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:

Ensuring Individual Rights are not Diminished in the Face of Mass Victimization

By Meg Garvin, J.D.

This country has experienced the horror of mass victimization in a number of very public moments, among these, the bombing in Oklahoma City and the attacks of 9-11. On a daily basis, crimes such as fraud, identity theft, and human trafficking, are perpetrated on significant numbers of victims. These multiple victim crimes present unique challenges for law enforcement, prosecutors, and courts, regarding how and when to afford individual victims their legal rights. Though there are logistical and practical hurdles to affording rights in these situations, the federal Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, is clear that rights must be given effect.

Taking notice of the challenges presented by multiple victim cases, Congress incorporated into the text of the CVRA a roadmap for how courts and other participants in the criminal justice system should address the situation when such challenges arise. Specifically, the CVRA provides:

> In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

18 U.S.C. § 3771(d)(2). This provision makes clear that the rights must be given effect, but allows courts, after undertaking a two prong analysis, to craft reasonable, alternative methods of provision of the rights.

Prong One: The Number of Victims Makes it Impracticable

The first prong of the analysis requires a court to find that the number of victims in any particular case makes it impracticable to individually accord the rights contained in the CVRA. To date, no federal court has defined "impracticability" in this context, but such a determination will necessarily be fact-specific. Numerous federal courts have provided guidance on the number of victims that are necessary to trigger the provision. Notably, courts have made findings and resorted to the multiple victim provision of the CVRA only where the potential number of victims has numbered in the thousands. *See, e.g., In Re W.R. Huff Asset Mgmt. Co.,* 409 F.3d 555, 559 (2d Cir. 2005) (applying the CVRA's multiple victim provision where "[t]he Government argued that there were tens of thousands of victims of the crimes committed"); *United States v. Stokes*, No. 3:06-00204, 2007 WL 1849846, at *1 (M.D. Tenn. June 22, 2007) (applying the CVRA's multiple victim provision where estimated "total number of potential victims [was] 35,000 individuals"); *United States v. Causey*, No. H-04-025-SS (S.D. Tex. July 28, 2006) (unpublished opinion) (applying the CVRA's multiple victim provision where "[p]otential crime victims in the case include thousands of former Enron employees, owners of Enron securities, and other persons who were harmed as a result of the crimes for which

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Message From the Director

by Meg Garvin, J.D.

As I look to our criminal justice system, I am regularly reminded of Hubert Humphrey's famous statement, "The moral test of a government is how it treats those who are at the dawn of life, the children; those who are in the twilight of life, the aged; and those who are in the shadow of life, the sick, the needy and the handicapped." This issue of *NCVLI News* is about working together to protect the rights and voice of vulnerable and silenced victim populations.

First, in "Ensuring Individual Rights are not Diminished in the Face of Mass Victimization," I discuss the provisions of the federal Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, that deal with multiple victim cases. The article posits that even in the face of the unfortunate reality of mass victimization, the justice system has an obligation to ensure that the voices and rights of individual victims are heard through the cacophony.

In "The Aftermath of *Giles v. California*: Are a Killer's Prior Threats Against His Victim Admissible?", Professor Doug Beloof discusses a recent United States Supreme Court case that has implications for those silenced by domestic violence homicide. Professor Beloof's reading of the Court's decision provides hope that there may be avenues left to ensure that the voices of these victims may still be heard at trial.

In "Practical Tips and Legal Strategies for Protecting Child-Victims While Testifying," Terry Campos discusses the importance of protecting child-victims during the most challenging moment of their criminal justice participation – trial. This article provides both legal analysis and practical approaches to help this vulnerable population withstand the pressures of testifying so that their voices can be heard.

In addition to these legal articles are three personal stories. First, NCVLI volunteer Cristie Prasnikar discusses her recent experiences in Rwanda and reminds us that there are vulnerable victims across the globe that need our help. Next, Ben Lull, a law student at Lewis & Clark Law School, shares how his discovery of victims' rights as a law student with NCVLI has helped him along the path following his victimization. Finally, Tiffany Edens, who was victimized in the 1970s at the age of 13, reminds us what it means to do more than survive, when she says, "I want victims to feel empowered and not guilty and not ashamed. I want to share my ability to take action."

Every day, victims of crime, victim advocates and victim attorneys work to empower others to become survivors, and to ensure that our criminal justice system does not forget individual victim's voices and rights. Our goal for *NCVLI News* is to help you with this critical work. I hope this edition proves useful to your work. ■

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defendants will be sentenced"). In contrast, where the number of victims was only in the hundreds, one court has commented that the victims' CVRA rights could be practicably afforded, and therefore resort to the multiple victim provision was improper. *See In re Dean*, 527 F.3d 391, 394-95 (5th Cir. 2008) (noting that the relatively small number of victims – fewer than 200 – should have been notified of the ongoing plea negotiations and given the opportunity to talk to the government before it negotiated a deal with defendants).

Prong Two: A Reasonable Procedure to Give Effect

Assuming a court makes the findings required by prong one, rights are not lost for the individual victims. Instead, the CVRA mandates that courts craft a reasonable procedure that gives effect to the rights without unduly prolonging proceedings. Crafting reasonable procedures that meet this criteria may be difficult at times, but hurdles are not grounds to thwart Congress' mandate that individual victims be afforded rights. Invariably, procedures must be crafted on a case-by-case basis, and often on a right-by-right basis, with the needs of the individuals affected being of primary consideration.[1] Possible procedures to ensure the enforcement of two rights of victims under the CVRA – notice and presence – follow.

Federal courts and the United States Department of Justice have employed a number of methods to provide notice to large classes of victims in an effort to comply with the CVRA, including using a combination of national media press releases, press conferences and advertisements, informational websites, toll-free telephone numbers, and direct notice via letter.

The Right to Reasonable, Accurate, and Timely Notice

The CVRA affords crime victims "[t]he right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused." 18 U.S.C. § 3771(a)(2). This right to notice is the building block of other rights, and therefore any alternative procedure crafted must be designed to give actual and accurate notice to the victims in a timely fashion. *Cf.* U.S. Dep't of Justice, *Attorney General Guidelines for Victim and Witness Assistance* 13 (2005) (stating that "in cases with large numbers of victims, responsible officials should use the means, given the circumstances, most likely to achieve notice to the greatest possible number of victims"). Federal courts and the United States Department of Justice have employed a number of methods to provide notice to large classes of victims in an effort to comply with the CVRA, including using a combination of national media press releases, press conferences and advertisements, informational websites, toll-free telephone numbers, and direct notice via letter. *See, e.g., In Re W.R. Huff Asset Mgmt. Co.,* 409 F.3d at 559; *Stokes*, 2007 WL 1849846, at *1-2; *Causey*, No. H-04-025-SS; *see also Attorney General Guidelines*, at 13-14 (suggesting methods for providing notice to large numbers of victims, such as electronic mail (including listservs), Internet websites, toll-free telephone numbers, and town meetings).[2]

The Right Not to be Excluded - 18 U.S.C. § 3771(a)(3).

The right to personally witness court proceedings, which subsection (a)(3) of the CVRA guarantees, is fundamental for many victims. While certainly it may be impracticable to have thousands of victims attend a proceeding in a courtroom with 50 seats, reasonable alternative mechanisms are readily available. For instance, closed circuit television or telephonic presence are both viable options in many situations. In fact, when discussing the right to be present in the context of a multiple victim case, Senator Kyl endorsed the idea of crafting a closed circuit television procedure to ensure victim presence. *See* 150 Cong. Rec. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (noting, as one example of an alternative procedure that gives effect to the law and yet takes into account impracticability, that "in the Oklahoma City bombing case the number of victims was tremendous and attendance at any one proceeding by all of them was impracticable so the court fashioned a procedure that allowed victims to attend the proceedings by close circuit television.")

