



**Testimony of Susan Smith Howley  
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**Before the  
United States Sentencing Commission  
November 16, 2004**

Good afternoon, Mr. Chairman and members of the Sentencing Commission. My name is Susan Howley, and I am the Director of Public Policy and Victim Services at the National Center for Victims of Crime. The National Center for Victims of Crime is the nation's leading resource and advocacy organization for victims of crime. Our mission is to forge a national commitment to help victims of crime rebuild their lives. I am here this afternoon to address crime victim concerns on the reexamination of sentencing procedures following the Supreme Court's decision in *Blakely v. Washington*.<sup>1</sup>

I would like to be clear at the outset that I am not here to address the structure of sentencing guidelines, or the constitutionality or workability of various proposals for reform. But because your deliberations and your actions are likely to affect victims of crime, I want to make you aware of the possible implications of those proposals for victims.

The National Center for Victims of Crime will celebrate its 20<sup>th</sup> anniversary next year. During these 20 years, much of our work has involved securing rights and resources for victims of crime. When we were founded in 1985, the passage of crime victims' rights laws across the country was just beginning in earnest. President Ronald Reagan's Task Force on Victims of Crime had recently released its *Final Report*, calling for the widespread adoption of crime victims' rights.<sup>2</sup> The first few states had passed victims' rights amendments to their constitutions. The National Center worked with victim advocates and legislatures across America to promote the adoption of crime victims' rights to be informed, present, and heard throughout the criminal justice process, and the right to receive restitution from a convicted offender. Today, every state has a basic set of rights for crime victims, and 32 have amended their state constitutions to protect those rights.

The rights of victims to be informed, present, and heard throughout the criminal justice process, and the right to restitution from convicted offenders, are now bedrock principles of our system of justice, strongly supported by the American public. Victims' rights amendments to state constitutions have passed with an average voter approval rating of 79%. These rights do more than help victims of crime—they strengthen our system of justice by ensuring that the voice of the victim informs our decisions.

The response to *Blakely* and related cases may erode two core victim rights: the right to allocution at sentencing and the right to restitution from the offender.

### Crime Victim Allocution

The first of these rights, allocution at sentencing, is important to victims and to the general public. For victims, it may be the first time they have the opportunity to be heard in court. It is likely the first time they will be able to communicate to the court the personal harm they have sustained. The public strongly supports the right of victims to be heard at sentencing. A public opinion survey the National Center conducted several years ago, *America Speaks Out*, revealed that 72% of Americans think it is “very important” for victims and victims’ families to have an opportunity to make a statement prior to sentencing about the effect of the crime on their lives.<sup>3</sup>

Victim impact testimony serves another important purpose in sentencing. In calling on judges to allow for and give appropriate weight to victim input at sentencing, the President’s Task Force on Victims of Crime observed that “a judge cannot evaluate the seriousness of a defendant’s conduct without knowing how the crime has burdened the victim. A judge cannot reach an informed determination of the danger posed by a defendant without hearing from the person he has victimized.”<sup>4</sup>

The Supreme Court recognized the appropriateness of victim statements at sentencing in the 1991 case of *Payne v. Tennessee*.<sup>5</sup> In holding that the admission of victim impact evidence at sentencing is not barred by the Constitution, the Court “reaffirmed the view expressed by Justice Cardozo. . . . ‘Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.’ ”<sup>6</sup>

Today, every state and the federal government allow victim input at sentencing, and nearly all allow that input to be in the form of an oral statement in court. At the federal level, victims of violent and sexual crimes are allowed input at sentencing; the adoption last month of the *Justice for All Act* will extend this right to all direct victims of crime in the federal criminal justice system.<sup>7</sup>

A change in sentencing procedures may affect victims’ right to allocution at sentencing if it increases the burden on victims. Because victim impact is not expressly an element under the federal sentencing guidelines (with the exception of a few discrete facts such as the age or vulnerability of the victim), it is possible that *Blakely* and resulting reforms will not affect victim impact testimony. However, if victim impact testimony is determined to be an element in the severity of punishment and thus would have to be proven beyond a reasonable doubt, victims may be increasingly subject to cross-examination.

If victims of crime are subject to cross-examination regarding the impact of the offense, some will be too intimidated to exercise this important right. The thought of enduring scrutiny of their reactions to the crime, and to the physical, emotional, and financial repercussions of that offense will be more than some victims can bear. Some protection may be provided victims by expressly

limiting any cross-examination to their factual statements. For example, under Maryland law “The cross-examination [of a crime victim at sentencing] is limited to the factual statements made to the court.”<sup>8</sup>

## Victim Restitution

The second of these rights, the right to restitution, also serves an important purpose to the victims themselves, to the general public, and even to the defendant. To the victims, restitution represents an acknowledgment by the criminal justice process that the harm was done to *them*, and that the defendant is personally responsible for that harm.

