

Maryland Crime Victims' Resource Center, Inc.

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

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Mr. Chairman and Members of the Commission:

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

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

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

The Courts' obligations under the CVRA.

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

1. In any court proceeding involving an offense against a crime victim, the **court shall ensure** that the crime victim is afforded the rights described in subsection (a).
2. Before making a determination described in subsection (a)(3), the **court shall** make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding.
3. The reasons for any decision denying relief under this chapter **shall be** clearly stated on the record.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The need to document compliance and non-compliance.

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

Miscellaneous changes in conformance with the CVRA

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

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

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

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

