

TO: Federal Public and Community Defenders
FR: Amy Baron-Evans
RE: Defending Against the Crime Victim Rights Act
DA: May 5, 2007

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I. Introduction

A. The CVRA

The Crime Victim Rights Act (CVRA) gives crime victims the following eight “rights.”

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

18 U.S.C. § 3771(a). The Adam Walsh Act, effective July 27, 2006, made subsections (a)(3), (4), (7) and (8) applicable in habeas proceedings arising from state convictions. *See* 18 U.S.C. § 3771(b)(2). This paper does not specifically cover the CVRA’s application in habeas cases, though some of it would apply there as well.

Most of these rights already existed in some form in the trial and sentencing context (but not habeas), *see* 42 U.S.C. § 10606 (repealed), Fed. R. Crim. P. 32(i)(4)(B), but they were not limited by the term “reasonable,” nor were they enforceable. The CVRA contains express and implied “reasonableness” limitations, and also an extraordinary enforcement mechanism -- victims may seek mandamus from the court of appeals if the district court denied the “relief sought,” and the court of appeals must render a decision within 72 hours.

The Rules Advisory Committee has voted on modifications to the Rules of Criminal Procedure that supposedly implement the CVRA. The Committee rejected most of the more extreme proposals (made by Judge Cassell), but some of the rules it adopted would create new “rights” not found in the plain language of the CVRA and the rules as a whole fail to provide “procedures” where needed. This paper mentions a couple of the

proposed rules, but it is premature to discuss them all here, as they will not go into effect unless and until approved by the Standing Committee, the Judicial Conference and the Supreme Court, and are not disapproved by Congress.

B. Preventing Incorrect and Unconstitutional Interpretations of the CVRA

1. Relevant Legislative History

Congress enacted the CVRA when sponsors of a crime victims' constitutional amendment failed to secure sufficient support for its passage after years of debate and lobbying efforts by victim advocates.¹ The constitutional amendment would have provided that "victims' rights 'shall not be denied . . . and may be restricted only as provided in this article.'" S.J. Res. 1, § 1 (108th Cong.). The "CVRA strikes a different balance, and it is fair to assume that it does so to accommodate the concerns of such legislators [who opposed the constitutional amendment] In particular, it lacks the language that prohibits all exceptions and most restrictions on victims' rights, and it includes in several places the term 'reasonable' as a limitation on those rights." *United States v. Turner*, 367 F.Supp.2d 319, 333 n.13 (E.D.N.Y. 2005) (emphasis in original). In short, the full Congress did not intend to give victims statutory rights as broad, much less broader, than those they would have had under the failed constitutional amendment.

The fundamental objection to creating constitutional rights for victims was that it would install the private prosecution model the Framers rejected, unbalance the adversary criminal justice system the Framers created, and threaten the Bill of Rights.² Opposition was also based on the recognition that if victims were allowed to drive the criminal process, their desire for vengeance and lack of expertise would lead to unfair and unreliable results.³ Family members of victims candidly and poignantly told Congress of being in an emotional state in which they sought vengeance, not justice, and of their

¹ 150 Cong. Rec. at S4261 (Apr. 22, 2004) (statement of Sen. Feinstein).

² See S. Rep. No. 108-191 at 68-69 (minority views) (The "colonies shifted to a system of public prosecutions because they viewed the system of private prosecutions as 'inefficient, elitist, and sometimes vindictive.' . . . [T]he Framers believed victims and defendants alike were best protected by the system of public prosecutions that was then, and remains, the American standard for achieving justice."); *id.* at 70 ("[W]e have historically and proudly eschewed private criminal prosecutions based on our common sense of democracy."); *id.* at 56 ("Never before in the history of the Republic have we passed a constitutional amendment to guarantee rights to a politically popular group of citizens at the expense of a powerless minority," or "to guarantee rights that intrude so technically into such a wide area of law, and with such serious implications for the Bill of Rights.").

³ *Id.* at 73, 85-86.

gratitude that the legal system stood as a buffer between them and the accused.⁴ Prosecutors and former prosecutors testified that giving victims too much say over release, plea and sentencing would undermine law enforcement strategy, resulting in fewer convictions, and in some cases threatening witness safety.⁵

Thus, the constitutional amendment failed, and a statute was passed. Defendants continue to have constitutional rights, victims have limited statutory rights, the constitutional rights of defendants must always trump the statutory rights of victims, and if we are careful, the adversary criminal justice system will remain intact.

However, a small but vocal group of advocates whose mission is to expand victim rights promote aggressive interpretations of the CVRA which would exceed congressional intent, destroy our adversary system, create a three-party system (two against one), and violate defendants' constitutional rights. It is noteworthy that these aggressive interpretations are not supported by citations to the language of the statute, but rather to (1) the floor statements of the disappointed sponsors of the failed constitutional amendment, and (2) the theories and opinions of victim advocates.

2. Inappropriate Reliance on Floor Statements

The legislative history of the CVRA itself (as distinct from the debate on the failed constitutional amendment) consists only of a scripted exchange between Senator Kyl (the bill's author), and Senator Feinstein (the minority co-sponsor) when they introduced the bill on the Senate floor,⁶ an abbreviated version of the same by Senator Kyl before final passage in the Senate,⁷ and an unembellished description of the bill in the House Judiciary Committee Report.⁸ "Nowhere in [this] legislative history . . . does one find the debate or exchange of ideas that more frequently accompanies the art of law-crafting." *United States v. Marcello*, 370 F.Supp.2d 745, 749 (N.D. Ill. 2005).

The sponsors' floor statements contain purported explanations of the meaning of various provisions of the CVRA that range from obviously correct, *see* Part III(B)(1) (CVRA does not apply to closed proceedings), to obviously incorrect, *see* Part II (victims have rights whether or not they are a victim of a charged offense), to utterly outlandish, *see* Part III(C)(3) (victims have a right to "due process").

⁴ *Id.* at 85.

⁵ *Id.* at 74-76, 103.

⁶ 150 Cong. Rec. S4260-01 (Apr. 22, 2004) (floor statements of Sens. Kyl and Feinstein).

⁷ 150 Cong. Rec. S10910-01 (Oct. 9, 2004) (floor statement of Sen. Kyl).

⁸ H.R. Rep. No. 108-711, U.S.C.C.A.N. 2274, 2277 (Sept. 30, 2004).

When the language of a statute is plain, courts may not turn to the legislative history in search of a contrary meaning. *See Crandon v. United States*, 494 U.S. 152, 160 (1997); *Whitfield v. United States*, 543 U.S. 209, 215 (2005); *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 130-36 (2002); *United States v. Gonzales*, 520 U.S. 1, 6 (1997); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

If (and only if) the language is ambiguous (which it is not), the most reliable source of congressional intent is the debate reflected in the legislative history of the failed constitutional amendment, consisting of Senate Judiciary Committee Reports setting forth the views for and against a constitutional amendment.⁹ As noted above, this history reveals why the constitutional amendment failed and what compromises were made to secure passage of the statute. Further, Congress must be presumed not to have intended an unconstitutional meaning. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005); *Rust v. Sullivan*, 500 U.S. 173, 191 (1991).

The floor statements of the CVRA's sponsors (the disappointed sponsors of the failed constitutional amendment) are not a reliable source of congressional intent. As the Supreme Court has said:

Floor statements from two Senators [who sponsored the bill] cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text.

Barnhart v. Sigmon Coal Co., Inc. 534 U.S. 438, 457 (2002).

Floor statements, in fact, may “open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President,” *Regan v. Wald*, 468 U.S. 222, 237 (1984), and this may be particularly true of a bill's sponsor disappointed in some respect with the final bill. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2766 n.10 (2006).

The Ninth Circuit has said that the floor statements of Senators Kyl and Feinstein should be followed, despite their disfavored status, because other legislators did not register disagreement with their floor statements at the time. *Kenna v. United States District Court*, 435 F.3d 1011, 1015-16 (9th Cir. 2006), citing no law but only *A Man for All Seasons*. This was wrong for reasons well-stated by Justice Scalia:

Of course this observation, even if true, makes no difference unless one indulges the fantasy that Senate floor speeches are attended (like the Philippics of Demosthenes) by throngs of eager listeners, instead of being delivered (like Demosthenes' practice sessions on the beach) alone into a

⁹ S. Rep. No. 108-191 (Nov. 7, 2003); S. Rep. No. 106-254 (Apr. 4, 2000).

vast emptiness. Whether the floor statements are spoken where no Senator hears, or written where no Senator reads, they represent at most the views of a single Senator.

Hamdan, 126 S. Ct. at 2815-16 (Scalia, J., dissenting). *See also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 390-91 (2000) (“the statements of individual Members of Congress (ordinarily addressed to a virtually empty floor) . . . [are not] a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute before us. The *only* reliable indication of *that* intent—the only thing we know for sure can be attributed to *all* of them—is the words of the bill that they voted to make law.”) (Scalia, J., concurring) (emphasis in original).

3. Advocacy for Change Masquerading as Law

The State/Federal Clinics and Demonstration Project of the National Crime Victim Law Institute (NCVLI) operates litigation clinics in several states, including the Crime Victim Legal Assistance Project (CVLAP), a federal clinic at Arizona State University School of Law. Their mission is to expand victims’ rights through litigation. *See* National Crime Victim Law Institute, State/Federal Clinics and Demonstration Project, available at <http://law.lclark.edu/org/ncvli/demoproject.html>. The victim in the Ninth Circuit *Kenna* cases was represented by the CVLAP, with *amicus* support from the NCVLI. I reviewed the record in the *Kenna* cases to find explanations for some of the oddities I noticed in the Ninth Circuit opinions (discussed below) and was struck by the absolutist positions these groups took even when detrimental to *Kenna*’s apparent interests.

Professor Beloof, the Executive Director of the NCVLI, has written a book and articles advocating the expansion of victim rights. Among his theories is that victims should have a right to litigate the sentence just as prosecutors do. Steve Twist litigates with the CVLAP and co-authored an article with Senator Kyl. Judge Cassell, a self-professed victims’ rights advocate, represented the Oklahoma City bombing victims before he became a judge and has written several articles and co-authored a book with Professor Beloof. Like Professor Beloof, Judge Cassell favors a three-party system.¹⁰ Judge Cassell has published several opinions interpreting provisions of the CVRA, sometimes when no issue is in dispute and without briefing by the parties. Judge Cassell, Professor Beloof and Steve Twist all testified in favor of the failed victim rights constitutional amendment. In pleadings, opinions and articles, these victim rights advocates cite to each other and to Senator Kyl’s floor statements.

¹⁰ Judge Cassell recently spoke on NPR, saying that we “are moving in the direction of a three party system. Prosecutors represent society. The defense attorney represents the defendant. And we need to get counsel for crime victims so that they have their voices heard in the process as well.” *Debating the Value of Victims’ Rights Laws*, All Things Considered, National Public Radio, April 29, 2007, <http://www.npr.org/templates/story/story.php?storyId=9907104>.

