

Crime Victims Must Be Afforded Meaningful Notice When Offenders Claim Actual Innocence or Request DNA Testing as Part of Appellate Review

Victims' involvement with the justice system may last long after the offender is convicted and sentenced. By way of example, many victims may continue to have concerns regarding an offender's release or escape, probation or parole proceedings may loom, and restitution collection may prove challenging. In addition, when offenders challenge their convictions and/or sentences it may result in years of interaction with the system, which can lead to secondary victimization for victims.¹

Many victims' rights extend to these "after conviction" realities, including when offenders raise claims of actual innocence or request DNA testing.² This is true whether the challenge is through an offender's direct appeal³ or through other post-conviction avenues, such as habeas corpus petitions.⁴ Victims' meaningful exercise of their rights requires not only that they be informed of those rights but also that they be provided timely notice of all events and processes that implicate these rights.

The right of victims to notice of offenders' challenges to their convictions as well as requests for DNA testing may be explicit, as is the case in some jurisdictions.⁵ Notably, even if there is not an explicit right for victims to be notified of a specific event, because other rights may be lost, notice must be provided. Among the rights that may be implicated when offenders make claims of actual innocence or request DNA testing are victims' rights to privacy, to be treated with fairness, dignity and respect, to protection and to be heard. It is well-established that protecting the privacy of victims and ensuring that they are treated with fairness, dignity and respect are compelling state interests and matters of utmost importance to victims.⁶ Although the rights of "fairness," "dignity" and "respect" are broad and seemingly abstract, these are enforceable rights with unique meaning.⁷ Victims' privacy and dignity interests may be implicated in a variety of ways by offenders' appeals, claims of actual innocence and requests for DNA testing. For example, as a result of such claims, victims may be contacted by defense counsel, agents of the courts, and others seeking interviews or depositions, or asking that victims submit DNA for testing. Further, offenders' claims of actual innocence on appeal may result in unwanted media

attention. Victims' rights to protection⁸ and to be heard⁹ about post-conviction claims may also be implicated.

In light of these rights, timely notice of offenders' challenges is required; what constitutes "timely" is notice adequate to ensure that a victim can consider whether, when and how to assert and seek protection of the rights implicated. This understanding of notice—mandating notice when a right is at risk—is rooted in due process. Moreover, due process requires not only that notice is provided, but also that it is afforded in a meaningful manner.¹⁰ Thus, due process requires that victims are provided prompt notice of offenders' appellate claims—including requests for DNA testing—as well as of victims' other rights implicated by the offenders' claims, so that they may knowingly and voluntarily exercise or waive their rights.¹¹ Only with sufficient notice may victims make informed decisions about whether, when and how to exercise their rights and mitigate the risk of re-victimization.¹²

Victims' rights also include the right to receive sufficient information about post-conviction processes—in non-legal and accessible language—so that victims' choices are informed choices. To facilitate these informed decisions, victims should be given the choice about whether and how to receive notice as soon as practicable after conviction, and should be provided with contact information for the specific personnel or agency they may contact if they wish to change their notice elections at any time in the future. Lastly, as to the question of "what" the notice should look like, where victims have elected to receive notice, notice must be provided in a trauma-informed manner and using methods selected by the victims to ensure accessibility and respect for safety concerns.

Vigorous compliance with and enforcement of victims' rights in the context of offenders' challenges to their convictions or sentences is critical to victim agency and is a key part of preventing or reducing secondary victimization experienced by many victims.

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¹ Secondary victimization is "victimization that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim." U.N. Office for Drug Control & Crime Prevention, Handbook on Just. for Victims 9 (1999), https://www.unodc.org/pdf/criminal_justice/UNODC_Handbook_on_Justice_for_victims.pdf. See also, e.g., Pamela Tontodonato & Edna Erez, *Crime, Punishment, and Victim Distress*, 3 Int'l R. of

Victimology 33, 34 (1994) (defining “secondary victimization” as “the wounds suffered by victims when they come in contact with the criminal justice system as complainants or witnesses”); Malini Laxminarayan, *Procedural Just. and Psychol. Effects of Crim. Proc.: The Moderating Effect of Offense Type*, 25 Soc. Just. Res. 390, 392 (2012) (describing “secondary victimization” as “negative experiences” caused by criminal proceedings or “societal reactions in response to a primary victimization that may be perceived as a further violation of rights or entitlements by the victim”). For a discussion of secondary victimization and its impact on victims, see *Polyvictims: Victims’ Rights Enforcement as a Tool to Mitigate “Secondary Victimization” in the Crim. Just. Sys.*, Victim Law Bull. (Nat’l Crime Victim Law Inst., Portland, Or.), Mar. 2013, <https://law.lclark.edu/live/files/13798-polyvictims-victims-rights-enforcement-as-a-tool>.

