

*Victim Law Position Paper**

LEGAL PUBLICATIONS PROJECT OF THE NATIONAL CRIME VICTIM LAW INSTITUTE AT LEWIS & CLARK LAW SCHOOL**

Crime Victims Have the Right to Retained Counsel's Presence During Investigative Interviews

*Position Papers are essays in which NCVLI details its positions on cutting-edge victims' rights issues to help ensure vigorous assertion and enforcement of victims' rights.

The Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, grants victims of federal crimes a myriad of rights that are implicated at the earliest stages of investigation, including when victims are interviewed by law enforcement or other governmental agencies. Victims also have weighty constitutional and rule-based rights that may be implicated during an investigative interview. These rights, whether grounded in the Constitution, statutes, or rule make crime victims independent participants, rather than mere witnesses, in the criminal justice system.¹ These rights must be interpreted through the lens of due process; consequently, victims' rights must be afforded in such a way that the rights are meaningful.² In the context of investigatory interviews, due process requires recognition of the right to the presence of retained counsel.

The Supreme Court first recognized a due process right to the assistance of counsel in 1932 in *Powell v. Alabama*,³ and although the context of the proceedings at issue in *Powell* today would be subject to analysis under the Sixth Amendment right of criminal defendants to counsel, commentators have recognized that "the concept of a right to counsel grounded on due process has continuing significance for other proceedings not encompassed by the Sixth Amendment."⁴ In construing the requirements of due process, the Court has emphasized that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands[,] and that, a determination of whether procedural protections are constitutionally mandated "requires analysis of the governmental and private interests that are affected."⁵ The factors to be considered include: (1) the private interests at stake in the official action; (2) the risk of an erroneous deprivation of the private interest through the procedures used and the probable value

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of any additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and any fiscal and administrative burdens that these procedures would create.⁶

Consideration of these factors makes clear that due process requires that investigatory agencies afford notice to victims of their right to have retained counsel present in investigatory interviews,⁷ and that they accommodate victims' counsel's presence at the interviews if the victims so choose. The private interests at stake are vast. In the federal criminal justice system, victims are afforded a number of statutory and rule-based rights that may be implicated in an investigatory interview, including, *inter alia*, to: "be reasonably protected from the accused"; "reasonable, accurate, and timely notice" of a variety of proceedings; "confer with the attorney for the Government in the case"; and "be treated with fairness and with respect for the victim's dignity and privacy[.]"⁸ Other critical rights of constitutional dimension are also implicated during such investigatory interviews, including victims' rights to privacy,⁹ to access justice,¹⁰ and to be free from compelled self-incrimination.¹¹

Protecting victims' legal rights and interests implicated in such interviews requires special legal knowledge and analysis that may only be provided by victims' counsel.¹² Thus, there is a considerable risk that victims will be deprived of these rights if retained counsel is dissuaded or barred from being present during investigatory interviews. Notably, the administrative

and financial burden on the government to provide the process of notice of right to the presence of retained counsel and accommodation of such presence would be minimal; law enforcement and other investigative agencies would simply be required to inform the victim in advance of an interview of the victim's right to have his or her counsel present, and then accommodate such presence.¹³

Thus, due process requires that victims who have secured the assistance of counsel have the benefit of the attorney's knowledge and skills in asserting the victims' legal rights as part of investigatory interviews; to conclude otherwise is to deny the victims access to the very tools that are necessary to ensure that their rights are meaningful.¹⁴

¹ See *Kenna v. U.S. Dist. Ct. for the C.D. Cal.*, 435 F.3d 1011, 1016 (9th Cir. 2006) ("The statute [Crime Victims' Rights Act] was enacted to make crime victims full participants in the criminal justice system.").

² See, e.g., *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (observing that fundamental aspects of due process include the opportunity to be heard in a "meaningful manner" and to be treated fairly).

³ 287 U.S. 45 (1932).

⁴ 3 Wayne R. LaFave et al., *The Constitutional Rights to Retained and Appointed Counsel*, Crim. Proc. § 11.1(b), at 1 (3d. ed. 2013). Other Supreme Court decisions have described the right to retained and appointed counsel as resting on "both equal protection and due process concerns." *Halbert v. Michigan*, 545 U.S. 600, 610 (2005) (quoting *M.L.B. v. S.L. J.*, 519 U.S. 102, 120 (1996)). The Court has further explained that: "The equal

protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs,' while '[t]he due process concern homes in on the essential fairness of the state-ordered proceedings.'" *Id.* at 610-11.

⁵ *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

⁶ *Id.*

⁷ The United States Supreme Court has noted that at the core of notions of procedural 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.").

