

# What Practitioners and Judges Need to Know Regarding Crime Victims' Participatory Rights in Federal Sentencing Proceedings



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The United States Congress recently enacted and the President signed into law what could be the most dramatic change to federal criminal proceedings since the adoption of federal sentencing guidelines: providing crime victims standing to participate in criminal proceedings in both trial and appellate courts. Congress believed the “scales of justice are out of balance—while criminal defendants have an array of rights under law, crime victims have few meaningful rights.”<sup>1</sup> While Congress had previously provided crime victims with rights, those prior rights lacked enforceability. Having rights without remedies was illusory. In order to have justice for all, including the victim, Congress determined that the United States must provide “a fair and balanced criminal justice system—one that considers victims’ rights as well as defendants’ rights.”<sup>2</sup> The new era in federal criminal justice allows victims to have enforceable civil rights within a criminal case.

## I. Crime Victims' Participatory Rights Provide Fundamental Change in Federal Criminal Justice Proceedings

In 2004 Congress passed the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act (“CVRA”),<sup>3</sup> which gave victims statutory standing to enforce their rights.<sup>4</sup> The CVRA passed with overwhelming majorities in both houses (96-1 in the Senate and 393-14 in the House).<sup>5</sup> The CVRA moved the victims' rights statutes to the Crimes and Criminal Procedure Article of Title 18 of the United States Code to give judges and practitioners more exposure to the existing and new rights.<sup>6</sup> The following rights for federal crime victims are now provided by 18 U.S.C. § 3771(a):

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

From a historical perspective, federal crime victims' rights statutes previously had a fundamental flaw—they were unenforceable in any legal sense. Thus, historically, federal crime victims' rights laws were illusory because they did not create “rights.” This failure was keenly demonstrated in *United States v. McVeigh*.<sup>7</sup> In *McVeigh*, victims of the Oklahoma City bombing sought to exercise their right to attend the criminal trial and to subsequently testify at the sentencing if there were a conviction. The trial court prohibited the victims' attendance at trial. The victims sought review and the Tenth Circuit upheld the trial court, pointing to the pre-CVRA statute's requirement of only “best efforts” and finding that the statute did not grant the victims standing to seek review of denials of their rights.

The CVRA was drafted, in part, to remedy this type of unenforceability of rights. The enforcement mechanisms fall into four categories.<sup>8</sup>

1. Courts are required to ensure that crime victims are afforded the rights described in the law.
2. The Attorney General of the United States is required to take steps to ensure that federal prosecutors “make their best efforts” to see that crime victims are aware of, and can exercise, these rights.<sup>9</sup>
3. Crime victims and their representative or their attorneys can assert the rights in United States District Court proceedings, giving victims standing to ask federal courts to enforce their rights.
4. Victims, or their attorneys, and the United States Attorney can seek a writ of mandamus, permitting

*Federal Sentencing Reporter*, Vol. 19, No. 1, pp. 21–29, ISSN 1053-9867 electronic ISSN 1533-8363  
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immediate appellate review when trial courts deny victims' rights.

Thus, the CVRA empowers crime victims as participants in the criminal justice system.<sup>10</sup>

The CVRA establishes new roles and responsibilities to achieve Congress's intent regarding victims' rights. Various players in the criminal justice system have new and important roles regarding victims' rights, including United States Attorneys and federal judges. Other new players, including victims and their attorneys, will create a new dynamic among judges, prosecutors, and defense attorneys. As part of the "Justice for All Act," the CVRA delineates substantive and procedural rights to allow victims to participate in the justice system.

Documenting the successes and failures of the CVRA will constitute a vital role in the new law. The Administrative Office of the United States Courts will report annually the number of times a right is requested and denied.<sup>11</sup> Congress will review these statistics four years after the bill's passage to determine if the CVRA adequately protects victims' rights.<sup>12</sup>

Change is often difficult. The past course of dealings in criminal proceedings will continue to be what judges and practitioners know and expect. Providing crime victims with participatory rights is not only what the law requires but also the right course in providing justice for all. Once victims' rights are accepted as the rule of law to be followed, our federal criminal justice system will, in fact, be more just. Existing federal and state case law may assist in the interpretation of the CVRA under certain circumstances, but many issues under the CVRA will pose new and novel questions of law. While the case law of the CVRA is limited, it is just the proverbial tip of the iceberg of case law to come.

## **II. Specific Crime Victims' Rights and Their Relationship to Federal Sentencing**

### **A. Right to Fairness and Privacy**

This right, provided by 18 U.S.C. § 3771(a)(8), is a mandate to treat victims appropriately. This right alters the common perspective that in criminal cases the only interests to be considered are those of the Government and the defendant. The United States Supreme Court long ago opined that in the administration of criminal justice, courts may not ignore the concerns of victims.<sup>13</sup> Victims have due process rights and rights of privacy like everyone else.<sup>14</sup>

The direction to treat victims with fairness is already affecting state criminal justice jurisprudence. An example is the current trend toward the abrogation of the abatement ab initio doctrine when a criminal defendant dies during an appeal of the conviction.<sup>15</sup> It clearly would not be fair to victims to erase a defendant's sentence and an underlying criminal charge because a defendant died while a case was pending on appeal. For example, a victim's right to obtain restitution would be lost.<sup>16</sup> Although there have been inconsistent holdings on abatement by

the federal courts of appeals, fairness to victims is a new consideration that will likely cause the federal courts to reexamine their respective positions.<sup>17</sup> Fairness to victims therefore encompasses not only the enumerated rights of victims under the CVRA but also a mandate to consider the victim throughout the federal criminal justice system. In interpreting or reinterpreting federal statutes and procedures, effect must be given to this mandate.

