

RETHINKING THE ROLE OF THE STATE'S ATTORNEY

by Kim Montagriff, NCVLI Staff Attorney

I joined the National Crime Victim Law Institute as a staff attorney six months ago, and in this brief period, my conception of criminal procedure has shifted. Specifically, I have come to understand that there is a fundamental limitation on the state's ability to adequately represent the interests of crime victims in all situations.

Prior to coming to NCVLI, I was an Assistant Attorney General and Special Assistant Attorney General for the State of Colorado for seven years. My job was to represent the state in criminal appeals. At the time, I believed that representing the interests of society would necessarily include serving the interests of the victim. Now that I work strictly as a victims' rights attorney, I've come to realize that I was operating without a full understanding of the victims' role in the criminal justice system.

It is now clear that the only cases that were reaching the appellate level were those in which a victim's interest coincided with the interests of the state. I know now that as often as a victim's interests coincide with the state, those interests diverge, and the state cannot be the victim's voice. This may seem a small epiphany to those of you who have been in the victim's rights world for years, but I had always adhered to the traditional view that it is the state that protects victims.

The Maryland case of *Lopez-Sanchez v. State* was elucidating. NCVLI submitted an amicus brief in the case in support of the Petition for Certiorari filed by Russell Butler, the Executive Director of the Maryland Crime Victims' Resource Center, Inc., and Neil Quinter, Esq., who directly represented the victim, Oscar Antonio Lopez-Sanchez. In that case, the victim was requesting restitution for lost wages when he was shot in the back, paralyzed, and unable to work. In violation of the victim's rights, the district attorney proposed to the court — and the court ordered — an amount of restitution that was significantly less than that which would adequately compensate the victim for his losses.

I had previously dealt with restitution as an Assistant Attorney General. In one case, the victim was denied her right to restitution because the prosecutor failed to request restitution on her behalf. I had argued that a prosecutor cannot waive a victim's right to restitution. In this case, the prosecutor's error in failing to request restitution was inadvertent, and it was the prosecutor who appealed the court's restitution order. As such, I was able to step into the traditional role of the state as protector of the victim's interests. The prosecutor's actions demonstrate

that even when the state does not agree or does not recognize or admit error, there is an independent voice that needs to be heard on such issues — the victim's voice.

I continue to believe that a state's attorney can represent victims' interests. For example, in a case in Utah, an Assistant Attorney General who was seeking to maintain the privacy of a victim's records in a sexual assault case reached out to NCVLI and requested a complementary brief. Similarly, in a restitution case in Tennessee, an Assistant Attorney General was open to receiving assistance from NCVLI in researching a jurisdictional issue in trying to uphold a trial court's revision of restitution on appeal. In both these cases, the state's attorney recognized that although the victim and state's interests were aligned, the victim had a particular interest in the outcome of the proceeding — one that was unique from the interests of the state. While I certainly continue to believe that the state can be a strong advocate for the victim, I now recognize that victims need independent legal representation. ■