

Network for Victim Recovery of DC's¹ Priorities: Enhancing the Crime Victims' Rights Act

Why does the Crime Victims' Rights Act (CVRA) need to be updated?

Many crime victims and their advocates, as illustrated by the Jeffrey Epstein case, cannot rely on government prosecutors to ensure their rights are protected in the criminal legal system. Proposed changes to the CVRA in Congress can ensure the law will deliver on its promised rights and protections, invest in local crime victims' rights resources and support, and provide processes for holding government actors accountable for violating these rights. Because the District relies on federal prosecutors to handle local prosecutions, DC crime victims are disproportionately disenfranchised when the CVRA lacks enforcement and when those tasked with affording the rights are not held accountable.

Problem #1: The creation of Department of Justice (DOJ) employees functioning as crime victim advocates fails to address the current system's failures, resulting in additional concerns for crime victims.

- The role of a victim advocate should not be filled by a federal government employee. A victim may not feel like they can trust another federal employee to advocate on their behalf. This possible conflict of interest, or even the appearance of it, would threaten the trust that should be foundational to a client-advocate relationship. Furthermore, to be able to maintain and protect the victim's trust, an advocate should have legally protected confidentiality and privilege. A government employee cannot offer the same legal protection that exists between a private attorney and their client. This lack of protection could threaten the victims' privacy or safety, the outcome of the investigation of the underlying crime, or the investigation into the crime victims' rights violation.
- **Recommendation - Invest in local and independent victim resources.** In addition to having access to a crime victims' rights attorney during a criminal investigation and prosecution, victims should have independent and confidential advocates to help them navigate the process of filing a complaint for a crime victims' rights violation by a DOJ employee. Now is the time to invest in building and expanding local crime victims' rights resources, including free and competent crime victims' rights attorneys, rather than expanding government agencies' roles in this effort that have been historically unsuccessful in serving this purpose.

Problem #2: Crime victims lack access to confidential, independent legal advice and representation during the criminal legal process.

- It is a common misconception by victims of crime that the prosecutor is the victim's attorney. While many prosecutors feel the desire to achieve justice for victims, they ultimately answer to the government, which can lead to them acting in conflict with a victim's desires. Prosecutors are ethically required to turn over certain evidence to the defense team, including things a victim may have told them in confidence. Conversely, the loyalty and ethical duties of a private crime victims' rights attorney lies solely with their client, the victim. The CVRA requires prosecutors to advise victims that "the crime victim can seek the advice of an attorney" but there are *no* requirements or procedures for ensuring a victim was informed of this option and what resources were provided regarding available options.
- **Recommendation - Enhance access to crime victims' rights attorneys.** Because the interests of victims and prosecutors often differ, it is imperative prosecutors are required to explain the limitations of their role, and offer victims an updated list of local, free attorneys that are competent in crime victims' rights representation at the outset

¹ *About Network for Victim Recovery of DC (NVRDC):* NVRDC is a nonprofit that provides free legal, advocacy, and case management services to survivors of crime in the District of Columbia. Since 2012, NVRDC has worked with over 5,000 crime victims and has formally represented over 300 crime victims under the federal Crime Victims' Rights Act, which applies to all local offenses committed in the District and prosecuted by the federal U.S Attorney's Office for the District of Columbia.

of the case (or as soon as requested by a victim). If no attorneys exist, prosecutors should refer victims to regional crime victims' rights organizations developed through pro bono referral panels with courts.

Problem #3: The CVRA is unclear as to when a victim's rights begin.

- NVRDC maintains that the CVRA provides victims with rights *before* charges are filed; however, the DOJ has taken the opposite position.² This difference in interpretation impacts the vast majority of federal criminal cases and cases prosecuted in DC, where a prosecutor's decision to not charge a case can effectively deprive crime victims' from having any rights or ability to file complaints about the process.
- **Recommendation - Clarify that CVRA rights attach at the time an offence is committed.** It is necessary for the CVRA to unequivocally state that the rights of crime victims attach at the time of the *commission* of the crime, regardless of when or even whether formal criminal charges are ever filed. Without this clarification, we will undoubtedly see case after case, like with the Epstein case, where prosecutors become the determiner of if and when a victim gets their rights under the CVRA.

Problem #4: Victims have no right to be notified, present, or heard at *non-public* proceedings that directly impact their rights under the CVRA.

- While many of the rights in the CVRA apply to public proceedings, victims' rights may be impacted during hearings that are closed to the public or issues litigated "on the papers" without anyone coming to court. For instance, a victim's right to privacy under the CVRA is frequently attacked by motions seeking subpoenas for crime victims' personal or confidential information. In NVRDC's experience, defendants, and sometimes prosecutors, have asked the court for access to our client's medical, therapeutic, educational, cell phone, and employment records without anyone—including the court—notifying the victim about the request. It is often only when NVRDC attorneys enter these cases and argue against such motions that anyone considers the victim's rights.
- **Recommendation - The CVRA must reflect a meaningful right to be present.** Victims should be notified of, and permitted to be present and heard at, any proceeding, whether in court or litigated "on the papers" (i.e. in a legal motion) where their rights under the CVRA are implicated.³ This includes, but is not limited to, proceedings regarding the sealing or expungement of a defendant's criminal record, proceedings regarding requests for victims' personal or confidential information, and probation or supervised release hearings.

