

# AUTHORITY SUPPORTING THE PROPOSED CRIME VICTIMS' RIGHTS AMENDMENT

PREPARED FOR  
NATIONAL VICTIMS' CONSTITUTIONAL  
AMENDMENT PASSAGE

DISCUSSION DRAFT ONLY



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# AUTHORITY SUPPORTING THE PROPOSED CRIME VICTIMS' RIGHTS AMENDMENT<sup>1</sup>

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<sup>1</sup> Thank you to \_\_\_\_\_ for compilation of authority and to the dedication of the Executive Board of *Phoenix Law Review*, Vol. V. in preparation and editing of this document. *Phoenix Law Review* looks forward to publishing a special edition in April 2012 based on the many ideas and concepts of this piece of work.

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## How to Use This Guide

The purpose of this document is to show through legislative history, scholarly review, and current case law how the courts would interpret the proposed Crime Victims' Rights Amendment. Each clause of the proposed amendment is individually broken out with relevant discussion of how the clause would be interpreted and impact the Victims, Defendants, and the criminal justice system.

The documents referred to are:

**Senate Report No. 108-91 (2003)** on the proposed 2003 Crime Victim's Rights Amendment, which recommended enactment of a substantially similar version of this Amendment.

**Statement of Senator Jon Kyl.** The following statements regarding H.R. 5107 were made by Senator Jon Kyl as part of the Congressional Record on October 9, 2004. Senator Kyl was the primary drafter of H.R. 5107—a bill that included a substantially similar version of this Amendment.

**Kyl Law Review Article** - Jon Kyl, Steven J. Twist, & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581 (2005). This article explains the background and history of the Crime Victims' Rights Act, 18 U.S.C. § 3771 (2006) ("CVRA"), a federal statute which attempted to protect the rights of crime victims at the federal level.

**Cassell Law Review Article** - Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479 (1999). This article was authored by Professor of Law and Executive Board member of the National Victims Constitutional Amendment Network Paul Cassell to explain the practical impact of a substantially similar Amendment to the one currently offered.

**A.L.R.** - Fern L. Kletter, Annotation, *Validity, Construction and Application of Crime Victim's Rights Act (CVRA)*, 18 U.S.C.A. § 3771, 26 A.L.R. FED. 2D 451 (2008). An American Law Report summarizing current case law interpretation of the CVRA.

**Cases** – A compilation of cases interpreting a provision of the CVRA, an equivalent state statute, or an equivalent state constitutional amendment.

## **Text of the Proposed Amendment**

SECTION 1. The rights of crime victims to fairness, respect, and dignity, being capable of protection without denying the constitutional rights of the accused, shall not be denied or abridged by the United States or by any State. The crime victim shall, moreover, have the rights to reasonable notice of, and shall not be excluded from, public proceedings relating to the offense, to be heard at any release, plea, sentencing, or other such proceeding involving any right established by this Article, to proceedings free from unreasonable delay, to reasonable notice of the release or escape of the accused, to due consideration for their safety, and to restitution. The crime victim or the crime victim's lawful representative has standing to assert these rights in any court. Nothing in this Article provides grounds for a new trial or any claim for damages and no person accused of the crime may obtain any form of relief hereunder.

SECTION 2. For purposes of this Article, "crime victim" includes any person or legal entity directly harmed by the commission of a criminal offense, delinquent act, or an act, which, if committed by a competent adult, would constitute a crime.

SECTION 3. This article shall take effect on the 180th day after the date of its ratification.

## **Section 1, Clause 1: “The rights of crime victims to fairness, respect, and dignity,”**

The following sources illuminate the recognized existence of Crime Victims’ Rights and define the concepts of fairness, respect, and dignity as they will be applied.

### Senate Report No. 108-91:

#### **Existence of Crime Victims’ Rights**

“In the administration of criminal justice, courts may not ignore the concerns of victims.” S. REP. NO. 108-91, at 6 (2003) (quoting *Morris v. Slappy*, 461 U.S. 1, 14 (1983)).

“Justice, though due to the accused, is due to the accuser also.” *Id.* at 15 (quoting *Snyder v. Massachusetts*, 291 U.S. 987, 1222 (1934)).

#### **Need for Protection**

Too often crime victims are denied basic rights to fair treatment and due process that should be every citizen’s birthright when seeking justice through our courts. *Id.* at 8.

The criminal justice system has lost an essential balance; the system deprives protection from the innocent, the honest, and the helpless; crime victims have been transformed into a group oppressively burdened by a system designed to protect them. *Id.* at 3 (citing President’s Task Force on Victims of Crime, Final Report 114 (1982)).

Victims will be more willing to participate in the criminal justice system if they perceive that the system is striving to treat them with respect and to recognize their central place in any prosecution. *Id.* at 8 (citing *Senate Judiciary Committee Hearing*, 105th Cong. 41 (1997) (statement of Attorney General Reno)).

### Rita Goldsmith’s Testimony:

Goldsmith of Parents of Murdered Children (POMC) testified that POMC’s national office receives more than 1,000 murder-related calls per week and half involve homicide survivors who believe they have been treated unfairly by the criminal justice system. *Id.* at 17 (citing *Senate Judiciary Committee Hearing*, 104th Cong. 35-36 (1996) (prepared statement of Rita Goldsmith)). Some members even have as much anger about their unfair treatment as they do about the murder. *Id.*

### Statement of Senator Jon Kyl:

#### **Fairness**

“Of course, fairness includes the notion of due process. Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to

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direct government agencies and employees, whether they are in executive or judicial branches, to treat victims of crime with the respect they deserve and to afford them due process.

It is not the intent of this bill that its significance be whittled down or marginalized by the courts or the executive branch. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process. This legislation is meant to ensure that cases like the McVeigh case, where victims of the Oklahoma City bombing were effectively denied the right to attend the trial and to avoid federal appeals courts from determining, as the Tenth Circuit Court of Appeals did, that victims had no standing to seek review of their right to attend the trial under the former victims' law that this bill replaces.” 150 CONG. REC. S10911 (2004).

### Kyl Law Review Article:

#### **Existence of Crime Victims' Rights**

“While most of the rights guaranteed by the CVRA apply in the context of legal proceedings following arrest and charging, other important rights are triggered by the harm inflicted by the crime itself. For example, the right to be treated with fairness, the right to be reasonably protected from the accused (who may qualify as the accused before his arrest), and the right to be treated with respect for the victim’s dignity and privacy each may arise without regard to the existence of legal proceedings. If any doubts remain on this point, the CVRA sweeps them away with its proviso that the rights established by the Act may be asserted ‘if no prosecution is underway, in the district court in the district in which the crime occurred.’” Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 594 (2005).

“The right to be treated with fairness and with respect for the victim’s dignity and privacy . . . is intended to direct government agencies and employees, whether they are in executive or judicial branches, to treat victims of crime with the respect they deserve and to afford them due process.” *Id.* at 613.

#### **Fairness**

“Fairness requires that victims be given notice and an opportunity to be heard. This right to fairness requires that the victim be given notice and the right to be heard, even at stages not specifically enumerated by § 3771(b) of the CVRA. Fairness requires, for example, that the victim be given the opportunity to be heard on the matter of a delay requested by the defendant, especially in light of the victim’s right to proceedings free from unreasonable delay.” *Id.* at 613.

#### **Dignity and Privacy**

“The right to fairness, coupled with this right to ‘dignity and privacy,’ should allow the victim to file motions to seal those records and allow for restrictions on access to the victim’s testimony.” *Id.* at 614.

“The right to be treated ‘with respect for the victim’s dignity and privacy,’ may be applied in a variety of contexts and again, as a matter of fairness, should form the basis for additional opportunities for the victim to be heard, when those contexts arise in court. For example, a victim should be allowed to oppose a defense discovery request for the reproduction of child pornography, the release of personal records of the victim, or the release of personal identifying or locating information about the victim.” *Id.* at 614

### Cassell Law Review Article

#### **Fairness**

“Equality demands fairness not only *between* cases, but also *within* cases. Victims and the public generally perceive great unfairness in a sentencing system with ‘one side muted.’ The Tennessee Supreme Court stated the point bluntly in its decision in *Payne*, explaining that ‘[i]t is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character, and good deeds of Defendant . . . without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.’” Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims’ Rights Amendment*, 1999 UTAH L. REV. 479, 494-95 (1999) (emphasis added).

### A.L.R.:

#### **Fairness**

“Although some of the other rights enumerated in the CVRA, such as the right to be heard and the right to not be excluded, are limited to public proceedings, the right to fairness is not so restricted, pointed out the court. Referencing the conventional rule of statutory construction that where the legislature has used a limiting term in one part of a statute but left it out of others, the term should not be implied where it has been excluded, the court reasoned that the crime victims’ right to be treated with fairness and dignity applies not only to public court proceedings, but more broadly to all aspects of the criminal justice system, including a court’s decision whether to grant the government’s motion to dismiss.” Fern L. Kletter, Annotation, *Validity, Construction and Application of Crime Victims’ Rights Act (CVRA)*, 18 U.S.C.A. § 3771, 26 A.L.R. FED. 2D 451, §30 (2008) (citing *United States v. Heaton*, 458 F. Supp. 2d 1271 (D. Utah 2006)).

The court did not violate considerations of fairness to the victim in allowing a settlement amount less than the total mandated to recoup victim losses when “there were potentially tens of thousands of victims and the complexity of resolving a multitude of issues to determine the amount of losses of those victims would extend the sentencing process inordinately. . . . The court reasoned that the district court 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 under 18 U.S.C.A. § 3771(d)(2), which requires the court to fashion a reasonable procedure that does not unduly complicate or prolong the proceedings where the number of crime victims makes it impracticable to accord all of the victims the rights enumerated under the CVRA.” *Id.* at §31. (citing *W.R. Huff Asset Management Co. v. Rigas*, 409 F.3d 555 (2d Cir. 2005)).

### **Dignity and Privacy**

The right of fairness and respect for dignity and privacy includes protections against identification of mentally ill victim witnesses when it would add “considerable additional distress and loss of dignity.” *Id.* at §29 (citing *United States v. Kaufman*, Nos. CRIM.A. 04-40141-01, CRIM.A. 04-40141-02, 2005 WL 2648070 (D. Kan. Oct. 17, 2005)).

### Cases:

A victim’s right to be treated with fairness, respect, and dignity is established when it has been determined that a crime was committed, and the person is a victim within the meaning of the statute. *In re Petersen*, No. 2:10-CV-298 RM, 2010 WL 5108692, at \*2 (N.D. Ind. Dec. 8, 2010).

“The first substantive provision of the Victims’ Rights Amendment provides that victims of crime shall be treated with fairness, compassion, and respect by the criminal justice system. This provision effects a fundamental change in the criminal justice system. Instead of adopting a two-party *State v. Defendant* paradigm, this provision requires that the system consider interests of third parties, specifically crime victims. Unfair practices that deny crime victims fairness, compassion, and respect are unconstitutional under the amendment.” *State ex rel. K.P.*, 709 A.2d 315, 319, 322, 237 (N.J. Super. Ct. Ch. Div. 1997) (citing N.J. CONST. art I, par. 22 (1991)).

“Fairness-(Fair)-def. 6(a) marked by impartiality and honesty: free from self-interest, prejudice, and favoritism: (b)(1) conforming with merit or importance: Due (c) open to legitimate attack or ridicule: free from favor toward either or any side.” *Id.* at 321-22 (citing WEBSTER’S NINTH COLLEGIATE DICTIONARY (1991)). “Compassion-Sympathetic consciousness of others distress together with a desire to alleviate it (compassionate-def. 2: granted because of unusual distressing circumstances affecting an individual).” *Id.* Respect-1(a): To consider worthy of high regard: Esteem: 2: an act of giving particular attention: Consideration: 3(a): high or special regard: Esteem.” *Id.* “Based upon these standard definitions, the court finds the amendment mandates victims be treated accordingly.” *Id.* “These rights are fundamental and were meant to serve as a floor and not a ceiling. *Id.* at 324.

### **Fairness**

A crime victim’s right to fairness does not include access to all portions of a defendant’s presentence report nor the ability to challenge or argue against the court’s sentencing guideline calculation when a victim is given ample information and the court considers the victim’s impact statement. *In re Brock*, 262 F. App’x 510, 512-13 (4th Cir. 2008).

A crime victim’s right to fairness, respect, and dignity is hampered when a court fails to rule on a crime victim’s motion for three months, regardless of the lack of any substantive proceedings in the criminal action during this time. Therefore, the crime victim may validly seek a petition for a writ of mandamus from the higher court without awaiting a district court’s denial of the initial motion. *In re Simons*, 567 F.3d 800, 801 (6th Cir. 2009).

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A change in venue may adversely affect a victim's rights to be treated with fairness and to appear at court proceedings. *United States v. Agriprocessors, Inc.*, No. 08-CR-1324-LRR, 2009 WL 721715, at \*2 n.2 (N.D. Iowa Mar. 18, 2009).

When considering a change in venue, the court should consider as a factor the victim's right to be treated with fairness and to appear at court proceedings. *United States v. Kanner*, No. 07-CR-1023-LRR, 2008 WL 2663414, at \*8 (N.D. Iowa June 27, 2008).

A victim's right to be treated with fairness is only one of many factors taken into consideration by a court in determining whether a plea agreement should be rejected. *United States v. BP Prods. N. Am. Inc.*, 610 F. Supp. 2d 655, 725-27 (S.D. Tex. 2009); *see also United States v. BP Prods. N. Am. Inc.*, No. H-07-434, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008). Despite a victim's rights being violated, a plea agreement may still stand under the court's broad discretion to accept or reject a plea agreement, particularly when nothing in the record supports a finding that if the victims had conferred with the government a different plea agreement would have been reached. *BP Prods. N. Am. Inc.*, 610 F. Supp. 2d at 725-27; *see also BP Prods. N. Am. Inc.*, 2008 WL 501321.

Although a victim does not have "an affirmative right to be heard at a competency hearing, the [ ] intent is to provide a victim with appropriate access to the proceedings" and uphold the victim's right to be treated fairly. *United States v. Mitchell*, No. 2:08CR125DAK, 2009 WL 3181938, at \*8 n.3 (D. Utah Sept. 28, 2009). Therefore, the court may or may not allow a victim's testimony in an evidentiary hearing. *Id.*

A victim's right to be treated with fairness, respect, and dignity "extends to the court's decision regarding whether to dismiss an indictment even though no public proceeding will be held on the issue." *United States v. Heaton*, 458 F. Supp. 2d 1271, 1272-73 (D. Utah 2006). The victim has the right to be heard and conferred with prior to the prosecutor requesting a dismissal because the victim's rights are to be applied "broadly to all aspects of the criminal justice system. . . ." *Id.*

### **Dignity and Privacy**

"The court finds that denying the victim in this case the ability to close the proceedings, when she can clearly demonstrate a substantial likelihood that specific harm to her recovery will result, would infringe upon her right to be treated with fairness, compassion and respect by the criminal justice system." *State ex rel. K.P.*, 709 A.2d 315, 319, 322, 237 (N.J. Super. Ct. Ch. Div. 1997). "[A]n important motivation for [closing the proceedings] is our responsibility, as judges, to protect minors and their families from emotional or physical harm. This is protection is never more important than situations involving a child victim. In these delicate situations, the court exercises its *parens patriae* authority and must protect this child from pending harm." *Id.*

The mother of a victim's right to be treated with fairness and with respect for her dignity and privacy under the CVRA was not violated through *in camera* review of the minor-victim's entire juvenile record, that arguably contained confidential counseling, medical, and school records. *Order, In re Zito*, (9th Cir. Feb. 26, 2009) (No. 09-70554). However, the victim's petition was

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dismissed without prejudice so it could be refiled if the district court determined it would share the documents with the parties. *Id.*

A victim “has an unquestionable right ‘to be treated with fairness and with respect for [his]dignity and privacy[,]’” and this right provides a “good cause” to uphold a Stipulation and Order that prevents disclosure of discovery materials provided to defense counsel. *United States v. Patkar*, No. 06-00250 JMS, 2008 WL 233062, at \*3-5 (D. Haw. Jan. 28, 2008).

To treat the victim fairly and protect the victim’s dignity and privacy, the government may refer to the victim as a “victim,” rather than by his/her full name, throughout the criminal process. *United States v. Spensley*, No. 09-CV-20082, 2011 WL 165835, at \*1-2 (C.D. Ill. Jan. 19, 2011). Further, a jury would not be inflamed or prejudiced against a defendant by referring to the victim as a “victim.” *Id.*

To protect a victim’s right to privacy and dignity, the court may prohibit the display of graphic videos to persons other than the jury and restrict a sketch artist’s activities, particularly when the victim is mentally-ill. *United States v. Kaufman*, Nos. CRIM.A. 04-40141-01, CRIM.A. 04-40141-02, 2005 WL 2648070, at \*1-4 (D. Kan. Oct. 17, 2005).

Although a crime victim has the right to be treated with fairness, respect, and dignity and be protected from the accused, which might allow a victim to avoid testifying, these “right[s] must yield to [a] defendant’s right to compel the testimony of witnesses in his favor.” *United States v. Pinke*, No. 09-01-01-JSS, 2009 WL 4432669, at \*2 (E.D. Ky. Dec. 2, 2009).

The right of public access to court records under the First Amendment applies only to documents actually submitted to a court in the course of litigation. *United States v. Robinson*, No. 08-10309-MLW, 2009 WL 137319, at \*1-3 (D. Mass. Jan. 20, 2009). If the government has not submitted any such document or otherwise notified the court of a victim’s identity in the case, the court has no legal basis, nor knowledge, to disclose a victim’s identity. *Id.* A victim, who has the right to be treated with fairness, respect, and dignity, holds significant privacy interests in non-disclosure, particularly in extortion where public access would subject the victim to precisely the harm threatened by defendant. *Id.*

Although a victim’s full name is known to the parties and appears on the record, the court may redact her name from further reports out of respect for the victim’s dignity and privacy, as protected by the Crime Victim’s Rights Act. *Gueits v. Kirkpatrick*, 618 F. Supp. 2d 193, 198 n.1 (E.D.N.Y. 2009) *rev’d*, 612 F.3d 118 (2d Cir. 2010). Despite the fact the state has lost track of a victim, best efforts must be made to assure the victim’s right to be heard regarding a defendant’s potential release are fulfilled. *Id.*

A victim, who is properly notified and requests to be heard in the proceedings, may validly object to his/her identifying information contained in such a request from being released to the media, as this flows from the victim’s right to fairness, respect, and dignity. *United States v. Madoff*, 626 F. Supp. 2d 420, 425-28 (S.D.N.Y. 2009). Such a request, or a court’s action of

sealing the documents, does not violate the First Amendment right to access when seal is essential to preserve higher values and is narrowly tailored to serve that interest. *Id.*

To protect the victim's right to respect and dignity, the victim's identity may be protected through the use of a pseudonym rather than sealing a motion in which the government used the victim's full name. *United States v. Darcy*, No. 1:09CR12, 2009 WL 1470495, at \*1 (W.D.N.C. May 26, 2009). "If naming the victim via pseudonym is sufficient for Rule 7(c)(1), Federal Rules of Criminal Procedure, it is certainly sufficient for [CVRA] purposes." *Id.*

Regardless of any alternative procedure the court enacts to accommodate numerous victims and for judicial economy, the court must uphold the victim's right to respect and dignity. *United States v. Okun*, No. 3:08cr132, 2009 WL 790042, at \*2-3 (E.D. Va. Mar. 24, 2009). Further, the Federal Rule of Evidence 615 provides an exception to the exclusion of a witness from the courtroom, which via the CVRA, allows a victim to be present in the courtroom. *Id.*

## **Section 1, Clause 2: "[B]eing capable of protection without denying the constitutional rights of the accused"**

The following sources demonstrate how the rights of Crime Victims can be protected without infringing on the constitutional rights of defendants.

### *Senate Report No. 108-91:*

#### **Balance of Rights**

This amendment neither intends to, nor denies, the constitutional rights of the accused. S. REP. NO. 108-91, at 30 (2003).

Adopting rights for the victim need not come at the expense of the accused's rights. *Id.* at 33 (citing Chief Justice Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1, 17 (1997)).

This amendment creates rights, not in opposition to those of defendants, but in parallel to them. *Id.* The common goal is to protect victims and defendants from abuse by State actors. *Id.* If any conflicts emerge, courts retain ultimate responsibility for harmonizing the rights at stake. *Id.* (citing Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B7).

Just as the courts have accommodated the rights of the press and the public to attend a trial with the rights of a defendant to a fair trial, the courts can make the same sort of accommodation to dissipate any tension between victims' and defendants' rights. *Id.*

Cassell Law Review Article:

**Balance of Rights**

The right of victims to be heard would not impact the ability of judges to limit witness testimony at trial or impact the rights of defendants as victims' rights are limited to proceedings where they do not impact the finding of guilt, and victims have a compelling reason to be heard—bail, plea, and sentencing. Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 487 (1999).

“Correcting [ ]misimpression is not distorting the decision-making process, but eliminating a distortion that would otherwise occur. This interpretation meshes with empirical studies in noncapital cases suggesting that, if a victim impact statement makes a difference in punishment, the description of the harm sustained by the victims is the crucial factor. The studies thus indicate that the general tendency of victim impact evidence is to enhance sentence accuracy and proportionality rather than increase sentence punitiveness.” *Id.* at 493

“[E]ven in rare circumstances of multiple victims [who might tailor their testimony to align], other means exist for dealing with the [ ] issue. For example, the victims typically have given pretrial statements to police, grand juries, prosecutors, or defense investigators that would eliminate their ability to change their stories effectively. In addition, the defense attorney may argue to the jury that victims have tailored their testimony even when they have not. . . .” *Id.* at 499.