² Some jurisdictions require that victims be provided services when defendants claim actual innocence and request DNA testing on appeal. See, e.g., N.C. Gen. Stat. Ann. § 15A-269(g) (providing that “[u]pon receipt of a motion for postconviction DNA testing, the State shall, upon request, reactivate any victim services for the victim of the crime being investigated during the reinvestigation of the case and pendency of the proceedings”). This paper focuses on victims’ rights and a thorough review of mandated victim services is outside of its scope.

³ Offenders may make post-conviction claims asserting actual innocence—including requests for DNA testing—through direct appeals and as part of other post-conviction proceedings, including in connection with petitions for writs of habeas corpus. Generally speaking, an appeal is:

The process of seeking review of a conviction, court decision or procedure by a higher legal authority within the jurisdiction, based on the facts and circumstances reflected in the transcripts and documents associated with the criminal proceeding. This is commonly referred to as a ‘direct appeal.’ Within the context of a state criminal proceeding, the appellate process commonly involves the review of a conviction, trial court decision, or procedure by an intermediate appellate court in the state; additional review of the intermediate court’s decision may be sought from the state’s highest court. If the issues raised on appeal involve federal constitutional rights, further review may be sought from the United States Supreme Court; grants of this review are rare.

Post-Conviction Select Definitions, Rights Enforcement Toolkit (Nat’l Crime Victim Law Inst., Portland, Or.), at 1, <https://law.lclark.edu/live/files/26730-post-conviction-select-definitions-document-sep>.

⁴ A federal writ of habeas corpus is “[a] challenge to a conviction brought in federal court after the conclusion of any direct appeals or other post-conviction proceedings that is based on an assertion that a convicted person’s federal constitutional rights were violated.” *Post-Conviction Select Definitions*, *supra* note 3, at 2. Habeas petitions filed by state prisoners in federal district court are governed by 28 U.S.C. § 2254. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA), which amended the habeas corpus statutes to limit federal habeas review of state cases in an effort to “curb the abuse of the . . . writ of habeas corpus, and to address the acute problem of unnecessary delay[s].” H.R. Conf. Rep. No. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 944. Notably, claims of actual innocence—if proved—permit an offender to overcome the procedural bars and statute of limitations established by the AEDPA. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (holding that

“actual innocence, if proved, serves as a gateway through which a prisoner may pass whether the impediment is a procedural bar, as in *Schlup [v. Delo]*, 513 U.S. 298 (1995), or *House [v. Bell]*, 547 U.S. 518 (2006), or, as in this case, expiration of the statute of limitations”).

⁵ See, e.g., Ariz. Rev. Stat. Ann. § 13-4411(D) (providing that “[o]n request of the victim, the prosecutor’s office that is responsible for handling any post-conviction or appellate proceedings immediately shall notify the victim of the proceedings and any decisions that arise out of the proceedings”); Ark. Code Ann. § 16-90-1108 (providing that “[i]f the defendant appeals or pursues a post-conviction remedy, the Attorney General, as to cases handled by the Attorney General, shall promptly inform the victim of: (1) That fact; (2) The date, time, and place of any hearing; and (3) The decision”); Md. Code Ann., Crim. Proc. §§ 8-301(d)(1), (2) (requiring that before a hearing is held on an offender’s petition for writ of actual innocence that “the victim or victim’s representative shall be notified of the hearing” and that “[a] victim or victim’s representative has the right to attend a hearing”); Md. Code Ann., Crim. Proc. §§ 11-503(c), (d) (requiring the State’s Attorney’s office to “notify the victim or victim’s representative of all appeals to the Court of Special Appeals and the Court of Appeals” and thereafter to “notify the victim or victim’s representative of each subsequent date pertinent to the appeal, including dates of hearings, postponements, and decisions of the appellate courts”; and also requiring that any notice sent “include the date, the time, the location, and a brief description of the subsequent proceeding”); Md. R. Special Proc. R. 15-1206(b) (requiring the State’s Attorney to “give notice to each victim and victim’s representative who has filed a Crime Victim Notification Request form pursuant to Code, Criminal Procedure Article, § 11-104 or who has submitted a written request to the State’s Attorney to be notified of subsequent proceedings as provided under Code, Criminal Procedure Article, § 11-503” of the filing of “a petition for a writ of error coram nobis[,]” that “the petition has been denied without a hearing or the date, time, and location of the hearing[,]” and that “each victim or victim’s representative may attend any hearing and request the opportunity to be heard”); Mass. Gen. Laws Ann. ch. 278A, §§ 14(a), (b) (requiring the prosecuting attorney to provide notice to a victim: (1) if the convicted offender files a motion alleging actual innocence and seeking forensic or scientific analysis; and (2) “if the court allows a motion for forensic or scientific analysis[;]” and that (3) “if the victim is notified of the allowance of the motion” the prosecuting attorney “shall promptly notify the victim of the result of the analysis”); Mich. Comp. Laws Ann. §§ 770.16(1), (11) (providing for the ability of offenders convicted of felonies before a certain date to petition the circuit court to order DNA testing of biological material and for a new trial based on the results of that testing; and requiring that “[i]f the name of the victim of the felony conviction . . . is known, the prosecuting attorney shall give written notice of a petition under this section to the victim[,]” and that “[u]pon the victim’s request, the prosecuting attorney shall give the victim notice of the time and place of any hearing on the petition and shall inform the victim of the court’s grant or denial of a new trial to the defendant”); N.H. Rev. Stat. Ann. § 21-M:8-k(II)(w) (providing for the right of victims “to be informed of the filing of a petition for post-conviction DNA testing under RSA 651-D”); Vt. Stat. Ann. tit. 13, § 5315 (providing that “[i]f the defendant appeals or pursues a post-conviction remedy, the prosecutor’s office shall promptly inform the victim of a listed crime of that fact, shall explain the significance of such a proceeding and shall promptly notify the victim of the date, time and place of any hearing and of the decision”). See also N.C. Gen. Stat. Ann. § 15A-1468(b) (providing that “[t]he Director [of the North Carolina Innocence Inquiry Commission] shall use all due diligence to notify the victim at least 30 days prior to any proceedings of the full Commission held in regard to the victim’s

