

The Crime Victims' Rights Act of 2004 and the Federal Courts
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I. Overview of the Act

As part of the Justice For All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (effective Oct. 30, 2004), victims of federal crimes were given significantly expanded rights in the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act (CVRA). The CVRA set forth these rights in newly enacted 18 U.S.C. § 3771, which also placed on the federal courts a duty to ensure that victims are afforded those rights. Section 3771 effectively replaces 42 U.S.C. § 10606 ("Victims' Rights"), now repealed by the CVRA, which included a list of victims' rights but did not provide any means of enforcement.

Among the rights given to victims by the CVRA are the right to be present at public court proceedings involving the crime, section 3771(a)(2) and (3), and the right to be "reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding," section 3771(a)(4). Up to now, victims have had a right to be heard only in limited circumstances. For example, Fed. R. Crim. P. 32(i)(4)(B) allows "any victim of a crime of violence or sexual abuse who is present at sentencing . . . to speak or submit any information about the sentence." (Note: Effective Dec. 1, 2008, a proposed amendment to Fed. R. Crim. P. 32(i)(4)(B) states that the sentencing court "must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.")

As did the prior statute, the CVRA directs Department of Justice personnel (and personnel of other agencies, as appropriate) to "make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)." Section 3771(c)(1). However, under section 3771(d)(1), crime victims are now authorized to assert those rights independently. In addition, the federal district courts themselves are now directed, "[i]n any court proceeding involving an offense against a crime victim, [to] ensure that the crime victim is afforded the rights described in subsection (a)." 18 U.S.C. § 3771(b)(1).

*This document will be updated periodically as warranted by additional case law or legislative changes. Readers should check the Center's website on the courts' intranet at cwn.fjc.dcn to be sure they have the most current version.

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In an amendment effective July 27, 2006, new section 3771(b)(2)(A) provides that “[i]n a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded” certain of the rights given to federal crime victims, namely: to be present at public court proceedings involving the crime; to be reasonably heard at any public proceeding involving release, plea, sentencing, or parole; to proceedings free from unreasonable delay; and to be treated with fairness and with respect for the victim’s dignity and privacy. Although the state crime victim can enforce these rights in the same way as a federal crime victim, see section 3771(b)(2)(B)(i), no agency is charged with providing notice or other assistance to a state crime victim under this section. In fact, section 3771(b)(2)(C) specifically excludes any “Executive Branch” personnel from “any obligation or requirement” in such proceedings.

The CVRA included a process for congressional review of the new legislation’s effectiveness: “[T]he Administrative Office of the United States Courts, for each Federal court, shall report to Congress the number of times that a right established in [section 3771] is asserted in a criminal case and the relief requested is denied and . . . the reason for such denial.” And within four years of the CVRA’s effective date, the Comptroller General shall submit a report on “the effect and efficacy of the implementation of the amendments made by this title on the treatment of crime victims in the Federal system.” See Pub. L. No. 108-405, Title I, § 104(a) and (b).

The expanded victims’ rights under the CVRA may affect several stages of federal criminal proceedings, from a defendant’s initial appearance through sentencing. The Center’s *Benchbook for U.S. District Court Judges* has been revised to reflect section 3771 and the possible effects on court procedure. Part II below provides a quick guide to how various procedures covered in the *Benchbook* may be affected by the CVRA. Part III notes several other issues that courts may have to deal with under the CVRA, and Part IV contains summaries of cases that have addressed aspects of the CVRA. The complete text of 18 U.S.C. § 3771 is provided in Part V.

II. *Benchbook* Sections Affected by the CVRA

Listed below are sections of the *Benchbook for U.S. District Court Judges* where the various provisions of section 3771 might come into play. Potential issues that may arise in a particular proceeding are also noted in some sections. Because of the right of victims to enforce their rights, courts may want to put on the record any matters pertaining to victims, such as inquiring whether the offense involved any victims, whether the government has provided the victims with adequate notice of all proceedings, and whether any victims wish to be “reasonably heard” where appropriate.

1.01 Initial Appearance

Section 3771(a)(2) to (4) may apply here. The victim has the right to be notified of and present at the defendant’s initial appearance, and if bail is to be set or denied at the initial appearance, the victim has the right to be “reasonably heard.” The district court may want to ask the prosecutor specifically if there are any vic-

tims in the offense and if they have been properly informed of these rights. See *U.S. v. Turner* in Part IV *infra* for a summary of a district court's actions to correct inadequate notice to victims about a defendant's arraignment and bail hearing.

A few other points should be considered here. Because the CVRA does not distinguish between proceedings that occur before a plea or guilty verdict and proceedings that follow a plea or verdict, it seems that in all proceedings courts must treat alleged victims as if they were admitted or proven victims. Also, now that video teleconferencing is available under Fed. R. Crim. P. 5(f) for the defendant's initial appearance, it raises the issue of where a victim who wishes to "be present" would go. Note, too, that because the time between arrest and initial appearance may be very brief, questions concerning what constitutes "reasonable . . . and timely notice" under section 3771(a)(2) may arise.

1.02 Assignment of Counsel or Pro Se Representation

If assignment of counsel is done in a public proceeding, as part of the defendant's initial appearance or separately, victims have the right to be notified and present.

1.03 Release or Detention Pending Trial

As noted for section 1.01, victims have a right to be reasonably heard when the court determines whether the defendant will be released before trial. Section 3771(a)(1) provides that crime victims have the right "to be reasonably protected from the accused."

Note that the statute does not in any way indicate what *weight* a court should give to a victim's statements. This may have to be decided on a case-by-case basis, and may also depend on the proceeding involved or the other legal requirements courts must consider, such as 18 U.S.C. § 3142 (for release) or the Sentencing Guidelines (for sentencing).

The statute also does not specify whether the right to be "reasonably heard" requires the court to allow an oral statement or can be limited to a written submission. One district court determined that, in a pretrial detention hearing, section 3771(a)(4) would be satisfied by a written statement under the particular circumstances of the case. See *U.S. v. Marcello* in Part IV, *infra*.

1.04 Offense Committed in Another District

If the defendant is arrested and makes his or her initial appearance in a district that is different from the one in which the offense was committed, a victim has the right to be notified and present. If the defendant agrees to have the prosecution transferred to the different district and pleads guilty or nolo contendere under Fed. R. Crim. P. 20, a victim also has the right to be reasonably heard at that proceeding.

1.05 Commitment to Another District (Removal Proceedings)

If the defendant is arrested in a district that is different from the one in which the offense occurred, as above, and declines to have the prosecution transferred, the court must hold a removal hearing in order to send the defendant to the district in

which the offense occurred. A victim has the right to be notified of and present at the removal hearing. Also, if the defendant is to be released on bail rather than held and transferred, a victim has the right to be reasonably heard.

Section 1.05 also covers commitment to another district after the arrest of a probationer or supervised releasee, which raises a question not answered by the text of section 3771. Are the victims of the original offense of conviction “victims” under the CVRA with respect to the violation proceedings? If the conduct underlying the violation of release was the commission of a new federal crime, are the victims of that crime entitled to the rights under the CVRA for the proceedings related to the violation? Or does the CVRA only apply to proceedings that result if new federal charges are brought for that underlying conduct?

1.06 Waiver of Indictment

A victim has the right to be notified of and present at a waiver of indictment hearing. If the release of the defendant becomes an issue, as when the defendant refuses to waive indictment and bail must be continued or modified, a victim has a right to be heard.

1.07 Arraignment and Plea

A victim has the right to be notified of and present at the defendant’s arraignment, and has the right to be heard regarding the plea and the continuation or resetting of bail.

Note that, as with the initial appearance in section 1.01 *supra*, the defendant may agree to video conferencing for arraignment. Fed. R. Crim. P. 10(c). A victim’s right to be present and reasonably heard must be accommodated if the court is in public session during the video teleconference.

1.08 Joint Representation of Codefendants

A victim has the right to be notified of and present at a hearing regarding joint representation of codefendants.

1.09 Waiver of Jury Trial

A victim has the right to be notified of and present at a hearing regarding waiver of a jury trial.

1.10 Speedy Trial Act

A victim has the right to be notified of and present at any public hearing regarding Speedy Trial Act issues. If a violation of the Speedy Trial Act could lead to dismissal of the charges against the defendant and to his or her possible release, it appears that a victim would have the right to be reasonably heard in any public proceeding on that issue.

