

Providing a Voice: Crime Victim Rights & Services



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Overview



- **Federal CVRA and VVRA**
 - Definition of Victim
 - Victim Services
 - Victim Rights
 - Enforcement Mechanisms
- **Tribal Codes**
- **Protection of Child Victims in Federal Court**



Definition of Victim

Victims Rights & Restitution Act 42 U.S.C. §10607 (1990)

- Governs mandatory services
- Not enforceable in court
- Attaches upon detection of a crime
- Applies to victims of all crimes under investigation

Crime Victims Rights Act 18 U.S.C. §3771 (2004/2015)

- Ten court enforceable rights
- Attaches upon the filing of a charging instrument (complaint, information, indictment)
- Applies *only* to victims of counts charged

Attorney General Guidelines for Victims & Witness Assistance, Nov. 2011, rev. May 2012 – to be followed by DOJ personnel in treatment of victims and witness to crime.



Definition of Victim



Victims Rights & Restitution Act
42 U.S.C. §10607 (VRRRA)

Crime Victims Rights Act
18 U.S.C. §3771 (CVRA)

A victim is “a person that has suffered direct physical, emotional or pecuniary harm as a result of the commission of a crime.” (42 U.S.C. §10607(e)(2)(A))

Crime victim is “a person that has been directly and proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia.” (18 U.S.C. §3771(e))

Both acts allow for others to stand in the shoes of victims who are minors, incapacitated, incompetent or deceased.



Definition of Victim



Tests for Determining Harm –

- Direct Harm: The harm would not have occurred “but for” the conduct constituting the offense.
- Proximate Harm: the harm must be a reasonably foreseeable result of conduct underlying an element of the offense charged.
- VRRRA requires a showing of direct harm only
- CVRA requires a showing of direct and proximate harm

If there are doubts that a person is a victim, err on the side of caution and provide rather than withhold assistance and services.



Definition of Victim



- Corporate entities – can be victims
- Government entities – not victims except for purposes of restitution under Mandatory Victims Restitution Act (MVRA)
- Culpable persons –
 - A person who is “culpable for or accused of the crime being investigated or prosecuted” is not entitled to victims rights and services.



Identification of Witnesses



The investigating agent --

- Shall identify victims of a crime at the earliest opportunity after detection of a crime and when it can be done without interfering with the investigation (42 U.S.C. §10607(b)(1))
 - Remains the responsibility of investigating agent throughout the case
- Must provide prosecutor with victim's contact information
 - Victim's Name
 - ✦ If victim is a business, name of the business's responsible official
 - ✦ If a minor, must provide date of birth
 - Mailing Address
 - Telephone Numbers (land line and/or cell)
 - E-mail Address



Identification of Witnesses



- In cases with large numbers of victims, try to provide in electronic format for easy entry in Victim Notification System
 - Excel spreadsheet with format can be obtained from Victim-Witness Coordinator at U.S. Attorney's Office



Victim's Services Under VRRRA



- **Responsible official shall –**
 - Advise victim of emergency medical and social services
 - Inform victim of any restitution or other relief to which the victim may be entitled under this or any other law and manner in which such relief may be obtained
 - ✦ **Crime Victims' Compensation Program**
 - Inform a victim of public and private programs that are available to provide counseling, treatment, and other support to the victim



Victim's Services Under VRRRA



- Services for victims of domestic violence
 - ✦ Assist victim in identifying potential risks to safety and well-being
 - Options for addressing those risks
 - Information about types of services and support
 - Consider referrals to community-based victim services programs that allow for confidentiality of the victim's address and enrollment in those programs
- Sexual assault in Indian Country
 - ✦ Investigative agency responsible for payment of forensic sexual assault examinations
 - ✦ Attorney General responsible for payment of –
 - Up to two (2) anonymous and confidential tests of the victim for sexually transmitted diseases during the 12 months following the assault and
 - Cost of a counseling session by a medically trained professional regarding accuracy of such tests and risk of transmission of sexually transmitted disease to victim as a result of the assault



Victim's Services Under VRRRA



- Investigating agent shall arrange for the victim to receive reasonable protection from the suspect and those acting in concert with or at the behest of suspect
 - Remains the responsibility of investigating agent throughout the case
 - Safety planning
 - Pretrial detention, EWAP, Witness Security Program



