

## **Overview of Victims' Right to Be Heard in Connection with Parole and Other Post-Conviction Release Proceedings**

One of the rights commonly guaranteed to victims of crime is the right to be heard.<sup>1</sup> Post-conviction, this right finds expression in many contexts, including a victim's right to be heard at sentencing<sup>2</sup> and in connection with parole and other post-conviction proceedings that implicate release or other changes in the offender's status.<sup>3</sup> Nearly every jurisdiction in the United States guarantees victims a constitutional and/or statutory right to be heard post-conviction in connection with parole and other release-related proceedings.<sup>4</sup> This right is often explicitly termed a "right to be heard,"<sup>5</sup> but some jurisdictions may additionally or alternatively describe the right as one to provide "input"<sup>6</sup> or a "statement"<sup>7</sup> or to "testify"<sup>8</sup> in connection with proceedings before the post-conviction releasing authority.<sup>9</sup>

The parameters of the right to be heard vary across jurisdictions.<sup>10</sup> A recent national survey of releasing authorities provides a ranking of release factors in order of importance, as reported by the chairpersons of the authorities.<sup>11</sup> The top five most important factors were reported to be: (1) the nature of the present offense, (2) the severity of the current offense, (3) any prior criminal record, (4) the incarcerated person's disciplinary record, and (5) an empirically based risk assessment.<sup>12</sup> Although the category of "victim input" ranked ninth in importance out of seventeen factors,<sup>13</sup> victims frequently have information to contribute that speaks to other factors, including the nature and severity of the incarcerated person's criminal conduct.<sup>14</sup>

The scope of a victim's right to be heard is not uniform across jurisdictions; however, it commonly includes: the victim's views regarding the criminal conduct and the convicted person; the impact of the incarcerated person's criminal conduct; whether the victim supports the release of the incarcerated person on parole; information relating to the victim's concerns regarding protection; and any release conditions necessary to safeguard the victim's safety.<sup>15</sup>

Because navigating the post-conviction stages of the criminal justice system carries with it some unique challenges, attorneys and advocates working with victims who are considering whether

and to what extent they want to be heard post-conviction may wish to consider the following practice tips:

- Know Rights and Resources in Your Jurisdiction. Identify key post-conviction victims' rights and resources, including any found in constitution, statute, rules and/or agency practice.<sup>16</sup> Investigate whether specific post-conviction resources are available to victims (e.g., post-conviction advocates and compensation funds that may be available post-conviction).<sup>17</sup>
- Start Early. Working with victims well in advance of any post-conviction release proceeding is a best practice. It may take time for the victim to decide whether they want to share information and, if so, how they would like to share it and exactly what to include.
- Know Your Jurisdiction's Process. Jurisdictions differ when it comes to the procedural steps victims must take to indicate their desire to be notified about upcoming parole or other post-conviction release-related proceedings. For instance, some jurisdictions require victims to affirmatively request notice from specific authorities and to do it in a particular way; others automatically afford notice unless they have been informed that the victim does not wish to receive such notice; still others require that the request include preferred method(s) and timing for notification requests.<sup>18</sup>
- Know What Victim-Related Information May Already Be in the Possession of the Parole Board or Other Authority. In some jurisdictions, an impact statement provided by the victim in connection with sentencing proceedings is, by law, to remain in the convicted person's file for use in connection with release hearings.<sup>19</sup> This may be a procedure welcomed by a victim, in which case confirmation should be sought that the statement is, in fact, in the file being considered. The parole board's or other authority's access to such information may, however, be cause for concern or consternation if the victim's view of the convicted person or of the underlying conduct has changed since the time of sentencing. Under those circumstances, the victim may desire assistance in submitting a new statement for consideration that reflects his/her/their current views.
- Discuss the Types of Input Permissible in Your Jurisdiction. Jurisdictions differ regarding the methods of being heard and submitting input that are available to victims. Many jurisdictions guarantee victims the right to provide in-person input, others have procedures in place to facilitate videoconferencing or telephonic input, several anticipate videotaped or audiotaped input, and most offer victims of crime the option to provide written input.<sup>20</sup> If accommodations are necessary to facilitate the victim's exercise of his/her/their right to be heard, be prepared to raise the need for those accommodations in advance and address any potential legal challenges.<sup>21</sup>

