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Testify



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12/20/2006 10:21 PM

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Subject Criminal Rules January 26, 2007, Washington, D.C.

December 20, 2006

Secretary of the Committee on Rules of Practice and Procedure,

Administrative Office of the United States Courts,

Washington, D.C. 20544.

Dear Mr. McCabe:

On behalf of the Maryland Crime Victims' Resource Center, Inc., I request to testify at the hearing on the proposed criminal rules on January 26, 2007 in Washington, D.C.

Please feel free to contact me on 301-952-0063 (office) or 301-423-7500 (cell) if you have any questions.

Thank you for your anticipated cooperation.

Sincerely,

Russell P. Butler

Executive Director

**TESTIMONY OF RUSSELL P. BUTLER, ESQUIRE ON BEHALF OF
THE MARYLAND CRIME VICTIMS' RESOURCE CENTER, INC.
REGARDING THE PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE REGARDING VICTIMS OF CRIME**

January 19, 2007

On behalf of the Maryland Crime Victims' Resource Center, Inc.,
¹(MCVRC) please accept these comments and recommendations regarding the
proposed changes to the Federal Rules of Criminal Procedure to implement the
Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn
Crime Victims Rights Act (CVRA). ² MCVRC's mission is to provide victims of
crime with comprehensive rights and service in order that victims can obtain
justice. MCVRC has represented victims regarding their rights in both Maryland
³and federal courts. MCVRC and its predecessor, The Stephanie Roper
Foundation, Inc. have also filed several amicus briefs representing the interests of
crime victims ⁴ Recently, MCVRC worked with the University of Baltimore to
establish a law school course regarding the rights of crime victims. ⁵

As a preliminary matter, I have attached and incorporate by reference a
copy of my recent article. *What Practitioners and Judges Need to Know
Regarding Crime Victims' Participatory Rights in Federal Sentencing
Proceedings*, 19 Fed. Sent. Rptr. 21 (Oct. 2006). This article provides in more
detail than allowed in this testimony for the legal basis underlying a victim's
interest in privacy, the right to counsel, and the judiciary's obligations to victims
under federal law.

¹ www.mdcrimevictims.org

² MCVRC was formed by Vince and Roberta Roper after the 1982 kidnapping,
rape and murder of their daughter, Stephanie Ann Roper of whom the CVRA is,
in part, named. *Beatty v. State*, 56 Md. App. 627, 631 (1983) (Noting that the
backlash of the crimes continues to reverberate in the halls of criminal tribunals
throughout the State.)

³ See. e.g. *Lopez-Sanchez v. State*, 388 Md. 214 (2005); *Lamb v. Kontgias*, 169
Md.App. 466 (2006)

⁴ See. e.g. *Booth v. Maryland*, 482 U.S. 496 (1987); *Maryland v. Craig*, 497
U.S. 836 (1990); *Carey v. Musladin*, 127 S. Ct. 649 (2006); *Lawson v. State*, 389
Md. 570 (2005)

⁵ See. <http://law.ubalt.edu/courses/rightsvictims.html>

I. *The Crime Victims' Rights Act.*

Congress has passed the Crime Victims' Rights Act intending to change the nature of the criminal justice system. Crime victims are now independent participants in the federal criminal justice system. *Kenna v. District Court*, 435 F.3d 1011, 1013 (9th Cir. 2006) At common law, a victim's roles included law enforcement, prosecutor, and corrections. Over the years, the government assumed those roles. While victims remained interested, they lost their status as participants in the criminal justice system. Over time, society recognized that the interests of victims were ignored. As a consequence, Congress's action is remedial to increase the ability of victims to participate in the justice system. As the Ninth Circuit recently aptly indicated, crime victims were once assumed to be like Victorian children – seen but not heard; however that assumption is no longer correct. *Id.* at 1013.

II. *Purpose of Rules*

The purpose of the Rules is set forth in Rule 2.

”These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.“

Federal Rules of Criminal Procedure were designed to provide uniform set of procedures to govern criminal cases within federal courts consistent with requirements of justice and sound administration. *United States v Weinstein* 452 F.2d 704, 715 (2nd Cir. 1972), cert den 406 US 917 (1972). Under the CVRA, crime victims now explicitly have the right to be treated with fairness. 18 U.S.C., § 3771(a)(6). The rules therefore should provide the just determination regarding victim's interests through simple procedures to eliminate unjustifiable expenses and delay.

In light of the intent, the Maryland Crime Victims' Resource Center, Inc., urges that the Federal Rules of Criminal Procedure clearly implement the CVRA. Rather than leave issues ambiguous, the Rules should set forth the ability of victims to participate. While the Government is represented by the United States Attorney and the defendants will most often be represented by counsel, victims will hardly ever be represented by counsel. Under the CVRA, the court has the obligation to ensure the rights of victims.

As further discussed below, there are three areas which in our view need to be addressed and changed as they either are contrary to the intent of the CVRA or they fail to implement the CVRA in a material way:

- **Contrary to the CVRA, the right of a victim to speak regarding a sentence is reduced or made ambiguous under the proposed amendment to Rule 32.**
- **Contrary to the CVRA, the proposed amendment to Rule 17 rather than protecting a victim's rights implies a new right of discovery to third persons which will violate a victim's right of privacy.**
- **Nothing is provided under the proposed amendments to spell out the obligations of the judiciary, counsel, and the clerk to ensure the rights of crime victims and to facilitate the entry of appearance and appointment of counsel or guardians ad litem for crime victims.**

III. Right to Be Heard

Under existing Rule 32, victims of a violent crime have had a clear right to be heard regarding the sentence. Under the proposed revisions, victims would only have the right to reasonably be heard. The proposed rules revision actually reduces the rights of victims. By eliminating the existing requirement victim to speak or submit any information about the sentence, a construction argument could be made that the victim no longer has the right to speak or submit information regarding a sentence. The rules should be clear that victims still have right to speak regarding the sentence and they do not become ambiguous on this point.

A recent case which MCRVC represented a victim in federal court demonstrates the need for the existing rule. The Government called the victim of a road rage case which occurred on the Baltimore Washington Parkway. After having the victim testify regarding the facts at sentencing, the prosecutor concluded her case. The judge should have, but failed to inquire of the victim whether the victims wanted to be heard regarding the sentence under Rule 32. Victim counsel asked the court to hear from the victim regarding the sentence as allowed under Rule 32. Before allowing the address, the court indicated he assumed that because that the victim had submitted a written statement and answered the U.S. Attorneys' questions, the victim did not want to speak at sentencing. Because the existing Rule 32 was clear that the victim could speak to the sentence, the court allowed it. Had the victim not had his own counsel, it is unlikely that any *pro se* victim would have either known that the victim would have had the right to address the court regarding sentence, or would have asked the judge to be heard regarding the sentence.

