DEPARTMENT OF JUSTICE
JOURNAL OF FEDERAL LAW AND PRACTICE

Volume 72 September 2024 Number 2

United States Department
of Justice

Executive Office for United
States Attorneys

Washington, D.C. 20530

The Department of Justice Journal
of Federal Law and Practice is
published pursuant to
28 C.F.R. § 0.22(c).

The Department of Justice Journal of Federal Law and Practice is published by the Executive Office for United States Attorneys

Office of Legal Education

1620 Pendleton Street
Columbia, SC 29201

Cite as:

72 DOJ J. FED. L. & PRAC., no. 2, 2024.

Internet Address:

https://www.justice.gov/usao/resources/
journal-of-federal-law-and-practice

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Resources for Victim-Centered Prosecutions in Federal Practice

In This Issue

Resources for Victim-Centered Prosecutions in Federal Practice

In This Issue - Continued

Introduction

Executive Office for U.S. Attorneys
Legal Programs Office
Victim–Witness Team

Welcome to the *Resources for Victim-Centered Prosecution in Federal Practice* edition of the Department of Justice Journal of Federal Law and Practice (DOJ Journal). We are proud to present this collection of scholarship from teams of attorneys and victim–witness professionals throughout the Department of Justice (Department). This edition is particularly meaningful as we reflect upon the 20-year passage of the Crime Victims' Rights Act (CVRA) of 2004.

The Department maintains a comprehensive commitment to facilitating victims' paths to justice through participation in the criminal justice process. Several recent Department initiatives demonstrate this commitment. In 2023, the revised Attorney General Guidelines for Victim and Witness Assistance (AG Guidelines) became effective, providing Department personnel with key amendments that include legal and policy mandates for their work on behalf of crime victims. Along with the revision of the AG Guidelines, each U.S. Attorney's Office (USAO) designated a criminal Assistant U.S. Attorney (AUSA) to serve as a Victim Rights Coordinator (VRC) in its respective district. VRCs work collaboratively with victim–witness professionals to further support, promote, and advance victims' rights so that the USAO community is well-positioned to understand and honor the Department's obligations to crime victims. Similarly, the Criminal Division created Victim Policy Liaisons to support their litigating units in the same fashion. In addition to these supports, the Department implemented an annual training requirement for designated personnel on the AG Guidelines, the CVRA, and the Victims' Rights and Restitution Act, ensuring that legal mandates and policies affecting victims are continually at the forefront of their work.

The curated topics selected by Department attorneys and victim–witness professionals for this edition reflect this momentum on behalf of crime victims. These articles examine intricate facets of working with victims—from establishing victims' privacy considerations and seeking restitution on behalf of victims of Child Sexual Abuse Material to identifying victims of environmental crimes and establishing jurisdiction for certain violent crimes. For instance, in *Applying Privacy Law and Policy in Unique Victim and Witness Context*, authors Michelle Ramsden and Christina Baptista, attorneys for the Department's Office of Privacy

and Civil Liberties, provide a helpful discussion of the unique circumstances in which a victim's privacy interest is implicated in practice. In *Federal Prosecution of Sexual Assault in Indian Country*, National Indian Country Training Coordinator, Leslie Hagen, guides the reader through the jurisdictional considerations that accompany a prosecution of violent crime in Indian country, while recognizing that American Indians and Alaska Natives experience disproportionate rates of victimization.

This edition of the DOJ Journal also pays homage to the revised AG Guidelines' directive that Department personnel should use best efforts to follow a victim-centered, trauma-informed approach in their interactions with victims. In *Understanding Elder Fraud Victims*, Andy Mao, National Elder Justice Coordinator, and Shelley Jackson of the Department's Elder Justice Initiative, share a thoughtful examination of the consequences of elder fraud and victim-focused factors that can influence these investigations. Similarly, Heather Putnam, Victim–Witness Coordinator, and F. Todd Lowell, AUSA, both from the USAO in the District of Maine, along with Melodie Tiddle, Victim Services Division, Federal Bureau of Investigation, use several case-based examples to consider how certified facility dogs can improve a victim's experience and participation in a prosecution.

Those who implement victim-centered prosecutions know the tremendous contributions that victim–witness professionals make to federal investigations and prosecutions of crimes affecting victims. The goals and objectives we carry as a Department—to protect vulnerable victims and to make victims true participants in the criminal justice system—could not be realized without the steadfast commitment of USAO victim–witness coordinators and specialists, USAO tribal victim assistance specialists, litigating component victim assistance personnel, law enforcement victim specialists, and victim assistance program specialists. This edition reflects some of their knowledge, skill, and commitment through article contributions from Christie Jones, Victim–Witness Coordinator, USAO for the Northern District of Georgia; Sandra Palazzolo, Program Analyst and Victim–Witness Coordinator, Consumer Protection Branch; and Kesha Miller, Victim–Witness Coordinator in the USAO, Southern District of Texas.

Thank you to all who made this edition possible and the countless others who also carry the honor of affording victims their rights and services every day.

Applying Privacy Law and Policy in Unique Victim and Witness Contexts

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I. Privacy and victim and witness assistance

On October 21, 2022, the U.S. Department of Justice (Department) revised *The Attorney General Guidelines for Victim and Witness Assistance* (AG Guidelines).[1] The Department's Office of Privacy and Civil Liberties (OPCL) is grateful for the Attorney General's (AG's) thoughtful incorporation of privacy considerations for victims and witnesses into the revised text. For instance, the AG Guidelines encourage Department personnel to limit the publication of victims' and witnesses' personally identifiable information and, in some circumstances, seek protective orders or other safeguards for information that must be used in court proceedings, a practice which is well-supported by caselaw stemming from the Privacy Act of 1974 (Privacy Act).[2] The AG Guidelines also address best efforts to protect victims' and witnesses' privacy while presenting the government's case, sharing information for law enforcement purposes, communicating with the media and the public, and engaging with particularly vulnerable

[1] U.S. Dep't of Just., The Attorney General Guidelines for Victim and Witness Assistance (2022) [hereinafter AG Guidelines].
[2] *Id.* at 5; *see* Laxalt v. McClatchy, 809 F.2d 885, 889–90 (D.C. Cir. 1987); *see also*, *e.g.*, Meyer v. United States, No. 16-2411, 2017 WL 735750, at *4 (D. Kan. Feb. 24, 2017) (citing *Laxalt* and recommending that parties address privacy concerns through a protective order); *see also Noble v. City of Fresno*, No. 116CV01690, 2017 WL 5665850, at *5 (E.D. Cal. Nov. 27, 2017) (suggesting that a Defendant's privacy concerns could be assuaged by a protective order specifying specific access and uses of information).

victims.[3]

The Department's responsibility to protect information about individuals is broader than the context of these AG Guidelines and stems from statutes (predominantly the Privacy Act and its 50 years of sharpened caselaw) and U.S. government and Department policy.[4] Central to the protection of information about victims and witnesses, however, is the Crime Victims' Rights Act (CVRA).[5] The act astutely captures the spirit of the practice of privacy law and policy in its "right eight," which is "the right to be treated with fairness and with respect for the victim's dignity and privacy."[6] In many contexts, including "privacy torts," the protection of individuals' privacy is linked to the protection of their dignity.[7] As such, the practice of privacy law and policy often requires the practitioner to consider unique facts and circumstances not articulated in statute.

This article supplements the considerations outlined in the AG Guidelines and highlights the Department's best practice of privacy outside the relatively well-defined bounds of the Privacy Act. Specifically, this article explains how the Department applies privacy concepts in cases of deceased victims, noncitizen victims and witnesses, and data breaches implicating victim and witness information.

II. Privacy considerations in practice

In all circumstances, Department personnel are responsible for protecting the information collected to fulfill each component's mission. In some cases, the Department is required to implement cybersecurity and privacy-protective measures, such as encryption or auditing of employees' access of information technology.[8] In other cases, Department employees are required to consider whether there is a legal basis for disclosure of records about individuals under the Privacy Act. Even when a legal basis does exist, Department employees are required to "impose . . . conditions . . . that govern the creation, collection, use, processing, storage, maintenance, dissemination, disclosure, and disposal of [personally iden-

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[3] AG Guidelines, *supra* note 1, at 5–7, 70–72.
[4] 5 U.S.C. § 552a.
[5] 18 U.S.C. § 3771.
[6] *Id.* at (a)(8).
[7] *See, e.g.*, Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 Cornell Law Review 317 (2019).
[8] *Security and Privacy Controls for Information Systems and Organizations, Special Publication 800-53, Revision 5*, U.S. Dep't of Com., Nat'l Inst. of Standards and Tech. (Dec. 10, 2020), https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-53r5.pdf.

tifiable information] through written agreements."[9] Certain Department practices—the use of Privacy Act protective orders or memoranda of understanding—fulfill these requirements without impeding the ability of Department employees to meet their mission.

Each of the Department's 42 components employs a Senior Component Official for Privacy (SCOP), a senior official who has responsibility and accountability for the component's privacy program, "including implementation of privacy protections; compliance with privacy related federal laws, regulations, and policies; management of privacy risks; and playing a central policymaking role in the agency's development and evaluation of legislative, regulatory, and other policy proposals affecting privacy."[10] Department personnel seeking advice about the legality or wisdom of particular disclosures or other matters implicating personally identifiable information are encouraged to contact their SCOP or OPCL.

While statutes (the Privacy Act and the eGovernment Act of 2002), regulations (the Office of Management and Budget's Circular A-130, *Managing Information as a Strategic Resource*), and Department policy (AG Guidelines) provide sufficient guidance for Department employees to tackle the majority of privacy-implicating matters arising in their daily work, privacy law and policy is not without nuance. This article intends to capture three of the many unique, multifaceted considerations that may arise in the Department's application of privacy law and policy: (1) privacy considerations for deceased victims; (2) privacy considerations for noncitizen victims and witnesses; and (3) privacy considerations for victims and witnesses implicated in data breaches.

A. Privacy considerations for deceased victims

The Privacy Act is not interpreted to control federal agencies' disclosures of records pertaining to deceased individuals. The Office of Management and Budget's 1975 implementation guidelines clarify that "the thrust of the [Privacy] Act was to provide certain statutory rights to living as opposed to deceased individuals," and neither relatives nor interested parties are permitted to exercise an individual's Privacy Act rights after their demise.[11] In the years since the Privacy Act's passing, caselaw

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[9] *Circular No. A-130: Managing Information as a Strategic Resource*, Nat'l Archives, Off. of Mgmt. & Budget, Appendix II, 7 (July 28, 2016), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/OMB/circulars/a130/a130revised.pdf.

[10] *DOJ Order 0601: Privacy and Civil Liberties,* U.S. Dep't of Just. at II(A)(3)(a) (May 14, 2020), https://www.justice.gov/d9/pages/attachments/2021/04/05/doj_order_0601_-_privacy_and_civil_liberties_order_may_2020.pdf.

[11] *See* Privacy Act Implementation, 40 Fed Reg. 28 at 951 (July 9, 1975).

has echoed that an individual's rights under the act may not be asserted derivatively by others.[12]

As a matter of policy, the Department endeavors to treat non-Privacy Act records with the same care and consideration as if they were covered by the Privacy Act. The Department's practice is to refrain from disclosures that may constitute an unwarranted invasion of privacy. Certainly, the Department also recognizes its duty of transparency to the public and may disclose a record implicating an individual's privacy interest when such disclosure is warranted. In determining whether a particular disclosure is warranted, the Department relies on Justice Stevens' opinion in the unanimously decided *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*:

> [W]hether disclosure of a private document under Exemption 7(C) [withholding of information compiled for law enforcement purposes] is warranted must turn on the nature of the requested document and its relationship to "the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'"[13]

In practice, this boils down to a balancing test between the individual's privacy interest in the information at issue and the public's interest in the information as evidence of agency action.

The Department recognizes that the unconstrained disclosure of information about deceased crime victims is incongruent with the right to be treated with fairness and with respect for the victim's dignity and privacy set out in the CVRA.[14] It is also incongruent with the concept, under the CVRA and the Freedom of Information Act (FOIA), that a decedent's relatives may assume some privacy interest in the disclosure of information about the decedent.[15]

Unlike the Privacy Act, the CVRA expands its definition of crime victims to allow, "in the case of a crime victim who is . . . 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" to assume the rights of the crime victim.[16]

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[12] *See*, *e.g.*, Parks v. U.S. Internal Revenue Serv., 618 F.2d 677, 684–85 (10th Cir. 1980); Whitaker v. Cent. Intel. Agency, 31 F. Supp. 3d 23, 48 (D.D.C. 2014); Lorenzo v. United States, 719 F. Supp. 2d 1208, 1215–16 (S.D. Cal. 2010).
[13] 489 U.S. 749, 772 (1989) (quoting Dep't of Air Force v. Rose, 425 U.S. 352, 372 (1976)) (referencing 5 U.S.C. § 552(b)(7)(C)).
[14] *See* 18 U.S.C. § 3771(a)(8).
[15] *See id.* § 3771(e)(2)(B); 5 U.S.C. § 552(b).
[16] 18 U.S.C. § 3771(e)(2)(B).

While FOIA requires disclosure of agency records upon request to any person, FOIA's general disclosure obligation is subject to nine exemptions.[17] Exemption 6, for instance, permits agencies to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,"[18] and Exemption 7(C) permits withholding of "records or information compiled for law enforcement purposes . . . to the extent [its production] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy."[19] In *New York Times v. National Aeronautics and Space Administration*, the D.C. District Court held that NASA providing the media with audio recordings of the Space Shuttle Challenger astronauts in the moments before their death constituted an unwarranted invasion of their families' personal privacy interests.[20] The District Court explained that disclosure of the audio recordings could subject the families "not just to a barrage of mailings and personal solicitations, but also to a panoply of telephone calls from media groups as well as a disruption of their peace of mind every time a portion of the tape is played within their hearing."[21] Likewise, in *National Archives and Records Administration v. Favish*, the U.S. Supreme Court applied a balancing test, finding the decedent's family had a privacy interest in control over the decedent's body and images of the decedent's body that outweighed the asserted public interest in showing that the responsible officials acted negligently or otherwise improperly in handling the death.[22] In *Favish*, the Court also noted decisions to withhold documents under FOIA exemptions should be made in consideration of potential consequences.[23] While agencies typically determine whether to disclose otherwise protected non-Privacy Act records on a case-by-case basis, in circumstances where records are likely to be protected under FOIA exemptions 6 and 7(C), it is wise to avoid disclosure.

The balancing test outlined in *Reporters Committee* serves as an excellent reference for Department personnel seeking to redact information—for instance, to effectuate article II section D of the AG Guidelines. For example, in determining which information is appropriate to disclose to the media or the public, and after ensuring the underlying information is appropriate to disclose in accordance with the Privacy Act, Department personnel should consider which information is of sufficient

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[17] *See* 5 U.S.C. § 552(a)(3), (b).
[18] *Id.* at (b)(6).
[19] *Id.* at (b)(7)(C).
[20] 782 F. Supp. 628, 632–33 (D.D.C. 1991).
[21] *Id.* at 632.
[22] 541 U.S. 157, 169, 174–75 (2004).
[23] *Id.* at 171.

interest to the public to outweigh the privacy interest of its subject. This is also true in contexts where the subject is living. In some cases, factors such as an individual's public position or influential actions tilt the balance toward public disclosure. In other cases, the relevant personal information may not be necessary to achieve the intended public awareness of Department actions, and its disclosure may result in unwarranted harm to an individual's dignity and privacy. In the victim and witness assistance context, the sensitivity of such information tilts heavily toward nondisclosure, particularly under the CVRA and in cases where victims or witnesses are children or otherwise vulnerable.

B. Privacy considerations for noncitizen victims and witnesses

The Privacy Act, by its definition of "individuals," controls federal agencies' disclosures of records pertaining to U.S. citizens and lawful permanent residents.[24] Noncitizen victims and witnesses, through other legal authorities, may also be entitled to certain privacy-related protections and safeguards. Such protections, for example, may apply depending on the form of legal relief being sought, the legal action being pursued, or the individual's mental state.

The Department, whether through civil or criminal matters or the administration of immigration proceedings, encounters hundreds of thousands of individuals each year who are seeking protection from persecution and torture. Information contained in or about any application for asylum[25] or credible fear or reasonable fear determination,[26] along with any other records related to these applications, shall not be disclosed without the written consent of the applicant, absent an enumerated exception or the exercise of the AG's discretion.[27] The AG's discretion in this context has been used sparingly, and the enumerated exceptions are limited. Exceptions that allow for third-party disclosure of information related to

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[24] *See* 5 U.S.C. § 552a(a)(2).

[25] *See* 8 U.S.C. § 1158(a) (authority to apply for asylum); 8 U.S.C. § 1231(b)(3)(A) (regarding withholding of removal to a country where the individual's "life or freedom would be threatened in that country because of the [noncitizen]'s race, religion, nationality, membership in a particular social group, or political opinion"); 8 C.F.R. §§ 208.16(c)–208.18 (regarding protection under article 3 of the Convention Against Torture).

[26] Individuals who express a fear of persecution or torture or express a fear of return to their country may be referred to an asylum officer for an interview to determine whether the individual has a credible fear (for arriving noncitizens) or a reasonable fear (for noncitizens already subject to an order of removal) of persecution or torture. *See* 8 C.F.R. §§ 208.30–208.31.

[27] *See* 8 § C.F.R. 1208.6 (disclosure to third parties).

these fear-based requests include the following: a qualified need to examine records in connection with the adjudication of the application or consideration of the request; the defense of any legal action arising from the adjudication of the application or request; the defense of any legal action which the application or request is a part of; any U.S. government civil or criminal investigation; and any federal, state, or local court in the United States considering legal action arising from the adjudication of the application or a proceeding in which the application or request is a part of.[28]

Overall, these exceptions allow limited release in the context of civil or criminal law enforcement investigations and litigation. Such actions may arise directly from the adjudication of asylum applications or credible or reasonable fear requests (for example, direct appeal, mandamus action to compel the underlying administrative body to act on the application or request), or legal actions where the information is a part of (for example, class action litigation or collateral matters such as habeas relief, *Bivens* actions, or matters arising under the Federal Torts Claims Act). Additional safeguards may be necessary to protect the subject's privacy and safety where such information is received, given the sensitive nature of this information and potential harm to the individual should the information become public. Merely disclosing the identity of the individual and the fact the individual is seeking protection from removal to a country where they claim they were or will be persecuted or tortured could create a new claim for relief should the foreign government or entity learn of the claim. Additional safeguards may include proceeding under a pseudonym or seeking a protective order that would limit the public disclosure of this information. Do not assume that because the subject has affirmatively disclosed this information in the proceedings the government should not proceed with caution and seek additional safeguards and protections when responding to such information or submitting additional information into the record.

Another special category of noncitizens entitled to enhanced privacy protections are victims of domestic violence, human trafficking, or criminal activity. Title 8, United States Code, Section 1367 prohibits the government from the use or disclosure of information relating to the noncitizen beneficiary of a pending or approved application for a T visa, a U visa, or protections under the Violence Against Women Act (VAWA),[29] in accordance with 8 U.S.C. 1367(d) and section 810 of the Violence Against Women Reauthorization Act of 2013, including VAWA self-petitioners

[28] *Id.*
[29] 34 U.S.C. § 12291.

and VAWA cancellation of removal.[30] T visas are available to noncitizens who have been the victim of a severe form of human trafficking, who are physically present in the United States on account of such trafficking, and who have complied with any reasonable requests for assistance in a law enforcement investigation or prosecution of such acts or where such acts are at least one central reason for the commission of that crime.[31] U visas are available to noncitizen victims of criminal activity who have suffered substantial physical or mental abuse as a result of the underlying crime, who possess information concerning the criminal activity, and who are helpful to or likely helpful to any related investigation or prosecution.[32] Under VAWA, noncitizens who have been battered or subjected to extreme cruelty by a qualifying relative may self-petition for lawful permanent resident status or, if in removal proceedings, seek lawful permanent residence status by applying for VAWA cancellation of removal with the immigration court.[33]

Information protected under section 1367 is particularly sensitive, given the vulnerability of the protected population and the consequences for violating the statute. Section 1367 prohibits the disclosure of such information to anyone other than a sworn officer or employee of the Department of Homeland Security, the Department of State, or the Department of Justice, unless one of several enumerated exceptions apply.[34] The exceptions allow for the following limited disclosures: anonymized information for statistical purposes in the same manner and circumstances as census information under 13 U.S.C. § 8; legitimate law enforcement or national security purposes; judicial review of a determination on the underlying application or petition; disclosures to agencies providing benefits used solely in making determinations of eligibility for benefits under a specific federal, state, or local program; and congressional oversight.[35] The enumerated exceptions place limitations on the receiving entity, restricting the use of the information to the intended purpose for which it is shared and requiring that the transmission is conducted in a manner that protects the confidentiality of such information. As such, the Department must ensure the recipient of any section 1367-protected information agrees to not further disseminate the information or use it for a purpose other than the purpose for which it is provided. Similarly, if the Department receives such information, it must agree to do the following: only

[30] 8 U.S.C. § 1367(a)(1)(F).
[31] *See id.* § 1101(a)(15)(T).
[32] *See id.* § 1101(a)(15)(U).
[33] *See id.* §§ 1101(a)(51), 1229b(b)(2)(A).
[34] *Id.* § 1367(a).
[35] *Id.* § 1367(b); 13 U.S.C. § 8.

use the information for an authorized purpose; safeguard the information from disclosure to anyone not authorized to have access to that information for an authorized purpose; and refrain from further disseminating the information. The exception for judicial review is limited in scope to the review of a determination on the underlying application or petition. The exception is not so broad as to allow for production in a legal action, such as civil discovery in a class action, where the information may merely be a part of the litigation but does not concern the direct judicial review of the decision on the application or petition.

Waiver of the section 1367 disclosure restrictions is only allowed if all the battered individuals in the case are adults and they have all waived the restrictions.[36] Written consent is required to communicate with victim service providers, who are then bound by section 1367 if receiving referrals.[37] The disclosure limitations end when the application for relief is denied and all opportunities for appeal of the denial have been exhausted.[38] There are penalties for willfully using, publishing, or permitting information to be disclosed in violation of section 1367, including disciplinary action and civil monetary penalties of up to $5,000 for each violation.[39]

In the case of noncitizens who present with mental health concerns, such individuals may warrant additional safeguards and protections to not only preserve privacy but also encourage open participation in litigation. In *Dusky v. United States*, the Supreme Court reasoned that to be competent to stand trial, a defendant must have a sufficient ability to rationally consult with their lawyer and a rational and factual understanding of the proceeding.[40] In immigration court, noncitizens do not have the benefit of counsel. As such, the standard for competency for a pro se individual is more demanding. All noncitizens in immigration proceedings, regardless of representation, must be able to "meaningfully participate" in the proceedings.[41] Detained pro se noncitizens, in addition, must also have the ability to perform the additional functions necessary for self-representation.[42] To meaningfully participate, the noncitizen

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[36] *See* 8 U.S.C. § 1367(a)(4).
[37] *See id.* § 1367(a)(7).
[38] *See id.* § 1367(a)(2).
[39] *Id.* § 1367(c).
[40] 362 U.S. 402 (1960).
[41] Matter of M-A-M-, 25 I. & N. Dec. 474 (BIA 2011).
[42] *See* Franco-Gonzalez v. Holder, No. CV 10-02211, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013) (partial judgment and permanent injunction); Franco-Gonzalez v. Holder, No. CV 10-02211, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014) (order further implementing this court's permanent injunction).

must have a rational and factual understanding of the nature and object of the proceedings; the privilege of being represented by counsel; the right to present, examine, and object to evidence; the right to cross-examine witnesses; and the right to appeal.[43] In order to represent themselves, detained pro se noncitizens must have sufficient present ability to do the following: exercise all the rights necessary to meaningfully participate in the proceedings; make informed decisions about whether to waive those rights; present information and evidence relevant to eligibility for relief; and act upon instructions and information presented by the immigration judge and government counsel.[44] Noncitizens are incompetent to represent themselves in an immigration proceeding if they are unable to satisfy any of these requirements because of a mental disorder (including intellectual disability). For purposes of this standard, "mental disorder" (including intellectual disability) is defined as a significant impairment of the cognitive, emotional, or behavioral functioning of a person.[45] Noncitizens represented by counsel only need to "meaningfully participate" in the proceedings to be found competent; they do not also have to perform the additional functions necessary for self-representation.

If an immigration judge determines that a noncitizen lacks sufficient competency to proceed with the hearing, the Immigration and Nationality Act provides the immigration judge "shall prescribe safeguards to protect the rights and privileges of the alien."[46] Immigration judges have broad discretion in determining which safeguards are appropriate, given the circumstances of the case.[47] Judges also have the authority to prescribe safeguards, even if the noncitizen is found competent but would otherwise benefit from such safeguards.[48] Those safeguards may include privacy-protecting measures, such as closing the proceedings to the public to not only ensure fairness in the proceedings, but to facilitate open communication between the noncitizen and the court. Mental illness is often stigmatized, particularly in less developed countries, making individuals reluctant to discuss their mental health in open court. While the

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[43] M-A-M-, 25 I. & N. Dec. 474.

[44] Franco-Gonzalez v. Holder, No. CV 10-02211; *see also* Press Release, Executive Office for Immigration Review, Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013) ("If . . . medical records or other forms of evidence provide indication of mental incompetency, Immigration Judges will convene a competency hearing to determine whether the detainee is competent to represent himself or herself in immigration proceedings.").

[45] Franco-Gonzalez v. Holder, No. CV 10-02211.

[46] 8 U.S.C. § 1229b(b)(3).

[47] M-A-M-, 25 I. & N. Dec. at 480–81.

[48] *Id.*

general rule provides all immigration proceedings are open to the public, immigration judges have the authority to close or otherwise limit attendance at hearings to protect witnesses, parties, or the public interest.[49] Therefore, immigration judges are not only able to close proceedings as a safeguard when the noncitizen is determined to be incompetent, but also able to close the hearings before making such a determination as necessary to protect the noncitizen. While safeguards prescribed by the immigration judge are generally only applicable before the immigration court, given the vulnerability of this population, it may behoove the parties and the court to continue to apply such safeguards on appeal or in collateral proceedings to ensure fairness.

These examples show while the Privacy Act may only apply to U.S. citizens and lawful permanent residents, noncitizens may be entitled to certain privacy-related safeguards and protections through other legal authorities. Moreover, while individuals may not have been U.S. citizens or lawful permanent residents when their information was originally collected, their status may have since changed, causing their records to become Privacy Act-protected records. As such, it is important to work with your privacy office to identify additional measures that may be required when handling such information.

C. Privacy considerations for victims and witnesses implicated in data breaches

Despite best efforts to protect the information for which organizations are responsible, an unfortunate inevitability of this digital age is that electronically stored information is vulnerable to breach. Harvard Business Review reports that from 2022 to 2023, the world experienced a 20% increase in data breaches and the number of victims of data breaches doubled.[50] Given its law enforcement mission, the Department also remains particularly vigilant over electronic information it possesses or collects. The Office of the Inspector General exemplifies this in reporting that "the importance of data security [to the Department] was illustrated in February 2023, when the U.S. Marshals Service suffered a major security breach."[51] Hackers broke into and stole data from a computer system that included sensitive information such as "ongoing investigations, employee

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[49] *See* 8 C.F.R. § 1003.27.

[50] Stuart Madnick, *Why Data Breaches Spiked in 2023*, Harv. Bus. Rev. (Feb. 19, 2024), https://hbr.org/2024/02/why-data-breaches-spiked-in-2023.

[51] *Department of Justice Top Management and Performance Challenges 2023*, U.S. Dep't of Just., Off. of the Inspector Gen., https://oig.justice.gov/reports/department-justice-top-management-and-performance-challenges-2023/cybersecurity (last visited July 2, 2014).

personal data, and internal processes" as well as "sensitive files, including information about investigative targets."[52]

In conducting its privacy-focused reviews of Department information collections, systems of records, and technologies, the OPCL ensures Department components account for and appropriately protect particularly sensitive information such as victim and witness information. For instance, Department components are encouraged to encrypt information at rest and in transit and establish appropriate memoranda with third-party recipients of victim and witness information to encourage responsible information handling. Even the best-laid plans are occasionally frustrated by malign technological advancements or, at simplest, human error. The consequences of data breaches impacting crime victims and witnesses may threaten the lives or well-being of the underlying individuals. Consider crime victims or witnesses who have reported criminal activity to a Department tipline, despite threats from the perpetrators. If the details of their report, the fact they have submitted a report, or information of their location is made public, their lives may be at risk. Therefore, in the case of a data breach impacting victim and witness information, Department personnel should incorporate an awareness of victim equities into each step of the remediation process.

One of the predominant considerations in organizational data breach response procedures, including the Department's, is whether to notify the victims of the breach. Often fundamental to this determination is an assessment of risk to the individual victims. If, for example, a breach consisted only of an email with personal information being sent to the wrong "John Smith" within the Department, and the recipient was confirmed to have deleted the email without opening it, the risk to the subjects of the personal information may be nominal enough that notification was not warranted. If information concerning a victim of violence perpetrated by an intimate partner was mistakenly published to the Department's publicly accessible FOIA "reading room," the risk to the victim may be sufficiently high to warrant notification. Considering this pattern, the Department carefully considers the mechanism and timing of notification to the individual. Mailing a letter to or calling the victim's home might present a significant risk that the alleged perpetrator of violence would learn of the victim's report. Additionally, a delay in notification, while the Department determines the best mechanism of notification, might result in a longer timeframe in which the alleged perpetrator may learn about the victim's report before the victim learns of its disclosure. Potentially, the Department may notify local law enforcement of the breach and re-

[52] *Id.*

quest an immediate, in-person notification to the victim. Certainly, this approach is not appropriate in all cases, including when the alleged perpetrator is a member of law enforcement or is standing right beside the victim. Department personnel handling breaches of victim and witness information should be aware of and exercise caution in navigating such risks in data breach victim notification.

For assistance, in navigating these issues, Department personnel may consult with designated attorneys in the primary prosecuting component, such as the USAO Victims' Rights Coordinator or the Criminal Division Victim Witness Attorney Liaison for support in this regard. In keeping with the interconnectedness of privacy and dignity, Department personnel engaged in data breach notification must also approach data breach notification carefully to avoid retraumatizing crime victims and may wish to collaborate with victim witness personnel.

III. Conclusion

Like all legal practice, federal practice is rife with unexpected fact patterns, nuances, and technological developments that impact federal employees' applications of even the most established federal law and policy. Although cases involving deceased victims, noncitizen victims and witnesses, and data breaches might be familiar to the modern practitioner, other unique circumstances often arise and require the Department to reevaluate its privacy practice and adapt best practices accordingly. SCOPs and OPCL are best positioned to advise Department personnel about the legality or wisdom of disclosures or other matters implicating personally identifiable information. Component engagement with Department privacy officials enhances privacy practice Department-wide and can have a substantial impact on the individuals—crime victims and witnesses—who entrust the Department with their information.

About the Author

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Help and Hope: A Federal Law Enforcement Perspective on Victims' Rights and Services

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I. Introduction

Elie Wiesel, Chair of the President's Commission on the Holocaust and winner of the 1986 Nobel Peace Prize, wrote the following in his memoir: "Just as despair can come to one another only from other human beings, hope, too, can be given to one only by other human beings."[1] The trauma and despair that one person inflicts on another by committing a crime can be overwhelming and long-lasting. The role of law enforcement as a victim's first contact with the criminal justice system is to provide victims with information, tools, and resources to begin the process of healing—to provide them with hope.

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) investigates and reduces the risk to public safety caused by federal crimes involving firearms and explosives, arson, and illegal trafficking of alcohol and tobacco products. ATF's Victim–Witness Assistance Program (VWAP) plays an integral role in assisting victims and coordinating with other agencies to meet victims' needs. The VWAP provides a link between investigative agents and crime victims, increases the capacity of crime victims and witnesses to cooperate in the case investigation and prosecution, and minimizes further victimization and trauma. The overall goal of the VWAP is to ensure the safety of federal crime victims and

[1] Elie Wiesel, Night (Marion Wiesel trans. 2006).

witnesses. From the earliest identification of a crime to the completion of a defendant's sentence, law enforcement plays a role in protecting victims' statutory rights.[2]

This article provides an overview of ATF's duties, obligations, and practices to provide services and afford rights to victims of federal crimes from the earliest phases of an investigation to the conclusion of the criminal justice process.

II. Law enforcement obligations under the Victim's Rights and Restitution Act

Congress passed the Victims' Rights and Restitution Act (VRRA) in 1990, which mandates certain services be provided to victims in federal cases.[3] The *Attorney General Guidelines for Victim and Witness Assistance* (AG Guidelines) provide further clarification and guidance regarding the responsibilities of law enforcement and prosecutors in providing victims with services under the VRRA.[4]

After the detection of a crime, the investigative agency must identify the victims of the crime; this should be accomplished at the earliest opportunity without interfering with the investigation.[5] The VRRA defines "victim" as "a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime."[6] "The responsibility for identifying victims continues with the investigative agency throughout the criminal justice process."[7] Moreover, while other components and other investigative agencies may also identify victims, all identifications should be coordinated with the lead case agent.[8]

Under the VRRA and the AG Guidelines, the investigative agency is also responsible for arranging for a victim to receive "reasonable protection from a suspected offender and persons acting in concert with or at the behest of the suspected offender."[9] This responsibility remains with

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[2] *See* 34 U.S.C. § 20141; 18 U.S.C. § 3771.
[3] 34 U.S.C. § 20141.
[4] U.S. Dep't of Just., The Attorney General Guidelines for Victim and Witness Assistance (2022) [hereinafter AG Guidelines].
[5] 34 U.S.C. § 20141(b)(1); *see also* AG Guidelines, *supra* note 4, at 48 ("At the earliest opportunity after the detection of a crime at which it may be done without interfering with an investigation, the responsible official of the investigative agency shall identify the victims of the crime.").
[6] 34 U.S.C. § 20141(e)(2).
[7] AG Guidelines, *supra* note 4, at 48; *see* 34 U.S.C. § 20141(b)(1).
[8] AG Guidelines, *supra* note 4, at 48.
[9] 34 U.S.C. § 20141(c)(2); AG Guidelines, *supra* note 4, at 82.

"the investigative agency throughout the criminal justice process."[10] It is important to note that the right to reasonable protection does not guarantee physical protection for victims. The AG Guidelines provide that, for example, "neither the CVRA nor the VRRA requires the Department to provide victims with a security detail or bodyguards to ensure their physical security."[11]

Additional VRRA responsibilities fall solely to the investigative agency during an investigation per the AG Guidelines. Unless prohibited by a specific statute, regulation, or policy, an investigative agency must use their best efforts to provide VRRA victims with the earliest possible notice concerning the status of the investigation of the crime, to the extent that it is appropriate and feasible and will not interfere with the investigation.[12] In addition, the investigative agency must use best efforts to provide VRRA victims with the earliest possible notice concerning the arrest of a suspected offender—again, to the extent that it is appropriate and feasible and will not interfere with the investigation.[13]

Department personnel must provide identified victims with information about services available to them.[14] These services include information about where the victim may receive emergency medical or social services;[15] the availability of any restitution or other relief to which the victim may be entitled;[16] and public and private programs that are available to provide counseling, treatment, and other support to the victim.[17] While responsibility for providing a victim with this information during an investigation lies with the investigative agency, once an investigation has transferred to the prosecutorial component, it is the prosecutorial component that it is responsible for such referrals for services.[18]

One of the most important aspects of the relationship between law enforcement and crime victims is how victims receive the notices they are entitled to under the VRRA. While practices may differ between individual law enforcement components, notification of VRRA services is chiefly done through the Victim Notification System (VNS). The VNS is a free, computer-based system that provides federal crime victims with information on the following: scheduled court events, the outcome of those court

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[10] AG Guidelines, *supra* note 4, at 49.
[11] *Id.* at 50.
[12] 34 U.S.C. § 20141(c)(3)(A); AG Guidelines, *supra* note 4, at 52.
[13] 34 U.S.C. § 20141(c)(3)(B); AG Guidelines, *supra* note 4, at 52.
[14] 34 U.S.C. § 20141(b)(2); AG Guidelines, *supra* note 4, at 51.
[15] 34 U.S.C. § 20141(c)(1)(A); AG Guidelines, *supra* note 4, at 51.
[16] 34 U.S.C. § 20141(c)(1)(B); AG Guidelines, *supra* note 4, at 51.
[17] 34 U.S.C. § 20141(c)(1)(C); AG Guidelines, *supra* note 4, at 51–52.
[18] AG Guidelines, *supra* note 4, at 52.

events, and the offender's custody status and release.[19] It is a cooperative effort between U.S. Attorneys' Offices (USAO) and other Department components.[20] ATF uses VNS to notify victims of the VRRA services they are entitled to and the status of the offenders' custody or release condition.

While VNS is helpful in making the process of notifying victims more efficient, law enforcement components may also use other forms of communication, including phone calls and emails from their respective VWAPs. In addition to Department component VWAPs, case agents are also heavily involved in ensuring that victims are properly notified.

It is also important to note that there are sometimes compelling and legitimate reasons to delay notification to an identified victim. For example, a victim's existence may be known through a cooperating witness. In such cases, providing notice to an identified victim could interfere with or compromise the integrity of an investigation if, by providing such notice, it would disclose the identity of the cooperating witness. When the target of the investigation knows the victim personally, victim notification may compromise the investigation or endanger the safety of the victim. In fact, the recent revisions to the AG Guidelines make clear that nothing in the AG Guidelines shall require Department personnel to take any action that would interfere with or compromise an investigation, endanger the security of any person, or impair prosecutorial discretion.[21] ATF and law enforcement generally make these determinations on a case-by-case basis while being mindful of the safety concerns of identified victims.

While the VRRA and the AG Guidelines provide a great deal of information on these processes, practical application of the AG Guidelines during investigations can be challenging at times. ATF's VWAP and special agents navigate this process every day, and in doing so, are able to offer victims hope of healing.

The following closed case is an example of ATF's work to support crime victims. In 2018, a package left on the front porch of a family home exploded, killing a father and leaving his young child to witness his tragic death and address resulting trauma. Ten days later, a woman and her son were getting ready for a morning workout when they noticed a package left on their front stoop. The son brought the package into the kitchen and proceeded to open it. The package exploded, releasing shrapnel that killed the son and caused multiple serious injuries to his mother. A few hours later, approximately five miles away from their home, an older woman

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[19] *Id.*

[20] *Victim Notification System,* U.S. Dep't of Just. (Sept. 27, 2023), https://www.justice.gov/criminal/criminal-vns/victim-notification-system.

[21] AG Guidelines, *supra* note 4, at 4.

stepped outside and noticed a package addressed to the house across the street. As she attempted to pick up the package, it exploded, causing serious injuries that resulted in hospitalization in the intensive care unit.

Working with local police officers and victim specialists, ATF's VWAP assisted multiple victims in this case. For example, VWAP worked closely with the victim who lost her son. ATF Emergency Victim Funds covered the cost of temporary lodging and subsistence for her and her mother until they could return to their home. In addition, these funds were used to obtain emergency clothing, toiletries, and a disposable cell phone to replace the one destroyed by the explosion.

ATF VWAP specialists also met with family members of the older woman who was injured hours later, providing them with information about potential resources and services available to them. Such meetings provide information on how to navigate the next steps and can provide a sense of relief and hope. Indeed, in this case, the family expressed how much they appreciated the fact that ATF reached out to them and met with them in-person; the meeting made them feel connected to law enforcement and the case.

Maintaining contact with victims and their families is equally important. For the above case example, ATF VWAP specialists maintained contact with all three victims' families throughout the investigative process, provided ongoing support and information, and assisted in coordination of the return of personal property.

III. Law enforcement obligations under the Crime Victims' Rights Act

Congress passed the Crime Victims' Rights Act (CVRA) in 2004, which "affords victims in criminal cases 10 rights that are enforceable in federal courts."[22] As the AG Guidelines provide, "the CVRA 'rights' should be distinguished from crime victim 'services' contained in the VRRA."[23] There is some overlap between the rights and services provided by the CVRA and VRRA; for example, "'reasonable protection' is considered both a right and a service."[24] They also differ in their definitions of "victim" and, as a result, some victims may qualify to receive services under the VRRA but not have court-enforceable rights under the CVRA.[25] Specifically, "[t]he VRRA[] mandates services to those directly harmed by

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[22] AG Guidelines, *supra* note 4, at 57; *see* 18 U.S.C. § 3771.
[23] AG Guidelines, *supra* note 4, at 57.
[24] *Id.* at 57; *see also* 18 U.S.C. § 3771(a)(1) (considering reasonable protection a right); 34 U.S.C. § 20141(c)(2) (considering reasonable protection a service).
[25] AG Guidelines, *supra* note 4, at 57.

a crime, whereas the CVRA establishes court-enforceable rights for those who are directly and proximately harmed as a result of the commission of a [f]ederal offense or an offense in the District of Columbia."[26]

While many of the rights in the CVRA pertain to court-related events, there are a few that are particularly relevant to Department law enforcement components. As discussed above, the first CVRA right that a crime victim is entitled to is reasonable protection from the accused.[27] As with the VRRA, the responsibility of arranging for reasonable victim protection remains with the investigative agency throughout the criminal justice process.[28] As part of this responsibility, ATF also closely coordinates with the respective prosecutorial component, as there may be reasonable legal protections that prosecutors can facilitate, such as requests for detention, stay-away or no-contact orders, heightened supervision, or drug and alcohol testing.[29]

In determining the nature and scope of the protection measures, ATF evaluates the threat level, identifies reasonable options to address that threat within available resources, and determines the risk to the security of other individuals.[30] In practice, ATF conducts a risk assessment that involves the special agent assigned to the case, as well as ATF's VWAP. The risk assessment involves evaluating several factors. For example, it is important to first determine if a victim was exposed, and if so, how the exposure occurred, such as through discovery obligations, the victim's own actions, unintended exposure, or some other action. ATF also looks at the timing of the threat and how the threat was made (for example, in-person, by phone, email, letter, or some other means such as social media). Other factors to consider include whether the threat was based on cooperation by the victim with law enforcement and whether there has been identification of the subject making the threat.

After looking at all the factual circumstances underlying a threat to a victim, ATF evaluates the following: (1) the impact of the possible threat to the victim; (2) the subject's capability to carry out the threat; and (3) vulnerabilities that are available and susceptible to the subject's exploitation.

Depending on the level of these various factors, ATF then determines if it needs to take certain reasonable protection actions and the scope of such actions. This includes looking at whether there are any criminal organizations at play and their respective geographic range. Relocating

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[26] *Id.* at 13.
[27] *See* 18 U.S.C. § 3771(a)(1); AG Guidelines, *supra* note 4, at 58.
[28] AG Guidelines, *supra* note 4, at 58.
[29] *Id.*
[30] *Id.*

victims is sometimes the only viable option. Relocation, however, can be a difficult experience for victims, as it uproots their entire lives. ATF also looks at the victim's current financial means and whether there are financial means available at the possible relocation area. It is also vital for ATF to address other needs in the assessment, such as the need for counseling, medical attention, recovery from substance abuse, childcare, and transportation.

Law enforcement also takes an active role in giving victims the following rights: (1) reasonable, accurate, and timely notice; (2) full and timely restitution; and (3) fair and respectful treatment.[31] These rights go hand-in-hand with the rights and provisions in the VRRA.[32]

IV. Obligations as to "other persons" harmed by a crime

What about individuals who do not fall under the statutory definitions of a "victim"? ATF and law enforcement components are keenly aware that individuals who are not "victims" but were nonetheless "significantly harmed" by a crime are still eligible to receive services.[33]

In 2022, officials made changes to the AG Guidelines concerning Department obligations to "other persons."[34] Specifically, the AG Guidelines now provide that Department personnel "should make their best efforts to provide these significantly harmed persons or entities, when known to the government, with assistance within available resources, to the extent reasonable, feasible, and appropriate."[35] The assistance may include the following: (1) information about the status of an investigation; (2) the opportunity to communicate with the Department personnel responsible for the prosecution; (3) information about public court proceedings and potential opportunities for participation; and (4) consultation with prosecutors regarding any agreement that would require an offender to pay restitution or other compensation to, or for the benefit of, the significantly harmed persons or entities.[36]

The AG Guidelines provide several examples of possible "other persons" who could be significantly harmed by a crime.[37] One example in particular is especially relevant to ATF's work: In a prosecution of a de-

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[31] *See* discussion *supra* section II.
[32] *See* discussion *supra* section II.
[33] AG Guidelines, *supra* note 4, at 18.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 18–19*; see generally* 18 U.S.C. § 3663A(a)(2); U.S.S.G. § 1B1.3(a)(1)–(3).

fendant for unlawful possession of a firearm, there may be a domestic violence victim known to Department personnel to have a credible reason to fear the defendant's gun possession. Department personnel may assist this victim with the possessory crime prosecution.[38]

One way that law enforcement can become aware of a prior domestic violence victim is by reviewing the defendant's criminal history. Importantly, ATF also establishes effective working relationships with USAOs around the country to help identify domestic abusers who illegally possess firearms. For example, in 2019, the USAO for the Southern District of Ohio announced an initiative in which federal and local prosecutors would work with law enforcement and domestic violence victim services agencies to hold accountable domestic abusers who illegally possess firearms.[39]

Moreover, in 2021, as part of Domestic Violence Awareness Month, the USAO for the Western District of Oklahoma highlighted the success of "Operation 922," which specifically targets domestic violence abusers for federal prosecution in western Oklahoma.[40] The USAO initiated Operation 922 as part of the Department's Project Safe Neighborhoods initiative.[41] Through Operation 922, state and tribal police departments and district attorneys throughout the Western District of Oklahoma have direct access to federal prosecutors who review domestic violence-related cases for those that warrant federal prosecution.[42]

Another example of ATF's focus on this issue is "the Law Enforcement Action to Halt Domestic Violence (LEATH) Initiative," which "is named in honor of Indianapolis Metropolitan Police Department (IMPD) Officer Breann Leath, who was killed in the line of duty while responding to a domestic disturbance call."[43] ATF partnered with IMPD and the USAO for the Southern District of Indiana to focus federal, state, and local law enforcement resources on domestic violence offenders who illegally possess firearms. Since October 2020, the LEATH Initiative has recognized the inherent danger posed by firearms in the hands of domestic abusers.[44] "The following types of cases fall under the LEATH Initiative: (1) Defen-

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[38] AG Guidelines, *supra* note 4, at 19.

[39] Press Release, U.S. Attorney's Office, Southern District of Ohio, Federal and Local Law Enforcement Announce Cases as Part of Initiative to Hold Accountable Domestic Abusers with Guns (May 28, 2019).

[40] Press Release, U.S. Attorney's Office, Western District of Oklahoma, "Operation 922"—The Federal Domestic Violence Initiative for Western Oklahoma is Getting Results (Oct. 22, 2021).

[41] *Id.*

[42] *Id.*

[43] *L.E.A.T.H.*, U.S. Atty's Off. S.D. Ind. (Sept. 13, 2023), https://www.justice.gov/usao-sdin/leath.

[44] *Id.*

dants who commit any federal firearms offense and have a demonstrated history of domestic violence; (2) Defendants in possession of a firearm after having been convicted of a misdemeanor crime of domestic violence; and (3) Defendants in possession of a firearm while subject to an active protective order where the protected party is a current or former spouse or intimate partner."[45]

Through these various partnerships with prosecutorial components and state and local law enforcement agencies, ATF furthers its mission and protects individuals from the illegal use of firearms. Again, being able to provide "other persons" with services, including prior domestic violence victims in cases where defendants have illegally possessed a firearm, can help to make that individual feel seen and heard, thereby fostering a sense of hope.

V. Collaboration and coordination between law enforcement and prosecutorial components

Ensuring officials accord victims' rights and supporting victims as they heal from trauma requires continuous and collaborative partnerships among law enforcement and between law enforcement and the prosecutorial components involved in the case.

While the law enforcement component helps provide immediate services upon identification of a victim after a crime has been committed, justice can only be achieved through collaboration with prosecutorial components and continued law enforcement involvement through the end of the criminal justice process.

