

**NEW JERSEY COURTS SILENCE CRIME VICTIMS DURING PLEA BARGAINING: A COMMENT ON
*STATE V. MEANS***

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INTRODUCTION

Around midnight on August 12, 2001, twenty-three year old, Raheem Means, saw a thirteen-year old girl wandering in a neighborhood park.¹ After realizing that he knew the young girl, Means engaged her in conversation and learned that she had just run away from her grandmother's home.² Means tried to convince the young girl to return home, but she refused out of fear that the police were at her house.³ Instead of escorting her home or notifying the police of her whereabouts, Means suggested that they find a motel together.⁴ She agreed and accompanied

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¹ *State v. Means*, 926 A.2d 328, 329 (N.J. 2007).

² *Id.* In fact, on the evening prior to this encounter the defendant himself escaped and ran away from a halfway house in Newark, New Jersey. Brief and Appendix on Behalf of the State of New Jersey at 8, *State v. Means*, 191 N.J. 610 (2007) (No. 59,571) [hereinafter State's Brief] (on file with author). Also, at the time of this incident, the defendant admits that he and I.P. were in a dating relationship. Supplemental Brief and Appendix on Behalf of Defendant-Petitioner, at 6, *State v. Means*, 191 N.J. 610 (2007) (No. 59,571) [hereinafter Defendant's Brief] (on file with author).

³ *Means*, 926 A.2d at 329. According to the defendant's brief, I.P. actually informed him that the police were already at her home. Defendant's Brief, *supra* note 2, at 6.

⁴ *Means*, 926 A.2d at 329.

Means to a motel in Irvington, New Jersey.⁵ While at the hotel, the pair engaged in consensual sex.⁶ The girl returned home the following morning and explained the evening's events to her grandmother.⁷ Consequently, her family brought her to a local hospital for examination and contacted the police.⁸

The police arrested the defendant on December 31, 2001 following an incident at a New Year's Eve party.⁹ On April 30, 2002, a grand jury indicted the defendant for kidnapping, sexual assault, and endangering the welfare of a child after hearing evidence concerning the August 12, 2001 incident.¹⁰ At this point, the thirteen-year old girl's father indicated to authorities that he wanted to be present at the defendant's sentencing.¹¹

On August 16, 2002, Means pled guilty to child endangerment, first degree robbery, possession of a weapon without a license, and possession of a weapon for an unlawful purpose.¹² In exchange for the defendant's guilty plea, the prosecutor recommended that he serve a thirteen year sentence with eighty-five percent parole ineligibility.¹³ At the sentencing hearing on

⁵ *Id.*

⁶ *Id.*

⁷ *See id.*

⁸ *See id.*

⁹ *Id.* at 330. At this party the defendant used an automatic weapon to force eight guests to line up against a wall while his co-conspirators took their belongings. State's Brief, *supra* note 2, at 8.

¹⁰ *Means*, 926 A.2d at 330.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

November 16, 2002, the Assistant Prosecutor requested the court withdraw the plea offer because it had been made without consulting the victims.¹⁴ The Assistant Prosecutor revealed, for the first time, that the father of the thirteen-year old sexual assault victim had not been notified during the plea negotiations.¹⁵ The court granted the request, vacated the pleas, and reinstated the defendant's not guilty plea.¹⁶

Almost six months later, on May 2, 2003,¹⁷ the defendant pled guilty to charges similar to those in his first plea in exchange for the State's recommendation of a now fifteen-year prison term and eighty-five percent parole ineligibility.¹⁸ As a result, on February 5, 2004, the trial court sentenced the defendant according to this recommendation.¹⁹ After granting defendant's motion to reconstruct the record, on April 5, 2006, the Appellate Division affirmed the defendant's sentence.²⁰ The defendant petitioned the New Jersey Supreme Court for certification of the Appellate Division's Order, and on July 19, 2006 his petition was granted.²¹

In *State v. Means*, the New Jersey Supreme Court decided whether a trial court may set aside a plea agreement based solely on the prosecutor's failure to notify and consult the crime

¹⁴ *Id.*

¹⁵ State's Brief, *supra* note 2, at 3.

¹⁶ *Means*, 926 A.2d at 331.

¹⁷ Defendant's Brief, *supra* note 2, at 4.

¹⁸ *Means*, 926 A.2d at 331.

¹⁹ *Id.*

²⁰ *See* State's Brief, *supra* note 2, at 7.

²¹ *See id.*

victim before entering into such an agreement.²² In its majority opinion, the court determined that it was “undisputed that at least the victims’ statutory rights and the Attorney General’s guidelines were violated,” when the father was not notified.²³ Nonetheless, the court found this violation, by itself, insufficient to vacate the plea agreement.²⁴ The dissent took the position that the trial court did not abuse its discretion in reasoning that the interests of justice permit vacating a plea when the agreement violates the constitutional rights afforded to crime victims.²⁵ Ultimately, the court reversed the judgment of the Appellate Division and reinstated the defendant’s original plea agreement.²⁶

This Comment takes the position that the court in *State v. Means* failed to properly weigh both the victim’s and defendant’s constitutional considerations in determining whether to vacate the plea and therefore rendered the wrong decision. The refusal to afford the victim any participation in the plea bargaining process violated the victim’s right to fair, compassionate, and respectful treatment by the criminal justice system.²⁷ The rights afforded to crime victims, including the right to participate in plea negotiations, can be upheld without violating the defendant’s due process concerns.²⁸ The practical effect of victim rights legislation is in danger of being rendered meaningless if future judicial opinions hold consistent with this decision.²⁹

²² *Id.* at 329.