- Know Who May Access the Victim's Input. Many jurisdictions provide privacy protections for at least some aspect of victim input. It is important to know the law and practice in your jurisdiction regarding the privacy afforded the victim's input, including whether and to what extent the convicted person or the public will have access to the information shared by the victim. Among the laws to review include the relevant Public Records Law and the statutes and rules governing the practice of the releasing authority. If necessary, be prepared to argue that the victim's input should be protected from disclosure in order to protect the victim's rights.
- Prepare the Victim. Preparation may include: visiting the setting where the proceeding will take place; providing an overview of the individuals expected to be present during the proceeding, the anticipated process, and timing; requesting accommodations necessary to facilitate the victim's exercise of his/her/their rights; identifying support persons, if desired, who can be available to the victim before, during and after the input; and practicing giving any statements. Note that if the victim chooses to read a statement in-person at a proceeding, ensuring that the statement is printed on thicker weight paper and in a sufficiently large font can help facilitate the reading.
- Consider Challenging a Denial of the Victim's Right to Be Heard. If the victim is not afforded his/her/their rights in connection with parole or other post-conviction release proceedings—or is not provided the notice necessary for him/her/them to assert this right—keep in mind that victims' rights enforcement litigation is a potential avenue that may provide relief.<sup>22</sup>



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*This Bulletin was supported by Grant No. 2017-VF-GX-K026, awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions or recommendations expressed in this document are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice.*

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<sup>1</sup> For an overview of common victims' rights, see *Fundamentals of Victims' Rights: A Summary of 12 Common Victims' Rights*, Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), Nov. 2011, at 3-4, <https://law.lclark.edu/live/files/11823-fundamentals-of-victims-rights-a-summary-of-12>.

<sup>2</sup> See, e.g., Kan. Const. art. 15, § 15(a) ("Victims of crime, as defined by law, shall be entitled to certain basic rights, including the right . . . to be heard at sentencing or at any other time deemed appropriate by the court, to the extent that these rights do not interfere with the constitutional or statutory rights of the accused."); Or. Const. art. I, § 42(1)(a) (guaranteeing crime victims the right "to be present at, and, upon specific request, to be informed in advance of any critical stage of the proceedings held in open court when the defendant will be present, and to be heard at the pretrial release hearing and the sentencing or juvenile court delinquency disposition"); W. Va. Code Ann. § 61-11A-2(b) (guaranteeing victims of crime the right to "appear before the court to make an oral statement for the record" or a "written statement" that can be submitted either to the court or to the probation officer to be made part of the record at the sentencing hearing); Wyo. Stat. Ann. § 7-21-103(a) ("At any hearing to determine, correct or reduce a sentence, an identifiable victim of the crime may submit, orally, in writing or both, a victim impact statement to the court."). For more information about victims' right to be heard at sentencing, see *Considerations When Advising Victims About Methods for Exercising Their Right to Be Heard at Sentencing*, Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), Aug. 2018, <https://law.lclark.edu/live/files/26752-victim-input-at-sentencing-qr-codepdf>; *Victim Impact Statements: Top Twelve Practice Tips*, Victim Law Article (Nat'l Crime Victim Law Inst., Portland, Or.), Feb. 2018, <https://law.lclark.edu/live/files/25756-victim-impact-statements-top-twelve-tipspdf>; *NCVLI Toolkit: Crafting Victim Impact Statements: Talking to Survivors About Victim Impact Statements*, [https://www.youtube.com/watch?v=2BC2c\\_otFDM](https://www.youtube.com/watch?v=2BC2c_otFDM).