Section 3771(a)(7) states that victims have a right to “proceedings free from unreasonable delay.” While that right may normally be compatible with a defendant’s right to a speedy trial, there are several exceptions in the Speedy Trial Act, *see* 18 U.S.C. § 3161(h), that could authorize a delay that seems unreasonable to a

victim. The question may arise whether a delay that is authorized under section 3161(h) is presumptively reasonable or possibly a violation of section 3771(a)(7).

A victim has the right to be notified of and present at any public hearing on a motion to delay the trial, but does not have the right to be reasonably heard unless the defendant is to be released upon a finding that his or her speedy trial rights were violated. If the defendant is not to be released, a victim can object to a delay only by filing a motion for relief under section 3771(d)(3). If a delay will be granted, the court may wish to explain to the victim, or ask the government to explain, why such a delay is necessary and not unreasonable.

1.11 Delinquency Proceedings

The definition of “victim” in section 3771(e) is not limited to victims of adult offenders, so it appears that the CVRA applies to juvenile offenses and delinquency proceedings. However, because those proceedings are generally not public, the rights to be notified of and present at any public proceeding, and to be heard at certain public proceedings, would not be applicable. See the summary of *U.S. v. L.M.* in Part IV, *infra*, for a discussion of this issue.

1.12 Mental Competency in Criminal Matters

A victim has the right to be notified of and present at a public hearing to determine the defendant’s mental competency. If civil commitment of the defendant is at issue, it could be argued that the CVRA gives the victim a right to be heard.

2.01 Taking Pleas of Guilty or Nolo Contendere

Any victims have the right to be “reasonably heard” at the plea hearing.

One significant question not addressed in the CVRA, for a plea hearing or any other proceeding, is *when* the victim must be heard. For the right to be meaningful, it can be argued that the victim should be heard before the court makes a decision, such as whether to accept a plea bargain or to release the defendant pending sentencing.

Note, however, that a victim’s rights with respect to a plea agreement do not extend beyond being heard and, under section 3771(a)(5), “confer[ring] with the attorney for the Government.” As the Second Circuit found in *In re W.R. Huff Asset Management Co., LLC*, summarized in Part IV, *infra*, “[n]othing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement.” And section 3771(d)(6) specifies that “[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.”

2.02 Taking Pleas of Guilty or Nolo Contendere (Organization)

As with a plea hearing for an individual defendant, a victim has the right to be reasonably heard at a plea hearing when the defendant is an organization. With organizations, there may be more of a chance that “the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a).” In that case, “the court shall fashion a reasonable procedure to

give effect to this chapter that does not unduly complicate or prolong the proceedings.” Section 3771(d)(2).

2.03 Trial Outline (Criminal Case)

Note that 18 U.S.C. § 3510 already prohibits excluding victims from the trial merely because they may speak at the sentencing hearing. Section 3771(a)(3) now prohibits exclusion of victims from any covered 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.” Even then, “the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding.” Section 3771(b). *See also* Fed. R. Evid. 615 (“This rule does not authorize exclusion of . . . a person authorized by statute to be present.”).

If the defendant is found guilty, section 3771(a)(4) appears to give a victim the right to be heard regarding the decision whether the defendant will be released pending sentencing.

2.06 Standard Voir Dire Questions—Criminal

Victims have the right to notice of and to be present during jury selection, unless the courtroom is closed for all or part of voir dire.

2.09 Verdict—Criminal

Victims have the right to be notified that the jury has reached a verdict and that the court will be reconvening to hear it.

2.10 Trial and Post-trial Motions

If a motion for judgment of acquittal, Fed. R. Crim. P. 29, a motion for new trial, Fed. R. Crim. P. 33, or a motion for arrest of judgment, Fed. R. Crim. P. 34, will involve a public hearing, victims should be notified.

2.11 Release or Detention Pending Sentence or Appeal

If there is an issue whether the defendant may be released pending sentencing or appeal, victims must be notified of the hearing and provided an opportunity to be heard. As noted earlier, section 3771(a)(1) provides that crime victims have the right “to be reasonably protected from the accused.” Under Fed. R. Crim. P. 46, the defendant has the burden of establishing that he or she does not “pose a danger to any other person or to the community.”

3.01 Death Penalty Procedures

The definition of “crime victim” in section 3771(e) states that, if the crime victim is deceased, “the representatives of the victim’s estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim’s rights under this chapter.”

Note that a defendant convicted of a capital offense will usually be sentenced by a jury. It seems that a victim's "right to be reasonably heard at . . . sentencing" would have to be before this jury to be meaningful.

4.01 Sentencing Procedure

A victim has the right to notice of the sentencing hearing and to be reasonably heard sometime during the hearing. As noted earlier for the plea hearing, courts will have to determine when during the hearing to allow a victim to be heard. Fed. R. Crim. P. 32(i)(4)(B) gives victims of a crime of violence or sexual abuse the right to make a statement and present information at sentencing. Court practice under Rule 32(i)(4)(B) may provide a model to follow. Note that a proposed amendment to Rule 32(i)(4)(B), to be effective December 1, 2008, states that the sentencing court "must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard." The Committee Note to Rule 32(i)(4)(B) adds that "[a]bsent unusual circumstances, any victim who is present should be allowed a reasonable opportunity to speak directly to the judge."

4.02 Revocation of Probation or Supervised Release

As noted above for section 1.05, courts may have to determine whether the victims of the original offense may also have rights when probation or supervised release is revoked. The Supreme Court has held that "postrevocation penalties relate to the original offense," so that "postrevocation sanctions [are] part of the penalty for the initial offense." *Johnson v. U.S.*, 495 U.S. 694, 700–01 (2000). Revocation of supervised release was at issue in *Johnson*, but the same reasoning could be applied to probation. If revocation proceedings are seen as "involving the [original] crime . . . of the accused," section 3771(a)(2), then the victims or the original offense may be entitled to the CVRA rights, including the rights to notice of any public court proceedings, to be present at such proceedings, and to be "reasonably heard" at sentencing.

Also, if the violation of probation or release involves not just a violation of the conditions of release but a new crime, even if not separately charged, could the revocation proceeding be considered to "involve" the new crime of the accused so as to entitle any victims of that offense to the CVRA rights?

III. Other Issues That May Arise Under the CVRA

A. Large numbers of victims

Although section 3771(d)(2) provides courts with the flexibility to "fashion a reasonable procedure" when trying to accommodate the rights of large numbers of victims, it does not offer any specific ways to do so. How, for example, would the "right to be reasonably heard" be satisfied? Could the court select a group of representative victims to be heard in court, perhaps allowing the rest to submit written statements? If the number of victims who want to be present at a proceeding exceeds the capacity of the courtroom, how shall the court determine who is allowed to attend? And, while the prosecution is responsible for notifying and con-

sulting with the victims, the court may be called upon to determine whether those efforts were adequate under the CVRA.

B. Alternative means of being “heard”

May a court accommodate a victim’s right to be reasonably heard by means other than in person? For example, a child victim is allowed under 18 U.S.C. § 3509(b) to testify on closed-circuit television or videotape if the court finds that the child could not testify in person because of fear, or that there is a substantial likelihood that the child would suffer emotional trauma. The CVRA does not specifically allow or prohibit such an alternative means of being “heard.” A similar accommodation might be considered in cases in which victims live far from the courthouse, as may happen in a large, multi-state fraud case.

C. Weight to give victim’s statement

When a victim has the right to be heard at a proceeding, what weight, if any, must the court give to the victim’s statement or other submission? Must the court somehow account on the record for the impact, if any, such submissions have on its decisions involving release, plea, sentencing, or parole?

D. Waiver of rights by victim

If a victim waives any of the rights granted by the CVRA—intentionally or simply by a failure to respond to notice—would it be prudent to make a record of the waiver? Can a victim rescind an initial waiver and seek to enforce his or her rights later in the proceedings?

E. Act applies to all federal offenses

The CVRA is not limited to felony offenses. A victim is defined, in part, in section 3771(e) as a person harmed “as a result of the commission of a federal offense,” so it seems that the CVRA could apply to a misdemeanor offense or infraction.

F. Possible Confrontation Clause issues

Does the defendant have any right to cross-examine a victim who makes an oral statement? To dispute written statements? To challenge any other evidence proffered by a victim? To give a rebuttal? The substance of a victim’s statements or other submissions may raise Confrontation Clause issues.

G. Absent defendant

Note that the CVRA does not require that the defendant be present for a victim to have the right to notice or to be heard. The victim would, for example, still have a right to be notified of an arraignment if the defendant waived his or her appearance under Fed. R. Crim. P. 10(b). And if the defendant escaped after conviction and was to be sentenced in absentia, it appears that the victim would retain the right to be heard at sentencing and to receive notice of any public court proceeding related to the escape itself.

