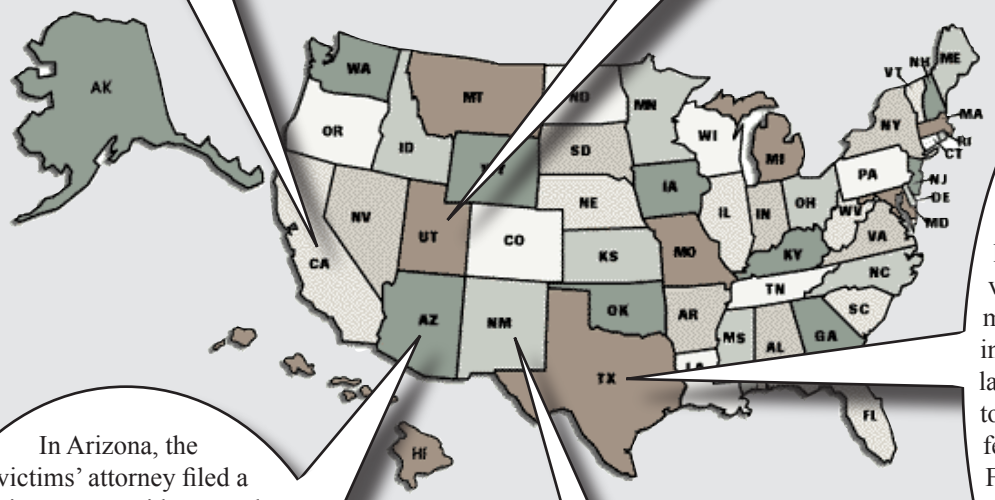
Currently, every state in the union affords crime victims rights in the criminal justice system, and 33 states have enshrined these rights in their state constitutions. At the federal level, through the CVRA, Congress has firmly established a participatory role for victims within criminal proceedings. Considering the legislative protections gained by crime victims in recent years, the doctrine of abatement is outmoded and unjust. The death of a defendant, found guilty in a court of law, should not erase the rights of the victims left behind. ■

In the Trenches

In this column, NCVLI publishes news from the frontlines of the crime victims' rights movement – information about cases we all want and need to know about, but which are not published in any of the reporters. Several of these cases are still pending and will be updated in future columns as information is available. If you know of a victims' rights case that should be included in our "In the Trenches" column, please e-mail us at ncvli@lclark.edu.

In California, the victim's attorney successfully argued that restitution properly included both past and future economic losses, and $10,000 in non-economic losses.

In Utah, defendant's attorney subpoenaed and received victims' medical records without notification to the victims. The victims' attorney successfully moved to quash the subpoenas and to require the defense to make a showing to the court that he is entitled to the records prior to issuance of a subpoena.



In Texas, defendant died prior to sentencing and the court vacated his conviction. The victim's attorney sought mandamus review, arguing that abatement violated the victim's rights to restitution, fairness and federal due process. The Fifth Circuit denied the victim's petition for writ of mandamus. The victim is investigating avenues of review.

In Arizona, the victims' attorney filed a motion to reconsider an order allowing defendants to be sentenced in civilian clothing, arguing that defendants had no constitutional right to appear in civilian clothing and that doing so would violate the victims' rights. After the local sheriff's office joined the motion, the court ordered defendants to appear in prison clothing.

In New Mexico, the victim's attorney filed an entry of appearance and an assertion of rights. Defense counsel moved to strike both the entry and the assertion. The trial court granted defense's motion in its entirety. The victim is investigating avenues of review.

A Call for Judicial Leadership in the Victims' Rights Movement

by Meg Garvin

Over the past thirty years, the Victims' Rights Movement has experienced tremendous success as a social movement as it sought to advance justice in the criminal justice system. It has not, however, had perfect success. There are competing theories regarding how rights-based social justice movements advance.[1] Amidst these competing theories, there is general consensus that the following core elements are necessary to advance victims' rights: a mobilized grassroots effort; existence of constitutional or statutory rights; support structures for legal mobilization to assert and enforce the rights; and judicial leadership in reviewing and affording the rights.[2] If this is an accurate roadmap of how to advance a rights-based social justice movement, the Victims' Rights Movement must critically analyze whether it has put each of these core pieces into place.