“The right the Amendment confers is one to ‘*consideration* of the interest of the victim that any trial be free from *unreasonable* delay.’ . . . [B]y definition . . . examples . . . of defendants legitimately needing more time to prepare would constitute reasons for ‘reasonable’ delay.” *Id.* at 500 (emphasis added).

Cases:

**Protection of Victims**

A crime victim should have access to review the court's file to determine if he/she has been afforded his/her rights as a crime victim. The court file should not be sealed when there is lack of sufficient justification, such as a “defendant's unsubstantiated and unsupported representation that he fears retaliation from anonymous, unidentified individuals with whom he might be incarcerated. . . .” *In re Simons*, 567 F.3d 800, 802 (6th Cir. 2009) (Clay, J., dissenting).

A defendant's First Amendment rights are not violated when 18 U.S.C. § 3613 is utilized to provide compensation to crime victims. The statute “is facially valid because it is not unconstitutional in all of its applications and is not overbroad.” *United States v. Kaczynski*, 551 F.3d 1120, 1126 (9th Cir. 2009).

The presence of a victim, who is also the case agent, at counsel's table is not inherently prejudicial to a defendant nor is there a “general constitutional principle . . . rendering it

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impermissible for a case agent who was also the victim in the case from sitting at counsel table. . .” *United States v. Charles*, 456 F.3d 249, 258-60 (1st Cir. 2006).

A defendant’s Fifth Amendment right to a fair trial and Sixth Amendment right of confrontation are not violated when a victim is allowed to remain in the courtroom per the exception provided for in Federal Rule of Evidence 615. *United States v. Edwards*, 526 F.3d 747, 757-58 (11th Cir. 2008). “A criminal defendant has no constitutional right to exclude witnesses from the courtroom.” *Id.*

A jury would not be inflamed or prejudiced against a defendant by referring to the victim as a “victim.” *United States v. Spensley*, No. 09-CV-20082, 2011 WL 165835, at \*1-2 (C.D. Ill. Jan. 19, 2011). To treat the victim fairly and protect the victim’s dignity and privacy, the government may refer to the victim as a “victim,” rather than by his/her full name, throughout the criminal process. *Id.*

### **Protection of Defendants**

A defendant has the right to refute any matter offered to the court for consideration at sentencing and challenge the reliability of any victim impact statement, “so long as the victim’s ‘right to be treated with fairness and with respect for the victim’s dignity and privacy’ is preserved.” *United States v. Endsley*, No. 08-40050-01-SAC, 2009 WL 385864, at \*2 (D. Kan. Feb. 17, 2009). A “court will evaluate the victim impact statements against the same standards of reliability and reasonableness applied to all matters introduced at sentencing hearings.” *Id.*

A victim impact statement, presented at sentencing, does not violate a defendant’s plea agreement which “authorize[s] the government to ‘inform the Court . . . of all facts pertinent to the sentencing process,’” as “the victims’ viewpoints were generally pertinent to the sentencing process.” *United States v. Horsfall*, 552 F.3d 1275, 1282-83, 1284 (11th Cir. 2008). Additionally, a court’s consideration of a victim impact statement does not violate a defendant’s Eighth Amendment rights in a non-capital child pornography prosecution versus the use of a victim impact statement during the sentencing phase of a capital case. *Id.*

Although a crime victim has the right to be treated with fairness, respect, and dignity and be protected from the accused, which might allow a victim to avoid testifying, these “right[s] must yield to [a] defendant’s right to compel the testimony of witnesses in his favor.” *United States v. Pinke*, No. 09-01-01-JSS, 2009 WL 4432669, at \*2 (E.D. Ky. Dec. 2, 2009).

A court has an obligation “to take whatever affirmative steps may be necessary to protect a criminal defendant’s right to a fair trial untainted by prejudicial comments in the media,” while also considering the prosecution’s obligation to uphold a victim’s rights. *United States v. Grace*, 401 F. Supp. 2d 1057, 1060, 1063-64 (D. Mont. 2005). Hence, some statements made to the media may fall “within the ‘legitimate law enforcement purpose’ exception because they were made in the course of fulfilling” the prosecution’s obligation to the victim. *Id.*

The act of providing rights to victims is not intended to “undermine the Speedy Trial Act, 18 U.S.C. §[§] 3161, *et. seq.*, nor to deprive either criminal defendants or the government of a full an[sic] adequate opportunity to prepare for trial.” *United States v. Tobin*, No. 04-CR-216-01-SM, 2005 WL 1868682, at \*1-2 (D.N.H. July 22, 2005). Therefore, the court may grant a continuance that “does not constitute either ‘undue’ or ‘unreasonable’ delay.” *Id.*

### **Section 1, Clause 3: “[S]hall not be denied or abridged by the United States or by any State.”**

#### Cassell Law Review Article:

“[V]ictims’ power is easy to overrate. Victims’ claims inevitably bump up against well-entrenched interests within the criminal justice system . . . . Victims have not, for example, generally obtained the right to sue the government for damages for violations of their rights.” Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims’ Rights Amendment*, 1999 UTAH L. REV. 479, 527 (1999).

#### Cases:

“The general public, specifically victims, perceive the judge as the person ultimately administering the criminal justice system.” *State ex rel. K.P.*, 709 A.2d 315, 319, 322, 237 (N.J. Super. Ct. Ch. Div. 1997). “Historically, the legal system did not view crime victims as having any rights.” *Id.* ““The victims’ rights movement has resulted in the adoption of new procedural and substantive rights for victims. Judges must learn and implement those new constitutional provisions and statutes because they will bring about a better justice system.”” *Id.* (citing John Albrecht, *The Rights and Needs of Victims of Crime: The Judges Perspective*, 34 JUDGES J. 29, 34 (1995)). “[A] judge must be prepared to implement a victim’s rights just as accurately as he or she would protect a defendant’s.” *Id.*

### **Section 1, Clause 4: “The crime victim shall, moreover, have the right to reasonable notice of . . . public proceedings relating to the offense”**

The following sources discuss the need for and application of notice requirements for Crime Victims.

*Senate Report No. 108-91:*

**Reasonable Notice**

Victims should be notified of public proceedings relating to the crime so they can exercise their rights. S. REP. NO. 108-91, at 33 (2003). “Notice” can be accomplished by a variety of methods, including computerized mailings and automatic telephone notification. *Id.*

The notice must be “reasonable,” which means it must be likely to provide actual notice to a victim or permits meaningful opportunity for the victims to exercise their rights. *Id.* at 33-34. Government actors must use due diligence, not heroic measures, to provide notice. *Id.* at 34. Special efforts are needed for victims with special needs (hearing impaired or illiterate). *Id.* Notice of rights, proceedings, or events should be given as soon as practicable to allow victims the greatest opportunity to exercise their rights. *Id.* In mass victim cases, reasonable notice could be tailored to those unusual circumstances, such as notification by newspaper or television announcement. *Id.*

**Public Proceedings**

“Public proceedings” are official events that take place before trial courts, appellate courts (including magistrates and special masters) and parole boards. *Id.* They include hearings of all types such as motion hearings, trials, and sentencings; however, they do not include informal meetings between prosecutors and defense attorneys, grand jury investigations, or any other proceedings not open to the public—like closed proceedings to protect the identity of an organized crime witness or to protect national security. *Id.* (citing 28 C.F.R. § 50.9 (2011); The Classified Information Procedures Act, 18 U.S.C. App. III.). While this amendment does not change the standards for closing hearings, it also does not prohibit the court from allowing a victim to attend a nonpublic hearing. *Id.*

“Public proceedings” are those “relating to the offense,” like criminal proceedings arising from the filed criminal charges and other proceedings. *Id.* The right applies to initial hearings, rehearings, appellate hearings, subsequent remand hearings, and multiple hearings. *Id.*

**Impact of Failure to Provide Notice**

Goldsmith of Parents of Murdered Children (POMC) testified that POMC’s national office receives more than 1,000 murder-related calls per week and half involve homicide survivors who believe they have been treated unfairly by the criminal justice system. *Id.* at 17 (citing *Senate Judiciary Committee Hearing*, 104th Cong. 35-36 (1996) (prepared statement of Rita Goldsmith)). Some members even have as much anger about their unfair treatment as they do about the murder. Many concerns come from not being informed about the progress of a case. *Id.* Victims are not informed about when a case is going to court or whether the defendant will receive a plea bargain. *Id.* Failure to provide information comes from indifference to the plight of surviving family members or a feeling that they have no right to the information. *Id.* Victims frequently have to call the prosecutor or courts for information while in a state of shock or grieving the loss of their loved ones. *Id.* They should not have to bear the added burden of trying to obtain information. It should be their automatic right. *Id.* at 17.

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Earlene Eason of Gary, Indiana, was not notified of proceedings or of the plea bargain that was offered to her 16 year old son's murderer. *Id.* at 9, 16 (citing *Senate Judiciary Committee Hearing*, 108th Cong. (2003) (prepared Statement of Earlene Eason)). She also experienced significant financial hardship because of failures to give her and her fiancé adequate notice. *Id.* They made constant trips to Minneapolis for court dates, which were frequently changed without adequate notice. *Id.* Her son's father, who resides in California, purchased several airline tickets but was never advised by the district attorney's office of changes in court dates. *Id.* He became so frustrated that he stopped trying to come to hearings because of the expense of cancelled tickets and fear of losing his job from disruption in work schedule. *Id.*

### Statement of Senator Jon Kyl:

#### **Reasonable Notice**

"The notice provisions are important because if a victim fails to receive notice of a public proceeding in the criminal case at which the victim's right could otherwise have been exercised, that right has effectively been denied. Public court proceedings include both trial level and appellate level court proceedings. It does not make sense to enact victims' rights that are rendered useless because the victim never knew of the proceeding at which the right had to be asserted. Simply put, a failure to provide notice of proceedings at which a right can be asserted is equivalent to a violation of the right itself." 150 CONG. REC. S10910 (2004).

"For these rights to notice to be effective, notice must be sufficiently given in advance of a proceeding to give the crime victim the opportunity to arrange his or her affairs in order to be able to attend that proceeding and any scheduling of proceedings should take into account the victim's schedule to facilitate effective notice." *Id.*

"Too often crime victims have been unable to exercise their rights because they were not informed of the proceedings. Pleas and sentencings have all too frequently occurred without the victim ever knowing that they were taking place. Victims are the persons who are directly harmed by the crime and they have a stake in the criminal process because of that harm. Their lives are significantly altered by the crime and they have to live with the consequences for the rest of their lives. To deny them the opportunity to know of and be present at proceedings is counter to the fundamental principles of this country. It is simply wrong. Moreover, victim safety requires that notice of the release or escape of an accused from custody be made in a timely manner to allow the victim to make informed choices about his or her own safety. This provision ensures that takes place." *Id.*

### Kyl Law Review Article:

#### **Reasonable Notice**

"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." Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston*,

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*Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 597 (2005).

“Victims cannot assert a right at a court hearing if they missed the hearing because they were given no notice of it.” *Id.*

“The notice provisions are important because if a victim fails to receive notice of a public proceeding in the criminal case at which the victim’s right could otherwise have been exercised, that right has effectively been denied. . . .” *Id.* (quoting 150 CONG. REC. S4267-68 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl)).

“‘Timely’ notice means that the victim be informed sufficiently in advance of a public proceeding that she is able to arrange her affairs so that she may attend. Often, criminal courts schedule proceedings, whether at the last minute or well in advance, without giving any notice to the victim. Of course, such proceedings render meaningless any participatory right granted to the victim. It goes without saying that the defendant, the state, and the court always have notice of proceedings; failure to provide such notice to any of these three would render void any action taken by the court. Victims simply seek equal consideration. Principles of fairness and decency demand no less.” *Id.* at 597-98.

“The CVRA also requires that notice of particular proceedings be ‘accurate.’ Victims often describe being told to arrive at a certain time, on a certain date, for a proceeding, only to discover that the time and date of the hearing have been changed. The standard of accuracy imposed by the CVRA requires that those providing notice be as careful giving information to the victim as they are when they are providing notice to the defendant, the lawyers, or the court itself.” *Id.*

“The statute recognizes that in certain cases--those involving large numbers of victims, for example--the notice requirement might prove extremely difficult or impossible to fulfill. In almost all cases, however, notice is possible and is therefore required.” *Id.*

“The failure to give victims notice of key events in their cases is increasingly less defensible in an era of technological advances. Automatic phone systems, Internet-based notice systems, and other modern notification technologies are widely available.” *Id.*

“Witnesses testifying before both the House and Senate Judiciary Committees gave compelling accounts of the devastating effects on crime victims of learning that proceedings were held in their case without their knowledge. In 1982, the President’s Task Force on Victims of Crime: Final Report recommended that victims be kept apprised of criminal justice proceedings. Since then, many states have enacted requirements that victims be notified of court hearings. But the effort has not been completely successful. A recent U.S. Justice Department report found that some states have not adopted any laws requiring that victims be given notice of proceedings, and even of those states that have done so, many have failed to implement mechanisms that make such notice a reality.” *Id.* at 597.

Cassell Law Review Article:

“[I]t is already recognized as sound prosecutorial practice to provide notice to victims. The National Prosecution Standards prepared by the National District Attorneys Association recommend that victims of violent crimes and other serious felonies should be informed, where feasible, of important steps in the criminal justice process. In addition, many states have required that victims receive notice of a broad range of criminal justice proceedings. Nearly every state provides notice of the trial, sentencing, and parole hearings.” Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims’ Rights Amendment*, 1999 UTAH L. REV. 479, 506 (1999).

A.L.R.:

**Reasonable Notice**

“[T]he government was required to notify alleged victims of the result of the hearing and of their right to request reconsideration of relevant decisions made in their absence . . . as the particular circumstances warranted balancing the victims’ interest in reasonable, accurate, and timely notice of the proceedings against the requirement that the defendant be brought before a magistrate judge without unnecessary delay.” Fern L. Kletter, Annotation, *Validity, Construction and Application of Crime Victim’s Rights Act (CVRA)*, 18 U.S.C.A. § 3771, 26 A.L.R. FED. 2D 451, §10 (2008) (citing *United States v. Turner*, 367 F. Supp. 2d 319 (E.D. N.Y. 2005)).

**Public Proceedings**

“A defendant’s initial appearance pursuant to Fed. R. Crim. P. 5 is a public proceeding and presumptively includes consideration of whether the accused offender will be released, stated the court. Accordingly, continued the court, victims must be given reasonable, accurate, and timely notice of the proceeding to afford them an opportunity to be heard with respect to bail. Noting that such application of the notice requirement to the initial appearance raises an obvious practical difficulty in that the defendant is generally required to be brought before the magistrate judge without unnecessary delay, the court framed the question as whether it is either necessary within the meaning of Rule 5 or reasonable within the meaning of 18 U.S.C.A. § 3771(a)(2) to delay the initial appearance to ensure timely notice to a victim. Answering that question may well require a case-by-case inquiry into the circumstances that might indicate that an absent victim is uniquely able to address the issue of the defendant’s release, stated the court, concluding that proceeding promptly with the initial appearance and belatedly requiring the government to notify victims of the result and of their right to request reconsideration of relevant decisions made in their absence reasonably balanced the competing interests at stake in this case.” *Id.*

Cases:

**Reasonable Notice**

The government has an affirmative obligation to notify victims of their rights. *United States v. Rubin*, 558 F. Supp. 2d 411, 421-23, 428 (E.D.N.Y. 2008). However, lacking any violation of victim’s substantive rights, “the government’s misstep on notice . . . is remediable only prospectively and not retrospectively.” *Id.*

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In cases involving multiple victims, the court can approve a reasonable alternative procedure to provide the victims with notice, such as notice by publication, where publication directs victims to a website maintained by the government with hyperlinks to updates on the case. *United States v. Saltsman*, No. 07-CR-641 (NGG), 2007 WL 4232985, at \*1-2 (E.D.N.Y. Nov. 27, 2007).

In providing alternative procedures for giving multiple victims adequate notice, the procedures should be proactive on the part of the government rather than awaiting victims to seek out the information. *United States v. Ingrassia*, No. CR-04-0455ADSJO, 2005 WL 2875220, at \*9 (E.D.N.Y. Sept. 7, 2005); *see also United States v. Ingrassia*, 392 F. Supp. 2d 493 (E.D.N.Y. 2005).

In a case involving multiple victims, the “court is encouraged . . . [to] fashion a reasonable procedure to ensure the victims are afforded their rights,” such as a public disclosure on the internet. *United States v. Croteau*, No. 05-CR-30104-DRH, 2006 U.S. Dist. LEXIS 23684, at \*2-3 (S.D. Ill. 2006).

To ensure that a victim receives proper notice, the victim’s attorney may be added to the service list in the case. *United States v. Gallion*, No. 07-39(WOB), 2008 WL 1904669, at \*6 (E.D. Ky. Apr. 29, 2008).

In providing a victim reasonable notice of the proceedings, extensive alternative notice procedures may be employed and found as a reasonable alternative given the possible time delays, the difficulty of identifying numerous victims, and the calculation of losses. *W.R. Huff Asset Mgmt. Co. v. Rigas*, 409 F.3d 555, 564 (2d Cir. 2005).

In a case involving numerous victims, the issuance of a press release to every daily newspaper in the area, containing specific information about defendants’ sentencing hearings, is a reasonable alternative to actual notice to each victim at his or her residential address. *United States v. Peralta*, No. 3:08cr233, 2009 WL 2998050, at \*1-2 (W.D.N.C. Sept. 15, 2009).

In a case involving numerous victims, providing notice to the victims by publication or news release is a reasonable alternative procedure when the publications are “representative of the market from which a large victim population was contacted in [the] case.” *United States v. Freedman*, No. 5:08CR335, 2009 WL 3784961, at \*1 (N.D. Ohio Nov. 10, 2009)

In a case involving numerous victims, the court may accept and order the reasonable alternative procedures the government proposes when the procedures are “consistent with the precedent and practice in other jurisdictions. . . .” *United States v. Stokes*, No. 3:06-00204, 2007 WL 1849846, at \*1 (M.D. Tenn. June 22, 2007).

In a case involving numerous victims, the court may provide reasonable alternative procedures for the victims to be heard and order the Department of Justice to publish the order, which

provides the alternative procedures, in local and national newspapers and on its website. *United States v. Skilling*, No. H-04-025-SS, 2009 WL 806757, at \*1-2 (S.D. Tex. Mar. 26, 2009).

### **Public Proceedings**

A victim's right to notice includes the government providing an explanation of its decision to enter a plea or to dismiss a case. *United States v. Blumhagen*, No. 03-CR-56S, 2006 US Dist. LEXIS 15380, at \*3 (W.D.N.Y. Apr. 3, 2006). Such action allows "victims who choose to exercise their right to be heard [the ability] to tailor their comments accordingly. . . ." *Id.*

A victim's rights to notice, to be heard, and to restitution may be jeopardized by a lengthy delay in the proceedings, such as an indefinite continuance. *United States v. Gallion*, No. 07-39 (WOB), 2007 WL 2407269, at \*2-3 (E.D. Ky. Aug. 20, 2007).

A victim's right to notice applies to public proceedings and, therefore, does not apply to proceedings that are sealed. *United States v. Keifer*, No. 2:08-CR-162, 2009 WL 414472, at \*3-4 (S.D. Ohio Feb. 18, 2009).

A victim's right to notice does not require the government or court to provide "presentence investigation reports or other documents of a similar nature" to the victim, and such documents may be sealed. *United States v. Citgo Petroleum Corp.*, No. C-06-563, 2007 WL 2274393, at \*1-2 (S.D. Tex. Aug. 8, 2007).

## ***Section 1, Clause 5: "The crime victim . . . shall not be excluded from public proceedings relating to the offense"***

The following sources discuss the need for Crime Victims to have access to public proceedings.

### *Senate Report No. 108-91:*

#### **Not be Excluded**

This amendment gives victims the right to "not be excluded" from public proceedings. S. REP. NO. 108-91, at 35 (2003). Victims, "no less than the defendant, have a legitimate interest in the fair adjudication of the case and should therefore, as an exception to the general rule providing for the exclusion of witnesses, be permitted to be present for the entire trial." *Id.* (quoting PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 80 (1982)).

Because the right is a negative one, "to not be excluded," the government does not have an obligation to provide funding, to schedule a particular proceeding according to the victim's wishes, or otherwise assert affirmative efforts to make it possible for a victim to attend proceedings. *Id.*

The amendment would not entitle a prisoner, who was attacked in prison, to a release from prison and a plane ticket to enable him to attend his attacker's trial. *Id.* Because prisoners

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ordinarily cannot be “present,” they will exercise their rights by submitting a “statement.” *Id.* (citing ARIZ. CONST. art. II, §2.1; UTAH CODE ANN. §77–38–5(8) (LexisNexis, LEXIS through 2011 Legis. Sess.)).

A victim’s right not to be excluded will parallel the right of a defendant to be present during criminal proceedings. *Id.* at 32-33 (citing *Diaz v. United States*, 223 U.S. 442, 454–55 (1912)). Like defendants, crime victims will have no right to engage in disruptive behavior and, like defendants, will have to follow proper court rules, such as those forbidding excessive displays of emotion or visibly reacting to testimony of witnesses during a jury trial. *Id.* at 36 (citing *Illinois v. Allen*, 397 U.S. 337, 343 (1977); *Foster v. Wainwright*, 686 F.2d 1382, 1387 (11th Cir. 1982)).

There is no general federal constitutional right of criminal defendants to exclude victims from trials. *Id.* at 21 (citing *Senate Judiciary Committee Hearing*, 104th Cong. 48-57 (1996) (statement of Paul Cassell)).