The CVRA includes the privacy of the victim within the scope of protected interests. Privacy interests include preserving the integrity of privileged relationships and maintaining the secrecy of matters that are confidential by law. These interests are broader than liberty interests protected under the Fifth Amendment to the United States Constitution. Even prior to the CVRA, victims had standing to assert their privacy interests, including the ability to seek appellate relief if their rights were denied by a district court.<sup>18</sup> With respect to confidential victim information that is privileged, privacy rights dictate that the confidentiality be protected.<sup>19</sup> As a statute, the CVRA protects the privacy of victims because it overrides the general rules of evidence involving privilege in federal court.<sup>20</sup> The provision regarding privilege applies to all proceedings, including those involving pleas and sentencing.<sup>21</sup> When victim privacy issues arise in such proceedings, courts have an obligation to consider and protect victim privacy interests.<sup>22</sup>

### **B. Right to Notice of Court Proceedings**

Notice regarding victims' rights is a key element of all of the rights provided to victims. If a victim does not know about a right, the victim will not know that he or she can exercise that right. The victim's opportunities to be present and heard are two rights that are dependent on notice.<sup>23</sup> Without reasonable, accurate, and timely notice before a proceeding,<sup>24</sup> victims will be unable to assert their right to be heard during the proceeding and the right will be effectively denied. The failure to provide notice will undermine the validity of the subsequent proceeding and provide a basis for setting it aside.<sup>25</sup>

Under the CVRA, the Government has a duty to provide notice, and courts have an obligation to ensure that notice is reasonable, accurate, and timely. While there are perhaps many ways to develop a viable system from which the court can verify that notice has been provided, taking no action to create such a notification system will result in the inability of the court to ensure that victims are notified of their rights except on a case-by-case basis. A lack of uniform procedures may cause either extensive delays or the ignoring of victims' rights.

In Maryland, for example, the state has adopted a notification request and demand-for-rights form to help victims protect their rights. (This form is reprinted as Appendix A to this Article.) The prosecutor provides the form to the victim and certifies service or the inability to provide service to the court clerk. If the victim wants to exercise rights as allowed by state law, the victim com-

pletes the form and returns it to the prosecutor, who files the completed form in the court file.<sup>26</sup> This practice provides a mechanism for the court to be able to examine the court file, check for the certification, and determine if a notification request and demand-for-rights form was filed with the court. In order to ensure that a victim was notified of a particular proceeding, the court must inquire if notice was provided before commencing the proceeding.<sup>27</sup> In cases where sentencing guidelines are required, Maryland requires the compliance or noncompliance with victims' rights requirements to be included on the Sentencing Guidelines Worksheet.<sup>28</sup>

As there is no such uniform procedure in the federal courts, each judge will have to determine a procedure to ensure notice until and unless more uniform procedures are adopted. For the efficiency of the system, a judicially verifiable system of notification needs to be created.

### C. Right Not to Be Excluded from Court Proceedings

In a case of first impression on mandamus review, the Ninth Circuit Court of Appeals reversed for further consideration a sequestration order issued contrary to 18 U.S.C. § 3771(a)(3), which provides that victims have 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."<sup>29</sup> The Ninth Circuit explained that it would violate Congress's intent if a victim could be excluded on a mere possibility that testimony would be materially altered.<sup>30</sup> Materiality requires that the substance of any possible alteration of testimony be as to a fact which would be germane to the case. Prior to excluding a victim subject to the protection of the CVRA, a court must make findings of fact on the record as to the materiality of the victim testimony. Even if this almost impossible standard is satisfied, a victim should not be excluded for every witness, but only those witnesses as to which the judge has made the required findings.

The CVRA allows victims to be present not only during trials but also during plea and sentencing proceedings. As the rule of sequestration is applicable only as to the testimony of other witnesses, victims should never be excluded if other witnesses are not testifying.<sup>31</sup> Under the CVRA, trial courts must make every effort to permit the fullest attendance possible by the victim and consider reasonable alternatives to the exclusion of the victim from the criminal proceeding.<sup>32</sup> While a defendant has a constitutional right to cross-examine his accusers, defendants have no concomitant right to exclude their accusers.<sup>33</sup> However, there may be certain circumstances where not all victims can be present. The CVRA recognizes this issue, providing that when it is impracticable to accord all of the crime victims their CVRA rights, "the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings."<sup>34</sup>

### D. Right to Be Reasonably Heard

Perhaps the greatest influence on sentencing is guilty pleas. United States Sentencing Commission statistics relate that 97.2 percent of sentencing is a result of plea agreement. To make victims' rights "meaningful" regarding a plea, the Government must notify the victim regarding the reasons for the plea in a timely manner for any victim to respond at a plea hearing.<sup>35</sup> A victim's right to provide a victim impact statement at the time of a plea that can impact a sentence is lost *unless* the victim's right to be informed, present, and heard is implemented when the plea is accepted. This right must continue throughout the presentence investigation, until the court's final calculation under the sentencing guidelines.