II. Who Has Rights As a “Crime Victim” Under the CVRA?

The statute defines “crime victim” as “a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.” *See* 18 U.S.C. § 3771(e). The courts have held that:

- Purported victims have no rights in criminal proceedings against persons who were not charged with an offense or who were acquitted. *See In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 564 (2d Cir. 2005) (rejecting petition for mandamus seeking to vacate settlement agreement approved by district court between United States and convicted, acquitted and uncharged persons; “the CVRA does not grant victims any rights against individuals who have not been convicted of a crime.”); *United States v. Sharp*, 463 F.Supp.2d 556 (E.D. Va. 2006) (denying putative victim’s *ex parte* motion to make impact statement at defendant’s sentencing on the basis that her former boyfriend, who was not charged with any crime, physically, mentally and emotionally abused her, which she claimed was caused by his use of marijuana purchased from defendant; “the CVRA only applies to [putative victim] if she was ‘directly and proximately harmed’ as a result of the commission of the Defendant’s federal offense.”). *See also United States v. Turner*, 367 F.Supp.2d 319, 326-27 (E.D.N.Y. 2005) (noting conflict between Senator Kyl’s statement and other legislative history, due process problems with designating a person as a victim of uncharged conduct, and concluding that the CVRA does not mandate rights for such persons).
- Civil plaintiffs have no right under the CVRA to restitution, damages, or non-public criminal discovery. *See United States v. Moussaoui*, ___ F.3d ___, 2007 WL 755276 (4th Cir. Mar. 14, 2007) (district court was without power to grant motion of civil plaintiffs in a case in the Southern District of New York to intervene in criminal case in the Eastern District of Virginia for purpose of obtaining non-public discovery materials from the criminal case; “The rights codified by the CVRA . . . are limited to the criminal justice process.”); *In re Searcy*, 202 Fed. Appx. 625 (4th Cir. Oct. 6, 2006) (rejecting petition for mandamus by civil RICO plaintiff claiming entitlement to restitution and damages; CVRA has “no application . . . to these [civil] proceedings”).
- Putative victims cannot use the CVRA as a basis for lawsuits or mandamus actions demanding the institution of criminal proceedings. *See In re Walsh*, slip op., 2007 WL 1156999 (3d Cir. Apr. 19, 2007) (rejecting claim by civil plaintiff seeking restraining orders and arrests); *In re Siyi Zhou*, 198 Fed. Appx. 177 (3d Cir., Sept. 25, 2006) (similar); *Estate of Musayelova v. Kataja*, slip op., 2006 WL 3246779 (D. Conn. Nov. 7, 2006) (rejecting action by victims demanding prosecution and sentencing of persons; “private citizens do not have the power to instigate prosecutions of alleged crimes, and doing so is clearly beyond the province of the Court.”).

- Victims of predicate prior offenses do not have rights under the CVRA. *See United States v. Guevera-Toloso*, 2005 WL 1210982 (E.D.N.Y. 2005) (where defendant was charged with “illegally re-entering the United States after being convicted of a felony and subsequently deported,” an element of which was his “previous conviction for a predicate offense,” victims of predicate offenses, if any, were not entitled to notice because the predicates were state offenses, doubtful that a victim of a federal predicate would be entitled to notice).

However, according to Senator Kyl, the definition of “crime victim” is “intentionally broad” because “all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged.” *See* 150 Cong. Rec. S10912 (Oct. 9, 2004).

When the language of a statute is plain, courts may not look to legislative history for evidence of a contrary meaning. *See* Part I(B)(2), *supra*. The CVRA directs the court to “ensure” that a victim is afforded the rights described in subsection (a) in “any court proceeding involving an offense against a crime victim.” 18 U.S.C. § 3771(b)(1). The rights described in subsection (a) refer explicitly or implicitly to pending criminal proceedings in which a defendant has been charged and is either being prosecuted or has been convicted, *see* 18 U.S.C. § 3771(a), as the courts have uniformly found.

If the court is nonetheless inclined to look to the legislative history, there is strong evidence there that Congress did not intend for the CVRA to cover alleged victims of uncharged or acquitted offenses.

Even when contemplating a victim rights constitutional amendment, Congress intended the term “victim” to have the same meaning as in the then existing Fed. R. Crim. P. 32(f), which “defined ‘victim’ for sentencing purposes as ‘any individual against whom an offense has been committed for which a sentence is to be imposed.’ The Committee anticipates that courts, in interpreting the amendment, will use a similar definition focusing on the criminal charges that have been filed in court.” *See* S. Rep. No. 108-191 at 30 (Nov. 7, 2003). In enacting the Victim Witness Protection Act, Congress recognized that “[t]o order a defendant to make restitution to a victim of an offense for which the defendant was not convicted would be to deprive the defendant of due process of law.” H.R. Rep. No. 99-334, p. 7 (1985) and H.R. Rep. No. 98-1017, p. 83, n. 43 (1984) (quoted in *Hughey v. United States*, 495 U.S. 411, 421 n.5 (1990)). The Supreme Court then interpreted the definition of “victim” in the Victim Witness Protection Act, 18 U.S.C. § 3663(a)(2), as authorizing restitution only for “loss caused by the conduct underlying the offense of conviction.” *Hughey*, 495 U.S. at 420. Congress then passed the CVRA, defining “crime victim” in 18 U.S.C. § 3771(e) the same as “victim” is defined in 18 U.S.C. § 3663(a)(2) in relevant part. When Congress incorporates a term into a statute that the Supreme Court has previously interpreted, Congress is assumed to have incorporated that interpretation. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

Even if the language were ambiguous, the rule of lenity and the need for fair warning would require that the statute be interpreted in favor of the defendant, *Simpson v. United States*, 435 U.S. 6, 14-15 (1978), rather than according to broad policy statements or legislative history not clearly warranted by the text. *Crandon v. United States*, 494 U.S. 152, 160 (1990). *See also Hughey*, 495 U.S. at 422.

Interpreting the CVRA as according rights to alleged victims of uncharged or acquitted conduct raises serious constitutional concerns. It would undermine the presumption of innocence. *Turner*, 367 F.Supp.2d at 326. As Congress recognized in the restitution context, it would deprive the defendant of due process of law. *Hughey*, 495 U.S. at 421 n.5 (citing H.R. Rep. No. 99-334 at 7 (1985) (citing H.R. Rep. No. 98-1017 at 83 n.43 (1984))). Congress is presumed not to have intended an unconstitutional meaning. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005); *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). A majority of the Supreme Court has decried the use of uncharged, dismissed and acquitted conduct in sentencing as an assault on our adversary system, *Blakely v. Washington*, 542 U.S. 296, 305-08, 313 (2004); *United States v. Booker*, 543 U.S. 220, 240 (2005), and is unlikely to uphold an interpretation of “crime victim” that includes persons allegedly harmed by uncharged or unproved conduct.

III. Limitations on Rights

A. Notice

Under subsection (a)(2), victims have a “right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.” It is difficult to imagine a “public court proceeding” involving an “escape of the accused.” Notice of release “shall not be given if such notice may endanger the safety of any person.” 18 U.S.C. § 3771(c)(1). This seems designed to protect the accused from the victim, and should be invoked if appropriate.

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

B. Right Not to Be Excluded Absent Clear and Convincing Evidence that the Victim’s Testimony Will be Materially Altered

Victims (or more accurately alleged victims, as the very question at trial is whether *anyone* is a victim and in certain cases, such as self defense, *who* is the victim), have a right “not to be excluded from any . . . public court proceeding . . . involving the crime or of any release or escape of the accused . . . unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.” 18 U.S.C. § 3771(a)(3). “Before making a determination described in subsection (a)(3),” that is, before excluding

a testifying victim whose testimony would be materially altered, “the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding.” 18 U.S.C. § 3771(b)(1).

1. There is no general right to have the court make “every effort to assure the fullest attendance possible.”

Unfortunately, the Criminal Rules Advisory Committee has voted for an amendment to Fed. R. Crim. P. 18 (proposed by Judge Cassell), which would require the district court, in setting the place of trial, to take into account the convenience of non-testifying victims on an equal basis with that of the defendant and witnesses. The Committee Note states it “implements the victim’s right to attend proceedings under . . . 18 U.S.C. § 3771(b).” It has also voted for a new rule that states that victims have a general “right to attend,” with a Committee Note stating that that it “incorporates . . . 18 U.S.C. § 3771(b), which provides that the court shall make every effort to permit the fullest attendance possible.” Both rules rest on an incorrect reading of the statute: that subsection (b) creates a general right to “attend” which the court must make “every effort to assure” (and can be the subject of a mandamus action if not). If these rules are eventually promulgated, they can be challenged as contrary to the plain language of the CVRA and in violation of the Rules Enabling Act, which provides that the “rules shall not abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b).

The “rights of crime victims” are set forth in subsection (a). The only “right” stated there is a “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.” 18 U.S.C. § 3771(a)(3). Subsection (b)(1), which tells courts how to “afford” the rights in subsection (a), tells the court that before “making a determination described in subsection (a)(3),” that is, to exclude a testifying victim because her testimony would be materially altered, “the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding.” 18 U.S.C. § 3771(b)(1).

Thus, victims have a right, like all members of the public, not to be excluded from public court proceedings involving the crime. This is a qualified right, as the court may order the proceedings closed if the defendant’s superior right to a fair trial, the need to protect the safety of any person, or the need to protect sensitive information is shown to require exclusion. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564, 581 (1980); *Estes v. Texas*, 381 U.S. 532 (1965); 28 C.F.R. § 50.9. The CVRA respects the qualified nature of this right as to victims by stating that victims have a “right not to be excluded from any such public proceeding.” *See* 150 Cong. Rec. S10910 (Oct. 9, 2004) (CVRA is not intended to alter existing law under which court may close proceedings). *See United States v. W.R. Grace*, 425 F.Supp.2d 998, 1020-21 (N.D. Iowa) (rejecting government’s argument that CVRA requires court to give extra consideration to interests of community

where crime occurred in ruling on defense motion for change of venue, and stating: “Community interests certainly do not rise to level of constitutional rights, nor may they serve an equal counterweight to the Defendants’ constitutional rights. To hold otherwise would be to betray the purpose of our courts, which is to serve justice without passion or prejudice.”); *United States v. L.M.*, 425 F.Supp.2d 948, 951-52 (N.D. Iowa 2006) (excluding victims from closed proceedings).

Testifying victims can be excluded from a “public” proceeding under the circumstances set forth in subsections (a)(3) and (b)(1). If the court has determined that a testifying victim’s testimony would be materially altered, *then* the court must make every effort, by considering reasonable alternatives to complete exclusion, to permit the fullest attendance possible. The court might, for example, order that the victim witness testify before other witnesses who will testify on the same subject matter.

The court, however, has no general duty to “make every effort to permit the fullest attendance possible.” Taken to its logical conclusion, courts would have to provide transportation to victims, reschedule proceedings based on non-testifying victims’ vacation schedules, recess for their medical appointments, and whatever else “every effort to permit the fullest attendance possible” would require.

