



NOVEMBER 2002

VICTIM INPUT INTO PLEA AGREEMENTS

LEGAL SERIES



Message From THE DIRECTOR

Over the past three decades, the criminal justice field has witnessed an astounding proliferation of statutory enhancements benefiting people who are most directly and intimately affected by crime. As of 2000, all states had passed some form of legislation to benefit victims. In addition, 32 states have recognized the supreme importance of fundamental and express rights for crime victims by raising those protections to the constitutional level.

Of course, the nature, scope, and enforcement of victims' rights vary from state to state, and it is a complex and often frustrating matter for victims to determine what those rights mean for them. To help victims, victim advocates, and victim service providers understand the relevance of the myriad laws and constitutional guarantees, the Office for Victims of Crime awarded funding to the National Center for Victims of Crime to produce a series of bulletins addressing salient legal issues affecting crime victims.

Victim Input Into Plea Agreements, the seventh in the series, provides an overview of state laws addressing the rights of victims to be involved during plea negotiations in criminal cases. This bulletin and the others in the Legal Series highlight various circumstances in

Continued on page 2

Introduction

According to the Bureau of Justice Statistics, guilty pleas in 1996 accounted for 91 percent of felony convictions in state courts.¹ This figure has been consistent since 1988. Thus, unless crime victims are afforded the opportunity to be involved during plea negotiations and related proceedings, most of them will be effectively denied any chance for meaningful participation in the criminal justice process.

The enactment of victims' rights legislation in recent years has allowed victims of crime to take a more active role in criminal proceedings. By sharing the impact the crime has had on their lives and voicing their views on sentencing, victims can play an essential role in the appropriate administration of justice. Victims in many states, however, have not been able to fully exercise the rights provided them by law.

Status of the Law

When victims have been permitted to provide input into plea agreements, the right has typically been granted at two stages of the criminal justice process: (1) when conferring with the prosecutor during plea bargaining and (2) when addressing the court, either orally or in writing, before the entry of the plea. Depending on the law of a particular state, a victim may be given the opportunity to comment on the proposed plea at either or both of these stages.

Right To Confer With Prosecutor

Most states provide victims with some level of prosecutorial consultation about a negotiated plea agreement; however, the extent of their participation varies widely from state to state. In no state is the right to confer interpreted as the right to direct the prosecution of the case or to veto decisions of the prosecutor. As the applicable law in Wisconsin specifically states, "The duty to confer . . . does not limit the obligation of the district attorney to exercise his or her discretion concerning the handling of any criminal charge against the defendant."²

In several states, victims are afforded a general right to confer with the prosecutor. The laws of those states require prosecutors to consult or confer with victims concerning plea



Continued from page 1

which such rights are applied, emphasizing their successful implementation.

We hope that victims, victim advocates, victim service providers, criminal justice professionals, and policymakers in states across the Nation will find the bulletins in this series helpful in making sense of the criminal justice process and in identifying areas in which rights could be strengthened or more clearly defined. We encourage you to use these bulletins not simply as informational resources but as tools to support victims in their involvement with the criminal justice system.

John W. Gillis
Director

bargaining or negotiated plea agreements but fail to state what “consult” and “confer” mean in this context.³

In other states, the obligation to confer appears to be limited to notifying, informing, or advising victims of a plea bargain or agreement that has already been reached before presenting the proposed plea to the court.⁴ Prosecutors in Vermont must both inform and consult with victims throughout the plea agreement negotiation process.⁵ Generally, few procedural guidelines regarding the prosecutor’s responsibilities to confer are included in these types of laws, however, leaving their implementation largely at the discretion of the prosecutor.

