Primer

Crime Victims' Rights

Prepared by the
Office of the General Counsel

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I. INTRODUCTION

This primer provides a general overview of crime victims' rights under the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771, the related restitution provisions of the Mandatory Victim Restitution Act ("MVRA") and the Victim and Witness Protection Act ("VWPA"), and the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018 ("the Amy, Vicky, and Andy Act"). The *Guidelines Manual* implements the CVRA through §6A1.5 (Crime Victims' Rights (Policy Statement)), and the related restitution provisions through §§5E1.1 (Restitution) and 8B1.1 (Restitution – Organizations). While the CVRA applies broadly to pretrial, trial, sentencing, and post-sentencing proceedings, this primer focuses primarily on its application to sentencing and to post-sentencing issues, including revocations of probation, supervised release, habeas proceedings, and parole proceedings.[1] Although the primer identifies some of the key cases and concepts, it is not a comprehensive compilation of authority nor intended to be a substitute for independent research and analysis of primary sources.

II. STATUTES, IMPLEMENTING RULES, AND SENTENCING GUIDELINES

A. THE CRIME VICTIMS' RIGHTS ACT

Officially titled the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act,[2] the CVRA's passage in 2004 significantly expanded the rights of federal crime victims and placed an explicit duty on federal courts to ensure that victims are afforded those rights.[3] The court must promptly take up and decide any motion asserting a victim's right.[4] The CVRA's aim is to promote and ensure victim participation in the criminal process and restitution for harm suffered. As relevant to sentencing, the CVRA's substantive goals are the right to notice of public court proceedings involving the crime, the right to be "reasonably heard" at any sentencing proceeding, and the right to full and timely restitution.[5]

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1 A previously released Commission educational video contains additional information to help crime victims exercise their right to participate in the sentencing process. *See* U.S. SENT'G COMM'N, VICTIMS' RIGHTS AND FEDERAL SENTENCING (Oct. 28, 2014), https://www.ussc.gov/education/videos/victims-rights-and-federal-sentencing.

2 The CVRA is part of the larger Justice for All Act of 2004, Pub. L. No. 108–405, 118 Stat. 2260. A 2015 amendment to the CVRA, promulgated as part of the Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114–22, 129 Stat. 227, added two subsections to the list of substantive rights accorded to victims, which codified specific government obligations to victims. *See* 18 U.S.C. § 3771(a)(9), (a)(10).

3 18 U.S.C. § 3771(b)(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 [the CVRA].").

4 *Id.* § 3771(d)(3); *see also In re* Simons, 567 F.3d 800, 801 (6th Cir. 2009) (the district court's unexplained three-month passage of time without ruling on a victim's motion can be construed as an effective denial of rights under the CVRA).

5 *See* 18 U.S.C. § 3771(a)(2), (a)(4), and (a)(6).

The CVRA defines the term "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."[6] The CVRA does not further define "person"; thus, the scope of that term is informed by the Dictionary Act, 1 U.S.C. § 1, which provides that "the word[] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[7] As a result, in addition to individuals, most non-corporeal entities, will be considered "victims" for CVRA and sentencing purposes.[8] The term "victim" does not, however, include the federal government or any state, local, tribal, or foreign government or agency thereof.[9]

The statute affords victims ten substantive rights. Seven of these rights are directly applicable to sentencing proceedings:

> (a) Rights of Crime Victims. A crime victim has the following 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[10] or escape of the accused.
> >
> > . . . .
> >
> > (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.

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6 18 U.S.C. § 3771(e)(2)(A). Case law interpreting the CVRA's direct and proximate cause requirements is discussed in detail in Section III.

7 1 U.S.C. § 1. The Dictionary Act provides definitions of terms, such as "person," used "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise." *Id.*; *see also* United States v. Kasper, 60 F. Supp. 3d 1177, 1178 (D.N.M. 2014) (where "person" is not specifically defined in the CVRA, the default definition in the Dictionary Act applies).

8 For ease of reading, this primer employs the term "person" when discussing CVRA victims, notwithstanding the fact that a victim can be an institutional entity.

9 *See* 1 U.S.C. § 1. Such governmental agencies may, however, qualify for restitution as a "victim" under parallel restitution statutes. *See, e.g.*, 18 U.S.C. § 3664(i); United States v. Ekanem, 383 F.3d 40, 42–43 (2d Cir. 2004) (the government is included in the definition of a "victim" under the MVRA).

10 The right to notice extends to the release of a juvenile accused of a crime, even if the accused's proceedings are not public. *See* United States v. C.S., 968 F.3d 237, 249–50 (3d Cir. 2020) ("[T]he text and structure of [the CVRA] indicate that crime victims have a right to notice of an accused's release even if the accused's proceedings were not 'public court proceedings' "; crime victims have "a right to notification of release or escape untethered to a public court proceeding because the victim of a criminal-at-large convicted in a sealed proceeding is in equal danger as a victim of a criminal-at-large convicted in a public proceeding.").

> (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.[11]
>
> . . . .

A separate subsection, 18 U.S.C. § 3771(d), specifies procedural mechanisms that guide and vindicate the CVRA's substantive rights. Notably, these procedures give personal standing to a victim (or the victim's lawful representative) to assert the substantive rights afforded,[12] grant sentencing courts discretion to fashion reasonable alternative procedures to give effect to the CVRA in cases where there are a large number of victims,[13] and provide an expedited mandamus appeal procedure should a putative victim be denied the relief sought.[14] Section 3771(d) also restricts the relief available to a victim, cautioning that it does not provide grounds for a new trial and will only permit reopening of a plea or sentence if certain procedural benchmarks have been met.[15] Significantly, the CVRA does not authorize a cause of action for damages and "shall [not] be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction."[16] However, the CVRA requires that prosecutors "make their best efforts to see that crime victims are notified" and accorded their rights.[17] Prosecutors also must advise the victim that the victim can seek the assistance of counsel with respect to the victim's rights.[18]

Regarding sentencing proceedings, the CVRA establishes two separate but corresponding sets of rights. The first set relates victims' ability to influence the length and character of the sentence a defendant receives—specifically, that the district court is required to reasonably hear the victim at any public proceeding involving sentencing and to conduct sentencing proceedings without unreasonable delay.[19] Aside from the CVRA, however, a sentencing court has latitude to consider all information relevant to the background, character, and conduct of a defendant.[20] Consequently, a sentencing court may

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11 18 U.S.C. § 3771(a).

12 *Id.* § 3771(d)(1).

13 *Id.* § 3771(d)(2).

14 *Id.* § 3771(d)(3). The unique aspects of mandamus appeals under the CVRA are discussed in more detail in Section VI.

15 *Id.* § 3771(d)(5).

16 *Id.* § 3771(d)(6).

17 *Id.* § 3771(c)(1).

18 *Id.* § 3771(c)(2).

19 *Id.* § 3771(a)(2), (a)(4), (a)(7).

20 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); U.S. SENT'G COMM'N, *Guidelines Manual*, §1B1.4 (Nov. 2018) [hereinafter USSG] ("In determining the sentence to impose within the guideline range, or whether a departure

receive victim impact statements at sentencing regardless of whether the putative victims meet the CVRA's definition of a victim.[21]

The second set of rights guides victims' access to the significant restitution provisions of the VWPA (codified at 18 U.S.C. § 3663) and the parallel provisions of the MVRA (codified at various statutes including 18 U.S.C. §§ 3556, 3663A, and 3664). The sentencing court's restitution decision can have a substantial and lasting impact on putative victims. Consequently, litigation interpreting the CVRA is largely conducted against the backdrop of a party's effort (or the government's effort on behalf of a person) to be accorded restitution.

B. RESTITUTION STATUTES

In addition to conferring the right to participate in the sentencing hearing, designation as a victim under the CVRA assures the right to full and timely restitution for any harm caused by a defendant's criminal conduct.[22] The CVRA, however, is not itself a substantive statutory basis for an order of restitution.[23] Rather, the CVRA's mandate of "full and timely restitution as provided in law" simply ensures compliance with existing restitution statutes, including the VWPA and the MVRA.[24]

The VWPA, passed in 1982, gives district courts discretion to order a defendant who is convicted of certain criminal offenses to pay restitution in full or in part to the victim(s) of

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from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law."); *see also* Pepper v. United States, 562 U.S. 476, 488 (2011) (section 3661 permits a sentencing court to "consider the widest possible breadth of information about a defendant").