In 1987 the U.S. Supreme Court found that victim evidence was inadmissible in a capital death penalty sentencing proceeding before a jury because of Eighth Amendment cruel and unusual punishment concerns related to the death penalty.<sup>36</sup> Four years later in *Payne v. Tennessee*, the Supreme Court reversed itself and found victim impact evidence admissible.<sup>37</sup> In a concurring opinion, Justice Scalia referenced a public sense of justice validating the national victims' rights movement.<sup>38</sup>

In perhaps the most important victims' rights case since *Payne* in 1991, the Ninth Circuit in 2006 provided teeth to the CVRA, confirming a victim's independent right to enforce his right to be heard in *Kenna v. District Court*.<sup>39</sup> The *Kenna* court rejected the argument that Mr. Kenna could not speak at the sentencing and that his reasonable rights to be heard could be satisfied by a written statement or a prior oral address in a related case. In *Kenna*, the court determined that the term "heard" has a broad definition, which does not restrict victims to written impact statements alone but gives the victim a right to provide oral and written impact statements.<sup>40</sup> The basis for the holding was Congress's intent that victims be full participants in the criminal justice system.<sup>41</sup> Even in multi-victim cases, courts can hear from victims. In the high-profile Enron case, the United States District Court provided the victims with the opportunity to be heard during sentencing, even though the number of victims "numbered in the thousands."<sup>42</sup>

Perhaps more important than the right to be heard is the right to be meaningfully heard. In *Kenna II*, another panel of the Ninth Circuit did not allow victims to be full participants as the first panel had contemplated. More specifically, the court in *Kenna II* rejected access to the presentence report ("PSR").<sup>43</sup>

If a victim is to be meaningfully heard regarding both pleas and sentencing, victims need to be heard concerning stipulations regarding the plea or sentence and any factual findings to be made. The government and the defendant may not stipulate to misleading or nonexistent facts. In determining the factual basis for the sentence, the court should consider any relevant information.<sup>44</sup> Knowledge of the victim may be relevant to facts set forth in the PSR.

The victim may be the only person who will know if a proposed stipulation has false or misleading information or when a probation agent preparing a PSR has incorrectly calculated a factor for guideline computation. Under the United States Sentencing Guidelines, “Even though stipulations are expected to be accurate and complete, the court cannot rely exclusively upon stipulations in ascertaining the factors relevant to the determination of sentence.”<sup>45</sup> Unless the victim has an opportunity to review the PSR and comment on the sentencing guideline factors, the victim lacks the ability to effectively and meaningfully be heard at sentencing. Such review is implicit in the right to be meaningfully heard; otherwise, the effect of the victim impact statement is minimized.

For example, for over fifteen years, Arizona’s sentencing guidelines structure has given victims the opportunity to review state PSRs and to argue for enhancements.<sup>46</sup> In general, most courts explain that disclosure of a PSR to a third party is appropriate if disclosure “is necessary to serve the ends of justice.”<sup>47</sup> To provide fairness to victims, federal courts should provide victims with access to PSRs and the ability to comment both to the probation office and to the court regarding facts and victim evidence. Allowing victims to be heard helps the court to appropriately determine sentencing factors and gives the victims a greater sense of justice.

#### **E. Right to Protection from the Accused**

Often in a crime against the person, safety is a victim’s greatest concern. Pretrial release and sentencing determinations, including those covering conditions of probation and supervised release, are major proceedings in which there is an obligation to reasonably protect victims from the accused. Whether at a release hearing or at a sentencing, victim impact evidence is important information that a court can weigh. The more information that a court has in making a decision that might protect a victim from an accused, the better and more informed the decision will be.<sup>48</sup> The victim as a member of the community directly impacted by crime has an important voice. Courts should appropriately weigh safety of the victim and any request of the victim at all appropriate opportunities, including at sentencing.

#### **F. Right to Restitution**

An important right to help restore the victim is the right to restitution. This right is incorporated in the Mandatory Victims Restitution Act of 1996, which requires courts to include restitution when sentencing for certain offenses.<sup>49</sup> Restitution has priority over criminal fines, and judges should only impose fines when it will not impair the defendant’s ability to make restitution to a victim.<sup>50</sup> Prior to the CVRA, at least one court of appeals determined that victims had implied standing to appeal regarding restitution.<sup>51</sup> With the CVRA, victims have express standing to request restitution in district court proceedings and to seek relief in the court of appeals when the lower court

denies or fails to consider the right to full and timely restitution.