Obtaining Views of Victim

In at least 22 states, the victim’s right to confer with the prosecutor requires a prosecutor to obtain the victim’s views concerning the proposed plea.⁶ Whereas the laws in some of these states do not address how victims will make their concerns known, others specifically provide for written input. In Georgia, a victim’s impact statement “shall be attached to the case file and may be used by the prosecuting attorney . . . during any stage of the proceedings against the defendant involving . . . plea bargaining.”⁷ State’s attorneys in Illinois are required, where practical, to both consult with the victim and consider a written impact statement, if one has been prepared, before entering into a plea agreement.⁸ South Dakota victims also are permitted to provide their views both orally and in writing.⁹ Not only do victims have the right to offer written input into whether a plea bargaining agreement is proper, but also prosecutors must make a reasonable effort to provide them the opportunity to comment on the agreement terms. In New Jersey, victims have the right to assistance with preparing

and submitting to the prosecutor a written statement outlining the impact of the crime and any sentencing recommendations they feel are appropriate.¹⁰

Under this type of consultation law, crime victims are at least given an opportunity to fully inform the prosecutor’s decision, although the terms and sentencing recommendations agreed to under a negotiated plea are still ultimately the decision of the prosecutor. Because most states provide no consequences for non-compliance with such laws, however, crime victims are still frequently left out of the plea agreement process.

Victim Impact Testimony at Plea Entry

The impact of the offense is also an important consideration in determining the appropriateness of a plea agreement, and the victim can offer the court a unique perspective on the impact of the crime. A third of the states permit the victim to be heard, either orally or in writing, at plea entry proceedings.¹¹ In Missouri, for example, “[p]rior to the acceptance of a plea bargain by the court, . . . the court shall allow the victim of such offense to submit a written statement or appear before the court personally or by counsel for the purpose of making a statement.”¹² Although Kansas only requires prosecutors to inform victims of the nature of a plea agreement, victims have the right to have their views and concerns heard throughout the criminal justice process and to have those views and concerns brought to the court’s attention when personal interests of the victim are affected.¹³

In a few states, a written impact statement may be submitted early in the criminal justice process and used by the court when the plea agreement is presented. Rhode Island victims have the right to prepare a written impact statement for insertion in the prosecutor’s case files.¹⁴ The statement is submitted for court review, or the victim is given a chance to address the court before the plea is accepted.¹⁵ Similarly, the same victim impact statement attached for use by Georgia prosecutors may be used by the judge when considering a plea agreement.¹⁶ In Texas, “[b]efore accepting a plea of guilty, . . . the court shall inquire as to whether a victim impact statement has been returned to the attorney representing the state and ask for a copy of the statement if one has been returned.”¹⁷

Prosecutor To Inform the Court of Victim’s Views

As an alternative to—and, in some states, in addition to—permitting the victim to address the court or submit a victim impact statement, the prosecutor must inform the court of the victim’s position on the plea agreement. For example, in Minnesota, if a victim is not present to express his or her

opinion of the plea agreement, the prosecutor must bring to the attention of the court any known objections expressed by the victim.¹⁸ Similarly, prosecutors in Arizona and Maine are required to inform the court of the victim's position on the plea, even when the victim is present and addresses the court at the time the plea is entered.¹⁹ In Washington, "the prosecutor shall make reasonable efforts to inform the victim . . . of the nature of and reasons for the plea agreement, . . . and ascertain any objections or comments the victim has to the plea agreement."²⁰ The court must be informed on the record whether any victim has objected or commented on the proposal.²¹ South Dakota prosecutors also are required to disclose victims' comments on the record.²² In Oregon cases in which the victim has requested notification and consultation regarding plea discussions, judges must ask the prosecuting attorney whether the victim is in agreement or disagreement with the plea.²³ In this way, the objections and concerns of victims who are unable to address the court themselves will be available to judges who can make informed decisions on a proposed plea agreement.

Certification of Compliance With the Court

Although many state legislatures give crime victims the right to consult with prosecutors concerning plea bargains, few include enforcement provisions in the laws to ensure compliance.

