

## Crime Victims Rights Act

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For a general description of the CVRA, its legislative history, and controlling principles of statutory construction, see *Defending Against the Crime Victim Rights Act* at 2-6 (May 5, 2007), [http://www.fd.org/pdf\\_lib/victim%20memo%20to%20defenders.pdf](http://www.fd.org/pdf_lib/victim%20memo%20to%20defenders.pdf).

### I. Victims Do Not Have Party Status.

The Framers created a two-party adversary system, with a public prosecutor, a criminal defendant and a neutral judge. They did so in the First, Fourth, Fifth, Sixth and Eighth Amendments, and in each reference to criminal procedure in the original Constitution, by defining and protecting the rights of the accused as against the State. The “colonies shifted to a system of public prosecutions because they viewed the system of private prosecutions as ‘inefficient, elitist, and sometimes vindictive,’” and the “Framers believed victims and defendants alike were best protected by the system of public prosecutions that was then, and remains, the American standard for achieving justice.” See S. Rep. No. 108-191 at 68-69, 70 (2003).

Under the CVRA, victims “are not accorded formal party status, nor are they even accorded intervenor status as in a civil action. Rather, the CVRA appears to simply accord them standing to vindicate their rights as victims under the CVRA and to do so in the judicial context of the pending criminal prosecution of the conduct of the accused that allegedly victimized them.” *United States v. Rubin*, 558 F. Supp. 2d 411, 417 (E.D.N.Y. 2008). The court cannot “compromise[e] its ability to be impartial to the government and defendant, the only true parties.” *Id.* at 428. “As for actual clashes between victim and government over the best way to convict, punish and seek restitution from a criminal wrongdoer, how can the court presiding over the prosecution of the defendant referee any spat between government and victim about how best to make the accused pay for his, at that point, only charged criminal conduct?” *Id.* at 429.

A victim has no right to appeal a defendant’s sentence because a victim is not a party. *United States v. Hunter*, 548 F.3d 1308, 1311 (10<sup>th</sup> Cir. 2008).

### II. Who May Assert Rights as a Crime Victim?

A “person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia,” 18 U.S.C. § 3771(e), may assert statutory rights in federal criminal proceedings “involving an offense against the crime victim.” 18 U.S.C. § 3771(b)(1).

No rights in criminal proceedings against persons who were not charged with any offense, were not charged (if before trial or plea) or convicted (if after trial or plea) of the offense that directly and proximately caused harm, or were acquitted. See *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 564 (2d Cir. 2005) (rejecting petition for mandamus seeking to vacate settlement agreement approved by district court between

United States and convicted, acquitted and uncharged persons; “the CVRA does not grant victims any rights against individuals who have not been convicted of a crime.”); *United States v. Sharp*, 463 F.Supp.2d 556 (E.D. Va. 2006) (woman who wished to speak at sentencing based on her claim that her boyfriend had mistreated her as a result of smoking marijuana he purchased from the defendant was not a “victim” within the meaning of the CVRA; “the CVRA only applies to [putative victim] if she was ‘directly and proximately harmed’ as a result of the commission of the Defendant’s federal offense.”); *United States v. Turner*, 367 F.Supp.2d 319, 326-27 (E.D.N.Y. 2005) (noting due process problems with designating a person as a victim of uncharged conduct, concluding CVRA does not mandate rights for such persons); *United States v. Hunter*, 2008 WL 53125 \*4 (D. Utah Jan. 3, 2008) (Kimball, J.) (woman shot by gunman on a rampage at a shopping mall and her parents were not “directly and proximately harmed” by the defendant’s offense of conviction of being a drug user in possession of a firearm or a dismissed offense of selling the gun to the gunman, a minor, where no evidence defendant was aware of his intentions), *aff’d*, *In re Antrobus*, 519 F.3d 1123 (10<sup>th</sup> Cir. 2008) (upholding district court on mandamus, and adding that gunman was an adult at time of shooting); *United States v. Merkosky*, 2008 WL 1744762 (N.D. Ohio Apr. 11, 2008) (defendant cannot be deemed victim of uncharged crimes of government agents against him in his own criminal case); *Defending Against the Crime Victim Rights Act at 8-9* (May 5, 2007) (discussing relevant legislative history and constitutional implications), [http://www.fd.org/pdf\\_lib/victim%20memo%20to%20defenders.pdf](http://www.fd.org/pdf_lib/victim%20memo%20to%20defenders.pdf).

Government’s theory of the case, in order to avoid dismissal on statute of limitations grounds, required that “another person” be placed in “imminent danger” after the earliest date within the statute of limitations, but the government offered no evidence that any person was exposed to or manifested harm after that date. Further, the crime is complete when “another person” is placed in “imminent danger.” The offense does not require that any person was “harmed,” and the indictment does not charge that anyone was “harmed,” but only knowing endangerment. The Indictment names people who were knowingly endangered but being in an indictment is not the definition of victim under the CVRA. The CVRA requires that the person was “directly and proximately harmed as a result of the commission of a Federal offense.” Because there are no “identifiable victims,” the witnesses will be sequestered under Fed. R. Evid. 615 without inquiry into whether their testimony would be materially altered. *United States v. W.R. Grace*, \_\_\_ F. Supp. \_\_\_, 2009 WL 368240 (D. Mont. 2009).