An effective method of collaboration is when law enforcement and prosecutorial components come together to implement initiatives that target the needs of specific victim populations.[46] ATF strives to foster excellent working relationships with prosecutorial components around the country. These partnerships advance the provision of victims' rights and services throughout the criminal justice process.

For example, in 2023, ATF came together with other Department components, as well as state and local law enforcement agencies, to announce a new initiative to surge law enforcement tools and resources to target gangs and other violent groups in Memphis, Tennessee.[47] The initiative

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[45] *Id.*

[46] *See* discussion *supra* section IV.

[47] Press Release, Department of Justice Office of Public Affairs, Justice Department Announce New Surge of Resources to Fight Violent Crime (Nov. 28, 2023).

includes federal prosecutors from the Violent Crime and Racketeering Section, Assistant U.S. Attorneys (AUSAs) already working in Memphis, and dedicated investigative agents, analysts, and forensic experts from ATF, FBI, U.S. Marshals Service, and Memphis Police Department.[48] In Memphis, when compared to 2023, official counts of murders, robberies, and aggravated assaults have decreased since the start of the initiative.[49]

This successful initiative further expanded in April 2024 when Attorney General Merrick B. Garland announced a surge of resources to fight violent crime in three additional cities: St. Louis, Missouri; Jackson, Mississippi; and Hartford, Connecticut.[50] As in Memphis, the initiatives utilize prosecutors as well as investigative agencies, including ATF, to work with community leaders in each city to best understand citizens' concerns and work to support them.[51]

When law enforcement and prosecutorial components focus their tools and resources on specific areas and offenses, officials can more effectively identify and provide victims the information and services necessary for them to move forward in their lives, even while the criminal case is still active. In short, collaboration and coordination between agents and prosecutors ensures that a victim's needs are met throughout the criminal justice process—from investigation to prosecution, and beyond. ATF values all its partnerships with prosecutorial components and strives every day to further those working relationships for the benefit of victims and witnesses.

VI. Case note examples

Perhaps the most effective illustrations of the impact of law enforcement components' VWAPs are real-world examples. The following are closed cases in which ATF assisted victims and witnesses. In each of these examples, ATF's VWAP strived to provide the respective victims and witnesses with a sense of trust and hope.

A. Case example #1

In January 2018, as high school students were arriving to school, a student opened fire with a Ruger handgun in a common area, murdering two students and injuring 18 others, 14 of whom suffered gunshot wounds.

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[48] *Id.*
[49] *Id.*
[50] Press Release, Department of Justice Office of Public Affairs, Attorney General Merrick B. Garland Announces Surge of Resources to Fight Violent Crime in Three Additional Cities (Apr. 3, 2024).
[51] *Id.*

The shooter then tossed the firearm and attempted to blend in and hide with other students. One of the other students hiding in the same location recognized the individual in question as the shooter and alerted a teacher. The teacher then called law enforcement. Officials arrested the shooter shortly thereafter.

ATF's VWAP specialists were at the scene within 24 hours and coordinated with the school, law enforcement partners, and other service providers to assist the victims and their families. VWAP's initial role was to meet students as they returned to the school to retrieve their belongings. For most students, this was a traumatic event because it was the first time that they were in the school after the shooting. VWAP specialists provided emotional support and escorted students to counselors who were available upon request. VWAP specialists also provided information about the Family Resources Center to students and their families. At the Family Resource Center, families could get information on resources such as the state compensation program and referrals to counseling services.

In the days after the school reopened, investigators continued to interview students who were present during the shooting. VWAP specialists assisted by escorting the students from the classroom to the interview room. Accompanying students provided comfort and gave ATF VWAP specialists opportunities to personally assess how each student was handling the stress of the crime they experienced. Following the interview, the specialists escorted the students either back to their classrooms or to speak with a counselor, if the student so chose. VWAP specialists continued to provide support to the victims and the agents as requested.

B. Case example #2

ATF received information regarding a felon in possession of a firearm. The investigation revealed that the suspect had several protective orders issued against him for domestic violence, stalking, and threatening harm against his victims. One victim reported that the suspect had spent months drugging her and filming sexual acts that he performed without her knowledge or consent. Throughout their relationship, the suspect repeatedly threatened to kill her, detailing how easy it would be for him to succeed and get away with the act. The victim ended the relationship, and the suspect began sending menacing text messages to her and posting messages on social media about his intent to open a knife shop in her town. The victim feared for her safety and stayed away from her home until a protection order was issued. Following issuance of the protection order, the suspect sent the victim photos from outside her place of employment, asking who she was going to call when he came for her. Further, the suspect sent the images and videos he had taken of the victim to her

family, friends, and employer. As a result, the victim lost her job and was forced to move out of her home.

The ATF Special Agent working the investigation contacted ATF's VWAP for assistance supporting the victim upon initial contact with her. The ATF Regional Victim–Witness Specialist (RVWS) spoke with the victim about the impact of the crime and the resources she felt were urgently needed. The RVWS worked with her to obtain counseling services, update her resume to gain employment, and kept her updated on the case status. Additionally, the victim had a pending case against the suspect in another state in which there was no victim–witness assistance available. The ATF RVWS coordinated with the state and local law enforcement, engaged in conference calls with the assistant district attorney and coordinated with the state victim's compensation board on behalf of the victim.

VII. Training of law enforcement personnel

Finally, another critical part of law enforcement's work to provide victims with statutory rights and services is through continuous training of law enforcement personnel. ATF takes this seriously, and through VWAP, provides training across the country on a whole range of victim-related issues.

ATF's VWAP offers training to all personnel who come into contact with victims and witnesses while performing their official job duties. This training provides guidance to personnel as to their responsibilities to victims and witnesses as stated in the VRRA, CVRA, and the AG Guidelines. VWAP also trains personnel on VWAP's roles and responsibilities in the investigative process. This training includes ATF-specific case examples, scenarios, and lessons.

As part of this continuing education, ATF's VWAP stays up to date on recent developments within the victim–witness assistance community. For example, ATF is part of numerous working groups dedicated to issues surrounding victims' rights and services. ATF's VWAP shares this knowledge with the field and routinely travels to each of ATF's 25 field divisions across the country to provide training and guidance.

This commitment to training predates recent changes to the AG Guidelines which now require an annual training on the VRRA, CVRA, and AG Guidelines.[52] The more awareness Department personnel have about their statutory obligations to crime victims, the better equipped they will be to fulfill those obligations and ensure that victims' needs are met.

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[52] AG Guidelines, *supra* note 4, at 7.

VIII. Conclusion

The path of a victim from the commission of the crime to the end of the criminal justice process can be a long one. The rights and services discussed within the VRRA, CVRA, and AG Guidelines can be instrumental in helping a victim begin to heal after a crime. It is through the hard work of Department personnel—from law enforcement components such as ATF to prosecutorial components working in conjunction with our state and local counterparts—that victims' rights and services are accorded every day. By working together, these personnel help provide a victim or their family with a way forward and a sense of hope for the future.

About the Authors

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U. Michelle Sommers is the National Program Manager for ATF's VWAP. She has 16 years of experience working in the field of victim and witness services with ATF, responding to critical incidents and providing direct services to violent crime victims. As Program Manager, she is responsible for establishing the crime victim response policies and procedures for the ATF. She has developed and provided victim and witness training to ATF personnel, as well as federal, state, and local partners. Before joining ATF, she served in the U.S. Air Force and worked as a contractor for the Department of Defense.

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Restitution in Child Sexual Abuse Material Cases

Michael A. Sullivan
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Executive Office for U.S. Attorneys, Legal Programs Office

I. Child sexual abuse material victims are unique

Imagine for a moment that you are the victim of a crime, and you suffer harm for which you are entitled to restitution from the defendant. The process and procedure are in place for you to document your losses to the court and ask the court, at the time of sentencing, to order the defendant to pay you restitution. While the process requires some work on your part, you will likely be compensated for your losses and made whole. Now imagine that you will be the victim of a crime virtually every day all over the country, and indeed, all over the world . . . forever. Is this a new version of *Minority Report*, the 2002 Tom Cruise movie in which "precogs" could foresee crime?[1] No, sadly, it is the life of every victim depicted in child sexual abuse material (CSAM).[2] The ubiquity of the internet and the nature of the underlying crime cause CSAM victims to stand alone among crime victims.

No one can truly understand the depth of the anguish like the victims themselves. Here is how one victim described it:

> Look at it like this. The hands-on was horrible. But at the very least it is over and done with. The constant sharing of the abuse will never end; therefore the reminder of its existence will never end. . . . If you ask me, a crime that will never end is worse than one that is over; no matter how much more serious it may appear. That this is something inescapable. That there will never be total absolution.[3]

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[1] Minority Report (20th Century Studios, DreamWorks Pictures 2002).
[2] "Child sexual abuse material" is preferred to "child pornography" to convey the content of the material more accurately, but the term "child pornography" will be used often in this article, as that is the term currently used in the U.S. Code.
[3] Canadian Centre for Child Protection, Inc., Survivors' Survey, Full Report 2017, 149.

And another:

> Because it's out there every day, anyone could have seen it. You don't know if you walk by someone, you don't know if they've seen it. I have had multiple cases in my own state. And people all over [my country] and the world are looking at it. Very difficult knowing anyone can see them.[4]

And another:

> Because the imagery continues to exist and you have no control over it. You never know who will see it. And if you get approached on the street by a total stranger who says 'Don't I know you from somewhere?' or 'You look familiar to me,' you quickly link that to the imagery.[5]

And one more:

> Because it never stops, never. Even after 20 years, my old photographs can serve as satisfaction for men whose hands I may be shaking. It makes it worse that everything is documented and that because of this it never is really ever over.[6]

We are all too familiar with the fact that once we post something online, we lose control of it and can never get it back. It enters cyberspace and internet users can simultaneously transmit it to millions of different locations around the world. The same is unfortunately true for CSAM—once it is transmitted over the internet, users can duplicate it all over the world with the click of a mouse. The devastating effect of child sex abuse on the victims is all too familiar. They suffer a lifetime of guilt and shame. It is not unusual to see a middle-aged adult still deeply affected by a single incident of abuse from childhood. Now, combine those: imagine the worst, most embarrassing, and most traumatic moment of your life memorialized in an image, or worse, in a video; imagine that individuals who get a perverse satisfaction in witnessing you at your worst moment share the video all over the world; and imagine that there is nothing you can do to stop it. You have just imagined reality for every CSAM victim.

Each offender who receives, distributes, or views CSAM contributes to the perpetual harm suffered by the victims. Each offender who does so should pay restitution to these victims. But therein lies the problem.

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[4] *Id.* at 150.
[5] *Id.*
[6] *Id.* at 154.

CSAM victims are unique. They suffer harm every single day, all over the world, caused by thousands of different offenders. It is cruel to expect anyone who has already been so grievously harmed to track the progress of thousands of federal and state prosecutions in order to obtain compensation for their losses from each offender who reveled in their suffering. In this respect, the restitution system was not designed for them. As discussed further, both Congress and the U.S. Supreme Court have grappled with these issues and have acted to bring some relief to this vulnerable population.

II. Mandatory restitution

In 1994, Congress passed the Violent Crime Control and Law Enforcement Act (VCCLEA), which included a provision for mandatory restitution for CSAM victims.[7] It required courts to order that "the defendant . . . pay to the victim . . . the full amount of the victim's losses."[8] It included a separate process for determining restitution.[9] The VCCLEA provided the basis for the broad compensatory terms that were included in the Mandatory Victim Restitution Act of 1996.[10] The term "full amount of the victim's losses" was defined as:

> (A) medical services relating to physical, psychiatric, or psychological care;
> (B) physical and occupational therapy or rehabilitation;
> (C) necessary transportation, temporary housing, and child care expenses;
> (D) lost income;
> (E) reasonable attorneys' fees, as well as other costs incurred; and
> (F) any other relevant losses incurred by the victim.[11]

This law gave some relief to CSAM victims, but not without practical and legal challenges. While the Act required defendants to pay restitution, victims still had to request it; this meant CSAM victims had to keep track of the dockets of all the defendants, all over the country, charged with

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[7] 18 U.S.C. § 2259.
[8] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.
[9] *Id*.
[10] 18 U.S.C. § 3663A; *see also* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (including mandatory restitution to victims of certain crimes).
[11] 18 U.S.C. § 2259(c)(2).

trafficking their depictions.[12] That is overwhelming, even for someone with experience in the criminal justice system. Although some victims engaged legal counsel to assist with restitution requests in cases across the country, these were a fraction of the identified victims being exploited daily. It was simply impractical for most victims.

These requests for restitution led to legal challenges. Typically, a victim seeking restitution needs to establish that the defendant's crime proximately caused the victim's harm.[13] Victims seeking restitution in CSAM cases were met with mixed results.[14] They generally submitted packets to the courts documenting their losses. The packets normally included a report from an economist, detailing the future lost wages, as well as reports from therapists, bills for past treatment, and predictions for future treatment costs.[15] The total losses often reached millions of dollars.[16] Some courts refused to order any restitution, finding no proximate cause between the defendant's crime and the victim's losses.[17] Courts questioned how a victim, who knew nothing of the defendant or the fact that the defendant possessed depictions of the victim, could claim that the defendant's actions proximately caused the victim harm when the defendant had no idea who the victim was, and the victim had no idea that the defendant even existed?[18] Other courts held that proximate cause was not necessary and ordered restitution.[19] Some ordered the defendant to pay the whole amount of the loss—into the millions.[20] Other courts held defendants liable for a portion of the losses.[21]

III. *Paroline v. United States*

In 2014, the unique characteristics of CSAM victimization led to the U.S. Supreme Court decision in *Paroline v. United States*.[22] Paroline was

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[12] *Id*.
[13] Paroline v. United States, 572 U.S. 434, 448 (2014).
[14] David. G. Savage, *Mixed Supreme Court ruling on damages for child porn victims*, Los Angeles Times (Apr. 23, 2014), https://www.latimes.com/nation/la-na-scotus-child-porn-20140424-story.html.
[15] 18 U.S.C. § 2259(c)(2).
[16] Letourneau, E.J. et al., *The Economic Burden of Child Sexual Abuse in the United States*, 79 Child Abuse & Neglect 413–22 (2018).
[17] *Paroline*, 572 U.S. at 446.
[18] *Id.* at 442.
[19] United States v. Rodriguez, No. 23-50024, 2024 WL 3338311, (9th Cir. July 9, 2024).
[20] United States v. Staples, No. 09-14017, 2009 WL 2827204, (S.D. Florida Sept. 2, 2009).
[21] *Paroline*, 572 U.S. at 466.
[22] 572 U.S. 434 (2014).

convicted of possessing between 150 and 300 images of CSAM.[23] Two of those images depicted a particular victim who sought restitution close to $3.4 million from Paroline.[24] The district court declined to award restitution, applying a but-for standard and finding the government failed to prove what losses were proximately caused by Paroline's offense.[25] In *In Re Amy Unknown*, the Fifth Circuit, hearing two similar cases en banc, held that section 2259 did not require a finding of proximate cause, and *each* defendant that possessed a victim's image was liable for the victim's *total* losses.[26] The Supreme Court granted certiorari.[27]

The Supreme Court faced two issues: (1) what causation is necessary to trigger restitution; and (2) for how much of a victim's losses is each defendant liable?[28] As to the causation issue, the Supreme Court recognized the unique aspects of CSAM cases and rejected the but-for causation standard in favor of a form of aggregate causation based on tort law—when multiple causes combine to produce a harm and no one cause is either necessary or sufficient to cause the harm, each cause can still be considered one cause-in-fact of the harm.[29] The Supreme Court observed:

> The cause of the victim's general losses is the trade in her images. And Paroline is a part of that cause, for he is one of those who viewed her images. While it is not possible to identify a discrete, readily definable incremental loss he caused, it is indisputable that he was a part of the overall phenomenon that caused her general losses.[30]

Therefore, CSAM defendants are liable for restitution.

As for determining how much a defendant should owe, the Supreme Court rejected the Fifth Circuit's holding that Paroline was liable for the victim's total losses.[31] Instead, the Court held that if a defendant possessed a victim's depictions, and the victim has outstanding losses caused by the trafficking of such depictions, a court should order restitution "in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses."[32] The Court stated

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[23] United States v. Paroline, 672 F. Supp. 2d 781, 783 (E.D. Tex. 2009).
[24] *Paroline*, 572 U.S. at 441.
[25] *Paroline*, 672 F. Supp. 2d at 783.
[26] 701 F.3d 749 (5th Cir. 2012).
[27] *Paroline*, 572 U.S. at 443.
[28] *Id.* at 449, 455–56.
[29] *Id.* at 461–62.
[30] *Id.* at 456–57.
[31] *Id.* at 462.
[32] *Id.* at 458.

that the amount would not be exorbitant, given the number of offenders who share in the causal connection, but the Court also cautioned that the amount should not be a token or nominal amount.[33] By assessing restitution based on an offender's relative role in the "causal process underlying the victim's losses," courts could ensure the restitution served the dual goals of helping victims eventually recover all their losses and make offenders realize the harm caused by their actions.[34]

After settling on a more flexible causation standard and determining that a particular defendant is only liable for restitution comporting with the defendant's relative role in the causal process leading to the victim's harm, the question remained: How is a court to determine the appropriate amount of restitution? The Court offered some (nonexclusive) factors for district courts to consider: a victim's total losses; the number of past criminal defendants found to have contributed to victim's losses; a prediction of number of future defendants likely to be caught and convicted for crimes contributing to victim's losses; a reliable and reasonable estimate of offenders involved (including those never caught or convicted); whether defendant reproduced or distributed the depictions; whether defendant had any connection to the original creation of the depictions; how many depictions of the victim the defendant possessed, and any other relevant factors.[35] Other than listing these considerations, the Court left the determination of the appropriate amount of restitution to the district courts: "There is no reason to believe they cannot apply the causal standard defined above in a reasonable manner without further detailed guidance at this stage in the law's elaboration."[36]

Not surprisingly, district courts disparately applied the standard. After the Supreme Court decided on *Paroline* in 2014, restitution awards varied from less than $50 to tens of thousands of dollars. The good news for victims was that they did not have to demonstrate but-for causation, restitution was mandatory, and courts could not order a nominal amount. *Paroline* still left a lingering question: What was a nominal amount, and how do you determine the correct amount? In addition, the same problem persisted since CSAM victims began requesting restitution: In order to achieve a full measure of restitution, victims had to follow criminal dockets nation-wide and submit hundreds if not thousands of requests; this is possible for victims with lawyers but unmanageable for those without.

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[33] *Id.* at 458–59.
[34] *Id.* at 459.
[35] *Id.* at 460.
[36] *Id.* at 462.

IV. Amy, Vicky, and Andy Child Pornography Assistance Act of 2018

Help was on the way. In 2018, Congress passed the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018 (AVAA).[37] This law essentially codified the holding of *Paroline* and made some other significant changes to the CSAM restitution landscape. While section 2259 previously mandated that courts order restitution for the "full amount of the victim's losses," the AVAA added a section for trafficking in child pornography offenses, which codified the holdings of *Paroline*.[38] Section 2259(b)(2) sets forth the procedure for a court to determine restitution in a CSAM case.[39] First, the court must determine the full amount of the victim's losses that they incurred or are reasonably projected to incur due to the trafficking.[40] Next, the court must "order restitution in an amount that reflects the defendant's relative role in the causal process that underlies the victim's losses."[41] Importantly, Congress went further than *Paroline* and set a minimum—the law indicates that the restitution amount cannot be less than $3,000.[42] The law also establishes that once victims have received the full amount of their losses, the liability of all defendants who had been ordered to pay that victim terminates.[43]

In addition to codifying *Paroline* and establishing a minimum amount for restitution, the AVAA provided some other significant assistance to CSAM victims. Notably, the AVAA created a mechanism for CSAM victims to receive financial assistance without the necessity of tracking criminal dockets across the country.[44] It established the Child Pornography Victims Reserve,[45] a fund from which CSAM victims could draw defined monetary assistance (DMA).[46] DMA is available to any victim of "trafficking in child pornography" resulting in a defendant's conviction in federal court of such trafficking.[47] "Trafficking in child pornography" is defined

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[37] Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299, 132 Stat. 4383 [hereinafter AVAA].
[38] 18 U.S.C. § 2259(b)(1).
[39] *Id.* § 2259(b)(2).
[40] *Id.* § 2259(b)(2)(A).
[41] *Id.* § 2259(b)(2)(B).
[42] AVAA, *supra* note 37, at 4384; 18 U.S.C. § 2259(b)(2)(B).
[43] AVAA, *supra* note 37, at 4384; 18 U.S.C. § 2259(b)(2)(C).
[44] AVAA, *supra* note 37, at 4387–88; 18 U.S.C. § 2259B.
[45] In recognition of the disfavored use of the term "child pornography," the Department refers to the Child Pornography Victims Reserve as the Defined Monetary Assistance Victims Reserve.
[46] AVAA, *supra* note 37, at 4385; 18 U.S.C. § 2259(d).
[47] AVAA, *supra* note 37, at 4385; 18 U.S.C. § 2259(d).

in section 2259(c)(3) and includes almost all CSAM offenses, including possession and access with intent to view.[48] Notably, it does not include sexual exploitation of a child, commonly referred to as "production."

For a victim to be eligible to receive DMA, a court must find that they were a victim of a defendant who was convicted of trafficking in child pornography, has not previously received DMA, and has not collected more than the current value of DMA in restitution.[49] A victim must elect to receive DMA and can only receive it one time.[50] The monetary value of DMA is statutorily calculated—the AVAA set it at $35,000 for 2019 and is adjusted each year for inflation.[51] While a victim who has already received more than the current value of DMA in restitution is not eligible to receive it, electing DMA does not prevent a victim from subsequently seeking restitution.[52] If a victim who has received DMA subsequently seeks restitution, the DMA amount received will be deducted from the victim's total losses for purposes of calculating and collecting restitution.[53]

How is the DMAVR funded? The AVAA established the DMAVR as part of the Crime Victims Fund and authorized the Director of the Office for Victims of Crime to set aside up to $10 million each fiscal year in the DMAVR (the DMAVR is capped at $10 million).[54] Additionally, the AVAA created new special assessments to be imposed upon a defendant convicted in CSAM cases: up to $17,000 for possession offenses, up to $35,000 for other trafficking offenses, and up to $50,000 for production offenses.[55] These assessments are mandatory and are also adjusted for inflation.[56] All of these assessments are deposited into the DMAVR. The AVAA also directed that the Attorney General (AG) shall administer the DMAVR and issue implementing guidelines and regulations.[57] The AG is expected to finalize those guidelines and regulations shortly.[58]

CSAM defendants benefit from statutory maxima and guideline ranges for sentencing, while CSAM victims experience a lifetime of stress, anxiety, pain, and fear. Nothing can truly compensate CSAM victims or their

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[48] 18 U.S.C. § 2259(c)(3).
[49] AVAA, *supra* note 37, at 4386; 18 U.S.C. § 2259(d)(1)–(2).
[50] AVAA, *supra* note 37, at 4386; 18 U.S.C § 2259(d)(2)(A).
[51] AVAA, *supra* note 37, at 4386; 18 U.S.C. § 2259(d)(1)(D).
[52] AVAA, *supra* note 37, at 4386; 18 U.S.C. § 2259(d)(2)–(3).
[53] AVAA, *supra* note 37, at 4386; 18 U.S.C. § 2259(d)(2).
[54] AVAA, *supra* note 37, at 4387; 34 U.S.C. § 20101(d)(6)(A).
[55] AVAA, *supra* note 37, at 4386–87; 18 U.S.C. § 2259A(a).
[56] AVAA, *supra* note 37, at 4386–87; 18 U.S.C. § 2259A.
[57] AVAA, *supra* note 37, at 4388; 18 U.S.C. § 2259B(c).
[58] Off. Gen. Couns., Offenses Involving Commercial Sex Acts and Sexual Exploitation of Minors (2024).

families for the harm they endure. There is no day on the calendar that they can circle to mark and end to their harm. Unfortunately, the restitution scheme in the criminal system, though well-intended, has been ill fit to address this harm; instead, it exacerbated stress for most of these victims. In implementing the AVAA, Congress stated, "It is the intent of Congress that victims of child pornography be compensated for the harms resulting from every perpetrator who contributes to their anguish."[59] The AVAA helps and brings some relief to this unique class of victims.

About the Author

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[59] AVAA, *supra* note 37, at 4383.

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Providing Services and Rights to Victims in Cases Involving Chemical Exposures and Faulty Medical Devices

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I. Introduction

Criminal exposure and public safety investigations and prosecutions involve crimes that result in exposure to harmful chemical substances or faulty medical devices (for example, adulterated drugs and medical apparatus with false claims) where individuals may not immediately or ever manifest any physical symptoms of those exposures. Nonetheless, they may have suffered a "harm" qualifying them as "victims" of the criminal conduct as defined under the Victims' Rights and Restitution Act (VRRA) or the Crime Victims' Rights Act (CVRA) statutorily entitling

them to certain services and rights, respectively.[1] These individuals are often victims of criminal violations of the nation's consumer protection, pollution control, and worker safety laws. Any of these cases may involve tens, hundreds, or even thousands of victims. Also, the concentration, length of exposure, and resulting effects experienced can vary dramatically between individual victims, making it challenging to determine who has suffered a statutory harm.

In these cases, investigators and prosecutors must analyze the nature and degree of harm to identify victims, especially in large-scale victim cases. Investigators, prosecutors, and victim–witness personnel must also effectively provide victims with services to address their injuries during the investigation and prosecution and accord them their rights, which may include restitution.[2] The purpose of this article is to assist law enforcement, victim–witness personnel, and prosecutors with understanding how exposure can meet the statutory requirement of "harm" under the VRRA and CVRA for crime victim status and recommend practices to identify and provide notice to these victims.

II. Victims' services and rights

A. Identifying statutory victims

1. Understanding harm in these cases

Identifying victims as defined by the VRRA and CVRA and providing them with proper notice and information so they can access victim services and exercise their statutory rights is the most important initial step that Department personnel must take at the opening of an investigation and continue to repeat through final adjudication of the matter to properly support victims. CVRA right ten states that a crime victim has "[t]he right to be informed of the rights under this section [18 U.S.C. § 3771(a)] and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. § 10607(c)) [34 U.S.C. § 20141 (c)] and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice."[3] The VRRA services cross-referenced in CVRA right ten include, among other services: informing a victim of where they may receive emergency medical and social service;

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[1] 34 U.S.C. § 20141 (VRRA); 18 U.S.C. § 3771 (CVRA). Congress passed the CVRA in 2004, which originally included eight statutory rights. As part of the Justice for Victims of Trafficking Act of 2015, Congress amended the CVRA, adding two more rights to the list of substantive rights that officials are required to accord crime victims.
[2] 18 U.S.C. § 3771(a)(6).
[3] *Id.* at (a)(10).

any restitution or other relief they may be entitled under law; and public and private programs available to provide counseling, treatment, and other support as well as helping the victim to contact persons responsible for providing such relief or services.[4] This is critical in these cases as they involve potential harm to the physical and psychological health of individuals. Additionally, assistance locating such services may also help them cope with any financial harm as a result of the physical and psychological harm related to subsistence due to the related potential financial harm (for example, medical expenses, loss work due to injuries, and so on).

The VRRA defines "victim" as a person who has suffered direct physical, emotional, or pecuniary harm as the result of the commission of a crime.[5] The CVRA defines "crime victim" as a person directly and proximately harmed as the result of the commission of a federal offense or an offense in the District of Colombia.[6] Cases with VRRA or CVRA victims of exposure range from fraud cases involving counterfeit or adulterated medications that were either prescribed or sold over the counter, to industrial facility explosions that emit hazardous fumes to an entire community, to workers being killed or permanently disabled due to illegally unsafe working conditions. In each of these instances, criminal conduct directly exposed the individuals to a chemical substance. In some incidents, the harm is immediate, resulting in death or permanent disabling injuries, such as in the prosecution of the *United States v. Elias* (D. Idaho) where an employer ordered workers to clean a storage tank that contained cyanide waste.[7] The employer provided no personal protective equipment, which resulted in one worker suffering permanent, debilitating brain damage.[8] In other exposure cases, the effect of the exposure may not be determinable for decades after the close of the criminal case because of the latency period for a disease to physically manifest, such as the development of mesothelioma from asbestos exposure. On the other hand, individuals may be fraudulently exposed to an ineffective substance for a medical purpose and suffer no physical harm but may have emotional or financial harm related to the fraudulent exposure. For example, in *United States v. Wright* from the District of Utah, officials prosecuted a chief executive officer for the sale of misbranded and adulterated medical devices for the treatment of migraine headaches without either conducting clinical studies that demonstrated it to be an effective treatment or

[4] 34 U.S.C. § 20141(c)(1).
[5] *Id.* at (e)(2).
[6] 18 U.S.C. § 3771(e)(2)(A).
[7] 269 F.3d 1003 (9th Cir. 2001).
[8] *Id.*

obtaining the required approval from the U.S. Food and Drug Administration.[9]

Identifying victims in exposure crimes can be challenging because, unlike a violent crime, the harm caused by exposure to a toxic pollutant or by a harmful medication is not always readily apparent. The statutes and regulations governing these crimes are technical and fact specific. It may take significant time for the investigators and prosecutors to verify how, when, and where the perpetrator committed the crime. The nature of the medium through which highly toxic chemicals travel (for example, air, soil, or water) may cause delay in determining the number of victims because the investigation and prosecution team will need to determine who was exposed or otherwise affected. The investigation and prosecution team may need to address questions, such as "How far did the emissions or plume spread in an adjacent neighborhood and surrounding neighborhoods?" and "What concentrations of a particular pollutant will create an exposure risk to human health?" To answer these legal and factual questions, the case team will need to engage scientific and forensic experts and technical expertise at the law enforcement agency, as well as conduct outreach to those affected to determine who may be a crime victim or be considered as significantly harmed under the 2022 Attorney General Guidelines on Victim and Witness Assistance (AG Guidelines).[10] In addition, the *type* of harm incurred or, potential alternate causes can complicate determining who is defined as a victim and whether an alleged victim suffered harm and may have a right to restitution under the CVRA.

Common examples are cases where individuals have been exposed to a chemical, but the actual manifestation of the physical harm may not be seen until 10, 15, or 20 years later. This scenario often occurs in illegal asbestos removal cases in violation of the Clean Air Act, where individuals inhale asbestos fibers.[11] The Environmental Protection Agency has determined there is no safe level of exposure to asbestos, so any exposure can put an individual at risk of developing asbestosis (chronic lung disease) or mesothelioma (asbestos-related cancer).[12] Therefore, these cases are often prosecuted and sentenced before anyone develops symptoms of

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[9] Press Release, Office of Public Affairs, Former CEO Pleads Guilty to Causing the Distribution of Adulterated and Misbranded Medical Devices Intended to Treat Migraine Headaches (Oct. 13, 2023).

[10] U.S. Dep't of Just., The Attorney General Guidelines for Victim and Witness Assistance (2022) [hereinafter AG Guidelines].

[11] 42 U.S.C. § 7601.

[12] *Learn About Asbestos,* U.S. Env't Prot. Agency (Mar. 6, 2024), https://www.epa.gov/asbestos/learn-about-asbestos.

asbestosis or mesothelioma. This makes providing evidence of direct and proximate harm from illegal exposure challenging.

Additionally, these exposure cases often involve emotional harm, especially when the harm from the exposure is not readily apparent, because of the uncertainty of what will happen to their health in the future. For example, in asbestos exposure cases, workers who remove dry asbestos from a demolition or renovation project in violation of the Clean Air Act, without any personal protective equipment or personal decontamination action may wear the same clothes at the construction site home. These clothes may be covered in asbestos fibers. The worker now has the psychological harm of wondering if they will develop asbestosis or mesothelioma and what this means to their length and quality of their life. The worker, however, may also have feelings of guilt for bringing the contaminants home and exposing the worker's family to the asbestos fibers when the worker was only trying to provide for the worker's family. In a case involving a faulty medical device, there can be emotional harm because the individual did not get the proper medical care and how the faulty medical device affected their existing condition and future prognosis and quality of life, including whether their condition was worsened or extended because of not receiving proper medical care.

2. Methods to identify victims in exposure cases including large-scale exposure victim cases

One of the more common characteristics in exposure and public safety cases is that the individuals and entities harmed by the criminal conduct may number in the tens or hundreds or thousands. Entire communities may be exposed to toxic fumes, or hundreds of people may have bought an unsafe drug that authorities have recalled. In these cases, the steps to identify who may be a victim under the VRRA and CVRA can be complicated and resource intensive.

In cases where the number of victims makes it impractical to accord crime victims, individually, with their rights, the CVRA gives the court with the authority to fashion a reasonable procedure to effectuate the provision of such rights.[13] The AG Guidelines also recognize that large-scale victim cases present unique challenges, and one-on-one contact with each victim may not be feasible. The AG Guidelines provide flexibility by recognizing the need for Department personnel to use both creativity and technology to provide services and rights to the greatest extent possible.[14] Department personnel must balance this flexibility with the

[13] 18 U.S.C. § 3771(d)(2).
[14] AG Guidelines, *supra* note 10, at 24.

CVRA statutory standard that they "shall make their best efforts to see that crime victims are notified of, and accorded" their rights.[15]

Department personnel can identify victims in these cases through various methods, including virtual or in-person town-hall meetings, newspaper postings, websites, and social media. In addition to the normal investigative practice of interviewing individuals, Department personnel can use paper or online surveys to help identify potential victims. Online surveys are more efficient and less resource intensive than paper surveys because Department personnel can directly download the information onto an electronic database and quickly organize and analyze the information. Department personnel may also employ these suggested methods to provide notification of case status information to victims. This process is explained in detail below.

As stated above, when using town halls, news media, websites, social media, or other alternative methods in large-scale cases to accord CVRA rights, consider whether obtaining court approval is required. Obtain such court approval before entering into negotiations for non-prosecution, deferred prosecution, pretrial diversion, or plea agreements, including precharging. This will ensure Department personnel have made their best efforts to obtain victim input before making a major decision in accordance with right five. This also facilitates the victims' ability to seek full and timely restitution pursuant to right six.

It is also important to consider whether the potential victim pool contains specific victim populations that may require the investigation and prosecution team to incorporate additional methods to identify victims. The AG Guidelines identifies these categories of populations as: American Indians or Alaska Native victims; older victims and persons living with disabilities; financially vulnerable victims; underserved populations; marginalized communities; and victims with limited or no proficiency in English.[16] Each of these populations may require additional considerations when planning and implementing town-hall meetings, news media, websites, social media, or other alternative methods of collecting potential victims' data. For example, communications to victims may need to be in multiple languages. If the case involves a facility explosion at a major employer in town, the investigation and prosecution team may need to build in additional mechanisms for victim privacy and security. Or if the incident involves a community that has a distrust of government or experienced discrimination or mistreatment, the communications to potential victims may have to be more targeted to reach those individuals.

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[15] 18 U.S.C. § 3771(c)(1).

[16] AG Guidelines, *supra* note 10, at 24.

Working with victim–witness personnel, community liaison staff, environmental justice coordinators, and local victim assistance organizations can help the investigation and prosecution team strategize optimal ways to reach these individuals.

Victim–witness personnel have training and experience in assisting with referrals to non-governmental organizations where victims can obtain much-needed services for personal injuries, counseling, or losses related to the victimization. For investigations involving many victims, notice to and coordination with the organizations that could provide victim assistance is vital to do the following: (1) ensure they are able to provide the assistance; (2) enable them to sufficiently staff their organization to assist; and (3) maintain good communications and a working relationship with the organization. It is always a good practice to confirm in advance that the organization can assist the victims.

3. Consideration of harm to individuals or entities who are not statutory victims

One of the most significant revisions to the AG Guidelines is the policy that promotes assistance to those who are "significantly harmed by crime," even if they do not meet the statutory definition of "victim" under the CVRA.[17] The updated AG Guidelines provide that where "persons or entities" who do not meet the definition are, nevertheless, "significantly, even if indirectly, harmed by the criminal conduct underlying the offense," Department of Justice (Department) personnel "should make their best efforts to provide [them] with assistance within available resources, to the extent reasonable, feasible, and appropriate."[18]

The 2011 version of the AG Guidelines included a discussion of other persons affected by the crime and encouraged Department personnel to provide them with appropriate assistance. The effect of this new provision in the current AG Guidelines, however, is more strongly direct Department personnel to provide assistance to certain persons beyond statutorily defined victims.[19] Department personnel are directed to "make their best efforts to provide these significantly harmed persons or entities, when known to the government, with within available resources, to the extent reasonable, feasible, and appropriate."[20] Thus, prosecutors should first determine whether there is a class of significantly harmed individuals or entities who might be eligible for assistance, and second, assess whether it

[17] *Id.* at 18–20.
[18] *Id.* at 18.
[19] *Id.*
[20] *Id.*

is "reasonable, feasible, and appropriate" to provide them with assistance (as that is not statutorily-required).[21]

It is important to keep in mind that the AG Guidelines do not discuss any steps to require any specific identify such persons or entities. The AG Guidelines only require best efforts to be made when these persons or individuals are "known to the government." This inquiry can be particularly important, especially in large cases, involving exposure or public harm, where various persons or entities could have been impacted by environmental or other harms. This could include, for example, individuals who were in a community harmed by a chemical release by a nearby facility, who were related to statutory victims, or whose home and business life were disrupted, although not to the decree of any measurable financial harm.

During the process of identifying statutory victims, you should be able to identify who should be considered a significantly harmed person or entity when determining who does not meet the definition of a CVRA or VRRA victim. Therefore, a separate identification and analysis process is not needed and would also be iterative as you continue to identify victims through final adjudication of the matter.

The AG Guidelines provides four examples of assistance that Department personnel should provide to significantly harmed persons or entities who are not statutory victims (for example, providing information about the status of the investigation and an opportunity to communicate with Department personnel responsible for the prosecution, including before a non-prosecution, deferred prosecution, pretrial diversion, or plea agreement).[22] While this assistance may seem much like the assistance provided to statutory victims pursuant to the VRRA and CVRA, Department personnel should remember that these significantly harmed persons or entities who fall under this policy are not crime victims and are not entitled to the corresponding rights and services. The examples are not an exhaustive list, and Department personnel should be aware of assistance beyond these examples that they can provide if appropriate.

The investigation and prosecution team should also direct these individuals and entities to assistance (for example, counseling services for trauma), and keep in mind that CVRA victims are entitled to the 10 court-enforcea-ble CVRA rights.[23] This limitation can be a difficult concept for a lay person to understand who has been harmed by a crime, and it is important for the investigation and prosecution team to be

[21] *Id.*
[22] *Id.*
[23] *Id.*

as transparent and understanding as possible in communications. Victim–witness personnel and public relations staff can be extremely helpful with developing the communications materials and outreach strategies. This can include developing informational materials (for example, websites, brochures, and so on) about available assistance or including information developed by agencies about the incident who are not part of the case team. For example, the U.S. Environmental Protection Agency frequently creates websites for incidents where it is overseeing the cleanup which may be of assistance to understanding what happened, how they are impacted, the remedial measures being taken, and where to get additional information. The Food and Drug Administration may have websites publishing information about recalls of medication. This information is not only of assistance to the general public but also provides additional information to statutory victims and other persons or entities significantly harmed. Victim–witness personnel can incorporate these resources into their communication strategies to avoid developing duplicative information or information that could potentially conflict and cause confusion.

B. Providing victims a voice in exposure and public safety cases

An important part of ensuring victims are considered in the criminal justice system is to provide them with a voice in the process. CVRA rights five and nine help ensure the views of the victims are considered as Department personnel decide what charges to pursue, government positions for negotiated case resolutions, and sentencing recommendations. CVRA right five accords victims "[t]he right to confer with the attorney for the Government in the case."[24] Additionally, CVRA right nine accords victims "[t]he right to be informed in a timely manner of any plea bargain or deferred prosecution agreement."[25] The AG Guidelines emphasizes the need to accord rights as early as possible in the process: "Department personnel shall make their best efforts to accord to victims the rights set forth in the [CVRA], 18 U.S.C. § 3771(a), as *early in the criminal justice process as is feasible and appropriate*, including prior to the execution of a non-prosecution agreement, deferred prosecution agreement, pretrial diversion agreement, or plea agreement."[26]

For CVRA right five, the AG Guidelines emphasize that prosecutors shall make their best efforts to confer with victims "in advance of and about major case decisions, such as non-prosecution agreements,

[24] 18 U.S.C. § 3771(a)(5)
[25] *Id.* at (a)(9).
[26] AG Guidelines, *supra* note 10, at 24 (emphasis added); 18 U.S.C. § 3771(a).

deferred prosecution agreements, pretrial diversion agreements, voluntary dismissals, agreements or recommendations in favor of release of the accused pending judicial proceedings (when such release is for non-investigative purposes), and plea agreements (pre- or post-charge)."[27] The AG Guidelines also direct prosecutors to "seek to provide victims with a meaningful opportunity to offer their views before a decision or agreement is reached."[28]

For CVRA right nine, the AG Guidelines extends application of this right to notification of non-prosecution agreements in addition to plea bargains and deferred prosecution agreements. Specifically, the AG Guidelines note: "[p]rosecutors shall also make best efforts to notify identified victims in a timely manner of any non-prosecution agreement made with a defendant."[29] The AG Guidelines importantly reminds prosecutors that this right to be informed is in addition to, not in lieu of and distinct from, CVRA right five's "reasonable right to confer with the attorney for the government."[30]

III. Notifications to victims

This section highlights practical applications of the previous sections when working with victims.

A. Investigative and prosecution coordination and teamwork

As the case team moves forward in an investigation, it is important to identify the various points of contact for coordination of specific tasks. Key contacts should include, at a minimum, investigative agents from all investigating agencies, prosecutors, victim–witness personnel from both the investigative agencies and the prosecutor's office(s), paralegals, and legal assistants. It is helpful for all team members to share contact information with the other members of the team at the onset of the investigation. While everyone's roles may be different, the education, experience, and knowledge that each team member contributes can have a vital effect on how smoothly each step in the process proceeds, and lead to enhanced communication and collaboration for the investigative and prosecution team and the victims.

Services and referrals for victims may be critical from the onset, depending on the nature of the incident that gave rise to the investigation.

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[27] *See* AG Guidelines, *supra* note 10, at 62.
[28] *Id.* at 63.
[29] *See* AG Guidelines, *supra* note 10, at 72.
[30] 18 U.S.C. § 3771(a)(5); *see* AG Guidelines, *supra* note 10, at 72–73.

Case team members should meet to evaluate the situation and discuss the various needs victims may have which may include medical screenings, counseling services, housing or relocation services, and assistance filling out forms. Anticipate challenges due to these evolving tasks, as well as the new issues and victims that were not anticipated. Additionally, these cases often involve health and financial concerns. Understanding the services available and providing applicable resource materials promotes peace of mind for victims.

As required by the VRRA, officials should identify victims at the earliest opportunity after the detection of a crime without interfering with the investigation.[31] Identify in advance the information that officials should collect, which should include the victim's name, home address, telephone number(s), and email address(es). Designate members of the team to collect victim data. Identify the types of information that are relevant to the investigation and prosecution as the case advances. Begin collecting that information at the earliest appropriate time.

The organization of the data collected is also important and can save time and improve efficiency at later stages of the investigation or prosecution. Coordinate with victim–witness personnel for the most efficient way to organize the victim contact data at the onset. Victim–witness personnel will advise the format and fields required for victim data input in the appropriate victim tracking database. It may not be necessary to create several different spreadsheets for specific needs as one master spreadsheet can suit multiple needs. The team should discuss the data fields of information each component will need to achieve its goal(s) and decide whether one spreadsheet can achieve those goals or if separate spreadsheets will be more beneficial.

Figure 1 is an example of how a victim–witness coordinator may request the team to organize data. Each data field is in a separate column. This is important for downloading the information into the Victim Notification System database, which many Department components use for victim tracking and notification purposes.[32]

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[31] 34 U.S.C. § 20141(b)(1).

[32] Victim Notification System (VNS) cannot be used to track information for or communicate with significantly harmed persons or entities that are not statutory victims. The investigation and prosecution team will need to agree upon an alternative communication method that is outside of VNS.

Last Name	First Name	Street Address	City	State	Zip	Phone	Email
Doe	John	123 Avenue	Example	MI	48148	XXX-XXX-XXXX	JD@g-mail.com

Figure 1

The team should recognize and discuss the pros and cons of each option under consideration, including whether court approval for alternative notification procedures is required for cases with multiple victims under 18 U.S.C. § 3771(d)(2) as discussed earlier.[33] Some common options for alternative notification to victims are described below, but those are not the only options to consider. Innovate and discuss what other possibilities may be available which could achieve the goals of the team, including compliance with the CVRA.

1. Webpage on a Department component or federal government investigation agency website

Team members can set up a case webpage to collect victim information, provide case information, notify victims of court hearing dates, and provide links to services or applicable public documents (for example, press releases and charging documents) associated with the case. If the goal is to collect information from victims, or if a victim is requesting information, decide which investigation and prosecution team member and point of contact will be responsible for collecting the information from potential victims and how they will track, record, and preserve the information. Law enforcement is responsible for collecting substantive information that will be beneficial to the investigation and prosecution of the case. If one of the intended purposes of the webpage is victim notification of hearing dates and case information, the prosecutor must file a motion with the court requesting an order granting the use of an alternative victim notification.[34]

2. Town-hall meeting

Town-hall meetings allow the team to provide case-related information to a large group of individuals at one or more meetings, either virtually or in person, when notification letters are impractical. There may be cases in which the victims are concentrated in a particular city or area.

[33] 18 U.S.C. § 3771(d)(2).
[34] *Id.*

An in-person town-hall meeting can be an effective forum to communicate information, creating a more personal atmosphere, and ensuring that only individuals who have a right to be present are permitted entry. A town-hall meeting is not a forum intended to be a continuing source for the dissemination of information.

When considering conducting a town-hall meeting, the team should consider these questions:

- Will it be virtual or in person?
- Will they be required to register or RSVP?
- If virtual, what video conferencing platform will be used?
- If in person, are there fees for the use of the facility, or can they find a location that would not charge for the use of the space (for example, churches, libraries, colleges, high schools, or victim-service organizations)?
- If there are fees, which investigation and prosecution team agency(ies) can provide payment?
- Should the team restrict meeting attendance to provide reasonable protection and confidentiality for the victims?
- How will the team disseminate information about the town-hall meeting to the community or individual victims?
- Should they make a resource table available?
- Who will monitor questions?
- At what point during the meeting will the team permit questions (for example, throughout the meeting or at the conclusion)?
- Who will facilitate the meeting?
- How should the team provide information on where the victims can continue to receive information and who they can contact with questions?

One downside of a virtual or in-person town hall is the limited control over who attends. Non-victims or members of the media may be able to access the meeting. It is also challenging to control the possibility of someone recording the event and releasing information. In a large group setting, some individuals may have a greater impact or influence on others in attendance, and the event could feed anger or negativity. It is important to review all case-related information and determine whether a town hall is the best forum for sharing information.

3. Use of the media to provide information

Use of mass media (print, radio, television, or social media) to provide information is another option to disseminate or collect information from a large group of individuals who have been harmed or whose contact information is not known. There may be situations where the team needs to collect information about individuals who have been harmed related to the investigation of a particular incident or conduct of an individual or organization. Media resources can broadcast the intended message or purpose to the members of the community on a wide scale or smaller, more targeted scale. Include the contact information, email address, or webpage link where victims can continue to receive information. One downside of this kind of media use is that non-victims may communicate or access this information or reach out to obtain additional information or services for which they are not entitled. Another drawback could be the media choosing not to run or air the story.

4. Paying for an advertisement in the media

Using paid media advertisements has similar goals and effects as the use of media to relay information. Among the downsides are that advertisements can be expensive, and the agency(ies) or other components may be unable to obtain sufficient funds for this type of expense, which may reduce the audience to a limited market. For any of these options, it is best to use a case-related web page to continue to provide court hearing dates and publicly available case-related information as an additional means of notice.