[21] *See, e.g.*, United States v. Fata, 650 F. App'x 260, 265 (6th Cir. 2016) (the district court had discretion to consider oral and written statements from the defendant's patients, whose status as "victims" had not been determined, at a sentencing for health care fraud); United States v. Weiner, 518 F. App'x 358, 367 (6th Cir. 2013) (the testimony of the mother of a victim of unrelated and uncharged sexual assault was relevant to the background, character, and conduct of the defendant regardless of whether she was technically a "victim" under the CVRA); United States v. Ortiz, 636 F.3d 389, 393–94 (8th Cir. 2011) (the district court properly permitted merchants' statements as to retail theft losses suffered nationwide in an organized shoplifting scheme because limiting statements to the scope of offense "would deprive the district courts of information which could aid them in determining whether to vary from the Guidelines based upon policy considerations."); United States v. Spiwak, 377 F. App'x 319, 323 (4th Cir. 2010) (per curiam) (finding no error in the government presenting prior sexual abuse victim's testimony to support upward departure in child pornography possession case, even though witness was not a victim under the CVRA). *But see* United States v. Ulbricht, 858 F.3d 71, 126 (2d Cir. 2017) (affirming the conviction and life sentence for the operator of the Silk Road website, but chiding the government for "hammer[ing]" the harms of the drug trade "point home with unavoidably emotional victim impact statements by parents of two of the decedents" absent "reason to believe that a drug dealer's methods . . . enhanced the risk of death from drugs he sold beyond those already inherent in the trade").

[22] 18 U.S.C. § 3771(a)(6).

[23] *See, e.g.*, *In re* Her Majesty the Queen in Right of Canada, 785 F.3d 1273, 1275 (9th Cir. 2015) ("[T]he CVRA is not a substantive basis for an award of restitution.").

[24] *Id.* at 1275–76 ("full and timely restitution as provided in law" means reliance on restitution statutes independent of the CVRA).

that offense.[25] In determining whether to order restitution under the VWPA, courts balance the victim's loss amount, the defendant's financial needs and earning ability, and other factors that the court deems appropriate.[26] "In conducting this balancing test, the court must articulate its analysis" and make specific factual findings relevant to applying the VWPA.[27] In 1996, however, Congress passed the MVRA, which *requires* sentencing courts to order restitution for a broad class of offenses, including offenses that constitute crimes of violence, offenses against property under title 18 (including offenses committed by fraud or deceit), offenses involving international doping fraud conspiracies, offenses relating to tampering with consumer products, and offenses related to theft of medical products in which an identifiable victim has suffered a physical injury or pecuniary loss.[28] For additional offenses that are not covered by the VWPA or MVRA or another title 18 statute,[29] courts may impose restitution as a condition of probation pursuant to the Federal Probation Act.[30] In addition, regardless of which statute governs, the court may order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.[31]

Both the VWPA and the MVRA permit a sentencing court to bypass the restitution procedure if it finds that the number of victims or the complexity of fact finding unduly burdens the sentencing process.[32] For purposes of the MVRA, this "complexity exception" is applicable to offenses involving international doping fraud conspiracies, and, including those committed by fraud or deceit, offenses against property under title 18 and section 416(a) of the Controlled Substance Act (maintaining drug-involved premises) but does not apply to the other broad classes of offenses listed above, including crimes of violence.[33] Ordinarily, however, "[t]he complexity of issues has not discouraged district courts from ordering restitution in criminal cases."[34] The procedural provisions regarding restitution "reinforce

[25] 18 U.S.C. § 3663(a)(1)(A)–(B).

[26] *Id.* § 3663(a)(1)(B)(i).

[27] *In re* Brown, 932 F.3d 162, 173–74 (4th Cir. 2019) (granting a petition for mandamus and remanding the case for the court to explain its balancing analysis regarding whether to award restitution).

[28] 18 U.S.C. § 3663A(a)(1), (c)(1).

[29] Eight additional title 18 statutes include mandatory restitution provisions: § 228 (child support); § 1593 (peonage, slavery, and trafficking in persons); § 2248 (sexual abuse); § 2259 (sexual exploitation and other abuse of children); § 2264 (domestic violence and stalking); § 2327 (telemarketing and email marketing fraud); § 2429 (transportation for illegal sexual activity and related crimes); § 2259 (child pornography). Restitution for victims of child pornography offenses is discussed in Section II.C.

[30] 18 U.S.C. § 3563(b)(2).

[31] *Id.* §§ 3663(a)(3), 3663A(a)(3).

[32] *Id.* §§ 3663(a)(1)(B)(ii), 3663A(c)(3).

[33] *Id.* § 3663A(c)(1)(A); *see also* United States v. Cienfuegos, 462 F.3d 1160, 1168 (9th Cir. 2006) ("[T]he MVRA made the 'complexity exception' inapplicable to crimes of violence.").

[34] United States v. Brennan, 526 F. Supp. 2d 378, 384 (E.D.N.Y. 2007).

th[e] substantive purpose [of ordering restitution], namely, that the statute seeks primarily to ensure that victims of a crime receive full restitution."[35]

Restitution ordered for a victim may include the return of any property taken or payment of its value, payment for medical expenses, psychiatric or psychological care, physical therapy, loss of income, or payment of funeral expenses.[36] Restitution also covers other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense, but those damages are limited to costs incurred related to government investigations and criminal proceedings, and not to collateral matters, such as private investigations or bankruptcy litigation.[37]

Under the MVRA, the court shall order the full amount of the restitution to the victim without consideration of the economic circumstances of the defendant.[38] The defendant's economic circumstances—including projected earnings, other income, and any financial obligations—are only relevant to the schedule of payments.[39] The restitution order may require the defendant to make a single payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.[40] An in-kind payment may be in the form of the return or replacement of property or, if the victim agrees, of services rendered to the victim or a person or organization other than the victim.[41] The restitution may be made to the victim, the victim's estate, a person agreed to by the parties in a plea agreement,[42] or to an insurer or other person who has provided or is obligated to provide compensation for the victim's loss.[43] If the United States is a victim, a court shall ensure that all victims receive full restitution before the United States receives any restitution.[44]

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35 Dolan v. United States, 560 U.S. 605, 612 (2010) (neither the language nor the structure of the MVRA requires denying the victim restitution in order to remedy a missed hearing deadline).

36 18 U.S.C. §§ 3663(b), 3663A(b).

37 *Id.* §§ 3663(b)(4), 3663A(b)(4); Lagos v. United States, 138 S. Ct. 1684, 1688 (2018) (analyzing section 3663A(b)(4): "[W]e ask whether the scope of the words 'investigation' and 'proceedings' is limited to government investigations and criminal proceedings, or whether it includes private investigations and civil or bankruptcy litigation. We conclude that those words are limited to government investigations and criminal proceedings.").

38 18 U.S.C. § 3664(f)(1)(A).

39 *Id.* § 3664(f)(2); *see also* United States v. Inouye, 821 F.3d 1152, 1156–57 (9th Cir. 2016).

40 18 U.S.C. § 3664(f)(3)(A); *see also* USSG §5E1.1(e).

41 18 U.S.C. § 3664(f)(4); *see also* USSG §5E1.1(e).

42 18 U.S.C. §§ 3663(a)(1)(A), 3663A(a).

43 *Id.* § 3664(j)(1).

44 *Id.* § 3664(i).

C. RESTITUTION FOR VICTIMS OF CHILD PORNOGRAPHY OFFENSES

The Amy, Vicky, and Andy Act[45] amended 18 U.S.C. § 2259 to modify procedures for determining the amount of mandatory restitution in child pornography cases.

Victims of child pornography production crimes are entitled to receive restitution for the full amount of their losses.[46] As amended, section 2259 requires a court sentencing a defendant convicted of "trafficking" child pornography—which is defined to include advertisement, distribution, receipt, reproduction, and possession of child pornography[47]—to first determine the full amount of the victim's losses and then to order restitution for the amount reflecting the defendant's relative role in the causal process.[48] The full amount of the victim's loss includes the following:

> [A]ny costs incurred, or that are reasonably projected to be incurred in the future, by the victim, as a proximate result of the offenses involving the victim, and in the case of trafficking in child pornography offenses, as a proximate result of all trafficking in child pornography offenses involving the same victim, including—
>
> (A) medical services relating to physical, psychiatric, or psychological care;
>
> (B) physical and occupational therapy or rehabilitation;
>
> (C) necessary transportation, temporary housing, and child care expenses;
>
> (D) lost income;
>
> (E) reasonable attorneys' fees, as well as other costs incurred; and
>
> (F) any other relevant losses incurred by the victim.[49]

After determining the full loss amount for each identifiable child pornography trafficking victim, the sentencing court must impose a minimum of $3,000 in restitution for each victim.[50] However, the "victim's total aggregate recovery . . . shall not exceed the full amount

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45 Pub. L. No. 115–299, 132 Stat. 4383.

46 18 U.S.C. § 2259(b)(1).