That this is not what Congress intended is not only clear in the plain statutory language, but in the floor statement of Senator Kyl:

I would like to turn to (a)(3), which provides that the crime victim has the *right not to be excluded* from any public proceedings. *This language was drafted in a way to ensure that the government would not be responsible for paying for the victim’s travel and lodging to a place where they could attend the proceedings.*

In all other respects, this section is intended to grant victims the right to attend and be present throughout all public proceedings. This right is limited in two respects. First, the right is limited to public proceedings, thus grand jury proceedings are excluded from the right. Second, the government or the defendant can request, and the court can order, judicial proceedings to be closed under existing laws. This provision is *not intended to alter those laws or their procedures in any way.* . . . Despite these limitations, this bill *allows* crime victims, in the vast majority of cases, *to attend* the hearings and trial of the case involving their victimization. . . .

See 150 Cong. Rec. S10910 (Oct. 9, 2004). Senator Kyl also made clear that which is already clear in the statute: that the “fullest attendance possible” provision of subsection (b)(1) is not a generally applicable “right,” but only a step the court must take before excluding a testifying victim pursuant to subsection (a)(3):

The standards of "clear and convincing evidence" and "materially altered" are extremely high and intended to make exclusion of the victim quite rare, especially since (b) says that "*before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding.*"

See 150 Cong. Rec. S10910-S10911 (Oct. 9, 2004).

2. Protecting against tainted testimony

"The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion." Fed. R. Evid. 615, 1972 advisory committee note. Sequestration has been used since biblical times, and "is (next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice." *Opus 3 Ltd. v. Heritage Park, Inc.*, 91 F.3d 625, 628-29 (4th Cir. 1996). Fed. R. Evid. 615 provides that "[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." (emphasis supplied) The rule does not apply if the person "is authorized by statute to be present," an exception that was created as a result of the judge's sequestration order in the Oklahoma City bombing trial. A testifying victim whose testimony would not be materially altered is authorized by the CVRA to be present.

Obviously, the decision whether to permit a witness to be present for other testimony that may influence his or her own must be made with care. It appears to be the defendant's burden to show that material alteration is likely. See *In re Mikhel*, 453 F.3d 1137, 1139 (9th Cir. 2006); *United States v. Johnson*, 362 F.Supp.2d 1043, 1056 (N.D. Iowa). Defense counsel should insist on discovery of the victim's intended testimony, that of other witnesses the victim would hear if present, and any other information that would tend to show that the victim's testimony would be materially altered, e.g., psychiatric history, and a pretrial hearing to examine the victim/witness.

The victim could be excluded during the testimony of other witnesses concerning matters related to their testimony. Or, to greatly simplify matters, the court could order the government to put the victim on first, even in the absence of the required showing.

If victims are permitted to hear other witnesses' testimony despite best efforts to exclude them, defense counsel should seek a jury instruction explaining that they were not subject to sequestration like other witnesses, the purpose of the sequestration rule "as a means of discouraging and exposing fabrication, inaccuracy, and collusion," Fed. R. Evid. 615, 1972 advisory committee note, and that it is "natural and irresistible for a jury, in evaluating the relative credibility of a [witness] who testifies last, to have in mind and weigh in the balance the fact that he heard the testimony of all those who preceded him." *Portuondo v. Agard*, 529 U.S. 61, 67-68 (2000).

Whenever a victim is allowed to hear other testimony, preserve an objection under the Due Process Clause and the Confrontation Clause, and raise it on appeal and in a petition for certiorari.

C. Right to “Be Reasonably Heard” at a Public Proceeding Involving Sentencing

1. Do victims have an absolute right to speak at sentencing?

According to Senator Kyl, it is usually not up to the district court judge, but to the victim if s/he wishes to “speak” in person: “Only if it is not practical for the victim to speak in person or if the victim wishes to be heard by the court in a different fashion should this provision mean anything other than an in-person right to be heard.” *See* 150 Cong. Rec. S10910-S10911 (Oct. 9, 2004). If so, the victim’s sole wishes are enforceable through mandamus.

The phrase “reasonably heard” is not ambiguous. Though Congress could very easily have enacted a right to be “addressed” and to “speak” at sentencing based on the language of Fed. R. Crim. P. 32(i)(4)(B), it enacted a “right to be reasonably heard.” “Reasonably heard” is a legal term of art meaning to bring one’s position to the attention of the court, in person or in writing, as the court deems reasonable under the circumstances. *See O’Connor v. Pierson*, 426 F.3d 187, 198 (2d Cir. 2005); *Fernandez v. Leonard*, 963 F.3d 459, 463 (1st Cir. 1992); *Commodities Futures Trading Com. V. Premex, Inc.*, 655 F.2d 779, 783 n.2 (7th Cir. 1981); *United States v. Marcello*, 370 F.Supp.2d 745, 748 (N.D. Ill. 2005); U.S.S.G. § 6A1.3, backg’d. comment. When Congress uses a legal term of art, it is presumed to intend its traditional meaning. *Morissette v. United States*, 342 U.S. 246, 263 (1952).

The full Congress did not enact a right to “speak, but a right to “be reasonably heard,” and for good reason. A principal objection to the failed constitutional amendment was its apparent creation of an absolute right to speak and prohibition on courts’ ability to respond flexibly if, for example, there were multiple victims, the victim was involved in the criminal activity, the victim provoked the crime, or the victim’s statement would violate the defendant’s right to due process. *See* S. Rep. No. 108-191 at 76, 85, 106-107 & n.133 (Nov. 7, 2003) (minority views). The failed constitutional amendment stated that victim rights, including the right to be heard, “shall not be denied . . . and may be restricted only as provided in this article.” S.J. Res. 1, § 1 (108th Cong.). The CVRA does not include that language and includes the modifier “reasonably.” Thus, it is reasonable to assume that Congress intended for the courts to determine the manner in which victims may be heard under the circumstances, and to preserve the rights of the defendant and third parties, prosecutorial discretion, and the orderly administration of justice. *United States v. Turner*, 367 F.Supp.2d 319, 333 n.13 (E.D.N.Y. 2005)

There is no settled caselaw to support a right to “speak.” Only one district court has reached the issue of whether the “right to be heard” means a right to “speak” in a case where it was actually in dispute and litigated (albeit in a detention hearing, not

sentencing). The judge concluded that the “statute clearly and unambiguously . . . does not mandate oral presentation of the victim’s statement.” *United States v. Marcello*, 370 F.Supp.2d 745, 748 (N.D. Ill. 2005). The statute gives victims a right to be “reasonably heard,” the “ordinary legal and statutory meaning [of which] typically includes consideration of the papers alone.” *Id.* The “statute, which contains both a reasonableness requirement and a legal term of art (the opportunity to be ‘heard’), does not require the admission of oral statements in every situation, particularly one in which the victim’s proposed statement was not material to the decision at hand.” *Id.* at 745. Because the statutory language was clear, the judge declined to look to the floor sponsor’s statements. *Id.* at 748-49.

Only one court of appeals has addressed the right “to be reasonably heard.” Though the holding in that case is fairly limited (a right to “allocute” about “victim impact” if the victim was not already heard on the same topic), the Ninth Circuit used sweeping language, *i.e.*, victims “now have an indefeasible right to speak.” *Kenna v. United States District Court*, 435 F.3d 1011, 1016 (9th Cir. 2006). There are several reasons to be skeptical of this opinion, including that neither party was heard in the district court, the defendant was not allowed to participate in the mandamus action, *see* Part III(A), *infra*, the factual basis for the opinion was inaccurate, the reasoning is seriously flawed, and one judge wrote separately to state his doubts about various aspects of the opinion.

The underlying criminal case was a prosecution of a father and son for wire fraud and money laundering in which investors had been defrauded of \$94 million, to which each pled guilty. Over sixty victims, including Patrick Kenna, submitted written victim impact statements regarding both defendants, and several, including Kenna, spoke at the father’s sentencing hearing about the impact on them of both defendants’ conduct.¹¹ At the son’s sentencing hearing three months later, the court, *sua sponte*, spoke at length and with compassion about the harm to investors. Most of the discussion between the court and counsel was about an issue Kenna had raised at the father’s sentencing, to wit, why the government had not indicted others and recovered money the father apparently had hidden in spite of the son’s extensive cooperation. Kenna then asked to speak, claiming that he wished to tell the court about impacts that had unfolded since the father’s sentencing hearing 90 days prior. The court declined to hear Kenna, saying it had re-reviewed all of the written victim impact statements, recalled the oral statements from the father’s sentencing hearing, and there was nothing more to say that would have a further impact. The court then imposed sentence,¹² and promptly entered judgment.¹³ No

¹¹ *United States v. Moshe Leichner*, No. CR 03-00568-JFW, Transcript of Sentencing Hearing, February 28, 2005 (on file with author).

¹² *United States v. Zvi Leichner*, No. CR 03-00568-JFW, Transcript of Sentencing Hearing, May 23, 2005 (on file with author).

¹³ *United States v. Zvi Leichner*, No. CR 03-00568-JFW, Judgment and Commitment, May 25, 2005, available on PACER, Docket No. 145.

“motion” was made in the district court, no notice was given that Kenna intended to file a petition for writ of mandamus, and no factual or legal record was made in the district court.

The CVLAP then filed a petition for mandamus on behalf of Kenna, with *amicus* support from its umbrella organization the NCVLI, using it as a test case. Without even a minimally developed district court record or any briefing by the defendant or the government, a panel of the Ninth Circuit held that the district court committed an error of law in declining to allow Kenna to “allocute” about victim impact at the son’s sentencing hearing. *Kenna v. United States District Court*, 435 F.3d 1011, 1017 (9th Cir. 2006) (*Kenna I*). Judge Friedman wrote separately to state that he doubted that a “victim has an absolute right to speak at sentencing, no matter what the circumstances,” and that “the statutory standard of ‘reasonably heard’ may permit a district court to impose reasonable limitations on oral statements.” *Id.* at 1018-19 (Friedman, J., dubitante).

The reasoning of *Kenna I* is seriously flawed, which should be pointed out in future cases. In concluding that the phrase “reasonably heard” was ambiguous, the Ninth Circuit gave equal weight to the definition of “reasonably heard” as a legal term of art and Kenna’s dictionary definition of “hear” as “to perceive (sound) by the ear,” *Kenna*, 435 F.3d at 1014, contrary to at least two rules of statutory construction. *See Buckhannon Bd. And Home Care, Inc. v. West Virginia Dept. of Health and Human Services*, 532 U.S. 598, 615 (2001) (Scalia and Thomas, JJ., concurring) (meaning of a legal term of art is followed over a dictionary definition); *Sullivan v. Stroop*, 496 U.S. 478, 483 (1990) (“where a phrase in a statute appears to have become a term of art . . . any attempt to break down the term into its constituent words is not apt to illuminate its meaning.”). Further, the Ninth Circuit concluded that Congress’ use of the word “public” made “the right to be ‘heard’ at a ‘public proceeding’ . . . synonymous with ‘speak.’” *Kenna*, 435 F.3d at 1015. This too was wrong, as the purpose of the word “public” in the CVRA was to limit the right to be “reasonably heard” to public, as opposed to closed, proceedings. *See* 150 Cong. Rec. S10910 (Oct. 9, 2004); 150 Cong. Rec. S4268 (April 22, 2004). *See also* S. Rep. No. 108-191 at 38 (Nov. 7, 2003).