B. Communications with victims

When communicating with victims or other individuals who have been affected by an incident or crime, take time to listen. Communications should be meaningful and never rushed and allow ample time for the individual to provide information and ask questions. During an investigation, the team may only be able to provide limited information because of legal restrictions or unavailable information. As part of the introduction, be honest with victims and harmed individuals and advise them that there may be questions that the team cannot answer at the time of the conversation. During the progression of the investigation and prosecution, new information may surface that answers their questions. At the conclusion of the matter, the team may be able to provide information victims are seeking or resources who can provide that information.

Following the initial interview, reach out to victims to ask about their well-being and reassess their needs. Make sure to have an agent present

who can record any new or inconsistent information. The team may be able to obtain additional evidence that was previously unknown. Be prepared to assist with service referrals or address needs not recognized at the initial interview. Work with victim–witness personnel to obtain assistance and guidance as needed.

Remember, the victim has experienced trauma and may have continuing side-effects from that trauma. As noted in the revised AG Guidelines, the team should practice a victim-centered, trauma-informed, culturally sensitive approach when working with victims.[35] This includes placing the crime victim's priorities, needs, and interests at the center of the work with the victim; providing non-judgmental assistance; helping victims make informed choices; striving to restore a victim's sense of safety and security; safeguarding against policies and practices that may inadvertently re-traumatize victims; and ensuring victims' rights, voices, and perspectives are incorporated in protocols that impact crime victims.[36]

A victim-centered, trauma-informed, and culturally sensitive approach involves an understanding of the vulnerabilities and experiences of trauma survivors, including the prevalence and physical, social, and emotional impact of trauma. A trauma-informed approach recognizes signs of trauma in victims and witnesses and responds by integrating knowledge about trauma into policies, procedures, practices, and settings.[37] For example, in a town with environmental justice concerns or a medical device that is actively marketed to a specific marginalized community, there may be common trauma and systemic distrust among those victims requiring investigators, victim–witness personnel, and prosecutors to consider when interacting with these victims.

Meaningful engagement shows victims that their voices are heard and acknowledged. Remember, the criminal justice process may be a new experience for many victims, and it does not always produce the outcome a victim is expecting. Victims may not always be happy with the result, but if the team takes their time to explain the process, limitations, and realities of the criminal justice process, the victim will better understand the limits of the law or the rationale for the outcome.

If the team secures a conviction, either through a plea or guilty verdict, the prosecution team's victim–witness coordinator will send a notice to victims advising them of their right to provide victim impact statements. While victims are not required to provide a verbal or written statement explaining to the court the impact the offense has had on them or their

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[35] AG Guidelines, *supra* note 10, at 16, 24.
[36] *Id.* at 16–17.
[37] *Id.* at 17.

family, the team should encourage victims to provide one. A victim's story told to the court in their own words, whether it is written or spoken directly with the court, can be influential for sentencing. Follow up with victim–witness personnel to ensure victims get a chance to provide their statements. This is a right victims have under the CVRA.[38]

Statutory victims have the right to file a complaint with the Department ombudsman if they feel there has been a violation of their CVRA rights.[39] Victims who are unhappy and feel that officials are not affording them their CVRA rights can either seek to overturn case decisions or file a complaint with the Department ombudsman.[40] Ensure that crime victims have the opportunities to exercise their rights as outlined in the CVRA, as the statute contains disciplinary sanctions, including suspension or termination for employees of the Department who willfully or wantonly fail to comply with provisions of federal law about the treatment of crime victims.[41]

IV. Conclusion

While providing victim services and according rights in these cases may require more thought and effort, it is worth it to ensure team members fully support these victims as contemplated by the law and the AG Guidelines. The Antitrust Division,[42] Consumer Protection Branch (CPB),[43] and Environment and Natural Resources Division (ENRD)[44] have expertise and resources available to assist in these cases.

About the Authors

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[38] 18 U.S.C. § 3771(a)(4).

[39] *See Contact the Crime Victims' Rights Ombudsman,* U.S. Dep't of Just. Offs. of the U.S. Att'ys (Apr. 3, 2024), https://www.justice.gov/usao/contact-crime-victims-rights-ombudsman.

[40] *See id.*

[41] 18 U.S.C. § 3771(D), (F)(2)(c).

[42] *See Antitrust Division: About the Division,* U.S. Dep't of Just. Antitrust Div. (Nov. 20, 2023), https://www.justice.gov/atr/about-division.

[43] *See Consumer Protection Branch,* U.S. Dep't of Just. Civ. Div., https://www.justice.gov/civil/consumer-protection-branch (last visited July 9, 2024).

[44] *See Environment and Natural Resources Division,* U.S. Dep't of Just. Env't Nat. Res. Div., https://www.justice.gov/enrd (last visited July 9, 2024).

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[45] 650 F. App'x 260 (6th Cir. 2016).

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Understanding Elder Fraud Victims

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I. Introduction

Each year, the Department of Justice (Department) investigates and pursues hundreds of elder fraud cases, including romance scams, technical support scams, government imposter scams, and business imposter scams.[1] These fraud schemes are widespread, and no age group is immune from being tricked or deceived by fraudsters. Currently, the research on whether older adults are more prone to financial fraud is inconclusive and there is no consensus on the mechanism of the effect if it does exist.[2] According to the Bureau of Justice Statistics, using a narrow definition of fraud, there are no statistically significant age differences in the prevalence of fraud victimization across seven fraud types.[3] Although older adults are defrauded at rates lower than their younger counterparts, it is not uncommon for older adults who have been victimized by fraud schemes to deny their victimization or resist assisting law enforcement with investigations. This article explores potential reasons for this resistance as well as other factors that may impact, if not undermine, the effectiveness of elder fraud investigations, such as victim blaming and ageism. This article also explores the importance of taking a trauma-informed approach to interviewing and interacting with older victims and how that approach may contribute to more robust elder fraud investigations.

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[1] Off. of the Att'y Gen., U.S. Dep't of Just., Annual Report to Congress on Department of Justice Activities to Combat Elder Fraud and Abuse (2023).

[2] *See* A Fresh Look at Fraud: Theoretical and Applied Perspectives (Yaniv Hanoch & Stacey Wood eds., 2022); Peter Fischer et al., *Why do Individuals Respond to Fraudulent Scam Communications and Lose Money? The Psychological Determinants of Scam Compliance*, 43 J. of Applied Soc. Psych. 10 (2013).

[3] *See* Rachel E. Morgan, Financial Fraud in the United States, 2017 (Edrienne Su ed., 2021).

II. Elder fraud victimization and loss

Elder fraud is often committed against older adults residing in community and congregate living situations. Most older adults live independently in the community, with approximately 4% of older adults residing in nursing homes.[4] Overall, crime victimization of older adults is less common than crime victimization of younger adults, but among older adults, fraud is the largest victimization category.[5]

According to federal reports, older adults lose billions of dollars annually to elder fraud. Data from the Federal Trade Commission's Consumer Sentinel database indicate that older adults (ages 60 and older) are less likely than younger adults (ages 18–59) to report losing money to fraud, although when they do lose money, they lose a larger amount than do younger adults.[6] According to the Federal Bureau of Investigation's (FBI) Internet Crime Complaint Center (IC3), the IC3 received over 100,000 reports of elder fraud, with a total financial loss of over $3.4 billion.[7] On average, each older victim lost $33,915, with 5,920 older adults losing over $100,000.[8] Loss amounts varied substantially by the type of fraud reported, and the rise of cryptocurrency in financial fraud transactions was evident in the report. Lastly, a recent analysis by the Financial Crimes Enforcement Network (FinCEN), which receives reports of suspicious activity from financial institutions, found that for scams committed against older adults, FinCEN filers reported an average suspicious activity amount of $129,483, while the median amount was $33,499.[9]

Only about 15% of older adults report financial fraud to authorities, suggesting that these estimates may not fully capture the total amount of financial loss experienced by older adults each year.[10] What is clear, however, is that too many older adults are financially harmed, and the consequences for them are life altering.

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[4] *See* Admin. for Cmty. Living, U.S. Dep't of Health and Hum. Servs., 2021 Profile of Older Americans (2022).

[5] Kristy Holtfreter et al., Financial Exploitation of the Elderly in a Consumer Context (2014).

[6] Fed. Trade Comm'n, Protecting Older Consumers 2022–2023, at 26 (2023).

[7] Internet Crime Complaint Center, Fed. Bureau of Investigation, Elder Fraud Report 2023, at 5 n.1 (2024).

[8] *Id.*

[9] U.S. Dep't of the Treasury, Fin. Crimes Enf't Network, Financial Trend Analysis, Elder Financial Exploitation: Threat Pattern & Trend Information, June 2022 to June 2023, at 6 (2024).

[10] David Burnes et al., *Prevalence of Financial Fraud and Scams Among Older Adults in the United States: A Systematic Review and Meta-Analysis*, 107 Am. J. of Pub. Health 8 (2017); Morgan, *supra* note 3.

III. Consequences of elder fraud

Historically, people perceive financial crimes as less serious than violent crimes.[11] And yet, financial victimization may be experienced as a form of trauma similar to other crime victimization. Further, research suggests that financial victimization results in a wide array of significant harms.[12] These harms are typically categorized as follows: financial, health, psychological, and social consequences.

A. Financial

Not all older adults exposed to financial fraud lose money, but for those who do, many experience diminished economic well-being.[13] The fallout from financial loss may include financial insecurity, loss of financial autonomy,[14] and changing financial behavior.[15] Likewise, financial loss from fraud may also result in the older adult incurring additional costs associated with the incident (for example, late fees),[16] damaged credit scores and obstacles to obtaining credit,[17] difficulty meeting monthly expenses,[18] financial dependency (on family, the government, or both),[19] losing one's home,[20] and, in some cases, reliance on senior subsidized housing.

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[11] Helen Eigenberg & Tammy Garland, *Victim Blaming, in* Controversies in Victimology 15 (Laura J. Moriarty ed., 2008).

[12] Mark Button et al., A better deal for fraud victims: Research into victims' needs and experiences (2009); Debbie Deem, *Notes from the Field: Observations in Working with the Forgotten Victims of Personal Financial Crimes,* 12 J. of Elder Abuse and Neglect 33 (2000).

[13] Marti DeLiema et al., Exposed to Scams: What Separates Victims from Non-Victims? 2 (2019).

[14] Katalin Parti & Faika Tahir, "*If We Don't Listen to Them, We Make Them Lose More than Money*": *Exploring Reasons for Underreporting and the Needs of Older Scam Victims*, 12 Soc. Scis. 264 (2023).

[15] Annie Nguyen et al., *Perceived Types, Causes, and Consequences of Financial Exploitation: Narratives from Older Adults*, 76 The J. of Gerontology: Series B 996 (2021).

[16] Debbie Deem & Erik S. Lande, *Transnational Scam Predators and Older Adult Victims: Contributing Characteristics of Chronic Victims and Developing an Effective Response*, 66 DOJ J. of Fed. L. and Prac. 177 (2018); Marguerite DeLiema et al., Exploring the Risks and Consequences of Elder Fraud Victimization: Evidence from the Health and Retirement Study (2017).

[17] Stephen Deane, Elder Financial Exploitation: Why It is a Concern, What Regulators are Doing About it, and Looking Ahead (2018).

[18] Marguerite DeLiema et al., Findings From a Pilot Study to Measure Financial Fraud in the United States (2017).

[19] Parti & Tahir, *supra* note 14.

[20] Debbie Deem et al., *Victims of Financial Crime, in* Victims of Crime 185 (Robert C. Davis et al. eds., 4th ed. 2013).

B. Health

Health consequences from elder fraud may include difficulty sleeping,[21] diminished physical health,[22] and elevated blood pressure.[23] Health is also indirectly impacted when older adults are financially unable to pay for health-care visits or purchase prescriptions, and when financial strain triggers other health conditions,[24] including mortality.[25]

C. Psychological

Studies have shown a wide array of psychological effects resulting from an older adult being victimized by fraud. These include feelings of shame,[26] betrayal,[27] depression,[28] embarrassment,[29] anxiety,[30] anger,[31] regret,[32] stress,[33] guilt (for squandering the family's inheritance),[34] suici-

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[21] Applied Research & Consulting LLC, Non-Traditional Costs of Financial Fraud: Report of Survey Findings (FINRA Investor Educ. Found. ed., 2015); Niclas Olofsson et al., *Fear of Crime and Psychological and Physical Abuse Associated with Ill Health in a Swedish Population Aged 65–84 Years,* 126 Pub. Health 358 (2012).

[22] Ron Acierno et al., *The National Elder Mistreatment Study: An 8-year Longitudinal Study of Outcomes,* 29 J. of Elder Abuse & Neglect 254 (2017); Steven Kemp & Nieves Erades Pérez, *Consumer Fraud Against Older Adults in Digital Society: Examining Victimization and its Impact*, 20 Int'l J. of Envtl. Res. & Pub. Health 5404 (2023).

[23] Melissa Lamar et al., *Self-Reported Fraud Victimization and Objectively Measured Blood Pressure: Sex Differences in Post-Fraud Cardiovascular Health,* 70 J. of the Am. Geriatrics Soc. 3185 (2022).

[24] Laura Samuel et al., *Leveraging Naturally Occurring Variation in Financial Stress to Examine Associations with Inflammatory Burden Among Older Adults,* 74 J. of Epidemiology and Cmty. Health 892 (2020).

[25] Szanton, S.L. et al., *Effect of Financial Strain on Mortality in Community-Dwelling Older Women,* 63(6) The J. of Gerontology: Series B 369–74 (2008).

[26] DeLiema et al., *supra* note 16.

[27] Mark Button et al., *Not a Victimless Crime: The Impact of Fraud on Individual Victims and their Families*, 27 Sec. J. 36 (2014); Deem, *supra* note 12.

[28] Acierno et al., *supra* note 22; Scott R. Beach et al., *Financial Exploitation and Psychological Mistreatment Among Older Adults: Differences Between African Americans and Non-African Americans in a Population-Based Survey*, 50 The Gerontologist 744 (2010); DeLiema et al., *supra* note 16; Applied Research, *supra* note 21.

[29] Kemp & Erades Pérez, *supra* note 22.

[30] Acierno et al., *supra* note 22; Olofsson, et al., *supra* note 21.

[31] Kemp & Erades Pérez, *supra* note 22.

[32] Applied Research, *supra* note 21.

[33] Button et al., *supra* note 12; Olofsson et al., *supra* note 21.

[34] Parti & Tahir, *supra* note 14.

dal ideation,[35] and suicide.[36] Destroying an otherwise well-planned retirement may also require older victims to radically modify how they envision their futures.[37]

Many older fraud victims experience additional harms from offenders, such as threats and unrelenting intrusion in their lives. These threats and intimidation may constitute psychological abuse that may result in diminished psychological functioning,[38] decreased physical functioning (up to five years later),[39] hospitalization,[40] admission to a skilled nursing facility,[41] emergency department use,[42] and mortality.[43]

D. Social

In addition to the physical and psychological impacts of being victimized by elder fraud, there are also social costs, including the loss of or changes to social relationships.[44] For example, family members may respond to an older adult being defrauded with physical or psychological abuse[45] when learning they have to provide financial assistance[46] or

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[35] Olofsson et al., *supra* note 21; Raudah Yunus et al., *Consequences of Elder Abuse and Neglect: A Systematic Review of Observational Studies*, 20 Trauma, Violence, & Abuse 197 (2017).

[36] *See* Press Release, U.S. Attorney's Office, Western District of Texas, Austin-Based Nigerian Money Launderer Sentenced to Federal Prison for Romance Scams (July 17, 2018).

[37] Peter A. Lichtenberg et al., *Is Psychological Vulnerability Related to the Experience of Fraud in Older Adults?*, 36 Clinical gerontologist 132 (2013); Russell G. Smith, *Fraud and Financial Abuse of Older Persons*, 11 Current Issues in Crim. Just. 273 (2000).

[38] Josh M. Cisler et al., *Elder Mistreatment and Physical Health Among Older Adults: The South Carolina Elder Mistreatment Study*, 23 J. of Traumatic Stress 461 (2010); Olofsson et al., *supra* note 21; Jaclyn S. Wong & Linda J. Waite, *Elder Mistreatment Predicts Later Physical and Psychological Health: Results from a National Longitudinal Study*, 29 J. of Elder Abuse & Neglect 15 (2017).

[39] Wong & Waite, *supra* note 38.

[40] XinQi Dong & Melissa A. Simon, *Elder Abuse as a Risk Factor for Hospitalization in Older Persons*, 173 JAMA Internal Med. 911 (2013).

[41] XinQi Dong & Melissa A. Simon, *Association Between Reported Elder Abuse and Rates of Admission to Skilled Nursing Facilities: Findings from a Longitudinal Population-based Cohort Study*, 59 Gerontology 464 (2013).

[42] XinQi Dong & Melissa A. Simon, *Association between Elder Abuse and Use of ED: Findings from the Chicago Health and Aging Project*, 31 The Am. J. of Emergency Med. 693 (2013).

[43] Lindsay R. Pool et al., *Association of a Negative Wealth Shock with All-Cause Mortality in Middle-aged and Older Adults in the United States*, 319 Jama 1341 (2018).

[44] Jan Bailey et al., *Older Adults and "Scams": Evidence from the Mass Observation Archive*, 23 The J. of Adult Prot. 57 (2021); Button et al., *supra* note 12.

[45] Deem & Lande, *supra* note 16; Parti & Tahir, *supra* note 14.

[46] Parti & Tahir, *supra* note 14.

when a partner loses the couple's retirement funds.[47] Fraud can affect friendships,[48] leading to increased social isolation and loneliness, which are shown to damage mental and physical health.[49]

It is against this backdrop that investigators encounter older victims. Understanding the impact of trauma (resulting from elder fraud) may enable investigators to work more effectively with older adults during the investigation and prosecution.

IV. Two victim-focused factors that impact investigations

Investigators may encounter several challenges when interacting with older victims of fraud. This section explores two of those common obstacles.

A. Perceptions of victimization

Victims of any age and across multiple crime types may fail to label their experience of crime as a form of victimization.[50] Several potential reasons explain why older victims may double down and deny the potential victimization, even when confronted with compelling evidence.

Research in cognitive psychology may offer some explanations for this phenomenon in the context of elder fraud. For example, cognitive dissonance theory asserts that holding two contradictory beliefs simultaneously produces cognitive discomfort. Here is an example: "I will receive $1 million," and "This is a scam." To return to a state of internal consistency, cognitive dissonance teaches that changing perceptions or attitudes is easier than changing behavior. As such, scam victims might do the following: (1) look for confirming information while ignoring disconfirming information; (2) revise their expectations (for example, "I thought this is what would happen all along"); or (3) believe their experience will defy the odds (exceptionalism). These normal cognitive processes may contribute to victimization denial.[51]

In the discipline of social cognition, scientists study how people process

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[47] Deem & Lande, *supra* note 16.
[48] Nguyen et al., *supra* note 15.
[49] Emily Harris, *Meta-Analysis: Social Isolation, Loneliness Tied to Higher Mortality*, 330 JAMA 211 (2023); Julianne Holt-Lunstad et al., *Social Relationships and Mortality Risk: A Meta-analytic Review,* 7 PLOS Med. (2010).
[50] *See, e.g.*, Laura C. Wilson & Katherine E. Miller, *Meta-analysis of the Prevalence of Unacknowledged Rape*, 17 Trauma, Violence, & Abuse 149 (2016).
[51] Maria Konnikova, The Confidence Game: Why We Fall for It . . . Every Time 235 (2016).

and respond to social information.[52] In that discipline, researchers have found that judging another person's trustworthiness typically involves weighing the benefits and costs of assigning trust to someone. Compared to younger adults, older adults may fail to adjust their first impressions of someone they initially labeled as cooperative when they later learn new information that indicates noncooperation.[53] This means that when older adults initially characterize a scammer in a positive manner, they may continue to do so even when confronted with warning signs and as such fail to label themselves a crime victim.

In addition to cognitive explanations, there are several potential psychological explanations. First, fraud is a crime of deception and manipulation, so victims may not even know that a crime has been committed.[54] For example, in the case of a government impersonation scam, a strong belief in authority figures (such as Internal Revenue Service employees) may prompt older adults to respond to fraud with no perception that a crime has occurred, thus assuming the transaction was legitimate.[55] Second, when scammers successfully persuade victims to make an initial payment, victims are more likely to convince themselves the transaction is legitimate, regardless of the warning signs. This denial mechanism can insert victims into a vicious cycle and make them more vulnerable to future fraud victimization.[56] Finally, fraud techniques used by scammers often focus on stimulating the victims' instincts, such as fear, hope, and greed.[57] For example, grandparent scams activate fear, lottery scams may

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[52] R. Nathan Spreng et al., *Aging and Financial Exploitation Risk*, *in* Aging and Money: Reducing Risk of Financial Exploitation and Protecting Financial Resources 55–73 (Ronan M. Factora ed., 2d ed. 2021); R. Nathan Spreng et al., *Cognitive, Social, and Neural Determinants of Diminished Decision-making and Financial Exploitation Risk in Aging and Dementia: A Review and New Model*, 28 J. of Elder Abuse & Neglect 320 (2016).

[53] Carina Fernandes et al., *Aging and Social Cognition: A Comprehensive Review of the Literature*, 14 Psych. & Neuroscience 1 (2021); Atsunobu Suzuki et al., *Age-related Differences in the Activation of the Mentalizing- and Reward-related Brain Regions During the Learning of Others' True Trustworthiness,* 73 Neurobiology of Aging 1 (2019).

[54] Brandon Atkins & Wilson Huang, *A Study of Social Engineering in Online Frauds*, 1 Open J. of Soc. Scis. 23 (2013).

[55] Alexandra Burton et al., *Exploring How, Why and in What Contexts Older Adults are at Risk of Financial Cybercrime Victimisation: A Realist Review*, 159 Experimental Gerontology (2021); Yuxi Shang et al., *The Psychology of the Internet Fraud Victimization of Older Adults: A Systematic Review*, 13 Frontiers in Psych. (2022).

[56] Peter Kratcoski, *Older Victims of Crime*, *in* The Sage Encyclopedia of Criminal Psychology 1003 (Robert Morgan ed., 2019).

[57] Shang et al., *supra* note 55.

appeal to hope (for instance, the ability to leave an inheritance for one's children), and investment scams may appeal to greed. These emotions interfere with rational thinking that might otherwise alert older adults to the possibility they are experiencing a crime and again, fail to label themselves a crime victim.

B. Resistance to assisting in the investigation

In addition to encountering older victims who may deny having been defrauded, investigators commonly encounter older adults who resist assisting with the investigation. The social science and criminal justice literature provides some potential explanations for this phenomenon.

One potential reason for resistance is that some older victims choose to maintain a relationship with the scammer. Social isolation and loneliness contribute to older adults establishing what they perceive to be genuine social relationships with scammers and want that relationship to continue.[58] In reality, older victims may remain under the control of the offender, as in the context of undue influence, even after the investigation has begun and may continue to assist the offender. Victims of romance or money-mule scams may even undermine an investigation by providing the offender with inside information about an investigation.[59] Note that fraud deceives the mind whereas undue influence overpowers it; undue influence is a process whereas fraud often occurs over a shorter period, but there may be some overlap between the two concepts.[60]

Second, older adults may find the justice system challenging to navigate, inaccessible, stressful, and ineffective, and they may choose to avoid the process altogether.[61] Further, some older victims consider it a waste of time since there is little prospect of identifying the offenders.[62] Older adults who are in poor health may also be unable or disinclined to expend their limited energy on assisting investigators.[63]

In addition to feeling overwhelmed by the criminal justice system, older victims may resist assisting investigators for fear of reprisals. For example, strong negative emotions and even abuse from family members

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[58] *Id.*

[59] Consumer Financial Protection Bureau, Recovering from Elder Financial Exploitation: A Framework for Policy and Research (2022).

[60] David Horton & Reid Kress Weisbord, *The New Undue Influence*, 2024 Utah L. Rev. 231 (2024); Sandra D.Glazier et al., Undue Influence and Vulnerable Adults (2020).

[61] Michal Segal et al., *Consumer Fraud: Older People's Perceptions and Experiences*, 33 J. of Aging & Soc. Pol'y 1 (2021).

[62] Parti & Tahir, *supra* note 14.

[63] Consumer Financial, *supra* note 59.

upon discovering that a parent has been defrauded may dissuade some older adults from engaging with an investigation.[64] For families who are unaware of the fraud, cooperation with an investigation may raise concerns that family members will discover the fraud, interpret victimization as an inability to care for oneself, and risk losing independence.

Understanding the root cause of an older victim's resistance may provide the investigator with a potential path to gaining the older adult's cooperation with the investigation.

V. Two investigator-focused factors that impact investigations

As discussed above, there are many reasons why older victims of fraud may deny their victimization or otherwise resist assisting with an elder fraud investigation. At the same time, prosecutors and investigators may have implicit biases, such as victim blaming and ageism, that negatively impact an investigation.

A. How victim blaming may impact elder fraud investigations

According to FBI Director William Webster, "If it can happen to me, it can happen to you," implying anyone can be defrauded.[65] And yet, for decades, the public, including older adults,[66] has tended to blame victims for their fraud victimization,[67] using pejorative terms such as "gullible," "stupid," "greedy," and "careless."[68] Reprimanding older victims for "falling for fraud" or using cliches—such as, "If it sounds too good to be true, it probably is"—implies older adults are responsible for their victimization.[69] The field of victimology teaches that complicity (even if based on duplicity) negates "victimhood," thus denying older adults their status as victims worthy of sympathy.[70] Crimes that involve complicity or complacency are crimes nonetheless. These victim-blaming attitudes

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[64] Deem & Lande, *supra* note 16; Parti & Tahir, *supra* note 14.
[65] Fed. Bureau of Investigation, Former Dir. Webster Warns About Elder Fraud, YouTube (May 10, 2022), https://www.youtube.com/watch?v=BNlPQvdRf1E.
[66] Cassandra Cross, *No Laughing Matter: Blaming the Victim of Online Fraud*, 21 Int'l Rev. of Victimology, 187 (2015).
[67] DeLiema et al., *supra* note 13.
[68] Bailey et al., *supra* note 44, at 10.
[69] AARP Fraud Watch Network, *Blame and Shame in the Context of Financial Fraud: A Movement to Change our Societal Response to a Rampant and Growing Crime* (2022).
[70] William G. Doerner & Steven P. Lab, Victimology (7th ed. 2017).

are discernable by older adults and may be internalized.[71]

When older victims use terms such as "confessing" and "admitting" they had been fooled, they are conveying internalized victim blaming, indicating feelings of being idiotic, dumb, stupid, devastated, overwhelmed, or worthless.[72] Self-blaming attitudes may result in older adults trivializing their victimization, thereby impacting reporting and interviewing behavior.

In one report, 83% of fraud victims (of all ages) reported wanting a sympathetic response.[73] When older adults say they feel foolish or naïve, older fraud victims can be empowered by understanding that financial fraud happens to individuals across the country, regardless of age, education, or intelligence; there are people from all walks of life who have lost money to fraud schemes.[74] Explaining to older victims that many others have had a similar experience to their own can help develop rapport and trust with them.

Investigators can also refocus the blame on offenders, emphasizing that the offenders are at fault, and that the older adults do not have control over offenders' behavior.[75] They can also emphasize that fraudsters are experts at making people feel comfortable and lowering suspicions. Victims are targeted in complex manners, and the offenders who manipulate and exploit these victims are often highly skilled and use sophisticated social engineering techniques, including threats, promises, isolation, grooming, and manipulation to defraud older adults.[76]

B. How ageism may impact elder fraud investigations

Ageism is defined as stereotyping, prejudice, and discrimination based on age.[77] Ageism can manifest as discriminatory practices such as failing to thoroughly investigate crimes against older adults. It can result in prejudicial attitudes, such as believing that older adults are unable to convey reliable information to law enforcement, or that older adults make

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[71] Karl Pillemer et al., *Investigating the Connection Between Ageism and Elder Mistreatment,* 1(2) Nature Aging 159–64 (2021).

[72] Button et al., *supra* note 12; Parti & Tahir, *supra* note 14; Segal et al., *supra* note 61.

[73] Button at al., *supra* note 12.

[74] *Interacting with Victims of Transnational Fraud.* Federal Fraud Working Group. (n.d.) (on file with authors).

[75] *Words Matter: Blame Fraud on Criminals, Not Victims,* Am. Ass'n Retired Perss. (Apr. 7, 2023), https://www.aarp.org/podcasts/the-perfect-scam/info-2023/victim-blaming.html; AARP, *supra* note 69.

[76] Bailey et al., *supra* note 44; Cross, *supra* note 66.

[77] Sheri R. Levy et al., *The Worldwide Ageism Crisis*, 78 J. of Soc. Issues 743 (2022); Lisa Nerenberg, Elder justice, ageism, and elder abuse (2019).

poor witnesses, thereby undermining their credibility.[78]

Prejudice and discrimination are often based on stereotypes. Stereotypes explain why younger adults often change their speech patterns when talking with older adults[79] to a form of speech known as Elderspeak,[80] a patronizing form of speech that should be avoided. Also pervasive is the stereotype that all older adults have dementia and therefore are not credible witnesses. While the prevalence of neurocognitive disorders such as Alzheimer's disease increases with age, by no means are all older adults living with this disease.[81] Neurocognitive disorders may be a risk factor for financial fraud,[82] but many older adults with no cognitive impairments are also victimized by fraud.[83] Research finds older adults living with dementia are able to recall information about a traumatic event, and generally speaking, they should be interviewed.[84]

Investigators' implicit ageism may cause older adults to feel insecure and less confident, which can hinder their recall performance.[85] Further, it can deter investigators from making the necessary accommodations to support effective communication with older victims. For these reasons, it is critical to be aware of and counteract internal biases that may affect interactions with older fraud victims.[86]

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[78] Allison M. Wright & Robyn E. Holliday, *Police Officers' Perceptions of Older Eyewitnesses*, 10 Legal and Criminological Psych. 211 (2005).

[79] Anna I. Corwin, *Overcoming Elderspeak: A Qualitative Study of Three Alternatives*, 58 The Gerontologist 724 (2018).

[80] Tammi R. LaTourette & Suzanne Meeks, *Perceptions of Patronizing Speech by Older Women in Nursing Homes and in the Community: Impact of Cognitive Ability and Place of Residence*, 19 J. of Language and Soc. Psych. 463 (2000).

[81] B. L. Plassman et al., *Prevalence of Dementia in the United States: The Aging, Demographics, and Memory Study*, 29 Neuroepidemiology 125 (2007).

[82] Lauren Hersch Nicholas et al., *Financial Presentation of Alzheimer Disease and Related Dementias*, 181 JAMA Internal Med. 220 (2021).

[83] Deem & Lande, *supra* note 16.

[84] Laura Mosqueda & Aileen Wiglesworth, *The Ability of People with Dementia to Reliably Recall Recent Emotional Life Events*, 6 Alzheimer's & Dementia: The J. of the Alzheimer's Ass'n, (2010); *see also Communication and Alzheimer's*, Alzheimer's Ass'n, https://www.alz.org/help-support/caregiving/daily-care/communications (last visited July 10, 2024) (giving guidance on communicating with persons living with Alzheimer's disease and related dementias).

[85] Joshua Wyman & Lindsay Malloy, *Increasing Disclosures of Older Adult Maltreatment: A Review of Best Practices for Interviewing Older Adult Eyewitnesses and Victims*, 31 Psychiatry, Psych. & L. 274 (2024).

[86] *Project Implicit*, Harvard, https://implicit.harvard.edu/implicit/ (last visited July 10, 2024) (implicit bias test).

VI. Recognizing trauma in older victims

In contrast to victim blaming and ageism, trauma is a framework for understanding the emotions and behaviors observed in crime victims that are often misinterpreted. Adopting trauma-informed practices (described below) can provide valuable guidance in interacting with older victims of fraud during an investigation.[87]

The concept of trauma has penetrated many fields, but elder justice has been slow to adopt this framework. At the core of trauma is a change in mindset from "What's wrong with you?" (internal) to "What happened to you?" (external).[88] Rather than pathologizing the individual, a trauma framework focuses on what impact a traumatic *event* has had on an individual. Trauma is subjective, meaning the same event does not have the same impact on all individuals. Individual trauma results from an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual's functioning and mental, physical, social, emotional, or spiritual well-being.[89] This is consistent with the observation that not all fraud victims exhibit the same response. Nonetheless, some older adults may experience elder fraud as a traumatic event,[90] resulting in trauma responses.[91]

Trauma helps to explain why a person experiencing a traumatic event may exhibit emotions and behaviors that at times appear antithetical to expectations of how a victim *should* respond. For example, older adults who have experienced elder fraud may present with symptoms such as disorganized thinking that may raise doubts about their credibility. And

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[87] *See* U.S. Dep't of Just., The Attorney General Guidelines for Victim and Witness Assistance 16 (2022).

[88] Sandra L. Bloom & Brian Farragher, Restoring Sanctuary: A New Operating System for Trauma-Informed Systems of Care (2013).

[89] Substance Abuse and Mental Health Services Administration (SAMHSA), SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach (2014); *see also* Bessel van der Kolk, The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma (2014) (showing how trauma affects the body and brain).

[90] Shelly L. Jackson, *Recognizing the Trauma Experienced by Community-Dwelling Older Victims of Financial Abuse Perpetrated by Trusted Others*, *in* Handbook of interpersonal violence and abuse across the lifespan 4,499 (Robert Geffner et al. eds., 2021).

[91] Ron Acierno et al., *Mental Health Correlates of Financial Mistreatment in the National Elder Mistreatment Study Wave II,* 31 J. of Aging and Health 1,196 (2019); Ronald C. Kessler et al., *Prevalence, Severity, and Comorbidity of 12-Month DSM-IV Disorders in the National Comorbidity Survey Replication* 62 Archives of Gen. Psychiatry 617 (2005).

yet, trauma research confirms that disorganized thinking is a normal response to a traumatic event.[92] Therefore, an understanding of how trauma impacts behavior and emotions guards against the misinterpretation of trauma responses, thereby promoting a more appropriate response.[93]

As previously mentioned, a trauma-informed approach provides guidance for interacting with trauma survivors. This guidance is contained in the six trauma-informed principles described below.[94]

A. Safety

Traumatic events disrupt a person's sense of safety—including physical, personal, psychological, and environmental safety—sometimes long after the event. When interacting with older adults, ensure they feel safe. Provide physical safety by avoiding physical contact without an older victim's permission. Ensure psychological safety by establishing trust before raising sensitive issues. Demonstrate respect by addressing victims by their preferred pronouns. Give them the psychological space to talk about what they want to discuss, responding in a nonjudgmental manner. And finally, provide environmental safety by interviewing older adults in a location that promotes their comfort (for example, the victim's home or an Elder Justice Forensic Center).

B. Trustworthiness and transparency

Because trauma often involves betrayal, it is important to be trustworthy; for example, do not make promises that you cannot keep. Trust takes time to develop and is accomplished by building a relationship with the older adult.

Trust also can be established through transparency. Clearly convey the practices and policies guiding an investigation to the older adult. For example, describe all confidentiality policies or mandatory reporting obligations. Explain the reasons for the questions being asked and how that information will be used.

C. Peer support

Trauma is one-sided in that fraud is committed against an individual, but it is also interpersonal and destroys faith in relationships. To counteract that effect, victims may both receive peer support and provide support. Peer support is empowering and helps re-establish the value of

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[92] Kessler et al., *supra* note 91.
[93] Mark Lokanan, *The Application of Cognitive Interviews to Financial Crimes*, 25 J. of Fin. Crime 882 (2018).
[94] SAMHSA, *supra* note 89.

relationships. Investigators can facilitate this process by engaging with older adults in ways that re-establish positive connections with people.

D. Collaboration and mutuality

When individuals experience a traumatic event, they are often left feeling less powerful in relation to the person or event that caused the harm. Likewise, there is an inherent power differential between older victims and investigators. It is important to reduce status differentials to avoid recreating that sense of powerlessness. Engage in behaviors that balance power through collaboration and mutuality. That is, treat older adults as experts in their own experiences. Emphasize that the investigation is a mutual undertaking, requiring both investigators and older victims working collaboratively to achieve the goal of justice.

E. Empowerment, voice, and choice

Trauma-informed practices devalue the deficit model and elevate a strengths-based model where trauma survivors are seen as strong. Rather than focusing on real or imagined limitations and imposing a single identity such as "victim," a trauma-informed approach focuses on building skills and resilience. An older adult may have many problems, like fraud victimization, yet function well as a grandmother, employee, or a neighborhood organizer. Older adults maneuver competently in multiple spheres in their life. Acknowledge and build on those strengths to optimize their ability to provide useful information to the investigation.

The experience of trauma is disempowering, taking away a person's sense of control. This situation is only compounded when it involves older trauma survivors, some of whom face physical and cognitive impairments that may add to feelings of disempowerment. Return that power by honoring their voice and their choices. In practice, this means giving them control over the interview. Ask older adults what they want to happen, prioritizing their goals and collaborating with them to achieve those goals. Fostering voice and choice also produces more cooperative trauma survivors.

F. Cultural, historical, and gender consideration (intersectionality)

This principle is expanding to embrace the concept of intersectionality; that is, the complex ways in which multiple forms of discrimination intersect, especially in the experiences of marginalized individuals or groups. Forms of discrimination include the following: class, gender identity, race, ethnicity, sexual preferences, ableism, religious identity, historical trauma,

collective trauma, ageism, culture, and geography (rurality).[95] People experience multiple forms of discrimination simultaneously, which may be experienced differently than someone experiencing a single form of discrimination. For example, two female older adults will likely experience differences in their sense of safety, employment opportunities, and the ability to partner depending on their sexual orientation, level of ability, age, race, and class. The point is to honor the uniqueness of each person.

VII. Safe Accessible Forensic Interviewing for Elders Training

It is critical for the field of elder justice to become trauma informed.[96] Adopting a trauma framework benefits the investigation and prosecution by providing guidance on how to interact with older fraud victims,[97] reducing misinterpretations of emotions and behavior, improving the quality of victim statements, and increasing the cooperation of older adults with the criminal and civil justice systems.[98] This approach also benefits older victims by reducing revictimization, promoting resilience, and, ultimately, increasing access to justice and services. Organizational adoption

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[95] *See* Emma Finnegan, *Using Intersectionality to Understand Abuse Against Elders: A Conceptual Examination*, *in* Contemporary Intersectional Criminology in the UK: Examining the Boundaries of Intersectionality and Crime 187 (Jane Healy & Ben Colliver eds., 2022); Sherry Hamby et al., *Understanding the Burden of Trauma and Victimization Among American Indian and Alaska Native Elders: Historical Trauma as an Element of Poly-Victimization*, 21 J. of Trauma & Dissociation 172 (2020); Mary Beth Quaranta Morrissey et al., *Intersectionality of Race, Ethnicity, and Culture in Neglect, Abuse, and Violence Against Older Persons: Human Rights, Global Health, and Systems Approaches in Pandemics*, *in* Handbook of Interpersonal Violence and Abuse Across the Lifespan: A project of the National Partnership to End Interpersonal Violence Across the Lifespan 4699 (Robert Geffner et al. eds., 2022); Mickey Sperlich et al., *Adopting a Trauma-Informed Approach to Gender-Based Violence Across the Life Course*,*in* Understanding Gender-Based Violence 185 (Caroline Bradbury-Jones & Louise Isham eds., 2021).

[96] *See* Joy Swanson Ernst & Tina Maschi, *Trauma-Informed Care and Elder Abuse: A Synergistic Alliance*, 30 J. of Elder Abuse & Neglect 354 (2018); Holly Ramsey-Klawsnik & Erin Miller, *Polyvictimization in Later Life: Trauma-Informed Best Practices*, 29 J. of Elder Abuse & Neglect 339 (2017); SAMHSA, *supra* note 89.

[97] Dorothy E. Stubbe, *Communication with the Trauma Survivor: The Importance of Responsive Support*, 11 Focus: J. of Lifelong Learning in Psychiatry 368 (2013); Parti & Tahir, *supra* note 14.

[98] Kara Blue et al., Guide for a Trauma-Informed Law Enforcement Initiative: Based on Experience in Cambridge, Massachusetts (n.d.); Karen Rich, *Trauma-Informed Police Responses to Rape Victims*, 28 J. of Aggression, Maltreatment & Trauma 463 (2019).

of a trauma-informed approach is also recommended.[99]

A trauma-informed approach ensures that accommodations are made to support effective communication with older victims. In alignment with trauma-informed practices, the Department supported the development of forensic investigative interviewing training for use with older adults. Safe Accessible Forensic Interviewing for Elders (SAFE) Training is a trauma-informed, person-centered training developed to meet the growing need for interviewing techniques for use with older adults in criminal contexts.[100] SAFE is grounded in forensic interviewing best practices while accommodating age-related changes in cognition, underlying neuropathology, individual disability, language capacity, and cultural background. In the past fiscal year, the Department has funded the provision of this training to 14 communities across the country, including over 500 law enforcement officers, adult protective service workers, Medicaid Fraud Control Unit Investigators, and many other professionals.[101]

VIII. Conclusion

As a result of the Department's unwavering commitment to elder justice, elder justice programming is now pervasive throughout the Department. This article was intended to mitigate prevalent misperceptions of older fraud victims and to encourage the adoption of a trauma framework when responding to older fraud victims. By actively countering the pejorative narratives that currently characterize older fraud victims, this article seeks to increase access to justice for older Americans.

About the Authors

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[99] SAMSHA, *supra* note 89; Buffalo Center for Social Research, Institute on Trauma and Trauma-Informed Care, Trauma-informed organizational change manual (2019).

[100] *See generally SAFE Training*, U.S. Dep't of Just. (Feb. 20, 2024), https://www.justice.gov/elderjustice/safe-training.

[101] Contact the Elder Justice Initiative at elder.justice@usdoj.gov if you are interested in offering this training in your community. *See Elder Justice Initiative (EJI),* U.S. Dep't of Just., https://www.justice.gov/elderjustice (last visited July 10, 2024).

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The Right to be Heard: A Prosecutor's Obligation to Enforce Victims' Rights in United States District Court

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I. Introduction

The Crime Victims' Rights Act (CVRA) affords victims in criminal cases 10 rights that are enforceable in federal courts.[1] As such, Department of Justice (Department) prosecutors serve as critical first responders for victims every day in courtrooms across the United States.[2] When a judge makes a ruling that negatively impacts a victim's statutory rights, federal prosecutors are called to action with power vested in them by the legislative branch through the CVRA. In this capacity, and on behalf of victims substantively and procedurally aggrieved by the judiciary, counsel in the executive branch assert critical rights and serve as a check against judges who stray from the letter and spirit of the law. Once prosecutors assert a right, prosecutors can—and should—seek enforcement of crime victims' rights. In doing so, we come to know the reach and meaning of the statute when courts issue decisions interpreting the CVRA.

This article aims to aid executive branch practitioners in better understanding a prosecutor's duty to seek enforcement of the CVRA. The article begins by exploring the origins of the CVRA's enforcement mechanisms and standing for aggrieved victims. It then recounts this author's personal experience in enforcing crime victims' rights in district court as a case study on lessons learned. Finally, the article will highlight the intersection of a prosecutor's obligations under the CVRA and recently revised Attorney General Guidelines for Victim and Witness Assistance

[1] U.S. Dep't of Just., The Attorney General Guidelines for Victim and Witness Assistance 57 (2022) [hereinafter AG Guidelines].
[2] The terms "district court" and "court" include the Superior Court of the District of Columbia. *See* 18 U.S.C. § 3771(e)(3).

(AG Guidelines) that went into effect on March 31, 2023.

II. 2004 origins of crime victim standing in federal court

Two decades ago, the Justice for All Act of 2004 was signed into law by President George W. Bush.[3] A section within the law contains the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn CVRA.[4] The landmark CVRA remedies systemic judicial injustices suffered by crime victims and their families by the institutional imbalance between the rights of crime victims and the rights of defendants.

While the CVRA now serves as a shield for crime victims and their families—affording reasonable protections from the accused, allowing access to court proceedings, providing notice of case events, and so on—Congress also crafted a proverbial sword for prosecutors, victims, and their representatives to enforce those rights.[5] Lawmakers realized that without an enforcement mechanism for prosecutors, victims, and victim's counsel, the new law would not have any teeth, and nothing would change. The Congressional Record made clear the new legislation's significance would not be "whittled down or marginalized by the courts or the executive branch."[6] As the second decade of this veritable legislation draws to a close, a closer look at the statutory language and Congressional intent helps inform Department prosecutors of the roles and responsibilities of the judiciary and the government with respect to according and enforcing victims' rights.

A. Judicial obligations: rights afforded in any court proceeding

Subsection (b) of the CVRA directs the judiciary to ensure that a crime victim in any court proceeding is afforded the 10 rights outlined in subsection (a).[7] In doing so, Congress underscores the importance of the court's role in advancing victims' rights. Indeed, Congress acknowledged the court's profound impact on crime victims in the Congressional Record:

> This legislation is meant to ensure that cases like the McVeigh case, where victims of the Oklahoma City bombing were effectively denied the right to attend the trial and to avoid federal

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[3] Pub. L. No. 108-405, 118 Stat. 2260.
[4] *Id.*
[5] 18 U.S.C. § 3771(d).
[6] 150 Cong. Rec. S10910-01, S10911 (2004).
[7] 18 U.S.C. § 3771(b)(1).

> appeals courts from determining, as the Tenth Circuit Court of Appeals did, that victims had no standing to seek review of their right to attend the trial under the former victims' law that this bill replaces.[8]

As a result, the law requires that judges "make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding."[9] If the judge denies any request for relief under the CVRA, the reasons "shall be stated on the record."[10]

Importantly, the passage of the CVRA came on the heels of an eight year-long lost battle for a constitutional amendment to protect crime victims.[11] Senator John Kyl was a proponent of the constitutional amendment and an original sponsor of the CVRA. Shortly after the CVRA's passage, he explained why the requirement for an on-the-record explanation of the denial of any right was critical to the new law's success:

> This provision will enable those in the legal community to ascertain in the future, whether the rights established in the CVRA are effective substitutes for constitutional rights. Without a body of jurisprudence under the new law, the hypothesis that statutes are sufficient could not be fully and fairly tested. This section directs that records be made of the reasons for the denial of an asserted right. The record serves two functions: (1) it provides a basis for a review on mandamus and (2) it builds a record of construction that Congress can later evaluate.[12]

Senator Kyl and his fellow lawmakers knew that the CVRA could only be effective if judges were held accountable by affording crime victims' rights. The Congressional Record reflected those sentiments:

> This provision is critical because it is in the courts of this country that these rights will be asserted and it is the courts that will be responsible for enforcing them. Further, requiring

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[8] 150 Cong. Rec. S10910-01, S10911 (2004).
[9] 18 U.S.C. § 3771(b)(1).
[10] *Id.*
[11] *Sponsors of Victims' Rights Amendment Pull Bill in Face of Senate Opposition, in* CQ Almanac 2000, at 15-46 to 15-47 (56th ed. 2001).
[12] Symposium, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L. Rev. 581, 614–15 (2005).

> a court to provide the reasons for denial of relief is necessary for effective appeal of such denial.[13]

While the CVRA commands the judicial branch to afford crime victims' rights in court proceedings involving an offense against a crime victim and to state a denial of any such right on the record, Congress also holds the executive branch equally responsible for according victims' rights.