Be Wary of Red Herrings

Everything in the CVRA indicates that the rights guaranteed therein must be given effect even in complex cases, and places affirmative obligations on the courts to ensure rights are afforded. S*ee* 18 U.S.C. § 3771(b)(1) (providing that "the court shall ensure that the crime victim is afforded the rights described in subsection (a)");

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see also United States v. Turner, 367 F. Supp. 2d 319, 326 (E.D.N.Y. 2005) (construing 18 U.S.C. § 3771(b)(1) to require courts to independently and proactively "ensure victims' rights"); *United States v. Degenhardt*, 405 F. Supp. 2d 1341, 1343 (D. Utah 2005) (recognizing courts' independent obligation to ensure victims are afforded their rights).[3] Despite these clear directives, experience reveals that parties to the criminal cases, both prosecution and defense, often argue against affording rights to victims in multiple victim cases, asserting that 1) rights do not attach pre-charging; 2) affording such rights will result in excessive media coverage, thereby prejudicing the government's ability to present a case and the defendant's ability to receive a fair trial; or 3) affording such rights will impair plea negotiations. Nothing in the CVRA's plain language or its legislative history, nor in court interpretation of the statute, supports any of these arguments as legitimate opposition to affording of rights in multiple victim cases.

First, the CVRA's plain language rebuts the idea that rights do not attach pre-charging. The CVRA provides: "The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, *if no prosecution is underway*, in the district court in the district in which the crime occurred." 18 U.S.C. § 3771(d)(3) (emphasis added). The Fifth Circuit in *In re Dean*, held that this provision means that certain CVRA rights, including the right to confer with the attorney for the government, attach before a defendant is formally charged. 527 F.3d at 394; *see also United States v. Rubin*, 558 F. Supp. 2d 411, 418-19 (E.D.N.Y. 2008) (citing *Dean* and noting that a reasonable limitation on pre-formal commencement attachment is that the government be "contemplating" charges).

Similarly, the plain language of the CVRA and recent court interpretation refute the idea that either speculative fear of interference with fair trial or plea bargaining are grounds for denying victims' rights, even in multiple victim cases. As noted above, not only is the CVRA clear that the *only* grounds for crafting alternative methods of rights provision is when "the number of crime victims makes it impracticable to accord all of the crime victims," 18 U.S.C. § 3771(d)(2), but in *In re Dean*, the Fifth Circuit held that reasons such as media coverage and its interference with possible plea negotiations "do not pass muster," and that such speculative reasons "missed the purpose of the CVRA[]." 527 F.3d at 394.

CONCLUSION

The unfortunate fact that some crimes have many victims does not diminish the rights provided by the CVRA. The CVRA recognizes the complexity of multiple victim cases, and mandates that courts fashion procedures that give effect to the victims' rights. Procedures that effectuate administrative efficiency but fail to give effect to the CVRA are impermissible. Victims, victim attorneys, and victim advocates must hold courts to the standard set forth in the law – only upon a finding that the number of victims makes it impracticable to afford the rights to each individual may a court craft an alternative procedure, and even in that moment the court must craft a procedure that gives meaningful effect to the rights. ■

(Endnotes)

1 Senator Kyl, one of the primary sponsors of the CVRA, noted this fact-specific analysis, stating,

> Importantly, courts must seek to identify methods that fit the case before [them] that ensure that despite the high number of crime victims, the rights in this bill are given effect. It is a tragic reality that cases may involve multiple victims and yet that fact does is not grounds for eviscerating the rights in this bill. Rather, that fact is grounds for the court to find an alternative procedure to give effect to the bill.

150 Cong. Rec. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

2 Selection of any one of these identified methods is likely insufficient because it is not reasonably calculated to reach the most victims; selection of any of these methods without consideration of the population of victims and how those victims routinely access information would similarly be insufficient.

3 Notably, responsibility for safeguarding victims' rights under the CVRA in multiple victim cases does not fall to the judiciary alone. The CVRA also provides:

> Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

18 U.S.C. § 3771(c)(1). In the United States Department of Justice Guidelines, the United States Attorney General has opined that in cases with a large numbers of victims "the attorney for the Government should move the appropriate district court at the earliest possible stage for an order fashioning a reasonable procedure" so that victims can effectuate their rights under the CVRA "to the greatest practicable extent." U.S. Dep't of Justice, *Attorney General Guidelines for Victim and Witness Assistance* 13 (2005).

NCVLI Volunteer
Cristie Prasnikar

Other than the hours I've spent watching "Matlock" reruns, my legal experience is next to nil. I am not an attorney; I'm not even a law student. So when I sat down with Meg Garvin last year to inquire about volunteering for NCVLI all I could bring to the table was compassion for those who have been harmed and a desire to help. Luckily that was enough. Meg said something like, "Don't worry… we'll FIND something for you to do!" Since then my awareness of victims' rights issues and my passion for helping victims has grown tremendously.

I found myself thinking of the work NCVLI does recently while on a volunteer trip to Rwanda, as I spoke to survivors of the 1994 Genocide, labored alongside genocide inmates, and visited the mass grave sites and memorials. At one memorial was a plaque reminding visitors that the Interahamwe did not kill one million Tutsis; they killed one, and then another, and then another. This profoundly simple recognition that each act of violence is its own horror, and each victim has a deeply personal story to tell, seems to me the core of what NCVLI is all about.

Video footage of the crude legal proceedings following the genocide reveals an almost surreal clarity of focus that is missing from our legal system—to hear the victims' stories, if any have survived. As there wasn't a single person not touched by the rampant terror and slaughtering attacks, the entire community would gather in an open field for the hearings. The accused man was called to rise and describe the acts he had committed. Those who had suffered at his hands or witnessed the atrocities he had perpetrated would have a chance to tell their story. I was awestruck watching a subtle strength return to the victims as their experience was validated. Many were weak or bore still visible injuries; some spoke too softly to hear; some did nothing but rise and point and weep. But each one stood before their families, their neighbors, and their attackers and had the chance to be recognized and to ask for justice.

Obviously the Rwandan legal system is wildly flawed in many ways but should be admired for its purity of purpose. I am so proud to be affiliated with NCVLI and the incredible talented, dedicated people I've met who work everyday to ensure that the victims in this country aren't trampled by our legal system. NCVLI works relentlessly to give victims a voice and to honor their right to stand up, have their crime acknowledged, and ask for justice. It is a privilege to be part of this organization. ■

The Aftermath of *Giles v. California*: Are a Killer's Prior Threats Against His Victim Admissible?

By Professor Doug Beloof, J.D.

Prior to her murder, Brenda Avie filed a domestic violence report, telling the police that ex-boyfriend, Dwayne Giles, had hit, choked and threatened to kill her while holding a knife to her neck. Three weeks after this report Giles shot and killed Brenda. At trial, Giles claimed he acted in self-defense. In response, the State introduced Brenda's prior statements to police regarding Giles' previous violence. The jury convicted Giles of first-degree murder. The California Supreme Court affirmed, ruling admission of the statements was permissible because Giles forfeited his Confrontation Clause rights by killing Brenda. In *Giles v. California*, 128 S.Ct. 2678 (2008), the Supreme Court, in a split 4-2-3 decision, overturned Giles' conviction, holding that the trial court's admission of the statements to police violated Giles' Sixth Amendment right to confront his accusers. Justice Scalia's majority opinion, which focused on the historical application of the forfeiture by wrongdoing exception to the Confrontation Clause, held that the doctrine applies only when a defendant murders a declarant (here Brenda) with the motive to make the declarant unavailable at trial. While this holding seemingly created an impossible hurdle for prosecutors, it is not the last word on the forfeiture by wrongdoing doctrine. In fact, the concurring and dissenting opinions in *Giles* reveal at least three possible arguments that the forfeiture by wrongdoing exception to the Confrontation Clause may still be applied in domestic violence cases.