The Ninth Circuit concluded, “as did *Degenhardt*, that both readings of the statute are plausible.” *Kenna*, 435 F.3d at 1015. In *United States v. Degenhardt*, 405 F. Supp.2d 1341 (D. Utah 2005), Judge Cassell found that the term “reasonably heard” was ambiguous and concluded based on Senator Kyl’s floor statements that victims have an absolute right to speak. Previously, *Marcello*, which held that victims do not have an absolute right to speak, was the only opinion on the subject. The split in authority “developed” while *Kenna I* was pending. In *Degenhardt*, the government had announced prior to sentencing that some of the victims wished to speak at the sentencing hearing. Defense counsel, Assistant Federal Defenders, did not object or litigate the issue, since the judge had accepted Mr. Degenhardt’s guilty plea under Fed. R. Crim. P. 11(c)(1)(C) in May 2005, so whatever a victim might say could make no difference. Mr. Degenhardt was sentenced on December 9, 2005, and judgment entered the same day. The *Degenhardt* opinion was issued on December 21, 2005, and stated, “the court cannot agree with another district court’s conclusion that in-court victim allocution at one

defendant's sentencing eliminates the need to allow victim allocution when a co-defendant is sentenced," citing to Kenna's pending mandamus action before the Ninth Circuit. *See* 405 F. Supp.2d at 1348 n. 42. The following day, Steve Twist of CVLAP submitted the opinion to the Ninth Circuit under Fed. R. App. P. 28(j).¹⁴

With the rabbit in the hat, the Ninth Circuit turned to the floor statements of the bill's sponsors stating that the purpose of the section was to allow the victim to directly address the court in person. *Kenna*. at 1015. Reliance on those floor statements was inappropriate, first because the statute is not ambiguous, and second because they are not a reliable source of congressional intent. *See* Part I(B), *supra*.

Still, there are some helpful snippets in this opinion. Relying on Kenna's representation that he only wished to "allocute" about victim impact and not to "present evidence," the court distinguished the case from one in which a victim wishes to "present evidence," in which case being heard in writing is appropriate. *Id.* at 1014 n.2. (It later emerged that this was a test case intended to establish a right to present facts and argument under the sentencing guidelines.) The Ninth Circuit also recognized that the district court "may place reasonable constraints on the duration and content of victims' speech," *id.* at 1014, but did not think Kenna's statement would be irrelevant or repetitious because Kenna had represented that "impacts" had changed over time. *Id.* at 1013, 1016-17. (As it turned out, he merely repeated what he said at the father's sentencing.) The court also recognized that the CVRA provides that in a case with multiple victims where it is impracticable to allow all of them to speak, the district court may "fashion a reasonable procedure . . . that does not unduly complicate or prolong the proceedings." *See* 18 U.S.C. § 3771(d)(2). It said this "may well be appropriate in a case like this one," *Kenna I*, 435 F.3d at 1014 n.1, leaving that avenue open to the district court if it "re-opened" the sentencing hearing.

2. Do victims have a right to make unsworn statements without notice?

In any case in which you suspect or know that a victim will seek to "speak" at sentencing (or a public proceeding involving release or plea), insist on notice of what the victim intends to say and disclosure of any statement in the possession of the Probation Officer, the government or the court (victims sometimes write directly to the court). If a victim stands up and asks to speak on the spot (as Kenna did), move for the same notice and disclosure and a continuance in order to have a fair opportunity to respond.

Advance notice is necessary for several reasons. First, the court must make a reasoned decision whether this person is a "victim" at all, and if so, in what form he or she will be allowed to be "reasonably heard." The question whether a person is a victim is often complex and cannot be reliably determined on the spot, but only with advance

¹⁴ *See* December 22, 2005, Letter of Steve Twist to Clerk, Ninth Circuit Court of Appeals, docketed December 23, 2005, *Kenna v. United States District Court*, No. 05-73467.

notice and input from the parties.¹⁵ Similarly, the court and the parties must know the likely content of a victim's statement in advance in order to determine whether the victim should be heard orally, in writing, only on limited matters, or not at all. For example, a victim may be allowed to "allocute" about victim impact (as the court believed in *Kenna I*), but not to provide unsworn factual testimony (as was attempted in *Kenna II*), and not on irrelevant or prejudicial matters. See *Marcello*, 370 F.Supp.2d at 747-48 (government's contention that the court must hear the victim's views orally without providing a written summary and even if those views would have no bearing on the decision before the court was "extraordinary.").

Second, a victim (or the government) may attempt to evade the constitutional requirements and rules designed to ensure notice and adversarial testing by presenting unsworn and untestable allegations that may impact the sentencing decision in the guise of the right to be "reasonably heard." Defendants have a right under the Due Process Clause to notice and the opportunity to challenge facts and arguments that may be used to deprive them of life, liberty or property. See *Burns v. United States*, 501 U.S. 129, 137-38 (1991); *Gardner v. Florida*, 430 U.S. 349, 351, 358 (1977); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Curran*, 926 F.2d 59, 61, 63 (1st Cir. 1991). To protect those rights, the rules require notice in the presentence report; an opportunity to investigate, object and present contrary evidence and argument to the Probation Officer; an opportunity to file a sentencing memorandum with the court and to argue orally to the court; an opportunity for a hearing; the right to obtain witness' statements, to have witnesses placed under oath and to question witnesses at any such hearing; and a right to have the court resolve any disputed matter. See Rule 32(e)(2), (f), (g), (h), (i); Fed. R. Crim. P. 26.2(a)-(d), (f). These protections apply to information about victim impact and restitution, just as they apply to information provided by the government or any other witness. See Fed. R. Crim. P. 32(d)(2)(B), (D); 18 U.S.C. § 3664(a), (b), (e).

If the statutory right of victims to be "reasonably heard" is interpreted as permitting victims, unlike any witness or party, to present allegations for the first time at the sentencing hearing (or a hearing on release or plea) under the guise of an unsworn right to "be heard," the practical effect will be to circumvent the rules providing for notice and adversarial testing, and to violate defendants' constitutional rights under the Due Process Clause. A troubling example is *United States v. Leach*, 206 Fed. Appx. 432 (6th Cir., Nov. 6, 2006), where the "government did not present any *witnesses* at the sentencing hearing," but with no notice, had the defendant's estranged wife, with whom he was in a contentious divorce, make an on-the-spot "statement" as a "victim" of the defendant's felon-in-possession offense. She minimized his medical problems, claimed

¹⁵ See, e.g., *United States v. Sandhu*, 462 F.Supp.2d 663 (E.D. Pa. 2006) (where defendant commercial truck driver was convicted under 18 U.S.C. § 1001 for false statements in his daily logbook, family members of persons killed in an accident caused by the defendant would be allowed to address the court at sentencing because there was a nexus between the falsifications and the accident); *United States v. Sharp*, 463 F.Supp.2d 556 (E.D. Va. 2006) (woman who wished to testify at sentencing based on her claim that her boyfriend had mistreated her as a result of smoking marijuana he purchased from the defendant was not a "victim" within the meaning of the CVRA).

he was “very dangerous,” and said that “as long as [his] trigger finger works, there are people that are in danger.” In *United States v. Vampire Nation*, 451 F.3d 189 (3d Cir. 2006), the Third Circuit held that no notice is required of an upward variance, in part because it “would be impossible to predict what statements victims might offer at sentencing.” *Id.* at 197 n.4. The Tenth Circuit reached the opposite result, holding that if the judge forms an intention to increase the sentence based on a victim’s statement, the defendant must be given notice and an opportunity to respond. See *United States v. Dozier*, 444 F.3d 1215, 1127-28 (10th Cir. 2006).

That the CVRA may not be used to circumvent notice and adversarial testing is clear when one considers that the defendant, whose life, liberty and property rights are at stake, has a *constitutional* right to be heard, yet even a defendant’s right to allocute at sentencing is not absolute, and may be denied in certain situations, or limited as to duration and content. *United States v. Mack*, 200 F.3d 653 (9th Cir. 2000); *Ashe v. North Carolina*, 586 F.2d 334, 336-37 (4th Cir. 1978); *Marcello*, 370 F.Supp.2d at 750 & n.10. If the defendant wishes to *testify*, he is placed under oath, subjected to cross-examination, and limited to matters that are relevant and material and about which he is competent to testify. *Id.* at 750. The defendant may be precluded from testifying at all if he fails to comply with rules requiring notice, *Michigan v. Lucas*, 500 U.S. 145, 152-53 (1991); *Taylor v. Illinois*, 484 U.S. 400, 417 (1988); *Williams v. Florida*, 399 U.S. 78, 81-82 (1970), does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under the rules of evidence, *Taylor*, 484 U.S. at 410, may not “testify[] *falsely*,” *Nix v. Whiteside*, 475 U.S. 157, 173 (1986) (emphasis in original), and has no right to introduce hearsay, *Chambers v. Mississippi*, 410 U.S. 484 (1973), or evidence that is otherwise unreliable. *United States v. Scheffer*, 523 U.S. 303, 309 (1998).

Victim testimony carries a heightened risk of unreliability. As some victims told Congress during the legislative debates on the proposed constitutional amendment, victims are often in an emotional state in which they seek vengeance, not justice.¹⁶ Further, victims are not always pure. One reason the colonies moved to a system of public prosecutions was that victims abused the system of private prosecutions to exert pressure for financial reparation.¹⁷ Victim provocation is sufficiently common that it is an explicit ground for departure under the guidelines.¹⁸

Thus, victims who seek to testify to facts that may impact the length of the sentence or the amount of restitution (or a decision on release or acceptance of a plea) must be subject to the same procedural safeguards that the rules, statutes and Constitution require with respect to any other witness.

¹⁶ S. Rep. No. 108-191 at 85 (Nov. 7, 2003) (minority views).

¹⁷ *Id.* at 68.

¹⁸ U.S.S.G. § 5K2.10.

3. Do victims have a right to litigate defendants' sentences as the functional equivalent of parties?

On remand after *Kenna I*, the CVLAP and *amicus* NCVLI argued that victims have an absolute right to receive the pre-sentence report, not subject to limits on disclosure applicable to third parties. Acknowledging that nothing in the language of the CVRA grants victims a right to obtain the report, they argued that such rights are implied in the rights to “be reasonably heard” and to “be treated with fairness” (which they said included a right to “due process”), which, they said, gave victims a right to recommend a sentence and, to that end, to receive all information relevant to the court’s sentencing decision, including the guideline facts and calculation and the defendant’s personal history and characteristics.¹⁹ Similar arguments have been advanced to urge the Sentencing Commission and the Rules Advisory Committee to promulgate policies and rules to facilitate victim litigation of the sentence as the functional equivalent of parties.²⁰

The government, the defendant, and the probation department (by letter to the government) opposed the motion. They argued, *inter alia*, that while Kenna had a legitimate right to inform the court of the impact of the offense on him personally, he had no right to litigate the sentence and, accordingly, no right to discovery. Thus, he was subject to the limits on disclosure applicable to third parties, and had not made a compelling showing of need sufficient to overcome the privacy and confidentiality interests of the defendant, other victims and other persons who provided information included in the report.²¹

At a hearing on the matter, the CVLAP demanded the entire pre-sentence report, including the defendant’s personal, family, financial, medical, psychological, emotional, educational, employment and uncharged criminal history, and declined the offer of the court and the parties to disclose a portion of the report containing information regarding

¹⁹ *United States v. Leichner*, No. CR-00568-JFW, Memorandum of Points and Authorities in Support of Crime Victim’s Motion for Disclosure of Presentence Report (May 15, 2006); Brief of *Amicus Curiae*, National Crime Victim Law Institute, in Support of Victim’s Motion for Disclosure of Presentence Report (May 15, 2006); Victim’s Reply in Support of Crime Victim’s Motion for Disclosure of Presentence Report (June 17, 2006).