As detailed in the Spring/Summer 2005 edition of *NCVLI News*, the Crime Victims' Rights Movement has a well-established mobilized grassroots effort.[3] This grassroots effort has led more than thirty states to amend their respective state constitutions to provide crime victims with rights and protections in criminal justice proceedings, and the remaining states and Congress to pass statutes recognizing and affording crime victims' rights in the criminal justice system.[4] The current membership in the National Alliance of Victims' Rights Attorneys, which as of December 2006 boasts 331 members from 41 states (including the District of Columbia), and the generous support of the Office for Victims of Crime in funding the *pro bono* legal clinics of the State & Federal Clinics and System Demonstration Project and the Victims' Rights Enforcement Project, demonstrates an ever-growing support for legal mobilization related to these rights. This leaves only judicial leadership – has there been judicial leadership in the Victims' Rights Movement? Focusing on the federal judiciary, the answer is that while there has been some recent leadership, far more is needed if the movement is to achieve social justice.[5]

The CVRA's Explicit Call for Judicial Leadership

The federal Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, provides crime victims individually enforceable participatory rights in the criminal justice system. Equally important to this provision of clear rights and remedies is the CVRA's call to the federal judiciary to exercise leadership with regard to the rights. The CVRA provides: "In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a)." *Id.* at (b). This call for judicial leadership is not a call to ensure that crime victims "win" in every case. Instead, it is a call upon the judiciary to recognize victims' rights as rights. It is a call upon the judiciary to engage in the legal analysis of balancing victims' rights against any competing rights at play in a particular case. Judicial leadership requires courts to disregard the antiquated notion that crime victims are interlopers in the criminal justice system, and to recognize that rights, even new legal rights such as those afforded by the CVRA, are properly a part of every judicial determination in a criminal case. A few courts have heeded Congress' call for leadership; unfortunately, others have failed to do so. Outlined below are four cases in which the CVRA's call for judicial leadership has been answered, and one example of where it was ignored.

The Courts' Responses

In *United States v. Heaton*, ___ F. Supp. 2d ___ 2006 WL 3072573 (D. Utah. Oct. 24, 2006), defendant was charged with using a means of interstate commerce to entice an individual under the age of 18 to engage in unlawful sexual activity. The United States filed a one sentence motion for leave to dismiss the charge without prejudice, averring that the dismissal was "in the interest of justice." *Id.* at *1. The court noted that under the CVRA victims have the right "to be treated with fairness and with respect for dignity and privacy" and, citing Black's Dictionary, stated that to be treated with fairness means "treating them 'justly' and 'equitably.'" *Id.* at *2. Finding that the victim's right to be treated with fairness extended to courts' decisions regarding dismissal of indictment, the court stated that "[i]t is hard to understand how a victim would be treated with fairness if the court acted precipitously to approve dismissal of a case without even troubling to consider the victim's views." *Id.* Thus, the court

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went on, "[w]hen the government files a motion to dismiss criminal charges that involve a specific victim, the only way to protect the victim's right to be treated fairly and with respect for her dignity is to consider the victim's views on the dismissal." *Id.* The court then directed the government to the provision in the CVRA that guarantees victims the right to confer with the attorney for the government, and required that in its re-filing the government recount both that the victim had been consulted regarding the dismissal and the victim's views on the matter. *Id.*

Second, in *United States v. Wood*, CR. No. 05-00072DAE, slip op. at 2 (D. Haw. July 17, 2006), Defendant was found guilty of one count of fraud and sentencing was scheduled. The government moved to continue sentencing because the individual victims were scheduled to be out of the country on the scheduled date. *Id.* Defendant objected, arguing that the corporation, not the individuals, was the victim. *Id.* The court found that the individuals, as well as the corporation were victims of defendant's action. *Id.* at 3. Citing the CVRA, the court noted that crime victims have the right to be reasonably heard and that the "CVRA was enacted to make crime victims full participants in the criminal justice system." *Id.* Noting "the importance of victim allocution as embodied by the CVRA," the court granted the government's motion. *Id.* at 4.

Third, in *Kenna v. United States District Court for the Central District of California*, 435 F.3d 1011 (9th Cir. 2006), Moshe and Zvi Leichner, father and son, defrauded numerous victims out of nearly $100 million. After each defendant pleaded guilty, more than sixty victims submitted written impact statements, and at Moshe's sentencing, several victims, including Mr. Kenna, delivered an oral impact statement. *Id.* at 1013. At Zvi's sentencing, which was three months later, Mr. Kenna was present again to verbally allocute, but the district court denied him the opportunity, stating that after reviewing all the victims' written statements and listening to the victims at the prior sentencing, "I don't think there's anything that any victim could say that would have any impact whatsoever." *Id.* Mr. Kenna filed a petition for writ of mandamus with the Ninth Circuit. Noting that the CVRA sought to change the criminal justice system's assumption "that crime victims should behave like good Victorian children – seen but not heard," the court framed the issue presented as the proper scope of the right to be reasonably heard. *Id.* Turning to the legislative history of the CVRA, the court determined that the law disclosed "a clear congressional intent to give crime victims the right to speak at proceedings covered by the CVRA." *Id.* at 1016. The court then concluded that under the CVRA, "[v]ictims now have an indefeasible right to speak, similar to that of the defendant," and found that Mr. Kenna's statutory right was violated when the district court denied him the right to speak at Zvi's sentencing. *Id.*