Additional Recommendations:

- **There should be *no* fine or other punishment for victims who violate confidentiality given the extremely high risk of retraumatization such penalties may cause the victim.** The CVRA was meant to be a vehicle to protect and empower victims, *not* to retraumatize and punish them.
- **The U.S. Attorney's Office for DC needs to have the same reporting obligations as other U.S. Attorney's Offices throughout the country.** USAO's DC office does not provide the same types (or amount of data) to the public on their prosecution rates within the Superior Court of the District of Columbia. Without this data, it is difficult for the public to hold this office to the same level of accountability as other USAO sections around the country.

² The DOJ's guidelines for working with victims explicitly states that "CVRA rights attach when criminal proceedings are initiated by complaint, information, or indictment." https://www.justice.gov/sites/default/files/olp/docs/ag_guidelines2012.pdf. This guidance can be seen in the Epstein case, <https://www.courthousenews.com/victims-challenge-to-epstein-plea-deal-rejected-by-full-11th-circuit/>.

³ The proceedings listed in the CVRA do not include record-sealing hearings, probation hearings, or hearings related to the defendant's supervised release. All of these proceedings may impact a victims' rights, including their right to reasonable protection from the accused. Victims do not currently have the right to notice regarding appeals filed by the prosecutor or defendant in the criminal case, despite the fact that such proceedings could result in overturning all or part of a defendant's sentence or conviction, including any awards for restitution. In NVRDC's experience, victims are rarely notified when defendants file appeals arising from their conviction, which often require the defense investigator to contact the victim out of the blue months or even years after the defendant is convicted.

Network for Victim Recovery of DC's Priorities (Expanded Version): Enhancing the Crime Victims' Rights Act

About Network for Victim Recovery of DC (NVRDC): Since its founding in May 2012, NVRDC has worked with over 5,000 victims of crime who come to our organization through a variety of avenues⁴ and provided legal assistance to victims in over 1,200 crime victims' rights matters. On average, we assist 150 new clients a year requiring assistance asserting their rights as crime victims at various stages of a criminal case, from reporting to police through post-conviction proceedings.

NVRDC's Crime Victims' Rights Act Experience: As a result of its unique status as a non-state, the vast majority of adult prosecutions in the District of Columbia are handled by the United States Attorney's Office for the District of Columbia. Additionally, while it is a federal law, the Crime Victims' Rights Act (CVRA) applies to local offenses committed in the District as well as federal officers and employees engaged in the investigation, detection, and prosecution of crime. As such, the vast majority of crime victims in the District are afforded rights under the CVRA. Since its founding, NVRDC has formally asserted our clients' rights under the CVRA by entering our appearance on behalf of crime victims in hundreds of criminal cases. No other local organization asserts the rights of victims in criminal cases at the level of NVRDC and we are confident that no other legal service organization in the country represents this number of victims annually under the CVRA. With our significant experience, feedback from clients we have represented, and our own observations of how entities involved in the criminal legal system routinely fail to afford victims their rights under the law, NVRDC makes the following recommendations for amending the Crime Victims' Rights Act to ensure victims are not only meaningfully afforded their rights at every stage of a criminal case but are provided with avenues to enforce those rights and hold government actors accountable when they violate victims' rights:

Why does the Crime Victims' Rights Act (CVRA) need to be updated?

Many crime victims and their advocates, as illustrated by the Jeffrey Epstein case, cannot rely on government prosecutors to ensure their rights as crime victims are protected in the criminal legal system. Proposed changes to the CVRA in Congress can ensure the law will deliver on its promised rights and protections, invest in local crime victims' rights resources and support, and provide processes for holding government actors accountable for violating these rights. Because the District relies on federal prosecutors to handle local prosecutions, DC crime victims are disproportionately disenfranchised when the CVRA lacks enforcement and when those tasked with affording the rights are not held accountable.

Problem #1: The creation of Department of Justice (DOJ) employees functioning as crime victim advocates fails to address the current system's failures, resulting in additional concerns for crime victims.

⁴ NVRDC provides a variety of avenues for victims to access our services. First, we onboard about 500 clients a year because of our involvement in the District's Sexual Assault Crisis Response Project, which provides sexual assault survivors with an NVRDC, advocate during a medical-forensic exam. We also have a referral relationship with the Community Violence Intervention Program at MedStar Washington Hospital Center, which provides advocacy services for victims of gun violence, stabbings, and assaults. Furthermore, we have memorandums of understanding with a variety of community-based providers who refer clients to NVRDC for legal assistance. Additionally, hundreds of crime victims a year contact NVRDC directly for assistance.

The role of a victim advocate should not be filled by a federal government employee because the cornerstone of a victim's relationship is confidentiality and privilege—two mechanisms that allow for free-flowing conversations and legal advice. This is especially true for crime victims seeking to assert their rights in criminal prosecutions when a victim needs someone to advocate for their stated interest. While a prosecutor can assert a victim's rights under the CVRA, as an attorney for the government, their loyalty and obligations are not to the victim. Ultimately, the prosecutor answers to the federal government and a victim may not feel like they can trust another federal employee to advocate on their behalf. This possible conflict of interest, or even the appearance of it, would threaten the trust that should be foundational to a client-advocate relationship. Furthermore, to be able to maintain and protect the victim's trust, an advocate should have legally protected confidentiality and privilege. A government employee cannot offer the same legal protection that exists between a private attorney and their client. This lack of protection could threaten the victims' privacy or safety, the outcome of the investigation of the underlying crime, or the investigation into the crime victims' rights violation. It is NVRDC's position that an attorney appearing before the court asserting a victim's rights *must* represent the victim in a formal sense as any private attorney would with a client. It is vital a victim have access to free, independent attorneys throughout every stage of a criminal case to advocate for the victim has stated interest and to hold accountable those government actors who may violate a victim's rights.

