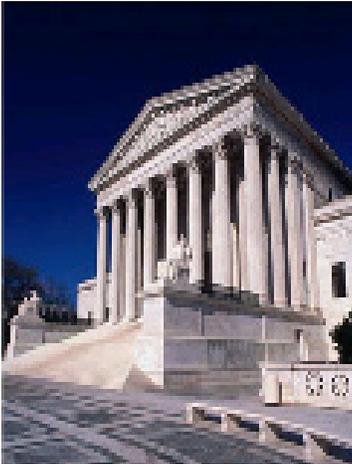


## The New Federal Landscape: Snapshots of Change

by Meg Garvin



SUPREME COURT BUILDING  
WASHINGTON, DC

Just over a year has passed since the Crime Victims' Rights Act, 18 U.S.C. § 3771 (CVRA), was signed into law. The impact of this historic legislation is slowly unfolding as victims, their attorneys, and U.S. Attorneys' Offices begin to litigate the scope of the rights provided.

In the year since the CVRA's passage, at least fifteen federal courts have been asked to interpret and apply the new law—or have done so of their own accord (*sua sponte*). While it is too soon to know the full impact of the law, it is clear that a dramatic shift in the business of the federal criminal justice system is beginning to take place. Courts and parties to criminal proceedings are being forced to factor victims' rights into their analyses. For example, a federal court in New York *sua sponte* reviewed the CVRA and the affirmative obligations it places on courts. See *United States v. Turner*, 367 F. Supp. 2d 319 (E.D.N.Y. 2005). The *Turner* Court concluded that to give effect to all parts of the CVRA, it had an obligation—independent from any prosecutorial obligation—to establish procedures in advance to assure compliance with the CVRA, not merely to rule on victims' applications for relief. *Id.*

Certainly not all aspects of these court decisions are favorable to crime victims. One federal court referred, in *dicta*, to the CVRA as “the new, mushy, ‘feel good’ statute with the grand title ‘Crime Victims’ Rights.’” *United States v. Holland*, 380 F. Supp. 2d 1264, 1279 (N.D. Ala. 2005). However, even unfavorable decisions, or seemingly hostile *dicta*, represent an important shift in the criminal justice system. Crime victims are present and recognized in a new and significant way.

Summaries of thirteen cases discussing the CVRA—organized by the right most affected by the court's discussion—follow:

### The Right to Reasonable, Accurate, and Timely Notice of Any Public Court Proceeding – 18 U.S.C. § 3771(a)(2)

*In re W.R. Huff Asset Management Co.*, 409 F.3d 555 (2d Cir. 2005). A jury found John and Timothy Rigas (the Rigases) guilty of securities fraud. Subsequently, the government entered a proposed settlement agreement with the Rigases and other members of the Rigas family who had either not been named or convicted. Pursuant to the settlement agreement, the entire Rigas family would forfeit assets in exchange for the government not requesting an order of restitution or a criminal fine. Noting the numerosity of victims and the alleged impossibility of notifying each victim, the government moved the court to designate the case as one with multiple crime victims under subsection (d)(2) of the CVRA, and proposed an alternative plan for notification. Petitioners/victims objected to the settlement and sought additional notice. Ruling that such notice would cause “unacceptable” delay the district court accepted the settlement. *Id.* at 560. Petitioners sought a writ of mandamus, arguing that the settlement agreement violated their rights including the rights to be treated fairly, to full and timely restitution, to notice, and to an opportunity to confer with the government. Applying an abuse of discretion standard, the Second Circuit upheld the trial court's rulings.

*United States v. Ingrassia*, 392 F. Supp. 2d 493 (E.D.N.Y. 2005). The trial court refused to rule generally on the government's objections to the magistrate's report and recommendations, which had found that, while the pleas satisfied the relevant requirements of the federal rules, they violated the notification rights in the CVRA. The court did rule, however, that the magistrate's recommendation that the government's objections be served by first-class mail, or other reasonably equivalent method, on

the victims was unnecessary and not required by the CVRA.

The Right Not to be Excluded from Public Court Proceedings – 18 U.S.C. § 3771(a)(3)

*United States v. Johnson*, 362 F. Supp. 2d 1043 (N.D. Iowa 2005). The government filed a pretrial motion to permit victim-witnesses to be present during the merits phase of the trial, even if a victim-witness was to testify. Noting that the CVRA provides “a crime victim ‘[t]he right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding,’” the court granted the motion. *Id.* at 1056 (quoting 18 U.S.C. § 3771). The court found that the defendant had made no showing that the testimony would be materially altered, and determined that the victim-witnesses would testify to matters not subject to material alteration.