Finally, in *United States v. Degenhardt*, 405 F. Supp. 2d 1341 (D. Utah 2005), defendant pleaded guilty to committing fraudulent interstate transactions, and the defendant and government agreed to a sentence of six months of home confinement, payment of at least $2.4 million in restitution, and such additional amounts of payment as the court might determine. Prior to the sentencing hearing, the government advised the court that several victims would be present and wanted to allocute. *Id.* at 1342. The court initially noted that "[p]erhaps [it] could duck the question [of the scope of this allocution] because . . . [a] strong argument can be made that courts have discretion to hear at sentencing from any person who might provide useful information." *Id.* at 1343. Importantly, however, the court stated that "treating victim allocution as a mere discretionary matter for the courts would leave questions open for debate in future cases," and that "victims deserve to know" the scope of their right. *Id.* Thus, heeding Congress' call, the court concluded that the CVRA gives the right to be heard to all crime victims. The court then held that the right to be heard is the mandatory right of the victim to personally address the court and make an in-court statement, and that this right is not subject to the court's discretion. *Id.* at 1349.

In contrast to the four cases discussed above stands *United States v. Holland*, 380 F. Supp. 2d 1264 (N.D. Ala. 2005). In *Holland*, the Government moved to dismiss a petition filed by *pro se* petitioner, and subsequently amended by court appointed counsel, which attacked the restitution portion of a sentence entered pursuant to the Victim Witness Protection Act. The court held that it retained jurisdiction to alter the restitution obligation nine years after sentencing. In its conclusion, the court stated that if the victim "believes that . . . the new, mushy, 'feel good' statute with the grand title 'Crime Victims' Rights", abrogated [prior case law] by including among victims'

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'rights', 'the right to full and timely restitution as provided by law, the [victim] may, of course, mount an appeal from the order." *Id.* at 1278. The court's curt dismissal of victims' rights led the court to fail to actively balance all of the participants' competing rights that were legitimately at issue in the case. When a court fails to adequately take into account all participants' legal rights and interests in a case, whether those rights attach to the defendant or to the victim, the outcome is a skewed legal analysis. Such failure represents a fundamental rejection of the call for judicial leadership.

The Time is Right for Federal Judicial Leadership

Victims' rights today, be they codified in the CVRA or in state constitutional or statutory provisions, firmly establish that crime victims are legitimate participants in the criminal justice system. This is a fundamental shift in the way the system works.[6] The Crime Victims' Rights Movement has put in place many of the elements necessary for significant social change – grassroots support, constitutional and statutory law, support structures for litigation. Now it is time to call upon our judiciary to furnish the missing piece – judicial leadership. This call for judicial leadership is not about victims winning. It is about courts working to effectuate the fundamental purpose of the CVRA – rights-based participatory status of crime victims in the criminal justice system. It is about balancing the victims' rights against competing participants' rights so that the outcome is one which recognizes that all participants' rights – victims and defendants – are critical. This leadership is legally proper and absolutely necessary to advance social justice. As a movement we must demand that our courts heed the call. ■

(Endnotes)

1 *See, e.g.,* Charles R. Epp, THE RIGHTS REVOLUTION (1998); Gerald N. Rosenberg, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); Mark V. Tushnet, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950, (1987).

2 *Id.*

3 *See The Grassroots Beginnings of the Victims' Rights Movement*, NCVLI News, Spring/Summer 2005, at 6.

4 *See, e.g.*, Ala. Const. Amend. No. 557; Alaska Const. art. I, § 24; Ariz. Const. art. 2, § 2.1; Cal. Const. art. I, § 28; Colo. Const. art. II, § 16a; Conn. Const. art. I, § 8; Fla. Const. art. I, § 16(b); Ill. Const. art. I, § 8.1; Idaho Const. art. I, § 22; Ind. Const. art. I, § 13(b); Kan. Const. art. 15, § 15; La. Const. art. I, § 13; Md. Const. Decl. of Rights, art. 47; Mich. Const. art. I, § 24; Miss. Const. art. 3, § 26A; Mo. Const. art. I, § 32; Neb. Const. art. I, § 28; Nev. Const. art. I, § 8; N.J. Const. art. I, ¶ 22; N.M. Const. art. II, § 24; Ohio Const. art. I, § 10A; Okla. Const. art. II, § 34; Or. Const. art. I, § 42; R.I. Const. art. I, § 23; S.C. Const. art. I, § 24(B); Tenn. Const. art. I, § 35; Tex. Const. art. I, § 30; Utah Const. art. I, § 28; Va. Const. art. I, § 8-A; Wash. Const. art. I, § 25; Wis. Const. art. I, § 9m. *See also* 18 U.S.C. § 3771.

