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Comments

THE VICTIM'S RIGHTS AMENDMENT: A PROSECUTOR'S, AND SURPRISINGLY, A DEFENSE ATTORNEY'S SUPPORT IN SENTENCING

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INTRODUCTION

Since the early eighties, prosecutors in Maryland have sought to buttress their arguments for the maximum or lengthy sentences for convicted criminals, by suggesting that the plight of the victims, or in homicide cases, the victim's family, compelled such a sentence under the Victim's Rights Act.[1] This argument,

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1. MD. ANN. CODE art. 27, § 780 (1996). The Code states, in part:

> (a) *In general.*—In every case resulting in serious physical injury or death, the victim or a member of the victim's immediate family, or if the victim is deceased, under a mental, physical, or legal disability, or otherwise unable to provide the required information, the personal representative, guardian, or committee, or other family member may, at the request of the State's Attorney and in the discretion of the sentencing judge, address the sentencing judge or jury under oath or affirmation before the imposition of sentence.

Id. § 780(a). The Code further provides for a presentence investigation and the preparation of a victim impact statement. It states:

> (c) *Same—Request from court; victim impact statement.*—(1) Prior to the sentence by the circuit court of any county to the jurisdiction of the Division of Correction of a defendant convicted of a felony, or a misdemeanor which resulted in serious physical injury or death to the victim, or the referral of any defendant to the Patuxent Institution, the court may order the Division of Parole and Probation to complete a presentence investigation if the court is satisfied that the investigation would help the sentencing process. The burden of establishing that the presentence investigation should be ordered is on the party that requests the investigation.
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> (2) A presentence investigation shall include a victim impact statement if required under Article 27, § 781 of the Code . . .
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> (d) *Same—Cases involving death penalty or life imprisonment.*—In any case in which the death penalty or imprisonment for life without the possibility of parole is requested under Article 27, § 412, a presentence investigation, including a victim impact statement as provided under Article 27, § 781 of the Code, shall be completed by the Division of Parole and Probation, and shall be considered by the court or jury before whom the separate sentencing proceeding is conducted under Article 27, § 412 or § 413.

no doubt, has been persuasive in a large number of cases.[2]

Interestingly, when the purpose of the Act is closely scrutinized and applied to a number of specific case scenarios, it becomes evident, particularly in post-sentencing and judgment proceedings, that

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MD. ANN. CODE art. 41, § 4-609 (1997). The Code also specifies under what circumstances a victim impact statement is required, establishes the proper content of an impact statement, and requires the sentencing court to consider the statement:

(a) *When required.*—A presentence investigation that is completed by the Division of Parole and Probation under Article 41, § 4-609 of the Code shall include a victim impact statement, if:

(1) The defendant, in committing a felony, caused physical, psychological, or economic injury to the victim; or

(2) The defendant, in committing a misdemeanor, caused serious physical injury or death to the victim.

(b) *When no presentence investigation order.*—If the court does not order a presentence investigation, the State's Attorney may prepare a victim impact statement to be submitted to the court and the defendant in accordance with the Maryland Rules of Procedure pertaining to presentence investigations.

(c) *Consideration of statement by court.*—The court shall consider the victim impact statement in determining the appropriate sentence, and in entering any order of restitution to the victim under § 807(c) of this subtitle.

(d) *Contents.*—A victim impact statement shall:

(1) Identify the victim of the offense;

(2) Itemize any economic loss suffered by the victim as a result of the offense;

(3) Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;

(4) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;

(5) Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and

(6) Contain any other information related to the impact of the offense upon the victim or the victim's family that the court requires.

(e) *Deceased or incompetent victim.*—If the victim is deceased, under a mental, physical, or legal disability, or otherwise unable to provide the information required under this section, the information may be obtained from the personal representative, guardian, or committee, or such family members as may be necessary.

MD. ANN. CODE art. 27, § 781 (1996).

