NCVLI
NATIONAL CRIME VICTIM LAW INSTITUTE
PROTECTING, ENFORCING & ADVANCING VICTIMS' RIGHTS

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of Crime Victim Law

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# Interpreters: A Requirement for Meaningful Exercise of Victims' Rights by Non-English Speaking[1] Victims[2]

*by Sarah A. LeClair, J.D.*

For non-English speaking victims[3] accessing courts and effectuating their rights can be daunting. According to a 2011 American Community Survey conducted as part of the U.S. Census Bureau, more than 60 million persons in the United States who are age 5 or older—about 20 percent of the population—speak a language other than English at home.[4] Modern crime victims' rights envisions victims meaningfully exercising their rights and being active participants in the system.[5] Yet, a "high level of English proficiency is required for meaningful participation in court proceedings due to the use of legal terms, the structured nature of court proceedings, and the stress normally associated with a legal proceeding when important interests are at stake."[6] Thus, to

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[1] Consistent with the Model Court Interpreter Act definition, the term "non-English speaking" is used throughout this article to refer to both non-English speaking persons as well as those with limited-proficiency in the English language. *See infra* note 3.

[2] NCVLI is actively working on the intersection of victims' rights and the use of interpreters by non-English speaking victims as part of its work under the Legal Assistance for Crime Victims: An OVC Capacity Building Initiative. Through that Initiative, OVC TTAC and NCVLI are working collaboratively to expand the availability of pro bono and no-cost legal assistance for victims of crime nationally and to provide resources designed to give attorneys the tools needed to increase their knowledge base about crime victim issues. For additional information about the Initiative and to stay up-to-date on future work on this topic, please visit NCVLI's website or https://www.ovcttac.gov/.

[3] A non-English-speaking person is "any principal party in interest or witness participating in a legal proceeding who has limited ability to speak or understand the English language." Model Court Interpreter Act § 2B (1995) (Model Act), *reprinted in* William E. Hewitt, *Court Interpretation: Model Guides for Policy and Practice in the State Courts* 215-34 (1995).

[4] 2011 U.S. Census Bureau, *available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/ product-view.xhtml?pid=ACS_11_1YR_S1601&prodType=table.

[5] *See Kenna v. United States Dist. Ct. for the Cent. Dist. of Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006) ("The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard. The Crime Victims' Rights Act sought to change this by making victims independent participants in the criminal justice process.").

[6] ABA Standing Committee on Legal Aid and Indigent Defendants, ABA Standards for Language Access in Courts (Adopted as ABA policy on February 6, 2012), at 1, *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf. The ABA Standards further explain that:

> Lack of language access services exacts a serious toll on the justice system. Although there is scant national data on the number of LEP [limited-English proficient] persons involved in court proceedings, there is ample experience and anecdotal evidence to substantiate that many LEP persons regularly come before the courts and are unable, without language access services, to protect or enforce their legal rights, with devastating consequences to life, liberty, family, and property interests. Persons who are unable to communicate in English are also likely to have limited understanding of their rights and of the role of the courts in ensuring that rights are respected. The language barrier exacerbates this lack of awareness, and effectively prevents many LEP persons from accessing the system of justice.

*Id.* at 1-2 (internal citation omitted).

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# Message from the Director

*by Meg Garvin, M.A., J.D.*

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From Left to Right: Jeff Hanson, Amy Liu, Meg Garvin, Marissa Behringer, Alison Wilkinson, Rebecca Khalil, Johanna Borkan, Sarah LeClair, Terry Campos, Scott Flor. Not Pictured: Julie Landrum, Goldann Salazar.

"Access to justice" is about each individual's access to courts, fair hearings before tribunals, and availability of remedies for violations of rights. It is axiomatic that there can be no access to justice where individuals do not have knowledge of their rights, or when the tools with which to make those rights meaningful are out of reach. Improving access to justice requires removing barriers that stand in the way of procedural and substantive justice whether those barriers are physical, gender-based, economic, linguistic, educational, racial, developmental, or psychological. The 15th edition of NCVLI's *Newsletter of Crime Victim Law* includes articles and features addressing barriers to accessing justice and how victims' rights can and must be leveraged to remove these barriers. Throughout this edition we pay particular attention to hurdles polyvictims (those who experience multiple victimizations of different types) may face when trying to access justice. Although polyvictims share many of the same concerns and face many of the same hurdles as other crime victims, they may also face unique challenges that require unique assistance.

In *Interpreters: A Requirement for Meaningful Exercise of Victims' Rights by Non-English Speaking Victims*, Sarah LeClair tackles how language may act as a barrier to justice. The article notes that although securing interpreters for defendants has become common place, providing interpreters for victims tends to be an afterthought, and even then is too often limited to those times when victims testify as witnesses or provide victim impact statements. The article challenges this normative reality, setting forth how victims' rights require appointment of an interpreter to assist non-English speaking victims throughout the criminal proceedings.

In *Facility Dogs: Helping Victims Access Justice and Exercise Their Rights*, Rebecca Khalil demystifies the language and law surrounding the use of facility dogs during court processes. The article addresses how facility dogs may assist victims in being able to meaningfully exercise their rights, including the rights to be present and heard, and therefore how these dogs can help victims to access justice.

We continue the theme in our standard features where we spotlight the work happening in the field every day to increase access to justice for crime victims. For instance, it is well-accepted that access to justice, at times, requires access to counsel. In *Pro Bono Corner* we spotlight lawyers who fight to help victims. In *Case Spotlight* we focus on the landmark decision *Airman First Class (E-3) LRM v. Lieutenant Colonel Kastenberg*, in which the Court of Appeals for the Armed Forces recognized the right of sexual assault victims to have independent counsel during court martial proceedings to protect their rights to privacy and to be heard.

Our goal with this edition is to help improve access to justice for all crime victims. We hope that the articles and practice tips provided help us reach that goal!

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Interpreters: A Requirement . . . **continued from page 1**

achieve the promise of modern victims' rights, non-English speaking victims require interpreters.[7]

Victims' rights to fairness, dignity, respect, due process, and to be present and heard, together with a jurisdiction's laws on appointment of interpreters and sound public policy, support appointment of interpreters throughout criminal court proceedings[8] to assist non-English speaking victims.[9]

## A Non-English Speaking Victim's Rights Require Appointment of an Interpreter

Some combination of the broad rights to fairness, dignity, and respect is found in jurisdictions nationwide. A majority of states explicitly provide victims with the right to be treated with fairness, dignity, and respect.[10] Further, many state constitutions explicitly afford due process to victims of crime,[11]and where state constitutions do not explicitly provide for it, guarantees of dignity, respect, fairness, and the right to be heard, encompass basic notions of due process.[12]

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[7] "Although the term 'translate' is frequently used interchangeably with or instead of 'interpret,' the activities are distinct and require different skills. Interpreting is oral rendering of one spoken language into another, while translation is the rendering of a written document from one language into a written document in another language. The Model Act recognizes that court interpreters will be required to perform *sight translations*, which involves reading and orally translating a written document." Model Act, *supra* note 3, at n. 4 (emphasis in original).

[8] This article focuses on the appointment of interpreters in state criminal court proceedings. A complete discussion of this topic as applied to federal courts is outside the scope of this article.

[9] U.S. Department of Justice guidance documents conclude that federal law—namely Title VI and the Safe Streets Act—require meaningful access by limited-English proficient (LEP) persons in all programs and activities that receive federal financial assistance from DOJ, including state court operations. *See, e.g.*, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,471 (June 18, 2002) (directing court recipients of financial assistance from DOJ that: "At a minimum, every effort should be taken to ensure competent interpretation for LEP individuals during all hearings, trials, and motions during which the LEP individual must and/or may be present."). The Assistant Attorney General for the Civil Rights Division issued a guidance letter in August 2010 to all Chief Justices and State Court Administrators describing the obligation of state courts under Title VI to provide LEP individuals with meaningful access to court proceedings, notwithstanding any conflicting state or local laws or court rules. Letter from Assistant Attorney General Thomas Perez to Chief Justices and State Court Administrators 1 (Aug. 16, 2010) (Guidance Letter), *available at* www.lep.gov/final_courts_ltr_081610.pdf (noting that "[t]he Supreme Court has held that failing to take reasonable steps to ensure meaningful access for LEP persons is a form of national origin discrimination prohibited by Title VI regulations"). In the Guidance Letter, DOJ identified areas of "particular concern[,]" which include courts that limit the types of proceedings for which qualified interpreter services are provided by the court, and courts that charge persons involved with a case for the cost of interpreter services. *Id.* at 2. With respect to the first concern about courts that limit the types of proceedings, DOJ emphasized that it "views access to *all* court proceedings as critical[,]" and that "[c]ourts should also provide language assistance to non-party LEP individuals whose presence or participation in a court matter is necessary or appropriate, including parents and guardians of minor victims of crime[.]" *Id.* (emphasis in original). With respect to the cost of interpreter services, DOJ explained that "court proceedings are among the most important activities conducted by recipients of federal funds[,]" and, as such, "DOJ expects that, when meaningful access requires interpretation, courts will provide interpreters at no cost to the persons involved." *Id.* In the vast majority of jurisdictions, the meaningful presence and participation of a victim during court proceedings—including, but not limited to, trial—involves the exercise of that victim's constitutional or statutory rights and, as such, would be "necessary or appropriate" by definition. Thus, federal law provides additional authority requiring courts to provide interpreters free of charge to effectuate the right of non-English speaking victims to meaningful access to the courts.