Before analyzing the three arguments, an examination of the Justices' opinions is necessary. Disagreement over whether motive to silence the victim or simply the intent to kill controls admissibility of evidence is the central difference between the six justice majority and the three justice dissent. The majority held that for victim statements about a prior threat to come into evidence in homicide cases it is not enough that the killing was intentional, rather there must be proof that the defendant's motive for the killing was to make the witness unavailable to testify against him. Four Justices in the majority conclude that history supports such a motive requirement; two Justices in the majority said that while history was not clear regarding this requirement, equity required motive be proven. In contrast, the dissent rejected any motive requirement, urging that defendant's knowledge that killing a person would silence that person as a witness was sufficient to establish forfeiture by wrongdoing. The concurring and partly dissenting opinion by Justice Souter, joined by Justice Ginsberg, pointed out that history did not provide a clear answer to the specific issue of domestic violence in the forfeiture context. Instead, Souter focused on what equity would require. (Equity is relevant because the Court identified the forfeiture by wrongdoing exception to the Confrontation Clause as essentially equitable in nature.) Souter focused on the "near circularity" of a judge determining guilt by a preponderance of the evidence as a predicate to allowing the statements into evidence. The "near circularity" Souter discusses is that a judge determines pretrial that the accused killed the victim, then the prior statement about the threat is admitted as evidence for the jury to consider when determining if the accused is guilty of murder beyond a reasonable doubt. Thus, the accused is, in effect, judged guilty by the judge before the jury finds guilt beyond a reasonable doubt. Souter reasons that because of this "near circularity," there must be motive to achieve an equitable forfeiture by wrongdoing doctrine. For Souter, the motive requirement adds an element separate from the elements of the crime, thereby solving the circularity problem.

Practice Tip

Regularly consult Professor Richard D. Friedman's "The Confrontation Blog," http://confrontationright.blogspot.com/.[1]

With this foundation, the three arguments that the forfeiture by wrongdoing exception to the Confrontation Clause may still be applied in domestic violence cases can now be turned to.

1. Circularity is unavoidable.

Justice Souter's circularity analysis provides the first argument that *Giles* may not preclude application of the forfeiture by wrongdoing exception in domestic violence cases. This is true because Souter's "solution" to the problem of circularity does not work

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in every instance and therefore the motive requirement is a superfluous element. For example, in many states, killing a person with the motive of silencing him or her as a witness is a death penalty offense. When the prosecutor opts to charge the aggravated offense of murder to silence, rather than un-aggravated murder, the judge is again faced with determining the existence of all the elements of the underlying crime (essentially defendant's guilt) in order to rule on admissibility of the threats; i.e. the circularity problem. Thus, to a significant extent, the presence or absence of circularity is controlled by the prosecutors' charging decision. Equity is therefore not achieved under Souter's reasoning, and is hardly a solid foundation for the requirement of motive in the forfeiture by wrongdoing doctrine.

2. The motive to make a person unavailable is inherent in domestic violence.

There are indications in all three opinions in *Giles* that motive would have readily been proven had the prosecutor revealed all the facts of prior threats and abuse in the trial court. In domestic violence cases, establishing a history of violence, threats, or intimidation is the same as proving motive to make the witness unavailable. As Justice Scalia points out:

Practice Tip

Offer the history of domestic violence and abuse into evidence to establish motive.

> Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and stop her from reporting abuse to the authorities or cooperating with a criminal prosecution-rendering her prior statements admissible under the forfeiture doctrine.

Id. at 2693.

In a similar vein, Justice Souter opined that the historical material provides no reason to doubt

> that the element of intention [to make the witness unavailable] would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger.

Id. at 2695.

Finally, the dissent's analysis, while focusing on intent and foreseeable consequences, is also consistent with the conclusion that motive need not be shown. Justice Breyer, joined by Justices Stevens and Kennedy, wrote that

> murdering his ex-girlfriend would keep her from testifying; and that knowledge is sufficient to show the *intent* that law ordinarily demands. As this Court put the matter more than a century ago: A "man who performs an act which is known will produce a particular result is from our common experience presumed to have anticipated that result and to have intended it."

Id. at 2698 (emphasis in original) (internal citations omitted).

In sum, six Justices agree that what establishes motive in a domestic violence case is a history of violence, threats or intimidation. Thus, in these cases the Court's acknowledgment that a history of domestic violence may be sufficient proof of motive lessens the prosecution's burden. On re-trial, the prosecution can produce any evidence of a history of domestic violence relationship to establish motive.

3. Because reports of domestic violence threats are not testimonial, defendant's Sixth Amendment rights are not implicated.

Only testimonial statements are excluded by the Confrontation Clause, therefore, a third avenue to admit Brenda Avie's statements is to show her statements were non-testimonial. In an interesting

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development, Justices Thomas and Alito wrote separate concurring opinions expressing doubt that Avie's statements to police regarding Giles' threats were testimonial.

Practice Tip
Argue that evidence sought to be admitted is non-testimonial.

The Court's present position on what statements qualify as testimonial is addressed in the companion cases *Davis v. Washington* and *Hammond v. Indiana*, 547 U.S. 813 (2006). In *Davis*, a seven to one majority held:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822.

In Justice Thomas' partial dissent in *Davis*, he objected to a measure of whether a statement is testimonial being based on the officer's purpose. In *Davis*, Justice Thomas correctly observed that the Court rarely uses the subjective intent of the police as a measure for decision-making, and viewed the Court's test as unworkable. Moreover, Justice Thomas identified the Confrontation Clause as seeking to prevent the evil wrought by the Marian Statutes. Thus, a statement that is testimonial requires "solemnity."

Practice Tip
Attend the January 30, 2009, Giles Symposium, hosted by Professor Doug Beloof of Lewis & Clark Law School in Portland, Oregon.[2]

Affidavits, depositions, and prior testimony fit in this category; confessions, when extracted by police in a formal matter also qualify because they bear a striking resemblance to examinations of accused and accusers under the Marian Statutes. Mere conversations between police and witnesses, however, do not contain the required solemnity. *Id.* at 838. Such conversation, according to Thomas should only be excluded where they are offered by the prosecution to avoid subjecting the declarant to cross-examination; in contrast if offered because a witness is unavailable, the statements would be offered in good faith and would be admissible. *Id.*

Thomas reasserted his *Davis* position on testimonial statements to police in his concurring opinion in *Giles*. Referencing Thomas' reasoning in *Giles*, Justice Alito stated,

> Like Justice Thomas, I am not convinced that the out of court statement at issue here fell within the Confrontation Clause in the first place. . . . The Confrontation Clause does not apply to out of court statements unless it can be said that the are the equivalent of statements made at trial by witnesses. . . . It is not at all clear that Ms. Avie's statement falls within that category.

Giles, 128 S.Ct. at 2694.

It is unclear whether Justice Alito thinks the statement by Brenda Avie is admissible under the majority test in *Davis* (the primary purpose test) or whether he is prepared to join Justice Thomas' view that the majority test is unworkable.

Ultimately, the *Giles* Court did not confront the testimonial nature of Brenda Avie's statement because the prosecution never raised it below. Justices Thomas' and Alito's concurrences appear to invite this argument on re-trial and may shed more light on how domestic violence cases can be prosecuted in the future.

CONCLUSION

Giles presented a narrow question, and the Court's decision raised as many or more questions than it answered. The split opinions reveal that the thread that held together the large majorities in *Crawford* and *Davis* appears to be unraveling and the Court's divergent views provide opportunity for challenges to *Giles* such that unavailable victims may still have the opportunity to be heard at trial. Stay tuned. ■

(Endnotes)

1 This blog is devoted to reporting and commenting on the Confrontation Clause in the aftermath of *Crawford v. Washington,* 541 U.S. 36 (2004).

2 Presenters will include national experts on the Confrontation Clause, including Thomas Davies (Tennessee), Jeffrey Fisher (Stanford), Richard Friedman (Michigan), Robert Kry (Firm of Baker Botts), Tom Lininger (Oregon), Robert Mosteller (Duke), and Deborah Tuerkheimer (Maine). For details – continue checking NCVLI's website – www.ncvli.org.

