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Crime Victims' Rights Act: A Sketch of 18 U.S.C. §3771

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Summary

Section 3771 of Title 18 of the *United States Code* is a statutory bill of rights for victims of crimes committed in violation of federal law or the laws of the District of Columbia. It defines victims as anyone directly and proximately harmed by such an offense, individuals and legal entities alike. It does not appear to include family relatives of a deceased, child, or incapacitated victim, except in a representative capacity.

Numbered among the rights it conveys are (1) the right to be reasonably protected from the accused; (2) the right to notification of public court and parole proceedings and of any release of the accused; (3) the right not to be excluded from public court proceedings under most circumstances; (4) the right to be heard in public court proceedings relating to bail, the acceptance of a plea bargain, sentencing, or parole; (5) the right to confer with the prosecutor; (6) the right to restitution under the law; (7) the right to proceedings free from unwarranted delays; (8) the right to be treated fairly and with respect to one's dignity and privacy; (9) the right to be informed in a timely manner of any plea bargain or deferred prosecution agreement; and (10) the right to be informed of the statutory rights and services to which one is entitled.

The section directs the courts and law enforcement officials to see to it that the rights it creates are honored. Both victims and prosecutors may assert the rights and seek review from the appellate courts should the rights be initially denied.

The section vests no rights in the accused; nor does it create cause of action damages in any instance where a victim is afforded less than the section's full benefits.

Conforming amendments to the Federal Rules of Criminal Procedure became effective on December 1, 2008. The Justice Department promulgated implementing regulations on November 17, 2005. The Justice for Victims of Trafficking Act of 2015 added to the inventory of victims' statutory rights and clarified the appellate standard to be used to enforce those rights.

This report is an abridged form of a longer report, without quotation marks, footnotes, appendixes, and most of the citations to authority found in the longer version, which is available as CRS Report RL33679, *Crime Victims' Rights Act: A Summary and Legal Analysis of 18 U.S.C. 3771*, by Charles Doyle.

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Background

Section 3771 is the product of a long effort to afford greater deference to victims in the criminal justice process. It is akin to the victims' bill of rights provisions found in the laws of the various states and augments a fairly wide variety of preexisting federal victims' rights legislation. Its enactment followed closely on the heels of discontinued efforts to pass a victims' rights amendment to the U.S. Constitution.

Who Is a Victim?

The definition of "victim," the question of deciding who should be afforded rights and who should not be, was one of the issues that over the years fired debate during consideration of proposals to amend the U.S. Constitution. Section 3771 provides an explicit definition:

> For the purposes of this chapter, the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

Section 3771 speaks of victims who are "persons" ("'crime victim' means a person"). Although in common parlance, this might be thought to restrict the class of victims to human beings, general usage within the *United States Code* is to the contrary. Unless the context suggests another intent, the word "person" as used in the *United States Code* is understood to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies as well as individuals."

Earlier restitution cases rejected arguments that only human beings could be "victims." Perhaps because the question is considered settled, the argument has disappeared, and later courts have regularly found restitution appropriate for legal entities without commenting upon their want of human status. Section 3771's coverage of legal entities seems to have been generally assumed and with little explicit discussion. The universal definition of person in 1 U.S.C. 1 does not mention governmental entities. The *2011 AG Guidelines* take the position that governmental entities are not eligible for "court enforceable rights," but may be entitled to restitution. Section 3771's limited available case law indicates that a governmental entity is not a person entitled to victim's rights under the statute.