H. Victims and relevant conduct

What about victims of related but uncharged, dismissed, or acquitted criminal conduct? If a defendant is, for example, charged with three counts involving separate but related offenses, each with different victims, and as part of a plea agreement one or two counts are dismissed, are the victims of the dismissed counts also “dismissed” from proceedings thereafter?

Or, because under the U.S. Sentencing Guidelines, relevant or related conduct that is considered at sentencing may involve victims who are not victims of the count or counts of conviction, could there be circumstances where such victims can be considered “directly and proximately harmed as a result of the commission of” the offense of conviction so as to qualify as victims under section 3771(e)? Similarly, can there be a CVRA “victim” in an ostensibly victim-less crime of conviction, such as an illegal weapon possession offense that involved an uncharged assault that may be considered at sentencing? See summaries of *In re Antrobis* and *U.S. v. Sharp* in Part IV, *infra*.

I. Motion for relief—procedures and remedies

When a victim makes a “motion for relief” under section 3771(d)(3), the district court is to “decide any motion asserting a victim’s rights forthwith.” The statute does not further specify a time limit or a procedure for deciding the motion. Should the court hold a hearing? Should it allow submission of briefs or otherwise give the prosecution and defendant an opportunity to respond? If the claimed violation relates solely to an action of the government, is the defendant entitled to notice and an opportunity to be heard on the motion?

What remedies are available for a violation? If a victim claims, for example, that the government is not reasonably conferring under section 3771(a)(5), could the court order the government to hold more frequent meetings with the victim, or perhaps provide written answers to questions the victim may have? What if the violation relates to the right to notice of and to be present at a proceeding that has already occurred?

J. Motion to reopen a plea or sentence—procedures

Section 3771(d)(5) states that under limited circumstances a victim “may make a motion to re-open a plea or sentence” when the right to be heard was denied. If the plea or sentence is reopened, then what? Could the defendant withdraw his or her plea? Could the defendant or government seek to renegotiate a plea agreement? Would sentencing have to begin anew? Or could the court simply give the victim an opportunity to be heard and re-accept the plea and/or reinstate the sentence? If the victim is given the opportunity to be heard, should the defendant and government be allowed to respond? What happens if the court decides, after the victim’s statement, to disallow the plea or change the sentence?

K. Restitution

How will section 3771(a)(6)’s “right to full and timely restitution as provided in law” interact with the current restitution statutes, such as sections 3663, 3663A, and 3664? Since under section 3771(d)(1) each crime victim “may assert the

rights described in subsection (a),” could a victim file a motion claiming that restitution is not “full” or “timely” under the applicable restitution statute? Could a victim claim that the court did not adequately follow section 3572(b), which directs it to impose a fine “only to the extent that such fine . . . will not impair the ability of the defendant to make restitution”? Does a victim’s right to restitution remain in force until the amount of restitution ordered is fully paid? (Note that section 3771 only imposes a time limit on motions “to re-open a plea or sentence.”)

If payment of restitution is a condition of probation or supervised release, could a victim’s complaint that restitution is not being paid be used to begin revocation proceedings? And would the victim then have the right to be present and possibly be heard at any revocation hearings?

L. Challenging a victim’s status

Because a victim’s rights under the CVRA seem to begin long before an actual guilty plea or conviction after trial, the status of “victim” may be based on allegations rather than proof. Does the defendant have the right to challenge whether a person should be considered a victim under section 3771(e)? If so, when and how? Would the victim and the government then be required to supply some modicum of proof that the person in question actually is a victim of the defendant’s offense?

M. Oath or affirmation by victim

Should a victim be treated like a witness and required to take an oath or make an affirmation before being allowed “to be reasonably heard”? Should some form of affidavit be required for written submissions?

N. Potential claims against government

Note that, although 42 U.S.C. § 10606 was repealed, section 10607 remains in effect. It outlines the specific “services to victims” that government personnel must supply, some of which are related to the rights set out in section 3771. Although section 10607(d) specifically states that it “does not create a cause of action” for failure to provide these services, a failure to satisfy section 10607 could be relevant to some claims under the CVRA, such as the government did not adequately consult with the victim, section 3771(a)(5), or the victim was not “treated with fairness and with respect for the victim’s dignity and privacy,” section 3771(a)(8).

O. Organizational “victims”

Do companies or other organizations have rights under the CVRA? The definition of “victim” in section 3771(e) refers only to “a person,” and the alternates who may assume the rights of an incapacitated victim are also individuals. However, organizations are not specifically excluded. A related statute, 42 U.S.C. § 10607(e), includes “an institutional entity” in its definition of a victim.

P. Habeas corpus proceedings

As noted above in Part I, section 3771(b)(2) was added in 2006 to give some rights to state crime victims when the defendant brings a habeas proceeding in federal court. The federal courts are again charged with “ensur[ing] that a crime victim is afforded the rights described” therein. However, this section does not require anyone to provide notice to state victims, as the government must for federal crime victims under section 3771(c)(1). As part of its obligation to “ensure” that victims are afforded their rights, should a court take any steps to see that state crime victims are notified?

Also, regarding the right to be heard at a public proceeding “involving release, plea, sentencing,” how should “involving” be interpreted in the habeas context? In a regular federal criminal proceeding, “involving the plea” would refer to the plea colloquy and the taking of the defendant’s plea. In the habeas context, the plea colloquy and plea occurred previously in the state court. The same is true of the sentencing hearing and imposition of sentence. If plea or sentencing is “involved” in habeas, it may only be as legal arguments about the validity of past pleas or sentences. Should section 3771(b)(2)(A) be read as allowing a victim to be heard during such arguments?

IV. Case Summaries

Note: Because there are still relatively few opinions available on the CVRA, this section will list unpublished opinions and orders as well as published cases. These are provided for informational purposes only, and their listing here should not be considered any indication of precedential value. In each section, published cases will be listed first, starting with the most recent.

A. Courts of Appeals

1. *In re Dean*, __ F.3d __ (5th Cir. May 7, 2008) (per curiam)

Victims from the *BP Products* case, *infra*, petitioned the appellate court for a writ of mandamus after the district court denied their motion to reject the plea agreement between the government and BP Products and their claim that their rights under the CVRA were violated. [Note: See the summary of *BP Products, infra*, at B.11, for details of the underlying case.] Although the appellate court agreed that their rights had been violated, it denied the petition because it did not meet the strict standards for granting a writ of mandamus.

The court first held that it agreed with *In re Antrobus, infra*, that the strict standards for obtaining a writ of mandamus apply, rather than the “ordinary appeal standards” used in *Kenna I* and *In re Huff, infra*. “A writ of mandamus may issue only if (1) the petitioner has ‘no other adequate means’ to attain the desired relief; (2) the petitioner has demonstrated a right to the issuance of a writ that is ‘clear and indisputable;’ and (3) the issuing court, in the exercise of its discretion, is satisfied that the writ is ‘appropriate under the circumstances.’”

The court then found that, “under the specific facts and circumstances of this case, it was contrary to the provisions of the CVRA for the court to permit and employ the *ex parte* proceedings that have taken place—proceedings that have no

precedent, as far as we can determine. . . . The district court acknowledged that ‘[t]here are clearly rights under the CVRA that apply before any prosecution is underway.’ . . . Logically, this includes the CVRA’s establishment of victims’ ‘reasonable right to confer with the attorney for the Government.’ 18 U.S.C. § 3771(a)(5). . . . The government and the district court relied on the provision of the CVRA that states that ‘[i]n a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.’ 18 U.S.C. § 3771(d)(2). Here, however, where there were fewer than two hundred victims, all of whom could be easily reached, it is not reasonable to say that notification and inclusion were ‘impracticable.’”

As for the district court’s concern that early notification could impair the plea negotiation or prejudice the case, “the court missed the purpose of the CVRA’s right to confer. In passing the Act, Congress made the policy decision—which we are bound to enforce—that the victims have a right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached. That is not an infringement, as the district court believed, on the government’s independent prosecutorial discretion . . . ; instead, it is only a requirement that the government confer in some reasonable way with the victims before ultimately exercising its broad discretion.”

However, the petition would be denied “because a writ is not ‘appropriate under the circumstances.’ . . . [A]s we have explained, the victims were notified—albeit much too late in the process—and were allowed substantial and meaningful participation at the February 4 hearing. . . . The district court, therefore, has the benefit of the views of the victims who chose to participate at the hearing or by their various filings. . . . The decision whether to grant mandamus is largely prudential. We conclude that the better course is to deny relief, confident that the district court will take heed that the victims have not been accorded their full rights under the CVRA and will carefully consider their objections and briefs as this matter proceeds.”