²³ *Id.* at 334.

²⁴ *Id.* at 335.

²⁵ *Id.* at 340 (Rivera-Soto, J., dissenting).

²⁶ *Id.* at 335 (majority opinion).

²⁷ *See infra* text accompanying note 46.

²⁸ *See infra* Part III.B.

Part I to this Comment examines the Victim’s Rights Amendment to the New Jersey Constitution as well as the Crime Victim’s Bill of Rights.³⁰ Part II presents the court’s opinion and the reasoning of both the majority and the dissent.³¹ Part III takes the position that the dissenting opinion better promotes the interests of justice and addresses several areas of disagreement with the majority opinion’s reasoning.³²

I. BACKGROUND

In 1985, the New Jersey Legislature enacted a series of statutes referred to as the Crime Victim’s Bill of Rights (“Bill of Rights”).³³ The Legislature enacted the Bill of Rights to help fulfill its responsibility to protect the role of crime victims in the criminal justice system.³⁴ The statutes conferred on crime victims the right: (1) to receive treatment by the justice system with dignity and compassion;³⁵ (2) to be informed throughout the criminal process;³⁶ (3) to have their

²⁹ *See infra* Part III.C.

³⁰ *See infra* Part I.

³¹ *See infra* Part II.A-B.

³² *See infra* Part III.A-C.

³³ N.J. STAT. ANN. § 52:4B-34 (West 2008). The statutory rights enumerated in the New Jersey Crime Victim’s Bill of Rights closely resemble those rights in its federal counterpart. *See* Crime Victims’ Rights Act, 18 U.S.C. § 3771(a)(1)-(8) (2006).

³⁴ N.J. STAT. ANN. § 52:4B-35 (West 2008). “These rights are among the most fundamental and important in assuring public confidence in the criminal justice system.” *Id.* § 52:4B-35.

³⁵ *Id.* § 52:4B-36(a).

³⁶ *Id.* § 52:4B-36(b).

participation in the criminal process minimally inconvenienced;³⁷ (4) to be notified if their presence is not needed in court;³⁸ (5) to be advised of case progress and final disposition;³⁹ (6) to submit a written criminal impact statement to the prosecutor before consideration of final charges;⁴⁰ and (7) to make an in-person statement directly to the sentencing court.⁴¹

The victims' rights movement did not end with the Bill of Rights but continued to grow and gain momentum.⁴² On November 5, 1991 the voters of New Jersey passed a constitutional amendment by an overwhelming majority,⁴³ in what was only the second amendment added since 1947 to the New Jersey Constitution.⁴⁴ Article 1, ¶ 22 to the New Jersey Constitution essentially created three distinctive rights for crime victims.⁴⁵ The amendment states:

³⁷ *Id.* § 52:4B-36(d).

³⁸ *Id.* § 52:4B-36(g).

³⁹ *Id.* § 52:4B-36(k).

⁴⁰ *Id.* § 52:4B-36(m).

⁴¹ *Id.* § 52:4B-36(n).

⁴² *See State v. Muhammad*, 678 A.2d 164, 169 (N.J. 1996).

⁴³ *See id.* at 174 (“Over 1,200,000 citizens voted for the Victim's Rights Amendment while only 223,248 people voted against it.”).

⁴⁴ Richard E. Wegryn, *New Jersey Constitutional Amendment for Crime Victim's Rights: Symbolic Victory?* 25 RUTGERS L.J. 183, 183 (1993). The ineffectiveness of the Bill of Rights as the sole authority for promoting crime victims' rights led to this need for constitutional recognition. *See also* Editorial, *Victim's v. Defendant's Rights*, N.J.L.J., Aug. 6, 2007, at 22 (explaining how victims' rights supporters sought state constitutional amendments after recognizing the practical ineffectiveness of victims' rights statutes).

A victim of a crime shall be treated with *fairness, compassion and respect* by the criminal justice system . . . Shall not be denied the right to be present at public judicial proceedings . . . [and] Shall be entitled to those rights and remedies as may be provided by the Legislature.⁴⁶

New Jersey courts have recognized the validity of these rights by enforcing them in various criminal cases.⁴⁷ Additionally, case law reflects the liberal application of these Constitutional requirements to further reinforce the purpose of victims' rights as expressed in the

⁴⁵ Wegryn, *supra* note 44, at 184.

⁴⁶ N.J. CONST. Art. 1, ¶ 22. (emphasis added). New Jersey is not alone in providing constitutional protection for crime victims. As of 2005, there were thirty states that adopted victims' rights amendments to their state constitutions "with overwhelming popular support." See Paul G. Cassel, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments In Light of the Crime Victims' Rights Act*, 2005 B.Y.U. L. REV. 835, 842 n.23 (2005).

