

# IS THE OFFICE CLOSED? THE ROLE OF THE OFFICE OF VICTIMS' RIGHTS AFTER *COOPER* V. *DISTRICT COURT*

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*In 2001, the State of Alaska reinforced an already strong public policy in favor of victims' rights by creating the Office of Victims' Rights, a state-level agency charged with representing crime victims in and out of court. However, in an important recent decision, Cooper v. District Court, the Alaska Court of Appeals greatly limited the Office of Victim's Rights' role in court proceedings. This Note gives a detailed analysis of the Court of Appeals' decision in Cooper and addresses the consequences of the Cooper decision for the Office of Victim's Rights. It considers several possible courtroom roles for the Office of Victim's Rights which likely remain legal under Cooper and concludes by recommending that the Alaska Legislature act to clarify the role of the Office of Victim's Rights in the court system.*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	264
II.	BACKGROUND: VICTIMS' RIGHTS IN ALASKA AND NATIONWIDE .....	266
	A. The Alaska Victims' Rights Statute and the Alaska Victims' Rights Amendment.....	268
	B. The Office of Victims' Rights .....	269
III.	<i>COOPER V. DISTRICT COURT</i> .....	270
	A. The Significance of <i>Cooper</i> .....	270
	B. <i>Cooper's</i> Factual Background.....	270
	C. Victims are Not Parties to Criminal Proceedings.....	271
	D. A Victim's Right to a Timely Disposition of a Case Is Not Violated Where the Defendant Has Been Sentenced .....	272

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E.	Victims May Have Standing to Vindicate Procedural Rights.....	272
F.	A Crime Victim’s Constitutional Right to Fairness Does Not Encompass a Right to Appeal Substantive Decisions by a Trial Court .....	273
G.	The Office of Victims’ Rights Does Not Have Independent Standing to File Suit on Behalf of Crime Victims .....	274
H.	The Office of Victims’ Rights is Analogous to the Office of the Ombudsman.....	274
IV.	DISCUSSION OF THE COURT’S HOLDING IN <i>COOPER</i> .....	275
A.	The Role of the Office of Victims’ Rights’ Is Not Analogous to that of the State Ombudsman.....	275
B.	Dangers of Denying the Office of Victims’ Rights a Role in Court Proceedings .....	276
V.	UNANSWERED QUESTIONS AFTER <i>COOPER</i> .....	277
A.	How May Crime Victims Enforce Rights?.....	277
B.	Possible Ways for Alaska Crime Victims to Enforce Their Procedural Rights .....	278
1.	<i>Can Victims Address the Court to Alert it to         Procedural Violations?</i> .....	278
2.	<i>Can Victims Seek Appellate Relief if Procedural         Rights are Violated?</i> .....	279
3.	<i>May Victims Petition Courts of Appeal for Writs         of Mandamus?</i> .....	281
C.	How Will the Right to Dignity, Fairness, and Respect be Protected Under the Alaska Victims’ Rights Amendment? .....	283
VI.	CONCLUSION.....	285

## I. INTRODUCTION

For most of the history of criminal justice in the United States, criminal proceedings have been perceived as a transaction between the offender and the state. Since the 1970s, however, legislators and other policymakers have paid greater attention to the human cost of crime and its continuing effects on the lives of crime victims.<sup>1</sup> Crime victims have mounted campaigns to win recognition for their concerns, and legislators have responded by

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1. See Chief Justice Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims’ Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1, 2 (1997).

making efforts to enumerate the rights of crime victims through statutes and state constitutional amendments.<sup>2</sup>

States have struggled to decide how to enforce victims' rights. Not only do many victims not know their rights, but they are often unsure of how to assert them, since it is well-established that victims are not parties to criminal proceedings.<sup>3</sup> In sorting through these issues, crime victims are additionally unsure of where they may turn for assistance.

Alaska's legislature took a bold step toward resolving these uncertainties in 2001 by establishing the Office of Victims' Rights to enforce the rights that the Alaska's Victims' Rights Statute and the state constitution's victims' rights amendment created.<sup>4</sup> The Office of Victims' Rights was intended to function as a comprehensive information clearinghouse for crime victims, an investigative agency that would examine the procedures of justice agencies to ensure they protected victims' rights, and a public interest law firm that would represent victims' interests in court.<sup>5</sup> To this end, the statute that created the Office of Victims' Rights stated that the Office of Victims' Rights had "jurisdiction to advocate on behalf of crime victims . . . in the courts of the state."<sup>6</sup>

The recent *Cooper v. District Court* decision, however, has called the Office of Victims' Rights' assertion of jurisdiction into question.<sup>7</sup> In *Cooper*, the Alaska Court of Appeals, construing the Alaska Victims' Rights Amendment for the first time, rejected a crime victim's assertion of the right to intervene in the disposition of a criminal case and the Office of Victims' Rights' assertion of independent standing to file suit on behalf of crime victims.<sup>8</sup> Yet, the court did not state that crime victims were entirely without recourse under Alaska law.<sup>9</sup>

The passage of the Alaska Victims' Rights Amendment demonstrates a strong public policy in favor of victims' rights in Alaska. After *Cooper*, however, the role of the state's appointed victims' advocate in court proceedings is an open question. How

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2. *Id.* at 5.

3. See *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 n.6 (1973) (holding that a crime victim has no cognizable legal interest in the prosecution of his assailant).

4. See Stephen E. Branchflower, *The Alaska Office of Victims' Rights: A Model For America*, 21 ALASKA L. REV. 259, 262-63 (2004).

5. See ALASKA STAT. §§ 24.65.100-250 (2006).

6. ALASKA STAT. § 24.65.100(a).

7. See *Cooper v. Dist. Ct.*, 133 P.3d 692, 695 (Alaska Ct. App. 2006).

8. See *id.*

9. See *id.* at 711.

can the Office of Victims' Rights serve crime victims in court without running afoul of *Cooper*?

Part II of this Note offers a brief overview of victims' rights in the United States and in Alaska in particular. Part III examines the reasoning behind the court's holding in *Cooper*. Part IV discusses some strengths and weaknesses of the court's holding. Part V investigates several roles for the Office of Victims' Rights in the court system that may be permissible under *Cooper*. It concludes that the Alaska Legislature should recognize a victim's right to address a court and to alert the court to violations of the victim's procedural rights, and should offer the Office of Victims' Rights the opportunity to undertake this task. It further concludes that pursuing appellate relief is not practical for victims. Part VI reiterates that the Alaska Legislature should pass legislation to clearly identify the circumstances under which crime victims may assert the rights which are justly theirs under the Alaska constitution.

