

Written Statement of Amy Baron-Evans
National Sentencing Resource Counsel and Assistant Federal Public Defender
Federal Public and Community Defenders

Before the Subcommittee on the Constitution and Civil Justice
of the Judiciary Committee of the United States House of Representatives

Hearing: H.J. Res. 45, Victims' Rights Amendment
May 1, 2015

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Chairman Franks, Ranking Member Cohen, and Members of the Subcommittee:

Thank you for giving me the opportunity to speak this morning on proposed H.J. Res. 45, the "Victims' Rights Amendment," on behalf of the Federal Public and Community Defenders. Our offices serve 91 of the 94 federal judicial districts. Over 80 percent of federal defendants require appointed counsel, and we represent the majority of these defendants. By my rough estimate, about 20 percent of federal criminal cases could involve one or more victims. And many of our clients have been or are victims.

Judge Posner recently observed that the allowing victims to intervene in criminal cases in the district court "would be a recipe for chaos. Imagine plea bargaining in which intervening crime victims argue for a different bargain from that struck between the government and the defendant, or trials at which victims' lawyers present witnesses and cross-examine the defendant's witnesses or participate in the sentencing hearing in order to persuade the judge to impose a harsher sentence than suggested by the prosecutor."¹ This scenario approaches reality in some cases that have already occurred, but which the courts have been able to address. It would be the reality in all cases involving a victim under a constitutional amendment.

I want to focus primarily on the difficult if not impossible task courts would face if required to simultaneously protect the constitutional rights of both defendants and victims. At a previous hearing, it was said that no one had given any real world examples of any conflict between the two. I will give you many real world examples.

I'd like to first say a few words about the burden the proposed amendment would impose, the lack of necessity for it, and why Congress enacted the Crime Victims Rights Act (CVRA) rather than a constitutional amendment.

The burden of such a system on the Federal Defender program would be devastating. We are short-staffed as is without having to defend against a second adversary. The proposed amendment would impose burdens and costs on federal and state criminal justice systems as a whole. For example, as explained below, the proposed amendment would ultimately result in a constitutional right to counsel at government expense. In addition, counsel would likely have to be appointed for people defending against victims who do not have a right to counsel now. It would require additional judges, probation officers, and other court personnel.

¹ *United States v. Laraneta*, 700 F.3d 983, 985-86 (7th Cir. 2013).

At the same time, a constitutional amendment is not necessary. The Government Accountability Office (GAO) released a report on the CVRA in December 2008, just four years after it was enacted. The GAO reported that most victims who responded to its survey questions were satisfied with the provision of the CVRA rights.² The perception among criminal justice participants was that the treatment of victims had improved under the CVRA, though many believed that victims were already treated well before the CVRA,³ and both Federal Defenders and judges expressed concerns that certain provisions of the CVRA, or certain interpretations of it, conflict with defendants' rights.⁴ The vast majority of victim-witness professionals reported that judicial attentiveness to victim rights had increased and a large minority (40%) reported that it had greatly or very greatly increased.⁵

The number of people in DOJ's Victim Notification System increased from 600,000 in 2004 to 2.2 million in 2010.⁶ The Attorney General issued new guidelines for its employees in 2011.⁷ In 2008 and 2010, the Federal Rules Committee issued eight new or revised rules of criminal procedure to account for victims' CVRA rights while attempting not to violate defendants' constitutional rights.⁸

Nor does there appear to be a need to impose a constitutional amendment upon the states. According to Professor Cassell's statement from 2012, many states have victim rights statutes or constitutional provisions. The states should be free to adopt a victim rights constitutional amendment or not, given their policies and budgetary constraints.

Finally, Congress passed the CVRA in 2004 instead of adopting a victim rights constitutional amendment for good reasons. The fundamental objection to the proposed amendment was that it would replace the two-party adversary system the Framers created with a three-party system in which criminal defendants would face both the public prosecutor and private prosecutors with rights equal to or greater than the rights of the accused. The opposition explained that the "colonies shifted to a system of public prosecutions because they viewed the system of private prosecutions as 'inefficient, elitist, and sometimes vindictive,'" and that the "Framers believed victims and defendants alike were best protected by the system of public

² See GAO Report at 83-84.

³ *Id.* at 13, 86.

⁴ *Id.* at 13, 87-88.

⁵ *Id.* at 85.

⁶ U.S. Department of Justice, Fact and Figures: U.S. Attorneys' Offices' Victim-Witness Programs, <http://www.justice.gov/usao/priority-areas/victims-rights-services/fact-and-figures>.

⁷ U.S. Department of Justice, Victims' Rights and Services, <http://www.justice.gov/usao/priority-areas/victims-rights-services>.

⁸ See Fed. R. Crim. P. 1(b)(11), 12.1, 12.3, 17(c), 18, 21, 32, 60.

prosecutions that was then, and remains, the American standard for achieving justice.”⁹ Further, “we have historically and proudly eschewed private criminal prosecutions based on our common sense of democracy,”¹⁰ and “[n]ever 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.”¹¹

Thus, Congress intended to preserve the system the Framers created – a two-party system with a public prosecutor acting in the public interest, a criminal defendant with constitutional rights to protect his life, liberty and property, and a neutral judge. The proposed amendment, like its failed predecessor, would replace this system with a system in which the defendant would face not only the public prosecutor acting on behalf of victims to extent consistent with the public interest, but victims acting as private prosecutors, and a judge whose neutrality would be compromised.

The Proposed Amendment Would Create Unresolvable Constitutional Conflicts and Practical Problems, as Well as High Costs.

The proposed amendment begins by stating that “the following rights of a crime victim, being capable of protection without denying the constitutional rights of the accused, shall not be denied or abridged by the United States or any State.” It seems obvious, as Congressman Scott previously noted, that this language is “trying to be a statement of fact that there is, in fact, no conflict, and that the crime victims’ rights will be respected notwithstanding any denial of constitutional rights to the accused.”¹²

Professor Cassell responded that “both rights can coexist,” and “nobody has provided a real-world example of how the rights are going to interfere with the defendant’s rights.”¹³ Professor Cassell also said that defendants’ “claims about their federal constitutional due process rights being violated . . . would be unavailing after passage of a federal amendment.”¹⁴

Below are many real-world examples of victims’ statutory rights conflicting with defendants’ constitutional rights, and how the courts resolved these conflicts because they could. A constitutional amendment, however, would make victims third parties to the litigation, with victim rights directly competing with defendant rights and no way to resolve the conflict. In fact,

⁹ See S. Rep. No. 108-191 at 68-69, 70 (2003) (minority view).

¹⁰ *Id.* at 70.

¹¹ *Id.* at 56.

¹² Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 112th Cong. 200 (2012) [hereinafter “2012 Hearing”].

¹³ *Id.*

¹⁴ *Id.* at 99 (statement of Paul G. Cassell).

the victim would have the upper hand because, unlike the defendant, the victim could file an interlocutory appeal. If constitutionalized, the rights of a person who is or claims to be a crime victim would not be “capable of protection without denying the constitutional rights of the accused.”