See also *In re Antrobus* and *BP Products*, *infra*. Cf. *Kenna I* and *In re Huff*, *infra*.

2. *U.S. v. Eberhard*, __ F.3d __ (2d Cir. May 5, 2008) (Jacobs, C.J.)

Shortly before passage of the CVRA, the defendant pled guilty to conspiracy, investment advisor fraud, and obstruction of justice. The parties stipulated to a guidelines range of 97–121 months. The presentence report added an enhancement for a leadership role and calculated the guidelines range at 151–188 months, but recommended a below-range sentence of 96 months. Before sentencing, the district court issued a written opinion adopting the PSR’s calculations, but indicated it planned to impose a sentence of 151 months. At the sentencing hearing, which occurred several months after the effective date of the CVRA, the court “heard from several victims, who urged a draconian sentence.” The court sentenced the defendant to 160 months. The defendant appealed his sentence, in part on the ground that the CVRA “is unconstitutional as applied to him . . . [because,]

as a consequence of § 3771(a)'s requirement that his victims be allowed the 'right to be reasonably heard' at his sentencing (and of their vindictive statements), he received a sentence nine months longer than otherwise, and that § 3771(a) thus violated his rights under both the *Ex Post Facto* and Due Process Clauses."

The appellate court found the defendant's claims were without merit and affirmed. The court stated that, apart from the fact that courts were permitted to allow victims to speak long before passage of the CVRA, "even if we assumed (as we do not) both that (1) the longer sentence was attributable to the victim statements and (2) the court was barred from considering victim impact statements prior to enactment of § 3771(a), Eberhard's *Ex Post Facto* rights would still be unimpaired. The *Ex Post Facto* Clause does not prohibit all retroactive laws that disadvantage defendants, . . . [and a] law requiring that victims be reasonably heard (if they request) after the defendant has already been convicted does not implicate the *Ex Post Facto* clause."

On the due process claim, the defendant argued "that the district court's application of § 3771(a) allowed or compelled the government to circumvent the agreement through 'victim-surrogates,' and thereby deprived Eberhard of the benefit of his plea agreement." The appellate court rejected this argument also, finding that "nothing in the [plea agreement] precluded the government from presenting victim impact testimony. There was no evasion of the contractual limitations on the government's legal arguments: the victims' pleas for a harsh sentence were incidental to presentation of facts. They were not allowed to argue as *amici curiae*." The defendant also claimed that "he received insufficient notice both of the identity of the victims who would address the sentencing court and of the nature of their statements. But the court afforded Eberhard an opportunity to respond after hearing from the victims. Eberhard neither objected to the victim statements nor requested additional time to prepare a more thorough response."

3. *In re Antrobus*, 519 F.3d 1123, 1124–26 (10th Cir. 2008)

The defendant pled guilty to the illegal transfer of a handgun to a juvenile. Several months after the sale, and after the juvenile had turned eighteen, the juvenile killed several people at a shopping center and was himself killed. The parents of one of the victims of that crime moved to have their daughter recognized as a victim of the instant crime so that they, assuming her rights under section 3771(e), would be allowed to be heard at this defendant's sentencing. The district court held that the illegal gun sale was not a direct and proximate cause of the later murder and the daughter was not a "victim" of the illegal gun sale under the terms of section 3771(e); therefore, the parents did not have a right to be heard at sentencing. *U.S. v. Hunter*, No. 2:07CR307DAK (D. Utah Jan. 3, 2008) (Kimball, J.) (memorandum decision and order).

The parents petitioned for a writ of mandamus, but the court of appeals upheld the district court's decision and denied the writ. After first finding that the standard of review for a writ of mandamus requires the petitioners to "show that their right to the writ is 'clear and indisputable,'" the court concluded that, under the facts of the case, "we cannot say that the district court was clearly wrong in its conclusion." In a later order denying the petitioners' request for a rehearing, the

court more fully explained its decision to treat the petition under the stricter standards for review of writs of mandamus rather than the standards that apply to review of interlocutory appeals, noting its disagreement on this issue with *In re Huff* and *Kenna I, infra*.

See also *In re Dean, supra*, and *Sharp, infra*.

4. *U.S. v. Ausburn*, 502 F.3d 313, 324 & n.17 (3d Cir. 2007)

The defendant pled guilty to an offense involving sex with a minor. He received a sentence of 144 months, approximately double the high end of the applicable guidelines range. On appeal, the defendant claimed that he should have received prior notice that the court was considering imposing a sentence so far above the guidelines range, and also that the sentence was unreasonable. As part of his claim of inadequate notice, the defendant “contends that he was subject to unfair surprise because he ‘had no idea that the district court intended to double his sentence based upon victim statements,’ and that ‘had [he] received prior notice, he could have taken action to mitigate the victim statements.’”

The appellate court remanded, holding that the defendant’s sentence was unreasonable because the district court failed to adequately respond to his arguments for a lower sentence. However, the court rejected the defendant’s argument that the victim statements unfairly surprised him. Noting that the CVRA gives victims the right to participate in criminal cases and to allocute at sentencing, the court added that “we perceive no violation of due process in the ‘emotional appeal’ presented by the victim impact statements. While it may be true that the statements presented a compelling account of the harms allegedly wrought by Ausburn’s conduct, this is inherent in the victim’s right to attend court and present his or her own account of the crime and its impact. . . . Nothing in the victim impact statements in this case was so unfairly prejudicial or inflammatory as to present a due process issue.”

5. *U.S. v. Moussaoui*, 483 F.3d 220, 234–35 (4th Cir. 2007)

The defendant was convicted of offenses related to the September 11 terrorist attacks. Separate from the criminal prosecution, victims and family members of victims of the attacks brought civil suits against the defendant and others. The civil plaintiffs filed a motion with the court handling the criminal case for access to virtually all non-public discovery materials provided by the government to the defendant. The district court, basing its decision partly on the CVRA, ordered the government to provide much of that material. A later order granted the court handling the civil suit the authority to determine what documents could be disclosed. The government appealed the orders.

In reversing this decision on several grounds, the appellate court found that the CVRA offered “no support for the district court’s orders.” “The rights codified by the CVRA . . . are limited to the criminal justice process; the Act is therefore silent and unconcerned with victims’ rights to file civil claims against their assailants.”

See also *Kenna II, Brock, Citgo*, and *Sacane, infra*.

6. *In re Kenna*, 453 F.3d 1136, 1136–37 (9th Cir. 2006) (per curiam) (Kenna II)

A victim in a fraud case filed a petition for a writ of mandamus, seeking an order to require the sentencing court to release to the victim the entire presentence report. Agreeing with the district court, the appellate court found no support “in either the language of the statute or the legislative history” for the victim’s argument that the CVRA conferred a general right for crime victims to access presentence reports. The district court had also found that the victim “has not demonstrated that his reasons for requesting the PSR outweigh the confidentiality of the report under the traditional ‘ends of justice’ test.”

See also *Moussaoui*, *supra*, and *Brock*, *Citgo*, and *Sacane*, *infra*.

7. *In re Mikhel*, 453 F.3d 1137, 1139–40 (9th Cir. 2006) (per curiam)

In a multiple-murder case, the government moved to allow family members of the murder victims—including those who planned to testify—to observe the trial in its entirety. The district court ruled that non-witness family members could observe the entire trial, but that witnesses would be excluded from the courtroom until after they had testified. The government then filed a petition for a writ of mandamus under section 3771(d)(3) to order the district court to allow the witness family members to observe the entire trial.

The appellate court granted the writ and remanded for reconsideration, after first finding that the family members would be considered to have “assume[d] the [deceased] crime victim[s]’ rights” pursuant to section 3771(e). Although Fed. R. Evid. 615 allows a party to request that the court “order witnesses excluded so they cannot hear the testimony of other witnesses,” the rule contains an exception for “a person authorized by statute to be present.” The court concluded that section 3771(a)(3) provides just such an exception, and reading the rule and statute together, it held that the “mere *possibility* that a victim-witness may alter his or her testimony as a result of hearing others testify is therefore insufficient to justify excluding him or her from trial. Rather, a district court must find by clear and convincing evidence that it is *highly likely*, not merely *possible*, that the victim-witness will alter his or her testimony.” On remand, the district court must “consider whether clear and convincing evidence proves that the victim-witnesses’ testimony will be ‘materially altered’ if they are allowed to attend the trial in its entirety.”

See also *Johnson*, *infra*.