#### **G. Right to Confer with the Attorney for the Government**

In line with receiving notice, victims have a reasonable right to confer with the prosecutor in the case. This right also relates to a victim having a right to be present insofar as presence helps the victim to be able to confer intelligently with the prosecutor. This provision is also akin to a victim’s right to be heard by the court. In terms of plea and sentencing proceedings, a prosecutor who has consulted with the victim will be in a better position to take into account the effect of the crime on the victim and make intelligent offers and recommendations that are fair to the victim in accord with the CVRA.

#### **H. Right to Proceedings Free from Unreasonable Delay**

Often said and very true is that justice delayed is justice denied. This expression is true not only in connection with trials, where testimony may become stale as memory fades, but also in connection with sentencing proceedings, which implicate the victim’s interest in finality.<sup>52</sup>

### **III. Attorneys for Crime Victims in Federal Criminal Justice Proceedings**

#### **A. Need for Counsel for Crime Victims**

Under 18 U.S.C. § 3771(d)(1), the crime victim *or the crime victim’s lawful representative*, as well as the attorney for the Government, may assert the rights described in subsection (a). Victims’ rights may be enforceable under the CVRA, but, in practice, those rights may only be effectively enforced if victims have competent counsel to represent them.<sup>53</sup> Federal statutes expressly provide authority for the court appointment of counsel to adequately represent defendants.<sup>54</sup> There is no express statutory provision for the appointment of counsel for most victims, but such authority is implicit in the CVRA provision regarding the court’s obligation to ensure that victims’ rights are afforded. Even prior to the CVRA, at least one federal court appointed counsel to represent a victim.<sup>55</sup> Fairness to victims may require courts to consider appointing counsel to victims.<sup>56</sup> Such appointment will be needed to protect a victim’s rights because, unless restitution is involved, the victim may not have a pecuniary interest in obtaining counsel. Even if a pecuniary interest is involved, a victim may not be able to afford counsel. Fairness to victims requires having counsel just as the Government or the defendant will have. Otherwise, there may not be an adequate mechanism in place to ensure that the rights of victims are protected.

Congress, in adopting the CVRA, provided funding for attorneys for crime victims. Through the National Crime Victim Law Institute, attorneys are assisting crime victims across the country.<sup>57</sup> In addition, the American Bar Associ-

ation's Victims Committee recently prepared a report, *The Victim in the Criminal Justice System*, which offers a historical perspective and references existing ABA Criminal Justice Standards applicable to crime victims.<sup>58</sup> The role of attorneys for crime victims is a pioneering opportunity to implement fairness and justice in the federal criminal justice system.

The CVRA establishes best-effort requirements for United States Attorneys and creates a duty for the prosecutor to "advise the crime victim that the crime victim can seek the advice of an attorney with respect to the [CVRA] rights."<sup>59</sup> The extent to which United States Attorneys comply with this provision may dramatically impact whether the attorney provisions are effective. If the United States Attorneys merely add a note regarding independent counsel in an initial cover letter to a victim, it is unlikely that this will succeed, and such minimal information can hardly be considered best efforts. If prosecutors do not inform victims how and why an independent counsel may be beneficial, victims will likely assume there is no need for independent counsel. Clearly there exist circumstances where United States Attorneys may have ethical conflicts between their role in representing the Government and their activities on behalf of victims; such circumstances will require the prosecutor to notify the victim and ask the court to appoint independent counsel to effectuate the rights of the victims. Perhaps a greater problem is that even if prosecutors make best efforts, there are few attorneys who currently understand the law in order to adequately represent crime victims.

#### **B. Special Issues Regarding Child Victims**

Unlike most adult victims, child victims do not have legal competency. As a consequence, courts under the doctrine of *parens patriae* have special duties to children whose interests come before the court.<sup>60</sup> Current federal law provides for the appointment of a guardian *ad litem* ("GAL") in federal criminal cases.<sup>61</sup> Courts should appoint attorneys to serve as GALs to protect the rights of child victims.<sup>62</sup> If a family member or someone else close to a family member is charged as a defendant in victimizing a child, the victim needs the protection of a GAL.<sup>63</sup>

### **IV. Legal and Ethical Obligations of Judges and Attorneys**

#### **A. Judicial Responsibilities under the CVRA**

Congress provided not only procedures by which victims can assert their rights in court and obtain judicial determination of such claims, but also imposed affirmative obligations on the judiciary to ensure that victims obtain their rights.<sup>64</sup> These include the general obligation to "ensure that the crime victim is afforded" his or her rights, and the specific obligation to "decide any motion asserting a victim's right forthwith."<sup>65</sup>

Since judges cannot serve as advocates for victims, perhaps the best analogy is to the way that courts protect the

rights of criminal defendants. The rights of defendants are well known and long established, including those rights in the Bill of Rights to the United States Constitution. However, the rights of crime victims are new and relatively unknown. Defendants' rights are an important part of the criminal justice system, and victims' rights should be equally important. Courts will regularly *voir dire* a defendant under Rule 11(c) of the Rules of Criminal Procedure prior to accepting a plea, but there is a lack of understanding of the court's obligation to victims under the CVRA.<sup>66</sup> A preliminary obligation of the court, pursuant to the obligation to ensure that the rights of victims are afforded, is to ascertain who the victims are in the case.<sup>67</sup> When it comes to a plea proceeding or a sentencing proceeding, courts have the obligation to see if the victims were notified of the proceeding, of their right to be present, and of their ability to be heard. Courts should find good cause to stay any proceeding until compliance with the law is obtained in order not to violate any victim's rights.