A victim’s presence at a trial can facilitate healing of the victim’s debilitating psychological wounds. *Id.* at 19 (citing Ken Eikenberry, *The Elevation of Victims’ Rights in Washington State: Constitutional Status*, 17 PEPP. L. REV. 19, 41 (1989)). A victim’s presence in the courtroom can further the truth-finding process by alerting prosecutors to misrepresentations in the testimony of other witnesses. *Id.* (citing U.S. DEPARTMENT OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, *NEW DIRECTIONS FROM THE FIELD: VICTIMS’ RIGHTS AND SERVICES FOR THE 21ST CENTURY* 15 (1998)).

Closing the courthouse doors to America’s crime victims is one of the shames of justice today and must be stopped. *Id.* at 20 (citing *Senate Judiciary Committee Hearing*, 105th Cong. 90-91 (1998) (statement of Steve Twist)).

### **Impact of Exclusion**

Collene and Gary Campbell from San Juan Capistrano, California, were not permitted to be in the courtroom during three trials for the men who murdered their son, Scott. *Id.* at 9. They were literally forced to sit in the hallway outside the courtroom while the murderers’ families were ushered in to reserved seats in the front row of the gallery. *Id.* More than 20 years later, they endured the same treatment during the trial of the man accused of murdering her brother and sister-in-law, racing legend Mickey Thompson and his wife Trudy. *Id.* Collene and Gary were told that they would not be allowed in the courtroom during the trial. *Id.*

#### *Roberta Roper’s Testimony:*

Roper, as co-chair of the National Victims Constitutional Amendment Network was denied the opportunity to sit in the courtroom of the trial of her daughter’s murderer because it was thought that her presence might influence the outcome. *Id.* at 12.

“Public proceedings” are official events that take place before trial courts, appellate courts (including magistrates and special masters), and parole boards. S. REP. NO. 108-91, at 3 (2003). They include hearings of all types such as motion hearings, trials, and sentencings; however, they

do not include informal meetings between prosecutors and defense attorneys, grand jury investigations, or any other proceedings not open to the public—like closed proceedings to protect the identity of an organized crime witness or to protect national security. *Id.* (citing 28 C.F.R. § 50.9 (2011); The Classified Information Procedures Act, 18 U.S.C. App. III). While this amendment does not change the standards for closing hearings, it also does not prohibit the court from allowing a victim to attend a nonpublic hearing. *Id.*

### **Public Proceedings**

“Public proceedings” are those “relating to the offense,” like criminal proceedings arising from the filed criminal charges and other proceedings. *Id.* The right applies to initial hearings, rehearings, appellate hearings, subsequent remand hearings, and multiple hearings. *Id.*

### Statement of Senator Jon Kyl:

#### **Not be Excluded**

“This language was drafted in a way to ensure that the government would not be responsible for paying for the victim's travel and lodging to a place where they could attend the proceedings.

In all other respects, this section is intended to grant victims the right to attend and be present throughout all public proceedings.” 150 CONG. REC. S10910 (2004).

“[T]his bill allows crime victims, in the vast majority of cases, to attend the hearings and trial of the case involving their victimization. This is so important because crime victims share an interest with the government in seeing that justice is done in a criminal case and this interest supports the idea that victims should not be excluded from public criminal proceedings, whether these are pre-trial, trial, or post-trial proceedings.” *Id.*

“When ‘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,’ a victim may be excluded. The standards of ‘clear and convincing evidence’ and ‘materially altered’ are extremely high and intended to make exclusion of the victim quite rare, especially since (b) says that ‘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.’ It should be stressed that (b) requires that ‘the reasons for any decision denying relief under this chapter shall be clearly stated on the record.’ A judge should explain in detail the precise reasons why relief is being denied.” *Id.* at S10910-11.

### **Public Proceedings**

“This right is limited in two respects. First, the right is limited to public proceedings, thus grand jury proceedings are excluded from the right. Second, the government or the defendant can request, and the court can order, judicial proceedings to be closed under existing laws. This provision is not intended to alter those laws or their procedures in any way. There may be organized crime cases or cases involving national security that require procedures that necessarily deny a crime victim the right not to be excluded that would otherwise be provided under this section. This is as it should be. National security matters and organized crime cases

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are especially challenging and there are times when there is a vital need for closed proceedings. In such cases, the proceedings are not intended to be interpreted as “public proceedings” under this bill. In this regard, it is not our intent to alter 28 CFR Sec. 50.9 in any respect.” *Id.*

“Restrictions on public proceedings are in 28 CFR Sec. 50.9, and it is not the intent here today to alter the meaning of that provision.” *Id.*

### *Kyl Law Review Article:*

#### **Not be Excluded**

“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.” Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act*, 9 LEWIS & CLARK L. REV. 581, 599 (2005).

The CVRA’s attendance provision reasserts the right not to be excluded from any public court proceedings, but it also adds the following important clarification: the victim must be allowed to attend “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.” *Id.* at 600.

“For example, in Arizona, the ‘right to be present at . . . all criminal proceedings where the defendant has a right to be present’ has been a part of the state constitution since November 1990. In Alabama, the law provides that victims not only may be in the courtroom during trial, but that they may also sit at the counsel table. The Alabama statute has been upheld against a constitutional challenge brought by a convicted defendant in a capital case in which the victim’s widow sat at counsel table with the prosecutor and at one point during the autopsy testimony ‘did begin to cry.’ The court concluded that in the context of the entire trial, the “record indicates no prejudice from the trial court’s allowing [the widow] to be present.” *Id.*

“As a compromise between the earlier Senate and the House versions, the CVRA adopts a strict and narrow standard for the circumstances in which sequestration can be required. The exceptions apply only in the very unlikely event that the ‘court, after receiving clear and convincing evidence, determines that the testimony by the victim would be materially altered if the victim heard other testimony at the proceeding.’ Clear and convincing evidence is a demanding standard of proof. It means that the evidence for the thing to be proved makes that thing highly probable or reasonably certain. The party advocating the victim’s exclusion has the burden of producing such evidence and persuading the court that the victim’s testimony would be materially altered.” *Id.* at 600-01.

“In addition, section (b) of the CVRA requires that ‘[b]efore 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.’ In the unlikely event that the standard for the exception is met, section (b) requires that ‘[t]he reasons for any decision denying relief under this chapter shall be clearly stated on the record.’ A judge must explain in detail the precise reasons why the victim is being excluded.” *Id.*

“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.” *Id.* at 617.

“When a crime has so many victims that it becomes impracticable to provide notice, or the right to be present, or the right to be heard, or even the right to restitution (presumably, in any case where a victim, even of a large group, can show a threat to safety, no exception would apply), the court may provide for ‘a reasonable procedure’ to protect the victim and yet not undermine the fair administration of justice.” *Id.* at 617-18.

### **Public Proceedings**

“The ‘public court proceedings’ for which notice is required, according to the Department of Justice, include, ‘for example, hearings on motions to quash subpoenas and motions for return of property, arraignments, bail hearings, hearings on pre-trial motions, trials, plea proceedings, sentencing hearings, appellate arguments, . . . hearings regarding collateral attack motions . . . [and] post-judgment hearings such as hearings on probation violations and parole hearings. Some courts may also interpret this language broadly to apply to public court hearings involving restitution enforcement.’ To this list, the CVRA adds initial appearances pursuant to Rule 5, pre-trial conferences on scheduling issues, and any other proceedings which the defendant has a right to attend. This notice requirement also expressly applies to parole proceedings.” *Id.*

“[T]he right is limited to public proceedings; thus, grand jury proceedings are excluded from the right. Furthermore, the government or the defendant can request, and the court can order, judicial proceedings to be closed under existing laws. This provision is not intended to alter those laws or procedures in any way.” *Id.*

### Cassell Law Review Article:

“‘The right conferred is a negative one—a right ‘not to be excluded’—to avoid the suggestion that an alternative formulation—a right ‘to attend’—might carry with it some governmental obligation to provide funding . . . for a victim to attend proceedings.’” . . . [N]o court has interpreted any one of these provisions as guaranteeing a victim a right of transportation and lodging at public expense.” Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims’ Rights Amendment*, 1999 UTAH L. REV. 479, 505 (1999) (citing S. REP. NO. 105-409 (1998)).

“Once victims arrive at the courthouse, their attendance at proceedings imposes no significant incremental costs. In exercising their right to attend, victims simply can sit in the benches that have already been built.” *Id.*

“[L]itigating claims concerning exclusion from the courtroom . . . promises to be quite difficult. For example, a victim may not learn that she will be excluded until the day the trial starts. Filing effective appellate actions in such circumstances promises to be practically impossible.” *Id.* at 521.

A.L.R.:

**Not be Excluded**

“[A] judge conducting a public proceeding involving a crime may not close the courtroom to a crime victim who seeks entry, but has no obligation to ensure that the victim actually arrives there.” Fern L. Kletter, Annotation, *Validity, Construction and Application of Crime Victim’s Rights Act (CVRA)*, 18 U.S.C.A. § 3771, 26 A.L.R. FED. 2d 451, §17 (2008) (citing *United States v. Turner*, 367 F. Supp. 2d 319 (E.D. N.Y. 2005)).

“[T]he court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to the exclusion of the victim from the criminal proceeding.” *Id.* (citing *United States v. Johnson*, 362 F. Supp. 2d 1043 (N.D. Iowa 2005)).

The CVRA does not permit a district court to exclude victim-witnesses from a courtroom unless clear and convincing evidence proves their testimony will be materially altered if they are allowed to attend the trial in its entirety. *Id.* (citing *Mikhel v. U.S. District Court*, 453 F.3d 1137 (9th Cir. 2006)). However, the crime victim does not have an absolute right to witness a trial at the expense of the defendant’s rights, and the court may exclude a victim-witness if the court finds by clear and convincing evidence that testimony by the victim would be materially altered if the victim heard other testimony. The mere possibility that a victim-witness may alter his or her testimony is insufficient to justify excluding him or her from trial. *Id.*

**Public Proceedings**

The CVRA applies only to public proceedings, and thus applies only to juvenile proceedings insofar as they are public court proceedings. *Id.* at §19 (citing *United States v. L.M.*, 425 F. Supp. 2d 948 (N.D. Iowa 2006) (denying government’s request to permit crime victim to attend a juvenile transfer hearing, though granting the government’s request to notify the victims of the time and location of the hearing)).

Cases:

**Not be Excluded**

A defendant’s rights under the Fifth and Sixth Amendments to a fair trial and to confrontation are not violated when a victim is allowed to remain in the courtroom per the exception provided for in Federal Rule of Evidence 615. *United States v. Edwards*, 526 F.3d 747, 757-58 (11th Cir. 2008). “A criminal defendant has no constitutional right to exclude witnesses from the courtroom.” *Id.*

## DISCUSSION DRAFT ONLY

A victim's right to be treated with fairness and to appear at court proceedings may be adversely affected by a change in venue. *United States v. Agriprocessors, Inc.*, No. 08-CR-1324-LRR, 2009 WL 721715, at \*2 n.2 (N.D. Iowa Mar. 18, 2009).

When considering a change in venue, the court should consider as a factor the victim's right to be treated with fairness and to appear at court proceedings. *United States v. Kanner*, No. 07-CR-1023-LRR, 2008 WL 2663414, at \*8 (N.D. Iowa June 27, 2008).

The Federal Rule of Evidence 615 contains an explicit exception for case agents. *United States v. Charles*, 456 F.3d 249, 257-58 (1st Cir. 2006). Therefore, it is permissible for a case agent, who is also a victim, to be present during proceedings and/or sit at counsel's table. *Id.*

Once a court deems a person to be a victim that person shall not be excluded from the court proceedings, regardless if he/she is a witness. *Parker v. U.S. District Court*, Nos. 09-70529, 09-70533, 2009 WL 5609734 (9th Cir. Feb. 27, 2009); *see also United States v. Grace*, 597 F. Supp. 2d 1157 (D. Mont. 2009), *vacated*, No. CR 05-07-M-DWM, 2009 WL 5697923 (D. Mont. Feb. 27, 2009) ("Grace II").

Absent a finding upon clear and convincing evidence that a victim's testimony would be "materially altered" if he/she was present during the trial, the victim-witness should not be excluded from the proceedings. *Mikhel v. U.S. District Court*, 453 F.3d 1137 (9th Cir. 2006).

### **Public Proceedings**

"[T]he court finds that the second sentence of the amendment clearly gives victims an inalienable right to be present during a criminal proceeding, subject only to rules concerning sequestration. This sentence clearly gives a victim a substantive right to be present during a criminal proceeding." *State ex rel. K.P.*, 709 A.2d 315, 319, 322, 237 (N.J. Super. Ct. Ch. Div. 1997) (citing N.J. Const. art I, par. 22 (1991)).

A court may find that court documents should not be sealed or redacted, as to do so would violate a victim's right to not be excluded from the proceedings. *United States v. Crompton Corp.*, 399 F. Supp. 2d 1047, 1051 (N.D. Cal. 2005).

"[T]here are significant public interests in full disclosure of [a] plea agreement . . . [including] the victims' right of access to the terms of a plea agreement . . . ." *Doe v. Hammond*, 502 F. Supp. 2d 94, 102-03 (D.D.C. 2007).

Even if a plea agreement could be considered sufficiently stigmatizing to implicate the defendant's due process interests, the court may find that interest outweighed by the victims' right of access to the terms of a plea agreement. *United States v. Korean Air Lines Co.*, 505 F. Supp. 2d 91, 96 n.3 (D.D.C. 2007).

A victim's right to not be excluded from proceedings applies only to public proceedings. *United States v. L.M.*, 425 F. Supp. 2d 948, 951-52 (N.D. Iowa 2006). Whether a juvenile proceeding

should be “public” is properly made by the court on a Case-by-case basis. *Id.* Therefore, a victim has the right not to be excluded from a juvenile proceeding only if the court holds that the juvenile’s proceeding is public. *Id.*

A victim-witness, including a victim-witness who would testify at trial, has the right to be present during the merits phase of a capital trial and not to be excluded from the proceedings unless the court finds by “clear and convincing evidence” that the testimony he/she would give would be “materially altered” by hearing other testimony. *United States v. Johnson*, 362 F. Supp. 2d 1043, 1055-56 (N.D. Iowa 2005).

A victim’s right not to be excluded applies to public proceedings, and, therefore, does not apply to proceedings that are sealed. *United States v. Keifer*, No. 2:08-CR-162, 2009 WL 414472, at \*3-4 (S.D. Ohio Feb. 18, 2009).

The Federal Rule of Evidence 615 provides an exception to the exclusion of a witness from the courtroom, which, via the CVRA, allows a victim to be present in the courtroom. *United States v. Okun*, No. 3:08cr132, 2009 WL 790042, at \*2-3 (E.D. Va. Mar. 24, 2009). Regardless of any alternative procedure the court enacts to accommodate numerous victims and for judicial economy, the court must uphold the victim’s right to respect and dignity. *Id.*

In a habeas proceeding, the court records are generally open to the public, and “[m]ost habeas cases are resolved on the pleadings without in-court hearings.” *Pann v. Warren*, No. 5:08-CV-13806, 2010 WL 2836879, at \*3-4 (E.D. Mich. July 19, 2010). Therefore, victims have the right to submit documents to the court and be heard on the issue. *Id.*

## **Section 1, Clause 6: “[T]o be heard at any release, plea, sentencing, or other such proceedings relating to the offense”**

The following sources discuss the scope of the right to be heard, how that right has been applied, and the types of proceedings at which it is most pertinent.

### *Senate Report No. 108-91:*

This amendment confers to crime victims the right to be heard by the relevant decision makers at four critical points before the final decisions are made: (1) release proceedings; (2) public plea proceedings; (3) sentencing proceedings; and (4) public parole proceedings. S. REP. NO. 108-91, at 36 (2003).

### **Release**

“[A] victim of domestic violence will have the opportunity to warn the court about possible violence if the defendant is released on bail, probation, or parole. A victim of gang violence will have the opportunity to warn about the possibility of witness intimidation. The court will then evaluate this information in the normal fashion in determining whether to release a defendant and, if so, under what conditions. Victims have no right to ‘veto’ any release decision by a court,

rather simply to provide relevant information that the court can consider in making its determination about release.” *Id.* at 36. This phrase encompasses hearings to determine any release on bail (including comparable releases during or after an appeal, from a secure mental facility, acquittal on grounds of insanity, parole hearings, or their functional equivalent), personal recognizance, to the custody of a third person, or under any other conditions, including pre-trial diversion programs, work release, and home detention. *Id.* A crime victim would have no right to be heard when a prisoner is released after serving the statutory maximum penalty, or the full term of his sentence, but would be notified of such a release. *Id.* at 36-37.

Victim participation at bail hearings can alert courts to the dangers that defendants might present if released unconditionally. *Id.* at 22. Without victim participation, courts may not be fully informed about the consequences of a defendant’s release. *Id.* The person best able to inform the court of the threat a defendant poses is often the victim. *Id.* (citing PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 65 (1982)).

Katherine Prescott, the President of Mothers Against Drunk Driving (MADD), sat with a victim of domestic violence in court one day. *Id.* at 22-23 (citing *Senate Judiciary Committee Hearing*, 104th Cong. 25-26 (1996) (statement of Katherine Prescott)). The woman was terrified because she knew her ex-husband was going to kill her. *Id.* The victim was never allowed to speak with the judge, who did not know how frightened she was. *Id.* Had he known, he might have put some restrictions on the ex-husband’s release. *Id.* That same night, her ex-husband killed her, then himself, leaving their four children orphans. *Id.*

Anita Lawrence’s son and his grandparents were murdered. *Id.* at 24-25 (citing *St. Louis Field Senate Judiciary Committee Hearing Before the Subcomm. on Constitution, Federalism, & Property Rights*, 106th Cong. (1999) (statement of Anita Lawrence, mother of murder victim)). She never received notice that her son’s murderer had his death sentence commuted and learned of it by watching television. *Id.* She was left completely out of the process, instead of being able to seek justice. *Id.*

The surviving family members of victims of the FALN bombing were not notified that the President granted clemency but heard of it through the media. *Id.* at 25. Unfortunately, this treatment is typical. *Id.*

Victims seek a voice in the clemency process, not a veto. *Id.* at 25-26.

### **Plea Bargaining**

This right allows victims to be heard before the court accepts a final plea bargain entered into by the prosecution and the defense. *Id.* at 34. Each State will determine at what stage this right attaches. *Id.* Victims do not have the right to be heard by prosecutors and defense attorneys negotiating a deal. *Id.* Prosecutors may decide, in their discretion, to consult with victims before arriving at a plea. *Id.* The court will receive this information, along with that provided by prosecutors and defendants, and give it the weight it believes appropriate in deciding whether to accept a plea. *Id.*

## DISCUSSION DRAFT ONLY

Because judges act in the public interest when they decide whether to accept or reject a plea bargain, the victim is an additional source of information for the court. *Id.* at 22 (citing DOUGLAS E. BELOOF ET AL., VICTIMS IN CRIMINAL PROCEDURE 464 (1999)).

### *Earlene Eason's Testimony:*

Eason of Gary, Indiana, was not given the opportunity to appear in court to object to the plea bargain or speak at sentencing of her 16 year old son's murderer. *Id.* at 9 (citing *Senate Judiciary Committee Hearings*, 108th Cong. (2003) (statement of Earlene Eason, mother of murder victim)).

### **Sentencing**

This amendment provides that victims will have the right to "allocute" at sentencing. *Id.* at 34. It would give the same constitutionally protected rights to victims that defendants have to personally address the court. *Id.* (citing *Green v. United States*, 365 U.S. 301 (1961)). This is important for two reasons. First, such a right guarantees that the sentencing court or jury will have full information about the impact of a crime, the nature of the offense, the harm inflicted, the offender's attitude, along with other information, in crafting an appropriate sentence. *Id.* Second, the victims' opportunity to speak at sentencing can sometimes provide a powerful catharsis. *Id.* (citing *United States v. Smith*, 893 F. Supp. 187, 188 (E.D.N.Y. 1995); *United States v. Hollman Cheung*, 952 F. Supp. 148, 151 (E.D.N.Y. 1997)). "Because the right to speak is based on both of these grounds, a victim will have the right to be heard even when the judge has no discretion in imposing a mandatory prison sentence." *Id.*

State and Federal statutes frequently provide allocution rights to victims. *Id.* at 35 (citing FED. R. EVID. 32(c), ILL. CONST. art. I, § 8.1(a)(4)). The United States Supreme Court has already recognized the propriety of a victim's allocution in capital proceedings. *Id.* (citing *Payne v. Tennessee*, 501 U.S. 808 (1991)). Victim impact statements regarding the victim's character and the crime's impact remain constitutional. *Id.* (citing Douglas E. Beloo, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282 (2003)).

A right to have victim impact statements offered at sentencing does not confer any right to have such statement heard at trial. *Id.* (citing *Sager v. Maass*, 907 F. Supp. 1412, 1420 (D. Or. 1995)). "The victim's right to be heard does not extend to the guilt determination phase of trials, although victims may, of course, be called as a witness by either party." *Id.*

Victims of violent crime should be allowed to provide information to the person preparing the presentence report of the circumstances/consequences of the crime and to speak at sentencing. *Id.* at 23 (citing PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 77 (1982)).

Courts have found information from victims helpful in crafting appropriate sentences. *Id.* (citing *United States v. Martinez*, 978 F. Supp. 1442, 1452 (D.N.M. 1997); *United States v. Smith*, 893 F. Supp. 187, 188 (E.D.N.Y. 1995)).

## DISCUSSION DRAFT ONLY

Duane Lynn of Phoenix, Arizona, was finally able to offer his victim impact statement to the court regarding his wife's murder three years after her death but was told that he had to stop short of talking about how he felt about how the murderer should be sentenced. *Id.* at 9-10. The jury never heard that Lynn wanted to recommend a life sentence, as they gave the murderer the death penalty. *Id.* at 10.