A. Definition of Crime Victim

The CVRA 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.”¹⁵ While this definition unfortunately presumes guilt at time when the defendant must be presumed innocent (*i.e.*, at the time of notice and public proceedings involving pretrial release), the courts have confined the term “victim” to mean a person directly and proximately harmed by an offense with which the defendant has been *charged* and is being prosecuted (if before verdict or plea), or of which the defendant has been *convicted* (if after a guilty verdict or guilty plea).

This interpretation derives from the statute, its legislative history, and the Constitution. Congress recognized in enacting the VWPA 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.”¹⁶ The Supreme Court then interpreted the definition of “victim” in the VWPA, 18 U.S.C. § 3663(a)(2), as authorizing restitution only for “loss caused by the conduct underlying the offense of conviction,”¹⁷ and not by alleged conduct underlying dismissed counts.¹⁸ 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,¹⁹ and Congress is presumed not to have intended an unconstitutional meaning.²⁰

Moreover, the CVRA does not by its terms accord free floating rights. It requires courts to “ensure” victim rights only “[i]n any court proceeding involving an offense against a crime victim.”²¹ Since this presupposes that “a prosecution is pending,”²² the rules of procedure

¹⁵ 18 U.S.C. § 3771(e).

¹⁶ 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)).

¹⁷ *Hughey*, 495 U.S. at 420.

¹⁸ *Id.* at 422.

¹⁹ *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

²⁰ See *Clark v. Martinez*, 543 U.S. 371, 381 (2005); *Rust v. Sullivan*, 500 U.S. 173, 191 (1991).

²¹ 18 U.S.C. § 3771(b)(1).

²² Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 3, May 19, 2007 (revised July 2007).

provide that a “victim’s rights described in these rules must be asserted in the district where a defendant is being prosecuted for the crime.”²³ Under current law, alleged victims have no right under the Constitution or the CVRA to insist that a prosecution be brought.²⁴

Accordingly, the courts have rejected attempts to use the CVRA to intervene in existing or non-existing criminal cases, or to assert rights or bring mandamus actions: (1) before a criminal prosecution has begun,²⁵ (2) before a habeas corpus petition has yet been filed,²⁶ (3) in criminal proceedings against persons who were not charged with any offense, persons who were not charged or convicted of the offense alleged to have directly and proximately caused harm, or persons who were acquitted,²⁷ (4) in criminal proceedings involving a charged federal offense

²³ Fed. R. Crim. P. 60(b)(4).

²⁴ See, e.g., *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005); *In re Rodriguez*, slip op., 2008 WL 5273515 (3d Cir. Dec. 10, 2008); *In re Walsh*, slip op., 2007 WL 1156999 (3d Cir. Apr. 19, 2007); *In re Siyi Zhou*, 198 Fed. Appx. 177 (3d Cir. 2006); *Estate of Musayelova v. Kataja*, slip op., 2006 WL 3246779 (D. Conn. Nov. 7, 2006).

²⁵ CVRA “does not confer any rights upon a victim until a prosecution is already begun.” *United States v. Merkosky*, 2008 WL 1744762 at *2 (N.D. Ohio Apr. 11, 2008). In a case where persons claiming to have been defrauded asserted that the government was required to freeze defendant’s assets and prevent him from conducting fraudulent securities activities before he was charged, the court held that the “‘right to be reasonably protected from the accused’ cannot have ripened before” the defendant was “‘accused by criminal complaint, information or indictment of conduct victimizing the complainant.” *United States v. Rubin*, 558 F. Supp. 2d 411, 420 (E.D.N.Y. 2008)

²⁶ *Habeas Corpus Resource Center v. U.S. Department of Justice*, 2013 WL 6157321 *1 (N.D. Cal. 2013).

²⁷ See *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 564 (2d Cir. 2005) (rejecting petition for mandamus seeking to vacate settlement agreement approved by district court between United States and convicted, acquitted and uncharged persons; “the CVRA does not grant victims any rights against individuals who have not been convicted of a crime.”); *United States v. Sharp*, 463 F.Supp.2d 556 (E.D. Va. 2006) (woman who wished to speak at sentencing based on her claim that her boyfriend had mistreated her as a result of smoking marijuana he purchased from the defendant was not a victim within the meaning of the CVRA; “the CVRA only applies to [putative victim] if she was ‘directly and proximately harmed’ as a result of the commission of the Defendant’s federal offense.”); *United States v. Turner*, 367 F.Supp.2d 319, 326-27 (E.D.N.Y. 2005) (concluding CVRA does not mandate rights for victims of uncharged conduct); *United States v. Hunter*, 2008 WL 53125 *4 (D. Utah Jan. 3, 2008) (woman shot by gunman on a rampage at a shopping mall and her parents were not “directly and proximately harmed” by the defendant’s offense of conviction of selling the gun to the gunman with reason to believe he was a minor, where there was no evidence defendant was aware of his intentions), *aff’d*, *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008); *United States v. Merkosky*, 2008 WL 1744762 (N.D. Ohio Apr. 11, 2008) (defendant cannot be deemed victim of uncharged crimes of government agents against him in his own criminal case); see also *United States v. Saferstein*, slip op., 2008 WL 4925016 *3 (E.D. Pa. Nov. 18, 2008) (no notice was required of tax or perjury charges because there were no victims).

with state predicates by which persons claim to have been harmed,²⁸ (5) in criminal proceedings where the harm alleged to have been directly and proximately caused is too attenuated from the elements of the charged offense,²⁹ (6) by civil plaintiffs seeking to intervene in criminal proceedings to seek restitution, damages, discovery, or other relief,³⁰ and (7) in lawsuits or mandamus actions requesting arrest, restraining orders, prosecution, sentencing, damages or injunctive relief.³¹

It appears that all or most of these actions would be allowed under the proposed constitutional amendment. First, the definition of “victim” is not limited to persons harmed by charged or convicted conduct. It would include any person (1) “against whom the criminal offense is committed,” or (2) “who is directly and proximately harmed by the commission of an act, which, if committed by a competent adult, would constitute a crime.” As Professor Cassell

²⁸ *United States v. Guevera-Toloso*, 2005 WL 1210982 (E.D.N.Y. 2005) (where defendant was charged with “illegally re-entering the United States after being convicted of a felony and subsequently deported,” victims of predicate offenses, if any, were not entitled to notice because the predicates were state offenses, and expressing doubt that a victim of a state predicate would be entitled to notice).

²⁹ *United States v. Atlantic States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 545 (D.N.J. 2009) (“The conduct that allegedly harmed one or more of the six named workers may have been in violation of OSHA workplace standards ... Such conduct, however, was not conduct proscribed by the obstruction and false statement substantive offenses and conspiracy objectives of which each of these defendants was convicted, and we perceive no ‘direct and proximate’ causal link between those offenses of conviction and the injuries sustained by the six named workers.”).