²⁰ Statement of Paul G. Cassell Before the United States Sentencing Commission at 1-15 (Mar. 15, 2006), http://www.ussc.gov/hearings/03_15_06/cassell-testimony.pdf; Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure*, 2005 B.Y.U. L. Rev. 835, 892-905 (2005), Paul G. Cassell, *Treating Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, <http://old.law.utah.edu/faculty/bios/cassellp/website/index.html>.

²¹ *United States v. Leichner*, No. CR-00568-JFW, Government’s Response to Victim Patrick Kenna’s Motion for Disclosure of Presentence Report (May 30, 2006); Defendant’s Opposition to Motion of W. Patrick Kenna to Disclose PSR (June 6, 2006).

the impact on Kenna alone (in particular, regarding restitution, of which he was owed none because he recovered his entire investment) so that he could verify its accuracy.²²

The district court rejected Kenna's argument that the CVRA or its legislative history confers a general right to obtain the pre-sentence report, held that Kenna was therefore subject to the balancing test applicable to third parties, and found that he had failed to offer reasons to obtain the report sufficient to outweigh the reasons for keeping it confidential. The Ninth Circuit affirmed. *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006) (*Kenna II*).

The CVRA gives victims a right to be "reasonably heard" at public proceedings involving sentencing.²³ This is a "right of allocution, much like that traditionally guaranteed a criminal defendant before sentence is imposed," and not a right to present evidence and legal argument. *Kenna I*, 435 F.3d at 1014 & n.2 (distinguishing allocution from presentation of facts and argument).

In *Kenna II*, however, Kenna's advocates relied on a floor statement by Senator Kyl stating that "victim impact" was intended to include not only "the character of the victim" and "the impact of the crime," but "sentencing recommendations." 150 Cong. Rec. S10911 (Oct. 9, 2004) (statement of Sen. Kyl). From this, they said, it flowed that victims have a right to the pre-sentence report so that they can recommend a sentence based on the sentencing guidelines.

The Ninth Circuit implicitly rejected this argument, and rightly so. First, the plain language of the statute in no way gives victims a right to make sentencing recommendations, much less to receive discovery and litigate the sentence.

Second, floor statements of individual legislators, especially those of a sponsor disappointed with the final bill, are a notoriously unreliable source of congressional intent. *See* Part I(B)(2). (And even Senator Kyl did not say victims have a right to discovery or to litigate a defendant's sentence).

Third, the full legislative history demonstrates that the full Congress did not intend to give victims a right to recommend a sentence, much less to receive discovery and litigate the sentence under applicable law.

The House Judiciary Committee Report, a more reliable source than floor statements, *see Zuber v. Allen*, 396 U.S. 168, 186 (1969), states only that the rights already codified for victims in Title 42 without an enforcement mechanism were being moved to Title 18 with an enforcement mechanism. *See* H.R. Rep. No. 108-711, U.S.C.C.A.N. 2274, 2277 (Sept. 30, 2004). Under 42 U.S.C. § 10606(b)(4), now repealed, victims had a right "to be present at all public court proceedings related to the

²² *United States v. Zvi Leichner*, No. CR 03-00568-JFW, Transcript of Hearing (June 19, 2006).

²³ 18 U.S.C. § 3771(a)(4).

offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.” In the only cases mentioning “testimony by the victim” at sentencing, it was understood to mean testimony about “victim impact,” not controverted factual matters, and certainly not argument under the applicable sentencing law. *See United States v. McVeigh*, 106 F.3d 325, 332 (10th Cir. 1997); *United States v. Spann*, 51 M.J. 89, 93 (C.M.A. 1999). Congress is assumed to be “aware of existing law when it passes legislation.” *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). The House Judiciary Committee in no way indicated that it contemplated that the right to be “reasonably heard” under the CVRA would encompass more than allocution about traditional victim impact.

The Senate Judiciary Committee Report on the failed victim rights constitutional amendment demonstrates that even a victim’s *constitutional* right to be “reasonably heard” was intended to be no more than a right of “allocution”:

This provision guarantees that victims will have the right to “allocute” at sentencing. Defendants have a constitutionally protected interest in personally addressing the court. *See Green v. United States*, 365 U.S. 301 (1961). This provision would give the same rights to victims²⁴

In *Green*, the Supreme Court held that Rule 32(a) required the court, before imposing sentence, to afford the defendant the right to speak personally in his own behalf. A defendant’s right to allocute is a right to make a *personal* statement, not an opportunity to present evidence or argument under the sentencing guidelines and statutes. *See Kenna I*, 435 F.3d at 1014 & n.2. The defendant’s *separate* right to litigate his sentence is based on his status as a party and his right to due process of law as the party whose liberty is at stake. Victims, however, are not parties, nor is their liberty at stake. *Cf. United States v. Ingrassia*, 2005 WL 2875220 *17 (E.D.N.Y. 2005) (CVRA “no more requires disclosure of the pre-sentence report to meet its remedial goal of giving crime victims a voice in sentencing than it does disclosure of all discovery in a criminal case to promote the goal of giving victims a voice at plea proceedings.”).

As described in the Senate Judiciary Committee Report on the failed victim rights constitutional amendment, the purposes of a victim’s right to “allocute” would be twofold: (1) to ensure that the court would have full information about the impact of a crime, in addition to the other information before it, in crafting an appropriate sentence, and (2) to provide the victim with catharsis.²⁵ As to the content of a victim’s allocution, the Report mentioned only “the character of the victim and the impact of the crime.”²⁶ Likewise, the Ninth Circuit understood that victims would allocute about the “effects of crime” such as physical injuries, feelings, broken families and lost jobs, and could “look

²⁴ S. Rep. No. 108-191 at 37 (Nov. 7, 2003).

²⁵ *Id.*

²⁶ *Id.* at 38.

this defendant in the eye and let him know the suffering his misconduct has caused.” *Kenna*, 435 F.3d at 1016-17 (emphasis in original).

Further, the failed constitutional amendment contained an “adjudicative decisions” clause, which would have required judges to “duly consider” the victim’s “safety, interest in avoiding unreasonable delay, and just and timely claims to restitution” in adjudicative decisions.²⁷ The clause did not require judges to “duly consider” a victim’s opinion as to the length or type of sentence, much less a victim’s opinion regarding what sentence was required or allowed by law.

In fact, it was just such a radical transformation of our criminal justice system that most concerned opponents of the proposed constitutional amendment. *See* Part I(B)(1).

In sum, Congress never contemplated a right to *litigate* defendants’ sentences even under a constitutional amendment, much less under the statute it passed as a compromise.

Amicus NCVLI also argued that *Kenna*’s statutory right to “be treated with fairness,” 18 U.S.C. § 3771(a)(8), included a right to due process of law, again relying solely on a floor statement by Senator Kyl that “fairness includes the notion of due process,” and “[t]his provision is intended to direct government agencies and employees . . . to afford them due process.” *See* 150 Cong. Rec. S10911 (Oct. 9, 2004) (statement of Sen. Kyl). According to NCVLI, this entitled victims to make a “meaningful sentence recommendation,” in pursuit of which the victim “must have all portions of the presentence report that will guide the court as to sentence.”

In April 2004, Senator Kyl issued a statement explaining that a crime victims’ constitutional amendment was needed because crime victims “have **no** constitutional rights in the criminal justice process.”²⁸ Congress thereafter did not enact a constitutional amendment, and no such right is found in the existing Constitution. The Due Process Clause provides that no person may be deprived through official action of life, liberty or property without due process of law. A judge’s decision regarding a criminal defendant’s sentence cannot deprive a victim of a constitutionally protected interest in life, liberty or property.²⁹ *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 125 S. Ct. 2796, 2810 (2005) (“the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its ‘substantive’ manifestations.”); *Pusey v. City of Youngstown*, 11 F.3d 652, 656 (6th Cir. 1994) (victim had no constitutionally protected liberty interest in

²⁷ *See* S.J. Res. 1, § 2 (108th Cong.).

²⁸ *See* Crime Victims’ Rights Amendment: The Need for Constitutional Protection at 2, April 7, 2004 (emphasis in original), available at <http://rpc.senate.gov/files/Apr0704VictimsSD.pdf>.

²⁹ *See also Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460-65 (1989); *Olim v. Wakinekona*, 461 U.S. 238, 250 & nn.12 & 13 (1983); *Paul v. Davis*, 424 U.S. 693, 701 (1976).

statutory right to notice of plea hearing because statute “does not specify how the victim’s statement must affect the hearing nor does it require a particular outcome based on what the victim has said.”); *Dix v. County of Shasta*, 963 F.2d 1296, 1300 (9th Cir. 1992) (in providing that judge must consider victim statements in imposing sentence, state victim rights statute did not create a constitutionally protected liberty interest because it did not mandate a particular result based on a finding about the victim).

4. Do victims have a right to obtain the pre-sentence report under the test applicable to third parties?

By rule and statute, the pre-sentence report is disclosed only to the defendant, the defendant’s attorney, and the attorney for the government. *See* Fed. R. Crim. P. 32(e)(2); 18 U.S.C. § 3552(d); 18 U.S.C. § 3664(b). The amount of restitution for a particular victim is disclosed to that victim. 18 U.S.C. § 3664(d)(2)(A)(ii). Otherwise, “the privacy of any records filed, or testimony heard, pursuant to this section,” including the defendant’s financial information and information submitted by other victims, “shall be maintained to the greatest extent possible.” 18 U.S.C. § 3664(d)(4). Many districts and circuits have local rules requiring the pre-sentence report to be sealed and prohibiting disclosure to third parties.

The courts have established a strong presumption of confidentiality in the pre-sentence report with respect to third parties. The report contains, among other things, information about the offense; the defendant’s cooperation with the government; the defendant’s history and characteristics including family background, health, medical and psychological information, educational background, financial condition, uncharged conduct, prior arrests and convictions; information about the financial, social, psychological and medical impact on all victims of the offense; and information sufficient for a restitution order. *See* Fed. R. Crim. P. 32(d); 18 U.S.C. § 3664(a), (d)(3). The information comes from a variety of sources, including the defendant, the defendant’s family, employers and friends, medical, psychiatric and social services providers, cooperating witnesses, grand jury minutes, law enforcement reports, and victims of the offense. The defendant in particular, and other sources as well, provide information with the assurance that it will be kept confidential, and would not provide it otherwise.

The presumption of confidentiality rests on the need to protect the privacy interests of the defendant, the defendant's family, and crime victims, the court’s interest in receiving full disclosure of information relevant to sentencing, and the interest of the government in the secrecy of information related to ongoing criminal investigations and grand jury proceedings. *E.g.*, *United States v. Corbitt*, 879 F.2d 224, 229-30 (7th Cir. 1989). To overcome the presumption of confidentiality, a third party must establish a compelling need for particular information in the report such that disclosure is necessary to meet the ends of justice. *E.g.*, *id.* at 238-39; *United States v. Charmer Industries, Inc.*, 711 F.2d 1164, 1175 (2d Cir. 1983).