5 The United States Supreme Court has, in *dicta*, recognized the legitimacy of victims' interests in the criminal justice system in a variety of cases. *See, e.g., Calderon v. Thompson*, 523 U.S. 538, 555 (1998) (acknowledging that both the state and victim share an interest in finality, moral judgment, and the punishment of the guilty); *Morris v. Slappy*, 461 U.S. 1, 14 (1983) (noting crime victims' interests in criminal cases and admonishing the lower court for "wholly fail[ing] to take into account the interest of the victim of these crimes" when it interpreted the Sixth Amendment.); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 428 (1979) (discussing the educational value of public trials and noting "the victim of the crime, the family of the victim, others who have suffered similarly, . . . have an interest in observing the course of a prosecution."); *Snyder v. Massachusetts,* 291 U.S. 97, 120 (1934) (stating, "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true. . . ."). Importantly, however, in none of these cases did the outcome of the issue presented to the court turn on a victim's constitutional or statutory right.

6 The transformation that the CVRA works on the federal criminal justice system has been recognized by courts and commentators alike. *See, e.g., Kenna*, 435 F.3d at 1013 (noting that the rights provided in the CVRA are designed to change the criminal justice system which functions "on the assumption that crime victims should behave like good Victorian children—seen but not heard"; Paul Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 B.Y.U. L. REV. 835, 893 (2005) (noting, "The CVRA transforms crime victims into participants in the criminal justice process . . . . These new rights will reshape the federal criminal justice system . . . .").

Diane Moyer accepts the Victim Advocacy Award from Douglas Beloof

2006 Crime Victim Law & Litigation Conference

Over 130 individuals from all parts of the crime victim advocacy system gathered for the fifth annual Crime Victim Law & Litigation Conference in Portland, Oregon, making it the most attended conference to date. The conference program was packed with expert workshop presenters and speakers, including the Honorable Margaret R. Mahoney, Superior Court Judge of Maricopa County, Arizona; Judith Armatta, attorney, author, lecturer, and activist; and Steve Twist, founder and president of Arizona Voice for Crime Victims.

At the annual awards ceremony, NCVLI paid tribute to the following people and organizations: Cynthia Hora, a victims' rights attorney from the state of Alaska, received the Legal Advocacy Award for her outstanding legal service on behalf of crime victims; Diane Moyer, Legal Director of the Pennsylvania Coalition Against Rape, received the Victim Advocacy Award for her outstanding advocacy to end violence against women; James L. Huffman, Erskine Wood Sr. Professor of Law, Lewis & Clark Law School, received the 2006 Service Award for his commitment to crime victims' rights; and the Grant County Prosecutor's Office, the Grant County Victim/Witness Unit, and Dano Gilbert & Ahrend P.L.L.C. received the 2006 Victims' Rights Partnership Award for joining efforts on behalf of crime victims.

2007 Crime Victim Law & Litigation Conference

The 2007 conference is scheduled for May 18th and 19th at the Doubletree Hotel in Portland, Oregon. The theme of the 2007 Conference is Architecture of Justice: An Integration of Victims' Rights. This is an acknowledgement that building a truly just criminal justice system requires victims' voice and participation. This 2007 conference is designed to move us one step closer to ensuring that victims' rights are the cornerstone of this country's justice system. For more information, please go to the conference website at www.ncvli.org/conference.html or call (503) 768-6951.

State and Federal Demonstration Project Update

In April 2007, NCVLI's State/Federal Clinics and System Demonstration Project will begin its fifth and final year. Through the Demonstration Project, eight legal clinics are providing free legal services to victims of crime in state and federal criminal courts, and are educating the public and participants in the criminal justice system about victims' rights and the critical role of crime victims in achieving justice.

Recently, we talked with the Clinics' Project Directors and attorneys about the victories and ongoing struggles of the work they do.[1] Here's what those in the trenches said:

Q: What has been your greatest victory to date on the Project?