[10] *See, e.g.,* Ariz. Const. art. 2, § 2.1(A)(1) (treated with fairness, respect, and dignity); Conn. Const. art. 1, §8(b)(1) (treated with fairness and respect); Idaho Const. art. 1, § 22(1) (treated with fairness, respect, and dignity); Ill. Const. art. 1, § 8.1(a)(1) (treated with fairness and respect for victim's dignity); Ind. Const. art. 1, § 13(b) (treated with fairness, dignity, and respect); 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. I, § 24(1) (treated with fairness and respect for victim's dignity); Miss. Const. art. 3, § 26A (treated with fairness, dignity, and respect); N.J. Const. art. I, § 22 (treated with fairness, compassion, and respect); N.M. Const. art. II, § 24(A)(1) (treated with fairness and respect for victim's dignity); Ohio Const. art. I, § 10a (accorded fairness, dignity, and respect); Okla. Const. art. II, § 34 (treated with fairness, respect, and dignity); 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); Utah Const. art. I, § 28(1)(a) (treated with fairness, respect, and dignity); Va. Const. art. I, § 8-A (accorded fairness, dignity, and respect); Wash. Const. art. 2, § 35 (accorded due dignity and respect); Wis. Const. art. I, § 9(m) (treated with fairness and dignity); Cal. Penal Code § 679 (treated with dignity, respect, courtesy, and sensitivity); Colo. Rev. Stat. Ann. § 24-4.1-302.5(1)(a) (treated with fairness, respect, and dignity); Haw. Rev. Stat. Ann. § 801D-1 (treated with dignity, respect, courtesy, and sensitivity); Kan. Stat. Ann. § 74-7333(a)(1) (treated with courtesy, compassion, and respect for victim's dignity); N.H. Rev. Stat. Ann. § 21-M:8-k(II)(a) (treated with fairness and respect for victim's dignity); Tenn. Code Ann. § 40-38-102(a)(1) (treated with dignity and compassion); Vt. Stat. Ann. tit. 13, § 5303(a) (treated with dignity and respect).

[11] *See, e.g.*, Ariz. Const. art. 2, § 2.1(A) (acknowledging victims' "rights to justice and due process"); Cal. Const. art. I, § 28(b) (same); S.C. Const. art. I, § 24(A) (same); Tenn. Const. art. I, § 35 (same); Utah Const. art. I, § 28(1) (same).

[12] *See, e.g.*, Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 Utah L. Rev. 289, 294 (1999) (explaining that some victims' rights, such as the "rights to notice and attendance, and the right to speak to the prosecu-

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Fundamental aspects of due process include the opportunity to be heard in a "meaningful manner" and to be treated fairly.[13] From a legal as well as common-sense perspective, this requires that non-English speaking victims must be able to comprehend court proceedings and access information and court services to the same extent as their English-speaking counterparts. Fairness requires that non-English speaking victims be able to participate meaningfully during legal proceedings.[14]

In addition to these broad rights, victims are afforded the right to be present. The right to be present refers to the victim's right to attend the criminal trial and other criminal justice proceedings related to the investigation, prosecution, and incarceration of his or her offender.

The vast majority of states provide victims either an unqualified or qualified right to be present at a variety of criminal proceedings, including trial.[15] Strong public policy supports this right of attendance: "[T]he right to attend the trial may be critical in allowing the victim to recover from the psychological damage of a crime. It seems reasonable to assume a victim's attendance at a trial may 'facilitate healing of the debilitating psychological wounds suffered by a crime victim.'"[16] Notably, not only does attendance aid recovery, but it also prevents the "secondary harm" that may result if a victim is excluded from trial.[17]

The right to be heard refers to the right to make an oral and/or written statement to the court at a criminal justice proceeding. Depending upon the jurisdiction, victims have the explicit right to be heard at release, plea, sentencing, and parole. Focusing on the critical stages of plea and sentence, at least 39 states provide crime victims with a constitutional or statutory right to be heard.[18] Most statutory and constitutional rights to

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tor and the judge . . . are, by nature, due-process-like rights"). *See also United States v. Heaton*, 458 F. Supp. 2d 1271, 1272-73 (D. Utah 2006) (stating that fairness and conferral rights could not be satisfied "without having the victim's views on the subject[,]" and quoting the explanation of Senator Kyl—one of the chief sponsors of the federal Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771—that the CVRA's right to be treated with fairness "includes the notion of due process").

[13] As the United States Supreme Court has noted, at the heart of due process is the idea that "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." *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."); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (citation omitted) ("A fundamental requirement of due process is 'the opportunity to be heard[,]'" and "[i]t is an opportunity which must be granted at a meaningful time and in a meaningful manner."); *People v. Vasquez*, 137 P.3d 199, 207-8 (Cal. 2006) (*quoting Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967)) (discussing "the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment").

[14] A number of courts have held or recognized that where a defendant does not understand or speak English well enough to adequately comprehend or communicate in the proceedings, federal and state constitutional rights to fundamental fairness and due process of law require that an interpreter be provided. *See, e.g., United States v. Cirrincione*, 780 F.2d 620, 634 (7th Cir. 1985) (holding "that a defendant in a criminal proceeding is denied due process when: (1) what is told him is incomprehensible; (2) the accuracy and scope of a translation at a hearing or trial is subject to grave doubt; (3) the nature of the proceeding is not explained to him in a manner designed to insure his full comprehension; or (4) a credible claim of incapacity to understand due to language difficulty is made and the district court fails to review the evidence and make appropriate findings of fact"); *United States v. Mosquera*, 816 F. Supp. 168, 173 (E.D.N.Y 1993) (internal citations and quotations omitted) ("The due process clause also prohibits trying the criminal defendant who lacks capacity to understand the proceedings, to consult with counsel or to assist in the preparation of his defense. This prohibition refers not only to mental incompetents, but also to those who are hampered by their inability to communicate in the English language."); *Giraldo-Rincon v. Dugger*, 707 F. Supp. 504, 507 (M.D. Fla. 1989) (internal citation omitted) (adopting the report and recommendation of the federal magistrate judge and concluding that the state "trial judge's refusal and failure to inquire into [defendant's] need for and ability to pay for an interpreter violated his Sixth Amendment right to confrontation and his right to due process of law. Regardless of any probability of guilt, the [defendant's] trial 'lacked the fundamental fairness required by the due process clause.'").

[15] *See* Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 Lewis & Clark L. Rev. 481, 504-13 (2005).

[16] *Id.* at 536 (quoting Ken Eikenberry, *Victims of Crime/Victims of Justice*, 34 Wayne L. Rev. 29, 41 (1987)).

[17] *Id.* (quoting Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7, 18-19 (1987) ("'[V]ictims' perceptions about the equity of their treatment and that of the defendants affects their crime-related psychological trauma . . . . [F]ailure to . . . offer the right of [criminal justice] participation should result in increased feelings of inequity on the part of victims, with a corresponding increase in crime-related psychological harm.'")). *Cf. Polyvictims: Victims' Rights Enforcement as a Tool to Mitigate "Secondary Victimization" in the Criminal Justice System*, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), March 2013, at 1-2 (internal citations omitted), *available at* https://law.lclark.edu/live/files/13798-poly-victims-victims-rights-enforcement-as-a-tool (discussing that "for some victims, interaction with the criminal justice system—through contact with law enforcement, defense attorneys, prosecutors, judges and other legal system personnel and processes—can cause secondary victimization, which has been associated with increased post-traumatic stress symptoms and other physical and mental distress. Secondary victimization can cause victims to feel frustrated with and alienated from the criminal justice system; it can also reduce the victims' 'self-esteem, faith in the future, trust in the legal system, and faith in a just world.'").

[18] *See* Ala. Const. amend. 557; Alaska Const. art. 2, § 24; Ariz. Const. art. 2, § 2.1(A)(4); Colo. Const. art. II, § 16a; Conn. Const.