No CVRA rights where crime was victimless. *United States v. Saferstein*, slip op., 2008 WL 4925016 \*3 (E.D. Pa. Nov. 18, 2008) (no victims related to tax and perjury charges). The only other courts to address this found harmless or not plain error under the circumstances. *United States v. Kennedy*, slip op., 2008 WL 4107208 (4<sup>th</sup> Cir. Sept. 5, 2008) (where charges were false statement in applying to purchase a firearm and possession of a firearm by a user of marijuana, assuming it was error to admit impact statement from widow of officer the defendant’s mentally ill son shot with one of the firearms, it was harmless because sentence was at bottom of guideline range); *United States v. Poole*, 241 Fed. Appx. 153 (4<sup>th</sup> Cir. July 30, 2007) (where charge was felon in possession, suggesting it may have been error to admit victim impact statement of police

officer whom defendant struck upon his arrest, but was not plain error because sentence was in middle of guideline range).

Probably no CVRA rights for victims of prior offenses that are predicates of instant offense. *United States v. Guevera-Toloso*, 2005 WL 1210982 (E.D.N.Y. 2005) (where defendant was charged with “illegally re-entering the United States after being convicted of a felony and subsequently deported,” victims of predicate offenses, if any, were not entitled to notice because the predicates were state offenses, and expressing doubt that a victim of a federal predicate would be entitled to notice).

Civil plaintiffs have no right under the CVRA to intervene in criminal proceedings to seek restitution, damages, or discovery. See *United States v. Moussaoui*, 483 F.3d 220 (4<sup>th</sup> Cir. 2007) (“The rights codified by the CVRA . . . are limited to the criminal justice process.”); *In re Searcy*, 202 Fed. Appx. 625 (4<sup>th</sup> Cir. Oct. 6, 2006) (CVRA has “no application . . . to these [civil] proceedings”).

CVRA is not basis for lawsuits or mandamus actions demanding arrest, restraining order, prosecution, sentencing, damages or injunctive relief. See *In re Rodriguez*, slip op., 2008 WL 5273515 (3d Cir. Dec. 10, 2008); *Walsh v. Krantz*, slip op. 2008 WL 2329130 \*8 n.32 (M.D. Pa. June 4, 2008); *In re Walsh*, slip op., 2007 WL 1156999 (3d Cir. Apr. 19, 2007); *In re Siyi Zhou*, 198 Fed. Appx. 177 (3d Cir., Sept. 25, 2006); *Estate of Musayelova v. Kataja*, slip op., 2006 WL 3246779 (D. Conn. Nov. 7, 2006).

CVRA “does not confer any rights upon a victim until a prosecution is already begun.” *United States v. Merkosky*, 2008 WL 1744762 at \*2 (N.D. Ohio Apr. 11, 2008). Victims’ rights did not arise when they were victimized, but when an indictment charging the defendant with crimes against them was filed. *United States v. Rubin*, 558 F. Supp. 2d 411, 418-19, 429 (E.D.N.Y. 2008).

No right to discovery of prosecution’s investigative files or grand jury transcripts to establish victim status. *United States v. Hunter*, 548 F.3d 1308, 1317 (10<sup>th</sup> Cir. 2008); No right to access government’s files or prevent sealing of documents. *United States v. Hunter*, 2008 WL 110488 (D. Utah Jan. 8, 2008) (Kimball, J.).

### **III. Right to be Reasonably Protected From the Accused**

Victims have a “right to be reasonably protected from the accused.” 18 U.S.C. § 3771(a)(1). Because there must be an “accused,” a “complaint, information or indictment of conduct victimizing complainant” is required at minimum, and this is not a “wellhead of boundless authority to fashion protection for victims in the guise of ‘protecting them from the accused.’” *United States v. Rubin*, 558 F. Supp. 2d 411, 419-21 (E.D.N.Y. 2008).

While § 3771(a)(1) and (8) “point to the need to protect victims from their assailants,” “[t]here is no general concern of the CVRA to hide a victim’s identity at all costs.” “[A] defendant has the right to test the government’s evidence, and only the most unpracticed lawyers would be satisfied with their preparation if they had no opportunity to meet the

government's star witness(es) until the day of testimony. Why even bother with cross-examination if one cannot prepare for it?" *United States v. Vaughn*, slip op., 2008 WL 4615030 \*2-3 & n.1 (E.D. Cal. Oct. 17, 2008) (ordering disclosure of names, addresses, email addresses, and telephone numbers under a protective order precluding dissemination to the defendant or anyone other than the defense team).

#### **IV. Right to Reasonable Notice of Public Court Proceedings**

Victims and alleged victims have a "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." 18 U.S.C. § 3771(a)(2). Government shall make "best efforts" to notify. 18 U.S.C. § 3771(c)(1). Notice of release "shall not be given if such notice may endanger the safety of any person." 18 U.S.C. § 3771(c)(3).

Notice is not required of matters handled without court appearance or that arise without prior notice at a status conference. *United States v. Rubin*, 558 F. Supp. 2d 411, 423 (E.D.N.Y. 2008).

While CVRA, unlike the Bail Reform Act, "does not include a provision expressly preserving the presumption of the accused defendant's innocence," court concludes "that such a reasonable limitation must be inferred as a matter of due process and to avoid an interpretation that would render the statute unconstitutional," and interprets "victim" for purposes of pretrial notice "to include any person who would be considered a 'crime victim' if the government were to establish the truth of the factual allegations in its charging instrument." *United States v. Turner*, 367 F.Supp.2d 319, 326 (E.D.N.Y. 2005).