An earlier version of the restitution statutes authorized restitution for injuries and losses resulting from certain offenses, but made no mention of direct and proximate harm. "This [earlier] language suggest[ed] persuasively that Congress intended restitution to be tied to the loss caused by the offense of conviction," the Supreme Court said in *Hughey v. United States*. The implication might have been that restitution was appropriate where the loss would not have occurred but for the offense conviction. Not all persons who suffer a loss as the direct result of an offense are considered victims for purposes of the restitution statutes. The loss must be directly *and proximately* caused by the offense. A loss caused in part by intervening circumstances cannot be said to have been directly and proximately caused by the offense of conviction, unless the intervening cause is related to or a foreseeable consequence of that offense of conviction. But the restitution statutes enlarge the victim definition by including those directly harmed by an offense one of whose elements is a "scheme, conspiracy or pattern." Section 3771 has no such explicit provision, but it features the restitution statutes' "direct and proximate" cause language. Its use of

the phrase "directly and proximately harmed encompasses the traditional 'but for' and proximate cause analyses."

Under the restitution statutes, restitution is available only for harm caused by the crime of conviction. The same cannot be said of the victims' rights statute. Section 3771 is focused on the activities and proceedings involving the victimizing offense before and after conviction; the restitution sections are focused on the victimizing offense of conviction. Section 3771 and the restitution statutes are similar, however, in that persons—harmed by crimes other than those of conviction in the case of the restitution statutes or other than those which are the subject of a particular proceeding in the case of the victims' rights statute—are unlikely to be able to claim the benefits of a victim. In particular in both instances, individuals may lose or never acquire the benefit of victim status during the course of criminal proceedings, if charges covering the crimes of which they are the victim are dropped, dismissed, or never filed, even though related crimes are or continue to be prosecuted.

The Justice Department's Office of Legal Counsel (OLC) believes that "the CVRA is best read as providing that the rights identified in section 3771(a) are guaranteed from the time that criminal proceedings are initiated (by complaint, information, or indictment) and cease to be available if all charges are dismissed either voluntarily or on the merits (or if the Government declines to bring formal charges after the filing of a complaint)." The *2011 AG Guidelines* make the same point: "[T]he particular charges filed in a case will define the group of individuals with CVRA rights.... Absent a conviction, a victim's CVRA rights cease when charges pertaining to that victim are dismissed either voluntarily or on the merits, or if the government declines to bring formal charges after filing a complaint." Congress responded to the OLC opinion with a 2015 amendment which assures victims of the right to notification of plea and deferred prosecution agreements. Section 3771, under other circumstances, moreover, has been found to afford the obvious victim of a clearly identifiable federal crime at least some of its benefits notwithstanding the absence of a charge or even a suspect.

Section 3771, like the restitution statutes, states that in the case of a deceased or incapacitated victim, "the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, *may assume the crime victim's rights*." This suggests that family members are not themselves considered victims. It implies that one of the parents and other relatives of an adult homicide victim may assume the victim's rights, but otherwise they are entitled to none of the rights found in the statute. This is not the case. Family members do not lose their status as victims by virtue of the possible appointment of a representative of the incapacitated or deceased victim.

Section 3771 applies to the victims harmed as a result of "the commission of a Federal offense or an offense in the District of Columbia." Section 3771 should probably not be read to extend rights to the victims of the crimes proscribed in any of the territorial codes and the Uniform Code of Military Justice. Section 3771 apparently does cover victims of juvenile delinquency with respect to misconduct that in the case of an adult offender would have been a violation of federal or DC law. Section 3771 rights with respect to juvenile proceedings, however, may depend upon whether the juvenile proceedings are open or closed. Moreover, the *2011 AG Guidelines* assert that federal juvenile delinquency provisions "restrict[] the type of information that may be disclosed to victims about investigations and proceedings regarding juvenile offenders unless the juvenile waives the restrictions or has been transferred for criminal prosecution as an adult."

A corporation or other legal entity may incur criminal liability by virtue of the misconduct of a rogue officer or employee. Thus, under some circumstances, the entity might be considered both an offender and a victim, but not here. A corporation may not claim restitution for losses it incurs as consequences of its executives' misconduct.