8. *Kenna v. U.S. Dist. Court for the Central Dist. of Calif.*, 435 F.3d 1011, 1015–16 (9th Cir. 2006) (Kenna I)

The defendants, a father and son, defrauded dozens of victims in an investment scheme. Several victims spoke at the father’s sentencing. When the son was sentenced three months later, the court denied the victims the opportunity to speak, stating that it had heard the victims at the previous sentencing and did not think they could say anything that would impact the court’s sentence because the court already considered the crime to be very serious, and that if anything had changed since the first sentencing, the prosecutor would inform the court. One victim filed

a petition for mandamus, seeking an order vacating the defendant's sentence and ordering the court to allow the victims to speak at the resentencing.

The appellate court granted the petition, finding that, despite the use of the term "mandamus," the CVRA contemplates "routine interlocutory review of district court decisions denying rights asserted under the statute . . . [and] we must issue the writ whenever we find that the district court's order reflects an abuse of discretion or legal error." After determining that the statute "is ambiguous as to what it means for crime victims to be heard," the court turned to the legislative history of the CVRA for guidance. Reviewing the floor statements of the bill's sponsors, as well as an earlier Senate report, the court concluded that there was "a clear congressional intent to give crime victims the right to speak at proceedings covered by the CVRA." That right was not satisfied by the fact that the victims were allowed to speak at the father's sentencing three months earlier. The right to be heard at any public proceeding involving sentencing "means that the district court must hear from the victims, if they choose to speak, at more than one criminal sentencing." It was left to the district court to decide whether it should conduct a new sentencing hearing.

See also *Degenhardt* and *Marcello*, *infra*.

9. *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 558–64 (2d Cir. 2005)

In what appears to have been the first appellate decision involving an action brought under the CVRA, a group of victims petitioned for a writ of mandamus, seeking to vacate a settlement agreement in a forfeiture action. The underlying case involved a large and complex securities fraud, and the government entered into a proposed settlement agreement that involved setting up a \$715 million victim compensation fund. To receive a distribution from the fund, victims would have to forgo most separate civil actions. Two sets of victims objected to the proposed settlement, claiming mainly that the compensation fund would be inadequate and their right to "full and timely restitution" under section 3771(a)(6) would be violated. Victims also argued that the government did not adequately consult with the victims before entering the settlement, section 3771(a)(5), and that the victims were not "treated with fairness," section 3771(a)(8). The district court accepted the settlement agreement and ruled against the victims, finding that, in light of the complexity of the case and the many thousands of potential victims, the settlement was the sort of reasonable compromise envisioned by section 3771(d)(2) to avoid "unduly complicat[ing] or prolong[ing] the proceedings."

The appellate court, after first holding that "a district court's determination under the CVRA should be reviewed for abuse of discretion," denied the petition for mandamus. The right to full and timely restitution is qualified by the phrase "as provided in law." The court found that the relevant law was the Mandatory Victim Restitution Act, 18 U.S.C. § 3663A, which specifically allows for less than full restitution in a case with so many victims as to "make restitution impracticable" and complex issues that could "complicate or prolong the sentencing process." The court also noted that the settlement agreement involved some defendants who were not convicted, as well as other individuals who had not been

charged. “[T]he CVRA does not grant any rights against individuals who have not been convicted of a crime. Concomitantly, neither the Government nor the sentencing court are restricted by the CVRA from effecting reasonable settlement or restitution measures against non-convicted defendants.”

As to the other claims, the appellate court held that “no petitioner has alleged that it asked the Government to confer with it and was denied the opportunity to do so. Nothing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement. The CVRA requires only that the court provide victims with an opportunity to be heard concerning a proposed settlement agreement, and the court provided the victims with a full opportunity to do so in this case.” The court also held that “the district court in no way treated the victims unfairly or without ‘respect for [their] dignity and privacy,’ 18 U.S.C. § 3771(a)(8), but rather took into consideration the numerosity of victims, the uncertainty of recovery, and the prospect of unduly prolonging the sentencing proceedings when adopting the settlement, factors which Congress has required the court to consider. See 18 U.S.C. § 3771(d)(2).”

**10. *In re Brock*, No. 08-1086 (4th Cir. Jan. 31, 2008) (per curiam)
(unpublished)**

Prior to sentencing, the victim filed a motion requesting disclosure of several parts of the defendants’ sentencing reports, including the calculation of their guideline ranges. The district court denied the motion, finding that the victim, who had already been given some documents relating to the defendants’ sentencing, had sufficient information to make a victim impact statement. The victim did, in fact, file a victim impact statement and speak at sentencing. After the sentencing, however, he filed a mandamus petition, claiming that the district court did not sufficiently afford him the rights under section 3771(a)(4) and (8) “to be reasonably heard at . . . sentencing” and “to be treated with fairness and with respect for [his] dignity.”

The appellate court denied the petition. “Based on the record before us, we cannot conclude that the district court abused its discretion or abridged Brock’s rights under the CVRA by denying him access to portions of the PSR. Although Brock claims that, without the PSR, he had insufficient knowledge of the issues relevant to sentencing to meaningfully exercise his right to be reasonably heard, the record reveals that he was provided ample information concerning the applicable Sentencing Guidelines and other issues related to the defendants’ sentencing. And, of course, he did not need access to the PSR to describe the crime’s impact on him.” As for the calculation of the guideline ranges, the district court had stated that it would have imposed the same sentence, and in any event, the appellate court noted that “the CVRA does not provide victims with a right to appeal a defendant’s sentence by challenging the district court’s calculation of the Guidelines range.”

See also *Moussaoui* and *Kenna II*, *supra*, and *Citgo* and *Sacane*, *infra*.

11. *In re Jane Doe*, No. 07-1705 (4th Cir. Aug. 9, 2007) (per curiam) (unpublished)

In a federal criminal prosecution of a pharmaceutical company, Purdue Frederick Company, Inc., and its corporate officers for misbranding the prescription drug OxyContin, the parties sought acceptance from the district court of a proposed plea agreement. The agreement would require the company to pay a significant amount of fines and penalties, and provide restitution to various entities affected by the misbranding conduct. However, the parties asked the court to limit the restitution obligations to those provided in the plea agreement. An individual who had used OxyContin objected to the proposed limitation on restitution, claiming that under the CVRA, she, too, should receive restitution for harms suffered from using OxyContin to treat chronic pain. The district court denied her motion and accepted the guilty plea and plea agreement. The individual then petitioned the appellate court for a writ of mandamus under the CVRA, seeking to reopen the company's sentencing and enforce her claimed right to restitution.

In denying the petition, the appellate court first noted that the petitioner had to demonstrate a legal entitlement to restitution. The CVRA itself does not provide that entitlement; rather, it states that a victim has a right to full and timely restitution "as provided in law." 18 U.S.C. § 3771(a)(6). The relevant law in this instance, as the petitioner acknowledged, is the Victim Witness and Protection Act (VWPA), 18 U.S.C. § 3663. Under the VWPA, restitution is limited to "victims" as defined in the statute. Section 3663(A)(2) states that "the term 'victim' means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." Although "not unsympathetic" to the petitioner's problems, the court found that "we cannot conclude that they were 'directly and proximately' related to the conduct underlying Purdue's offense of conviction so as to justify restitution under § 3663. Purdue pleaded guilty to introducing a misbranded drug into interstate commerce with the intent to defraud or mislead. . . . In order to qualify as a victim under § 3663, Petitioner would have to demonstrate that her injuries flowed 'directly and proximately' from the conduct underlying one of the elements of this offense." Because no evidence to that effect had been introduced, "we cannot conclude that the district court abused its discretion in denying [the] motion under the CVRA to seek such restitution."

B. District Courts

1. *U.S. v. Sharp*, 463 F. Supp. 2d 556, 561–67 (E.D. Va. 2006)

The defendant pled guilty to a conspiracy to possess with intent to distribute marijuana. The former girlfriend ("Nowicki") of one of the defendant's customers claimed that her former boyfriend abused her at least in part because of his use of the marijuana sold by the defendant, and that she is therefore a victim of the defendant's offense, with the right to give a victim impact statement at the defendant's sentencing hearing.

After an extensive discussion of the meaning of "directly and proximately harmed," the standard under section 3771(e), the court concluded that she was not a victim of the defendant's offense under the CVRA. "Here, Nowicki is not a 'victim' as that term is used in the CVRA because she is not a person 'directly

and proximately harmed' by the federal crime committed by the Defendant. The Defendant has pled guilty to conspiring to distribute marijuana. But linking this fact to Nowicki's abuse is too attenuated, either temporally or factually, to confer 'victim' status on Nowicki as that term is used in the statute. Nowicki is no doubt an alleged victim of her boyfriend's violent ways. But Nowicki cannot demonstrate the nexus between the Defendant's act of selling drugs and her former boyfriend's subsequent act of abusing her."