A few states have attempted to hold prosecutors accountable for compliance with such laws by requiring certification of prosecutors' efforts to confer with the victim. For example, in Arizona,

The court shall not accept a plea agreement unless—

1. The prosecuting attorney advises the court that before requesting the negotiated plea[,] reasonable efforts were made to confer with the victim.
2. Reasonable efforts are made to give the victim notice of the plea proceeding . . . and to inform the victim that the victim has the right to be present and, if present, to be heard.
3. The prosecuting attorney advises the court that to the best of the prosecutor's knowledge[,] notice requirements . . . have been complied with and the prosecutor informs the court of the victims' position, if known, regarding the negotiated plea.²⁴

Both Alabama and Indiana have similar laws in effect.²⁵ In Maine, the attorney for the state must disclose to the court any and all attempts to notify the victim of the plea agreement and any victim objections to the plea proposal.²⁶ Prosecutors in Delaware must state on the record that the victim has been notified of a plea agreement to a reduced charge and given the opportunity to discuss the plea before entry. If notice is not made or practically possible, the prosecutor must state what steps were taken to inform the victim.²⁷ In Oregon, the judge is responsible for determining whether the victim has asked to be notified and consulted regarding plea discussions.²⁸

Prosecutors' efforts must be recorded even in some of the states that grant victims only a general right to confer and do not explicitly require prosecutors to ascertain the views of the victim(s) concerning the agreement. Mississippi courts are prohibited from accepting a plea agreement unless the prosecuting attorney advises that reasonable efforts were made to confer with the victim and to provide him or her with notice of the plea proceeding.²⁹ At the time a plea is entered in Utah, the prosecutor must provide written assurance to the court that the victim has been contacted and the agreement explained.³⁰ Nebraska requires the county attorney to make a good faith effort to consult the victim regarding the contents and reasons for the plea and to record consultation efforts in his or her file.³¹ In Ohio, the court is to note on the record any failure by the prosecutor to confer with the victim and the reasons for such failure.³²

Court certification of compliance efforts provides a system of checks and balances that can help preserve victims' consultation rights without placing undue burden on the criminal justice process.

Current Issues

Misconceptions

Both victims and criminal justice officials have numerous misconceptions regarding the right to confer. Some victims mistakenly believe that the right to confer gives them the right to veto a decision to plea bargain. At the same time, some prosecutors fear that mandatory consultation may undermine their prosecutorial discretion. In fact, neither assumption is true. No state has extended or interpreted a victim's right to confer to be a victim's right to control the prosecution of the case. Such laws merely provide victims with an opportunity to be heard, giving them a voice, not a veto.



The Minnesota Court of Appeals case *State v. Johnson*³³ illustrates this principle. When two victims of domestic assault indicated to the court, one at the plea proceeding, that they wanted to drop the charges against the defendants, the trial court dismissed both of the criminal cases solely on the basis of the victims' wishes. On appeal, the court agreed with the state's allegations, and remanded the cases, confirming that "the prosecuting authority makes the decision to commence and maintain criminal prosecutions. A private citizen/victim does not have the unilateral right to start or stop a criminal prosecution. . . . The victim's wishes regarding prosecution, although important, are not determinative."³⁴

As the following two cases illustrate, victims can exercise their right to be heard without jeopardizing the prosecutor's authority to negotiate a resolution to the case. These court rulings suggest that differences between victim impact testimony as to sentencing and agreements in a negotiated plea recommendation do not constitute a violation of the agreement between the state and the defendant.

In *Sharp v. Missouri*,³⁵ the prosecutor, in the course of plea bargaining, had agreed to remain silent on the subject of sentencing. One of the victims, who was also the mother of the three other victims, was invited to make an impact statement to the court, pursuant to Missouri Code § 557.041, in which she included a request for the maximum sentence. The court proceeded to sentence the defendant to a total of 16 years on four counts. After sentencing, the defendant filed a motion to withdraw his guilty plea on the grounds that the victim's request for the maximum sentence in her impact statement breached the terms of the plea agreement whereby the prosecutor would make no recommendation as to the defendant's sentence. The court denied the motion, concluding that no evidence had been submitted to establish that the state's agreement to remain silent as to sentencing also applied to the victim and that nothing in the victim's impact statement purported to be the views of the prosecutor, the state, or anyone other than herself and her family.

The Vermont Supreme Court's ruling was similar.³⁶ In that case, the court rejected a plea agreement as being too lenient after hearing the victims' impact testimony. The court held that the prosecutor's questioning of victims about the impact of the crime during sentencing proceedings did not violate the plea agreement, even though the victims, in the course of questioning, requested a harsher sentence than that agreed to in the plea recommendation.