47 "[T]he term 'trafficking in child pornography' means conduct proscribed by section 2251(d) [advertising], 2252 [transport, receive, distribute, reproduce, or possess child pornography], 2252A(a)(1) through (5) [transport, receive, distribute, reproduce, or possess child pornography], 2252A(g) [child exploitation enterprise], or 2260(b) [production of child pornography for importation into United States]." *Id.* § 2259(c)(3).

48 *Id.* § 2259(b)(2)(B).

49 *Id.* § 2259(c)(2)(A)–(F).

50 *Id.* § 2259(b)(2)(B).

of the victim's demonstrated losses."[51] Accordingly, "[a]fter the victim has received restitution in the full amount of the victim's losses as . . . found in any case involving that victim that has resulted in a final restitution order[,] . . . the liability of each defendant who is or has been ordered to pay restitution for such losses to that victim shall be terminated."[52]

The Amy, Vicky, and Andy Act also creates a fund—the Child Pornography Victims Reserve ("CPVR")—to compensate victims of trafficking in child pornography.[53] Victims of child pornography trafficking offenses identified by the sentencing court have the option of electing to receive a one-time "defined monetary assistance" payment from the CPVR for $35,000 (indexed for inflation).[54] Victims who obtain a "defined monetary assistance" payment are not barred from receiving restitution against any defendant for any other offense not covered by the Act.[55] However, if a victim receives a "defined monetary assistance" payment and subsequently seeks additional restitution under the Act, the sentencing court must deduct the amount the victim received from the "defined monetary assistance" payment when determining the full amount of the victim's losses.[56] Similarly, if a victim collected a restitution payment pursuant to the Act for an amount greater than $35,000, the victim is ineligible to receive a "defined monetary assistance" payment.[57]

The CPVR is funded, in part, through special assessments levied on defendants. The Act provides that a sentencing court may assess defendants up to $17,000 for child pornography possession offenses, $35,000 for other offenses involving trafficking in child pornography, and up to $50,000 for child pornography production crimes.[58] Sentencing courts "shall consider the factors set forth in [18 U.S.C. §§] 3553(a) and 3572" when determining the special assessment amount.[59]

The Amy, Vicky, and Andy Act also provides child pornography victims with the right to review the child pornography depicting them at a government facility or court for the purpose of furnishing expert testimony.[60]

The Amy, Vicky, and Andy Act does not apply retroactively. Defendants who committed a child pornography offense prior to December 7, 2018, but are sentenced after

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51 *Id.* § 2259(b)(2)(C).

52 *Id.*

53 *See id.* § 2259B; 34 U.S.C. § 20101(d)(6).

54 18 U.S.C. § 2259(d)(1)(A)–(D).

55 *Id.* § 2259(d)(2)(B).

56 *Id.* § 2259(d)(2)(C).

57 *Id.* § 2259(d)(3).

58 *Id.* § 2259A(a)(1)–(3).

59 *Id.* § 2259A(c).

60 *Id.* § 3509(m)(3).

that date, are "subject to the statutory scheme that was in effect at the time the offenses were committed."[61]

D. FEDERAL RULES OF CRIMINAL PROCEDURE 32 AND 60

Two procedural rules, Federal Rules of Criminal Procedure 32 (Sentencing and Judgment) and 60 (Victim's Rights), assist in implementing the CVRA.[62] Rule 32 provides guidance to ensure the CVRA's "reasonably heard" right is honored at sentencing. It requires a probation officer to include "information that assesses any financial, social, psychological, and medical impact on any victim" in the pre-sentence report.[63]

A centerpiece of the CVRA is the indefeasible right of a victim to be heard at sentencing, a right akin to the defendant's own right of allocution.[64] Rule 32(i)(4)(B) provides guidance for carrying out this provision, requiring sentencing courts to "address any victim of the crime who is present at sentencing and . . . permit the victim to be reasonably heard."[65] Rule 32 drafters further clarified that "[a]bsent unusual circumstances, any victim who is present should be allowed a reasonable opportunity to speak directly to the judge."[66]

Rule 60 largely mirrors the language of the CVRA in directing that crime victims or their lawful representatives be afforded the CVRA's rights throughout all stages of a criminal proceeding, including sentencing.[67] The Advisory Committee's note clarifies that, in referring to the victim or the victim's lawful representative, "the committee intends to include counsel."[68]

E. USSG §6A1.5 (CRIME VICTIMS' RIGHTS)

The *Guidelines Manual* implement the CVRA through §6A1.5 (Crime Victims' Rights (Policy Statement)). Section 6A1.5 provides:

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61 *Id.* § 2259B(d).

62 A 2008 amendment to Federal Rule of Criminal Procedure 1 incorporated the CVRA's definition of crime victim into the entirety of the Federal Rules of Criminal Procedure by equating "victim" as used in the rules with "crime victim" as defined by § 3771(e). *See* FED. R. CRIM. P. 1(b)(12).

63 FED. R. CRIM. P. 32(d)(2)(B).

64 18 U.S.C. § 3771(a)(4); *see also* FED. R. CRIM. P. 32(i)(4)(A)–(B); Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1013 (9th Cir. 2006) (CVRA's aim in making victims independent participants was to change the long-held "assumption that crime victims should behave like good Victorian children—seen but not heard."); United States v. Moussaoui, 483 F.3d 220, 234 (4th Cir. 2007) (Congress enacted the CVRA in order "to protect victims and guarantee them some involvement in the criminal justice process." (citing *Kenna*, 435 F.3d at 1016)).

65 FED. R. CRIM. P. 32(i)(4)(B).

66 FED. R. CRIM. P. 32 advisory committee's note to 2008 amendments.

67 Fed. R. Crim. P. 60.

68 *Id.* advisory committee's note.

> In any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. § 3771 and in any other provision of Federal law pertaining to the treatment of crime victims.[69]

The guideline's application note explains that "crime victim" has the same meaning as set forth in the CVRA.[70] As noted above, the term also includes institutional and other non-corporeal victims by reference to the Dictionary Act.[71]

F. USSG §§5B1.3 AND 5D1.3 (CONDITIONS OF PROBATION AND SUPERVISED RELEASE)

Sections 5B1.3 and 5D1.3 list mandatory, discretionary, standard, and special conditions of probation and supervised release, respectively. Several of the conditions directly or indirectly relate to the goals and purposes of the CVRA and therefore must be considered to vindicate the rights afforded by it. Mandatory conditions of supervision include compliance with restitution orders and related payment schedules, and notification of any material change in economic circumstances,[72] along with a special condition, when warranted, of providing access to financial information.[73] Standard conditions include risk-notification to third parties and organizations.[74] These conditions may be modified post-sentencing.[75]

G. USSG §§5E1.1 (RESTITUTION) AND 8B1.1 (RESTITUTION – ORGANIZATIONS)

Defendants who commit federal crimes where an identifiable victim suffered a physical injury or monetary loss are generally required to pay restitution.[76] The primary goal is remedial—that is, to make victims whole for the harm caused by the offense.[77]

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69 USSG §6A1.5.

70 USSG §6A1.5, comment. (n.1).

71 *See supra* notes 6–9 and accompanying text.

72 The condition requiring notification of any material change in economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments is mandatory if the defendant is sentenced to probation. 18 U.S.C. § 3563(a)(7); USSG §5B1.3(a)(7). The condition is available to the court as a special condition if the defendant is sentenced to a term of supervised release and has unpaid restitution, fines, or special assessments. USSG §5D1.3(d)(8).

73 *See*, *e.g.*, USSG §§5B1.3(a)(2), (a)(6), (a)(7), (d)(3), 5D1.3(a)(6), (d)(3). In addition, section 3664(k) requires that restitution orders provide that the defendant shall notify the court of any material change in the defendant's economic circumstances that might affect his or her ability to pay. 18 U.S.C. § 3664(k).

74 USSG §§5B1.3(c)(12), 5D1.3(c)(12).

75 18 U.S.C. §§ 3563(c) (probation), 3583(e)(2) (supervised release).

76 18 U.S.C. §§ 3663, 3663A.

77 *See* United States v. Razzouk, 984 F.3d 181, 188 (2d Cir. 2020) ("[T]he [MVRA] statute is designed 'to

Restitution is addressed in the *Guidelines Manual* in §§5E1.1 (Restitution) and 8B1.1 (Restitution – Organizations), both of which echo language in the CVRA, MVRA, and VWPA. In relevant part, section 5E1.1 provides:

> (a) In the case of an identifiable victim, the court shall—
>
> > (1) enter a restitution order for the full amount of the victim's loss, if such order is authorized under 18 U.S.C. § 1593, § 2248, § 2259, § 2264, § 2327, § 3663, or § 3663A, or 21 U.S.C. § 853(q); or
> >
> > (2) impose a term of probation or supervised release with a condition requiring restitution for the full amount of the victim's loss, if the offense is not an offense for which restitution is authorized under 18 U.S.C. § 3663(a)(1) but otherwise meets the criteria for an order of restitution under that section.[78]
>
> (b) *Provided*, that the provisions of subsection (a) do not apply—
>
> > (1) when full restitution has been made; or
> >
> > (2) in the case of a restitution order under 18 U.S.C. § 3663; a restitution order under 18 U.S.C. § 3663A that pertains to an offense against property described in 18 U.S.C. § 3663A(c)(1)(A)(ii); or a condition of restitution imposed pursuant to subsection (a)(2) above, to the extent the court finds, from facts on the record, that (A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.[79]

Thus, sentencing courts shall order defendants to pay restitution to compensate identifiable victims for their losses as authorized by statute.