If the district court denies relief sought under the CVRA, the movant may petition the court of appeals for a writ of mandamus under 18 U.S.C. § 3771(d)(3). The court of appeals must "decide such application forthwith within 72 hours after the petition has been filed." The CVRA further provides that proceedings may not "be stayed or subject to a continuance of more than five days" and requires a written statement of reasons for any denial of relief. As judges become more accustomed to seeing victims in the courtroom and having counsel for victims, judges will be more familiar with victims' rights laws. Better judicial knowledge will allow for prompter judicial decisions regarding victims' rights.

#### **B. Prosecutorial Responsibilities under the CVRA**

Under 18 U.S.C. § 3771(c)(1), the Department of Justice and other federal law enforcement agencies must "make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)." Furthermore, as noted above, under 18 U.S.C. § 3771(c)(2), the prosecutor must advise victims that they may seek the advice of an attorney. Government attorneys are given great responsibility when working with victims to ensure that victims' rights are afforded. At the same time, the rights established by the CVRA, including the right to confer with the government, do not give victims a right to direct the litigation and should not hinder the Government's ability to prosecute the case.

#### **C. Ethical Obligations for Judges and Attorneys**

While this Article does not cover ethical obligations in depth, judges and attorneys should become aware of potential ethical responsibilities in federal proceedings with victims as participants and with independent counsel. For example, judges have an obligation under the ABA Model Code of Judicial Conduct Canon 3(b)(7) to afford all interested persons a right to be heard. Canon 3(b)(2) requires a judge to be faithful to the law and maintain

professional competence in it. This provision is noteworthy because judges must follow the CVRA and be aware of this new law. Other judicial canons prevent certain ex parte contacts, which would include contact with regard to victims when their rights were involved.

While the ABA Model Rules of Professional Conduct do not include any explicit rules on “victims,”<sup>68</sup> Rule 4.4(a) sets forth the obligation to show “respect for rights of third persons,” which parallels the victim’s CVRA right to be treated with fairness and respect.<sup>69</sup> This Rule would be applicable to both prosecutors and defense counsel. Counsel must also be aware of all of the CVRA-mandated obligations to victims and the issues involving contacting both a represented and an unrepresented victim. Prosecutors must also be aware that while they can act for victims under the CVRA, there may be conflict issues when the interests of the government and the victim differ. If a victim incorrectly assumes that the prosecutor is acting in the victim’s interest, the prosecutor may have affirmative obligations to disclose that conflict or potential conflict, including to the government, victim, and court.

While defense attorneys must be zealous advocates for their clients, they, too, cannot forget that they are officers of the court and that their obligations go beyond those they owe to their clients. If a defense lawyer violates the rights of victims, his or her client may suffer if the lawyer is forced to withdraw as a result of the violation.<sup>70</sup>

#### V. Conclusion—The Future of Victim Participation

Some day, it will be standard practice to allow victims to participate fully in the criminal justice system. With victims’ rights statutes still in their infancy, there is relatively little case law interpreting these rights. Yet, the future of victim participation is bright in federal court with the passage of the CVRA. Before, victims’ rights in the federal system could be ignored because there was no enforceability. With enforceability, victims will be able to benefit from the rule of law principles on which this country is based.

Lawyers and judges will now more than ever need to know about the rights of crime victims and their enforcement. However, few law schools have any classes that include material regarding victims. In the future, more law schools should help prepare future practitioners and judges regarding the rights of victims in the criminal justice system. Practitioners and judges will need to recognize that their roles and responsibilities toward victims have changed. Once the system accepts the participant status of victims and their counsel, the justice system will embody fairness to victims and better justice for all.

#### Notes

\* Law Clerk Ryan McQuighan assisted with this Article. This Article was supported in part by subgrant funding awarded by the National Crime Victim Law Institute (NCVLI) under a grant from the Office for Victims of Crime, Office of Justice Programs, United States Department of Justice (Grant No. 2002-VF-GX-K004). Points of view in this document are those of the author and do not necessarily represent the official

position or policies of the United States Department of Justice or NCVLI.

<sup>1</sup> 150 CONG. REC. S4260 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

<sup>2</sup> 150 CONG. REC. S4260 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

<sup>3</sup> The CVRA is codified at 18 U.S.C. § 3771.

<sup>4</sup> This compromise resulted after an almost decade-long movement for a victims’ rights amendment to the United States Constitution.

<sup>5</sup> Many will continue to argue for an amendment to the United States Constitution if the federal law and state counterparts to this important law prove ineffective.

<sup>6</sup> H.R. REP. NO. 108-711, at 2 (2004).

<sup>7</sup> 106 F.3d 325 (10th Cir. 1997).

<sup>8</sup> 150 CONG. REC. S4260 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

<sup>9</sup> Guidelines adopted by the Attorney General were published in May 2005. See <http://www.usdoj.gov/olp/final.pdf>.