<sup>3</sup> Post-conviction release proceedings may include parole and probation determinations, as well as a variety of other proceedings that may result in a change in custodial status or terms of release. See, e.g., Alaska Const. art. 1, § 24 (guaranteeing crime victims the right, *inter alia*, to "be allowed to be heard, upon request, at sentencing, before or after conviction or juvenile adjudication, and at any proceeding where the accused's release from custody is considered"); Ohio Const. art. I, § 10a(A)(3) (guaranteeing victims the right "to be heard in any public proceeding involving release, plea, sentencing, disposition, or parole, or in any public proceeding in which a right of the victim is implicated"); 18 Pa. Stat. Ann. § 11.201(7)(i) (guaranteeing victims of "personal injury crimes where the adult is sentenced to a State correctional facility" the right, *inter alia*, to be "given the opportunity to provide comment on and to receive State postsentencing release decisions, including work release, furlough, parole, pardon or community treatment center placement"); Wash. Const. art. 1, § 35 (guaranteeing victims of crime the right, *inter alia*, to "make a statement at sentencing and at any proceeding where the defendant's release is considered, subject to the same rules of procedure which govern the defendant's rights"). For more detailed, jurisdiction-specific information, see *Survey of Select Federal and State Laws Governing Victim Impact Statements and a Victim's Right to Be Heard Post-Conviction Regarding the Imposition and Completion of Sentence* (Nat'l Crime Victim Law Inst., Portland, Or.), Aug. 2018, <https://law.lclark.edu/live/files/26753-right-to-be-heard-post-conviction-survey-qr> (hereinafter *Survey of Select Federal and State Laws*).

<sup>4</sup> For a compilation of select federal and state laws governing victims' post-conviction rights to be heard, see Nat'l Crime Victim Law Inst., *Survey of Select Federal and State Laws*, *supra* note 3. Note that this Survey focuses on constitutional and statutory rights, so rule-based provisions affording rights to victims may not be included in this resource.

<sup>5</sup> See, e.g., 18 U.S.C. § 3771(a)(4) (guaranteeing crime victims the right "to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding"); Cal. Const. art. 1, § 28(b)(8) (guaranteeing victims the right to "be heard, upon request, at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue"); Ill. Const. art. I, § 8.1(a)(5) (guaranteeing crime victims the right "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"); Mo. Const. art. 1, § 32(1)(2) (guaranteeing crime victims "[u]pon request of the victim, the right to be informed of and heard at guilty pleas, bail hearings, sentencings, probation revocation hearings, and parole hearings, unless in the determination of the court the interests of justice require otherwise"); Okla. Const. art. 2, § 34(A) (guaranteeing victims, *inter alia*, the right to "be heard" in connection with any sentencing or parole hearing).

<sup>6</sup> See, e.g., Okla. Stat. Ann. tit. 57, § 332.2(K) (mandating that the Board "shall provide all victims or representatives of the victim with the date, time and place of the scheduled [Pardon and Parole Board] meeting and rules for attendance and providing information or input to the Board regarding the inmate or the crime"); 18 Pa. Stat. Ann. § 11.502(a) ("Upon the request of a victim who has notified the board in writing of the victim's desire to have input and make comment prior to a parole release decision, the victim advocate shall either petition the board as to the special conditions of release which may be imposed or that the offender not be paroled based upon the statement that the victim submitted under section 501."); S.D. Codified Laws § 23A-28C-1(10) (guaranteeing victims of crime the right to "provide written input at parole and clemency hearings or with respect to clemency by the Governor, should those options be considered"); Wis. Stat. Ann. § 950.04(1v)(n) (guaranteeing victims of crime the right to "have direct input in the parole decision-making process, as provided by the rules promulgated under s. 304.06(1)(em)").

<sup>7</sup> See, e.g., 28 C.F.R. § 2.72(c)(2) (addressing victims' right to "testify and/or offer a written or recorded statement as to whether or not parole should be granted, including information and reasons in support of such statement"); Ariz. R. Crim. P. 39(c)(2)-(3) (providing that victims in custody for an offense may exercise their right to be heard in connection with post-conviction release by submitting a written statement and that victims who are not in custody may exercise their right to be heard "through an oral statement or by submitting a written or recorded statement"); Ark. Code Ann. § 16-90-1113(a) (addressing the right of a victim to present a statement, either in writing or in person or via technology assistance in connection with Parole Board consideration of release); Cal. Penal Code § 679.02(a)(5) (addressing the right of victims "to be notified of any parole eligibility hearing and of the right to appear . . . [personally or by other means] to reasonably express his or her views, and to have his or her statements considered"); Wis. Stat. Ann. § 950.04(1v)(m) (guaranteeing victims of crime the right to "provide statements concerning sentencing, disposition, or parole").