The Right to Be Reasonably Heard at Public Court Proceedings – 18 U.S.C. § 3771(a)(4)

*In re Kari Ann Jacobsen*, Case No. 05-7086, 2005 Lexis 13990 (D.C. Cir. July 8, 2005). The victim filed a writ of mandamus arguing that the CVRA applied in the District of Columbia, and seeking to be heard prior to the court’s acceptance of a plea. Avoiding the question of whether the CVRA applied in the District of Columbia, the appellate court held that, even if the victim was entitled to a writ of mandamus, she had failed to make necessary showing because the plea had not been irrevocably accepted by the superior court and thus there was no case or controversy to be decided.

*Kenna v. United States District Court* (Case No. CR-03-00568-JFW). Victim, through counsel, filed a writ of *mandamus* in May 2005, arguing that the district court for the Central District of California denied his right to be heard when it held that because the victim was heard at co-defendant’s earlier sentencing and had submitted a written statement, the court need not hear from him at the current sentencing. Despite the CVRA’s

requirement of a 72-hour review period, the district court was permitted to file a response to the petition for the writ of mandamus on August 29, 2005. This pleading was not served on the victim. The case has been assigned to a merits panel for decision in January, 2006, nine months after the action was brought.

*United States v. Marcello*, 370 F. Supp. 2d 745 (N.D. Ill. 2005). The government sought leave for



Sculptor James Earle Fraser’s statue **CONTEMPLATION OF JUSTICE**, seated on the left side of the main steps to the Supreme Court Building.

the victim to offer an oral statement opposing the defendant’s pretrial release. The court held that the right to be heard did not require admission of oral statements in every situation, “particularly one in which the victim’s proposed statement was not material to the decision at hand.” *Id.* at 746. The court based its reasoning on the reasonableness requirement of the right, coupled with the court’s determination that “heard” is a term of art. The court rejected any resort to legislative history (which plainly requires oral statement), finding that despite the explicit statements in the history regarding the right to be heard, too little history existed and that which did exist did not reflect sufficient debate or exchange of ideas. The court went on to state that while “a victim’s statements will

(at least at sentencing and prison release hearings) almost always be relevant, material and spoken from personal knowledge, this will not always be the case at hearings on bond . . . .” *Id.* at 750. The court concluded that “[i]n light of the statute’s clear language, the purpose of the detention hearing and the content of the testimony sought to be introduced in this case, I found that this victim’s right to be reasonably heard could be satisfied through means other than an oral statement.” *Id.*



“The Republic endures and this (the Supreme Court) is the symbol of its faith,” Chief Justice Charles Evans Hughes, laying the cornerstone for the Supreme Court Building on October 13, 1932.

#### The Right to Full and Timely Restitution – 18 U.S.C. § 3771(a)(6)

*United States v. Visinaiz*, 344 F. Supp. 2d 1310 (D. Utah 2004), *aff’d on other grounds* 2005 WL 3065950 (10th Cir. 2005). Defendant was found guilty of second degree murder and filed an objection to the proposed award of restitution, arguing that the jury rather than the judge had to establish restitution in light of *Blakely v. Washington*, 542 U.S. 296 (2004).

The District Court revisited its prior decisions in *United States v. Bedonie* and *United States v. Serawop*, 317 F. Supp. 2d 1285 (D. Utah 2004), in which it held that the Mandatory Victims Restitution Act mandates an award of lost income in homicide cases, and re-affirmed its prior decision, noting that the legislative history of the CVRA specifically endorses the *Bedonie* and *Serawop* holdings.

#### The Right to Proceedings Free From Unreasonable Delay – 18 U.S.C. § 3771(a)(7)

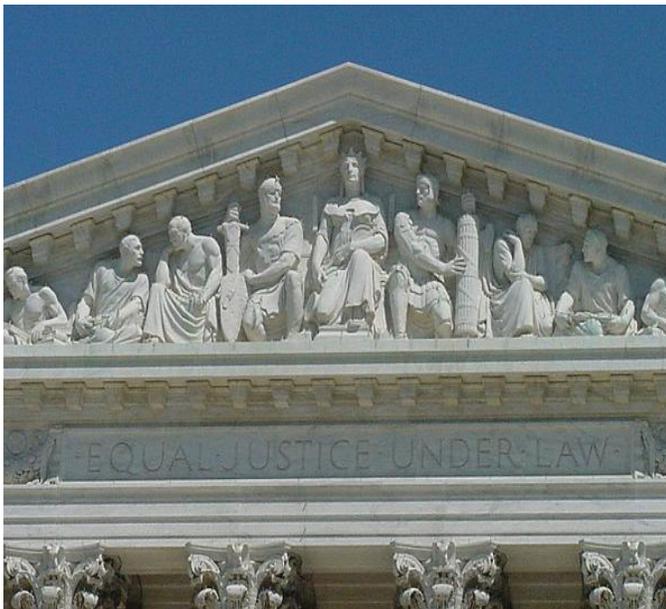
*United States v. Eight Automobiles with Fraudulently Obtained Ohio and New York State Division Of Motor Vehicle Titles*, 356 F. Supp. 2d 223 (E.D.N.Y. 2005). Petitioners, appearing *pro se*, filed a motion seeking return of their automobile, which had been seized and held as evidence for ten months in a criminal case. Balancing the government’s interest in preserving and examining potential evidence with the petitioners’ interests in obtaining return of their property, the court denied the petitioners’ motion without prejudice. The court noted, however, that the CVRA’s provision of an enforceable right “to proceedings free from unreasonable delay,” might create “standing, independent of the government’s, to intervene in the case to contest any ‘unreasonable delay’ of that trial.” *Id.* at 226 (quoting 18 U.S.C. § 3771).