The Right to Be Reasonably Protected from the Accused

Section 3771 lists the right to be reasonably protected from the accused first among its victims' rights. The clause appears to have been the subject of little judicial construction. One court understood the term "accused" to mean that the right does not attach until a person has been "accused by criminal complaint, information or indictment." A second court observed that "[r]egardless of what this right might entail outside the bail context, it appears to add no new substance to the protection of crime victims afforded by the Bail Reform Act, which already allows a court to order reasonable conditions of release or the detention of an accused defendant to 'assure ... the safety of any other person.'" (18 U.S.C. 3142(c)(1)).

Notice

Notice allows victims to assert their rights, facilitates their participation, assures them that justice is being done, and affords them the opportunity to take protective measures when the accused is at large. Section 3771 explicitly excuses a failure to notify victims of the release of an accused when to do so might be dangerous, and it permits the courts to seek reasonable accommodations when the number of victims in a given case precludes strict compliance with the section's demands. The notice clause has several distinctive features: (1) the notice rights apply only with respect to *public court proceedings* and *parole proceedings*; (2) the rights attach to those proceedings *involving the crime* but not necessarily to all those related to the crime; (3) victims are entitled to *reasonable, accurate and timely* notice; and (4) victims are entitled to notice of the release or escape only of *the accused*.

Attendance

Section 3771(a)(3) assures victims of the right not to be excluded from any public proceedings involving the crime except when to attend would color their subsequent testimony. It is one area where balancing the interests of victim, defendant, and government may be the most challenging.

Participation

Unlike the rights to notice and not to be excluded, the right to be heard is a right to participate. The section describes the proceedings at which it may be invoked with greater particularity, and here too limits application to reasonable participation in public court and parole proceedings. It does not on its face give victims the right to be heard in closed proceedings or to be heard on other pretrial motions, at trial, perhaps on appeal, or with respect to related forfeiture proceedings. Nor does it explicitly give the victim the right to be heard in any particular form.

Section 3771 assures crime victims the right to be reasonably heard at proceedings where a plea bargain is accepted, a right which the 2015 amendments confirm. The right clearly does not vest a victim with the right to participate in plea negotiations. By the same token, the right to be heard is not the right to decide; victims must be heard, but their views are not necessarily controlling.

Confer

Section 3771 might be read to afford a right to confer beginning with the commission of the offense, including with regard to the manner in which the investigation is conducted and the decision as to what charges to bring and against whom. The Senate sponsors of the section, however, described an extensive but more limited right.

Restitution

Section 3771's language here is reminiscent of the constitutional amendment proposals in the 108th and 107th Congresses, which spoke of a right "to full and timely restitution." Those proposals were very different from earlier proposals. They did not establish a right to restitution in so many words. They did not explicitly convey a right to have proceedings reopened for failure to accommodate a victim's right to restitution. Instead, for the first time they spoke of just and timely claims to restitution, two concepts which could be subject to several interpretations.

The first victims' rights proposals promised either a right "to an order of restitution from the convicted offender," or a right "to full restitution from the convicted offender." Subsequent proposals opted for the right to a restitution order. The proposals appeared to make restitution orders mandatory as a matter of right. The scope of the right was unstated. Although the proposals applied to juvenile proceedings, the use of the term "convicted offender" might have been construed to limit their restitution command to criminal convictions and therefore not reach findings of delinquency.

Restitution orders in a nominal amount or subject to priorities for criminal fines or forfeiture or other claims against the defendant's assets might have seemed inconsistent with the decision to elevate mandatory victim restitution to a constitutional right. Their legislative history indicated that these early proposals did "not confer on victims any rights to a specific amount of restitution, leaving the court free to order nominal restitution.... The right conferred on victims [was] one to an 'order' of restitution. With the order in hand, questions of enforcement of the order and its priority as against other judgments [were] left to the applicable Federal and State law."

The committee reports, however, continuously suggested that the right might include the right to a pretrial restraining order to prevent an accused from dissipating assets that might be used to satisfy a restitution order. The right also might have extended to prevent dissipation in the form of payment of attorneys' fees for the accused, since the accused has only a qualified right to the assistance of counsel of his choice.