Chapter Eight of the *Guidelines Manual*, which applies to organizations convicted of criminal offenses, also addresses victims' rights and restitution. As noted in the Introductory Commentary, the Chapter Eight guidelines reflect several general principles relating to the sentencing of organizations. Notably, the court must, whenever practicable, order the organization to remedy any harm caused by the offense.[80] The harm caused by the offense

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make victims of crime whole, to fully compensate these victims for their losses and to restore these victims to their original state of well-being.' " (quoting United States v. Maynard, 743 F.3d 374, 377–78 (2d Cir. 2014))).

78 *See also* USSG §§5E1.1, comment. (backg'd), 8B1.1, comment. (backg'd); 18 U.S.C. §§ 3563(b)(2), 3583(d).

79 USSG §5E1.1(a), (b).

80 USSG Ch.8, intro. comment.

may be remedied through a restitution order, a remedial order, an order of probation requiring restitution or community service, or an order of notice to victims.[81]

The approach to imposing restitution on organizational defendants is substantially similar to the approach set forth in Chapter Five for individual defendants. Section 8B1.1 generally contains the same restitution provisions for organizational defendants as §5E1.1 provides for individual defendants.[82] Additionally, for individual defendants, a court should order that any amount paid applies to the order of restitution before any money is paid to satisfy the fine.[83] For organizational defendants, courts should reduce any applicable fine imposed on the organizational defendant under the *Guidelines Manual* to the extent that the imposition of such fine would impair the organization's ability to make restitution to its victims.[84]

III. DETERMINING WHO IS A CRIME VICTIM FOR SENTENCING PURPOSES

Determining who is a victim for CVRA, MVRA, and VWPA purposes generally requires interrelated resolutions of who are the "victims" of the charged offense and whether the "harm" suffered is cognizable under the CVRA's provisions.[85] Both determinations are required before a victim may take advantage of the substantive and procedural rights to participate in the sentencing process.[86] During its analysis, a court must identify the behavior constituting the federal offense and determine the direct and proximate effects of that behavior on affected parties.[87]

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81 USSG Ch.8, Pt.B, intro. comment; USSG §§8A1.2(a), 8B1.1–8B1.4.

82 *Compare* USSG §5E1.1(a)–(c), (e)–(g), *with* USSG §8B1.1(a)–(f). One difference is that in cases involving individual defendants, district courts may award "community restitution" in the absence of an identifiable victim for certain drug trafficking convictions. USSG §5E1.1(d).

83 USSG §5E1.1(c). Courts should consider any restitution the defendant has made or is obligated to pay when determining the appropriate fine amount. USSG §5E1.2(d)(4).

84 USSG §8C3.3(a).

85 The text of all three statutes is substantively similar; consequently, courts have adopted the MVRA's and VWPA's harm analyses when considering victim issues under the later-passed CVRA. *See, e.g.*, *In re* McNulty, 597 F.3d 344, 350 n.6 (6th Cir. 2010) ("[W]e find our case law construing the VWPA and the MVRA persuasive, both for how the CVRA is to be interpreted procedurally and for when an individual qualifies as a victim of a conspiracy."); *In re* Rendon Galvis, 564 F.3d 170, 173–76 (2d Cir. 2009) (per curiam) (determining that a claimant was not a victim under either the CVRA or VWPA by using the same analysis for both statutes).

86 The determination of who is a victim under the CVRA is not necessarily dispositive of who is a victim under the *Guidelines Manual*. *See* United States v. Binkholder, 832 F.3d 923, 929 (8th Cir. 2016) (distinguishing "victim" under USSG §2B1.1 from "victim" in the CVRA: "While the CVRA is intended to protect the rights of crime victims and ensure that they receive proper restitution for their injuries, the Guidelines are meant to assess the culpability of the defendant.").

87 *See In re* Stewart, 552 F.3d 1285, 1288 (11th Cir. 2008) ("To determine a crime victim, then, first, we identify the behavior constituting 'commission of a Federal offense.' Second, we identify the direct and proximate effects of that behavior on parties other than the United States. If the criminal behavior causes a

The rights conferred by the CVRA and the associated restitution provisions of the MVRA and VWPA are offense specific. Suffering harm from the defendant's conduct, even if that conduct would qualify as a separate crime, is insufficient to trigger the rights conferred by the CVRA, MVRA, and VWPA for the offense of conviction. Rather, the harm must be directly tied to the offense of conviction.[88] Relatedly, the defendant's criminal conduct will not be the "but-for" cause of the harm if the harm would have occurred absent commission of the offense.[89]

Like most legal causation inquiries, the question of whether a federal offense caused direct and proximate harm to a person for purposes of the CVRA requires a fact-specific analysis.[90] The harm must have a close, rather than tangential, relationship to the conduct inherent to the offense.[91] Thus, a person experiencing harm where there were additional, intervening causes independent of the offense will not be accorded victim status for purposes of the CVRA.[92]

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party direct and proximate harmful effects, the party is a victim under the CVRA."); *see also In re McNulty*, 597 F.3d at 351 ("The CVRA 'instructs the district court to look at the offense itself only to determine the harmful effects the offense has on parties. Under the plain language of the statute, a party may qualify as a victim, even though it may not have been the target of the crime, as long as it suffers harm as a result of the crime's commission.' " (quoting *In re Stewart*, 552 F.3d at 1289)); *In re* Fisher, 640 F.3d 645, 648 (5th Cir. 2011) ("The CVRA's 'directly and proximately harmed' language imposes dual requirements of cause in fact and foreseeability. A person is directly harmed by the commission of a federal offense where that offense is a but-for cause of the harm. A person is proximately harmed when the harm is a reasonably foreseeable consequence of the criminal conduct.").

88 *In re McNulty*, 597 F.3d at 352 (an employee who was fired for not participating in an antitrust conspiracy is not a "crime victim" because these actions are not "inherent in the crime of conspiracy to violate antitrust laws" to which the defendant pled guilty); United States v. Battista, 575 F.3d 226, 231 (2d Cir. 2009) ("[I]n determining whether one qualifies as a victim, a sentencing court can only consider the offense or offenses for which the defendant was convicted.") (citations omitted). The court may look to the facts and circumstances of the offense of conviction rather than restricting the analysis to the elements of the offense of conviction. *See* United States v. Razzouk, 984 F.3d 181, 188–89 (2d Cir. 2020) ("In holding that the court may look to the facts and circumstances of the offense of conviction to determine if the MVRA authorizes a restitution order, we are in accord with those of our sister circuits that have addressed the question."). However, because of the CVRA's direction that "nothing in th[e] [statute] shall be construed to impair the prosecutorial discretion" of the government, a person may not assert victim status because a defendant *could have* been charged with an additional offense or a different crime. *See* 18 U.S.C. § 3771(d)(6).

89 *See*, *e.g.*, *In re* Fisher, 649 F.3d 401, 403 (5th Cir. 2011) ("An act is a but-for cause of cause of an event if the act is a *sine qua non* of the event—if, in other words, the absence of the act would result in the non-occurrence of the event. Conversely, an act is not a but-for cause of an event if the event would have occurred even in the absence of the act.").

90 *See In re Rendon Galvis*, 564 F.3d at 175; *In re McNulty*, 597 F.3d at 350 (citing *In re Rendon Galvis*).

91 *See, e.g.*, *In re McNulty*, 597 F.3d at 352 ("The alleged harm to McNulty stemmed from his firing for refusing to participate in the conspiracy and his 'blackballing' from employment with packaged-ice companies until he stopped working with the government in exposing the conspiracy. If proven, these would indeed be harms to McNulty, but they are not criminal in nature, nor is there any evidence that they are normally associated with the crime of antitrust conspiracy.").

