

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 crime 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 Section 3771 effectively replaces 42 U.S.C. § 10606 ("Victims' Rights"), now repealed by the CVRA, which included a list of victims' rights but did not provide any means of enforcement.

The CVRA gives victims 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, 2005, amended Fed. R. Crim. P. 32(i)(4)(C) will allow "any victim of a felony offense . . . to speak or submit any information about the sentence.")

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).

The CVRA also adds 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 estab-

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lished 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 arraignment to sentencing. The Center’s *Benchbook for U.S. District Court Judges* will be amended to reflect section 3771 and the resulting changes in court procedure. In the meantime, Part II below provides a preliminary guide to how various sections of 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 the handful of cases that have so far addressed any 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* that are likely to be affected by the various provisions of section 3771. Judges who use the *Benchbook* may wish to note in their copies that the CVRA might apply in these proceedings.

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 victims 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 re-

fuses 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 teleconferencing 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

Victims have 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.

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 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, effective Dec. 1, 2005, Fed. R. Crim. P. 32(i)(4)(C) extends the right to make a statement or present information at sentencing to “any victim of a felony offense.”

4.02 Revocation of Probation or Supervised Release

As noted above for section 1.05, courts may have to determine whether there is a “crime victim” under the CVRA when there is a violation of probation or supervised release. Might the revocation hearing be deemed a “public court proceeding . . . involving the crime or of any release . . . of the accused,” for which victims of the original crime would have the right to notice? If probation or supervised release is considered to be directly connected to the original offense of conviction, the requirements of the CVRA may be applicable to revocation proceedings. 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, would the CVRA apply to the victims of that crime?

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 consulting 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 victimless crime of conviction, such as an illegal weapon possession offense that involved an uncharged assault that may be considered at sentencing?

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 oth-

erwise 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.

IV. Case Summaries

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

In what appears to be 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).”

B. *U.S. v. Ingrassia*, — F. Supp. 2d — (E.D.N.Y. Oct. 15, 2005) (Spatt, J.)

This case provides some examples of notice issues under the CVRA when multiple victims are involved. After the government had identified more than two hundred 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 poten-

tial 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 Order are all available to the public on the Public Access to Court Electronic Records (PACER) service."

C. *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.

D. *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.

E. *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.

F. *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 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."

**G. *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 that “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.

**H. *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 continuance 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).

**I. *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.**—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.

(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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