⁴⁷ See *Muhammad*, 678 A.2d at 174 (upholding the use of victim impact statements at sentencing due in part to the authority under the Amendment that provides for fair treatment to crime victims); see also *State v. Gilchrist*, 885 A.2d 29, 35 (N.J. App. Div. 2005) (holding that the defendant was not entitled to a court-ordered photograph of the sexual assault victim because her rights to be treated with fairness, compassion, and respect outweighed his request); *State in Interest of K.P.*, 709 A.2d 315, 324-25 (N.J. Super. Ct. Ch. Div. 1997) (finding the court's denial of a sexual assault victim's request to close the court proceedings from the media as violating her rights to be treated with fairness, compassion, and respect).

Crime Victim’s Bill of Rights.⁴⁸ For example, in *State v. Timmendequas*, the New Jersey Supreme Court upheld the denial of a change in venue because of the substantial burdens it would have placed on the victim.⁴⁹ The court reasoned that the Amendment did not merely create the right for victims to be present at court proceedings.⁵⁰ Instead, the meaning of “fairness” and “compassion” in the Amendment required the court to minimize the victim’s inconveniences attributed to the expense and time involved in traveling to a distant venue.⁵¹ Therefore, under the standards of fairness, compassion, and respect, the Amendment provides constitutional authority for the application of future victim rights statutes and legislative enactments.⁵²

The power to create protections for the involvement of crime victims in the criminal justice system is not solely contained within the Legislature’s passage of the Bill of Rights, or

⁴⁸ *Means*, 926 A.2d at 332; *see State v. Timmendequas* 737 A.2d 55, 76 (N.J. 1999) (viewing the rights created by the Amendment as only those which are expressly stating in its text is too narrow of a view), *cert. denied*, 534 U.S. 858.

⁴⁹ 737 A.2d 55, 76 (N.J. 1999).

⁵⁰ *Id.*

⁵¹ *Id.* at 75-76. This essentially incorporates the Bill of Right’s requirement for the victim’s participation to be minimal inconvenienced into the definitions of fairness, compassion, and respect. *See* N.J. STAT. ANN. § 52:4B-36(d) (West 2008).

⁵² “The amendment, essentially, augmented victims’ statutory rights by raising them to constitutional significance.” *State in Interest of K.P.*, 709 A.2d at 325.

the Victim's Rights Amendment.⁵³ The legislature's enactment of The Standards to Ensure Rights of Crime Victims granted the State Attorney General the authority to establish guidelines for the courts to follow when confronted with victims' rights issues.⁵⁴ In 1993, Attorney General Robert J. Del Tufo issued protocols for all county, local, and statewide agencies to follow in order to alleviate the problems victims face when involved in the criminal justice system.⁵⁵ These guidelines were directed at law enforcement officials and particularly state prosecutors regarding their treatment of crime victims.⁵⁶ Therefore, just as the Victim's Rights Amendment reinforced the prior legislation contained in the Bill of Rights,⁵⁷ the Attorney General Standards reinforced the major principles behind the Amendment by mandating specific practices.⁵⁸

⁵³ See N.J. STAT. ANN. § 52:4B-44a (explaining that the Attorney General has the responsibility to promulgate standards); see also *Attorney General Standards To Ensure The Rights of Crime Victims*, pt. 2, § II.A, at 22 (Apr. 28, 1993), available at <http://www.state.nj.us/lps/dcj/agguide/3victims.pdf> [hereinafter *Attorney General Standards*].

⁵⁴ *Id.* Specifically stating, “[t]he Attorney General shall . . . promulgate standards for law enforcement agencies to ensure that the rights of crime victims are enforced.” *Id.*

⁵⁵ See *Attorney General Standards*, *supra* note 53, at 2-3.

⁵⁶ See *id.* at 11, 18.

⁵⁷ See *supra* text accompanying note 48.

⁵⁸ Compare *Attorney General Standards*, *supra* note 53, at 18-19 (stating that crime victims shall be treated with fairness, compassion and respect with minimal inconvenience by the criminal justice system) with N.J. CONST. Art. 1 ¶22 (illustrating that crime victims “shall be treated with fairness, compassion and respect”).

These Attorney General Standards specifically forced prosecutors to incorporate the violent crime victim's considerations into their decision making process.⁵⁹ As such, prosecutors should take into account these views throughout the entire adjudicatory process, including all the phases of plea negotiations until the final disposition of the criminal trial.⁶⁰ These guidelines advise prosecutors to consult the victim before plea negotiations, to explain the negotiating process and the reasoning involved in any offers made to the defendant, and to incorporate the victim's concerns before reaching any final decision.⁶¹

II. THE COURT'S OPINION IN *STATE V. MEANS*⁶²

In New Jersey, the state constitutional mandate that the justice system treat crime victims with fairness, compassion, and respect is achieved with the requirement that victims have the opportunity to participate during their offender's plea negotiations.⁶³ In this case, the defendant's original plea agreement was reached without the victim's knowledge or participation.⁶⁴ As such,

⁵⁹ See *Attorney General Standards*, *supra* note 53, at 21.

⁶⁰ *Id.*

⁶¹ *Id.* at 20-21 (explained in the Commentary to this section).