- **Recommendation - Invest in local and independent victim resources.** In addition to having access to a crime victims' rights attorney during a criminal investigation and prosecution, victims should have independent and confidential advocates to help them navigate the process of filing a complaint for a crime victims' rights violation by a DOJ employee. Now is the time to invest in building and expanding local crime victims' rights resources, including free and competent crime victims' rights attorneys, rather than expanding government agencies' roles in this effort that have been historically unsuccessful in serving this purpose.
- **Proposed language:**
 - "Office of the National Coordinator for Victims' Rights.
 - (a) ESTABLISHMENT.—There is established within the Office of the Deputy Attorney General of the Department of Justice, the Office of Crime Victims' Rights, headed by the National Coordinator for Victims' Rights (in this section referred to as the 'National Coordinator'), which shall receive, investigate, and adjudicate complaints related to the violation of rights of a crime victim under section 3771, monitoring court proceedings as Special Victim's Advocate to protect the rights of victims, and developing standards for treatment of victims."
 - (b) DUTIES.—The National Coordinator shall have the following duties:
 - (1) REVISIONS.—Not less than once every 2 years, the National Coordinator, the Director of the Office of Violence Against Women, the Director of the Federal Bureau of Investigation, the Director of the Office of Victims of Crime, and the litigating components of the Department of Justice, and victims' rights and services groups, shall review and, if necessary, recommend the revision of the rules issued by the Attorney General under section 3774.

(2) TRAINING.—The National Coordinator shall coordinate a mandatory course of training, in consultation with victims’ rights and services groups, on the treatment of crime victims for each officer or employee of the Department of Justice who interacts with crime victims as a part of their official duties.

(3) ADJUDICATION OF COMPLAINTS.— [...]

(2) RIGHT TO COUNSEL.—

(A) IN GENERAL.—The complainant shall have the right to be represented by legal counsel in any hearing under this section.

(B) PRO BONO REPRESENTATION.—The National Coordinator shall submit to the complainant a list of persons (updated quarterly at minimum) who have indicated their availability to represent crime victims on a pro bono basis.

(C) CONTACT INFORMATION OF COUNSEL.—In the case that a complainant is represented by legal counsel in a hearing convened under this section, the contact information of such attorney shall be included on the complaint. [...]

(4) SANCTIONS.— [...]

(5) MINIMUM REQUIREMENTS.— [...]

○ § 3771(d) “ENFORCEMENT AND LIMITATIONS.—

(1) RIGHTS.—The crime victim or the crime victim’s lawful representative, and the attorney for the Government with the informed consent of the victim, the Government (including a victim’s representative) may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.”

○ Strike any advocacy duties under this office.

Problem #2: Crime victims lack access to confidential, independent legal advice and representation during the criminal legal process.

It is a common misconception by victims of crime that the prosecutor is the victim’s attorney. While many prosecutors feel the desire to achieve justice for victims, they ultimately answer to the government, which can lead to them acting in conflict with a victim’s desires. Prosecutors are ethically required to turn over certain evidence to the defense team, including things a victim may have told them in confidence. Conversely, the loyalty and ethical duties of a private crime victims’ rights attorney lies solely with their client, the victim. The CVRA requires prosecutors to advise victims that “the crime victim can seek the advice of an attorney” but there are *no* requirements or procedures for ensuring a victim was informed of this option and what resources were provided regarding available options.

Being informed of their right to have independent representation and supplied with a list of available free legal service organizations can have a positive impact on the victim’s experience throughout the criminal case. As an organization that has represented hundreds of victims seeking to assert their rights at every stage of a criminal case, NVRDC understands the necessity and importance of victims having access to free, knowledgeable and

experienced crime victims' rights attorneys.⁵ While our organization does occasionally receive direct referrals from the United States Attorney's Office, many victims find NVRDC through other mechanisms, often when a victim is extremely frustrated with their experience with the criminal legal system, wishing they were connected with an attorney sooner. An example of the positive impact of knowing about and having access to an independent attorney can be found in the experience of a former NVRDC client, as documented by the Washington Post.⁶ That client came to NVRDC for assistance with a Civil Protection Order after she saw the man who was convicted of sexually abusing her in her neighborhood. The client was unaware of the conditions of the defendant's probation and was extremely concerned that he worked within a short distance of her place of employment. Furthermore, the victim had incurred expenses related to the crime committed against her and was never informed of her right to access crime victims compensation to reimburse her for those expenses. Retaining an attorney at NVRDC who not only helped the client access safety through a civil protection order and obtain crime victims compensation, but also provided her with the ability to learn and understand her rights under the CVRA and lead to outcomes in the criminal case that were in line with the victim's goal of being safe and informed. Many crime victims are not aware that they have rights during criminal proceedings nor that free attorneys exist to help them assert their rights and advocate for their goals and needs. It is extremely important that crime victims have access to confidential and privileged legal and advocacy resources throughout the entirety of a criminal case. Therefore, the CVRA should mandate that government attorneys maintain and provide victims with an up-to-date list of local referrals containing legal services organizations and attorneys that are available pro bono and have familiarity with crime victims' rights. If there are no crime victims' rights attorneys available locally, then prosecutors should refer victims to regional panels.