Government's obligation to use "best efforts" to give notice "is not a statute authorizing vigilante justice and it must be read in light of the Constitutional presumption of innocence." *United States v. Grace*, 401 F.Supp.2d 1057, 1063 (D. Mont. 2005).

#### **V. Right "not to be excluded" unless testimony would be materially altered**

Victims and alleged victims have a right "not to be excluded from any . . . public court proceeding . . . involving the crime or of any release or escape of the accused . . . 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." 18 U.S.C. § 3771(a)(3). Before excluding a testifying victim whose testimony would be materially altered, "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," 18 U.S.C. § 3771(b)(1), e.g., exclude during testimony on same subject, or victim testifies first.

By stating that victims have a "right not to be excluded from any such *public* proceeding," CVRA does not alter existing law under which court may close

proceedings.<sup>1</sup> 150 Cong. Rec. S10910 (Oct. 9, 2004); *United States v. L.M.*, 425 F.Supp.2d 948, 951-52 (N.D. Iowa 2006) (no right to attend closed proceedings);

Victims have no affirmative right to attend, and neither courts nor government have an affirmative duty to ensure that they are present. *See* 150 Cong. Rec. S10910 (Oct. 9, 2004); *United States v. Turner*, 367 F.Supp.2d 319, 332 (E.D.N.Y. 2005); *United States v. Rubin*, 558 F. Supp. 2d 411, 423 (E.D.N.Y. 2008). Where notice of proceedings was given, no more was required. *Id.* at 424.

The burden is apparently on the defendant to provide the court with clear and convincing evidence that the victim-witness's testimony would be materially altered. *See, e.g., United States v. Edwards*, 526 F.3d 747, 758 & n.28 (11<sup>th</sup> Cir. 2008) (upholding denial of exclusion where defendant "does not argue that he provided the district court with clear and convincing evidence of the likelihood that the victim-witnesses would materially alter their testimony if they were not sequestered," and "conceded [that such evidence was] not discernible from the record."). Thus, defense counsel should move for discovery of the victim's intended testimony, that of other witnesses the victim would hear if present, and any other information that would tend to show that the victim's testimony would be materially altered, *e.g.*, psychiatric history, and a pretrial hearing to examine the victim/witness. If a victim is permitted to hear other witnesses' testimony, defense counsel should seek a jury instruction explaining that he or she was not subject to sequestration like other witnesses, the purpose of the sequestration rule "as a means of discouraging and exposing fabrication, inaccuracy, and collusion," Fed. R. Evid. 615, 1972 advisory committee note, and that it is "natural and irresistible for a jury, in evaluating the relative credibility of a [witness] . . . to have in mind and weigh in the balance the fact that he heard the testimony of all those who preceded him." *Portuondo v. Agard*, 529 U.S. 61, 67-68 (2000).

## **VI. Right to be "reasonably heard at any public proceeding involving release, plea, sentencing, or any parole proceeding"**

*Defending Against the Crime Victim Rights Act* at 13-23, 25 (May 5, 2007), [http://www.fd.org/pdf\\_lib/victim%20memo%20to%20defenders.pdf](http://www.fd.org/pdf_lib/victim%20memo%20to%20defenders.pdf).

### **A) Contours**

*Kenna v. United States District Court*, 435 F.3d 1011, 1013, 1014 & nn.1-2, 1016-17 (9<sup>th</sup> Cir. 2006) (right to be reasonably heard is "right of allocution" about "impact" if not irrelevant or repetitious; district court "may place reasonable constraints on the duration and content of victims' speech"); *but see id.* at 1016 ("indefeasible right to speak"); *id.* at 1018-19 (Friedman, J., dubitante) (expressing doubt that "victim has an absolute right to speak at sentencing, no matter what the circumstances," "statutory standard of

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<sup>1</sup> Court may close proceedings if the defendant's right to a fair trial, the need to protect the safety of any person, or the need to protect sensitive information so requires. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564, 581 (1980); *Estes v. Texas*, 381 U.S. 532 (1965); 28 C.F.R. § 50.9.

'reasonably heard' may permit a district court to impose reasonable limitations on oral statements.")

*United States v. Marcello*, 370 F.Supp.2d 745 (N.D. Ill. 2005) (no absolute right to make an oral statement at detention hearing; "statute, which contains both a reasonableness requirement and a legal term of art (the opportunity to be 'heard'), does not require the admission of oral statements in every situation, particularly one in which the victim's proposed statement was not material to the decision at hand," must be relevant, material and based on personal knowledge)

Note that even defendant's constitutional right to allocute at sentencing is not absolute, and may be denied in certain situations, or limited as to duration and content. *Marcello*, 370 F.Supp.2d at 750 & n.10; *United States v. Mack*, 200 F.3d 653 (9<sup>th</sup> Cir. 2000); *Ashe v. North Carolina*, 586 F.2d 334, 336-37 (4<sup>th</sup> Cir. 1978).

Right to be reasonably heard "does not empower victims to [have] veto power over any prosecutorial decision, strategy or tactic regarding bail, release, plea, sentencing or parole." *United States v. Rubin*, 558 F. Supp. 2d 411, 424 (E.D.N.Y. 2008). Delaying defendant's travel to Israel for impending death and funeral of family member in order to allow victims to be heard "would not have been 'reasonable.'" *Id.*

*United States v. Hunter*, 2008 WL 53125 \*6 (D. Utah Jan. 3, 2008) (Kimball, J.) (no right to be heard under CVRA by persons who were not "victims," and no right under court's discretionary power because they had no information regarding the defendant's background, character or conduct; distinguishing *United States v. Leach*, 206 Fed. Appx. 432 (6<sup>th</sup> Cir., Nov. 6, 2006), where district court allowed defendant's ex-wife, who was not a victim of defendant's offense, to testify at sentencing under its authority to consider a "wide variety of factors" at sentencing). See also *United States v. Forsyth*, slip op., 2008 WL 2229268 (W.D. Pa. May 27, 2008) (excluding "victim impact" letter because author was not a "victim" under CVRA, and although "relevant" under § 3553(a), it did not have sufficient reliability under Due Process Clause).