³⁰ For example, in *United States v. Moussaoui*, 483 F.3d 220 (4th Cir. 2007), lawyers representing plaintiffs in a tort action in the Southern District of New York against various third parties as a result of the 9/11 attacks moved to intervene in the capital case against Moussaoui in the Eastern District of Virginia in order to be “heard” with respect to a motion to obtain for use in the civil litigation non-public discovery (some of it classified) the government had provided under protective orders to Moussaoui’s lawyers. The Fourth Circuit reversed, in part because the CVRA is “limited to the criminal justice process” and “unconcerned with victims’ rights to file civil claims against their assailants,” *id.* at 234-35, and in part because allowing victims to intervene in criminal cases to obtain discovery for use in civil litigation would burden courts, criminal defendants, the government and the public, *id.* at 237-38. See also *United States v. McNulty*, 597 F.3d 344, 352 (6th Cir. 2010) (McNulty was not a victim under CVRA for purposes of receiving restitution from former employer for firing and blackballing him because those acts are not criminal in nature, and are not inherent in the antitrust crime to which employer pled guilty; “[c]ivil, not criminal, remedies are available to address these actions”); *In re Searcy*, 202 Fed. Appx. 625 (4th Cir. Oct. 6, 2006) (CVRA has “no application . . . to these [civil] proceedings”); *In re Nabaya*, 481 Fed. Appx. 64 (4th Cir. 2012) (“Petitioners are not crime victims under the CVRA. . . . Their mandamus petition attacks a sanction order entered in civil litigation and upheld on appeal.”).

³¹ See *In re Bond*, 547 Fed. Appx. 348 (4th Cir. 2013) (mandamus petitioner is “not a crime victim” under the CVRA because he “was not the victim in the underlying criminal matter,” his “failed attempts to intervene in the criminal case do not make him a crime victim,” and “there is no prosecution . . . as yet underway”); *In re Rodriguez*, slip op., 2008 WL 5273515 (3d Cir. Dec. 10, 2008); *In re Walsh*, slip op., 2007 WL 1156999 (3d Cir. Apr. 19, 2007); *In re Siyi Zhou*, 198 Fed. Appx. 177 (3d Cir. 2006); *Estate of Musayelova v. Kataja*, slip op., 2006 WL 3246779 (D. Conn. Nov. 7, 2006).

has explained, the first definition is “unlimited,” and the second definition should be read to include victims of uncharged crimes.³²

Second, a victim would have a “right to be heard at any . . . proceeding involving any right established by this article,” which apparently includes a proceeding for the sole purpose of allowing a person to “present information in support of a claim of right under the amendment.”³³ Thus, unlike under the CVRA, persons claiming to be victims could initiate proceedings before any criminal prosecution is pending for the purpose of claiming a right to be heard to insist upon arrest, prosecution, sentencing, restitution, or other relief. Lawyers would then have to be appointed to represent people not charged by the government but accused by private parties.

B. Standing

The CVRA provides that the victim, his lawful representative, or the attorney for the government “may assert” the rights described in subsection (a), and that the prosecutor shall advise the victim that he “can seek the advice of an attorney.”³⁴

The proposed amendment would provide that the “crime victim or the crime victim’s lawful representative has standing to assert these [constitutional] rights.”

Professor Cassell previously asserted that this provision is necessary to “overrule[] derelict court decisions,”³⁵ citing only a 1997 case in which the Tenth Circuit correctly held that sequestered victim-witnesses had no standing to complain because the statute at the time provided that victims had a right “to be present at all public court proceedings related to the offense, *unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial,*” which it did.³⁶ The court was not “derelict” but following the law. Professor Cassell cited no case in which a court did not permit a person who met the definition of a “victim” in the CVRA to “assert” his or her rights under the statute.

The standing provision is not only unnecessary, but dangerous and costly. It would undeniably make victims third parties to the litigation, with constitutional rights unavoidably in conflict with the constitutional rights of defendants. And it would soon be read to create a victims’ right to counsel. Although the defendant’s right to counsel is grounded in the Due Process Clause and the Sixth Amendment, crime victims would now have constitutional rights too. As the Supreme Court has often said, it is through counsel that the accused secures his other

³² 2012 Hearing at 123-125.

³³ *Id.* at 110.

³⁴ 18 U.S.C. § 3771(d)(1), (c)(2).

³⁵ 2012 Hearing at 118-19.

³⁶ *United States v. McVeigh*, 106 F.3d 325, 334-35 (10th Cir. 1997) (citing 42 U.S.C. § 10606(b)(4)).

rights.³⁷ Professor Cassell describes the “standing” provision in similar terms.³⁸ It seems likely that it would soon be invoked to require a constitutional right to counsel at the expense of state and federal governments.

Professor Cassell also explained that the crime victim would have standing to “enforce these rights in any court,”³⁹ including by filing a petition for federal habeas corpus claiming a constitutional violation by state authorities after first exhausting state remedies.⁴⁰

C. Right to be Heard

The proposed amendment would grant an unqualified right “to be heard at any release, plea, sentencing, or other proceeding involving any right established by this article.” It would not be limited by reasonableness, and it is not explicitly limited to public proceedings or proceedings in the district court. As noted above, the phrase “or other proceeding involving any right established by this article” would likely be read to mean that persons could initiate a freestanding proceeding claiming rights as victims independent of any pending criminal case. As shown above, people have tried but failed to do this under the CVRA. It is unclear on what basis the courts could stop it under the proposed constitutional amendment.

The CVRA, in contrast, provides a right to be “*reasonably* heard at any *public* proceeding *in the district court* involving release, plea, [or] sentencing.” One objection to the constitutional amendment that failed before the CVRA was enacted was that it would have created an absolute right to be heard and would have prohibited judges from responding 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.⁴¹ By not including language that would have prohibited judges from restricting the right to be heard,⁴² and adding the modifier “reasonably,” the CVRA gives the courts flexibility to permit victims to be

³⁷ See *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986) (“[I]t is through counsel that the accused secures his other rights.”) (internal citations omitted); *United States v. Cronin*, 466 U.S. 648, 653-54 (1984) (“Lawyers . . . are the means through which the other rights of the person on trial are secured.”); *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”).

³⁸ “Standing is a critically important provision “that must be read in connection with all of the other provisions,” for it “ensures that [victims] will be able to *fully* enforce those rights,” will “eliminate” the “difficulty of being heard” by “conferring standing on the victim,” and permitting “a lawyer to be heard on behalf of a victim-client.” 2012 Hearing at 118-19.

³⁹ *Id.* at 118.

⁴⁰ *Id.* at 198-99.

⁴¹ See S. Rep. No. 108-191 at 76, 85, 106-107 & n.133 (Nov. 7, 2003) (minority views).

⁴² It stated that 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.).

heard in a manner that does not infringe on the rights of the defendant or the orderly administration of justice.⁴³

The right to be reasonably heard under the CVRA “does not empower victims to [have] veto power over any prosecutorial decision, strategy or tactic regarding bail, release, plea, sentencing or parole,” or any other agreement of the parties or decision of the court⁴⁴ They have “a voice, not a veto.”⁴⁵ But under the proposed amendment, the victim would have constitutional rights equal to the defendant’s and a right to appeal a defendant’s guilty plea or sentence.