## II. BACKGROUND: VICTIMS' RIGHTS IN ALASKA AND NATIONWIDE

In the 1970s and 1980s, attention began to turn to the role of the victim in criminal proceedings.<sup>10</sup> In the aftermath of such high-profile United States Supreme Court decisions as *Gideon v. Wainwright*<sup>11</sup> and *Miranda v. Arizona*,<sup>12</sup> which offered new protections for the rights of the accused, the public began to perceive a comparative lack of protection for the rights of crime victims.<sup>13</sup> In 1983, the Task Force on Victims of Crime, which President Ronald Reagan had appointed the previous year, issued a slate of sixty-eight recommendations that became the basis of many new federal and local programs and policies.<sup>14</sup>

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10. See John W. Stickels, *Victim Impact Evidence: The Victims' Right that Influences Criminal Trials*, 32 TEX. TECH L. REV., 231, 235–36 (2001).

11. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the Fourteenth Amendment's guarantee of equal protection requires the Sixth Amendment's guarantee of assistance of counsel in criminal trials to be extended to all indigent defendants in such trials).

12. *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that, in criminal cases, the prosecution may not use statements obtained by law enforcement officers after a person has been taken into custody or deprived of his freedom in any significant way without employing safeguards that protect that person's Fifth Amendment right against self-incrimination).

13. Stickels, *supra* note 10, at 236.

14. Office for Victims of Crime, *Crime Victims' Rights in America: A Historical Overview* (2005), <http://www.ojp.usdoj.gov/ovc/ncvrv/2005/pg4b.html>.

Many states also responded by passing laws specifically delineating and protecting the rights of victims. In 1981, Wisconsin was the only state to have a "Victim's Bill of Rights."<sup>15</sup> At present, thirty-two states include provisions for victims' rights in their state constitutions.<sup>16</sup>

In 1995, the National Victims Constitutional Amendment Network, a group representing all major victims' rights organizations, proposed specific language to be added to the Sixth Amendment and began an effort to amend the United States Constitution with provisions for victims' rights.<sup>17</sup> A separate victims' rights amendment to the United States Constitution was first formally proposed in 1996.<sup>18</sup> The proposed amendment was subject to detailed criticism,<sup>19</sup> and different versions of such an amendment continued to come before the Senate in the following years.<sup>20</sup> For instance, in 2003 the Senate Judiciary Subcommittee on the Constitution approved the Crime Victims' Rights Constitutional Amendment authored by Senators Jon Kyl and Dianne Feinstein.<sup>21</sup> However, the bill proposing the amendment was ultimately rewritten as a federal criminal statute and was signed into law in 2004.<sup>22</sup> The law established new procedural rights for crime victims similar to those established by state victims' rights constitutional amendments.<sup>23</sup> A victims' rights amendment to the United States Constitution has yet to be adopted.

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15. Office for Victims of Crime, *Paving the Path to Justice* (2005), <http://www.ojp.usdoj.gov/ovc/ncvrw/2005/pg4a.html>.

16. *Id.*

17. Robert P. Mosteller, *Victims' Rights and the Constitution: Moving from Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 ST. MARY'S L.J. 1053, 1055 (1998).

18. See Remarks Announcing Support for a Constitutional Amendment on Victims' Rights, 1 PUB. PAPERS 976 (June 25, 1996).

19. See, e.g., Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691, 1692 (1997).

20. See Laura Murphy and Terri Schroeder, American Civil Liberties Union: Letter to the Senate Urging Opposition to S.J. Res. 1, the "Victims' Rights Amendment" (Apr. 4, 2003), <http://www.aclu.org/crimjustice/victimrights/102031eg20030404.html>.

21. See Press Release, Senate Judiciary Subcommittee Approves Kyl/Feinstein Crime Victims' Rights Constitutional Amendment (June 12, 2003), <http://feinstein.senate.gov/03Releases/r-vicrights-subcommittee.htm>.

22. *Id.*

23. 18 U.S.C. § 3771(a) (Supp. V 2005); see also *id.* at 1–2. The statute secures for victims:

(1) The right to be reasonably protected from the accused.

### A. The Alaska Victims' Rights Statute and the Alaska Victims' Rights Amendment

Alaska first addressed the rights of crime victims in legislation passed in 1984 entitled "Rights of Victims, Protection of Victims and Witnesses."<sup>24</sup> In 1994, voters passed the Alaska Victims' Rights Amendment, which became section 24 of article I of the Alaska Constitution.<sup>25</sup> In pertinent part, it states that:

Crime victims, as defined by law, shall have the following rights as provided by law: [(1)] the right to be reasonably protected from the accused through the imposition of appropriate bail or conditions of release by the court; [(2)] the right to confer with the prosecution; [(3)] the right to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile justice process; [(4)] the right to timely disposition of the case following the arrest of the accused; [(5)] the right to obtain information about and be allowed to be present at all criminal or juvenile proceedings where the accused has the right to be present; [(6)] the right 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; [(7)] the right to restitution from the accused; and [(8)] the right to be informed, upon request, of the accused's escape or release from custody before or after conviction or juvenile adjudication.<sup>26</sup>

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- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
  - (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
  - (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
  - (5) The reasonable right to confer with the attorney for the Government in the case.
  - (6) The right to full and timely restitution as provided in law.
  - (7) The right to proceedings free from unreasonable delay.
  - (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

*Id.* at § 3771(a)(1)–(8).