<sup>8</sup> See, e.g., 28 C.F.R. § 2.72(c)(2) (addressing victims' right to "testify and/or offer a written or recorded statement as to whether or not parole should be granted, including information and reasons in support of such statement"); Pa. Stat. Ann. § 11.502(b) ("The victim or the victim's representative shall be permitted

to appear in person and provide testimony before the panel or the majority of those board members charged with making the parole release decision or, in the alternative, the victim's or victim's representative's testimony may be presented by electronic means as provided by the board.”); N.J. Stat. Ann. § 30:4-123.54(b)(2) (addressing victims' right to “present a written or videotaped statement for the parole board to be considered at the parole hearing or to testify to the parole board concerning [the] harm at the time of the parole hearing”).

<sup>9</sup> Parole and other post-conviction release-related proceedings are commonly held before a releasing authority. The structure, scope of authority and composition of releasing authorities throughout the United States vary by jurisdiction. For detailed information regarding releasing authorities nationally, based on a recent national survey, see Ebony L. Ruhland et al., Robina Inst. of Crim. Law and Crim. Just., *The Continuing Leverage of Releasing Authorities: Findings from a Nat'l Survey* (2016), <http://robinainstitute.umn.edu/publications/continuing-leverage-releasing-authorities-findings-national-survey>. An earlier survey containing similar information regarding releasing authorities is also available. See Susan C. Kinnevy & Joel M. Caplan, *Findings from the APAI Int'l Surv. of Releasing Authorities* (2018), <http://www.apaintl.org/resources/documents/surveys/2008.pdf>.

<sup>10</sup> See, e.g., Cal. Penal Code § 3043(b)-(e) (addressing victims' right to be heard in connection with parole proceedings and mandating, *inter alia*, that the board “shall consider the entire and uninterrupted statements of the victim or victims, next of kin, immediate family members of the victim, and the designated representatives of the victim or next of kin, if applicable”); Colo. Rev. Stat. Ann. § 17-2-214(1) (addressing the right of victims and their representatives to attend parole proceedings and to appear “personally or with counsel, at the proceeding and to reasonably express his or her views concerning the crime, the offender, and whether or not the offender should be released on parole, and if so released under what conditions”); Mo. Ann. Stat. § 217.690(8) (specifying that “[p]arole hearings shall, at a minimum, contain the following procedures: (1) The victim or person representing the victim who attends a hearing may be accompanied by one other person; (2) The victim or person representing the victim who attends a hearing shall have the option of giving testimony in the presence of the inmate or to the hearing panel without the inmate being present; (3) The victim or person representing the victim may call or write the parole board rather than attend the hearing; (4) The victim or person representing the victim may have a personal meeting with a board member at the board's central office . . .”). For more information, see Nat'l Crime Victim Law Inst., *Survey of Select Federal and State Laws*, *supra* note 3.

<sup>11</sup> Ruhland, *supra* note 9, at 27, Chart 10.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* Other factors afforded more weight than victim input were: (6) prison program participation; (7) an empirically based assessment of criminogenic needs; and (8) previous parole adjustment. *Id.*

<sup>14</sup> Critics of victims' right to be heard in connection with parole and other release proceedings express concern that victims' right to be heard will “undermine the integrity of the parole process,” Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sent'g and Parole*, 38 Crime & Just. 347, 395 (2009), presuming that the “principal reason for victims to make a submission to a parole board or to attend a hearing must be to oppose the application for parole,” *id.* at 398, and fearing a transformation of parole and release proceedings into a process where “victims' preferences outweigh other criminogenic release factors,” Joel M. Caplan, *Parole Release Decisions: Impact of Victim Input on*