<sup>10</sup> See *Kenna v. District Court*, 435 F.3d 1011, 1013 (9th Cir. 2006) (“The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard. The [CVRA] sought to change this by making victims independent participants in the criminal justice process.”); Paul G. Cassell, *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, 893 (2005) (“The CVRA transforms crime victims into participants in the criminal justice process. . . . These new rights will reshape the federal criminal justice system.”).

<sup>11</sup> The CVRA includes a requirement that the Administrative Office of the United States Courts report annually to Congress, on a court-by-court basis, “the number of times that a right established in chapter 237 of title 18, United States Code, is asserted in a criminal case and the relief requested is denied, and with respect to each such denial, the reason for such denial, as well as the number of times a mandamus action is brought pursuant to chapter 237 of title 18, and the result reached.” Justice for All Act, Pub. L. No. 108-405, § 104(a) (2004).

<sup>12</sup> See 150 CONG. REC. S4260 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (“[T]his information is critical to understanding whether federal statutes can effectively protect victims’ rights or whether a constitutional amendment is necessary.”).

<sup>13</sup> See *Morris v. Slappy*, 461 U.S. 1, 14 (U.S. 1983) (“But in the administration of criminal justice, courts may not ignore the concerns of victims.”).

<sup>14</sup> U.S. CONST. amend. V.

<sup>15</sup> See, e.g., *State v. Korsen*, 111 P.3d 130 (Idaho 2005).

<sup>16</sup> *Surland v. State*, 895 A.2d 1034 (Md. 2006).

<sup>17</sup> John H. Derrick, Annotation, *Abatement Effects of Accused’s Death before Appellate Review of Federal Criminal Conviction*, 80 A.L.R. FED. 446 (2005).

<sup>18</sup> See, e.g., *Doe v. United States*, 666 F.2d 43, 46 (4th Cir. 1981) (“[T]he injustice to rape victims in delaying an appeal until after the conclusion of the criminal trial is manifest. Without the right to immediate appeal, victims aggrieved by the court’s order will have no opportunity to protect their privacy from invasions forbidden by the rule. Appeal following the defendant’s acquittal or conviction is no remedy, for the harm that the rule seeks to prevent already will have occurred.”).

<sup>19</sup> “[T]he right of a victim of a crime to be aware of any subpoenas concerning privileged information is at least as important as the same right of a civil defendant. . . . The fundamental requisite of due process of law is the opportunity to be heard,

a right which has little reality or worth unless one is informed that the matter is pending and one can choose for himself whether to contest.” *State v. Gonzales*, 125 P.3d 878 (Utah 2005) (citation and internal quotation marks omitted).

20 Federal Rule of Evidence 501 provides, “*Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.*”

21 FED. R. EVID. 1101(c).

22 See, e.g., *P.M. v. Gould*, 136 P.3d 223 (Ariz. Ct. App. 2006) (requiring trial court to consider victim’s privacy interest in sentencing proceedings).

23 The government must give sufficient notice to the victims to ensure that they have a reasonable opportunity to submit written statements or attend the plea proceeding personally. *United States v. Blumhagen*, 2006 U.S. Dist. LEXIS 15380 (W.D.N.Y.).

24 See *United States v. Turner*, 367 F.Supp.2d 319, 332 (E.D.N.Y. 2005) (noting that right to “timely” notice “is designed to be a flexible concept that ensures a victim can reasonably arrange her affairs to attend the proceeding for which notice is given”).

25 See *State ex rel. Hance v. Arizona Bd. of Pardons & Paroles*, 875 P.2d 824 (Ariz. Ct. App. 1993).

26 MD. CODE ANN., CRIM. PROC. § 11-104 (d).

27 Maryland Rule 4-345(e)(2) provides as follows: “The State’s Attorney shall give notice to each victim and victim’s representative who has filed a Crime Victim Notification Request form pursuant to Code, Criminal Procedure Article, § 11-104 or who has submitted a written request to the State’s Attorney to be notified of subsequent proceedings as provided under Code, Criminal Procedure Article, § 11-503 that states (A) that a motion to modify or reduce a sentence has been filed; (B) that the motion has been denied without a hearing or the date, time, and location of the hearing; and (C) if a hearing is to be held, that each victim or victim’s representative may attend and testify.” Rule 4-345(f) provides that the “court may modify, reduce, correct, or vacate a sentence only on the record in open court, after hearing from the defendant, the State, and from each victim or victim’s representative who requests an opportunity to be heard. . . . No hearing shall be held on a motion to modify or reduce the sentence until the court determines that the notice requirements in subsection (e)(2) of this Rule have been satisfied.”

28 Information requested on the sentencing guidelines worksheet includes the following:

1. Whether there was a written or an oral Victim Impact Statement.
2. Whether the victim was notified of and present at the sentencing.
3. Whether the victim was notified of a plea agreement.
4. Whether the victim filed a notification request form.
5. Whether there was a victim in this offense.
6. Whether the victim was available to participate.

The worksheet is available at <http://www.msccsp.org/guidelines/worksheet.html>.