The judge should continue to have an affirmative obligation to ask the victim whether the victim wanted to address the court regarding the sentence.

Even more critical, what if the victim was not present? Moreover, the court should also have an affirmative obligation to inquire of the Government whether the victim had been notified of the proceeding and the right to be reasonably heard as part of its requirements to ensure the rights of victims. *infra*. Just as the defendant needs the court to ensure that defendant's rights are not violated, so to should the court have an obligation to see that victims' rights are not violated.

Courts similarly have obligations under the Federal Sentencing Guidelines to consider any relevant information regarding the sentencing guidelines. Since victims will normally be in a unique position regarding the facts of a case, the victim should be able to review and comment on sentence which includes the pre-sentence report. As federal sentences are determined by the guidelines, victims need to be heard regarding the guidelines to be effectively heard regarding the sentence.

MCVRC urges that the rule be modified to indicate that the victims have the right to be reasonably heard including the right to be heard regarding the sentence. This language would ensure that the victim's rights would not be decreased as a result of the revision.

Proposed modification to Rule 32 follow:

Rule 32. Sentencing and Judgment

(c) Presentence Investigation.

(1) *Required Investigation.*

(A) *In General.* The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

- (i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or
- (ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

(B) *Restitution.* If the law requires **OR PERMITS** restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

(2) *Interviewing the Defendant.* The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

(d) Presentence Report.

(1) *Applying the Sentencing Guidelines.* The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range;

(E) IDENTIFY ANY VICTIM OF CRIME; and

~~(E)~~ **(F)** identify any basis for departing from the applicable sentencing range.

(2) *Additional Information.* The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and

(F) any other information that the court requires.

(3) *Exclusions.* The presentence report must exclude the following:

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(B) any sources of information obtained upon a promise of confidentiality; and

(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(e) *Disclosing the Report and Recommendation.*

(1) *Time to Disclose.* Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) *Minimum Required Notice.* The probation officer must give the presentence report to the defendant, the defendant's attorney, **VICTIM, VICTIM'S ATTORNEY,** and an attorney for the

government at least 35 days before sentencing unless the defendant waives this minimum period.

(3) *Sentence Recommendation.* By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(f) Objecting to the Report.

(1) *Time to Object.* Within 14 days after receiving the presentence report, the parties **OR VICTIM** must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

(2) *Serving Objections.* An objecting party **OR VICTIM** must provide a copy of its objections to the opposing party, **TO THE VICTIM**, and to the probation officer.

(3) *Action on Objections.* After receiving objections, the probation officer may meet with the parties **AND VICTIM** to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(g) Submitting the Report. At least 7 days before sentencing, the probation officer must submit to the court and to the parties **AND VICTIM** the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(h) Notice of Possible Departure From Sentencing Guidelines.

Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's **OR VICTIM'S** prehearing submission, the court must give the parties **AND THE VICTIM** reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

(i) Sentencing.

(1) *In General.* At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of--or summarize in camera--any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys **AND THE VICTIM OR VICTIM'S ATTORNEY** to comment on the probation officer's

determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party **OR A VICTIM** to make a new objection at any time before sentence is imposed.

(2) *Introducing Evidence; Producing a Statement.* The court may permit the parties **OR THE VICTIM** to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) *Court Determinations.* At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must--for any disputed portion of the presentence report or other controverted matter--rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

(4) *Opportunity to Speak.*

(A) *By a Party.* Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) *By a Victim.* Before imposing sentence, the court must address any victim of a crime of violence or sexual abuse who is present at sentencing and must **ALLOW THE VICTIM TO BE HEARD INCLUDING PERMITTING** ~~permit~~ the victim to speak or submit any information about the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:

— (i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or

— (ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated **BY A PERSON ALLOWED BY LAW TO ASSUME THE CRIME VICTIM'S RIGHTS.**

(C) *In Camera Proceedings.* Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

IV. Right To Privacy

The proposed amendments to Rule 17 do not adequately protect the victim's rights to privacy and fairness. In fact, they almost appear to authorize pre-trial discovery to third parties which is not currently allowed under law. The rule should prophylactically protect a victim's right to privacy and fairness.

The CVRA provides victims with a right of privacy. 18 U.S.C., § 3771(a)(8). MCVRC believe that the proposed rule actually violates a victim's right to privacy by authorizing pre-trial discovery of third parties contrary to existing law. While violations occur under the existing rules, the proposed rules will only create more violations. For example, a direct violation of a victim's right to privacy is attached in Appendix A. The court should not facilitate violating a victim's right to privacy. *United States v. Doyle*, 1 F.Supp.2d 1187, 1191 (D. Ore. 1988); *See also. United States v. Hatch*, 162 F.3d 937, 947 (7th Cir. 1998). Moreover as stated by the court in *Doyle*, it is improper for a court to breach confidentiality.

If, as in *Camitsch*, a defendant is not entitled "to rummage through the otherwise confidential case files of every juvenile witness" to see if something therein might help him, even less is the defendant herein able to invade the privacy of Ms. Garcia by examining the confidential and privileged files of her psychotherapists.

Finally, although the defendant has requested the court to examine the contents of these files in camera in order to determine if there is anything therein that could possibly be a mitigating factor with respect to the upward departure issue, I decline to undertake such an examination. The court's review of the files would itself be a breach of the privilege.

In a different setting, would it be proper for a court to conduct an in camera invasion of an attorney-client privilege to determine if the privileged communication was helpful to an accused? It's not uncommon, for example, for a co-defendant in a criminal case to make a deal with the Government and testify against the remaining defendants. The co-defendant is himself represented by counsel. Can anyone imagine the court granting a motion by the defendants to examine the cooperating defendant's attorney in camera regarding the privileged statements made to him to determine if any could be helpful to the defense? *United States v. Doyle*, 1 F. Supp. 2d 1187, 1190 (D. Or. 1998). (Emphasis added)

Personal and private information survives even after death. *Swidler & Berlin v. United States*, 524 U.S. 399, 410-411. Even if some part of any records may be subpoenaed, those records should be delivered to the court for an in camera review and not provided to counsel. *United States v. Santiago-Lugo*, 904 F.Supp 43, 46 (D.P.R. 1995); *United States v. Najarian*, 164 F.R.D. 484, 487 (D. Minn. 1995).