Virginia Bell, a retired civil servant, was accosted and robbed in Washington, D.C. *Id.* at 12. She suffered from a broken hip, incurred medical expenses over \$11,000, and was forced by her resulting debilitation to live with her daughter in Texas. *Id.* After the assailant plead guilty, she was not informed, and the impact of her victimization was never heard by the court. *Id.* As such, the court ordered restitution in the inadequate and arbitrary amount of \$387. *Id.*

The victim's right is to "be heard" or the right to make an oral statement is conditioned on the victim's presence in the courtroom. *Id.* at 35. It does not confer on victims a right to have the Government transport them to the relevant proceeding or give victims any right to "filibuster" a hearing. *Id.* Just as with defendants, a court may set reasonable limits on the length of statements, but should not require the victim to submit a statement for approval before it is offered. *Id.*

Under the Due Process clause, the victim's statement cannot be "unduly prejudicial." *Id.* (citing *Payne v. Tennessee*, 501 U.S. 808 (1991)). Victims should be given the power to determine the form of the statement. *Id.* "Simply because a decision making body, such as the court or parole board, has a prior statement of some sort on file does not mean that the victim should not again be offered the opportunity to make a further statement." *Id.* This right to be heard is not limited to written statements. Even if not present, the victim is entitled to submit a statement at the specified hearings for the court's consideration. *Id.*

The right to be heard is also limited to "public proceedings"; therefore, a victim has no right to be heard at a proceeding that the court has properly closed under the existing standards governing court closures. *Id.*

### **Parole**

In jurisdictions in which parole decisions are not public, this amendment places victims on equal footing with defendants. *Id.* at 35-36. They have the right to communicate with the releasing authority. *Id.* at 35-36.

Patricia Pollard, who was abducted, raped, brutally beaten, had her throat slashed with a jagged edge of a beer can and was left to die in the Arizona desert. *Id.* at 23-24 (citing *Senate Judiciary Committee Hearing*, 104th Cong. 31-32 (1996) (statement of Patricia Pollard)). She was not told her attacker was released on parole ten years short of his minimum sentence or given the chance to say what she thought about it. *Id.* Within less than a year, his parole was revoked for drug crimes. *Id.* Again, he was released without any notice to her, nor was she given an opportunity to tell the parole board about the horrible crime or need to protect others in that community. *Id.*

This second time, the county attorney filed an action to stop the release and the court of appeals forced the board to hold another hearing to hear from her. *Id.* His release was then denied. *Id.*

*Statement of Senator Jon Kyl:*

“This provision is intended to allow crime victims to directly address the court in person. It is not necessary for the victim to obtain the permission of either party to do so. This right is a right independent of the government or the defendant that allows the victim to address the court. To the extent the victim has the right to independently address the court, the victim acts as an independent participant in the proceedings. When a victim invokes this right during plea and sentencing proceedings, it is intended that the he or she be allowed to provide all three types of victim impact: the character of the victim, the impact of the crime on the victim, the victims' family and the community, and sentencing recommendations. Of course, the victim may use a lawyer, at the victim's own expense, to assist in the exercise of this right. This bill does not provide victims with a right to counsel but recognizes that a victim may enlist a counsel on their own.” 150 CONG. REC. S10911 (2004).

**To be Heard**

“It is not the intent of the term ‘reasonably’ in the phrase ‘to be reasonably heard’ to provide any excuse for denying a victim the right to appear in person and directly address the court. Indeed, the very purpose of this section is to allow the victim to appear personally and directly address the court. . . . This section would fail in its intent if courts determined that written, rather than oral communication, could generally satisfy this right. On the other hand, the term ‘reasonably’ is meant to allow for alternative methods of communicating a victim's views to the court when the victim is unable to attend the proceedings. Such circumstances might arise, for example, if the victim is incarcerated on unrelated matters at the time of the proceedings or if a victim cannot afford to travel to a courthouse. In such cases, communication by the victim to the court is permitted by other reasonable means. In short, the victim of crime, or their counsel, should be able to provide any information, as well as their opinion, directly to the court concerning the release, plea, or sentencing of the accused. This bill intends for this right to be heard to be an independent right of the victim.

It is important that the ‘reasonably be heard’ language not be an excuse for minimizing the victim's opportunity to be heard. Only if it is not practical for the victim to speak in person or if the victim wishes to be heard by the court in a different fashion should this provision mean anything other than an in-person right to be heard.” *Id.*

*Kyl Law Review Article:*

**To be Heard**

“The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.” Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 601 (2005).

## DISCUSSION DRAFT ONLY

“The right to be ‘heard’ joins the rights to ‘notice’ and ‘not to be excluded’ to form the foundation for the fair treatment of victims in the federal criminal-justice system”. *Id.* at 601-602. The CVRA expressly establishes the right to be heard, not as a witness but rather as an independent participant, at critical public proceedings, including release, plea, sentencing, and parole hearings. *Id.*

“This provision is intended to allow crime victims to directly address the court in person. It is not necessary for the victim to obtain the permission of either party to do so. This right is a right independent of the government or the defendant that allows the victim to address the court. To the extent the victim has the right to independently address the court, the victim acts as an independent participant in the proceedings.” *Id.* at 602 (quoting 150 CONG. REC. S10911 (2004) (statement of Sen. Kyl)).

### **Release**

“The first hearing at which the victim has the right to be heard is the release hearing. Release hearings can include both post-arrest and post-conviction public release proceedings. Thus, a victim of domestic violence has the right to tell a judge at an initial appearance about the circumstances of the assault and the need for any special conditions of release that may be necessary to protect her safety. The right also extends to post-conviction public release proceedings, for example parole or conditional release hearings. Even jurisdictions that have abolished parole in favor of ‘truth in sentencing’ regimes may still have conditional release. Only if the jurisdiction also has a ‘public proceeding’ before such a conditional release, would the right attach. The language would extend, however, to any post-conviction public proceeding that could lead to the release of the convicted offender.” *Id.*

### **Plea Bargain**

“Victims have the right to be heard at plea proceedings. When a case is resolved through a plea bargain without the victim’s knowledge or participation, a grave injustice has been committed by the authorities. One of the more famous quotes reported in the Reagan Task Force report was from a woman in Virginia: ‘Why didn’t anyone consult me? I was the one who was kidnapped, not the State of Virginia.’ This cry for justice, for a voice, not a veto, is heard throughout the country still. To be effective, the right to be heard must be applied in a way that permits the victim to address the court before the judge exercises discretion to accept or reject a plea.” *Id.* at 602-03.

### **Sentencing**

“The right to be heard also extends to public sentencing proceedings. The victim is given the right to address the sentencing authority (judge or jury) as an independent participant in the proceedings. It should be noted that the victim’s right to be heard at sentencing is not the right to be a witness. Rather, it is an independent right of allocution, not dependent on the victim being called to the witness stand. In this way, the right parallels the right of the defendant to speak at trial. This right is important for the victim as well; for example, in homicide cases, there is no way the fact-finder can assess the full harm caused by a murder without hearing testimony from the surviving family members.” *Id.* at 603.

“The right to be heard at sentencing is not limited in any way by the text of the statute, other than that which is communicated must be “reasonable.” [W]hile a relative of a victim of a murder, in most instances, can provide a statement at a sentencing proceeding concerning the impact of a crime on the victim’s family, it remains to be seen whether a victim can suggest an appropriate sentence for a convicted criminal.” *Id.* at 604.

**Parole**

“Under the CVRA, victims have the right to attend public parole proceedings and to be heard at those proceedings. The importance of the victim’s right to speak at parole proceedings is underscored by the Arizona case of *State ex rel. Hance v. Arizona Board of Pardons and Paroles*. During debate of the CVRA on the Senate floor, this case was discussed to illustrate the importance of this right:

[T]he woman [was] brutally raped and slashed and left to die [but] recovered. Her perpetrator was convicted and put into prison. He had a parole hearing and the parole board decided to release him prematurely. She got no notice of that. She got no opportunity to be present. The action of the parole board violated the victim’s state constitutional rights to notice of the proceeding, the right to be present, and the right to be heard. The victim, through the prosecuting attorney, filed a special action in the Arizona Court of Appeals challenging the board’s action and seeking to reverse it and have the court order a new hearing. The court did precisely that. On the second hearing, the board denied parole to the rapist.” *Id.* at 608-09.

“The right to be heard at parole hearings was equally important to Senator Feinstein. As she said during a debate on the crime victims’ federal constitutional amendment:

What really focused my attention on the need for greater protection of victims’ rights was a particularly horrifying case in 1974, in San Francisco, when a man named Angelo Pavageau broke into the house of the Carlson family in Portero Hill. Pavageau tied Mr. Carlson to a chair, bludgeoning him to death with a hammer, a chopping block, and a ceramic vase. He then repeatedly raped Carlson’s 24-year-old wife, breaking several of her bones. He slit her wrist, tried to strangle her with a telephone cord, and then, before fleeing, set the Carlson’s home on fire--cowardly retreating into the night, leaving this family to burn up in flames. But Mrs. Carlson survived the fire. She courageously lived to testify against her attacker. But she has been forced to change her name and continues to live in fear that her attacker may, one day, be released. When I was Mayor of San Francisco, she called me several times to notify me that Pavageau was up for parole. Amazingly, it was up to Mrs. Carlson to find out when his parole hearings were. . . . I believe this case represents a travesty of justice--It just shouldn’t have to be that way. I believe it should be the responsibility of the state to send a letter through the mail or make a phone call to let the victim know that her attacker is up for parole, and she should have the opportunity to testify at this hearing.” *Id.* at 609.

“Of course, in providing victim information or opinion it is important that the victim be able to confer with the prosecutor concerning a variety of matters and proceedings. Under (a)(5), the victim has a reasonable right to confer with the attorney for the government in the case. This

right is intended to be expansive. For example, the victim has the right to confer with the government concerning any critical stage or disposition of the case. The right, however, it is not limited to these examples.” *Id.* at 609-10.

### **Limitations**

“This right to confer does not give the crime victim any right to direct the prosecution. Prosecutors should consider it part of their profession to be available to consult with crime victims about concerns the victims may have which are pertinent to the case, case proceedings or dispositions. Under this provision, victims are able to confer with the government’s attorney about proceedings after charging. I would note that the right to confer does [not] impair the prosecutorial discretion of the Attorney General or any officer under his direction. . . .” *Id.* at 610.

### Cassell Law Review Article:

#### **To be Heard**

“[T]he Amendment explicitly limits the right to ‘public proceedings to determine a conditional release from custody, an acceptance of a negotiated plea, or a sentence.’ At these three kinds of hearings—bail, plea, and sentencing—victims have compelling reasons to be heard and can be heard without adversely affecting the defendant’s rights.” Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims’ Rights Amendment*, 1999 UTAH L. REV. 479, 486 (1999).

“It is a commonplace of evidence law that a litigant is not entitled to exclude harmful evidence, but only *unfairly* harmful evidence. . . . [T]o conceal such evidence from the jury may leave them with a distorted, minimized view of the impact of the crime.” *Id.* at 490.

#### **Impact of Failure to Hear Victims**

“What? I’m not getting a chance to talk to the jury? He’s not a defendant anymore. He’s a murderer! A convicted murderer! The jury’s made its decision. . . . His mother’s had her chance all through the trial to sit there and let the jury see her cry for him while I was barred. . . . Now she’s getting another chance? Now she’s going to sit there in that witness chair and cry for her son, that murderer, that murderer who killed my little girl! Who will cry for Staci? Tell me that, who will cry for Staci?” *Id.* at 495 (quoting Marvin Weinstein after Weinstein had been informed he would not be able to speak at sentencing).

“[A] justice system that fails to recognize a victim’s right to participate threatens ‘secondary harm’—that is, harm inflicted by the operation of government processes beyond that already caused by the perpetrator.” *Id.* at 496.

“[F]ailure to offer victims a chance to participate in criminal proceedings can ‘result in increased feelings of inequity on the part of the victims, with a corresponding increase in crime-related psychological harm.’ On the other hand, there is mounting evidence that ‘having a voice may

## DISCUSSION DRAFT ONLY

improve victims' mental condition and welfare.' For some victims, making a statement helps restore balance between themselves and the offenders. Others may consider it part of a just process or may want 'to communicate the impact of the offense to the offender.' This multiplicity of reasons explains why victims and surviving family members want so desperately to participate in sentencing hearings, even though their participation may not necessarily change the outcome." *Id.* at 497.

"[R]eported cases of victims persuading judges to reject unjust pleas form just a small part of the picture, because in many other cases, the mere prospect of victim objection undoubtedly has restrained prosecutors from bargaining cases away without good reason." *Id.* at 504.

### A.L.R.:

#### **To be Heard**

"[A]s the initial appearance and detention hearings were all unquestionably public proceedings in the district court involving release, and therefore implicated the right of any victim of the charged offense to be heard under . . . then to the extent that any properly notified victim would have wanted to exercise that right, the CVRA requires the victim to be given an opportunity actually to be heard rather than afforded some alternate means of communicating his or her views. . . . [T]he very purpose of this provision is to allow the victim to appear personally and directly address the court, and that the provision would fail in its intent if courts determined that written, rather than oral, communication could generally satisfy this right." Fern L. Kletter, Annotation, *Validity, Construction and Application of Crime Victim's Rights Act (CVRA)*, 18 U.S.C.A. § 3771, 26 A.L.R. FED. 2D 451, § 20 (2008) (citing *United States v. Turner*, 367 F. Supp. 2d 319 (E.D. N.Y. 2005)).

"[C]ourts may not limit victims to a written statement." *Id.* (citing *United States v. Vampire Nation*, 451 F.3d 189 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 424(2006)).

"[T]he right of victims to be heard is guaranteed by . . . the CVRA, affording victims a right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding, a right which is in the nature of an independent right of allocution at sentencing. Under the CVRA, courts may not limit victims to a written statement, stated the court, quoting authority that limiting victims to written impact statements, while allowing the prosecutor and the defendant the opportunity to address the court, would treat victims as secondary participants in the sentencing process, whereas the CVRA clearly meant to make victims full participants." *Id.* (citing *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)).

"In denying the right to orally allocute, the court considered that the sole subject of the hearing concerned the detention of the defendants pending trial; the murder of the victim's father occurred more than 20 years ago; the victim had no personal knowledge of any fact that would tend to show whether or not the defendants were guilty of the charged offenses; there was no

## DISCUSSION DRAFT ONLY

doubt as to the seriousness of the crimes; there was no claim that the victim's welfare would be endangered by the defendants if they were released; and though the victim had been given an opportunity to present a written statement, none had been delivered to the Court. In detention hearings, the victim's right to be reasonably heard does not mandate oral statements, particularly when the witness has no personal knowledge of the guilt of the defendants and offers an undisputed opinion that the crime is the most serious one known to law. . . ." *Id.* (citing *United States v. Marcello*, 370 F. Supp. 2d 745 (N.D. Ill. 2005)).

### **Sentencing**

"[T]he statutory right . . . to be reasonably heard during a sentencing proceeding was not vindicated when the crime victim was given the opportunity to speak at the sentencing of a codefendant, and thus the sentencing court could not deny the victim the opportunity to speak at the defendant's sentencing merely because it believed that it had heard the victim's concerns at the codefendant's sentencing and had read the victim impact statements." *Id.* (citing *Kenna v. U.S. District Court*, 435 F.3d 1011 (9th Cir. 2006)).

"The drafters of the CVRA left no doubt that they intended their handiwork to grant victims a right to directly make an oral statement to the court at sentencing, stated the court, adding that it is not necessary for the victim to obtain the permission of either party to do so. It is not the intent of the term 'reasonably' in the phrase 'the right to be reasonably heard' to provide any excuse for denying a victim the right to appear in person and directly address the court, as the very purpose of the provision is to allow the victim to appear personally and directly address the court . . . ." *Id.* (citing *United States v. Degenhardt*, 405 F. Supp. 2d 1341 (D. Utah 2005)).

### **Right in Other Contexts:**

The government's motion for dismissal in a prosecution for using a means of interstate commerce to entice an individual under the age of 18 to engage in unlawful sexual activity would not be granted until the government had consulted with the victim, and the district court could not make the required independent determination that dismissal was warranted without examining the government's reasons for dismissal in light of the victim's rights. *Id.* at § 24 (citing *United States v. Heaton*, 458 F. Supp. 2d 1271 (D. Utah 2006)).

"[N]othing in the CVRA requires the government to seek approval from crime victims before negotiating or entering into a settlement agreement." *Id.* at § 25 (citing *W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555 (2d Cir. 2005)).

### Cases:

#### **To be Heard**

Once a person is deemed to be a victim of the crime, the victim's right to be heard attaches. *United States v. McElroy*, 353 F. App'x 191, 193-94 (11th Cir. 2009).

## DISCUSSION DRAFT ONLY

A victim's right to be heard at any public proceeding does not attach until "charges have been brought against a defendant, and a case has been opened." *In re Petersen*, No. 2:10-CV-298 RM, 2010 WL 5108692, at \*2 (N.D. Ind. Dec. 8, 2010).

In a pretrial detention hearing, the court may limit the victim's right to be reasonably heard to a written statement and not allow an oral statement when the victim's proposed oral statement is not relevant or material to the factors the court must consider in deciding whether to release the defendant. *United States v. Marcello*, 370 F. Supp. 2d 745 (N.D. Ill. 2005).

A victim's rights to notice, to be heard, and to restitution may be jeopardized by a lengthy delay in the proceedings, such as an indefinite continuance. *United States v. Gallion*, No. 07-39, 2007 WL 2407269, at \*2-3 (E.D. Ky. Aug. 20, 2007).

In a habeas proceeding, the court records are generally open to the public, and "[m]ost habeas cases are resolved on the pleadings without in-court hearings." *Pann v. Warren*, No. 5:08-CV-13806, 2010 WL 2836879, at \*3-4 (E.D. Mich. July 19, 2010). Therefore, victims have the right to submit documents to the court and be heard on the issue. *Id.*

A victim, who is properly notified and requests to be heard in the proceedings, may validly object to his/her identifying information contained in such a request from being released to the media, as this flows from the victim's right to fairness, respect, and dignity. *United States v. Madoff*, 626 F. Supp. 2d 420, 425-28 (S.D.N.Y. 2009). Such a request or a court's action of sealing the documents, when seal is essential to preserve higher values and is narrowly tailored to serve that interest, does not violate the First Amendment right to access. *Id.*

In a habeas case, which is usually decided on the parties' motions, a victim's right to be heard may be communicated through a submitted brief and does not mean that the victim has a right to intervene or be heard in-person. *Brandt v. Gooding*, 636 F.3d 124, 136-37 (4th Cir. 2011).

A crime victim's right to be reasonably heard does not include access to all portions of a defendant's presentence report nor the ability to challenge or argue against the court's sentencing guideline calculation when a victim is given ample information, and the court considers the victim's impact statement. *In re Brock*, 262 F. App'x 510, 512-13 (4th Cir. 2008); *United States v. Coxton*, 598 F. Supp. 2d 737 (W.D.N.C. 2009).

A victim's right to be heard applies to public proceedings and, therefore, does not apply to proceedings that are sealed. *United States v. Keifer*, No. 2:08-CR-162, 2009 WL 414472, at \*3-4 (S.D. Ohio Feb. 18, 2009).

In a case involving numerous victims, the court may provide reasonable alternative procedures for the victims to be heard and order the Department of Justice to publish the order, which provides the alternative procedures, in local and national newspapers and on its website. *United States v. Skilling*, No. H-04-025-SS, 2009 WL 806757 (S.D. Tex. Mar. 26, 2009).

### **Release**

Although a victim's full name is known to the parties and appears on the record, the court may redact her name from further reports out of respect for the victim's dignity and privacy, as protected by the Crime Victim's Rights Act. *Gueits v. Kirkpatrick*, 618 F. Supp. 2d 193, 198 n.1 (E.D.N.Y. 2009) *rev'd*, 612 F.3d 118 (2d Cir. 2010). Even if the state loses track of a victim, best efforts must be made to assure the victim's right to be heard regarding a defendant's potential release. *Id.*

A victim's right to notice includes the government providing an explanation of its decision to enter a plea or to dismiss a case. *United States v. Blumhagen*, No. 03-CR-56S, 2006 US Dist. LEXIS 15380, at \*3 (W.D.N.Y. Apr. 3, 2006). Such action allows "victims who choose to exercise their right to be heard [the ability] to tailor their comments accordingly." *Id.*

### **Sentencing**

Sentencing courts have had access to victim statements long before victims were given rights via statute. *United States v. Eberhard*, 525 F.3d 175 (2d Cir. 2008). Additionally, "a law requiring that victims be reasonably heard (if they request) after the defendant has already been convicted does not implicate the Ex Post Facto clause." *Id.*

Although a victim's attorney may assert the victim's right to be heard and request to speak during a sentencing, the court may hold that the victim's right to be heard will be sufficiently represented by the Government, alone, where nothing in the court order precludes the victim from exercising his/her right to be heard. *In re Zackey*, No. 10-3772, 2010 WL 3766474 (3d Cir. Sept. 22, 2010).

During a defendant's sentencing, the victim has a right to be heard, which may include the court asking a victim his/her opinion of what the sentence should be. *United States v. Green*, No. 09-1560, 2010 WL 2982837 (3d Cir. July 29, 2010).

In a sentence proceeding, a victim impact statement is proper and is not inadmissible hearsay. *United States v. Clark*, 335 F. App'x 181, 183-84 (3d Cir. 2009). Further, when the victim is a minor, his/her name and their family members' names may be redacted in the victim impact statement. *Id.* In a child pornography case, "[t]he law does not require that a victim of child pornography write a new statement every time someone is sentenced for possessing or distributing a pornographic image of him or her." *Id.*

Courts may vary from the advisory sentence without advance warning, because the court has discretion, and "it would be impossible to predict what statements victims might offer at sentencing." *United States v. Vampire Nation*, 451 F.3d 189, 197 n.4 (3d Cir. 2006).