B. Executive obligations: best efforts to accord rights

Subsection (c) of the CVRA contains an unambiguous directive from Congress to the executive branch:

> 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 make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).[14]

Most often seen in contract law, "best efforts" are a good faith promise that a certain result will get as close as humanly possible; a high standard that if it is not met, is excusable.[15] On the continuum of effort, "best efforts" are the top tier. Distinguishable from the more relaxed terms "reasonable" and "good faith," Congress' use of "best efforts" here in the statute "fulfills its original intent to raise the bar for government officials who so clearly are the keepers of the culture."[16] This mandate is reiterated in the AG Guidelines, which state, "Department personnel engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims . . . are accorded the rights provided in [the CVRA]."[17]

The next paragraph of the subsection bestows a special duty on one group within the executive branch: the prosecutors. Subsection (c)(2) states "the prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the [CVRA] rights."[18] Whether counsel appears at the victim's own expense, or as a pro bono attorney, both counsel and victim have access to standing before the

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[13] 150 Cong. Rec. S10910-01, S10911 (2004).
[14] 18 U.S.C. § 3771(c)(1).
[15] *Best Efforts*, Black's Law Dictionary (2d ed. 1910).
[16] Symposium, *supra* note 12, at 615.
[17] AG Guidelines, *supra* note 1, at 57.
[18] 18 U.S.C. § 3771(c)(2).

court to assert rights.[19] The CVRA explicitly confers trial-level standing to victims and victims counsel with respect to the assertion of rights and sets forth an expedited mechanism for appellate review which will be discussed in section B, *infra*. As such, and because prosecutors do not personally represent crime victims, victims may choose to seek the advice of an attorney with respect to their rights under the CVRA at any point in the case. The Congressional Record explains:

> [T]his provision requires that the government inform the victim that the victim can seek the advice of the attorney, such as from the legal clinics for crime victims contemplated under this law . . . . This is an important protection for crime victims because it ensures the independent and individual nature of their rights.[20]

This obligation becomes particularly important with respect to the next subsection of the statute regarding enforcement. That is, if a victim or the government asserts a right that is subsequently denied by the district court, prosecutors may want to remind victims of their ability to seek the advice of counsel, if the victim has not already done so earlier in the case. For guidance on fulfilling this mandate, prosecutors can consult Article IV.H of the AG Guidelines.[21]

C. Prosecutor obligations: enforcing the statute

The last substantive subsection of the CVRA creates two "first responder" obligations for prosecutors: (1) asserting a right (or any combination thereof) for crime victims when a temporal event occurs in a courtroom that violates crime victims' rights (for example, an adverse procedural or substantive ruling by the judge); and (2) filing a motion for relief and writ of mandamus if the court rules against victims' rights. Each obligation will be addressed in turn.

First, the assertation of rights provision is stated clearly in the statute: "The crime victim or the crime victim's lawful representative, and the attorney for the [g]overnment may assert the rights described in subsection (a)."[22] A review of the Congressional Record reveals the intent behind the provision:

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[19] *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (allowing non-party newspaper to petition criminal court for protection of First Amendment rights); *United States v. McVeigh*, 106 F.3d 325, 334 n.7 (10th Cir. 1997) (explaining that non-party status was not a bar to mandamus review).
[20] 150 Cong. Rec. S10910-01, S10911 (2004).
[21] AG Guidelines, *supra* note 1, at 52.
[22] 18 U.S.C. § 3771(d)(1).

> This provision allows a crime victim to enter the criminal trial court during proceedings involving the crime against the victim, to stand with other counsel in the well of the court, and assert the rights provided by this bill. This provision ensures that crime victims have standing to be heard in trial courts so that they are heard at the very moment when their rights are at stake and this, in turn, forces the criminal justice system to be responsive to a victim's rights in a timely way.[23]

So if the defense moves to exclude crime victims from the courtroom during the trial proceedings, the crime victims, their representatives, or the prosecutors should assert the victims' right not to be excluded from any such public court proceeding.[24] This can be accomplished by an oral or written motion for relief and must be done in the district court in which a defendant is being prosecuted for the crime.[25] If no prosecution is underway, the crime victims' rights should be asserted in the district court where the crime occurred.

Once asserted, under subsections (b)(1) and (d)(3), the court must "ensure that the crime victim is afforded the rights" and "take up and decide any motion asserting a victim's right forthwith."[26] Then the court will either grant or deny the crime victim's requested relief. If the judge denies relief, depending on the circumstances, a motion for reconsideration may be appropriate before filing an emergency stay and writ of mandamus. Regardless, the judge must "clearly state on the record" the reasons for denying relief.[27] At this juncture, either a victim or their counsel may file an emergency stay and petition the court of appeals for a writ of mandamus.[28]

Independently, and regardless of whether the victim or victim's counsel seek a writ of mandamus, the prosecutor may also file an application for a stay while seeking Department authorization to petition the court of appeals.[29] The emergency stay ceases the jurisdiction of the district court while the appeals court takes up and decides the application.[30] Prosecutors "must obtain written authorization from the Solicitor General, in addition to the approvals required by that attorney's office or section."[31]

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[23] 150 Cong. Rec. S10910-01, S10912 (2004).
[24] 18 U.S.C. § 3771(a)(3).
[25] *Id.*
[26] *Id.* § 3771(b)(1), (d)(3).
[27] *Id.* § 3771(b)(1).
[28] *Id.* § 3771(d)(3).
[29] Fed. R. App. P. 8(a)(1)(A).
[30] 18 U.S.C. § 3771(d)(3).
[31] *See* AG Guidelines, *supra* note 1, at 74–75; *see also* 28 C.F.R. § 0.20(b) (determining

The AG Guidelines explain:

> To facilitate the authorization process, the attorney must prepare a written recommendation as to why appeal or mandamus is warranted in the case and transmit that recommendation to the attorney's appellate section for them to prepare their own recommendation for the Solicitor General. In cases involving appeals or mandamus requests from divisions other than the Criminal Division, the attorney or the division's appellate section should consult with the Criminal Division's Appellate Section. Because the authorization process will generally extend beyond the time period for filing a valid notice of appeal, the attorney should file a protective notice of appeal within the applicable time period even though it has not yet been authorized. If the Solicitor General declines to authorize an appeal, the attorney must then file a motion to voluntarily dismiss the appeal.[32]

Prosecutors should work with their supervisors to prepare the written recommendation for their appellate section and may consider including a reference to Article V.M. of the AG Guidelines, along with an overview of the CVRA enforcement process and detailed description of the violation.[33] If the prosecutor's appellate section agrees to seek authorization and the Solicitor General authorizes the appeal, the petition for mandamus should include an explanation of the right asserted, reasons stated for denial (attaching the written or oral decision of the district court judge), and relief sought.[34] Then, "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."[35] Within 72 hours, the court of appeals "shall take up and decide [the] application forthwith," and in "deciding such application . . . apply ordinary standards of appellate review."[36] The statute places a five-day limit on a stay in the district court proceedings.[37] In the end, if the appeals court denies the crime victim's relief sought, "the reasons for the denial shall be clearly stated on the record."[38]

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whether appeals will be taken to all appellate courts).

[32] *See* AG Guidelines, *supra* note 1, at 75.

[33] AUSAs may consult the Executive Office for U.S. Attorneys (EOUSA) regarding this process.

[34] *See* Fed. R. App. P. 21(a)(2)(A) (mandamus petition format).

[35] 18 U.S.C. § 3771(d)(3).

[36] *Id.*

[37] *Id.*

[38] *Id.*

All is not lost, however, if the circuit court denies mandamus relief. At this point, prosecutors have satisfied their obligations with respect to the rights that are the subject of the writ of mandamus by asserting those rights in the district court on behalf of the crime victim. Additionally, by filing a motion for a writ of mandamus after an adverse district court ruling, prosecutors contribute to the body of jurisprudence that assesses the potency of a relatively young statute. "Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. This provision ensures review and encourages courts to broadly defend the victims' rights."[39] In other words, federal prosecutors who assert rights and seek mandamus relief satisfy the Congressional intent for the CVRA to be more than just aspirational words in the legislative record.

III. Enforcement in action: an overview of data tracking motions for relief

After the passage of the CVRA, prosecutors and victim's counsel slowly began flexing their statutory enforcement muscles in both the district and appellate courts. Congressionally mandated annual reports on CVRA enforcement data indicate that victims' rights have been asserted at least one hundred times. Specifically, over the last two decades, prosecutors and victims or victims' counsel filed 111 motions for relief in the trial court and 86 motions for writs of mandamus with appeals courts.[40] Section 104(a) of the Justice for All Act of 2004 requires the Administrative Office of the U.S. Courts to report "the number of times that a right established in Chapter 237 of title 18, [U.S.] Code, is asserted in a criminal case and the relief requested is denied and, with respect to each such denial, the reason for such denial, as well as the number of times a mandamus action is brought pursuant to [c]hapter 237 of title 18, and the result reached." Since the CVRA's inception two decades ago, the average number of annual motions for relief in the district court is 6.1 motions and 4.7 annual mandamus appeals. The table below summarizes the annual report data.[41]

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[39] 150 Cong. Rec. S10910-01, S10912 (2004).

[40] Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260.

[41] *Crime Victims' Rights Report,* U.S. Courts, https://www.uscourts.gov/statistics-reports/analysis-reports/crime-victims-rights-report (last visited July 11, 2024).

Year	Criminal Cases Filed	District Court Actions	Mandamus Actions
2005	Not reported	1	2
2006	Not reported	0	7
2007	68,400	4	4
2008	No report	No report	No report
2009	76,200	12	10
2010	78,400	6	10
2011	No report	No report	No report
2012	71,300	9	7
2013	68,900	3	9
2014	62,700	12	8
2015	61,200	11	7
2016	59,000	6	4
2017	59,700	6	4
2018	87,100	5	3
2019	75,000	4	3
2020	59,800	7	4
2021	58,800	16	3
2022	54,900	9	1
TOTALS		**111**	**86**

Table 1: Summary of Annual Report Data

This data indicates that though victims' rights have been asserted in federal courts throughout the country, looking forward, prosecutors can—and should—play an important role in continuing that trend.

IV. One prosecutor's experience: asserting a crime victim's right in district court

As a former military prosecutor and a task-saturated Assistant U.S. Attorney (AUSA), I did not fully appreciate the mechanics of affording crime victims' rights or the enforcement mechanisms of the statute. Crime victims' rights in the military under article 6(b) did not become law until December 26, 2013.[42]

Committed to do better, I drilled down on the statute and reviewed not only my obligations to assert crime victims' rights in the district court, but the obligation to seek enforcement of those rights in the courts

[42] *See* 10 U.S.C. § 806b.

of appeal.[43] I also ensured I could appropriately track CVRA issues for court appearances by creating a checklist detailing my obligations in an "if/then" format. So, with open ears and a watchful eye, I waited for any opportunity to assert crime victims' rights in court. And then the day finally came.

In early February of 2020, a district court judge in the Western District of New York (WDNY) set a sentencing date of April 16, 2020, for a defendant who pleaded guilty to one count of enticing travel to engage in sexual activity.[44] Just a month later, the COVID-19 pandemic halted life as we knew it and triggered a series of events that led to my assertion of a crime victim's CVRA rights. First, on March 7, 2020, the Governor of New York declared a disaster emergency in the state of New York in response to COVID-19.[45] Next, on March 13, 2020, the U.S. President declared a national emergency in response to COVID-19.[46] Then, on March 13, 2020, the Chief Judge of the U.S. District Court for the WDNY (Chief Judge) issued a General Order encouraging judges to reduce personal appearances as much as practicable due to the COVID-19 pandemic.[47] The order specified that, after making specific findings, criminal proceedings may be adjourned for a period of 60 days.[48]

In short order, the Chief Judge issued two subsequent COVID-19 pandemic General Orders. The first continued all criminal jury trials;[49] the second halted all in-person felony sentencings due to the risk to public health and safety.[50] The defendant desired to keep the April 16, 2020 sentencing date because he had a parallel proceeding in state court and wished to be sentenced federally first. The Coronavirus Aid, Relief, and Economic Security Act order contained a provision that enabled court proceedings to be conducted by video conference (or by telephone if video conferencing is not reasonably available) where serious delay could harm the interests of justice and with the consent of the defendant.[51] Accordingly, and at the request of the defense, the district court judge kept the

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[43] 18 U.S.C. § 3771(c)–(d).
[44] *See* United States v. Torres-Acevedo, No. 1:19cr74 (W.D.N.Y. 2020), ECF No. 35.
[45] *See generally* N.Y. Comp. Codes R. & Regs. tit. 9, § 8.202 (2020).
[46] Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15,337 (Mar. 13, 2020).
[47] General Order, Court Operations Under the Exigent Circumstances Created by COVID-19 (W.D.N.Y. 2020).
[48] *Id.*
[49] General Order, Criminal Jury Trials Under the Exigent Circumstances Created by COVID-19 (W.D.N.Y. 2020).
[50] General Order, Video and Teleconferencing for Criminal Proceedings Under the CARES Act (W.D.N.Y. 2020).
[51] *Id.*

April 16, 2020 sentencing date but ordered the parties to appear virtually. Just one week before sentencing, the family of the minor victim contacted the Federal Bureau of Investigation victim specialist with a concern.

The minor victim and two adult family members who served as sources of support for the victim wanted to physically attend the sentencing in the courtroom. Due to the national pandemic emergency, however, both adult family members felt unsafe to be inside a courtroom. One family member was elderly and therefore following the Centers for Disease Control, state, and federal guidance to stay home. They hoped the court would adjourn the sentencing until the threat of the pandemic subsided. Making things even more complex, the minor victim did not reside with either family support member. The minor victim resided with another parent who provided love and care but apportioned blame to the child for getting into the defendant's vehicle. As such, the minor victim did not feel supported zooming into a sentencing proceeding alone and without the two family members who served as sources of support.

I consulted with defense to see if they would agree to an adjournment. They would not. I then filed a motion requesting an adjournment of the sentencing.[52] But I also asserted one of the victim's rights under the CVRA:

> While the nationwide response to the COVID-19 pandemic has brought about many changes in court operations, the [CVRA], codified in 18 U.S.C. § 3771, continues to apply to victims in all federal criminal prosecutions. While district courts continue to issue orders that may change the mode of communication, postpone proceedings, or curtail operations, district courts must also continue to "ensure that the crime victim is afforded [the victim's] rights." 18 U.S.C. § 3771(b)(1). A crime victim has the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding. 18 U.S.C. § 3771(a)(4); *see also* Fed. R. Crim. P. 60(a)(3).
>
> In this case, the minor victim is asserting [the victim's] right to be heard. The minor victim and two adult family support members wish to be physically present in the courtroom for the proceedings. However, due to the national pandemic emergency, the two family members feel it is unsafe for them and the minor victim to be physically present for the sentencing. One of the two family members is elderly, and is therefore

[52] *See Torres-Acevedo,* No. 1:19cr74, at ECF No. 48.

> following the Centers for Disease Control, state and federal guidance to stay home. The minor victim does not live with either family member who is supporting [the victim] at sentencing and therefore would have no support person with [the victim] even in a telephonic conference situation.
>
> The government is asking the Court to make a finding that the victim's physical presence would be "unreasonable" and "impractical" in light of the unprecedented global health crisis and due to safety concerns, and rule that the victim's right to be reasonably heard is outweighed by any potential harm to the interests of justice—in this case, the fact that the defendant is in primary state custody and desires an immediate sentencing.[53]

The defense moved in opposition. Two days later, the judge issued a summary text order denying my motion to adjourn the sentencing.[54] I moved for reconsideration two days after the order—re-asserting the crime victim's right to be reasonably heard and asserting additional rights to be treated with fairness and not to be excluded from the sentencing proceedings:

> The government re-asserts the victim's right to be reasonably heard in this case. 18 U.S.C. § 3771(a)(1). The government further asserts the victim's right to be treated with fairness and with respect for the victim's dignity and privacy. 18 U.S.C. § 3771(a)(8). Additionally, the government asserts the victim's right to the fullest attendance of the proceedings. 18 U.S.C. § 3771(b)(1). This includes the victim's desire to be physically present for the sentencing proceedings. It is not the victim's circumstances that are preventing her from coming to Court, it's the current state of worldwide emergency which prevents the victim and her family from attending. The President of the United States down to county administrators are telling citizens to stay home. The Court's present ruling is giving the victim and her family a Hobson's choice: Come to sentencing and risk your health and the health of your loved ones, or call in and give up your right to be reasonably heard and attend to the fullest possible extent.
>
> This is a truly unique case. While the government understands that the Court is making accommodations to have the victim

[53] *Id.*
[54] *Id.* at ECF No. 50.

> and her family call into the proceeding on a telephone conference line, the victim desires the fullest possible attendance, in this case, in-person attendance at a Court proceeding without risk to health and safety. Further, due to the pandemic, the victim is not with her mother or grandmother and would have to call into the Court by herself without adult supervision or support.
>
> It is the duty of the federal prosecutor to make her best efforts to see that crime victims are accord[ed] the rights . . . in the Crime Victim's Rights Act. 18 U.S.C. § 3771(c)(1). To put forth my best effort for this minor victim and her family, I respectfully file this motion for reconsideration.[55]

While I was drafting the motion for consideration, the minor victim obtained counsel who could then decide if mandamus relief would be appropriate. While my CVRA checklist reminded me earlier in the case to advise the victim that she was entitled to seek the advice of an attorney with respect to her rights as a crime victim, until this point, the advisement seemed hollow. I, however, was fully feeling the importance of this provision of the CVRA. Meg quickly linked me to Professor Judith Olin, Director, Family Violence and Women's Rights Clinic at University at Buffalo School of Law.[56] At the end of my motion for reconsideration, I flagged for the court the possible addition of a victim's counsel and asked for an emergency stay of the proceedings:

> At the present moment, the victim is seeking counsel to independently assert her rights under 18 U.S.C. § 3771(c)(2). The government has been advised that a writ of mandamus may be filed under § 3771(d)(3). As such, should the Court deny this motion for reconsideration, the government respectfully requests a stay of the sentencing proceedings on April 16, 2020 until the appeals court takes up and decides the application.[57]

The next day, the judge denied my motion and request for a stay.[58] Now that the writ of habeas corpus was signed and issued, the judge proceeded full steam ahead. By this point, Professor Olin and one of her clinical law students contacted me to say they represented the minor victim and filed a writ of mandamus with the court of appeals. In the nick

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[55] *Id.* at ECF No. 51.
[56] *See Faculty Directory: Olin, Judith*, Univ. at Buff. Sch. of L., https://www.law.buffalo.edu/faculty/facultyDirectory/olin-judith.html (last visited July 11, 2024).
[57] *See* Torres-Acevedo, No. 1:19cr74, at ECF No. 51.
[58] *Id.* at ECF No. 52.

of time, on April 16, 2020, the Second Circuit issued an order for a temporary stay of the district court proceedings pending the determination of the petition for a writ of mandamus by a three-judge panel.[59]

In the end, the Second Circuit denied the crime victims' writ finding the district court judge did not abuse the victim's discretion by continuing with remote sentencing proceedings. At first, I felt crushed. I wanted the victim to be able to attend sentencing in person, and I also hoped to contribute to the CVRA body of jurisprudence, but not on the losing end of things. The perceived loss, however, was just that—a perception. The actual feedback from the minor victim and family indicated a true win: The crime victim felt supported, heard, and most importantly, helped. And for me, and certainly for the district court judge, the entire experience was a profound validation that the crime victims' rights established by the CVRA are not symbolic or aspirational. Each assertion of rights on behalf of a victim advances the overall intent of the CVRA, even if the assertion is ultimately unsuccessful.

V. Conclusion

As the CVRA celebrates its twentieth anniversary, Department prosecutors should take seriously their obligation to assert victims' rights with temerity and seek appeals thoughtfully with the imprimatur of a statute that places victims' rights securely inside the federal criminal code. In this role, prosecutors serve as critical first responders for crime victims in the nation's district and appellate courts. The lasting legacy of the vigilant prosecutor is a rich body of jurisprudence that gives meaning to the CVRA and lights a path for future crime victims.

About the Author

Meghan Tokash is a trial attorney with the Criminal Section's Human Trafficking Prosecution Unit (HTPU) at the Department, Civil Rights Division. Before joining the HTPU, she served as an AUSA for the WDNY and was the supervisor of the district's Special Victim Unit. Before joining the Department, she was a Special Victim Prosecutor in the U.S. Army Judge Advocate General's Corps. She received her J.D. from the Catholic University of America Columbus School of Law and her LL.M. from Temple University Beasley School of Law. She serves as one of 25 members of the Department's Standing Committee for Victims' Rights and Services.

[59] *Id.* at ECF No. 56.

Updates to a Victim's Right to Confer

Mary L. Webb
Deputy Chief, Appeals and Legal Advice
Northern District of Georgia

Christie Smith Jones
Supervisory Victim Specialist
Northern District of Georgia

I. Right to confer

You are an Assistant U.S. Attorney (AUSA), and your supervisor asks you to work on one of the following four new investigations presented to your office for prosecution by a law enforcement agency:

- an investigation of a local drug dealer who sold a teenager pills laced with fatal quantities of fentanyl—the teenager died after taking one;
- an investigation of a serial armed robbery crew who robbed seven retail stores in your area, holding three to four employees at gunpoint during each robbery;
- an investigation of a Ponzi scheme alleged to have defrauded 200 people of their life savings; or
- an investigation of a cyberattack where thousands of people's sensitive financial information was stolen and then sold on the dark web.

Which investigation would you choose? These cases are quite different from one another in their subject matter and the criminal statutes used to charge them. You may have more or less of an interest in one of these possible cases based on the investigative techniques available to develop the evidence, the legal questions at issue, or the kinds of evidence that will be used to prove the case at trial. But as different as these four crimes are from one another, they have something important in common: People were harmed. This means they each have victims who will want to know what is happening with the case and are entitled to be a part of the process. So whichever investigation you decide to take on, you will have a duty to confer with these victims.

Who should participate in victim conferrals? When should you confer with the victims? And how do you provide victims with the "reasonable" right to confer? Court opinions in several recent cases,[1] including the widely reported litigation involving Jeffrey Epstein's victims,[2] and the 2022 revisions to the Attorney General Guidelines for Victim and Witness Assistance (AG Guidelines),[3] have reiterated the importance of victim conferrals in the federal criminal justice system. These sources provide guidance on how to answer those questions and ensure you are fulfilling duty to confer with victims. Along with planning an effective investigative and litigative strategy, at the outset of any case involving victims, you should develop a plan for effectively conferring with the victims. To aid you in developing a victim conferral plan that accords with recent guidance, this article will address the who, when, and what of victim conferral. This will help you to ensure that the victims in your cases are afforded this very important right.

II. Background: The Crime Victims' Rights Act and the Attorney General Guidelines for Victim and Witness Assistance

A crime victim's right to confer with the attorney for the government is enshrined in the Crime Victims' Rights Act (CVRA). The right to confer is 1 of 10 substantive rights afforded victims by the current version of the CVRA.[4] As one court has explained, the CVRA was one of several reform laws passed to address concerns that "courts, prosecutors and law enforcement officers too often ignored or too easily dismissed the legitimate interests of crime victims."[5] Thus, "the CVRA's passage in 2004 significantly expanded the rights of federal crime victims and placed an explicit duty on federal courts to ensure that victims are afforded those rights."[6] As the legislative history for the CVRA reflects, the CVRA was

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[1] *See* In re Ryan, 88 F.4th 614 (5th Cir. 2023); In re Wild, 994 F.3d 1244 (11th Cir. 2021) (en banc); United States v. Stevens, 239 F. Supp. 3d 417 (D. Conn. 2017).

[2] *In re Wild*, 994 F.3d 1244.

[3] U.S. Dep't of Just., The Attorney General Guidelines for Victim and Witness Assistance (2022) [hereinafter AG Guidelines].

[4] 18 U.S.C. § 3771(a).

[5] United States v. Turner, 367 F. Supp. 2d 319, 322 (E.D.N.Y. 2005) (citing President of the U.S., President's Task Force on Victims of Crime (1982); U.S. Dep't of Just., Attorney General Guidelines for Victim and Witness Assistance, app. D (2000)).

[6] U.S. Sent'g Comm'n, Off. of the Gen. Couns., Primer on Crime Victims' Rights 1 (2023).

"meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal [justice] process,"[7] and Congress passed the legislation in part to address the concern that "[v]ictims of crime often do not feel their voices are heard or that their concerns are adequately addressed in the judicial process."[8] Giving crime victims the right to confer with the prosecutor handling the criminal case is a critical component of ensuring victims' voices are heard and their concerns are addressed in the judicial process. This process helps to empower and support victims.

Additionally, the statute places obligations on prosecutors and other staff of the Department of Justice (Department), providing that "[o]fficers and employees of the Department[] 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)."[9]

As to the right to confer, the CVRA provides that "[a] crime victim has the following rights: . . . The reasonable right to confer with the attorney for the [g]overnment in the case."[10] The CVRA places the burden on federal courts to ensure that crime victims receive their rights under the statute, including the right to confer. Specifically, the statute sets forth that "[i]n 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)."[11] As will be discussed later in this article, if a federal court determines it needs to take action to ensure victims have been afforded their right to confer in your case, you may be in a difficult situation.

But beyond the guarantee to victims of the reasonable right to confer and placing an obligation on the courts and executive branch to afford victims that right, the statute is largely silent on when and how that conferral should take place. Courts have noted that the sparse details in the statute regarding what constitutes a conferral or how to implement that right may be a product of the CVRA's origins as a proposed constitutional amendment that became a statute instead (after it became clear in 2004 that the constitutional amendment could not pass).[12] Thus, it falls

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[7] 150 Cong. Rec. S4237, S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).
[8] H.R. REP. No. 108-711, at 3 (2004), *reprinted in* 2004 U.S.C.C.A.N. 2274, 2276.
[9] 18 U.S.C. § 3771(c)(1).
[10] *Id.* § 3771(a)(5).
[11] *Id.* § 3771(b)(1).
[12] *See* Fed. Ins. Co. v. United States, 882 F.3d 348, 358 (2d Cir. 2018) ("One notable consequence of the rapid transition from constitutional amendment to Congressional statute is the Act's relatively sparse technical detail.").

to the Department to fill the implementation gap with the AG Guidelines. The AG Guidelines provide direction to Department employees on how to fulfill their obligation to provide victims a reasonable right to confer, and the 2022 AG Guidelines include important direction on the timing of when prosecutors should engage in conferral with victims.

Further, in several cases since the CVRA's passage 20 years ago, federal courts have explained the meaning and scope of the conferral right contained in the CVRA. These cases have provided additional guidance regarding conferring with victims that prosecutors would be wise to consider when starting work on a case.[13]

III. Why conferring with victims matters

Aside from the legal obligation to confer set forth above, prosecutors and Department staff should realize that conferring with victims is crucial to achieve the Department's goal of "the reasoned exercise of prosecutorial authority and . . . the fair, evenhanded administration of the federal criminal laws."[14]

While all 10 rights afforded victims by the CVRA are important, the conferral right stands out because it provides a two-way street between a crime victim and a lawyer for the United States. That is, during a conferral, a victim will both receive information from the lawyer for the United States and will potentially provide information to that attorney.[15] This is important for three reasons.

First, conferring with victims throughout the criminal justice process is critical to achieving a central purpose of the CVRA: that victims' voices be heard, and their concerns addressed in the criminal justice system. "The fact that they are consulted and listened to provides [crime victims] with respect and an acknowledgement that they are the harmed individual, and this in turn may contribute to the psychological healing of the victim."[16]

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[13] *See In re Ryan*, 88 F.4th 614; *In re Wild*, 994 F.3d 1244; In re Dean, 527 F.3d 391 (5th Cir. 2008); *Stevens,* 239 F. Supp. 3d 417; Jordan v. Dep't of Just., 173 F. Supp. 3d 44 (S.D.N.Y. 2016); United States v. Rubin, 558 F. Supp. 2d 411 (E.D.N.Y. 2008).

[14] U.S. Dep't of Just., Justice Manual 9-27.001.

[15] *See* AG Guidelines, *supra* note 3, at 62 ("Ordinarily, prosecutors should use such conferences to obtain relevant information from the victim and convey appropriate, nonsensitive or public information to the victim. The conference provides victims the opportunity to express their views, keeping in mind that prosecution decisions are within the prosecutor's discretion.").

[16] *Stevens*, 239 F. Supp. 3d at 422 (internal punctuation omitted) (quoting Douglas E. Beloof et al., Victims in Criminal Procedure 478 (Carolina Acad. Press 2005)).

Second, providing victims with their reasonable right to confer may also serve as a bridge for delivery of other CVRA rights, and mandatory services afforded victims under federal law.[17] For example, conferral with a victim about a potential plea agreement can serve as a valuable opportunity to talk with victims about their losses for purposes of restitution.[18] During such conferrals, you might find out that the victim will be significantly disadvantaged by a proposed defense continuance due to an upcoming change in their personal life, thereby prompting you to oppose the continuance in furtherance of their right to proceedings free from unreasonable delay.[19] You might also learn information about a newt danger they are facing, which could prompt you to request modified conditions of release in furtherance of their right to be reasonably protected.[20]

Third, beyond their status as potential witnesses to the crime, victims have valuable information and input to share with the prosecution team. Conferring with victims at all appropriate points during a prosecution means that the government will be best positioned to advocate for a just outcome in its prosecutions. The Justice Manual directs that "[i]n determining whether it would be appropriate to enter into a plea agreement, the attorney for the government should weigh . . . [t]he interests of the victim, including any effect upon the victim's right to restitution."[21] And the Justice Manual further explains:

> Some victims may view a plea as denying them the opportunity to see the defendant answer for his crimes, while others may be grateful for a faster resolution of a difficult phase in their lives. In any event, it is useful for the prosecutor to understand the victim's desires with regard to a plea, and to explain to the victim the impact of any plea on the victim and on the defendant.[22]

Conferral regarding potential resolutions can also assist the victim in understanding the criminal justice process better and provide the victim with validation and a sense of empowerment. Typically, this results in a victim who is more satisfied with the criminal justice process and with the final decisions made by the prosecutor. A district court has explained:

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[17] *E.g.* 34 U.S.C. § 20141 (containing mandatory victim services); 18 U.S.C. § 3663A (detailing mandatory restitution to victims of certain crimes).
[18] 18 U.S.C. § 3771(a)(6) ("The right to full and timely restitution as provided in law."); *see* AG Guidelines, *supra* note 3, at Art. V.H.
[19] *Id.* § 3771(a)(7) ("The right to proceedings free from unreasonable delay."); *see* AG Guidelines, *supra* note 3, at Art. V.I.
[20] *Id.* § 3771(a)(1); *see* AG Guidelines, *supra* note 3, at Art. V.C.
[21] U.S. Dep't of Just., Justice Manual 9-27.420.
[22] *Id.* at cmt. L.

> Although the victim has no veto over the prosecutor's choices, the choices that a prosecutor makes will be better informed if the prosecutor learns and tries to understand the perspective of the person most deeply affected by a crime. Often enough, victims may urge the prosecutor to deal severely with defendants who have hurt them. Some victims, however, may urge leniency for reasons of mercy, compassion, or forgiveness. Whatever the views that a victim may have, the integrity of a criminal prosecution is stronger if the prosecutor learns about these views if possible before making major decisions in a case.[23]

In addition, this discussion ensures that victims' rights are met and that victims are part of the process. When victims feel heard, they feel more comfortable with the process and the prosecutors' decisions.

Because the reasonable right to confer is so critical for victims and their participation in the process, prosecutors should include victim conferral as a part of their investigation and prosecution plan from the outset, in accordance with the AG Guidelines. The result will be better-informed victims who are satisfied that their interests are considered important to the criminal justice process.

IV. Who must confer?

As an initial matter, it is important to note that the CVRA specifically phrases the right to confer as a "reasonable right to confer with the attorney for the [g]overnment in the case."[24] Although victim–witness coordinators and agency partners are key components in delivering the rights required under the CVRA, Victims' Rights and Restitution Act (VRRA), and other statutes, there is simply no substitute for prosecutors conferring with victims.

The case of *United States v. Stevens* is instructive.[25] In *Stevens*, the district court rejected the proposed plea agreement in a fentanyl overdose case. While the victim–witness coordinator had spoken with the deceased victim's mother about the plea agreement and provided her with information regarding the timing of sentencing, the prosecutor had never spoken with the victim's family before appearing at the guilty plea hearing.[26] In rejecting the plea agreement, the district court emphasized that a prosecutor's duty to speak with victims could not be fully "outsourced" to

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[23] *Stevens*, 239 F. Supp. 3d at 423.
[24] 18 U.S.C. § 3771(a)(8).
[25] 239 F. Supp. 3d at 423.
[26] *Stevens*, 239 F. Supp. 3d at 418–19.

victim–witness coordinators:

> The professionals who have served in that role [as victim–witness coordinators] are [] dedicated and caring people who strive to do their job well. But they are not the prosecutor. They are not the decisionmaker. The CVRA does not contemplate that prosecutors will outsource all "victim" communications to coordinators or other administrative personnel. To the contrary, among the rights guaranteed to victims by the CVRA is the "reasonable right to confer with the attorney for the [g]overnment in the case."[27]

The AG Guidelines similarly direct that "[p]rosecutors shall make their best efforts to confer with victims."[28] The AG Guidelines provide that "the AG Guidelines use the word 'shall' where 'shall' appears in a statute or when the policy is mandatory. The use of the term 'shall' means that the relevant guideline is mandatory, though room may remain for individual judgment in determining how best to comply with the guideline."[29] The AG Guidelines further direct that "such conferences should be conducted in coordination with the relevant investigative agency."[30]

Of course, there will be times when victim–witness staff or investigative agency staff have contact with victims without the prosecutor involved. The takeaway of *Stevens* is not to undermine the role of the victim–witness coordinator; instead, it emphasizes that the prosecutor maintains the ultimate responsibility to be a key part of the process. As the *Stevens* court summarized: "If a prosecutor walks into a courtroom and realizes that he or she has never personally spoken or corresponded with the crime's victim, then that should be a sign that the victim's interests have probably not been fully served and respected."[31]

Thus, while a prosecutor need not confer every time a term in a possible agreement with a defendant changes, the prosecutor must use their best efforts to confer with victims before making major case decisions as discussed below. A prosecutor who can fully convey the victims' views in court because they personally conferred with the victims, is a prosecutor who is well positioned to convey the victims' views and to address possible concerns of the court in this regard.

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[27] *Id.* at 421 (quoting 18 U.S.C. § 3771(a)(5)).
[28] AG Guidelines, *supra* note 3, at 62.
[29] *Id.* at 1.
[30] *Id.* at 62.
[31] *Stevens*, 239 F. Supp. 3d at 425.

V. When should conferral happen?

While the CVRA's legislative history shows that the right was meant to be "expansive" and to apply to any "critical stage" of criminal justice proceedings, the statute is silent about exactly when this right attaches or when the conferrals should occur.[32] Four federal court cases have provided explanation and guidance to prosecutors on when the conferral right attaches under the statute. And since 2022, the AG Guidelines give added direction on the required timing of conferrals. We address the lessons learned from each court case and the direction from the AG Guidelines in turn below.

Aside from the lack of direct contact between the prosecutor and the victim's family, the district court in *Stevens* also faulted the government for the timing of its conferral regarding the government's proposed plea agreement.[33] Specifically, the court noted that "the prosecution did not consult with the victim's mother or family about the anticipated terms of the plea agreement before entering in the agreement with the defendant. The victim's mother learned about the plea agreement only after the fact from a victim–witness coordinator at the [USAO]."[34] And the court critically noted that while the government may have had strong reasons for the plea agreement it entered, "that is not the issue at this point. The question for now is did the [g]overnment have a good or defensible reason for not speaking with the victim's family about its intentions before sealing a plea deal with the defendant? I do not think so."[35] The court explained that "[i]n my view, the CVRA's right to confer with the prosecutor requires at the least that a prosecutor take reasonable steps to consult with a victim before making a prosecution decision that a prosecutor should reasonably know will compromise the wishes and interests of the victim."[36]

In *In re Dean*, the Fifth Circuit Court of Appeals similarly found that the victims' rights under the CVRA had been violated.[37] The *Dean* decision stemmed from a 2005 explosion at an oil refinery operated by BP Products North America Incorporated (BP) that tragically killed 15 peo-

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[32] 150 Cong. Rec. S4237, S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) ("Section 2, (a)(5) provides a right to confer with the attorney for the [g]overnment in the case. This right is intended to be expansive. For example, the victim has the right to confer with the [g]overnment concerning any critical stage or disposition of the case.").
[33] *Stevens*, 239 F. Supp. 3d at 421.
[34] *Id.* at 420–21.
[35] *Id.* at 421.
[36] *Id.* at 422.
[37] 527 F.3d at 394.

ple and injured more than 170 others.[38] "The Department[] investigated the possibility of federal criminal violations."[39] In 2007, before filing any criminal charges in the case and three years after the CVRA's passage, the Department sought an ex parte order regarding the procedures it wanted to follow under the CVRA.[40] Essentially, the government sought and the district court granted permission for the government to delay notifying victims that it was going to enter a plea agreement with BP until after the plea agreement was signed.[41] The Department gave two reasons for the delay. First, it claimed that advance public notification to the victims was impracticable because of the "large number of victims." Second, the government claimed that "on account of the extensive media coverage, any public notification of a potential criminal disposition resulting from the government's investigation of the explosion would prejudice BP and could impair the plea negotiation process and may prejudice the case in the event that no plea is reached."[42] The procedures requested allowed the government to delay notifying the victims until after the plea agreement was signed but proposed that the actual change of plea hearing "would be delayed to ensure that victims could receive notice and fully exercise their rights to attend and be heard."[43] The district court approved this plan.[44] The government then filed a criminal information under seal, signed a plea agreement with BP two days later, unsealed the criminal information the next day, announced the plea agreement, and began mailing notices to the victims.[45] Many victims then began appearing in the case and objected to the plea agreement.[46] The district court moved forward with the change of plea hearing and allowed "[a]ll victims who wished to be heard, personally or through counsel . . . to speak."[47] The victims essentially raised three challenges to the plea agreement: "the fine was too low; the probation conditions were too lenient; and certain CVRA requirements had been violated."[48] When the district court denied the victims' request that it reject the plea agreement, the victims

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[38] *Id.* at 392.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 393 (cleaned up).
[43] United States v. BP Prod. N. Am. Inc., No. CRIM. H-07-434, 2008 WL 501321, at *2 (S.D. Tex. Feb. 21, 2008).
[44] *In re Dean*, 527 F.3d at 393.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*

petitioned for mandamus in the Fifth Circuit Court of Appeals.[49]

While the Fifth Circuit ultimately denied the request for mandamus, the court found that the procedures used violated the CVRA.[50] In denying the mandamus request, the Fifth Circuit explained that it did so based on the posture of the case, in which the district court allowed victims to be heard at the guilty plea hearing regarding their objections to the plea agreement.[51] The district court denied the victims' request to reject the plea agreement based on the CVRA violations, but reserved ruling on other challenges to the plea agreement raised by victims.[52] The Fifth Circuit denied mandamus despite finding the CVRA had been violated based on this unique posture, and expressed that it was "confident . . . that the conscientious district court will fully consider the victims' objections and concerns in deciding whether the plea agreement should be accepted" and that it was "confident that the district court will take heed that the victims have not been accorded their full rights under the CVRA and will carefully consider their objections and briefs as this matter proceeds."[53] Thus, the Fifth Circuit appears to have relied particularly on the fact that the victims "were allowed substantial and meaningful participation at the [guilty plea] hearing," and that the district court had an opportunity to consider their views before deciding whether to accept the plea.[54] The court rejected the idea that the number of victims was a reason for the delayed notification. The court explained that "where there were fewer than two hundred victims, all of whom could be easily reached, it is not reasonable to say that notification and inclusion were 'impracticable.'"[55] The court was also critical of the attempt to avoid media and publicity:

> [i]t is true that communication between the victims and the government could, in the district court's words, "impair the plea negotiation process," if, by using the word "impair," the court meant that the views of the victims might possibly influence or affect the result of that process. It is also true (and we cannot know whether the court considered) that resourceful input from victims and their attorneys could facilitate the reaching of an agreement. The point is that it does not matter: The Act gives the right to confer. The number of victims here did not render notice to, or conferring with, the victims to

[49] *Id.*
[50] *Id.* at 395.
[51] *Id.* at 392–93.
[52] *Id.*
[53] *Id.* at 396.
[54] *Id.* at 395.
[55] *Id.*

> be impracticable, so the victims should have been notified of the ongoing plea discussions and should have been allowed to communicate meaningfully with the government, personally or through counsel, before a deal was struck.[56]

Thus, like in *Stevens*, the *Dean* court emphasized that the government's consideration of victim input is important to reaching a just result, and victims should be allowed to communicate "meaningfully" with the government "before a deal [is] struck."[57]

In *In re Wild*, the Jeffrey Epstein investigation described above, the government again was criticized for failing to confer with victims before reaching a deal.[58] As summarized by the Eleventh Circuit's en banc opinion, the victim asserted that "when federal prosecutors secretly negotiated and executed an [NPA] with Epstein in 2007, they violated her rights under the CVRA—in particular, her rights to confer with and to be treated fairly by the government's lawyers."[59] The litigation in *Wild* focused on the question of when the right to confer attaches and whether the CVRA provides for a private right of action that crime victims can use to bring a claim to enforce their CVRA rights when no federal charges are filed. Nonetheless, the en banc opinion noted concerns about the government's communication with victims in connection with the execution of the NPA:

> [t]o be clear, the question before us is not whether Jeffrey Epstein was a bad man. By all accounts, he was. Nor is the question before us whether, as a matter of best practices, prosecutors *should* have consulted with Ms. Wild (and other victims) before negotiating and executing Epstein's NPA. By all accounts—including the government's own—they should have.[60]

Thus, the *Wild* case shows the importance of fulfilling the spirit of the CVRA by using victim conferral to provide victims with a meaningful and substantive opportunity to be heard rather than just technical compliance with legal requirements.[61] As stated earlier, conferral ensures that victims are part of this important process in the case.

Finally, in *in re Ryan,* decided in 2023, the Fifth Circuit Court of Appeals again weighed in on a situation where the government negoti-

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[56] *Id.* (internal citations omitted).
[57] *Id.*
[58] *In re Wild*, 994 F.3d.
[59] *In re Wild*, 994 F.3d at 1247.
[60] *Id.* at 1269.
[61] *In re Wild*, 994 F.3d.

ated a resolution before conferring with crime victims. In that case, the Department investigated Boeing regarding 737 Max plane crashes, and it ultimately filed a criminal information for conspiracy to defraud the United States and simultaneously filed a deferred prosecution agreement (DPA) between Boeing and the government.[62] The victims asked the district court to modify the DPA and sought mandamus when the district court denied their request. Although the Fifth Circuit denied the mandamus request as premature at that phase of the case, the Fifth Circuit noted:

> As in Dean, the victims' families "should have been notified of the ongoing [DPA] discussions and should have been allowed to communicate meaningfully with the government . . . before a deal was struck." That is particularly true if the deal, in ultimate outcome *as approved by federal court*, means no company, and no executive and no employee, ends up convicted of any crime, despite the Government and Boeing's DPA agreement about criminal wrongdoing leading, the district court has found, to the deaths of 346 crash victims.[63]

In *Stevens*, the district court emphasized the importance of consulting with victims before executing a plea agreement in a charged case. In *Dean*, the Fifth stated it was a violation of the right to confer not to consult with victims before negotiating a pre-charge plea agreement. In *Wild*, the en banc Eleventh did not say whether there was a pre-charge conferral right that was violated but noted that the failure to confer with victims before negotiating a NPA was not a best practice. And in *Ryan*, the Fifth Circuit stated the government has an obligation to confer with victims before entering a DPA. The consistent point throughout these cases is that prosecutors should confer with victims *before* reaching an agreement with the defendant to resolve a case.

And the revised AG Guidelines now require prosecutors to do so as a matter of policy, so even if the case law is unclear whether the CVRA requires conferral pre-charge, the AG Guidelines mandate pre-charge conferral. The AG Guidelines direct that "[p]rosecutors shall make their best efforts to confer with victims *in advance of* and about major case decisions."[64] The AG Guidelines then list examples of those major case decisions: "[NPAs], [DPAs], pretrial diversion agreements, voluntary dismissals, agreements or recommendations in favor of release of the ac-

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[62] *In re Ryan*, 88 F.4th at 619.
[63] *Id.* at 626–27. (internal citations omitted) (quoting *In re Dean*, 527 F.3d at 395).
[64] AG Guidelines, *supra* note 3, at 62 (emphasis added).

cused pending judicial proceedings . . . and plea agreements."[65] Notably, the 2022 AG Guidelines specifically and clearly direct that this duty to confer with victims regarding plea agreements applies whether the plea agreement is negotiated "pre- or post-charge."[66]

The AG Guidelines mandate that prosecutors "shall use their best efforts" to confer before making a "major case decision." And the AG Guidelines emphasize that this conferral before a major case decision should be a "meaningful opportunity" for the victims to "offer their views *before* a decision or agreement is reached."[67]

Consistent with other considerations, the AG Guidelines set forth that

> Department personnel shall make their best efforts to accord to victims the rights set forth in the [CVRA], 18 U.S.C. § 3771(a), as early in the criminal justice process as is feasible and appropriate, including prior to the execution of a non-prosecution agreement, [DPA], pretrial diversion agreement, or plea agreement. . . . [I]n those limited instances when it is not feasible or appropriate to accord rights earlier, Department personnel shall commence their best efforts to accord rights when charges are initiated by complaint, information, or indictment.[68]

The AG Guidelines therefore recognize that prosecutors must confer early and often to provide a meaningful opportunity for victims to be heard in the criminal justice process. Of course, the AG Guidelines further clarify that "[t]he reasonable right to confer does not obligate the prosecutor to confer with victims every time a term in a possible agreement with a defendant changes."[69] And there are various limitations to the obligation to confer, such as where conferral would jeopardize public safety or impact the integrity of the investigation.[70] Consult with your investigating agency when determining that one of these limitations to the conferral right applies. While circumstances such as a large number of victims in botnet cases may make the conferral obligation challenging to administer, your first reaction should be to "use technology and be creative, with the goal of providing rights and services to the greatest extent possible given the circumstances and resources available," and "Depart-

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[65] *Id.*
[66] *Id.*
[67] *Id.* at 63 (emphasis added).
[68] *Id.* at 14.
[69] *Id.* at 63.
[70] *See id.* at 63 (listing "rare exceptions in which conducting the conference would be unreasonable").

ment personnel should coordinate between victim assistance personnel at the investigating agency and the prosecuting office in cases with large numbers of victims to maximize resources and effectively communicate with victims."[71]

VI. What is a "reasonable" right to confer?

We have established that a prosecutor must assume ultimate responsibility for conferring with victims, and they must do so before major case decisions, even in uncharged cases. But what does a reasonable right to confer mean?

As the AG Guidelines explain, "[t]he conference provides victims the opportunity to express their views, keeping in mind that prosecution decisions are within the prosecutor's discretion."[72] Thus, the AG Guidelines emphasize that "the victim's right to confer shall not be construed to impair prosecutorial discretion."[73] In essence, the CVRA "gives crime victims a voice but not a veto."[74]

As the 2022 AG Guidelines direct, the conferences should ordinarily be used "to obtain relevant information from the victim and convey appropriate, nonsensitive or public information to the victim."[75] This suggests that, in addition to discussing decisions or proposed agreements with victims, conferences are an opportunity to check in with the victim about their views on matters such as charges, resolution, and sentencing. Conferences can also include an exchange of information by listening to victims' questions, providing them with appropriate information, and explaining why you may not be able to provide all the information they may be seeking.[76]

But while prosecutors should use the conferences to "convey appropriate, nonsensitive or public information to the victim,"[77] the right to confer is limited by Department personnel's obligations to protect the integrity of an investigation, ensure the security of persons, and provide for

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[71] *Id.* at 24.
[72] *Id.* at 62.
[73] *Id.* at 62 (citing 18 U.S.C. § 3771(d)(6)).
[74] *Turner*, 367 F. Supp. 2d at 331.
[75] AG Guidelines, *supra* note 3, at 62.
[76] *See id.* at 9 (explaining that while victims are not a Department attorney's client, "Department policy and federal victims' rights laws require Department lawyers to inform crime victims of their rights and the statutory basis for those rights; provide information about the legal process, consistent with federal statutes and Department policy; and meaningfully consult with them at critical junctures of the case").
[77] *Id.* at 62.

prosecutorial discretion.[78] The reasonable right to confer cannot override these other obligations. Further, the right to confer "does not authorize an unbridled gallop to any and all information in the government's files."[79] Nor should sensitive information be disclosed in the conferral process, such as personally identifiable information, classified information, information reasonably likely to compromise investigative sources or methods, proprietary information, information under seal, or other information protected by law.[80]

Another important point to remember is that "Department personnel shall not provide legal advice to victims, either as part of [victim] conferences or otherwise."[81] Thus, while Department attorneys should provide appropriate information to victims and answer the questions they can, they also "must remain mindful that victims may misunderstand the Department attorney's role, and thus, must swiftly correct any misunderstandings that might arise."[82] Indeed, in the case of unrepresented victims, Department attorneys should proactively "inform victims that Department attorneys are not the victims' attorney," and Department attorneys should "advise victims of their right to seek legal counsel as set forth in the CVRA."[83] When interacting with represented victims, Department attorneys must be mindful of the rules of professional conduct governing ex parte contact with represented persons and should consult with their Professional Responsibility Officer or the Professional Responsibility Advisory Office.[84]

Nor does a reasonable right to confer provide crime victims the ability to "dictate the manner, timing, or quantity of conferrals."[85] In *Jordan v. Department of Justice*, a victim, with counsel, contacted both the Southern District of New York (SDNY) and the Eastern District of Pennsylvania United States Attorneys' Offices and federal law enforcement agencies regarding her allegations that she was a victim of a large fraud

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[78] *Id.* at 8.