29 See, e.g., *United States v. District Court (In re Mikhel)*, 453 F.3d 1137 (9th Cir. 2006).

30 *Id.* at 1139 n.3.

31 See Fed. R. Evid. 615.

32 18 U.S.C. § 3771 (b) (2).

33 See *Wheeler v. State*, 596 A.2d 78, 88 n.16 (Md. Ct. Spec. App. 1991).

34 18 U.S.C. § 3771(d)(2).

35 For instance, in *United States v. Blumhagen*, 2006 U.S. Dist. LEXIS 15380 (W.D.N.Y.), the court ordered: “[T]his Court will require the government to include a statement explaining its decision to enter a plea with Steven Blumhagen and to move to dismiss the Indictment against Susan Blumhagen in its notice to the victims in this case. In this Court’s view, inclusion of this information is consistent with the public notice required by Rule 48 and with the substantive provisions of the [CVRA]. . . . Notice of the government’s position makes these [CVRA] rights meaningful, as victims who choose to exercise their right to be heard will be able to tailor their comments accordingly, and will not be unfairly surprised by the government’s position on the day of the plea proceeding.”

36 *Booth v. Maryland*, 482 U.S. 496 (1987).

37 501 U.S. 808 (1991).

38 *Id.* at 834 (Scalia, J., concurring).

39 435 F.3d 1011 (9th Cir. 2006).

40 *Id.* 1014-15.

41 *Id.* at 1016.

42 *United States v. Causey*, Crim. No. H-04-025-SS (S.D. Tex. July 28, 2006). See <http://news.findlaw.com/ap/o/51/07-31-2006/1416003631878a1c.html>.

43 *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006).

44 U.S.S.G. § 6B1.4, comment (2004).

45 *Id.*

46 As Keli Luther, Esq., of Arizona Voice for Victims puts it, “Arizona has provided victims with access to pre-sentence reports for years and the sky has not fallen—instead, permitting access to such information when requested by the crime victim, releases sunlight on a monopolistic criminal justice sentencing regime that has operated for far too long in the dark—leaving crime victims with far more questions than answers.”

47 *United States v. Schlette*, 842 F.2d 1574, 1579 (9th Cir. 1988).

48 “Whether or not victim impact statements directly affect a sentence, they have value in the sentencing process. They may convey which treatment plans might work for a defendant, offer new information to a judge, educate the whole courtroom about the nature of crime, or affirm how the sentence will work best in stopping violence or rehabilitating an offender. Certainly victim impact statements may help a victim reach emotional closure, and they bring a human face into the courtroom. However, fear of the perpetrator or of the public setting of the courtroom, and distrust of the system might prevent a victim from writing or delivering an impact statement. A domestic violence victim might have a hard time achieving credibility, especially if she recants or pleads for mercy for her abuser. And to be persuasive, all victims may be challenged to distinguish their assault from the ‘average’ assault and to give a balanced but detailed account of the effects of the crime on their lives. Judges, however, as we observed and as advocates convey, can help empower victims by being aware of the dynamics of their courtrooms and their own judicial demeanor.” MARY LAY SCHUSTER & AMY PROPEN, VICTIM IMPACT STATEMENTS: DO THEY MAKE A DIFFERENCE? 2 (2006). A copy of this report is available at <http://www.watchmn.org/pdfs/executive%20summary.pdf>.

49 See 18 U.S.C. § 3663A.

50 18 U.S.C. § 3572(b).

51 *United States v. Perry*, 360 F.3d 519, 526 (6th Cir. 2004).

52 See *Hagen v. Commonwealth*, 772 N.E.2d 32, 38 (Mass. 2002) (noting rights of victim and public to finality).

53 “The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law.” *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