Only with court intervention can the subpoena be utilized for production before the court at any time prior to the trial or prior to the time when the documents are to be offered in evidence. Only the court may, upon the production of the documents, permit the documents or objects to be inspected by the parties or their attorneys. Nowhere in Fed. R. Crim. P. 17 do we find language allowing the utilization of the court's subpoena power privately, with a secret return directly to an attorney. The rule definitely does not allow for the proponent of the subpoena to convey the message that a private investigator has been vested with court-related powers to receive documents on behalf of the court.

Federal case law specifically contemplates that the practice of using trial subpoenas for ex-parte propositions, such as it appears to be the case here, is improper. See *United States v. LaFuente*, 991 F.2d 1406, 1411 (8th Cir. 1993). The LaFuente case confirms that subpoenas are to be issued only for the purpose of compelling the attendance of witnesses or the production of evidence at formal proceedings, such as Grand Jury proceedings, preliminary hearings, and trials, and that the government (or, in this case, the defense) may not use trial subpoenas to compel prospective trial witnesses to attend pretrial interviews with government attorneys (or, as in this case, compel the private production of documents to a defense attorney). See also *United States v. Keen*, 509 F.2d 1273, 1274 (6th Cir. 1975), and *United States v. Hedge*, 462 F.2d 220, 222 (5th Cir. 1972).

The use of Rule 17(c) for the inspection of documents at the pretrial phase or before they are offered in evidence is only valid if strict adherence to Rule 17(c) is made. See *United States v. Nixon*, 418 U.S. 683, 699-700, 94 S. Ct. 3090, 3103, 41 L. Ed. 2d 1039 (1974). There, the Supreme Court recognized the fundamental characteristics of a subpoena duces tecum under Rule 17(c) in the criminal context. The rule is not intended to provide a means for discovery in criminal cases and its chief innovation after the 1966 amendments to the rule was to expedite the trial process by providing a mechanism for a court-supervised inspection of subpoenaed materials before trial or before submission in evidence, as long as the parties show the following: (a) that the documents are evidentiary and relevant; (b) that they are not otherwise procurable reasonably in advance of trial by exercise of due

diligence; (c) that the party cannot properly prepare for trial without such production and inspection and the failure to obtain such inspection may tend unreasonably to delay the trial, and (d) that the application is made in good faith and is not intended as a general fishing expedition.

On the basis of our understanding of the applicable law, the use of the subpoena power of this court in the context under discussion here is, in the language of the cases, unauthorized and improper. See *Keen*, 509 F.2d at 1275. The subpoena under scrutiny and any other subpoena similarly obtained under Fed. R. Crim. P. 17, are presumed to be invalid and must be quashed. *United States v. Santiago-Lugo*, 904 F. Supp. 43, 46 (D.P.R. 1995)

Notice of the subpoena must be made to all parties. *United States v. Santiago-Lugo*, 904 F.Supp at 47. In fairness to victims, prior notice should also be provided to victims.

MCVRC recently represented a victim in the Circuit Court for Montgomery County, Maryland. Fortunately, the victim had retained counsel as the prosecutor failed to appear at the hearing because of a problem with traffic. After hearing from the victim's attorney, the court held the records sealed in case any issue might arise during the trial. Without notice and an opportunity for the victim's counsel to be heard, the court may have improperly allowed access to the records.

Once private records are reviewed by anyone including the court, any privacy created by law is lost. *Cf. Doe v. United States*, 666 Fed.2d 43, 46 (4th Cir. 1981). (Indicating that there needs to be a procedure before privacy is violated as one can not go back and remedy the violation of privacy after it occurs.) The Rules Committee should protect the interests of a victim as intended to by the CVRA. Allowing review of the private records would create an injustice contrary to the CVRA's requirement of fairness because there will be no remedy for the harm the CVRA intends to prevent subsequent to the disclosure of the records.

Rule 17. Subpoena

1 * * * * *

2 (c) Producing Documents and Objects.

3 * * * * *

4 (3) Subpoena for Personal or Confidential

5 **Information About Victim.** After a complaint,

6 indictment, or information is filed, a subpoena

7 requiring the production of personal or

8 confidential information about a victim may not be

9 served on a third party without a court order,

10 which may **NOT** be granted ex parte. Before entering

11 the order, the court may **SHALL** require that notice be

12 given to the victim so that the victim has an
13 opportunity to ~~move to quash or modify~~ **BE HEARD PRIOR TO THE**
ISSUANCE OF the
14 subpoena **AND ADVISE THE VICTIM OF THE RIGHT TO COUNSEL**
UNDER RULE 44 PRIOR TO ANY HEARING. IF THE COURT FINDS
THAT THE MOVANT DEMONSTRATED THE MOVANT'S BURDEN
AND THE REQUESTED INFORMATION WAS NOT PERSONAL OR
CONFIDENTIAL INFORMATION REGARDING THE VICTIM, THE
COURT SHALL DIRECT THAT THE VICTIM'S RECORDS BE
DELIVERED ONLY TO THE CLERK OF THE COURT FOR AN IN
CAMERA REVIEW TO ASSURE THAT CONFIDENTIAL OR
PERSONAL INFORMATION IS NOT ACCIDENTALLY PROVIDED.

V. *Obligations of the Court, Counsel, and Clerk*

The proposed Rules omit what is perhaps most need - Guidance to judges, clerks, and counsel regarding the procedures of new participatory status of victims and their counsel.

The CVRA provides that in any court proceeding involving a victim, the court shall ensure the crime victim is afforded the rights described in subsection (a). 18 U.S.C., § 3771(b). *United States v. Turner*, 367 F.Supp.2d 319 (E.D.N.Y. 2005). The rules should clearly provide the obligations of the court regarding victims just as they indicate the court's responsibilities to defendants. As an example, the Rule 11 describes the court's obligation to ensure the rights of defendants. See Appendix

Under proposed Rule 60, the Rules should provide at every proceeding, the court should inquire whether the victims are present and if not present, whether the victim was advised of the proceeding. At any time when a victims' right is implicated, the court shall be require to inform the victim regarding the victims' right so the right will not be lost by omission.⁶ In this manner, the rules will implement the court's obligation to ensure the rights of victims under the CVRA.

