

The Changing Landscape of Federal Criminal Practice*

The Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, created eight explicit rights for crime victims – rights that are enforceable in trial courts and guaranteed review by appellate courts. Each of the CVRA's provisions represents a tremendous step forward for crime victims. But the CVRA is more than the sum of these parts.

The CVRA ushered in a new era in the federal criminal justice system – an era in which victims are firmly established as independent participants. *See Kenna v. United States Dist. Ct. for the Cent. Dist. of Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006) (finding that “[t]he criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children – seen but not heard. The [CVRA] sought to change this by making victims independent participants in the criminal justice process.”); Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 B.Y.U. L. Rev. 835, 893 (2005) (noting that “[t]he CVRA transforms crime victims into participants in the criminal justice process These new rights will reshape the federal criminal justice system”). In this new era of clear participatory status coupled with explicit rights, the influence of the CVRA on the federal criminal justice system will be far and wide, including seemingly peripheral aspects of a criminal case.

This article details one of those ostensibly peripheral moments – the CVRA's impact on disclosure of a presentence report to the crime victim.

The Pre-CVRA Law of Disclosure

A presentence report is the report of the investigation conducted by a probation officer prior to the imposition of sentence. *See* 18 U.S.C. § 3552(A). Federal Rule of Criminal Procedure 32, which governs presentence reports, identifies certain mandatory recipients of the report. It provides, in pertinent part:

The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. Fed. R. Crim. P. 32(e)(2).

Notably the Rule is silent regarding disclosure to other persons – neither affirmatively requiring, nor prohibiting such disclosure. Thus, courts have long recognized that nothing in federal law prohibits disclosure of the presentence report to nonparties. *See, e.g., United States v. Charmer Indus., Inc.*, 711 F.2d 1164, 1172 (2d Cir. 1983); *United States v. Figurski*, 545 F.2d 389, 391 (4th Cir. 1976). Despite the lack of a legal proscription to disclosure, by habit and practice courts have treated the reports as confidential.¹ *See, e.g., United States v.*

Corbitt, 879 F.2d 224, 229 (7th Cir. 1989); *Charmer Indus., Inc.*, 711 F.2d at 1173; *United States v. Dingle*, 546 F.2d 1378, 1381 (10th Cir. 1976); *United States v. Preate*, 927 F. Supp. 163, 166 (D. Pa. 1996).

In light of this lack of a proscription and the practice of confidentiality, courts have articulated a number of tests to guide their discretionary release of the reports. At their core, each of these tests requires a court to look at the need of the individual seeking disclosure, and to balance that against the practice of maintaining confidentiality. *See, e.g., United States v. Huckaby*, 43 F.3d 135, 138 (5th Cir. 1995) (adopting standard of Seventh Circuit that disclosure should occur only where there is a compelling and particularized need); *Corbitt*, 879 F.2d at 239 (finding that disclosure should only occur “where a compelling, particularized need for disclosure is shown”); *United States v. Schlette*, 842 F.2d 1574, 1578 (9th Cir. 1988) (holding that disclosure to a nonparty is appropriate where that nonparty makes a threshold showing that the disclosure will serve the ends of justice, and there is no valid counter-showing of a reason to preclude the disclosure); *Charmer Indus., Inc.*, 711 F.2d at 1175 (finding that disclosure should not be made “in the absence of a compelling demonstration that disclosure of the report is required to meet the ends of justice”).

The CVRA Changes the Disclosure Equation

Among the recognized purposes of a presentence report are 1) to aid a sentencing court in its formulation of a sentence; 2) to aid a sentencing court in calculating restitution; and 3) to aid a parole commission when making determinations of parole eligibility. *See Julian v. United States Dep’t of Justice*, 806 F.2d 1411, 1415 (9th Cir. 1986), *aff’d* 486 U.S. 1 (1988); *Schlette*, 842 F.2d at 1578. The contents of a presentence report directly reflect these purposes. *See, e.g., Fed. R. Crim. P. 32(d)(1)* (identifying information that must be included to aid in calculation of the sentencing guideline range); (d)(2)(A)(ii) (providing that the report must include information about “defendant’s financial condition”); (d)(2)(A)(iii) (providing that the report must contain “any circumstances affecting the defendant’s behavior that may be helpful in . . . correctional treatment”); (d)(2)(C) (providing that when appropriate the report must contain “the nature and extent of nonprison programs and resources available to defendant”); (d)(2)(D) (providing that the report must include “information sufficient for a restitution order”).

A victim’s rights to protection, to be reasonably heard, to restitution, and to fairness afforded by the CVRA, *see* 18 U.S.C. §§ 3771(a)(1), (4), (6) & (8), are directly implicated by the purposes and contents of the report. Without access to the information in the report that impacts these rights, the rights will be fundamentally undermined. Thus, the CVRA changes the analysis regarding when disclosure of the presentence report is appropriate.

The Right to be Reasonably Heard

The CVRA provides that victims have the right “to be reasonably heard at any public proceeding in the district court involving . . . sentencing.” 18 U.S.C. § 3771(a)(4). This affords victims the right to provide all three types of victim impact, specifically including “sentencing recommendations.” 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).²

Intimately related to the right to be heard, is subsection (a)(8) of the CVRA, which provides the victim with “[t]he right to be treated with fairness and with respect for the victim’s dignity and privacy.” 18 U.S.C. § 3771(a)(8). When explaining the scope of this right, Senator Kyl stated, “Of course, fairness includes the notion of due process.” 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). Due process requires that when a person’s rights may be negatively affected, that person must receive notice and an

opportunity to be heard, *see, e.g., Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), and that such notice and opportunity to be heard “must be granted at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). *See also Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950).