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be heard at sentencing are drafted in mandatory terms, leaving judges no discretion.[19]

To effectuate the rights to be present and heard in a meaningful manner, victims must be given access to all necessary information. For example, a non-English speaking victim's exercise of his or her right to be present will not be satisfied solely by enabling the victim's physical presence at proceedings. Rather, as courts have recognized with respect to criminal defendants, in order for the non-English speaking victim's presence to be meaningful, the court must appoint an interpreter to assist the victim in understanding the proceedings.[20]

Similarly, the right to be heard is of little value if victims are not adequately informed about the pending matter. If victims are not meaningfully informed, it follows that they cannot meaningfully form their views, let alone make their views known to the prosecution or to the court, and they are thereby denied the ability to exercise their right to be heard. Consequently, to ensure meaningful exercise of the right, victims must be provided interpreters from the earliest stages of the proceedings before the victims address the court to provide them with the information necessary to make their communication with the court meaningful. Only with knowledge of all relevant information may victims fulfill one of the key purposes of the right to be heard—acquainting the court with the victims' unique perspectives and otherwise providing input valuable to the court's decision making process.[21]

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art. 1, §(8)(b)(8); Fla. Const. art. I, § 16; Idaho Const. art. 1, § 22(6); Ill. Const. art. 1, § 8.1(a)(4); Kan. Const. art. 15, § 15(a); La. Const. art. I, § 25; Md. Const. Decl. of Rights, art. 7(b); Mich. Const. art. I, § 24(1); Miss. Const. art. 3, § 26A(1); Mo. Const. art. I, § 32(1)(2); Neb. Const. art. I, § 28(1); Nev. Const. art. 1, § 8(2)(c); N.M. Const. art. II, § 24(A)(7); N.C. Const. art. 1, § 37(1)(b); Okla. Const. art. II, § 34(A); Pa. Const. Stat. § 11.201(5); S.C. Const. art. I, § 24(A)(5); Utah Const. art. I, § 28(1)(b); Va. Const. art. I, § 8-A(3); Wash. Const. art. 2, § 35; Wis. Const. art. I, § 9(m); Ala. Code § 15-23-74; Cal. Penal Code § 679.02(a)(3); Colo. Rev. Stat. Ann. § 24-4.1-302.5(10(g); Fla. Stat. Ann. § 960.01(1)(k); Ind. Code Ann. § 35-40-5-5; Iowa Code Ann. § 915.21(1)(b); La. Rev. Stat. Ann. § 1842(2); Me. Rev. Stat. Ann. tit. 17-A, § 1174(1)(A); Md. Code Ann., Crim. Proc. § 11-403; Mass. Gen. Laws Ann. ch. 258B, § 3(p); Minn. Stat. Ann. § 611A.038(a); Miss. Code Ann. § 99-43-33; N.H. Rev. Stat. Ann. § 21-M:8-k(I)(p); N.J. Stat. Ann. § 52:4B-36(n); Ohio Rev. Code Ann. § 2930.14(A); R.I. Gen. Laws Ann. § 12-28-3(11); S.D. Codified Laws § 23A-28C-1(8); Utah Code Ann. § 77-38-4(1); Vt. Stat Ann. tit. 13, § 5321(a)(2); Wyo. Stat. Ann. § 14-6-502(a)(xvii).

[19] *See, e.g.*, Ill. Const. art. I, § 8.1(a)(2) (providing, "Crime victims . . . *shall* have the following rights as provided by law: . . . (4) The right to make a statement to the court at sentencing.") (emphasis added). *Cf. People v. Hemmings*, 808 N.E.2d 336, 339 (N.Y. 2004) (internal quotation omitted) (stating that victims' rights laws "elevated what had previously been a privilege left entirely to the discretion of the sentencing court to a right that a victim could exercise at his or her discretion").

[20] As recognized in analogous cases discussing the necessity of appointing interpreters to assist non-English speaking defendants, the right to be present is empty if it means only that non-English speaking persons may watch what they cannot understand. *See Mosquera*, 816 F. Supp. at 172 ("To be 'present' implies more than being physically present. It assumes that a defendant will be informed about the proceedings so he can assist in his own defense."); *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973) (internal citations omitted) ("Clearly, the right to confront witnesses would be meaningless if the accused could not understand their testimony, and the effectiveness of cross-examination would be severely hampered . . . [t]he right to an interpreter rests most fundamentally, however, on the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment."). As such, courts have cautioned that: "Courts, prosecutors, and defense attorneys alike must be especially vigilant in assuring that a language barrier does not unfairly prejudice a criminal defendant." *United States v. Garcia*, 956 F.2d 41, 45 (4th Cir. 1992). *See also ex rel. Negron*, 434 F.2d at 389 (quoting *Dusky v. United States*, 362 U.S. 402 (1962) (per curiam)) ("It is . . . imperative that every criminal defendant—if the right to be present is to have meaning—possess 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.'"); *State v. Natividad*, 526 P.2d 730, 732 (Ariz. 1974) (citing *Lewis v. United States*, 146 U.S. 370 (1892)) ("[Defendant's inability to understand testimony] would be as though a defendant were forced to observe the proceedings from a soundproof both [sic] or seated out of hearing at the rear of the courtroom, being able to observe but not comprehend the criminal processes whereby the state had put his freedom in jeopardy. Such a trial comes close to being an invective against an insensible object, possibly infringing upon the accused's basic 'right to be present in the courtroom at every stage of his trial.'"); Thomas M. Fleming, J.D., 32 A.L.R. 5th 149 (1995) ("Because language is the principal means of communication in a legal proceeding, the participants' ability to understand and speak that language is critical to the proceeding's fairness. The explosive growth of immigration to the United States, both legal and illegal, has increased the number of criminal defendants and witnesses who lack a full command of English and need a qualified interpreter to function meaningfully in the courtroom.").

[21] *See* Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 Cornell L. Rev. 282, 285 (2003); Douglas E. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 Cath. U. L. Rev. 1135, 1152 (2007) ("In *Payne v. Tennessee*, decided in 1991, the Court recognized crime victims as unique individual human beings whose particularized harm could be the subject of victim impact statements."); *People v. Stringham*, 253 Cal. Rptr. 484, 490 (Cal. Ct. App. 1988) (explaining that the purpose behind the victim's statutory right to be heard at sentencing is "to acquaint the court with the victim's unique perspective of the case, and require consideration of the victim's statement by the court," and acknowledging that, where a defendant enters a guilty plea and matters proceed directly to sentencing, the proper construction of the right is to allow the victim the opportunity to speak in opposition to a plea bargain at sentencing, and that a contrary result would reduce the victim's sentencing statement to "'an arid ritual of meaningless form.'"); *see also State v. Koertje*, Nos. CR090171, CR080477, CR080626 (Yamhill Cnty. Cir. Ct., Sept. 21, 2009) (Arraignment/Pleading Order) (on file with author) (Oregon state trial court decision granting the state's "Motion re: Claim of Violation of Crime Victim's Rights re: Interpreters, and for Sentencing"). The *Koertje* court, in correspondence with the Court Interpreter Services after its decision to order interpreters for a non-English speaking victim, maintained that the "Oregon Constitution now

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**State Interpreter Laws Support Appointment of Interpreters To Assist Non-English Speaking Victims in Exercising Their Rights**

A number of jurisdictions have statutes, rules, and judicial policies that arguably either require or provide for court appointment of interpreters to assist non-English speaking victims, particularly when read in light of that jurisdictions' crime victims' rights laws.

A handful of states follow in some part the Model Court Interpreter Act § 2B (1995), which begins with a policy statement declaring it the "intent of this Act to provide for the certification, appointment, and use of interpreters to secure the state and federal constitutional rights of non-English speaking persons in all legal and administrative proceedings."[22] "Non-English speaking person" is defined to mean "any principal party in interest or witness participating in a legal proceeding who has limited ability to speak or understand the English language."[23] "Principal party in interest[,]" is then defined to mean "a person involved in a legal proceeding who is a named party, or who will be bound by the decision or action, or who is foreclosed from pursuing his or her rights by the decision or action which may be taken in the proceeding."[24] The Model Act further provides that when an interpreter is requested or "when the [court] determines that a principal party in interest or witness has a limited ability to understand and communicate in English, a certified interpreter *shall* be appointed."[25] In the jurisdictions that have adopted in substantial part the provisions outlined above,[26] crime victims qualify as principal parties in interest with critical rights at stake and therefore the court has a clear duty to appoint interpreters to assist non-English speaking victims during criminal proceedings.

A number of other jurisdictions, although not following the Model Act's language, either require or provide for court appointment of interpreters to assist non-English speaking victims.[27]

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provides a crime victim with a constitutional right to meaningful participation in the criminal proceeding . . . . [I]n situations where the victim can neither understand what is being said, nor make a statement to the court, I believe the Constitution requires that the court make an interpreter available to the victim." Letter from John L. Collins, Presiding Judge, Oregon Circuit Court, 25th Judicial District, Yamhill County, to Kelly Mills, Program Manager, Court Interpreter Services, Oregon Judicial Department (Nov. 13, 2009) (on file with author). According to the court, the state's original request was for the appointment of an interpreter for the victim as an observer at trial, but the request was narrowed when the defendant changed his plea and agreed to proceed with sentencing. The victim spoke Nahuatl, a native Central American language, and because the Nahuatl interpreter spoke Nahuatl and Spanish only, another interpreter was required to translate from English to Spanish. In discussing the critical nature of the victim's participation in the proceedings, the court remarked as follows:

> The victim did appear at sentencing and did wish, as was her right, to address the court. As it turns out, some of her remarks would not have been possible had she not been able to have what the judge, prosecutor, defendant attorney [and] the defendant said in court. Her input was valuable to the court, and that opportunity to have that input appeared to be very important to her. The interpreters, then, not only assisted in interpreting the victim's statement to the court, but also in allowing the victim to do so meaningfully by understanding what was said by others in court. I cannot see how it would have been possible for the victim to play this 'meaningful role' without the assistance of the two interpreters.