2. *See* Ball v. State, 347 Md. 156, 192-93, 699 A.2d 1170, 1189-91 (1997) (upholding the trial court's sentence of death and rejecting the appellant's argument that the testimony of the victim's mother, which extended beyond the crime's impact on immediate family members, was improper); Cianos v. State, 338 Md. 406, 413, 659 A.2d 291, 295 (1995) (declaring that "trial judges *must* give appropriate consideration to the impact of crime upon the victims"); Evans v. State, 333 Md. 660, 688-89, 637 A.2d 117, 131-32 (1994) (rejecting the appellant's argument that the written victim impact statement made by the victim's sister was unduly inflammatory thereby rendering the trial "fundamentally unfair" so as to deny the appellant due process); Ingoglia v. State, 102 Md. App. 659, 669-71, 651 A.2d 409, 413-15 (1995) (concluding that consideration of the recommendation of the victim's mother is "within the sentencing court's prerogatives"); Hurley v. State, 60 Md. App. 539, 564, 483 A.2d 1298, 1311 (1984) (noting that "[i]n assessing the gravity of the offense, a proper consideration is the effect the crime has had upon the victims").

the Act may also be applied in a manner that supports a defense attorney's argument for a reduction or modification of sentencing.[3] Despite the fact that the legislative history of the Act does not reflect any intent or even mention that its purpose might include an application to benefit a sentenced defendant to reduce his sentence,[4] interpreting the Act in this manner is consistent with its stated purposes as explained in Maryland case law.[5]

I. BACKGROUND AND HISTORY

In 1982, the Maryland General Assembly passed legislation in response to the growing concern of crime victims, who felt they were being treated poorly by the criminal justice system.[6] This legislation, now part of the Maryland Code, authorizes a "Victim Impact Statement" to be submitted to the judge along with the Pre-Sentence Investigation Report prior to the sentencing of a defendant.[7] The Code also specifically provides for victims to be able to make an oral statement to the judge at the time of sentencing.[8]

In fact, a victim and/or a family member of a victim are given the opportunity to testify orally before sentencing. The relevant Maryland Code provides:

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3. *See* State v. Gerhold, No. CT882529X (7th Jud. Cir. Ct. Md. Apr. 8, 1999) (considering testimony of a victim's adult children for the purpose of reconsidering a sentence imposed upon their father, who was convicted ten years earlier for the murder of their mother). Maryland Rule 4-345 proscribes the power of Maryland trial courts to revise a sentence in a criminal case as follows:

> The court has revisory power and control over a sentence upon a motion filed within 90 days after its imposition . . . (2) in a circuit court, whether or not an appeal has been filed. Thereafter, the court has revisory power and control over the sentence in case of fraud, mistake, or irregularity, or as provided in section (d) of this Rule. The court may not increase a sentence after the sentence has been imposed, except that it may correct an evident mistake in the announcement of a sentence if the correction is made on the record before the defendant leaves the courtroom following the sentencing proceeding.

MD. RULE 4-345(b).

4. *See infra* notes 10-11 and accompanying text.

5. *See, e.g., Cianos*, 338 Md. at 413, 659 A.2d at 295 (stating that victim impact statements should be accepted "whenever possible").

6. *See generally Hearings on SB 50 Before the Maryland Senate Judicial Proceedings Committee*, 388 Legis. 1982 Sess. (Md.) (testimony in support) (emphasizing the necessity for the courts to take into account the psychological impact of crime on victims when sentencing defendants).

7. *See* Victim Impact Statement Act, ch. 494, 1982 Md. Laws 3108, 3109 (codified as amended at MD. ANN. CODE art. 41, § 4609 (1997)); MD. ANN. CODE art. 41, § 4-609 (1997); *see supra* note 1 (providing the relevant text of section 4-609).

8. MD. ANN. CODE art. 27, § 780(a) (1996).

> In every case resulting in serious physical injury or death, the victim or a member of the victim's immediate family, . . . may, at the request of the State's Attorney and in the discretion of the sentencing judge, address the sentencing judge or jury under oath or affirmation before the imposition of sentence.[9]

On January 19, 1982, a hearing was held before the State Senate Judicial Proceedings Committee where then State Senator John J. Garrity, who later became a judge of the Court of Special Appeals of Maryland, emphasized that the purpose behind the legislation was to provide for greater victim involvement in the sentencing proceedings.[10] The Senator stated that although he realized most judges already give consideration to the impact on victims in determining sentence, "[t]his bill asks that every judge make this consideration .... There should be some place in the sentencing procedure to view the victim with compassion and assess the harm done, . . . the extent of that harm should be the factor to be considered when sentencing is determined."[11]