Arizona: Winning the *Kenna* case in the 9th Circuit. [In *Kenna v. District Court*, 435 F.3d 1011 (9th Cir. 2006), the Ninth Circuit issued a writ of mandamus directing the trial court to afford the crime victim his right to allocute at sentencing.]

California: Forming the clinic at the law school was our first victory; then, gaining the trust of the local district attorney's office; then, this year, representing more crime victims and successfully arguing for non-economic damages in a sexual assault case.

Idaho: Getting the clinic well-established at the law school and having it be well-received by students and faculty.

Maryland: Having attorneys representing victims regarding their rights in the trial and appellate courts of the state.

New Mexico: Getting a unanimous decision from the New Mexico Supreme Court that victims have the independent ability to assert their rights under our state constitution.

South Carolina: Training all of the magistrates in the state of South Carolina. The magistrates handle the majority of criminal cases in the state, so having them know victims' rights is a great victory.

Q: What would you say to another attorney out there who wants to help crime victims but is not affiliated with a clinic?

Arizona: This area of law [victims' rights law] is on the cutting edge of criminal justice jurisprudence. If lawyers are interested in an exciting and developing area of law this is where they should practice.

California: There are some issues, such as privacy and restitution, which are discrete issues within a criminal case, and therefore allow for limited scope representation. These types of issues provide a clean and easy way to represent victims without too much exposure.

Idaho: This is very rewarding work with a population that can benefit from legal services and are generally very appreciative.

Maryland: NCVLI and the existing Clinics are models that others could emulate in their jurisdiction. Please call us!

New Mexico: This work is as important and cutting-edge as all the other previous constitutionally-based civil rights movements in our history. Because of the institutional resistance in the legal community, this work needs the brightest and the best to make these changes real.

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South Carolina: Victims' rights are human rights. This is a new and innovative area of the law. There are people in the field with expertise who are available to help.

Q: What is the number one hurdle that still exists to enforcing victims' rights? And what can we do to overcome this hurdle?

Arizona: The criminal justice culture that remains hidebound to the past. We have to change the culture.

California: I would have to name two hurdles that go hand-in hand: lack of knowledge and enforcement of rights. Sometimes even advocates do not recognize a victim's rights issue because they have not been confronted with the issue or they are examining the issue only from the perspective of the prosecutor. Education [is how we overcome the hurdles] – constantly meeting with the people on the frontlines of the criminal justice system to educate them.

Idaho: Making the victims aware of the rights that they have. Public education. Doing outreach to victims as soon as possible after they are victimized.

Maryland: It is like fighting with one hand tied behind your back because of the novelty regarding representing victims in criminal cases. But enforcing victims' rights is an exciting field and with persistence, you will succeed in the long run!

New Mexico: The blind irrational certainty limited to the bench and bar that equates any protection of victims' rights with a diminishment of defendants' rights. Fundamental changes in legal education are needed and frequent practical demonstrations in lower courts that the assertion of victims' limited rights does not cause the sky to fall.

South Carolina: On a daily basis there is a lack of awareness of victims' rights by virtually all the players in the system. [I would urge people to take] a progressive, holistic and balanced approach to the rights of victims and defendants.

1 People interviewed: Arizona – Steve Twist; California – Julise Johanson; Idaho – Pat Costello; Maryland – Russell Butler and Tracy Delaney; New Mexico – Melissa Stephenson; South Carolina – Susan Quinn and Veronica Swain. Representatives from the Clinics located in New Jersey and Utah will be interviewed for future newsletters.

Case Spotlight

United States v. Cienfuegos, 462 F.3d 1160 (9th Cir. 2006).

After defendant pled guilty to involuntary manslaughter and assault resulting in serious bodily injury, the government sought restitution for the victim's lifetime future lost income. The trial court denied that request, limiting its award to the victim's funeral expenses. The government appealed, arguing that the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3663A, permitted restitution for future lost income. The Ninth Circuit Court of Appeals agreed, construing the MVRA's use of the term "lost income" as encompassing "future lost income to be paid to victim's estate." The court explained that its reading was supported by similar interpretations of "lost income" in the civil context and the legislative history of the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, which endorsed an "expansive view of restitution" that included restitution for future income. The court remanded the case to the trial court with instructions to redetermine the amount of restitution to include the victim's lost future income.

The Victims Committee of the American Bar Association

by Mary Boland

The American Bar Association is the largest membership organization of attorneys in the United States. Its entities include those related to judges, law schools, criminal justice participants, children, and *pro bono* services. The ABA has long had a commitment to giving victims a voice in the legal system, establishing a Victims Committee as part of its Criminal Justice Section in 1976. The ABA also works with national, state, and local organizations and task forces; legislators, administrators, victim/witness advocates, service providers and many others who have been crucial to the advancement of victims' rights. The federal Crime Victims' Rights Act has created greater opportunities for the involvement of attorneys in shaping justice for crime victims.