*Id.* The court's remarks emphasize the importance of meaningful victim input in the process, which may benefit the victim as well as provide valuable information to the court.

[22] Model Act, *supra* note 3, at § 1.

[23] *Id.* at § 2B.

[24] *Id.* at § 2E.

[25] *Id.* at § 4 (emphasis added).

[26] *See e.g.*, Idaho Code Ann. Ct. Admin. r. 52; La. Rev. Stat. Ann. Crim. Proc. art. 25.1; N.M. Stat. Ann. §§ 38-10-2 & 3; Or. Rev. Stat. Ann. §§ 45.273-75; Pa. Cons. Stat. Ann. §§ 4412, 4416; R.I. Gen. Laws Ann. §§ 8-19-1 & 2; Utah Code Ann. Jud. Admin. r. 3-306; Wash. Rev. Code Ann. §§ 2.43.010-090.

[27] *See e.g.*, Colo. Sup. Ct. C.J. Directive 06-03, *available at* http://www.courts.state.co.us/ Courts/Supreme_Court/Directives/CJD%2006-03%20amended%2006-11.pdf (mandating that as a matter of policy "the courts shall assign and pay for language interpretation for all parties in interest during or ancillary to a court proceeding," and defining "party in interest" to include "a victim"); Fla. Stat. Jud. Admin. r. 2.560(a), *available at* https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/ F854D695BA7136B085257316005E7DE7/$FILE/Judicial.pdf?OpenElement ("In any criminal or juvenile delinquency proceeding in which a non-English speaking person is a victim, an interpreter shall be appointed unless the court finds that the victim does not require the services of a court-appointed interpreter"); S.C. Code Ann. § 17-1-50(B)(1) ("Notwithstanding any other provision of law, whenever a party, witness, or victim in a criminal legal proceeding does not sufficiently understand or speak the English language to comprehend the proceeding or to testify, the court must appoint a . . . qualified interpreter to interpret the proceedings to the party or victim or to interpret the testimony of the witness."); Tenn. Code Ann., Sup. Ct. Rules r. 42 § 3, *available at* http://www.tncourts.gov/rules/supreme-court/42 ("Appointing an interpreter is a matter of judicial discretion. It is the responsibility of the court to determine whether a participant in a legal proceeding has a limited ability to understand and communicate in English. If the court determines that a participant has such limited ability, the court should appoint an interpreter pursuant to this rule."); Va. Code. Ann. § 19.2-164 ("In any criminal case in which a non-English speaking person is a victim or witness, an interpreter shall be appointed by the judge of the court in which the case is to be heard unless the court finds that the person does not require the services of a court-appointed interpreter."); Wis. Stat. Ann. § 885.38(3)(a) ("If the court determines that the person has limited English proficiency and that an interpreter is necessary, the court shall advise the person that he or she has the right to a qualified interpreter at the public's expense if the person is one of the following . . . [a]n alleged victim, as defined in s. 950.02(4)."). Another category of jurisdictions appears to expressly provide for interpreter

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Some of these laws expressly include victims in the categories of non-English speaking persons for whom the court must appoint an interpreter; others define non-English speaking persons broadly enough to include victims. These jurisdictions—like those that follow the Model Act—also provide authority for the proposition that the court either must or should exercise its discretion to appoint interpreters to assist non-English speaking victims in exercising their rights.

### Conclusion

State victims' rights require—and state interpreter provisions as well as strong public policy rationales support—a trial court's appointment of an interpreter to assist non-English speaking victims during criminal proceedings. It is only with the assistance of an interpreter that non-English speaking victims can exercise their rights to fairness, dignity, respect, and due process, and to meaningful presence and participation.

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services to assist criminal defendants and witnesses only. Even though these jurisdictions do not expressly provide for the right of victims to court appointment of interpreters, when considered in light of the crime victims' rights laws, the interpreter provisions should not be read as mandating a ceiling, but instead as providing a floor establishing the minimum requirements the courts are required to uphold. As such, crime victims are entitled to interpreter services in these jurisdictions as well. *See e.g.*, 2013 Ark. Acts 237 (H.B. 1325) (amending statutes to include new subchapters (Ark. Code Ann. §§ 16–10–1101 to 1108), which provide, *inter alia*, that "[a] person with limited English proficiency who is a party to or a witness in a court proceeding is entitled to a qualified interpreter to interpret for the person throughout the court proceeding"); D.C. Code § 2-1902(a) ("Whenever a communication-impaired person is a party or witness . . . the appointing authority may appoint a qualified interpreter to interpret the proceedings to the communication-impaired person . . . . The appointing authority shall appoint a qualified interpreter upon the request of the communication-impaired person."); Ga. Code Ann., Ct. r. 1 and app. B2("A")(1), *available at* http://www.georgia-courts.org/councils/state/benchbook/ state%20court%20benchbook/ Chapters/B2%20Interpreters.pdf ("An interpreter is needed and an interpreter shall be appointed when the decision maker . . . determines, after an examination of a party or witness, that: (1) the party cannot understand and speak English well enough to participate fully in the proceedings and to assist counsel; or (2) the witness cannot speak English so as to be understood directly by counsel, the decision maker, and/or the jury."); Tex. Code Crim. Proc. Ann. art. 38.30(a) ("When a motion for appointment of an interpreter is filed by any party or on motion of the court, in any criminal proceeding, it is determined that a person charged or a witness does not understand and speak the English language, an interpreter must be sworn to interpret for the person charged or the witness.").

## Intern *Spotlight*

Pamela (Pam) Frazier began her work with NCVLI in Fall 2012 as a Crime Victim Litigation Clinic student, participating in NCVLI's Clinic at Lewis & Clark Law School in Portland, Oregon. She then spent the next semester working as a full-time extern at NCVLI, and after completing her externship, she continued as a volunteer, staffing NCVLI's Victim Resource Hotline. Through her work on the Resource Hotline, Pam has connected numerous victims with pro bono legal services and other needed resources in jurisdictions across the nation. In her work with NCVLI's legal team, Pam worked on a range of projects, including: a national review of the law regarding the propriety of providing services to minor victims without parental consent; drafting a demand letter for return of victim property improperly retained by the state following a criminal prosecution for homicide; and researching the state of the nation on employment protections for victims of crime. Pam has impacted every aspect of NCVLI's work and made important contributions to the field of victims' rights generally.

Pam graduated from Lewis & Clark Law School in May 2013, and in August began a position with a law firm in Southern Oregon after taking the Oregon Bar exam. NCVLI is grateful for her service and looks forward to continuing to work with her as she develops her legal career! Pam has this to say about her work with NCVLI:

> "When I first joined NCVLI's Crime Victim Litigation Clinic in fall semester 2012, the concept of victims' rights was completely new to me. In retrospect, it is shocking how marginalized victims are in the criminal justice system. Too often, criminal law becomes so oriented around the defendant, cast solely in terms of 'State v. Defendant,' that the victim is practically forgotten. In the past year at NCVLI, I have had the unique opportunity to fully engage in victims' rights. I have seen up-close both the injustices to victims and the efforts to rectify those injustices. The experience as a whole has equipped me with an awareness of these issues that I will take with me going forward in my career as an attorney."

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# *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 that are not necessarily 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 this column, please e-mail us at* ***ncvli@lclark.edu.***

*1.*

## CALIFORNIA.

A defendant charged with domestic violence for the attempted murder of the victim sought to depose the victim as part of a parallel civil restraining order proceeding. NCVLI provided assistance to the victim's attorney, including support for the argument that the court should stay discovery in the civil proceeding because defendant should not be able to use the civil process to obtain discovery greater than he would be able to in the criminal matter, and that defendant is limited by the application of California's victims' rights laws, which give victims the right to refuse defendant's discovery requests. The court granted the victim's attorney's request and quashed defendant's subpoena to depose the victim.

*2.*

## ARIZONA.

The victim, an architect, was shot in the head, and his injuries negatively impacted his ability to continue to work. In seeking restitution, the victim's attorney sought future lost wages, among other of the victim's expenses resulting from the crime. Initially the trial judge indicated that future lost income would not be a permissible form of losses to recover in restitution, but allowed further briefing on the issue. NCVLI provided the victim's attorney with legal research to support the attorney's arguments, and the court ultimately granted the request and ordered restitution in an amount to compensate the victim for past medical expenses, future medical expenses, and future lost wages.