It is equally important that victims be informed of their right to access independent representation and their other rights under the CVRA. Access to justice for victims of crime necessitates providing victims with information about the rights afforded to them under the law. Therefore, the CVRA should mandate that prosecutors provide crime victims with a victims' rights card that contains a list of their rights. Additionally this information should be repeated orally to the victim by the prosecutor. Translated versions of the card should be available as well. California mandates an informational card be provided to victims by law enforcement members and NVRDC recommends modeling this change to the CVRA after California's law.

- **Recommendation - Enhance access to crime victims' rights attorneys.** Because the interests of victims and prosecutors often differ, it is imperative prosecutors are required to explain the limitations of their role, and offer victims an updated list of local, free attorneys that are competent in crime victims' rights representation at the outset of the case (or as soon as requested by a victim). If no attorneys exist, prosecutors should refer victims to regional crime victims' rights organizations developed through pro

⁵ Lee, J.G., Backes, B.L. Civil Legal Aid and Domestic Violence: a Review of the Literature and Promising Directions. *J Fam Viol* **33**, 421–433 (2018). <https://doi.org/10.1007/s10896-018-9974-3>. See also The Justice in Government Project's "Key Studies and Data About How Legal Aid Assists Domestic Violence Survivors," <https://www.american.edu/spa/jpo/toolkit/upload/domestic-violence-7-30-19.pdf> (last updated Nov. 2020).

⁶ Amy Brittain and Maura Judkis, "The man who attacked me works in your kitchen': Victim of serial groper took justice into her own hands." https://www.washingtonpost.com/investigations/the-man-who-attacked-me-works-in-your-kitchen-victim-of-serial-groper-took-justice-into-her-own-hands/2019/01/30/bda43adc-deae-11e8-b3f0-62607289efee_story.html (Jan. 2019).

bono referral panels with courts. Provide victims with a crime victims' rights card that lists their rights under federal law.

- **Proposed language:**

- §3771(a)(10) “The right to be informed of the rights under this section and the services described in section 503(c) of the Victims’ Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) [1] and provided a crime victims’ rights card, contact information for the Office of Crime Victims’ Rights, and a referral list for local pro bono crime victims’ rights attorneys.”

- §3771(c) “EFFORTS TO ACCORD RIGHTS.—

- (2) ADVICE OF ATTORNEY.—

- (A) The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

- (B) The prosecutor shall submit to the Victim a list of local agencies providing free crime victims’ rights representation, (updated quarterly at minimum) who have indicated their availability to represent crime victims on a pro bono basis.

- (i) in a jurisdiction where a local crime victims’ rights representation is not available, the prosecutor shall provide to a Victim, in writing, a list of pro bono attorneys with appropriate experience and care to represent victims of crime that would not conflict with such attorney’s representation.”⁷

Problem #3: The CVRA is unclear as to when a victim’s rights attach.

Although Congress intended for victims’ rights to attach *prior* to the charging of a crime, the DOJ has taken the opposite position.⁸ Although the 11th Circuit originally addressed this issue in 2020, the Court ultimately vacated its 2020 decision and avoided resolving the issue after its en banc review in April 2021.⁹ The CVRA must be amended to explicitly state that victims’ rights attach *prior* to the filing of a complaint, information, or indictment. Indeed, several provisions in the CVRA make clear that Congress intended for rights to apply throughout the process. For example, the CVRA specifically directs 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*

⁷ NVRDC recommends that the National Coordinator be mandated with updating and keeping current the list of local agencies and pro bono attorneys who meet these qualifications.

⁸ The DOJ’s guidelines for working with victims explicitly states that “CVRA rights attach when criminal proceedings are initiated by complaint, information, or indictment.” https://www.justice.gov/sites/default/files/olp/docs/ag_guidelines2012.pdf. While this issue was discussed by the 11th Circuit in the Jeffrey Epstein-related case, *In re Wild*, 994 F.3d 1244 (11th Cir. 2021), the Court ultimately avoided addressing the issue of whether the rights to confer with or be treated with fairness by the prosecution attach prior to the bringing of formal charges by the government. It is important that Congress’s intent to have rights attach prior to formal charges must be made clear in the statute. See <https://www.courthousenews.com/victims-challenge-to-epstein-plea-deal-rejected-by-full-11th-circuit/>; <https://www.forbes.com/sites/insider/2021/06/16/eleveth-circuit-en-banc-ruling-fails-to-resolve-key-issue-regarding-victims-right-to-confer-with-prosecutors/?sh=73c8327b4065>.

