

NATIONAL CRIME VICTIM LAW INSTITUTE
at Lewis & Clark Law School
PROTECTING, ENFORCING and ADVANCING VICTIMS' RIGHTS

MEMORANDUM

TO: G.R.
FROM: NCVLI
RE: Victims' Rights Rights & Retroactive Sentencing
DATE: March 14, 2007

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Pursuant to your request, the National Crime Victim Law Institute (NCVLI) has prepared an independent analysis of what rights of Illinois crime victims would be affected if the legislature passed a statute retroactively reducing offenders' sentences.

NCVLI is a nonprofit educational organization located at Lewis & Clark Law School, in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; technical assistance to attorneys; promotion of the National Alliance of Victims' Rights Attorneys; research and analysis of developments in crime victim law; and provision of information on crime victim law to crime victims and other members of the public. In addition, NCVLI actively participates as *amicus curiae* in cases involving crime victims' rights nationwide.

DISCUSSION

With the passage of Article I, Section 8.1 of the Illinois Constitution (the “Victims’ Rights Amendment”), and other statutory provisions, the citizens of Illinois endowed crime victims with rights in the criminal justice system. Those rights include the rights to be treated with fairness and respect for victims’ dignity, to timely disposition, to be reasonably protected, to be present at all court proceedings and to restitution. The Victims’ Rights Amendment was enacted as part of a national movement to ensure that crime victims are not treated as second class citizens in the criminal justice system, but instead are treated as participants in that system who are to be respected, protected and heard. As noted by the Ninth Circuit Court of Appeals in discussing the passage of the federal victims’ rights act, victims’ rights law overturns the longstanding “assumption that crime victims should behave like good Victorian children—seen but not heard.” *Kenna v. United States Dist. Ct. for the Cent. Dist. of Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006).

This memorandum discusses how the rights in the Victims’ Rights Amendment will be implicated if the sentences of violent criminals are retroactively reduced.

A) Victims’ Right to be Treated with Fairness

Illinois victims have a state constitutional right “to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.” Ill. Const. art I, § 8.1(a)(1). This right ensures that victims are treated properly within the criminal justice system. As stated by Justice Cardozo, “justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.” *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

While fairness, with respect to victims' rights, has not been defined by an Illinois court, other state and federal courts have discussed the meaning of fairness within the context of victims' rights.¹ As noted by a federal district court, "[t]o treat a person with fairness is generally understood as treating them 'justly' and 'equitably.'" *United States v. Heaton*, 458 F.Supp.2d 1271, 1272 (D. Utah 2006). Fairness also includes fundamental precepts of due process. *See* 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) ("Of course, fairness includes the notion of due process.").

While no published opinion has applied a victim's right to fairness to the retroactive reduction of offenders' sentences, a retroactive reduction of violent criminals' sentences risks causing more harm to victims, an effect that would implicate common sense notions of fairness. At a minimum, fairness requires taking the interests of victims into account in any decision to retroactively change the sentence that was given at conviction. Additionally, as a matter of procedural fairness, victims should be given due process – notification and an opportunity to be heard before their offender's sentence is reduced.

¹ *See, e.g., Romley v. Schneider*, 45 P.3d 685, 688 (Ariz. Ct. App. 2002) (holding that fingerprinting victim violates victims' rights under the Arizona Constitution, statutory law and Rule 39(b)(1), including the rights to fairness, dignity, and respect and to be free from intimidation, harassment and abuse); *State v. Timmendequas*, 737 A.2d 55, 75-82 (N.J. 1999) (holding that constitutional requirements of fairness and dignity for victims dictate that the needs of the victim and defendant should be balanced in determining venue); *State in the Interest of K.P.*, 709 A.2d 315, 321 (N.J. Super. Ct. 1997) (holding that the language of "fairness, compassion and respect" create mandatory and self-executing rights for victims); *State v. O'Neil*, 836 P.2d 393, 394 (Ariz. Ct. App. 1991) (holding that requiring the state to record witness interviews violates the right to fairness, dignity and respect and the right to be free from intimidation, harassment and abuse, as well as other constitutional rights of the victim); *State v. McDonald*, 839 S.W.2d 854, 858-59 (Tex. 1992) (holding that the right to "fairness" in the Texas Constitution gives victims of crime access to the prosecutor but does not grant victims civil discovery of contents of prosecutor's file). *But cf. Schilling v. State Crime Victims Rights Bd.*, 692 N.W.2d 623, 631 (Wis. 2005) (holding that the fairness and dignity language in victims' rights amendment was not mandatory); *Bandoni v. Rhode Island*, 715 A.2d 580, 587 (R.I. 1998) (holding that the fairness provisions were not self-executing but rather statements of general principle).