case[.]” and that “the victim is permitted to attend proceedings otherwise closed to the public, subject to any limitations imposed by this Article”).

Notably, the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771, was amended in 2006 to include section 3771(b)(2), which provides that “[i]n a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).” 18 U.S.C. § 3771(b)(2)(A). The explicitly enumerated habeas-specific rights are: the “right not to be excluded from any . . . public court proceeding”; the “right to be reasonably heard at any public proceedings involving release, plea, sentencing or any parole proceeding”; the “right to proceedings free from unreasonable delay”; and the “right to be treated with fairness and with respect for the victim’s dignity and privacy.” 18 U.S.C. § 3771(a)(3), (4), (7), (8). When state convictions are challenged in federal courts by way of habeas petitions under 28 U.S.C. § 2254, it is unclear how many crime victims actually receive notice of the proceedings such that they can meaningfully exercise their other CVRA rights. This uncertainty may be attributed, in part, to a lack of empirical data on victim notification of habeas petitions; it may also be attributed to the CVRA’s failure to explicitly charge any specific person or agency with providing notice or other assistance to a state crime victim in federal habeas proceedings. Thus, the structure of the law itself creates a gap in the system. Nevertheless, because the federal courts are charged with “ensur[ing] that a crime victim is afforded [his or her] rights” under the CVRA, 18 U.S.C. § 3771(b)(1), the federal courts in which the habeas petitions are pending are obligated to provide crime victims with the requisite notice of all proceedings. In practice, state agencies are generally in a better position to provide notice to victims—at least with regard to the commencement of the federal habeas action—because they should already have the crime victims’ contact information or can more easily locate this information.

⁶ Some combination of victims’ rights to privacy and to be treated with fairness, dignity, and respect is found in many jurisdictions’ laws nationwide. *See, e.g.*, 18 U.S.C. § 3771(a)(8) (treated with fairness and with respect for the victim’s dignity and privacy); Ariz. Const. art. 2, § 2.1(A)(1) (treated with fairness, respect, and dignity); Cal. Const. art. I, § 28(b)(1) (treated with fairness and respect for privacy and dignity); Colo. Rev. Stat. § 24-4.1- 302.5(1)(a) (treated with fairness, respect, and dignity); Conn. Const. art. 1, § 8(b)(1) (treated with fairness and respect); Fla. Const. art. I, § 16(b)(1) (treated with fairness and respect for the victim’s dignity); Ga. Const. art. I, § 1, ¶ XXX(a) (accorded the utmost dignity and respect and be treated fairly by the criminal justice system); Haw. Rev. Stat. § 801D-1 (treated with dignity, respect, courtesy, and sensitivity); Idaho Const. art. 1, § 22(1) (treated with fairness, respect, dignity and privacy); Ill. Const. art. 1, § 8.1(a)(1) (treated with fairness and respect for victim’s dignity and privacy); Ind. Const. art. 1, § 13(b) (treated with fairness, dignity, and respect); Kan. Stat. Ann. § 74-7333(a)(1) (treated with courtesy, compassion, and respect for victim’s dignity and privacy); La. Const. art. I, § 25 (treated with fairness, dignity, and respect); Md. Const. Decl. of Rights art. 47(a) (treated with dignity, respect, and sensitivity); Mich. Const. art. 1, § 24(1) (treated with fairness and respect for victim’s dignity and privacy); Miss. Const. art. 3, § 26A(1) (treated with fairness, dignity, and respect); Nev. Const. art. I, § 8A(1)(a) (treated with fairness and respect for victim’s privacy and dignity); N.H. Rev. Stat. Ann. § 21-M:8-k(II)(a) (treated with fairness and respect for victim’s dignity and privacy); N.J. Const. art. 1, § 22 (treated with fairness, compassion, and respect); N.M. Const. art. 2, § 24(A)(1) (treated with fairness and respect for victim’s dignity and privacy); N.C. Const. art. I, § 37(1) (treated with dignity and respect by the criminal justice system); Ohio Const. art. I, § 10a(A)(1) (treated with fairness and respect for victim’s