Victim's Services Under VRRRA



- During the investigation and prosecution of a crime, a responsible official shall provide a victim the earliest possible notice of –
 - The status of the investigation (to the extent it is appropriate and will not interfere with the investigation)
 - ✦ Talk to AUSA before giving out any information
 - Arrest of a suspected offender;
 - Scheduling of each public court hearing;
 - Release or detention status of a suspected offender
 - Acceptance of a plea of guilty or nolo contendere or rendering of a verdict after trial; and
 - Sentence imposed on an offender



Victim's Services Under VRRRA



- **Preservation of property held for evidentiary purposes –**
 - Ensure victim's property held as evidence is maintained in good condition and returned as soon as possible
 - If property will deteriorate or be damaged, consider advising victims
 - Contraband shall not be returned to victims



Victim's Rights Under CVRA



- Reasonable protection from the accused
- Reasonable, accurate and timely notice of all public court proceedings
 - Difficult for USAO to get out timely notice of initial appearance, so try to help
- Right not to be excluded from public court proceedings, including initial appearance
 - Not a “right to attend”
 - Requires court to make a determination regarding whether the victim is testifying, and whether attendance would materially alter the victim’s testimony before excluding victim.



Victim's Rights Under CVRA



- Right to be reasonably heard at any public court proceeding involving release, plea, sentencing, or any parole proceeding
- The reasonable right to confer with the attorney for the government in the case
 - Pre-indictment pleas
 - Victim may voice concerns over a plea, but AUSA has final decision as to a plea
 - Does not give the right to approve/disapprove a plea
- Full and timely restitution as provided in law
- Proceedings free from unreasonable delay



Victim's Rights Under CVRA



- Treated with fairness and with respect for the victim's dignity and privacy
- Right to be informed in a timely manner of any plea bargain or deferred prosecution agreement
- Right to be informed of the rights under this section and the services described in Section 503(c) of the VRRRA and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice



Enforcement Mechanisms



- **Motion in District Court**
 - The victim or government may file a motion on behalf of the victim
 - Court must decide “forthwith”
 - Reasons for any denial must be **stated on the record**
- **Petition the Court of Appeals for a Writ of Mandamus**
 - Writ may be issued on order of single judge
 - Must be decided **within 72 hours**
 - Proceedings in District Court cannot be delayed more than **5 days**
 - If Court denies the appeal, it must issue a **written opinion**



Enforcement Limitations



If the Court finds victim's rights were denied --

- No new cause of action for damages
- No motion for new trial
- Victim may make a motion to re-open a plea or sentence only if:
 - Victim asserted right to be heard before or during the proceedings at issue and such right was denied;
 - Victim petitioned court of appeals for writ of mandamus within 14 days; AND
 - If a plea, the defendant did NOT plead to the highest offense charged.
- Victims' sole appellate route is the writ of mandamus, they may not file a direct appeal. *United States v. Aguirre-Gonzalez*, 597 F.3d 46 (1st Cir. 2010)



Other Enforcement Mechanisms



- **Administrative Complaint**
 - Point of Contact in each USAO to receive complaints
 - Department of Justice Victims' Rights Ombudsman
 - ✦ Receives and investigates complaints
 - ✦ Recommends sanctions, if any
 - May require training for employees and offices
 - May impose sanctions, including suspension and termination, for “willful or wanton” failure to comply with victims’ rights laws
 - Complainant has no judicial review



A Cautionary Case



- *Ochran v. United States*, 117 F.3d 495 (11th Cir. 1997)
 - Ochran was informant in drug case, threatened by defendant
 - AUSA warned Defendant not to do it again, but took no other action
 - Defendant bonded out, kidnapped and seriously injured Ochran
 - Ochran sued based on AUSA's negligence
- ***Holding:*** Tort Claims Act “discretionary function” exemption applied to AUSA's decision not to inform Marshals of threat, but did not apply to AUSA's decision not to inform Ochran of DOJ assistance available against intimidation and harassment provided for in AG Guidelines