⁹ In April 2020, the 11th Circuit read the CVRA narrowly, with its panel being divided, held that CVRA rights do not attach prior to the filing of charges. *In re Wild*, 955 F.3d 1196 (11th Cir. 2020). After an appeal, the 2020 decision was vacated and the 11th Circuit granted a request for en banc review. *In re Wild*, 967 F.3d 1285 (11th Cir. 2020). The opinion was issued in April 2021, and, unfortunately, the 11th Circuit did not specifically rule on the previously addressed issue of whether rights attach prior to formal charges; however, it did address the issue of whether a victim can bring a freestanding civil action to enforce their rights prior to the filing of an indictment, information, or charges by the government. The majority opinion held that there was no such remedy available in the CVRA. <https://media.ca11.uscourts.gov/opinions/pub/files/201913843.enb.pdf>.

of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in [the CVRA].”¹⁰ Furthermore, a venue provision instructs victims that they can assert their rights “in the district court in which a defendant is being prosecuted for the crime or, *if no prosecution is underway*, in the district court in the district in which the crime occurred.”¹¹ Here again, this provision is only needed because the CVRA applies before the formal filing of charges. The CVRA was most recently amended in 2015, when, in the wake of the horrific treatment by the prosecution of victims in the Jeffrey Epstein case, Congress saw fit to add the right “to be informed in a timely manner of any . . . deferred prosecution agreement,”¹²— a right that *logically* extends before charges are filed.

In spite of both the national outcry over the treatment of victims in the Epstein case and the 2015 CVRA amendments, the DOJ Guidelines for Victim and Witness Assistance have not been revised since 2012. These guidelines still maintain the “CVRA rights attach when criminal proceedings are initiated by complaint, information, or indictment”¹³ and make no exceptions for the newly added right to be informed in a timely manner of any plea deal or deferred prosecution agreement.

This difference in interpretation affects the vast majority of cases prosecuted by the USAO-DC and federal criminal cases, because a prosecutor’s decision to decline prosecution can effectively deprive crime victims’ from having any rights or ability to file complaints about the process. If these rights do not attach until after a crime is charged, then the prosecutor becomes the gatekeeper for determining when and if a victim is accorded their rights, leaving the victim with little to no recourse when they are treated poorly or left in the dark about the status of the case. Indeed, one of the dissenting opinions in *In re Wild* opines that “[u]nder the Majority’s ruling, victims have no CVRA remedy when a prosecutor secretly negotiates these pre-charge agreements in the absence of federal charges.”¹⁴ The CVRA needs to clearly express Congress’s intent 1) for rights to attach prior to the formal initiation of a criminal case and 2) to allow crime victims to independently assert their rights at any point following the commission of a crime, not just after the filing of an indictment, information, or charges.

- **Recommendation - Clearly assert that CVRA rights attach at the time an offence is committed.** It is necessary for the CVRA to state, unequivocally and explicitly, that the rights of crime victims attach at the time of the *commission* of the crime, regardless of when, or even if, formal criminal charges are filed. The Jeffrey Epstein case is the most public example of how the current interpretation of the CVRA by the DOJ continues to leave victims in the dark as they are denied their right to confer absent the formal initiation of a criminal case; however, as an organization that annually represents hundreds of crime victims seeking assistance with the assertion of their crime victims’ rights, we have experienced this issue in our cases. While some prosecutors and sections of the USAO-DC will confer with our clients prior to the formal charging of a criminal case, the experience is not consistent and varies depending on the type of crime, the individual prosecutor, and the prosecutorial section.

¹⁰ 18 U.S.C. § 3771(c)(1) (emphasis added).

¹¹ 18 U.S.C. § 3771(d)(3) (emphasis added).

¹² 18 U.S.C. § 3771(a)(9).

¹³ <https://www.ojp.gov/ncjrs/virtual-library/abstracts/attorney-general-guidelines-victim-and-witness-assistance-revised>.

¹⁴ *In re Wild*, 967 F.3d 1285 at 183 (*Hull, F., dissenting*).

- **Proposed Language -**

- §3771

- “(a) RIGHTS OF CRIME VICTIMS.—The crime victim rights described in this section shall attach upon the alleged commission of an offense: [...]

- “(e) DEFINITIONS.—For the purposes of this chapter: [...]

- (2)CRIME VICTIM.—

- (A)In general.— The term “crime victim” means a person directly and proximately harmed as a result of a suspected, alleged, charged, or convicted Federal offense or an offense in the District of Columbia.”

- **Recommendation - Clearly assert that victims can independently enforce their CVRA rights prior to the filing of an indictment, information, or charges.**

Not only must the CVRA clarify that victims’ rights attach *prior* to the initiation of a criminal proceeding, it must clearly assert that victims can enforce their rights through judicial enforcement in a private action when there is no preexisting criminal proceeding. Without this clarification, victims will continue to lack any recourse under the CVRA when they are stymied by attorneys for the government in seeking to be treated with fairness, confer with the government, and access information during the pre-charging phase of a criminal case. Clearly asserting that victims’ rights attach *prior* to the formal initiation of a criminal proceeding *and* that those rights can be enforced absent a preexisting criminal proceeding allows for greater accountability when government attorneys violate victims’ rights.

- **Proposed Language -**

- §3771

- “(d) ENFORCEMENT AND LIMITATIONS.