Third parties have failed to meet this test in every reported case,³⁰ save one. In that highly unusual case, *United States v. Schlette*, 842 F.2d 1574 (9th Cir. 1988), the defendant was deceased, the court concluded (perhaps incorrectly) that his privacy rights did not survive him, and there was no evidence before the court in that case that the privacy interests of anyone else were implicated. *Id.* at 1581. The Ninth Circuit also concluded that there was no need to keep the report confidential in order to preserve the free flow of information in other cases, relying on a study that concluded that *defense access* to the pre-sentence report had not had an appreciable effect on the free flow of information. *Id.* at 1579-80 (citing Fennell and Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv.L.Rev. 1613 (1980)). As the Seventh Circuit soon pointed out, the Ninth Circuit was mistaken, as the same study “noted that ‘third-party disclosure may adversely affect the court’s ability to obtain information,’ and included in its recommendations a suggestion that ‘the district courts should restrict noncorrectional parties’ access to the presentence report.’” *Corbitt*, 879 F.2d at 234 (quoting Feller and Hall, *supra*, at 1684, 1696).

The defendant’s right of access to the pre-sentence report, itself of fairly recent vintage and based on the defendant’s right to due process of law, provides no basis for disclosing it to anyone else. *See United States Dept. of Justice v. Julian*, 486 U.S. 1, 9-10, 12 (1988); *Corbitt*, 879 F.2d at 229, 235-36; *Charmer Industries*, 711 F.2d at 1171-72; *Hancock Bros.*, 293 F. Supp. at 1234.

Kenna argued that his alleged right to recommend a sentence under the guidelines and to restitution established a compelling need for the entire pre-sentence report under *Schlette*. As noted above, the district court and the court of appeals rejected the first justification. Kenna’s counsel rejected the offer of the court and the parties to disclose portions of the report pertaining directly to the impact on him, in particular restitution, so that he could check its accuracy. Note, however, that the CVRA does not expand victim rights with respect to restitution, but rather gives victims a right to “full and timely restitution as provided in law.” Existing law provides particular procedures for victims to receive, provide and correct information pertaining to restitution. *See* 18 U.S.C. § 3664(d)(2), (5), (e).

³⁰ *See United States v. Huckaby*, 43 F.3d 135 (5th Cir. 1995); *United States v. Anzalone*, 886 F.2d 229 (9th Cir. 1989); *United States v. McKnight*, 771 F.2d 388 (8th Cir. 1985); *United States v. Anderson*, 724 F.2d 596 (7th Cir. 1984); *United States v. Charmer Industries, Inc.*, 711 F.2d 1164 (2d Cir. 1983); *United States v. Martinello*, 556 F.2d 1215 (5th Cir. 1977); *United States v. Cyphers*, 553 F.2d 1064 (7th Cir. 1977); *United States v. Dingle*, 546 F.2d 1378 (10th Cir. 1976); *United States v. Figurski*, 545 F.2d 389 (4th Cir. 1976); *United States v. Walker*, 491 F.2d 236 (9th Cir. 1974); *United States v. Greathouse*, 484 F.2d 805 (7th Cir. 1973); *United States v. Evans*, 454 F.2d 813 (8th Cir. 1972); *United States v. Boesky*, 674 F.Supp. 1128 (S.D.N.Y. 1987); *United States v. Krause*, 78 F.R.D. 203 (E.D. Wis. 1978); *Hancock Bros. v. Jones*, 293 F. Supp. 1229 (N.D. Cal. 1968).

D. Right to be “Reasonably Heard” at a Public Proceeding Involving Release or Plea

1. Detention hearings

In *United States v. Marcello*, 370 F.Supp.2d 745 (N.D. Ill. 2005), the district court held that victims do not have a “right” to make oral statements in every situation, and declined to allow the victim (the son of a man who was murdered twenty years ago) to make a statement in open court at a detention hearing opposing the defendant’s pre-trial release. *Id.* at 745, 750. The statute unambiguously did not mandate an oral statement; rather it contained a “reasonableness” requirement and a legal term of art -- an opportunity to be “heard” -- which includes consideration of the papers alone. Because the language is plain, the court declined to turn to the legislative history, which consisted only of Senator Kyl’s floor statement and reflected no reasoned debate. *Id.* at 748-50. Whether a victim may be heard depends on whether his intended statement is relevant, material and based on personal knowledge. As applied to the issues at the detention hearing, the victim had no personal knowledge regarding the strength of the case against the defendant; the seriousness of the offense, murder, was not in doubt; and there was no claim that the victim would be endangered by the defendant’s release. *Id.* at 747. “For me to consider the likelihood of guilt based solely on a witness’s faith in the prosecution would violate the law that an indictment is merely an accusation.” *Id.* at 747 n.5. While certain victims are allowed to speak at sentencing pursuant to Rule 32(i)(4), and victim statements at sentencing will “almost always” be relevant, material and based on personal knowledge (apparently referring to “victim impact” statements), this is not the case in a detention hearing, where the defendant is “clothed with the presumption of innocence and against whom the victim can offer no material information.” *Id.* at 750.

2. Plea agreements, dismissals

Victims have a right to be “reasonably heard at any public proceeding in the district court involving release [or] plea,” and a “reasonable right to confer with the attorney for the government in the case.” 18 U.S.C. § 3771(a)(4), (5). “Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.” 18 U.S.C. § 3771(d)(6). “Nothing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement.” *In re Huff Asset Management Co.*, 409 F.3d 555, 564 (2d Cir. 2005). Moreover, a defendant has due process rights to be accurately apprised of the consequences of a plea, *Mabry v. Johnson*, 467 U.S. 504, 509 (1984), and to specific enforcement of a promise made in a plea bargain, *Santobello v. New York*, 404 U.S. 257, 262 (1971).

In *United States v. Heaton*, 458 F.Supp.2d 1271 (D. Utah 2006), however, Judge Cassell required that the government report back to him what the (possible) victim’s views were regarding the government’s decision to dismiss an indictment. Requiring the government to report the victim’s views, Judge Cassell said, was necessary to effectuate the victim’s right “to be treated with fairness and with respect for [her] dignity and

privacy,” which, he said, is not restricted to a public proceeding. In this manner, the “public proceeding” requirement of the right to be heard was circumvented. Judge Cassell also relied on Senator Kyl’s outlandish floor statement that the right to be treated with fairness gives victims a right to due process. *See* Part III(C)(3), *supra*.

This case was cited in support of Judge Cassell’s proposal to the Rules Advisory Committee to amend Rule 48 to require the judge to consider the victim’s views on dismissal. The Rules Advisory Committee rejected the proposal because there is no public proceeding when the government moves for dismissal, the statute prohibits interference with prosecutorial discretion, and the proposal raised separation of powers problems.

E. Right to “Restitution As Provided in Law”

Under the CVRA, crime victims have a “right to full and timely restitution *as provided in law*.” 18 U.S.C. § 3771(a)(6) (emphasis supplied). Congress did not intend to expand the right to restitution under the MVRA or VWPA in any way. *See* H.R. Rep. No. 108-711, 2005 U.S.C.C.A.N. 2274, 2283 (Sept. 30, 2004) (“it makes no changes in the law with respect to victims’ ability to get restitution”). *Accord United States v. Lay*, 456 F.Supp.2d 869 (S.D. Tex. 2006) (restitution may not be ordered against a deceased defendant); *United States v. Garcia*, ___ F.Supp.2d ___, 2007 WL 841612 (D. Utah Mar. 21, 2007) (Cassell, J.) (court lacked authority to award restitution for time lost in clearing stolen credit card). Even the proposed constitutional amendment was not intended to change federal restitution law but only to extend it to cases in state court. *See* S. Rep. No. 180-191 at 29 (Nov. 7, 2003).

A novel question is whether a deceased victim’s estate has a right to restitution for future lost earnings if the victim had lived. The MVRA requires that in a case involving “bodily injury,” an order of restitution shall require the defendant, *inter alia*, to “reimburse the victim for income lost by such victim as a result of such offense.” *See* 18 U.S.C. § 3663A(b)(2)(C). It is not at all clear that Congress intended for future lost income to be awarded to a deceased victim’s estate under this provision. The plain language, “reimburse,” seems to refer to *past* lost income, and the statute says nothing about “future” lost income. Further, Congress specifically intended with the MVRA to guarantee that “the sentencing phase of criminal trials do not become fora for the determination of facts and issues better suited to civil proceedings,” and believed that “speculative” losses should not be subject to mandatory restitution. *See* S. Rep. No. 104-179, Part IV(B). The Seventh Circuit held that “an order requiring a calculation of lost future earnings unduly complicates the sentencing process and hence is not authorized by the Victim and Witness Protection Act—unless . . . the amount is uncontested,” noting (as in the MVRA) that “‘Future’ is not in the statute.” *United States v. Fountain*, 768 F.2d 790, 802 (1985).

The Tenth Circuit has suggested (but not held) that future lost earnings might not be properly awarded to a deceased victim’s estate under the MVRA. *United States v. Bedonie*, 413 F.3d 1126 (10th Cir. 2005). The Ninth Circuit has held that future lost

earnings are properly awarded to a deceased victim's estate, relying in part on an opinion by Judge Cassell and a floor statement by Senator Kyl. *United States v. Cienfuegos*, 462 F.3d 1160 (9th Cir. 2006).

The history of that opinion and that floor statement is interesting. After the CVRA was introduced, but before it was passed, Judge Cassell had before him two cases involving deceased victims. In *United States v. Bedonie*, the defendant pled guilty to involuntary manslaughter in connection with a drunk driving accident that resulted in the death of a passenger. In *United States v. Serawop*, the defendant was found guilty of voluntary manslaughter for throwing a three-month-old baby, resulting in her death. On January 22, 2004, Judge Cassell ordered Bedonie to pay restitution to the mother of the deceased to cover funeral and burial expenses and lost wages for attending the hearing, and expressed frustration that he had no authority to order future lost income restitution. Judgment entered on January 23, 2004. Judge Cassell then revoked the judgment in *Bedonie*, consolidated the case with *Serawop*, and appointed an expert *sua sponte* to determine future lost income for both deceased victims.

Neither the prosecutor, the probation officer, nor any victim had sought restitution for future lost income in either case, and the government opposed Judge Cassell's actions. Judge Cassell accused the government of violating its duties. *United States v. Serawop*, 303 F.Supp.2d 1259 (D. Utah Feb. 18, 2004). The government withdrew its opposition. On May 11, 2004, Judge Cassell ordered each defendant to pay future lost income restitution to the deceased victims' survivors in the amount of \$446,000 and \$325,000 respectively. See *United States v. Bedonie*, *United States v. Serawop*, 317 F.Supp.2d 1285 (D. Utah May 11, 2004).

Senator Kyl did not mention this novel theory when introducing the CVRA on the Senate floor on April 22, 2004. In his statement before final passage on October 9, 2004, however, he stated: "We specifically intend to endorse the expansive definition of restitution given by Judge Cassell in U.S. v. Bedonie and U.S. v. Serawop in May 2004." 150 Cong. Rec. S10911 (Oct. 9, 2004) (floor statement of Sen. Kyl).