92 *See, e.g.*, *In re* Antrobus, 519 F.3d 1123, 1124–25 (10th Cir. 2008) (denying petition for mandamus under

In many cases, determining whether a putative victim's harm is cognizable and was caused by the offense will be relatively straightforward. More challenging, however, are the tasks of evaluating foreseeability and attenuated harm in more complex cases and assessing whether emotional or psychological harm suffered by putative victims qualifies them for access to the CVRA's rights.[93]

Using foreseeability and attenuation tests, putative victims have been accorded "victim" status where:

- bystanders suffered property and personal injury damage from a defendant's flight from an offense because the damage "directly and proximately" resulted from the commission of the crime;[94]
- community members suffered rashes and eye, nose, and throat symptoms stemming from the defendant corporation's Clean Air Act violations because the violations were the but-for cause of those harms;[95] and
- an organization (the National Basketball Association) was a victim of the defendant's scheme to transmit wagering information because a key feature of the conspiracy was the defendant's ability to gain a wagering advantage from using confidential information belonging to the organization.[96]

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the CVRA to parents of a homicide victim seeking to be recognized as victims because defendant's sale of a firearm to a juvenile was not proximate cause of homicide seven months later and not foreseeable to defendant); United States v. Sharp, 463 F. Supp. 2d 556, 566 (E.D. Va. 2006) (linking defendant's marijuana sales to unrelated physical abuse of a domestic partner is too attenuated to confer victim status under the CVRA).

93 *See, e.g.*, United States v. C.R., 792 F. Supp. 2d 343, 388 (E.D.N.Y. 2011) (parents "emotionally hurt" by exploitation of a child are "victims" for CVRA purposes), *vacated and remanded on other grounds sub nom*. United States v. Reingold, 731 F.3d 204 (2d Cir. 2013); *see also* FED. R. CRIM. P. 32(d)(2)(B) (incorporating CVRA definition of "crime victim" and requiring the presentence report to include "information that assesses any financial, social, psychological, and medical impact on any victim"). Likewise, the Department of Justice's post-CVRA guidelines state:

> emotional harm may be presumed in violent crime cases where the individual was actually present during a crime of violence, or, if not present, received information about a violent act attempted against him or her. In all other cases, emotional harm should not be presumed in the absence of physical or pecuniary harm, but rather the existence of cognizable emotional harm should be determined on a factual, case-by-case basis.

U.S. DEP'T OF JUST., ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 9 (2011 ed., rev. May 2012), https://www.justice.gov/sites/default/files/olp/docs/ag_guidelines2012.pdf [hereinafter GUIDELINES FOR VICTIM ASSISTANCE].

94 *In re Fisher*, 649 F.3d at 403–04, & n.9 (citing United States v. Washington, 434 F.3d 1265, 1268–70 (11th Cir. 2006) (police department and condominium association afforded victim status where property damaged during defendant's flight from bank robbery); United States v. Donaby, 349 F.3d 1046, 1053 (7th Cir. 2003) ("The district court could properly conclude that robbing the bank directly and proximately led to the high-speed chase and the property damage that ensued.").

95 United States v. CITGO Petroleum Corp., 893 F. Supp. 2d 848, 852–53 (S.D. Tex. 2012) (CVRA).

96 United States v. Battista, 575 F.3d 226, 231 (2d Cir. 2009) (VWPA).

Conversely, courts have denied "victim" status where:

- the defendant pled guilty to conspiracy to import cocaine from Colombia and the family of a murder victim killed in Colombia sought victim status, but the evidence did not support a direct causal connection to the conspiracy because of intervening paramilitary terrorist activity;[97]
- the defendant corporation pled guilty to tax fraud and the individual seeking victim status was harmed by the defendant in an attenuated and unrelated commercial transaction;[98]
- the defendant was convicted of obstructing bankruptcy proceedings and the purported victims suffered harm in an unrelated loan transaction with the defendant;[99]
- the defendant company and four key employees were convicted of misleading the Occupational Health and Safety Administration ("OSHA"), but workers' injuries flowed from safety violations, not from the false information submitted to OSHA;[100]
- the defendant company pled guilty to submitting misleading reports to the Food and Drug Administration regarding implantable heart devices, but there was nothing in the record to show that individuals who had the devices implanted suffered physical harm;[101] and
- the defendant and members of a city council were convicted of bribery relating to the approval of affordable housing development contracts, but a competitor seeking to recover $1.8 million of its costs in its unsuccessful effort to win the contracts could not show that it would have done anything different in absence of the bribery scheme.[102]

Because the CVRA merely confirms that restitution must be guided by the existing requirements under the MVRA and VWPA, a sentencing court in a difficult case may resort to the provisions in each statute that permit it to bypass restitution proceedings if the number

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97 *In re* Rendon Galvis, 564 F.3d 170, 175–76 (2d Cir. 2009) (per curiam) (CVRA). *But see In re* de Henriquez, No. 15-3054, 2015 WL 10692637, at *2 (D.C. Cir. Oct. 16, 2015) (per curiam) (while a satisfactory nexus between the charged offense and assertion of victim status is necessary, direct traceability between a specific instance of controlled substance importation and the eventual murder of purported victim is "a prohibitively onerous burden. The pertinent question under the [CVRA] is whether the murder bears the requisite connection to the overall conspiracy . . . not whether the murder bears a connection to particular coca.").

98 United States v. Credit Suisse AG, No. 1:14CR188, 2014 WL 5026739, at *4 (E.D. Va. Sept. 29, 2014).

99 United States v. Freeman, 741 F.3d 426, 428 (4th Cir. 2014).

100 United States v. Atl. States Cast Iron Pipe Co., 612 F. Supp. 2d 453, 545 (D.N.J. 2009).

101 United States v. Guidant LLC, 708 F. Supp. 2d 903, 913–14 (D. Minn. 2010).

102 *In re* Fisher, 640 F.3d 645, 648–49 (5th Cir. 2011); *In re* Fisher, 649 F.3d 401, 404 (5th Cir. 2011).

of victims or complex issues of fact make a restitution award impractical.[103] Moreover, "[u]nder the MVRA, the availability of a civil suit can no longer be considered by the district court in deciding the amount of restitution."[104] However, the "MVRA also precludes duplicative awards by reducing restitution by any amount later recovered as compensatory damages for the same loss by the victim in any federal or state civil proceeding."[105]

The CVRA specifically authorizes others to assume a victim's procedural and substantive rights in conjunction with, or on behalf of, the victim. Persons so authorized include the victim's "lawful representative" (including legal counsel), the attorney for the government, and any other person as authorized by 18 U.S.C. § 3771(d) and (c)(2). It also provides for the assumption of CVRA rights by a family member, guardian, or other person appointed by the court on behalf of victims who are minors, incompetent, incapacitated, or deceased.[106] An incapacitated victim is "any victim who is unable to interact" during the proceedings because of "a cognitive impairment or other physical limitation, or because of physical restraint or disappearance."[107] A separate statute provides for the appointment of a guardian ad litem for children who have witnessed or suffered a crime of exploitation or abuse to protect the best interests of the child and assert their CVRA rights as appropriate.[108]

Like the substantive right to full and timely restitution, the CVRA's procedural remedies—in particular, its mandamus appeal provision—are invoked by victims alleging error in either the government's or the sentencing court's restitution decisions. *In re W.R. Huff Asset Management Co., LLC* illustrates the interplay of the substantive right to restitution and the CVRA's procedural remedies.[109] There, the Second Circuit considered restitution in a large, complex financial fraud case featuring numerous victims. In a victim's challenge against the government and the court, it held that the district court was acting within its discretion under the CVRA when it approved a settlement agreement that established a $715 million

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[103] 18 U.S.C. § 3663A(c)(3) (court may bypass the restitution procedure in section 3663A "if the court finds, from facts on the record, that (A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process."); 18 U.S.C. § 3663(a)(1)(B)(ii) (a sentencing court may decline to make a restitution order if "the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims"); *see also* United States v. Martinez, 690 F.3d 1083, 1089 (8th Cir. 2012) (affirming the district court's conclusion that the loss the victim bank sustained would have occurred regardless of the defendant's fraud, making the numerous witnesses and hearings required for the determination of loss unduly burdensome).

[104] United States v. Cienfuegos, 462 F.3d 1160, 1168 (9th Cir. 2006).

[105] *Id.* (citing 18 U.S.C. § 3664(j)(2)).

[106] 18 U.S.C. § 3771(d)(1), (e)(2)(B); FED. R. CRIM. P. 60 advisory committee's note.

[107] Guidelines for Victim Assistance, *supra* note 93, at 8.

[108] 18 U.S.C. § 3509(h) (guardian ad litem). The CVRA explicitly prohibits the defendant from being named as such a guardian or representative or otherwise deriving rights from the CVRA. 18 U.S.C. § 3771(e)(2)(B).