See also *Antrobus, supra*.

2. *U.S. v. Heaton*, 458 F. Supp. 2d 1271, 1272–73 (D. Utah 2006)

After charging the defendant with attempting to entice a minor into unlawful sexual activity, the government sought leave to dismiss the charge without prejudice, citing as its reason only that the dismissal would be "in the interest of justice." Apart from noting that the court should make its own determination whether dismissal is warranted, it found that "[t]here is a particular need to examine the reasons for dismissal in this case to ensure that the crime victim's rights are fully protected. The indictment alleges a sexual offense against a young victim. Under the Crime Victims' Rights Act (CVRA), this victim has the broad right 'to be treated with fairness and with respect for [her] dignity and privacy.'"

"This victim's right to fairness extends to the court's decision regarding whether to dismiss an indictment even though no public proceeding will be held on the issue. Although some of the other rights in the Crime Victims' Rights Act (such as the right to be heard and the right to not be excluded) are limited to 'public proceedings,' the right to fairness is not so restricted."

"When the government files a motion to dismiss criminal charges that involve a specific victim, the only way to protect the victim's right to be treated fairly and with respect for her dignity is to consider the victim's views on the dismissal. . . . [B]efore granting any motion by the government . . . to dismiss charges involving a specific victim, the court must have the victim's views on the motion." In such cases, therefore, the government should consult with the victim and inform the court "that the victim has been consulted on the dismissal and what the victim's views were on the matter."

3. *U.S. v. L.M.*, 425 F. Supp. 2d 948, 951–57 (N.D. Iowa 2006)

A juvenile defendant ("L.M.") was charged with multiple counts of heroin distribution, including counts of distribution resulting in death (of a juvenile, "T.L.") and in serious bodily injury (to a different juvenile). The government filed a motion to transfer the juvenile defendant to adult status, but before that hearing was held the government asked the court for permission to notify T.L.'s family members of the proceedings and to allow them to attend any hearings related to this case. Because the defendant was still being treated as a juvenile at this stage, the court engaged in an extensive examination of how to protect the rights of the juvenile while also taking into account the rights of the victims to be present under section 3771(a)(3) and (b)(1). The court considered whether the proceedings should be closed and what steps could be taken to allow victim participation.

The court first held that a juvenile proceeding was not by nature a closed proceeding, but that the court has discretion to balance the interests of the public, the

victims, and the defendant on a case-by-case basis. After reviewing the many competing factors in this case, the court granted the government's motion to notify T.L.'s family of the proceedings against L.M. and unseal the case, but only after certain redactions in the record to protect L.M.'s interests. The family would be allowed to attend any public proceedings, but the transfer hearing would be closed to the public. The court reserved ruling on whether other hearings would be open to the public. The court ordered the government to "inform all of the crime victims of their CVRA rights," including "their rights to appeal this order."

4. *U.S. v. Degenhardt*, 405 F. Supp. 2d 1341, 1343–45 (D. Utah 2005)

Prior to the sentencing hearing of a defendant in a multimillion dollar fraud case, the government informed the court that several victims planned to attend and wished to make a statement to the court. The district court had to determine whether the right of any federal crime victim to "be reasonably heard" at sentencing conflicted with the narrower right to speak granted in Fed. R. Crim. P. 32(i)(4)(B), which is granted only to victims of certain violent or sexual crimes.

The court held that "a broad congressional mandate in a statute must take precedence over a narrower court rule, . . . [and] the limits in Rule 32 of the Federal Rules of Criminal Procedure must give way to the CVRA's command that all victims have the right to allocute." The court also concluded that "the CVRA gives victims the right to speak directly to the judge at sentencing." The phrase "to be reasonably heard" is ambiguous, but the legislative history "makes it clear that the CVRA created a right to be heard in person." Finally, the court concluded that a victim's right to speak is mandatory, and is not subject to the discretion of the court unless such a large number of victims are involved that the court's ability to function effectively would be threatened.

See also *Kenna I*, *supra*, and *Marcello*, *infra*.

5. *U.S. v. Crompton Corp.*, 399 F. Supp. 2d 1047, 1051 (N.D. Cal. 2005)

In an antitrust case, the defendant company pled guilty to one count and was sentenced according to the terms of a plea agreement. In order to protect ongoing investigations in which the defendant was assisting the government, the sentencing hearing was closed, the transcript of the sentencing was sealed, and the plea agreement was filed under seal. Later, the government moved to unseal the plea agreement and the transcript. The defendant did not oppose the motion, but requested that the name of one of its executives—who had not been indicted—be redacted from any documents before they were unsealed.

The district court granted the motion to unseal the documents, but denied the motion to redact the name of the executive. Apart from policy considerations and the fact that the plea agreement probably should not have been sealed in the first place, the court found that redacting the executive's name "would violate the Crime Victims' Rights Act." The defendant wanted to shield the executive from civil lawsuits filed against the company by victims of the offense. "[T]he plaintiffs in the additional civil lawsuits filed against Defendant are those who were directly and proximately harmed as a result of the commission of the antitrust violation. Therefore, the Court should be particularly sensitive to ensuring they are

given full access to the proceedings and the Plea Agreement” in accordance with section 3771(a)(2)–(3), (b).

6. *U.S. v. Ingrassia*, 392 F. Supp. 2d 493, 495–98 (E.D.N.Y. 2005)

This case provides some examples of notice issues under the CVRA when multiple victims are involved. After the government had identified more than 200 victims of the large securities fraud scheme at issue, it initially sought to provide notice solely through publication. The court rejected that request, and required the government to submit a proposed notice for the court’s review and to then provide the approved notice to each identified victim by mail with return receipt requested. The court later removed the requirement for a return receipt and approved a request by the government to supplement the mailing by including notice of the case in a national publication.

The notice mailed to the victims informed them about the case and their rights under the CVRA. It also stated that there was a pending trial date and that they could obtain current information about the case through the government’s Victim Notification System (VNS); they were also given an identification number and a phone number to gain access to the VNS. The notice added that, because of the large number of victims, further information would most likely be provided only through the Internet or the VNS call center. A week later, the government sent a second mailing that informed victims that three of the defendants were going to plead guilty and provided the scheduled dates and times for the pleas, but it did not place this information on its website. At the same time, the government placed an advertisement in *USA Today* to notify unidentified potential victims about the case. The ad listed a government website that contained information concerning victims’ rights, how to register as a victim, and how to obtain access to the VNS. The website also contained a link to provide updated information about the case. However, the information provided at that link was not current.

At issue in the instant decision was a report to the court by a magistrate judge relating to plea proceedings of the remaining defendants and whether the government’s notification of victims met the requirements of the CVRA. The report concluded that notification through the VNS did not satisfy the CVRA, and “recommended that [the court] accept each guilty plea only after the government has provided notice by first-class mail or other reasonably equivalent method to all identified victims of the following: each defendant’s plea, release status, sentencing date, and notice of the victims’ right to be heard with regard to the plea and sentence.” The government agreed to do this, and “as an additional curative measure it . . . agreed not to object on the ground of timeliness to a victim’s assertion of any rights the victim could have asserted under the CVRA at the plea proceeding.” The court accepted the magistrate judge’s report, but upheld the government’s objection to the magistrate judge’s order that the government provide a copy of its objections to the report to each victim by first-class mail (or reasonable equivalent) within ten days. The court concluded that such notification was “unnecessary and not required under the CVRA or the Federal Magistrates Act. The Report, the government’s objections, and this Memorandum of Decision and Or-

der are all available to the public on the Public Access to Court Electronic Records (PACER) service.”

See also *Turner, Saltsman, and Stokes, infra*.

7. *U.S. v. Marcello*, 370 F. Supp. 2d 745, 746–50 (N.D. Ill. 2005)

At a pretrial detention hearing for two defendants accused of murder, the government moved to allow the son of the murder victim to give an oral statement in court, under section 3771(a)(4), opposing release of the defendants. The district court allowed only a written statement, concluding that “heard” is a term of art that includes written statements and that under the facts of this case—the murder occurred over twenty years ago, the son had no personal knowledge of the crime, and the judge had already determined that the defendants would not be released pending trial—a written statement would allow the victim to be “reasonably heard.” The court acknowledged that “reasonable minds may differ” on this issue.

See also *Kenna I* and *Degenhardt, supra*.