[79] *Rubin*, 558 F. Supp. 2d at 425; *see also* In re Kenna, 453 F.3d 1136 (9th Cir. 2006) (denying request for mandamus when district court found CVRA did not require disclosure of defendant's presentence report); United States v. Ingrassia, No. CR-04-0455, 2005 WL 2875220 at *17 (E.D.N.Y. Sept. 7, 2005) (noting that the CVRA "no more requires disclosure of the pre-sentence report to meet its remedial goal of giving crime victims a voice in sentencing than it does disclosure of all discovery in a criminal case to promote the goal of giving victims a voice at plea proceedings").

[80] AG Guidelines, *supra* note 3, at 62–63.

[81] *Id.* at 62.

[82] *Id.* at 9.

[83] *Id.*

[84] *See id.* at 8–11.

[85] *Jordan*, 173 F. Supp. 3d at 52–53.

scheme.[86] The victim's counsel met with a prosecutor from the SDNY for an hour.[87] The victim and her attorneys also had meetings with federal law enforcement.[88] When the victim requested additional meetings with prosecutors that were denied, she filed a petition to enforce, *inter alia*, her right to confer with the prosecution under the CVRA.[89] The district court rejected her claim and found that "SDNY prosecutors fulfilled their obligation when an AUSA received and reviewed the documents she submitted, met with her attorney, and listened to her allegations."[90] The district court flatly rejected the contention additional meetings were required under the CVRA given that the matter was still in an investigative stage.

But there is no one-size-fits-all answer to what is reasonable for the "manner, timing, or quantity of conferrals." This will depend on the type of case, the number of victims, and any sensitive or nonpublic aspects of the case. Do not assume that having numerous victims, like in *Dean*, means that conferral can be overlooked. Instead, as the 2022 AG Guidelines direct, in large or unusual conferral situations, "[d]epartment personnel should use technology and be creative, with the goal of providing rights and services to the greatest extent possible given the circumstances and resources available."[91] And prosecutors should "coordinate between victim assistance personnel at the investigating agency and the prosecuting office in cases with large numbers of victims to maximize resources and effectively communicate with victims."[92] Victim–witness staff and investigative agency partners can help with finding creative solutions and devising the best possible way under the circumstances of the particular case to provide conferral and engage with victims early and often. Consult with others and make decisions throughout the case that fulfill the victims' reasonable right to confer.

VII. Conclusion

Having considered the who, when, and what of victim conferral, in any case involving victims, we suggest you keep in mind the following tips:

- Plan for how you will handle victim conferrals from the beginning

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[86] *Id.* at 47–48.
[87] *Id.*
[88] *Id.*
[89] *Id.* at 46.
[90] *Id.* at 52.
[91] AG Guidelines, *supra* note 3, at 24.
[92] *Id.*

of your investigation. Remember, conferral is necessary under the 2022 AG Guidelines in advance of every major case decision, such as dismissals, release, pretrial diversion, plea bargains, NPAs and DPAs. Especially in cases with large numbers of victims, make development of a victim conferral strategy a core component of your case plan so that you can easily and meaningfully engage in the conferral process throughout the case.

- Remember that conferral can be a two-way street. Truly listen to victims' input and assess what the input means in your case. Also, plan to share appropriate information with victims without compromising your case. Remember that you are the criminal justice expert, and victims look to you for guidance on the process, what to expect, what their rights are, and what resources are available to them. Taking time to include the victim and give the victim a voice provides respect, understanding and acknowledgment.
- Do not work alone. Use a team effort for conferral and have victim–witness and agency partners help you to devise and implement victim conferral sessions and make them effective.
- In large and unusual cases, try to think of creative ways of still fulfilling conferral obligation rather than seeking to avoid it. This could include notices, weblinks, press releases, magazine or newspaper advertisements, and telephone or virtual conferral sessions. Use the Department website for large cases.[93] Seek court approval in advance where needed and consult with your supervisors and investigating agencies.

About the Authors

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[93] *Information for Victims in Large Cases*, U.S. Dep't of Just., https://www.justice.gov/information-victims-large-cases (last visited July 12, 2024).

justice process. She has presented both locally and nationally on topics related to victim assistance, children who have been abused, gang cases, large-victim cases, and best practices for working with friends and family members of homicide victims.

Courthouse Facility Dogs as a Resource in Victim-Centered Prosecutions

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> "A positive experience with the criminal justice system can play a central role in victims' ability to begin to recover from crime and witnesses' desire to participate in the process."[1]

I. Introduction

The Attorney General Guidelines for Victim and Witness Assistance (AG Guidelines) direct Department of Justice (Department) personnel to follow a victim-centered, trauma-informed approach.[2] This includes recognizing signs of trauma in victims and witnesses and acknowledges that reactions to trauma can vary greatly.[3] In addition, it is guided by six key principles: safety; trustworthiness and transparency; peer support, collaboration and mutuality; empowerment, voice and choice; and cultural issues.[4] Most importantly for Department personnel, a victim-centered approach requires integrating its principles and values into the work of the Department, including prosecuting and trying cases. A certified facility

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[1] U.S. Dep't of Just., The Attorney General Guidelines for Victim and Witness Assistance, at i (2022).
[2] *Id.* at 16.
[3] *Id.*
[4] Substance Abuse & Mental Health Servs. Admin., SAMHSA's Trauma & Just. Strategic Initiative, SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach 10–11 (2014).

dog is a tool that can empower a trauma survivor's feelings of safety and control and help that trauma survivor participate in the criminal justice process.[5] Facility dogs are working dogs that are specially chosen because of their calm demeanor and ability to work in a high-stress environment, thereby decreasing the risk of creating legal issues.[6] The dog is a graduate of an accredited assistance dog organization.[7]

Drawing on the experience of victim–witness specialists, Assistant U.S. Attorneys (AUSAs), and a Federal Bureau of Investigation (FBI) facility dog handler, this article will provide a series of four brief case studies describing how FBI Crisis Response Canines—a specialized type of facility dog—have been used in federal prosecutions in the District of Maine.[8] The final section of this article lists practical considerations and suggestions based on lessons learned in those prosecutions. In each case, the facility dog was a component of a trauma-informed process that treated the victims with dignity and respect. The facility dog helped build relationships and was an ever-present tactile tool that reinforced a feeling of safety and assisted self-regulation for the victims. Above all, the facility dog was part of a victim-centered approach tailored to each victim and each case.

II. Facility dogs

Witnesses testifying in court about a traumatic event can benefit from the presence of a trained facility dog in the courtroom. According to James C. Ha, Ph.D., a Research Associate Professor and a Certified Applied Animal Behavioralist at the University of Washington, "Participating in courtroom or other legal proceedings . . . is arguably one of the most stressful events that most people experience. . . . [T]he presence of an appropriately bred and trained dog can significantly reduce the anxiety associated with these experiences, thereby improving the efficiency and quality of the legal process."[9] Research shows that human–animal interactions can have both psychological and physiological benefits. "Such

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[5] While the term "facility dog" is used throughout the remainder of the article for brevity, it is implied that the facility dog is certified.

[6] *Facility Dogs*, Courthouse Dogs Found., https://courthousedogs.org/dogs/facility-dogs/ (last visited Sept. 3, 2024).

[7] Accreditation of these nonprofit organizations is under the auspices of Assistance Dogs International, which has set the standards in this industry since 1987.

[8] The term "facility dog" will be used when referring to the FBI's Crisis Response Canines.

[9] James C. Ha, *Dogs Reduce Stress: Scientific Research Confirms that the Presence of Dogs Reduces Stress in Humans*, Courthouse Dogs Found., https://courthousedogs.org/legal/dogs-reduce-stress/ (last visited July 15, 2024).

studies have shown that the mere presence of a friendly animal can result in decreased anxiety and lessened sympathetic nervous systems arousal. Benefits include reduced blood pressure, lowered heart rate, a decrease in depression, increased speech and memory functions, and heightened mental clarity."[10]

While dogs are generally not allowed in federal buildings, there is substantial precedent courts have relied on to allow facility dogs to enter and remain in the courthouse buildings to aid victim testimony.[11] In fact, courthouses and victim advocacy centers across the country use therapy and facility dog programs to provide victims emotional support through trial.[12]

The presence and use of dogs in the courtroom is a rapidly evolving issue of law. Several federal district courts have allowed the use of a facility dog to assist victims at trial either by being in the courthouse during trial in a separate room or at the witness stand during the victim's testimony. Recently, a district court in the Middle District of Florida entered an order granting the United States' motion to allow use of a facility dog during a jury trial involving a minor victim.[13] The district court found the facility dog would provide emotional support to the child victim and assist the child victim in communicating, which thereby promoted the ends of justice.[14] The district court stated that to mitigate any prejudice to the defendant, it would use procedures to minimize the facility dog's presence before the jury and would, at the defendant's discretion, "instruct the jury not to draw any inference in favor or against either side due to the dog's presence."[15] This case was one of several that Maine relied on in advancing its use of facility dogs.

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[10] Debra S. Hart-Cohen, *Canines in the Courtroom*, GPSolo, July/Aug., 2009, at 54; *see also* United States v. Jackson, 535 F. Supp. 3d 809, 820 (N.D. Ind. 2021) (listing benefits such as "decreased anxiety, reduced blood pressure, lower heart rate, decrease in depression, increased speech and memory functions, and heightened mental clarity").

[11] *See* 41 C.F.R. § 102-74.425.

[12] Hart-Cohen, *supra* note 6, at 54–56.

[13] United States v. Durning, No. 6:22-cr-102, 2023 WL 3931949, at *2, (M.D. Fla. June 9, 2023) (finding "the use of a facility dog to be equally, if not more, neutral than the use of an adult attendant, which [child victim] is entitled to when testifying" pursuant to 18 U.S.C. § 3509(i)).

[14] *Id.*

[15] *Id.*; *see also* United States v. Deschambault, No. 2:19-cr-187, 2023 WL 4974003, at *14–15 (D. Me. August 3, 2023) (permitting the use of a facility dog in the courthouse in a conference room for an 18-year-old victim during the trial).

III. Four case examples

In several cases over the last 10 years, the U.S. Attorney's Office (USAO) for the District of Maine has partnered with the FBI's Victim Services Division to use a facility dog. This article will give four case examples in which a facility dog was used in prosecutions in the District of Maine.[16] Two of the cases were Project Safe Childhood prosecutions with child victims who testified at trial, another was a civil rights prosecution, and the most recent was a Violence Against Women Act prosecution involving interstate domestic violence.

In all four cases, the facility dog was part of trial preparation, and in one case, the dog stayed with the victim during testimony. In each of the four prosecutions, the lead agent, the FBI Crisis Response Canine Handler, and the USAO victim–witness specialist engaged with the victim and family members using a victim-centered and trauma-informed approach from the beginning of the case. The investigation included trauma-informed interview techniques and the victims were provided with victim-centered supports and services. The facility dog was a continuation of the effort to fulfill obligations under the Crime Victims' Rights Act, including treating victims with dignity. When it became clear that the case was going to trial, each prosecution team sensitively inquired how the witnesses felt about working with a facility dog, and in the case of the child witness, a guardian and family members were included in that conversation. Part of the discussion included a full explanation of how the facility dog would be used and what to expect. Each witness consented to using a facility dog before the first introduction, and at the conclusion of the trial, all four witnesses reported that the presence of the dog had helped them testify and feel safe.

A. Two Project Safe Childhood prosecutions

Case #1

The investigation that led to the first prosecution involved an early collaboration with state and local law enforcement in an interstate child sex abuse investigation. The primary FBI case agent worked diligently to establish a relationship of trust with the victim's mother. That diligence, and the commitment of the various investigative agencies to focus on the needs of the victim, led to a decision to avoid charging multiple cases in different states and instead pursue a single federal prosecution in the District of Maine. Ultimately, the defendant was charged in 2016 with

[16] Given the details of this article, the four cases will remain anonymous out of respect for the victims.

having transported the child between Maine and another state with the intent to engage in sexual activity with the child.

The victim and the victim's family had a complicated history of trauma and violence. The defendant terrorized the victim and the victim's family to the point that domestic violence and abuse had been a consistent part of the victim's life. The prospect of having to testify in the defendant's trial weighed heavily on the victim and the victim's mother.

As the trial date approached, the prosecution team considered using a facility dog to help support the victim and the victim's mother. At that time, the district had little experience with facility dogs and had never used one to support a prosecution. The FBI's Victim Services Division and one of its facility dog handlers provided invaluable guidance and advice to the team and described the role a facility dog could play in the case. After confirming with the FBI that a facility dog would be available for the trial and ensuring that the victim and the victim's mother would appreciate that dog's presence, the prosecution team included the facility dog in every meeting with the victim and the victim's mother. The effect was remarkable. The dog was attentive and provided a calming presence for the victim and family members when they struggled with difficult witness preparation sessions.

The facility dog was present in the witness preparation rooms and in the courthouse hallways during trial but never in the courtroom. Although the court had granted the government's request to allow the dog in the courthouse, the judge made clear that the jury should not see the dog during the trial as the court was concerned that this could prejudice a party. The facility dog and its handler accompanied the child victim to the courtroom door when the victim was called to testify and waited for the victim outside the courtroom to greet the victim when the testimony was complete.

The jury convicted the defendant, and the facility dog and his handler returned to Maine for the sentencing. This time, the court allowed the facility dog into the courtroom to sit at the feet of the child sexual assault victim during their powerful and emotional statement to the court.

Case #2

The next case in which a facility dog was used was a child exploitation trial. This prosecution involved a defendant who had sexually abused a minor victim to create child sexual abuse material. The videos the defendant produced were found on his cell phone after investigators seized the phone.

From the beginning of this case, the victim and the victim's parent were reluctant to meet with law enforcement. Some of the victim's family members had prior criminal justice involvement, and they had difficulty

trusting the criminal justice system. By the time of trial, the victim had become a parent and was experiencing complicated family dynamics.

The trial preparation was thoughtful and victim-centered, and the prosecution team was always mindful of the victim's school and child-care obligations. Despite the team's efforts, the approaching trial weighed heavily on the victim, and the victim became increasingly anxious about the prospect of testifying. The prosecution team confirmed the availability of a facility dog and talked with the victim about some of the benefits of having a facility dog present. The victim was grateful and positive about having a facility dog present for support. The prosecutor filed a motion asking the court to permit the use of a facility dog in the courthouse but not in the courtroom; and the court granted the motion without objection.

During the trial, the facility dog was a trusted chaperone for the victim. The dog waited with the victim in a conference room, and he accompanied the victim down the hall to the courtroom. During the victim's testimony, he waited with his handler outside the courtroom and immediately approached the victim after the victim's testimony was completed. The prosecution team noticed the dog's impact on the victim and the victim's family. When the facility dog was around, the victim was less anxious. The dog's presence and interactions prompted comfortable and spontaneous communication between the victim, the victim's family members, and the prosecution team.

B. A civil rights prosecution

Case #3

Two perpetrators violently attacked two Black men in separate incidents. In each attack, the men hurled racial slurs at their target, striking him in the head. Both victims suffered serious injuries that required emergency surgery and hospitalization. The victims suffered lasting physical, emotional, and financial consequences.

The potential benefits of an FBI facility dog became clear during trial preparation. The trauma ran deep for these victims and the impact of the crime was multilayered. Two of the victims moved to Maine expecting it to be a safe place for them and their families. Their sense of safety was shattered by these violent and senseless crimes. One victim had not reported the crime at all and was only identified and located after an extensive investigation by the FBI. This victim remained reluctant throughout the investigation and prosecution. The second victim struggled during interviews and trial preparation to describe the attack and the trauma and injury it had caused. Both victims were distrustful of the criminal justice system and skeptical that officials within the system would believe them.

The prosecution team met with each victim to discuss how a facility dog might provide helpful support during trial. One of the victims firmly declined the offer for cultural reasons and did not want to be near the facility dog. The other victim met with the dog and handler and decided that they would like the facility dog to be present for trial preparation and to be outside the courtroom while waiting to testify. The victims testified on separate days so their preferences about the facility dog would be honored.

It was apparent to the victim–witness specialist that the dog calmed and comforted the victim that wanted the dog present. The facility dog offered this victim a companion in the courthouse who asked nothing in return and expected nothing. This victim may have dreaded testifying and having to recount the violent attack, but looked forward to seeing the gentle facility dog, whose presence reduced this victim's trauma and stress. The victim also appreciated that the facility dog was often at the center of others' attention, redirecting their focus away from the victim.

C. A kidnapping and interstate violation of protective order prosecution

Case #4

In this case, the perpetrator kidnapped the victim, with whom he had a relationship, and forced the victim to accompany him as he drove through several states. Throughout the trip, the perpetrator drank heavily and told the victim that they were going to Canada where the victim would die. The perpetrator used a scarf to tie the victim to the vehicle's gear shift. When the victim tried to escape, the perpetrator struck the victim. On the interstate in southern Maine, the victim tried to open the door while the car was traveling at high speed. When the perpetrator pulled over, the victim attempted to remove the vehicle's keys and broke the key in the ignition. The victim ran along the highway with the defendant in pursuit. At least five concerned motorists called 911, which alerted Maine State Troopers to the area. Troopers later found the perpetrator in the woods with the aid of a K-9.

While detained on the federal kidnapping charge, the defendant tried to convince the victim to recant their statement to police and to stop cooperating with the investigation. In a recorded phone call from the holding facility, the defendant instructed the victim to write to prosecutors, informing them that the victim was not kidnapped, and that the victim wanted the charges dropped. During the call, the defendant told the victim that if the letter was not written, he would kill himself because he could not face years in prison.

Trial preparation sessions were consistently difficult for the victim.

The victim was extremely reluctant to testify. The extended time between charging and trial—mostly due to the pandemic and delays caused by defense motions—increased the victim's stress and anxiety. During a particular trial preparation session, the victim discussed how meaningful it had been for the victim to know that a Maine State Trooper K-9 had located the defendant after he kidnapped and assaulted the victim. This led to a conversation about the possibility of having a facility dog present for the trial. Fortunately, the FBI facility dog and handler were available for the scheduled trial dates.

The victim thought it would be helpful to have the facility dog present while testifying, and the prosecutors moved to allow the use of a facility dog in and out of the courtroom. In the motion, the government provided the facility dog's qualifications, training, and experience. The government's proposal, which the court ultimately accepted without objection from the defense, permitted the facility dog to sit at the witness's feet during testimony.

At the government's suggestion, the court asked the following question during voir dire: "Do you have strong feelings about service dogs or allergies to dogs that would prevent you from being present in a room with a service dog, or would prevent you from being fair and impartial if a witness were to use a service dog during testimony?"

During the trial, the facility dog's handler brought the dog into the courtroom before the jury entered. The dog remained quietly at the feet of the victim throughout the testimony, and it is likely that none of the jurors knew the dog was in the courtroom at all. It was clear to the prosecution team, however, that the dog's presence helped the victim to regulate emotions and remain present when testifying about the extensive trauma that the victim experienced.

IV. Practical considerations and suggestions when using a facility dog

Using a facility dog requires careful planning and preparation. Based on the experience in the District of Maine and guidance provided by the FBI's Victim Services Division, we have compiled the following list of considerations and suggestions when using a facility dog in a federal prosecution.

- The FBI has limited facility dog resources, and those resources may not always be available for a trial or proceeding. Before discussing the possibility of using a facility dog with a victim or witness, talk with an agent and the FBI's Victim Services Division to ensure that the facility dog is available. If availability is limited, USAOs

should contact the Executive Office for U.S. Attorneys (EOUSA) to explore potential alternatives.

- Even if the prosecution team believes that a facility dog would be appropriate to use with a particular victim or witness, the final decision is up to the victim or witness. This empowers the victim's feelings of choice and control and also accounts for potential allergies or phobias that may impact the victim. The prosecution team should take the time to explain to the victim or witness exactly how the facility dog will be used.
- Introduce the facility dog as early as possible to build rapport with the facility dog team before court proceedings. This includes during preparation and victim meetings.
- If the facility dog will be used in the courthouse, talk to the U.S. Marshal Service (court security) and the clerk's office as soon as possible about the plan and address any concerns raised.
- Provide notice to defense counsel as early as possible that the prosecution team anticipates using a facility dog and share its plan to address any defense concerns. In the District of Maine's cases, this consultation resulted in defense attorneys not objecting to requests to use facility dogs in the courthouse and courtroom.
- Consult with EOUSA's before submitting the motion to grant facility dog support. Consult with EOUSA for potential resources.
- Obtain permission from the court to bring the facility dog into the building. Even if the court is unwilling to permit the use of a facility dog in trial, the prosecution team may still be able to support the victim or witness with a facility dog outside the courtroom, in meetings at the USAO, or during sentencing.
- The FBI's facility dog handlers are experts and consummate professionals. Discuss with them the roles of the various participants on the prosecution team and defer to the handler on any questions about how the facility dog should be used.
- To avoid discovery issues, make certain the victim or witness does not meet with the facility dog and dog handler outside the presence of a member of the prosecution team. As always, interviews and trial preparation must be done with a case agent present.
- While proposing that a facility dog be present in the courtroom with the witness, consider proposing a voir dire question like the one noted in the case study described in subsection C, *infra*.

- When proposing that the facility dog be present in the courtroom for testimony in cases, consider having the dog enter the courtroom and lay down on the floor near the witness stand before the jury enters, and leave the courtroom after the witness completes testimony. This requires that the court be willing to take breaks after the witness testifies, but it also mitigates concerns about the jury's exposure to the facility dog and possible prejudice.
- In cases in which the facility dog was present in the courtroom and observable by the jury, consider submitting a proposed jury instruction regarding the facility dog. The court may want to provide an instruction to the jury before the witness takes the stand or as part of the general instructions at the conclusion of the trial.

Implementing these and other considerations when using a facility dog can and should enhance the experience of vulnerable victims and witnesses in the federal legal process without causing undue disruption of the court proceedings they are participating in.

V. Conclusion

The District of Maine USAO's experience using facility dogs has clearly demonstrated how these dogs can benefit certain victims. As noted in the AG Guidelines, a trauma-informed approach involves an understanding of the vulnerabilities and experiences of trauma survivors and requires prosecution teams to consider how best to respond to that trauma with resources that empower victims with control and choice. In adopting a trauma-informed approach, a facility dog can be a powerful resource and source of support for victims.

VI. Other resources

Several articles published in recent years document the effects of service-trained facility dogs used in the forensic process, such as in forensic interviews and court testimony. The studies are limited but suggest that facility dogs provide measurable benefits to vulnerable victims and witnesses.[17]

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[17] *See* Kayla A. Burd & Dawn E. McQuiston, *Facility Dogs in the Courtroom: Comfort Without Prejudice?* 44 Crim. Just. Rev. 515 (2019); Cheryl A. Krause-Parello et al., *Examining the Effects of a Service-Trained Facility Dog on Stress in Children Undergoing Forensic Interview for Allegations of Child Sexual Abuse*, 27 J. Child Sexual Abuse (2018); Robert H. Pantell, *The Child Witness in the Courtroom*, 139 Pediatrics (2017); Elizabeth Spruin et al., *Facility Dogs as a Tool for Building Rapport and Credibility with Child Witnesses*, 62 Int'l J. L., Crime & Just. (2020); Diane Walsh et al., *Job-Related Stress in Forensic Interviewers of Children with Use*

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of Therapy Dogs Compared with Facility Dogs or No Dogs, 5 Front. Vet. Sci. (2018).

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Working with Victims and Witnesses in a Language They Understand

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I. Introduction

In the U.S. Attorney's Office (USAO) community, these two underlying premises are key to the mission and work of the USAOs: (1) When working with victims and witnesses, communication and rapport are important; and (2) Victim and witness involvement in federal investigations and trials is necessary. But what happens when an attorney and the victim or witness do not speak the same language?

USAOs, like other components of the Department of Justice (Department), have an obligation to provide language access services to make their programs and services accessible to the communities they serve. This article discusses that obligation and its importance and implications. It examines both challenges and promising practices in providing language access services to victims and witnesses.

II. Background on language access obligations

On August 11, 2000, the President issued Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency."[1] Executive Order 13166 requires federal agencies to make reasonable efforts to assess and address the needs of otherwise eligible persons seeking access to federally conducted programs and activities who, due to limited

[1] Exec. Order No. 13166, 65 Fed. Reg. 50121 (Aug. 16, 2000).

English proficiency, cannot fully and equally participate in or benefit from those programs and activities.[2] In addition, the Rehabilitation Act of 1973 requires federal agencies to take appropriate steps to ensure their communications with individuals who are deaf or hard of hearing (D/HOH), blind, or have speech disabilities are as effective as their communications with others.[3] Section 504 of the Rehabilitation Act prohibits discrimination based on disability in federally assisted and federally conducted programs and activities.[4] Section 508 of the Rehabilitation Act requires federal agencies and departments to give employees and members of the public who are disabled access to information comparable to the access available to others, subject to certain limitations.[5]

Since Executive Order 13166, the Department has issued memoranda and enforcement guidance to ensure the implementation of language access requirements with respect to the Department's programs and activities throughout the federal government.[6]

On August 15, 2023, the Department issued an updated version of its Language Access Plan (LAP).[7] The LAP implements the Attorney General's November 2022 Memorandum for Heads of Federal Agencies, Heads of Civil Rights Offices, and General Counsels Regarding Strengthening the Federal Government's Commitment to Language Access by providing important guidance to Department components and staff as to how to appropriately identify communication and language needs for individuals and communities, and provide high-quality language assistance services, including translation and interpretation.[8]

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[2] *Id.*

[3] 29 U.S.C. § 791.

[4] *Id.* § 794.

[5] *Id.* § 794d.

[6] Enforcement of Title VI of the Civil Rights Act of 1964, 65 Fed. Reg. 50123 (Aug. 16, 2000); Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455 (June 18, 2022); Memorandum from the Att'y Gen. on Language Access Obligations Under Executive Order 13166 to the Heads of Dep't Components (June 28, 2010); Memorandum from the Att'y Gen. on Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166 to the Heads of Fed. Agencies, Gen. Couns., and C.R. Heads (Feb. 17, 2011); Memorandum from the Att'y Gen. on Improving the Department's Efforts to Combat Hate Crimes and Hate Incidents to Dep't of Just. Emps. (May 27, 2021); Memorandum from the Att'y Gen. on Strengthening the Federal Government's Commitment to Language Access to the Heads of Fed. Agencies, Heads of C.R. Offs. and Gen. Couns. (Nov. 21, 2022).

[7] U.S. Dep't of Just., Off. for Access to Just., Language Access Plan (2023).

[8] Memorandum from the Att'y Gen. on Strengthening the Federal Government's Com-

The Executive Office for U.S. Attorneys (EOUSA) has corresponding U.S. Attorneys' Policies and Procedures (USAPPs) governing language access (Language Access USAPP). The Language Access USAPP establishes the policies and procedures and provides guidance to ensure individuals with limited English proficiency (LEP) and individuals who are D/HOH, blind, or have speech disabilities have meaningful access to the services and information that EOUSA and USAOs provide.

The LAP and the Language Access USAPP further the commitment of the Department, EOUSA, and USAOs to provide timely and accurate communications with the public, which is essential to the Department's mission to uphold the rule of law, to keep our country safe, and to protect civil rights.[9] We are committed to advancing equity for all, including historically underserved individuals with LEP, through meaningful language access to Department benefits, information, and services in accordance with Executive Orders 13166,[10] 13985,[11] 14031,[12] and 14091.[13]

III. Language access matters: the importance of providing meaningful language access

For any individual, exercising their rights in the court system is a daunting process. Now imagine the person speaks little or no English and is D/HOH, blind, or has speech disabilities. USAO personnel interacting with victims and witnesses will likely encounter such individuals. According to the 2018–2022 American Community Survey, about 21.7% of the nation aged five and older speak a language other than English at home, and nearly half of those speak English less than "very well."[14] About 13.4% of the population reported a disability.[15] Of that percentage, about 6.2% have a hearing or visual disability.[16]

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mitment to Language Access to the Heads of Fed. Agencies, Heads of C.R. Offs. and Gen. Couns. (Nov. 21, 2022).

[9] *Organization, Mission and Functions Manual*, U.S. Dep't of Just., https://www.justice.gov/doj/organization-mission-and-functions-manual#:~:text=The%20mission%20of%20the%20Department,and%20to%20protect%20civil%20rights (last visited Aug. 9, 2024).

[10] Exec. Order No. 13166, 65 Fed. Reg. 50121 (Aug. 16, 2000).

[11] Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

[12] Exec. Order No. 14031, 86 Fed. Reg. 29675 (Jun. 3, 2021).

[13] Exec. Order No. 14091, 88 Fed. Reg. 10825 (Feb. 22, 2023).

[14] Press Release, U.S. Census Bureau, Most American's Speak Only English at Home or Speak English "Very Well" (Dec. 7, 2023).

[15] Cornell University, 2022 Disability Status Report: United States 6 (2022).

[16] *Id.*

Personnel at USAOs may have both planned and unexpected interactions with persons with LEP and individuals who are D/HOH, blind, or have speech disabilities. USAO personnel may unexpectedly encounter persons with LEP and those who are D/HOH, blind, or have speech disabilities who contact the USAO to provide or request information, whether in person, by mail or email, or by telephone. Victim–witness staff and Assistant U.S. Attorneys (AUSAs) most commonly interact with such individuals when these individuals are victims of, or witnesses to, crimes. Interactions may also occur in civil matters, including where the USAO is enforcing civil rights statutes. Finally, the USAO's engagement events, websites, press releases, and social media, have the potential to reach and impact persons and communities with LEP and those who are D/HOH, blind, or have speech disabilities. Each of these interactions provides an opportunity for meaningful communication, but also risks information being lost, distorted, or misunderstood.

In addition, under the Crime Victims' Rights Act, federal crime victims have certain rights, including the right of timely notice of any public court proceeding or parole proceeding involving the crime or any release or escape of the accused; the right to be reasonably heard at public court proceedings; the right to be informed in a timely manner of any plea bargain or deferred prosecution agreement; and the right to be treated with fairness and respect for their dignity and privacy.[17] To exercise these rights, the victim must be able to understand their rights and USAO personnel must be able to accurately communicate information to the victim. If the victim has LEP or is D/HOH, blind, or has a speech disability, the victim likely will need the assistance of an interpreter to understand victims' rights, follow court proceedings, and access information. Even absent our language access obligations, the notions of fairness, equity, and common-sense underly this conclusion.

To illustrate the importance of meaningful language access, especially for those who are victims or witnesses of crime, we point to a recent case. In November 2023, a federal jury convicted defendant, Kim Taylor, of 26 counts of providing false information in registering and voting, 3 counts of fraudulent registration, and 23 counts of fraudulent voting.[18] To perpetrate her scheme to generate votes for her husband, who ran for both the U.S. House of Representatives and Woodbury County Supervisor in Sioux City, Iowa, Taylor personally approached dozens of Sioux City residents in the Vietnamese American community who had limited ability to

[17] 18 U.S.C. § 3771.
[18] United States v. Taylor, 5:23-cr-04004 (N.D. Iowa Jan. 11, 2023).

read or speak English.[19] She submitted or caused others to submit dozens of voter registrations, absentee ballot request forms, and absentee ballots containing false information.[20] The assistance of interpreters was crucial to the investigation and eventual prosecution. Quality interpreter assistance helped the prosecution team prepare several victim–witnesses for testimony at trial. For example, during trial preparation, the interpreter helped bridge the cultural divide between the victim–witnesses and the prosecution team by relaying the stories of the victims' immigration experience, which the prosecutors later conveyed to the jury to show the human side of the victim–witnesses.[21] As a result of the excellent work of the interpreter, and an FBI linguist providing meaningful language access, victims' tensions were eased, and the government successfully prosecuted the defendant.[22]

This is just one example of the importance of providing meaningful language access to victims and witnesses. Providing meaningful access may look different in each situation. Under the LAP, the term "meaningful access" is defined as

> language assistance that results in accurate, timely, and effective communication at no cost to the individual with LEP needing assistance. Meaningful access denotes access that is not significantly restricted, delayed, or inferior as compared to programs or activities provided to English-proficient individuals.[23]

According to the LAP, translation is "the process of converting written [or typed] text from a source language into an equivalent written text in a target language as fully and accurately as possible while maintaining the style, tone, and intent of the text, while in light of differences of culture and dialect."[24] Interpretation is "the act of listening, understanding, analyzing, and processing a spoken communication in one language (source language) and then faithfully orally rendering it into another spoken language (target language) while retaining the same meaning."[25] The LAP further notes that "[f]or individuals who are D/HOH, this can include

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[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] U.S. Dep't of Just., Off. for Access to Just., Language Access Plan 19 (2023).
[24] U.S. Dep't of Just., Off. for Access to Just., Language Access Plan: Appendix A (2023).
[25] *Id.*

understanding, analyzing, and processing a spoken or signed communication in the source language and faithfully conveying that information into a spoken or signed target language while retaining the same meaning."[26]

In practical terms, this means victims and witnesses should have the same opportunities to access, understand, and share information as others regardless of whether they have LEP, are D/HOH or blind, or have a speech disability. Providing meaningful language access is not without its challenges, but there are also some promising practices that can help make the goal a reality.[27]

IV. Challenges and promising practices in providing meaningful language access

Looking at a situation from the perspective of the victim or witness helps us understand the challenges and promising practices in providing meaningful language access. From the victims' or witnesses' perspectives, they suddenly find themselves involved in a legal proceeding they likely do not understand, which operates in a language they also do not fully understand. We ask victims or witnesses to trust us even though the victims or witnesses do not know us and might even have a reason to distrust the government or the legal system. The difficulty of establishing trust with victims and witnesses is exacerbated when we cannot easily communicate with each other.

USAOs should take the following steps to provide language access. Initially, USAOs should designate a Language Access Coordinator (LAC) to coordinate their overall language access efforts. Employees may go to the LAC with questions and for assistance identifying resources. Having such a liaison in the USAO provides a point of contact for employees who encounter language access needs. Additionally, USAOs should track the following information: the number of individuals who may need language assistance, how those individuals are encountered, their language needs, and how those needs were addressed. Tracking this information helps USAOs assess the particular language assistance needs in the community they serve and plan their language access resources to ensure that they provide appropriate language access services. For example, as a result of tracking, a USAO might discover that certain notices or other information should be made available in a particular language. Moreover, if USAO personnel are likely to have continued contact with an individual with

[26] *Id.*

[27] These challenges and promising practices are collected from USAO personnel who work with victims, experience these challenges, and implement these practices.

language access needs, they should document those needs and share them with appropriate personnel to ensure the language needs continue to be met through the duration of the contact.

An initial challenge is identifying when victims or witnesses need language access services. Sometimes victims or witnesses notify the USAO personnel handling the case that they will need an interpreter, while other times case agents will be aware of the need and notify USAO personnel. There are also times when the victims or witnesses may not say anything about their need for an interpreter and USAO personnel may discover the communication barrier during their initial interactions with the victims. All USAOs should prominently display a notice informing victims or witnesses that they may request language access services to facilitate communication with victims, witnesses, and others who meet at the USAO.

Language competency varies with the circumstances. A victim–witness may be proficient enough in English to carry on an initial conversation yet lack the vocabulary to understand legal terminology or complex issues. Moreover, proficiency may decline under stressful circumstances, such as testifying in court. As noted in the Attorney General Guidelines for Victim and Witness Assistance, "Individuals who possess English language proficiency in certain types of interactions may find that their English language skills falter when faced with a stressful or unfamiliar situation (such as a law enforcement encounter, legal proceeding, or medical encounter)."[28] Thus, USAO personnel should have an interpreter available when there is any question of English proficiency.[29]

In addition, even victims or witnesses who have enough familiarity with English to carry on a basic conversation may not be able to convey the full depth of their experience or background without the assistance of an interpreter. If language barriers limit full discussion with a victim–witness, crucial information may be missed. For example, in the voting fraud prosecution case discussed at the beginning of this article, the FBI linguist overheard a conversation during a court recess between the defendant's mother and a witness who was still in the process of testifying. The defendant's mother was telling the witness about the worst-case sentencing scenarios for her daughter in an attempt to gain sympathy for her daughter and obstruct justice. The FBI linguist relayed the conversation to the prosecution team and the Court issued a stern reprimand warning about the potential consequences of further contact with victims

[28] U.S. Dep't of Just., The Attorney General Guidelines for Victim and Witness Assistance 48 (2022).
[29] *See id.*

and witnesses by anyone on behalf of the defendant.

Regardless of how staff members become aware of a victim's or witness' language needs, they must engage in reasonable efforts to provide meaningful language access services. As outlined in the LAP, Department policy dictates its "Offices, Bureaus, Divisions (components), and staff are required to plan for, and take reasonable steps to provide, timely, accurate, and meaningful access to all programs or activities conducted both by the Department and by entities receiving federal financial assistance from the Department for individuals with LEP."[30]

Providing meaningful language access services often requires USAO personnel to engage with victims or witnesses to ensure that the USAO provides appropriate interpreters. For example, just because a victim is Spanish speaking does not mean every Spanish interpreter will speak the correct variation or dialect of the Spanish language. An AUSA handling a child exploitation case encountered this problem when a Spanish-speaking victim testified about whether the defendant should be released from custody, and the bilingual case agent alerted the AUSA that the interpreter made a significant mistake because of different regional Spanish dialects. Similarly, a victim who is D/HOH may not be proficient in American Sign Language and may need a different interpreter for meaningful language access assistance.

Tools available to assist with this process include "I Speak" language identification cards or posters.[31] "I Speak" cards and posters help identify the primary language of individuals with LEP by using short phrases (for example, "I speak") in a number of different languages that an individual can use to indicate the language they speak. "I Speak" posters may also inform individuals that they may ask for interpretation services (for example, "Free Interpretation Services are available. Please ask at the front desk for assistance."). These cards and posters can aid USAO staff in determining the language the individual speak to secure the appropriate interpreter. It may also be feasible to use a telephonic interpreter to assist with an initial inquiry or to have a qualified multilingual staff member speak with the victim to obtain information about language access needs.

Given the kind of work the USAO community does, some interpreters may have limited familiarity with the vocabulary and setting of the case. A promising practice is to have a call or meeting with the interpreter in advance of the interview or other event to answer questions, give ter-

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[30] U.S. Dep't of Just., Off. for Access to Just., Language Access Plan 1 (2023) (internal citations omitted).

[31] *See Translation,* U.S. Dep't of Just., Ltd. Eng. Proficiency, https://www.lep.gov/translation#toc-language-identification-and-i-speak-cards (last visited July 16, 2024) (providing sample language assistance notices, posters, and "I Speak" cards).

minology, and ensure the interpreter will be able to provide meaningful language service in the particular context. Providing meaningful language access services may require this advance interview with the interpreter or the rescheduling of events or proceedings to ensure an appropriate interpreter is available.

Time is often a challenge in many aspects of providing meaningful language access. There may be a limited amount of time to obtain an interpreter or translation. Due to time constraints, it may be tempting to ask the victim's family member or friend, or a colleague who may speak the language, to interpret or to translate. The LAP addresses these circumstances and provides that, absent exigent circumstances,[32] Department staff should avoid using the following individuals to provide language assistance services:

- family members (including children);
- neighbors;
- friends;
- acquaintances or bystanders;
- opposing parties; and
- adverse witnesses or victims.[33]

In addition, if the USAO uses multilingual staff as "translators, interpreters, or who communicate 'in-language' with individuals with LEP and/or who are [D/HOH]" should take reasonable steps to ensure that the multilingual staff member is competent to do so and have the resources necessary to meet the Department's requirements.[34]

Considerations of competency for qualified multilingual staff may include:

- Demonstrated proficiency in and ability to communicate information accurately in both English and the other language.
- Using the appropriate mode of interpreting (for example, consecutive, simultaneous, or sight translation).
- Accurately interpreting or translating materials and rendering meaning using appropriate terminology particular to a component's program or activity into the language used by the individual with LEP.

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[32] USAO staff should consult EOUSA policies and their designated Language Access Coordinator regarding what constitutes exigent circumstances.
[33] U.S. Dep't of Just., Off. for Access to Just., Language Access Plan 7–8 (2023).
[34] *Id.* at 7.

- Understanding and following Department and other applicable confidentiality, impartiality, and ethical rules in compliance with Department expectations.
- Understanding and maintaining the role and observing professional standards for interpreters, translators, or multilingual staff.
- Understanding the appropriate use of current technologies for providing language assistance, including the proper review and use of machine translation.[35]

Even if exigent circumstances require reliance on a temporary interpreter, any information obtained must be confirmed as accurate after the exigency ends.

AUSAs and Victim–Witness Coordinators working on cases involving a victim who has LEP, is D/HOH, blind, or has a speech disability will need to allocate extra time, patience, and persistence to complete tasks. Early and ongoing collaboration is key to ensuring the Department is providing meaningful language access, as is coordination with the LAC regarding available language access resources.

Once a staff member identifies and obtains a certified or qualified interpreter, there is the issue of confidentiality. Interpreters will hear and receive confidential information and personal information from victims or witnesses, who may be hesitant to provide information because they do not know the interpreters, and their hesitation may inhibit the necessary rapport between the victims and USAO personnel. A promising practice for USAOs is to use confidentiality agreements with every interpreter and keep a copy of the agreement in the file. Confidentiality agreements reassure the victim, witness, and USAO staff involved in the case that the interpreter is aware of the confidential nature of the matter and has agreed to abide by the confidentiality provisions. This is extremely helpful when working with a victim or witness who may be weary of disclosing information to someone other than the AUSA or Victim–Witness Coordinator.

Another side of the confidentiality challenge is where there is a risk the victim and interpreter know each other or have minimal degrees of separation. For example, in small geographic areas or in close-knit communities within a particular area, there may be additional confidentiality concerns. Even in a large metropolis, if the victim or witness speaks a non-prevalent language, local interpreters may know or have connections to the victim or witness, which may be particularly problematic with vulnerable victims such as children or in cases that divide a local com-

[35] *Id.* at 7–8.

munity. In addition to utilizing a confidentiality agreement, additional precautions may be necessary, such as performing a cross-check of names or asking the interpreter service to provide an interpreter from outside the community at issue. A promising practice is to request an out-of-town interpreter when using a telephonic or virtual interpretation service.

Initial contact with victims or witnesses can also be challenging, particularly when contacting a class or group of victims through written notices. The notices may need to be translated into one or more languages, which can be a time-intensive process. The USAO Victim Notification System has notifications in English and Spanish. Under limited circumstances, nongovernmental organizations with established connections to particular victim groups may be able to assist with providing connections or introductions to the particular group. We caution against continued use of nongovernmental organizations to translate or interpret. If ongoing communications will occur with the particular group, a qualified translator or interpreter should be procured.

Another challenge is when victims or witnesses with LEP need to travel to the USAO, or even to the district, to participate in meetings or proceedings. In that situation, staff members need to consider the provision of language access services during the victims' or witnesses' travel, for example, navigating airports, using taxis or public transportation, and getting through building security. One promising practice is to provide victims and witnesses with translated travel instructions, along with materials in English such as a note for taxi drivers and others that explains where the victims or witnesses need to go.

As discussed above, even common languages have regional and other variations in language and dialect. Depending on the geographical area, there may be limited availability of certified or qualified interpreters and translators, especially for less common languages or dialects. While there is no magical solution to this issue, particularly where there is a nationwide shortage of certified or qualified interpreters and translators for a particular language or dialect, knowledge of the issue can help in planning ahead and making the best of the available resources.

Given the changing landscape of any federal agency's budget situation, the cost barrier remains an ongoing challenge. For example, the cost of securing a certified or qualified interpreter and the cost of having a notice translated quickly can be daunting. One promising practice is to contract with interpreters and translators for bulk hours in cases involving individuals who have LEP, is D/HOH, blind, or have a speech disability rather than hiring interpreters on a meeting-by-meeting basis. This practice is not only a cost-saving measure, but it also increases efficiency, situational knowledge, and rapport.

To provide meaningful language access to victims and witnesses, staff members need to keep these considerations in mind and understand these considerations may not be exhaustive. The good news is there are some promising practices, and the Department is optimistic that USAOs will continue to develop and share other promising practices as it continues its efforts to ensure that individuals who have LEP, is D/HOH, blind, or have a speech disability, have timely, accurate, and meaningful language access.

About the Authors

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The authors want to thank all the USAOs who provided key input for this article. Special thanks to the USAOs in the Northern District of Iowa, the Western District of Kentucky, the District of Maine, the Northern District of Ohio, and the Western District of Wisconsin. In addition, they want to thank their colleagues at EOUSA for providing valuable information and support.

Protecting and Corroborating a Sexual Assault Victim's Account: Using the Federal Rules of Evidence to Build a Provable Case

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I. Introduction

On March 12, 2020, just as the COVID-19 pandemic began to grip the country, a trial jury in the Eastern District of Arkansas returned guilty verdicts against Eric Kindley, a private prisoner transport officer, who sexually assaulted two women in his custody during two separate transports.[1] Kindley was convicted of violating two counts of Deprivation of Rights Under Color of Law and one count of Possession of a Firearm in Furtherance of Crime of Violence.[2] He was sentenced to two concurrent life sentences plus five years in federal prison.[3] The Eighth Circuit Court of Appeals affirmed the conviction.[4]

But the outcome of the *Kindley* case was hardly a foregone conclusion. Like most sexual assaults, there were no independent eyewitnesses, and there was no dispositive physical evidence. The only witness to each sexual assault was the victim. Kindley claimed they were lying, a defense common to sexual assault cases. Although Kindley was successfully prosecuted, this perceived lack of evidence when a victim first reports is often why sexual assault allegations are declined even though they may have

[1] United States v. Kindley, No. 21-3484, 2022 WL 17245115 (8th Cir. Nov. 28, 2022), *cert. denied*, 143 S. Ct. 2676 (2023).
[2] *Id.* at *2; *see also* 18 U.S.C. § 242 (deprivation of rights under color of law); 18 U.S.C. § 924(c) (possession of a firearm in furtherance of crime of violence).
[3] *Kindley,* No. 21-3484, 2022 WL 17245115, at *2.
[4] *Id.*

merit.[5]

In May 2024, in an effort to reduce such declinations, the U.S. Department of Justice (Department) released its *Framework for Prosecutors to Strengthen Our National Response to Sexual Assault & Domestic Violence Involving Adult Victims*.[6] Designed to "equip prosecutors to build provable cases in a trauma-informed manner that treats victims with humanity and ensures due process for defendants," it sets out five principles for prosecutors to implement when investigating, evaluating, and prosecuting these crimes.[7] The guide emphasizes relying on the evidentiary value of the victim's account because offender accountability and vindication for the victim often rest on whether the jury believes the victim. Prosecutors must therefore "establish *why* [the victim's] account is credible and *why* the trier of fact can believe the victim's testimony."[8] The guide discusses various ways to do just that. This article, however, focuses on Principle Three, which encourages prosecutors to "Use the Law and Evidentiary Tools Strategically and Effectively."[9] It specifically explores using the Federal Rules of Evidence to corroborate the victim's account and protect that account from improper impeachment to effectively counter the defendant's objective to undermine the victim's credibility. Engaging in offensive litigation based on the rules discussed below seeks to lessen victim re-traumatization, educate the court, and as a result, allows prosecutors to develop strong cases based on the victim's account, in complement with other investigative steps.