[109] 409 F.3d 555 (2d Cir. 2005).

fund to compensate victims of securities and bank fraud perpetrated by the defendants, even though the fund would not be sufficient to ensure that the victims were afforded full restitution under the MVRA. The victims, potentially numbering in the tens of thousands, lost money when they relied on false and misleading statements to purchase high-yield debt securities issued by a corporation founded by one of the defendants. The government entered a settlement agreement with two of the defendants and family members of the defendants who either were not convicted or were not charged. Under the agreement, the defendants and the family members agreed to forfeiture of designated assets, and, in exchange, the government agreed not to request an order of restitution, a criminal fine, additional forfeiture, or other economic sanctions. The government also entered into a non-prosecution agreement with the corporation, which specified that the corporation would pay the government $715 million for a victim compensation fund that would distribute funds to eligible victims as determined by the Attorney General and the Securities and Exchange Commission, subject to court approval.[110]

The district court invoked the CVRA's multiple crime victim provision, 18 U.S.C. § 3771(d)(2), and approved the proposed settlement. Resorting to the CVRA's mandamus remedy, the victims appealed to the Second Circuit, contending that relief was warranted because the settlement violated their CVRA rights to be treated fairly, to confer with government counsel, and to be provided with full and timely restitution.[111]

On mandamus review, the Second Circuit held that the agreement did not violate the victims' right to restitution under 18 U.S.C. § 3771(a)(6). The addition of subsection (d)(2) of the CVRA made clear that Congress recognized that there would be situations when it would be impossible for multiple crime victims of the same set of crimes to be repaid every dollar they had lost. The court pointed out that under § 3663A(c)(3) of the MVRA, victims of a property offense by fraud or deceit are not necessarily entitled to mandatory restitution if the district court determines that the number of identifiable victims is so large as to make restitution impracticable, or that complex issues of fact related to the cause would complicate or prolong the sentencing process such that the need to provide restitution is outweighed by the burden on the sentencing process. The government's settlement agreement recognized "that victims would have difficulty in effecting any recoveries . . . because of difficulties in proof of culpability and because of security interests affecting the [ ] assets" of the defendants and their family.[112] Accordingly, the Second Circuit held that the district court acted reasonably in entering the settlement agreement and approving it.[113]

110 *Id.* at 559, 563–64.

111 *Id.* at 559–61.

112 *Id.* at 564.

113 *Id.*

IV. NOTICE OF, AND PARTICIPATION IN, THE SENTENCING PROCESS

An essential component of the CVRA is its provision affording crime victims 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."[114] This provision means that a conviction by guilty plea or jury verdict triggers the government's mandatory obligations to notify victims of the sentencing hearing and the procedures outlined in the CVRA, Rule 32, and Rule 60. The government should, for example, notify victims that a probation officer will be preparing a presentence investigation report.[115] The prosecution team (or agents on its behalf) should explain that the presentence investigation report includes a section assessing the financial, social, psychological, and medical impact of the crime on any individual against whom the offense was committed, including restitution information, as well as outline how to communicate directly with the probation officer concerning the submission of a victim impact statement.[116] The government must continue to "use its best efforts to give the victim reasonable, accurate, and timely notice" of sentencing proceedings.[117]

Although the rights accorded under the CVRA are substantial, the statute stops short of granting victims any formal party status. Instead, the CVRA's purpose is limited to providing victims a path to vindicating its enumerated rights.[118] For example, although the statute confers the "reasonable right to confer with the attorney for the government in the case,"[119] courts have held that the CVRA's rights to notice and conferral do not impact the government's broad discretion in prosecuting cases,[120] and consequently does not give the victim veto power over discretionary decisions in negotiating sentencing recommendations, restitution agreements, or forfeiture actions.[121] However, "the reasonable right to confer in the case" may extend to pre-charge stages of criminal investigations, including the

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114 18 U.S.C. § 3771(a)(2).

115 Guidelines for Victim Assistance, *supra* note 93, at 41.

116 *Id.*; *see also* 18 U.S.C. § 3771(c)(1) ("Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in [the CVRA].").

117 Fed. R. Crim. P. 60(a)(1).

118 *See* United States v. Rubin, 558 F. Supp. 2d 411, 417 (E.D.N.Y. 2008) ("So far as the Court can divine, however, victims in this posture are not accorded formal party status, nor are they even accorded intervenor status as in a civil action. Rather, the CVRA appears to simply accord them standing to vindicate their rights as victims under the CVRA and to do so in the judicial context of the pending criminal prosecution of the conduct of the accused that allegedly victimized them.").

119 18 U.S.C. § 3771(a)(5).

120 *See In re* Dean, 527 F.3d 391, 395 (5th Cir. 2008).

121 *See Rubin*, 558 F. Supp. 2d at 418 (the CVRA "gives victims a voice, not a veto" over prosecutorial decision-making); *In re* Stake Ctr. Locating, Inc., 731 F.3d 949, 951 (9th Cir. 2013) (per curiam) (subsection 3771(d)(6) does not permit a victim to force the government to file a criminal forfeiture action in connection with the disposition to recover assets that are connected to the offense).

government's decision to dispose of criminal charges.[122]

As the sentencing hearing in a particular case approaches, the government should, in accord with any local rules of procedure or practice, give advance notice to the court of any known victims who seek to be heard at the hearing so that the court is able to exercise its independent obligation to "reasonably hear" any victims in an efficient manner.[123] Relatedly, advance notice of victim participation permits a sentencing court to ensure it complies with the victims' CVRA right to a sentencing proceeding "free from unreasonable delay."[124]

Notably, nothing in the CVRA, Rule 32 or Rule 60 prohibits a victim who comes forward at the "last minute," or even decides as the sentencing hearing is taking place, to make a statement, regardless of whether the victim has provided advance notice to the government or the court.[125] However, a victim statement that injects last-minute factual issues may implicate the constitutional due process protections of Rule 32 and Rule 26.2, which together require that the defendant be afforded the opportunity to investigate, object, and present contrary evidence, and the right to have the court resolve any disputed matter.[126]

The CVRA specifically recognizes the challenge posed by the mandatory notification provisions in large fraud and other wide-ranging cases where the victim pool is large or unknown. The CVRA provides:

> [i]n a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in [the statute], the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.[127]

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122 *See In re* Wild, 955 F.3d 1196, 1205 (11th Cir. 2020) (noting conflicting authorities on whether the CVRA applies prior to the initiation of criminal proceedings), *vacated*, *reh'g granted*, 967 F.3d 1285 (11th Cir. 2020); United States v. Heaton, 458 F. Supp. 2d 1271, 1272–73 (D. Utah 2006) (government motion to dismiss charge of using facility of interstate commerce to entice minors to engage in unlawful sexual activity would not be granted until government consulted with victim); GUIDELINES FOR VICTIM ASSISTANCE, *supra* note 93, at 41 ("Federal prosecutors should be available to confer with victims about major case decisions, such as dismissals, release of the accused pending judicial proceedings (when such release is for non-investigative purposes), plea negotiations, and pretrial diversion.").

123 Guidelines for Victim Assistance, *supra* note 93, at 40.

124 18 U.S.C. § 3771(a)(7).

125 *See* United States v. Eberhard, 525 F.3d 175, 178 (2d Cir. 2008) (lack of prior notice of victims' identity and substance of statements not error where defendant was afforded an opportunity to respond after hearing from victims).

126 *See* FED. R. CRIM. P. 26.2(a)–(d), (f); FED. R. CRIM. P. 32(e)(2), (f)–(i); United States v. Rakes, 510 F.3d 1280, 1285–86 & n.3 (10th Cir. 2007) ("Had the court proceeded to issue something other than the parties' agreed sentence without first affording them a meaningful opportunity to review and comment on the victim's letter, Rule 32(i)(1)(B) surely would have been implicated and we would have before us a very different case.").

127 18 U.S.C. § 3771(d)(2); *see also* United States v. Olivares, No. 3:13-CR-355(MOC), 2014 WL 2531559, at *3

Courts have applied the "reasonable procedure" provision to include alternative notification methods such as publication of notices through media outlets, on public websites dedicated to victim notification services, or by proxy notification to an individual or organization (such as community organizations, corporate entities, or counsel for a class of victims) that are able to disseminate notice to other victims.[128] Courts now routinely grant the government's request that it be permitted to use various Department of Justice webpages and other victim notification services to satisfy its obligations in large, multi-victim cases.[129]

V. IMPLEMENTING THE CVRA AT THE SENTENCING HEARING

Although neither the CVRA nor the criminal rules dictate the procedure a sentencing court should use to implement the "reasonably heard" mandate, executing the directive at the sentencing hearing is conceptually straightforward. Rule 32 dictates that before imposing sentence, the district court "must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard."[130] Rule 32's drafters evinced a strong preference for in-court oral allocution, stating that "any victim who is present should be allowed a reasonable opportunity to speak directly to the judge" at the sentencing proceeding. [131] All victim statements to the sentencing court should be concluded before a defendant exercises the right to allocution in order to permit the opportunity to respond to the statement if desired.[132]

(W.D.N.C. June 5, 2014) (recommending procedures for victim notification in light of the impractical nature of individual notice for an internet-based Ponzi scheme that generated more than 700,000 victims in over 150 countries).