What was a right to a restitution order prior to the 107th Congress became the right to consideration of just and timely victims' claims, appropriate to the circumstances, weighed against the interests of others, and perhaps applicable only during proceedings on other matters. At first glance, it appeared that as long as the victim's interest in just restitution when asserted in a timely manner was recognized, the amendment proposals left the law of restitution unchanged.

The implication was that in horrific cases, victims had a right to restitution without reference to any other factors. Yet insertion of the word "just" for the first time in the restitution component of the amendment proposal presumably called for consideration of such factors when appropriate. Moreover, it probably precluded restitution claims by the "ripped-off" drug dealer or others victimized in the course of their own illegal conduct, at least in some circumstances.

Historical proposals explicitly allowed victims to reopen final proceedings in vindication of their right to restitution. That language disappeared, and in its place was a reference to "timely" claims

to restitution. The implications were obvious, but the statement quoted above seems to suggest that "timeliness" may be judged by the date of the injury, the date of sentencing, or the date on which the offender had the resources to begin paying restitution.

Section 3771 affords victims "the right to full and timely restitution as provided by law." It seems to confirm rather than enlarge existing law in the area of restitution. Sponsors felt that elsewhere the section bolsters the victim's restitution interest by ensuring the victim's rights to notice, consultation and participation. One appellate court has pointed out that the promise of "full" restitution extends only as far as the law provides, a fact that "makes it clear that Congress recognized that there would be numerous situations when it would be impossible for multiple crime victims to the same set of crimes to be repaid every dollar they had lost."

Reasonable Freedom from Delay

Section 3771(a)(7) describes the right to delay avoidance in limiting terms. The case law indicates that the courts are sensitive to victims' interest in delay avoidance; that in some instances delay may be in the interest of at least some victims; and that the provision "appears to add little if anything substantive to existing law ... except that it does appear to confer ... the right to object to delay and ask the Court to hold both government and defendant to what the Speedy Trial Act already requires."

Fairness, Dignity, and Privacy

This right to be treated with fairness and respect for one's dignity and privacy rarely found explicit expression in the proposed constitutional amendments, although it clearly lies at the heart of all of them. The same language appears in the earlier federal "best efforts" statute, and a similar right is featured in many of the state constitutional and statutory victims' rights provisions.

Notice of Plea and Deferred Prosecution Agreements

The Justice for Victims of Trafficking Act added this to the inventory of victims' rights. It is something many understood to be a component of the original right to be heard (i.e., "the right to be ... heard at any ... proceeding ... involving ... [a] plea ... "). The Justice Department, however, believed that the right attached only after a defendant had been formally charged, by which point plea bargaining has often already been completed. The provision is designed to correct any misunderstanding for the benefit of victims. The reference in the new right to a "timely manner" seems to negate any suggestion that notification may occur after the court has accepted the plea or deferred prosecution agreement.

Notice of Section 3771 Rights and Statutory Services

This, too, the Justice for Victims of Trafficking added to the inventory of victims' rights. It, too, is something that may have been thought implicit from the beginning, given the command elsewhere in the statute. Section 3771(c)(1), for example, has declared from the beginning that "[o]fficers 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)." Section 3771(a)(10) now supplements the command with an explicit right.

Responsibilities of Other Authorities

Section 3771(c)(1) replicates the language of 42 U.S.C. 10606(a)(2000 ed.) with the addition of the notification in italics above. Section 3771(c)(2) is new, and was added in recognition of the fact that the interests of the government and the interests of the victim may not always coincide. The Department of Justice's implementing regulations create a complaint procedure and enforcement mechanism to ensure compliance. None of the proposed constitutional amendments had a provision comparable to either of these provisions.