II. Corroborating a sexual assault victim's account

The Federal Rules of Evidence permit prosecutors to corroborate a victim's account in two notable ways. The first is by admitting evidence of

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[5] Ashley K. Fansher & Bethany C. Welsh, *A Decade of Decision Making: Prosecutorial Decision Making in Sexual Assault Cases*, 12 Soc. Scis. 348 (2023) (summarizing research of sexual assault case attrition and factors affecting prosecutors' decision-making); *see also* U.S. Dep't of Just., Violence Against Women Act Reauthorization Act of 2022 (VAWA 2022), Section 1204(a) Report, For Fiscal Year 2023 (2024) (cataloguing the number of allegations of sexual assaults committed under color of law reported to federal investigative agencies and the dispositions of those allegations).

[6] U.S. Dep't of Just., Framework for Prosecutors to Strengthen Our National Response to Sexual Assault & Domestic Violence Involving Adult Victims (2024) [hereinafter Prosecutor Guide].

[7] *Id.* at 1.

[8] *Id.* at 5.

[9] *Id.* at 12.

the defendant's similar conduct to show, among other purposes, a pattern of behavior or modus operandi, the defendant's intent, lack of accident or mistake, and in certain instances, a propensity to commit sexual assault.[10] This is often known as "similar fact" or "other acts" evidence. The second is by admitting the victim's prior consistent statements under certain circumstances, usually made before the advent of the federal investigation, even though a victim's out-of-court statements are typically inadmissible hearsay.[11] If deployed strategically and effectively, the combination of these rules can lead to readily provable sexual assault cases which are arguably just as strong as those cases built on traditional eyewitness testimony or physical evidence.[12]

A. The defendant's conduct

Defendants charged with offenses involving sexual assault often have committed other sexual assaults, even if they have never been prosecuted for such conduct.[13] Such evidence is highly compelling and, if admitted

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[10] Prosecutors are typically prohibited from using "evidence of a defendant's evil character to establish a probability of his guilt," Michelson v. United States, 335 U.S. 469, 475 (1948). See *infra* discussions of Rules 413 and 404(b) as exceptions to the inadmissibility of a defendant's prior bad conduct.

[11] Fed. R. Evid. 801(c) ("'Hearsay' is a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement"); Fed. R. Evid. 802 (prohibition against hearsay which are out-of-court statements offered for the truth of the matter asserted).

[12] See Fara Gold, *2022 Update: Prosecuting Sexual Misconduct by Government Actors*, 70 DOJ J. Fed. L. & Prac. 49, 52 (2022) ("A purpose-driven, victim-centered investigation that focuses on corroborating the victim's account and minimizing unfair impeachment by using [Rules 404(b), 413, and 801(d)(1)(B)] will make for a stronger case by increasing the likelihood of vindicating the victim's constitutional rights and securing a guilty plea or getting a conviction at trial.").

[13] *See* Letter from Jonathan J. Wroblewski, Dir., Off. of Pol'y & Legis., to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n 33 (Feb. 22, 2024), *in* 2023–2024 Proposed Amendments: Public Comment, 88 Fed. Reg. 89142 ("But just like the falsity that most sexual assaults are committed by strangers, so too is the falsity that most sexual assaults involve violence or threats of violence or that defendants are first-time offenders.") (internal citations omitted); The International Association of Chiefs of Police, Sexual Assault Incident Reports: Investigative Strategies 7 (2018). ("Sexual assault cases are typically portrayed as 'he said/she said' but in reality, are often 'he said/they said' cases. Perpetrators of this crime frequently have a history of acts of sexual violence."); Tricia L. Nadolny, Nick Penzenstadler, Jayme Fraser, and Gina Barton, *America tested 100,000 forgotten rape kits. But justice remains elusive.,* USA TODAY, Sept. 19, 2024. ("Rapists are often repeat offenders, research shows . . . [A review of] the criminal histories of more than 250 men named as suspects in rape cases where [rape] kits were not originally tested. Their backgrounds – before and after those kits were collected – are full of not only additional

at trial, can lead to better outcomes for victims, more accountability for defendants, and, ultimately, safer communities. Rules 413 and 404(b) are exceptions to the general prohibition against admitting evidence of the defendant's other bad acts to prove the crime charged.[14] Evidence admitted pursuant to Rule 404(b) applies to every kind of criminal case and can be used to establish motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident, so long as it is not used to establish the defendant's propensity to commit the crime charged.[15] Rule 413, though limited solely to sex crimes prosecutions, is arguably broader than Rule 404(b) because it permits prosecutors to use evidence of other sexual assaults for "any matter to which it is relevant."[16] Unlike Rule 404(b) evidence, Rule 413 permits the use of other sexual assaults as propensity evidence, essentially allowing prosecutors to argue that if the defendant committed sexual assault before, then the defendant committed the charged sexual assault.[17] Rule 413 is therefore one of the strongest evidentiary tools available to prosecute sex crimes.

Enacted in 1994,[18] Rule 413 "continues the movement toward focusing on the perpetrators, rather than the victims, of sexual violence."[19] It reflects the "public interest in admitting all significant evidence of guilt in sex offense cases," or else risk that sex offenders will continue to rape with impunity because victims are reluctant to come forward, and there are few, if any, eyewitnesses to the assault.[20] As a result, Rule 413 has a presumption in favor of admission.[21] The Tenth Circuit Court of Appeals

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sexual offenses, but a litany of violent crimes . . . .").

[14] Fed. R. Evid. 404(b)(1) ("Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.").

[15] Fed. R. Evid. 404(b)(2) ("[Evidence of any other crime, wrong, or act] may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.").

[16] Fed. R. Evid. 413(a) ("In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.").

[17] United States v. Enjady, 134 F.3d 1427, 1430–32 (10th Cir. 1998) (permitting Rule 413 evidence to establish the defendant's propensity to commit sexual assault).

[18] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat 1796. Along with Rule 413, Congress also passed Rule 414 (similar crimes in child-molestation cases) and Rule 415 (similar acts in civil cases involving sexual assault or child molestation).

[19] *Enjady*, 134 F.3d at 1432.

[20] David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 Chi.-Kent L. Rev. 15, 20–21 (1994).

[21] See United States v. Sumner, 119 F.3d 658, 662 (8th Cir. 1997) (presumption is in favor of admission); *see* 140 Cong. Rec. H8992 (daily ed. Aug. 21, 1994) (statement of

in *United States v. Enjady* recognized the challenges associated with sex crimes prosecutions and cited to the *Congressional Record* when it issued one of the first decisions upholding the constitutionality of Rule 413:

> Alleged consent by the victim is rarely an issue in prosecutions for other violent crimes—the accused mugger does not claim that the victim freely handed over his wallet as a gift—but the defendant in a rape case often contends that the victim engaged in consensual sex and then falsely accused him. Knowledge that the defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of these claims and accurately deciding cases that would otherwise become unresolvable swearing matches. . . . Prosecutors often have only the victim's testimony, with perhaps some physical evidence, linking a defendant to the sexual assault. Unlike other crimes, the defendant may raise consent as a defense . . . reducing the trial to a "swearing match" and diffusing the impact of even DNA evidence. Rule 413 is based on the premise that evidence of other sexual assaults is highly relevant to prove propensity to commit like crimes, and often justifies the risk of unfair prejudice. Congress thus intended that rules excluding this relevant evidence be removed.[22]

To be admissible under Rule 413, prosecutors must meet the following criteria: First, the defendant must be accused of a crime involving sexual assault; second, the evidence proffered must be evidence of the defendant's commission of another offense involving sexual assault; and third, the evidence must be relevant.[23] For the first two criteria, the defendant

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Rep. Molinari) ("The presumption is in favor of admission. The underlying legislative judgment is that the evidence admissible pursuant to the proposed rules is typically relevant and probative, and that its probative value is normally not outweighed by any risk of prejudice or other adverse effects."); 140 Cong. Rec. S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole).

[22] 134 F.3d at 1431 (internal citations omitted); *see also* United States v. LaVictor, 848 F.3d 428, 450 (6th Cir. 2017) ("In cases where the defendant argues that a victim consented, such testimony is especially important."); United States v. Guardia, 135 F.3d 1326, 1330 (10th Cir. 1998) (noting that "propensity evidence has a unique probative value in sexual assault trials and that such trials often suffer from a lack of any relevant evidence beyond the testimony of the alleged victim and the defendant").

[23] Fed. R. Evid. 413(a); *see also* United States v. LeMay, 260 F.3d 1018, 1024 (9th Cir. 2001) (upholding the constitutionality of the admitting evidence of similar crimes of sexual assault and setting out factors to consider for admissibility); United States v. McHorse, 179 F.3d 889, 898 (10th Cir. 1999) (upholding the constitutionality of the admitting of evidence of similar crimes of sexual assault); United States v. Benally, 500 F.3d 1085, 1090 (10th Cir. 2007) (upholding the ad-

need not be charged with a federal sex offense under 18 U.S.C. chapter 109A,[24] nor must there be independent federal jurisdiction for the other or uncharged sexual assaults.[25] Similarly, those other or uncharged sexual assaults need not have ever been charged to be admissible,[26] and prosecutors do not have to explicitly corroborate the testimony of the victims of those assaults.[27] Importantly, just like with evidence admissible under Rule 404(b), prosecutors need only proffer such evidence. This spares those other victims from testifying and being cross-examined before trial, and it also spares them from being impeached with that prior testimony during trial.[28]

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missibility of defendant's other sexual assaults based on the trial court's application of Rule 413 and *Enjady* factors); United States v. Crow Eagle, 705 F.3d 325, 328 (8th Cir. 2013) (upholding the admissibility of other sexual assaults pursuant to Rule 413).

[24] Chapter 109A includes the federal sexual abuse statutes: 18 U.S.C. §§ 2241 (aggravated sexual abuse), 2242 (sexual abuse), 2243 (sexual abuse of a minor, ward, or an individual in federal custody), and 2244 (abusive sexual contact).

[25] *See* United States v. Blazek, 431 F.3d 1104, 1109 (8th Cir. 2005) ("Rule 413 does not require that the defendant be charged with a chapter 109A offense, only that the instant offense involve conduct proscribed by chapter 109A"); United States v. Shaw, No. 22-cr-105, 2023 WL 2815360, at *7 (N.D. Cal. Apr. 5, 2023) (surveying caselaw and legislative history and concluding that the plain language of Rule 413(d) requires focusing on the defendant's conduct, regardless of the location, to determine if the definition of "sexual assault" is met, and finding that it is applicable in prosecution of 18 U.S.C. § 242 that alleges sexual assault); *see also* Carroll v. Trump, 660 F. Supp. 3d 196, 202 (S.D.N.Y. 2023) (admitting evidence under Rule 415 [Rule 413's counterpart in civil cases] based on the definition of Rule 413(d) and because proof of sexual assault is an essential element of defamation claim given the nature of the alleged defamation).

[26] United States v. Abundiz, 93 F.4th 825, 837 (5th Cir. 2024) ("To be admissible under Rule 413, the uncharged 'offense of sexual assault' need not be established by a conviction . . . but the district court must make a preliminary finding that a jury could reasonably find by a preponderance of the evidence that the defendant committed the other act and that it constituted an 'offense of sexual assault' for purposes of Rule 413.") (internal citations omitted).

[27] *See* United States v. Dillon, 532 F.3d 379, 391 (5th Cir. 2008) (holding that Rule 413 evidence does not require corroboration and that "Rule 104(b) [deciding a preliminary question] only requires that the district court consider the witness's testimony and determine that a reasonable jury could find by a preponderance of the evidence that the asserted sexual assault of that victim by the defendant occurred") (internal citations omitted).

[28] *See*, *e.g.*, *LeMay*, 260 F.3d at 1022–23 (affirming admission of prior uncharged child-molestation evidence under Rule 414 based on the evidence proffered by the government without an evidentiary hearing); Huddleston v. United States, 485 U.S. 681, 690 (1988) (determining no evidentiary hearing necessary for determination of Rule 404(b) evidence, and holding that in making such a determination, "[T]he trial court neither weighs credibility nor makes a finding [of fact] that the [g]overnment

The third prong for admissibility requires establishing the relevance of a defendant's other sexual assaults. The *Congressional Record*, cited above by the *Enjady* court, essentially sets out the relevance. Both Rule 413 and Rule 404(b) evidence are particularly relevant in sexual assault cases when the defendant asserts that the victim consented or that the victim fabricated the assault in its entirety. In those instances, the defendant's intent and whether he acted in the manner that the victim described are squarely at issue. Evidence of a defendant's pattern of behavior or modus operandi, be it taking victims to secluded locations, silencing them with threats of violence, job loss, or reputational harm, or otherwise exploiting authority to gain a victim's submission, can strongly corroborate a victim's account and establish a defendant's intent, making it highly relevant. As the Eighth Circuit pointed out in the *Kindley* affirmance, both the Rule 413 and Rule 404(b) evidence "helped the jury answer the question posed by defense counsel during opening statement: 'Do you believe that these acts happened as described, or is this just blown out of proportion?'"[29]

Rule 413, however, does not provide a "blank check" for admissibility, even when prosecutors can establish its three criteria.[30] Just as the balancing test of Rule 403 tempers the admissibility of other types of relevant evidence, the same is true for Rule 413.[31] For nearly 30 years, courts have repeatedly upheld Rule 413's constitutionality on due-process grounds because it not only requires advance notice to the defendant,[32] but it also requires the trial judge to balance the probative value of the evidence against its prejudicial effect.[33] Although circuits differ slightly

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has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence.").

[29] United States v. Kindley, No. 21-3484, 2022 WL 17245115, at *2 (8th Cir. Nov. 28, 2022).

[30] United States v. Sioux, 362 F.3d 1241, 1244 (9th Cir. 2004).

[31] Fed. R. Evid. 403 ("Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons . . . The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

[32] *LeMay*, 260 F.3d at 1026 (concluding that there is nothing "fundamentally unfair" about the allowance of propensity evidence); United States v. Mound, 149 F.3d 799, 801 (8th Cir. 1998) ("Rule 413 does not violate the Due Process Clause."); Fed. R. Evid. 413(b) ("Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.").

[33] United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998) (Rule 413 would be

in the standard they apply when conducting Rule 403 analysis for Rule 413 evidence, courts have typically considered "the similarity of the prior acts to the acts charged . . . the closeness in time of the prior acts to the charged acts . . . the frequency of the prior acts, the presence or lack of intervening events . . . and the need for evidence beyond the testimony of the defendant and alleged victim."[34] Unsurprisingly, courts have frequently assigned high probative value when the evidence illustrates a similar pattern of behavior. Though significantly, "[t]here is no time limit on the admission of prior-sexual-assault evidence."[35]

Courts have also exercised their gate-keeping function, not by blanketly prohibiting the admissibility of Rule 413 evidence, but by limiting the amount that prosecutors can introduce. For example, in *Kindley*, prosecutors sought to admit the testimony of seven additional sexual assault victims under Rule 413 and eight additional victims under Rule 404(b).[36] For the latter category, the defendant stopped short of sexually assaulting those victims due to intervening circumstances, but he followed the same pattern of conduct up to that point. Ultimately, the trial court allowed the testimony of three Rule 413 victims and two Rule 404(b) victims.[37] When it affirmed Kindley's conviction, the Eighth Circuit held that the trial court was within its discretion to admit and limit the number of victims who could testify. It also noted that the trial court correctly found that "'individually, no account is so unfairly prejudicial or problematic that it requires exclusion under Rule 403.' . . . [The trial court] also recognized, however, [there is] 'an issue of diminishing evidentiary returns—each additional account carries a bit less probative value, but a bit more prejudice to [the defendant.]'"[38]

Because of the value of similar fact evidence, sex crimes investigations should focus on locating a defendant's other victims, whether they be former romantic partners, colleagues, or other individuals who may have been in the defendant's care or custody or with whom they attended school, religious services, or the like. Rule 413 and Rule 404(b) evidence can be particularly compelling when victims do not know each

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unconstitutional "without the safeguards embodied in Rule 403.").

[34] United States v. Guardia, 135 F.3d 1326, 1331 (10th Cir. 1998); *see also LeMay,* 260 F.3d 325, 1027–28 (quoting *Guardia*).

[35] United States v. Crow Eagle, 705 F.3d 325, 327 (8th Cir. 2013).

[36] *See* United States' Notice of Intent to Use Other Acts Evidence Pursuant to Rules 413 and 404(b), United States v. Kindley, No. 17-cr-267 (E.D. Ark. Feb. 19, 2019), ECF No. 35, *Kindley*, No. 21-3484, 2022 WL 17245115.

[37] United States v. Kindley, No. 17-cr-267 (E.D. Ark. Feb. 19, 2019); D. Ct. Order of Nov. 21, 2019.

[38] *Kindley*, No. 21-3484, 2022 WL 17245115, at *2 (quoting D. Ct. Order of Nov. 21, 2019, at 4).

other because it rebuts any argument that they conspired with each other against the defendant. When looking for other victims, it is important to be mindful of the argument that the victims are simply telling investigators what they want to hear and are "jumping on the bandwagon." It is therefore imperative to take steps not to presume or suggest victimization during initial contact or thereafter. In *Kindley*, the investigative team knew, based on transport records, whom the defendant transported. Consequently, the investigation team did not ask those transportees about whether the defendant transported them but rather asked about their individual transports and their interactions with the defendant, without suggesting any sort of sexual assault, thereby limiting the "bandwagon" defense during trial.[39]

Because Rules 413 and 404(b) neither limit the amount of admissible evidence nor require a time frame during which the assaults must have occurred, investigations may benefit from casting a wide net in search of other victims. This can give prosecutors the option of deciding which victims to call to testify.[40] Such testimony would then be subject to a limiting jury instruction during trial to safeguard the defendant's due-process rights as well as protect the record on appeal.[41]

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[39] Trial Brief, United States v. Kindley, No. 17-cr-267 (E.D. Ark. Feb. 19, 2019), ECF No. 98.

[40] *Kindley*, D. Ct. Order of Nov. 21, 2019, at 4 (after conducting its Rule 403 analysis, rather than deciding which additional five victims could testify, the trial court largely gave the United States the option of choosing which victims it wanted to call); United States v. Shaw, No. 22-cr-105, 2023 WL 3899012, at *2 (N.D. Cal. June 7, 2023) ("The Court previously determined that it would allow at least four Rule 413 witnesses to testify. . . . The Government has identified the first four witnesses that it intends to call under Rule 413 pursuant to that Order.") (internal citations omitted).

[41] *See*, *e.g.,* 8th Cir. Model Jury Instr. 2.08A (2023 ed.); United States v. Benally, 500 F.3d 1085, 1089 (10th Cir. 2007) (upholding the following instruction:

> "In a criminal case in which the defendant is accused of an offense of sexual assault . . . evidence of the defendant's commission of another offense or offenses of sexual assault . . . is admissible and may be considered for its bearing on any matter to which it is relevant. However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crime charged in the indictment. Bear in mind as you consider this evidence, at all times the government has the burden of proving that the defendant committed each of the elements of the offense charged in the indictment. I remind you that the defendant is not on trial for any act, conduct or offense not charged in the indictment.").

B. The victim's prior consistent statements

Victim statements made outside of the courtroom are generally inadmissible at trial because they are hearsay.[42] This applies to written, recorded, oral, or transcribed statements whether in journals, made to investigators and prosecutors, or given as testimony before a grand jury or during preliminary hearing. For the jury to hear the victim's complete, detailed account of sexual assault, absent rare and narrow exceptions, the victim must testify at trial and be subject to cross-examination, as required by the Sixth Amendment's Confrontation Clause.[43] Therefore, prosecutors must build cases without substantively introducing those statements into evidence, while being mindful that defendants will typically use such statements to cross-examine victims and potentially impeach their testimony.[44]

Despite this general prohibition, under certain circumstances, prosecutors can substantively use a victim's prior consistent statements as long as the victim testifies. Such statements are usually short and nonexhaustive, but they corroborate the victim's testimony, and as a result, strengthen the case overall. For example, statements made to medical personnel like emergency responders or medical forensic clinicians (who conduct sexual assault medical forensic exams or rape kits) may be admissible as statements made for the purpose of medical diagnosis or treatment.[45] Statements made as an event was occurring or shortly thereafter, such as during a terrified text to a friend or call to 911, may be admissible as present sense impressions or excited utterances.[46]

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[42] *See* Gold, *supra* note 12.

[43] U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."); *see* Crawford v. Washington, 541 U.S. 36 (2004) (out-of-court statements by witnesses to investigators are barred under the Confrontation Clause). *But see* Fed. R. Evid. 804(b)(6) (statement offered against a party that wrongfully caused the declarant's unavailability) and Fed. R. Evid. 807 (residual exception) that provide rare exceptions to the Confrontation Clause where a victim's statement can be admitted in lieu of testimony. The former, known as forfeiture by wrongdoing, is used mostly in intimate-partner violence and gang-related cases; the latter is most applicable in child abuse cases.

[44] *See*, *e.g.*, Fed. R. Evid. 613(a) (witness's prior statement) ("When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness.").

[45] Fed. R. Evid. 803(4) (statement made for medical diagnosis or treatment) ("A statement that: (A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.")

[46] Fed. R. Evid. 803(1) (present sense impression) ("A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it."); Fed. R. Evid. 803(2) (excited utterance) ("A statement relating to a startling

Yet because it is not uncommon for victims to delay disclosure for various reasons, if victims do not seek medical treatment or disclose the incident to anyone right away, their prior statements may not meet the requirements associated with these exceptions.[47]

Therefore, perhaps the most applicable hearsay exception in sexual assault cases is not an exception at all. Rule 801(d)(1)(B) governs prior consistent statements that are definitionally "not hearsay."[48] It has two relevant subparts: Subsection (d)(1)(B)(i) permits the substantive introduction of a prior consistent statement to rebut the defense of recent fabrication or motive to lie.[49] And, subsection (d)(1)(B)(ii) permits introduction "to rehabilitate the [victim's] credibility . . . when attacked on another ground."[50] When the defense to sexual assault is that the victim is lying due to an improper motive, Rule 801(d)(1)(B)(i) is arguably one of the strongest tools prosecutors have to corroborate a victim with that victim's own words.

Rule 801(d)(1)(B)(i) permits the admission of those words when (1) the victim testifies at trial and is subject to cross-examination; (2) the prior statement is consistent with the victim's trial testimony; and (3) the

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event or condition, made while the declarant was under the stress of excitement that it caused.").

[47] Prosecutor Guide, *supra* note 6, at 4.

> "[V]ictims may delay disclosure or keep an assault a secret out of (misplaced) shame or embarrassment or because they fear retaliation or not being believed. . . . [T]hey may not want their families or social circles to know what they have endured, or they may initially lie because they fear that telling the truth will put them in greater danger. . . . [T]hey may have drunk alcohol or initially flirted with the perpetrator. . . . [S]uch conduct can cause victims to blame themselves and think that [prosecutors and law enforcement] will blame them, too."

Id.

[48] Fed. R. Evid. 801(d) (statements that are not hearsay).

[49] *Id.* at 801(d)(1)(B)(i) (prior consistent statement admissible where the declarant testifies and is subject to cross-examination and the statement is offered to "rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying"); *see* Tome v. United States, 513 U.S. 150, 156 (1995).

[50] Fed. R. Evid. 801(d)(1)(B)(ii) (prior consistent statement admissible where the declarant testifies and is subject to cross examination and the statement is offered to "rehabilitate the declarant's credibility as a witness when attacked on another ground"); United States v. GossJankowski, No. 21-123, 2024 WL 2013856, at *4 (D.D.C. May 7, 2024) (Added in 2014, subsection (ii) permits a prior consistent statement on "another ground." It "did not change the traditional rules regarding admissibility of prior consistent statements. According to the Advisory Committee, 'the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.'") (internal citations omitted).

prior statement is offered "to rebut an express or implied charge that the [victim] recently fabricated it or acted from a recent improper influence or motive . . . ."[51] Therefore, the "prior statement" must have been made "before the charged recent fabrication or improper influence or motive" arose.[52]

For example, if a sexual assault victim has a pending civil suit, the defendant will likely claim that the victim is lying for potential financial gain. Likewise, if the victim is seeking immigration relief, child custody, a reduction in sentence, or some other benefit, the defendant will claim that the victim made up the sexual assault to get that benefit. Rule 801(d)(1)(B)(i) helps to rebut those arguments by allowing the jury to hear the substance of a victim's prior consistent statements made before the federal investigation began or before the purported motive to lie arose. This is especially useful because, even if a victim delays reporting to law enforcement, they will often disclose some part of the sexual assault to someone (or in some manner) well before a formal investigation begins. This disclosure could be via journal entries, text messages, social media exchanges, recorded jail calls, written letters, or oral statements to friends, counselors, or family members.[53] A tearful phone call or a distressed text message to a loved one in the aftermath of a sexual assault, even if days later, can be compelling evidence to a jury to rebut the claim that the victim made up the assault to, for example, get money from a civil suit, especially if it was the loved one's idea to contact the civil attorney in the first place.

These "disclosure" or "outcry witnesses" are often lay people. There are occasions, however, when the motive to lie will arise after the victim reported the sexual assault to law enforcement, permitting the admissibility of statements to investigators. In *United States v. Kootswatewa*, the Ninth Circuit held that a victim's prior consistent statement to law enforcement was properly admitted where the defendant argued that the victim lied because her mother coached her to do so.[54] The court reasoned that because the victim "spoke to the officer shortly after the abuse and did not have an opportunity to speak with her mother before the officer interviewed her, the statements the victim made to the officer could

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[51] Fed. R. Evid. 801(d)(1)(B)(i); United States v. Jahagirdar, 466 F.3d 149, 155 (1st Cir. 2006) (citing the requirements of admissibility under Rule 801(d)(1)(B)(i)).
[52] *Tome*, 513 U.S. at 167; *see also* United States v. Chang Da Liu, 538 F.3d 1078, 1086 (9th Cir. 2008) (statements must have been made before this alleged improper influence or motive to fabricate arose).
[53] *See*, *e.g.*, Prosecutor Guide, *supra* note 6, at 7.
[54] 893 F.3d 1127 (9th Cir. 2018).

not have been tainted by any coaching from her mother."[55] Similarly, in *Kindley*, one of the Rule 413 victims reported her sexual assault to local law enforcement years before the federal investigation began. But because that agency lacked jurisdiction, nothing more happened. Her statement to the original local detective (not to the Federal Bureau of Investigation (FBI)) was admissible to rebut a claim that the victim "jumped on the bandwagon" when the FBI contacted her in search of other victims.[56]

If an investigation uncovers multiple victims, whether those victims can be listed in the indictment or properly noticed as Rule 413 or 404(b) victims, the defendant may claim that the victims conspired with each other to fabricate their accounts. He may claim that they have a vendetta against him, are seeking to gain some sort of notoriety, or they just told investigators what they wanted to hear. By asking each victim to whom and in what manner they first disclosed any part of the assault (even if just a small reference to a friend), and then calling that disclosure or "outcry" witness to testify and, if available, admitting documentary evidence that corroborates the disclosure, prosecutors can effectively rebut such a defense.

Locating other victims and asking about initial disclosure can have a resounding impact on the strength of a case. What may start out as a sexual assault allegation with a single victim who appears to have a motive to lie may lead to multiple victims who each disclosed their assaults to someone else well before the advent of the federal investigation. That evidence is all potentially admissible under Rules 413, 404(b), and 801(d)(1)(B)(i), converting what may have been an immediate declination into a prosecutable case—even where there are no independent eyewitnesses or dispositive physical evidence.

III. Protecting a sexual assault victim's account from improper impeachment

When witnesses get impeached during trial, it is often because they have made prior inconsistent statements, engaged in prior bad acts, been convicted of a crime, attempted to curry favor with the United States, or appear to have a motive to lie. It is therefore good trial practice to anticipatorily blunt credibility attacks during direct examination, prepare witnesses for such attacks during cross-examination, and file motions in limine to limit improper impeachment. Doing so is even all the more crucial when preparing a sexual assault victim to testify because the jury's

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[55] *Id.* at 1135 (cleaned up).
[56] *See* Prosecutor Guide, *supra* note 6, at 28.

verdict often hinges on the victim's credibility.

The defendant's objective will be "to portray the victim as a liar, or, at the very least, as someone whom the jury should not believe at that moment."[57] Defendants will try to discredit the victim not only by amplifying inconsistent statements and questioning the victim's motives, as discussed above, but by attempting to impugn the victim's character, sometimes with inadmissible evidence that has no legitimate bearing on credibility. This evidence may include prior drug use (so long as it did not affect the victim's memory of the assault), prior victimizations, or a victim's sexual history, use of dating apps, or manner of dress.[58] Filing appropriate motions in limine prevents the defendant from either inadvertently or intentionally moving to admit inadmissible evidence in the middle of trial. It also seeks to lessen the likelihood that the court erroneously admits such evidence because it lacked enough time to consider it. Should the court take an opposite view of the evidence, filing motions in advance of trial allows prosecutors to properly prepare victims to address that evidence during testimony.

Rules 412, 608, and 609 are particularly significant in sex crimes prosecutions. Rule 609 allows impeachment by felony convictions and crimes of dishonesty, but it is subject to time limitations and a Rule 403 balancing analysis.[59] While it may be more common to think about Rule 609 in the context of a defendant testifying, victims are entitled to the same Rule 609 protections. Thus, for example, where a defendant seeks to question a sexual assault victim about her misdemeanor shoplifting conviction from decades before, Rule 609 should prohibit it. Although Rule 609(a)(2) allows for the admission of a misdemeanor offense if the elements of that offense include a "dishonest act or false statement," Rule 609(b) precludes admission if more than 10 years have elapsed since the conviction, unless the probative value substantially outweighs the prejudice.[60] There is a presumption against admissibility unless the defendant can demonstrate

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[57] Prosecutor Guide, *supra* note 6, at 14.

[58] *See infra* discussions of Rules 608, 609, and 412.

[59] Fed. R. Evid. 609 (impeachment by evidence of a criminal conviction); Fed. R. Evid. 403 (excluding relevant evidence for prejudice, confusion, waste of time, or other reasons) ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

[60] Fed. R. Evid. 609(b) ("[I]f more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if . . . its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.").

that the interests of justice require that the court admit the evidence.[61] In the foregoing example, the interests of justice should not require the jury hearing about a decades-old shoplifting conviction. Filing a motion in limine and obtaining a favorable pretrial ruling is better than having the defendant ring the proverbial bell in front of the jury. While a stale shoplifting conviction may have little detriment to a victim's credibility on its own, it will almost assuredly be one of a string of attempts by the defendant to undermine the truthfulness of a victim's account. Curtailing each small attempt where the law permits it can make a big difference in protecting a victim's account overall.

Rule 412, more colloquially known as the "rape shield rule," also protects the jury from learning of evidence that has no probative value. Enacted as part of the Violence Against Women Act in 1994, it prohibits the admissibility of "evidence offered to prove that a victim engaged in other sexual behavior; or evidence offered to prove a victim's sexual predisposition."[62] Its purpose is to prohibit inappropriate victim-blaming and painting the victim as promiscuous, based on the false premise that the victim must have consented to sex with the defendant because the victim engaged in sexual behavior in the past.[63] Rule 412's prohibitions also exclude evidence of, among others, commercial sex work, sexual fantasies, suggestive text messages, manner of dress, and sexually transmitted infections, unless they are subject to one of the Rule 412 exceptions discussed below.[64] In addition, Rule 412 was enacted to not further discourage vic-

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[61] United States v. Portillo, 633 F.2d 1313, 1323 (9th Cir. 1980); United States v. Cavender, 578 F.2d 528, 531 (4th Cir. 1978); United States v. Sims, 588 F.2d 1145, 1149 (6th Cir. 1978).

[62] Fed. R. Evid. 412(a) (sex-offense cases: the victim's sexual behavior or predisposition—prohibited uses).

[63] *Id.* at advisory committee notes on 1994 amendments ("The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process."); *see also* United States v. Willis, 826 F.3d 1265, 1278 (10th Cir. 2016) (evidence that victim had sex with another individual did not tend to make it more or less probable that victim consented to sex with defendant, as defendant admitted he had sex with victim).

[64] *See, e.g.*, Harness v. Anderson Cnty., Tennessee, No. 3:18-CV-100, 2019 WL 8405381, at *1 (E.D. Tenn. Oct. 23, 2019) (concluding that absent an exception, evidence of victim's "mode of speech, communications, social media postings[,] and lifestyle[,] as well as her behavior or predisposition in and outside the workplace," falls within Rule 412's prohibition) (internal citations omitted); United States v. Woody, 336 F.R.D. 293, 341–42 (D.N.M. 2020) (Rule 412's function is "to combat the sexual stereotyping of victims, "*i.e.,* to prevent the jury from subverting the substantive law of rape by making the guilt of the defendant turn on the jury's assessment of the moral worth of the victim.") (internal citations omitted).

tims from reporting out of fear that they will suffer shame, humiliation, and blame during testimony.[65] Consequently, it "applies to all criminal proceedings involving sexual misconduct even where a sex crime is not charged, such as a kidnapping prosecution where the prosecutor seeks to prove that the victim was sexually assaulted" during the course of the kidnapping.[66]

In criminal cases, Rule 412's prohibitions are subject to three exceptions. First, prior sexual activity may be admissible to show that someone other than the defendant is the "source of semen, injury, or other physical evidence."[67] This does not give a defendant free rein to argue that a victim's injuries must have resulted from another sexual encounter. The defendant must make an offer of proof that is more than speculation.[68] This exception is typically applicable when someone's DNA other than (or in addition to) the defendant's is recovered from the victim's body or clothing. The presence of another person's DNA, be it from semen, saliva, or skin, however, should not necessarily cast doubt on the victim's credibility, particularly if there is a reasonable explanation for it. The other or additional DNA may be from the victim's partner. If a DNA analyst can corroborate the victim's account and testify to the additional DNA's origin, the defendant will be hard pressed to discredit the victim by insinuating promiscuity, despite Rule 412's prohibition against such an argument.

The second exception to Rule 412 permits admissibility of "evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to

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[65] Fed. R. Evid. 412 at advisory committee's notes to 1994 amendments ("[b]y affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders"); *see also* Dep't of the Army, Military Criminal Law Evidence Department of the Army Pamphlet 27-22 at *1 n. 20 (citing 124 Cong. Rec. H11945 (remarks of Rep. Holtzman)

> Too often in this country victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself. Since rape trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt, it is not surprising that it is the least reported crime.)

[66] C. Mueller et al., § *4.32 Sexual History of Complainant Generally Excluded*, GW L. Sch. Pub. L. & Legal Theory Paper No. 2018-59 (6th ed. 2018).
[67] Fed. R. Evid. 412(b)(1)(A).
[68] *See, e.g.*, United States v. Pumpkin Seed, 572 F.3d 552, 558 (8th Cir. 2009) (internal citations omitted) (affirming the lower court's decision to exclude reference to prior consensual sex where there was no indication that it caused injury).

prove consent or if offered by the prosecutor."[69] This exception does not provide unfettered admissibility of a victim's prior sexual encounters with the defendant, but instead requires consideration of temporal remoteness and a showing of probative value.[70]

The third exception is a catchall for "evidence whose exclusion would violate the defendant's constitutional rights."[71] It, too, does not provide an end-run around the purposes of Rule 412. That is, a defendant, in the name of due process, may not admit the victim's sexual history in order to argue that the victim "should not be believed—the exact type of argument that [courts have] held is preclude[d] by Rule 412."[72] Rather, the rule is "limited to situations involving relevant evidence where the defendant's interests in admittance outweigh the state's interests in exclusion."[73] Such a situation may arise when a defendant asserts that the victim made up the sexual assault to avoid admitting to cheating on a boyfriend. The fact that the victim has a sexual relationship with that boyfriend may be admissible under this exception.[74] But the purpose for admittance is to argue the victim's motive to lie, not to argue that she is promiscuous and therefore must have consented to sex with the defendant.

Although Rule 412 has a notice and hearing requirement, it is advisable for prosecutors to file motions in limine in anticipation that the

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[69] Fed. R. Evid. 412(b)(1)(B).

[70] *See, e.g.*, United States v. Anderson, 467 F. App'x 474, 479 (6th Cir. 2012) ("[T]here is no bright-line rule governing the admissibility of evidence under Rule 412(b)(1)(B). A court can consider temporal factors, such as the length of time between the previous sexual act and the alleged offense, to determine whether such evidence is admissible.").

[71] Fed. R. Evid. 412(b)(1)(C).

[72] United States v. Perez, No. 20-1982-cr, 2022 WL 1421408, at *2 (2d Cir. May 5, 2022) ("[E]vidence of the victim witnesses' sexual contacts with other officials was irrelevant to the charges against [the defendant] and therefore did not implicate his right to present a complete defense.")

[73] United States v. Russell, 798 F. App'x 198, 202 (10th Cir. 2019) (affirming the trial court's decision to prohibit evidence that the victim engaged in consensual sex five days before the defendant raped her; there was no evidence that the victim's injuries resulted from the consensual encounter).

[74] *See, e.g.*, Olden v. Kentucky, 488 U.S. 227, 230 (1988) (holding that defendant should have been allowed to introduce evidence of victim and her boyfriend's cohabitation because defense argued that victim lied about rape so that her boyfriend wouldn't question why she was in the defendant's car).

defendant may seek to introduce such evidence without giving notice.[75] While the failure to provide notice may not bode well for the defendant in the short term, foregoing the filing of motions in limine may be detrimental to the victim and to the United States' case in the long run if the jury unnecessarily learns about the victim's sexual history. Filing pretrial motions will also trigger the court to hold an in camera hearing which will better protect the victim's privacy.[76]

The defendant may also (improperly) attempt to use either Rule 412 or Rule 404(b) as the vehicle by which to admit evidence that the victim engaged in a pattern of prior bad conduct. This may take the form of the defendant seeking to introduce a series of the victim's drug-related or prostitution arrests in an improper attempt to undermine the victim's credibility. If any of those arrests resulted in convictions, Rule 609 governs, and the defendant would have to establish that rule's requirements for admissibility as outlined above. As a general matter, however, instances of specific conduct are inadmissible under Rule 608(b) in much the same way that a defendant's arrest history is largely inadmissible.[77] Rule 608(b) allows the victim (or any witness) to be questioned about specific conduct if probative of untruthfulness, but the inquiry ends there. The defendant cannot admit extrinsic evidence to prove the conduct.[78]

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[75] Fed. R. Evid. 412(b)(1)(C).

> "Procedure to Determine Admissibility. (1) Motion. If a party intends to offer evidence under Rule 412(b), the party must: (A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered; (B) do so at least 14 days before trial unless the court, for good cause, sets a different time; (C) serve the motion on all parties; and (D) notify the victim or, when appropriate, the victim's guardian or representative.(2) Hearing. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed."

Id.

[76] *Id.*

[77] Fed. R. Evid. 608(b) (specific instances of conduct).

> "Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of . . . the witness . . . ."

Id.

[78] *Id.*

In practice, that means that a court may allow a defendant to ask a victim if she previously lied to a police officer about possessing drugs. If the victim denies it, the defendant cannot call the arresting officer to rebut the victim's denial.

Rules 608(b) and 412 also prohibit defendants from attempting to admit a victim's past sexual assault allegations as "reverse 404(b) evidence." Defendants may seek to admit such evidence to ostensibly show that the victim has a pattern of making false sexual assault allegations. But this is problematic in two respects. First, it is a misapplication of the evidentiary term. "Reverse 404(b) evidence" is evidence of a pattern of similar sexual assaults committed by a perpetrator other than the defendant. It is relevant when the defendant is arguing misidentification or that someone else committed the crime charged.[79] It has nothing to do with the victim's prior victimizations. Second, Rule 608(b), which might otherwise be the appropriate vehicle for admissibility, permits inquiry if probative of truthfulness. The defendant's purpose in introducing prior victimizations is to show that they are untrue. Yet just because a victim reports a sexual assault that does not result in prosecution, does not necessarily mean the allegation was false. Allegations fail to get prosecuted for myriad reasons unrelated to a victim's truthfulness.[80] And victims can be revictimized and sexually assaulted more than once over a lifetime.[81] Unless the victim recanted and there is proof of falsity, prior victimizations are not admissible impeachment evidence under Rule 608(b). "Even if a defendant can show that a prior assault allegation against a third party was false, the admissibility of that accusation depends on its similarity to the

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[79] Rene Vallardares & Hannah Nelson, *The Busy Lawyer's Guide to Character Evidence*, 48 Champion 12, 14, ("[T]he defense can also use [reverse 404(b)] to present other acts evidence to show that someone else may have committed the charged crimes.")

[80] Hughes v. Raines, 641 F.2d 790, 792 (9th Cir. 1981) ("The fact that the district attorney chose not to prosecute, in itself, could mean no more than that he decided he did not have sufficient evidence to obtain a conviction."); *see also* Fara Gold, *2022 Update: Prosecuting Sexual Misconduct by Government Actors*, 70 DOJ J. Fed. L. & Prac. 49, 50 (2022) (Cases are declined for prosecution because there is a "misconception that, because these crimes happen in seclusion, they cannot be proven."); Prosecutor Guide, *supra* note 6, at 1, 12 (discussing how declinations may be due to misconceptions about how sexual assault and domestic violence are committed and reported and fallacies about victim behavior, victim accounts, and the evidence required to prove those accounts).

[81] Rebecca Makkai, I Have Some Questions for You 127 (2024) ("[T]he witness wasn't considered credible because six years earlier, she'd accused another man of the same thing, and it was easier to believe she was lying than that lightning loves a scarred tree.").

facts of the charged assault."[82] In fact, "[a]dmission of all evidence that is the least bit probative of credibility is not . . . always constitutionally required."[83]

The most effective way to exclude the aforementioned types of evidence (or prepare victims for their introduction) is to address it in advance of trial. Just as it is essential to learn of a defendant's prior history for Rule 404(b) and Rule 413 purposes, it is equally essential to learn about a victim's past, even though those conversations may be difficult. Learning about prior arrests, convictions, reports of sexual assaults and other victimizations, sexual activity within days of the sexual assault at issue, and other sexual activity with the defendant will ultimately help protect the victim's account at trial. Obtaining rulings before trial reduces the risk of surprise, ensures due process for defendants, and endeavors to lessen the difficulty and potential for re-traumatization of cross-examination for the victim, all while strengthening the prosecution's case within the bounds of the law and the rules of evidence.

About the Author

Fara Gold serves as an Attorney Advisor for the Office on Violence Against Women (OVW), where she spearheaded the development of the Department's 2024 *Framework for Prosecutors to Strengthen Our National Response to Sexual Assault & Domestic Violence Involving Adult Victims*.[84]

Before joining OVW in 2023, she served as Special Litigation Counsel and Senior Sex Crimes Counsel for the Criminal Section of the Civil Rights Division. There, she developed national expertise in prosecuting sexual misconduct committed by government actors. Before joining the Department in 2009, she served as an Assistant State Attorney in Broward County, Florida, where she specialized in prosecuting sex crimes and child abuse cases. She also currently serves as an adjunct professor of law at Georgetown University Law Center where she teaches a class called *Prosecuting Sex Crimes and Vindicating Constitutional Rights*.

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[82] *Hughes*, 641 F.2d at 793; *see also* United States v. Bartlett, 856 F.2d 1071, 1088 (8th Cir. 1988) (affirming the trial court's decision to disallow evidence of a prior allegation of sexual assault, holding that even if there was stronger evidence of the allegations' falsity, the defendant's Sixth Amendment rights were not violated and "the probative value of the evidence would still depend on the inference that, because the victim made a false accusation [sic] in the past, the instant accusation is also false. Yet, because the circumstances of the two incidents were so different, the value of the inference to be drawn was minimal.").

[83] *Bartlett*, 856 F.2d at 1088.

[84] Prosecutor Guide, *supra* note 6.

Fara received the Attorney General's Award for Exceptional Service in 2014 and the Attorney General's Award for Outstanding Contributions by a New Employee in 2012. She also received the Office of Inspector General Collaboration Award for Outstanding Contributions to the Inspector General in 2023, the FBI Director's Award for Distinguished Service in Assisting Victims of Crime in 2021, and the Assistant Attorney General's Award for Distinguished Service in 2020.

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Federal Prosecution of Sexual Assault in Indian Country

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> *"This work requires each of us to face our own trauma, to relive unimaginable pain, and visualize a future in which our loved ones are safe and our communities have closure. We're here for our children, grandchildren and relatives we have yet to meet . . . . This work is urgently needed and requires all of us working collaboratively."*[1]

I. Introduction

Shana is a 20-year-old member of Tribe Apple, a fictitious federally recognized tribe located in Michigan. When Shana was three years old, her Uncle Jimmy—an Indian and her mother's brother—molested her while he was babysitting her and her siblings at her home on the reservation.[2] Even though Shana immediately reported to her mother that Uncle Jimmy "rubbed her butt with his finger until it hurt," her mother said the assault should be a kept secret. Shana's mother said that she would "deal" with Uncle Jimmy. No one ever called the police. Shana remembers that after the assault, Uncle Jimmy was still frequently welcomed into her home and was even allowed to babysit her again.

When Shana was 18 years old and a rising senior in high school, she was at a bonfire one summer night on the reservation. She was with a group of people several years older than her and someone was passing around beer and whiskey. Shana wanted to fit in, so she drank to the point of passing out. She remembers waking up to a sharp pain between her legs and seeing Tom, a 30-year-old Indian male, on top of her, penetrating her with his penis. When he was finished, she vomited, put her jeans back on, and walked home. She told no one what had happened.

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[1] Press Release, U.S. Dep't of Just., Deputy Attorney General Lisa Monaco and Secretary Deb Haaland Meet with Not Invisible Act Commission (Feb. 28, 2023).

[2] The terms *American Indian*, *Indian*, *Native American*, and *Native* are often used interchangeably in the United States. *Indian*, however, is the term used in statutes and caselaw. Because this article focuses on legal issues, the term *Indian* is used.

Shana's life began to quickly spiral out of control. She drank alcohol frequently, dropped out of school, began experimenting with drugs, and started shoplifting. She soon ran away from home, left the reservation, and headed to Detroit. Her first night in the city, she was approached by a nice-looking man, Steve, a non-Indian, who offered to help her get employment. Steve gave her a place to live and food to eat. He also provided her with alcohol and hard drugs like methamphetamine. She quickly became an addict. To pay for room, food, and drugs, she was forced to have sex with strangers and turn the money over to Steve. It soon became clear to Shana that Steve was her pimp, and she was a victim of human trafficking. She was too ashamed to ask her family for help. Steve convinced Shana to move to an Indian reservation in Arizona, Tribe Flower, which is close to a major urban area. He believed Shana would be more marketable there. Shana hoped to have a fresh start in Arizona, but she was still addicted to drugs and still being trafficked. She stopped believing her life had any value.

Shana's story is fictional, but sadly many living in tribal communities have similar stories. Many, like Shana, have been sexually assaulted and victimized repeatedly throughout their lives. This article will illustrate relevant federal law, list options available to Shana, and outline the rights and services owed to victims like her. The focus of this article is federal law, but it is important to remember some of the offenses perpetrated against Shana may also be prosecuted in tribal or state court.