There are a variety of ways in which courts are now able to reasonably implement, limit, or in some cases reasonably deny, a victim’s claimed statutory right to be heard which would be difficult or impossible under a constitutional amendment.

First, courts have rejected claims that the “right to be reasonably heard” includes a right to litigate the sentence, to make a specific sentencing recommendation, and to appeal the defendant’s sentence.⁴⁶ If a constitutional amendment were adopted, the unqualified right to be heard would clearly include the right to litigate and appeal the sentence.

⁴³ The “CVRA strikes a different balance, and it is fair to assume that it does so to accommodate the concerns of such legislators. . . . 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).

⁴⁴ *Id.* at 424.

⁴⁵ *Id.* at 417. “[T]here is absolutely no suggestion in the statutory language that victims have a right independent of the government to prosecute a crime, set strategy, or object to or appeal pretrial or in limine orders entered by the Court whether they be upon consent of or over the objection of the government. Quite to the contrary, the statute itself provides that ‘[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.’ 18 U.S.C. § 3771(d)(6).” *Id.* See also *In re Huff Asset Management Co.*, 409 F.3d 555, 564 (2d Cir. 2005) (“Nothing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement.”); *United States v. Thetford*, 935 F. Supp.2d 1280, 1282-83 (N.D. Al. 2013) (same).

⁴⁶ See *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006) (affirming district court’s rejection of victim’s claimed right to litigate guidelines as basis for disclosure of PSR); *In re Brock*, 262 Fed. Appx. 510, 512-13 (4th Cir. 2008) (no right to present argument regarding, or to appeal, guideline calculations); *United States v. Hunter*, 548 F.3d 1308, 1311-12 (10th Cir. 2008) (no right to appeal a defendant’s sentence because a victim is not a party, and finding “no precedent for allowing a non-party appeal that would reopen a criminal case following sentencing”).

It has been suggested that *Payne v. Tennessee*, 501 U.S. 808 (1991) provides support for a right of victims to recommend a sentence, but this is incorrect. The Court held in *Payne* that the Eighth Amendment does not bar the admission of “‘victim impact’ evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim’s family” during the penalty phase of a capital trial, *id.* at 817, though such evidence may be so prejudicial that it violates the Due Process Clause. *Id.* at 825. In *Payne*, a family member testified to the emotional impact on the victim’s family, but did not recommend a sentence. *Id.* at 814-15. The Court explicitly limited its holding to “the impact of the

Second, courts have rejected victims' claimed right to the presentence report as part of the right to be heard.⁴⁷ By statute and rule, the pre-sentence report is disclosed only to the parties.⁴⁸ 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.⁴⁹ 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 and others provide information with the assurance that it will be kept confidential, and would not provide it otherwise. The report is presumed confidential in order 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.⁵⁰ The defendant's right of access to the pre-sentence report is of fairly recent vintage and is based on the defendant's right to due process of law.⁵¹

Courts are also able to deny victims' requests to review the pre-sentence report to learn about the defendant's assets or ability to pay restitution.⁵² To do otherwise would conflict with the restitution statute. Under that statute, victims have the opportunity to provide information to

victim's death on the victim's family" and explicitly left standing its previous holding prohibiting "a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence." *Id.* at 830 n.2 (emphasis supplied). See also *Welch v. Simons*, 451 F.3d 675, 703 (10th Cir. 2006) (collecting cases).

⁴⁷ See *In re Brock*, slip op., 2008 WL 268923 (4th Cir. Jan. 31, 2008); *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006); *United States v. Coxton*, 598 F. Supp. 2d 737 (W.D.N.C. 2009); *United States v. BP Products*, 2008 WL 501321 *9 (S.D. Tex. Feb. 21, 2008); *United States v. Hunter*, 2008 WL 53125 *7 (D. Utah Jan. 3, 2008) (Kimball, J.); *United States v. Citgo Petroleum Corp.*, 2007 WL 2274393 *2 (S.D. Tex. Aug. 8, 2007); *United States v. Sacane*, 2007 WL 951666 *1 (D. Conn. Mar. 28, 2007); *United States v. Ingrassia*, 2005 WL 2875220 *17 (E.D.N.Y. 2005).

⁴⁸ See 18 U.S.C. § 3552(d); 18 U.S.C. § 3664(b); Fed. R. Crim. P. 32(e)(2).

⁴⁹ See Fed. R. Crim. P. 32(d); 18 U.S.C. § 3664(a), (d)(3).

⁵⁰ See, e.g., *United States v. Corbitt*, 879 F.2d 224, 229-30 (7th Cir. 1989).

⁵¹ See *United States Dept. of Justice v. Julian*, 486 U.S. 1, 9-10, 12 (1988); *Corbitt*, 879 F.2d at 229, 235-36; *United States v. Charmer Industries, Inc.*, 711 F.2d 1164, 1171-72 (2d Cir. 1983); *Hancock Bros. v. Jones*, 293 F. Supp. 1229, 1234 (N.D. Cal. 1968).

⁵² *United States v. Rubin*, 558 F. Supp. 2d 411, 426 (E.D.N.Y. 2008).

the court regarding restitution,⁵³ but the “privacy of any records filed, or testimony heard” on the subject of restitution, whether from the defendant, other victims, or anyone else, “shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.”⁵⁴

If victims had constitutional standing as parties, they could obtain the presentence report.

Third, the CVRA did not alter existing law under which the court may order closed proceedings closed,⁵⁵ in order to protect the defendant’s right to a fair trial, the safety of any person, or sensitive information.⁵⁶ Accordingly, courts have held that victims may not be heard at a closed juvenile transfer proceeding in which the court considers highly sensitive information,⁵⁷ or on matters that are routinely handled without a court appearance.⁵⁸ It may be that the proceedings to which the amendment refers are intended to be “public” and in the “district court,” but it does not say so, and courts must follow plain language.

Fourth, courts are able to protect the defendant’s due process rights to notice, a fair opportunity to challenge whether a person who wishes to be heard is a “victim,” and a fair opportunity to investigate and challenge statements and testimony by victims by introducing contrary information or through cross-examination. The defendant’s right to notice and an opportunity to be heard at sentencing is rooted in the Due Process Clause,⁵⁹ and is protected through various provisions of Rule 32 and Rule 26.2.⁶⁰ These protections apply to victim impact information and restitution. *See United States v. Rakes*, 510 F.3d 1280, 1285-86 & n.3 (10th Cir. 2007); Fed. R. Crim. P. 32(d)(2)(B), (D); 18 U.S.C. § 3664(a), (b), (e); *see also United States v.*

⁵³ *See* 18 U.S.C. § 3664(d)(1), (2), (5).

⁵⁴ 18 U.S.C. § 3664(d)(4).

⁵⁵ *See* 150 Cong. Rec. S10910 (Oct. 9, 2004) (statement of Senator Kyl); 150 Cong. Rec. S4268 (April 22, 2004) (statement of Senator Kyl).

⁵⁶ *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.