24. ALASKA STAT. §§ 12.61.010–900 (2006).

25. Branchflower, *supra* note 4, at 261.

26. ALASKA CONST. art. I, § 24. In discussing the Alaska Victims' Rights Amendment, this Note will discuss the rights conferred by the Amendment in terms of procedural rights and substantive rights. The term "procedural rights" encompasses: (1) the imposition of appropriate bail or conditions of release; (2) the right to confer; (3) the right to timely disposition of the case; (4) the right to

## B. The Office of Victims' Rights

In 2001, the 22nd Alaska Legislature created a new agency called the Office of Victims' Rights, an agency of the Alaska Legislature offering legal services to crime victims.<sup>27</sup> Since its creation, the Office of Victims' Rights has provided its clients with information, education, investigation, in-court advocacy, and support.<sup>28</sup>

The Office of Victims' Rights was established as an inspector general's office under the Alaska Legislature rather than as an arm of the executive branch in order to prevent conflicts of interest if the Office of Victims' Rights was called upon to investigate criminal justice agencies.<sup>29</sup> Giving the Office of Victims' Rights responsibility for the entire spectrum of victims' rights was also intended to prevent conflicts of interest which might have arisen if responsibilities for vindicating certain rights were given to prosecutors, as they are in some states.<sup>30</sup>

The Office of Victims' Rights was given statutory authority to adopt its own regulations concerning procedures for advocating on behalf of crime victims, processing complaints, conducting investigations, reporting findings, and preventing improper disclosure of information obtained through its investigations.<sup>31</sup> The agency was also given broad authority to collect information and was empowered to seek enforcement of information requests in superior court if individuals or justice agencies failed to comply with its requests.<sup>32</sup> The agency was further given the power to subpoena individuals to obtain information that might aid in its investigations.<sup>33</sup>

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information and the right to be present at all hearings where the accused may be present; (5) the right to be heard upon request at sentencing and at parole hearings, etc.; and (6) the right to be informed of the accused's escape or release. "Substantive rights" refers to the Amendment's guarantee of "the right to be treated with dignity, fairness and respect."

27. Branchflower, *supra* note 4, at 263.

28. *Id.* at 264.

29. *Id.* at 263.

30. *Cf.* Gina Warren, *Prosecutorial Implications of a Victim's Right to Be Heard: Court Upholds Victim's Right to Be Heard at Important Criminal Justice Hearings*, 34 RUTGERS L.J. 1173, 1179–80 (2003) (describing how the Utah Supreme Court held in a recent case that a prosecutor was responsible for conveying to the court a victim's request to be heard at a hearing regarding a change in plea to a felony charge).

31. Branchflower, *supra* note 4, at 263.

32. *See id.* at 271–72.

33. ALASKA STAT. § 12.61.130 (2006).

The Alaska Statutes provide that “[t]he victims’ advocate has jurisdiction to advocate on behalf of crime victims of felony offenses or class A misdemeanors . . . .”<sup>34</sup> The Alaska Administrative Code also outlines procedures by which a victims’ advocate can appear before courts in criminal proceedings.<sup>35</sup> These statutory provisions led the director of the Office of Victims’ Rights to assert in 2004 that:

[B]ecause the legislature recognized that victims’ statutory or constitutional rights could be deprived during a criminal prosecution or juvenile proceeding, the legislature granted the victims’ advocate broad discretion to decide, given the specific circumstances, whether to participate as an independent attorney on the victims’ behalf. . . . The Alaska Legislature specifically authorized the [Office of Victims’ Rights] to represent crime victims before all state tribunals, at any stage of the proceedings in criminal cases, in order to ensure that their statutory and constitutional rights are protected and enforced.<sup>36</sup>

### III. *COOPER V. DISTRICT COURT*

#### A. The Significance of *Cooper*

Given the broad authority granted to the Office of Victims’ Rights by the Alaska Legislature and Alaska citizens (through a constitutional amendment), especially with regard to court proceedings, it was inevitable that the scope of the Office of Victims’ Rights’ power would come under the Alaska court system’s scrutiny. Although the Alaska Victims’ Rights Amendment was added to the Alaska Constitution in 1994, the Alaska courts had not construed the amendment prior to *Cooper*, making *Cooper* in some respects a ground-breaking case.

#### B. *Cooper*’s Factual Background

Daniel Cooper was initially prosecuted by the Municipality of Anchorage for assaulting his wife, Cynthia Cooper.<sup>37</sup> Daniel Cooper pleaded no contest to misdemeanor assault and received a suspended sentence conditioned on satisfactory completion of one year of probation.<sup>38</sup> Daniel Cooper was required by the conditions of his probation to attend counseling, but the court did not specifically require him to attend one of the “batterer’s

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34. ALASKA STAT. § 24.65.100(a) (2006).

35. ALASKA ADMIN. CODE tit. 23, § 20.210(a) (2004).

36. See Branchflower, *supra* note 4, at 279–80.

37. *Cooper v. Dist. Ct.*, 133 P.3d 692, 694 (Alaska Ct. App. 2006).

38. *Id.*



intervention” programs approved by the Alaska Department of Corrections.<sup>39</sup> The court instead allowed Daniel Cooper to continue with the counseling program he had been participating in prior to his sentencing, although the program was not approved by the Department of Corrections.<sup>40</sup>

Both Cynthia Cooper and the Office of Victims' Rights challenged Daniel Cooper's sentence, because the district court failed to require him to attend a Department of Corrections-approved batterer's intervention program.<sup>41</sup> Immediately after Daniel Cooper's sentencing, Cynthia Cooper filed an application for relief arguing that the counseling portion of Daniel Cooper's sentence was illegal.<sup>42</sup> She argued that, as the victim of the crime, she had standing under Alaska law to challenge the sentence imposed by the district court.<sup>43</sup> The Office of Victims' Rights argued that it was independently authorized to appeal Daniel Cooper's sentence, whether or not Cynthia Cooper was found to have standing to sue.<sup>44</sup>

### C. Victims are Not Parties to Criminal Proceedings

The court began its analysis of the issue of Cynthia Cooper's standing by noting that neither the Alaska Constitution nor the Alaska Victims' Rights statute expressly granted crime victims the right to intervene in a criminal case with respect to the charges brought, the sentence requested, or the appeal choices made.<sup>45</sup>

The court further noted that because the prosecutor in the district court case believed that the judge had the discretion to decide that Daniel Cooper's pre-sentencing therapy arrangement was sufficient to meet the conditions of the sentence, he declined to appeal the sentence on behalf of the Municipality of Anchorage.<sup>46</sup> Cynthia Cooper's appeal was thus contrary to the declared interest of the municipality, since if the sentence were revisited, Daniel Cooper might move to withdraw from the plea agreement that the municipality had worked to obtain.<sup>47</sup>

The court then considered and rejected Cynthia Cooper's arguments that the right to appeal the sentence was implicit in two

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39. *Id.*

40. *Id.* at 696–97.

41. *Id.* at 695.

42. *Id.* at 697.