Perhaps the most significant obligation for the court to ensure the rights of victims would be to consider the appointment of counsel for the victim in appropriate circumstances. *infra*. Indigent victims, like indigent defendants should have the opportunity for court appointed counsel. While the CVRA provides that the Government may assert a right for a victim, the CVRA does not mandate that U.S. Attorney shall assert the right. In many cases, the interests of the Government and the Victim may be aligned; however, this will not always be the case. When the interests of the victim and the Government diverge,

⁶ As an example, see Maryland Rule 4-345 in Appendix B.

the Government should have an obligation to inform the Court for the Court to further advise the victim of the right to independent counsel.

The rules should also delineate the responsibilities for attorneys and clerks when counsels for the victim or guardians ad litem represent the interests of victims.⁷

Rule 60. Victim's Rights

1 (a) In General.

2 **(1) Notice of a Proceeding.** The government must use
3 its best efforts to give the victim reasonable,
4 accurate, and timely notice of any public court
5 proceeding involving the crime.

6 **(2) Attending the Proceeding.** The court must not
7 exclude a victim from a public court proceeding
8 involving the crime, unless the court determines by
9 clear and convincing evidence that the victim's
10 testimony would be materially altered if the victim
11 heard other testimony at that proceeding. The
12 court must make every effort to permit the fullest
13 attendance possible by the victim and must
14 consider reasonable alternatives to exclusion. The
15 reasons for any exclusion must be clearly stated on
16 the record.

17 **(3) Right to Be Heard.** The court must permit a
18 victim to be reasonably heard at any public
19 proceeding in the district court **regarding any right of the victim as allowed**
20 **by law.** concerning release,
21 plea, or sentencing involving the crime.

21 (b) Enforcement and Limitations.

22 **(1) Time for Decision.** The court must promptly
23 decide any motion asserting a victim's rights under **LAW**
24 these rules.

25 **(2) Who May Assert Rights.** The rights of a victim
26 under these rules **LAW** may be asserted by the victim, **ATTORNEY FOR**
27 **THE VICTIM,** or
28 the attorney for the government.

29 **(3) Multiple Victims.** If the court finds that the
30 number of victims makes it impracticable to
31 accord all of the victims the rights described in
32 subsection (a) **OF 18 U.S.C., § 3771,** the court must fashion a reasonable
procedure to give effect to these rights that does

⁷ As an example, see Maryland Rule 1-326 in Appendix C.

33 not unduly complicate or prolong the proceedings.

34 (4) *Where Rights may be Asserted.* The rights
35 described in subsection (a) OF 18 U.S.C., § 3771 must be asserted in the
36 district in which a defendant is being prosecuted
37 for the crime.

38 (5) *Limitations on Relief.* A victim may make a
39 motion to re-open a plea or sentence only if:

40 (A) the victim has asked to be heard before or
41 during the proceeding at issue and the request
42 was denied;

43 (B) the victim petitions the court of appeals for a
44 writ of mandamus within 10 days of the
45 denial and the writ is granted; and

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

48 (6) *No New Trial.* In no case is a failure to afford a
49 victim any right under these rules grounds for a
50 new trial.

(7) **OBLIGATIONS TO JUDICIARY**

**(A) IN ANY COURT PROCEEDING INVOLVING AN OFFENSE AGAINST
A VICTIM, THE COURT SHALL ENSURE THAT THE CRIME VICTIM
IS AFFORDED THE VICTIM'S RIGHTS.**

**(B) IF THE VICTIM IS PRESENT AT A COURT PROCEEDING, THE
COURT SHALL ON THE RECORD ADDRESS THE VICTIM
PERSONALLY IN OPEN COURT UNLESS THE VICTIM REQUEST
THAT THE ADDRESS NOT BE IN OPEN COURT. THE COURT MUST
INFORM THE VICTIM OF, AND DETERMINE THAT THE VICTIM
UNDERSTANDS THE RIGHTS OF THE VICTIM INVOLVING THE
PROCEEDING AND ASCERTAIN WHETHER THE VICTIMS
REQUESTS OR WAIVES THE VICTIM'S RIGHTS.**

**(C) IF THE VICTIM IS NOT PRESENT AT A COURT PROCEEDING
INVOLVING AN OFFENSE AGAINST A VICTIM, THE COURT SHALL
ON THE RECORD ADDRESS THE GOVERNMENT PERSONALLY IN
OPEN COURT OR OTHERWISE AT THE REQUEST OF THE
WHETHER EACH VICTIM WAS NOTIFIED OF THE PROCEEDING
AND ANY RIGHT OF THE VICTIM WHICH WOULD BE AT ISSUE IN
THE PROCEEDING. UNLESS THE COURT FINDS THAT THE
GOVERNMENT USED ITS BEST EFFORTS TO PROVIDE THE VICTIM
REASONABLE, ACCURATE, AND TIMELY NOTICE OF ANY
PROCEEDING INVOLVING THE CRIME VICTIM AND THE VICTIM
KNOWINGLY AND VOLUNTARILY WAIVED THE VICTIM'S RIGHT,
THE COURT SHALL FASHION A REASONABLE PROCEDURE TO
ACCORD THE VICTIMS THEIR RIGHTS.**

(8) ATTORNEY FOR CRIME VICTIMS

(A) AN ATTORNEY MAY ENTER AN APPEARANCE ON BEHALF OF A VICTIM OR A VICTIM'S REPRESENTATIVE IN A CRIMINAL OR JUVENILE DELINQUENCY PROCEEDING FOR THE PURPOSE OF REPRESENTING THE RIGHTS OF THE VICTIM OR VICTIM'S REPRESENTATIVE.

(B) A PARTY SHALL SERVE COUNSEL FOR A VICTIM OR A VICTIM'S REPRESENTATIVE, COPIES OF ALL PLEADINGS OR PAPERS THAT RELATE TO THE RIGHT OF THE VICTIM OR VICTIM'S REPRESENTATIVE REGARDING THE CRIMINAL OR JUVENILE DELINQUENCY CASE INCLUDING UNDER 18 U.S.C., § 3771, THESE RULES, AND FEDERAL RULES OF EVIDENCE, RULE 412 (C). ANY ADDITIONAL PLEADINGS AND PAPERS SHALL BE SERVED ONLY IF THE COURT DIRECTS.

(C) THE CLERK SHALL SEND TO COUNSEL FOR A VICTIM OR VICTIM'S REPRESENTATIVE A COPY OF ANY COURT ORDER RELATING TO THE RIGHTS OF THE VICTIM AND NOTIFY COUNSEL FOR A VICTIM OR A VICTIM'S REPRESENTATIVE OF ANY HEARING THAT MAY AFFECT THE RIGHTS OF THE VICTIM OR VICTIM'S REPRESENTATIVE.