⁵⁷ *United States v. L.M.*, 425 F.Supp.2d 948, 951-56 (N.D. Iowa 2006).

⁵⁸ *United States v. Rubin*, 558 F. Supp. 2d 411, 423, 424 (E.D.N.Y. 2008).

⁵⁹ *See 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).

⁶⁰ The rules require notice in the presentence report; the opportunity to investigate, object and present contrary evidence and argument to the Probation Officer; the opportunity to file a sentencing memorandum and argue orally to the court; the 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 the 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).

Forsyth, slip op., 2008 WL 2229268 (W.D. Pa. May 27, 2008) (excluding “victim impact” letter because author was not a “victim” under CVRA, and although “relevant” for sentencing purposes, it did not have sufficient reliability under the Due Process Clause).

For example, in *United States v. Endsley*, slip op., 2009 WL 385864 (D. Kan. Feb. 17, 2009), the presentence report contained victim impact statements blaming the victim’s behavioral problems on the assault with which the 19-year-old defendant was charged. The government argued that “the victim has a right to make a statement about how he feels the crime impacted him,” but “the defendant has no parallel right to counter the information provided by the victim,”⁶¹ and the probation officer asserted that “it would be inappropriate for the Court to obtain additional background information on the victim.”⁶² The judge rejected these contentions, holding that the defendant had a right to full adversary testing, to be sentenced based on accurate information, and “certainly has the right to challenge the reliability of that causation opinion by argument or evidence.”⁶³ The court held that the victim’s right to “dignity and privacy” does “not impinge on a defendant’s right to refute by argument and relevant information any matter offered for the court’s consideration at sentencing,” or the court’s duty to “evaluate the victim impact statements against the same standards of reliability and reasonableness applied to all matters introduced at sentencing hearings.”⁶⁴

It would at least be difficult for a judge to simultaneously protect a victim’s constitutional rights to be heard and to dignity and privacy, and the defendant’s constitutional right to challenge the victim’s statements with embarrassing information.

Fifth, the district court “may place reasonable constraints on the duration and content of victims’ speech, such as avoiding undue delay, repetition or the use of profanity,” and relevance.⁶⁵ Thus, for example, a judge disregarded the testimony of a victim’s son at a bail hearing because it was “not material to the decision at hand.”⁶⁶ The son had no personal knowledge regarding the strength of the case against the defendant, and there was no claim that anyone would be endangered by the defendant’s release.⁶⁷ The judge was able to avoid a potential conflict with the defendant’s rights, noting that “to consider the likelihood of guilt

⁶¹ *Id.* at *1.

⁶² *Id.* at *2.

⁶³ *Id.* at *2 & nn.1-2.

⁶⁴ *Id.* at *2.

⁶⁵ *Kenna v. United States District Court*, 435 F.3d 1011, 1014 (9th Cir. 2006); *id.* at 1018-19 (Friedman, J., dubitante).

⁶⁶ *United States v. Marcello*, 370 F.Supp.2d 745, 745 (N.D. Ill. 2005).

⁶⁷ *Id.* at 747.

based solely on a witness's faith in the prosecution would violate the law that an indictment is merely an accusation."⁶⁸

In a case involving so many victims that permitting them all to give an oral presentation at sentencing would be impracticable, courts may fashion a "reasonable procedure" that "does not unduly complicate or prolong the proceedings."⁶⁹ Courts have done so, for example by allowing a limited number of victims to speak and others to submit written impact statements.⁷⁰

Again, it would be difficult for a judge to place reasonable limitations on a victim who had an absolute constitutional right to be heard.

D. Right Not to Be Excluded

The proposed amendment states that a victim "shall not be excluded from public proceedings related to the offense," without exception. The CVRA gives victims the same right *unless* the court finds by "clear and convincing evidence" that a victim's "testimony would be materially altered if the victim heard other testimony at that proceeding."⁷¹

The right of a testifying victim-witness not to be excluded is a significant incursion on defendants' rights. "[A]s a means of discouraging and exposing fabrication, inaccuracy, and collusion,"⁷² Rule 615 of the Federal Rules of Evidence requires the court to order any other witness to be sequestered upon request. But the rule contains an exception for "a person authorized by statute to be present." This exception was added in response to an earlier statute providing that victims may not be excluded from *trial* on the basis that they may make a victim impact statement at *sentencing*.⁷³ Unlike that statute, the proposed amendment would permit tainted *factual testimony* at *trial*, without even the possibility provided by the CVRA that the defendant might prove in advance that the testimony would be altered.⁷⁴

⁶⁸ *Id.* at 747 n.5.

⁶⁹ *Id.* at 1014 n.1; 18 U.S.C. § 3771(d)(2).

⁷⁰ *See United States v. CITGO Petroleum Corp.*, 893 F.Supp.2d 848, 854 (S.D.Tex.2012) (fifteen of over 100 potential victims could speak at sentencing and the others could provide written impact statements).

⁷¹ 18 U.S.C. § 3771(a)(3).

⁷² Fed. R. Evid. 615, 1972 advisory committee note.

⁷³ Fed. R. Evid. 615, 1998 advisory committee note.

⁷⁴ The showing required by the CVRA is difficult if not impossible to make. *See* United States Government Accountability Office, *Crime Victims' Rights Act* at 87 (Dec. 2008) (hereinafter "GAO Report"); *United States v. Edwards*, 526 F.3d 747, 758 & n.28 (11th Cir. 2008); *In re Mikhel*, 453 F.3d 1137, 1139 & n.3 (9th Cir. 2006) ("[T]here is always a *possibility* that one witness will alter his testimony based on the testimony of another," but "[a] mere *possibility* that a victim-witness may alter his or her testimony as a result of hearing others testify is ... insufficient to justify excluding him or her from trial.").

An absolute constitutional right not to be excluded would present other problems as well. For example, victims would have to be notified of and attend plea hearings for cooperating defendants. As DOJ reported to the GAO, “public knowledge of the defendant’s cooperation could compromise the investigation, as well as bring harm to the defendant and others.”⁷⁵ Currently, the government asks the court to close the proceedings, but this does not appear to be an option under the proposed constitutional amendment.

E. Right to Due Consideration of Dignity and Privacy

Under the CVRA, a victim has a statutory “right to be treated ... with respect for the victim’s dignity and privacy.” Under the proposed amendment, a victim would have a constitutional “right[] ... to due consideration of the crime victim’s ... dignity[] and privacy.”

