

Integrating Crime Victims Into the Sentencing Process*

The Current System Gives Victims a Limited Role in the Sentencing Process

It is worth briefly highlighting the important role for victims provided for by the [Federal Sentencing] Guidelines and Rules of Criminal Procedure. Under the current system, a victim impact statement is typically included in the pre-sentence report prepared by the probation office. This “victim impact statement” is often written by the victim and explains the effect of the crime. Later, at the sentencing hearing, victims are allowed to speak or “allocute.” As Rule 32 of the Federal Rules of Criminal Procedure currently provides, “[b]efore imposing sentence” the court must “address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.”¹

Yet while this rule gives many victims the right to allocute, courts typically seem to treat this right of allocution as a mere general exhortation about the effects of the crime rather than for providing specific information that goes into the Guidelines calculation or other specific information that bears on the sentencing. Handling victim allocution in this way often means that victims’ information will have little or no effect on the sentence imposed. The most important determinant of most sentences is the applicable guideline. To be sure, the Supreme Court recently held in the well-known *Booker* decision that the federal sentencing guideline scheme is “advisory.”² But most district judges continue to give the Guidelines “heavy weight”³ and statistics collected by the Sentencing Commission show the most sentences continue to fall within the Guideline recommendations or are based on Guideline calculations in some fashion.⁴ Indeed, while recognizing the right of district court judges to vary from the Guidelines, the Supreme Court has been quite clear that the sentencing judges “must treat the Guidelines as the starting point and initial benchmark” for calculating any sentence.⁵ If crime victims do not participate in the sentencing guideline process – or are unable to provide information that influences the sentencing guideline calculation – then their right of allocution will have little effect on sentencing.

The Crime Victims’ Rights Act Commands that Victims be Given an Expanded Role in the Sentencing Process, Including Access to Pre-Sentence Reports

Limiting crime victims’ role in federal sentencing to mere general exhortation is inconsistent with the role that Congress envisions victims should play. In October 2004, Congress passed the “Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act.”⁶ Congress intended through this legislation to make crime victims real participants in the criminal justice process. To that end, the Act guarantees crime victims a series of rights, such as the right to be present and heard at appropriate points in the criminal justice process and the right to be treated fairly.⁷

Specifically, the Crime Victims' Rights Act guarantees crime victims the right "to be reasonably heard" and "to be treated with fairness" throughout the criminal justice process, including at sentencing hearings.⁸ This congressional command is not an invitation for business as usual. Instead, Congress expected "*meaningful participation* of crime victims in the justice

system"⁹ In federal sentencings, crime victims cannot be such participants unless they are allowed an appropriate role in the process of determining the applicable sentencing guideline. In the great majority of cases, the Guidelines are *the* major factor driving a defendant's sentence. . . .

[V]ictims must be given an opportunity to be involved in that guidelines determination. . . . Anything less will leave victims on the outside looking in at the process, rather than participating in the process as Congress – and justice – require.

One particular provision in the Act is worth highlighting here because of its effects on Guidelines procedures. Among its comprehensive list of rights, the Act gives victims "the right to be reasonably heard at any public proceeding in the district court involving . . . sentencing"¹⁰ This codifies the right of crime victims to provide a "victim impact statement" to the court.¹¹ The right is not narrowly circumscribed to just impact information, however. To the contrary, the right conferred is a broad one – to be "reasonably heard" at the sentencing proceeding.

The CVRA appears to legally entitle victims to be heard on disputed Guidelines issues and, as a consequence, to review parts of the pre-sentence report relevant to those issues. As Senator Kyl explained, the right includes sentencing recommendations:

When a victim invokes this right during . . . sentencing proceedings, it is intended that he or she be allowed to provide all three types of victim impact: the character of the victim, the impact of the crime on the victim, the victim's family and the community, and *sentencing recommendations*.¹²

A "sentencing recommendation" will often directly implicate Guidelines issues, particularly where a court gives significant weight to the Guidelines calculation (as most currently do).¹³ For example, if the victim wishes to recommend a 60-month sentence when the maximum guideline range is only 30 months, that sentencing recommendation may be meaningless unless a victim can provide a basis for recalculating the Guidelines or departing from the Guidelines.

Congress intended the victim's right to be heard to be construed broadly, as Senator Feinstein stated:

The victim of crime, or their counsel, should be able to provide *any information*, as well as their opinion, directly to the court concerning the . . . sentencing of the accused.¹⁴

Again, it is hard to see how victims can meaningfully provide "any information" and their "opinion" about a sentence without being told what everyone else in the courtroom knows – the Guidelines calculations that likely will drive the sentence.

Victims may often possess information quite relevant to the district court's assessment of the Guidelines range. The Guidelines themselves contain an entire part devoted to "victim-related adjustments" and issues relating to the victim are often part of the Guidelines calculation process.¹⁵ This part requires the court to make such determinations as whether a defendant selected his victim because of race, whether a defendant should have known that a victim was vulnerable, and whether a victim was physically restrained during the course of an offense. In addition, other Guidelines look to victim-related characteristics. The kidnapping provision, for

example, looks to such things as the degree of injury suffered by the victim.¹⁶ The fraud provision looks to loss to the victim.¹⁷

To be sure, in many cases a prosecutor may bring some of these relevant facts to the court's attention. Indeed, under the [CVRA] prosecutors are required to "use their best efforts" to insure that victims' rights are protected.¹⁸ But the [CVRA] clearly indicates that the prosecutor's representations are not a substitute for the victim's personal right to be reasonably heard. Thus, the [CVRA] begins: "A *crime victim* has the following rights . . ."¹⁹ Moreover, the [CVRA] specifically provides that victims can "assert the rights" provided in the statute both before the district court and on appeal by way of expedited mandamus relief.²⁰ This demonstrates that Congress intended victims to be involved in sentencing proceedings as the functional equivalent of parties, that is, as equal participants in the process.²¹ As Senator Kyl explained about the right-to-be-heard provision:

This provision is intended to allow crime victims to directly address the court in person. It is not necessary for the victim to obtain the permission of either party to do so. This right is a right independent of the government or the defendant that allows the victim to address the court. To the extent the victim has the right to independently address the court, the victim acts as an *independent participant in the proceedings*.²²

An independent basis for the victim reviewing pre-sentence reports is the victim's broad right under the CVRA to be "treated with fairness."²³ This right seems to comfortably encompass a right of access to relevant parts of the pre-sentence report. The victim's right to fairness gives victims a free-standing right to due process. As Senator Kyl instructed:

The broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, *fairness includes the notion of due process*. . . . This provision is intended to direct government agencies and employees, whether they are in the executive or judicial branches, to treat victims of crime with the respect they deserve *and to afford them due process*.²⁴

Due process principles dictate that victims have the right to be apprised of Guidelines calculations and related issues. The Supreme Court has explained that "[i]t is . . . fundamental that the right to . . . an opportunity to be heard 'must be granted at a meaningful time and *in a meaningful manner*.'"²⁵ It is not "meaningful" for victims to make sentencing recommendations without the benefit of knowing what the recommended Guidelines range is. Yet Congress plainly intended to pass a law establishing "[f]air play for crime victims, *meaningful participation* of crime victims in the justice system, protection against a government that would take from a crime victim the dignity of due process. . . ."²⁶

A victim's right to be heard regarding sentencing issues is important for another reason: insuring proper restitution. Federal law guarantees most victims of serious crimes the right to restitution.²⁷ While reinforcing those laws, the new Crime Victims' Rights Act also guarantees that victims have "[t]he right to full and timely restitution as provided in law."²⁸ As a practical matter, many of the calculations undergirding an award of restitution will rest on information contained in the pre-sentence report. While the restitution statutes have their own detailed procedural provisions,²⁹ it is unclear how those provisions are integrated with the Guidelines procedural provisions.

For all these reasons, the Crime Victims' Rights Act should be understood as giving victims the right to be heard before a court makes any final conclusions about Guidelines calculations and other sentencing matters. It is therefore incumbent on the judiciary to take specific steps to integrate victims into the sentencing process.

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^{1*} This text is excerpted from the Statement of Paul G. Cassell before the United States Sentencing Commission on Protecting Crime Victims' Rights in the Sentencing Process, October 20, 2009. The full text of the Statement is available, upon request, from NCVLI.

Fed. R. Crim. P. 32(i)(4)(B).

² *United States v. Booker*, 543 U.S. 200, 234 (2005) (remedial majority opinion by Justice Breyer).

³ *See, e.g., United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005).

⁴ U.S. Sentencing Commission, Preliminary Quarterly Data Report (Sept. 8, 2009) (57.4% of all cases sentenced within the guideline range and an additional 25.0% were sentenced based on a government recommendation to go below the Guideline range). *See generally* Frank O. Bowman, III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System After Booker*, 43 U. Houston L. Rev. 279, 319 (2006) (“[I]t seems reasonable to predict that the guidelines will remain the predominant factor in determining individual sentences for years to come.”).

⁵ *Kimbrough v. United States*, 552 U.S. 85, 108 (2007).

⁶ Pub. L. No. 108-405, § 102(a), 118 Stat. 226 (Oct. 30, 2004).

⁷ *See generally* Jon Kyl, Steven J. Twist, & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L. Rev. 581 (2005).

⁸ 18 U.S.C. §§ 3771(a)(4), (8).

⁹ 150 Cong. Rec. S4264 (Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added).

¹⁰ 18 U.S.C. § 3771(a)(4).

¹¹ *See generally* Douglas Beloof, Paul Cassell & Stephen Twist, *Victims in Criminal Procedure* ch. 10 (2d ed. 2006) (discussing victim impact statements); Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 Utah L. Rev. 1373, 1395-96 (same).

¹² 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added). *See generally* Beloof, Cassell & Twist, *Victims in Criminal Procedure*, ch. 10 (discussing three types of victim impact information).

¹³ *See supra* note 4.

¹⁴ 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) (emphasis added).

¹⁵ U.S.S.G. §§ 3A.1.1 *et seq.*

¹⁶ U.S.S.G. § 2A4.1(b)(2).

¹⁷ U.S.S.G. § 2B1.1(b).

¹⁸ 18 U.S.C. § 3771(c).

¹⁹ 18 U.S.C. § 3771(a) (emphasis added).

²⁰ 18 U.S.C. § 3771(d).

²¹ See generally Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 Utah L. Rev. 289 (explaining victim participation model of criminal justice).

²² 150 Cong. Rec. S10910-11 (Oct. 9, 2004) (remarks of Sen. Kyl) (emphasis added).

²³ 18 U.S.C. § 3771(a)(8).

²⁴ 150 Cong. Rec. S10912 (Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added).

²⁵ *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (emphasis added).

²⁶ 150 Cong. Rec. S4264 (Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added); see generally Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Act*, 26 Yale L. & Pol'y Rev. 431 (2008).

²⁷ See 18 U.S.C. § 3663A (Mandatory Victims Restitution Act); accord 18 U.S.C. § 3663 (Victim Witness Protection Act).

²⁸ 18 U.S.C. § 3771(a)(6).

²⁹ 18 U.S.C. § 3664.