The Court of Appeals of Maryland has interpreted the legislation to mandate that "trial judges *must* give appropriate consideration to the impact of crime upon the victims."[12] Moreover, the court has held that the impact of a crime on the victim or on the victim's family is both "relevant and probative."[13] Because it is unclear how probative testimony from friends of the victim may be, generally any impact testimony given at the time of sentencing is limited to the victim and to close family members.[14]

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9. *Id.*

10. *Hearing on SB 50 Before the Senate Judicial Proceedings Comm.*, 388 Legis. 1982 Sess. (Md.) (statement of Senator John Garrity).

11. *Id.*

12. Cianos v. State, 338 Md. 406, 413, 659 A.2d 291, 295 (1995).

13. Evans v. State, 333 Md. 660, 687, 637 A.2d 117, 130 (1994) (referring to the court's *obiter dicta* in Lodowski v. State, 302 Md. 691, 490 A.2d 1228 (1985) (examining the legislative history of victim impact statements)).

14. *See* Ball v. State, 347 Md. 156, 198, 699 A.2d 1170, 1190 (1997). In *Ball*, the court was faced with the issue of whether the testimony of the victim's mother was improper due to its references to the impact on those outside the immediate family. *Id.* at 166, 699 A.2d at 1174. A contrast was made between the strict provisions of MD. ANN. CODE art. 27, § 781(d) (1996) concerning written impact statements in the presentence investigation report, and the oral testimony permitted at the time of sentencing under MD. ANN. CODE art. 27, § 780 (1996). *See Ball*, 347 Md. at 193-94, 699 A.2d at 1187-88. The court found that because the victim impact witnesses were testifying "under great emotional strain, . . . in venting their pain and frustration, [they] may make an occasional reference to the impact of the crime on individuals beyond the victim's family." *Id.* at 197, 699 A.2d at 1189.

This situation is not to be confused with the court's comments regarding the submission of victim impact statements by friends and colleagues. Although the court ultimately

Generally, a victim impact statement provides the sentencing judge with a description of the physical, emotional, and psychological effects of the crime.[15] Traditional policy justifications for allowing victim impact statements to be considered by the judge at sentencing include: giving victims more control of their lives; satisfying a victim's desire for retribution; and making the criminal sentencing proceeding more fair by giving consideration to the victim's needs.[16]

II. FACTS AND CIRCUMSTANCES OF THE *GERHOLD* CASE WHERE THE ACT WAS USED TO BENEFIT THE DEFENDANT

Giving consideration to all of the preceding history concerning a victim's right to give oral testimony at the time of sentencing, the Cir-

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did not have to decide the issue of whether such statements constituted proper victim impact evidence, it stated that "[e]ven if we were to agree with Appellant that the letters from friends and colleagues were not proper victim impact evidence, . . . it would be of no favorable consequence to Appellant" due to the fact that the letters were never even offered into evidence by the State. *Id.* at 194, 699 A.2d at 1188.

The court in *Williams v. State*, 342 Md. 724, 679 A.2d 1106 (1996), however, did address this second issue more directly. While the court did not permit the admission of written statements made by friends and colleagues of the victims because they were not properly "incorporated as part of a [presentence investigation] prepared pursuant to § 4-609(d)," the court stressed that "we do not mean to rule out the possibility that information from friends or colleagues of a victim might be considered in the sentencing phase of a death penalty case." *Williams*, 342 Md. at 763, 679 A.2d at 1126. The court noted that the Division of Parole and Probation has "wide latitude in preparing such reports," however, "the only written victim impact statements that are admissible in death penalty cases are those made part of a [presentence investigation] prepared by the Division of Parole and Probation as authorized by Art. 41, § 4-609(d)." *Id.* at 763, 679 A.2d at 1126.