In the Trenches

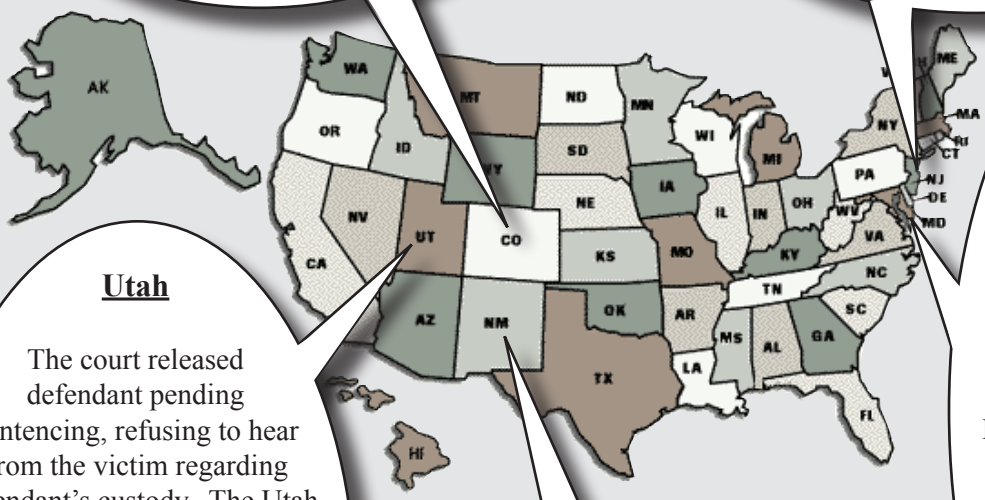
In this column, NCVLI publishes news from the frontlines of the crime victims' rights movement – information about cases we all want and need to know about but which are not published in any of the reporters. Several of these cases are pending and will be updated in future columns as information is available. 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.

Colorado

Together with several other victim agencies, the Colorado Organization of Victim Assistance submitted an amici curiae brief to the Colorado Supreme Court regarding whether, for purposes of a domestic violence sentencing enhancer, the term "intimate relationship," required explicit evidence of a sexual relationship. The brief highlighted the role that victims' rights must play in the court's analysis. The case is pending.

New Jersey

Defendant subpoenaed clients of the New Jersey Crime Victims' Law Center (NJCVLC) to testify at trial, with the intent of later invoking the rule of sequestration to bar them from being present in the courtroom during trial. NJCVLC advised the court of its intent to file a motion on behalf of the victims, asserting their right to be present. At the beginning of trial, defense counsel backed down, and the victims were allowed to attend the entire trial.



Utah

The court released defendant pending sentencing, refusing to hear from the victim regarding defendant's custody. The Utah Crime Victims Legal Clinic filed a motion asserting the victim's right to be heard when defendant's custody is at issue. The court held an immediate hearing and heard from the victim despite objections from defendant. The court reversed its prior decision and set bail at $50,000, pending sentencing.

New Mexico

The New Mexico Victims Rights Legal Assistance Project (the Project) filed a motion to protect the child-victim from pretrial interview and during courtroom testimony. The judge granted the Project's motion, denying the pretrial interview and ordering that, during the child-victim's testimony, the courtroom would be closed, the child-victim could have a comfort item, and the child-victim's father could be present.

Maryland

Defendant filed a motion for reconsideration of bail, but the victim was not notified of the hearing on the motion. The victim contacted the Maryland Crime Victims' Resource Center (MCVRC) immediately prior to the hearing. MCVRC entered a notice of appearance and was present in court with the victim at the hearing. The victim was able to address the court, and defendant's motion was denied.

NCVLI Legal Intern
Ben Lull

My name is Benjamin Lull and I am a student at Lewis & Clark Law School currently working as a student intern with NCVLI. When I began law school two years ago, I had never heard of victims' rights and certainly never realized the impact these rights can have on victims of crime. This changed last year when I was fortunate enough to participate in NCVLI's Crime Victim Litigation Clinic. NCVLI's legal clinic served as my initiation into the world of victims' rights. As a law student, the clinic offered a unique opportunity to develop research and writing skills while working on a real amicus brief. The brief written by my partner and I was targeted for submission to the Utah Supreme Court. Working on a real brief and not simply an assignment based on an abstract fact pattern was extremely motivating. On a more personal level, my discovery of victims' rights has also helped validate my own feelings of victimization from when my father was murdered three years ago. I was empowered to learn that I too was considered a victim who had rights.

After the clinic, wanting to make victims' rights a part of my future legal career, I approached my supervising attorney, Meg Garvin, about possible volunteer opportunities at NCVLI and was informed of the internship position.

As an NCVLI student intern I get an insider's view of the workings of a small non-profit law firm. I attend the weekly attorney meetings on legal matters and also get the chance to see the intricacies of grant based funding in action. The bulk of my work consists of research projects on a variety of victims' rights issues; from specific victims' rights as they exist nationally, to specific issues within specific states, such as the right of a victim of sexual assault to be notified when a sex offender fails to register as required under state law. This last spring I also had the opportunity to participate in NCVLI's 7th Annual Crime Victim Law and Litigation Conference. It was enlightening to see how a national conference, bringing together many of the leaders in the field of victims' rights, is organized and run. The conference speakers were absolutely amazing!

The NCVLI staff is extremely supportive of my development and I am lucky to be working alongside such a highly motivated group of co-workers. ■

2008 Crime Victim Law & Litigation Conference Summary

NCVLI's 7th Annual Crime Victim Law & Litigation Conference, *Opening the Doors: Victim Access to Justice*, took place on May 30 & 31, 2008 in Portland, Oregon. One hundred thirty individuals from twenty-five states and the District of Columbia, gathered for two days of lively plenary sessions and workshop presentations.

The conference included many experts in the field, including The Honorable Paul Cassell, Professor of Law at the S.J. Quinney College of Law at the University of Utah, who spoke about his experiences as a federal district court judge from 2002-07 and as a victims' rights attorney. Roberta Roper, founder and board chair of the Maryland Crime Victims' Resource Center (MCVRC) and Oliver Smith Sr., founding member of the Washington, DC Chapter of the Concerns of Police Survivors and board member of MCVRC, shared their unique experiences as victim survivors of violent crime, discussing the progress that has been made in the victims' movement and empowering attendees to keep the promise for victim justice. Other nationally recognized conference faculty included The Honorable Hardy Myers, Oregon Attorney General, Steve Twist, founder and president of Arizona Voice for Victims, John Clune, co-founder of the Victim Justice Initiative, and Diane Moyer, Legal Director of the Pennsylvania Coalition Against Rape. This year's award ceremony paid tribute to Mr. Twist for his pioneering work and devotion to legal service on behalf of victims and to Ms. Roper for her commitment and achievements in advancing victims' rights.

Thanks to all who helped make the 2008 Conference a success!. ■

Case Spotlights

***State v. Baby*, 946 A.2d 463 (Md. 2008).**

The Maryland Court of Appeals held: (1) that if a woman withdraws consent to vaginal intercourse post-penetration, the continuation of intercourse through force or threat of force may constitute rape; (2) that a trial court errs when it responds to jury questions regarding post-penetration withdrawal of consent with only an instruction to review previously provided instructions on the elements of first degree rape; (3) and that such an error is not harmless. The court further suggested that, on remand, the trial court subject Rape Trauma Syndrome evidence to the *Frye-Reed* analysis, which is the standard the state uses when evaluating the validity of controversial new scientific techniques.