VI. Need for Counsel and Guardians ad Litem

As part of how the court protects the right of defendants, it the appointment of counsel. Similarly, the court should ensure the rights of victims by the appointment of counsel and guardians ad litem. The CVRA provides that the prosecutor shall advise the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a). 18 U.S.C., § 3771(c)(2). Further, the CVRA provides that the crime victims or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). 18 U.S.C., § 3771(d)(1). While the Government and the victim will often have similar positions, there will not always be an alignment of positions between a victim and the Government. A victim however may be confused that the U.S. Attorney is, in fact, representing a victim's interest when that may not be the case.

While the Rule 44 currently provide for the court's appointment of counsel and for inquiry into joint representation between defendants, there is no provision in the rules for the joint representation by an attorney representing more than one victim in the same case. A guardian *ad litem*

could have similar joint representation issues. *See, e.g.* 18 U.S.C., § 3509(h). Rule 44 could be amended to address these issues as follows:

Rule 44. Right to and Appointment of Counsel

(a) Right to Appointed Counsel AND GUARDIAN AD LITEM.

(1) A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right.

(2) A VICTIM WHO IS UNABLE TO OBTAIN COUNSEL IS ENTITLED TO HAVE COUNSEL OR A GUARDIAN AD LITEM APPOINTED TO REPRESENT THE VICTIM AT EVERY STAGE OF THE PROCEEDING FROM INITIAL APPEARANCE THROUGH APPEAL.

(b) Appointment Procedure. Federal law and local court rules govern the procedure for implementing the right to counsel AND THE APPOINTMENT OF GUARDIANS AD LITEM.

(c) Inquiry Into Joint Representation.

(1) Joint Representation. Joint representation occurs when:

(A) two or more defendants have been charged jointly under Rule 8(b) or have been joined for trial under Rule 13; and

—(B) the defendants are represented by the same counsel, or counsel who are associated in law practice;

(B) SERVING AS GUARDIAN AD LITEM FOR MORE THAN ONE PERSON IN THE CASE; OR

(C) VICTIMS ARE REPRESENTED BY THE SAME COUNSEL, OR COUNSEL WHO ARE ASSOCIATED IN LAW PRACTICE IN THE SAME CASE.

(2) Court's Responsibilities in Cases of Joint Representation.

(A) The court must promptly inquire about the propriety of joint representation BY COUNSEL and must personally advise each defendant PERSON of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's PERSON'S right to counsel.

(B) IF COUNSEL UNDER A JOINT REPRESENTATION ASCERTAINS THAT A CONFLICT DOES ARISE, COUNSEL

**SHALL PROMPTLY NOTIFY THE COURT AND AS
APPROPRIATE THE COURT SHALL PROMPTLY READWISE
THE PERSONS INVOLVED.**

VII. Conclusion

The Maryland Crime Victims Resource Center, Inc., urges prompt action to incorporate the suggestions made in this testimony to properly implement the CVRA in the Federal Rules of Criminal Procedure. Others and particularly those who opposed the federal constitutional amendment will oppose the implementation of the CVRA as they oppose victims' rights under any circumstance. Opponents will propose procedural hurdles for victim participation and attempt to weaken victims' rights. The final product of the Committee should procedurally implement Congress' intent under the CVRA and allow victims to participate as the full force and effect that the law provides.

Thank you for the opportunity to allow us to present the views of victims of crime on these important issues.

Sincerely,

Russell P. Butler, Esq.
Executive Director

APPENDIX A

Date: Wed, 3 Jan 2007 18:53:29 -0500 Download RE: Case example for meeting on Thursday.msg
From: "Rosenstein, Rod \ (USAMD\)" <Rod.Rosenstein@usdoj.gov>
To: <rbutler@mcrimevictims.org>
CC: "Hess, Steven \ (USAMD\)" <Steven.Hess@usdoj.gov>
Subject: RE: Case example for meeting on Thursday

In the case that we have discussed, the defendant was charged in federal court for physically attacking a victim who was a military veteran.

Defense counsel used Federal Rule of Criminal Procedure 17(c) to issue a subpoena for the victim's Veterans Administration medical records. The federal district court judge approved the subpoena and issued an order, ex parte and under seal, for the VA to comply with it. Defense counsel then obtained the records without the knowledge of the victim or the prosecutor. The VA evidently believed that it was obligated to comply because the defendant had secured a federal judicial order.

In order to protect the privacy of the victim, I cannot disclose the specific nature of the records secured by the criminal defendant. Suffice it to say that this was a worst-case scenario. Without notice to the prosecution or the victim, the defendant obtained extraordinarily intimate records including details of all medical treatment ever received by the victim, including sensitive medical conditions, medications, psychiatric counseling, etc. Much of the information consisted of very personal details unrelated in any way to the case.

The matter came to the prosecutor's attention only because defense counsel "warned" the prosecutor, while trying to negotiate a favorable plea, that taking the case to trial would cause irreparable harm to the victim, and that by the time the defense attorney got finished with the victim, the victim would never trust a therapist again.

Victim notification alone might not have prevented this outrageous result. If the United States had been notified, however, we could have protected the legitimate privacy concerns of the victim, and assisted in crafting any narrow disclosures that were related to any viable defense.

APPENDIX B

Md. Rule 4-345 (2006). Sentencing -- Revisory power of court.

- (a) Illegal sentence. The court may correct an illegal sentence at any time.
- (b) Fraud, Mistake, or Irregularity. The court has revisory power over a sentence in case of fraud, mistake, or irregularity.
- (c) Correction of Mistake in Announcement. The court may correct an evident mistake in the announcement of a sentence if the correction is made on the record before the defendant leaves the courtroom following the sentencing proceeding.
- (d) Desertion and Non-support Cases. At any time before expiration of the sentence in a case involving desertion and non-support of spouse, children, or destitute parents, the court may modify, reduce, or vacate the sentence or place the defendant on probation under the terms and conditions the court imposes.
- (e) Modification Upon Motion. (1) Generally. Upon a motion filed within 90 days after imposition of a sentence (A) in the District Court, if an appeal has not been perfected or has been dismissed, and (B) in a circuit court, whether or not an appeal has been filed, the court has revisory power over the sentence except that it may not revise the sentence after the expiration of five years from the date the sentence originally was imposed on the defendant and it may not increase the sentence.

