

STATEMENT
OF
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BEFORE
THE
SENATE JUDICIARY COMMITTEE
HEARING ON
THE COMMITMENT TO SUPPORT VICTIMS OF CRIME
ON APRIL 13, 2011
WASHINGTON, D.C.

Mr. Chairman and Distinguished Members:

I am pleased and honored to be here today during this 30th National Crime Victims' Rights Week to discuss ways that Congress, and each of us, can fulfill our commitment to supporting victims of crime.

The theme of this year's Crime Victims' Rights Week is "*Reshaping the Future, Honoring the Past.*" In keeping with this theme, I want to spend just a little time describing how we got to be where we are regarding victims within our criminal justice system because that history not only identifies the commitments that we have made to crime victims in this country, but it also sets forth the very path that we can and must take to fulfill those commitments. To this end, in Part I of my testimony I will provide a brief history of victims in this country's criminal justice system. In Part II, I will talk about two key pieces of legislation – the Victims of Crime Act (VOCA) and the Crime Victims' Rights Act (CVRA), which, when taken together, articulate both our promise and our obligation to victims in this country. In Parts III and IV, I will talk about key steps we have already taken to fulfill these promises and commitments to victims, specifically, the creation of a national network of rights enforcement clinics, and the progress of these efforts. In Parts V and VI, I will discuss the funding of these efforts and identify just a few specific harms that victims will suffer if support for these existing services is not continued, which is a looming reality. Finally, I will conclude by urging Congress to raise

the cap on VOCA or identify and commit to other concrete funding mechanisms to ensure adequate funding the existing legal and social services that are necessary to protect the rights we have put into law for victims – the rights which articulate the very promise we have made to them – that they will be treated with fairness and with respect for their dignity and privacy.

Before I start, however, I would like to tell you a bit about my nonprofit, the National Crime Victim Law Institute (NCVLI). NCVLI was first conceived in 1997 by law professor Doug Beloof to be a national resource for crime victim lawyers and victims to support the assertion and enforcement of victims’ rights in criminal and civil processes. Our mission is to actively promote balance and fairness in the justice system through crime victim centered legal advocacy, education, and resource sharing. In 2002, NCVLI entered into a 5-year cooperative agreement with the United States Department of Justice, Office for Victims of Crime (OVC), to launch the State & Federal Clinics and System Demonstration Project, the central component of which was to launch and oversee a network of pro bono legal clinics to work in state and federal criminal justice systems to ensure protection of victims’ rights. I joined NCVLI in 2003 and shortly thereafter we launched the clinical network with five clinics. Today, NCVLI has seven attorneys and six others on staff providing support to a network of 11 pro bono legal clinics as well as victims’ rights advocates and attorneys nationwide and is the only national agency seeking to secure enforcement of victims’ rights.

I. History of Victims in Criminal Justice.

The American criminal justice system began as one in which crime victims controlled the investigation and prosecution of the crimes against them.¹ The United States Supreme Court has acknowledged this foundation.² The rationale for this victim-centered approach to criminal justice was recognition that the harm that crime inflicts is a harm inflicted primarily against individuals.³ Gradually, however, crime came to be recognized as harming *both* the individual *and* the state.⁴ Eventually, this balanced approach of recognizing harm to the individual *and* to the state shifted again, and led to what essentially became a victim-exclusion model by the 1970s. In this system crime victims had no formal legal status beyond that of witness to a crime or piece of evidence in a case against an accused. At one point during this shift, the United States Supreme Court observed in *dicta* that “in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another.”⁵ Further

¹ See Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J. L. & Pub. Pol’y 357, 359, 366-68 (1986); Angela J. Davis, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 9 (2007); Douglas E. Beloof and Paul G. Cassell, *The Crime Victim’s Right to Attend the Trial: The Reascendant National Consensus*, 9 Lewis & Clark L. Rev. 481, 484-87 (2005).

² See, e.g., *Steele Co. v. Citizens for a Better Environment*, 523 U.S. 83, 127-28 (1998) (Stevens, J., concurring) (“[I]n England, in the American Colonies, and in the United States, private persons regularly prosecuted criminal cases.”); *United States v. Marion*, 404 U.S. 307, 329 n.2 (1971) (Douglas, J., concurring) (noting private prosecution history and quoting 1 J. Stephen, *History of the Criminal Law of England* 493 (1883)).

³ See Cardenas, *supra* note 1, at 359-60.