43. *Id.* at 695.

44. *Id.*

45. *Id.* at 700.

46. *Id.*

47. *Id.*

rights granted to victims in the Alaska Victims' Rights Amendment—the right to a timely disposition of the case and the right to be heard at a sentencing hearing.<sup>48</sup>

#### D. A Victim's Right to a Timely Disposition of a Case Is Not Violated Where the Defendant Has Been Sentenced

In arguing that she had a right to appeal Daniel Cooper's sentence, Cynthia Cooper cited appellate court decisions which held that illegal sentences are not meaningfully imposed.<sup>49</sup> Cynthia Cooper argued that since Daniel Cooper's sentence was not meaningfully imposed he was never meaningfully sentenced, thus depriving Cynthia of her right to a timely disposition of the case.<sup>50</sup> The court flatly rejected this argument, stating that even if an element of the sentence had been illegal, the fact that Daniel Cooper had been sentenced to any extent meant that the case had proceeded in a timely manner within the meaning of the Victims' Rights Amendment.<sup>51</sup> Therefore, Cynthia Cooper's right to a timely disposition of the case had not been violated.<sup>52</sup>

#### E. Victims May Have Standing to Vindicate Procedural Rights

The court next considered Cynthia Cooper's argument that a victim's constitutional right to be heard at sentencing presupposes a right to appeal if the victim believes the court has imposed an illegal sentence.<sup>53</sup>

Rather than addressing this broader question, the court examined the record and determined that all of Cynthia Cooper's cognizable procedural rights under the Victims' Rights Amendment—her rights to receive notice of proceedings, to attend the proceedings, and to be heard at the proceedings—had been vindicated.<sup>54</sup> The court found she had received notice of the proceedings, had attended those proceedings, and had made her views known to the court, both individually and through her lawyer from the Office of Victims' Rights.<sup>55</sup> Since none of Cynthia Cooper's procedural rights had been violated, the court stated it would not decide the question of whether crime victims have

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48. *Id.* at 700–06.

49. *Id.* at 700.

50. *Id.*

51. *Id.* at 701–06.

52. *Id.*

53. *Id.*

54. *Id.* at 702.

55. *Id.*

standing to sue to enforce procedural rights under the Alaska Constitution or the Alaska Victims' Rights statute.<sup>56</sup>

Instead, the court decided the narrower question of whether a victim whose procedural rights have been vindicated has standing to appeal based solely on her disagreement with the offender's sentence.<sup>57</sup> The court reviewed a number of state court decisions from around the country and found that no other state court had recognized that a victim had standing to appeal in such circumstances.<sup>58</sup> The court concluded that "the law does not guarantee crime victims a right to attack the sentencing decision if the judge fails to adhere to the crime victim's views regarding the proper sentence."<sup>59</sup>

#### F. A Crime Victim's Constitutional Right to Fairness Does Not Encompass a Right to Appeal Substantive Decisions by a Trial Court

In addition to its procedural provisions, the Alaska Victims' Rights Amendment guarantees crime victims "the right to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile justice process."<sup>60</sup> The court rejected Cynthia Cooper's argument that the amendment's guarantee of fairness "must encompass the right to insist on enforcement of all of the provisions of the Alaska Statutes that speak to the interests of crime victims."<sup>61</sup> In doing so, the court cited recent legislative history, noting that the legislature had taken no action on a bill that would have granted crime victims broad rights to petition courts to vindicate their constitutional and statutory rights.<sup>62</sup> Instead, the legislature had passed more modest measures securing crime victims only one specific right—the right to appeal sentences that, due to mitigating factors, were reduced below the presumptive sentencing range for the crime in question.<sup>63</sup> The court concluded that the legislature had chosen not to grant victims either independent party status or "an extensive independent right to litigate."<sup>64</sup>

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56. *Id.*

57. *Id.* at 702–03.

58. *Id.* at 703.

59. *Id.* at 706.

60. ALASKA CONST. art. I, § 24.

61. *Cooper*, 133 P.3d at 708–09.

62. *Id.* at 709 (discussing H.B. 55, § 3, 24th Leg., 1st Sess. (Alaska 2005)).

63. *Id.* (discussing ALASKA STAT. § 12.55.120(f) (2006)).

64. *Id.* at 709.

G. The Office of Victims' Rights Does Not Have Independent Standing to File Suit on Behalf of Crime Victims

Despite the Office of Victims' Rights' mandate to "assist crime victims in obtaining the rights [that] crime victims are guaranteed,"<sup>65</sup> the *Cooper* court was unwilling to separate the Office of Victims' Rights' role in court proceedings from that of the crime victim, stating that, even if an attorney is employed by a public agency, "the attorney's authority to file a lawsuit is merely an extension of the client's authority to do so."<sup>66</sup> The court instead concluded that the legislature intended the Office of Victims' Rights' authority to "advocate"<sup>67</sup> and "assist"<sup>68</sup> to extend only to the Office's express authority to "publicly criticize a government agency if the Office believes that the agency has violated a crime victim's rights."<sup>69</sup> Therefore, the Office of Victim's Rights cannot advocate and assist a victim in exercising rights the victim does not have.<sup>70</sup>

H. The Office of Victims' Rights is Analogous to the Office of the Ombudsman

The *Cooper* court noted that the Office of Victims' Rights' statutory investigative and reportorial duties are analogous to those of another state agency, the Office of the Ombudsman, which is empowered to investigate and report on state government offices if it appears a citizen has been treated unfairly or unreasonably.<sup>71</sup> The court concluded that because the provisions creating the two agencies were similar, "the legislature intended the Office of Victims' Rights to act as a special ombudsman in the area of victims' rights."<sup>72</sup> The court further reasoned that since the legislature did not expressly give the Office of the Ombudsman independent ability to intervene in a criminal proceeding or to appeal its result, the legislature did not intend to give the Office of Victims' Rights that ability either.<sup>73</sup> The court cited the Model Ombudsman Act for State Governments as additional authority for

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65. ALASKA STAT. § 24.65.110(a) (2006).

66. *Cooper*, 133 P.3d at 712.

67. ALASKA STAT. § 24.65.100(a).

68. *Id.*

69. *Cooper*, 133 P.3d at 712.

70. *Id.*

71. *Id.* at 713–14.