(2) Notice to victims. **The State's Attorney shall give notice to each victim and victim's representative who has filed a Crime Victim Notification Request form pursuant to Code, Criminal Procedure Article, § 11-104 or who has submitted a written request to the State's Attorney to be notified of subsequent proceedings as provided under Code, Criminal Procedure Article, § 11-503** that states (A) that a motion to modify or reduce a sentence has been filed; (B) that the motion has been denied without a hearing or the date, time, and location of the hearing; and (C) if a hearing is to be held, that each victim or victim's representative may attend and testify.
- (f) Open court hearing. The court may modify, reduce, correct, or vacate a sentence only on the record in open court, after hearing from the defendant, the State, and from each victim or victim's representative who requests an opportunity to be heard. The defendant may waive the right to be present at the hearing. **No hearing shall be held on a motion to modify or reduce the sentence until the court determines that the notice requirements in subsection (e)(2) of this Rule have been satisfied.** If the court grants the motion, the court ordinarily shall prepare and file or dictate into the record a statement setting forth the reasons on which the ruling is based.

APPENDIX C

Md. Rule 1-326. Proceedings regarding victims and victims' representatives.

(a) Entry of appearance. An attorney may enter an appearance on behalf of a victim or a victim's representative in a proceeding under Title 4 or Title 11 of these Rules for the purpose of representing the rights of the victim or victim's representative.

(b) Service of pleadings and papers. A party shall serve, pursuant to Rule 1-321 on counsel for a victim or a victim's representative, copies of all pleadings or papers that relate to: (1) the right of the victim or victim's representative to be informed regarding the criminal or juvenile delinquency case, (2) the right of the victim or victim's representative to be present and heard at any hearing, or (3) restitution. Any additional pleadings and papers shall be served only if the court directs.

(c) Duties of clerk. The clerk shall (1) send to counsel for a victim or victim's representative a copy of any court order relating to the rights of the victim referred to in section (b) of this Rule and (2) notify counsel for a victim or a victim's representative of any hearing that may affect the rights of the victim or victim's representative.

HISTORY: (Added Nov. 8, 2005, effective Jan. 1, 2006.)

NOTES:

Committee note. -- This Rule does not abrogate any obligation to provide certain notices to victims and victims' representatives required by statute or by other Rule.

Cross-References. -- See Maryland Declaration of Rights, Article 47; Rules 16-813, Maryland Code of Judicial Conduct, Canon 3B (6)(a); and Rule 16-814, Maryland Code of Conduct for Judicial Appointees, Canon 3B (6)(a). For definitions of "victim" and "victim's representative," see Code, Courts Article, § 3-8A-01 and Code, Criminal Procedure Article, Title 11.

Source. -- This Rule is new.

APPENDIX D

Extract of Rule 11 showing court's obligation to ensure the rights of defendants

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel--and if necessary have the court appoint counsel--at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) the court's obligation to apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances; and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(3) Judicial Consideration of a Plea Agreement.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing

provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.”

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



RUSSELL P. BUTLER

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

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

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

1. The right to be reasonably protected from the accused.
2. The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
3. The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
4. The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
5. The reasonable right to confer with the attorney for the Government in the case.
6. The right to full and timely restitution as provided in law.
7. The right to proceedings free from unreasonable delay.
8. The right to be treated with fairness and with respect for the victim's dignity and privacy.

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

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

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

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immediate appellate review when trial courts deny victims' rights.

Thus, the CVRA empowers crime victims as participants in the criminal justice system.¹⁰

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

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

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

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

A. Right to Fairness and Privacy

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

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

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

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

B. Right to Notice of Court Proceedings

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

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

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

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

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

C. Right Not to Be Excluded from Court Proceedings

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

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

D. Right to Be Reasonably Heard

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

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

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

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

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

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

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

E. Right to Protection from the Accused

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

F. Right to Restitution

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

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

G. Right to Confer with the Attorney for the Government

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

H. Right to Proceedings Free from Unreasonable Delay

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

III. Attorneys for Crime Victims in Federal Criminal Justice Proceedings

A. Need for Counsel for Crime Victims

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

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

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

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

B. Special Issues Regarding Child Victims

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

IV. Legal and Ethical Obligations of Judges and Attorneys

A. Judicial Responsibilities under the CVRA

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

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

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

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

B. Prosecutorial Responsibilities under the CVRA

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

C. Ethical Obligations for Judges and Attorneys

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

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

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

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

V. Conclusion—The Future of Victim Participation

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

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

Notes

¹ Law Clerk Ryan McQuighan assisted with this Article. This Article was supported in part by subgrant funding awarded by the National Crime Victim Law Institute (NCVLI) under a grant from the Office for Victims of Crime, Office of Justice Programs, United States Department of Justice (Grant No. 2002-VF.GX.K004). Points of view in this document are those of the author and do not necessarily represent the official

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

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

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

³ The CVRA is codified at 18 U.S.C. § 3771.

⁴ This compromise resulted after an almost decade-long movement for a victims' rights amendment to the United States Constitution.

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

⁶ H.R. REP. NO. 108-711, at 2 (2004).

⁷ 106 F.3d 325 (10th Cir. 1997).

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

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

¹⁰ See *Kenna v. District Court*, 435 F.3d 1011, 1013 (9th Cir. 2006) ("The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard. The [CVRA] sought to change this by making victims independent participants in the criminal justice process."); Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 B.Y.U. L. REV. 835, 893 (2005) ("The CVRA transforms crime victims into participants in the criminal justice process. . . . These new rights will reshape the federal criminal justice system.");

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

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

¹³ See *Morris v. Slappy*, 461 U.S. 1, 14 (U.S. 1983) ("But in the administration of criminal justice, courts may not ignore the concerns of victims.");

¹⁴ U.S. CONST. amend. V.

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

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

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

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

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

right which has little reality or worth unless one is informed that the matter is pending and one can choose for himself whether to contest." State v. Gonzales, 125 P.3d 878 (Utah 2005) (citation and internal quotation marks omitted). Federal Rule of Evidence 501 provides, "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

FED. R. EVID. 1101(c).

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

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

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

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

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

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

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

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

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

³⁵ *Id.* at 1139 n.3.

³⁶ See Fed. R. Evid. 615.

³⁷ 18 U.S.C. § 3771 (b) (2).

³⁸ See Wheeler v. State, 596 A.2d 78, 88 n.16 (Md. Ct. Spec. App. 1991).

³⁹ 18 U.S.C. § 3771(d)(2).

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

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

³⁷ 501 U.S. 808 (1991).

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

³⁹ 435 F.3d 1011 (9th Cir. 2006).