## **B) Defendants' Right to Notice and Opportunity to Challenge**

Defendants have a right under the Due Process Clause, protected through various provisions of Rule 32 and Rule 26.2, to "thorough adversarial testing," through notice and the opportunity to challenge any information that may be used to deprive them of life, liberty or property in sentencing. See *Rita v. United States*, 127 S. Ct. 2456 2465 (2007); *Burns v. United States*, 501 U.S. 129, 137-38 (1991); *Gardner v. Florida*, 430 U.S. 349, 351, 358 (1977); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Curran*, 926 F.2d 59, 61, 63 (1<sup>st</sup> Cir. 1991). See also *United States v. Rakes*, 510 F.3d 1280, 1285-86 & n.3 (10<sup>th</sup> Cir. 2007) (Rule 32 and due process require advance notice to parties of victim impact statement upon which court will rely in sentencing; court cannot exercise sound discretion under Rule 11 when it rejects plea agreement based on undisclosed victim impact statement, but error was harmless because court stated it would have rejected the plea agreement for other reasons and appellant offered no reason why outcome would have been different).

In *United States v. Endsley*, slip op., 2009 WL 385864 (D. Kan. Feb. 17, 2009), the court rejected the government's argument that "the victim has a right to make a statement about how he feels the crime impacted him," but "the defendant has no parallel right to counter the information provided by the victim, especially not with extrinsic evidence." *Id.* at \*1. The judge held that the defendant had a right to full adversary testing of sentencing issues, to be sentenced based on accurate information, and here, "to challenge the government's [and the victim's] argument that the crime here had 'life-altering implications for the young victim.'" *Id.* at \*2 & n.1. While the CVRA requires that a victim be treated "with fairness and with respect for [his] dignity and privacy," this did not "impinge[] on a defendant's right to refute by argument and relevant information any matter offered for the court's consideration at sentencing," and the "the court will evaluate the victim impact statements against the same standards of reliability and reasonableness applied to all matters introduced at sentencing hearings." *Id.* at \*2.

Regarding victim impact statements in support of "departures" or "variances," see Amy Baron-Evans, *After Irizarry: (1) Notice of All Facts Must Still Be Given in the PSR, (2) Object and Seek a Continuance if Any Unnoticed Facts Arise, (3) Argue that the Reason is a "Departure"* (August 11, 2008), [http://www.fd.org/pdf\\_lib/After%20Irizarry.pdf](http://www.fd.org/pdf_lib/After%20Irizarry.pdf).

Rules require notice in the presentence report; opportunity to investigate, object and present contrary evidence and argument to the Probation Officer; opportunity to file a sentencing memorandum and argue orally to the court; opportunity for a hearing; right to obtain witness' statements, to have witnesses placed under oath and to question witnesses at any such hearing; and right to have the court resolve any disputed matter. See Rule 32(e)(2), (f), (g), (h), (i); Fed. R. Crim. P. 26.2(a)-(d), (f). These protections apply to information about victim impact and restitution, just as they apply to information provided by the government or any other witness. See Fed. R. Crim. P. 32(d)(2)(B), (D); 18 U.S.C. § 3664(a), (b), (e).

The defense must enforce these rights. See *United States v. Eberhard*, 525 F.3d 175, 178 (2d Cir. 2008) ("court afforded Eberhard an opportunity to respond after hearing from the victims," and he "neither objected to the victim statements nor requested additional time to prepare a more thorough response" so "not plain error for the district court to impose sentence immediately thereafter"); *United States v. Korson*, 243 Fed. Appx. 141, 151 (6<sup>th</sup> Cir. Aug. 8, 2007) (no plain error in lack of notice that victims would speak at sentencing where no objection, no request for continuance, PSR contained some description of victim impact, and defendant did not claim on appeal that oral statements were false or show how he could have rebutted them). *Id.* at 149 (may be a problem if judge "was influenced by the emotional nature" of the statements, but judge's explanation for upward departure was "well-reasoned and dispassionate").

Note that even a defendant's right to allocute at sentencing is not absolute, and may be denied in certain situations, or limited as to duration and content. *Marcello*, 370 F.Supp.2d at 750 & n.10. If the defendant, who has a constitutional right to testify,

wishes to testify to certain information, he is placed under oath, subjected to cross-examination, and limited to matters that are relevant and material and about which he is competent to testify. *Id.* at 750. The defendant may be precluded from testifying at all if he fails to comply with rules requiring notice. *Michigan v. Lucas*, 500 U.S. 145, 152-53 (1991); *Taylor v. Illinois*, 484 U.S. 400, 417 (1988); *Williams v. Florida*, 399 U.S. 78, 81-82 (1970). Defendants do not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under the rules of evidence, *Taylor*, 484 U.S. at 410, may not “testify[] *falsely*,” *Nix v. Whiteside*, 475 U.S. 157, 173 (1986) (emphasis in original), and have no right to introduce inadmissible hearsay, *Chambers v. Mississippi*, 410 U.S. 484 (1973), or evidence that is otherwise unreliable. *United States v. Scheffer*, 523 U.S. 303, 309 (1998).