⁴ See, e.g., 4 William Blackstone, *Commentaries* *5 (“In all cases the crime includes an injury: every public offense is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community.”); Cesare Beccaria, *ON CRIMES AND PUNISHMENTS* (Richard Bellamy ed., Richard Davies trans., 1995) (“Here then, is the foundation of the sovereign’s right to punish crimes: the necessity of defending the repository of the public well-being from the usurpations of individuals”).

⁵ *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

evidence of the shift was found in the 1975 adoption of the federal rules of evidence, specifically Rule 615, which allowed exclusion of victims/witnesses upon motion of either the prosecution or defense.⁶

Just one example of the impact that this shift had on victims was that victims like Roberta and Vince Roper whose daughter was kidnapped, raped, and murdered, were told that they had to sit outside the trial. Quite literally victims nationwide were forced to peek through a crack in the courtroom door and strain to hear about the last days and hours of a loved one's life. They were forced to sit outside while "justice" was done inside. As President Ronald Reagan's Task Force on Victims of Crime concluded, somewhere along the way, the American criminal justice system became "appallingly out of balance," "serv[ing] lawyers and judges and defendants, [while] treating the victim with institutionalized disinterest."⁷ To remedy the imbalance, the 1982 Final Report of the Task Force set forth 68 recommendations, including a proposal to amend the Sixth Amendment to provide that "victims, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings."

Fortunately, more than 30 states have amended their constitutions and every state has passed victims' rights statutes to correct the system. These provisions vary greatly in the number of rights afforded, the stage of criminal investigation and prosecution at which rights attach, and the enforceability of the rights by victims. The result is that while there are a myriad of rights in this country for crime victims, each crime victim is still treated differently depending upon where he or she is victimized. Efforts at the federal level have successfully included significant statutory reform that aims to ensure that victims are afforded fair treatment no matter in which federal jurisdiction a crime occurs. It is in large part because these federal statutes exist and articulate a clear promise to crime victims that we are having this hearing today.

II. Two Key Statutory Provisions that, when Taken Together, Articulate a Promise of Meaningful Rights for Crime Victims.

First, the Victims of Crime Act (VOCA). As the Committee is well-aware, VOCA was enacted in 1984 as a fund dedicated to providing financial assistance to support a variety of services and activities to assist victims of crime. VOCA is funded by fees and fines paid by convicted federal criminals. Most of the funds are distributed to states who use those funds to provide financial support to local direct victim service providers and to compensation programs, although a portion of the Fund is also used for discretionary grants for national-scope training and technical assistance, demonstration projects and services for victims of Federal crimes – among these demonstration projects is one that my organization the National Crime Victim Law Institute initiated in 2002 to determine the viability of protecting victims' rights through legal and social services for crime victims. There is a cap set on the fund which limits the amount of the fund that can be disbursed each year. Over the years, the VOCA cap has increased but so have needs, services, and the costs of services. The reality is that the increases in the cap have

⁶ Rule 615, as initially drafted allowed for exclusion of crime victims from the courtroom unless their "presence is . . . essential to the presentation of a party's cause[;]" thereafter, a majority of states adopted rules that were similar or identical to Federal Rule 615. Beloof and Cassell, *supra* note 1, at 498, 502. In practice, these rules of evidence "effectively exile[d] most crime victims from the courtroom." *Id.* at 502.

⁷ 1982 President's Task Force on Victims of Crime, Final Report vi (1982).

not kept pace with the needs of the field and many proposals have resulted in “increases” in the cap which have in fact reduced the amount of funds otherwise available to existing critical services. It is my understanding that today the fund has nearly \$6 billion in the fund. An amount that would easily withstand a raise in the cap in the coming year to respond to victim need.

Second, on October 30, 2004, *the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act (CVRA)* was signed into law as Title I of the Justice for All Act (Pub. L. No. 108-405), and was subsequently codified at 18 U.S.C. § 3771. In April 2004, at the time the CVRA was being debated, one of the law’s co-sponsors noted that the CVRA was proposed “because the scales of justice are out of balance – while criminal defendants have an array of rights under the law, crime victims have few meaningful rights. In case after case we found victims, and their families, were ignored, cast aside, and treated as non-participants in a critical event in their lives”.⁸ Thus, despite the myriad of laws passed nationally over the years the CVRA was enacted to fix the dysfunction of the system that continued – rights being afforded on paper but rarely enforced in court. To achieve this end the CVRA provides victims of federal offenses with eight rights and also explicit standing for individual victims to assert rights in trial courts and to seek rapid and mandatory appellate review if a trial court denies a right. The first federal circuit court to analyze the law noted that that the rights afforded by the CVRA operate to change the modern criminal justice system’s assumption “that crime victims should behave like good Victorian children—seen but not heard,” and that instead, with these rights, victims are to be “full participants in the criminal justice system.”⁹