72. *Id.*

73. *Id.*

its conclusion that the Office of Victims' Rights does not have independent ability to intervene or appeal.<sup>74</sup>

#### IV. DISCUSSION OF THE COURT'S HOLDING IN *COOPER*

##### A. The Role of the Office of Victims' Rights' Is Not Analogous to that of the State Ombudsman

There are clear justifications for the court's insistence on limiting the reach of the Office of Victims' Rights to the ombudsman-like powers established under statute. Primary among them, as the court indicated, is the victim's third-party status which leaves the victims' advocate, despite his mandate to advocate on the part of the victim, without a clear role in the courtroom. Under this view, implicit in *Cooper*, it is the court's job to enforce victims' rights laws governing trial procedure as much as it is to enforce any other state law. The Office of Victims' Rights would better serve the citizens of Alaska by monitoring the justice system for abuses of victims' rights and reporting violations of the system to the executive branch and to the public rather than sending victims' advocates to trial and forcing individual judges to decide what role they may or may not play. Implicit in this determination is the possibility that any unprecedented intervention in court proceedings by the victims' advocate or the crime victim could jeopardize a conviction or give a defendant additional grounds for appeal. Such an outcome would certainly be contrary to the victim's interests. It is highly unlikely that a victim would chance seeing an offender go free merely to enforce a procedural right.<sup>75</sup>

Even so, it does not follow from the structure of the amendment and statutes that the Alaska Legislature primarily intended the Office of Victims' Rights to play the role of an ombudsman. The most obvious criticism of the *Cooper* court's conclusion that the Office of Victims' Rights' authority is strictly analogous to that of the Office of the Ombudsman is that there is a clear distinction between the clientele of the Office of the Ombudsman, which works on behalf of a broad range of citizens who have been treated "unfairly or unreasonably,"<sup>76</sup> and that of the

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74. *Id.* at 713 (Under the terms of the Model Act, "the ombudsman has no power to coerce government agencies to take action, nor the power to sue government agencies in court . . .").

75. See Nikki Morton, *Cleaning Salt From the Victim's Wound: Mandamus as a Remedy for the Denial of a Victim's Right of Allocution*, 7 TEX. WESLEYAN L. REV. 89, 96 (Fall 2000).

76. *Cooper*, 133 P.3d at 713.

Office of Victims' Rights, which is limited to those who have been victims of serious crimes—felonies or first-degree misdemeanors.<sup>77</sup>

Given that the Office of the Ombudsman's scope of operation may not encompass criminal proceedings at all, and the Office of Victims' Rights' scope of operation explicitly includes criminal proceedings,<sup>78</sup> it does not follow from the fact that the Office of the Ombudsman does not have the authority to intervene in criminal proceedings that the Office of Victims' Rights also lacks such authority. The legislature may well have expected that the task of enforcing these citizens' rights might involve circumstances of greater urgency or seriousness and would be undertaken with an eye towards the wrongs the victims had already suffered. Being wronged by a criminal court is different from being wronged by another state agency, especially when, in order to come within the court's purview, one has already had to have been wronged by an offender.

#### B. Dangers of Denying the Office of Victims' Rights a Role in Court Proceedings

Fundamental grounds for a courtroom role for the Office of Victims' Rights may be found in the fact that several of the constitutional rights the Office is charged with protecting directly involve court proceedings, for instance: (1) the right to confer with the prosecution, (2) the right to be present at all criminal or juvenile proceedings where the accused has the right to be present, and (3) the right to be heard upon request in instances such as post-trial sentencing and parole hearings.<sup>79</sup> Such rights cannot be fully enforced retroactively. If a crime victim is denied the right to be heard at sentencing and the offender is sentenced, that denial of rights cannot be rectified at a later date. If a crime victim is excluded from a trial, that victim will not have another opportunity to be present at that trial. A later investigation and a report by the Office of Victims' Rights cannot protect that victim's rights—it can only serve to prod the courts to do a better job of protecting the rights of other victims in the future.

If the Office of Victims' Rights were allowed to intervene during court proceedings, it is possible that certain rights belonging to the victim which otherwise would have been violated could be fully protected. The impossibility of fully enforcing these rights retroactively is what led the director of the Office of Victims'

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77. ALASKA STAT. § 24.65.100(a) (2006).

78. ALASKA ADMIN. CODE tit. 23 § 20.210(a) (2002).

79. ALASKA CONST. art. I, § 24.

Rights to conclude, prior to *Cooper*, that “the legislature recognized that victims’ statutory or constitutional rights could be deprived during a criminal prosecution [and] granted the victims’ advocate . . . discretion . . . to participate as an independent attorney on the victims’ behalf.”<sup>80</sup>

## V. UNANSWERED QUESTIONS AFTER *COOPER*

### A. How May Crime Victims Enforce Rights?

The aftermath of *Cooper* has left the Office of Victims’ Rights striving to determine its proper role at trial. The Office of Victims’ Rights’ annual report for 2006 notes that:

[T]he fallout from the *Cooper* decision has been extremely problematical. Many judges and defense counsel around the state have used the decision to deprive the Office of Victims’ Rights from filing documents, from being able to be present by phone for hearings, from speaking at hearings, and in some cases, the office’s attorney’s presence is not even being acknowledged by the court.<sup>81</sup>

Yet Alaska law clearly states that “[t]he right to representation includes the bringing of an action on behalf of a crime victim when, in the judgment of the victims’ advocate, the action will protect and advance the crime victim’s statutory and constitutional victim rights.”<sup>82</sup> The Alaska Code was annotated after *Cooper*<sup>83</sup> to clarify that the Office of Victims’ Rights does not have “an independent right to file lawsuits that the victims themselves could not file.”<sup>84</sup> Although it recognizes this restriction, the Office of Victims’ Rights has asserted that the court’s holding in *Cooper* does not rule out all suits entirely.<sup>85</sup> The Office of Victims’ Rights’ position remains that when crime victims’ legal rights are violated, they are entitled to “limited standing,” which is distinct from party status, but which allows the crime victims to

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80. Branchflower, *supra* note 4, at 279.

81. MARY ANNE HENRY, THE OFFICE OF VICTIMS’ RIGHTS ANNUAL REPORT TO THE ALASKA LEGISLATURE 10 (2006), [http://www.officeofvictimsrights.legis.state.ak.us/ovrdocuments/2006\\_ANNUAL\\_REPORT.pdf](http://www.officeofvictimsrights.legis.state.ak.us/ovrdocuments/2006_ANNUAL_REPORT.pdf).