⁶² *State v. Means*, 926 A.2d 328 (N.J. 2007).

⁶³ See *supra* Part. I. The author of this Comment recognizes the fact that minor child victim and her father were both crime victims in this case. However, the court in *State v. Means* refers to the child victim's father, as represented in his custodian capacity, as the crime victim and this author will likewise refer to the victim in the singular tense for the purpose of this Comment.

⁶⁴ See *supra* Introduction.

the New Jersey Supreme Court's decision to reinstate the defendant's original plea, despite the father's lack of involvement, violated his constitutional rights.⁶⁵

A. The Majority Opinion

The majority opinion found it insufficient for the trial court to vacate the original plea based solely on the prosecutor's failure to notify the victim prior to extending a plea offer.⁶⁶ The court acknowledged that the rules governing plea-bargaining in New Jersey permit a trial court to vacate an agreement when its terms do not accord with the interests of justice.⁶⁷ As such, the court found that in order to reach its determination it should balance the constitutional considerations of both the defendant and the victim.⁶⁸

The court expressed that the basic principles behind the theory of plea bargains require that due process considerations are afforded to the defendant when he initially pleads guilty and thereby waives his constitutional rights.⁶⁹ These forfeited rights include his right to counsel, the right to a jury trial, and his right to cross-examine witnesses.⁷⁰ On the other hand, the victim's rights are uniquely derived from the New Jersey Constitution and its Bill of Rights.⁷¹ The court

⁶⁵ *See supra* Part I.

⁶⁶ *Means*, 926 A.2d at 335.

⁶⁷ *Id.* at 333. "If at the time of sentencing the court determines that the interests of justice would not be served by effectuating the agreement reached by the prosecutor and defense . . . the court may vacate the plea." N.J. R. Cr. R. 3:9-3(e).

⁶⁸ *See Means*, 926 A.2d at 334.

⁶⁹ *See id.* at 333.

⁷⁰ *Id.* at 335.

⁷¹ *See supra* Part I.

found it “undisputed” that the prosecutor’s failure to notify the victim violated statutory rights along with the Attorney General’s guidelines.⁷² Before the court could attempt to balance these respective rights, it declared that, “[t]he trial court should consider the concerns of the victim, but the court may not impinge on the defendant’s constitutional rights.”⁷³

Despite its acknowledgement of the separate rights in conflict, the court never performed such a balancing test.⁷⁴ The majority argued that the trial court could not properly determine the victim’s concerns without knowing if he had any objection to the plea agreement in the first place.⁷⁵ In support of this position, the court inferred that the sexual assault victim may very well have been satisfied with the defendant’s original plea agreement, as it was a combination of several other unrelated charges which increased his total jail time.⁷⁶ Therefore, the majority found that “when the trial court vacated the pleas, it was not in a position to fairly evaluate [the victim’s] concerns without knowing if [he] had an objection to the plea agreement and, if so, what the objection was.”⁷⁷

⁷² *Means*, 926 A.2d at 334.

⁷³ *See id.* at 335.

⁷⁴ *See id.* at 334.

⁷⁵ *Id.*

⁷⁶ *See id.*

⁷⁷ *Id.* The majority also suggests that rather than vacating the plea, the trial court should have postponed the sentencing to allow the prosecutor sufficient time to evaluate the victim’s concerns and determine if there were any objections. *Id.*

Additionally, the majority supported its conclusion on basic principles of contract law.⁷⁸ In a very brief analysis, the opinion discussed how the meeting of the minds between the defendant and the State rendered the agreement enforceable.⁷⁹ Valid consideration existed for both sides, with the State promising to reduce the number of charges and the length of sentence in exchange for the defendant's guilty plea.⁸⁰ Thus, the court simply reasoned that the unilateral mistake on behalf of the prosecutor's failure to notify the victim was insufficient to withdraw from the agreement.⁸¹

B. The Dissenting Opinion

As the sole dissenter, Justice Rivera-Soto took the position that the defendant was procedurally barred from raising objections with respect to the vacated plea.⁸² He reasoned that when entering into the second voluntary and unconditional plea agreement, the defendant never preserved the issue to challenge his earlier vacated plea.⁸³ Therefore, the defendant waived his right to challenge the validity of the original plea agreement.⁸⁴

More importantly, Justice Rivera-Soto recognized the compelling concerns of the crime victim, declaring that even absent a procedural technicality, the defendant was still not entitled to

⁷⁸ *State v. Means*, 926 A.2d 328, 335 (2007).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 336 (Rivera-Soto, J., dissenting).

⁸³ *Id.*

⁸⁴ *Id.* at 338.

relief.⁸⁵ Pursuant to *New Jersey Court Rule 3:9-3(e)*, the trial court was required to implement the “interest of justice standard” to determine whether to vacate a plea agreement or impose a sentence.⁸⁶ Justice Rivera-Soto believed that the trial court did not abuse its discretion in considering the victim’s rights when analyzing whether the interests of justice warranted vacating the original plea.⁸⁷

Unlike the majority opinion, the dissent recognized the importance of truly balancing the conflicting interests between the defendant and the victim in regards to the plea negotiations.⁸⁸ On the one hand, due process concerns afford the defendant the right to a negotiating process conducted with basic fairness, protection against forced admissions of guilt, and the reasonable expectation that his agreed upon terms are carried out.⁸⁹ On the other hand, the crime victim is entitled to be informed of this process and have his or her questions and concerns presented to the prosecutor and the court before a final agreement is reached.⁹⁰ In balancing these considerations, Justice Rivera-Soto reasoned that he could not agree with the majority’s

⁸⁵ *Id.*

⁸⁶ *Id.* at 339.