Tribal Codes



Umatilla - SECTION 5.01. RIGHTS OF CRIME VICTIMS INVOLVING DOMESTIC ABUSE, SEXUAL ASSAULT, STALKING, AND DATING VIOLENCE



- A) Generally. Any victim of a crime that has been filed in court that directly or indirectly involves domestic abuse, sexual assault, stalking, or dating violence, has the following rights:
 - 1) To be reasonably protected from the accused.
 - 2) To reasonable, accurate, and timely notice of any public court proceeding, or any probation proceeding, involving the crime or of any release or escape of the accused.
 - 3) To not 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.
 - 4) To be reasonably heard at any public proceeding in the court involving release, plea, sentencing, or any probation proceeding.
 - 5) Within reason, to confer with the attorney for the [tribe] in the case.
 - 6) To proceedings free from unreasonable delay.
 - 7) To be treated with fairness and with respect for the victim's dignity and privacy.
 - 8) To the prompt return of property when no longer needed for the prosecution of the case.
 - 9) To be notified whether or not criminal charges will be filed.



Burns Paiute Tribe



5.3.17 Duties of Law Enforcement Officer to Victim of Domestic Violence; Required Notice to Victim

- (a) A law enforcement officer who responds to an allegation of domestic violence shall use all reasonable means to protect the victim and prevent further violence, including but not limited to:
 - (1) Taking the action necessary to provide for the safety of the victim and any family or household member.
 - (2) Confiscating any weapon involved in the alleged domestic violence.
 - (3) Transporting or obtaining transportation for the victim and any child to a shelter.
 - (4) Assisting the victim in removing essential personal effects.
 - (5) Assisting the victim and any child in obtaining medical treatment, including obtaining transportation to a medical facility.
 - (6) Giving the victim immediate and adequate notice of the rights of victims and of the remedies and services available to victims of domestic violence.



Burns Paiute Tribe



- 5.3.24 Duty of Prosecutor to Notify Victim
- (a) The prosecutor shall make reasonable efforts to notify a victim of an alleged crime involving domestic violence when the prosecutor has decided to:
 - (1) Decline the prosecution of the crime;
 - (2) Withdraw the criminal charges filed against the defendant; or
 - (3) Enter into a plea agreement.
- (b) Release of a defendant from custody must not be delayed because of the requirements of subsection "a".



Hopi Tribe of Arizona



- **1.5.8. VICTIM'S RIGHTS.**
- The Hopi Tribe recognizes that victims of crime, including victims of Domestic Violence and Elderly Abuse, must be treated with the utmost respect in all criminal investigations and court proceedings. In addition to the rights enumerated in Rule 60 of the Federal Rules of Criminal Procedure, victims shall have the following rights:
 - (a) To be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process.
 - (b) To be reasonably protected from the defendant, or anyone acting on his or her behalf, from intimidation, threat, harassment or abuse.
 - (c) To confer with the Tribal Prosecutor regarding the disposition of the case.



Hopi Tribe of Arizona



- (d) To refuse a personal interview by the defense attorney or anyone representing the defendant regarding the charges alleged in the criminal complaint.
- (e) To be accompanied by a victim's advocate, Village leader, family member or friend, at all court proceedings.
- (f) To be compensated for all reasonable economic losses sustained by the victim caused by the defendant's criminal conduct.
- (g) To have personal property seized as evidence returned promptly.
- (h) To be informed, upon request, when the defendant is released from custody or has escaped.



Little Traverse Bay Bands of Odawa Indians

- All crime victims have the following rights:
- A. Right to be Protected. The following measures may be taken to protect victims as necessary and appropriate:
 - 1. Have police escorts to and from court;
 - 2. Have secure waiting areas separate from those of the accused and his or her family, witness and friend during court proceedings;
 - 3. Have bail denied or have specific conditions imposed on bail release such as protective orders for defendants who are found to present a danger to the community, the victims, or witnesses;
 - 4. Have the victim's address, place of employment, and other personal identification information kept confidential based upon the victim's reasonable apprehension of acts or threats of physical violence or intimidation by the defendant or at the defendant's direction against the victim or the victim's immediate family; and
 - 5. Have any other action taken that is necessary to protect the victim from the accused.