***State v. Smith*, 178 P.3d 672 (Kan. Ct. App. 2008).**

Defendant appealed his conviction of rape by intoxication, arguing, inter alia, that the court erred in refusing to instruct the jury on his defense of voluntary intoxication (his own). Defendant claimed that during the time at issue, he was incapable of forming the requisite state of mind for the crime (i.e., that the victim's inability to consent due to intoxication was "known" or was "reasonably apparent"). The state argued that a voluntary intoxication defense can only be asserted where a particular intent or state of mind is a necessary element of the crime charged, and that such a defense does not apply to rape. While acknowledging that rape is traditionally a crime of general intent, the court noted that the statutory language of the crime at issue is distinct because it expressly requires specific knowledge of the victim's condition and inability to consent. Concluding that the knowledge element of rape by intoxication is an "other state of mind" for purposes of a voluntary intoxication defense, the court held that the trial court erred in failing to instruct the jury on the defense. The court went on, however, to hold that the error did not entitle defendant to a new trial because overwhelming evidence supported the conviction.

***United States v. Edwards*, 526 F.3d 747 (11th Cir. 2008).**

Defendant appealed his conviction and sentence, arguing, inter alia, that the trial court violated his Fifth Amendment right to a fair trial and his Sixth Amendment right of confrontation when it denied his motion to sequester victim-witnesses pursuant to federal Rule 615. On appeal defendant asserted that Rule 615 was constitutionally based and therefore the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, upon which the trial court relied, was an insufficient basis for denying the motion. Applying an abuse of discretion standard, the court affirmed the trial court's denial, stating that defendant's "argument fails for one simple reason: A criminal defendant has no constitutional right to exclude witnesses from the courtroom."

***United States v. Kanner*, No. 07-CR-1023-LRR, 2008 WL 2663414 (N.D. Iowa June 27, 2008).**

Defendant filed a motion to transfer his case, claiming the current venue would cause ". . . unnecessary hardship, inconvenience, and expense." After considering factors proposed by defendant and the state, the court denied the motion, finding that the transfer "would be inconvenient and would not be in the interest of justice." Among the factors considered by the court was its observation that the current venue "serves as a convenient geographic midpoint for the potential victims . . . to gather to observe trial." Noting the provision of the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771(a)(8), directing courts to treat victims "with fairness," and citing Supreme Court case law, the court noted, "The victim of the crime, the family of the victim, [and] others who have suffered similarly, ... have an interest in observing the course of a prosecution." ■

Practical Tips and Legal Strategies for Protecting Child-Victims while Testifying

By Terry Campos, J.D.

For a long time the expression, "children should be seen but not heard" was courtroom policy, where children were deemed incompetent witnesses and not allowed to testify.[1] Today, in the "pursuit of justice," children are often forced to speak when they would rather remain silent. This is especially true in child sexual abuse cases where the child-victim plays a central role in the prosecution, and children as young as three and four are required to publicly recount the very events that traumatized them.

As the child-victim's attorney and advocate, we are obligated to support the child through the criminal proceedings, yet we also share the community's desire to pursue prosecution. Studies, cases and anecdotal evidence reveal these two goals are often in conflict as children who testify may suffer a second victimization.[2] In an effort to address this dilemma, many states have passed laws mandating special accommodations for child witnesses.[3] For example, in Utah a trial court "should ensure children's participation in the criminal justice process be conducted in the most effective and least traumatic, intrusive, or intimidating manner." Utah Code Ann. § 77-37-1. Even without such statutes, judges have discretion to fashion procedures to accommodate children's special needs. 98 C.J.S. *Witnesses* § 397 (2008). This article discusses several accommodations a victim's attorney can seek to minimize the revictimization a child suffers while giving evidence against her offender.[4]

Removing the child from defendant's presence

A child-victim can be protected during testifying by being outside defendant's presence. This can be accomplished in two ways: 1) the victim can testify outside of the courtroom via closed circuit television (CCTV); or 2) the victim can testify from behind a witness screen. Each method has advantages and disadvantages.

Closed Circuit Television

Many jurisdictions have codified the option of testifying via CCTV in child abuse cases.[5] The benefit of CCTV is obvious: the child does not have to see her abuser or talk about painful events in a room of strangers. CCTV has been found to reduce children's anxiety,[6] and in so doing, to promote more accurate testimony from children.[7]

While CCTV may be desirable, not every child will be permitted to testify via CCTV. Since CCTV removes the child from the defendant's presence, each case must be analyzed to protect both the rights and interests of the child-victim, and the defendant's constitutional right to confront his accuser.[8] In *Maryland v. Craig*, 497 U.S. 836, 855-856 (1990), the Supreme Court held that a child may testify via CCTV without violating a defendant's Sixth Amendment rights when the trial court finds a compelling need to do away with face-to-face confrontation. The compelling need standard is satisfied where the child would suffer trauma from being in the presence of the defendant, such that it would impair the child's ability to communicate. *Craig*, 497 U.S. at 856. A desire to protect the child from mere nervousness, excitement, or general fear of testifying is not enough to justify CCTV. *Id. See also United States v. Bear*, 357 F.3d 730 (8th Cir. 2004) (finding general fear of participants and courtroom, rather than of defendant, inadequate to support finding of necessity); *Cumbie v. Singletary*, 991 F.2d 715 (11th Cir. 1993) (finding error where there was no evidence that 5-year old victim was afraid of defendant and no individual finding about possibility of harm); *Lewis v. State* 626 So. 2d 1073 (Fla Dist. Ct. App. 1993) (holding court's decision based on testimony of mother and child that child would be frightened to testify in front of defendant violated confrontation rights). Some states require that the compelling need finding be based on expert testimony. *See, e.g., People v. Cintron*, 551 N.E.2d 561 (N.Y. 1990) (holding court's observations of child without testimony regarding child's mental state insufficient).

[Closed Circuit Television] has been found to reduce children's anxiety,[6] and in so doing, to promote more accurate testimony from children.[7]

Once ordered, CCTV procedures must provide defendant with adequate means to communicate with defense counsel during testimony, and must be conducted

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in a manner consistent with the impartiality and decorum of in-court testimony. *See Myles v. State*, 602 So. 2d 1278 (Fla. 1992) (finding procedure for oral relay of defendant's communications to attorney in the other room violated right to assistance of counsel); *People v. Fletcher*, 768 N.E.2d 72 (Ill. App. Ct. 2002) (reversing where 9-year old assault victim testified in other room and defendant lacked electronic means to communicate with counsel); *State v. Michaels*, 625 A.2d 489 (N.J. Super. Ct. App. Div. 1993) (reversing where judge played ball with children, let them sit on lap, and encouraged and complimented them).

While CCTV saves the child from having to see her abuser, it is not without a downside. A significant concern is that a child's testimony may not be as effective at persuading jurors of defendant's guilt. Studies reveal that closed circuit testimony is associated with a negative juror bias.[9] In fact, jurors viewed children who testified via CCTV as less believable, less attractive, less intelligent and more likely to be making up a story than children who testified in court.[10] So while CCTV may reduce anxiety, thus allowing the child to have better recall and clearer testimony, it does not necessarily translate to jurors' ability to assess the increased accuracy.[11] For these reasons it may not be the ideal procedure from the stand point of ensuring a conviction.

In light of the required findings and manner of implementation, and the possible risk of negative juror bias, it is critical to carefully analyze the desirability of CCTV on a client-by-client basis. If it is in the best interests of the child-victim to pursue CCTV, the victim's attorney should seek specific findings on the record sufficient to support its use, and ask for only necessary accommodations to avoid reversal and retrial that could further harm the child.

Screens

A child-victim may testify out of view of the defendant through use of a witness screen. Before using a screen, courts must make the same findings of compelling need as with CCTV. *See State v. Vogelsburg*, 724 N.W.2d 649 (Wis. Ct. App. 2006) (applying *Maryland v. Craig* to use of barrier between defendant and child); *State v. Welch*, 760 So. 2d 317 (La. 2000) (finding use of screen based on a generalized statement of possible trauma was error in light of *Maryland v. Craig*). The most beneficial characteristic of screens may be that they are portable and easily used during emergencies, such as when a child freezes on the stand. Notably, however, a screen may not be as effective as CCTV in removing anxiety since the child is still in the room with defendant.[12] An additional downside is that a screen may block the child from seeing support people in the courtroom.[13]

Comforting the child-victim: support persons and facility dogs

It is generally accepted that a court has discretion to permit the child to hold a comfort item such as a doll or teddy bear while testifying if it makes findings that there is a "particular" or "compelling" need for the comfort item.[14] Two additional "comfort items" to consider: 1) a support person, and 2) a facility dog.