The Victims Committee continues to spearhead ABA efforts to improve the status of crime victims within the criminal justice system. Comprised of nearly 50 members, the Committee includes victim rights attorneys, prosecutors, judges and private attorneys. As outgoing chair of the Committee, I am pleased to share with NCVLI's readers this update on the Victims Committee's efforts on behalf of crime victims.

Early ABA policies included a package of recommendations for Reducing Victim/Witness Intimidation (1980); Fair Treatment Guidelines for Crime Victims and Witnesses (1983); and Case Continuance Guidelines for Crime Victims (1986). More recent efforts have involved incorporating victim-related policies into the ABA's multi-volume set of Criminal Justice Standards on issues addressing the prosecution function, guilty pleas, speedy trial, DNA evidence and sentencing. The Standards are relied on by prosecutors, judges, and defense attorneys, and are often cited in court pleadings and decisions. In 2004, the Committee produced a guide to developing a national strategy on restitution for victims. Also in 2004 and again in 2005, the Committee and the Criminal Justice Section shared its views with Congress in supporting the retention of the VOCA (Victims of Crime Act) fund cap as vital for victim compensation and for victim/witness assistance programs. Most recently, the Committee prepared a report entitled "The Victim in the Criminal Justice System" that formed the basis of incoming ABA President Karen Mathis' speech on the rights of crime victims in the United States to international criminal court judges in Siracusa, Italy in July, 2006.

Currently, the Committee is developing revisions to the ABA's Fair Treatment Guidelines. The 1983 Guidelines grew out of the 1982 Report from President Reagan's Task Force on Victims of Crime that highlighted the unacceptable way victims were treated in the criminal justice system and identified 68 recommendations directed at all segments of public and private sector to improve the treatment of crime victims. By August of 1983, the ABA recommended 13 general guidelines to improve the treatment of crime victims in the criminal justice system. Over the next 20 years, thousands of victims' rights laws were passed, rendering the Guidelines outdated.

Currently, the Committee is developing revisions to the ABA's Fair Treatment Guidelines.

During 2004, with a small stipend from the Criminal Justice Section and the assistance of a group of dedicated law students working under the supervision of a contract attorney, the Committee conducted an initial review of the changes in state and federal laws. Next, the Committee requested assistance from the experts at NCVLI to interpret the initial research in light of the existing ABA Guidelines. The Committee was most appreciative of the efforts of Director Doug Beloof, Meg Garvin and Kim Montagriff who analyzed the Guidelines in light of the massive changes in federal and state law over the last two decades. By the end of 2005, the NCVLI report, some 50 pages long, was completed. (The 1983 Guidelines and the NCVLI Report are available on the Victims Committee's Website at http://meetings.abanet.org/webupload/commupload/CR300000/newsletterpubs/victimsguidelinereview.pdf).

The NCVLI Report has enabled the Committee to identify areas in need of reform in the Guidelines. Based on the Report, the Committee has established working groups to draft Guidelines revisions. The proposed

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revisions will be distributed for review and comment by national organizations and interested persons in the coming months. I am excited to report that liaison relationships have already been established with the United States Department of Justice, the National Center for Victims of Crime, and the National Organization of Victim Assistance. Once the language is finalized, the Committee will prepare a draft Resolution and circulate it to other relevant committees and sections of the ABA. Finally, the Committee will seek to have the Resolution adopted by the Criminal Justice Section and then approved by the ABA House of Delegates to become the new ABA Guidelines for fair treatment of crime victims and witnesses.

[T]he Committee will prepare a draft Resolution and circulate it to other relevant committees and sections of the ABA.

In the Fall of 2006, I became a member of the Criminal Justice Section Council, but I know that the new chairs Russell Butler of the Maryland Crime Victim Resource Center and Meg Garvin, Acting Director of NCVLI and their new vice-chair, Angela Downes of Mothers Against Drunk Driving, will be very active in bringing resolutions to the Criminal Justice Section Council on behalf of the Committee. We need many voices of support in this process. I invite you to join the Criminal Justice Section of the ABA (www.abanet.org) and especially the Victims Committee as it works to develop ABA policy on fair treatment for victims and witnesses in the criminal justice system.