The court may deem an erroneous admission of a victim impact statement as a harmless error when the statement did not substantially sway the court's decision. *United States v. Kennedy*, 292 F. App'x 240, 243 (4th Cir. 2008).

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The court is not limited on what it may consider when imposing a sentence. *United States v. Rhodes*, 410 F. App'x 856, 862-63 (6th Cir. 2010). Therefore, it is within the court's discretion to hear from both the victim and the victim's attorney. *Id.*

When presenting a victim impact statement, a victims' right to be reasonably heard is not "limited to presentation of relevant and admissible evidence," because the court will not consider any irrelevant testimony. *United States, v. Ortiz*, 636 F.3d 389, 393-94 (8th Cir. 2011).

A victim's right to be heard includes both the right to submit a written victim impact statement and the right to speak at a sentencing hearing. *Kenna v. U.S. District Court (Walter)*, 435 F.3d 1011 (9th Cir. 2006).

A victim impact statement, presented at sentencing, does not violate a defendant's plea agreement which "authorize[s] the government to 'inform the Court . . . of all facts pertinent to the sentencing process,'" as "the victims' viewpoints were generally pertinent to the sentencing process." *United States v. Horsfall*, 552 F.3d 1275, 1282-83, 1284 (11th Cir. 2008). Additionally, a court's consideration of a victim impact statement does not violate a defendant's Eighth Amendment rights in a non-capital child pornography prosecution, versus the use of a victim impact statement during the sentencing phase of a capital case. *Id.*

When there are both capital and non-capital offenses, the victim of a non-capital offense does not have the right to be heard at the phase in which the jury decides on the death penalty. *United States v. Gooch*, No. 04-128-23 (RMC), 2006 WL 3780781, at \*22 (D.D.C. Dec. 20, 2006).

The court may grant a continuance of a sentencing to provide the victim an opportunity to be heard. *United States v. Wood*, CR. No. 05-00072DAE (D. Haw. July 17, 2006).

### **Right in Other Contexts**

A victim's right to be heard is only one of many factors taken into consideration by a court in determining whether a plea agreement should be rejected. *United States v. BP Prods. N. Am. Inc.*, 610 F. Supp. 2d 655, 725-27 (S.D. Tex. 2009)); *see also In re Dean*, 527 F.3d 391 (5th Cir. 2008); *United States v. BP Prods. N. Am. Inc.*, No. H-07-434, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008). Despite the fact a victim should have been given the opportunity to be heard at an earlier stage, a plea agreement may still stand under the court's broad discretion to accept or reject a plea agreement, particularly when nothing in the record supports a finding that if the victims had conferred with the government a different plea agreement would have been reached, and the record shows that the victims had extensive communications with the prosecutors before the plea's execution. *BP Prods. N. Am. Inc.*, 610 F. Supp. 2d at 725-27; *see also In re Dean*, 527 F.3d 391; *BP Prods. N. Am. Inc.*, 2008 WL 501321.

Although a victim does not have "an affirmative right to be heard at a competency hearing, the [ ] intent is to provide a victim with appropriate access to the proceedings" and uphold the victim's right to be treated fairly. *United States v. Mitchell*, No. 2:08CR125DAK, 2009 WL 3181938, at

\*8 n.3 (D. Utah Sept. 28, 2009). Therefore, the court may or may not allow a victim’s testimony in an evidentiary hearing. *Id.*

A victim’s right to be treated with fairness, respect, and dignity “extends to the court’s decision regarding whether to dismiss an indictment even though no public proceeding will be held on the issue.” *United States v. Heaton*, 458 F. Supp. 2d 1271, 1272-73 (D. Utah 2006). The victim has the right to be heard and conferred with prior to the prosecutor requesting a dismissal because the victim’s rights are to be applied “broadly to all aspects of the criminal justice system.” *Id.*

“The CVRA plainly extends victims’ rights beyond those found in the current criminal rules by giving a right to be heard to *all* victims.” *United States v. Degenhardt*, 405 F. Supp. 2d 1341, 1344 (D. Utah 2005).

## **Section 1, Clause 7: “[T]o proceedings free from unreasonable delay”**

The following sources discuss the right of Crime Victims to see justice done absent unreasonable delay and how that right is balanced with a defendant’s constitutional rights.

### *Senate Report No. 108-91:*

#### **Scope of Victims’ Interest**

“Just as defendants currently have a right to a ‘speedy trial,’ this provision will give victims a protected right in having their interests to a reasonably prompt conclusion of a trial considered.” S. REP. NO. 108-91, at 40 (2003). Courts must give “consideration” to the victims’ interest, along with other relevant factors, at all hearings involving the trial date, including the initial setting of a trial date and any subsequent motions or proceedings that result in delaying that date. *Id.* This right allows the victim to ask the court to set a trial date if the failure to do so is unreasonable. *Id.*

While a victim will have a right to be heard on the issue, the victim will have no right to force an immediate trial before the parties have had an opportunity to prepare. *Id.* In complicated cases, either prosecutors or defendants may have unforeseen and legitimate reasons for continuing a previously set trial or for delaying trial proceedings that have already commenced. *Id.*

Using past precedence, courts determine what is unreasonable and interpret a defendant’s right to a speedy trial. *Id.* These cases emphasize issues such as the length of the delay, the reason for the delay, any assertion of a right to a speedy trial, and any prejudice to the defendant. *Id.* (citing *Barker v. Wingo*, 407 U.S. 514, 530–33 (1972)).

A defendant’s right to a speedy trial must be “assessed in the light of the interest of defendant which the speedy trial right was designed to protect.” *Id.* (quoting *Barker*, 407 U.S. at 532). This provision allows victims to have the accused’s trial completed as quickly as is reasonable under

all of the circumstances of the case, giving both the prosecution and the defense a reasonable period of time to prepare. *Id.* “The right would not require or permit a judge to proceed to trial if a criminal defendant is not adequately represented by counsel.” *Id.*

**Unreasonable Delay**

“Repeated continuances cause serious hardships and trauma for victims as they review and relive their victimization in preparation for trial, only to find the case has been postponed.” *Id.* at 27 (quoting OFFICE FOR VICTIMS OF CRIME, U.S. DEPARTMENT OF JUSTICE, NEW DIRECTIONS FROM THE FIELD: VICTIMS’ RIGHTS AND SERVICES FOR THE 21ST CENTURY 21 (1998)).

Victims should not be forced to endure extensive delays for no apparent good reason. *Id.* at 27. One case of child abuse of a five year old child lasted more than 15 months from arraignment to trial for no good reason. *Id.* at 26-27 (citing *Senate Judiciary Committee Hearing*, 105th Cong. 115-16 (1997) (statement of Paul Cassell)).

Ross and Betty Parks, whose daughter Betsy was murdered, had to wait seven years for the trial. *Id.* at 13. The delay was due, in part, to repeated motions—31 at one point. *Id.*

*Statement of Senator Jon Kyl:*

**Scope of Victims’ Interest**

“This provision does not curtail the government's need for reasonable time to organize and prosecute its case. Nor is the provision intended to infringe on the defendant's due process right to prepare a defense. Too often, however, delays in criminal proceedings occur for the mere convenience of the parties and those delays reach beyond the time needed for defendant's due process or the government's need to prepare. The result of such delays is that victims cannot begin to put the criminal justice system behind them and they continue to be victimized. It is not right to hold crime victims under the stress and pressure of future court proceedings merely because it is convenient for the parties or the court.

This provision should be interpreted so that any decision to schedule, reschedule, or continue criminal cases should include victim input through the victim's assertion of the right to be free from unreasonable delay.” 150 CONG. REC. S10911 (2004).

**Unreasonable Delay**

“I would add that the delays in criminal proceedings are among the most chronic problems faced by victims. Whatever peace of mind a victim might achieve after a crime is too often inexcusably postponed by unreasonable delays in the criminal case. A central reason for these rights is to force a change in a criminal justice culture which has failed to focus on the legitimate interests of crime victims, a new focus on limiting unreasonable delays in the criminal process to accommodate the victim is a positive start.” *Id.*

*Kyl Law Review Article:*

**Scope of Victims' Interest**

“While the defendant has a constitutional right to a ‘speedy and public trial,’ the victim has no similar right and, therefore, no countervailing balance when the defendant in fact wants delay (as often occurs) and the government does not object. This lack of balance has resulted in a legal culture that accommodates, perhaps some would say indulges, delay to the detriment of the victim.” Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 611 (2005).

“This provision does not curtail the government’s need for reasonable time to organize and prosecute its case. Nor is the provision intended to infringe on the defendant’s due process right to prepare a defense. Too often, however, delays in criminal proceedings occur for the mere convenience of the parties and those delays reach beyond the time needed for defendant’s due process or the government’s need to prepare. The result of such delays is that victims cannot begin to put the criminal justice system behind them and they continue to be victimized. It is not right to hold crime victims under the stress and pressure of future court proceedings merely because it is convenient for the parties or the court.” *Id.* at 612.

“This provision should be interpreted so that any decision to schedule, reschedule, or continue criminal cases should include victim input through the victim’s assertion of the right to be free from unreasonable delay.” *Id.*

“In determining what delay is ‘unreasonable,’ the courts can look to the precedents that exist which interpret a defendant’s right to a speedy trial. *Id.* These cases focus on such issues as the length of the delay, the reason for the delay, any assertion of a right to a speedy trial, and any prejudice to the defendant. *Id.* Courts will no doubt develop a similar approach for evaluating victims’ claims. In developing such an approach, courts will undoubtedly recognize the purposes that the victim’s right is designed to serve.” *Id.*

**Unreasonable Delay**

The need is demonstrated in cases like that of a Phoenix man whose murderers were not convicted for two-and-a-half years and not sentenced until after another two-and-a-half. *Id.* at 611-12. The man’s family waited five years for justice, despite Arizona’s constitutional amendment mandating the right to a speedy trial. *Id.*

*Cassell Law Review Article:*

“The right the Amendment confers is one to ‘consideration of the interest of the victim that any trial be free from unreasonable delay.’ . . . [B]y definition, all of the examples . . . of defendants legitimately needing more time to prepare would constitute reasons for ‘reasonable’ delay.” Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 500. (1999).

“The Committee intends for this right to allow victims to have the trial of the accused completed as quickly as is reasonable under all of the circumstances of the case, giving both the prosecution and the defense a reasonable period of time to prepare. The right would not require or permit a judge to proceed to trial if a criminal defendant is not adequately represented by counsel.” *Id.* at 501 (quoting S. REP. NO. 105-409, at 3).

A.L.R.:

**Scope of Victims’ Interest**

Although a filing objecting to a joint motion requesting a continuance in a criminal case was properly asserted, it was without merit given the complexities of the case made a seven month continuance perfectly reasonable. Fern L. Kletter, Annotation, *Validity, Construction and Application of Crime Victim’s Rights Act (CVRA)*, 18 U.S.C.A. § 3771, 26 A.L.R. FED. 2D 451, § 26 (2008) (citing *United States v. Tobin*, No. 04-CR-216-01-SM, 2005 WL 1868682 (D.N.H. 2005)). However, given the number of victims in the case no further continuances would be granted absent extraordinary circumstances. *Id.*

“[T]he court denied the defendant’s motion for substitution of counsel at sentencing on murder charges . . . referencing the CVRA and pointing out that the killing of the victim occurred over eight years ago . . . . The appointment of new counsel at this point would certainly require adjournment of the sentencing, which at this point was unacceptable [after] a lengthy delay for the submission of pretrial motions and sentencing submissions.” *Id.* (citing *United States v. Kopp*, No. 00-CR-189A, 2007 WL 1747165 (W.D. N.Y. 2007)).

Cases:

**Scope of Victims’ Interest**

A victim’s right to “proceedings free from unreasonable delay” does not attach until “charges have been brought against a defendant and a case has been opened.” *In re Petersen*, No. 2:10-CV-298 RM, 2010 WL 5108692, at \*2 (N.D. Ind. Dec. 8, 2010).

A victim’s rights to notice, to be heard, and to restitution may be jeopardized by a lengthy delay in the proceedings, such as an indefinite continuance. *United States v. Gallion*, No. 07-39, 2007 WL 2407269, at \*2-3 (E.D. Ky. Aug. 20, 2007).

A court may grant a continuance that “does not constitute either ‘undue’ or ‘unreasonable’ delay.” Because the act of providing rights to victims is not intended “to undermine the Speedy Trial Act, 18 U.S.C. §§ 3161, *et. seq.*, nor to deprive either criminal defendants or the government of a full and adequate opportunity to prepare for trial.” *United States v. Tobin*, No. 04-CR-216-01-SM, 2005 WL 1868682, at \*1-2 (D.N.H. July 22, 2005).

A victim may assert his/her right to have proceedings free from unreasonable delay through his/her representative expressing opposition to defense motions for extensions, which the court

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may take into consideration. *Carter v. Turley*, No. 2:02-CV-326 TS, 2009 WL 3349938, at \*2-3 (D. Utah Oct.15, 2009).

A court's delay of three months on the ruling of a crime victim's motion, regardless of the lack of any substantive proceedings in the criminal action during this time, "can be construed as an effective denial of rights," based upon the Crime Victims' Rights Act. *In re Simons*, 567 F.3d 800, 801 (6th Cir. 2009). Therefore the crime victim may validly seek a petition for a writ of mandamus from the higher court without awaiting a district court's denial of the initial motion. *Id.*

Crime victim may not "unilaterally waive the statutory deadline" for decision on her mandamus petition, and the passing of the Court's deadline to decide the petition does not defeat jurisdiction. *United States v. Monzel*, 641 F.3d 528, 531 (D.C. Cir. 2011). "[T]o read [the 72-hour deadline for deciding a mandamus petition] as depriving the ...court of the power to order [relief] would harm those—the victims of crime—who likely bear no responsibility for the deadline's being missed and whom the statute also seeks to benefit." *Id.* at 532 (quoting *Dolan v. United States*, 130 S. Ct. 2533, 2540 (2010)). "[N]either the language nor the structure of [either] statute requires denying the victim [relief] in order to remedy [the] missed...deadline, [and] doing so would defeat the basic purpose of the [statute]." *Id.* at 532 (quoting *Dolan*, 130 S. Ct. at 2541).

Car owners requested the Court to order the government to return their automobile which was itself evidence of a stolen car fraud scheme; the Court denied the motion without prejudice since the case was complex and still in discovery but cautioned the Government that if the motion was renewed, the Government would be required to make a more complete factual record. *United States v. Eight Automobiles*, 356 F. Supp. 2d 223, 226 (E.D.N.Y. 2005). In denying the motion, the Court balanced the car owners' need of their property with the Government's need for evidence; the Court also noted that if the car owners were found to be crime victims under the CVRA, they would have standing to challenge any unreasonable delay of trial, once the trial began. *Id.* at 225-26.

Olesen, son of victim murdered by Defendant, challenged the denial of Defendant's habeas claims because the District Court ruled on Defendant's motions without considering Olesen's CVRA rights, and Olesen argued he was denied his right to proceedings without delay. *In re Olesen*, No. 11-4190, 2011 WL 5357631, at \*1 (10th Cir. Nov. 4, 2011). District Courts should do more than simply acknowledge an assertion of CVRA rights and should expressly address the CVRA rights asserted. *Id.* at \*3. Even though the District Court should have been clearer with its reasons for denying Olesen relief on the record as the CVRA requires, Defendant's right to habeas proceedings justified the delay in proceedings, and the District Court had set a briefing schedule to resolve the habeas claim; thus, Olesen's claims were properly denied. *Id.* at \*2. "The nine-and-a-half-year delay is too long[; Olesen] has not been responsible for the delay, he has asserted his rights several times, and he has been prejudiced by the lengthy litigation. Nonetheless, while the question is close, we cannot conclude at this juncture that the prejudice and delay overcome [Defendant's] due process right to have his habeas case decided." *Id.* at \*3.

### **Unreasonable Delay**

In denying the Defendant's motion for substitution of counsel, the Court cited, among other reasons, the rights of the victim's family to prompt disposition of the case, as the murder central to this case occurred over eight years prior to this motion. *United States v. Kopp*, No. 00-CR-189A, 2007 WL 1747165, at \*3 (W.D.N.Y. June 18, 2007).

In denying the Defendant's motion for substitution of counsel, the Court cited the substituting attorney's failure to certify that the trial will proceed as planned if the substitution order is granted because, among other reasons, "criminal defendants and crime victims have rights to a speedy trial." *United States v. McDaniel*, 411 F. Supp. 2d 1323, 1325 (D. Utah 2005).

Under the CVRA victim's right to proceedings free from unreasonable delay, the Court was unwilling to delay Defendant's sentencing when it had already been delayed over a month, and the "crimes [were] extremely serious and have caused considerable trauma and anxiety to his victims." *United States v. Wilson*, 350 F. Supp. 2d 910, 931 (D. Utah 2005).

Victim rights to confer with the attorney for the Government in the case, receive full and timely restitution, and to proceedings free from unreasonable delay under the CVRA "arise only after charges have been brought against a defendant and a case has been opened." *In re Petersen*, No. 2:10-CV-298 RM, 2010 WL 5108692, at \*2 (N.D. Ind. Dec. 8, 2010).

While seven months is not an unreasonable delay and consistent with speedy trial requirements no further continuances would be granted by the court on account of the CVRA's victim's right to be free from unreasonable delay. *United States v. Tobin*, No. 04-CR-216-01-SM, 2005 WL 1868682, at \*2 (D.N.H. July 22, 2005).

## **Section 1, Clause 8: "To reasonable notice of the release or escape of the accused"**

The following sources discuss the need for notification to Crime Victims of the release or escape of perpetrators, and how such notification can reasonably be accomplished.

### *Senate Report No. 108-91:*

This amendment gives victims a right to reasonable notice of such escape or release to ensure that the victim is not surprised or threatened by an escaped or released prisoner. S. REP. NO. 108-91, at 35 (2003). Extraordinary measures are not required. *Id.*

### **Reasonable Notice**

"Reasonable notice" is one likely to provide actual notice. *Id.* An automated voice response technology that places repeated telephone calls to victims whenever a prisoner is released is

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reasonable notice of the release. *Id.* As technology improves, what is “reasonable” may change as well. *Id.* “Reasonable” notice must be considered in light of the circumstances surrounding the case. *Id.* While mailing a letter would be “reasonable” notice of an upcoming parole release date, it would not be reasonable notice of the escape of a dangerous prisoner bent on taking revenge on his accuser.” *Id.*

### **Impact of Failure to Give Notice**

“Around the country, there are a large number of documented cases of women and children being killed by defendants and convicted offenders recently released from jail or prison. In many of these cases, the victims were unable to take precautions to save their lives because they had not been notified of the release.” *Id.* at 18 (quoting OFFICE FOR VICTIMS OF CRIME, U.S. DEP’T OF JUSTICE, *NEW DIRECTIONS FROM THE FIELD: VICTIMS’ RIGHTS AND SERVICES FOR THE 21ST CENTURY* 14 (1998)).

On December 6, 1993, Mary Byron was shot to death as she left work by her former boyfriend, Donovan Harris. *Id.* Harris had been arrested three weeks earlier on charges of kidnapping and raping her at gunpoint. *Id.* No one thought to notify her or the police of his release after a relative posted his bond. *Id.* (citing Jeffrey A. Cross, Note, *The Repeated Sufferings of Domestic Violence Victims Not Notified of Their Assailant’s Pre-Trial Release from Custody: A Call for Mandatory Domestic Violence Victim Notification Legislation*, 34 J. FAM. L. 915 (1996) (collecting this and other examples)).

Sharon Christian, a 20 year old rape victim, was victimized again by the criminal justice system when walking down the street in her neighborhood two weeks after the attack, she saw her attacker hanging out on the corner. *Id.* (citing *Senate Judiciary Committee Hearing*, 105th Cong. 105 (1998) (statement of Marlene Young)). He had been released on personal recognizance with no notice to her and no opportunity for her to ask for a restraining order or for the possibility of a bond. *Id.*

### *Statement of Senator Jon Kyl:*

“Equally important to this right to notice of public proceedings is the right to notice of the escape or release of the accused. This provision helps to protect crime victims by notifying them that the accused is out on the streets.” 150 CONG. REC. S10911-12 (2004).

### *Kyl Law Review Article:*

“Finally, reasonable and timely notice of the defendant’s release or escape is a matter of profound importance to victims’ safety in cases of violent crime. Twenty years after the President’s Task Force on Victims of Crime: Final Report, victims still are learning ‘by accident’ about the release of the person accused or convicted of attacking them. A recent Justice Department report documents cases of crime victims, including women and children, being killed by defendants or convicted felons who had recently been released from prison.” Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act*, 9 LEWIS & CLARK L. REV. 581, 598-99 (2005).

Cassell Law Review Article:

“[E]ven in several states identified as giving ‘strong protection’ to victims [sic] rights, fewer than 60% of the victims were notified of the sentencing hearing and fewer than 40% were notified of the pretrial release of the defendant.” Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims’ Rights Amendment*, 1999 UTAH L. REV. 479, 509 (1999) (citing NAT’L INST. OF JUSTICE, RESEARCH IN BRIEF, THE RIGHTS OF CRIME VICTIMS—DOES LEGAL PROTECTION MAKE A DIFFERENCE? 1 (1998)).

