

## ENSURING INDIVIDUAL RIGHTS ARE NOT DIMINISHED IN THE FACE OF MASS VICTIMIZATION

By MEG GARVIN, J.D.

This country has experienced the horror of mass victimization in a number of very public moments, among these, the bombing in Oklahoma City and the attacks of 9-11. On a daily basis, crimes such as fraud, identity theft, and human trafficking, are perpetrated on significant numbers of victims. These multiple victim crimes present unique challenges for law enforcement, prosecutors, and courts, regarding how and when to afford individual victims their legal rights. Though there are logistical and practical hurdles to affording rights in these situations, the federal Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, is clear that rights must be given effect.

Taking notice of the challenges presented by multiple victim cases, Congress incorporated into the text of the CVRA a roadmap for how courts and other participants in the criminal justice system should address the situation when such challenges arise. Specifically, the CVRA provides:

In 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 subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

18 U.S.C. § 3771(d)(2). This provision makes clear that the rights must be given effect, but allows courts, after undertaking a two prong analysis, to craft reasonable, alternative methods of provision of the rights.

### **Prong One: The Number of Victims Makes it Impracticable**

The first prong of the analysis requires a court to find that the number of victims in any particular case makes it impracticable to individually accord the rights contained in the CVRA. To date, no federal court has defined "impracticability" in this context, but such a determination will necessarily be fact-specific. Numerous federal courts have provided guidance on the number of victims that are necessary to trigger the provision. Notably, courts have made findings and resorted to the multiple victim provision of the CVRA only where the potential number

of victims has numbered in the thousands. *See, e.g., In Re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 559 (2d Cir. 2005) (applying the CVRA's multiple victim provision where "[t]he Government argued that there were tens of thousands of victims of the crimes committed"); *United States v. Stokes*, No. 3:06-00204, 2007 WL 1849846, at \*1 (M.D. Tenn. June 22, 2007) (applying the CVRA's multiple victim provision where estimated "total number of potential victims [was] 35,000 individuals"); *United States v. Causey*, No. H-04-025-SS (S.D. Tex. July 28, 2006) (unpublished opinion) (applying the CVRA's multiple victim provision where "[p]otential crime victims in the case include thousands of former Enron employees, owners of Enron securities, and other persons who were harmed as a result of the crimes for which defendants will be sentenced"). In contrast, where the number of victims was only in the hundreds, one court has commented that the victims' CVRA rights could be practicably afforded, and therefore resort to the multiple victim provision was improper. *See In re Dean*, 527 F.3d 391, 394-95 (5th Cir. 2008) (noting that the relatively small number of victims – fewer than 200 – should have been notified of the ongoing plea negotiations and given the opportunity to talk to the government before it negotiated a deal with defendants).

### **Prong Two: A Reasonable Procedure to Give Effect**

Assuming a court makes the findings required by prong one, rights are not lost for the individual victims. Instead, the CVRA mandates that courts craft a reasonable procedure that gives effect to the rights without unduly prolonging proceedings. Crafting reasonable procedures that meet this criteria may be difficult at times, but hurdles are not grounds to thwart Congress' mandate that individual victims be afforded rights. Invariably, procedures must be crafted on a case-by-case basis, and often on a right-by-right basis, with the needs of the individuals affected being of primary consideration.<sup>1</sup> Possible procedures to ensure the enforcement of two rights of victims under the CVRA – notice and presence – follow.

#### *The Right to Reasonable, Accurate, and Timely Notice*

The CVRA affords crime victims "[t]he right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving

(continued on next page)

the crime or of any release or escape of the accused.” 18 U.S.C. § 3771(a)(2). This right to notice is the building block of other rights, and therefore any alternative procedure crafted must be designed to give actual and accurate notice to the victims in a timely fashion. *Cf.* U.S. Dep’t of Justice, *Attorney General Guidelines for Victim and Witness Assistance* 13 (2005) (stating that “in cases with large numbers of victims, responsible officials should use the means, given the circumstances, most likely to achieve notice to the greatest possible number of victims”). Federal courts and the United

multiple victim case, Senator Kyl endorsed the idea of crafting a closed circuit television procedure to ensure victim presence. *See* 150 CONG. REC. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (noting, as one example of an alternative procedure that gives effect to the law and yet takes into account impracticability, that “in the Oklahoma City bombing case the number of victims was tremendous and attendance at any one proceeding by all of them was impracticable so the court fashioned a procedure that allowed victims to attend the proceedings by close circuit television.”)

### **Be Wary of Red Herrings**

Federal courts and the United States Department of Justice have employed a number of methods to provide notice to large classes of victims in an effort to comply with the CVRA, including using a combination of national media press releases, press conferences and advertisements, informational websites, toll-free telephone numbers, and direct notice via letter.