⁸ 18 U.S.C. § 3771(a)(1), (2), (5), (8).

⁹ *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (noting that "[v]arious guarantees [in the Bill of Rights] create zones of privacy"); *Roe v. Wade*, 410 U.S. 113, 152 (1973) ("[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.").

¹⁰ Courts recognize the fundamental nature of the right of all people to access the courts. *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).

¹¹ *See Miranda v. Arizona*, 384 U.S. 436, 470 (1966) (recognizing that the "need for counsel to protect the Fifth Amendment privilege [against self-incrimination] comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires"); *see also Hill v. State*, 847 So. 2d 518, 522 (Fla. Dist. Ct. App. 2003) (finding that the trial court did not err when it informed the victim—at the state's request—at an evidentiary hearing that she faced possible criminal exposure for perjury and advised her of her right to counsel and her right against self-incrimination related to an affidavit submitted to the court by defendant in which the victim recanted her trial testimony).

¹² *Cf. ABA Formal Op. 95-396* (July 28, 1995) (observing that "[t]he legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel"; *ABA Formal Op. 91-359* (Mar. 22, 1991) ("The profession has traditionally considered that the presumptively superior skills of the trained advocate should not be matched against those of one not trained in the law.")).

¹³ *See Goldberg v. Kelly*, 287 U.S. 45, 68-69 (1932) (quoting *Powell v. Alabama* and observing that even in cases where an individual is not entitled to court-appointed counsel, he or she "must be allowed to retain an attorney if he [or she] so desires" and that the court did "not anticipate that this assistance will unduly prolong or otherwise encumber the hearing").

¹⁴ One concern that may be raised in connection with having victim counsel present during investigative interviews is whether the defendant or the prosecution will later be able to call the attorney as a witness in a criminal case. Although attorneys acting in the case are not incompetent witnesses, "courts are especially reluctant, and rightfully so, to allow lawyers . . . to be called as witnesses in trials in which they are advocates." *Gajewski v.*

United States, 321 F.2d 261 (8th Cir. 1963). Given this reluctance, the general standard for allowing an attorney in the case to be called as a witness in federal courts is strict. Some courts find that an attorney in a criminal proceeding is a competent witness for the defense only where there is a “compelling and legitimate need” for the testimony. *See, e.g., United States v. Regan*, 103 F.3d 1072, 1083 (2d Cir. 1997) (“A defendant who wishes to call a prosecutor as a witness must demonstrate a compelling and legitimate reason to do so.”); *United States v. Roberson*, 897 F.2d 1092, 1098 (11th Cir. 1990) (finding defendant did not establish a “compelling” need for prosecutor to be called as a witness). Similarly, other jurisdictions, including the Sixth Circuit, have found that defendant must demonstrate that “the evidence is vital to his case, and . . . his inability to present the same or similar facts from another source creates a compelling need for the testimony.” *United States v. Ziesman*, 409 F.3d 941, 950 (8th Cir. 2005) (citing *United States v. Watson*, 952 F.2d 982, 986-87 (8th Cir. 1991)); *see also United States v. Brothers*, 856 F. Supp. 388, 391 (M.D. Tenn. 1993) (stating that defendant must “exhaust other available sources of evidence before a court should sustain a defendant’s efforts to call a participating prosecutor as a witness”); *United States v. Atman*, No. 96-6648, 1998 U.S. App. LEXIS 7975, *11-12 (6th Cir. Apr. 22, 1998) (stating that a “defendant seeking to call the prosecutor as a witness must demonstrate that the prosecutor’s testimony is ‘vital’ to his case, and that he will be unable to present the same or similar facts from another source” and finding that the court did not abuse its discretion in concluding that defendant failed to produce evidence that calling the prosecutor was his only means of presenting relevant evidence in his defense). It is unlikely that the presence of a victim’s attorney during law enforcement interviews would create a “compelling need” for the attorney to testify at trial because other people would be present from whom the relevant testimony (if any) could be elicited—for instance, the investigating officers. *See, e.g., United States v. Ashman*, 979 F.2d 469, 494 (7th Cir. 1992) (finding there was no abuse of discretion in preventing defense from calling prosecutor as

a witness regarding defendant’s initial interview as an FBI agent was also in attendance who could testify about the interview); *Brothers*, 856 F. Supp. at 391 (finding attorney was not a necessary witness because “there were many other investigating agents present at [defendants’] proffer who can testify to what occurred during the meetings”). Notably, even if a court were to find that defense counsel or the prosecution had met the burden to call victim counsel as a witness at trial this would not defeat the victim’s right to have had counsel present in the first instance.

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