



Meaningful Crime Victims' Rights Require Discovery of Case Information and Records

More than 130 years ago, the United State Supreme Court rejected the notion that due process of law is a principle fixed by time and pre-existing practice: “[T]o hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.”¹ Although “due process” remains a concept that “can never be[] precisely defined,”² “the phrase expresses the requirement of ‘fundamental fairness[,]’”³ and what it demands in any particular case depends on the rights and interests at stake.⁴

This concept of fundamental fairness has been a driving force behind significant shifts in criminal procedure; shifts that include the advent of prosecutorial disclosure obligations to the defendant recognized by the Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963), and the adoption of crime victims’ constitutional, statutory and rule-based rights across the country, including explicit rights to due process and fairness.⁵

Although much progress has been made to advance fundamental fairness for victims, victims continue to find themselves lacking sufficient information about the case investigation and prosecution to allow them to assert their rights in a fully informed and timely fashion. Moreover, when victims request case information, they are often met with silence or resistance. The result is that many victims are unable to meaningfully participate in the criminal justice process and exercise their rights.

This article spotlights the evolution of due process jurisprudence, specifically as it relates to recognition of the disclosure obligations of the state to defendants, and posits that there is a related need for courts to recognize the right of crime victims to access important investigative and other case information from the state to ensure meaningful exercise of rights and to comport with evolving notions of due process

The Development of the Government’s Disclosure Obligations in a Criminal Case

At common law and throughout early American history, defendants had no right to pretrial discovery from the government and unless legislation provided otherwise, trial courts had no authority to order the prosecution to disclose its evidence to the defense before trial.⁶ Courts later largely abandoned the common law rule, and began to recognize their inherent authority to require the prosecution to make pretrial disclosures to the defense.⁷ It was not until the middle of

the twentieth century, however, that “a substantial majority of the states” adopted laws that “allow[] or require[] pretrial discovery,” and even then discovery from the government was “an exceptional practice for a limited group of situations rather than a standard element of pretrial procedure.”⁸

The Supreme Court’s 1963 decision—*Maryland v. Brady*—changed this discovery and disclosure landscape. Before *Brady*, Supreme Court case law had held that the government violates due process only when nondisclosure of exculpatory evidence was a deliberate act on the part of the prosecution—*i.e.*, a bad faith suppression.⁹ In *Brady*, the prosecutor had disclosed, upon the defense attorney’s request, defendant’s co-conspirator’s statements that asserted defendant was the person who committed the homicide; the prosecutor did not, however, disclose a statement in which the co-conspirator admitted to committing the homicide.¹⁰ The record in *Brady* is unclear as to whether the prosecution acted in bad faith in withholding the statement, but, in *dicta*, the Court determined that the nondisclosure of exculpatory evidence in the prosecution’s possession upon request violated due process “irrespective of the good or bad faith of the prosecution.”¹¹ During oral argument, defendant’s attorney admitted that he could not “point to a decision of this Court” that supported his argument, but he nevertheless maintained that a violation of defendant’s constitutional rights had occurred.¹² Breaking from prior precedent, the Court held that requiring the prosecution to disclose exculpatory evidence is a principle designed to avoid “an unfair trial”; the Court noted “[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly . . . [as] for the federal domain: ‘The United States wins its point whenever justice is done its citizens in the courts.’”¹³ In sum, the Court determined that due process and fundamental fairness mandated a prosecutorial duty to disclose exculpatory information.¹⁴

Due Process Requires the Government to Disclose Case Information to Victims

Victims, too, have myriad rights, including to due process and fair treatment by the government;¹⁵ rights that are routinely ignored in cases where the victims are denied access to case information and records relevant to the meaningful exercise of their rights. The information and records may include police reports, autopsy reports, the information or indictment, written communication between defense counsel and the prosecutor, and the presentence report.¹⁶ The examples that follow are drawn from real cases and briefly explore some of the issues raised when victims seek these types of important case information.

Example 1: Police Report

A minor-victim and her parent, also a crime victim under state law, each request a copy of the police report from the prosecutor. The prosecutor denies the requests, explaining that the state’s

victims' rights law does not explicitly provide that victims are entitled to access documents from the government and no other law explicitly requires disclosure.

Example 2: Autopsy Report

A crime victim requests a copy of her deceased husband's autopsy report after reading a newspaper article that reported facts about the death that differed from what she understood. The prosecutor directed her to the coroner's office; the coroner's office directed her back to the prosecutor. A year later, defendant was charged with second degree murder but the victim's request remained unfulfilled.