82. ALASKA ADMIN. CODE tit. 23 § 20.210(a) (2002).

83. Act of June 16, 2006, ch. 74, § 1, 2006 Alaska Adv. Legis. Serv. P\*1 (LexisNexis).

84. *Cooper v. Dist. Ct.*, 133 P.3d 692, 712 (Alaska Ct. App. 2006).

85. Henry, *supra* note 81, at 22 (“[Crime victims and the Office of Victims’ Rights] simply wish to exercise their right to *limited standing* to address violations of their constitutional and statutory rights. The *Cooper* decision does NOT prohibit this.”).

present their rights in court even in the absence of express provisions allowing them to do so.<sup>86</sup>

Given the limitations placed upon the Office of Victims' Rights by the *Cooper* holding, questions remain for both crime victims and the Office of Victims' Rights, whose mission is to assist those victims. What lawsuits *can* victims file? Are there other avenues crime victims may pursue in court in order to enforce procedural rights?

Part B will examine three possibilities which have been employed to differing extents outside of Alaska courts. Part C will then briefly address the significance of the substantive rights of dignity, respect, and fairness for crime victims provided by the Alaska Victims' Rights Amendment.

## B. Possible Ways for Alaska Crime Victims to Enforce Their Procedural Rights

Three possibilities which have been employed to differing extents outside of Alaska include: (1) opportunities to address the court to alert it to a violation of a procedural right, (2) petitions for appellate relief after violations of victims' procedural rights, and (3) petitions for writs of mandamus.

*1. Can Victims Address the Court to Alert it to Procedural Violations?* One of the *amici curiae* in *Cooper*, the Victim Advocacy Research Group, cited a case from the Supreme Judicial Court of Massachusetts, *Hagen v. Commonwealth*,<sup>87</sup> as support for its position that the court in that case had recognized a crime victim's standing.<sup>88</sup> The *Cooper* court strongly rejected this argument stating that the *Hagen* court did not grant crime victims the right to "independently challenge the rulings of the trial court," but instead merely "[suggested] that crime victims have the right to personally address the trial judge before the judge makes decisions that involve any of the rights guaranteed under the Massachusetts Victims' Rights Act."<sup>89</sup>

The right granted to victims to address the judge in such circumstances in Massachusetts under *Hagen* may be similar in practice to the "limited standing" for which the Office of Victims' Rights has argued. In *Hagen*, the crime victim was allowed by the trial judge to alert the court through a representative to the matter

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86. *Id.*

87. 772 N.E.2d 32 (Mass. 2002).

88. *Cooper*, 133 P.3d at 704.

89. *Id.* at 705.



of a long delay in the disposition of the offender's case.<sup>90</sup> According to the *Hagen* court, when the remedy for a violation of a victim's right (here, the right to a prompt disposition) is one only a court can provide, the victim should have the right to address and alert the court of the violation of the victim's rights.<sup>91</sup>

This decision presents a possible solution to the problem of enforcing victims' rights that are implicitly tied to court proceedings. The victim is still not a party and cannot compel the court to act on the victim's behalf. Discretion still remains with the court. The victim, however, would be given leave to alert the court to a violation of rights, giving the court the opportunity to consider a course of action that would address the violation during the court proceedings, rather than leaving it to an agency such as the Office of Victims' Rights to issue a report after the fact. The Office of Victims' Rights' use of the term "limited standing"<sup>92</sup> in asserting this right may decrease the likelihood of recognition of this right. As the term suggests, this right would be a species of standing rather than an informational gesture by the crime victim for the court's benefit, an occurrence in the proceedings somewhat analogous to the presentation of the victim impact statement at sentencing.

The fact that the *Cooper* court did not reject the central holding of *Hagen* suggests that it is possible that the Office of Victims' Rights could be empowered to act similarly to alert courts on behalf of its clients without running afoul of the settled principle that victims are never parties to criminal proceedings. The Alaska Legislature should remove confusion surrounding this issue by establishing a clearly limited right for victims to inform the court of violations of procedural rights, leaving the court with full discretion over how to redress the violation in question.

2. *Can Victims Seek Appellate Relief if Procedural Rights are Violated?* The *Cooper* court stated that "the executive branch of government (as the representative of the community) has the sole responsibility and authority to initiate and litigate criminal cases—and, if necessary, to challenge a trial court's decisions by seeking appellate review."<sup>93</sup> In its review of state court decisions from around the country, however, the *Cooper* court noted that among the states with victims' rights amendments, "many courts are prepared to recognize a crime victim's standing to sue for

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90. *Id.*

91. *Hagen*, 772 N.E.2d at 38.

92. Henry, *supra* note 81, at 22.

93. *Cooper*, 133 P.3d at 710.

enforcement of the procedural rights granted by the victims' rights act—the rights to notice, to attend court proceedings, and to offer their views on certain decisions (especially sentencing and parole release).”<sup>94</sup>

In fact, other states have been even more generous in recognizing a crime victim's right to sue to enforce an entire range of rights. In 2002, for example, the Utah Supreme Court concluded in *State v. Casey* that “(1) . . . crime victims possess the right to appeal rulings on motions related to their rights as a victim and (2) that an appellate court must review appeals of such a nature.”<sup>95</sup> Utah's Rights of Crime Victims Act provides that a crime victim can sue an individual acting under color of state law as well as the state entity which employs that individual if the individual willfully or wantonly fails to act to protect the victim's rights.<sup>96</sup> However, other state courts have not been as generous in granting crime victims the right to appeal. In *Cianos v. State*, the Court of Appeals of Maryland affirmed a judgment of a lower court holding that crime victims could not appeal the trial court's decision not to allow them to speak at an offender's sentencing because they were not parties to the proceeding.<sup>97</sup>

The *Cooper* court declined to decide the question of possible appellate relief, stating that “we leave for another day the question of whether a crime victim in Alaska has the right to seek appellate relief when a lower court fails to honor a crime victim's procedural rights.”<sup>98</sup> The Alaska Court of Appeals also declined to decide the issue in a recent order, *Kalenka v. Volland*,<sup>99</sup> in which it refused to grant an application for relief filed with the court of appeals by the father of a murder victim alleging the denial of his constitutional right to a prompt disposition of the charges. Despite its denial of relief, the court declined to decide the issue of whether crime victims can file motions at the trial court level.<sup>100</sup>

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94. *Id.* at 705.