II. Is Shana more vulnerable to being victimized because she is Native American?

American Indians and Alaska Natives (AI/ANs) experience much higher rates of victimization than the rest of the population. Recent studies suggest that American Indian women are 2.5 times more likely than the national average to experience certain violent crimes, such as nonfatal strangulation.[3] Therefore, criminal justice and social service personnel responding to crimes in tribal communities should be knowledgeable of the types and frequency of abuse perpetrated on the first Americans. Additionally, be mindful of the painful experiences Native Americans have suffered at the hands of the federal and state governments: forced removal from their ancestral homelands, boarding school, slavery, and sex-

[3] *See* United States v. Lamott, 831 F.3d 1153, 1154 (9th Cir. 2016).

ual abuse.[4]

Throughout the past decade, the National Institute of Justice (NIJ) has dedicated many resources to researching and evaluating the rate and types of violence perpetrated against AI/ANs. Results from a NIJ funded study, researched and written by Andre Rosay, Ph.D., Director of the Justice Center at the University of Alaska-Anchorage, were released in 2016; the study shows AI/AN women and men suffer violence at alarmingly high rates and are often unable to receive services that could help them.[5]

Given exposure to such high rates of trauma, it is not surprising that research documents higher rates of related behavioral health concerns, including high occurrence of alcohol and substance abuse, mental health disorders, suicide, violence, and behavior-related chronic diseases across Indian country.[6]

III. Jurisdiction

A. Which jurisdiction has the legal authority to investigate and prosecute Uncle Jimmy and Tom?

Four questions must be answered to determine which jurisdiction has the legal authority to prosecute a case arising in Indian country. First, did the crime occur in Indian country as defined by federal law?[7] The Indian or non-Indian status of the victim and defendant are questions two and three. And, finally, what crime did the defendant commit?

Shana was molested as a child and then raped as an adolescent on Tribe Apple, a federally recognized Indian reservation in Michigan. Because these assaults occurred within the exterior boundaries of Tribe Apple, they were committed in Indian country under 18 U.S.C. § 1151.[8] We know Shana is an Indian, and the facts provided also state both Uncle Jimmy and Tom are Indian. So, now we need to look at what each of these men did to Shana.

Federal criminal jurisdiction over crimes occurring in Indian country arises mainly out of two statutes, 18 U.S.C. §§ 1152 (the General Crimes

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[4] Benjamin Thomas Greer, *Hiding Behind Tribal Sovereignty: Rooting Out Human Trafficking in Indian Country*, 16 J. Gender Race & Just. 453, 455–59 (2013) (human trafficking in Indian country and jurisdictional obstacles to law enforcement).
[5] André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, 277 Nat'l Inst. Just. J. 38 (2016).
[6] Amanda Lechner et al., Addressing Trauma in American Indian and Alaska Native Youth 1 (2016).
[7] 18 U.S.C. § 1151.
[8] *Id.*

Act) and 1153 (the Major Crimes Act).[9] In the cases involving Shana, the Major Crimes Act is the appropriate jurisdictional statute; this is because both Shana and the defendants are Indian.[10] In the assault committed by Uncle Jimmy, the federal government has jurisdiction to prosecute him. The same is true for the assault committed by Tom. If either of these cases were initiated closer in time to their occurrence, the tribal court would also have jurisdiction to prosecute both Uncle Jimmy and Tom. Given the passage of time and the relatively short statute of limitations in tribal courts, however, it is not likely Tribe Apple can bring a case against either defendant because of the statute of limitations. More information about the statute of limitations is provided below.

Federal sexual crimes against both adults and children are defined in chapter 109A of the Federal Criminal Code, codified in Title 18 of the United States Code.[11] Chapter 109A consists of eight separate sections delineating the criminal offenses as aggravated sexual abuse, sexual abuse, sexual abuse of a minor or ward, and abusive sexual contact.[12] Chapter 109A is not a federal law of general jurisdiction; therefore, the acts must occur within the special maritime or territorial jurisdiction of the United States and must otherwise comply with jurisdictional criteria to qualify for federal prosecution.[13]

Chapter 109A distinguishes sexual assaults by the following: (1) the nature and type of sexual assault; (2) the means used to commit the assault; or (3) the defendant's age or position in relation to the victim.[14] Further, sexual assaults fall within two categories: abusive sexual acts[15] and abusive sexual contact.[16] Abusive sexual acts, the more serious category of offenses, include the following:

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to

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[9] 18 U.S.C. §§ 1152–1153.
[10] *Id.* § 1153.
[11] *Id.* §§ 2241–2248.
[12] 18 U.S.C. 109A.
[13] *Id.*
[14] *Id.*
[15] *Id.* §§ 2241–2243.
[16] *Id.* § 2244.

abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.[17]

By contrast, abusive sexual contact is the "intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[18] A sexual assault is "aggravated" when committed or attempted through use of force, threats of force, by placing the victim in fear or when the victim is under the age of 12.[19] Both completed and attempted sexual assaults are criminalized under federal law.[20]

Based on the limited case facts presented here and if the government can prove beyond a reasonable doubt Uncle Jimmy penetrated Shana's genital or anal opening with his finger,[21] it appears that the appropriate charge to bring against Uncle Jimmy is one count of aggravated sexual assault of a minor.[22] Should Uncle Jimmy be convicted of this crime, he faces a mandatory minimum 30 years' imprisonment.[23]

When Tom raped Shana, she was passed out due to alcohol intoxication. It appears Shana's alcohol consumption was voluntary. Accordingly, the appropriate charge to bring against Tom is likely one count of sexual abuse.[24] If Tom is convicted at trial for sexual abuse, he faces a maximum possible penalty of life or any term of years.[25]

B. Which jurisdiction has the authority to prosecute the sex trafficking crimes committed against Shana in Michigan and Arizona?

Based on the limited facts provided, it is likely the federal government has jurisdiction to prosecute Steve for the trafficking offenses committed in Detroit. The federal "human trafficking" statute is found at

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[17] *Id.* § 2246(2).
[18] *Id.* § 2246(3).
[19] *Id.* § 2241.
[20] *Id.* §§ 2241–2242.
[21] United States v. Joseph Seymour, 468 F.3d 378, 388 (6th Cir. 2006).
[22] 18 U.S.C. § 2241(c).
[23] *Id.*
[24] *Id.* § 2242(2)(B).
[25] *Id.* § 2242(3).

18 U.S.C. § 1591, and the official title in the federal code is "[s]ex trafficking of children or by force, fraud, or coercion."[26] Section 1591 is a crime of general applicability.[27] If the government can prove that Steve used force, fraud, or coercion to cause Shana to engage in a commercial sex act, and that the crime was committed "in or affecting interstate or foreign commerce," there is no need to consider other bases of jurisdiction, like the General Crimes Act or the Major Crimes Act, for crimes occurring in Indian country.[28] In this case, Shana was trafficked in a large urban area, the City of Detroit. Detroit does not meet the federal definition of Indian country. The fact that Shana is an Indian person does not make the case an Indian country case.

The federal government has jurisdiction in sex trafficking cases because of the crime's effects on interstate commerce. Accordingly, the federal prosecutor using section 1591 must be able to prove what activity falls within the definition of interstate commerce.[29] Must the pimp, the john, or the victim travel across state lines or in and out of Indian country? Or does purely intra-jurisdiction activity meet the legal definition? The case of *United States v. Evans* addressed the issue of whether solely "intrastate" commercial sexual activity could satisfy the interstate-commerce element of section 1591(a)(1).[30] In *Evans*, a fourteen-year-old girl (Jane Doe) worked in Miami–Dade County as a prostitute for the defendant.[31] "[Defendant] arranged 'dates' for Jane Doe at local hotels."[32] Jane Doe gave all money earned to the defendant.[33] Evans communicated with the victim using a cell phone.[34] "Evans supplied Jane Doe with condoms for use on the dates."[35] The most used brand of condom was Lifestyle which is produced overseas and imported into Georgia for sale and delivery throughout the United States.[36] Jane Doe was ultimately hospitalized for 11 days and diagnosed with acquired immunodeficiency syndrome (AIDS).[37] After her release from the hospital, Evans contacted Jane Doe via landline telephone and asked her to work for him again. Jane Doe worked for the defendant until she was hospitalized again to be

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[26] *Id.* § 1591.
[27] *Id.*
[28] *Id. See also id.* § 1152 (General Crimes Act); *id.* § 1153 (Major Crimes Act).
[29] *Id.* § 1591.
[30] 476 F.3d 1176 (2007).
[31] *Id.* at 1177.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 1177–78.

treated for AIDS.[38]

The *Evans* court found section 1591(a)(1) constitutional as applied to the defendant's purely intrastate activities.[39] The court said that section 1591 "was enacted as part of the Trafficking Victims Protection Act of 2000"; this act "criminalizes and attempts to prevent slavery, involuntary servitude, and human trafficking . . . particularly of women and children in the sex industry."[40] Importantly, the court highlighted that "Congress found that trafficking of persons has an aggregate economic impact on interstate and foreign commerce."[41] The court stated that Congress's conclusions in this regard were not irrational.[42] Therefore, the *Evans* court concluded the defendant's enticement of a fourteen-year-old female to commit intrastate prostitution "had the capacity when considered in the aggregate with similar conduct by others, to frustrate Congress' broader regulation of interstate and foreign economic activity."[43] In short, the defendant's "use of hotels that served interstate travelers and distribution of condoms that traveled in interstate commerce are further evidence that Evans' conduct substantially affected interstate commerce."[44] This case is often cited to support a broad definition of interstate commerce. It is also likely the State of Michigan has jurisdiction to prosecute Steve for trafficking Shana in Detroit.

The following may be a more challenging question: Does the tribe in Arizona, Tribe Flower, have jurisdiction to prosecute Steve, a non-Indian, for trafficking Shana there? In 1978, the U.S. Supreme Court ruled tribal courts have no criminal jurisdiction over non-Indian offenders.[45] The inability of tribes to prosecute non-Indians for offenses committed against Indians in Indian country left some victims without justice and tribal communities feeling vulnerable. Tribal leaders and victim advocates have worked hard over the years to include, in federal legislation, an ability for tribes to prosecute non-Indian defendants.

Nearly a decade ago, the Violence Against Women Reauthorization Act (VAWA) of 2013 was passed.[46] Title IX of VAWA 2013 is titled "Safety for Indian Women." Section 904 of Title IX, Tribal Jurisdiction

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[38] *Id.*
[39] *Id.* at 1180–81.
[40] *Id.* at 1179.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
[46] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

over Crimes of Domestic Violence, amended the Indian Civil Rights Act (ICRA).[47] Section 1304(b)(1) stated that "the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons."[48] A tribe's ability to prosecute a non-Indian offender, however, was limited to violations of domestic or dating violence occurring "in the Indian country of the participating tribe" and violations of a qualifying protection order.[49] Implementing tribes had to provide non-Indian defendants appearing in tribal court with a host of due process protections.[50]

On March 15, 2022, the VAWA Reauthorization 2022 was signed into law. Many of its provisions, however, did not go into effect until October 1, 2022. The most significant changes were that the ICRA was amended, and special domestic violence criminal jurisdiction (SDVCJ) was replaced with special Tribal criminal jurisdiction (STCJ). The list of "covered crimes" for STCJ includes the following: assault of tribal justice personnel; child violence; dating violence; domestic violence; obstruction of justice; sexual violence; sex trafficking; stalking; and violation of a protection order.[51] The term "sex trafficking" means conduct within the meaning of 18 U.S.C. § 1591(a).[52] A participating tribe may not exercise STCJ over an alleged offense, other than obstruction of justice or assault of tribal justice personnel, if neither the defendant nor the alleged victim is an Indian.[53]

Effective October 1, 2022, for a tribal court to prosecute a non-Indian defendant under STCJ, the tribe must afford the defendant certain due process protections including:

> (1) all applicable rights under this Act;
>
> (2) if a term of imprisonment of any length may be imposed, all rights described in section 1302(c) of this title;
>
> (3) the right to a trial by an impartial jury that is drawn from sources that—
>
> > (A) reflect a fair cross section of the community; and

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[47] 25 U.S.C. § 1304.
[48] *Id.* § 1304(b)(1).
[49] *Id.* § 1304(c).
[50] *Id.* § 1304(d).
[51] *Id.* § 1304(a)(5).
[52] 18 U.S.C. § 1591(a).
[53] 25 U.S.C. § 1304(b)(4).

> (B) do not systematically exclude any distinctive group in the community, including non-Indians; and
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> (4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.[54]

Section 1302(c), enacted as part of the Tribal Law and Order Act of 2010, provides to defendants the following rights:

> (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
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> (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
>
> (3) require that the judge presiding over the criminal proceeding–
>
> > (A) has sufficient legal training to preside over criminal proceedings; and
> >
> > (B) is licensed to practice law by any jurisdiction in the United States;
>
> (4) [before] charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
>
> (5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.[55]

A tribe's decision to implement STCJ does not create or eliminate any federal or state criminal jurisdiction over Indian country.[56] In short, the tribe's exercise of this inherent power is "concurrent with the jurisdiction

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[54] *Id.* § 1304(d).
[55] Indian Arts and Crafts Amendments Act of 2010, Pub. L. 111-211, 124 Stat. 2258, 2261 (quoting 25 U.S.C. § 1302(c)).
[56] 25 U.S.C. § 1304(b)(3)(A).

of the United States, of a [s]tate, or of both."[57] VAWA 2022 makes STCJ available to any participating tribes in the State of Maine.[58] Previously, tribes in Maine were unable to exercise SDVCJ authority because of the Maine Indian Claims Settlement Act of 1980.[59]

STCJ affords tribes the ability to provide justice to victims of crime, hold offenders accountable, strengthen their sovereignty, and make their communities safer. Provided Tribe Flower has implemented STCJ and offered Steve all the required due process protections, Tribe Flower could bring sex trafficking charges against him in tribal court.

In short, working in Indian country is complex because multiple jurisdictions and a myriad of criminal justice and social services personnel may have an active role to play in a single case. Thus, the federal, state, and tribal governments' response to sex trafficking must be coordinated and collaborative.

C. If there are multiple criminal cases in two or more jurisdictions at the same time concerning Shana, who is responsible for coordinating the different jurisdiction's efforts?

Federal law requires all U.S. Attorneys' Offices (USAO) with Indian country responsibility to have at least one designated tribal liaison who serves as the primary point of contact for tribes in the district.[60] The duties of the tribal liaison are outlined in statute and include the following: coordinating prosecution of federal crimes in Indian country; developing multidisciplinary teams to combat child, domestic, and sexual abuse against Indians; consulting and coordinating with tribal justice officials and advocates to address prosecution backlog; developing relationships with tribal leaders; and conducting training sessions.[61]

While the Tribal Liaisons are collectively the most experienced prosecutors of crimes in Indian country, they are not the only Assistant U.S. Attorneys (AUSAs) doing these prosecutions. The volume of cases from Indian country requires these prosecutions in most USAOs to be distributed among numerous AUSAs.

On January 11, 2010, then-Deputy Attorney General (DAG) David Ogden issued a memorandum to all U.S. Attorneys with districts that included Indian country declaring, "public safety in tribal communities is

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[57] *Id.* § 1304(b)(2).
[58] *Id.* § 1304(b)(1).
[59] *Id.* §§ 1721–1735.
[60] *Id.* § 2810.
[61] *Id.* § 2810(b).

a top priority for the Department of Justice (Department)."[62]

The DAG noted several challenges confronting tribal criminal justice systems: scarce law enforcement resources, geographic isolation, vast size of reservations, and insufficient federal and state resources dedicated to Indian country.[63] Yet, "[d]espite these challenges, tribal governments have the ability to create and institute successful programs when provided with the resources to develop solutions that work best for their communities."[64]

In an effort to advance the work of the United States in Indian country, the DAG memorandum directed the following: (1) that every USAO with Indian country in its district, in coordination with its law enforcement partners, engage at least annually in consultation with the tribes in that district, and (2) that "[e]very newly confirmed U.S. Attorney in such districts . . . should conduct a consultation with tribes in his or her district and develop or update the district's operational plan within eight months of assuming office."[65]

The subject matter of each district's plan will vary depending on whether the district is a Public Law 280 (criminal jurisdiction delegated by statute to the state) or non-Public Law 280 (federal government has jurisdiction in Indian country depending on the Indian or non-Indian status of the suspect and victim, and the type of crime committed) jurisdiction, the number of tribes in the district, and the unique history and resource challenges of the tribes.[66] Districts were instructed, however, operational plans should include topics such as "a plan to develop and foster an ongoing government-to-government relationship; a plan to improve communications with each tribe [. . .]; [and] a plan to initiate [. . .]" a tribal Special Assistant U.S. Attorney program.[67] To assist with the development of district operational plans, the DAG instructed the Executive Office of U.S. Attorneys (EOUSA) to develop and provide model approaches for district tribal consultations and operational planning to the USAO.[68]

The DAG memorandum also has several important paragraphs dedicated specifically to violence against women and children in tribal com-

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[62] Memorandum from David W. Ogden, Deputy Att'y Gen., on Indian Country Law Enforcement Initiative to the United States Attorneys with Districts Containing Indian Country 1 (Jan. 11, 2010).
[63] *Id.* at 2.
[64] *Id.*
[65] *Id.* at 3.
[66] 18 U.S.C. § 1162.
[67] Memorandum from David W. Ogden, *supra* note 62, at 3.
[68] *Id.* at 4.

munities.[69] The DAG directed "every U.S. Attorney to pay particular attention to violence against women, and to work closely with law enforcement to make these crimes a priority."[70]

This need to focus on sexual assault and coordination across jurisdictions was again highlighted in June 2016 when then-Attorney General Loretta Lynch issued a memorandum to all U.S. Attorneys concerning recommendations of a national task force looking at the issue of sexual violence in Indian country. The Attorney General's memorandum required the following of all U.S. Attorneys with Indian country responsibility:

> Pursuant to Key Area One of the Committee recommendations, by August 12, 2016, all United States Attorneys with jurisdiction to prosecute crimes in Indian Country based on Title 18, United States Code, Sections 1152 and 1153, shall meet with federal partners ([Federal Bureau of Investigation (FBI)], [Bureau of Indian Affairs], and [Indian Health Service]) and tribal partners to develop written sexual violence guidelines that detail specific responsibilities of each federal partner. United States Attorneys shall implement those guidelines by September 9, 2016. United States Attorneys with Indian Country jurisdiction but without the authority to prosecute crimes based on Title 18, United States Code, Sections 1152 and 1153 shall discuss federal sexual violence response with their tribal partners and federal partners as appropriate during annual consultations.[71]

Consequently, all USAOs with federally recognized Indian tribes have written sexual violence guidelines in place. In many USAOs these guidelines were appended to the district's operational plan.

In July 2022, DAG Lisa Monaco issued a memorandum titled "Promoting Public Safety in Indian Country."[72] The memorandum reinforced that it is a Department priority to address the disproportionately high rates of violence experienced by Native Americans, and relatedly, the high

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[69] *See id.* at 4–5.

[70] *Id.* at 5.

[71] Memorandum from Loretta Lynch, Att'y Gen., on Recommendations of the National Coordination Committee on the AI/AN SANE-SART Initiative for Improving Federal Response to Sexual Violence in Indian Country to all U.S. Attorneys (June 27, 2016).

[72] Memorandum from Lisa Monaco, Deputy Att'y Gen, on Promoting Public Safety in Indian Country to Dir., Bureau of Alcohol, Tobacco, Firearms & Explosives; Adm'r., Drug Enforcement Admin.; Dir., Federal Bureau of Investigation; Dir., U.S. Marshals Service; Dir., Exec. Off. for U.S. Att'ys; and U.S. Att'ys (July 13, 2022).

rates of indigenous persons reported missing.[73] The DAG's memorandum required every USAO with Indian country to update its operational plan. The memorandum also stated that USAO's have

> a duty to prosecute serious crimes in Indian country, including domestic violence and sexual assault, as well as federal offenses outside of Indian country that affect AI/AN persons, including human trafficking and interjurisdictional domestic violence and stalking offenses. Reports of these offenses in Indian country should be investigated wherever credible evidence of a violation of federal law exists, and offenses should be prosecuted when the Department's *Principles of Federal Prosecution* are met.[74]

The memorandum also emphasizes the need for the different jurisdictions to work closely together because successful multijurisdictional investigations and prosecutions require collaborative working relationships.[75] Tribal Liaisons and AUSAs assigned to cases of adult sexual assault and domestic violence are encouraged to develop and use a multidisciplinary team model like the model used in cases of child abuse in Indian country.[76] The DAG also stressed the importance of training for all federal personnel working with tribes.[77]

Therefore, if there are multiple prosecutions involving Shana in federal or tribal court, there has been Department guidance since 2010 requiring a collaborative approach. The tribal liaison, working in concert with federal victim–witness specialists and tribal victim advocates, should ensure that the various investigative agencies and prosecutors are coordinated and employing a victim-centered, trauma-informed approach in every case impacting Shana.[78] A coordinated response to sexual assault and open lines of communication among federal and tribal criminal justice and social service professionals will benefit Shana or any similarly situated victim.

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[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] 18 U.S.C. § 3509(g).
[77] Memorandum from Lisa Monaco, *supra* note 72.
[78] U.S. Dep't of Just., The Attorney General Guidelines for Victim and Witness Assistance 16–17 (2022).

IV. Prosecution and the statute of limitations

A. Uncle Jimmy's sexual assault on Shana occurred years ago. Is prosecution for this crime barred by the statute of limitations?

A statute of limitations is the period within which a legal proceeding must begin.[79] The reason for statutes of limitations in criminal cases is to ensure charges are brought promptly and that defendants do not have to defend themselves against old charges after memories may have faded, witnesses are unable to be located, or evidence is lost.[80] In the federal system, criminal cases must be brought within five years.[81] Certain crimes, however, have a longer statute of limitations or no statute of limitations at all.

As it concerns sex crimes committed against a minor, the statute of limitations has changed several times since 1990.[82] The most recent change occurred when the Adam Walsh Child Protection and Safety Act of 2006 (AWA) was enacted.[83] The AWA eliminated the statute of limitations for felony sex offenses involving the exploitation of minors. The change became effective on July 27, 2006, and is codified at 18 U.S.C. § 3299.[84] The law states, "Notwithstanding any other law, an indictment may be found or an information instituted at any time without limitation for any offense under section 1201 involving a minor victim, and for any felony under chapter 109A, 110 (except for section 2257 and 2257A), or 117, or section 1591."[85]

From the limited facts provided, Shana was molested when she was three years old. She is now 20 years old, so we can assume Uncle Jimmy assaulted her approximately 17 years ago or in 2007. Because this assault occurred after passage of the AWA, there is no statute of limitations barring the prosecution of Uncle Jimmy. Even though nearly two decades have passed since Shana was molested by Uncle Jimmy, prosecutors can

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[79] *Statute of limitations*, Merriam-Webster Dictionary (1641).
[80] Charles Doyle, Statute of Limitation in Federal Criminal Cases: An Overview (2017).
[81] 18 U.S.C. § 3282.
[82] Chantel L. Febus, *Determining the Statute of Limitations for a Child Exploitation Offense*, CEOS Q. Newsl. 5 (Apr. 2009).
[83] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 211, 120 Stat. 587 (codified as amended at 34 U.S.C. §§ 20901–20962).
[84] 18 U.S.C. § 3299.
[85] *Id.*

still bring charges if there is sufficient evidence to prove the case beyond a reasonable doubt and such a case would meet the Department's principles of federal prosecution.[86]

In this case, there was an immediate report of sexual assault. Shana reported Uncle Jimmy's assault to her mother right away. Unfortunately, Shana's mother failed her daughter and did seemingly nothing to hold Uncle Jimmy accountable. Sexual assault and molestation cases are the types of crimes where a delay in reporting is common. Most victims of sexual assault never report the crime to law enforcement. Those who do report the crime, frequently do so after some time has passed.[87] A delay in reporting should never be interpreted by the criminal justice system as evidence the victim is lying. Even delayed reports of sexual assault must be thoroughly investigated. Victims typically have legitimate reasons for delaying the report of sexual assault, like fear, shame, and humiliation. And with the elimination of statutes of limitation for many federal sex crimes, it is possible to bring charges against defendants like Uncle Jimmy.

If a victim reports a sexual assault occurring before the effective date of the AWA in 2006, the prosecutor should research the applicable law at the time of the offense. While in certain situations the tribal court may have concurrent jurisdiction to bring charges against a defendant, the statute of limitations in tribal law is typically much shorter than it is in federal law. For example, some tribes have a six-month, one-year or perhaps a two-year statute of limitations for even felony cases. Consequently, federal prosecutors must act expeditiously when deciding whether to bring charges. Any prosecution of Uncle Jimmy in tribal court would almost certainly be prohibited by expiration of the tribe's statute of limitations.

B. If Tribe Apple prosecuted either Uncle Jimmy or Tom, could the federal government also prosecute them?

The Petite Policy is a Department policy precluding the federal prosecution of cases that are based on substantially the same acts of a prior state or federal prosecution, when that prior prosecution has resulted in an acquittal, a conviction, or a dismissal.[88] This preclusion applies even where a subsequent prosecution would not be legally barred under the

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[86] U.S. Dep't of Just., Justice Manual 9-27.000.
[87] Int'l. Ass'n. of Chiefs of Police, Sexual Assault Incident Reports: Investigative Strategies 5 (n.d.).
[88] *See* U.S. Dep't of Just., Justice Manual 9-2.031(1).

Double Jeopardy Clause because of the doctrine of dual sovereignty.[89] The policy as outlined in the Justice Manual may be overcome if the following elements are met:

> [F]irst, the matter must involve a substantial federal interest; second, the prior prosecution must have left that interest demonstrably unvindicated; and third, applying the same test that is applicable to all federal prosecutions, the government must believe that the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction . . . . [T]he prosecution must be approved by the appropriate Assistant Attorney General.[90]

The policy does not apply when:

- "prior prosecution involved only a minor part of the contemplated federal charges";[91]
- "contemplated federal prosecution could not have been brought in the initial federal prosecution because of . . . venue restrictions, or joinder or proof problems";[92] or
- "the federal trial has commenced and the prior prosecution subsequently reaches" an acquittal, a conviction, or a dismissal.[93]

This policy was created solely for the use of the Department and is exercised within its discretion.[94]

The language of the policy does not specifically address federal prosecutions following a prior tribal prosecution within Indian country, and the policy is not traditionally applied in those cases.[95] Federal circuit courts have routinely held the Petite Policy does not grant substantive rights and, therefore, cannot be used by a defendant as a bar to federal prosecution.[96] The Supreme Court has held Department policies govern-

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[89] *Id.* at 9-2.031(2).
[90] *Id.* at 9-2.031(1).
[91] *Id.* at 9-2.031(2).
[92] *Id.*
[93] *Id.* at 9-2.031(3).
[94] *Id.* at 9-2.031(1).
[95] *See generally id.*
[96] *See, e.g.*, United States v. Snell, 592 F.2d 1083 (9th Cir. 1979); United States v. Howard, 590 F.2d 564 (4th Cir. 1979); United States v. Frederick, 583 F.2d 273 (6th Cir. 1978); United States v. Thompson, 579 F.2d 1184 (10th Cir. 1978) (en banc); United States v. Wallace, 578 F.2d 735 (8th Cir. 1978); United States v. Nelligan, 573 F.2d 251 (5th Cir. 1978); United States v. Hutul, 416 F.2d 607 (7th Cir. 1969).

ing its internal operations do not create rights that may be enforced by defendants against the Department.[97]

A similar principle applies regarding tribal prosecutions: An Indian defendant cannot raise the Double Jeopardy Clause as a bar to federal prosecution following a tribal prosecution based on substantially the same acts or underlying elements. Tribes have sovereign authority to prosecute criminal offenses over all Indians.[98] This power does not derive from federal authority, but "[r]ather, it enlarges the *tribes'* own 'powers of self-government' to include 'the inherent power of Indian tribes . . . to exercise criminal jurisdiction over *all* Indians,' including nonmembers."[99] Thus, tribes act as separate sovereigns when conducting their own criminal prosecutions.[100] Absent a showing that a tribal court's power to prosecute a case derived from federal power, the doctrine of dual sovereignty is applied and "the Double Jeopardy Clause does not prohibit the [f]ederal [g]overnment from . . . prosecuti[ng] . . . a discrete federal offense."[101]

In short, the federal government can legally bring charges against Uncle Jimmy and Tom even if Tribe Apple has already convicted both men for the sexual assault committed on Shana. There is no double jeopardy prohibition.

V. Medical forensic examination

A. Can Shana obtain a medical forensic examination even if she does not want to report having been sexually assault or trafficked?

A timely medical forensic examination performed by a trained and skilled clinician "can potentially validate and address sexual assault patients' concerns, minimize the trauma they may experience, and promote their healing."[102] Many sexual assault victims who seek a medical forensic exam choose to report the assault to law enforcement.[103] Reporting to law enforcement allows the criminal justice system with the opportunity to provide a number of things: protection for the victim; collection of

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[97] *See* United States v. Caceres, 440 U.S. 741, 751–53 (1979); Sullivan v. United States, 348 U.S. 170, 184 (1954).
[98] 25 U.S.C. § 1301(2).
[99] United States v. Lara, 541 U.S. 193, 198 (2004) (citing 25 U.S.C. § 1301(2)).
[100] *See id.* at 209–10.
[101] *Id.* at 210.
[102] U.S. Dep't of Just., Off. on Violence Against Women, A National Protocol for Sexual Assault Medical Forensic Examinations 4 (2d ed. 2013) [hereinafter Protocol for Medical Examiners] (internal citation omitted).
[103] Protocol for Medical Examiners, *supra* note 102, at 51.

evidence from all crime scenes; a complete investigation of the case; potential prosecution; community safety; potential deterrence; and offender accountability.[104] A sexual assault nurse examiner (SANE), victim advocate, or other service provider should discuss all reporting options with victims and the pros and cons of each, including the fact delayed reporting may negatively impact the ability to prosecute the case. Shana should be told that even if she is not ready to report to law enforcement at the time of the medical forensic exam, the best way to preserve her option to report later is to have the exam performed.[105]

The decision to report to law enforcement belongs solely to the victim. The only exception to this is where the case fits within a jurisdiction's law mandating a report to law enforcement. For example, the federal government requires that covered professionals, like medical providers, report the sexual exploitation of an Indian child in Indian country to either local law enforcement or child protective services.[106] Health-care professionals, to include SANEs, should be trained on mandatory reporting laws and patient autonomy.

VAWA requires that state governments, Indian tribal governments, and units of local government seeking funding under the Services, Training, Officers, and Prosecutors Violence Against Women Formula Grant Program must ensure victims of sexual assault have access to a forensic medical exam, free of charge or with full reimbursement, even if the victim chooses not to report the crime to the police or otherwise participate with law enforcement authorities or the criminal justice system.[107] The state, however is not required to pay for medical care for assault related injuries.[108] Jurisdictions must determine where to store evidence collected during the medical forensic examination in cases where the victim has not yet opted to report her case to law enforcement. Given limited storage options in some departments, the issue of storage can be a challenge.[109]

If Shana presents at a clinic or hospital for purposes of a medical forensic examination, she should be informed of the following before deciding about reporting to law enforcement:

- The process of reporting the sexual assault to law enforcement and the information that will typically be requested from the victim.

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[104] *Id.*
[105] *Id.*
[106] 18 U.S.C. § 1169.
[107] 34 U.S.C. § 10449.
[108] Protocol for Medical Examiners, *supra* note 102, at 52.
[109] *Id.*

- Procedures dealing with reporting in the jurisdictional protocol for immediate response to sexual assault.
- Whether health[-]care personnel are mandated by law to report the assault.
- The fact that the report will trigger an investigation. Depending upon the results of the investigation, the case may be referred to the prosecutor, and the prosecutor may file charges.
- The purposes of the exam and how documented injuries as well as evidence gathered could be used during investigation and prosecution.
- Types of evidence (beyond that found on patients) that may be gathered during an investigation.
- The fact that delays in reporting, especially extended ones, can result in loss of evidence and may negatively affect the ability of the criminal justice system to investigate and prosecute a case.
- Practices regarding prosecution of sexual assault victims for unrelated criminal charges.
- The right to accept or decline exam procedures and the possible consequences of declining.
- The right to copies of any communication or report issued to law enforcement and procedures for accessing such data.
- Policies related to payment for the exam, evidence collection, and medical care, whether or not a report is made.
- Policies on collecting [and] holding evidence in cases where patients are undecided about reporting, and, if evidence can be collected with no report, the amount of time they have to make a reporting decision.[110]

Some jurisdictions have implemented alternatives to standard reporting policies and procedures. This is sometimes referred to as blind or anonymous reporting. One such jurisdiction providing for anonymous reporting is the State of Nebraska.[111] In Nebraska, if a victim chooses to anonymously report a sexual assault, the law enforcement agency closest to the medical facility is contacted. This is true even if the assault

[110] *Id.*
[111] Neb. Att'y Gen.'s Off., Nebraska Medical Sexual Assault Protocol 12 (2020).

occurred in a different jurisdiction.[112] Following chain of custody procedures, local law enforcement will pick up the Anonymous Sexual Assault Kit (A-SAK) and store the sealed A-SAK among their evidence. The A-SAK will be retained for 20 years from the date of collection—unless otherwise ordered by a court.[113] Per Nebraska's policy, the A-SAK must never change custodial agencies (for example, move from a police department to a sheriff's department or state police) or it will negatively impact the ability of the victim to later "convert" the report from anonymous to a full investigation.[114]

Per the Nebraska policy, the A-SAK number of every A-SAK stored by the agency must be entered into the agency's record management system in a searchable field. The victim is not identified on the A-SAK, and the law enforcement copies of the health-care provider's report are sealed inside the A-SAK.[115]

At any time during the 20-year storage period, the victim of an anonymously reported sexual assault in Nebraska may choose to contact the law enforcement agency storing the A-SAK in order to "convert" the report type and participate in the criminal justice process.[116] The victim is tasked with providing the number of their A-SAK to the storing law enforcement agency in order to associate the A-SAK with the victim.[117] The medical facility where the exam was conducted can provide the victim with their A-SAK number if the victim does not have it. The A-SAK number is kept by the health-care provider in the victim's confidential records.[118] The health-care provider also keeps a record of the law enforcement agency that picked up the A-SAK. Keeping a record allows the health-care provider to send the victim to the correct agency and to connect the evidence with the investigative report.[119] If the law enforcement agency storing the A-SAK is different than the one with jurisdiction to investigate the case, the two agencies will arrange for a transfer of custody to facilitate the conversion of the case to an active investigation.

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[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* at 15.
[116] *Id.* at 16.
[117] *Id.*
[118] *Id.*
[119] *Id.*

B. Does Shana have the right to information about her case to include the results of the medical forensic examination?

Effective October 1, 2022, the Sexual Assault Survivors' Rights Act (SASRA) provides Shana with several rights.[120] Per this act, "sexual assault" is defined as, "any nonconsensual sexual act proscribed by [f]ederal, tribal, or [s]tate law, including when the victim lacks capacity to consent."[121] It seems clear the offenses committed against Shana on Tribe Apple fit the definition of sexual assault within the SASRA. Accordingly, Shana is entitled to the following:

- the right to have a sexual assault evidence collection kit or its probative contents preserved, without charge, for the duration of the maximum applicable statute of limitations or 20 years—whichever is shorter;[122]
- the right to "be informed of any result of a sexual assault evidence collection kit, including a DNA profile match, toxicology report, or other information collected as part of a medical forensic examination, if such disclosure would not impede or compromise an ongoing investigation;"[123]
- the right to "be informed in writing of policies governing the collection and preservation of a sexual assault evidence collection kit;"[124]
- the right to "be informed of the status and location of a sexual assault evidence collection kit;"[125]
- the right upon written request, to "receive written notification from the appropriate official with custody not later than 60 days before the date of the intended destruction or disposal;"[126]
- the right "upon written request, be granted further preservation of the kit or its probative contents";[127] and

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[120] 18 U.S.C. § 3772.
[121] *Id.* § 3772(c).
[122] *Id.* § 3772(a)(2)(A). *Practice Note:* If any of the aggravated sexual abuse or human trafficking crimes committed against Shana are prosecuted in federal court, there is no statute of limitations. Hence, the sexual assault evidence collection kit or its probative contents must be preserved for 20 years.
[123] *Id.* § 3772(a)(2)(B).
[124] *Id.* § 3772(a)(2)(C).
[125] *Id.* § 3772(a)(2)(D).
[126] *Id.* § 3772(a)(3)(A).
[127] *Id.* § 3772(a)(3)(B).

- the "right to be informed of the rights under this [Act]."[128]

There is nothing in the text of the SASRA that limits it to only crimes committed after the act's effective date of October 1, 2022. And the rights owed to Shana under the SASRA are in addition to the services due to her by the Victims' Rights and Restitution Act (VRRA)[129] and the rights she is owed under the Crime Victims' Rights Act.[130]

VI. Safety

A. While the FBI is investigating the case against Steve, Shana is concerned that Steve may try to harm her before charges are filed. Does the FBI have any obligation to provide for her safety?

The VRRA requires that:

> the head of each department and agency of the United States engaged in the detection, investigation, or prosecution of crime shall designate by names and office titles the persons who will be responsible for identifying the victims of crime and performing the services described in subsection (c) at each stage of a criminal case.[131]

These services are owed to the victim even before prosecutors file any charges. Concerning Shana, the FBI must tell her where she can obtain emergency medical and social services.[132] Given Shana's history of victimization and substance abuse issues, she will likely need medical and social services. Second, the responsible official for the FBI must tell Shana about restitution or other relief to which she is entitled.[133] The FBI must also tell Shana about public and private counseling or treatment programs, and the responsible official must assist her in contacting those who may provide her with assistance.[134]

Perhaps most important for Shana and her well-founded safety concerns is the VRRA's requirement that the responsible FBI official "arrange for a victim to receive reasonable protection from a suspected offender and persons acting in concert with or at the behest of the suspected

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[128] *Id.* § 3772(a)(4).
[129] 34 U.S.C. § 20141.
[130] 18 U.S.C. § 3771.
[131] 34 U.S.C. § 20141(a).
[132] *Id.* § 20141(c)(1)(a).
[133] *Id.* § 20141(c)(1)(b).
[134] *Id.* § 20141(c)(1)(c)–(d).

offender."[135] Protection in Indian country can be challenging. Victims may live on a reservation in a remote area without available transportation. The victim may not have a working cell phone or may have unreliable cell phone service. If the case involves intimate partner violence, it is important to remember the suspect may have intimate knowledge about the victim's dwelling. The suspect may know if door or window locks are broken, if the area is dimly lit, and how to disable power to the home.

FBI and tribal personnel assigned to Shana's cases should ask about her safety concerns and work together to ensure she is not vulnerable to additional violence or threats at the hands of Steve, Tom, or Uncle Jimmy. They should also keep her informed about the status of the case investigation, so long as it is appropriate to do so and will not compromise the investigation.[136]

B. What if Shana has concerns that she may have contracted a sexually transmitted infection during the assault or that Steve is possibly positive for human immunodeficiency virus?

Federal law provides that for sexual assault victims who are concerned they may have been exposed to human immunodeficiency virus (HIV):

> The Attorney General shall provide for the payment of the cost of up to [two] anonymous and confidential tests of the victim for sexually transmitted diseases, including HIV, gonorrhea, herpes, chlamydia, and syphilis, during the 12 months following sexual assaults that pose a risk of transmission, and the cost of a counseling session by a medically trained professional on the accuracy of such tests and the risk of transmission of sexually transmitted diseases to the victim as the result of the assault.[137]

Also, if the case is charged in state or federal court, federal law provides that the victim or prosecutor can request the court to order the defendant be tested for the presence of the etiologic agent for acquired HIV.[138] To successfully request such testing, the moving party must show the defendant was charged with a sexual assault crime that included the

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[135] *Id.* § 20141(c)(2); U.S. Dep't of Just., The Attorney General Guidelines for Victim and Witness Assistance 49–50 (2022).
[136] 34 U.S.C. § 20141(c)(3)(A).
[137] *Id.* § 20141.
[138] *Id.* § 12391(b)(1).

transmission of bodily fluid and poses a risk of transmitting HIV.[139] There also must be a probable cause determination that the defendant committed the crime.[140] The victim must request the test and the test must be necessary to provide information concerning the victim's health.[141] The defendant must receive notice the victim has requested the test and the defendant must be provided an opportunity to object to the court's order.[142] The law requires the test results be kept confidential. The results, however, "shall be disclosed only to the victim or, where the court deems appropriate, to the parent or legal guardian of the victim, and to the person tested."[143] The test results and the contents of the court proceedings must be sealed. Additionally, the test results may not be used as evidence in any criminal trial.[144]

VII. Evidence and conviction

A. While prosecuting Tom, the government learns that he committed a similar offense against another intoxicated female a couple of years before Shana was assaulted. Is this evidence admissible at the trial for the sexual assault on Shana?

Evidence of the earlier assault may be admissible against Tom at the trial focused on the sexual assault of Shana. Evidence of a prior sexual assault is admissible under Federal Rules of Evidence 413 and 414, "unless its probative value is substantially outweighed by one or more of the factors enumerated in Rule 403, including the danger of unfair prejudice."[145] Rule 413 establishes a special, broad standard for the admission of evidence of a defendant's commission of charged and uncharged offenses of sexual assault in cases in which the defendant is charged with a federal sexual assault offense.[146]

When Rule 413 was passed, Senator Bob Dole said the following about the importance of this other relevant information:

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[139] United States v. Ward, 131 F.3d 335, 340 (3d Cir. 1997).
[140] *Id.* at 341.
[141] *Id.*
[142] *Id.*
[143] 34 U.S.C. § 12391(b)(5).
[144] *Id.* § 12391(b)(6).
[145] United States v. Weber, 987 F.3d 789, 793 (8th Cir. 2021) (quoting United States v. Keys, 918 F.3d 982, 986 (8th Cir. 2019)); *see also* Fed. R. Evid. 413 (similar crimes in sexual-assault cases); Fed. R. Evid. 414 (similar crimes in child-molestation cases).
[146] Fed. R. Evid. 413.

> [S]exual assault cases, where adults are the victims, often turn on difficult credibility determinations. Alleged consent by the victim is rarely an issue in prosecutions for other violent crimes—the accused mugger does not claim that the victim freely handed over his wallet as a gift—but the defendant in a rape case often contends that the victim engaged in consensual sex and then falsely accused him. Knowledge that the defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of these claims and accurately deciding cases that would otherwise become unresolvable swearing matches.[147]

Unlike Rule 404(b), Rule 413(a) allows such evidence to be admitted and considered for its bearing "on any matter to which it is relevant."[148] Accordingly, evidence of a defendant's other sexual offenses may be admitted under Rule 413 to show the defendant's propensity to commit the charged sexual assault offense.[149] Finally, Rule 413 operates under a presumption that evidence of prior sexual assaults is admissible, and no time limit on a defendant's conduct bars this presumption of admissibility.[150]

If the prosecutor wants to use evidence of the prior sexual assault committed by Tom at trial, notice must be provided to the defense at least 15 days before trial or later upon a finding of good cause.[151] The prosecutor must also provide to the defense witness statements or a summary of the expected testimony.[152] The evidence of the prior assault, if admitted, may be "considered on any matter to which it is relevant."[153]

In the case of *United States v. LaVictor*, the defendant was charged with several sexual assault and domestic violence crimes for a violent assault on his girlfriend.[154] At trial, the government called to testify two of LaVictor's previous girlfriends under Rule 413.[155] One testified that after she broke up with LaVictor, he broke into her home and raped her; this assault went unreported.[156] The second witness testified about an incident where LaVictor "forced her to get on her knees, perform oral sex on him, and then proceeded to take her clothes off and force objects

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[147] 140 Cong. Rec. S24799 (daily ed. Sept. 20, 1994) (remarks of Sen. Dole).
[148] *Id.* at 413(a).
[149] *Id.* at 413.
[150] *Id.*
[151] *Id.* at 413(b).
[152] *Id.*
[153] *Id.* at 413(a).
[154] 848 F.3d 428 (6th Cir. 2017).
[155] *Id.* at 449.
[156] *Id.*

into her vagina."[157] LaVictor challenged the admission of the previous girlfriends' testimony and argued the alleged assaults were not sufficiently similar to the assault being litigated, were uncorroborated, and were too old to be have probative value.[158] The appellate court disagreed and found the evidence was properly admitted.[159]

The investigators working the various cases of Shana's sexual assault should ask all witnesses in the case or those connected to Tom if they are aware of anyone else that Tom may have assaulted. If additional victims are uncovered, the government may be able to call those individuals to the stand to testify.

B. If Shana's assailants are convicted, will the community be aware of the offenders' convictions once they are released from prison?

If Shana's assailants are charged, tried, and convicted, it is likely one or all of them may eventually be released from prison and will either move back home or to a new community. These new communities may know nothing about either man's criminal history. Many citizens are concerned about the recidivism rates of sex offenders. And, at least in the case of Tom, recidivism is a realistic concern given that we know he has sexually assaulted at least two women. A large recidivism study published by the Bureau of Justice Statistics showed a sexual recidivism rate of 5.3% for the entire sample of sex offenders researched based on an arrest during the three-year follow-up period.[160] The violent and overall arrest recidivism rate, however, for this group of sex offenders was much higher. Just over 17% of sex offenders were rearrested for a violent crime, and 43% were rearrested for a crime of any kind during the three years after the release period that was studied.[161] One way to help communities know who is living among them is for those individuals, convicted of certain sex crimes, to be listed on a public sex offender registry.

The Adam Walsh Child Protection and Safety Act of 2006 (AWA) was signed into law on July 27, 2006.[162] The AWA is designed to protect the public from sexual exploitation and violent crime; prevent child abuse and child pornography; promote internet safety; and honor the memory

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[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] Roger Przybylski, U.S. Dep't of Just. Sex Offender Mgmt. Assessment & Plan. Initiative, Recidivism of Adult Sexual Offenders 2 (2015).
[161] *Id.*
[162] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 211, 120 Stat. 587 (codified as amended at 34 U.S.C. §§ 20901–20962).

of Adam Walsh and other crime victims. The AWA was named in honor of Adam Walsh, a six-year-old boy who was abducted from a store in Florida and murdered.[163]

The Sex Offender Registration and Notification Act (SORNA), Title I of AWA, was enacted to inform and protect the public from convicted sex offenders by establishing a comprehensive national system for the registration of those offenders.[164] SORNA requires a convicted offender register in the jurisdictions where they live, work, and go to school.[165]

Under the AWA, all federally recognized Indian tribes are entitled to elect whether to carry out the sex offender registration and notification requirements of the Act or delegate the functions to the state (or states) in which the tribal land is located, unless the tribe is subject to the criminal jurisdiction of a state under Public Law 280.[166] According to the relevant Department website, 137 tribes have substantially implemented SORNA's requirements.[167]

The crimes committed by Uncle Jimmy, Tom, and Steve are all offenses requiring registration under SORNA. If Tribe Apple or Tribe Flower are registration tribes per SORNA, then all adult sex offenders convicted of a registerable sex offense must register, regardless of whether the offender is an Indian or non-Indian.[168] Accordingly, if Uncle Jimmy, Tom, or Steve either live, work, or go to school in either tribe, they would need to register with that tribe. An offender can be required to register in more than one jurisdiction. Failure to register is a federal crime.[169]

Community members can search for sex offenders in their community by using The Dru Sjodin National Sex Offender Public Website (NSOPW).[170] The NSOPW is the only U.S. government website that

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[163] In Memory of Adam Walsh, Nat'l Ctr. for Missing & Exploited Child. (Nov. 13, 2023), https://www.missingkids.org/blog/2022/in-memory-of-adam-walsh#:~:text=On%20July%2027%2C%201981%20%2D%2041,and%20families%20who%20needed%20help.

[164] 34 U.S.C. § 20901.

[165] U.S. Dep't of Just., Off. of Sex Offender Sent'g, Monitoring, Apprehending, Registering, & Tracking, Guide to SORNA: Implementation in Indian Country 5 (2d ed. 2020) [hereinafter Guide to SORNA].

[166] 34 U.S.C. § 20929.

[167] *Substantially Implemented: Jurisdictions That Have Substantially Implemented SORNA,* U.S. Dep't of Just., Off. of Sex Offender Sent'g, Monitoring, Apprehending, Registering, & Tracking, https://smart.ojp.gov/sorna/substantially-implemented#jurisdictions-that-have-substantially-implemented-sorna (last visited July 19, 2024).

[168] Guide to SORNA, *supra* note 165, at 4.

[169] 18 U.S.C. § 2250.