These cases indicate that victim impact statements can influence the court's decision to accept or reject a plea. Also, consulting with the victim throughout plea bargain discussions allows prosecutors to incorporate the victims' concerns before presenting a plea proposal to the court. Furthermore, this inclusion may enhance the probability that the plea agreement will meet with judicial approval.

In addition, education can significantly reduce misunderstanding. Explaining to a victim how the criminal justice process works at the outset of the case, including the circumstances that might lead to a plea bargain, can help prevent unrealistic victim expectations. Victim/witness coordinators in prosecutors' offices can help victims understand their consultation rights, including any related limitations, and their use is essential to maximizing the benefit victims receive from conferring with prosecutors. Also, victim service professionals can help victims prepare and submit impact statements that are useful to both the prosecutor and the court throughout the plea bargaining process.

For prosecutors and judges, familiarity with the workings of victim impact and consultation laws provides for smooth implementation of these laws. Articulating the victim's views on a proposed plea agreement to the court in a victim's absence encourages a prosecutor to actively listen to the concerns and objections of a victim rather than simply notifying or informing a victim after an agreement has been reached. At the same time, prohibiting judges from accepting a plea agreement unless the victim's views have been made known and notification requirements have been met promotes enforcement of crime victims' rights.

Inability To Enforce

Relatively little case law addresses enforcement of a victim's right to provide input for a negotiated plea. Laws of many states specifically prohibit remedial action for noncompliance with victims' rights provisions or state that failure to observe such rights shall not be grounds to change a sentence.³⁷ In addition, victims may lack standing to seek enforcement of their rights.

The holding in a recent Rhode Island case illustrates the effect of this prohibition.³⁸ Despite the fact that the victims in the case had both a constitutional and a statutory right to present victim impact testimony before the state accepted a plea agreement, the defendant negotiated and entered a plea to a reduced charge without the victims' knowledge. Only after the victims retained counsel to investigate and pursue a civil claim on their behalf did they discover that the criminal case had been resolved without

an opportunity for the victims to address the court. The victims brought a suit against the state and the town for failure to notify them of their rights and the pending criminal case and for monetary damages. On appeal, the Supreme Court of Rhode Island denied their claim, stating that “in order for a cause of action for damages to resonate from the deprivation of a crime victim’s rights, the legislature must create specific provisions or mechanisms as mandated by the framers.”³⁹ By enacting a statute that states, “Failure to afford the victim of a felony offense any of the rights established by this chapter shall not constitute grounds for vacating an otherwise lawful conviction, or for voiding an otherwise lawful sentence or parole determination,” the Rhode Island General Assembly declined to create a remedy for crime victims whose rights have been violated.⁴⁰

Innovative Practices

In addition to compliance certification procedures, states can use other creative means to ensure that victims’ voices are heard throughout the plea bargaining process. Arizona has experimented with a rule permitting judges to participate in plea negotiations.⁴¹ The rule also clearly defines a victim’s role in the plea bargaining process, even permitting victims to be present and heard during any settlement discussions attended by the defendant. In any case, the rule requires the prosecutor to confer with the victim and inform the court about the victim’s position; in addition, it states that the court must consider the victim’s views in deciding whether to accept or reject the negotiated plea.

Conclusion

To better incorporate victim input on negotiated plea agreements into the criminal justice process, concisely worded legislation that defines key terms can help avoid misconceptions by prosecutors and victims. Well-written statutory language that clarifies the prosecutor’s obligations toward victims encourages more consistent application of the right to confer for all victims. Moreover, certification of efforts to consult with victims before pleas can be accepted may be a valuable tool for ensuring compliance. Finally, criminal justice professionals should be familiar with laws governing victim input and should help victims understand their meaning.

About This Series

OVC Legal Series bulletins are designed to inform victim advocates and victim service providers about various legal issues relating to crime victims. The series is not meant to provide an exhaustive legal analysis of the topics presented; rather, it provides a digest of issues for professionals who work with victims of crime.

Each bulletin summarizes—

- Existing legislation.
- Important court decisions in cases where courts have addressed the issues.
- Current trends or “hot topics” relating to each legal issue.