“Victims of crime literally have died because of the failure of the criminal justice system to extend to them the rights protected by the Amendment. Consider, for example, the victims’ right to be notified upon a prisoner’s release. The Department of Justice recently explained that ‘[a]round the country, there are a large number of documented cases of women and children being killed by defendants and convicted offenders recently released from jail or prison. In many of these cases the victims were unable to take precautions because they had not been notified.’” *Id.* at 527-28 (quoting OFFICE FOR VICTIMS OF CRIME, U.S. DEP’T OF JUSTICE, NEW DIRECTIONS FROM THE FIELD: VICTIMS’ RIGHTS AND SERVICES FOR THE 21<sup>ST</sup> CENTURY 13-14 (1998)).

## **Section 1, Clause 9: “[T]o due consideration for the victim’s safety”**

The following sources discuss how the safety of Crime Victims should be taken into account in other contexts, and why “due consideration” from the courts and prosecuting agencies is necessary.

Senate Report No. 108-91:

“Around the country, there are a large number of documented cases of women and children being killed by defendants and convicted offenders recently released from jail or prison. In many of these cases, the victims were unable to take precautions to save their lives because they had not been notified of the release.” S. REP. NO. 108-91, at 18 (2003) (quoting OFFICE FOR VICTIMS OF CRIME, U.S. DEPARTMENT OF JUSTICE, NEW DIRECTIONS FROM THE FIELD: VICTIMS’ RIGHTS AND SERVICES FOR THE 21<sup>ST</sup> CENTURY 14 (1998)).

On December 6, 1993, Mary Byron was shot to death by her former boyfriend, Donovan Harris, as she left work. *Id.* Harris had been arrested three weeks earlier on charges of kidnapping and raping her at gunpoint. *Id.* No one thought to notify her or the police of his release after a relative posted his bond. *Id.* (citing Jeffrey A. Cross, Note, *The Repeated Sufferings of Domestic Violence Victims Not Notified of Their Assailant’s Pre-Trial Release from Custody: A Call for Mandatory Domestic Violence Victim Notification Legislation*, 34 J. FAM. L. 915 (1996) (collecting this and other examples)).

Sharon Christian’s Testimony:

Christian, a 20 year old rape victim, was victimized again by the criminal justice system when walking down the street in her neighborhood two weeks afterwards, she saw her attacker hanging

## DISCUSSION DRAFT ONLY

out on the corner. *Id.* at 12. He had been released on personal recognizance with no notice to her and no opportunity for her to ask for a restraining order or for the possibility of a bond. *Id.*

### Statement of Senator Jon Kyl:

“There are cases, particularly in domestic violence cases, where there is danger posed by an intimate partner if the intimate partner is released. Such circumstances are not the norm, even in domestic violence cases as a category of cases. This exception should not be relied upon as an excuse to avoid notifying most victims.” 150 CONG. REC. S10911-12 (2004).

“Of course the government cannot protect the crime victim in all circumstances. However, where reasonable, the crime victim should be provided accommodations such as a secure waiting area, away from the defendant before and after and during breaks in the proceedings. The right to protection also extends to require reasonable conditions of pre-trial and post-conviction relief that include protections for the victim's safety.” *Id.*

### Cassell Law Review:

The right to have the safety of the victim considered is not intended to be construed to hold offenders beyond their maximum term or indefinitely, even if they pose a danger to their victims. Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 485 n. 25. (1999).

### Cases:

#### **Due Consideration**

In providing due consideration for the victim's safety, nothing changes the substantive bases of a defendant's bail, release, or detention, which other laws provide for. *United States v. Rubin*, 558 F. Supp. 2d 411,420 (E.D.N.Y. 2008).

The victim's identifying information shall not be redacted from otherwise disclosable information, provided any disclosure is for “attorneys' eyes only” and those who view the documents are identified to the government and sign a protective order. *United States v. Vaughn*, No. S-08-0052 LKK (GGH), 2008 WL 4615030 (E.D. Cal. Oct.17, 2008). Concerns about disclosing the information can be addressed by the government filing an *ex parte* motion under seal for the court to rule on, by the government and defense counsel obtaining direction from the court on how to disclose any protected information during a proceeding, and by prohibiting defense personnel from contacting any victim under the age of eighteen outside of the presence of an adult. *Id.*

“[G]ood cause” to uphold a Stipulation and Order, preventing disclosure of discovery materials provided to defense counsel, is shown by a victim's “unquestionable right ‘to be treated with fairness and with respect for [his] dignity and privacy.’” *United States v. Patkar*, Cr. No. 06-00250 JMS, 2008 WL 233062, at \*3-5 (D. Haw. Jan. 28, 2008).

Although a crime victim has the right to be treated with fairness, respect, and dignity and be protected from the accused, which might allow a victim to avoid testifying, these “right[s] must yield to [a] defendant’s right to compel the testimony of witnesses in his favor.” *United States v. Pinke*, No. 09-01-01-JSS, 2009 WL 4432669, at \*2 (E.D. Ky. Dec. 2, 2009).

Rights in the CVRA give “the victim standing to be heard independent of any presentation the prosecutor might make, but those rights do not appear to change the substantive bases on which a defendant can be released or detained” because the CVRA standard is the victim’s right to be reasonably protected from the accused. *United States v. Turner*, 367 F. Supp. 2d 319, 332 (E.D.N.Y. 2005).

### **Section 1, Clause 10: “[A]nd to restitution.”**

The following sources discuss the need for restitution to Crime Victims, and the reasonable limits thereof.

#### *Senate Report No. 108-91:*

“This provision recognizes that an offender should be held responsible for the harm his crime caused, through an order of restitution at sentencing.” S. REP. NO. 108-91, at 41 (2003). This philosophy has previously explained this philosophy in some detail in connection with the Mandatory Victim Restitution Act, codified at 18 U.S.C. §§3663A and 3664. *Id.* at 41-42. The relevant details for implementing this amendment will be spelled out under the resulting case law and statutes to enforce the amendment. *Id.* at 42. This amendment does not confer on victims any mandatory right to restitution, nor rights to a particular payment schedule. *Id.* at 42.

“The right conferred on victims is to consideration of just and timely claims of restitution. The right is, of course, limited to ‘convicted’ defendants, that is, those who pled guilty, are found guilty, or enter a plea of no contest. Even before a conviction, however, courts remain free to take appropriate steps to prevent a defendant’s deliberate dissipation of his assets for the purpose of defeating a restitution order, as prescribed by current law.” *Id.*

“The principle of restitution is an integral part of virtually every formal system of criminal justice, or every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also ensure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.” *Id.* at 28. (quoting S. REP. NO. 104–179, at 12; *Victim Restitution Act of 1995 Senate Judiciary Committee*, 104th Cong. 12 (1995)).

Restitution remains one of the most underutilized means of providing crime victims with a measurable degree of justice. *Id.* at 29 (citing OFFICE FOR VICTIMS OF CRIME, U.S. DEPARTMENT OF JUSTICE, *NEW DIRECTIONS FROM THE FIELD: RIGHTS AND SERVICES FOR THE 21ST CENTURY* 357 (1998)).

**Impact of Failure to Provide Restitution**

Sue Russell of Vermont was denied restitution in the aftermath of the devastating assault committed against her, despite the fact that her attacker now earns a significant wage from the state prison system. *Id.*

Virginia Bell, a retired civil servant, was accosted and robbed in Washington, D.C. *Id.* at 13. She suffered from a broken hip, incurred medical expenses over \$11,000, and was forced by her resulting debilitation to live with her daughter in Texas. *Id.* After the assailant plead guilty, Bell was not informed, and never got to share with the court the impact of her victimization. *Id.* As such, the court ordered restitution in the inadequate and arbitrary amount of \$387. *Id.*

*Statement of Senator Jon Kyl:*

“We specifically intend to endorse the expansive definition of restitution given by Judge Cassell in *U.S. v. Bedonie* and *U.S. v. Serawop* in May 2004. This right, together with the other rights in the act to be heard and confer with the government’s attorney in this act, means that existing restitution laws will be more effective.” 150 CONG. REC. S10911 (2004).

*A.L.R.:*

Victim’s right to restitution must be as provided in law, indicating Congressional recognition that there would be numerous situations when it would be impossible for multiple crime victims of the same set of crimes to be repaid every dollar they had lost. Fern L. Kletter, Annotation, *Validity, Construction and Application of Crime Victim’s Rights Act (CVRA)*, 18 U.S.C.A. § 3771, 26 A.L.R. FED. 2D 451, § 28 (2008) (citing *W.R. Huff Asset Mgmt. Co. v. Rigas*, 409 F. 3d 555 (2d Cir. 2005)). As such, it was not unreasonable to approve a settlement for less than the entire amount of damages suffered. *Id.*

Even though the primary goal of a restitution order is to make a victim whole, courts can order restitution only for losses that happen to fall within the particular categories covered by current statutes. *Id.* (citing *United States v. Garcia*, 478 F. Supp. 2d 1333 (D. Utah 2007)).

Restitution is limited to harm proximately caused by the defendant. *Id.* at § 28.5 (citing *United States v. Monzel*, 641 F. 3d 528 (D.C. Cir. 2011) *cert. denied*, No. 11-85, 2011 WL 3055311 (2011)).

*Cases:*

**Scope of Right to Restitution**

Victim rights to confer with the attorney for the Government in the case, receive full and timely restitution, and to proceedings free from unreasonable delay under the CVRA “arise only after charges have been brought against a defendant and a case has been opened.” *In re Petersen*, No. 2:10-CV-298 RM, 2010 WL 5108692, at \*2 (N.D. Ind. Dec. 8, 2010).

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A victim's right "to receive 'full and timely restitution'" does not attach until "charges have been brought against a defendant and a case has been opened." *Id.*

A victim's rights to notice, to be heard, and to restitution may be jeopardized by a lengthy delay in the proceedings, such as an indefinite continuance. *United States v. Gallion*, No. 07-39, 2007 WL 2407269, at \*2-3 (E.D. Ky. Aug. 20, 2007).

A victim's right to restitution applies to public proceedings and, therefore, does not apply to proceedings that are sealed. *United States v. Keifer*, No. 2:08-CR-162, 2009 WL 414472, at \*3-4 (S.D. Ohio Feb. 18, 2009).

Crime victims' right to full and timely restitution under the CVRA, 18 U.S.C. § 3771, does not require access to Defendant's presentence report because the reports have a presumption of confidentiality. *United States v. Coxton*, 598 F. Supp. 2d 737, 738 (W.D.N.C. 2009). Additionally, the information in the report that would assist in setting proper restitution and a proper restitution schedule was already provided to the government, so disclosure to the crime victims was not necessary to ensure full and timely restitution. *Id.* at 738-39.

The right to restitution under the CVRA does not include the right to documents under seal. *United States v. Keifer*, No. 2:08-CR-162, 2009 WL 414472, at \*3 (S.D. Ohio Feb. 18, 2009).

The Court granted crime victim's request to unseal the case and documents under the First Amendment so he may assert his rights under the CVRA, establish the basis for his restitution request, and speak at Defendant's sentencing. *Id.* at \*3.

### **Restitution Awarded**

Pharmaceutical company pled guilty to misbranding a prescription drug with intent to defraud, and the District Court limited the company's restitution obligations to those provided in the plea agreement. *In re Doe*, 264 Fed. App'x 260, 260 (4th Cir. 2007) (per curiam).

The Court found that the District Court erred in reading a proximate causation requirement onto 18 U.S.C. § 2259 for the victim's specific losses; the Court interpreted the statute as requiring proximate causation only for "other losses" under the statute. *In re Amy*, 636 F.3d 190, 198, 201-02 (5th Cir. 2011). As a result, crime victim of child pornography was entitled to restitution from the Defendant, under the CVRA, 18 U.S.C. §3771. *Id.* at 192-93.

The Court reversed and remanded the District Court decision denying restitution under the Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A(b)(2)(C), to a manslaughter victim's estate in the form of future lost income. *United States v. Cienfuegos*, 462 F.3d 1160, 1161, 1169 (9th Cir. 2006). Restitution for victim's future lost income could be awarded under the MVRA because it was "not based on speculation[,]"" was "reasonably calculable[,]"" and analysis of the statute "support[s] the conclusion that the MVRA does not per se exclude restitution for lost future income to homicide victims...." *Id.* at 1161, 1163-64, 1168-69. Finally, the Government's failure to follow procedural requirements in requesting restitution for

the victim's future lost earnings was harmless error because the Defendant failed to show it actually prejudiced him. *Id.* at 1162-63.

Three-month-old child killed through voluntary manslaughter by her father was a crime victim under the MVRA, 18 U.S.C. § 3663A. *United States v. Serawop*, 505 F.3d 1112, 1116 (10th Cir. 2007). Three-month-old child killed through voluntary manslaughter by her Defendant-father was entitled to restitution in the form of future lost income. *Id.* at 1121-22. The restitution award was not too speculative for the Court to determine under mandatory restitution rather than a civil case, but it would have also been within the District Court's discretion, given the time and complexity required to determine the award, to defer the determinations to a civil forum. *Id.* at 1124-25. The Court upheld the restitution award even though the calculation for future lost income did not include offset for the crime victim's gender, race, or personal consumption. *Id.* at 1125-28.

Victim of child pornography petitioned for mandamus relief challenging "nominal" restitution award from District Court. *United States v. Monzel*, 641 F.3d 528, 541, 544 (D.C. Cir. 2011). Crime victims may obtain mandamus relief for requests to adjust restitution awards which, if granted, result in adjustment of a defendant's sentence. *Id.* To award restitution, the Defendant must be the proximate cause of the victim's harm; the Court remanded the case to the District Court to determine proximate causation. *Id.* at 534. However, direct appeals by crime victims are not authorized by the CVRA because the CVRA provides crime victims with mandamus review, expressly authorizes the government to assert crime victim's rights on direct appeal, and sets forth specific rules for when crime victims may move to reopen sentences. *Id.* at 530, 541-42.

### **Restitution Not Awarded**

The Court, through a divided panel, denied a crime victim's request for restitution under 18 U.S.C. § 2259 because the District Court was not indisputably wrong to find that none of the defendant's conduct proximately caused the victim's damages. *In re Amy*, 591 F.3d 792, 793 (5th Cir. 2009), *rev'd on rehearing*, 636 F.3d 190 (5th Cir. 2011).

Investors, crime victims of a real estate scheme in which the president of a bank was guilty of depriving the bank of its honest services by obtaining an illegal kickback from the brokers, were not entitled to restitution because they were on notice of the amount of points being billed, and they suffered no loss as a consequence of the illegal kickbacks but instead suffered loss due to the builder's insolvency. *In re Stewart*, 641 F.3d 1271, 1273 (11th Cir. 2011) (per curiam).

Restitution was not appropriate for victims of a securities fraud conspiracy because the complexity of determining the victims in this case would "severely complicate and prolong the sentencing process" and is better suited for civil proceedings. *United States v. Ferguson*, 584 F. Supp. 2d 447, 458 (D. Conn. 2008). Congress intended mandatory restitution under both the Mandatory Victims Restitution Act (MVRA) for non-speculative losses by victims, but highly complex issues need not be resolved under the provisions of mandatory restitution. *Id.* at 457.

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Nor was restitution appropriate under the both the Victim Witness Protection Act (VWPA) for the same reasons of complexity. *Id.* at 458.

Persons with implants of medical device manufacturer were not crime victims and were not entitled to restitution under the VWPA or MVRA because the FDA violations Defendant was charged with, failing to report a medical device correction and filing a false and misleading report to the FDA, are not enumerated crimes under the statutes. *United States v. Guidant LLC*, 708 F. Supp. 2d 903, 911 (D. Minn. 2010). Additionally, although restitution is provided under the CVRA, 18 U.S.C. §3771, no persons were “directly and proximately harmed” by defendant’s alleged crimes. *Id.* at 907, 914.

Crime victims who purchased securities of Defendant’s company during a period in which Defendant participated in a securities conspiracy involving the same company’s financial statements sought restitution. *United States v. McQuillan*, No. 07 Cr. 17(LMM), 2007 WL 2827850, at \*1 (S.D.N.Y. Sept. 26, 2007). There would be many difficulties in proving that the crime victims were directly and proximately harmed from Defendant’s conspiracy, such as: other causes affecting the stock, the victims were aware of at least some of Defendant’s conduct before they sold their stock, and the need to identify and locate other victims. *Id.* at \*2. Thus, the Court determined that a restitution order would “complicate and prolong the sentencing process” and so denied the request for restitution. *Id.*

### **Restitution in Other Contexts**

District Court had jurisdiction to hear restitution appeal nine years after the order due to a mistake of the courts. *United States v. Holland*, 380 F. Supp. 2d 1264, 1269 (N.D. Ala. 2005). Defendant received ineffective assistance of counsel at trial and on appeal because counsel failed to argue that any order of restitution requires a jury to determine whether the Government proves that the defendant’s conduct caused the victim’s loss and the amount of the victim’s compensable loss. *Id.* at 1271. A victim has no standing to challenge a denial of restitution under the VWPA, and if the victim in this case believes it has a cause of action under the CVRA, it may appeal. *Id.* at 1279.

Science Fund crime victims may not request more detailed financial statements for purposes of determining restitution payment schedule directly from the defendant; they must enlist assistance from the Government. *United States v. Sacane*, No. 3:05cr325(AHN), 2007 WL 951666, at \*2 (D. Conn. Mar. 28, 2007).

Defendant’s arguments that the court improperly linked his bond to restitution failed because the bond was already affirmed by the Sixth Circuit and did not establish personal bias of the judge against the defendant. *United States v. Gallion*, No. 07-39(WOB), 2008 WL 1904669 (E.D. Ky. Apr. 29, 2008).

The Court determined that the victims’ rights to timely restitution and to proceedings free from unreasonable delay, under the CVRA, 18 U.S.C. § 3771, would be jeopardized by a continuance of the trial. *United States v. Gallion*, No. 07-39(WOB), 2007 WL 2407269, at \*2 (E.D. Ken.

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Aug. 20, 2007). This fact, along with the fact that counsel was afforded enough time to come up to speed on the case and were attempting a delay tactic to transfer assets beyond the jurisdiction of the court, caused the Court to grant the trial continuance but revoke Defendants' bonds. *Id.* at \*2.

The Court denied Defendant's motion to stay his joint and several restitution obligations under Defendant's theory that the entirety of the restitution obligation could be satisfied by his jointly and severally liable co-defendants. *United States v. Osborne*, No. 1:06-CR-00006-R, 2010 WL 4788169, at \*1 (W.D. Ky. Nov. 17, 2010). Because \$187, 523 was still owed to the victim and this amount did not exceed the court-imposed ceiling on Defendant's liability, Defendant's motion was denied. *Id.* at \*2. Finally, settlement of a civil liability doesn't affect enforcement of a restitution order, and civil payments do not count as restitution payments unless the amount is recovered as compensatory damages. *Id.* at \*2. "[A]bsent exceptional circumstances... a criminal defendant who fails to object to the calculation of restitution at [trial or appeal] loses the right to advance a challenge to this calculation." *Id.* at \*3 (quoting *Cani v. United States*, 331 F.3d 1210, 1215 (11th Cir. 2003)).

Family members of murder victim requested intervention in Defendant's case, under the CVRA, 18 U.S.C. § 3771, based on their interest in a restitution order. *Pann v. Warren*, No. 5:08-CV-13806, 2010 WL 2836879, at \*1 (E.D. Mich. July 19, 2010). The motion to intervene was untimely and was sought to protect a property interest arising from a state court restitution order, which is not the purpose of habeas review. *Id.* at \*2. Additionally, given courts limited role in habeas proceedings and that the victims failed to show that the respondent in the case would be unable to protect their interests, as is required to intervene, the motion to intervene was denied. *Id.* at \*2.

Victims of an explosion at Defendant's oil refinery objected to the plea agreement on the basis that the fine was incorrectly calculated. *United States v. BP Products N.A., Inc.*, 610 F. Supp. 2d 655, 660, 680 (S.D. Tex. 2009). The Court held that the fine calculation should only include pecuniary losses or gains and not non-pecuniary factors, such as pain and suffering. *Id.* at 682-84.

Upon Defendant's death, after trial but before a final judgment, notice of appeal, or sentencing, his estate moved for dismissal of the conviction and crime victims opposed the motion asserting violation of their rights under the CVRA, 18 U.S.C. § 3771, including the right to timely restitution. *United States v. Lay*, 456 F. Supp. 2d 869, 871-72 (S.D. Tex. 2006). The Court found that it had no authority to order restitution for the crime victim because controlling authority required dismissal, and therefore, Defendant was not convicted since he was not able to exercise his right to appeal. *Id.* at 874.

Defendant's conviction for voluntary manslaughter of his three-month-old daughter was reversed on appeal due to an error in the jury instructions. *United States v. Serawop*, 409 F. Supp. 2d 1356, 1356 (D. Utah 2006). Defendant's restitution order was adopted in full on remand because

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its prior reasoning was sound, and five months after the original restitution order Congress enacted the CVRA which gave the right to full and timely restitution. *Id.* at 1357-58.

The Court found Defendant, convicted of armed bank robbery, should pay the credit union's net loss from the robbery as appropriate restitution. *United States v. Wilson*, 350 F. Supp. 2d 910, 911-12 (D. Utah 2005). "[B]ecause restitution is not criminal punishment, it is not subject to the strictures of the Sixth Amendment." *Id.* at 929.

Defendant objected to the proposed award of restitution arguing that the jury rather than the judge had to determine restitution in light of *Blakely v. Washington*, 542 U.S. 296 (2004). *Id.* at 1311-12. The Court held that the Sixth Amendment does not mandate juries for restitution amounts and that the defendant did not have a right to a jury trial for restitution issues under the Seventh Amendment. *Id.* at 1314, 1325.