[170] *Dru Sjodin National Sex Offender Public Website*, U.S. Dep't of Just., Off. of Sex Offender Sent'g, Monitoring, Apprehending, Registering, & Track-

links public state, territorial, and tribal sex offender registries in one national search site. It also is a critical component of the SORNA scheme to provide a comprehensive national system to notify the public about registered sex offenders.[171] "As of April 2020, all 50 states, the five principal U.S. territories, the District of Columbia and 151 tribes are participating in NSOPW.gov."[172]

VIII. Conclusion

What has happened to Shana throughout her life is a tragedy beyond words. If even one of her cases is reported to federal law enforcement, investigated, and charged, services, support, and ultimately perhaps justice can be provided to her and her community. Justice for victims and offender accountability in Indian country are strengthened when federal and tribal governments work together.

Attorney General Garland recently stated the following:

> We will continue working with our law enforcement partners to help ensure that all people in Indian country are safe in their communities. The Justice Department's partnerships with federal, state, local, and Tribal law enforcement, and with the communities they serve, are at the center of all of our efforts to keep our communities safe.[173]

Shana's journey may be long and difficult, but she will not make the trip alone. She can count on investigators, prosecutors, victim advocates, medical providers, mental health providers and many other professionals to help her navigate the criminal justice system and get the services she needs to begin the healing process. These services and supports should be available to her wherever she chooses to live, either back on the reservation or off-reservation.

About the Author

Leslie A. Hagen serves as the Department's first National Indian Country Training Coordinator. In this position, she is responsible for planning, developing, and coordinating training on a broad range of matters relating to the administration of justice in Indian country. Previously, she

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ING, https://www.nsopw.gov/ (last visited July 19, 2024).

[171] *Programs,* U.S. DEP'T OF JUST., OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, & TRACKING, https://smart.ojp.gov/programs (last visited July 19, 2024).

[172] *Id.*

[173] Merrick B. Garland, Att'y Gen., Attorney General Merrick B. Garland Delivers Remarks at the U.S. Attorney's Office for the District of Montana (Mar. 5, 2024).

served as the Native American Issues Coordinator for the EOUSA. In that capacity, she served as EOUSA's principal legal advisor on all matters pertaining to Native American issues, provided management support to the USAOs, coordinated and resolved legal issues, and served as a liaison and technical assistance provider to Department components and the Attorney General's Advisory Committee on Native American Issues. She started with the Department as an AUSA in the Western District of Michigan where she was assigned to Violent Crime in Indian Country and handled federal prosecutions and training on issues of domestic violence, sexual assault, child abuse, and human trafficking affecting the eleven federally recognized tribes in the Western District of Michigan. Before joining the Department, she was both an elected prosecuting attorney and assistant prosecuting attorney in Michigan.

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Tools to Implement Victim-Centered Practices in Fraud Investigations and Prosecutions

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I. Introduction

When a case agent presents pages of financial records and spreadsheets that contain a complex scheme to defraud, a prosecutor may feel conflicted. Deciphering transactions, unraveling a scheme, and finding evidence that establishes the elements of the crime can be exciting. Yet, finding the hundreds or thousands of victims, understanding their harm, providing them with assistance, and incorporating their perspectives during the investigation and prosecution can be challenging—almost overwhelming—even for a prosecutor who is well-schooled in victims' rights.

This year marks the 20-year anniversary of the passage of the Crime Victims' Rights Act (CVRA), which affords crime victims participatory and enforceable rights in the federal criminal justice system.[1] Twenty years ago, the CVRA framers addressed something that economic crime prosecutors and agents know all too well: The number of persons harmed by a criminal act is not always proportionate. One crime can harm hundreds or thousands of people. To address this challenge, the CVRA contains a useful tool for prosecutors to afford rights to multiple victims of a single criminal scheme, herein referred to as "section (d)(2)" or a "(d)(2) motion".[2]

Specifically, 18 U.S.C. § 3771(d)(2) provides

[1] *See generally* 18 U.S.C. § 3771 (Crime Victims' Rights Act).
[2] *Id.* § 3771(d)(2).

> [i]n 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 subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.[3]

Section (d)(2) provides practical support for prosecutors as they give full effect to the CVRA in a wire-fraud case where there may be hundreds or thousands of victims. Victim-savvy prosecutors also know that utilizing section (d)(2) is one part of their approach in such cases. These prosecutors recognize that investigations and prosecutions should be victim-centered and trauma-informed, and that they should provide services and assistance to all victims of the crime. To accomplish, they should use other tools in addition to section (d)(2).

II. Policy and statutory framework

This article will address how prosecutors can construct approaches that are victim-centered, thereby effectively honoring the rights and services in cases, such as wire-fraud, where there are many victims of a fraudulent scheme. First, it will review the general policy and statutory frameworks that shape prosecutors' obligations to all victims. Then, it will discuss tools, including (d)(2) motions, that can assist prosecutors in implementing a victim-centered approach in a case with many victims. Finally, it will consider the application of some of these tools when affording select CVRA rights.

A. Attorney General Guidelines for Victim and Witness Assistance

The Attorney General Guidelines for Victim and Witness Assistance (AG Guidelines) provide Department of Justice (Department) personnel with recommendations and requirements for the fair treatment of victims and witnesses.[4] It includes detailed discussions of the principal statutes addressing victims' services and rights: the Victims' Rights and Restitution Act (VRRA) and the CVRA. It serves to remind Department personnel that these statutes contain the *minimum* conduct expected of them when engaging with victims.[5] The AG Guidelines encompass a presumption in favor of providing assistance and services to all victims

[3] *Id.*
[4] *See* U.S. Dep't of Just., The Attorney General Guidelines for Victim and Witness Assistance (2022) [hereinafter AG Guidelines].
[5] *Id.* at 4.

of federal crimes.[6] Consistent with this presumption, the AG Guidelines note that Department personnel should use their best efforts to follow a victim-centered approach.[7] A victim-centered approach may include helping victims make informed choices, incorporating their voices when developing strategies that impact them, identifying and addressing their needs, and communicating plans early so that victims can participate in the process.[8] As discussed in greater detail below, executing a victim-centered approach in cases with large numbers of victims, such as crimes of wire fraud, requires collaboration, problem-solving, use of technology, and a bit of creativity.

B. Victims' Rights and Restitution Act

The VRRA (1990) predates the CVRA and remains a significant part of the statutory mandate to support victims in federal investigations and prosecutions.[9] The VRRA emulates a victim-centered approach because it is premised, in part, on supporting victims' recoveries. It provides victims with prescribed services and referrals from the moment a crime is detected and victims are identified.[10] If it can be done without interfering with an investigation, the VRRA requires the responsible official, usually a case agent with the assistance of a law enforcement victim specialist, to inform identified victims of services they may receive and to assist these victims in obtaining those services.[11] VRRA-prescribed services include: informing victims where they may receive emergency medical and social services; informing victims about restitution or other relief and how such relief may be obtained; informing victims about available public and private programs that provide counseling, treatment and other support to a victim; and assisting victims in contacting those who provide these services and relief.[12] Responsibility for overseeing the provision of these services transitions to the prosecutor when a crime is charged.[13] In cases with multiple victims, providing information and service referrals can be accomplished with strategies and tools discussed herein.

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[6] *Id.*
[7] *Id.* at 16.
[8] *Id.*
[9] 34 U.S.C. § 20141 (VRRA).
[10] 34 U.S.C. § 20141(b); *see also* AG Guidelines, *supra* note 4, at 48 ("Department responsibilities to crime victims begin as soon as possible after the detection of a crime at which they may be undertaken without interfering with the investigation.").
[11] 34 U.S.C. § 20141(b)(2)–(3).
[12] *Id.* § 20141(c)(1).
[13] AG Guidelines, *supra* note 4, at 47–48.

C. Crime Victims' Rights Act

For federal crime victims, VRRA services are strengthened by the ten court-enforceable rights of the CVRA: the right to reasonable protection; the right to notice; the right not to be excluded; the right to be reasonably heard; the reasonable right to confer; the right to full and timely restitution; the right to be free from unreasonable delay; the right to fairness and respect for the victim's privacy and dignity; the right to timely notice of a plea agreement or deferred prosecution agreement; and the right to be informed of rights, services and contact information for the Victims' Rights Ombudsman.[14] The CVRA provides that Department employees must make "best efforts" to ensure victims are notified of and afforded these rights.[15] The CVRA allows prosecutors to assert victims' rights, and requires prosecutors to inform victims they can seek the advice of an attorney about their rights.[16]

Knowing when to afford CVRA rights to victims is critical for prosecutors in fulfilling their statutory obligations and a key aspect of a victim-centered approach because these rights are intended to promote victims' participation in the process. The CVRA's text, purpose, and legislative history suggest that these rights are assured from the time criminal proceedings are initiated.[17] As a matter of Department policy, however, CVRA rights may be implicated at various investigative and prosecutorial stages, including in pre-charging settings.[18] Indeed, Department policy requires its personnel to make best efforts to afford victims their CVRA rights as early in the criminal justice process as is feasible and appropriate, including before the execution of a non-prosecution agreement, deferred prosecution agreement, pretrial diversion agreement, or plea agreement.[19] So, a prosecutor contemplating a pre-indictment plea agreement or other types of pre-charging agreements with a defendant must be mindful that all victims of the crimes under investigation have a reasonable right to confer with the prosecutor at this stage of the process.[20]

A prosecutor implementing a victim-centered approach in a fraud

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[14] *See* 18 U.S.C. § 3771(a). *See also, Office of the Victims' Rights Ombuds*, U.S. Dep't of Just. (Nov. 14, 2022), https://www.justice.gov/usao/office-victims-rights-ombuds.
[15] *Id.* § 3771(c)(1).
[16] *Id.* § 3771(c)(2).
[17] Memorandum from John E. Bies, Deputy Assistant Att'y Gen., on the Availability of Crime Victims' Rights Under the Crime Victims' Rights Act of 2004 to the Acting Deputy Att'y Gen. (Dec. 17, 2010).
[18] AG Guidelines, *supra* note 4, at 14.
[19] *Id.*
[20] *Id.* at 62–63.

scheme with many victims may face a number of challenges implementing the CVRA in a pre-charging context. First, prosecutors must ensure agents have made their "best efforts" to identify all the victims of the scheme.[21] The CVRA does not define "best efforts." Black's Law Dictionary, however, may provide some insight in defining "best efforts" as "[g]ood faith promises that one will get as close as humanly possible to a result," and noting that "the efforts put forth are all that can be done."[22] To be sure, this is a high standard. Second, prosecutors must remember victims' rights are individual rights and should obtain the court's approval for methods of affording *all* of those rights to multiple victims when it is impracticable to do so in a "one-on-one" setting.[23] Third, prosecutors fashioning an approach to simultaneously afford multiple victims their rights must be mindful of professional conduct rules and should consult with appropriate Department personnel about their professional responsibilities when necessary.[24]

Another key provision of the CVRA is its enforcement-of-rights provision. The CVRA authorizes victims to assert rights, seek review of denials in district court, and petition a court of appeals for a writ of mandamus if the district court denies relief.[25] Further, if a writ of mandamus issues, the court of appeals must decide the application forthwith within 72 hours.[26] But victims cannot always rely upon this relief to remedy prosecutors' failure to afford victims' rights. The CVRA clearly provides a "limitation on relief."[27] Failure to afford a right is never grounds for a new trial.[28] Moreover, victims may move to re-open a plea or sentencing hearing only if the following statutorily prescribed conditions are met: a victim asserted the right to be heard before or during the applicable proceeding and was denied; a victim petitioned the court of appeals within 14 days; and, in the case of a plea, the accused did not plead guilty to the highest offense charged.[29] Therefore, victims who were not afforded their rights but cannot meet the statutory prerequisites to re-open a proceeding may find their only recourse is to file a complaint against the prosecutor who failed to afford a CVRA right(s).[30]

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[21] *Id.* at 48.
[22] *Best efforts*, Black's Law Dictionary (2d ed. 1910).
[23] 18 U.S.C. § 3771(d)(2).
[24] AG Guidelines, *supra* note 4, at 8–10.
[25] 18 U.S.C. § 3771(d)(3).
[26] *Id.*
[27] *Id.* § 3771(d)(5).
[28] *Id.*
[29] *Id.*
[30] *Id.* § 3771(f).

Filing a complaint against a prosecutor will likely influence the prosecutor's future behavior with other victims, but it does not provide aggrieved victims with equitable relief, such as making the victims full participants in the criminal justice process where the conduct that harmed them was adjudicated. In a case with large numbers of victims, a prosecutor's failure to accord victims' rights may leave multiple victims with no recourse but to file complaints against the prosecutor. While both the enforcement and complaint provisions of the CVRA serve important purposes, a prosecutor seeking to follow the more advisable path—which avoids a need for these recourses all together—may consider employing some of the victim-centered practices and tools discussed below.

III. Tools for victim-centered prosecutions

This section provides a general discussion of tools that will help prosecutors establish a victim-centered approach in fraud cases with large numbers of victims. These tools range from the intangible, such as coordination, team building, and planning, to the tangible, such as mailings, surveys, dedicated phone lines, and email boxes.

A. Early coordination

Early coordination with the case agent not only structures the investigation for prosecution, but it also helps develop strategies to identify persons harmed by the fraudulent acts under investigation. During initial meetings, a prosecutor and case agent should review the information obtained during the investigation and determine what steps have or should be taken to identify those harmed by the scheme.[31] Since investigations involving complex schemes to defraud can take years to build, the initial meeting should include how the case agent and prosecutor will address changes affecting victims. For example, over time additional charges may be considered, additional victims may be identified, or all victims may be experiencing hardships related to the harm caused by the targeted crime. Early coordination between the prosecutor and case agent focused on victim identification will lead to victim-centered responses throughout the investigation and prosecution because finding victims will be a deliberative part of their work from the onset. It will also avoid responses that are*not* victim-centered, such as affording rights and services for the first time just before a sentencing hearing.

[31] *See* AG Guidelines, *supra* note 4, at 24, 48–49, 56.

B. Team building

Early coordination between the prosecutor and case agent is an important tool but it should not be the only tool utilized. By definition, a person is a victim because they were harmed by criminal acts.[32] The VRRA's provision for victim information and services does not rely upon an investigation progressing to prosecution for victims to receive assistance to address these harms. The VRRA clearly states services, which include information, must be provided as soon as possible.[33] The VRRA allows a delay in identifying victims, providing points of contact and information about services, and providing other notices.[34] This delay, however, is not intended to be indefinite. Once it is safe to do so without compromising an investigation, victims must be informed of the statutory services, provided with assistance to obtain these services, and given appropriate VRRA notifications.[35]

Unlike the CVRA, the VRRA has no provision that allows for an alternative procedure to notify large numbers of victims. So, to comply with the VRRA and afford CVRA rights during an investigation, a prosecutor needs help. Therefore, prosecutors should build a team that includes, at minimum, the prosecutor, case agent, a law enforcement victim specialist, and, at the appropriate time, a U.S. Attorney's Office (USAO) victim specialist. Typically, the case agent should have a law enforcement victim specialist assigned. The prosecutor can ensure that a USAO victim specialist is a part of the team by designating the matter is a "victim" case on the case intake form. Then, the prosecutor should include the assigned USAO victim specialist when victim-related concerns arise during the investigation, with the understanding the law enforcement victim specialist is the lead specialist during the investigation.

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[32] 34 U.S.C. § 20141(e) (crime victim means a person that has suffered direct, physical, emotional, or pecuniary harm as a result of the commission of a crime); 18 U.S.C. § 3771(e) ("crime victim" means a person directly and proximately harmed as the result of a commission of a Federal offense or an offense in the District of Columbia).

[33] 34 U.S.C. § 20141(b), (c)(3).

[34] 34 U.S.C. § 20141 provides that the responsible official shall provide notice of the status of the investigation, to the extent appropriate to inform victim and to extent that it will not interfere with the investigation; notices also included in the statute are arrest of the offender; filing of charges against suspected offender; scheduling of each court proceeding that a witness is required to attend; release or detention status of offender or suspected offender; acceptance of plea or rendering of verdict after trial; sentence imposed for an offender, and after trial notice of escape, work release, furlough, or any other form of release from custody and death of offender, if offender dies in custody. *See* 34 U.S.C. § 20141(c)(2), (3)(5).

[35] *Id.*

Having both law enforcement and USAO victim assistance specialists recognized as part of the team allows for victim-centered practices to be established early and maintained throughout the investigation and prosecution. Victim specialists are knowledgeable professionals with a variety of skills: communicating in a trauma-informed manner; understanding state crime victim compensation programs; and recognizing that some victims or groups of victims have needs that change during the investigative and prosecution process. Victim specialists often recognize victims' needs that are not readily apparent to the prosecutor or case agent. Including USAO victim assistance specialists during the initial case meeting and at case initiation also contributes to the continuity of rights and services for victims as the matter progresses from investigation to prosecution.

Another reason prosecutors should consider early coordination among team members is rooted in rules of professional conduct. Prosecutors may be held accountable under these rules for the actions of agents, victim specialists, and non-attorneys who assist in the case.[36] Thus, prosecutors should ensure the conduct of team members comports with prosecutors' professional obligations. Building the team early in the investigation allows prosecutors to define the roles of each team member. This may include clarifying who carries the responsibility for affording victim's rights and services during the investigation and prosecution and how the transition of affording rights and services is expected to occur as a matter moves from investigation to prosecution.[37]

C. Planning

Once the team is assembled, members should continue to develop a plan that honors victims. While having no plan or having a plan that addresses victims' rights and services later in the criminal justice process may produce an indictment expeditiously, it will be costly to both victims and prosecutors. For example, waiting until sentencing to afford victims' rights, such as the reasonable right to be heard or the right to restitution, is a failed plan because other rights and services for victims would be ignored.

Another option is to plan to contact and interview each victim individually. In most investigations or prosecutions of fraud, this is not feasible

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[36] *See* Model Rules of Pro. Conduct r. 5.3 (Am. Bar Ass'n 2023); *see also* AG Guidelines, *supra* note 4, at 10 ("There are circumstances in which Department attorneys may be held accountable . . . for the actions of non-attorneys with whom they work. Accordingly, when working with non-attorneys, Department attorneys should make reasonable efforts to ensure that the conduct of non-attorneys is compatible with a Department attorney's professional obligations.").

[37] *See* AG Guidelines, *supra* note 4, at 47–48.

due to the large number of victims. Likely, the team will construct a plan that gives full effect to the VRRA and CVRA by examining factors that are fact-specific, such as the following:

- What is the status of the fraud scheme? Is it active or has it collapsed?
- What type of information is needed from victims to determine their harm?
- How many people have been harmed by the fraud?
- What contact information is available for victims?
- Is individual victim contact practicable?
- How will information be distributed?
- Are some tools more effective than others at each stage of the investigation or prosecution?
- What are the consequences of distributing too broadly or too narrowly?
- How often will victims be contacted to obtain information about harm, losses, and services needed?
- What considerations should be in place for the timing of notices so that victims have adequate time to respond and participate?
- What resources are available to address victims who contact the law enforcement agency?
- What resources are available to address victims who contact the prosecution?
- How will information retrieved from contacts be organized and distributed among the team?[38]

D. Postcards

Throughout a fraud investigation, agents often create tables or spreadsheets containing information with relevant transactions. These tables or spreadsheets may be foundational tools to use for immediate victim contact if they contain information that identifies victims and their loss amounts. Victims' contact information from investigation-generated tables or spreadsheets can be content for mailing labels on postcards. Postcards can be used to achieve initial victim contact, either by law enforcement or by USAOs as they are an inexpensive way to confirm victims'

[38] The authors developed these items by drawing from their collective experiences and applying what they know about the legal constructs for working with victims.

contact information. Postcards returned "undeliverable" signify further research is needed to obtain accurate victim contact information. Postcards can also be used to (1) prompt victims to validate their information by directing them to a monitored site for identification verification; or (2) share case updates or important reminders for victims, such as the importance of submitting information about losses in a timely manner.

E. Victim Notification System

The Victim Notification System (VNS) is an internet-based system designed to ensure victim notification throughout the investigative, prosecutorial, and incarceration stages of a case.[39] Victims' contact information, their preferred methods of contact, and templates for a variety of notices and case events are maintained within this program.[40] Notices created using VNS can be sent to victims via U.S. mail, email, and telephonic or online platforms.

F. 18 U.S.C. § 3771(d)(2) motions

Under section 3771(d)(2), a court may approve a prosecutor's alternative plan to identify victims and afford victims' rights when the number of victims or case circumstances make it impracticable to afford rights on an individual basis.[41] When using section 3771(d)(2) as a tool for victim identification, prosecutors should consider filing appropriate motions as soon as possible after developing an alternative method of victim identification. Prosecutors should also file additional motions under section 3771(d)(2) seeking court approval for any significant modification of their plans as their case develops. Prosecutors who are well-grounded in CVRA rights know that (d)(2) motions are not only great tools to provide alternative notice in cases with large numbers of victims, but also tools that should be used to afford every CVRA right that cannot be provided to victims individually, as discussed in further detail below.

G. Websites

Information beneficial to victims can be displayed via a district or Department website. District-specific websites are used to provide notice of court events in voluminous cases, as well as provide links to surveys, questionnaires, or documents needed for prosecution of the matter. These websites may also contain resource referrals or links to service providers

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[39] *Victim Notification System*, U.S. Dep't of Just. (Sept. 27, 2023), https://www.justice.gov/criminal/criminal-vns/victim-notification-system.
[40] *Id.*
[41] *See* 18 U.S.C. § 3771(d)(2).

that address specific harm experienced by victims of financial fraud. The Department maintains a large case website as well.[42] This website is often utilized with the Mega Case Assistance Program (MCAP). It allows for posting of court-approved notices and can be easily accessed through basic internet searches. Cases posted on this website are linked to the prosecuting district's website for additional case details, updates, and contact information for members of the prosecution team. If the prosecution team does not intend to provide victims with individual notices, then the use of a website requires court approval via a (d)(2) motion filed pursuant to 18 U.S.C. § 3771(d)(2).[43] If the prosecution team, however, provides individual notices and wishes to *also* use a website for notice, court approval via (d)(2) is not required.[44]

H. Mega Case Assistance Program

MCAP is a service managed by the Executive Office for U.S. Attorneys (EOUSA) that assists in large-scale victim cases when there are limited USAO personnel to address victim issues, or there are time restrictions regarding the collection of victims' data or providing required notice of case events. MCAP may be used in conjunction with an approved alternative procedure or as part of a plan that provides individual notice to victims. Members of the MCAP team are equipped to sort tables and spreadsheets, research the accuracy of victim contact information, input victim data in VNS, and generate notices of upcoming court hearings, as well as address individual victim inquiries. MCAP team members work closely with the prosecution team to ensure victim notices are provided with accuracy, efficiency, and timeliness.

I. Centralized communication systems

Voicemail boxes, call-in lines, or email inboxes dedicated to receiving and providing information are beneficial communication tools in large-scale victim cases. Utilization of these tools creates efficiency in responding to victim inquiries, minimizes the loss of information, and readily permits access by all prosecution team members to address specific victim issues. Inquiries or concerns posted in these centralized systems can also be used by the prosecution team to develop a "frequently asked questions" tool to display on websites or address during town hall meetings.

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[42] *Information for Victims in Large Cases*, U.S. Dep't of Just., https://www.justice.gov/information-victims-large-cases (last visited July 19, 2024).
[43] 18 U.S.C. § 3771(d)(2).
[44] 18 U.S.C. § 3771(d)(2).

J. Surveys or questionnaires

Surveys and questionnaires are effective for victim-centered practices in cases with large numbers of victims. Prosecution teams should determine what survey programs are available and how to use surveys or questionnaires in their overall plan. Team members may create a single survey or questionnaire that is distributed to several victims simultaneously. These tools can be disseminated to victims through postal mail, email, or a website. Questions contained in a survey or questionnaire may focus on the needs, interests, or concerns of victims in general, or may be specific to a victim's right, service, or court proceeding. For example, surveys can be useful in identifying victims; capturing accurate victim data; assessing the magnitude of physical, social, or financial harms that victims experience; or even flagging potential security concerns as further discussed below.

A related and efficient tool for cases with large numbers of victims is a reporting website where victims can respond to an online survey or questionnaire. Victims retrieve a reporting website, input their contact information, and then share with the prosecution team how they have been affected by a crime, without having to receive a survey or questionnaire via mail or email. Victims can be encouraged to report via the website throughout the pendency of the investigation or prosecution, which in turn provides the prosecution team with a centralized database of responses. Another option is to include a hyperlink to a victim questionnaire in press releases about the case.

All tools discussed above can be used in a variety of ways to promote victim-centered prosecutions. In doing so, these tools can play a critical role in ensuring that victims are afforded their rights.

IV. Using tools to afford select rights under the Crime Victims' Rights Act

The following is a discussion of how to apply many of the tools discussed above when affording select CVRA rights to further demonstrate how prosecutors can practice a victim-centered approach in fraud cases where there are large numbers of victims.

A. Right to reasonable protection from the accused

Crime victims have "[t]he right to be reasonably protected from the accused."[45] The AG Guidelines clearly provide that law enforcement has the responsibility of arranging for reasonable victim protection through-

[45] 18 U.S.C. § 13771(a)(1).

out the investigation and prosecution.[46] Yet, prosecutors should also take reasonable steps to address legitimate security concerns.[47] In order to carry out this duty, prosecutors must know about the victims and their relationships with the accused. In cases with numerous victims and limited resources, finding this information and determining which victims have safety or security concerns may be challenging.

Early coordination with the case agent allows a prosecutor an opportunity to examine existing or readily obtainable information for indicators that suggest safety or security concerns. For example, a review of records may contain a victim's age, indicate the amount and frequency of financial transactions between a victim and the accused, or reveal threatening text messages from the accused. Any one of these items may prompt a prosecutor to follow up with the victim to determine if interventions such as protective orders, no contact orders, or referrals to protective services are needed.[48]

Often, victims of financial offenses experience extreme guilt and believe they contributed to their victimization by allowing themselves to be deceived into providing personal identifying information and access to financial records and accounts. When this occurs, not only do these individuals experience a lack of confidence in their ability to make sound financial decisions, but questions arise regarding their physical security and safety. The idea that perpetrators possess—and may have even shared—victims' personal data may result in victims' reluctance to assist with active investigations or to participate in court proceedings; as victims may fear continued reprisals by perpetrators or their associates.

As referenced above, surveys can be useful tools in identifying and assessing reluctant victims' concerns when there are many victims in a case. Survey questions extract the type or amount of information a victim shared with the accused and may alert agents and prosecutors to what the accused knows about that victim. Inquiries in a survey that address the specific interactions between a victim and the accused, such as identifying who was present when a victim interacted with the accused, what the accused did to cause a victim to provide access to their accounts, or whether a victim was accompanied by a perpetrator or a perpetrator's associate when they made financial transactions on behalf of the accused, will also aid law enforcement in evaluating the possibility of harm, and establishing a safety and threat assessment. Survey questions should also include inquiries regarding social media access, which in turn can be used

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[46] AG Guidelines, *supra* note 4, at 50, 58.
[47] *Id.*
[48] *Id.* at 40–42, 49.

to minimize or eliminate the possibility of harassment or stalking via electronic platforms. Types of inquiries via surveys of this type should be provided as early as possible after victim identification so that efforts are taken and services are provided to assess and address victims' concerns about security and safety.

B. Right to reasonable accurate and timely notice

The CVRA provides crime victims with "[t]he right to reasonable, accurate, and timely notice of any public court proceeding."[49] Many of the tools discussed earlier in this article are particularly useful to effectuate this right and are therefore worth repeating in this context.

Postcards. Because victim contact information in financial crimes investigations can be dated, time-saving strategies, such as mailing postcards, are the first step to ensure timely notice of court proceedings. Postcards are used to provide initial contact with victims as well as determine accurate contact information. The postcard itself may provide general information about the offender, pending charges, and direct a victim to either a website or monitored email address for additional information. Once a victim accesses the website or email address, information can be obtained from the victim (via a survey or questionnaire). Information obtained may include updated contact information or particulars about victimization. Contact information can be entered into VNS. Depending upon the nature of other information victims provide, it may be reviewed by the team separately or categorized in an excel spreadsheet.

Victim Notification System. VNS is a sound tool to use to ensure notice is provided to each victim—unless there over 25,000 victims in the case or USAO resources are limited. Along with VNS, the team may also use the Department's large case website to provide victims with notice.[50] Recall that when VNS and the large case website are used together to provide notice, a prosecutor is not obligated to seek the court's permission because victims are receiving individual notice via VNS. The challenge with using VNS for cases with large numbers of victims usually occurs on the backend: managing victims' responses to these notices. A prosecutor may find that MCAP or in-house alternatives, such as cross-training administrative personnel to assist, are satisfactory solutions for such case management challenges.

Mega Case Assistance Program. MCAP is a service designed to assist USAOs who do not have the resources to manage all aspects of victim notification, such as checking victims' addresses for accuracy, or

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[49] 18 U.S.C. § 3771(a)(2); AG Guidelines, *supra* note 4, at 59–60.
[50] Information for Victims in Large Cases, *supra* note 42.

responding to victims' inquiries. This program requires the USAO victim–witness personnel to submit a request to EOUSA's MCAP program requesting assistance for any of the scenarios provided earlier. Once assistance to the requesting USAO is approved, MCAP staff members will coordinate the specific assistance needed and will follow through with the tasks by providing the USAO with updates until the project is completed. MCAP services take a huge responsibility off smaller-staffed offices and ensure compliance with notification requirements under the CVRA.

Procedures for notice pursuant to 18 U.S.C. § 3771(d)(2).[51] As noted earlier, the CVRA permits a court to consider alternative notice when the number of victims makes it impracticable to afford CVRA rights to individual victims.[52] Prosecutors should establish a clear plan for initial and ongoing notices to victims before seeking a court's approval to allow deviation from statutory requirements of individual victim notice. Then, prosecutors should file a (d)(2) motion, requesting permission to employ the alternative notice procedure outlined in their motion. Typically, the Department's large case website is the suggested alternative to providing individual notice.[53] Other options for alternative notice include publication through media outlets or proxy notification.[54] Or a prosecutor may use a hybrid procedure, providing individual notice to some victims, such as elderly victims or victims without access to the internet, and alternative notice via a (d)(2) motion to remaining victims of the same case.

Websites. In voluminous victim cases, whether providing individual notice or utilizing (d)(2) motions, the development of website content, a centralized email box, and a centralized voice mailbox can be necessary in order to relay, distribute, and collect accurate victim data. A website should contain the case name, current case events, and contact information for the investigative agency, prosecution office, or victim services personnel that are able to assist with specific victim concerns. This website may also contain secured links to surveys or questionnaires soliciting specific details regarding an individual's victimization, requesting documentation supporting claims, outlining the process for review of information submitted, and providing a general timeline for responses. The prosecution team should determine the criteria and methods for review of all victim information submitted before activating the web page. Utiliz-

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[51] 18 U.S.C. § 3771(d)(2).
[52] *Id.*
[53] United States v. Olivares, 2014 WL 2531559 at *3 (W.D.N.C. June 5, 2014) (collecting multiple victim fraud cases where alternative notices were allowed to be posted on the Department's websites).
[54] AG Guidelines, *supra* note 4, at 59–60.

ing a website, survey, and questionnaire early in the process allows team members to provide notice, and as discussed earlier obtain current victim data, determine which victims need additional support, ascertain potential victim–witnesses for court proceedings, and assess the magnitude of victim losses.

C. Right not to be excluded

The CVRA provides crime victims with the right not to be excluded from any 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.[55] Absent the CVRA disqualification from court attendance, in cases with large numbers of victims, limited courtroom capacity can result in *de facto* exclusion of victims. To avoid this, prosecutors should file a (d)(2) motion asking the court to fashion a reasonable procedure to prevent victims from being excluded from public court proceedings.[56] Prosecutors may suggest alternatives such as the use of closed circuit television (CCTV), limited sharing of proceedings via a conference call or website, or lotteries to select those who may attend in person.[57] Remote participation alternatives also require a prosecutor to ensure courtroom integrity is preserved, victims have access to web-based platforms, and equipment is functioning. For a more expansive list of items to review in this regard, please see the Audio and Video Teleconferencing Checklist in the appendix to this journal issue.

Before preparing the (d)(2) motion, prosecutors should consider issuing a questionnaire or survey to victims. Using such tools to obtain information, like that listed below, will assist prosecutors in developing alternative plans for attendance that are particular to victims' needs. For example, in a case with many victims, responses to a questionnaire may reveal that several victims live in the same city in another district. This may prompt prosecutors to include a request for an alternative procedure, in their (d)(2) motion, that will allow those victims to travel to the district court closest to their homes and view the proceeding from that location via CCTV.

The following are items to address in a questionnaire or survey:

- victims' contact information, including representatives or family members;
- victims' plans to attend;

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[55] 18 U.S.C. § 3771(a)(3).
[56] 18 U.S.C. § 3771(d)(2); AG Guidelines, *supra* note 4, at 61.
[57] AG Guidelines, *supra* note 4, at 61.

- factors that influence victims' decisions to attend;
- victims' preferences for attendance: courtroom, CCTV viewing room, or other location;
- victims' accessibility to web-based platforms if remote access is considered;
- victims' needs for support persons;
- victims' needs for information about crime victims' compensation or funding sources to assist with attendance; and
- victims' needs for accommodations to allow attendance, including the following:
  - transportation;
  - mobility devices;
  - access to courthouse;
  - parking;
  - hearing devices; and
  - language access.[58]

D. Reasonable right to be heard

Although the right to be heard applies to public court proceedings involving release, plea, sentencing or any parole proceeding, victims most commonly exercise this right in the form of impact statements during defendants' sentencing hearings.[59] Tools such as software programs can create a framework for impact statements, in the form of questionnaires which victims complete and submit via an online portal directly to the court and probation department, streamline the process. For cases where large numbers of victims exercise their right to be heard, using such programs can be efficient since these questionnaires can also capture loss amounts necessary for the issuance of restitution orders.

Still, impact statements submitted in this fashion are not a substitute for oral impact statements that some victims want to provide. At sentencing hearings, it is recognized that many victims have a preference for in-court oral allocution. Federal Rule of Criminal Procedure 32(i)(4)(B) requires that a district court "address any victim of the crime who is

[58] These items were developed by the authors from their collective experiences and those of their colleagues who work with crime victims.
[59] *See* 18 U.S.C. § 3771(a)(4).

present at sentencing and must permit the victim to be reasonably heard" before sentencing the defendant.[60]

To accommodate cases with large numbers of victims, courts may allow additional time for victims to provide oral impact statements if a prosecutor files a request before the sentencing date. However, victims are not required to inform prosecutors before a proceeding that they want to be heard. In such a case, prosecutors should advocate for victims who decide at the last minute they want to provide an oral impact statement.

Even with additional time allotted for victims to be heard, the number of victims exercising this right in one case may make it impracticable to afford all victims this right. In that instance, prosecutors should file a (d)(2) motion, presenting an alternative that gives practical effect to victims' rights to be heard.[61] The CVRA places no prohibition on alternatives that may be considered. Courts may consider alternatives can such as call-in lines for those victims who cannot appear in person; written statements by all victims; lotteries to determine which victims will give oral impact statements; designation of representatives to provide oral impact statements on all victims' behalf; time limits for oral impact statements; or teleconference appearances from victims who reside in another district and cannot travel to the court to provide impact statements.[62] Regardless of the alternative(s) a court approves, all victims should know that the alternatives allowed are related to court operations or the ability of the court to honor many victims in limited time. Victims should never feel these alternatives signify a hierarchy of victimization.

E. Reasonable right to confer

The CVRA affords victims a reasonable right to confer with an attorney for the government in the case.[63] The purpose of this right is to give victims opportunities to obtain information on which to base the views they express to the court.[64] The AG Guidelines provide

> [that] such conferences should be conducted in coordination with the relevant investigative agency and be consistent with applicable rules governing criminal procedure and professional

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[60] Fed. R. Crim. P. 32(i)(4)(B)*; see also* Kenna v. U.S. Dist. Court for C.D. Cal., 435 F.3d 1011, 1016 (9th Cir. 2006) (remanded so the victim had an opportunity to speak at a sentencing hearing).

[61] *See* 18 U.S.C. § 3771(d)(2).

[62] AG Guidelines, *supra* note 4, at 61–62.

[63] 18 U.S.C. § 3771(a)(5).

[64] *See* United States v. B.P. Products of North America, Inc. 2008 WL 501321 (S.D. Tex. Feb. 21, 2008) (collecting cases); *see also* AG Guidelines, *supra* note 4, at 62–63 (discussing the victim's reasonable right to confer with the prosecutor).

> conduct. Ordinarily, prosecutors should use such conferences to obtain relevant information from the victim and convey appropriate, nonsensitive or public information to the victim. The conference provides victims the opportunity to express their views, keeping in mind that prosecution decisions are within the prosecutor's discretion.[65]

The AG Guidelines also require prosecutors to make best efforts to confer with victims in advance of major case decisions, which includes those agreements made before or in lieu of charging the offense.[66]

Like all of the CVRA rights, the reasonable right to confer is a victim's individual right. In *In re Dean*, the Fifth Circuit held that the number of victims in that case (less than 200) did not render notice to, or conferral with the victims to be impracticable.[67] In *Dean*, the victims sought a writ of mandamus challenging the district court's decision that allowed prosecutors to forgo conferring with them about a plea agreement.[68] The *Dean* Court found the victims should have been notified of the ongoing plea discussions and should have been allowed to communicate meaningfully with the government, personally or through counsel, before reaching the agreement between the parties.[69] Yet, in a case with several hundred victims, or even thousands, individual conferences with each victim could fill a prosecutor's calendar well beyond court deadlines for the case. A prosecutor faced with this, or a similar dilemma, should seek the court's permission to employ an alternative procedure to confer, that does not "unduly complicate or prolong the proceedings."[70]

Town halls are one of the most useful alternatives, via (d)(2) motions, to afford victims their right to confer on an individual basis. Town halls allow a prosecutor flexibility to communicate with large numbers of victims at one time or over several days at varying times, allowing for maximum victim participation. This flexibility is especially important in fraud cases which can have large numbers of victims, victims residing outside of the district, or complex victim issues and loss calculations. Prosecutors planning town hall meetings should also contact their professional responsibility officer to discuss what restrictions the rules of professional responsibility may place on these meetings.

The meeting itself can be conducted in person or virtually, using secured online platforms and employing appropriate restrictions. During the

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[65] AG Guidelines, *supra* note 4, at 62.
[66] *Id.* at 62–63.
[67] In re Dean, 527 F.3d 391 (5th Cir. 2008).
[68] *Id.* at 394.
[69] *Id.* at 395.
[70] 18 U.S.C. § 3771(d)(2).

meeting, the prosecutor (along with members of the prosecution team) may provide details of the offense committed, case updates, or discuss restitution recovery processes. In turn, victims should be afforded an opportunity to provide input, ask questions, or learn how they may meet with a prosecutor individually, if required.

In addition to case conferences, town halls may be used to further inform victims about the restitution process and encourage victims to begin the process of gathering loss information. Because the prosecution team should utilize a victim-centered approach, this forum can also be an opportunity to connect victims with resources that may be available to address compromised identities, displacement, or provide financial help for daily living. In sum, town halls allow for an information exchange that may assist the prosecution team in truly assessing the magnitude of harm caused by the perpetrator(s) before resolving the case.

F. Right to be free from unreasonable delay

Most litigators will agree continuances are necessary at times. The CVRA framers concurred by stating that the intent of the CVRA right to be free from unreasonable delay is to avoid "convenience" delays.[71] Even so, the framers also believed a victim's input should be obtained and asserted when continuances are requested. Indeed, Senator Kyl, one of the primary drafters of the CVRA, stated the right to proceedings free from unreasonable delay "should be interpreted so that any decision to schedule, reschedule, or continue criminal cases should include victim input through the victim's assertion of the right to be free from unreasonable delay."[72]

To accomplish this, questionnaires or surveys should include asking victims to provide dates of unavailability or to identify new harms, such as financial hardships, that will occur with the granting of continuances. This practice allows prosecutors to plan long before court dates are scheduled. It also arms prosecutors with information so they can proactively engage in scheduling court matters or articulate objections to continuances, with specificity, on behalf of victims. Most importantly, asking victims to provide their dates of unavailability signals to victims that they are indeed participants in the criminal justice process.

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[71] *See* 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).
[72] *Id.*

G. Right to be treated with fairness and with respect for dignity and privacy

All victims have the right to be treated with fairness and respect for their dignity and privacy.[73] Redaction of identifying information and the use of pseudonyms or initials in place of victims' names are commonly used tools to afford this right. These tools should be used to respect the dignity and privacy of victims in fraud cases.[74]

Repeat victimization is a reality for many victims of fraud; it can be humiliating and isolating or lead to bankruptcy, physical decline, depression, or even death.[75] Perpetrators engage in schemes to defraud those who were previously defrauded by acquiring lists of these victims because they may be "predisposed to the very scam" used to defraud them in the past.[76] These lists are offensively referred to as a "sucker's list" by perpetrators.[77] For these reasons, prosecutors should advocate for the use of tools that restrict the disclosure of victims' identities or personal information and educate courts on how refusal to protect victims' privacy in this fashion, contributes to revictimization.[78]

Victims are entitled to the right to dignity and privacy in the courtroom as well. Family members or associates of defendants may be present or financial crimes with large losses may draw the interest of local media. In either event, victims should be aware of outside interest a crime may generate. The prosecution team should ask if victims have privacy concerns and whether they are interested in speaking with the media. On some occasions, a member of the prosecution team may have to inform members of the media that victims are simply not interested in speaking with them. If victims express concerns about their privacy in the courtroom, team members should make efforts to address those concerns. This may include escorting victims to the proceedings. Or, when introducing victims for allocution, prosecutors should request the use of a pseudonym to preserve privacy. Finally, when departing the courtroom, victims' exits

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[73] 18 U.S.C. § 3771(a)(8).

[74] AG Guidelines, *supra* note 4, at 7.

[75] *See* Debbie Deem & Erick S. Lande, *Transnational Scram Predators & Older Adult Victims: Contributing Characteristics of Chronic Victims & Developing an Effective Response*, 66 DOJ J. Fed. L. & Prac. 177, 179 (2018).

[76] United States v. Brawner, 176 F.3d 966, 973 (6th Cir. 1999) (defendant bought "leads list" and repeatedly contacted persons on list who had already been victims of the scheme).

[77] *Id.* at 973; Downing et al. v. United States, 35 F.2d 454 (9th Cir. 1929).

[78] *See also* United States v. Belfort, 2014 WL 2612508 (E.D.N.Y. June 11, 2014) (releasing victims' names poses further victimization by fraudsters who buy and sell "sucker" lists on theory such persons are easy targets for fraudsters).

may be delayed, allowing others to depart first, or victims may be immediately escorted to a separate area to avoid contact with others; thus, preserving their dignity and privacy.

V. Conclusion

The use of the tools discussed throughout this article—early coordination, planning, surveys, questionnaires, and (d)(2) motions—can aid prosecutors in fulfilling their duties to large numbers of victims in fraud cases and can work to ensure that these victims are afforded their rights. Through these means, prosecutors can employ victim-centered principles to position victims of fraud as true participants in investigations and prosecutions.

About the Authors

Kesha T. Miller is the Victim–Witness Coordinator for the USAO for the Southern District of Texas, where she has served for 24 years. She manages the district's Victim–Witness Program and staff members, provides direct services to federal crime victims, and educates the community on the work of the USAO. She received her B.A. from Austin College in 1994 and her M.L.S. from Rice University in 2015. She has developed and provided training to Department personnel, law enforcement agencies, and social service organizations on federal victim issues, developing innovative practices for victim-centered approaches, and human trafficking. She mentors new victim coordinators and has worked with EOUSA in developing collaborative approaches for varying agencies. She has received numerous awards and recognitions from the Department, USAO, FBI, EPA, and other agencies.

Karen E. Rolley is an Attorney Advisor with EOUSA, Legal Programs. She provides support, professional legal advice, and guidance to the USAOs on victim–witness matters. Before joining EOUSA, she served as an AUSA in the District of Arizona, where she prosecuted violent crimes in Indian country, human trafficking, criminal civil rights, theft, and crimes associated with the international border, such as immigration and drug and human smuggling. During her tenure with the USAO, she led a multiagency working group which became a fully funded human trafficking taskforce for southern Arizona. She has also served as Complaint Counsel with the Enforcement Division of the Massachusetts Board of Registration in Medicine and as an Assistant District Attorney for the Suffolk County District Attorney's Office in Boston, Massachusetts.

The authors would like to thank EOUSA White Collar Coordinator AUSA Mark Zuckerman for his input and the many subject matter experts who

contributed to this article.

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Appendix: Audio and Video Teleconferencing Victim Participation Checklist[79]

First, confirm with victims that they wish to participate in court proceedings via alternative means and determine the type of communication that will work best for the victim and the court. If approved, identify the actual attendees. Discuss court rules of behavior with the victims. Alternative means of communication could include the following:

- cell phone, computer, or tablet (strictly audio or a specific platform or application for virtual meetings/video communication);
- internet connection (home-based, work, public library, or restaurant);
- video teleconferencing through a government-based office; and
- social media platforms.

Second, Victim–witness Professionals using this checklist should discuss the above information with the Assistant United States Attorney (AUSA) and ask the following questions:

- Are there specific issues regarding the case that may become problematic if alternative means of participation is used?
- Does the court have a preferred method for remote participation?
- Will defense oppose remote participation?
- Who will coordinate actual participation with the court case manager (AUSA, paralegal, or victim–witness staff member)?
- Will there be an opportunity to test video teleconferencing equipment before court begins?
- Are there multiple cases on the docket? If so, will the victims need to sit through all the hearings awaiting their specific case?
- Will proceedings be delayed if there are connectivity issues?

[79] This checklist was created by Kesha Miller and Karen Rolley to supplement their article, "Tools to Implement Victim-Centered Practices in Fraud Investigations and Prosecutions."

Third, coordinate remote participation by doing the following:

- ensure you have reviewed all options regarding participation;
- explain the pros and cons of remote participation;
- establish a clear outline of the process;
- test electronic capability; and
- emphasize integrity of the courtroom.

Finally, proceed with the following for victims:

- express your wishes early and understand there may not be an opportunity to change such—especially regarding speaking during detention or sentencing hearings;
- plan a secondary method of communication before and after the hearing, and address any questions or concerns before and after connectivity;
- attend from a safe place with no distractions or interruptions;
- write down notes and terms that you are unfamiliar with to be discussed during a follow-up conversation;
- have a support person available as one may be needed for violent crime cases in which victims need emotional support;
- connect early so the court is not delayed because of technical issues on your end; and
- be prepared to stay longer, especially if there is a full docket and no way to determine the order of the hearings.

Note from the Editor-in-Chief

When I started my career as a prosecutor over 40 years ago, victims didn't enjoy the rights and protections that they have today. Thankfully, those dark days are gone. Passage of the federal Crime Victims' Rights Act (CVRA) of 2004 was a watershed event for victims, granting them participation and enforceable rights in the criminal justice system. This issue deals with key issues in victim-centered prosecutions. Our authors, all subject-matter experts, take on a diverse array of topics, including victim privacy, victim services, and the rights of victims to confer with prosecutors and be heard in court, as well as more specialized matters, such as restitution in child sexual cases, victim practices in fraud cases, and the use of courthouse facility dogs. I know that every federal prosecutor will be enlightened by these articles, and I thank all our authors for taking time out of their busy practices to write them.

My thanks also go out to Sarah McClellan and Karen Rolley for acting as points of contact for this issue. They helped select the topics and recruited our authors. As always, thanks to our team here at the Office of Legal Education Publications: Managing Editor Kari Risher, Associate Editor Abbie Hamner, and our University of South Carolina law clerks. Also, a tip of the hat to IT guru Jim Scheide, who makes our issues reader friendly through his meticulous computer typesetting.

Enjoy this issue and the onset of autumn. And if you like what you read, be sure to spread the word. We'll see you again for the next issue.

Chris Fisanick
Columbia, South Carolina
September 2024