- (3)MOTIONS and PETITIONS FOR RELIEF AND WRIT OF MANDAMUS.—

- The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime. If no prosecution is underway, the rights may be asserted through a petition for enforcement of crime victim’s rights filed in the district court in the district in which the crime occurred. The district court shall take up and decide any petition or motion asserting a victim’s right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed, unless the litigants, with the approval of the court, have stipulated to a different time period for consideration. In deciding such application, the court of appeals shall apply ordinary standards of appellate review. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

Problem #4: Victims have no meaningful right to be notified, present, or heard on issues that directly impact their rights when litigation occurs at *non-public* proceedings or decided by the court “on the papers.”

The CVRA refers to rights attaching at “public proceedings” and, therefore, fails to address the following: (1) that some issues impacting victims’ rights occur “under seal,” meaning they are litigated essentially in secret, and (2) that the term “proceedings” is generally interpreted to mean “hearings,” therefore circumventing a victim’s rights if an issue is “decided on the papers,” litigated via written submissions to the court.

Victims should be notified of and provided the right to be present and heard at any proceeding impacting their rights, not just “public proceedings.” Proceedings that occur under seal allow the court to determine who is permitted to be present. Conducting hearings under seal essentially circumvents a victim’s right to notice, to be present, and to be heard if issues impacting the victim’s rights are litigated at that sealed hearing. While it is certainly understandable that certain proceedings, such as grand jury proceedings, are closed to the public, other proceedings may occur that a victim should absolutely be notified about and afforded their rights to be present and heard. It is important for victims to be provided notice and opportunity to appear and be heard at **any** hearing in which issues impacting a victim’s rights are litigated. For example, a hearing involving a defendant's release, regardless of whether it is public or not, should absolutely involve a victim because their physical, mental, and emotional welfare may be impacted by the court’s decision.

The limited term “public proceedings” means that a victim’s rights may be circumvented if requests for action by the court are made by written submissions to the court. Victims should be afforded the right to notice and the opportunity to be heard regarding any request for action by the court that could impact a victim’s rights, regardless of whether that request happens orally in open court, in writing via a formal submission to the court, or in any other communication to the court.¹⁵ For instance, a victim’s right to privacy under the CVRA is frequently attacked by motions seeking subpoenas for crime victims’ personal or confidential information. In NVRDC’s experience, defendants (and even sometimes prosecutors) have filed written requests for relief or action by the court on an issue that implicates a victim’s right; however, without rules of procedure mandating the victim be provided with notice of and an opportunity to be heard regarding such requests, victims are left in the dark. An example of this occurs frequently when a party in a criminal case seeks, via written motion, access to a victim’s personal or confidential information (such as medical, therapeutic, educational cell phone, or employment records). There are no rules requiring the party seeking the records to serve notice on the victim and it is often only when NVRDC attorneys enter these cases and argue against such motions that anyone considers the victim’s rights.

- **Recommendation - The CVRA must reflect meaningful rights to notice, to be present, and to be heard on issues affecting the victim and their rights.** Victims should be notified of, and permitted to be present and heard regarding any issue affecting the victim or their rights, regardless of whether the issue

¹⁵ This could include e-mails or conference calls with the court.

is addressed at an in-court proceeding or decided on the papers.¹⁶ This includes, but is not limited to, the proceedings currently included in the CVRA, proceedings regarding the sealing or expungement of a defendant's criminal record, proceedings regarding requests for victims' personal or confidential information, and probation or supervised release hearings.

- **Proposed language:**

- §3771

“(a) RIGHTS OF CRIME VICTIMS.—The crime victim rights described in this section shall attach upon the alleged commission of an offense:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any court proceeding, motion hearing, post-conviction proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such 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) The right to be reasonably heard at any proceeding in the district court involving release, plea, sentencing, record sealing, or any parole proceeding, or any motion for a victim's records.

(5) The reasonable right to confer with the attorney for the Government, including the right to confer about any plea bargain or other resolution of the case before such plea bargain or resolution is presented to the court or otherwise finalized.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(9) The right to be informed in a timely manner of any plea bargain deferred prosecution agreement, nonprosecution agreement, motion for victims' records, or the referral of a criminal investigation to another Federal, State, or local law enforcement entity. In the case of a nonprosecution agreement or referral of a criminal investigation to another law enforcement entity, upon a showing of good cause, which shall be based upon public safety and the needs of related ongoing prosecutions, the victim may be required to maintain the confidentiality of any nonpublic information disclosed to the victim. Any such duty of confidentiality may not be greater than that of the Government or the defendant. The Attorney General may assess a civil penalty for any breach of confidentiality under this

¹⁶ The proceedings listed in the CVRA do not include record-sealing hearings, probation hearings, or hearings related to the defendant's supervised release. All of these proceedings may impact a victim's rights, including their right to reasonable protection from the accused. Additionally, victims do not currently have the right to notice regarding appeals filed by the prosecutor or defendant in the criminal case, despite the fact that such proceedings could result in overturning all or part of a defendant's sentence or conviction, including any awards for restitution. In NVRDC's experience, victims are rarely notified when defendants file appeals arising from their conviction, which often require the defense investigator to contact the victim out of the blue months or even years after the defendant is convicted.

section, after notice and an opportunity for a hearing, of not more than \$500 for each violation.

(10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) [1] and provided a crime victims' rights card, contact information for the Office of Crime Victims' Rights, and a referral list for local pro bono crime victims' rights attorneys."