Example 3: Presentence Report

Child sex-trafficking victims with extensive losses associated with the crimes against them were preparing to file a motion seeking restitution for these losses. As part of this preparation, the victims requested that the prosecutor provide them with a copy of the presentence report, which had been submitted to the court, so that the victims could independently analyze and dispute any erroneous calculations. The prosecutor refused to provide a copy of the report, citing the lack of any law requiring such disclosure to the victims.

Assume that in all three examples, the law neither explicitly states that the government must disclose the records nor that such disclosure is prohibited. Depending on the jurisdiction, several arguments may be made in connection with the victims' requests.

First, crime victims have specific rights, including the rights to confer with the prosecutor and to be heard at proceedings that involve post-arrest release, plea and sentencing.¹⁷ Due process requires the government to ensure that crime victims are adequately informed of the facts of the case so that they may meaningfully exercise these rights.¹⁸ The fundamental components of due process are the rights to notice and to be heard in "at a meaningful time and in a meaningful manner."¹⁹ Victims who are denied reasonable access to important case information are not adequately informed and cannot meaningfully form their views, let alone exercise their rights to confer and be heard.²⁰ Autopsy reports are an example of documents that contain important case information: "No document is more telling of the specific nature of a victim's injuries than the autopsy report For the family of a crime victim, the writing and diagrams contain the details of a loved one's last experiences in this world."²¹ Similarly, police and presentence reports contain important information relating to the crime, information that the prosecution, the defense and the court may rely on in making charging, plea and sentencing decisions. Because of the critical nature of the information contained in these reports, denying access to them has been recognized as a violation of the due process rights of defendants.²² No less fairness is owed to victims.

Second, victims' constitutional and/or statutory right to be treated with "fairness" also requires the government to ensure that victims receive a copy of the autopsy, police, presentence and other necessary reports.²³ The term "fairness" must, at a minimum, guarantee that victims' rights are given no less consideration than defendants' rights or the state's interests.²⁴ Access to key information held by the government—for example, information relating to the crime as described in autopsy, police and presentence reports—is necessary to ensure victims are treated with fairness.

Finally, public records laws support victim access to autopsy, police, presentence and other relevant reports. Although these types of reports are generally exempt from public disclosure, some jurisdictions recognize that victims have a heightened interest in the information contained in these reports and provide an exception to this non-disclosure rule for crime victims.²⁵

Notably, none of these arguments will guarantee disclosure of records as victims' rights generally, and as the arguments relate to access to case information specifically, are in their nascent phase.²⁶ But just as with defendants' rights, all victims' rights must be viewed through the lens of due process and interpreted in a way that provides for victims' meaningful exercise of these rights. Victims, no less than defendants, must be given access to important investigative and other case information in the possession of the government when such access is necessary for meaningful exercise of their rights.

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¹ *Hurtado v. People of State of Cal.*, 110 U.S. 516, 528–29 (1884).

² *Lassiter v. Dep't of Soc. Servs. of Durham Cty., N. C.*, 452 U.S. 18, 25 (1981).

³ *Id.*

⁴ *See id.* at 24-5.

⁵ *See, e.g.,* Ariz. Const. art. 2, § 2.1(A) (1) (recognizing crime victims have "rights to justice and due process" and guaranteeing the right "[t]o be treated with fairness, respect, and dignity"); Cal. Const. art. I, § 28(b)(1) (recognizing crime victims have "rights to justice and due process" and guaranteeing the right "[t]o be treated with fairness"); Colo. Rev. Stat. § 24-4.1-302.5(1)(a) (recognizing crime victims have "rights to justice and due process" and guaranteeing "[t]he right to be treated with fairness, respect, and dignity"); Okla. Const. art. II, § 34 (recognizing crime victims have "rights . . . to justice and due process" and affording rights to "ensure that victims are treated with fairness, respect and dignity"); Or. Const. art. I, § 42(1) (recognizing victims have the "right . . . to justice," to be accorded "due dignity and respect," and to have proceedings conducted "to ensure that a fair balance is struck between the rights of crime victims and the rights of criminal defendants"); S.C. Const. art. I, § 24(A)(1)