[128] 18 U.S.C. § 3771(d)(2); *see also* United States v. BP Prod. N. Am., Inc., 610 F. Supp. 2d 655, 671 (S.D. Tex. 2009) (government, among other things, set up telephone number and website and established a procedure for victim-impact statement submissions); United States v. Saltsman, No. 07-CR-641, 2007 WL 4232985, at *1 (E.D.N.Y. Nov. 27, 2007) (allowing notice by publication).

[129] *See Saltsman*, 2007 WL 4232985 at *1–2; *Olivares*, 2014 WL 2531559 at *3 (collecting large-scale, multiple-victim fraud cases where alternative notices posted on the Department of Justice's and court-appointed trustee's websites permitted).

[130] FED. R. CRIM. P. 32(i)(4)(B).

[131] *Id.* advisory committee's note to 2008 amendments; *see also* Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1016 (9th Cir. 2006) (CVRA gives crime victims right to speak at proceedings covered by the CVRA).

[132] *See* United States v. Millan-Issac, 749 F.3d 57, 70–71 (1st Cir. 2014) (remanding because the defendant did not have the opportunity to respond to victim information proffered for the first time at sentencing); United States v. Eberhard, 525 F.3d 175, 178 (2d Cir. 2008) (lack of prior notice of identity and substance of statements not error where defendant was afforded an opportunity to respond after hearing from victims); United States v. Atl. States Cast Iron Pipe Co., 612 F. Supp. 2d 453, 497 (D.N.J. 2009) ("When participation of a statutory crime victim or other affected person becomes an issue in the sentencing process, the court facing those issues must not lose sight of the rights of the defendant.").

Victims need not be sworn in before speaking at sentencing.[133] Because victim impact statements, whether oral or written, are made in the context of a sentencing hearing, neither the Federal Rules of Evidence nor the defendant's Sixth Amendment confrontation clause protections apply to such statements.[134] For this reason, a sentencing court has discretion to curtail or prohibit direct questioning of a victim by the defense.[135]

A victim's right to be "reasonably heard" under the CVRA does not confer a general right to obtain a defendant's presentence report or financial information.[136]

VI. APPELLATE REVIEW

The CVRA adds the remedy of mandamus to the government's ordinary appellate rights. It also affords the victim (or the victim's lawful representative) separate independent status to seek mandamus to enforce the enumerated rights, and it features an expedited schedule for resolution.[137] In relevant part, the statute provides:

> *Motion for relief and writ of mandamus.* The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district

[133] *See* United States v. Grigg, 434 F. App'x 530, 533 (6th Cir. 2011) ("Every court that has examined this issue has held that there is no requirement to swear in CVRA victims.") (collecting cases); *see also* United States v. Christensen, 732 F.3d 1094, 1102 (9th Cir. 2013) ("As a general matter . . . a district court may consider victim impact statements, whether sworn or not, at sentencing.").

[134] FED. R. EVID. 1101(d)(3); *see also* United States v. Beydoun, 469 F.3d 102, 108 (5th Cir. 2006) ("*Crawford* [*v. Washington*, 541 U.S. 36, 61 (2004)] does not extend a defendant's rights under the Confrontation Clause to sentencing proceedings."); United States v. Cantellano, 430 F.3d 1142, 1146 (11th Cir. 2005) (per curiam) ("*Crawford* dealt with trial rights and we see no reason to extend *Crawford* to sentencing proceedings. The right to confrontation is not a sentencing right."); United States v. Roche, 415 F.3d 614, 618 (7th Cir. 2005) ("[W]itnesses providing information to the court after guilt is established are not accusers within the meaning of the confrontation clause.").

[135] *See* United States v. Castillo, 476 F. App'x 774, 775 (5th Cir. 2012) (per curiam) (rejecting defendant's arguments that the district court abused its discretion and the defendant's due process rights were violated by the court's limitation on questioning victim regarding her statement at sentencing); *see also* United States v. Barouch, No. 4:10-CR-099-A-I, 2013 WL 2151226, at *9 (N.D. Tex. May 17, 2013) ("The victim thus has the right to make a statement at sentencing about the effect the defendant's criminal conduct had on her without being cross-examined or placed under oath, just as a defendant has the right to make whatever statement he wants in mitigation.").

[136] *In re* Siler, 571 F.3d 604, 609 (6th Cir. 2009); *see also* United States v. Coxton, 598 F. Supp. 2d 737, 740 (W.D.N.C. 2009) (collecting cases and noting that every court to address the issue has held that nothing in the CVRA or its legislative history requires the disclosure of the PSR to victims);*cf*. United States v. Moussaoui, 483 F.3d 220, 234–35 (4th Cir. 2007) (nothing in the CVRA grants victims a general right of discovery in pursuit of a civil claim against perpetrators).

[137] 18 U.S.C. § 3771(d)(3).

> court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed, unless the litigants, with the approval of the court, have stipulated to a different time period for consideration. In deciding such application, the court of appeals shall apply ordinary standards of appellate review. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.[138]

The CVRA's bestowal to victims of personal standing to appeal is limited to the mandamus procedure outlined in the statute.[139] In contrast to the government, a putative victim appealing in his personal capacity has no standing to directly appeal from a CVRA ruling, including rulings related to restitution.[140] However, although not a party, a victim can intervene on appeal to defend restitution awarded by the district court.[141]

The scope of mandamus review at the sentencing stage of a criminal case depends on whether the motion to accord victim status is appealed before or after sentencing. If the writ is sought before the hearing, appellate review consists of an examination of the district court's decision not to accord victim status.[142] The relief, if granted, is a direction to the district court to accord victim status or a specific CVRA right going forward, or a remand for the district court to reconsider its denial.[143]

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[138] *Id*.

[139] *See In re* Akebia Therapeutics, Inc., 981 F.3d 32, 36 (1st Cir. 2020) ("When a crime victim is not happy with the district court's restitution order, 'a petition for a writ of mandamus under the CVRA is the exclusive mechanism for appellate review of sentencing orders affecting crime victims' rights.' " (quoting United States Aguirre-Gonzalez, 597 F.3d 46, 48 (1st Cir. 2010))).

[140] *See* United States v. Kovall, 857 F.3d 1060, 1065 (9th Cir. 2017) (while victims have standing to challenge a district court's restitution award, section 3771(d)(3)'s mandamus procedure is the sole vehicle by which it may do so); United States v. Stoerr, 695 F.3d 271, 277 (3d Cir. 2012) ("All Courts of Appeals to have addressed this issue have concluded that nonparties cannot directly appeal a restitution order entered against a criminal defendant."). Non-party victims have been permitted to appeal issues that do not alter a defendant's sentence. *See, e.g.*, United States v. Perry, 360 F.3d 519, 523–24 (6th Cir. 2004) (allowing a non-party victim to appeal an order vacating a lien securing her restitution award).

[141] *See* United States v. Laraneta, 700 F.3d 983, 985–86 (7th Cir. 2012) (permitting crime victims who were awarded restitution by the district court to intervene when defendant appealed).

[142] *See, e.g*., *In re* Rendon Galvis, 564 F.3d 170, 175–76 (2d Cir. 2009) (per curiam) (affirming district court decision denying victim status in ongoing sentencing hearings).

[143] *See, e.g*., Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1017 (9th Cir. 2006) (remanding to district court with instruction to accord aggrieved victim an opportunity to speak); *In re* de Henriquez, No. 15-3054, 2015 WL 10692637, at *2 (D.C. Cir. Oct. 16, 2015) (remanding with instructions to reconsider recognizing petitioners as

Regarding challenges to sentences, any remedy will necessarily implicate the measure of reopening the sentencing hearing or a guilty plea. In such instances, the CVRA adds specified conditions to obtain relief. It provides:

> *Limitation on relief.* In no case shall a failure to afford a right under this chapter provide grounds for a new trial. 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 14 days; and
> >
> > (C) in the case of a plea, the accused has not pled to the highest offense charged.[144]

These limitations do not affect the victim's rights to restitution.[145]

Victims have successfully obtained relief under the CVRA after sentencing and judgment.[146] However, courts have indicated concern with the statutory language regarding re-opening criminal sentences.[147]

In the wake of the CVRA's 2006 passage, circuit courts split over whether to apply an abuse of discretion standard of review to victim claims or the heightened review that until then had applied to mandamus appeals.[148] In 2015, Congress adopted the less stringent

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qualifying victims because district court imposed too stringent a proximate cause requirement when denying victim status).