*3.*

## COLORADO.

A defendant subpoenaed the child-victim's mother to appear at the preliminary hearing. The state filed a motion to quash the subpoena on the basis that requiring the child-victim and parents to appear at the courthouse would be a needless re-victimization. Defendant argued, in part, that the state did not have standing to oppose the subpoenas. When, shortly before the scheduled preliminary hearing the trial court had not issued a decision, the state petitioned the Colorado Supreme Court. The appellate court granted review and ordered a stay of the proceedings. Rocky Mountain Victim Law Center sought NCVLI's assistance with its amicus curiae participation. NCVLI conducted legal research and provided strategic advice. The appellate court issued a ruling in favor of prosecution standing to move to quash subpoenas for victims.

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## MARYLAND.

A trial court refused to dismiss a malicious prosecution suit against an individual who reported a violation of a protective order. NCVLI and co-amici argued that the Maryland court's refusal to dismiss the case would limit the ability of victims and others to access justice and would chill the likelihood of future reporting. Amici further argued that assuming that the individual did make a false statement to police, which was contrary to the evidence, the prosecutor proceeded with the criminal suit on an independent basis—that defendant was outside the victim's house.

6.

5.

## NORTH CAROLINA.

Defendant pleaded guilty in federal court to possessing or distributing images of her daughter's sexual abuse. In parallel state family court proceedings involving custody of the child-victim, the mother-defendant moved to have the state court order a psychiatric evaluation of the child-victim in connection with the ongoing custody proceedings. NCVLI provided legal research and strategic advice to both the federal prosecutor who prosecuted the case against the victim's mother and the child-victim's attorney regarding victims' rights bases for a motion to stay or quash the request for the psychiatric evaluation. The matter is pending.

## GEORGIA.

A defendant charged with sexual exploitation of children, invasion of privacy, and child molestation filed a motion and ex parte brief to compel the state to provide him with a physical copy of images of the child sexual exploitation. The images and videos included those saved on a computer, a "thumb-drive," a "flash-drive," a DVD, and some physical photograph prints that had been taken with a hidden camera. The state consented to inspection of the evidence but did not want to provide defendant with copies. The prosecutor in the case, with assistance from NCVLI, opposed defendant's request, arguing, *inter alia*, that the child-victim's rights to privacy and to be treated with fairness and dignity under Georgia law would be violated if the court were to grant defendant's motion. After the state filed its opposition brief, the defendant withdrew his motion to obtain copies of the images.

4.

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## Facility Dogs: Helping Victims Access Justice and Exercise Their Rights

*by Rebecca S.T. Khalil, J.D.*

Courts recognize the fundamental nature of the right of all people to access the courts.[1] This right must be enforced in a way that is "more than merely formal; it must also be adequate, effective, and meaningful."[2] In addition to this general right of access to courts, victims of crime are afforded participatory rights in connection with criminal justice proceedings,[3] and courts have an obligation to ensure the meaningful enforcement of these rights.[4] Facility dogs may assist victims by reducing the risk of secondary victimization, which in turn helps ensure the meaningful exercise of victims' rights, including the right to access justice.

"Facility dogs" are defined generally as "expertly trained dogs who partner with a facilitator working in a health care, visitation or education setting[,]"[5] and in the court setting, are trained to provide comfort to victims and other court participants.[6] Dogs are effective in providing comfort in a variety of settings because, among other benefits, they can reduce stress in humans.[7] For this reason, facility dogs can provide critical assistance to victims who find it difficult to exercise their

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[1] *See, e.g., Chappell v. Rich*, 340 F.3d 1279, 1282 (11th Cir. 2003) ("Access to the courts is clearly a constitutional right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment."); *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) (noting that access to courts is a fundamental right).

[2] *Chappell*, 340 F.3d at 1282 (citations omitted).

[3] *See, e.g., Kenna v. United States Dist. Ct. for the Cent. Dist. of Cal.,* 435 F.3d 1011, 1013 (9th Cir. 2006) ("The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard. The Crime Victims' Rights Act sought to change this by making victims independent participants in the criminal justice process."); Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. Rev. 255, 270 (2005) ("When victims are exercising either their broad or specific rights, they are no longer merely witnesses or third parties in the criminal process. Rather, victims are 'participants' in the criminal process. Being a participant means the 'crime victim [has] rights of intermittent participation in the criminal [trial] process.'") (citation omitted). For a brief overview of victims' rights, generally, see *Fundamentals of Victims' Rights: A Brief History of Crime Victims' Rights in the United States,* NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), Nov. 2011, *available at* http://law.lclark.edu/live/files/11822-fundamentals-of-victims-rights-a-brief-history-of; *Fundamentals of Victims' Rights: A Summary of 12 Common Victims' Rights*, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), Nov. 2011, *available at* http://law.lclark.edu/live/files/11823-fundamentals-of-victims-rights-a-summary-of-12.

[4] *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."). For a discussion of how victim integration into the criminal justice system results in a more beneficial process, see Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. Rev. 911, 953-55 (1996) (analyzing victim participation as a partial solution to problems associated with the criminal justice system). By contrast, when victims' rights to access the system or to meaningful participation therein are denied, the criminal justice system is dysfunctional. *See, e.g.,* Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 B.Y.U. L. Rev. 255, 331-42 (2005) (discussing the dysfunction that results from granting victims' rights that are merely illusory).

[5] Canine Companions for Independence, *available at* http://www.cci.org/site/c.cdKGIRNqEmG/ b.4011121/k.830A/Facility_Dogs.htm.

[6] "Facility dogs are used in [courts of] various jurisdictions, including Washington, Florida, Texas and Maryland with resounding success. Research indicates that companion animals can decrease a person's heart rate and blood pressure, increase mental clarity, and alleviate depression. 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. 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." *Practical Tips and Legal Strategies for Protecting Child-Victims While Testifying*, NCVLI Newsletter of Crime Victim Law, 10th Ed. (Nat'l Crime Victim Law Inst., Portland, Or.), 2008, at 14 (citations omitted).

[7] *See, e.g.,* David A. Crenshaw, *Guidelines for Attorneys and Judges to Recognize and Respond to Trauma Stress Reactions of Child Witnesses/Victims when Giving Testimony*, Courthouse Dogs (2012), http://courthousedogs.com/legal_child_witnesses.html (last accessed Apr. 8, 2013); James C. Ha, *Scientific Research Confirms that the Presence of Dogs Reduces Stress in Humans*, Courthouse Dogs (2012), http://courthousedogs.com/legal_stress.html (last accessed Apr. 8, 2013); *see also* Andrea Beetz, Kerstin Uvnäs-Moberg, Henri Julius & Kurt Kotrschal, *Psychological and Psychophysiological Effects of Human-Animal Interactions: The Possible Role of Oxytocin*, 3 Frontiers in Psychology 234 (2012) (reviewing scholarship analyzing human-animal interactions); Undine E. Lang et al., *Reduced Anxiety During Dog Assisted Interviews in Acute Schizophrenic Patients*, 2 European J. of Integrative Medicine 123 (2010) (finding that dogs reduced anxiety); Andreas O.M. Hoffmann, et al., *Dog-Assisted Intervention Significantly Reduces Anxiety in Hospitalized Patients with Major Depression*, 1 European J. of Integrative Medicine 145 (2009) (finding that dog-assisted therapy significantly reduced anxiety); Karen Allen, Barbara E. Shykoff & Joseph L. Izzo, Jr., *Pet Ownership but Not ACE Inhibitor Therapy, Blunt Home Blood Pressure Responses to Mental Stress*, 38 Hypertension 815 (2001) (finding that pets lowered blood pressure responses to stress).

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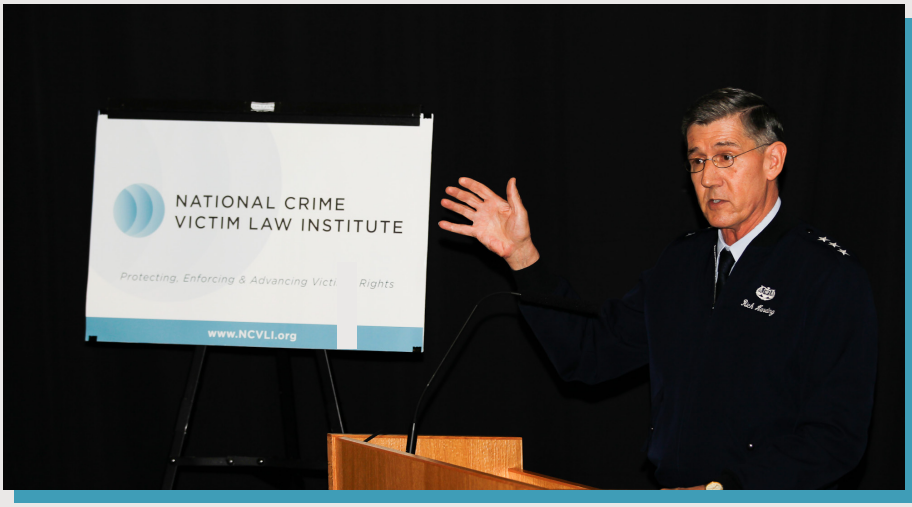
## 12th Annual Crime Victim Law Conference

On Friday and Saturday, June 7-8, 2013, NCVLI hosted the 12th Annual Crime Victim Law Conference in Portland, Oregon. NCVLI's Conference continues to be the only national conference focused on victims' rights enforcement. More than 200 attorneys, advocates, and others committed to victims' rights gathered to learn from the leading experts in the field and engage in conversations to shape the future of the victims' rights movement.