The court distinguished *Williams* from its earlier decision in *Reid v. State*, 302 Md. 811, 490 A.2d 1289 (1985), in which the court had declared that the then controlling statute, MD. ANN. CODE, art. 41, § 124 (1982) (recodified as MD. ANN. CODE art. 41, § 4-609 (1990)), "does not prevent additional statements or comments from being offered whether by the victim, his family or the State's Attorney." *Reid*, 302 Md. at 821, 490 A.2d at 1294. In *Williams*, the court stated that the reasoning in *Reid*

> does not apply in the instant case. *Reid* was not a death penalty case. As we have explained, the admissibility of victim impact statements in death penalty cases is specifically governed by Art. 41, § 4-609(d), which requires that the Division of Parole and Probation prepare a PSI and victim impact statement in every death penalty case. Our decision in *Reid* was based on a prior version of the PSI statute which did not include the provision mandating the preparation of a presentence investigation and victim impact statement by the Division of Parole and Probation in all capital cases.

Williams, 342 Md. at 764, 679 A.2d at 1126.

15. *See generally* Ilana Subar, Note, *Emphasizing Victims' Rights at the Sentencing Phase of Criminal Proceedings*, 55 MD. L. REV. 722 (1996) (reviewing *Cianos* and commenting on the history of victim impact statements).

16. *See id.* at 726 n.26 (citing Michael A. Johnson, Note, *The Application of Victim Impact Statements in Capital Cases in the Aftermath of* Booth v. Maryland: *An Impact no More?*, 13 T. MARSHALL L. REV. 109, 113-15 (1988))

cuit Court for Prince George's County was recently presented with a set of unusual circumstances that opened the door for the court to apply the Maryland Victim's Rights Amendment in a manner that was mutually beneficial to the defendant and to the family members of the victim.[17] This opportunity presented itself by way of a Motion for Reconsideration/Modification of Sentence filed by counsel on behalf of a defendant who had been convicted and sentenced for the murder of his wife, ten years earlier. The facts of the original case are as follows:

> *The Defendant, Lee Drury Gerhold, was married to Virginia Gerhold, the victim in this case.*[18] *On Wednesday evening, February 7, 1968, the children of the Defendant, and his then wife, Virginia Gerhold, were attending a weekly church function. At 7:30 that evening, Virginia Gerhold left the family home on Riggs Road in Adelphi, Maryland to pick up the children from the church event. Neighbors observed Virginia Gerhold leaving the home in her white Ford station wagon. This was the last time Virginia Gerhold was seen alive.*
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> *At 10:30 P.M., February 7th, the Defendant, Lee Drury Gerhold, reported to the police that his wife was missing and had failed to return home with the children. On the morning of February 8, 1968 Prince George's County police officers began conducting a search for Virginia Gerhold and shortly thereafter discovered her car at 2402 Mistletoe Place, a dead-end street in Adelphi, Maryland. Virginia Gerhold's body was discovered in the backseat. It appeared as if she had been sexually assaulted. Upon an autopsy, it was determined that the victim had died from two gunshot wounds, one to the head and one to the chest. The autopsy also revealed evidence of strangulation and lacerations on Virginia Gerhold's face, and on the back of her head. The facial lacerations were consistent with the type of injuries that could be inflicted by the muzzle of a handgun.*
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> *During the time immediately leading up to the death of Virginia Gerhold, the Defendant, Lee Gerhold, was involved in an extramarital affair with a woman who had become pregnant with his child. At the time the murder of Virginia Gerhold occurred, the Defendant was dining with his mistress at a restaurant in Prince Georges County.*
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> *For the next twenty years, the murder of Virginia Gerhold went unsolved. The Defendant went on with his life, married his pregnant girlfriend, whom he later divorced. Then in May of 1974, the Defendant married Helen Louise Janis who became his third wife.*

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17. *See* State v. Gerhold, No. CT882529X (7th Jud. Cir. Ct. Md. Apr. 8, 1999) (ruling on a Motion for Reconsideration of Sentence pursuant to MD. RULE 4-345).

18. *See id.* at 2-5. Those paragraphs following in the text, which are italicized come from this same cite.

In November of 1988, the Baltimore City Police Department arrested a man by the name of Gordon Gaskins for Possession of A Firearm. After agreeing to cooperate with the authorities, Gaskins informed the police that Gerhold had made an attempt to solicit him to murder his first wife, Virginia, in 1968. Because Gaskins was arrested and incarcerated for a different offense after contracting to perform the 1968 murder, he was unable to perform the contract killing on Virginia Gerhold. As a result, the Defendant resorted to hiring someone else to carry out the killing. Although Gaskins was unable to carry out the 1968 killing of Virginia Gerhold, he admitted to police that he was currently in negotiations with the Defendant concerning the possibility of contracting for the murder of his third wife, Helen Louise Janis Gerhold.