⁸⁷ *Id.* at 340.

⁸⁸ *See id.* at 339 (“This case starkly illustrates the clash between a defendant’s constitutional and contractual interests, and those rights provided both constitutionally and statutorily to victims in New Jersey.”). *Id.*

⁸⁹ *See id.* at 338-39.

⁹⁰ *See id.* at 339.

conclusion that a defendant's rights must take precedence, because doing so would render the victim's rights meaningless.⁹¹

III. THE COURT VIOLATED THE CRIME VICTIM'S RIGHTS BY NOT REQUIRING HIS PARTICIPATION THE DURING PLEA-BARGAIN NEGOTIATIONS

Regardless of the terms in the agreement, a victim's lack of participation during plea negotiations should be evaluated in determining whether the interests of justice required vacating the original plea.⁹² Crime victims only desire participation during the plea-bargaining process rather than the ultimate power to reject what they may view as unfavorable agreements between the state and defendant.⁹³ As such, victims can convey their concerns to prosecutors and receive information concerning potential plea bargains without violating the defendant's constitutional rights.⁹⁴

A. The Court Failed to Evaluate the Interests of Justice

New Jersey Courts must consider the concerns and interests of the crime victim during the judicial process.⁹⁵ As such, the New Jersey Supreme Court in this case should have determined how best to balance these interests against the constitutional concerns of the defendant.⁹⁶ In reaching its decision, the majority found that the trial court was incapable of fairly evaluating the victim's concerns, and as a result could not weigh them against those of the

⁹¹ *See id.*

⁹² *See infra* Part. III.A.

⁹³ *See infra* Part. III.C.

⁹⁴ *See infra* Part. III.B.

⁹⁵ *See Means*, 926 A.2d at 334.

⁹⁶ *Id.* at 334-335.

defendant.⁹⁷ Therefore, notwithstanding the fact that the trial court possessed the authority to reject a plea agreement in order to promote the interests of justice, the majority found that it was incapable of doing so.⁹⁸

According to the majority, the trial court judge could not adequately evaluate the victim's considerations because there was no evidence presented that he actually objected to the terms of the plea.⁹⁹ The majority incorrectly focused on whether the victim objected to the terms of the plea and disregarded the procedural mistake made by the prosecutor in failing to notify him during the negotiations. This line of reasoning does not comport with the purpose behind victims' rights legislation, which remains the promotion of victim participation throughout the disposition of a criminal case.¹⁰⁰ The victim's real interest concerned the court's recognition of his status as an affected third party deserving the right to be fully involved throughout the decision-making process, as opposed to whether he objected to the terms of the plea

⁹⁷ *Id.* This finding directly contradicts the State's position that "for the defendant to prevail, the court must conclude that 'fair treatment for victims' is not in the interests of justice and require the court to ignore the Victim's Right's Amendment and the will of the electorate that overwhelmingly approved the constitutional amendment." State's Brief, *supra* note 2, 40 (citing and agreeing with the New Jersey Crime Victims' Law Center).

⁹⁸ *Means*, 926 A.2d at 335.

⁹⁹ *Id.* at 334.

¹⁰⁰ *See supra* Part I. "Victims legitimately view the resolution of and sentencing in a case as an evaluation of the harm done to them." *Attorney General Standards*, *supra* note 53, at 22 (explaining the rationale for victims' rights legislation).

agreement.¹⁰¹ Therefore, regardless of any future objections to the terms of the plea, the majority should have realized that this interest was violated at the moment the prosecutor and defendant struck an agreement without the victim's participation.¹⁰²

By the very nature, plea-bargaining prohibits victims from engaging in all meaningful aspect of the criminal process.¹⁰³ Consequently, this exclusion from participating in plea negotiations further inhibits a victim's ability to convey the impact that the crime had on his or her life to the prosecutor. This kind of exclusion is a significant violation that all prosecutors throughout New Jersey are instructed to prevent and demonstrates a lack of respect and fairness for the victim in direct violation of the New Jersey Constitution.¹⁰⁴ On these facts alone, a judge should be in the position to evaluate whether the interests of justice warrant vacating a plea.

B. The Victim's Rights Can Be Upheld Without Violating Those Afforded to the Defendant.

¹⁰¹ See Thane Rosenbaum, *Stop Muzzling Wounded*, NAT'L L. J., Jan, 17, 2005 at 26 (discussing the importance of involving crime victims in the legal system so that they may "be given the opportunity to speak to their grief" and achieve a sense of moral justice).

¹⁰² See Sara N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 355 (1987) (explaining that one of the criminal victim's interest is to seek retribution through the defendant's punishment and that "[t]he victim could protect these interests by participating in the plea bargain").