*United States v. Tobin*, 2005 WL 1868682 (D.N.H. July 22, 2005). The prosecution and defense jointly moved for a second continuance of the trial, to which the victim (the New Hampshire Democratic Party) filed an objection. The court noted that the right to proceedings free from unreasonable delay, was not meant “to undermine the Speedy Trial Act, 18 U.S.C. § 3161, *et seq.*, nor to deprive either criminal defendants or the government of a full and adequate opportunity to prepare for trial.” *Id.* at \*2. The court found that “[a] trial within seven months of the superseding indictment does not constitute either ‘undue’ or ‘unreasonable’ delay.” *Id.* The court went on to state that, because victims have statutory rights under the CVRA and the court has a statutory obligation to ensure the rights in the CVRA are afforded, “the parties are hereby put on notice that

no further continuance will be granted in the absence of extraordinary circumstances.” *Id.*

*United States v. United States District Court for the District of Utah*, 2005 U.S. Dist. Lexis 24409 (D. Utah Oct. 19, 2005). The court rejected defendant’s motion to substitute counsel because it failed to comply with local rules. In so holding, the court noted that strict compliance with the rules serves important purposes, including avoiding unnecessary continuance of trial which might run afoul of both defendants’ and crime victims’ rights to a speedy trial.

*United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005). When imposing sentence, the court addressed a number of issues arising out of *United States v. Booker*, 543 U.S. 220 (2005). In resolving the issues, the court noted that it was reluctant to delay the sentencing because it had already been delayed by more than a month, the crimes were serious and caused considerable “trauma and anxiety” to the victims, and Congress had “mandated that victims have the right ‘to proceedings free from unreasonable delay.’” *Id.* at 931 (quoting 18 U.S.C. 8, 3771).



Above the entrance to the Supreme Court Building is engraved the motto “Equal Justice Under Law,” which was designed by Cass Gilbert. Above this motto is a group of nine figures, sculpted by Robert Aitken, representing *Liberty Enthroned* guarded by *Order and Authority*.

The Right to be Treated with Fairness and Respect for the Victim’s Dignity and Privacy – 18 U.S.C. § 3771(a)(8)

*United States v. Kaufman*, 2005 WL 2648070 (D. Kan. Oct. 17, 2005). A television station filed a motion arguing that the First Amendment afforded it the right to have a sketch artist attend and publicize drawings of proceedings involving alleged sexual misconduct with mentally ill victims. Citing the CVRA’s provision that the privacy and dignity of victims must be protected, the court noted it had previously ruled that videos of the offenses be displayed on a screen visible only to the jury, the court and the parties. The court then held that while media access to trials is critical to keeping the public informed, there is no First Amendment right to have sketch artists in the room. Finding that the CVRA proscribed “all forms of identification of the victims in this case,” the court ordered that a single sketch artist could attend, but s/he “shall not sketch jurors or victims” and “[d]uring each victim’s appearance, no sketching materials of any kind will be visible in the courtroom.” *Id.* at \*4.

Definition of Crime Victim – 18 U.S.C. § 3771(e)

*United States v. Guevara-Toloso*, 2005 WL 1210982 (E.D.N.Y. May 23, 2005). The court, *sua sponte*, raised the issue of whether the victim’s right to be notified of proceedings applied to a victim of a state offense that the defendant was previously convicted of and which was serving as an element of the current federal offense. The court stated that the CVRA’s “reference to ‘the crime’ . . . suggests a focus only on the crime with which a defendant is charged in the case in which a victim seeks to assert her statutory rights.” *Id.* at \*2. The court concluded that the CVRA’s provisions do not require notice to victims of a predicate state offense.

Conclusion

It is too early to know the full impact of the CVRA or these cases on the criminal justice system. What we do know is that each decision, regardless of outcome, reveals the strengths and weaknesses of the CVRA and provides a roadmap for the continuing advancement of victims’ rights. While only time will reveal the true impact of the CVRA, the knowledge that comes case-by-case can help victims’ rights advocates nationwide. ■