Prince George's County Police shortly thereafter arrested the Defendant for the murder of Virginia Gerhold. After his arrest, the Defendant admitted to having initially hired Gaskins. Upon becoming aware of Gaskins' incapacity as a result of his incarceration to execute the contract, he later hired an individual known as "Gangster Webster" to kill his first wife. According to the Defendant, he had paid Gangster Webster $5,000 for the hit. Lee Gerhold then confessed that he had his first wife murdered in 1968 because of the pressure he was under from his then pregnant girlfriend to get a divorce. Because the Defendant believed that a divorce would cause his friends to look down upon him, he decided to have his wife murdered.

In 1989 the Defendant was charged and ultimately convicted of the 1968 murder of his first wife in Prince George's County. He was thereafter charged with the Solicitation of Murder of his third wife, Helen Gerhold, in the Circuit Court for Baltimore City. Quite understandably, Helen Gerhold soon filed for divorce, preferring a more conventional dissolution of her marriage than that which appeared historically to be the Defendant's technique of choice to end his marital relationships.

The investigation into Defendant Lee Drury Gerhold's Solicitation of Murder of Helen Gerhold in Baltimore City revealed taped conversations between the Defendant and Gaskins, in which a variety of methods were suggested by Lee Drury Gerhold to eliminate his third wife. These included the possibility of a drowning or a hit and run accident. The Defendant rejected the suggestion of a shooting out of fear that it would be too similar to the method used to kill his first wife. Despite the fact that Lee Drury Gerhold was given two chances to call off the hit by Gaskins acting as a confidential informant, he failed to do so.

On December 20, 1988, the defendant, Lee Drury Gerhold was indicted by a grand jury in the Circuit Court for Prince George's

County, Maryland for the murder of his first wife, Virginia Gerhold.[19] On April 24, the defendant entered a plea of Guilty to Count 1 of the Indictment, "First Degree Murder as an Accessory Before the Fact."[20] On July 11, 1989, the defendant was sentenced to a term of imprisonment of his natural life with all but fifty years suspended, and credit for time served to that date by the Honorable Judge Howard S. Chasanow, then sitting as a Judge of the Circuit Court for Prince George's County.[21] On July 18, 1989, a timely Motion for Reduction of Sentence was filed. On November 21, 1989 an Order of Court, by Judge Chasanow, was entered, to hold the Motion for Reduction of Sentence sub curia where it remained for a period of ten years.[22]

In 1999, the defendant sought mercy from the successors to the original sentencing judges in both the Circuit Court for Prince George's County and the Circuit Court for Baltimore City in the form of reductions of the separately negotiated sentences he received in both those courts for the murder of his first wife in 1968 and the solicitation of the murder of his third wife some twenty years later in 1988.[23]

III. APPLICATION OF THE ACT TO THE *GERHOLD* CASE

In early 1990, Judge Howard S. Chasanow, the original sentencing judge of Lee Drury Gerhold, was elevated to the Court of Appeals of Maryland. He had previously reserved ruling on the Defendant's Motion for Reconsideration of his Sentence for the conviction of the murder of his first wife in 1968. His successor, myself, Judge Steven I. Platt, made the decision to grant a hearing on the defense's renewed motion in December 1998. At the hearing, three of the adult children of Virginia Gerhold, the victim in the case, came forth to offer testimony before the court as to whether their father's sentence should be

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19. *See* State v. Gerhold, No. 18901349 (Baltimore City, 8th Jud. Cir. 1989).

20. *Id.*

21. *Id.* Judge Chasanow sat on the Court of Appeals of Maryland until August 15, 1999, when he retired.

22. The defendant also entered a plea in the Baltimore City case before the Honorable Judge Joseph I. Pines. In this instance, a timely Motion for Reconsideration of Sentence was also filed and held in abeyance by the court. *See Gerhold*, No. 18901349.