¹⁰³ See Rosenbaum, *supra* note 101, at 26 ("In negotiated pleas, truth and story are routinely sacrificed in favor of an administrative outcome. The certainty of jail time, and the avoidance of the risk of trial, are deemed more important than the respect and dignity owed to victims.").

¹⁰⁴ See *Attorney General Standards*, *supra* note 53, at 11, 18; see also N.J. CONST. Art. 1, ¶ 22.

The dissenting opinion correctly focused on the victim as an interested third party whose concerns should be addressed by the court.¹⁰⁵ In contrast to the majority's holding, which had the practical effect of ignoring the victim's considerations,¹⁰⁶ the dissent gives full accord to the Crime Victim's Amendment and the Bill of Rights.¹⁰⁷ The dissent also recognized the due process concerns of the defendant in determining whether to vacate a plea agreement.¹⁰⁸ The plea bargaining process requires essential fairness to prevent a defendant from being entrapped when entering into a guilty plea.¹⁰⁹ The defendant should also receive the reasonable expectations of his agreement and have the terms of the agreement fulfilled once it receives judicial approval.¹¹⁰ However, unlike the majority, the dissent balanced these considerations with those of the victim, and found that the defendant's rights do not always take precedence when doing so would render the victim's rights meaningless.¹¹¹

¹⁰⁵ See *State in the Interest of K.P.*, 702 A.2d 315, 321 (N.J. Super. Ch. Ct. Div. 1997)

(explaining that the Victims' Rights Amendment "requires that the system consider interests of third parties, specifically crime victims").

¹⁰⁶ The final judgment of the Appellate Division reinstated the original plea agreement despite the fact that the victim was not notified during its negotiations. See *State v. Means*, 926 A.2d 328, 335 (N.J. 2007).

¹⁰⁷ *Id.* at 340.

¹⁰⁸ *Id.* at 338.

¹⁰⁹ *Id.* at 338-39.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 339.

The dissent's reasoning follows that of prior New Jersey Supreme Court decisions which upheld crime victims' constitutional rights without violating those afforded to the defendant.¹¹² In *State v. Timmendequas*, the court rejected the argument that a criminal defendant's constitutional rights were violated when the court ordered a change in venue to better accommodate the victim.¹¹³ In *State v. Muhammad*, the court upheld the use of victim impact statement and rejected the argument that such statements violated the defendant's due process rights and subjected him to cruel and unusual punishment.¹¹⁴ Additionally, in *In the Interest of J.G.*, the court upheld the constitutionality of a requirement that defendants, at the request of sexual assault victims, undergo HIV and AIDS testing despite the challenge on fourth amendment privacy violations.¹¹⁵

The dissent's position that a plea agreement can be vacated in the interests of justice without violating the defendant's constitutional rights is also supported by precedent. The court may, in the interest of justice, enhance the parole ineligibility time period for a defendant despite

¹¹² See *State v. Timmendequas*, 737 A.2d 55, 76 (N.J. 1999) ("Taking the concerns of the victim's family into account does not constitute error, *provided* that the constitutional rights of the defendant are not denied or infringed on by that decision").

¹¹³ See 737 A.2d 55, 77 (N.J. 1999).

¹¹⁴ See 687 A.2d 164, 17-74 (N.J. 1996).

¹¹⁵ See 701 A.2d 1260, 1271 (N.J. 1997). The court reasoned that the government's special need in protecting the sexual assault victim's interest permitted the blood test search of the defendant absent any warrant or individualized suspicion. *Id.* at 1267 (citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989)).

a contrary recommendation by the prosecutor.¹¹⁶ Also, the court violates the interest of justice if it were to impose a lesser sentence on a defendant than the one bargained for between himself and the prosecutor.¹¹⁷ Additionally, the court retains the ability to strike a portion of a defendant's guilty plea when the victim's input is necessary to effectuate its terms.¹¹⁸

Additionally, other jurisdictions recognize that a defendant's plea agreement may be vacated in order to promote the victim's rights. Many state courts regard the failure to inform victims about a negotiated plea agreement as a valid basis for rejecting the plea without violating the defendant's rights.¹¹⁹ Federal courts have also recognized that victim participation during the

¹¹⁶ See *State v. Cooper*, 684 A.2d 524, 528 (N.J. Super. 1996).

¹¹⁷ See *State v. Thomas*, 920 A.2d 142, 151 (N.J. Super. 2007).

¹¹⁸ See *State v. Faunce*, 582 A.2d 1268, 1270 (N.J. Super App. Div. 1990) (pertaining to the case of death by auto where the victim's family's right to request notice of any plea agreement conflicts with the defendant's application for a civil non-evidentiary order pursuant to his offered plea agreement).