This year's Conference was themed *Constructing Justice: Making Victims' Rights a Reality*, and focused on making victims' rights more than just paper promises, but instead laws that are consistently enforced and advanced. The 24 breakout sessions and 4 plenary sessions provided concrete tools and best practices in victim law.

NCVLI celebrated with Conference attendees and the local community by hosting the largest Crime Victims' Rights Reception on the first night of the Conference. Attendees networked and celebrated with colleagues from around the country while enjoying free food and drink, and live music from local Portland band, SloeGinFizz.




Lieutenant General Richard Harding of the United States Air Force closes the Conference with a discussion of the Air Force's innovative Special Victims' Counsel Program, which provides sexual assault victims with their own military attorney to provide them legal assistance and help them navigate the criminal justice system.

Facility Dogs . . . **continued from page 10**

rights in criminal proceedings. Indeed, it is well-established that although participation in the criminal justice process can be beneficial for some crime victims,[8] other victims' interactions with the justice system result in additional personal harm (often referred to as "secondary victimization" or "secondary trauma"), and function as an impediment to the victims' recovery from the crime as well as interfere with the exercise of their rights.[9] In a courtroom setting, use of facility dogs can reduce harm to victims and avoid the potential disservice to the truth-seeking process caused by a witness's "significant emotional distress," as recognized by the Supreme Court in *Maryland v. Craig*.[10]

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[8] *See, e.g.,* Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. of Traumatic Stress 159, 160-61 (2003) (discussing the potential benefits of participating in the justice system); Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health,* 23 J. of Traumatic Stress 182, 182 (2010) (same); Margaret E. Bell, et al., *Battered Women's Perceptions of Civil and Criminal Court Helpfulness: The Role of Court Outcomes and Processes*, 17 Violence Against Women 71, 72 (2011) (noting that some studies "have in fact found that positive experiences in the justice system are associated with less physical and psychological distress and better posttraumatic adjustment").

[9] For a more detailed discussion of secondary victimization, see *Polyvictims: Victims' Rights Enforcement as a Tool to Mitigate "Secondary Victimization" in the Criminal Justice System*, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), Mar. 2013, *available at* http://law.lclark.edu/live/files/13797-ncvlipvvictims-rights-enforcement-as-a-tool-to. *See also* Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. of Traumatic Stress 182, 183 (2010) (observing that some studies indicate that "contact with the justice system can lead to a 'secondary victimization,'" and that the experience may "exacerbate the initial trauma," "leave victims feeling embittered and disappointed," and cause anxiety); Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 Social Justice Research 313, 314 (2002) (noting that "secondary victimization" by the criminal justice system can negatively influence victims' "self-esteem, faith in the future, trust in the legal system, and faith in a just world"); Pamela Tontodonato & Edna Erez, et al., *Crime, Punishment, and Victim Distress*, 3 Int'l R. of Victimology 33, 34 (1994) (observing that secondary victimization can cause victims to feel frustrated with and alienated from the criminal justice system).

[10] 497 U.S. 836, 857 (1990) (emphasis in original) ("Indeed, where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal. *See, e.g.,*

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## Intersections with Polyvictimization: Practice Tip

Polyvictims—those who experience multiple victimizations of different types—share many of the same concerns as other victims when accessing justice and seeking to recover from their victimization. But it is important for practitioners who work with polyvictims to recognize that this group of victims may experience these shared concerns in a different or heightened fashion, as well as face challenges unique to their status. For example, the risk of experiencing secondary harm due to revictimization at the hands of the criminal justice system—often referred to as "secondary trauma" or "secondary victimization"—may be particularly acute for polyvictims. As a result, practitioners who work with polyvictims may want to consider requesting the use of facility dogs to assist these victims in the exercise of their rights. A jury instruction—instructing the jury not to "make any assumptions or draw any conclusions based on the presence of the facility dog" or similar language—may be suggested to the court as a means to assure it that the jury will not draw any inference from the presence of the dog.

In situations where a court's failure to afford the use of a facility dog would cause victims harm or subject them to improper treatment by the justice system, use of a facility dog may not be discretionary because victims' rights may require that it be ordered.[11] But courts may also order the use of facility dogs pursuant to their inherent authority to control courtroom proceedings, including the examination of witnesses and presentation of evidence.[12] As courts in at least three jurisdictions have recognized, permitting victim-witnesses to testify accompanied by a facility dog is an appropriate exercise of the trial courts' inherent authority as it reduces the risk of secondary harm to the victim-witness, protects and facilitates the exercise of victims' rights, promotes the truth-seeking function of criminal justice proceedings, and is not inherently prejudicial to defendants.[13]

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*Coy, supra,* 487 U.S., at 1032, 108 S.Ct., at 2809 (BLACKMUN, J., dissenting) (face-to-face confrontation 'may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself'); Brief for American Psychological Association as *Amicus Curiae* 18-24; *State v. Sheppard*, 197 N.J.Super. 411, 416, 484 A.2d 1330, 1332 (1984); Goodman & Helgeson, 3170 *Child Sexual Assault: Children's Memory and the Law*, 40 U. Miami L.Rev. 181, 203-204 (1985); Note, *Videotaping Children's Testimony: An Empirical View*, 85 Mich.L.Rev. 809, 813-820 (1987).").

[11] *See, e.g.,* Alaska Stat. Ann. § 12.61.010(a)(4) (providing that victims of crime have the "right to receive protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts"); Cal. Const. art. I, § 28(b)(1) (guaranteeing victims the right to be "treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process"); Del. Code Ann. tit. 38, § 801D-4(a)(3) (guaranteeing victims the right to "receive protection from threats or harm"); 725 Ill. Comp. Stat. 120/4(a)(1) (articulating "[t]he right to be treated with fairness and respect for [victims'] dignity and privacy throughout the criminal justice process"); Okla. Stat. Ann. § 142A-2(A)(2) (providing that victims of crime have the right to "receive protection from harm and threats of harm arising out of the cooperation of the person with law enforcement and prosecution efforts"); N.J. Const. art. I, ¶ 22 ("A victim of crime shall be treated with fairness, compassion and respect by the criminal justice system."); N.M. Const. art. 2, § 24(A)(1) (guaranteeing victims the right "to be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process"); Rev. Code Wash. § 7.69.030(4) (providing that victims have the right to "receive protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts").

[12] *See, e.g.,* Fed. R. Evid. 611(a) (explicitly providing that courts should exercise reasonable control over the examination of witnesses and the presentation of evidence to effectuate the truth-determining function of proceedings, avoid waste of time, and protect witnesses); *see also Illinois v. Allen*, 397 U.S. 337, 343 (1970) (discussing the trial court's inherent authority to regulate courtroom decorum); *Wells v. Gilliam,* 196 F. Supp. 792, 795 (E.D. Va. 1961) ("That a judge has control of his court room and the conduct of those attending his court is axiomatic. Indeed, it is a power inherent in any court."); *State v. Letendre*, 13 A.3d 249, 255-56 (N.H. 2011) (observing that trial courts have broad discretion to regulate proceedings before them and holding that the trial court did not abuse its discretion in allowing a guardian ad litem to accompany a child-victim on the stand during testimony); G. Gregg Webb & Keith E. Whittington, *Judicial Independence, the Power of the Purse, and Inherent Judicial Powers*, 88 Judicature 12, 14 (2004) ("The doctrine of inherent judicial power licenses the courts to take necessary actions to fulfill their constitutional functions, even when those actions are not specifically authorized by either constitutional text or legislative statute").

[13] *See, e.g.*, *People v. Tohom*, 969 N.Y.S.2d 123, 129-38 (N.Y. App. Div. 2013) (holding that the trial court's decision to permit the child-victim to testify in the presence of a therapeutic comfort dog was "a proper exercise of its inherent power and discretion to control the trial proceedings" because: (1) there is no statutory or other requirement that the state demonstrate "necessity" and the court is empowered to "adopt measures intended to address the stress which a child witness may experience on the witness stand"; (2) comfort dogs have "been shown to ameliorate the psychological and emotional stress of the testifying child witness"; (3) defendant made no showing that the dog's presence had any identifiable impact on the proceeding or was otherwise inherently prejudicial or impaired his right to a fair trial; (4) the dog's "unobtrusive presence" did not violate defendant's confrontation right as defendant had wide latitude to question witnesses, including

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## Crime Victim Litigation Clinic at Lewis & Clark Law School

From Left to Right: Kelly Ryan, Graham Parks, Sarah Garrett, Jason Mohabir, Chelsea Barclay. Not Pictured: Gabriela Norona.