Additional Recommendations:

- **There should be *no* fine or other punishment for victims who violate confidentiality given the extremely high risk of retraumatization such penalties may cause the victim.** The CVRA was meant to be a vehicle to protect and empower victims, *not* to retraumatize and punish them. While the CVRA currently does not include any civil penalties on victims for disclosing information from a case, the proposed legislative drafts do. NVRDC strongly opposes the imposition of such penalties on victims and the chilling effect they would have for victims who choose to seek additional or alternative legal avenues for justice after experiencing a crime.

Proposed language: Strike the following language

- §3771(a)(9) "The right to be informed in a timely manner of any plea bargain deferred prosecution agreement, nonprosecution agreement, motion for victims' records, or the referral of a criminal investigation to another Federal, State, or local law enforcement entity. In the case of a nonprosecution agreement or referral of a criminal investigation to another law enforcement entity, upon a showing of good cause, which shall be based upon public safety and the needs of related ongoing prosecutions, the victim may be required to maintain the confidentiality of any nonpublic information disclosed to the victim. Any such duty of confidentiality may not be greater than that of the Government or the defendant. ~~The Attorney General may assess a civil penalty for any breach of confidentiality under this section, after notice and an opportunity for a hearing, of not more than \$500 for each violation.~~"

- **Provide courts with further guidance on enforcement of crime victims' rights.**

The language of subsection (b) of the CVRA confers an obligation on courts to ensure that victims are afforded their rights under subsection (a). This obligation should be updated to reflect situations where it is less who is required to afford victims their rights. NVRDC suggests procedural language, similar to the current subsection (b), further detailing how the court can ensure consistent application of how rights are afforded, as well as a procedural mechanism to inquire about or cure any actual or perceived noncompliance with the CVRA by judges, prosecutors, or law enforcement.

One of NVRDC's primary concerns regarding CVRA reform is the enforceability of victims' rights. Without further clarity regarding who is responsible for enforcing these rights, and mechanisms for enforcement and accountability, these rights risk being void of any meaningful protections for victims.¹⁷

¹⁷ This brings up a related issue of accountability for failure to provide notice to victims about their rights. While the Federal Rules of Criminal Procedure provide some guidance on this topic (as well as some possible remedies), the Federal Rules and the CVRA both

Proposed language:

- §3771 “(b) RIGHTS AFFORDED.—
 - (1) IN GENERAL. In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a).
 - (A) Victim presence during court proceedings. – Before making a determination described in subsection (a)(3), the court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to the exclusion of the victim from the criminal proceeding.
 - i) The court must make inquiries to the government regarding victim participation and if the court determines that timely notice was not given or that the victim was not adequately informed of the nature of the court proceeding, the court must not rule on any substantive issues, accept a plea, or impose a sentence and must continue the hearing for the time necessary to notify the victim of the time, place and nature of the court proceeding.
 - (B) Right to confer with the Government. – Before making a determination restricting a Victim's right to confer with the Government under subsection (a)(5), the court shall make every effort to permit the fullest communication possible and, if issuing a protective order limiting communication, shall consider reasonable alternatives to excluding the Victim from conferring with the Government about any part of the criminal proceeding. The reasons granting or denying relief under this subsection shall be clearly stated on the record.
 - (C) Personal or confidential records. – Before making a determination granting or denying a party's request or motion to issue a subpoena for a Victim's confidential or personal information, the court shall make every effort to ensure that the crime victim is afforded the rights described in subsection (a)(8) by providing notice to the Victim of the party's request, a copy of all relevant pleadings, and a meaningful opportunity to be heard in response to such pleadings. The decisions granting or denying a party's request for a subpoena for a Victim's confidential or personal information shall be clearly stated on the record.
 - (2) If the court finds the rights in subsection (a) to be implicated or at issue, they must advise prosecutors to fulfil their mandates under subsection (c) and may appoint local crime victims' rights counsel for the victim.
 - (3) The reasons for any decision denying relief under this chapter must be clearly stated on the record.
 - (A) The court may make any inquiries necessary upon either party to ensure the crime victim is afforded the rights in subsection (a) and may issue any reasonable orders to cure noncompliance. In the case of a crime victim who is under 18 years of age, incompetent, or deceased, the court shall ensure that the victim's legal guardians,

estate representatives, or other persons appointed as suitable by the court are afforded the rights described in subsection (a).

- §3771 “(c) EFFORTS TO ACCORD RIGHTS.—

(1) GOVERNMENT.— Officers 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—

(A) ensure that crime victims are notified of, and accorded, the rights described in subsection (a); or

(B) in the case that officers and employees of the Department of Justice are unable meet the requirements of subparagraph (A), attempt to notify the crime victim or the legal representative of the crime victim on not less than 3 occasions in which the mode of contact is valid, including outreach by means of telephone, electronic mail, or certified mail;

(C) if a dispute arises about whether the officers and employees have made such efforts, the Department of Justice shall promptly provide to the victim and, if requested, to the court reviewing the issue all relevant information and documents concerning the circumstances, including steps taken to comply with this subsection.” [...]”

- **Create or task an agency to train federal prosecutors and courts on crime victims’ rights, and develop national best practices.**

NVRDC believes that training and manuals on best practices for protecting the rights of crime victims should be created with input from crime victims’ rights attorneys, advocates, and victims. Therefore, a task force that includes those groups should be assembled to inform the development of best practices for prosecutors and courts on protecting the rights of crime victims. In addition to any subject matter training, all federal prosecutors should receive training on trauma-informed interview methods.