¹¹⁹ See, e.g., *State v. Montiel*, 122 P.3d 571, 580 (Utah 2004) (failing to inform the victim of the specific plea agreement between the prosecutor and the defendant is a factor and "on [its] own, would likely have provided a legitimate basis . . . to reject the plea agreement"); *Hoskins v. Maricle*, 150 S.W.3d 1, 25 -26 (Ky. 2004) (rejecting a plea agreement for being too lenient by concluding that the trial court may consider the opinions of crime victims, and that the prosecutor "has an obligation to consult with the victim" during the plea negotiation); *State v. Warner*, 762 So.2d 507, 514 (Fla. 2000) (discussing that the court may consider pre-plea victim input before suggesting any sentence and "the judge must make it clear on the record that the court is required to and will consider any victim input which is offered")

plea bargain process is justified.¹²⁰ Additionally, federal courts incorporate crime victims' interests through the entire criminal process and even require their participation before upholding the dismissal of the defendant's charges.¹²¹ The dissent's refusal in this case to ignore the victim's absence during the negotiations between the prosecutor and defendant and permit this void as a valid basis for rejecting the plea properly ensured that the court will protect the victim's rights when the state has failed in such respect.¹²²

C. The Misconception of the “Victim’s Veto” and the Court’s Holding

¹²⁰ *See, e.g., Doe v. Hammond*, 502 F.Supp.2d 94, 102-03 (D.C. 2007) (recognizing that crime victims' rights require the victim have access to the terms of the plea agreement under the Crime Victim Rights Act, 18 U.S.C. § 3771); *Smith v. Stegall*, 385 F.3d 993, 1000 (6th Cir. 2004) (finding no error for a prosecutor, while presenting the terms of the plea agreement, to inform the sentencing court that the victim wished to see the defendant receive a life sentence, which exceeded the state's recommendation) *cert. denied* 544 U.S. 1052 (2005).

¹²¹ *See U.S. v. Heaton*, 458 F.Supp.2d 1271, 1272 (D.Utah 2006) (applying the federal Crime Victim's Rights Act, 18 U.S.C. § 3771 (2006)). “[T]he crime victims' right to be treated with fairness and dignity applies not only to public court proceedings but more broadly to all aspects of the criminal justice system-including the court's decision whether to grant the government's motion to dismiss.” *Id.*

¹²² *Welling*, *supra* note 102, at 335 (“Exposing the trial judge to the victim's views is an effective approach because trial judges currently have sufficient discretion in accepting plea bargains to take the victim's information into account and reject the plea bargain if the bargain is overly lenient to the defendant.”).

The majority's reluctance to vacate the original plea may be attributed to the fear of giving the victim a level of control over negotiations, which eclipses that held by the prosecutor.¹²³ The defendant argued that the court's failure to enforce the original plea would create an impermissible "veto power" for the victim to reject plea agreements.¹²⁴ The media also characterized the facts involved in this case as creating a "veto power" for crime victims.¹²⁵ However, viewing the requirement of victim notification in plea-bargains, as equal to an absolute veto power is inappropriate since it remains well established that the authority to withdraw a guilty plea lies within the broad discretion of the trial court.¹²⁶

No legislative authority exists that allows crime victims to control the plea process.¹²⁷ The Bill of Rights declares that victims are entitled to information concerning the judicial process, being minimally inconvenienced, and submit an impact statement to the prosecutor.¹²⁸ The Bill of Rights does not mention that a crime victim can veto a plea agreement.¹²⁹ Also, the New Jersey Constitution simply mandates that fairness, compassion, and respect are afforded to crime victims, and is silent on whether a victim possesses a veto power over objectionable plea

¹²³ See *State v. Means*, 926 A.2d 328, 333-34 (N.J. 2007) (explaining that the defendant has the right to move to withdraw a plea, while there is no corresponding right for the State).

¹²⁴ See Defendant's Brief, *supra* note 2, at 9.

¹²⁵ See Michael Booth, *Court Mulls Whether Criminal Victims Have Veto Power Over Plea Bargains*, N. J. L. J., Jan. 22, 2007.

¹²⁶ See *State v. Bellamy*, 835 A.2d 1231, 1236 (N.J. 2003).

¹²⁷ See Booth, *supra* note 125 (citing Justice Barry Albin).

¹²⁸ See *supra* text accompanying notes 30-34.

¹²⁹ See N.J. STAT. ANN. §§ 52:4B-36(a)-(o) (West 2008).

agreements.¹³⁰ If the Legislature intended to create the ability for crime victims to veto a plea agreement, then such right would have been incorporated by statute.¹³¹

Furthermore, any notion that a crime victim possesses a veto power over plea agreements is expressly forbidden and safeguarded by the Attorney General Standards that require their participation in the first place.¹³² Although the prosecutor should consider the victim’s concerns before entering into a final plea agreement, the ultimate decision to accept or reject a plea lies with the prosecutor and not the victim.¹³³ Additionally, it is well understood that, “[t]he views of the victim’s family may be taken into consideration when considering a plea agreement, but the family’s level of grief or degree of dissatisfaction with the plea cannot be controlling.”¹³⁴ Victims’ rights advocates only seek the simple right for victims to *participate* in plea bargains—a right that does not include the option to appeal the court’s decision if the court approves an unfavorable plea agreement.¹³⁵

In addition to the misconception of the “veto power,” the media has misinterpreted the general holding rendered by the New Jersey Supreme Court in *State v. Means*. As previously

¹³⁰ N.J. CONST. Art. 1, ¶ 22.

¹³¹ See WIS. STAT. ANN. § 973.195(1r)(d) (demonstrating that the court shall deny an inmate’s request for readjustment of sentence upon the victim’s objection).