Notably, however, the promise of the CVRA would fail if the rights (even with articulated standing) were again mere words on paper. In the American legal system there are three ways that rights can be asserted and enforcement sought: a person can act *pro se* (meaning self-representation); a government attorney may (if there is no conflict and there is standing) act on behalf of a person; or an attorney representing the person (in this case a crime victim) may assert the rights. History reveals that only the last option has real potential to protect individual rights because no one in the system (defense attorney, prosecution, judge) has the sole job of protecting the victim’s rights and because most non-lawyers are not skilled enough in the law to effectively protect their own rights. As the Supreme Court has said,

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law He is unfamiliar with the rules of evidence He lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings.

Powell v. State, 287 U.S. 45, 68-69 (1932). While said in the context of criminal defendants’ rights, the Supreme Court’s assessment is no less true for crime victims.

⁸ 150 CONG. REC. S4262 (April 22, 2004) (statement of Senator Feinstein).

⁹ *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1013 (9th Cir. 2006).

Fortunately, the CVRA did not make a hollow promise; instead it authorized appropriations to ensure that victims of crime could access legal services to help them effectively assert the rights. Specifically, the CVRA authorized funding for “the support of organizations that provide legal counsel and support services for victims in criminal cases for the enforcement of crime victims' rights” for fiscal years 2005-2009, and, upon its re-authorization in 2008, for fiscal years 2010-2013. As I will discuss later in this testimony, however, despite the clear promise of the CVRA in terms of rights and authorized funding, there has not been a single year since its passage that the CVRA has been fully funded.

III. The National Rights Enforcement Network.

As I noted earlier, in 2004, NCVLI officially launched its network of victims’ rights enforcement clinics. These clinics provide free legal services to victims of crime as they assert and seek enforcement of their rights. What started as five clinics is now a network of eleven partner clinics operating in Arizona, Colorado, Idaho, Maryland, New Jersey, New Mexico, New York, Oregon, South Carolina, Utah, and Washington, D.C.¹⁰ These clinics serve victims state courts and in the federal courts of the Second, Third, Fourth, Ninth, and Tenth Federal Circuits. Since its launch, NCVLI’s Network has provided legal representation to more than 4,000 victims; filed more than 2,300 pleadings in courts on behalf of those victims and more than 50 amicus curiae briefs; and supplied more than 100,000 hours of attorney time on behalf of crime victims. When looking at a snapshot of just the 12 months of 2010 more than 1,000 victims have been represented nationwide; representation that included more than 20,000 hours of attorney time and more than 8,000 hours of pro bono attorney and law student time, and which resulted in more than 500 pleadings being filed on behalf of crime victims.

IV. A “Report Card” on Affording Victims’ Rights.

The success of NCVLI’s Network was noted in the August 29, 2009, National Institute of Justice report *Finally Getting Victims Their Due: A Process Evaluation of the NCVLI Victims’ Rights Clinics Executive Summary*, which stated “the state clinics are on the road to fulfilling the intentions of their architects and funders. All of the clinics have pushed the envelope of victims’ rights in their state courts. Some have won significant victories in gaining standing for victims and expanding the definition of particular rights. Others are enjoined in the battle. But all have raised awareness of victims’ rights with prosecutors, judges, defense attorneys, and police officials.”

Section 104(b) of the Justice for All Act directed the GAO to “conduct a study that evaluates the effect and efficacy of the implementation of the amendments made by this title on the treatment of crime victims in the Federal system.” In December 2008, the GAO issued a study entitled, “Crime Victims’ Rights Act: Increasing Awareness, Modifying the Complaint

¹⁰ The initial effort was funded by demonstration project funding from the Office for Victims of Crime. The effort to provide legal services started with 5 clinics in 2004, grew to 8 in 2005, and then to 12 in 2009. In 2009-2010 the clinics in operation were located in AZ, CA, CO, DC, ID, MD, NJ, NM, NY, OR, SC, & UT. Funding has been precarious, however, and this precarious nature was part of what led to the shutdown of the California Clinic in August 2010.