23. *See* State v. Gerhold, No. CT882529X, at 6-7 (Md. 7th Jud. Cir. Ct. Apr. 8, 1999) (ruling on a Motion for Reconsideration of Sentence pursuant to MD. RULE 4-345); State v. Gerhold, No. 18901349 (Baltimore City, Oct. 20, 1999) (ruling on Motion for Reconsideration of Sentence pursuant to MD. RULE 4-345, from the bench, with no written opinion filed).

reduced.[24] The defendant's two daughters offered statements favoring their father's release.[25]

The Circuit Court for Prince George's County could find no direct guidance on the issue of what weight to give the wishes of the majority of the deceased victim's children.[26] The court therefore, focused on whether to grant a reduction based upon the statements made by Gerhold's children.[27] These siblings, the court noted, could be viewed as having been either victims of his original crime, because they lost their mother, or at the very least, family members of the victim of Gerhold's crime.[28]

As such, the question became: should the court accord the wishes of the victim's children, the so-called "victim impact testimony" enough weight that it would justify applying the Victim's Rights Act in a manner clearly not contemplated nor even described by anyone in any legislative history of the Act.[29] The answer for the Circuit Court for Prince George's County was yes because that application was consistent with the Victim's Rights Act—to accord the victim or the victim's family deference in considering the sentence of the defendant.[30]

It was the Circuit Court for Prince George's County's opinion that the situation warranted turning the traditional justification and application of the Victim's Rights Act "upside down and inside out."[31] Gerhold's children had already suffered the tragic loss of their mother and the painful reality of having their own father incarcerated for her murder. Because the court could find no other reason for Gerhold to remain incarcerated under the traditional theories of sentencing, it determined that it would be appropriate to accord greater weight, than it would have otherwise, to the wishes of Virginia Gerhold's adult children.[32]

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24. *See Gerhold*, No. CT882529X, at 7-10 (reproducing the testimony of Virginia Gerhold's two daughters).

25. *See id.* The transcripted statement of Gerhold's son is not included in the opinion.

26. *See id.* at 14-15.

27. *Id.* at 16.

28. *Id.* The court alternately refers to the daughters of the deceased victim as both "sibling victims" or "surviving victims," as well as simply the "victim's daughters." *Id.*

29. *See id.* ("The facts in the instant case virtually stand . . . [the] traditional policy justifications [of the Victim's Rights Act] on their head.").

30. *See supra* notes 1, 6 and 10 and accompanying text (providing text of, and discussing the purposes behind, the Victim's Rights Act).

31. *Gerhold*, No. CT882529X, at 17.

32. *Id.* at 19. The court declared it to be quite apparent that its decision on the reconsideration of sentence would "neither generally deter nor remove any general deterrence to others contemplating killing their spouses themselves or hiring someone else to do it." *Id.* at 11. Additionally, the court did not feel that "society's condemnation of [the defendant's] most serious and reprehensible crime inherent in his original sentence" would be

Had the children's testimony supported continued incarceration, equal weight would have been given in considering those wishes.[33] The children of Virginia Gerhold, however, felt that their father and they themselves had suffered enough from Gerhold's incarceration.[34] In the mind of the court, the benefit, if any, to the further incarceration of Lee Drury Gerhold in this case was far outweighed by the burden it would continue to have on his children—the victims of the crime.[35] The court, therefore, reluctantly ordered a reduction of the Defendant's sentence, concluding that there were no means of extending compassion to his and his deceased wife's children without granting mercy to Lee Drury Gerhold himself.[36] Mercy, the court stated, of which "he is not entitled to or deserving."[37] The Circuit Court for Prince George's County then went on to explain:

> Life was unfair to Virginia Gerhold. Her death was not only unfair, it was tragic, traumatic and violent beyond any explanation, which this Court can comprehend. This Court's decision not to hold her murderer accountable to the full extent the law allows is reached very reluctantly. I make that decision only because I view the alternative which is to maintain the status quo as unnecessarily penalizing at least two of the deceased's children and their families for no reason other than to satisfy my own personal and abstract theories of justice. I do not know what Virginia Gerhold would say to this Court if she were able to address me. I do know she instilled in all of her children, who are now adults with children of their own, an incredible capacity to address the very

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seriously compromised. *Id.* at 12. Regarding rehabilitation as a theory for sentencing, the court conceded that the question of whether the defendant is "rehabilitated" is not "capable of being answered to a reasonable degree of certainty in this Defendant's or even this member of the Court's lifetime." *Id.* at 13.