a *Representative Sample of Inmates*, 38 J. Crim. Just. 291, 298 (2010). These fears appear to be largely unsupported by current research. See, e.g., Ruhland, *supra* note 9, at 27, Chart 10 (summarizing the releasing authorities' ranking of release factors in order of importance). A study published in 2010 involving 820 parole-eligible adult inmates in New Jersey echoes the findings of the national survey; this study included analysis of cases where victim input was provided both in support of and in opposition to release. The study conducted and discussed in Caplan's 2010 article was designed to remedy some of the shortcomings observed in previous studies and found that "[v]ictim input was not a significant predictor of parole release in New Jersey when controlling for other release factors." Caplan, *supra*, at 297. The results of this study, which drew from a more representative sample of parole-eligible incarcerated persons compared to other studies its author analyzed, "produced results contrary (and perhaps counterintuitive) to prior empirical research." *Id.*

<sup>15</sup> See, e.g., Colo. Rev. Stat. Ann. § 17-2-214(1) (addressing the victim's right to attend and "to appear, personally or through counsel, at the proceeding and to reasonably express his or her views concerning the crime, the offender, and whether or not the offender should be released on parole, and if so released under what conditions"); Del. Code Ann. tit. 11, § 4350(d) ("When the Board is hearing an application for parole made by an offender, the victim or immediate family of the victim of such crime or their duly appointed representatives may make oral statements or arguments before the Board with respect to the application for parole being considered."); Iowa Code Ann. § 915.18(1)(a) ("Not less than twenty days prior to conducting a hearing at which the board will interview an offender, the board shall notify the victim of the interview and inform the victim that the victim may submit the victim's opinion concerning the release of the offender in writing prior to the hearing or may appear personally or by counsel at the hearing to express an opinion concerning the offender's release."); La. Stat. Ann. § 46:1844(O)(1) (providing that the "victim or victim's family shall have the right to make written and oral statements as to the impact of the crime at any hearing before the [Board of Pardons] or the [committee on parole] and to rebut any statements or evidence introduced by the inmate or defendant"). For more information, see Nat'l Crime Victim Law Inst., *Survey of Select Federal and State Laws*, *supra* note 3.

<sup>16</sup> For a useful starting-place to begin researching a jurisdiction's post-conviction rights to be heard, see Nat'l Crime Victim Law Inst., *Survey of Select Federal and State Laws*, *supra* note 3.

<sup>17</sup> See, e.g., Or. Dep't of Just., Crime Victim and Survivor Serv., *Post-Conviction Victim Advocacy*, <https://www.doj.state.or.us/crime-victims/victims-resources/victims-services/post-conviction-victim-advocacy/> (last accessed Dec. 13, 2018).

<sup>18</sup> See, e.g., 28 C.F.R. § 551.152 ("(a) A victim and/or witness of a serious crime who wants to be notified of a specific inmate's release must make this request to the United States Attorney in the district where the prosecution occurred. Requests for notification received by the Bureau of Prisons directly from a victim and/or witness will be referred to the U.S. Attorney in the district of prosecution for approval. (b) Institution staff shall promptly notify the victim and/or witness when his or her request for notification has been received. Staff shall advise each approved victim and/or witness of that person's responsibility for notifying the Bureau of Prisons of any address and/or telephone number changes."); Ala. Code § 15-22-36(e)(1) (specifying that the board receive a request from a victim that includes the "preferred mode or modes of notification from the victim" and "is submitted 45 days or more in advance of the board action"); Ark. Code Ann. § 16-93-702(b) ("If the person whose parole is being considered by the board was convicted of capital murder, § 5-10-101, or of a Class Y felony, Class A felony, or Class B felony, or any violent or sexual offense, the board shall also notify the victim of the crime, or the victim's next of

kin, of the parole hearing and shall solicit written or oral recommendations of the victim or the victim's next of kin regarding the granting of the parole, unless the prosecuting attorney has notified the board at the time of commitment of the prisoner that the victim or the victim's next of kin does not want to be notified of future parole hearings."'). For more information, see Nat'l Crime Victim Law Inst., *Survey of Select Federal and State Laws*, *supra* note 3.