Everything in the CVRA indicates that the rights guaranteed therein must be given effect even in complex cases, and places affirmative obligations on the courts to ensure rights are afforded. *See* 18 U.S.C. § 3771(b)(1) (providing that “the court shall ensure that the crime victim is afforded the rights described in subsection (a)”); *see also United States v. Turner*, 367 F. Supp. 2d 319, 326 (E.D.N.Y. 2005) (construing 18 U.S.C. § 3771(b)(1) to require courts to independently and proactively “ensure victims’ rights”); *United States v. Degenhardt*, 405 F. Supp. 2d 1341, 1343 (D. Utah 2005) (recognizing courts’ independent obligation to ensure victims are afforded their rights).<sup>3</sup> Despite these clear directives, experience reveals that parties to the criminal cases, both prosecution and defense, often argue against affording rights to victims in multiple victim cases, asserting that 1) rights do not attach pre-charging; 2) affording such rights will result in excessive media coverage, thereby prejudicing the government’s ability to present a case and the defendant’s ability to receive a fair trial; or 3) affording such rights will impair plea negotiations. Nothing in the CVRA’s plain language or its legislative history, nor in court interpretation of the statute, supports any of these arguments as legitimate opposition to affording of rights in multiple victim cases.

States Department of Justice have employed a number of methods to provide notice to large classes of victims in an effort to comply with the CVRA, including using a combination of national media press releases, press conferences and advertisements, informational websites, toll-free telephone numbers, and direct notice via letter. *See, e.g., In Re W.R. Huff Asset Mgmt. Co.*, 409 F.3d at 559; *Stokes*, 2007 WL 1849846, at \*1-2; *Casey*, No. H-04-025-SS; *see also Attorney General Guidelines*, at 13-14 (suggesting methods for providing notice to large numbers of victims, such as electronic mail (including listservs), Internet websites, toll-free telephone numbers, and town meetings).<sup>2</sup>

#### *The Right Not to be Excluded - 18 U.S.C. § 3771(a)(3).*

The right to personally witness court proceedings, which subsection (a)(3) of the CVRA guarantees, is fundamental for many victims. While certainly it may be impracticable to have thousands of victims attend a proceeding in a courtroom with 50 seats, reasonable alternative mechanisms are readily available. For instance, closed circuit television or telephonic presence are both viable options in many situations. In fact, when discussing the right to be present in the context of a

First, the CVRA’s plain language rebuts the idea that rights do not attach pre-charging. The CVRA provides: “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.” 18 U.S.C. § 3771(d)(3) (emphasis added). The Fifth Circuit in *In re Dean*, held that this provision means that certain CVRA rights, including the right to confer with the attorney for the government, attach before a defendant is formally charged. 527 F.3d

(continued on page 3)

(continued from page 2)

at 394; see also *United States v. Rubin*, 558 F. Supp. 2d 411, 418-19 (E.D.N.Y. 2008) (citing *Dean* and noting that a reasonable limitation on pre-formal commencement attachment is that the government be “contemplating” charges).

Similarly, the plain language of the CVRA and recent court interpretation refute the idea that either speculative fear of interference with fair trial or plea bargaining are grounds for denying victims’ rights, even in multiple victim cases. As noted above, not only is the CVRA clear that the *only* grounds for crafting alternative methods of rights provision is when “the number of crime victims makes it impracticable to accord all of the crime victims,” 18 U.S.C. § 3771(d)(2), but in *In re Dean*, the Fifth Circuit held that reasons such as media coverage and its interference with possible plea negotiations “do not pass muster,” and that such speculative reasons “missed the purpose of the CVRA[.]” 527 F.3d at 394.

### CONCLUSION

The unfortunate fact that some crimes have many victims does not diminish the rights provided by the CVRA. The CVRA recognizes the complexity of multiple victim cases, and mandates that courts fashion procedures that give effect to the victims’ rights. Procedures that effectuate administrative efficiency but fail to give effect to the CVRA are impermissible. Victims, victim attorneys, and victim advocates must hold courts to the standard set forth in the law – only upon a finding that the number of victims makes it impracticable to afford the rights to each individual may a court craft an alternative procedure, and even in that moment the court must craft a procedure that gives meaningful effect to the rights. ■

### (Endnotes)

1 Senator Kyl, one of the primary sponsors of the CVRA, noted this fact-specific analysis, stating,

Importantly, courts must seek to identify methods that fit the case before [them] that ensure that despite the high number of crime victims, the rights in this bill are given effect. It is a tragic reality that cases may involve multiple victims and yet that fact does is not grounds for eviscerating the rights in this bill. Rather, that fact is grounds for the court to find an alternative procedure to give effect to the bill.

150 CONG. REC. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

2 Selection of any one of these identified methods is likely insufficient because it is not reasonably calculated to reach the most victims; selection of any of these methods without consideration of the population of victims and how those victims routinely access information would similarly be insufficient.

3 Notably, responsibility for safeguarding victims’ rights under the CVRA in multiple victim cases does not fall to the judiciary alone. The CVRA also provides:

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 subsection (a).

18 U.S.C. § 3771(c)(1). In the United States Department of Justice Guidelines, the United States Attorney General has opined that in cases with a large numbers of victims “the attorney for the Government should move the appropriate district court at the earliest possible stage for an order fashioning a reasonable procedure” so that victims can effectuate their rights under the CVRA “to the greatest practicable extent.” U.S. Dep’t of Justice, *Attorney General Guidelines for Victim and Witness Assistance* 13 (2005).