Studies reveal that the presence of a support person increases some children's capacity to testify and enhances the child's direct and cross-examination

Support Persons

Studies reveal that the presence of a support person increases some children's capacity to testify and enhances the child's direct and cross-examination.[15] Several states have specific statutes governing support person procedures.[16] Generally, the record must reflect a need for the support person, a showing that is significantly less than that required for CCTV. For example, California merely requires that a support person is desired and would be helpful. *See People v. Lord*, 36 Cal. Rptr. 2d 453, 455 (Cal. Ct. App. 1994). While a support person does not implicate a defendant's confrontation rights, a defendant may still object, arguing that the person's presence prejudicially implies that the child is so emotionally scarred that she needs support, or that the support person is vouching for the child's veracity.[17] *People v. Patten*, 12 Cal. Rptr.2d 284, 289 (Cal. Ct. App. 1992) (noting defendant's opposition to the support person's presence). Fortunately, a practitioner can nullify such arguments with some forethought.[18]

Statutes may dictate who can fill the role of support person. In states lacking such specification, it is generally

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seen as less prejudicial for family members to accompany the child, whereas reviewing courts view victim advocates as more prejudicial because of the appearance of vouching for credibility. *See, e.g., State v. Suka*, 777 P.2d 240 (Haw. 1989) (noting accompaniment by parent or close relative as less prejudicial than accompaniment by a victim/witness counselor as former is more likely to be seen as support rather than vouching for credibility). Prosecutors and clergy have been found to be improper support choices because of the potential for an improper impression on the jury. *See, e.g., Sexton v. State*, 529 So. 2d 1041, 1044 (Ala. Crim. App. 1988) (noting general impropriety of prosecutor sitting with witness during testimony because of possible interpretation that action demonstrates personal belief in witness' credibility or guilt of the accused); *Brooks v. State* 330 A.2d 670, 675 (Md. Ct. Spec. App. 1975) (noting practice of clergy accompaniment is not recommended).

A victim's attorney must also give consideration to where the support person is positioned in the courtroom. Generally, the greater the distance from the child, the less the risk for prejudice; however, as long as the support person does not communicate (verbally or nonverbally) with the victim or the jury, it has been found permissible for the child to sit on the support person's lap or to hold his or her hands. *See, e.g., Holmes v. United States*, 171 F.2d 1022 (D.C. Cir. 1948) (allowing 9-year old to sit on mother's lap); *State v. Johnson*, 528 N.E.2d 567 (Ohio 1986) (allowing 8-year old to sit on aunt's lap); *Baxter v. State*, 522 N.E.2d 362 (Ind. 1988) (allowing 9-year old to hold hand of support person); *Soap v. State*, 562 P.2d 889 (Okla. Crim. App. 1977) (allowing 7-year old to hold hands with support person).

A certified facility dog, like a seeing eye dog, can remain quiet and still for long periods of time, such that the child can pet the dog and feel it next to her, thereby gaining all the calming benefits without disrupting the courtroom.

Facility Dogs[19]

Facility dogs are used in various jurisdictions, including Washington, Florida, Texas and Maryland with resounding success.[20] Research indicates that

CCI Facility Dog, Ellie,
at work in the forensic interview room

companion animals can decrease a person's heart rate and blood pressure, increase mental clarity, and alleviate depression.[21] The presence of the dog during a child's testimony has been shown to reduce anxiety by promoting a safe feeling and providing contact comfort to the child.[22] A certified facility dog, like a seeing eye dog, can remain quiet and still for long periods of time, such that the child can pet the dog and feel it next to her, thereby gaining all the calming benefits without disrupting the courtroom. Because the judge can give a special instruction and the dog can remain virtually unnoticeable at the child's feet during testimony, the risk of prejudice to the defendant is minimal.

Substantial and positive anecdotal evidence is coming from courtrooms that use facility dogs to aid child witnesses. Prosecutors and judges have noted that the effects of a dog as support are stronger than when the child holds a doll or sits with a support person.[23] Presently, there is no case law regarding facility dogs accompanying witnesses during testimony, however, if the dogs are available to all witnesses by request, including the defendant, a proper jury instruction should minimize any potential prejudice to the defendant.[24] For more information on facility dogs visit NCVLI's website - www.ncvli.org.

Conclusion

Justice cannot require a child to suffer emotional harm in order to convict a guilty person. Fortunately,

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laws now exist to protect children when testifying. According to victim need, a victim's attorney should ask the court to make findings on the record that particular accommodations are necessary. This will promote the child's interest by protecting her in the courtroom, while also protecting the conviction on appeal. Accommodating the child witness in the adult world of criminal justice is the crucial first step in the process of creating a new adage that, "children should be heard, but not harmed." ■

(Endnotes)

1 Nancy Walker Perry & Lawrence S. Wrightsman, The Child Witness: Legal Issues and Dilemmas 37 (1991).

2 George K. Goodhue, Comment, Maryland v. Craig: *Balancing Sixth Amendment Confrontation Rights with the Rights of Child Witnesses in Sexual abuse Trials*, 26 New Eng. L. Rev. 497, 498 (2001).

3 *See* Ala. Code §§ 15-25-1; Ark. Code Ann. § 16-43-1202; Ga. Code. Ann. §17-8-54 (55); 725 Ill. Comp. Stat. 5/106B-5; In. Code. § 35-37-4-6; Ky. Rev. Stat. Ann. § 26A.140; Mo. Ann. Stat. § 491.675-705 (Child Victim Witness Protection Law); N.D. Cent. Code §§ 12.1-35.02 to .06. *See also* 18 U.S.C. § 3509 (Child victims' and child witnesses' rights added Nov 29, 1990).

4 This article addresses only those methods used during testimony. The process of accommodation does not begin or end here, however, as a child must have assistance during investigation, pretrial and post trial of the criminal proceeding to best alleviate trauma.

5 Thirty-eight states have an affirmative Closed Circuit Television (CCTV) statute. For a list of the state statues see: http://www.ndaa.org/pdf/ncpca_statute_tv_testimony_ may_06.pdf (list is incomplete in that it is missing Michigan and West Virginia). Some states have the language "face to face" included in their constitution, for example: Tennessee's Constitution provides, "in all criminal prosecutions, the accused hath the right ... to meet the witnesses face-to-face." Tenn. Const. art. I, § 9. It is unclear whether the state's highest court would interpret this to be a literal requirement, but Tennessee does have a CCTV provision. *See State v. Deuter*, 839 S.W.2d 391 (Tenn. 1992) (not reaching the issue of whether Tennessee affords greater protection than federal); Pennsylvania and Illinois both had similar "face to face" language and were both amended to remove the explicit requirement following *Maryland v. Craig*. Prior to the amendment, Illinois cases held that CCTV violated a defendant's state right to confrontation. *People v. Dean*, 677 N.E.2d 947 (Ill. 1997).

6 Goodman, Gail et. al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Juror's Decision*. 22 Law & Hum. Behav. 165, 187 (1988) (finding children's average score on the State Anxiety Scale were significantly lower for children who were anticipating testifying via CCTV).

7 *Id*. at 197.

8 *Maryland v. Craig*, 497 U.S. 836, 856 (1990)

9 Goodman, *supra* note 6, at 199.

10 *Id*.

11 Debra Whitcomb, *Legal Interventions for Child Victims*, 16 J. Traumatic Stress 149, 153 (2003) (concluding jurors perceived children who testified via CCTV to be less credible than those who testified in court).

12 Allison Cunningham & Pamela Hurley, *Witness Screens*, *in* A Full and Candid Account: Using Special Accommodations and Testimonial Aids to Facilitate the Testimony of Children 2007, at 14 (Centre for Children and Families in the Justice System, Handbook No. 3, 2007).