Responsibilities of the Courts

Section 3771(b) assigns the federal courts responsibility in two areas. One deals with the obligations that follow from the rights granted the victims of crimes under the laws of the United States and the District of Columbia. The other addresses obligations federal courts conducting federal habeas corpus proceedings owe the victims of state crimes.

None of the proposed constitutional amendments featured an equivalent. It has no counterpart in the earlier federal "best efforts" provision. At least one court has expressed the view that "the provision requires at least some proactive procedure designed to ensure victims' rights," while noting the apparent primacy of the right to attend. The trial court's obligation to "ensure" victims' rights seems to set its responsibilities a notch above the "best efforts" level of obligation imposed upon other officials.

Section 3771(b)(2) provides the victims of state offenses limited rights when the offender seeks federal habeas corpus relief. It affords these victims a limited range of rights which related to matters within the control of the federal courts: attendance rights; the right to be heard; protection from unreasonable delays; the right to fair and respectful treatment; and the right to enforce those rights. Section 3771(b)(2)'s most interesting feature may be the absence of a right to notice. It does not list a federal right to be notified of federal habeas proceedings among the rights it provides. The section further absolves federal executive branch officials of any obligations under the habeas provision.

Enforcement

Who

Section 3771(d)(1) is an expansion of the related proposals contained in the proposed constitutional amendments. They contained an exclusive provision and made no mention of governmental representation. Section 3771(d)(1) grants standing to victims and their representatives, and it expressly authorizes the government to assert rights on behalf of the victim. The legislative history confirms the impression that "representatives" include both victims' attorneys and those standing in the stead of a legally unavailable victim; and it negates somewhat the implication that anyone other than the actual victim enjoys ultimate control of the victim's rights. Some of the cases note the propriety of prosecutors asserting victims' rights.

Mandamus and Appeal

Section 3771(d)(3) is more explicit than any of the proposed constitutional amendments. Furthermore, it contemplates interlocutory appeals with stays or continuances of pending criminal proceedings of no more than five days. Early constitutional amendment proposals limited the use of stays, and later proposals were simply silent on the issue. The provision's Senate sponsors apparently saw the availability of mandamus as a means of appellate review. In other contexts mandamus is more limited; it is a "drastic and extraordinary remedy reserved for really extraordinary cases." The federal appellate courts were divided over this standard applied in the case of victims' rights. Congress resolved the dispute in the Justice for Victims of Trafficking Act. The usual appellate standard, espoused by the Second Circuit, applies. The government's prerogative to assert the rights of a victim includes the right to appeal and to petition for mandamus relief on a victim's behalf.

Limitations

One Accused—Too Many Victims

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 the section, the court shall fashion a reasonable procedure to give effect to the section that does not unduly complicate or prolong the proceedings.

No New Trial

Proponents of the proposed constitutional amendment wrestled with the question of the circumstances, if any, under which criminal proceedings could be reopened to correct a denial of a victim's rights. Section 3771(d)(5) bars a new trial. It grants a limited opportunity to revisit plea and sentencing proceedings. It says nothing about bail, restitution, or other trial proceedings, all of which are thus presumably subject to the expedited, five-day stay and mandamus procedure of the statute. Moreover, on its face it permits a plea agreement when the accused has pled to the highest crime charged, but should the agreement be reopened, the statute promises the victim no more than the right to advise the court on the question of whether the agreement should be accepted.

No Damages and Prosecutorial Discretion

Section 3771(d)(6) has two components—(1) a denial of any intent to create a cause of action for damages against the United States or its officers or employees and (2) a denial of any intent to impair prosecutorial discretion. The courts have confirmed that the statute creates no cause of action for damages against the United States or its officials; negates the possibility of *Bivens* action; and provides no grounds for a claim against the United States. Section 3771(d)(6)'s prosecutorial discretion limitation "gives victims not a veto," but that does not mean that victims' rights stand at the prosecutor's convenience or that only the prosecutor's voice will be heard.

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