Process, and Enhancing Compliance Monitoring Will Improve Implementation of the Act” (Study). In the Study the GAO reviewed 1) efforts made to implement the CVRA, 2) existence and efficacy of mechanisms in place to ensure adherence to the CVRA, 3) methods that the Department of Justice uses to monitor performance regarding the provision of CVRA rights, and 4) key issues that have arisen in the interpretation of the CVRA by federal courts. The results of the Study included recognition that 1) both the Department of Justice and the federal judiciary had made efforts to implement the CVRA; 2) mechanisms had been created to create adherence to the CVRA, including creation of complaint process; 3) the Department of Justice had identified objectives to uphold the rights of crime victims; and 4) a number of legal interpretations were percolating in the courts. The Study noted that “[p]erceptions are mixed regarding the effect and efficacy of the implementation of the CVRA, based on factors such as awareness of CVRA rights, victim satisfaction, participation, and treatment, as well as regarding potential conflicts of the law with defendants’ interests.” The Report then recommended that the Department of Justice: 1) increase victim awareness of the existence rights and remedies; 2) improve the complaint process; 3) identify performance measures; 4) standardize the reporting of compliance; and 5) include performance measures regarding victims’ rights compliance for Department of Justice employees. The GAO Study did not, however, ask and how the CVRA’s goal of ensuring assertion and enforcement of victims’ rights through legal services had progressed. Anecdotally, however, we know that over the years when authorized funding has been appropriated and legal services for victims through the National Crime Victim Law Institute have been funded victims have had access to free lawyers who have helped protect their rights in courts nationwide. Protections that have included keeping private and privileged records of human trafficking victims out of the public’s eye, securing restitution for victims of crimes ranging from fraud to trafficking, and ensuring victims can choose how to exercise their rights to be present and heard.

V. Funding to Support Victims’ Rights.

As noted earlier in this testimony, the CVRA authorized funding for “the support of organizations that provide legal counsel and support services for victims in criminal cases for the enforcement of crime victims’ rights.” Initially, the authorization was for \$7,000,000 for the first year of the CVRA and \$11,000,000 for each of four years thereafter. Upon the re-authorization of the CVRA this category of authorized funding was established at \$11 million for each fiscal year 2010-2013. During the discussion of re-authorization, Congressman Conyers stated “the measure before us reauthorizes funding the National Crime Victims [sic] Law Institute, which supports critical crime victims’ legal assistance programs that help crime victims enforce their legal rights in a number of vital respects.” 154 CONG. REC. H10653 (Oct. 2, 2008) (statement of Rep. Conyers). Similarly, Congressman Cannon stated, “Many crime victim organizations around the country such as the National Crime Victim Law Institute work tirelessly every day to ensure that the interests and needs of crime victims are represented throughout the trial process. . . . [Re-authorization] ensures that the valuable work of the institute will continue and that crime victims will be given justice by the courts and made whole again by their offenders.” 154 CONG. REC. H10653 (Oct. 2, 2008) (statement of Rep. Cannon).

Despite these significant authorizations of funding, only a small percentage of such funding has in fact been appropriated for legal services. All told only \$7,822,611 in appropriated

funds have reached NCVLI, with the last appropriated funding for the clinical network occurring during the '08 appropriations process – specifically, \$4,248,155 was received and for services starting October 1, 2008. All told, including these appropriated funds and funds secured by NCVLI through grant applications to federal funding agencies, some of which were funded through VOCA, NCVLI and the clinical network have received approximately \$15 million since 2002 to provide legal services to crime victims to protect their rights across the entire country; notably, nearly \$5 million of this amount was part of a Demonstration Project funded by the Office for Victims of Crime to protect victims' rights in state courts and predates the passage of the CVRA in 2004. This means that since passage of the CVRA only approximately \$10 million has issued to fund the promise made to crime victims that they would no longer be viewed as interlopers in the system but would instead be participants with enforceable rights. Perhaps most importantly, as of today, no funding is slated to continue this effort.

VI. What will be lost without funding for these existing services?

As of March 31, 2011, NCVLI's Clinical Network has 235 open criminal cases in which lawyers are providing legal services to victims and NCVLI is helping on nearly 50 additional cases nationwide. A snapshot of a few of these cases reveals why funding these existing services is so critical.