### **C) No Right to Litigate Sentence as Functional Equivalent of Party**

*In re Kenna*, 453 F.3d 1136 (9<sup>th</sup> Cir. 2006) (affirming district court’s rejection of victim’s claimed right to litigate guidelines as basis for disclosure of PSR)

The right to be “reasonably heard” under the CVRA is a “right of allocution, much like that traditionally guaranteed a criminal defendant before sentence is imposed,” and not a right to present evidence and legal argument. *Kenna I*, 435 F.3d at 1014 & n.2 (distinguishing allocution from presentation of facts and argument).

*In re Brock*, slip op., 2008 WL 268923 (4<sup>th</sup> Cir. Jan. 31, 2008) (no right to present argument regarding, or to appeal, guideline calculations)

*United States v. Hunter*, 548 F.3d 1308, 1311-12 (10<sup>th</sup> Cir. 2008) (victim has no right to appeal a defendant’s sentence because a victim is not a party).

See *Defending Against the Crime Victim Rights Act* at 19-23 (May 5, 2007), [http://www.fd.org/pdf\\_lib/victim%20memo%20to%20defenders.pdf](http://www.fd.org/pdf_lib/victim%20memo%20to%20defenders.pdf), for discussion of plain language, congressional intent and constitutional principles.

Some say that *Payne v. Tennessee*, 501 U.S. 808 (1991) provides support for a right of victims to litigate the sentence because it gave victims a right to recommend a sentence, but this is incorrect. In *Payne*, the Supreme Court held that the Eighth Amendment does not bar the admission of “‘victim impact’ evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim’s family” during the penalty phase of a capital trial, *id.* at 817, although such evidence may be unduly prejudicial such that it violates the Due Process Clause. *Id.* at 825. In *Payne*, a family member testified to the emotional impact on the victim’s family, but did not recommend a sentence. *Id.* at 814-15. The Court explicitly limited its holding to “the impact of the victim’s death on the victim’s family” and explicitly left standing its previous holding prohibiting “a victim’s family members’ characterizations and opinions about the crime, the defendant, and the appropriate sentence.” *Id.* at 830 n.2 (emphasis supplied).

In *United States v. Hughes*, slip op., 2008 WL 2604249 (6<sup>th</sup> Cir. 2008), the Sixth Circuit disapproved the district court’s reliance on speculation as to the victim bank’s preference

for a sentence that would allow defendant to earn money to repay the debt rather than a lengthy prison term, in part because the bank's preference was speculation, but also because the court of appeals questioned "why the particular desires of this victim should affect the legal analysis necessary for sentencing Hughes." *Id.* at \*7 n.7, citing 18 U.S.C. § 3771.

#### **D) No Right to Presentence Report**

18 U.S.C. § 3552(d)

18 U.S.C. § 3664(b), (d)

Fed. R. Crim. P. 32(e)(2)

*In re Brock*, slip op., 2008 WL 268923 (4<sup>th</sup> Cir. Jan. 31, 2008)

*In re Kenna*, 453 F.3d 1136 (9<sup>th</sup> Cir. 2006)

*United States v. Coxton*, \_\_\_ F. Supp. 2d \_\_\_, 2009 WL 449192 (W.D.N.C. Feb. 24, 2009)

*United States v. Hunter*, 2008 WL 53125 \*7 (D. Utah Jan. 3, 2008) (Kimball, J.)

*United States v. BP Products*, 2008 WL 501321 \*9 (█. Tex. Feb. 21, 2008)

*United States v. Citgo Petroleum Corp.*, 2007 WL 2274393 \*2 (S.D. Tex. Aug. 8, 2007)

*United States v. Sacane*, 2007 WL 951666 \*1 (D. Conn. Mar. 28, 2007)

*United States v. Ingrassia*, 2005 WL 2875220 \*17 (E.D.N.Y. 2005)

*Defending Against the Crime Victim Rights Act* at 23-24 (May 5, 2007) (discussing policy basis of and caselaw regarding confidentiality of PSR, existing procedures for victims to give and correct information relevant to impact and restitution),

[http://www.fd.org/pdf\\_lib/victim%20memo%20to%20defenders.pdf](http://www.fd.org/pdf_lib/victim%20memo%20to%20defenders.pdf).

#### **VII. "Reasonable right to confer with the attorney for the government"**

Victims have a "reasonable right to confer with the attorney for the government in the case." 18 U.S.C. § 3771(a)(5). "Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6). "Under this provision, victims are able to confer with the Government's attorney after charging." 150 Cong. Rec. S4260, S4268 (daily ed. Apr. 22, 2004).

A defendant has due process rights to be accurately apprised of the consequences of a plea, *Mabry v. Johnson*, 467 U.S. 504, 509 (1984), and to specific enforcement of a promise made in a plea bargain, *Santobello v. New York*, 404 U.S. 257, 262 (1971).

"Nothing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement." *In re Huff Asset Management Co.*, 409 F.3d 555, 564 (2d Cir. 2005).

"[T]here is absolutely no suggestion in the statutory language that victims have a right independent of the government to prosecute a crime, set strategy, or object to or appeal pretrial or in limine orders entered by the Court whether they be upon consent of or over the objection of the government. Quite to the contrary, the statute itself provides that '[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.' 18 U.S.C. § 3771(d)(6). In short,

the CVRA, for the most part, gives victims a voice, not a veto.” *United States v. Rubin*, 558 F. Supp. 2d 411, 417 (E.D.N.Y. 2008).