On June 27, 2005, the Tenth Circuit reversed the restitution order in *Bedonie*, holding that Judge Cassell had no authority to re-open the judgment under the restitution statutes or Rule 35. The Tenth Circuit found that there could have been no "clear" error in the initial restitution order because (1) no other court had ever ordered future lost income restitution for a deceased victim under 18 U.S.C. § 3663A(b)(2)(C); and (2) the MVRA probably did not apply because driving under the influence causing serious bodily injury was not a crime of violence under *Leocal*. See *United States v. Bedonie*, 413 F.3d 1126 (10th Cir. 2005).

On June 6, 2005, the Tenth Circuit reversed Serawop's conviction based on an erroneous jury instruction, and so did not reach the defendant's appeal of the restitution order. Serawop then pled guilty to voluntary manslaughter. Over Serawop's objection, Judge Cassell adopted his May 2004 lost income restitution order and memorandum in full, noting in support Senator Kyl's October 9, 2004 floor statement approving that very

order. *United States v. Serawop*, 409 F.Supp.2d 1356, 1357-58 (D. Utah 2006) (Cassell, J.).

F. Right to Discovery?

The CVRA does not give victims a right to discovery in the criminal case or for use in a civil case. *See United States v. Moussaoui*, ___F.3d___, 2007 WL 755276 (4th Cir. Mar. 14, 2007); *United States v. Sacane*, slip op., 2007 WL 951666 (D. Conn. 2007); *United States v. Ingrassia*, 2005 WL 2875220 *17 (E.D.N.Y. 2005).

G. Proceedings Free From Unreasonable Delay

In *United States v. Tobin*, 2005 WL 1868682 (D.N.H. July 22, 2005), the court granted a joint motion for continuance over the alleged victim's objection, noting that Congress did not intend the CVRA to undermine the Speedy Trial Act or to deprive defendants or the government of a full and adequate opportunity to prepare for trial, and that the defendant's right to adequate preparation is of "constitutional significance." Allowing the victim's "discrete interests" to control "runs the unacceptable risk of [the] wheels [of justice] running over the rights of both the accused and the government, and in the end, the people themselves." *See also* 150 Cong. Rec. S4260-01 at S4268 (Apr. 22, 2004) (statement of Sen. Feinstein) (right to proceedings free of unreasonable delay "is [not] intended to infringe on the defendant's due process right to prepare a defense.").

H. Rights to "Fairness," "Dignity," and "Privacy"

All witnesses and parties are treated with fairness, dignity and privacy within the constraints and demands of the adversary system. But victims and their advocates may argue that the statutory "rights" to "fairness," "dignity," and "privacy" "imply" specific rights not found in the CVRA and to circumvent limitations in the statute. *See United States v. Heaton*, 458 F. Supp.2d 1271 (D. Utah 2006) (Cassell, J.); *United States v. Degenhardt*, 405 F. Supp.2d 1341 (D. Utah 2005) (Cassell, J.). Thus far, no other court has followed that course. If these general rights are used as a springboard for special treatment not otherwise found in the CVRA, there is no logical stopping point. "Fairness" would require whatever the victim views as "fair." Respect for "dignity" would require allowing the victim to litigate the case as a third party/private prosecutor. Respect for "privacy" would require the trial to be closed to the public, or preclude cross-examination of the victim.

III. Procedures

The procedural provisions of the CVRA are poorly written, scattered around and uncoordinated. To protect your client's rights, you need to use the procedures that are in the CVRA (some of which are hard to recognize), and insist on all procedures that are fundamental to a fair and reliable adversary process.

A. The *Kenna* Cases

The need to insist on regular procedures is amply demonstrated by the Ninth Circuit's *Kenna* cases, where a lack of any orderly procedure resulted in various factual and legal mistakes in *Kenna I*, and full and fair procedures in the district court (though not in the appeals court) led to a correct result in *Kenna II*. The troubling history of these cases is not much in evidence in the court of appeals' opinions. This account is based on a review of the complete district and appeals court records.

Kenna I. *Kenna* did not make or file anything recognizable as a "motion" asserting a right to "be reasonably heard," as the statute requires. 18 U.S.C. § 3771(d)(3). The district court therefore did not hear from the parties, hold any kind of hearing, or press *Kenna* on what he actually intended to say. The Crime Victim Legal Assistance Project then filed its first mandamus action, asking the Ninth Circuit panel to vacate the sentence and order the district court to re-sentence the defendant after hearing from "the victims." *Id.* at 1017. The panel then created a number of serious problems. It issued its decision six months, rather than 72 hours, after the petition was filed, contrary to 18 U.S.C. § 3771(d)(3). By then, the judgment had become final. The panel posed this task for the district court: "In ruling on the motion [to re-open], the district court must avoid upsetting constitutionally protected rights, but it must also be cognizant that the only way to give effect to *Kenna*'s right to speak as guaranteed to him by the CVRA is to vacate the sentence and hold a new sentencing hearing." *Id.* at 1017. Compounding the problem, the panel inexplicably failed to treat the defendant as a respondent to the petition for mandamus, issuing orders to respond only to the trial judge (who did respond) and the government (which did not), contrary to Fed. R. App. P. 21.³¹ As a result, the court of appeals (like the district court before it) had no briefing by any party to the proceeding, including the defendant whose due process and double jeopardy rights were at stake. The panel merely stated that the defendant "is not a party to this mandamus action," while correctly recognizing that "reopening his sentence in a proceeding where he did not participate may well violate his right to due process." 435 F.3d at 1017. Finally, the opinion concluded by holding that the district court must entertain a motion to re-open by *any* of the victims in the case, and if granted, allow *any* of them to speak at a new sentencing hearing, despite the fact that only *Kenna* had filed a petition for writ of mandamus, thus, according to 18 U.S.C. § 3771(d)(5), confining any relief to *Kenna* alone. Judge Friedman (writing dubitante) noted that this was probably wrong. 435 F.3d at 1019. In sum, *Kenna I* incorrectly suggests (1) that a final judgment may be "re-opened" as a result of a successful mandamus action, (2) that Fed. R. App. 21 and a defendant's due process rights may be ignored in a mandamus action, and (3) that if one victim complies with the requirements of 18 U.S.C. § 3771(d)(5), the district court must entertain a motion to "re-open" by and grant relief to any and all victims.

Kenna II. The district court then granted *Kenna*'s motion to re-open the sentencing hearing. But first, the Crime Victim Legal Assistance Project filed a motion asserting a right to obtain the entire presentence report. It filed this motion *ex parte*,

³¹ *Kenna v. United States District Court*, No. 05-73467 (9th Cir.), Order docketed August 8, 2005, available on PACER and on file with author.

offering no authority or reason why the parties should not be notified or heard.³² Now fully aware of the stakes and the need for full development of the record after being blindsided in *Kenna I*, the district court rejected the motion without prejudice to serving it on the parties, ordered the government to respond “[i]n light of [its] previous failure to take a written position with respect to Mr. Kenna’s appeal to the Ninth Circuit,” and also ordered the defendant to respond.³³ In *Kenna I*, the panel had stated its belief that Kenna “does not claim the right to present evidence or testify under oath; he seeks the right of allocution, much like that traditionally guaranteed a criminal defendant before sentence is imposed. . . . [T]he right to present evidence . . . is not at issue here.” *Kenna I*, 435 F.3d 1014 n.2. Now, however, the Crime Victim Legal Assistance Project revealed its intention to establish a right to present evidence, not only about the personal impact of the offense on the victim, but about the calculation of the guideline range, and a right to litigate the sentence as the equivalent of a party.³⁴ The defendant, the government, and the Probation Office opposed the motion in writing.³⁵ After a full hearing (at which the Crime Victim Legal Assistance Project rejected the offer of the court and the parties to disclose a portion of the report pertaining only to the impact on Kenna), the district court denied the motion.³⁶ The Crime Victim Legal Assistance Project filed another petition for writ of mandamus. Though the Ninth Circuit again failed to treat the defendant as a respondent (and actually prohibited him from responding),³⁷ it did at least have the benefit of a fully developed record below and a brief from the government.³⁸ This time,

³² *United States v. Leichner*, No. CR 03-00568-JFW, Crime Victim’s *Ex Parte* Application for Disclosure of Presentence Report, Apr. 25, 2006 (on file with author).

³³ *United States v. Leichner*, No. CR 03-00568-JFW, Minutes of In Chambers Order, April 26, 2006, Docket No. 216, available on PACER and on file with author.

³⁴ Of note, while some investors lost their life savings, Kenna recovered his entire investment and thus suffered no loss within the meaning of the Federal Sentencing Guidelines. *United States v. Zvi Leichner*, No. CR 03-00568-JFW, Amicus Brief filed by Christopher Lemoine 7-8, April 4, 2006, PACER Docket No. 214 (on file with author).

³⁵ *United States v. Leichner*, No. CR-00568-JFW, Government’s Response to Victim Patrick Kenna’s Motion for Disclosure of Presentence Report, May 30, 2006, including Exhibit A, Letter of Supervising U.S. Probation Officer, May 1, 2006; Defendant’s Opposition to Motion of W. Patrick Kenna to Disclose PSR, May 25, 2006; Defendant’s Response to Victim’s Reply, June 15, 2006, PACER Docket Nos. 226, 227, 230 (on file with author).

³⁶ *United States v. Leichner*, No. CR 03-00568-JFW, Transcript of Proceedings, June 19, 2006 (on file with author).

³⁷ *In re Kenna*, No. 06-73352 (9th Cir.), Order docketed July 3, 2006 (on file with author). Yet in *In re Mikhel*, 453 F.3d 1137 (9th Cir. 2006), decided two days later, the Ninth Circuit correctly treated the defendant as a respondent.

³⁸ *In re Kenna*, No. 06-73352 (9th Cir.), Real Party in Interest’s Response to Victim W. Patrick Kenna’s Petition for Writ of Mandamus, July 3, 2006 (on file with author); *In re Kenna*, No. 06-73352 (9th Cir.), Order docketed July 3, 2006 (on file with author).

the Ninth Circuit rejected Kenna's petition. *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006). But for the participation of the parties in the district court and the government's brief in the court of appeals, the Crime Victim Legal Assistance Project may have succeeded in creating precedent for its preferred private prosecution model, and for disregarding the interests of all concerned in the privacy and confidentiality of the presentence report.

The Re-Sentencing. The beleaguered district court judge then held a new sentencing hearing, permitting Kenna and other victims to speak. Kenna offered no information about further impacts that had occurred since the father's sentencing hearing, as he had claimed he would, instead reiterating the same complaints. Having received further information from defense counsel and the government regarding the extent, truthfulness and completeness of the defendant's cooperation and restitution, the court seriously considered imposing a lower sentence, but in the end imposed the same sentence.³⁹ This arguable waste of resources, and serious threat to the defendant's constitutional rights, might have been avoided had procedures designed to ensure a full airing of the facts and law been followed in the district and appeals court proceedings that led to the decision in *Kenna I*.