Notes

1. Brown, J., P. Langan, and D. Levin (1999). *Felony Sentences in State Courts, 1996*. Washington, DC: Bureau of Justice Statistics, U.S. Department of Justice.
2. WIS. STAT. § 971.095 (2000).
3. COLO. REV. STAT. § 24-4.1-303 (2001); HAW. REV. STAT. § 801D-4 (2000); KY. REV. STAT. ANN. § 421.500 (Banks-Baldwin 2001); MISS. CODE ANN. § 99-43-27 (2001); MO. REV. STAT. § 595.209 (2000); NEB. REV. STAT. ANN. § 23-1201 (Michie 2001); N.H. REV. STAT. ANN. § 21-M:8-k (2000); N.D. CENT. CODE § 12.1-34.02 (2001); OHIO REV. CODE ANN. § 2930.06 (Anderson 2001); WIS. STAT. § 971.095 (2000).
4. CAL. PENAL CODE § 679.02 (Deering 2001); IDAHO CODE § 19-5306 (Michie 2000); IOWA CODE § 915.13 (2001); KAN. STAT. ANN. § 22-3436 (2000); MD. ANN. CODE art. 27, § 770 (2000); OKLA. STAT. tit. 19, § 215.33 (2000); TENN. CODE ANN. § 40-38-103 (2001); WYO. STAT. ANN. § 1-40-204 (Michie 2001).
5. VT. STAT. ANN. tit. 13, § 5321 (2001).
6. ALA. CODE § 15-23-64 (2001); ARIZ. REV. STAT. § 13-4419 (2000); CONN. GEN. STAT. §§ 54-91c, -203 (2001); DEL. CODE ANN. tit. 11, §§ 9405, 9411 (2000); FLA. STAT. ANN. § 960.001 (West 2001); GA. CODE ANN. §§ 17-10-1.1, 17-17-11 (2000); 725 ILL. COMP. STAT. 120/4.5 (2001); IND. CODE ANN. §§ 35-35-3-2, -5, -6 (Michie 2000); LA. REV. STAT. ANN. § 46:1844 (West 2001); ME. REV. STAT. ANN. tit. 15, § 6101, tit. 17-A, § 1172 (West 2000);