- <sup>54</sup> 18 U.S.C. § 3006A.
- <sup>55</sup> *United States v. Stamper*, 766 F. Supp. 1396, 1397 (D.N.C. 1991).
- <sup>56</sup> See, e.g., *Fisher v. State*, 736 A.2d 1125, 1149 (Md. Ct. Spec. App. 1999) (“On March 23, 1998, Judge Levitz appointed Sandra Thornhill Brushart, Esquire, of the Baltimore County bar, to represent Georgia Fisher, to inform her of her psychotherapist-patient privilege, to ascertain her wishes with respect thereto, and to report those wishes to the court.”).
- <sup>57</sup> NCLVI provides technical assistance to attorneys who provide direct legal services to crime victims; researches and analyzes developments in crime victim law; files amicus briefs advocating for crime victims in courts; and offers education and training in crime victim law. For additional information, see [www.ncvli.org](http://www.ncvli.org).
- <sup>58</sup> The report is available at <http://meetings.abanet.org/webupload/commupload/CR300000/newsletterpubs/victimsreport.pdf>.
- <sup>59</sup> 18 U.S.C. § 3771(c).
- <sup>60</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 825 n.23 (1988).
- <sup>61</sup> 18 U.S.C. § 3509(h).
- <sup>62</sup> See, e.g., *State ex rel. Romley v. Dairman*, 95 P.2d 548, 553 (Ariz. Ct. App. 2004).
- <sup>63</sup> In every case involving an abused or neglected child, 45 C.F.R. § 1340.14 requires that the State ensure the appointment of a GAL, or other individual whom the State recognizes as fulfilling the same functions as a GAL, to represent and protect the rights and best interests of the child. For a description of the duties of the GAL, see 18 U.S.C. § 3509(h)(2).
- <sup>64</sup> As the court held in *United States v. Turner*, 367 F. Supp. 2d 319, 323 (E.D.N.Y. 2005), “Section 3771 grants specific rights to crime victims in subsection (a), and specifies in subsection (d)(3) the procedures by which victims can assert those rights in court and obtain judicial determination of such claims. No further statutory mandate would have been needed if all that Congress intended was to have judges rule on applications by aggrieved crime victims. But the statute also requires courts, in subsection (b), to ‘ensure that the crime victim is afforded the rights described in subsection (a).’ In order to give that provision separate meaning, courts must interpret it to require something more than merely ruling on applications for relief made pursuant to subsection (d)(3). Accordingly, I believe the provision requires at least some proactive procedure designed to ensure victims’ rights.”
- <sup>65</sup> 18 U.S.C. § 3771(b).
- <sup>66</sup> FED. R. CRIM. P. 11.
- <sup>67</sup> See, e.g., *Turner*, 367 F. Supp. 2d at 328 (directing prosecutor “to file with the court a list setting forth the name of (and contact information for) each individual it has identified as a victim of Turner’s alleged crime, including any person whom it characterizes as the victim of uncharged conduct, or to show good cause why it should not be required to do so”).
- <sup>68</sup> See Bennett L. Gershman, *Prosecutorial Ethics and Victims’ Rights: The Prosecutor’s Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559 (2005).
- <sup>69</sup> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- <sup>70</sup> See, e.g., *State v. Gonzales*, 125 P.3d 878 (Utah 2005) (“[T]he trial court responded to Mr. Montgomery’s unauthorized acquisition of the contents of Jessica’s therapy records by ordering him to write an apology to the victim, questioning whether the trial could be fair under the circumstances, and suggesting that he had created a conflict that ‘called into question the professional ethics of his continued representation of the defendant.’ Following this strong reprimand, Mr. Montgomery voluntarily moved to withdraw.”).

# Appendix A

## FORM MUST BE COMPLETED FOR EACH DEFENDANT OR JUVENILE

In the Circuit/Juvenile Court for _____ City/County Case No. _____
State v. _____ Date of Birth _____ / _____ / _____ <i>Name of Defendant/Juvenile</i>

### CRIME VICTIM NOTIFICATION REQUEST AND DEMAND FOR RIGHTS FORM (PLEASE PRINT ALL INFORMATION)

Victim's Name: Ms./Miss/Mrs./Mr. _____ If a minor, Date of Birth _____
If Victim is a Minor, or Deceased, or Disabled, please give:
Victim Representative's Name: Ms./Miss/Mrs./Mr. _____
Relationship _____
<b>I REQUEST NOTICE OF ALL EVENTS RELATED TO THIS CASE AND TO THE DEFENDANT/JUVENILE, AS ALLOWED BY LAW, AND DEMAND ALL THE RIGHTS TO WHICH VICTIMS OF CRIME ARE ENTITLED.</b>
_____ Date _____ <i>Signature of Victim or Victim's Representative</i>
<b>* See back of this form for specific instructions and information *</b>
<b><u>PLEASE PROVIDE AN ADDRESS AND PHONE NUMBER TO RECEIVE ALL NOTICES.</u></b>
<b><u>THIS FORM WILL BECOME PART OF THE PUBLIC RECORD IN THIS CASE. IF YOU DO NOT WANT YOUR ADDRESS AND PHONE NUMBER IN THE RECORD, PROVIDE AN ALTERNATE VICTIM CONTACT NAME, ADDRESS AND PHONE NUMBER</u></b>
Victim/Victim's Representative: _____
Address _____
City _____ State _____ Zip _____
Phone (day) _____ Phone (evening) _____
<b>Alternate Victim Contact</b>
<b><i>If another person or organization has agreed to receive and forward notices to you AND you agree to maintain contact with the Alternate, complete the following information:</i></b>
Name of Alternate Victim Contact _____
Relationship to Victim/Victim's Representative: <input type="checkbox"/> Family Member <input type="checkbox"/> Friend <input type="checkbox"/> Support Agency <input type="checkbox"/> Other
Contact Address: _____
City _____ State _____ Zip _____
Phone (day) _____ Phone (evening) _____

#### Additional services now available in Maryland for victims of crime:

VINE is a user-friendly notification service available 24 hours a day/7 days a week.  
For more information call 1-866-MD4VINE or register on-line at [www.vinelink.com](http://www.vinelink.com)

VICTIM RIGHTS COMPLIANCE LINE: 1-877-9CRIME2 or e-mail [victimrights@goccp-state-md.org](mailto:victimrights@goccp-state-md.org)

(WHITE: Clerk of Court; YELLOW: State's Attorney; PINK: Detention/DOC; GREEN: Parole & Prob; GOLDENROD: Victim/Victim's Rep.)