B. Procedures Contained in the CVRA and Elsewhere

District Court Proceedings. The district court "shall ensure" that a crime victim "is afforded" the rights described in subsection (a) only in a "court proceeding involving an offense against a crime victim," 18 U.S.C. § 3771(b)(1), not elsewhere and not otherwise. These are not free floating rights that a person claiming to be a victim may assert absent a pending criminal court proceeding. *See, e.g., United States v. Tobin*, 2005 WL 1868682 (D.N.H. July 22, 2005) ("I doubt, but need not decide, whether a pending motion to continue constitutes a public court proceeding at which NHDP is entitled to be heard."); *see also* Part II, *supra*.

A victim must "assert" any rights described in subsection (a) "in the district court in which the defendant is being prosecuted for the crime." 18 U.S.C. § 3771(d)(3). Oddly, the statute also says that rights may be asserted "in the district court in the district in which the crime occurred . . . if no prosecution is underway." *Id.* According to Judge Cassell, this means that persons claiming to be victims can assert a right to "be treated with fairness" by investigative agencies before any charges have been filed against anyone. *See* Written Testimony of Judge Cassell before the Rules Advisory Committee at 95-96, <http://www.uscourts.gov/rules/CR%20Comments%202006/06-CR-002.pdf>. This is in direct conflict with the directive to the district court to "ensure" rights are afforded "[i]n any court proceeding involving an offense against a crime victim." 18 U.S.C. § 3771(b)(1). It is unlikely to get any traction, given the caselaw thus far. *See In re Walsh*, slip op., 2007 WL 1156999 (3d Cir. Apr. 19, 2007) (expressing doubt that a plaintiff in a civil case demanding restraining orders against and arrests of various persons is a "victim"); *United States v. L.M.*, 425 F.Supp.2d 948, 951-52 (N.D. Iowa

³⁹ *United States v. Zvi Leichner*, No. CR 03-00568-JFW, Transcript of Sentencing Hearing 32-96, July 17, 2006 (on file with author).

2006) (CVRA “applies only to public court proceedings.”); *see also* Part II, *supra* (citing cases rejecting demands to institute prosecutions).

A victim must “assert” any rights described in subsection (a) by “motion.” *See* 18 U.S.C. § 3771(d)(3). The “motion” may be made by the victim, the victim’s “lawful representative,” or the government. 18 U.S.C. § 3771(d)(1), (e). Defense counsel should insist that any such “motion” comport with Fed. R. Crim. P. 47 and 49, like any other motion, so that the parties receive notice and have a full and fair opportunity to respond. *See United States v. Eight Automobiles*, 356 F.Supp.2d 223, 227 n.4 (E.D.N.Y. 2005) (victim’s motion must “be made on notice to all parties”). Otherwise, there will be an inadequate basis for the district court’s decision and a deficient record for the court of appeals in deciding either a victim’s mandamus petition or a defendant’s appeal. A putative victim may not “assert” rights in the first instance by seeking mandamus from a court of appeals. *In re Walsh*, slip op., 2007 WL 1156999 (3d Cir. Apr. 19, 2007).

The district court “shall take up and decide any motion asserting a victim’s right forthwith.” 18 U.S.C. § 3771(d)(3). Insist on a full hearing and briefing in the district court so that the decision is well-informed and so that your arguments are already developed before the 72-hour mandamus timetable begins.

The “reasons for any decision denying relief [to the victim] shall be clearly stated on the record.” 18 U.S.C. § 3771(b)(1). On the one hand, this is helpful because it encourages judges to receive and consider input from the parties and make a record in the event of a mandamus action. On the other, it suggests that reasons for granting relief to a victim, which will usually infringe on defendants’ rights, need not be stated on the record. If a lack of reasons will adversely affect your ability to appeal, insist, as a matter of due process and a *cf.* to Rule 12(d), that the reasons for granting relief to the victim be stated on the record.

The Government’s Obligations. The CVRA directs the government to “make [its] best efforts” to see that victims are notified of and accorded the rights set forth in subsection (a),” 18 U.S.C. § 3771(c)(1), which does not itself appear to be enforceable by the district court or through mandamus. The government “shall advise” the victim that s/he may seek the advice of an attorney. 18 U.S.C. § 3771(c)(2). Victims are not entitled to appointment of counsel.

Mandamus. “If the court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus.” 18 U.S.C. § 3771(d)(3). The court of appeals “shall take up and decide such application within 72 hours after the petition has been filed.” *Id.* Proceedings may be stayed or continued for up to five days for purposes of enforcing the CVRA. *Id.* Nothing in the statute prevents the defendant from seeking a stay or continuance.

Under Fed. R. App. 21, all parties to the proceeding in the trial court are respondents to a petition for a writ of mandamus for all purposes. *See* Fed. R. App. P. 21(a)(1). The court of appeals *must* order the respondents to answer within a fixed time

unless it denies relief without an answer, and *may* order or invite the trial judge to answer as well. *See* Fed. R. App. P. 21(b)(1), (4). In both *Kenna* cases, the Ninth Circuit issued orders only to the trial judge and the government, but no order to the defendant, and actually prohibited the defendant from responding in *Kenna II*.⁴⁰ Yet in *In re Mikhel*, 453 F.3d 1137 (9th Cir. 2006), decided two days later, the Ninth Circuit correctly treated the defendant as a respondent. As a party to the proceedings in the trial court, and the only one with constitutional rights at stake, defendants obviously must be ordered to answer pursuant to Fed. R. App. P. 21, and have a right to answer under the Due Process Clause. If not, the courts of appeals will be deprived of adequate factual and legal briefing (as was the Ninth Circuit in *Kenna I*), and defendants will be deprived of their constitutional rights.

In addition, it seems obvious that a *one-sided summary procedure*, in which a person with no constitutional rights at stake has ten days to file a brief while the defendant has in the neighborhood of 24 hours to file a brief in order for the court of appeals to consider it within 72 hours, must offend the Due Process Clause and perhaps the Equal Protection Clause. The contours of such a challenge are beyond the scope of this paper, but *Mathews v. Eldridge*, 424 U.S. 319 (1976) and *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) might be a start.

Motion to “Re-open.” A victim may “make a motion to re-open a plea or sentence only if (A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied; (B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and (C) in the case of a plea, the accused has not pled to the highest offense charged.” 18 U.S.C. § 3771(d)(5). The failure to afford a right does not provide grounds for a new trial. *Id.* The “motion to re-open” must be made in the district court. *Kenna I*, 435 F.3d at 1017. Only “the victim” who asserted the right in the district court and petitioned the court of appeals is entitled to relief. *See* 18 U.S.C. § 3771(d)(5); *Kenna I*, 435 F.3d at 1019 (Friedman, J., dubitante).

A final judgment cannot be vacated and “re-opened” and an increased sentence imposed or a greater charge re-instated. A judgment is final when direct appeal is concluded and certiorari is denied or the 90-day period for filing a petition for certiorari has run. *See Clay v. United States*, 537 U.S. 522 (2003). A defendant has a right under the Double Jeopardy Clause not to be sentenced to a higher sentence once he has a legitimate expectation in the finality of his sentence, *see United States v. DiFrancesco*, 449 U.S. 117 (1980), which occurs, *inter alia*, when the judgment has become final. *See id.* at 136 (defendant can have no expectation of finality in a sentence “until the appeal is concluded or the time to appeal has expired”); *United States v. Earley*, 816 F.2d 1428, 1434 (10th Cir. 1987) (noting that court’s ability to modify a sentence has generally been recognized as “extending through the end of the direct appeals and retrial process,” and holding that double jeopardy barred imposing enhanced sentence where defendant “took no appeal” and instead began serving his sentence). The defendant also has a double

⁴⁰ *Kenna v. United States District Court*, No. 05-73467 (9th Cir.), Order docketed August 8, 2005, available on PACER and on file with author.

jeopardy right against having a plea to a lesser offense vacated and a greater charge re-instated. *Ricketts v. Adamson*, 483 U.S. 1, 8 (1987).

One of the objections to the failed constitutional amendment was that it could result in a sentence being vacated and the defendant being re-sentenced to a more severe sentence in violation of the Double Jeopardy Clause. *See* S. Rep. 108-191 at 103 (Nov. 7, 2003) (minority views). Opponents of the constitutional amendment understood that the CVRA did not permit that result. *See* 150 Cong. Rec. S4275 (April 22, 2004) (CVRA "addresses my concerns regarding the rights of the accused," including "the Fifth Amendment protection against double jeopardy") (statement of Sen. Durbin).

The CVRA contemplates that the judgment will *not* be final after a successful mandamus petition, as it provides for a maximum of 21 days between the district court's denial of a motion asserting a victim's right and the court of appeals' decision on a petition for mandamus, *i.e.*, 10 days to file the petition, any intermediate Saturdays, Sundays and holiday, no more than 5 days for stay or continuance, and 3 days for decision. 18 U.S.C. § 3771(d)(3), (5). Congress clearly did not intend for a defendant's plea or sentence to be "reopened" after the judgment has become final. Re-sentencing to a higher sentence or vacating a plea to a lesser offense at that point would violate the Double Jeopardy Clause.

In *Kenna I*, however, the Ninth Circuit did not issue its opinion until over six months after the petition for mandamus was filed. In the interim, the judgment became final for all purposes other than as provided in 18 U.S.C. § 3582(b). That is, the defendant could be re-sentenced to a higher sentence only for "arithmetical, technical, or other clear error" within 7 days pursuant to Fed. R. Crim. P. 35(a), after an appeal pursuant to 18 U.S.C. § 3742, or if "modif[ied] . . . to the extent otherwise expressly permitted by statute," *see* 18 U.S.C. § 3582(c)(1)(B). There was no Rule 35(a) error, no one filed a notice of appeal, and there was no applicable statute expressly permitting modification of the sentence. If the district court had imposed a higher sentence, the defendant could have appealed under the Double Jeopardy Clause, and on the basis that the procedures followed by the court of appeals violated the CVRA. Though the statute says that a "person accused of the crime may not obtain any form of relief under this chapter," 18 U.S.C. § 3771(d)(1), the defendant would not be seeking "relief" provided by the CVRA, but simply to have the statute enforced as Congress intended, and his settled expectations left alone.

Defendant Cannot Assert Victim Rights to Obtain "Relief." A "person accused of the crime may not obtain any form of relief under this chapter." 18 U.S.C. § 3771(d)(1). This does *not* mean that the defendant cannot invoke the procedures and substantive limitations of the statute to defend against and challenge any assertion of rights or mandamus action by a victim. All it means is that the defendant cannot "assert any of the victim's rights to obtain relief." 150 Cong. Rec. S10912 (Oct. 9, 2004). For example, if a victim who wished to urge the judge to impose a low sentence was not allowed to be heard, the defendant could not seek re-sentencing as relief on appeal on the basis of the

CVRA. (The victim in such a case could petition for mandamus. The defendant could appeal on a basis other than the CVRA, such as 18 U.S.C. §§ 3553(a)(1) and 3661.)

Appeals. The government may assert as error on appeal the district court's denial of any crime victim's right, 18 U.S.C. § 3771(d)(4), apparently even if the victim does not petition for mandamus. Obviously, the defendant can assert as error on appeal the grant of any crime victim's right.