¹³² See *Attorney General Standards*, *supra* note 53, at 22.

¹³³ *Id.* at 21 (“Nothing contained herein should be construed to alter or limit the authority or discretion of the prosecutor to enter into any plea agreement which the prosecutor deems appropriate.”).

¹³⁴ *State v. Madan*, 840 A.2d 874, 884 (N.J. Super. App. Div. 2004).

¹³⁵ See *Welling*, *supra* note 102.

stated, the court determined that it was improper to reject the original plea because the trial court was not in the position to fairly evaluate the victim's concerns in determining the interests of justice.¹³⁶ This acknowledgement leaves open the possibility that if a court *is in the proper position* to evaluate the victims concerns, then it may determine if the interests of justice require victim participation. However, the court's holding has been reported as creating "black letter law" that the defendant's constitutional rights will always trump those afforded to the victim.¹³⁷

Consequentially, the characterization of the defendant's constitutional rights with such supreme authority frustrates the crime victim's fundamental interest in seeking recognition from the criminal justice system. Such an unwavering stance weakens the balancing approach that courts must take when the victim's rights are in conflict with the defendant's rights.¹³⁸ It also supports the dangerous misconception that crime victims and their advocates should be treated as "second-class citizens" whose motives seek to reverse the historical progress embodied in our

¹³⁶ See *supra* text accompanying note 74.

¹³⁷ See Michael Booth, *Victim Need Not Be Told of Plea Bargain*, NAT'L L.J., July 16, 2007, at Col. 3 ("New Jersey crime victims have a bill of rights, but it doesn't hold up against the rights constitutionally guaranteed to criminal defendants"); Kate Coscarelli, *State Justices Cite Constitutional Rights In Upholding Guilty Plea*, N.J. STAR LEDGER, July 12, 2007 (quoting Mean's attorney as saying "Nobody disparages victims' right, but this is a case where the Supreme Court said that a defendant's due process right is paramount."); Editorials, *supra* note 44 ("*Means* reflects the Court's recognition that the greatest protection goes to the criminal defendant.") (quotations omitted).

¹³⁸ See *supra* text accompanying note 68.

criminal justice system of protecting defendant's rights.¹³⁹ These misconceptions in combination with the majority's holding that refuses to balance the victim's interests, casts doubt on the future effectiveness of victims' rights legislation. An individual's constitutional rights are only as strong as to the extent they are enforced through the courts. As such, in order to prevent rendering victims' rights meaningless, future courts should keep in mind the reason that Justice Rivera-Soto could not agree with the majority's holding in stating that, "relegating victim's rights to a constitutional backwater renders them illusory."¹⁴⁰

IV. CONCLUSION

In *State v. Means*, the victim's lack of notice and consultation throughout the plea negotiations between the state and defendant violated his constitutional and statutory rights.¹⁴¹ This case created the opportunity for the New Jersey Supreme Court to validate the crime victims' status as an interested third party in the criminal justice system by necessitating their participation during plea negotiations.¹⁴²

However, the court failed to seize this opportunity with its refusal to balance the constitutional concerns of both the victim and the defendant in determining whether the interests

¹³⁹ See Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 536 (1999). "Victims are not barbarians seeking to dismantle the pillars of wisdom from previous ages. Rather, they are citizens whose legitimate interests require recognition in any proper system of criminal justice." *Id.* at 482.

¹⁴⁰ See *supra* text accompanying note 91.

¹⁴¹ See discussion *supra* Part III.

¹⁴² See *supra* text accompanying notes 105-107.

of justice permitted the trial court to vacate the original plea.¹⁴³ The majority incorrectly identified the victim’s concerns in holding that the trial court was not in the position to fairly evaluate the interests of justice issue.¹⁴⁴ The court should have focused on the victim’s lack of participation during the plea negotiations, instead of whether there were objections to the terms of the agreement.¹⁴⁵ The majority’s line of reasoning blatantly ignores the fact that whether the victim agreed or objected to the final terms of the plea, he was not afforded any participation during the decision-making process.

Conversely, the dissent correctly finds the absence of this participation, in and of itself, warranted the trial court to determine that the interests of justice were not served with the offered plea.¹⁴⁶ This view better promotes the interest of justice by giving full accord to the state constitutional rights of crime victims.¹⁴⁷ The dissent’s position attempts to reconcile the misconception that crime victims possess a “veto power” in reasoning that their participation in plea negotiations satisfies the constitutional requirement that the criminal justice system treat victims with fairness and respect.¹⁴⁸

The final result in this case is clear—the man who raped a young girl was permitted to reach a final agreement with the state regarding his punishment without ever incorporating her or

¹⁴³ *See supra* Part III.A.

¹⁴⁴ *See supra* Part III.A.

¹⁴⁵ *See supra* Part III.A.

¹⁴⁶ *See supra* Part. III.B.

¹⁴⁷ *See supra* Part III.B.

¹⁴⁸ *See supra* Part III.C.

her family's concerns or explaining to them why her rapist would not stand trial.¹⁴⁹ When the New Jersey electorate overwhelmingly approved a constitutional amendment to ensure the rights of crime victims, it almost certainly was to prevent this kind of injustice.

¹⁴⁹ See discussion *supra* Introduction.