For defendants, restitution has been seen as an effective rehabilitative penalty because, as the California Court of Appeals has said, “[It] forces the defendant to confront, in concrete terms, the harm his or her actions have caused. Such a penalty will affect the defendant differently from a traditional fine, paid to the state as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused.”<sup>9</sup>

The Victims Committee of the American Bar Association, in a report issued this year, called restitution “an important part of the healing process in the aftermath of crime. . . . Even a small amount, paid regularly, instills in an offender a sense that he or she has the power to right some of the harm done during the crime, gives a measure of satisfaction to society to know that the offender is being held accountable and provides a degree of parallel justice to a victim.”<sup>10</sup>

The general public also supports restitution. The National Center’s 1991 public opinion survey showed that 81% of the public think it is very important that victims have the right to be paid by the convicted defendant for injuries and losses relating to the crime.<sup>11</sup> The voters in Montana recently affirmed their support for restitution, when 71% of them ratified an amendment to the state’s constitution to provide that “[l]aws for the punishment of crime shall be founded on the principles of prevention, reformation, public safety, *and restitution for victims*” (emphasis added).<sup>12</sup>

All states and the federal government allow restitution to be ordered at sentencing. More than a third of states require that it be ordered in every case involving harm to a direct victim of crime, unless there are compelling circumstances that warrant an exception. At the federal level, restitution is mandatory in cases of violent crimes and certain other offenses, and discretionary for other crimes.<sup>13</sup>

Under most systems, restitution can only be ordered for demonstrated compensatory expenses: medical costs, counseling expenses, lost wages, burial expenses, and similar direct costs related to the crime. Increasingly, courts are required to order restitution for the full amount of damages. The defendant’s financial circumstances and earning ability are considered only when setting a payment plan.

Revisions to sentencing procedures and guidelines may affect the victims' right to restitution from a convicted offender. Courts may view restitution as purely compensatory, as opposed to punitive, and thus exempt restitution procedures from any reforms related to the punishment for the crime. If restitution is viewed as part of punishment, however, the potential need for more involved proceedings to determine the amount of restitution and the financial capacity of the defendant may make courts far less willing to order restitution.

#### Standard of proof

A third issue of concern to victim advocates is the prospect that evidence related to victim harm could be subject to a higher standard of proof than evidence regarding mitigating factors in sentencing. Such a change would likely cause victims and the general public to view the criminal justice process as inequitable. Some proposed responses to *Blakely* call for subjecting evidence of aggravating factors, which may include victim impact testimony and restitution requests, to a higher standard of proof than mitigating factors. If the victim is subjected to cross-examination regarding the impact of the offense, but the defendant's witnesses are not subjected to the same cross-examination when arguing for leniency, victims and the general public may see the justice system as unfair and biased.

The criminal justice system must have the confidence of victims and the public in order to function. If victims believe the system to be unfair, they are less likely to report crimes and to cooperate in the prosecution. The standard of proof for both aggravating and mitigating factors must be equal.

#### Implementation of Rights

Finally, as you consider the potential impact of your response to the *Blakely* decision and similar cases and then revise any procedures related to sentencing, we would urge you to take the opportunity to incorporate a system to document the implementation of victims' rights. For example, Maryland's sentencing guidelines worksheets provide a place to indicate whether a written or oral victim impact statement was made, whether the victim was present at sentencing, whether the victim was notified of the sentencing or the plea, etc. I have attached a copy of relevant worksheet pages to my written testimony.

The recently enacted *Justice for All Act* requires the Attorney General to develop regulations in the next year to promote compliance with victims' rights.<sup>14</sup> The Act also calls for a study of the effect and efficacy of the implementation of the victims' rights provisions on the treatment of crime victims in the Federal system.<sup>15</sup> Your current reexamination of sentencing procedures provides an opportunity to promote compliance and monitor implementation by the use of a simple mechanism to record such implementation.

In conclusion, as you reexamine sentencing procedures to protect the rights of criminal defendants in light of *Blakely*, the National Center for Victims of Crime urges you to protect the

rights of crime victims as well. Any impairment of those rights would undermine the public's trust and confidence in our system of justice.

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<sup>1</sup> *Blakely v. Washington*. 124 S.Ct. 2531 (1994).

<sup>2</sup> President's Task Force on Victims of Crime, *Final Report*, Washington, D.C. , U.S. Gov't Printing Office (Dec. 1982).

<sup>3</sup> National Victim Center, *America Speaks Out: Citizens' Attitudes About Victims' Rights and Violence*. (1991). p. 5.

<sup>4</sup> President's Task Force, *supra*, pp. 76-77.

<sup>5</sup> *Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

<sup>6</sup> *Id.*, at 2609.

<sup>7</sup> Public Law No. 108-405 (2004).

<sup>8</sup> MD Code Ann., Crim. Proc. § 11-403(c) (2004).

<sup>9</sup> *People v. Moser*, 50 Cal. App. 4<sup>th</sup> 130, 135-36 (1996), quoting *Kelly v. Robinson*, 479 U.S. 36 at p. 49, fn. 10 (1986).

<sup>10</sup> Report of the Victims Committee, Criminal Justice Section, American Bar Association. *Restitution for Crime Victims: A National Strategy*. American Bar Association, Washington, D.C. (2004) p. ii.

<sup>11</sup> *America Speaks Out, supra*, p. 6.

<sup>12</sup> Montana Constitution, Art. II, Sec. 28.

<sup>13</sup> 18 U.S.C. §§ 3663, 3663A (2004).

<sup>14</sup> Public Law No. 108-405, Sec. 102 (2004).

<sup>15</sup> *Id.*, Sec. 104.