- **U.S. v. Loughner** – Arizona District Court, Tucson. Jared Loughner is charged with shooting at dozens of individuals in Tucson, AZ at a grocery store parking lot during a political meet and greet for Representative Gabrielle Giffords. Six people were killed and 13 physically injured. The Defendant has been indicted on 49 various charges including murder, attempted murder, and willful injury. NCVLI's Arizona Clinic has undertaken representation of one of the victims who was shot and injured during this attack. Among the many victims' rights that are anticipated to be at issue in the case are the victims' rights to be present, to a speedy disposition, and to be heard. Without legal representation, this victim will not have an independent say in how his rights are exercised.
- **U.S. v. Ahmed Muhammed Dhakane** – Western District of Texas. NCVLI's Arizona Clinic is representing a minor human trafficking victim from Somalia. Defendant has pled guilty and sentencing is currently scheduled for April 28, 2011, however the sentencing has already been continued twice and may be continued again. It is anticipated that the minor victims will be called to testify at sentencing and will need legal assistance and accompaniment at sentencing due to fear of the defendant; further determination of restitution for the victim may be an issue that will require representation.
- **Carter v. Turley** – District of Utah Central Division. NCVLI's Maryland and Utah Clinics are jointly helping the son of a murder victim in a federal habeas corpus action in which almost a decade of delays has occurred. With the delays, the victim in this case must repeatedly assert his right to the proceedings free from unreasonable delay through motions and legal memoranda, which he certainly could not do on his own and yet which are the very pleadings that the federal court has now agreed with.
- **U.S. v. Keifer** – Southern District of Ohio. NCVLI's Maryland Clinic is representing a victim in a complex fraud case. When this matter initially went to trial the represented

victim was not officially listed as a victim and the court records were sealed. The result was that the victim could not find out anything that was happening in the case, including when sentencing and restitution would be determined. The Clinic successfully fought up to the appellate court on behalf of the victim who was eventually heard and restitution was ordered. In the victim's own words – "In May of 2008, my life was turned upside down at the arrest of a con artist . . . I had lost my livelihood, health insurance benefits for my sons and me, my transportation, my coffeehouse, and somebody who I trusted and believed to be a best friend in my life. . . . I did not know where to turn. . . . With [the Clinic's] continued legal expertise and representation, following motions and appeals and many trips . . . to Columbus, OH due to defense requested continuances, I was recognized as a victim of crime and was able to be present and to be heard by the court in the proceedings and sentencing of [Defendant] for his crimes. The representation that [the Clinic] provided on my behalf, which included a major victory in having sealed records opened for our awareness, was remarkable. I was able to present an impact statement at the sentencing, and the victory of ordered restitution to me was yet another euphoria." The case is not over, however. Defendant has filed a collateral attack against his plea and sentence under 18 U.S.C. § 2255, and is again challenging whether the victim is entitled to restitution. Ongoing representation by the Clinic is critical.

- ***U.S. v. Shrader*** – Southern District of West Virginia. This case is an interstate stalking case and NCVLI's Maryland Clinic is representing DS, and her husband RS. The Clinic's representation began when Defendant had the District Court issue a subpoena to the victim's counselor for all records relating to the victims' emotional or psychological treatment. The Clinic was able to protect the records and Defendant was subsequently convicted and sentenced to nearly 20 years in prison. The Defendant has, however, noted an appeal and therefore ongoing representation is necessary. Notably, for its efforts in this matter, the Clinic was awarded the U.S. Department of Justice United States Attorney Southern District of West Virginia Public Service Award for "invaluable service and assistance to victims and witnesses of crime."

Conclusion

During this 30th National Crime Victims' Rights Week we must look at the past to determine what promises we have made and what we have done to keep those promises; look at the future and determine what we need to do to fulfill our promises and improve upon how we achieve those; and to envision a better future for crime victims and for the country. *Vision 21: Transforming Victim Services*, is the current effort of the Office for Victims of Crime to envision the future of victim services. As explained by OVC, the "initiative will involve a comprehensive analysis of the current state of the crime victims field in the United States and development of a report of recommendations (including a blueprint for a demonstration project to implement those recommendations) for OVC and the broader crime victims field." NCVLI is actively involved in this effort as we too are committed to envisioning a better future. Notably, one of the key findings coming out of the initial twelve month projects is that victims must have access to competent and independent legal services to aid them with their rights. Thus, even when taking a "new" look at victim services the answer coming back is the one Congress itself first articulated in 2004 – fund victims' rights enforcement. If our promise to victims is to be met, the Congress must continue to fund legal services for crime victims. Notably, without funding every

one of the legal clinics I've discussed today will close by the end of the year. There are at least two paths to this funding. The Congress could raise the cap on VOCA funds and direct that a portion of the increase go to this purpose. With the significant amount of money currently in the fund and anticipated recoveries in years ahead, this path is easily achievable. Alternatively, the Congress could establish a mechanism to use False Claims Act funds for this purpose, as was originally articulated in the CVRA. Either option would be a fulfillment of the promise made to victims, and would ensure that we continue to move out of the victim-exclusion model of the last century in which victims were treated as pieces of evidence and into a system in which individual victims and their voice is valued. I urge Congress to look critically at the promises already made to the victims of this country and to re-commit to upholding those before it moves on to new promises.