Under current law, courts need not apply these amorphous concepts to up-end the adversary system and infringe on defendants’ constitutional rights. One court held that the right to be treated “with respect for dignity and privacy” does not “impinge[] on a defendant’s right to refute by argument and relevant information any matter offered for the court’s consideration at sentencing.”⁷⁶ Another declined to adopt the putative victims’ interpretation “that prohibits the government from raising legitimate arguments in support of its opposition to a motion simply because the arguments may hurt a victim’s feelings or reputation,” and cautioned that this was “precisely the kind of dispute a court should not involve itself in since it cannot do so without potentially compromising its ability to be impartial to . . . the only true parties to the trial of the indictment.”⁷⁷

It was suggested that this provision would allow victims to oppose a defense request for reproduction of child pornography.⁷⁸ Congress enacted a law in 2009 directing courts to deny any request by a defendant to reproduce any material constituting child pornography, so long as the government made the material reasonably available to the defendant, to be satisfied by defense inspection at a government facility.⁷⁹ Courts across the country ruled the statute unconstitutional as it interfered with defendants’ rights to prepare to defend themselves. The issue is now dealt with in most cases through protective orders or agreements confining examination of the material to the defense expert and counsel. For the same reason that statute is

⁷⁵ GAO, Testimony Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, House of Representatives, *Crime Victims’ Rights Act: Increasing Victim Awareness and Clarifying Applicability to the District of Columbia Will Improve Implementation of the Act* 9 (Sept. 29, 2009) [hereinafter “GAO Testimony”].

⁷⁶ *United States v. Endsley*, slip op., 2009 WL 385864 *2 (D. Kan. Feb. 17, 2009).

⁷⁷ *United States v. Rubin*, 558 F. Supp. 2d 411, 427-28 (E.D.N.Y. 2008).

⁷⁸ 2012 Hearing at 97 (statement of Paul G. Cassell).

⁷⁹ 18 U.S.C. § 3509(m).

unconstitutional, application of the proposed amendment in the manner suggested would violate the defendant's rights. But if a victim with a constitutional right to privacy objected to the defense obtaining and examining the evidence, there would be no way to resolve the conflict.

In December 2008, the Rules Committee revised Fed. R. Crim. P. 17(c)(3), which governs issuance of subpoenas compelling production of documents, witnesses or objects for use in federal proceedings, to account for victim privacy without infringing on defendants' right to prepare for trial. If the subpoena seeks "confidential information about a victim," the court must require advance notice to the victim so that s/he can move to quash or modify it, *except* that such notice may not be required if the defense would be "unfairly prejudiced by premature disclosure of a sensitive defense strategy," which the court may determine *ex parte*.

In some cases, the government has cited the victim's statutory right to privacy in this context, seeking to bar the defense from moving for a subpoena *ex parte* and the judge from issuing a subpoena *ex parte*. In *United States v. Vaughn*, slip op., 2008 WL 4615030 (E.D. Cal. Oct. 17, 2008), decided before the rule change, the judge reasoned that § 3771(a)(8) "point[s] to the need to protect victims from their assailants," but that "a defendant has the right to test the government's evidence," and ordered disclosure of the witnesses' names and contact information under a protective order. In *United States v. McClure*, the judge rejected the government's request and followed the rule.⁸⁰ See also *United States v. Crutchfield*, 2014 WL 2569058 (N.D. Cal. 2014) (ordering defense counsel to file an *ex parte* brief outlining how unfairly prejudiced by premature disclosure of a sensitive defense strategy, which the court would decide *in camera*). In *United States v. K.K.*, 756 F.3d 1169 (9th Cir. 2014), the court of appeals denied a victim's petition for mandamus because the district court "appropriately balanced the victim's privacy interests against the defendant's right to investigate the case and prepare a defense for trial," but ordered the court to review the documents *in camera* to ensure that they were relevant and whether any limits should be placed on use of the documents.

If a victim with a constitutional right to privacy asserted that the defendant could not obtain or use such information at all, it is difficult to see how the court could protect both the victim's and the defendant's constitutional rights.

F. Right to Proceedings Free of Unreasonable Delay

The CVRA provides a statutory right to proceedings "free of unreasonable delay." This is "not intended to infringe on the defendant's due process right to prepare a defense." 150 Cong. Rec. S4260-01 at S4268 (Apr. 22, 2004) (statement of Senator Kyl). In *United States v. Tobin*, 2005 WL 1868682 (D.N.H. July 22, 2005), the judge granted a joint motion for a continuance over the alleged victim's objection, noting that Congress did not intend the CVRA to deprive defendants or the government of a full and adequate opportunity to prepare for trial, that the defendant's right to adequate preparation is of "constitutional significance," and that 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

⁸⁰ See Memorandum and Order re: Motion to Preclude Ex Parte Rule 17(c) Subpoenas, April 7, 2009, *United States v. McClure*, S-08-100 and S-08-270 WBS (E.D. Cal.).

themselves.” *Id.* at *1; *cf. United States v. Hunter*, 2008 WL 53125 *1 n.1 (D. Utah Jan. 3, 2008) (victims did not have a right under the CVRA to unilaterally set a schedule that deprived the parties of the right to participate and the court of adequate time to review and decide the issues).

The amendment, however, would constitutionalize a speedy trial right for victims, which would in many cases collide head on with the constitutional right of the defendant to investigate the case and prepare a defense,⁸¹ and the court would have no way to resolve it. Further, the defendant and the government would have to respond to a victim’s claim that the delay was unreasonable by revealing trial strategy to each other and the victim in order to justify the time needed, which would also violate the defendant’s rights unless the proceeding was *ex parte*.

G. Right of Due Consideration of Victim’s Safety

The proposed constitutional right to “due consideration of the crime victim’s safety” is similar to the statutory right “to be reasonably protected from the accused.”

A constitutional amendment is not necessary for this purpose, and would create the same kinds of unresolvable conflicts as the other proposed constitutional rights. The Bail Reform Act requires the court to consider whether release of the person with or without conditions “will endanger the safety of any other person,” and specifies that if the court determines that conditions will assure the appearance of the person and the safety of any other person and the community, it may order the person to “avoid all contact with an alleged victim of the crime,” subject to pretrial release being revoked.⁸²

The Supreme Court upheld the preventive detention provisions of the Bail Reform Act⁸³ against a facial substantive due process challenge because, under “these narrow circumstances” - where detention may be sought only for “individuals who have been arrested for a specific category of extremely serious offenses,” and may be imposed only when the government “proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community” -- the government’s interest in preventing future crime is “compelling.”⁸⁴

The courts have held that the CVRA right “to be reasonably protected from the accused” does not add to or change the bases upon which a defendant may be released or detained under the Bail Reform Act.⁸⁵ The right to be “reasonably protected from the accused” also does not

⁸¹ *Michigan v. Harvey*, 494 U.S. 344, 348 (1990).

⁸² 18 U.S.C. § 3142(c)(1), (c)(1)(B)(v), (d)(2), (e)-(g).

⁸³ *See* 18 U.S.C. § 3142(e) and (f).

⁸⁴ *United States v. Salerno*, 481 U.S. 739, 750-51 (1987).

⁸⁵ *See United States v. Turner*, 367 F.Supp.2d 319, 332 (E.D.N.Y. 2005), *United States v. Rubin*, 558 F. Supp. 2d 411, 420 (E.D.N.Y. 2008).

permit a victim to dictate a defendant's financial affairs or restrict travel. In *United States v. Rubin*, 558 F. Supp. 2d 411 (E.D.N.Y. 2008), the court found that the government had not violated this provision of the CVRA when it chose not to freeze assets of the defendant or prevent him from engaging in securities activities, and that the court did not violate it by permitting the defendant to visit sick relatives in Israel after his arrest. *Id.* at 420.