⁴⁰ *Id.* 1014-15.

⁴¹ *Id.* at 1016.

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

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

⁴⁴ U.S.S.G. § 6B1.4, comment (2004).

⁴⁵ *Id.*

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

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

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

⁴⁹ See 18 U.S.C. § 3663A.

⁵⁰ 18 U.S.C. § 3572(b).

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

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

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

⁵⁴ 18 U.S.C. § 3006A.

⁵⁵ *United States v. Stamper*, 766 F. Supp. 1396, 1397 (D.N.C. 1991).

⁵⁶ See, e.g., *Fisher v. State*, 736 A.2d 1125, 1149 (Md. Ct. Spec. App. 1999) (“On March 23, 1998, Judge Levitz appointed Sandra Thornhill Brushart, Esquire, of the Baltimore County bar, to represent Georgia Fisher, to inform her of her psychotherapist patient privilege, to ascertain her wishes with respect thereto, and to report those wishes to the court.”).

⁵⁷ NCLVI provides technical assistance to attorneys who provide direct legal services to crime victims; researches and analyzes developments in crime victim law; files amicus briefs advocating for crime victims in courts; and offers education and training in crime victim law. For additional information, see www.ncvli.org.

⁵⁸ The report is available at <http://meetings.abanet.org/webupload/commupload/CR300000/newsletterpubs/victimsreport.pdf>.

⁵⁹ 18 U.S.C. § 3771(c).

⁶⁰ *Thompson v. Oklahoma*, 487 U.S. 815, 825 n.23 (1988).

⁶¹ 18 U.S.C. § 3509(h).

⁶² See, e.g., *State ex rel. Romley v. Dairman*, 95 P.2d 548, 553 (Ariz. Ct. App. 2004).

⁶³ In every case involving an abused or neglected child, 45 C.F.R. § 1340.14 requires that the State ensure the appointment of a GAL, or other individual whom the State recognizes as fulfilling the same functions as a GAL, to represent and protect the rights and best interests of the child. For a description of the duties of the GAL, see 18 U.S.C. § 3509(h)(2).

⁶⁴ As the court held in *United States v. Turner*, 367 F. Supp. 2d 319, 323 (E.D.N.Y. 2005), “Section 3771 grants specific rights to crime victims in subsection (a), and specifies in subsection (d)(3) the procedures by which victims can assert those rights in court and obtain judicial determination of

such claims. No further statutory mandate would have been needed if all that Congress intended was to have judges rule on applications by aggrieved crime victims. But the statute also requires courts, in subsection (b), to ‘ensure that the crime victim is afforded the rights described in subsection (a).’ In order to give that provision separate meaning, courts must interpret it to require something more than merely ruling on applications for relief made pursuant to subsection (d)(3). Accordingly, I believe the provision requires at least some proactive procedure designed to ensure victims’ rights.”

⁶⁵ 18 U.S.C. § 3771(b).

⁶⁶ FED. R. CRIM. P. 11.

⁶⁷ See, e.g., *Turner*, 367 F. Supp. 2d at 328 (directing prosecutor “to file with the court a list setting forth the name of (and contact information for) each individual it has identified as a victim of Turner’s alleged crime, including any person whom it characterizes as the victim of uncharged conduct, or to show good cause why it should not be required to do so”).

⁶⁸ See Bennett L. Gershman, *Prosecutorial Ethics and Victims’ Rights: The Prosecutor’s Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559 (2005).

⁶⁹ In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

⁷⁰ See, e.g., *State v. Gonzales*, 125 P.3d 878 (Utah 2005) (“[T]he trial court responded to Mr. Montgomery’s unauthorized acquisition of the contents of Jessica’s therapy records by ordering him to write an apology to the victim, questioning whether the trial could be fair under the circumstances, and suggesting that he had created a conflict that ‘called into question the professional ethics of his continued representation of the defendant.’ Following this strong reprimand, Mr. Montgomery voluntarily moved to withdraw.”).

ppendix A

FORM MUST BE COMPLETED FOR EACH DEFENDANT OR JUVENILE

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

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

Victim's Name: Ms./Miss/Mrs./Mr. _____ If a minor, Date of Birth _____

If Victim is a Minor, or Deceased, or Disabled, please give:

Victim Representative's Name: Ms./Miss/Mrs./Mr. _____

Relationship _____

I REQUEST NOTICE OF ALL EVENTS RELATED TO THIS CASE AND TO THE DEFENDANT/JUVENILE, AS ALLOWED BY LAW, AND DEMAND ALL THE RIGHTS TO WHICH VICTIMS OF CRIME ARE ENTITLED.

Date _____

Signature of Victim or Victim's Representative

See back of this form for specific instructions and information

PLEASE PROVIDE AN ADDRESS AND PHONE NUMBER TO RECEIVE ALL NOTICES.

THIS FORM WILL BECOME PART OF THE PUBLIC RECORD IN THIS CASE. IF YOU DO NOT WANT YOUR ADDRESS AND PHONE NUMBER IN THE RECORD, PROVIDE AN ALTERNATE VICTIM CONTACT NAME, ADDRESS AND PHONE NUMBER

Victim/Victim's Representative: _____

Address _____

City _____ State _____ Zip _____

Phone (day) _____ Phone (evening) _____

Alternate Victim Contact

If another person or organization has agreed to receive and forward notices to you AND you agree to maintain contact with the Alternate, complete the following information:

Name of Alternate Victim Contact _____

Relationship to Victim/Victim's Representative: Family Member Friend Support Agency Other

Contact Address: _____

City _____ State _____ Zip _____

Phone (day) _____ Phone (evening) _____

Additional services now available in Maryland for victims of crime:

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

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

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

Maryland Crime Victims' Resource Center, Inc.

Continuing the Missions of the Stephanie Roper Committee and Foundation, Inc.

Email: mail@mdcrimevictims.org • Web Page: www.mdcrimevictims.org

14750 Main Street
Upper Marlboro, MD 20772-3055
Phone: (301) 952-0063
FAX: (301) 952-2319

Toll Free: 1-877-VICTIM 1
218 E. Lexington St., Ste. 401
Baltimore, MD 21202
Phone: (410) 234-9885

March 15, 2006

Mr. Chairman and Members of the Commission:

On behalf of the Maryland Crime Victims' Resource Center, Inc. (MCVRC) where I serve as Executive Director, it is my honor to present the concerns of victims of crime to the Commission. Prior to my service as Executive Director, I practiced law including state and federal criminal defense from 1985 to 2002. Since 1998, I have served on the Maryland Commission on Criminal Sentencing Policy. I also serve as an adjunct professor of law at the University of Baltimore School of Law where I teach a course on the "Rights of Crime Victims."