safety, dignity and privacy); Okla. Const. art. II, § 34 (A)(treated with fairness and respect for victim’s safety, dignity and privacy); Or. Const. art. I, § 42(1) (accorded due dignity and respect); Pa. Const. Stat. § 11.102(1) (treated with dignity, respect, courtesy, and sensitivity); R.I. Const. art. 1, § 23 (treated with dignity, respect, and sensitivity); S.C. Const. art. I, § 24(A)(1) (treated with fairness, respect, and dignity); Tenn. Code Ann. § 40-38-102(a)(1) (treated with dignity and compassion); Utah Const. art. I, § 28(1)(a) (treated with fairness, respect, and dignity); Vt. Stat. Ann. tit. 13, § 5303(a) (treated with dignity and respect); Va. Const. art. I, § 8-A(2) (treated with respect, dignity and fairness); Wash. Const. art. 1, § 35 (accorded due dignity and respect); Wis. Const. art. I, § 9m (treated with fairness, dignity, and respect for privacy). If a victim is to be treated with dignity, fairness and respect, his/her/their privacy must be honored and protected. *Cf. Schmerber v. California*, 384 U.S. 757, 769-70 (1966) (observing in the context of searches and seizures that the Fourth Amendment protects the twin “interests in human dignity and privacy”). *See also Johnson v. Carroll*, Civ. Act. No. 05-237-KAJ, 2011 WL 12854409 (D. Del. Jan. 18, 2011) (ordering documents sealed in habeas proceeding to protect the victim’s privacy under both the CVRA and 18 U.S.C. § 3509).

⁷ Notably, one state, Utah, has statutorily defined the terms. *See* Utah Code Ann. §§ 77-38-2(2) (defining dignity as “treating the crime victim with worthiness, honor, and esteem”), (3) (defining fairness as “treating the crime victim reasonably, even-handedly, and impartially”), (8) (defining respect as “treating the crime victim with regard and value”).

⁸ Defense-initiated requests for victim information may implicate a victim’s rights to protection and to be free from harassment and intimidation. *See, e.g.*, 18 U.S.C. § 3771(a)(1) (guaranteeing crime victims the right to reasonable protection from the accused); Alaska Const. art. 1, § 24 (granting victims “the right to be reasonably protected from the accused”); Ariz. Const. art. 2, § 2.1(A)(1) (according victims the right “to be free from intimidation, harassment, or abuse, throughout the criminal justice process”); Conn. Const. art. 1, § 8(b)(3) (guaranteeing victims “the right to be reasonably protected from the accused”); Ill. Const. art. 1, § 8.1(a)(8) (granting victims “[t]he right to be reasonably protected from the accused”); Mich. Const. art. I, § 24(1) (guaranteeing victims the “right to be reasonably protected from the accused”); Mo. Const. art. I, § 32(1)(6) (granting victims the “right to reasonable protection from the defendant or any person acting on behalf of the defendant”); N.M. Const. art. II, § 24(A)(3) (granting victims the “right to be reasonably protected from the accused”); Ohio Const. art. I, § 10a(A)(4) (according victims the right “to reasonable protection from the accused or any person acting on behalf of the accused”); Or. Const. art. I, § 43(1)(a) (granting victims the “right to be reasonably protected from the criminal defendant”); S.C. Const. art. I, § 24(A)(6) (granting victims the right to “be reasonably protected from the accused or persons acting on his behalf”); Tenn. Const. art. I, § 35(2) (granting victims “the right to be free from intimidation, harassment and abuse throughout the criminal justice system”); Wis. Const. art. I, § 9m (granting victims the right to “reasonable protection from the accused”).