NCVLI is committed to educating the legal profession on victim law. One of the places where that education begins is the Crime Victim Litigation Clinic at Lewis & Clark Law School in Portland, Oregon. In the Clinic, NCVLI's legal staff works with law students to support crime victim attorneys and advocates through legal research and writing. During Summer 2013, six law students participated in the Clinic. These students worked on a variety of cases covering a wide range of legal issues, including whether a nonprofit that provides victim services and receives Violence Against Women Act (VAWA) funding may disclose information about a minor sex trafficking victim to law enforcement if the victim does not consent; whether a statutory fee exemption granted to victims of crime should be classified as a benefit, such that it triggers due process protections if it is denied to victims; and whether defendants in a particular jurisdiction who are convicted of encouraging child sexual abuse charges relating to their downloading of images of child sexual abuse are required to pay restitution to the child-victims depicted in the images.

### Facility Dogs . . . **continued from page 12**

Victims are legally entitled to access the courts, to be treated with due dignity and respect, and to participate in a meaningful way in the criminal justice system. Neither defendant's rights, nor the proper exercise of the judicial processes, require victims to endure revictimization to exercise their rights. If the assistance of a facility dog can remove impediments to victim participation in criminal justice proceedings, courts should encourage and adopt this practice.

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the child-victim; and (5) the trial court instructed the jury that it was not to draw any inference because of the dog's presence "and it must be presumed that the jury followed the legal instructions it was given"); *People v. Spence*, 151 Cal. Rptr. 3d 374, 400-06 (Cal. Ct. App. 2012) (finding that the trial court acted appropriately in allowing a child-victim to testify with the assistance of a dog and while accompanied by a support person); *State v. Dye,* 283 P.3d 1130 (Wash. Ct. App. 2012) (finding that the accompaniment of the victim by a facility dog during trial testimony did not prejudice defendant or violate defendant's rights to a fair trial or to confront and cross-examine witnesses), *review granted*, 297 P.3d 707 (2013).

Courts in a number of jurisdictions have also considered the propriety of a court's use of analogous accommodations such as support person presence and comfort items to facilitate victims' participation in criminal justice proceedings and have similarly concluded that reasonable steps to mitigate the stress and potential harm resulting from victim participation are appropriate and do not violate defendants' rights. *See, e.g., People v. Myles*, 274 P.3d 413, 438-39 (Cal. 2012) (finding no support for the proposition that the "mere presence" of a support person violates a defendant's rights); *State v. Marquez*, 951 P.2d 1070, 1074 (N.M. Ct. App. 1997) (approving the trial court's discretion to allow a child-victim to testify while holding a teddy bear and observing that while some victims may not need to use a comfort item, they can provide security for others); *State v. Hakimi*, 98 P.3d 809, 811-12 (Wash. Ct. App. 2004) (finding that the trial court acted appropriately in allowing the child-victims to hold a doll while testifying, to assist the victims by helping them to feel more secure and comfortable, where defense counsel was permitted the opportunity to cross-examine the victims about the doll); *Smith v. State*, 119 P.3d 411, 418 (Wyo. 2005) (finding no support for the defendant's position that the use of an accommodation by a victim during testimony constitutes a due process violation in the absence of a compelling reason and finding no error in the trial court's decision to allow the victim to hold a teddy bear while testifying).

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## Case Spotlights

NCVLI participated in these proceedings as amicus curiae in support of the victim's petitions before the Air Force Court of Criminal Appeals and the United States Court of Appeals for the Armed Forces. NCVLI argued that the respective courts must recognize the victim's right to be heard personally and through counsel on factual and legal matters regarding the admissibility of her private information at Military Rules of Evidence 412 and 513 hearings because: (1) military victims have independent standing to assert and to seek enforcement of their rights through counsel; (2) the military judge's discretionary powers do not extend to excluding participants' views from consideration once standing is established; and (3) discrete moments of victim participation do not result in a per se violation of defendants' fair trial rights, do not create a per se appearance of impartiality, and do not implicate defendants' confrontation rights.

*Airman First Class (E-3) LRM v. Lieutenant Colonel Kastenberg,* 72 M.J. 364 (C.A.A.F. 2013). Defendant was charged with raping a female Airman. As part of a larger Air Force program to combat sexual assault, the Air Force JAG Corps had implemented a special victims' counsel (SVC) program that affords legal counsel to victims of sexual assault. The victim was appointed an SVC, who entered a formal appearance in the case and asked the military judge to direct the parties to provide him with copies of motions filed under Military Rules of Evidence 412 (the military's rape shield law), 513 (psychotherapist-patient privilege), and 514 (victim advocate-victim privilege). SVC argued that as the Military Rules of Evidence expressly gave the victim the "right to be heard," she must be provided copies of the motions so that she can understand the arguments being made regarding her privacy interests and thereby be afforded a "meaningful opportunity" to be heard in response. In making this request, SVC acknowledged that the victim is not a party to the case, but contended that she had standing to participate in the proceeding regarding any issues that implicated her rights under Rules 412, 513, and 514. The government did not object to the victim being heard, either personally or through counsel, on factual matters, but argued that neither the victim nor SVC had the right to file motions or make legal arguments; defendant argued that the victim and SVC lacked standing to be heard and that permitting SVC to present legal arguments would unfairly burden the defense and create "an appearance problem." The military judge held that the victim had no standing to move for copies of motions, to be heard through SVC, or to seek any exclusionary remedy during any portion of the trial. The military judge further held that the victim was only authorized to be heard personally, through counsel for the government in pretrial hearings, or—in the event she became incompetent—through a guardian, representative, or conservator. The military judge explained that "to hold otherwise would make [the victim] a 'de facto party' to the court-martial, with a degree of influence over the proceedings akin to a private prosecution, which is antithetical to American criminal law jurisprudence."

Victim's appellate counsel filed a petition with the Air Force Court of Criminal Appeals for a writ of mandamus challenging the decisions of the military judge, but the court concluded that it lacked jurisdiction to review the victim's petition. After the court denied the victim's motion for reconsideration en banc, victim's appellate counsel filed a petition for a writ of mandamus with the United States Court of Appeals for the Armed Forces, certifying three issues for review by that court: (1) whether the Air Force Court of Criminal Appeals erred by holding that it lacked jurisdiction to hear A1C LRM's petition for a writ of mandamus; (2) whether the military judge erred by denying A1C LRM the opportunity to be heard through counsel thereby denying her due process under the military rules of evidence, the Crime Victims' Rights Act and the United States Constitution; and (3) whether the court should issue a writ of mandamus.

Upon review, the court answered the first two questions in the affirmative, holding that the Air Force Court of Criminal Appeals erred in finding that it lacked jurisdiction to hear the victim's petition for a writ of mandamus, and that the military judge erred in denying the victim the opportunity to be heard through counsel. As to the first question, the court explained that the issue of whether the victim has limited standing to be heard through counsel in M.R.E. 412 and 513 hearings was ripe and that the harm alleged by the victim has "the potential to directly affect the findings and sentence" in the case. The court concluded that this potential existed because the military judge's ruling "precluding [the victim] from presenting the basis for a claim of privilege or exclusion, with or without counsel, during an ongoing court martial[,]" had "a direct bearing" on the guilt or innocence determination, which would then "form the very foundation of a finding and sentence." The court dismissed the contention that the victim's position as a nonparty to the court martial precluded standing, relying instead on "long-standing precedent that a holder of a privilege has a right to contest and protect the privilege[,]" and recognition by numerous courts, including the United States Supreme Court, that limited participant standing is permissible.

As to the second question addressing the substantive merits of the military's judge's decision denying the victim the right to be heard through counsel, the court concluded that the military judge erred in so deciding, as "[s]tatutory construction indicates that the President intended, or at a minimum did not preclude, that the right to be heard in evidentiary hearings under M.R.E. 412 and 513 be defined as the right to be heard through counsel on legal issues, rather than as a witness."

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# *Pro Bono* Corner

*NCVLI is grateful for the outstanding work of attorneys who serve as pro bono counsel for NCVLI's efforts to help crime victims. In this issue we thank nine attorneys who have served as local counsel in our amicus curiae efforts in the past year.*

**Stephanos Bibas.** Mr. Bibas, Law Professor and Director of the Supreme Court Clinic at University of Pennsylvania Law School, in Philadelphia, Pennsylvania, served as local counsel in a brief filed by NCVLI before the United States Supreme Court, urging the Court to grant certiorari to resolve a circuit split on the issue of whether federal law requires victims of child sexual abuse whose images are captured (a.k.a. child pornography victims) to prove that the defendant's criminal actions proximately caused their losses in order to receive restitution. In that case, *Amy v. Kennedy*, NCVLI argued, *inter alia*, that Congress has repeatedly acknowledged that children who are sexually exploited and filmed suffer enduring harm each time perpetrators distribute or view the images of their abuse and that these victims face substantial difficulties in proving causation, procuring restitution awards, and collecting full restitution from defendants. NCVLI further argued that the Court should take up and decide the case to resolve the issue so that victims can recover full restitution as Congress intended.