13 *Id*.

14 *See Smith v. State*, 119 P.3d 411 (Wyo. 2005) (15-year old allowed to hold teddy bear); *State v. Cliff*, 782 P.2d 44 (Idaho Ct. App. 1989) (8-year old holding doll upheld); *State v. Hakimi*, 98 P.3d 809 (Wash. Ct. App. 2004) (7-year old allowed to carry a doll).

15 Amer. Bar Ass'n, The Child Witness in Criminal Cases 31 (2002); Sherrie Bourg Carter, Nat'l Inst. For Trial Advocacy, Children in the Courtroom Challenges for Lawyers and Judges 98 (2005).

16 For example, Connecticut law reads, "an adult who is known to the child and with whom the child feels comfortable shall be permitted to sit in close proximity to the child during the child's testimony, provided such person shall not obscure the child from the view of the defendant or the trier of fact." Conn. Gen. Stat. Ann. § 54-86g(b). *See also* Ark. Code Ann. § 16-42-102 (West 2008); Cal. Penal Code § 868.5; Haw. Rev. Stat. § 621-28; Idaho Code Ann. § 19-3023; Mich. Comp. Laws Ann. § 24.275a (4); Minn. Stat. Ann. § 631.046; N.Y. Exec. Law § 642-a (McKinney 2008); Okla. Stat. tit. 12, § 2611.2 (F); Wash. Rev. Code Ann. §§ 7.69.030 (10), 030A (3). Several states have a general language statute regarding support persons that may be used as authority for accompaniment during testimony: Ariz. Rev. Stat. Ann. § 13-4403; Del. Code Ann. 11, § 5134; 725 Ill. Comp. Stat. 120/4 (a)(9); Ky. Rev. Stat. Ann. § 421.575; R.I. Gen. Laws § 12-28-9. Four states allow a support person to accompany the minor witness during testimony when an alternate mode of testifying has been ordered by the court and testimony is being videotaped to be played back during trial: Neb. Rev. Stat. § 29-1926; Ohio Rev Code Ann. § 2945.481; Ohio Rev Code Ann. § 2907.41 42 Pa. Cons. Stat. §§ 5981, 85.

17 Carol A. Croca, Annotation, *Propriety and Prejudicial Effect of Third Party Accompanying or Rendering Support to Witness During Testimony*, 82 A.L.R. 4th 1038 (I)(2)(a) (2008).

18 Supra n. 12

19 These dogs are often referred to as "therapy dogs." This label is discouraged by some practitioners as defendants may object on the basis that use of a "therapy dog" is prejudicial as it labels the child witness a victim who is in need of therapy. Use of the terms "facility" or "assistance" helps avoids this objection.

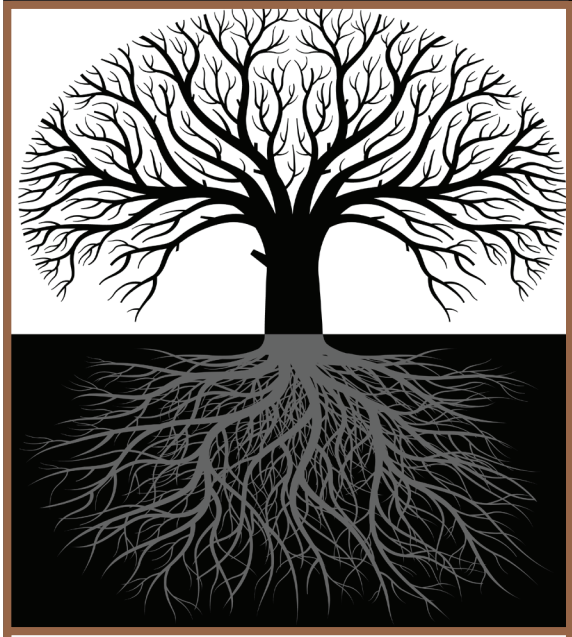
20 *See Children's Victim Advocates have Four Legs, Fur*, The Gainesville Sun, Aug. 26, 2006, Gainesville.com; *Therapy dog works in prosecutor's office to calm victims*, The Baltimore Sun, June 8, 2008, at 1, *available at* WTOPnews.com; Christine Clarridge, *Dedicated service dogs recognized at courthouse function*, The Seattle Times, June 29, 2007, at 1, *available at* Seattletimes.nwsource.com; Therapy Dogs Healing Kid's Hearts with Love, http://www.childadvocacycenter-jc.org/Therapy%20Dogs.htm.

21 Rena Marie Justice, *Animal Assistance Part I: The Use of Animal Assistance at Child Advocacy Centers*, Update (APRI's Nat'l Ctr. for Prosecution of Child Abuse, Alexandria, Va.), 2007, at 1.

22 Rena Marie Justice, *Animal Assistance Part II: Pets in the Courtroom: The New "Comfort Item,"* Update (APRI's Nat'l Ctr. for Prosecution of Child Abuse, Alexandria, Va.), 2007, at 1.

23 *Id.*

24 Sample instruction: Testifying in court is an unfamiliar and stressful event for most people, these dogs are used in the courthouse setting to help reduce witness anxiety and are available to any witness who requests one.



Join the NCVLI-Clinic Network! NCVLI Now Accepting Proposals

NCVLI is now soliciting proposals from nonprofit and/or educational entities to launch four to five new pro bono crime victim legal clinics.

The new clinics, which will join the network of eight existing victims' rights legal clinics, will be supported through subgrants of up to $100,000 from NCVLI with funding from the U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime.

The timeline for submissions, review, and awarding of the subgrants is anticipated to be:

- RFP Available: November 26, 2008
- Letter of Inquiry Due to NCVLI: January 2, 2009
- Proposals Due to NCVLI: January 30, 2009
- Awards Announced: April 2009
- Subgrant Funding Begins: May 2009

Please watch our website at www.ncvli.org for more details.

NCVLI Successfully Completes the Federal Enforcement Project and Launches New State, Federal and Tribal Victims' Rights Enforcement project

By Whitney Grubbs, J.D.

NCVLI has been awarded funding from the Department of Justice, Office of Justice Programs, Office for Victims of Crime (OVC) to continue its work of creating a pro bono legal clinic network aimed at ensuring that victims know their rights and have access to attorneys who will seek enforcement of those rights in state, federal and tribal criminal justice systems. The new funding is for the Crime Victims' Rights Enforcement Project, which is an enhancement of prior rights enforcement projects funded by OVC. The Project has as its primary goal pro bono legal representation of crime victims, effective enforcement of victims' rights nationwide, and education of criminal justice system participants.

To achieve these goals, the Project will continue funding a network of existing pro bono legal clinics located in Arizona, Idaho, New Jersey, New Mexico, Maryland, South Carolina, and Utah. Over the past five years, these clinics, with technical assistance from NCVLI, have fielded over 3,800 requests for legal help and provided free legal representation to more than 1,000 crime victims as they asserted their rights in criminal trial and appellate courts. In addition, the Project will continue funding the Colorado Clinic, which embarked on a planning and outreach phase in 2008, and which will engage in direct representation in 2009. Most excitingly, in 2009, the Project will launch new crime victim legal clinics. With a total of thirteen clinics, the network will serve even more victims across the country helping fulfill the promise to crime victims!

To ensure effective enforcement of victims' rights, the Project will also allow NCVLI to continue provision of expert legal technical assistance to attorneys and advocates nationwide and to train participants in the criminal justice system to better understand substantive victims' rights, the benefit of independent victim participation, and the legal foundation for victims' assertion and enforcement of rights.

In July 2008, NCVLI wrapped up work under the 2006 Federal Crime Victims' Rights Enforcement Project. Throughout the life of the 2-year federal project, NCVLI funded clinics in Arizona, Maryland and South Carolina to enforce crime victims' rights in federal courts, supported the clinics' work through ongoing legal technical assistance, and, together with the clinics, trained 3,104 attorneys, law students, advocates, judges, and others about federal crime victims' rights. The Federal Project, which was also funded through OVC, provided significant lessons that will enhance the new Project and help us advance victims' rights.