NCVLI would like to specially recognize the Barnett Law Firm for all of its pro bono efforts to help crime victims in New Mexico. Mr. Mickey Barnett served as local counsel to NCVLI and co-amici in the case of Nasci v. Pope, a case spotlighted on page five of this newsletter. The generous assistance of the Barnett Law Firm enabled amici to ensure that victims' interests from across the nation were heard in the New Mexico Supreme Court – we thank you.

Case Spotlight

In re: Russell P. Butler, No. 06-20848 (5th Cir. Nov. 1, 2006) (unpublished).

Defendant Ken Lay died after he was convicted of numerous fraud and conspiracy charges but prior to the resolution of his appeal. The Estate of Ken Lay filed a motion to vacate his convictions pursuant to the common law doctrine of abatement *ab initio*. A crime victim filed a motion opposing abatement. The trial court vacated Lay's convictions without addressing the victim's argument that abatement violated his statutory rights to "fairness" under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771 (a)(8). *See United States v. Lay*, ___ F. Supp. 2d ___, 2006 WL 2956273 (S.D. Tex. Oct. 17, 2006). The victim sought mandamus review of that decision. Denying mandamus, the Fifth Circuit concluded that, because a victim's right to restitution under the CVRA accrues at conviction, it abates with the conviction upon defendant's death.

News From the Frontline of Advocacy

by Liz Karns

In February 2006, *The State of Illinois v. Adrian Missbrenner* went to trial. The case was unusual for two reasons. First, the criminal prosecution of a sexual assault is a rare occurrence. Second, this trial highlighted the twisted perceptions that give more rights to defendants than to victims. But the victim in this case showed real bravery: she asserted her rights and won the battle.

The criminal trial of *State v. Missbrenner* was the result of a gang-rape of a 16 year old girl by four male high school students. The male students assaulted her, and when she was unconscious they wrote hateful messages on her body in permanent marker. They also videotaped the entire assault. The victim had no recollection of the assault; she had been given some alcohol to drink, and was probably given one of the "date rape drugs" along with it. She had never seen the video of her own assault, and she did not want to.

[The victim] had never seen the video of her own assault, and she did not want to.

On February 28, 2006, lawyers for one of the defendants insisted that they had a right to cross-examine the victim based on the videotape. More exactly, they wanted her to watch the video frame by frame and admit that she had consented to every part of the assault. They argued that the defendant's right to confront witnesses would be compromised if he could not force her to view the tape.

Shockingly, Judge Kerry Kennedy agreed with the defendant. He ordered the victim to view the video. She refused. The judge threatened her with contempt of court and jail if she did not watch it. Again the victim refused. The prosecuting attorneys, who are there to represent the interests of the state rather than the interests of the victim, did not advocate for the victim. The judge adjourned the court that day ordering the victim to watch the tape or go to jail.

A classic miscarriage of justice was now in motion. Videotaped evidence that demonstrated the perpetrators' guilt was being used against the victim. The victim, not the perpetrator, was now being threatened with jail.

A classic miscarriage of justice was now in motion. Videotaped evidence that demonstrated the perpetrators' guilt was being used against the victim. The victim, not the perpetrator, was now being threatened with jail.

A reporter in the courtroom contacted the Illinois Coalition Against Sexual Assault (ICASA) that afternoon asking if this ruling made legal sense. Lyn Schollett, General Counsel for ICASA, immediately contacted victims' rights organizations and law professors across the country, and our law firm here in Evanston, IL.

Kaethe Morris Hoffer and I are partners in a law firm that specializes in litigation on behalf of sexual assault victims. We use tort law and civil rights laws to bring justice to people who have been assaulted and seek compensatory damages for those injuries.

When Lyn contacted Kaethe it was already after 5 p.m. Kaethe was on her way home but stopped when she heard the outrage that was being committed in the Bridgeview courthouse. She accepted the challenge and began a long evening of phone conferences, research and writing.

Throughout the night, advocates from across the country, from the National Crime Victim Law Institute in Oregon to law professors in New England, worked on the arguments and motions to bring to the judge. The experts agreed that the judge's ruling was misguided; a defendant's right to confront witnesses does not entail any right to force a victim to relive an assault by watching it on tape. ICASA served as the clearinghouse, and by morning a writ of mandamus was prepared for presentation to the Supreme Court of Illinois. The writ was the best way to show that we were advocating on this particular issue for this client and we were ready to go the distance: if we could not persuade the trial judge to reverse his misguided ruling, we would take the case straight to the top. The briefs and arguments were ready for presentation to the prosecution.

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On the morning of March 1, 2006, Kaethe and I met with the victim, her family, and her civil attorney to discuss the strategy for dealing with the judge's order. The victim was absolutely clear on her refusal to watch the video and was willing to face going to jail until this was resolved. Her family supported her decision and continued to express their anger at the way the case had been handled.