- MICH. COMP. LAWS § 780.756 (2001); MINN. STAT. § 611A.03 (2000); MONT. CODE ANN. § 46-24-104 (2000); N.J. STAT. ANN. § 52:4B-44 (West 2001); N.Y. EXEC. LAW § 642 (Consol. 2001); N.C. GEN. STAT. § 15A-832 (2000); OR. REV. STAT. § 135.406 (1999); 18 PA. CONS. STAT. §§ 11.201, .213 (2001); R.I. GEN. LAWS § 12-28-3 (2001); S.D. CODIFIED LAWS §§ 23A-28C-1, 23A-7-8, -9 (Michie 2001); WASH. REV. CODE § 9.94A.080 (2001); W. VA. CODE § 61-11A-6 (2001).
7. GA. CODE ANN. § 17-10-1.1 (2000).
8. 725 ILL. COMP. STAT. 120/4.5 (2001).
9. S.D. CODIFIED LAWS §§ 23A-28C-1, 23A-7-8 (Michie 2001).
10. N.J. STAT. ANN. § 52:4B-44 (West 2001).
11. ARIZ. CONST. art. II, § 2.1, ARIZ. REV. STAT. § 13-4423 (2000); COLO. REV. STAT. § 24-4.1-302.5 (2001); CONN. GEN. STAT. §§ 54-91C, -203 (2001); IDAHO CONST. art. II, § 16a, IDAHO CODE § 19-5306 (Michie 2000); IND. CODE §§ 35-35-3-2, -3 (2000); ME. REV. STAT. ANN. tit. 17-A, § 1173 (West 2000); MD. ANN. CODE art. 27 §§ 770, 781 (2000); MINN. STAT. § 611A.03 (2000); MO. CONST. art. I, § 32, MO. REV. STAT. §§ 557.041, 595.209 (2000); MONT. CODE ANN. § 46-18-115 (2000); N.H. REV. STAT. ANN. § 21-M:8-k (2000); N.Y. EXEC. LAW § 647 (Consol. 2001); OKLA. STAT. tit. 22, § 984.1 (2000); R.I. GEN. LAWS §§ 12-28-3, -4.1 (2001); S.D. CODIFIED LAWS § 23A-28C-1 (Michie 2001); TEX. CODE CRIM. PROC. ANN. art. 26.13 (Vernon 2000).
12. MO. REV. STAT. § 557.041 (2000).
13. KAN. STAT. ANN. §§ 22-3436, 74-7333 (2000).
14. R.I. GEN. LAWS § 12-28-3 (2001).
15. R.I. GEN. LAWS § 12-28-4.1 (2001).
16. GA. CODE ANN. § 17-10-1.1 (2000).
17. TEX. CODE CRIM. PROC. ANN. art. 26.13 (Vernon 2000).
18. MINN. STAT. § 611A.03 (2000).
19. ARIZ. REV. STAT. § 13-4423 (2000); ME. REV. STAT. ANN. tit. 15, § 6101, tit. 17-A, § 1173 (West 2000).
20. WASH. REV. CODE § 9.94A.080 (2001).
21. WASH. REV. CODE § 9.94A.090 (2001).
22. S.D. CODIFIED LAWS § 23A-7-9 (Michie 2001).
23. OR. REV. STAT. § 135.406 (1999).
24. ARIZ. REV. STAT. § 13-4423 (2000).
25. ALA. CODE § 15-23-71 (2001); IND. CODE ANN. §§ 35-35-3-5, -6 (Michie 2000).
26. ME. REV. STAT. ANN. tit. 17-A, § 1173 (West 2000).
27. DEL. CODE ANN. tit. 11, § 5106 (2000).
28. OR. REV. STAT. § 135.406 (1999).
29. MISS. CODE ANN. § 99-43-27 (2001).
30. UTAH CODE JUD. ADMIN. R. 4-601 (2001).
31. NEB. REV. STAT. § 23-1201 (2001).
32. OHIO REV. CODE ANN. § 2930.06 (Anderson 2001).
33. *State v. Johnson*, No. C4-92-2517, 1993 Minn. App. LEXIS 617 (Minn. App. June 9, 1993).
34. *Id.* at *5.
35. *Sharp v. Missouri*, 908 S.W.2d 752 (Mo. Ct. App. 1995).
36. *State v. Clark*, 566 A.2d 1346 (Vt. 1989).
37. For example, ARIZ. CONST. art. II, § 2.1; COLO. REV. STAT. § 24-4.1-303 (2001) (see specifically subsection (4)); DEL. CODE ANN. tit. 11, §§ 5106, 9405 (2000); IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; N.H. REV. STAT. ANN. § 21-M:8-k (2000); N.Y. EXEC. LAW § 642 (Consol. 2001); OHIO REV. CODE ANN. § 2930.06 (Anderson 2001); S.D. CODIFIED LAWS §§ 23A-7-8, -9 (Michie 2001).
38. *Bandoni v. Rhode Island*, 715 A.2d 580 (R.I. 1998).
39. *Id.* at 601.
40. R.I. GEN. LAWS § 12-28-7 (2001).
41. ARIZ. ST. R.C.R.P.R. 17.4 (2001).

**NO MORE
VICTIMS**

**Know More
Ask OVC**

www.ojp.usdoj.gov/ovc

**The Office for Victims of Crime
Web site now has**

- NEW** Consultant Database
- NEW** Online Ordering
(Publications and Other Products)
- NEW** 2002 Training Calendar
- NEW** Research and Statistics

Check it out 

The OVC Legal Series bulletins were created by the National Center for Victims of Crime (NCVC) under grant number 1999-VF-GX-K007 awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this bulletin are those of the author/NCVC and do not necessarily represent the official position or policies of the U.S. Department of Justice.

The Office for Victims of Crime is a component of the Office of Justice Programs, which also includes the Bureau of Justice Assistance, the Bureau of Justice Statistics, the National Institute of Justice, and the Office of Juvenile Justice and Delinquency Prevention.

NCJ 189188