Crime Victim Litigation Clinic at Lewis & clark Law School

Back Row: Terry Campos (Instructor), Meg Garvin (Instructor), Preston Anonuevo, Tara Moore. Front Row: Susanna Cowen (Instructor), Ginger Beck, Juanita Duran.

Four Lewis & Clark Law School students are gaining experience answering real life legal questions from across the country, by taking the Fall 2008 Crime Victim Litigation Clinic. The Clinic, taught by NCVLI Staff Attorneys Susie Cowen and Terry Campos, and overseen by Executive Director Meg Garvin, is designed to provide the students practical skills to take into the real world practice of law. The students assist NCVLI attorneys in answering technical assistance requests from practitioners and victim advocates. While the students are one step removed from the victim, they are finding out how rewarding it can be to research, analyze and answer legal questions that affect people's lives. At the same time, the students are also finding out how frustrating it can be when their research turns up no case law on their topic. It only takes one assignment for a student to realize just how new the field of victims' rights law truly is and how cases of first impression are incredibly challenging.

For their first projects the students tackled a myriad of topics: Juanita Duran prepared a memorandum for a practitioner evaluating whether a California crime victim has standing to independently assert her right to restitution by filing a restitution memorandum. Ginger Beck worked to unravel the procedure of victim-led prosecution of misdemeanor crimes in the magistrate courts of South Carolina. Specifically, she addressed what implications Brady motions have on victims in such cases. Preston Anonuevo tackled whether a victim has a right to an interpreter during criminal proceedings in Maryland. Tara Moore became inspired by the use of facility dogs when she researched what accommodations are available for protecting child witnesses during grand jury proceedings in Ohio.

In addition to these interesting research projects, the Clinic hosted guest lectures from leading victims' rights experts. One such speaker, Professor Paul Cassell, graciously provided practice advice about what kinds of arguments to make – and not to make – to judges considering victims' rights cases. The students benefited from his experiences both as a federal district court judge from 2002-07 and as victims' rights attorney both before and after his time on the bench. The speakers generated a lot of interest and excitement, and the students wondered aloud at the unbelievable treatment that victims and victims' attorneys have experienced in the criminal courtroom. Perhaps the Clinic's greatest success is that there are four future attorneys who, regardless of the field of law they practice in, have experience and knowledge in victims' rights to help ensure victims are treated with dignity and respect throughout the justice process. ■

A Victim's Story: Tiffany Edens

By Angela Sanders

Tiffany Edens was 13 years old when Richard Gillmore broke into her Gresham, Oregon home and raped her. She'd spent the evening at home alone practicing a dance routine for her school's jazz dance group, not knowing that the man known as the Jogger Rapist, responsible for a string of unsolved rapes in the 1970s and now again active, was watching her.

That night unleashed a chain of events that Tiffany is still dealing with 22 years later. Besides the emotional damage of being raped, Tiffany has suffered from having her rights as a victim repeatedly violated.

Tiffany's rape occurred just days after Oregon's law granting rights to victims went into effect. Tiffany's mother—considered by the state to be a victim of a burglary since Gillmore had broken into her house—registered so that she could be kept informed of Gillmore's status and would have the opportunity to attend and speak at hearings. When Tiffany's mother registered, she mistakenly spelled Gillmore's name with one "l". As a result, she wasn't notified when the state parole board cut Gillmore's sentence in half.

About a year and a half ago, Tiffany started feeling anxious about Gillmore again and tried to find out what prison he was in. The snafu with the victim notification form had been cleared up, and she assumed that she would have been told had anything significant happened with Gillmore. But, when Tiffany's husband called the state parole board, he learned that just the week before the board had decided to release Gillmore the next month.

Tiffany discovered that she hadn't been notified of the hearing because the town her mother lived in had just been annexed to Gresham, so although she hadn't moved, her mailing address had changed. The board's notice of the hearing came back stamped "no such address", and the board made no further effort to contact her. "Blockbuster managed to find my mother—how come the state couldn't?" Tiffany asked.

Tiffany and her family were outraged, and worried. The state parole board agreed to hold another hearing where she could speak, but they only gave her 16 days notice, they asked her to limit her statement to three minutes, and they didn't tell her that she could request materials, such as Gillmore's psychological evaluation. After an emotionally wrenching hearing, and despite a psychologist's opinion that Gillmore was still dangerous and likely to re-offend, the parole board once again decided to release Gillmore.

At this point, Tiffany didn't know that victims could have legal representation. However, Tiffany's father called a state senator who put him in touch with Crime Victims United, who in turn suggested that the Edens talk to Doug Beloof. At the same time, the local media was abuzz with the news that the Jogger Rapist was going to be released. Also, the Multnomah County District Attorney was preparing to file suit against the state parole board, the first time it had been done in Oregon's history. "I felt so much more confident and secure having this army of brains behind me to ensure I have my rights," Tiffany said.

. . . she assumed that she would have been told had anything significant happened with Gillmore. But, when Tiffany's husband called the state parole board, he learned that just the week before the board had decided to release Gillmore the next month.

In January, 2008, Beloof and Multnomah County were successful in getting the board to withdraw its decision. In June the parole board held another hearing. Tiffany is still waiting for the board's decision. Meanwhile, an inmate at the prison where Gillmore is held reported that Gillmore has threatened to exact revenge on Tiffany when he's released.

At last, on October 1st, the parole board ruled against releasing Gillmore, saying that he is still a threat to society. He won't be eligible for parole for another two years.

To victims' rights attorneys and advocates, Tiffany says, "Remember that victims aren't lawyers and might not understand everything that you say, but we need to be kept in the loop. Victims are often fragile—anxious, shocked, and terrorized. Keep the lines of communication open."

Tiffany recently decided to explore starting a nonprofit foundation to spread the word to victims that they have rights and to provide attorneys for victims. "I want victims to feel empowered and not guilty and not ashamed. I want to share my ability to take action," she says. ■

NCVLI's Technical Assistance and Brief Bank

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

Whether:

- a criminal defendant can sue a crime victim for defamation based on victim impact statement given during a sentencing hearing.
- an Idaho victim's attorney can stand in the shoes of the victim for purposes of fulfilling the crime victim's statutory right to read the defendant's pre-sentence investigation report prior to the sentencing hearing when the victim is personally unable to read the PSI herself.
- crime victims in Idaho are able to speak at probation revocation hearings of a defendant who has failed to pay court ordered restitution to the victims during his probation.
- granting prosecutor a two week continuance in a complex homicide trial violates defendant's statutory and constitutional speedy trial rights where defendant, after asserting speedy trial rights, already requested and received continuances from the court and where prosecutor request is due to a scheduling conflict.

- defense counsel's failure to request leave to prepare a response to a victim impact statement constitutes ineffective assistance of counsel.
- court may order restitution for a murder victim's future lost income.
- emails and password-protected MySpace communications that detail a minor sexual assault victim's sexual history and experience are admissible to establish an alternate source of the victim's sexual knowledge, when that victim is a teenager at the time of prosecution and when the offense occurred prior to the history and experience at issue.

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 issues listed above are a sampling of some of NCVLI's work since our last newsletter. If you are an attorney or advocate seeking technical assistance, please contact NCVLI at 503-768-6819, or at www.ncvli.org. ■

Federal employees can give to NCVLI through the Combined Federal Campaign (CFC), http://www.opm.gov/CFC/. NCVLI's CFC number is 48652.

Also, please consider using Goodsearch, http://www.goodsearch.com/, for your internet searches and to shop online. Goodsearch is free, and every time you use it Goodsearch makes a donation to NCVLI.

NCVLI welcomes story ideas and suggestions for future articles that spotlight an attorney, service provider, advocate, or public or private citizen working on behalf of crime victims.

Please send newsletter ideas and/or stories to:

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