Dargan, crime-victim, sought a preliminary injunction under her right to full and timely restitution, CVRA, 18 U.S.C. § 3771, to enforce a restitution order she had against Defendant, arguing that Defendant was making fraudulent transfers of cash to avoid paying restitution. *Dargan v. Ingram*, No. C08-1714RSL, 2009 WL 1437564, at \*1 (W.D. Wash. May 22, 2009).

Victim properly proved that Defendant violated the terms of the restitution order, and Court ordered the preliminary injunction to the extent needed to account for and secure Defendant's assets. *Id.* at \*7-8.

The Court denied Crime victim's request to implement a proposed plan for distribution of restitution funds when victim was provided ample notice and opportunity to exercise his CVRA rights and when victim had already exercised his right to present his restitution plan to the Court. *United States v. Hays*, No. 09-91(1)(DWF), 2011 WL 4583822, at \*1-2 (D. Minn. Sept. 30, 2011). The Court rejected victim's restitution plan for a pro rata plan on the basis of fairness and equity. *Id.* at \*5.

Rhodes (defendant) wanted restitution credit for payment at sentencing b/c he already paid victim prior to arrest. He did not get it because he paid it after the victim knew of his offense, or after he reasonably should have known of discovery. *United States v. Rhodes*, 410 F. App'x 856 (6th Cir. 2010).

A victim's right to restitution is only one of many factors taken into consideration by a court in determining whether a plea agreement should be rejected. A victim's objection to a fine stated in a plea agreement, because it does not cover the victim's losses, is not a basis for finding the plea agreement invalid, particularly when "[t]he methods and measurements the victims propose are either unsupported by the law and facts or would raise [ ] difficult issues." *United States v. BP Prods. N. Am. Inc.*, 610 F. Supp. 2d 655, 681-707 (S.D. Tex. 2009).

**Section 1, Clause 11: “*The crime victim or the crime victim’s lawful representative has standing to assert these rights in any court.*”**

These sources discuss the need for standing to give crime victims the right to lawfully challenge violations of their rights.

**Senate Report No. 108-91:**

**Standing**

“Standing” gives victims the opportunity to be heard about their treatment—to have the merits of their claims considered. S. REP. NO. 108-91, at 43 (2003). Victims have the right to challenge their exclusion from the trial of the accused perpetrators of the crime. *Id.*

**Lawful Representative**

This amendment recognizes the right of a competent victim to choose a representative to exercise his or her rights, as provided by law. *Id.*

“Lawful representatives” will exist in the context of victims who are deceased, are children, or are otherwise incapacitated. *Id.* “In homicide cases, victim’s rights can be asserted by surviving family members or other persons found to be appropriate by the court.” *Id.* The “lawful representative” would not necessarily be someone who was the executor of the estate, but rather someone involved in issues pertaining to the criminal justice process. *Id.* “In cases involving child victims, a parent, guardian or other appropriate representative can do the same. For victims who are physically or mentally unable to assert their rights, an appropriate representative can assert the rights.” *Id.*

Care must be taken to ensure that the “representative” truly reflects the interests—and only the interests—of the victim. *Id.* The representative should never be criminally involved in the crime against the victim. *Id.*

**Statement of Senator Jon Kyl:**

“The provision allows the crime victim's representative and the attorney for the government to go into a criminal trial court and assert the crime victim's rights. The inclusions of representatives and the government's attorney in the provision are important for a number of reasons. First, allowing a representative to assert a crime victim's rights ensures that where a crime victim is unable to assert the rights on his or her own for any reason, including incapacity, incompetence, minority, or death, those rights are not lost. The representative for the crime victim can assert the rights. Second, a crime victim may choose to enlist a private attorney to represent him or her in the criminal case—this provision allows that attorney to enter an appearance on behalf of the victim in the criminal trial court and assert the victim's rights. The provision also recognizes that, at times, the government's attorney may be best situated to assert a crime victim's rights either because the crime victim is not available at a particular point in the trial or because, at times, the crime victim's interests coincide with those of the government and

it makes sense for a single person to express those joined interests. Importantly, however, the provision does not mean that the government's attorney has the authority to compromise or co-opt a victim's right. Nor does the provision mean that by not asserting a victim's right the government's attorney has waived that right. The rights provided in this bill are personal to the individual crime victim and it is that crime victim that has the final word regarding which of the specific rights to assert and when. Waiver of any of the individual rights provided can only happen by the victim's affirmative waiver of that specific right.” 150 CONG. REC. S10910-01 (2004).

*Kyl Law Review Article:*

**Standing**

“This provision’s simple yet profound directive—” [t]he crime victim . . . may assert the rights”—is the lynch-pin of the entire law, without which it would be as ineffective as the former VRRRA. It gives the victim standing to defend his rights.” Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act*, 9 LEWIS & CLARK L. REV. 581, 616 (2005).

“For a victim’s right to truly be honored, a victim must be able to assert the rights in trial courts, to then be able to have denials of those rights reviewed at the appellate level, and to have the appellate court take the appeal and order relief. By providing for all of this, this bill ensures that victims’ rights will have meaning. It is the clear intent and expectation of Congress that the district and appellate courts will establish procedures that will allow for a prompt adjudication of any issues regarding the assertion of a victim’s right, while giving meaning to the rights we establish.” *Id.* at 617.

“The rights described . . . 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.” *Id.* at 618.

**Legal Representative**

“In recognition of the suffering of those victims “left behind,” the CVRA broadly defines who can serve as a representative of the victim. Unlike the former VRRRA, which allowed a single member of the family to represent a victim’s interests, the CVRA allows “family members” to so serve. The notion . . . that only one family member suffered “direct physical, emotional, or pecuniary harm” as a result of the murder or incapacitation of a parent, child, or sibling . . . is

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belied by any visit to a Parents of Murdered Children meeting. The broader definition of who is harmed not only is more just, but it is more closely grounded in the harsh realities of crime.” *Id.*

“It must be noted again that the victim’s right established here is independent of the government and that the victim exercises rights not through the prosecutor or the courts but rather as an independent participant. While the role of a “participant” may be legally distinguishable from that of a “party,” participants are afforded the rights and the standing to assert them under the CVRA even if they are not parties to a case.” *Id.* at 617.

### Cassell Law Review Article:

#### **Standing**

“Giving victims explicit constitutional protection will vindicate their rights in many circumstances where today the trial judge would be uncertain how to proceed. Moreover, the Amendment’s clear conferral of ‘standing’ on victims will help to develop a body of precedents on how victims are to be treated.” Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims’ Rights Amendment*, 1999 UTAH L. REV. 479, 509 (1999).

#### **Impact of Failure to Recognize Standing**

When victims of the Oklahoma City Bombing were faced with the choice of either being able to attend the trial or submitting a Victim Impact Statement, they filed a motion asserting standing to present their own claims. *Id.* at 516-18. When the District Court denied their motion, the victims filed an appeal with the Tenth Circuit. *Id.* The court concluded that the victims lacked standing because they had no “legally protected interest” to be present at the trial and suffered no “injury in fact” from their exclusion. *Id.* (citing *United States v. McVeigh*, 106 F.3d 325, 328 (10<sup>th</sup> Cir. 1997). “It is now the law of the Tenth Circuit that victims lack “standing” to be heard on issues surrounding the Victims’ Bill of Rights and, for good measure, that the Department of Justice may not take an appeal asserting rights for victims under the statute.” *Id.* at 521.

### Cases:

#### **Standing**

The Crime Victims’ Rights Act, 18 U.S.C. § 3771, grants independent standing to crime victims and requires that courts ensure that victims’ rights are protected even if the victims and prosecutor do not request enforcement. *United State v. Turner*, 367 F. Supp. 2d 319 (E.D.N.Y. 2005). This requires more than mere rulings on applications for relief; the judge must take an active role in enforcing the CVRA. *Id.*

Regardless of a defendant’s plea and/or sentencing, a victim’s rights are neither limited nor restricted, based upon the Crime Victims’ Rights Act. *United States v. Patkar*, Cr. No. 06-00250 JMS, 2008 WL 233062, at \*6 (D. Haw. Jan. 28, 2008).

Juvenile-victim had standing to challenge request for open proceedings in this case because he or she would be directly affected by the decision since the community already knew she was the

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victim in the case. *State ex rel. K.P.*, 709 A.2d 315, 319, 322, 327 (N.J. Super. Ct. Ch. Div. 1997).

In an in rem civil forfeiture proceeding against real property, purchased with proceeds from a fraudulent investment scheme, investor-victims may have Article III standing under *United States v. \$4,224,958.58*, 392 F.3d 1002 (9th Cir. 2004) (holding that if victims can prove they were defrauded, they are the beneficiaries of a constructive trust under California law and have Article III standing to enter the forfeiture case itself), but lack prudential standing to receive direct written notice of the action prior to the entry of judgment. *United States v. 730 Glen-Mady Way*, 590 F. Supp. 2d 1295 (E.D. Cal. 2008). The victims' claims do not fall within the zone of interests Congress intended to protect, and under 18 U.S.C. § 981(d), Congress explicitly referred victims' claims to the discretion of the Attorney General for remission after the successful prosecution of the forfeiture case. *Id.*

### **Legal Representative**

While a victim may not have a right under 18 U.S.C. § 3771 to present both his and his attorney's impact statements at sentencing, allowing both to do so is within a district court's broad discretion of factors it may consider in imposing an appropriate sentence. *United States v. Rhodes*, 410 F. App'x 856 (6th Cir. 2010). Allowing both statements does not require prior notice to the defendant if it is harmless error. *Id.* In this case, the court determined that if there were an error, it would be harmless because the district court determined the sentence based on factors other than the impact statements. *Id.*

A crime victim's standing to assert rights at sentencing does not include a right to be represented by counsel at sentencing when: assistance from the prosecuting attorney is sufficient for determining a proper sentence, the government's ability to advocate unequivocally at sentencing for the victim's rights is not compromised, and the victim's right to be heard regarding a defendant's sentence and restitution is preserved. *In re Zackey*, No. 10-3772, 2010 WL 3766474 (3rd Cir. Sept. 22, 2010).

### **Limitations of Standing**

The CVRA, 18 U.S.C. § 3771 gives "the victim standing to be heard independent of any presentation the prosecutor might make, but those rights do not appear to change the substantive bases on which a defendant can be released or detained" because the CVRA standard is the victim's right to be reasonably protected from the accused. *United States v. Turner*, 367 F. Supp. 2d 319, 332 (E.D.N.Y. 2005).

The CVRA, 18 U.S.C. § 3771, "grants no privilege, much less an unconditional right, to intervene." *Brandt v. Gooding*, 636 F.3d 124, 136 (4th Cir. 2011) (quoting *Allen Calculators, Inc. v. Nat'l Cash Register Co.*, 322 U.S. 137, 141 (1944)). Crime victim did not have the right to intervene, but did have the right to be reasonably heard at any public proceeding involving release. *Id.* at 136.

## **Section 1, Clause 12: “Nothing in this Article provides grounds for a new trial”**

### **Senate Report No. 108-91:**

This amendment is designed to protect criminal trials against judicially created remedies that might interfere with finality, as it opens appropriate avenues for victims to challenge violations of their rights as well as the ability of Congress and the States to provide additional remedies. S. REP. NO. 108-91, at 42 (2003).

In balancing the competing concerns of giving victims an effective means of enforcing their rights and of ensuring that court decisions retain a reasonable degree of finality, victims must be given an opportunity to challenge previously taken judicial actions or victims’ rights might remain routinely ignored. *Id.*

This amendment does not provide grounds for a new trial is important because even in states that supposedly protect victims’ rights to attend a trial, victims are often “strongly advised” not to go in because of the possibility, it might create an issue for the defendant to appeal. *Id.* at 21 (citing *Senate Judiciary Committee Hearing*, 104th Cong. 36 (1996) (statement of Rita Goldsmith)).

Federal prosecutors in the Oklahoma City bombing case gave the victims less-than-clear-cut instructions on whether they could attend proceedings. *Id.* (citing *Senate Judiciary Committee Hearing*, 105th Cong. 73-74 (1997) (statement of Marsha Kight)).

### **Kyl Law Review Article:**

#### **Trials**

“Considerations of double jeopardy and finality of judgments govern the relief that may be sought if a right was denied to the victim during the trial and no immediate relief was sought through mandamus.” Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act*, 9 LEWIS & CLARK L. REV. 581, 611-12 (2005).

#### **Pleas and Sentencing**

“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.” *Id.* at 612.

“Implicit in this subsection is the authority for the victim to file motions to vacate proceedings that are held in derogation of victims’ rights and to seek reconsideration of the decisions made, with only limited exceptions. This provision is not intended to prevent courts from vacating decisions in non-trial proceedings--such as proceedings involving release, delay, pleas, or

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sentencing proceedings--in which victims' rights were not protected, and ordering those proceedings to be redone. It is important for victims' rights to be asserted and protected throughout the criminal justice process, and for courts to have the authority to redo proceedings such as release, delay, pleas, and sentencing proceedings where victims' rights are abridged." *Id.*

"For plea and sentencing proceedings to be re-opened these conditions must be met: 1. The victim must have asserted the right at issue before or during the proceeding. This condition will be satisfied upon the filing of a notice of appearance and a notice of assertion of rights in the victim's case; 2. The victim has sought enforcement of the right in the district court, been denied, and sought relief through the mandamus procedure in the court of appeals within ten days; and 3. In the case of a plea the defendant "has not pled to the highest offense charged." *Id.*

### Cases:

#### **Limitations on Defendants**

Application of the CVRA's, 18 U.S.C. § 3771(a), requirement allowing victims to be reasonably heard at sentencing does not violate defendant's rights under the *ex post facto* or due process clauses. *United States v. Eberhard*, 525 F.3d 175 (2d Cir. 2008). Allowing crime victim to be reasonably heard at sentencing does not violate the Government's contractual promise in the plea agreement to not suggest any sentence departure. *Id.* Nor does it violate Defendant's due process rights when nothing in the plea agreement precluded the Government from presenting victim impact testimony, and victims' pleas were incidental to the presentation of facts. *Id.*

Alleged false statements by the investigator and witnesses against the defendant in his own criminal case does not provide a cause of action under the CVRA, 18 U.S.C. § 3771. *United States v. Merkosky*, No. 1:02cr-0168-01, 2008 WL 1744762 (N.D. Ohio Apr. 11, 2008).

A court order requiring the victim's attorney be added to the service list for filings in the case, pursuant to the CVRA, 18 U.S.C. § 3771, did not show personal bias on the part of the judge against the defendant. *United States v. Gallion*, No. 07-39(WOB), 2008 WL 1904669 (E.D. Ky. Apr. 29, 2008).

#### **Limitations on Victims**

"[T]he CVRA does not provide victims with a right to appeal a defendant's sentence by challenging the district court's calculation of the Guidelines range." *In re Brock*, 262 F. App'x 510, 513 (4th Cir. 2008).

Victim petitioned for mandamus relief challenging "nominal" restitution award from District Court. *United States v. Monzel*, 641 F.3d 528, 530 (D.C. Cir. 2011). Crime victims may obtain mandamus relief for requests to adjust restitution awards which, if granted, result in adjustment of a defendant's sentence. *Id.* at 541-44. However, direct appeals by crime victims are not authorized by the CVRA, 18 U.S.C. § 3771, because the CVRA provides crime victims with mandamus review, expressly authorizes the government to assert crime victim's rights on direct

appeal, and sets forth specific rules for when crime victims may move to reopen sentences. *Id.* at 530, 541-42.

The CVRA, 18 U.S.C. § 3771, does not address victims' rights to file civil claims against their assailants. *United States v. Moussaoui*, 483 F.3d 220 (4th Cir. 2007). Therefore, it does not provide a district court with the authority to grant civil-victims' intervening request for non-public documents in a criminal case. *Id.* Additionally, allowing such a request exceeds a district court's inherent powers. *Id.*

“[T]he decision not to bring charges against the alleged perpetrators [is] a matter of prosecutorial discretion, not subject to review under the CVRA.” *In re Petersen*, No. 2:10-CV-298 RM, 2010 WL 5108692, at \*2 (N.D. Ind. Dec. 8, 2010).

“[T]here is absolutely no suggestion in the statutory language [of the CVRA] 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.” *Does v. United States*, No. 08-80736-CIV, 2011 WL 4793213, at \*5 (S.D. Fla. Sept. 26, 2011) (quoting *United States v. Rubin*, 558 F. Supp. 2d 411, 418 (E.D.N.Y. 2008)). “Even under an expansive approach, the reasonable right to confer on a proposed plea agreement and the government's obligation to provide notice of that right is subject to the limit that the CVRA not impair prosecutorial discretion.” *Id.* at \*5 (*United States v. BP Products North America, Inc.*, No. H-07-434, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008)).

## **Section 1, Clause 13: “[O]r any claim for damages”**

### *Senate Report No. 108-91:*

This amendment does not give rise to any claim for money damages against governmental entities or their employees or agents; affect any existing rights or ability to create rights in the future, independent of this amendment; and limit appropriate remedies within the criminal process. S. REP. NO. 108-91, at 38-39 (2003).

### *Kyl Law Review Article:*

“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.” Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 621 (2005).

“Victims do not seek enforcement of their rights through collateral civil actions for damages.”  
*Id.*

**Section 1, Clause 14: “[A]nd no person accused of the crime may obtain any form of relief hereunder.”**

Statement of Senator Jon Kyl:

“Importantly, however, the bill does not allow the defendant in the case to assert any of the victim's rights to obtain relief. This prohibition prevents the individual accused of the crime from distorting a right intended for the benefit of the individual victim into a weapon against justice.”  
150 CONG. REC. S10910-01 (2004).

Kyl Law Review Article:

“This part of the provision is intended simply to make explicit the rule that the defendant may not benefit from a denial of victims' rights. It “prevents the individual accused of the crime from distorting a right intended for the benefit of the individual victim into a weapon against justice.”  
Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act*, 9 LEWIS & CLARK L. REV. 581, 617 (2005).

Cases:

“Defendant may not use the CVRA, 18 U.S.C. § 3771, as either a sword or a shield, and is compelled to refrain from interfering with the victim’s rights....” *United States v. Aleo*, No. 09-20165, 2010 U.S. Dist LEXIS 42858, at \*4 (E.D. Mich. May 3, 2010).

The CVRA only gives Courts jurisdiction to allow the purported victim of crime to assert the rights thereunder, not the defendant in a criminal case. *United States v. Merkosky*, No. 1:02cr-0168-01, 2008 WL 1744762, at \*2 (N.D. Ohio Apr. 11, 2008). A defendant may not make a motion to be declared a crime victim in the context of his own criminal case because “the policy behind [the CVRA] intends to prevent the accused, or...convicted, from using the Crime Victims Restitution Act to their advantage in the cases against them.” *Id.* at \*2.

The CVRA, 18 U.S.C. § 3771, has no bearing on mandamus claims of convict regarding legality of confinement. *In re Rochester*, 292 Fed. App’x 226 (4th Cir. 2008).

## **Section 2, Clause 1: “For purposes of this Article, ‘crime victim’ includes any person . . . directly harmed”**

These sources discuss who can be considered a crime victim and the extent of “direct harm.”

### Statement of Senator Jon Kyl:

#### **Crime Victims**

“A ‘crime victim’ is defined as a person directly and proximately harmed as a result of a federal offense or an offense in the District of Columbia. This is an intentionally broad definition because all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged. Additionally, crime victims may, for any number of reasons, want to employ an attorney to represent them in court. This definition of crime victim allows crime victims to do that. It also assures that when, for any reason, crime victims unable to assert rights on their own—those rights will still be protected.” 150 CONG. REC. S10910-01 (2004).

### Kyl Law Review Article:

“According to the [CVRA], 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.” Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act*, 9 LEWIS & CLARK L. REV. 581, 594 (2005).

“The CVRA’s definition of a crime victim is . . . is broader than the definition employed in Rule 32 of the Federal Rules of Criminal Procedure, which limits the meaning of victim to the ‘individual against whom the defendant committed an offense for which the court will impose sentence.’ Such a limitation to offenses for which the court ‘will impose sentence’ does not appear in the CVRA. Thus, the CVRA could be applied to victims of counts dismissed in a plea agreement.” *Id.*

#### **Directly Harmed**

“The CVRA’s ‘harm’ predicate for the application of its guarantees is limited to that harm which is ‘directly and proximately’ caused by the offense. These terms necessarily invoke the concept of ‘foreseeability,’ which has been liberally interpreted in other victims’ statutes. Simply put, crime foreseeably has far-reaching consequences. As United States Supreme Court Justice David Souter noted in his concurring opinion in *Payne v. Tennessee*, for example: ‘Murder has foreseeable consequences. When it happens, it is always to distinct individuals, and, after it happens, other victims are left behind. . . .’ *Id.* at 594-95. (quoting *Payne v. Tennessee*, 501 U.S. 808 (1991)).

A.L.R.:

**Crime Victims**

Any person who would be considered a crime victim if the government were to establish the truth of the factual allegations must be given their rights under the CVRA, as to hold the CVRA inapplicable until a conviction has been obtained would render the CVRA meaningless and produce an absurd result that presumably Congress did not intend. Fern L. Kletter, Annotation, *Validity, Construction and Application of Crime Victim's Rights Act (CVRA)*, 18 U.S.C.A. § 3771, 26 A.L.R. FED. 2D 451, §7 (2008) (citing *United States v. Turner*, 367 F. Supp. 2d 319 (E.D. N.Y. 2005)).

Victim status extends to the family members of a person killed as a direct and proximate result of the commission of a federal crime. *Id.* (citing *United States v. L.M.*, 425 F. Supp. 2d 948 (N.D. Iowa 2006); *United States v. Marcello*, 370 F. Supp. 2d 745 (N.D. Ill. 2005); *United States v. Johnson*, 362 F. Supp. 2d 1043 (N.D. Iowa 2005)). The parents or legal guardians of juveniles can assume their rights under the CVRA. *Id.* (citing *United States v. Garate*, 482 F.3d 1013 (8<sup>th</sup> Cir. 2007)).