144 18 U.S.C. § 3771(d)(5).

145 *Id.*; *see* Fed. Ins. Co. v. United States, 882 F.3d 348, 363–65 (2d Cir. 2018) (concluding that "Congress intended to exempt parties using the CVRA's mandamus procedures to seek appellate review of decisions denying their claims for restitution from the limitations on reopening a sentence contained in § 3771(d)(5)").

146 *See, e.g.*, *Kenna*, 435 F.3d at 1016–17 (remanding to the district court where the sentencing judge erroneously interpreted the newly-passed CVRA's "right to be reasonably heard" provision and refused to allow petitioner to allocute at defendant's sentencing).

147 *See, e.g.*, United States v. Hunter, 548 F.3d 1308, 1316 (10th Cir. 2008) ("[i]f individuals were allowed to re-open criminal sentences after all issues have been resolved . . . then the government's prosecutorial discretion would be limited. A successful appeal by [the victims] would require a new sentencing hearing that could lead to a new sentence. The government determined what it believed to be the proper sentence for [the defendant], and Section 3771(d)(6) shows that Congress did not intend to allow non-party appeals that could disturb that judgment.").

148 *Compare In re* Stewart, 552 F.3d 1285, 1288–29 (11th Cir. 2008) (per curiam) (granting petition without asking whether victim had a clear and indisputable right to relief), *In re* Walsh, 229 F. App'x 58, 60 (3d Cir. 2007) (per curiam) (stating in dicta that "mandamus relief is available under a different, and less demanding, standard under 18 U.S.C. § 3771"), *Kenna*, 435 F.3d at 1017 (applying abuse of discretion standard), *and In re* W.R. Huff Asset Mgmt. Co., LLC, 409 F.3d 555, 562–63 (2d Cir. 2005) (applying abuse of discretion standard and

approach by amending subsection 3771(d)(3) to clarify that "[i]n deciding such application [for mandamus], the court of appeals shall apply ordinary standards of appellate review."[149]

A. POST-SENTENCING JUDICIAL PROCEEDINGS

The CVRA extends to a victim's right to be reasonably heard at post-sentencing proceedings. The Supreme Court has held that "postrevocation penalties relate to the original offense," so "postrevocation sanctions [are] part of the penalty for the initial offense."[150] Post-sentencing proceedings can include modifications of probation and supervised release,[151] remands after appeal, retroactive sentencing modifications,[152] and habeas proceedings.[153]

Similarly, if the violation of probation or supervised release involves a new crime, the revocation proceeding may be considered to "involve" the new crime of the accused and thus confer CVRA rights to the victims of the substantive offense that is the basis of the violation.[154] At a minimum, the government has an obligation to notify the victims of the defendant's initial offense and of the court's obligation to reasonably hear any victims who appear at such a revocation hearing.[155]

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stating that it is clear from the CVRA's language that the petitioner need not overcome the hurdles typically faced in mandamus review), *with* United States v. Monzel, 641 F.3d 528, 533 (D.C. Cir. 2011) (noting circuit split and holding "the best reading of the statute favors applying the traditional mandamus standard."), *In re* Acker, 596 F.3d 370, 372 (6th Cir. 2010) ("plain language of the statute compels application of the normal mandamus standards." (citing *In re* Antrobus, 519 F.3d 1123, 1124–25 (10th Cir. 2008))), *In re* Dean, 527 F.3d 391, 394 (5th Cir. 2008) (applying "no other adequate means," "clear and indisputable" right, and appellate court satisfaction that mandamus "appropriate under the circumstances" requirements), *and In re Antrobus*, 519 F.3d at 1124–25, 1130 (traditional mandamus standards apply).

149 Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114–22, § 113(c)(1), 129 Stat. 227, 241.

150 Johnson v. United States, 529 U.S. 694, 700–01 (2000). Only revocation of supervised release was at issue in *Johnson*, but the procedural and substantive similarities of probation and supervised release revocation proceedings suggest that the *Johnson* court's reasoning applies equally to both categories.

151 18 U.S.C. §§ 3563(c), 3583(e).

152 USSG §1B1.10.

153 *See* 18 U.S.C. 3771(b)(2); Pann v. Warren, No. 5:08-CV-13806, 2010 WL 2836879, at *3–4 (E.D. Mich. July 19, 2010) (the CVRA provides crime victims with rights in a federal habeas corpus proceeding arising out of a state conviction).

154 *See* United States v. Ramos, 979 F.3d 994, 1003 (2d Cir. 2020) (the CVRA "expressly guarantees" the right "to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding" and "district courts are obligated to at least consider the severity of the conduct constituting the violation in setting a sentence for a violation of supervised release, and the impact of the defendant's actions on her victims is no doubt a legitimate component of that consideration.").

155 GUIDELINES FOR VICTIM ASSISTANCE, *supra* note 93, at 8 ("If the defendant is convicted, CVRA rights continue until criminal proceedings have ended. For example, CVRA rights continue through any period of incarceration and any term of supervised release, probation, community correction, alternatives to incarceration, or parole."). The lack of decisional authority on this issue may be explained by the fact that victims may be hard to locate to assert the full panoply of rights granted by the CVRA at a post-conviction stage of the proceedings, which may take place years after the initial sentencing. A likely additional reason is the need for flexibility in the CVRA's

B. PAROLE HEARINGS

The CVRA explicitly provides that a victim is entitled to "reasonable, accurate, and timely notice of . . . any parole proceeding, involving the crime or of any release or escape of the accused," and to "be reasonably heard at . . . any parole proceeding."[156] Consistent with the CVRA, the U.S. Parole Commission provides public notice of the relatively infrequent dates of parole and parole revocation hearings.[157] The Bureau of Prisons also provides a requesting victim with information on the inmate's release, including by potential parole, from any Bureau of Prisons institution.[158] The Parole Commission's Manual, like the CVRA, specifies that in deciding whether to grant parole, it is required to consider (among other things) a "statement, which may be presented orally or otherwise, by any victim of the offense for which the prisoner is imprisoned about the financial, social, psychological, and emotional harm done to, or loss suffered by such victim."[159]

application by the sentencing court and litigants in the fast-moving context of supervised release and probation revocation hearings. *Cf.* United States v. Rubin, 558 F. Supp. 2d 411, 423 (E.D.N.Y. 2008) (lack of notice to victims of pretrial release modification hearings was not unreasonable when defendant's requests to leave the country for funeral of family members overseas was made under exigent circumstances because the court's decisions "would not have been altered by movants' (or other victims') input in a manner that rendered delay for their notice any more reasonable."). Additionally, the district court's wide discretion to hear information in the probation and supervised release revocation context may render any dispute regarding CVRA status moot. *See* United States v. Rizzolo, 472 F. App'x 638, 639–40 (9th Cir. 2012) (no error in the district court's decision to hear statements from interested persons at the defendant's probation violation hearing even though the persons making statements were not statutorily-recognized victims under the CVRA); United States v. Campbell, 309 F. App'x 490, 491 (2d Cir. 2009) ("As Campbell's supervised release was revoked pursuant to state harassment charges arising out of domestic disputes with his wife, the district court was clearly not in error to allow his wife to testify to Campbell's history of abusive acts.").

156 18 U.S.C. § 3771(a)(2), (a)(4); Garraway v. Tracey, No. CV-15-2163-PHX-SPL-DMF, 2016 WL 9234112, at *6–8 (D. Ariz. Oct. 11, 2016) (section 3771 permitted family members, including a cousin, of a victim to appear and submit statements at petitioner's parole hearing regarding 1986 murder conviction).

157 Federal parole largely was abolished with the implementation of the Sentencing Reform Act, which also drove the advent of the *Guidelines Manual* and statutory supervised release provisions. Consequently, parole procedures are only applicable to offenders who committed their offense prior to November 1, 1987. According to a 2015 Government Accountability Office report, there were just 1,334 offenders on parole and another 1,067 eligible for parole in 2014. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-359, U.S. PAROLE COMM'N: NUMBER OF OFFENDERS UNDER ITS JURISDICTION HAS DECLINED 18 (2015), https://www.gao.gov/assets/680/670509.pdf. The Parole Commission thus conducts only a limited number of hearings in any given year and the number of hearings will continue to decline before ultimately ceasing completely when there are no longer offenders under its jurisdiction. *Id.* at 4–5.

158 28 C.F.R. § 2.37(c)(7); *see also* 28 C.F.R. § 551.151.

159 28 C.F.R. § 2.19(a)(6); U.S. DEP'T OF JUST., U.S. PAROLE COMM'N, RULES AND PROCEDURES MANUAL §2.13–11, 2.19(a)(6) (2010), https://www.justice.gov/sites/default/files/uspc/legacy/2011/12/30/uspc-manual111507.pdf.