33. *See id.* at 14 (concluding that none of the traditional theories of incarceration (i.e., deterrence, denunciation of the act, or rehabilitation) would justify reconsideration of the defendant's sentence to warrant reduction, and deducing that "the only basis for further considering Lee Drury Gerhold's request for a reduction . . . is the express desire of his and two of his deceased wife's daughters that he be released").

34. *See id.* at 7-10 (providing the testimony of Virginia Gerhold's daughters).

35. The court commented that acceding to the victim's wishes would grant them greater control over their lives. *Id.* at 16; *see also supra* note 16 and accompanying text (discussing the traditional policy justifications for permitting victim impact statements). The court, however, also recognized that the only way that they would have this control was by "injecting [the defendant] back into their lives" and not by the conventional methods of "punishing the perpetrator of the crime and removing him from society and from the victims' lives." *Gerhold*, No. CT882529X, at 16.

36. *Gerhold*, No. CT882529X (noting that granting the reduced sentence would not "in the textbook manner, 'satisfy a victim's desire for retribution' in the traditional sense").

37. *Id.*

complex and emotional issues before this Court with dignity and understanding.

The threshold reality is that the risk is minimal that Lee Drury Gerhold, at the age of 75 and in failing health, will be a danger to anyone in whatever community he is allowed to settle in. The further reality is that he may or may not be "rehabilitated." The final reality is that Lee Drury Gerhold certainly has not been punished proportionately, but that two of the five remaining sibling victims of his crime and their families who were able to speak to this Court asked this Court to extend mercy to their father notwithstanding the loss of their mother at his hand. I am sure that they thought about their decision to speak and write as they did at great length and after reflection concluded that they were not dishonoring their mother's memory in doing so. This Court will therefore not second-guess their decision and I accord it great weight in reaching my own decision in this case. I also note that my decision in the instant case will not free this defendant. In fact he is serving a concurrent sentence as a result of his plea of guilty, conviction and sentence in the Circuit Court for Baltimore City for solicitation of the murder of his third wife Helen Gerhold. This Court has by this decision determined not to legally block the Defendant's release from incarceration in the event that the Circuit Court for Baltimore City determines for these or other reasons to reconsider its sentence in the Defendant's companion case in its jurisdiction.[38]

IV. FURTHER ANALYSIS

The Circuit Court for Baltimore City decided not to reconsider its sentence in the companion case.[39] Judge Martin P. Welch of the Baltimore City Circuit Court denied the Motion for Reconsideration filed by Gerhold's defense counsel to reduce the sentence he was concurrently serving for the solicitation of murder of his third wife.[40]

A hearing on the matter was held before Judge Welch on October 20, 1999. For the purpose of this hearing, the State produced its own victim, Gerhold's third wife, in an attempt to lessen the weight the Judge might accord to the children's wishes.[41] Gerhold's third

38. *Id.* at 18-19.

39. State v. Gerhold, No. 18901349 (Baltimore City Cir. Ct. 1989).

40. *Id.* Judge Welch denied Gerhold's motion for reconsideration on the bench on October 20, 1999.

41. Telephone Interview with Fred Bennett, Esq., Defense Attorney for Lee Drury Gerhold (Oct. 29, 1999).

wife testified that she was still in fear for her safety.[42] Upon conclusion of the arguments at the hearing, the Judge denied Gerhold's motion for a sentence reduction.[43] Here, it appears that Judge Welch still applied weight to a victim's testimony; only in this case, it was done in the more traditional manner.[44]

The practical limits, and for that matter, the wisdom of the application of the Victim's Rights Act in the non-traditional manner to justify the reduction of an otherwise appropriate sentence have not to date been fully explored and have certainly not been articulated in either legal literature or case law.

The area of family law and domestic violence is one where further development of the appropriateness of the Act has potential. Consider the situation involving a husband who batters his wife. The wife initially decides to file charges against her husband and the couple must appear in court. By the time the designated court date arrives, one of many things may have occurred. Possibly the husband and wife have reconciled. Maybe, after having substantial time to think about it, the wife has come to the realization that if her husband is incarcerated, she will have no way to support herself. In any event, the wife—the victim in the case—requests leniency on the part of the court.