Right to confer “does not authorize an unbridled gallop to any and all information in the government’s files.” *Id.* at 425. Conferring with and seeking information regarding restitution is within bounds, but not Rule 6(e) materials. *Id.* The MVRA, not the CVRA, controls extent to which prosecutor discusses restitution with victims. “Under 18 U.S.C. § 3664(d)(1), the government is to consult, ‘to the extent practicable, with all identified victims’ in order to ‘promptly provide the probation officer with a listing of the amounts subject to restitution.’ . . . [T]he MVRA’s ‘consultation’ requirement [requires] the government to gather from victims and others the information needed to list the amounts subject to restitution in the report” which “does not require the victim’s seal of approval, or even solicitation of the victim’s opinion beyond those facts that would assist the government’s required calculations,” and “is not an inherently collaborative effort,” but “clearly only for gathering the necessary information, not for the solicitation of creative input.” *Id.* at 426.

“Decisions on whether to charge, who to charge, and what to charge, are all in the prosecutor’s discretion.” *United States v. BP Products North America Inc.*, 2008 WL 501321 \*11 (W.D. Tex. Feb 21, 2008). “The right to confer is not a right to approve or disapprove a proposed plea in advance of the government’s decision.” *Id.* at \*15. In this case, the alleged victims asked the court to reject an 11(c)(1)(C) agreement based on the claim that the government failed to comply with its duty to use best efforts to give them notice of their rights, *see* 18 U.S.C. § 3771(c)(1), by not notifying them of their right to confer until after the plea agreement was signed. Although alleged victims do not have a right to confer before charges have been filed, *see* 150 Cong. Rec. S4260, S4268 (daily ed. Apr. 22, 2004), the government moved for and received, *ex parte*, an order from the court delaying notice until the agreement was executed based on (1) the large number of victims, (2) the extensive media coverage, (3) the potential damage to plea negotiations, and (4) the prejudice to the defendants’ right to a fair trial if negotiations broke down. Counsel for the victims argued that “the government had no constitutional obligation to protect [the defendant’s] right to a fair trial in the event plea negotiations failed” because “there is no constitutional right to plea bargain,” and that “if there was a choice between protecting the rights of the crime victims or the rights of [the defendant], the CVRA required the government to side with the victims.” *Id.* at \*17. The district court rejected these arguments on policy and constitutional grounds. *Id.* at \*\*17-18. At the plea hearing, the victims were allowed to speak and asked the court to reject the agreement, which the court denied. The victims then petitioned for mandamus seeking instructions that the plea agreement not be accepted. *In re Dean*, 527 F.3d 391, 392 (5<sup>th</sup> Cir. 2008). The Fifth Circuit panel denied the petition because the victims were allowed to be heard at the plea hearing, *id.* at 395-96, but it held that the district court violated the CVRA by not fashioning a way to inform the victims of the likelihood of criminal charges and to ascertain their views on a plea bargain, though the panel was careful to confine this to the specific facts, circumstances and posture of this case. *Id.* at 394-95. Probably because the petition had to be decided within 72 hours, the court missed the point that “[u]nder this provision [§ 3771(a)(5)], victims are able to confer with the Government’s attorney

after charging.” 150 Cong. Rec. S4260, S4268 (daily ed. Apr. 22, 2004) (emphasis supplied).

### **VIII. “Full and timely restitution as provided in law”**

Victims have a “right to full and timely restitution as provided in law.” 18 U.S.C. § 3771(a)(6). CVRA “makes no changes in the law with respect to victims’ ability to get restitution.” See H.R. Rep. No. 108-711, 2005 U.S.C.C.A.N. 2274, 2283 (Sept. 30, 2004). CVRA does not expand rights to restitution. *United States v. Rubin*, 558 F. Supp. 2d 411, 420-21, 425-27 (E.D.N.Y. 2008). Victims have no right to appeal a restitution order. *United States v. Hunter*, 548 F.3d 1308, 1313 (10<sup>th</sup> Cir. 2008).

### **IX. Proceedings “free from unreasonable delay”**

*United States v. Tobin*, 2005 WL 1868682 (D.N.H. July 22, 2005) (granting joint motion for continuance over alleged victim’s objection, noting that Congress did not intend CVRA to undermine Speedy Trial Act or deprive defendants or government of full and adequate opportunity to prepare for trial, defendant’s right to adequate preparation is of “constitutional significance,” and allowing the victim’s “discrete interests” to control “runs the unacceptable risk of [the] wheels [of justice] running over the rights of both the accused and the government, and in the end, the people themselves.”)

150 Cong. Rec. S4260-01 at S4268 (Apr. 22, 2004) (statement of Sen. Feinstein) (right to proceedings free of unreasonable delay “is [not] intended to infringe on the defendant’s due process right to prepare a defense.”)

### **X. Fairness, Dignity, Privacy**

*United States v. Patkar*, 2008 WL 233062 (D. Hawaii Jan. 28, 2008) (right to be treated with respect for privacy formed, in part, good cause for declining to grant disclosure to the press information about extortion victim provided by the government to defense counsel under a protective order)

*United States v. Robinson*, slip op., 2009 WL 137319 (D. Mass. Jan. 20, 2009) (denying newspaper’s request to order disclosure of extortion victim’s identity, where the government had not disclosed it to the court and it was not relevant to the adjudicatory process thus far; and even if the victim’s identity became relevant to the adjudicatory process, disclosure of the identity of the victim, who was allegedly threatened with public exposure in an effort to extort money, would inflict the same harm the prosecution seeks to punish)

*United States v. Endsley*, slip op., 2009 WL 385864 \*2 (D. Kan. Feb. 17, 2009) (statutory right to be treated “with fairness and with respect for [his] dignity and privacy” does not “impinge[] on a defendant’s right to refute by argument and relevant information any matter offered for the court’s consideration at sentencing”).