95. 44 P.3d 756, 762 (Utah 2002) (holding that the victim had both a statutory right under the Rights of Crime Victims Act and a state constitutional right under the Utah Constitution's victims' rights amendment to be heard at a change of plea hearing for a felony charge, which was held to be an “important criminal justice hearing” within the language of both the statute and the amendment).

96. Warren, *supra* note 30, at 1177–78.

97. 659 A.2d 291, 293–94 (Md. Ct. App. 1995).

98. *Cooper*, 133 P.3d at 711.

99. Court of Appeals Order Denying Kalenka's Original Application for Relief at 4, No. A-09575 (Apr. 25, 2006).

100. Henry, *supra* note 81, at 25.

The *Cooper* court clearly rejected the suggestion that victims could appeal if the court declined to follow a victim's or a victim advocate's independent conclusions about the facts of a case or suggestions about how to dispose of a case.<sup>101</sup> A clear violation of a victim's procedural rights during court proceedings, however, might present grounds for appeal. This possibility, again, raises practical considerations about how violations of procedural rights could actually be redressed were the victim to win on appeal. Such difficulties are clear in the facts surrounding the *Kalenka* order; even if the court of appeals had found that the trial court had violated the victim's right to a prompt disposition of the charges by the time the court had heard the appeal, the date of the murder trial, which had been postponed for four months, was only thirty-five days away.<sup>102</sup>

*Cianos* similarly provides useful perspective on the shortcomings of appellate relief for crime victims. The crime victims' application for leave to appeal makes clear the extent of the remedy they had hoped for: the vacating of the offender's sentence and remand to the trial court for resentencing.<sup>103</sup> The grounds for the *Cianos* court's decision are also instructive. Rather than deciding the issue of whether the crime victims had effectively been denied their right to address the court, the court of appeals found that a decision on the merits could have no practical bearing on the case. Even if the victims had appealed a decision of the court prior to sentencing, they could not have stayed the proceeding.<sup>104</sup>

Given these examples of the inability of the court system to grant meaningful relief to crime victims seeking to appeal violations of procedural rights, a right to appeal procedural violations will likely not be useful to Alaska crime victims.

3. *May Victims Petition Courts of Appeal for Writs of Mandamus?* Early in its opinion, in considering the issue of a victim's standing to challenge a plea bargain agreement, the *Cooper* court cited a passage from *Reed v. Becka*,<sup>105</sup> a South Carolina Supreme Court case which held that in South Carolina constitutional rights may be enforced via a writ of mandamus.<sup>106</sup> The *Cooper* court noted that:

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101. See *Cooper*, 133 P.3d at 705–06.

102. See Henry, *supra* note 81, at 24–25.

103. *Cianos v. State*, 659 A.2d 291, 292 (Md. Ct. App. 1995).

104. *Id.* at 293–94.

105. 511 S.E.2d 396 (S.C. 1999).

106. *Cooper*, 133 P.3d at 704.

[S]ome courts have recognized a crime victim's right to pursue litigation seeking relief in the nature of mandamus (*i.e.*, an appellate court order directing a lower court to follow the law) when a lower court fails to honor the procedural rights given to crime victims by state constitution or by state statute. This issue is not raised in the present case.<sup>107</sup>

Could writs of mandamus be used in Alaska courts to enforce victims' procedural rights? Alaska's rules of civil procedure no longer technically recognize the writ of mandamus.<sup>108</sup> Instead, Alaska Rule of Civil Procedure 91 provides that "[r]elief heretofore available by mandamus as prescribed by statutes may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."<sup>109</sup> Alaska courts thus recognize actions to compel civil courts to enforce the law which resemble mandamus; although mandamus is infrequently employed in a criminal law setting,<sup>110</sup> there is no indication that courts would not similarly recognize such actions in criminal proceedings.

Precedent indicates that the Alaska Legislature may statutorily approve additional petitions for review for crime victims that in other states would be characterized as petitions for writs of mandamus. An Alaska Court of Appeals decision referred to a "petition for writ of mandate" (equivalent to a writ of mandamus) filed in the California Court of Appeal as "the equivalent of our petition for review."<sup>111</sup> The one instance in which the Alaska Legislature has specifically recognized a crime victim's ability to pursue an action in court—when an offender has been sentenced below the sentencing range for the crime—refers to the prospective action as a "petition for review."<sup>112</sup> Accordingly, the situations in which crime victims in other states may pursue mandamus as a remedy are relevant to this discussion.

Crime victims have petitioned for writs of mandamus to compel courts to enforce procedural rights in other forums with varying degrees of success. In *United States v. McVeigh*,<sup>113</sup> family members of the victims of the Oklahoma City bombing unsuccessfully petitioned for a writ of mandamus in federal court in an attempt to compel the district court judge to allow them to be

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107. *Id.* at 711.

108. ALASKA R. CIV. PROC. 91 (2006).

109. *Id.*

110. *See* 63C AM. JUR. 2D *Prosecuting Attorneys* § 21 (2006).

111. *DeNardo v. Anchorage*, 938 P.2d 1099–1100 (Alaska Ct. App. 1997).

112. ALASKA STAT. § 12.55.120 (2006) ("The victim of the crime for which a defendant has been convicted and sentenced may file a petition for review in an appellate court of a sentence that is below the sentencing range for the crime.").