This example raises a troubling question. Should the judge in this case apply the Victim's Rights Act to lessen the sentence of the defendant because failure do so would result in separating a couple who have happily reconciled, or would it place the wife in a situation where she has no place to stay and no way to support herself? Is it the judge's duty to ignore this potential application of the impact statement because the judge believes her own wisdom and experience in the domestic violence arena dictate otherwise? A judge may choose to ignore the victim's impact statement expressing a request for leniency toward her husband because she believes that in the long run it is in the victim's best interest to incarcerate the batterer. Is this application of the victim's impact statement, or lack there of, any more justifiable than the manner in which it was applied by the Prince George's County Circuit Court to the facts in the Gerhold case?

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42. *Id.*

43. *Id.*

44. The traditional manner entails consideration of the testimony of the victim, or the deceased victim's family, regarding the psychological impact that the crime has had on the victim or on the family members. *See supra* text accompanying note 15. The Baltimore City Circuit Court followed this approach to the extent that it considered the testimony of Gerhold's third wife.

Child abuse is yet another situation where the consideration of an impact statement might act to assist a defendant in receiving a lessened sentenced.[45] A father has repeatedly abused his children, yet once in court, the children plead with the judge to allow their father to go free, yet they face a future of foster homes and potential separation. The children are the victims of a violent act. Thus, the legislation allows for them to make a statement at the time of sentencing and the judge "must" give it due consideration. Should the judge ignore the statement because he knows the violence and abuse the kids face far outweigh the drawbacks of foster care or should the judge give consideration to the request and demonstrate leniency toward the defendant?

An entirely different arena where judges are in reality already using a victim's statement to benefit the defendant is in the sentencing of defendants convicted for white-collar crime offenses. For example, consider a situation involving the crime of embezzlement on the part of an accountant employed by a small family-owned business. The State prosecutes the accountant, and the prosecutor requests the maximum penalty. However, the victims in the case—the family that owns the business—plead with the court to allow the defendant to serve time on the weekends so that she will be able to work and to pay back restitution to the victims. Incarcerating the defendant in a situation such as this could actually cause further harm and suffering to the victims should their business go bankrupt when they are unable to collect money owed by the defendant. It is the situation today, where judges already allow for just such an arrangement to keep victims of embezzlement from suffering the loss of their businesses. This arrangement, in reality reflects the application of the Victim's Rights Act in a parallel fashion to how it was applied in the *Gerhold* case. In both situations, a defendant receives a lesser sentence so that a victim does not endure further harm or emotional suffering.[46]

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45. For example, in *State v. Lucas*, No. CT991495X (7th Jud. Cir. Ct. Md. Feb. 29, 2000), a trial judge imposed a sentence of probation on a child abuse case after hearing a victim impact statement requesting no incarceration because the defendant was the victim's cousin. Judge Graydon S. McKee, III stated for the record that he was giving consideration to the victim's mother's statement. *See id.*

46. *Cf.* State v. Whitlock, No. CT98-130X (7th Jud. Cir. Md. Dec. 2, 1998) (imposing a sentence of five years with all but eighteen months suspended on a defendant who embezzled over $150,000 so that she could obtain employment and pay back restitution to the victim).

CONCLUSION

The remaining question is how and to what extent should the Victim's Rights Act be applied in a way that is fair to both the victim of a crime and to the defendant convicted of committing that crime. Certainly, there is no debate over the ultimate purpose of the Victim's Rights Act, which is to give greater weight and consideration to the interests and desires of the victim in the case.[47] The wisdom of doing so remains unclear and, therefore, is the subject of considerable debate. There is clearly no consensus in either academic or judicial circles on the issue.

It is difficult to surmise how many sentencing judges may already be using the Act in this manner because many may do so without making a record of the reasons for their sentencing decision. It is likely that many have applied the Act subconsciously in a way similar to those mentioned in the previous hypotheticals. There are currently no Maryland appellate opinions that attempt to set or to define the parameters of the Victim's Rights Act. If sentencing judges are going to apply the Act regularly, as they are doing now, then it is apparent that there should be further thought and discussion both academically and in case law on what, if any, limitations should be applied to that use.

47. *See supra* notes 10-11 and accompanying text.