“It is hard to comprehend, in any case, how a court presiding over the prosecution of a defendant could engage in sidebar dispute resolution between a victim and the government regarding the strategic decisions of the government about the very

prosecution the Court is to try impartially. . . . [M]ovants further suggested that the government and Rubin were harming their interests in fairness, respect and dignity by essentially accusing the Omni victims of extortion relating to their posture in this case. . . . [T]he Court refuses to adopt an interpretation of (a)(8) that prohibits the government [or the defendant] from raising legitimate arguments in support of its opposition to a motion simply because the arguments may hurt a victim's feelings or reputation. More pointedly, such a dispute is precisely the kind of dispute a court should not involve itself in since it cannot do so without potentially compromising its ability to be impartial to the government and defendant, the only true parties to the trial of the indictment." *United States v. Rubin*, 558 F. Supp. 2d 411, 427-28 (E.D.N.Y. 2008).

## **XI. Procedures**

The procedural provisions of the CVRA are poorly coordinated, not entirely clear, and in some respects unreasonable and potentially unconstitutional. Note that new rules under the Federal Rules of Criminal Procedure related to the CVRA, not addressed here, went into effect December 1, 2008. A separate article on the new rules will be posted on [www.fd.org](http://www.fd.org) under "Crime Victim Rights" under "Training Materials and Other Publications." The new rules do not solve any existing problems and create several new ones.

Significant procedural problems occurred in *Kenna v. United States District Court*, 435 F.3d 1011 (9th Cir. 2006). The victim filed no motion asserting a right to be heard and gave no notice of his intent to file a petition for mandamus. As a result, there was no hearing or briefing on the facts or legal arguments in the district court, and thus no adequate record for the court of appeals. The court of appeals denied the defendant the right to respond to the mandamus petition; waited six months to decide the petition; then, after the judgment in the criminal case was long since final, told the district court to both avoid violating the defendant's constitutional rights and to "re-open" the sentencing hearing. See pp. 29-31 of *Defending Against the Crime Victim Rights Act* (May 5, 2007), [http://www.fd.org/pdf\\_lib/victim%20memo%20to%20defenders.pdf](http://www.fd.org/pdf_lib/victim%20memo%20to%20defenders.pdf).

### **A) Defendant has a right to notice and to respond to a victim's motion asserting rights.**

A victim (or his lawful representative or the government) must "assert" a right described in subsection (a) by "motion," and the district court must "take up and decide" such motion "forthwith." 18 U.S.C. § 3771(d)(1), (3), (e).

Victims may not unilaterally determine the date by which a decision is "forthwith." CVRA does not require rulings before parties can respond in orderly fashion under the rules, and the court has adequate time to review their position. CVRA does not give victims a right to *ex parte* determinations or foreclose defendant's ability to participate in the process. *United States v. Hunter*, 2008 WL 53125 \*1 n.1 (D. Utah Jan. 3, 2008) (Kimball, J.)

Victim's motion must "be made on notice to all parties." *United States v. Eight Automobiles*, 356 F.Supp.2d 223, 227 n.4 (E.D.N.Y. 2005).

Victim may not "assert" rights in first instance by seeking mandamus from a court of appeals. *In re Walsh*, 2007 WL 1156999 (3d Cir. Apr. 19, 2007).

**B) Defendant has the right to respond to the petition for mandamus.**

See Fed. R. App. P. 21 (all parties to the proceeding in the trial court are respondents to a petition for a writ of mandamus for all purposes, court of appeals must order the respondents to answer within a fixed time unless it denies relief without an answer).

See also Due Process Clause.

*In re Antrobus*, 519 F.3d 1123, 1124 (10th Cir. 2008) (court of appeals ordered defendant to respond, and denied putative victims' motion to strike response).

*In re Mikhel*, 453 F.3d 1137 (9th Cir. 2006) (treating defendant as respondent)

But see *Kenna v. United States District Court*, 435 F.3d 1011, 1017 (9th Cir. 2006) (stating that defendant "is not a party to this mandamus action," although "reopening his sentence in a proceeding where he did not participate may well violate his right to due process.")

A summary procedure, in which a person with no constitutional rights at stake has ten days to file a brief while the defendant must file a brief and the court of appeals decide the matter within 72 hours should be held to violate the Due Process Clause. See *Mathews v. Eldridge*, 424 U.S. 319 (1976); *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

**C) Statutory and constitutional limits on "re-opening" sentence or plea**

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." 18 U.S.C. § 3771(d)(5).

"Re-open" has no legal meaning, but if it means "vacate the sentence with the possibility of imposing a higher sentence," or "vacate the plea and re-instate greater charges," this provision has the potential to violate defendants' constitutional rights under the Double Jeopardy Clause not to be sentenced to a higher sentence once the sentence has become final, *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980), and not to have a plea to a lesser offense vacated and a greater charge reinstated. *Ricketts v. Adamson*, 483 U.S. 1, 8 (1987). A judgment is final when direct appeal is concluded and certiorari is denied or

the 90-day period for filing a petition for certiorari has run. *See Clay v. United States*, 537 U.S. 522 (2003).