The prosecution team assembled in a large conference room and listened to the arguments on the limits of cross-examination. We focused on the lack of precedent for such an order, the absence of law on the point, and on the injustice of inserting a memory into the mind of a victim who had denied any recollection of the event. To force the viewing of a videotape would raise new problems — can any victim be forced to watch the crimes against themselves or their family? Can any new material be introduced into court not to refresh a memory but to create a memory? And finally, who exactly is on trial here — why was the victim being treated as a criminal?

After the arguments were examined and discussed the prosecution team left to decide what to do next. They took with them our briefs and the writ of mandamus that had been prepared to bring the issue immediately to the Supreme Court.

When the prosecutors came back they accepted the arguments and were headed to the judge's chambers to argue that the victim should not have to watch the video. We all exhaled a sigh of relief that they were now behind the victim on this issue. Within minutes the attorneys were back saying that the judge agreed with the oral argument and would not force the victim to view the video.

This victory of a victim's rights over a perpetrator's court-room maneuvering is an important one. But it is appalling that such an argument should even need to be made. It demonstrates how far we have NOT come in regard to the treatment of victims. Sexual assault trials are still far too likely to turn into public trials of the victim. It is no surprise that fewer than 20% of all sexual assault victims ever report the crime — look at the treatment of the victim in this case. She was the one on trial and the one who received the media criticism for her decisions. The focus was completely wrong — it should have been on the uncontroverted evidence of the behavior of the boys.

The good news is that we were able to protect a small part of the rights of the victim. But there is much work to be done in making everyone, from potential perpetrators to judges, aware that the system will not be used to punish the victim. In a perfect world there would be no sexual assault.

Until that time comes, we need to be there to advocate on the frontline for victims. ■

Two postscripts to this story. First, while the defendant who was on trial during the above referenced proceedings was acquitted, one of the other defendants who had previously fled the country has recently turned himself in. There is great hope that the prosecutors will use the experience gained during the earlier trial to conduct a successful prosecution during which all of the victim's rights are protected. Second, to this day the crime victim's wish to not view the video of her own assault has been successfully protected. Thus, the work of private victim rights attorneys stepping in on behalf of the crime victim truly helped.

Case Spotlight

United States v. Heaton, ___ F. Supp. 2d. ___, 2006 WL 3072573 (D.Utah Oct. 24, 2006).

The United States filed a one sentence motion for leave to dismiss charges without prejudice, averring that the dismissal was "in the interest of justice." The court noted that under the CVRA victims have the right "to be treated with fairness and with respect for dignity and privacy," and, citing Black's Dictionary, stated that to be treated with fairness means "treating them 'justly' and 'equitably.'" Finding that the victim's right to be treated with fairness was not limited to public proceedings and therefore extended to courts' decisions regarding dismissal of indictment, the court denied the government's motion. The court stated, "[w]hen the government files a motion to dismiss criminal charges that involve a specific victim, the only way to protect the victim's right to be treated fairly and with respect for her dignity is to consider the victim's views on the dismissal." The court then directed the government to the provision in the CVRA that guarantees victims the right to confer with the attorney for the government, and ordered the government to provide a basis for its motion that included a recount of the victim's views on the matter.

I'm Jennifer Sanders - a third-year law student at Washington University. I started law school however at Lewis & Clark, and as a first year I was given the opportunity to work with NCVLI performing "case updates". Case updating is searching for cases dealing with any aspect of crime victims' rights and writing short summaries of those cases. Although I am unsure how much use my first-year-law-student research actually was to NCVLI, the work provided me with a great opportunity to look at a very unique area of law while becoming a better researcher. My interest in crime victims' rights was also sparked, and this year when I was approved for a summer stipend I contacted NCVLI and volunteered my services as a summer law clerk.

Student Volunteer Story

by Jennifer Sanders

As a summer clerk I was given three major projects consisting of: updating clinic manuals, researching the HIPAA privacy regulations to determine if HIPAA could be used to prevent crime victims' medical records from being provided to defendants for use in a criminal trial without authorization, and researching the Nebraska constitutional crime victims' rights amendment and state statutes to determine the rights and remedies crime victims in Nebraska have. Additionally I assisted with research for various other smaller projects, helped with and attended NCVLI's annual victims' rights conference, and of course had a lot more opportunities to practice my blue-booking skills!

All in all my experience at NCVLI was not only a fantastic learning experience, but also helped shape my future career goals. My summer was enriching, fun, and time well spent!

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