(recognizing victims have “rights to justice and due process” and affording the right to “be treated with fairness, respect, and dignity”); Tenn. Const. art. I, § 35 (recognizing victims have the “rights . . . to justice and due process”); Utah Const. art. I, § 28(1)(a) (recognizing victim shave “rights to justice and due process” and guaranteeing the right “[t]o be treated with fairness, respect, and dignity”); *see also* 18 U.S.C. § 3771(a)(8) (affording the right “to be treated with fairness”); 150 Cong. Rec. S4269 (Apr. 22, 2004) (Senator Kyl) (explaining that the right to be treated with “fairness” under the federal Crime Victims’ Rights Act, 18 U.S.C. § 3771, “includes the notion of due process”); Alaska Const. art. I, § 24 (affording the right “to be treated with dignity, respect, and fairness”); Conn. Const. art. 1, § 8(b)(1) (affording the right “to be treated with fairness and respect”); D.C. Code § 23-1901(b)(1) (affording the right to “[b]e treated with fairness and with respect”); Ga. Code Ann. § 17-17-1(9) (affording the right “to be treated fairly and with dignity”); Idaho Const. art. I, § 22(1) (affording the right “[t]o be treated with fairness, respect, [and] dignity”); Ill. Const. art. 1, § 8.1(a)(1) (affording the right “to be treated with fairness and respect for their dignity”); Ind. Const. art. 1, § 13(b) (affording the right “to be treated with fairness, dignity, and respect”); La. Const. art. I, § 25 (affording the right to “be treated with fairness, dignity, and respect”); Mich. Const. art. I, § 24(1) (affording the right “to be treated with fairness and respect”); Miss. Const. art. 3, § 26A(1) (affording the right “to be treated with fairness, dignity and respect”); N.H. Rev. Stat. Ann. § 21-M:8-k(II)(a) (affording “[t]he right to be treated with fairness and respect”); N.J. Const. art. I, ¶ 22 (affording the right to “be treated with fairness”); N.M. Const. art. II, § 24(A)(1) (affording the right “to be treated with fairness and respect”); Ohio Const. art. I, § 10a (affording the right to “be accorded fairness, dignity, and respect”); Tex. Const. art. I, § 30(a)(1) (affording the right “to be treated with fairness”); Va. Const. art. I, § 8-A(2) (affording the right “to be treated with respect, dignity and fairness”); Wis. Const. art. I, § 9m (affording the right to be treated “with fairness [and] dignity”).

⁶ *See People in Interest of E.G.*, 368 P.3d 946 (Colo. 2016) (observing that “[t]he right of discovery in criminal cases is not recognized at common law” and citing Michael Moore, *Criminal Discovery*, 19 Hastings L.J. 865, 865 (1968), for the proposition that “‘at common law the defendant in a criminal trial had no right to discover any of the prosecution’s case against them’”); *see also* Wayne R. LaFave, et al., 5 Crim. Proc. § 20.1(a) (4th ed.) (stating that “[a]lthough the English common law may not have been quite so absolute,[] [early] American courts . . . adopted a common law rule holding that the judiciary lacked any inherent authority to order pretrial discovery in criminal cases” and “[a]bsent specific legislative authorization, a trial court could not order the prosecution to make a pretrial disclosure of its evidence to the defense”).

⁷ Wayne R. LaFave, et al., *supra* note 6, at § 20.1(a); *see also People in Interest of E.G.*, 368 P.3d at 949 (discussing the same and noting that “Colorado remains one of the few states that has never deviated from the traditional doctrine holding that courts lack power to grant discovery outside of [discovery rights established in] statutes or rules”).

⁸ Wayne R. LaFave, et al., *supra* note 6, at § 20.1(a).

⁹ *See Brady*, 373 U.S. at 86 (discussing prior case law).

¹⁰ *Id.* at 84; *see also Brady v. State*, 174 A.2d 167, 169 (Md. 1961), *aff’d*, 373 U.S. 83 (1963).

¹¹ *Brady*, 373 U.S. at 88-89; *see also id.* at 92 (White, J., concurring).

¹² Paul Shechtman, *How a Man Named Brady Made History 50 Years Ago*, 249 N.Y. L. J., no. 91 (May 13, 2013), available at http://www.zuckerman.com/media/publication/293_NYIJ_HowAManNamedBradyMadeHistory50YearsAgo_Shechtman.pdf.

¹³ *Brady*, 373 U.S. at 87.

¹⁴ In the ensuing years, the Court has expanded the rule to impose a mandatory, affirmative “duty to disclose . . . even [when] there has been no request” and to apply to “impeachment evidence as well as exculpatory evidence.” *Strickler v. Greene*, 527 U.S. 263, 280 (1999). The Court has, however, made clear that the constitutional obligation to disclose under the *Brady* rule does not create a general right to pretrial discovery. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (“There is no general constitutional right to discovery in criminal cases, and *Brady* did not create one.”).