<sup>19</sup> See, e.g., Cal. Penal Code § 1191.16 (addressing the audio and video recording of victim impact statements given in connection with sentencing and mandating that "[i]f a video and audio record is developed, that record shall be maintained and preserved by the prosecution and used in accordance with the regulations of the Board of Prison Terms at any hearing to review parole suitability or the setting of a parole date"); Okla. Stat. Ann. tit. 19, § 215.39(B) ("The [Narrative report of offenses for offenders sentenced to incarceration for more than five years] shall be provided to the Department of Corrections and the Pardon and Parole Board, together with the judgment and sentence in the case and any victim impact statements presented to the court in the case."); S.C. Code Ann. § 16-3-1555(B) ("In cases in which the sentence is more than ninety days, the prosecuting agency must forward, as appropriate and within fifteen days, a copy of each victim's impact statement or the name, mailing address, and telephone number of each victim, or both, to the Department of Corrections, the Department of Probation, Parole and Pardon Services, or the Board of Juvenile Parole, the Department of Juvenile Justice, and a diversion program."). For more information, see Nat'l Crime Victim Law Inst., *Survey of Select Federal and State Laws*, *supra* note 3.

<sup>20</sup> See, e.g., Ariz. Rev. Stat. Ann. § 13-4428(B) ("Except as provided in subsection C of this section [applicable to victims of crime who are currently incarcerated for the commission of an offense], a victim's right to be heard may be exercised, at the victim's discretion, through an oral statement, submission of a written statement or submission of a statement through audiotape or videotape or any other video or digital media that is available to the court."); Ohio Rev. Code Ann. § 5149.101(B), (D) (referencing the victim's right to appear and "to give testimony or to submit written statements" in connection with full board hearings relating to the proposed parole or re-parole of an incarcerated person and specifying that "[i]f the victim of the original offense died as a result of the offense and the offense was aggravated murder, murder, an offense of violence that is a felony of the first, second, or third degree, or an offense punished by a sentence of life imprisonment, the family of the victim may show at a full board hearing a video recording not exceeding five minutes in length memorializing the victim"); Wash. Rev. Code Ann. § 7.69.032(2)(a) (guaranteeing victims the right "to present a statement to the indeterminate sentence review board or its successor, in person or by representation, via audio or videotape or other electronic means, or in writing, prior to the granting of parole or community release for any offender under the board's jurisdiction"). For more detailed, jurisdiction-specific information, see Nat'l Crime Victim Law Inst., *Survey of Select Federal and State Laws*, *supra* note 3.

<sup>21</sup> Please contact NCVLI for technical assistance with seeking accommodations to facilitate a victim's exercise of his/her/their right to be heard.

<sup>22</sup> See, e.g., *State ex rel. Hance v. Ariz. Bd. of Pardons and Paroles*, 875 P.2d 824 (Ariz. Ct. App. 1993) (finding that the state failed to notify the victim of her rights to be present and to be heard in connection with parole proceedings, vacating the Board's decision to release the convicted person to home arrest as the result of defective release proceedings, and directing the Board to hold a re-examination hearing after making reasonable efforts to provide the constitutionally required notice to the victim); *Edens et al. v. Or. Bd. of Parole Marion Cty*, Nos. 07C22594 & 07C22595 (Or. Cir. Ct. Jan. 11, 2008) (on file with author)



(finding numerous violations of the victim's rights, including the victim's right to 30 days' notice of parole proceedings and the existence of an administrative rule purporting to limit the victim's right to be heard to three minutes which, even if not enforced, "has a chilling effect on the full exercise of the victim's rights and is unnecessarily intimidating[.]" and directing the Board to "conduct an entirely new parole consideration hearing where the victim is given adequate notice and full opportunity to participate"); *Daniels v. Traughber*, 984 S.W.2d 918 (Tenn. Ct. App. 1998) (affirming the propriety of the Tennessee Board of Parole's decision in scheduling a new parole hearing after failing initially to provide notice to the victim's representative, as requested, and affirming the Board's decision to rescind its prior grant of parole after hearing testimony from the victim's family). Please contact NCVLI for technical assistance or for help with identifying a potential attorney referral for victims' rights enforcement litigation.