Proposed language:

- “§3774. Office of the National Coordinator for Victims’ Rights.

(2) TRAINING.—The National Coordinator shall coordinate a mandatory course of training, in consultation with victims’ rights and services groups, on the treatment of crime victims for each officer or employee of the Department of Justice who interacts with crime victims as a part of their official duties.”

- “§3774. General provisions.

(c) JUDICIAL TRAINING ON THE RIGHTS OF CRIME VICTIMS.—Not later than 1 year after the date of enactment of this Act, the Director of the Federal Judicial Center shall, in consultation with victims’ rights and services groups—

(1) create a guidebook for Federal judges and judicial employees explaining legal requirements regarding crime victims’ rights and best practices for affording those rights in judicial proceedings; and

(2) incorporate the concepts from the guidebook in the Federal Judicial Center’s judicial orientation training.”

- **Provide transparency in reporting on activities by USAO offices and complaints made by victims.**

The Office of Professional Responsibility should report to congress on measures taken to address USAO offices with high complaint numbers. The majority of local crimes prosecuted in the District of Columbia are done so by the United States Attorney’s Office for the District of Columbia. As such, victims of crime in the District, residents of the District, and the Districts mayor and legislature have little recourse when they desire accountability or change from the USAO-DC. As such, the Office of Professional Responsibility should report to congress measures taken to address USAO offices with high numbers of complaints. Furthermore, the number of complaints against an individual attorney that flag the attorney should be lowered from 5 to 3.

Proposed language:

“§ 3774. General provisions

“(b) REPORTS TO CONGRESS.—

“(1) IN GENERAL.—The Attorney General shall submit to Congress a report on—

“(A) significant steps taken to improve the Department’s best efforts to accord crime victims their rights;

“(B) the number of complaints filed with the National Coordinator and the outcome of those complaints (including any disciplinary action);

(C) the number of complaints that were referred to a State bar associations;

(D) a list of Federal districts in which misconduct was alleged to have occurred and the number of complaints from such district;

(E) a list of attorneys against whom 3 or more complaints have been submitted to the Office of Crime Victims’ Rights;” [...]

- *Reporting obligations regarding prosecution rates and other data should be consistent for all USAO sections.* Although the vast majority of crimes prosecuted in the District are done so by the USAO-DC, the District has no ability to dictate what information and data the USAO provides regarding its prosecution rates, conviction rates, etc. USAO-DC does not provide the same types or amount of to the public on their prosecution rates within the Superior Court of the District of Columbia as that provided by other USAO offices. Without this data, it is difficult for the public to hold this office to the same level of accountability as other USAO sections around the country. The CVRA should be amended to include mandates that all USAO prosecutorial sections, including the DC Superior Court section, provide the same types and amounts of data regarding their activities and that this data be the prosecution statistics, including cases referred to the USAO for prosecution, of each specific type of crime prosecuted by each section

Proposed language:

“§ 3774. General provisions

“(b) REPORTS TO CONGRESS.—

“(1) IN GENERAL.—The Attorney General shall submit to Congress a report on—

“(A) significant steps taken to improve the Department's best efforts to accord crime victims their rights;

“(B) the number of complaints filed with the National Coordinator and the outcome of those complaints (including any disciplinary action);

(C) the number of complaints that were referred to a State bar associations;

(D) a list of Federal districts in which misconduct was alleged to have occurred and the number of complaints from such district;

(E) a list of attorneys against whom 3 or more complaints have been submitted to the Office of Crime Victims' Rights;” [...]

(2) OFFICES INCLUDED.—The data compiled in the Attorney General's report to Congress shall include the data from every U.S. Attorney Office in the country, including the U.S. Attorney's Office for the District of Columbia (USAO-DC) and the data from USAO-DC's Superior Court Section.

(3) BIENNIAL REPORTS. [...]

- **Complaint Process.**

NVRDC supports the ability for a victim to retain an attorney of their choosing when seeking redress following a violation of their rights by the government. Furthermore, a list should have pro bono attorneys who have familiarity with crime victims' rights be created, maintained, and updated and provided to victims who are unable to find or retain counsel.

NVRDC has some additional concerns regarding the representation of crime victims by government employees. If a government employee represents a crime victim in a complaint process, how will a conflict of interest be evaluated for the government employee? What level of connection to the accused prosecutor or prosecutor's office will meet the threshold of being a conflict of interest? How will a crime victim be assisted in finding private pro bono counsel if there is a conflict of interest with the government employee if there are no other government employees available? What kind of confidentiality or safety measures, akin to whistleblower-type protections, can be offered to crime victims who may fear retaliation from reporting a prosecutor for a crime victims' rights violation?

Finally, NVRDC seeks clarity on how the severity of sanctions or amount of financial award be determined for crime victims' rights violations. NVRDC supports financial awards for victims' compensation following a violation of their rights and believes any financial award under the CVRA should be free from taxation. NVRDC believes that the CVRA should also allow for additional compensation for the cost of reasonable attorneys' fees related to litigating the victim's complaint. Furthermore, there should be enumerated rights for victims and accused prosecutors during the complaint process.