8. *U.S. v. Turner*, 367 F. Supp. 2d 319, 321–28 (E.D.N.Y. 2005)

After discovering at the defendant’s bail hearing that the victims in the case had not received adequate notice of either the initial hearing or the bail hearing, the court concluded the bail hearing, ordered that the defendant be detained, and ordered the government to provide all alleged victims of the offense with a written summary of the proceedings to that point and notification of their rights under the CVRA with respect to future proceedings. After complying with the court’s order, the government reported that none of the victims wished to attend or be heard at a later hearing regarding the defendant’s application for release. The court then “direct[ed] the government to provide the court with sufficient information about the victims in this case to fulfill its independent obligation to ensure that those victims are afforded their rights,” including name and contact information, while allowing for the exclusion of such information under certain circumstances. The parties later filed a joint request to exclude a period of delay for purposes of computing Speedy Trial Act time limits. After noting that a public hearing on this matter would require further notice to the victims, but that a written submission would not, the court allowed the parties to submit a joint written waiver form and then approved the waiver in a written order.

Note: This opinion contains an extended discussion of many of the CVRA’s provisions, the legislative history, potential problems that courts may face, and actions courts may take in attempting to balance the various interests involved.

See also *Ingrassia, supra*, and *Saltsman and Stokes, infra*.

9. *U.S. v. Johnson*, 362 F. Supp. 2d 1043, 1055–56 (N.D. Iowa 2005)

In a murder case involving five victims, the district court approved the government’s request to allow seventeen “victim witnesses,” who were family members of the deceased, to be present during the guilt phase of the trial. The court found that the defendant had made no attempt to show under section 3771(a)(3) that any of the witnesses’ testimony would be “materially altered” by hearing the other testimony, and there was no other evidence to that effect, so the victim witnesses could not be excluded from the trial.

10. *U.S. v. Visinaiz*, 344 F. Supp. 2d 1310, 1314 (D. Utah 2004)

In a case that focused on the issue of lost income awards in homicide cases under the Mandatory Victims Restitution Act (MVRA) and the possible effect of *Blakely v. Washington*, 124 S. Ct. 2531 (2004), on the MVRA, the court also noted that the passage of the CVRA reinforced its decision to award lost income. The court cited legislative history that endorsed an “expansive definition of restitution” and the intention that the “right to full and timely restitution as provided in law” under the CVRA “means that existing restitution laws will be more effective.”

11. *U.S. v. BP Products of North America, Inc.*, No. H-07-434 (S.D. Tex. Feb. 21, 2008)

A large explosion at a BP Products refinery in Texas in 2005 resulted in a large number of victims, extensive media coverage, and civil and criminal litigation. Over two years later, before criminal charges were actually filed, the government sought and obtained *ex parte* a sealed order from the district court allowing it to reach a plea agreement with BP Products before notifying the victims of the agreement. The government was concerned that it would be impracticable to confer with the large number of victims during negotiations and that premature publicity could impair the negotiations and possibly prejudice the case if no agreement were reached. After an agreement was reached, the government was obligated to provide prompt notice to the victims, allow an extended period of time to ensure that notice was received, and delay the plea hearing to allow victims to exercise their rights to attend the hearing and be heard. Within days, the government filed a criminal information, which was sealed, and then the parties signed a binding plea agreement. After the agreement was signed, the information was unsealed and notification of the victims began.

Prior to the plea hearing on February 4, 2008, “[l]awyers for the victims filed motions and extensive briefs with supporting materials in opposition to the proposed plea agreement. One hundred and thirty-four individuals filed victim-impact statements.” At the hearing, BP Products entered a guilty plea and “the court heard from all those present who wanted to speak, whether represented by counsel or not and whether they had previously indicated an intent to appear or not. Ten individuals spoke in open court. The lawyers representing the victims presented arguments on the asserted grounds for asking the court to reject the proposed plea agreement.” The day after the hearing, the victims filed a motion urging rejection of the plea agreement on the grounds that the government violated its obligations under the CVRA, specifically “that the October 18, 2007 *ex parte* motion and order granting it, and the government’s failure to answer the two letters [questioning the restitution calculation] later sent by one of the lawyers representing the victims, violated the CVRA ‘reasonable right to confer’ with the prosecutors and to be treated with fairness and breached the government’s obligation to use its best efforts to notify the victims of these rights.”

In a lengthy opinion that surveyed virtually all CVRA cases to date, the district court held that the government adequately met its obligations to the victims and denied the motion to reject the plea agreement. First, “[t]he notices of the

right to appear and be heard at court proceedings met the section 3771(a)(2) requirements.” The government sent out three mailings to inform victims of court hearings, set up a website and telephone number, and made a victim-witness coordinator available. As noted above, many victims participated in the plea hearing personally, through their attorneys, or in writing.

Second, the court found that the “right to confer” was subject to differing interpretations based on case law, legislative history, and Department of Justice guidelines. However, “[e]ven under an expansive approach, the reasonable right to confer on a proposed plea agreement and the government’s obligation to provide notice of that right is subject to the limit that the CVRA not impair prosecutorial discretion. The right to confer is not a right to approve or disapprove a proposed plea in advance of the government’s decision. . . . The right to confer is a right to obtain and provide information and to express opinions. The right to confer about a proposed plea and the obligation to provide notice of this right are also subject to the multiple-victim provisions.” In light of the circumstances of the case, including the delay of the plea hearing to allow victim participation, the court found that the government adequately conferred with the victims.

The court also held that “[t]he government did not violate the CVRA by seeking judicial permission for the approach it wanted to take to giving notice to the victims, and which included delaying notice until after the charging instrument was filed and after the plea negotiations had concluded. The CVRA contemplates judicial supervision over a[n alternative] procedure used under section 3771(d)(2). Filing a motion *ex parte* because of a need for confidentiality is not in itself improper. . . . The court’s October 18, 2007 order made specific findings that justified the use of the procedure under the CVRA. The order made it clear that after the proposed plea agreement and information were made public, the victims would be given notice of their CVRA rights and the hearing on the proposed plea agreement and sentence would be deferred so that the victims could fully exercise their rights to attend and be heard. That procedure was followed and the well-represented victims have taken full advantage of the rights afforded.”

But see In re Dean, supra (denying a petition for writ of mandamus by the victims in this case but disagreeing with the district court on some issues).

12. *U.S. v. Patkar*, No. 06-00250 JMS (D. Haw. Jan. 28, 2008) (Seabright, J.) (unpublished order)

The defendant was accused of “transmitting in foreign commerce threats to injure the reputation of another.” During the course of discovery, some potentially embarrassing e-mails were placed under a protective order so as to avoid harm to the victim’s reputation. The Associated Press (AP) sought an order to dissolve the protective order and release the e-mails, claiming that they should be part of the public record of the case or that it should be allowed to seek access to the e-mails from the defendant.

The court denied the motion to dissolve the protective order, relying on a victim’s “right to be treated with fairness and with respect for the victim’s dignity and privacy” under section 3771(a)(8). The court recognized that this section’s “broad language will undoubtedly lead to litigation over the extent to which

courts must police the way victims are treated inside and outside the courtroom. Nevertheless, the Senate sponsors of the law were clear in their articulation of the overall import of the provision: to promote a liberal reading of the statute in favor of interpretations that promote victims' interest in fairness, respect, and dignity. . . . In order to protect [the victim]'s statutory right to be treated with fairness and with respect to his privacy, good cause exists to limit disclosure of these materials." The court added that even though the defendant has pled guilty and been sentenced, the victim "retains his right to be treated with fairness and with respect to his privacy." In response to the AP's argument that the public interest favored disclosure, the court stated that the victim had not been accused of any wrongdoing and, under the circumstances of the case, "the crime victim's right to be treated with fairness and respect for his privacy clearly outweighs any public interest in disclosure."

See also *Kaufman, infra*.

**13. *U.S. v. Saltsman*, No. 07-CR-641 (NGG) (E.D.N.Y. Nov. 27, 2007)
(Garaufis, J.) (unpublished memorandum and order)**

Section 3771(d)(2) of the CVRA provides that in cases involving a large number of victims, "the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings." In a large securities fraud case, the government estimated that there were potentially tens of thousands of victims, "only some of whom it has yet been able to identify, locate, and notify. It is thus impracticable in this case for the Government to attempt to identify and locate all of the potential alleged crime victims and provide them with reasonable, accurate and timely notice by mail. . . . The Government has proposed that published notice shall direct potential alleged victims to the website for the United States Attorney's Office in the Eastern District of New York or a website maintained by the Department of Justice, where hyperlinks will provide updates about the status of the case."