Federal Protections for Child Victims



Requirements of 18 U.S.C. § 3509(9)(d)



- Privacy protection
 - Keep documents disclosing child's name and other identifying information in a secure place and disclose only to persons with a need to know (§ 3509(d)(1))
 - Applies, in part, to all employees of the government connected with the case, including DOJ employees, any law enforcement agency involved in the case, and any person hired by the government to provide assistance in the proceedings
 - File documents disclosing child's name or other identifying information under seal (§ 3509(d)(2))



Requirements of 18 U.S.C. § 3509



- **Privacy protection**
 - Protective orders – non-disclosure of child’s name in court, closure of courtroom during child’s testimony (§ 3509(d)(3), (e))
 - Court may permit disclosure of information to the defendant, the atty for the defendant, a multidisciplinary child abuse team, a GAL, or an adult attendant, or to anyone whom, in the opinion of the court, disclosure is necessary to the welfare and well-being of the child (§ 3509(d)(4))



Requirements of 18 U.S.C. § 3509



- Guardians *ad litem* (18 U.S.C. § 3509(h))
 - May be appointed to protect best interests of child in cases where child is victim of, or witness to, abuse or exploitation offense
 - Prosecutors should consider whether moving for appointment of a GAL would be appropriate in any case involving child victim or witness
 - Can attend all proceedings in which child participates and make recommendations to court concerning child's welfare



Requirements of 18 U.S.C. § 3509



- Presumption that a child is competent to testify (§ 3509(c))
 - Party attacking presumption must file written motion and offer of proof that child is incompetent – standard is compelling reason for examination
 - allegation that child is mildly retarded or is simply reciting a narrative about the alleged incident is not enough, because it does not show child cannot understand and answer questions, or that child does not know difference between truth and lie
 - exam usually conducted by court
 - Related point: leading questions may be permitted of child witnesses under FRE 611(c) if needed to develop child's testimony



Requirements of 18 U.S.C. § 3509



- Adult Attendant (18 U.S.C. § 3509(i))
 - Provides emotional support to child testifying at or attending a proceeding
 - An adult attendant shall not provide the child with an answer to any question directed to the child during the course of the child's testimony or otherwise prompt the child.
 - If child testifying by closed circuit TV or at deposition, need to have contemporaneous videotape recording of attendant



Requirements of 18 U.S.C. § 3509



- Alternatives to live, in-court testimony by child
 - Closed circuit TV testimony (§ 3509(b)(1)); videotape testimony (§ 3509(b)(2))
 - Used when child unable to testify in open court in the presence of the defendant because of:
 - fear
 - substantial likelihood, established by expert testimony, that child would suffer emotion trauma from testifying
 - child suffers a mental or other infirmity
 - defendant's (or his counsel's) conduct causes child to be unable to continue testifying



Requirements of 18 U.S.C. § 3509



- Alternatives to live, in-court testimony by child, continued
 - Supreme Court has found alternatives don't violate defendant's Confrontation Clause rights (*Maryland v. Craig*, 497 U.S. 836 (1990))
 - But: in some cases courts have found CC violations where there either was no evidence that child was afraid of defendant, or that fear was not dominant reason child could not testify
 - Best course: when appropriate, establish that fear of defendant (or emotional trauma) is dominant reason child cannot testify in open court



Requirements of 18 U.S.C. § 3509



- **Closing the Courtroom (18 U.S.C. § 3509(e))**
 - When a child testifies the court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case.
 - Court must determine on the record that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child's inability to effectively communicate. Such an order will be narrowly tailored to serve the Government's specific compelling interest.



Requirements of 18 U.S.C. § 3509



- Designation of case as one of special public importance (18 U.S.C. § 3509(j))
 - Cases with child witnesses can be given precedence over any other
 - Minimizes length of time the child must endure stress of involvement with criminal process
- Testimonial aids (18 U.S.C. § 3509(l))
 - Court can permit child to use anatomical dolls, drawings, mannequins, etc. to help child testify



Use of Multidisciplinary Teams



- **18 U.S.C. § 3509(g)**
 - Medical diagnoses and evaluation of services
 - Telephone consultation services in emergencies and other situations
 - Psychological and psychiatric diagnoses and evaluation services for the child, parent, etc.
 - Expert medical, psychological and related professional testimony
 - Case service coordination
 - Training services



Requirements of 18 U.S.C. § 3509



- Victim Impact Statement (18 U.S.C. § 3509(f))
 - In preparing the presentence report, the probation officer **shall** request information from the **multidisciplinary child abuse team** and other appropriate sources to determine the **impact of the offense on the child victim** and any other children who may have been affected.



Questions?