¹⁵ *See supra* note 5.

¹⁶ *See, e.g., Doe No. 1 v. United States*, 749 F.3d 999 (11th Cir. 2014) (addressing a case arising from the crime victims’ petition alleging that the government—by entering into a non-prosecution agreement with the offender—violated their rights to confer, to be treated with fairness, to timely notice of relevant proceedings, and to information about restitution, and affirming the trial court’s orders directing the government to disclose to the victims all correspondence between the offender’s attorneys and the government). Some jurisdictions have laws that explicitly grant victims the right to access particular records such as police reports, *see, e.g.,* Ariz. Rev. Stat. § 13-4405(A)(3)(i) (affording “the victim or the immediate family member of the victim, if the victim is killed or

incapacitated, [] the right to receive one copy of the police report, including any supplements to the report, from the investigating law enforcement agency at no charge”); Colo. Rev. Stat. § 24-4.1-302.5(1)(b.9) (affording crime victims “[t]he right to receive a free copy of the initial incident report from the investigating law enforcement agency”); N.Y. Exec. Law § 646(1) (affording victims, “regardless of physical injury,” the right to a free copy of the police report of the crime), and presentence reports, *see, e.g.*, Ariz. Const. art. 2, § 2.1(A)(7) (affording victims the right “[t]o read pre-sentence reports relating to the crime against the victim when they are available to the defendant”); Cal. Const. art. I, § 28(b)(11) (affording victims the right to a copy of the presentence report “when available to the defendant, except for those portions made confidential by law”); Idaho Const. art. I, § 22(9) (affording victims the right “[t]o read presentence reports relating to the crime”). *See also* Colo. Rev. Stat. § 24-72-304(5) (recognizing the prosecutor’s discretion to allow the victim or the victim’s family to view the presentence report). These types of explicit laws remove a potential barrier from the path of victims of crime who wish to exercise victims’ rights. For a more in-depth discussion of a victim’s right to a copy of the presentence report in federal prosecutions, *see Victim Access to the Presentence Investigation Report in Federal Prosecutions*, NCVLI Victim Law Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), Aug. 2011, *available at* <http://law.lclark.edu/live/files/11820-victim-access-to-the-presentence-investigation>.

¹⁷ *See, e.g.*, Alaska Const. art. 1, § 24 (affording victims the rights to “confer with the prosecution” and “to be heard, upon request, at sentencing, before or after conviction or juvenile adjudication, and at any proceedings where the accused’s release from custody is considered”); Cal. Const. art. I, § 28(b)(6), (8) (affording victims the rights to “reasonable notice of and to reasonably confer with the prosecuting agency” regarding, *inter alia*, the charges filed and any pretrial disposition of the case, and “[t]o be heard, upon request, at any proceeding . . . involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceedings in which a right of the victim is at issue”); Colo. Const. art. II, § 16a (affording victims “the right to be heard when relevant, informed, and present at all critical stages of the criminal justice process”); Ill. Const. art. I, § 8.1(a)(4), (5) (affording victims the rights “to communicate with the prosecution” and “to be heard at any post-arraignment court proceeding in which a right of the victim is at issue and any court proceeding involving a post-arraignment release decision, plea, or sentencing”); Tex. Const. art. I, § 30(b)(3) (affording crime victims “the right to confer with a representative of the prosecutor’s office”); Tex. Code Crim. Proc. Ann. art. 56.02 (affording right to submit victim impact statement and have it considered).

¹⁸ *See supra* note 5. *See also*, 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 prosecutor and the judge . . . are, by nature, due-process-like rights”); *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”).

¹⁹ *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (observing that a fundamental requirement of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner”). *Accord Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (“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.”); *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”).

²⁰ *Cf. United States v. BP Prod. N. Am. Inc.*, No. CRIM. H-07-434, 2008 WL 501321, at *13-14 (S.D. Tex. Feb. 21, 2008) (explaining how federal courts have found that the victim’s right to be heard and to confer with the prosecutor encompasses a right to obtain information from the prosecutor in order “to enable victims to form and express opinions” both to the prosecutor and the court).