**Russell P. Butler.** Mr. Butler, Executive Director of the Maryland Crime Victims' Resource Center, in Upper Marlboro, Maryland, served as local counsel and his agency was co-amici in *Anthony v. Garrity*, a case before the Maryland Court of Appeals. In the brief, co-amici argued that the lower court's decision to uphold a malicious prosecution suit against an individual who reported a violation of a protective order was error, as the decision would limit the ability of victims and others to access justice and would chill the likelihood of future reporting.

**Colleen Clase.** Ms. Clase, an attorney with Arizona Voice for Crime Victims, in Tempe, Arizona, served as local counsel and her agency was co-amici in *State ex. rel. Montgomery v. Bassett*, before the Arizona Court of Appeals, arguing that the sexual assault victim's right to access justice, together with state constitutional rights to protection, fairness, and dignity, require that stand-by counsel cross-examine the victim rather than the pro se defendant.

**Seth Fine.** Mr. Fine, Assistant Chief Criminal Deputy for the Snohomish County Prosecutor's Office, in Everett, Washington, served as local counsel in *State v. Dye*, a case in which NCVLI together with Courthouse Dogs Foundation appeared as amici before the Washington State Supreme Court. In that case, amici argued in support of a victim's right to the assistance of a facility dog during the victim's trial testimony.

**Catherine G. Hoolahan.** Ms. Hoolahan, Attorney at Law in Toledo, Ohio, served as local counsel in *Doe v. Bruner*, a case in which NCVLI, along with co-amici National Center for Victims of Crime, The Justice League of Ohio, Ohio Coalition for Battered Women, Ohio Now Education and Legal Fund, Ohio Alliance to End Sexual Violence, Buckeye Region Anti-Violence Organization, Crime Victim Services, and Cleveland Rape Crisis Center filed a brief before the Ohio Supreme Court. Amici argued that the lower courts erred in denying the civil plaintiff—a sexual assault victim—the right to proceed by pseudonym as such a denial impedes the interests of justice and infringes on the victim's right to privacy.

**Neal Kumar Katyal, Dominic F. Perella, and Lisa Swartzfager.** Mr. Katyal, Mr. Perella, and Ms. Swartzfager, of Hogan Lovells US LLP, in Washington, D.C., served as local counsel in *Maryland v. King*, a case in which NCVLI and co-amici Maryland Crime Victims' Resource Center, National Center for Victims of Crime, National Organization for Parents of Murdered Children, Crime Victims United of California, D.C. Crime Victims' Resource Center, and Colorado Organization for Victim Assistance filed a brief before the United States Supreme Court arguing that collection of DNA from arrestees is appropriate as it serves critical government interests, including the prevention of crime and safeguarding the rights of crime victims.

**Randall Udelman.** Mr. Udelman, of DeFusco & Udelman, PLC, in Scottsdale, Arizona, served as local counsel in *Lynne v. Super. Ct. of Ariz.*, a case in which NCVLI filed a brief in the Arizona Court of Appeals, arguing that the trial court's decision to abate the deceased defendant's murder conviction based upon the doctrine of abatement ab initio fails to account for the changed landscape of the criminal justice system and ignores victims' fundamental rights.

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Case Spotlights . . . **continued from page 14**

The court found that this interpretation was consistent with case law and that although "the military judge suggests that LRM's request is novel, there are many examples of civilian federal court decisions allowing victims to be represented by counsel at pretrial hearings." The court further found that although the victim's right to be heard through counsel is not absolute, the victim "has a right to have the military judge exercise his discretion on the manner in which her argument is presented based on a correct view of the law." The court also concluded that the military judge erred in finding that judicial partiality was at stake, finding instead that "[i]t is not a matter of judicial partiality to allow a victim or a patient to be represented by counsel in the limited context of M.R.E. 412 or 513 before a military judge, any more than it is to allow a party to have a lawyer."

On the issue of the appropriate remedy, the court declined to issue a writ of mandamus, instead returning the matter to the military judge for reconsideration of his ruling in light of the court's holding.

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# *Sponsors &* Supporters

NCVLI is grateful to its many donors and sponsors, each of whom helps advance victims' rights with their support. Since January 2013, NCVLI has been privileged to have extraordinary support for four community events—NCVLI's Open House, Crime Victims' Rights Week Panel Presentation, Crime Victim Law Conference, and Crime Victims' Rights Reception. In addition to the United States Department of Justice's Office for Victims of Crime, the Conference, our largest event, had a record nine sponsors, including:

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In all, NCVLI has received support and donations for our events from 57 individuals, businesses, and civic organizations, 34 of which are first time supporters. Their contributions help make a difference for victims.

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## A Retrospective on NCVLI's Responding to Online Fraud Project: Education as Critical to Securing Meaningful Rights

*by Terry Campos, J.D.*

The crime victims' rights movement has come a long way in the past few decades, but as discussed in NCVLI's prior article—"Victims of Online Fraud: Crime Victims Without Meaningful Rights?"—victims of online fraud continue to face a number of obstacles that make it particularly difficult for them to access services and to exercise their rights.[1] Victim blaming is still common, and a lack of understanding of the trauma that victims of these crimes endure exists even among experienced victim service agencies.

NCVLI had a dedicated two year project—*Responding to Online Fraud Project*—to respond to this reality. Three key lessons emerged from the *Project*, each of which emphasizes the importance of improved education of the public and justice practitioners about the prevalence of online fraud and the serious harm these crimes cause victims.[2] First, understanding the complexity and sophistication of online fraud and other financial crimes will help dispel victim blaming and will likely increase reporting to law enforcement. Second, increased recognition that victims of these crimes may suffer severe physical and emotional harm will ensure that when victims reach out for help they are met with responsive services. Finally, understanding that the nature of online fraud may place victims at increased risk of polyvictimization[3] is critical to effective services.

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[1] NCVLI Newsletter of Crime Victim Law, 13th Ed. (Nat'l Crime Victim Law Inst., Portland, Or.), 2011, at 7-9, 12-13, 19. NCVLI is in the process of making past Newsletter articles available on its website, but in the meantime copies of this article may be accessed by contacting NCVLI. This article identifies several obstacles for victims of online fraud, including: the historical bias against victims of fraud that minimizes the harm suffered; complex jurisdictional issues that complicate the reporting and prosecution of these crimes; and the challenges inherent in mass victimization cases.

[2] As part of NCVLI's effort to educate on this topic, NCVLI produced a three-part webinar series regarding victims of online fraud entitled, *Online Fraud and Identity Theft: The Hurdles Victims Face to Protecting their Rights and the Tools Available to Overcome Them.* The webinar series provides victim law practitioners and advocates with the tools for identifying and meeting the unique needs of victims of online fraud. The series includes a discussion of the effect of these crimes on victims, barriers faced by victims in accessing legal and support services, available services to support victims in recovery, common victims' rights issues that arise in these cases, and best practices in meeting the legal and support needs of victims of online fraud. To access these webinars, please visit www.navra.org, or contact NCVLI.

[3] A polyvictim is someone who has experienced multiple victimizations of different kinds at various points during a lifetime. David Finkelhor *et al.*, *Polyvictimization: Children's Exposure to Multiple Types of Violence, Crime, and Abuse*, U.S. Dep't of Just., Office of Just. Programs, OJJDP Juv. Just. Bull. 1-4 (Oct. 2011), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/235504.pdf. For more information about polyvictimization, see *Polyvictims: Victims' Rights Enforcement as a Tool to Mitigate "Secondary Victimization" in the Criminal Justice System*, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), Mar. 2013, at 3 n.2, *available at* https://law.lclark.edu/live/files/13798-polyvictims-victims-rights-enforcement-as-a-tool. In the world of online fraud, for example, the online theft of personal information may lead to identity theft, stalking, home invasion, trafficking, sexual assault, and even homicide.

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**NCVLI'S TOOLS: Legal Advocacy, Training & Education, and Public Policy**

NATIONAL CRIME VICTIM LAW INSTITUTE

**LEGAL ADVOCACY.** We fight for victims' rights by filing amicus curiae (friend of the court) briefs in victims' rights cases nationwide. Through our National Alliance of Victims' Rights Attorneys (NAVRA), we also work to pair crime victims with free attorneys and work to ensure that those attorneys can make the best arguments possible. We do this by providing the attorneys with legal technical assistance in the form of legal research, writing, and strategic consultation.

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**PUBLIC POLICY.** We work with partners nationwide to secure the next wave of victims' rights legislation — legislation that guarantees victims substantive rights and the procedural mechanisms to secure those rights.

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