⁹ Although under the CVRA state crime victims have the right to be reasonably heard and to be present at federal habeas proceedings, 18 U.S.C. § 3771(b)(2)(A), (a)(3)-(4), as one federal court has acknowledged, “[m]ost habeas cases are resolved on the pleadings without in-court hearings.” *Pann v. Warren*, No. 5:08-CV-13806, 2010 WL 2836879, at *4 (E.D. Mich. July 19, 2010). As a result, in federal habeas cases, crime victims’ exercise of their rights to be present and to be heard must be construed to include the right to submit written pleadings and to have their submissions fully considered before the court issues a decision. *See id.* (affording the crime victims their right to be heard by accepting their filings for review

in the habeas proceeding); *see also* *Brandt v. Gooding*, 636 F.3d 124, 136-37 (4th Cir. 2011) (concluding that the “habeas petition initiated a ‘public proceeding’ within the meaning of the” CVRA and that the district court afforded the victim her “right to be reasonably heard by construing her submissions as amicus briefs”). Indeed, “[t]o preclude crime victims from submitting documents to the court in support of their right to be heard in a habeas proceeding would effectively preclude them from being [present and] heard at all in most cases.” *Pann*, 2010 WL 2836879, at *4. For more information about victims’ rights in federal habeas corpus proceedings, see *The Long and Confusing Road of the Crim. Just. Sys. After Conviction: Victims’ Rights in Habeas Corpus Proc. and Pardons*, (Nat’l Crime Victim Law Inst., Portland, Or.), Feb. 2018, <https://law.lclark.edu/live/files/25757-victims-rights-in-habeas-and-pardonspdf>.

¹⁰ *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 123, 168 (1965)) (explaining that “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner’”).

¹¹ As the United States Supreme Court has noted, at the heart of due process is the idea that “[p]arties whose rights are to be affected are entitled to be heard and, in order that they may enjoy that right, they must first be notified.” *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (internal citations omitted). *See also Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (internal citations omitted) (“For more than a century the central meaning of procedural due process has been clear: ‘Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.’ It is equally fundamental that the right to notice and an opportunity to be heard ‘must be granted at a meaningful time and in a meaningful manner.’ These essential constitutional promises may not be eroded.”); *People v. Scott*, No. F065665, 2014 WL 130479, at *5 (Cal. Ct. App. Jan. 15, 2014) (citing *Fuentes* for the proposition that due process requires notice); *Smith v. State*, 676 S.E.2d 750, 755 (Ga. Ct. App. 2009) (same); *Conner v. Dep’t of Commerce*, 443 P.3d 1250, 1262-63 (Utah Ct. App. 2019) (quoting *McBride v. Utah State Bar*, 242 P.3d 769 (Utah 2010)) (“Procedural due process requires, at a minimum, timely and adequate notice and an opportunity to be heard in a meaningful way.”).

¹² Notice is critically important to victim agency as it helps ensure that victims have the information necessary to make fundamental decisions affecting their lives. *See* Paul G. Cassell, *Balancing the Scales of Just.: The Case for and the Effects of Utah’s Victims’ Rights Amendment* 1994 Utah L. Rev. 1373, 1389 (1994) (discussing the anxiety and fear experienced by victims due to a lack of notice of proceedings). *See also* Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Law. for Sexual Assault Victims*, 13 Ohio St. J. Crim. L. 67, 68 (2015) (describing “agency” as “akin to the concept of crime victim autonomy, and at its core is the right and power of individuals to make fundamental decisions about their lives[,]” and arguing that providing independent lawyers for sexual assault victims in civilian criminal processes will improve victim agency and reduce secondary victimization). When respect for victim agency is demonstrated in the aftermath of crime, participation in the criminal justice system can be beneficial for crime victims. *See, e.g.,* Margaret E. Bell, et al., *Battered Women’s Perceptions of Civil and Crim. Ct. Helpfulness: The Role of Ct. Outcome and Process*, 17 Violence Against Women 71, 72 (2011) (noting that studies of intimate partner violence and rape victims “have in fact found that positive experiences in the justice system are associated with less physical and psychological distress and better posttraumatic adjustment”); Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. of Traumatic Stress 159, 160-61 (2003) (discussing

potential benefits of participating in the justice system); Jim Parsons & Tiffany Bergin, *The Impact of Crim. Just. Involvement on Victims' Mental Health*, 23 J. of Traumatic Stress 182, 182 (2010) (same).

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