The CVRA contemplates that the judgment will *not* be final by the conclusion of a victim's mandamus action, as it provides for a maximum of 21 days between the district court's denial of a motion asserting a victim's right and the court of appeals' decision on a petition for mandamus, *i.e.*, 10 days to file the petition, any intermediate Saturdays, Sundays and holiday, no more than 5 days for stay or continuance, and 3 days for decision. 18 U.S.C. § 3771(d)(3), (5). *See* 150 Cong. Rec. S4275 (April 22, 2004) (CVRA "addresses my concerns regarding the rights of the accused," including "the Fifth Amendment protection against double jeopardy") (statement of Sen. Durbin).

In *Kenna*, however, the Ninth Circuit panel did not issue its opinion until over six months after the petition for mandamus was filed. In the interim, the judgment became final for all purposes other than as provided in 18 U.S.C. § 3582(b), which did not apply. The panel posed this task for the district court: "In ruling on the motion [to re-open], the district court must avoid upsetting constitutionally protected rights, but it must also be cognizant that the only way to give effect to Kenna's right to speak as guaranteed to him by the CVRA is to vacate the sentence and hold a new sentencing hearing." 453 F.3d at 1017. The district court judge then held a new sentencing hearing, permitting Kenna and other victims to speak. Having received further information from defense counsel and the government, the court seriously considered imposing a lower sentence, but in the end imposed the same sentence. If the district court had imposed a higher sentence, the defendant's Double Jeopardy rights would have been violated, and the procedures set forth in the CVRA violated as well.

Victims have no right to "the extraordinary result of reopening [defendant's] sentence" through appeal of a final judgment. *See United States v. Hunter*, 548 F.3d 1308, 1314-15 (10<sup>th</sup> Cir. 2008). The single avenue of appeal for victims is mandamus, though the government may assert as error in an appeal in a criminal case the district court's denial of a crime victim's right in a proceeding to which the government's appeal applies. *Id.* at 1315, citing 18 U.S.C. § 3771(d)(3) & (4).

**D) Defendant cannot assert victim rights to obtain relief, but can rely on CVRA's procedures and substantive limits in defending against victims' claims.**

A "person accused of the crime may not obtain any form of relief under this chapter." 18 U.S.C. § 3771(d)(1). This does not mean that the defendant cannot rely on the procedures and substantive limitations of the statute in defending against any assertion of rights in the district court or in a mandamus action by a victim. It means that the defendant cannot "assert any of the victim's rights to obtain relief." 150 Cong. Rec. S10912 (Oct. 9, 2004).

For example, if a victim who wished to urge the judge to impose a low sentence was not allowed to be heard, the defendant could not seek re-sentencing as relief on appeal on the basis of the CVRA. The victim in such a case could petition for mandamus, and the

defendant could appeal on another basis, e.g., the district court failed to comply with 18 U.S.C. §§ 3553(a)(1) and 3661.

#### **E) No right to delay criminal proceedings**

*United States v. Hunter*, 2008 WL 153785 (D. Utah Jan. 14, 2008) (rejecting motion to stay the sentencing hearing so that persons the judge had determined were not victims could litigate and re-litigate issues the judge and the court of appeals had already decided; CVRA does not allow putative victims to delay criminal proceedings)

#### **F) Standard of Review on Mandamus**

Regular mandamus standard – “clear and indisputable right” to the writ. *In re Antrobus*, 519 F.3d 1123, 1124-25, 1127-30 (10<sup>th</sup> Cir. 2008) (supported with statutory language and principles of statutory construction, suggesting sister circuits got it wrong because of time pressures under which they operated); *In re Dean*, 527 F.3d 391, 394 (5<sup>th</sup> Cir. 2008) (mandamus standard applies for reasons stated in *Antrobus*).

Appellate review standard -- abuse of discretion -- *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 562 (2d Cir. 2005) (no support); *Kenna v. United States District Court*, 435 F.3d 1011, 1017 (9th Cir. 2006) (no support). Note that the government may assert as error on appeal the district court’s denial of any crime victim’s right, 18 U.S.C. § 3771(d)(4), so these courts are not correct in saying that Congress chose mandamus as the vehicle for appellate review.

#### **G) Reasonable Alternative Procedures for Multiple Victims**

The court may “fashion a reasonable procedure . . . that does not unduly complicate or prolong the proceedings” when the number of victims makes it “impracticable to accord all of the victims the rights described in” subsection (a). 18 U.S.C. § 3771(d)(2).

*Kenna v. United States District Court*, 435 F.3d 1011, 1014 n.1 (9th Cir. 2006) (this procedure for being “reasonably heard” “may well be appropriate in a case like this one, where there are many victims.”)

*United States v. Saferstein*, slip op., 2008 WL 4925016 \*3 (E.D. Pa. Nov. 18, 2008) (where government did not wish to individually notify 300,000 people individually, but defendants feared contamination of jury pool, court approved publication in USA today and an interactive website, stating the name of the company and defendants’ titles but not their names, omitting tax and perjury charges because there were no victims, and stating that an “indictment is an accusation,” and a “defendant is innocent unless and until proven guilty.”)

*United States v. Ferguson*, 584 F. Supp. 2d 447, 458 n.15 (D. Conn. Oct. 31, 2008) (“The Court finds restitution impracticable as provided in law under the MVRA and the VWPA, and it further finds that the several pending civil proceedings afford a reasonable procedure to give effect to the CVRA”)