H. Right to Restitution

The CVRA provides a right to “full and timely restitution as provided in law.”⁸⁶ Federal law makes restitution mandatory in some cases,⁸⁷ and discretionary in others.⁸⁸ Orderly procedures for the issuance and enforcement of restitution orders are provided by statute,⁸⁹ and a well-developed body of caselaw interprets the statutes.⁹⁰ The legislative history of the CVRA states that it “makes no changes in the law with respect to victims’ ability to get restitution.”⁹¹ Thus, courts have appropriately rejected efforts to use the CVRA to displace the restitution statutes.⁹²

The amendment, however, would require a “right ... to restitution.” As Professor Cassell’s previous testimony makes clear, this provision “would constitutionalize” mandatory restitution in every case; whether or not required by statute and apparently whether or not the crime of conviction caused any loss (since a person would be a victim based on unconvicted “acts”), “[c]ourts would be required to enter an order of restitution against the convicted offender.”⁹³ This would require Congress to re-write the restitution statutes, and it would likely violate the Eighth Amendment excessive fines clause in some cases.

I. No Limit on Rights with Respect to Defendants’ Habeas Proceedings

The CVRA provides that in a federal habeas corpus proceeding arising from a state conviction only, the court shall ensure that a victim is afforded some of the rights under

⁸⁶ 18 U.S.C. § 3771(a)(6).

⁸⁷ 18 U.S.C. § 3663A; 18 U.S.C. § 2259.

⁸⁸ 18 U.S.C. § 3663.

⁸⁹ 18 U.S.C. § 3664.

⁹⁰ *See, e.g., Hughey v. United States*, 495 U.S. 411, 420 (1990) (holding that 18 U.S.C. § 3663 authorizes restitution only for “loss caused by the conduct underlying the offense of conviction”).

⁹¹ *See* H.R. Rep. No. 108-711, 2005 U.S.C.C.A.N. 2274, 2283 (Sept. 30, 2004).

⁹² *See United States v. Rubin*, 558 F. Supp. 2d 411, 421, 425-27 (E.D.N.Y. 2008); *United States v. Hunter*, 548 F.3d 1308, 1312-13 (10th Cir. 2008).

⁹³ 2012 Hearing at 117-18.

subsection (a). This provision does not give rise to any obligation or requirement on the part of personnel of the Executive Branch of the Federal Government.⁹⁴

The proposed amendment does not contain such a limit. Hence, victims or persons claiming to be victims could exercise all of their constitutional rights in federal habeas corpus proceedings arising from either state or federal convictions. Not only would this add complexity to an already difficult area, but it should require appointed counsel for habeas petitioners in whose cases victims exercise their rights. Currently, habeas petitioners do not have a right to counsel, but they would be in a different posture under the proposed amendment. In addition to attacking their convictions or sentences, they would be defending themselves against an adverse party asserting its own affirmative rights to freedom from unreasonable delay, to be heard, to dignity and privacy.

J. Remedies

Like the CVRA,⁹⁵ the proposed amendment would provide no grounds for a victim to insist on a new trial or money damages. But any other remedy would be available, and the victim would have a right to appeal and thus could seek to overturn a guilty plea or sentence on any grounds. The CVRA's more limited remedies have proved difficult enough. A constitutional amendment would create unresolvable conflicts.

The CVRA attempts to avoid conflicts with defendants' rights. It sets forth a procedure entitled "Limitation on relief," which allows a victim to "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 pleaded to the highest offense charged."⁹⁶ If the judge "denies the relief sought" in a "motion asserting a victim's right," "the movant may petition the court of appeals for a writ of mandamus." The court of appeals must decide the petition "within 72 hours after the petition has been filed." The district court may, but need not, stay the proceedings or grant a continuance of no more than 5 days "for purposes of enforcing this chapter."⁹⁷

There have been problems in some cases in which the court of appeals failed to provide notice of or allow a defendant to respond to a mandamus action, in violation of Fed. R. App. 21 and the Due Process Clause,⁹⁸ and courts have rightly complained that 72 hours is not enough.⁹⁹

⁹⁴ 18 U.S.C. § 3771(b)(2).

⁹⁵ 18 U.S.C. § 3771(d)(5), (6).

⁹⁶ 18 U.S.C. § 3771(d)(5).

⁹⁷ 18 U.S.C. § 3771(d)(3).

⁹⁸ In *Kenna v. United States District Court*, 435 F.3d 1011 (9th Cir. 2006), the Ninth Circuit inexplicably stated that the defendant "is not a party to this mandamus action," although it did correctly note that

But there are potentially bigger problems, which fortunately appear to have been avoided. If “re-open” means “vacate the sentence with the possibility of imposing a higher sentence,” or “vacate the plea and re-instate greater charges,” it creates a serious potential conflict with defendants’ constitutional rights.

First, a defendant has due process rights to be accurately apprised of the consequences of a plea,¹⁰⁰ and to specific enforcement of a promise made in a plea bargain.¹⁰¹ These expectations are protected by the CVRA, which provides that “[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.”¹⁰² Courts have held that although victims have a right to be reasonably heard at public proceedings, this “does not empower victims to [have] veto power over any prosecutorial decision, strategy or tactic regarding bail, release, plea, sentencing or parole.”¹⁰³ “Nothing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement.”¹⁰⁴

Second, the CVRA procedure has the potential to violate defendants’ constitutional rights under the Double Jeopardy Clause. A defendant has a right not to be sentenced to a higher sentence once the sentence has become final,¹⁰⁵ and not to have a plea to a lesser offense vacated and a greater charge reinstated.¹⁰⁶ 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.¹⁰⁷

“reopening his sentence in a proceeding where he did not participate may well violate his right to due process.” *Id.* 1017. 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*. *Kenna v. United States District Court*, No. 05-73467 (9th Cir.), Order docketed August 8, 2005. 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.

⁹⁹ See *United States v. McNulty*, 597 F.3d 344, 348 n.4 (6th Cir. 2010).

¹⁰⁰ *Mabry v. Johnson*, 467 U.S. 504, 509 (1984).

¹⁰¹ *Santobello v. New York*, 404 U.S. 257, 262 (1971).

¹⁰² 18 U.S.C. § 3771(d)(6).

¹⁰³ *United States v. Rubin*, 558 F. Supp. 2d 411, 424 (E.D.N.Y. 2008).

¹⁰⁴ *In re Huff Asset Management Co.*, 409 F.3d 555, 564 (2d Cir. 2005).

¹⁰⁵ *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980).

¹⁰⁶ *Ricketts v. Adamson*, 483 U.S. 1, 8 (1987).

¹⁰⁷ *Clay v. United States*, 537 U.S. 522 (2003).