**Directly Harmed**

Any person directly and proximately harmed by the commission of an offense within the meaning of the CVRA is entitled to Victim Status, even when the extent of the harm is difficult to ascertain. *Id.* (citing *United States v. Tobin*, No. 04-CR-216-01-SM, 2005 WL 1868682 (D.N.H. July 22, 2005)).

Victim status does not depend solely on the requirements of the criminal act alleged, and extends to circumstances when the harm suffered is a foreseeable result of the criminal act. *Id.* (citing *United States v Eight Automobiles*, 356 F. Supp. 2d 223 (E.D. N.Y. 2005); *United States v Poole*, 241 Fed. App'x. 153 (4th Cir. 2007)).

Cases:

**Crime Victims**

A crime victim is a constructive equivalent to a party in the case. *State ex rel. K.P.*, 709 A.2d 315, 323 (N.J. Super. Ct. Ch. Div. 1997). “[V]ictim of a crime’ means: a) a person who has suffered physical or psychological injury or has incurred loss of or damage to personal or real property as a result of a crime or incident involving another person operating a motor vehicle under the influence of drugs or alcohol, and b) the spouse, parent, legal guardian, grandparent, child or sibling of the decedent in the case of a criminal homicide.” *Id.* at 323 (quoting N.J. CONST., art. I, par. 22 (November 5, 1991)).

Courts must make particularized findings about whether each of the alleged victim-witnesses, thirty-four in this case, identified by the United States as prospective victims fit the definition of crime victims under the CVRA, 18 U.S.C. § 3771. *In re Parker*, Nos. 09-70529, 09-70533, 2009 WL 5609734 (9th Cir. Feb. 27, 2009) (order).

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Protections under the CVRA, 18 U.S.C. § 3771, attaches before the government brings formal charges against the defendant because the statutory language clearly contemplates pre-charge proceedings. *Does v. United States*, No. 08-80736-CIV, 2011 WL 4793213, at \*3 (S.D. Fla. Sept. 26, 2011). “[T]here is absolutely no suggestion in the statutory language [of the CVRA] 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.” *Id.* at \*5 (quoting *United States v. Rubin*, 558 F. Supp. 2d 411, 418 (E.D.N.Y. 2008)). “Even under an expansive approach, the reasonable right to confer on a proposed plea agreement and the government’s obligation to provide notice of that right is subject to the limit that the CVRA not impair prosecutorial discretion.” *Id.* at \*5 (*United States v. BP Products North America, Inc.*, No. H-07-434, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008)).

Crime victims’ rights under the CVRA, 18 U.S.C. § 3771, did not arise until the superseding indictment was filed; “the realm of cases in which the CVRA might apply despite no prosecution being ‘underway,’ cannot be read to include the victims of uncharged crimes that the government has not even contemplated.” *United States v. Rubin*, 558 F. Supp. 2d 411, 419 (E.D.N.Y. 2008).

Petitioner inmate is not a crime victim under the CVRA, 18 U.S.C. § 3771, for an alleged assault against him because “the CVRA does not grant victims any rights against individuals who have not been convicted of a crime.” *Searcy v. Paletz*, No. 6:07-1389-GRA-WMC, 2007 WL 1875802, at \*2 (D.S.C. June 27, 2007). Here, no criminal prosecution was brought against Defendants, so Petitioner is not afforded victim status under the CVRA. *Id.* at \*2.

Courts disagree about whether the CVRA, 18 U.S.C. § 3771, confers rights upon a victim before prosecution of a crime has already begun. *United States v. Merkosky*, No. 1:02cr-0168-01, 2008 WL 1744762, at \*2 (N.D. Ohio Apr. 11, 2008) (citing *United States v. Turner*, 367 F. Supp. 2d 319, 327 (E.D.N.Y. 2005)).

The Court assumed without deciding that attorney, defendant in a malpractice suit, was a crime victim after Defendant was found in contempt of court for presenting a fraudulent letter in support of his malpractice case against attorney. *Brandt v. Gooding*, 636 F.3d 124, 136-37 (4th Cir. 2011).

### **Directly Harmed**

“Whether there are crime victims depends on 1) direct and proximate harm to a person 2) as the result of the commission of a federal offense.” *United States v. Grace*, 597 F. Supp. 2d 1157, 1161-62 (D. Mont. 2009), *vacated by United States v. Grace*, No. CR 05-07-M-DWM, 2009 WL 5697923 (D. Mont. Feb. 27, 2009) (“Grace II”). About 2000 persons believed to have been harmed from Defendant’s alleged release of air pollutant were not victims under the CVRA, 18 U.S.C. § 3771, because the Government offered no evidence that the victims were imminently endangered by Defendant’s alleged crime, and therefore there are no identifiable victims in the case. *Id.* at 1161, 1163-64. The order was later vacated so particularized findings may be made regarding the remaining alleged victims. *Grace II* at \*1.

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The receipt and distribution of child pornography, including “those ‘who merely or passively receive or possess child pornography directly contribute to [the] continuing victimization” of the child, and so the child is a crime victim since they are directly harmed from the crime. *United States v. McElroy*, 353 Fed. App’x 191, 193 (11th Cir. 2009) (per curiam) (quoting *United States v. Goff*, 501 F.3d 250, 259 (3d Cir. 2007)).

Treating psychiatrists testimony of victim’s post-traumatic stress disorder demonstrated sufficient possibility of direct harm to victim for the proceeding to be closed and the press denied access. *New Jersey ex rel K.P. D.O.B. 3/31/81*, 709 A.2d 315, 326 (1997).

Business partner of Defendant who suffered monetary loss in Defendant’s fraudulent scheme, including a scheme to steal partner’s identity, suffered direct and proximate harm from Defendant’s actions taken in furtherance of his scheme, and so partner constituted a crime victim under the CVRA, 18 U.S.C. § 3771. *United States v. Keifer*, No. 2:08-CR-162, 2009 WL 414472 (S.D. Ohio Feb. 18, 2009).

Witnesses complaining of harmful symptoms due to Defendant companies’ lack of emissions control on its equipment are not victims under the CVRA, 18 U.S.C. § 3771, when their symptoms could have many causes and chemical exposure only amounted to one “possibility.” *United States v. Citgo Petroleum Corp.*, No. C-06-563, 2011 WL 1337101, at \*3 (S.D. Tex. Apr. 5, 2011).

Unsecured creditors were crime victims under the CVRA, 18 U.S.C. § 3771, because they were directly and proximately harmed by Defendant’s failure to repay their exchange funds, and the CVRA provides for victim’s rights prior to a determination of Defendant’s guilt. *United States v. Okun*, No. 3:08cr132, 2009 WL 790042, at \*1-2 (E.D. Va. Mar. 24, 2009).

Former domestic partner of Defendant marijuana user was not a crime victim under the CVRA, 18 U.S.C. § 3771, and so could not provide a victim impact statement. *United States v. Sharp*, 463 F. Supp. 2d 556 (E.D. Va. 2006). This is because the assault and battery committed by Defendant on domestic partner was not directly or proximately related to the conspiracy to possess with the intent to distribute marijuana charge. *Id.* at 564.

Investors in real estate scheme in which president of bank was guilty of depriving the bank of its honest services by obtaining an illegal kickback from the brokers were crime victims under the CVRA, 18 U.S.C. § 3771 because the illegal kickback caused victims to be liable under their contract for an extra one percent of their total loan. *In re Stewart*, 552 F.3d 1285, 1288 (11th Cir. 2008) (per curiam). “The CVRA [ ] does not limit the class of crime victims to those whose identity constitutes an element of the offense or who happen to be identified in the charging document. The statute, rather, instructs the district court to look at the offense itself only to determine the harmful effects the offense has on the parties. Under the plain language of the statute, a party may qualify as a victim, even though it may not have been the target of the crime as long as it suffers harm as a result of the crime’s commission.” *Id.* at 1289.

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Industrial company and associated conspirator employees was charged with various Occupational Safety and Health Administration (OSHA) offenses; six workers who suffered ultimate workplace injuries are not crime victims under the CVRA, 18 U.S.C. § 3771, because the charged crimes are for obstruction of investigation and false statements to OSHA rather than actual workplace OSHA violations. *United States v. Atlantic States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 516 (D.N.J. 2009). Therefore, the six workers did not suffer direct or proximate harm from the offenses because their ultimate workplace injuries were too factually attenuated. *Id.*

Crime victim of Defendant's prior burglary case is not a crime victim under the CVRA, 18 U.S.C. § 3771, for Defendant's predicate offense of illegal re-entry into the United States, and therefore, victim was not entitled to notice of proceedings in Defendant's illegal re-entry case. *United States v. Guevara-Toloso*, No. M 04-1455(ARL), 2005 WL 1210982, at \*1 (E.D.N.Y. May 23, 2005).

Mother of son was killed by a paramilitary affiliated with a terrorist organization in Columbia which obtained some of its funding through drug trafficking. *In re Rendón Galvis*, 564 F.3d 170, 175 (2d Cir. 2009) (per curiam). Defendant's participation in a conspiracy to import cocaine was not a direct and proximate cause of the murder, and so mother is not a victim under the CVRA, 18 U.S.C. § 3771. *Id.* at 175-76.

Pharmaceutical company pled guilty to misbranding a prescription drug with intent to defraud, and the District Court limited the company's restitution obligations to those provided in the plea agreement. *In re Doe*, 264 Fed. App'x 260, 260 (4th Cir. 2007) (per curiam). Jane Doe, prescription user and alleged victim petitioned as a crime victim under the CVRA, 18 U.S.C. § 3771, against the limitation on restitution. *Id.* at 260. The Appellate Court analyzed Doe's claim under the Victim and Witness Protection Act, 18 U.S.C. § 3663, and found Doe is not a crime victim because there was not a direct and proximate relationship between the crime and the injury, and Doe presented no evidence that she relied on or was aware of any false or misleading information. *Id.*

Parents of murdered child are not crime victims under the CVRA, 18 U.S.C. § 3771, in Defendant's case in which Defendant illegally sold a gun to the juvenile who committed the murders. *In re Antrobus*, 563 F.3d 1092, 1094 (10th Cir. 2009). The parents did not fit the definition of crime victim because there was a lack of foreseeability, or proximate causation, between the gun sale and the murders since the juvenile committed the murders more than seven months after the sale of the gun and was no longer a juvenile at the time of the crime, and the parents did not present any new evidence that would establish their status as victims. *Id.* at 1095, 1100-01.

Parents of murdered child are not crime victims under the CVRA, 18 U.S.C. § 3771, in Defendant's case in which Defendant illegally sold a gun to the juvenile who committed the murders. *In re Antrobus*, 519 F.3d 1123, 1123-25 (10th Cir. 2008). To find the parents as crime

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victims in this case, the Court “would have to determine that selling a gun to a minor is the proximate cause of any resulting injury to third persons.” *Id.* at 1125.

Investors were not entitled to restitution because they were on notice of the amount of points being billed, and they suffered no loss as a consequence of Defendant’s illegal kickbacks but instead suffered loss due to the builder’s insolvency. *In re Stewart*, 641 F.3d 1271, 1273 (11th Cir. 2011) (per curiam).

### **Consideration of Non-victim Testimony**

Victim of child molestation incident occurring 20 years prior to Defendant’s current offense is not a crime victim under the CVRA, 18 U.S.C. § 3771, for the current offense. *United States v. Spiwak*, 377 Fed App’x 319, 323 (4th Cir. 2010) (per curiam). However, Court did not abuse its discretion in considering statement by victim of child molestation that occurred 20 years prior regarding an upward departure in sentencing, even though victim was not a crime victim under the CVRA for the current crime. *Id.* at 323-24.

Even though the law is unsettled regarding whether the wife of a carjacking victim constitutes a crime victim, the CVRA, 18 U.S.C. § 3771, does not limit what a Court may hear at sentencing, and therefore introduction of the wife’s statement at Defendant’s sentencing did not violate his due process rights. *United States v. Dunham*, No. 08-4484, 326 Fed. App’x 206, 207 (4th Cir. 2009) (per curiam). Nor was the Defendant entitled to advance notice of the prosecutor’s intent to introduce the spouse’s statement. *Id.*

Defendant convicted of falsifying information for a firearm application, discovery of which resulted when Defendant’s mentally ill son stole Defendant’s guns and killed two officers. *United States v. Kennedy*, 292 Fed. App’x 240, 241-43 (4th Cir. 2008) (per curiam). District court allowed wife of slain officer to give victim impact statement at Defendant’s sentencing, and Court of Appeals affirmed stating, “[e]ven if we assume the admission of the victim impact evidence was erroneous, the error was harmless.” *Id.*

When officers attempted to arrest Defendant, he stole an officer’s gun and struck the officer on the head with the gun. *United States v. Poole*, 241 Fed. App’x 153, 154-55 (4th Cir. 2007). Even assuming the District Court erred in allowing the officers to make victim impact statements as crime victims under the CVRA, 18 U.S.C. § 3771, at Defendant’s sentencing for possession of a firearm by a convicted felon, the error was harmless. *Id.* The statements were not so unduly prejudicial as to render the sentence unfair, the sentence given was in the middle of the guidelines, and the victim statements were largely cumulative of evidence already presented. *Id.*

## **Section 2, Clause 2: “[O]r legal entity directly harmed”**

These sources discuss the application of Victims’ Rights to legal entities.

## DISCUSSION DRAFT ONLY

### A.L.R.:

Legal entities directly and proximately harmed by the commission of an offense within the meaning of the CVRA are entitled to Victim Status, even when the extent of the harm is difficult to ascertain. Fern L. Kletter, Annotation, *Validity, Construction and Application of Crime Victim's Rights Act (CVRA)*, 18 U.S.C.A. § 3771, 26 A.L.R. FED. 2D 451, §7 (2008) (citing *United States v. Tobin*, No. 04-CR-216-01-SM, 2005 WL 1868682 (D.N.H. July 22, 2005)).

### Cases:

Court found both the individuals and the corporation involved were victims of Defendant's crime of fraud, and that both were entitled to victims' rights under the CVRA, 18 U.S.C. § 3771. *United States v. Wood*, CR. No. 05-00072DAE (D. Haw. July 17, 2006).

The Associated Press requested to intervene in a hearing in a criminal case regarding whether court documents that contained information harmful to the reputation of the victim should remain under seal. *United States v. Patkar*, Cr. No. 06-00250 JMS, 2008 WL 233062, at \*2 (D. Haw. Jan. 28, 2008).

New Hampshire Democratic Party allowed to file an objection to a joint motion to continue trial of Defendant, charged with conspiring with others to interfere with New Hampshire citizens' rights to vote freely, as a crime victim under the CVRA, 18 U.S.C. § 3771. *United States v. Tobin*, No. 04-CR-216-01-SM, 2005 WL 1868682, at \*1-2 (D.N.H. July 22, 2005).

The CVRA "does not grant crime victims a right to discover financial information from a defendant. *United States v. Sacane*, No. 3:05cr325(AHN), 2007 WL 951666, at \*1 (D. Conn. Mar. 28, 2007). The CVRA "does not provide a mechanism for crime victims to obtain information from a defendant; rather it was enacted to give crime victims an efficient means by which to provide information to the court and, as necessary, get information from the government for that purpose[.]" *Id.* at \*1. Thus, crime victims may not obtain information directly from the defendant; they must exercise their right to be heard in Court or enlist assistance from the Government in obtaining the information. *Id.* at \*2.

Union is not a crime victim under the CVRA, 18 U.S.C. § 3771, or the Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A-64, when the crime of conviction, a money laundering conspiracy by the employer's president, is completed prior to any further transactions concerning the Union, and the Union is unable to show proximate harm from the crime of conviction. *In re Local 46, Metallic Lathers Union*, 568 F.3d 81 (2d Cir. 2009) (per curiam).

"[T]he conspiracy charge to which [defendant] pleaded guilty did not encompass the activity of which [the Union] was a victim[.]" and therefore, Union is not a crime victim or entitled to restitution. *Id.* at 85. This is true even though the defendant planned to use the laundered money to pay employees in cash, thus avoiding union dues because defendant was not convicted of this separate crime, and there was "no basis for finding that the use of [the] case to pay union workers was part of the conspiracy." *Id.* at 85 (quoting *United States v. Doherty*, No. 05-CR-0494(JS)(WDW), 2009 WL 1310877, at \*7 (E.D.N.Y. May 7, 2009)).

Entity is not a crime victim under the CVRA, 18 U.S.C. § 3771, because it functioned effectively as a coconspirator due to the constant and consistent illegal conduct conducted by the principals, and it failed to establish direct or proximate harm suffered by the offender's criminal conduct. *In re Instituto Costarricense de Electricidad (ICE)*, Nos. 11-12707-G and 11-12708-G (11th Cir. June 17, 2011) (slip opinion).

**Section 2, Clause 3: “[By] the commission of a criminal offense, delinquent act, or act which, if committed by a competent adult, would constitute a crime”**

A.L.R.:

**Requirement of Criminality**

Victim status does not result from harms alleged against those who have not been convicted of a crime, and a mere allegation of harm is not sufficient to invoke claims for relief under the CVRA. Fern L. Kletter, Annotation, *Validity, Construction and Application of Crime Victim's Rights Act (CVRA)*, 18 U.S.C.A. § 3771, 26 A.L.R. FED. 2D 451, §5 (2008) (citing *Searcy v. Skinner*, C/A No. 6:06-1418-GRA-WMC, 2006 WL 1677177 (D.S.C. June 16, 2006); *Searcy v. Paletz*, C/A No. 6:07-1389-GRA-WMC, 2007 WL 1875802 (D.S.C. June 27, 2007); *In re Walsh*, 229 Fed. App'x 58 (3d Cir. 2007); *In re W.R. Huff Asset Management Co.*, 409 F.3d 555 (2d Cir. 2005)).

Failure of the Federal Government to notify a victim of an alien offender's re-entry to the United States and subsequent deportation did not violate the CVRA as the crime perpetrated against the victim was not a violation of a federal statute and thus not covered by the CVRA. *Id.* at §4 (2008) (citing *United States v Guevara-Toloso*, No. M 04-1455(ARL), 2005 WL 1210982 (E.D.N.Y. May 23, 2005)).

The spouse of the defendant and the CEO of the company for which the defendant worked were did not become “victims” within the meaning of the CVRA after they were assessed tax penalties for the defendant's acts, as there was insufficient connection between the criminal act and the claimed relief. *Id.* (citing *United States v Schwartz*, No. 3:06cr2 (JBA), 2006 WL 1662899 (D. Conn. May 25, 2006)).

While victim status need not be the result of the criminal act alleged, it must be a foreseeable result. When the claimed harm to the victim is too attenuated to be a foreseeable consequence, the statutory protections of the CVRA do not attach. *Id.* (citing *United States v. Sharp*, 463 F. Supp. 2d 556 (E.D. Va. 2006)).

Cases:

**Requirement of Criminality**

Individual and business are not victims under the CVRA, 18 U.S.C. § 3771, because no charges were filed so there could be no court proceedings involving an offense against them, and whether charges are ultimately filed is a matter of prosecutorial discretion. *In re Petersen*, No. 2:10-CV-298 RM, 2010 WL 5108692, at \*2 (N.D. Ind. Dec. 8, 2010).

Persons with implants of medical device manufacturer, charged with failing to report a medical device correction and filing a false and misleading report to the FDA, are not crime victims under the CVRA, 18 U.S.C. § 3771, because they were not directly and proximately harmed by Defendant's crimes of faulty reporting but rather the faulty equipment itself. *United States v. Guidant LLC*, 708 F. Supp. 2d 903, 907-14 (D. Minn. 2010).

Victims of Defendant's fatal vehicle accident state case allowed to speak at sentencing in Defendant's federal trucking logbook falsification case under broad discretion of court to consider information in determining an appropriate sentence. *United States v. Sandhu*, 462 F. Supp. 2d 663, 666 (E.D. Pa. 2006). Whether victims of state case constituted crime victims of federal case remained undetermined, but to be so, the Court would have to find a nexus between the falsifications and the accident. *Id.* at 666 n.9.

Where an element of the new charge against the defendant is his conviction for an earlier offense, it may not invoke protections for victims of the earlier offense. *United States v. Guevara-Toloso*, No. M 04-1455(ARL), 2005 WL 1210982 (E.D.N.Y. May 23, 2005).

Victims of an investment fraud are not entitled to notice of the civil action because they lack prudential standing. Although the victims may lack standing, there could be circumstances in which a fraud victim has both Article III standing and prudential standing to maintain a claim within a civil forfeiture proceeding. *United States v. 730 Glen-Mady Way*, 590 F. Supp. 2d 1295, 1302-04 (E.D. Cal. 2008).

**Section 3: *"This article shall take effect on the 180<sup>th</sup> day after the date of its ratification.***

Senate Report No. 108-91:

A 180 day "grace period" allows affected jurisdictions ample opportunity to prepare to implement the amendment. S. REP. NO. 108-91, at 41-42 (2003). After the 180 day period has elapsed, the amendment will apply to all crimes and proceedings thereafter. *Id.* at 42. "Few courts have held that retroactive application of changes in standards governing restitution

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Section 2, Clause 3: "[B]y the commission of a criminal offense, delinquent act, or an act which, if committed by a competent adult, would constitute a crime"

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violates the Constitution's prohibition of ex post facto laws." *Id.* (citing as an example *United States v. Williams*, 128 F.3d 1239 (8th Cir. 1997)). Because restitution is not intended to punish offenders but to compensate victims, ex post facto considerations are misplaced. *Id.* (citing as an example *United States v. Newman*, 144 F.3d 531 (7th Cir. 1998)).