²¹ Legis. Counsel’s Dig., Sen. Bill. No. 5, Deceased Child Victim’s Protection and Privacy Act, 2010 Cal. Legis. Serv. Ch. 302 (S.B. 5), § 2(b) (West) (enacting Cal. Civ. Proc. Code § 130); *see also People v. Dungo*, 286 P.3d 442, 450 (Cal. 2012), *as modified on denial of reh’g* (Dec. 12, 2012) (addressing the “usefulness of autopsy reports” and observing that “an autopsy report may provide answers to grieving family members”).

²² *See, e.g., Slutzker v. Johnson*, 393 F.3d 373, 386-88 (3d Cir. 2004) (affirming order granting habeas relief and finding withholding police reports from defendant at trial amounted to a due process violation under *Brady*); *People*

v. *Johnson*, 48 Cal. Rptr. 3d 439, 446 (Cal. Ct. App. 2006) (reversing conviction when prosecutor withheld police report that contained information material to the defense under *Brady*). See also *Gregory v. State Bd. of Control*, 86 Cal. Rptr. 2d 575, 581 (Cal. Ct. App. 1999), as modified on denial of reh'g (July 27, 1999) (concluding, in part, that the predecessor to the California Victim Compensation and Government Claims Board has a mandatory duty to obtain crime reports from law enforcement agencies when the victims cannot or do not obtain a copy and that duty requires the Board to use its subpoena power when necessary).

²³ See *supra* note 5.

²⁴ See, e.g., *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.) (“[J]ustice, 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.”), reaffirmed by *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); *Morris v. Slappy*, 461 U.S. 1, 14 (1983) (stating that “in the administration of criminal justice, courts may not ignore the concerns of victims”).

²⁵ See, e.g., Cal. Gov’t Code § 6254(f) (emphasis added) (providing that “state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, [and] the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof . . .” with limited exceptions); *In re Quinn*, 517 N.W.2d 895, 899-90 (Minn. 1994) (holding that the victim was entitled to access information in police files regarding a closed investigation into the reported rape and finding that the government data law recognizes a crime victim “has a greater right of access than the public/press”).

²⁶ In fact a number of courts confronted with victim discovery requests have balked. See, e.g., *Jordan v. Dep’t of Just.*, --- F. Supp. 3d ---, No. 15-CV-1028, 2016 WL 1271070, at *13-14 (S.D.N.Y. Mar. 29, 2016) (granting the government’s motion to dismiss the victim’s petition seeking, *inter alia*, an order compelling the government to provide documents from its investigative file that the victim argued established her as a victim of the perpetrator’s financial fraud, as there were no charges filed yet and the victim did not “allege that the documentation and information she seeks is related to an enumerated provision of the CVRA or any other statute” and referencing decisions of other federal district courts, including *United States v. Hunter*, see *infra*, for the proposition that the CVRA does not give victims unlimited access to prosecutors’ files, particularly with respect to investigative files pre-charging or to prove “victim” status); *United States v. Hunter*, No. 07-CR-307 (DAK), 2008 WL 110488, at *1 (D. Utah Jan. 8, 2008) (denying shooting victims’ parents’ motion for order compelling the government to disclose information from its files that would support their motion for “victim” status in prosecution of the person who sold the murder weapon (firearm) to their daughter’s killer based on the court’s determination that the parents did not submit sufficient proof they are “victims” of the sale of the murder weapon and noting that “[g]ranteeing rights to the prosecution’s investigative discovery file to persons wishing to establish themselves as a victim is a significant right to append to the CVRA”); *State ex rel. Hilbig v. McDonald*, 839 S.W.2d 854 (Tex. Ct. App. 1992) (reversing decision of lower court granting the victim’s application for disclosure of documents from the district attorney’s files in pending criminal case for use in a possible civil suit and to determine whether to petition the court to have defendant tested for AIDS or HIV, based on the court’s conclusions that the victims’ rights “statute and constitutional amendment do not contain any provision expressly giving victims the right to discover additional evidence within the prosecutor’s file” and that “[t]he legislature intended to give victims access to the prosecutor—not to the prosecutor’s file”). Depending on the circumstances of any particular case, the line of federal district court decisions described above finding that the CVRA does not provide victims with unlimited access to prosecutors’ files and declining to allow access, may likely be distinguishable on their facts as well as procedural history and because they are trial court opinions, are not precedential. The cases, including *Jordan* and *Hunter*, as well as others referenced in *Jordan*, were ones in which either no charges were yet pending or the victim’s status as a “victim” for purposes of that criminal case was not recognized by the court.