One of the reasons a victims' constitutional amendment previously failed was that giving victims constitutional rights could result in a sentence being vacated and the defendant being re-sentenced, which, if the new sentence was more severe, would create a double jeopardy problem.¹⁰⁸ The CVRA does not contemplate a double jeopardy violation.¹⁰⁹ It contemplates a maximum of 21 days between the district court's denial of a motion asserting a victim's right to be heard at a public proceeding involving plea or sentence and the court of appeals' decision on a petition for mandamus: 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.¹¹⁰

Courts have nonetheless had great difficulty in some cases balancing defendants' constitutional rights, the government's interests, and victims' statutory rights, as demonstrated by the following cases, one in which a victim sought to upset a sentence, and the other a plea agreement after the defendant had pled guilty.

In *Kenna v. United States District Court*,¹¹¹ a fraud case involving father and son defendants, the victims had submitted written impact statements and spoken in court at the more culpable father's sentencing hearing.¹¹² The judge declined Mr. Kenna's request to speak again at the son's hearing because the judge was well aware of the harm caused.¹¹³ The Ninth Circuit granted his petition for mandamus based on the understanding that he did not seek to "present evidence," but would speak about the effects of the crime, his feelings, and any effect on his family or job.¹¹⁴ Later, Mr. Kenna and his advocates sought to obtain the presentence report and litigate the defendant's sentence, a request that was denied by the district court and affirmed by the Ninth Circuit.¹¹⁵ In any event, the Ninth Circuit did not issue its first opinion until over six months after the petition for mandamus was filed. In the interim, the judgment became 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

¹⁰⁸ See S. Rep. 108-191 at 103 (Nov. 7, 2003) (minority views).

¹⁰⁹ 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 Senator Durbin).

¹¹⁰ 18 U.S.C. § 3771(d)(3), (5).

¹¹¹ 435 F.3d 1011 (9th Cir. 2006) (*Kenna I*).

¹¹² Transcript of Sentencing Hearing, *United States v. Moshe Leichner*, No. CR 03-00568-JFW (C.D. Cal. Feb. 28, 2005).

¹¹³ Transcript of Sentencing Hearing, *United States v. Zvi Leichner*, No. CR 03-00568-JFW (C.D. Cal. May 23, 2005).

¹¹⁴ *Kenna I*, 435 F.3d at 1014 n.2.

¹¹⁵ *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006) (*Kenna II*).

the sentence and hold a new sentencing hearing.”¹¹⁶ The district court held a new sentencing hearing, permitting Kenna and other victims to speak. Having received further information from defense counsel and the government, the court considered imposing a lower sentence, but ultimately imposed the same sentence.¹¹⁷ If the district court had imposed a higher sentence, the defendant’s Double Jeopardy rights would have been violated.

In *United States v. BP Products North America Inc.*,¹¹⁸ a case involving an explosion at a refinery that killed fifteen people and injured over 170 others, twelve of the victims and their lawyers (also representing them in the related civil case) sought, among many other things, to have a binding plea agreement rejected after the defendant had already pled guilty. The government had engaged in extensive efforts to notify the victims of the plea hearing. The victims and their lawyers were present at the hearing, the victims who wished to speak at the hearing did so, and their lawyers filed briefs and made oral argument to the court.

The victims’ complaint under the CVRA was that they were not consulted about the terms of the plea agreement before it was signed. The government had moved *ex parte* for an order allowing it to delay notice to the victims until the agreement was signed based on the large number of victims, the extensive media coverage, the potential damage to plea negotiations, and the prejudice to the defendants’ right to a fair trial if negotiations broke down. The order was granted.

Counsel for the victims argued that “the government had no constitutional obligation to protect [the defendant’s] right to a fair trial in the event plea negotiations failed” because “there is no constitutional right to plea bargain,” and that “if there was a choice between protecting the rights of the crime victims or the rights of [the defendant], the CVRA required the government to side with the victims.”¹¹⁹

The district court rejected these and other arguments on statutory and constitutional grounds, and declined to reject the agreement. Among other things, the court found that there is no statutory right to notice of plea negotiations as they are not “public proceedings”;¹²⁰ that the legislative history was clear that the “right to confer does not give the crime victim any right to direct the prosecution,” and that “victims are able to confer with the Government’s attorney about proceedings *after* charging”;¹²¹ that the CVRA provides that “[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer

¹¹⁶ *Kenna I.* 435 F.3d at 1017.

¹¹⁷ Transcript of Sentencing Hearing 32-96, *United States v. Zvi Leichner*, No. CR 03-00568-JFW (C.D. Cal. July 17, 2006).

¹¹⁸ 2008 WL 501321 (W.D. Tex. Feb 21, 2008).

¹¹⁹ *Id.* at *17.

¹²⁰ *Id.* at *10.

¹²¹ *Id.* at *11-12 (quoting 150 Cong. Rec. S10910, S10911 (Oct. 9, 2004) (Senator Kyl)).

under his direction”;¹²² that the defendants had a Sixth Amendment right to a fair trial and it was the court’s obligation to protect it by keeping the plea negotiations confidential;¹²³ and that the victims and their lawyers had a full opportunity to express their views on the plea agreement through victim impact statements, briefing and oral argument.¹²⁴

In ruling on the petition for mandamus, the Fifth Circuit found that the district court had violated the CVRA by not ensuring that the victims could confer with the government before the plea agreement was signed. Perhaps in its haste to issue a decision within 72 hours, the court missed the provisions of the CVRA and the statements of its sponsors making clear that victims are not entitled to confer with the prosecutor until after charges are filed, and did not address the defendants’ right to a fair trial if negotiations had failed.¹²⁵ Nonetheless, the panel denied the petition because the victims were allowed to be heard at the plea hearing, and could be heard further still.¹²⁶ The district court then considered voluminous additional information from the victims, and issued a 75-page opinion explaining why it accepted the plea agreement. Among other things, the \$50 million fine was the largest ever imposed against a single corporation under the Clean Air Act and the largest fine imposed for a fatal industrial accident, the company paid another \$1.6 billion to the victims to settle the civil cases, \$21.7 million in fines to OSHA, and over \$265 million to do the work required by the OSHA settlement agreement.¹²⁷

In this case, the plea agreement was binding under Fed. R. Crim. P. 11(c)(1)(C), and for that reason the company could have withdrawn its guilty plea if the court had rejected the agreement as the victims requested. But it is difficult to see how this would have benefited anyone. The company could not have gotten a fair trial. A new agreement with an even larger fine might have been negotiated, but the fine would not go to the victims in any event. Massive resources would have been wasted by the court, the parties and the victims.

In these cases, the violation of defendants’ constitutional rights was avoided, but would likely have occurred under the proposed constitutional amendment.

Thank you for this opportunity to testify. Do not hesitate to contact me if further information is needed.

¹²² *Id.* at *14-15 (quoting 18 U.S.C. § 3771(d)(6)).

¹²³ *Id.* at *18-19.

¹²⁴ *Id.* at *21.

¹²⁵ *In re Dean*, 527 F.3d 391, 394-95 (5th Cir. 2008).

¹²⁶ *Id.* at 395-96.

¹²⁷ *United States v. BP Products*, 610 F. Supp. 2d 655 (S.D. Tex. 2009).