113. 106 F.3d 325 (10th Cir. 1997).

present at all public court hearings regarding the case.<sup>114</sup> Recently, however, in *Kenna v. United States District Court*,<sup>115</sup> the Ninth Circuit Court of Appeals granted a writ of mandamus to a victim who had been denied the right to speak in open court at an offender's sentencing; the court found that he had been denied his right to be "reasonably heard" under the federal Crime Victims' Rights Act and remanded the case back to district court.<sup>116</sup>

Mandamus is a flexible equitable remedy. Given those qualities, the fact that the *Cooper* court declined to rule out mandamus as a remedy means it may be a future avenue for obtaining equitable relief for violations of procedural rights in court proceedings. The holding in *Kenna* supports this analysis. However, mandamus is regarded as an extraordinary remedy, one of "last resort."<sup>117</sup> Crime victims are not entirely deprived of grounds for a petition for review, which undercuts the need for an extraordinary remedy. The Alaska Legislature has so far recognized one basis for a petition for review—where a sentence falls below a mandatory sentencing range. It is thus possible that after *Cooper*, Alaska courts will recognize only that basis for review under Alaska Statute section 24.65.210. The issue may be clarified soon. In 2005, a bill was introduced in the Alaska Legislature which would create a statute giving crime victims the right to file petitions for review and to appeal the court's decisions regarding those petitions.<sup>118</sup> At the time of the *Cooper* decision, the legislature had yet to act on the bill.<sup>119</sup>

### C. How Will the Right to Dignity, Fairness, and Respect be Protected Under the Alaska Victims' Rights Amendment?

In addition to procedural rights, the Alaska Victims' Rights Amendment gives crime victims the substantive right to be treated with "dignity, respect and fairness."<sup>120</sup> Alaska is not alone in doing so; fifteen other states' victims' rights amendments also use these terms, and eight of those states statutorily define one or more of these terms.<sup>121</sup>

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114. Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 517 (1999).

115. 435 F.3d 1011 (9th Cir. 2006).

116. *Id.* at 1018. The court also ruled that "reasonably heard" means the victim has a right to speak in open court. *Id.* at 1015.

117. 52 AM. JUR. 2D *Mandamus* § 4 (2006).

118. H.B. 55, § 3, 24th Leg., 1st Sess. (Alaska 2005).

119. *Cooper v. Dist. Ct.*, 133 P.3d 692, 709 (Alaska Ct. App. 2006).

120. ALASKA CONST. art. I, § 24.

121. Branchflower, *supra* note 4, at 262.

Some courts in other states have employed similar guarantees of these substantive rights to provide context for interpreting other rights of victims. Recently, in *State v. Korsen*, the Idaho Supreme Court found that the Idaho victims' rights amendment's guarantees of dignity, respect, and fairness, combined with specific statutory provisions for restitution for crime victims, demonstrated a strong public policy against allowing abatement ab initio of charges against a defendant who had been convicted of kidnapping but died before his appeal was heard.<sup>122</sup> In *Salt Lake City v. Johnson*,<sup>123</sup> the Utah Court of Appeals also invoked Utah's constitutional "Declaration of the Rights of Victims" and its guarantee of "fairness, respect, and dignity" in affirming the decision of a trial court to dismiss a domestic violence charge at the request of the crime victim despite the opposition of the municipality of Salt Lake City.<sup>124</sup> In *Cianos*, even though the Maryland Court of Appeals concluded that crime victims did not have standing to appeal after a possible violation of the right to be heard at sentencing, the court cited Maryland's crime victims' bill of rights' guarantee of "dignity, respect and sensitivity" as support for the proposition that "trial judges *must* give appropriate consideration to the impact of crime upon the victims."<sup>125</sup> The *Cianos* court thus made the equitable determination that because the crime victims had arguably been denied a statutory right, they would be relieved of the responsibility of the court costs of their appeal.<sup>126</sup>

Not all state courts have concluded that these guarantees apply in the same circumstances. In a case with facts similar to *Korsen*, the Illinois Supreme Court held that the Illinois Crime Victims' Rights Amendment's guarantee of "fairness and respect for [victims'] dignity and privacy throughout the criminal justice process"<sup>127</sup> was not relevant, and that the amendment had "neither application nor reference to the abatement of criminal prosecutions."<sup>128</sup>

The *Cooper* court rejected Cynthia Cooper's assertion that the Alaska Victims' Rights Amendment's guarantee of fairness granted crime victims the right to override the discretion of the trial court and insist upon enforcement of all other applicable victims' rights provisions. Aside from *Cooper*, there have been no

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122. *State v. Korsen*, 111 P.3d 130, 134–35 (Idaho 2005).

123. 959 P.2d 1022 (Utah Ct. App. 1998).

124. *Id.* at 1023.

125. *Cianos v. State*, 659 A.2d 291, 295 (Md. Ct. App. 1995).

126. *Id.*

127. ILL. CONST. art. I, § 8.1(a)(1).

128. *People v. Robinson*, 719 N.E.2d 662, 663 (Ill. 1999).

other cases construing the meaning of these terms in Alaska.<sup>129</sup> Whether Alaska courts will choose to view the guarantee of “dignity, respect, and fairness” as merely a statement of ideals or as an enforceable right with practical applications has not yet been decided. As in *Korsen* and *Cianos*, these words should serve as a further reminder to judges of Alaska’s strong public policy in favor of victims’ rights.

## VI. CONCLUSION

*Cooper* represents an important definition of the landscape of victims’ rights in Alaska. The Office of Victims’ Rights will continue to play a unique role as a state agency, but the Alaska Court of Appeals has made clear that the Office of Victims’ Rights’ standing to intervene in criminal proceedings is no different than that of any other third party. Further, the court clearly and concretely stated its conclusion that the Office of Victims’ Rights is intended primarily to play the role of an ombudsman. Although this conclusion is not authoritative, it has already had consequences for the day-to-day operations of the Office of Victims’ Rights, as noted in Part V.

The doors of the court are not completely closed to crime victims in Alaska. As discussed above, opportunities may remain for victims to address trial courts to alert those courts to procedural violations, to seek appellate relief for violations of procedural rights, and to file petitions for writs of mandamus.

The first avenue, leave to alert courts to violations, is the most promising, as it would allow victims to assert their rights at trial without interfering with the discretion of the court. Accordingly, the Alaska Legislature should remove confusion surrounding this issue by establishing a clearly limited right for victims to inform the court of violations of procedural rights.

Appellate relief for procedural violations raises substantial procedural difficulties, chief among them the high likelihood that many issues would be mooted before appeals could be pursued, making appeal a comparatively unattractive means of redress.

The possibility of Alaska courts granting petitions for writs of mandamus cannot be ruled out as a last resort. A possible new statute outlining grounds by which crime victims could petition for review is before the legislature, but the legislature has yet to act on it.

The Alaska Legislature went to great lengths to establish the statutory and constitutional rights of crime victims under state law.

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129. *Id.* at 709.

By establishing the Office of Victims' Rights, it became a leader in victims' rights education and evidenced a strong commitment to ensuring that victims' rights would be protected by all the agencies of state government. But the issue of how victims' rights will be enforced in court remains open. The legislature should do crime victims the favor of clarifying the means by which these important rights will be enforced.