It is also a privilege to serve on the panel with the Honorable Paul Cassell. I wholeheartedly endorse Judge Cassell's comments as well as those comments of Professor Douglass Beloof of the National Crime Victims Law Institute.

With the adoption of the Crime Victims' Rights Act (CVRA), Congress intended that victims have participatory and enforceable rights in the federal criminal justice system. The question is no longer, whether victims should have these rights, but how to ensure that the Congressional intent becomes a reality. Within the Commission's jurisdiction, the Commission should implement the CVRA to provide meaningful participation as intended by Congress.

The Courts' obligations under the CVRA.

Under 18 U.S.C., § 3771 (b) courts have three (3) mandates:

1. In any court proceeding involving an offense against a crime victim, the **court shall ensure** that the crime victim is afforded the rights described in subsection (a).
2. 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.
3. The reasons for any decision denying relief under this chapter **shall be** clearly stated on the record.

These obligations impose on the court proactive obligations. *United States v. Turner*, 367 F. Supp. 2d 319, 324 (D.N.Y. 2005). Rather than allowing ad hoc and inconsistent application of law, the Commission should establish the minimum process to ensure fairness to crime victims. Moreover, the Commission should, as part of the Judiciary's obligation to state any decision denying relief on the record, amend the sentencing guidelines worksheet to track when victims receive or fail to receive their rights and any reason for the denial of rights.

Under 18 U.S.C., § 3771 (c) the Department of Justice is obligated to see that crime victims are notified of, and accorded, the rights described in subsection (a) and prosecutors shall advise the crime

victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a). The Court cannot delegate its separate and independent responsibilities to the Department of Justice. Without appropriate procedures to obtain uniform application and justice for victims, the Judiciary will lose the public's confidence in enforcing the law that Congress has entrusted to the Courts.

Perhaps most analogous is the Court's obligation to protect the rights of the accused. Judges routinely conduct a voir dire of an accused before accepting a guilty plea. Judges ensure that a defendant knowingly and intelligently waives the rights of the accused before accepting the plea. However, we suggest that there is a lack of uniform understanding on the part of the bench regarding:

1. How a victim can knowingly and intelligently waive the victim's rights? and
2. The obligation of the court to see that the interests of victims are not negligently or intentionally denied.

Judges should not become advocates for victims, but they have legal obligations to protect the rights of victims just as they protect the rights of the accused. The sentencing guidelines should implement the judicial obligations rather than merely restate the law under the CRVA.

The applicability of victims' rights vis-à-vis the Guidelines.

Related to the three (3) judicial mandates under the CVRA, the CVRA grants several specific rights to victims. The Commission should amend the Guidelines to implement the CVRA. (The existing statutory language of the CVRA will follow in bold and suggested amendments follow in italics.)

Under 18 U.S.C., § 3771 (a), a crime victim has the following rights:

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

The Commission should add required conditions of probation under § 5B1.3 and mandatory supervision under § 5B1.3 for an offender to have no contact with the victim or the victim's family if reasonable protection from the accused is indicated or if requested by the victim.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

The Commission should add language in § 6B1.2 regarding acceptance of plea, in 6A1.4 regarding determination of sentence, in § 5E1.1 regarding determination of restitution, and in § 7B1.3 regarding hearing and sentencing for violation of probation or mandatory supervision – If any identifiable victim is not present, the court shall inquire on the record of the prosecuting attorney if and when any victim was notified and the opportunity to be reasonably heard regarding (Can be combined with # 4 and # 5 below.)

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

The Commission should add language in § 6B1.2 regarding acceptance of plea, in 6A1.4 regarding determination of sentence, in § 5E1.1 regarding determination of restitution, and in § 7B1,3 regarding hearing and sentencing for violation of probation or mandatory supervision – If any victim is present, the court shall inquire if the victim desires to be heard and if requested, the court shall allow the victim to be reasonably heard. (Can be combined with #2 above and # 5 below.)

(5) The reasonable right to confer with the attorney for the Government in the case.

The Commission should add language in § 6B1.2 regarding acceptance of plea, in 6A1.4 regarding determination of sentence, in § 5E1.1 regarding determination of restitution, and in § 7B1,3 regarding hearing and sentencing for violation of probation or mandatory supervision – Whether any victim is present, the court shall inquire if any identifiable victim has reasonably conferred with the attorney for the government. (Can be combined with #2 and # 4 above.)

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

The Commission should add language in § 6A1.2 regarding disclosure of the presentence report, § 6A1.3 regarding resolution of disputed factors, and §6A1.4 regarding stipulations to allow identifiable victims to be reasonably heard. Under the federal guidelines, the sentence is determined by the application of the guidelines. In the commentary to §6A1.4 it is clear that “ it is not appropriate for the parties to stipulate to misleading or non-existing facts” and “in determining the factual basis for the sentence, the court will consider the stipulation, together with the results of the presentence investigation, and any other relevant information.” Victims are in the unique position to know when facts are incorrect or omitted. In order to treat victims with fairness, victims require access to the presentence report (other than the recommendation of the Probation Office) to present errors and omissions to the probation officer and to the court.

The need to document compliance and non-compliance.

The Maryland Commission on Criminal Sentencing Policy has incorporated on its sentencing guidelines worksheet appropriate space to quantify the compliance or non-compliance of applicable victims' rights provisions. (see attached) The Commission should similarly require the recordation of compliance data on the federal worksheet as part of the record including the basis for denying any relief to a victim.

Miscellaneous changes in conformance with the CVRA

1. In the commentary to § 1B1.1, the term “victim” should be defined to include a victim’s representative where appropriate.
2. In § 5F1.4 and § 8B1.4, the court guideline should also provide that a defendant may pay the cost of a guardian ad litem under 18 U.S.C., § 3509 or the cost of an attorney for the

victim under 18 U.S.C., § 3771. *See also United States v. Stamper*, 766 F. Supp. 1396 (D.N.C. 1991).

In conclusion, the Commission should take reasonable steps to incorporate Congressional enacted victims' rights within the federal sentencing guidelines. Such action by the Commission will provide victims with appropriate fairness to obtain justice and improve public confidence in the Judiciary.

Thank you for the opportunity to address these concerns. MCVRC offers to work with the Commission and the Commission's staff to implement the CVRA so that justice for all includes justice for victims of crime.