B) Victims' Right to Timely Disposition

Victims in Illinois have a right to “timely disposition following the arrest of the accused.” Ill. Const. art I, § 8.1(a)(6). In part, this right ensures that victims have closure of the criminal case so that they can begin the recovery process. *See* Paul Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah’s Victims’ Rights Amendment*, 1994 Utah L. Rev. 1373, 1405 (1994) (“Victims cannot heal from the trauma of the crime until the trial is over and the matter has been concluded.”). In the habeas context, the Supreme Court has affirmed the importance of finality in the criminal process:

Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out . . . to unsettle these expectations is to inflict a profound injury to the “powerful and legitimate interest in punishing the guilty,” an interest shared by the State and the victims of crime alike.

Calderon v. Thompson, 523 U.S. 538, 556 (1998) (citation omitted). Retroactively reducing sentences harms the victims’ sense of finality, implicating the right to timely disposition.

C) Victims' Right to Protection

The Victims’ Rights Amendment provides victims “[t]he right to be reasonably protected throughout the criminal justice process.” Ill. Const. art I, § 8.1(a)(7). The release of an offender directly implicates the safety and protection of the victim:

Victims and witnesses share a common, often justified apprehension that they and members of their family will be threatened or harassed as a result of their testimony against a violent criminal. This fear is quite understandable. Victims and witnesses have seen personally what the defendant is capable of doing. In addition, threats and actual retaliation are not uncommon.

President’s Task Force 19. For example, victims make safety planning decisions based on the release date of offenders. As noted by a survivor of sexual assault:

What are my concerns regarding my core rights as a victim/survivor relevant to this issue of offender reentry? Ensuring my safety and that of my family is, and always should be, first and foremost. Discussing my safety concerns with local law enforcement and the community should occur long before the offender is released.

Anne K. Seymour, *The Victim's Role in Offender Reentry: A Community Response Manual* 19 (U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime 2000).

The release of offenders by any means, including a retroactive reduction in sentence, directly affects victims' right to protection, and victims' safety must be taken into account in any decision to release offenders prior to their original sentence release date.

D) Victims' Right to Information Regarding Sentence, Imprisonment & Release

Victims have a constitutional right to information about "conviction, sentence, imprisonment, and release of the accused." Ill. Const. art I, § 8.1(a)(5). At a minimum, this means that victims must be notified if their offender's sentences are to be retroactively reduced. For this notification right to have meaning it must occur prior to the reduction in sentence.

E) Victims' Right to Be Heard at Sentencing

In addition to the right to information regarding an offender's sentence, victims also have the right to be heard at sentencing. Victims have a constitutional right to "make a statement at sentencing," Ill. Const. art I, § 8.1(a)(4), and a statutory right to "address the court regarding the impact that the offender's criminal conduct . . . has had upon . . . the victim." 725 Ill. Comp. Stat. Ann. 120/6(a). This statutory right to present a victim impact statement also includes the right to have the statement considered by the court in determining the sentence: "The court shall consider any impact statement admitted along with all other appropriate factors in determining the sentence of the offender . . ." *Id.* These rights to participate in the sentencing process reflect

the victim's interest in the sentence:

The imposition of a criminal penalty may be the most difficult kind of decision a judge is called on to make. In addition to affecting the defendant, the sentence is a barometer of the seriousness with which the criminal conduct is viewed. It is also a statement of social disapprobation, a warning to those tempted to emulate the offender's actions, and a step that must be taken for the protection of society. Finally, it is a statement of societal concern to the victim for what he has endured.

President's Task Force 76. The right to have a victim impact statement considered by the judge when deciding on the sentence recognizes the importance of the harm to the individual. As the Supreme Court stated in the context of capital sentencing, victim impact information "is designed to show . . . *each* victim's 'uniqueness as an individual human being,'" *Payne v. Tennessee*, 501 U.S. 808, 823 (1991).

A retroactive reduction in sentence essentially erases the victim's right to participate at the original sentencing. Victims gave statements at the sentencing and the judge used that information to impose a sentence based on existing law. Imposing a new sentence, automatically and retroactively, contravenes the right of victims to give victim impact statements prior to sentencing, violates the trust the victims placed in the system, and fundamentally undermines the purpose of a victim's original victim impact statement.

CONCLUSION

A retroactive reduction in the sentences of violent offenders implicates at least five rights held by victims in Illinois: the rights to fairness, timely disposition, protection, information about sentence, imprisonment and release, and to make statement at sentencing. Any change in existing sentencing law must take into account these rights.