Meaningful notice and a meaningful opportunity to be heard at sentencing, as it relates to the crime victim’s rights to fairness and to be heard, require disclosure of the presentence report prior to sentencing. This is true because, as noted *supra*, the presentence report provides the sentencing court with information used to calculate the appropriate sentence under the Sentencing Guidelines.³ Without this information the victim’s statement and sentencing recommendation may be so far outside the realm of possibility as to be rendered inconsequential. When a victim is denied the very information necessary to effectuate a right, the right itself is rendered meaningless and fundamental fairness is violated. Thus, for a victim to exercise his right to be heard, including giving an informed, coherent and meaningful sentencing recommendation, he must have access to all portions of the presentence report that may guide the court as to sentence.

The Right to Restitution

Subsection (a)(6) of the CVRA provides victims “[t]he right to full and timely restitution as provided in law.” 18 U.S.C. § 3771(a)(6). While the provision of restitution is governed generally by the Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A, and the Victim and Witness Protection Act of 1982, 18 U.S.C. § 3663, the CVRA now complements those laws. As noted *supra*, the presentence report contains a great deal of information that goes to calculating a restitution award, including a defendant’s financial condition. While the federal restitution statutes have procedural provisions governing calculation and award of restitution, “[a]s a practical matter, many of the calculations supporting a restitution award will rest on information in the presentence report.” *See Cassell, supra*, at 896. To ensure full restitution to a victim, the victim must know the information that a court may use to calculate a restitution award, be allowed the opportunity to challenge any erroneous information, and be allowed to provide sufficient counter-information to the court.⁴ Thus, enforcement of a victim’s right to restitution requires disclosure of the presentence report.

The Right to Protection

The CVRA provides that victims have the right to “be reasonably protected from the accused.” 18 U.S.C. § 3771(a)(1). This right requires “reasonable conditions of pretrial and post-conviction relief that include protections for the victim’s safety.” 150 Cong. Rec. S10910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). Because a presentence report not only aids a court in determining what sentence to impose, but also later aids the parole commission in determining release, a crime victim’s right to be protected is intimately connected to the contents of the report. To ensure that a victim’s right to protection is given its full meaning, the victim must have access to all portions of a presentence report that may guide a court or parole commission regarding detention of the defendant.

Conclusion

The CVRA’s provision of explicit rights and remedies is a tremendous step forward for crime victims. Similarly, the CVRA’s firm establishment of victims as proper participants in the federal criminal justice system is a positive step. Taken together it is clear that the CVRA will have a pervasive impact on the criminal justice system. The crime victim’s right to access defendant’s presentence report is just one example of this impact.

In light of the rights afforded by the CVRA and the newly solidified participatory status of the crime victim, presentence reports should be disclosed to crime victims. Further, the CVRA imposes an independent obligation on the judiciary to ensure that victims' rights are afforded. See *United States v. Ingrassia*, No. CR-04-0455ADSJO, 2005 WL 2875220 (E.D.N.Y. 2005) (unpublished); *United States v. Dengenhardt*, 405 F. Supp. 2d 1341, 1349 (D. Utah 2005). Thus, there simply can be no cogent reason for the wholesale decline of disclosure when an individual's statutory rights are at stake. Consequently, courts must afford crime victims access to those portions of a defendant's presentence report that affect their rights.⁵

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¹ In fact, until relatively recently this confidentiality included general non-disclosure even to the defendant. See *Corbitt*, 879 F.2d 224 (7th Cir. 1989).

² While some courts have found that *Payne v. Tennessee*, 501 U.S. 808 (1991), left unresolved the constitutionality of a victim giving a sentencing recommendation in a capital case, it is well-settled that in noncapital cases such recommendations are constitutionally permissible. See Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 Cornell L. Rev. 282, 289 (2003).

³ While courts need not strictly abide by the Sentencing Guidelines following *United States v. Booker*, 543 U.S. 220 (2005), the Guidelines continue to be considered by courts. See, e.g., *United States v. Dalton*, 404 F.3d 1029 (8th Cir. 2005); *United States v. Rogers*, 400 F.3d 640 (8th Cir. 2005); *United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005).

⁴ Rule 32 was only relatively recently amended to allow disclosure to the defendant – the motivation for such amendment included concerns about courts imposing sentences based on erroneous information. See *Schlette*, 842 F.2d at 1578 (discussing history of revisions to Rule); Fed. R. Crim. P. 32 (Advisory Committee Note to the 1983 Amendment) (stating, “These changes have been prompted by findings in a recent empirical study that the extent and nature of disclosure of the presentence investigation report in federal courts under current rule 32 is insufficient to ensure accuracy of sentencing information.”). These same concerns regarding inaccurate information damaging a right extend to a victim's right to restitution.

⁵ The entire presentence report does not invariably need to be turned over to every crime victim in every case. Instead, a court must determine which portions of a report are necessary to enforce the crime victim's individual rights, and those portions, excluding what is precluded by Rule 32(d)(3), should be disclosed.