Relying on section 3771(d)(2), the court concluded that "the Government's proposal is a reasonable one. . . . Given the large number of potential alleged crime victims, notification by publication is a reasonable procedure that will both give effect to the CVRA and not unduly complicate or prolong the proceedings." The court also noted "victims' rights under the CVRA begin well before a conviction; thus, the status of 'victim' may be based on allegations rather than proof."

See also *Ingrassia and Turner, supra*, and *Stokes, infra*.

**14. *U.S. v. Citgo Petroleum Corp.*, CR. No. C-06-563 (S.D. Tex. Aug. 8, 2007)
(Rainey, J.) (unpublished order)**

After the disposition of the case, the government moved to unseal its submission to the United States Probation Office in aid of sentencing. The court noted two reasons the government gave for disclosure: "(1) to aid in the discharge of its duties under the Crime Victims' Rights Act, 18 U.S.C. § 3771; and (2) to counter certain CITGO publications. While the Government's submission is not a presentence report, it contains information of the same type and character that is normally contained in a presentence report. For this reason, the same considerations

that apply to the disclosure of a presentence report also apply to the Government's submission."

The court noted that there is a general presumption against granting third parties access to presentence reports absent a "compelling, particularized need for disclosure." In this case, the Court found that such a need "has not been demonstrated. . . . [T]he Court acknowledges that the CVRA confers a duty upon the Government to make 'best efforts' to notify crime victims. 18 U.S.C. § 3371(c)(1). However, the Act does not require the disclosure of presentence investigation reports or other documents of a similar nature."

See also *Kenna II* and *In re Brock, supra*, and *Sacane, infra*.

15. U.S. v. Stokes, No. 3:06-00204 (M.D. Tenn. June 22, 2007) (Echols, J.) (unpublished order)

In an embezzlement case, the government sought authorization to provide notice to a large number of victims by various means. The estimated number of victims was 35,000 individuals employed by approximately 1,000 companies, and "[g]iven the time-line of this case, it will not be practical for the government to identify and locate all the victims and provide them with reasonable, accurate, and timely notice by mail in advance of defendant's trial or further court appearances." The government proposed to provide notice by a combination of a website, a toll-free telephone number, direct notice by letter for some victims, notice to the employers for other victims, and a blanket notice by publication for all victims.

The court agreed with the government's plan, finding "(1) that the 'multiple victim' provisions of 18 U.S.C. § 3771(d)(2) apply to the above-captioned case; (2) that it is impractical for the Government to identify all of the direct and proximate victims of the charged offenses on an individual basis at this time to provide the individuals with reasonable, accurate, and timely notice in advance of defendant's trial or further court appearances; and (3) [that] notice in the manner proposed by the government is consistent with precedent and practice in other jurisdictions and is a 'reasonable procedure' to give effect to the provisions of 18 U.S.C. § 3771."

See also *Ingrassia, Turner, and Saltsman, supra*.

16. U.S. v. Sacane, Crim. No. 3:05cr325(AHN) (D. Conn. Mar. 28, 2007) (Nevas, J.) (unpublished order)

The victims, a group of investment funds, moved for an order requiring more detailed financial disclosures from the defendant in advance of a restitution hearing. They claimed they needed the information to enforce their right to "full and timely restitution" under the CVRA. The court denied the motion, noting that other courts have found that victims have no right to information contained in a presentence report. "If the CVRA does not provide crime victims with a right to disclosure of the presentence report, then a fortiori it would not provide crime victims with a right to obtain such disclosures directly from a defendant. . . . If the [victims] believe that additional financial disclosures are necessary, then pursuant to the CVRA they may enlist the assistance of the government; but they are not

permitted to bypass the government and discover information directly from Sacane.”

See also *Moussaoui, Kenna II, In re Brock, and Citgo, supra*.

**17. U.S. v. Kaufman, No. CRIM.A. 04-40141-01 (D. Kan. Oct. 17, 2005)
(Belot, J.) (unpublished memorandum and order)**

In a case involving, among other things, Medicare fraud, civil rights violations, and abuse of mentally ill patients, a local television station filed a motion to allow a sketch artist to be present in the courtroom during trial. Apart from the First Amendment issues presented, the court had to account for the rights of each victim who would be testifying at the trial, specifically the right under section 3771(a)(8) of the CVRA to “be treated with fairness and with respect for the victim’s dignity and privacy.” Some of the evidence in the case involved sexually graphic videos of the abuse of the victims, and the court had previously ruled, in light of section 3771(a)(8), that “these videos be displayed on a screen that is visible to the jury, the court, and the parties, but not to people seated in the gallery.”

The court agreed to allow a sketch artist, but held that none of the victims may be sketched. Section 3771(a)(8) “requires that sketch artists’ activities in the courtroom be restricted under the circumstances of this case. First, there is a compelling government interest in protecting the dignity, as well as the physical and psychological well-being, of mentally-ill alleged crime victims Most, if not all, of the witnesses entitled to protection under 18 U.S.C. § 3771 suffer from forms of schizophrenia. The court has already viewed the testimony of two mentally ill witnesses and observed the distress that these individuals exhibited trying to concentrate on the questions and formulate answers. If that distress was compounded with concerns that the witness’ picture was going to be shown on television as one of those ‘victims’ who appeared in the graphic videos, the victim undoubtedly would not only face considerable additional distress and loss of dignity, but . . . might not even be able to testify, thereby damaging the truth-seeking function of a criminal trial.” The court concluded, “18 U.S.C. § 3771 proscribes all forms of identification of the victims in this case, including, but not limited to, sketching for purposes of television,” the station has to find out from the parties’ counsel when a victim will appear as a witness, and “no sketching materials of any kind will be visible in the courtroom” when a victim appears.

See also *Patkar, supra*.

18. U.S. v. Tobin, No. 04-CR-216-01-SM (D.N.H. July 22, 2005) (unpublished order)

The defendant was accused of conspiring to interfere with the right to vote by jamming phone lines set up to facilitate “get out the vote” efforts by the New Hampshire Democratic Party (NHDP) and a firefighters’ association. When the defendant and the prosecutor jointly moved to continue the trial for ninety days, the NHDP claimed it was a “victim” under section 3771(e) and filed an objection to the motion, arguing that the continuance would violate the “right to proceedings free from unreasonable delay” under section 3771(a)(7). Assuming, without deciding, that the NHDP can be considered a victim, the court ruled that the con-

tinuance was reasonable—it did not violate the Speedy Trial Act and the extra time was needed to allow a “full and adequate opportunity to prepare for trial.” However, in light of the rights of the ostensible victims, “and taking into account the court’s statutory obligation to ‘ensure that [all] crime victim[s][are] afforded the rights described,’” the court stated that “the parties are hereby put on notice that no further continuance will be granted in the absence of extraordinary circumstances.”

Cf. Turner, 367 F. Supp. 2d at 321 (court notes that it allowed the parties to exclude a period of delay in computing the time within which an indictment must have been filed by simply filing with the court a written waiver form signed by counsel for both parties, an action that did not require notice to the victims).

**19. *U.S. v. Guevara-Toloso*, No. M 04-1455 (E.D.N.Y. May 23, 2005)
(unpublished order)**

In a case involving the initial appearance of a defendant arrested for illegally re-entering the United States after being convicted of a felony and subsequently deported, the court asked whether any victim of the predicate crimes had been given notice pursuant to the CVRA. The prosecutor stated that he did not think notice was required, and the court agreed, concluding that, because the previous convictions were for *state* offenses, any victims of those crimes did not meet the definition in section 3771(e), which does not include victims of state offenses. The opinion also includes some discussion of the legislative history of the CVRA.

V. Text of 18 U.S.C. § 3771

§ 3771. Crime victims’ rights

(a) Rights of crime victims.—A crime victim has the following rights:

- (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.

(b) Rights afforded.—

(1) In general.—In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) Habeas corpus proceedings.—

(A) In general.—In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

(B) Enforcement.—

(i) In general.—These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).

(ii) Multiple victims.—In a case involving multiple victims, subsection (d)(2) shall also apply.

(C) Limitation.—This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

(D) Definition.—For purposes of this paragraph, the term “crime victim” means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative.

(c) Best efforts to accord rights.—

(1) Government.—Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) Advice of attorney.—The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) Notice.—Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

(d) Enforcement and limitations.—

(1) Rights.—The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

(2) Multiple crime victims.—In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

(3) Motion for relief and writ of mandamus.—The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) Error.—In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

(5) Limitation on relief.—In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(6) No cause of action.—Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) Definitions.—For the purposes of this chapter, the term “crime victim” means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

(f) Procedures to promote compliance.—

(1) Regulations.—Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

(2) Contents.—The regulations promulgated under paragraph (1) shall—

(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.

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