

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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UNITED STATES OF AMERICA,

Plaintiff,

Case No. 09-20165

Hon. BERNARD A. FRIEDMAN

vs.

CRAIG ALEO,  
Defendant.

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**DEFENDANT'S COMBINED MOTION AND BRIEF IN SUPPORT OF AN ORDER  
COMPELLING GOVERNMENT COMPLIANCE WITH THE  
CRIME VICTIMS' RIGHTS ACT**

CRAIG ALEO, by and through the undersigned attorney, hereby moves this Honorable Court for an order directing the prosecutor to file a formal motion, with notice to defense counsel, seeking permission for the child complainant's mother to speak at sentencing.

Moreover, since a victim's ability to speak at sentencing pursuant to the terms of the Crime Victims' Rights Act is not unlimited, counsel further requests that the Court direct the prosecution to specify what it anticipates the complainant's mother will say, so that counsel may appropriately respond.

## Facts

According to the Pre-Sentence Investigation Report and the assigned AUSA, the child complainant's mother intends to address the Court at sentencing pursuant to the Crime Victims' Rights Act (CVRA).

In an effort to obtain notice and ascertain whether there would be a legal basis to challenge the introduction of potentially impermissible material at Mr. Aleo's sentencing, counsel contacted the government via e-mail on April 6, 2010, and referring to the PSI report inquired, "Paragraph 28 refers to the defendant's daughter and her request to speak at sentencing. Please let me know whether you intend to seek permission from the court for her to speak. Also, please provide me with an offer of proof regarding what you expect her to say."

In response, the AUSA indicated, "As to the victim, I am not required to request permission from the court per the Crime Victims Rights Act. I ***imagine*** the victim will be speaking on the psychological impact her daughter has suffered at the hands of her grandfather." (Emphasis added).

Counsel then met with the government on Monday, April 12, 2010, and inquired regarding the specific harm suffered by the victim. Counsel also requested further details concerning the proposed statement. The

AUSA responded in substance that she did not know any further details, nor did she intend to investigate and provide further details to counsel.

### Relief Requested

Because the prosecution has refused to disclose the details of the anticipated statement pursuant to the Crime Victims Rights Act, defense counsel has no choice but to request that this Court compel the prosecutor to proceed in accordance with the motion and notice requirement of the CVRA and the Rules of Criminal Procedure as it relates to the anticipated victim statement.

Specifically, counsel respectfully requests that this Court issue an order directing the prosecutor to file a formal motion, with notice to defense counsel, seeking permission for the child complainant's mother to speak at sentencing.

Since a victim's ability to speak at sentencing pursuant to the terms of the Crime Victims' Rights Act is not unlimited, counsel further requests that the Court direct the prosecution to specify what it anticipates the complainant's mother will say, so that counsel may appropriately respond and ensure Mr. Aleo's rights are protected.

## Argument

### A. The defendant's rights are paramount

The Crime Victims' Rights Act, 18 U.S.C. § 3771, provides that a victim has the "right to be reasonably heard at any public... sentencing." 18 U.S.C. § 3771(a)(4).<sup>1</sup>

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<sup>1</sup> The Crime Victims' Rights Act is codified in Title 18, United States Code, Section 3771 and Rule 60 of the Federal Rules of Criminal Procedure, which states:

(a) In General.

(1) Notice of a Proceeding. The government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime.

(2) Attending the Proceeding. The court must not exclude a victim from a public court proceeding involving the crime, unless the court determines by clear and convincing evidence that the victim's testimony would be materially altered if the victim heard other testimony at that proceeding. In determining whether to exclude a victim, the court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record.

(3) Right to Be Heard on Release, a Plea, or Sentencing. The court must permit a victim to be **reasonably heard at any public proceeding** in the district court concerning release, plea, or sentencing involving the crime.

(b) Enforcement and Limitations.

(1) Time for Deciding a Motion. The court must promptly decide any **motion** asserting a victim's rights described in these rules.

(2) Who May Assert the Rights. A victim's rights described in these rules may be asserted by the victim, the victim's lawful representative, the attorney for the government, or any other person as authorized by 18 U.S.C. § 3771(d) and (e).

(3) Multiple Victims. If the court finds that the number of victims makes it impracticable to accord all of them their rights described in these rules, the court must fashion a reasonable procedure that gives effect to these rights without unduly complicating or prolonging the proceedings.

(4) Where Rights May Be Asserted. A victim's rights described in these rules must be asserted in the district where a defendant is being prosecuted for the crime.

(5) Limitations on Relief. A victim may move to reopen a plea or sentence only if:

(A) the victim asked to be heard before or during the proceeding at issue, and the request was denied;

Congress intended for the courts to have the flexibility to permit victims to be “reasonably heard,” under the circumstances, in a manner that does not infringe on the rights of the defendant or the orderly administration of justice.

A defendants’ constitutional rights always trump a victim’s statutory rights, *see, e.g., Davis v. Alaska*, 415 U.S. 308, 319 (1974) (“the right of confrontation is paramount to the State’s policy of protecting a juvenile offender”). Thus, no provision of the CVRA or a related rule may infringe on any right of the defendant.

Defendants have a number of fundamental constitutional rights. Among them are the rights to an impartial judge, *In re Murchison*, 349 U.S. 133 (1955); to be presumed innocent, and to be found guilty only based on proof beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970); the right to confront adverse witnesses, *Coy v. Iowa*, 487 U.S. 1012 (1988); the right to cross-examine adverse witnesses, *Crawford v. Washington*, 541

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(B) the victim petitions the court of appeals for a writ of mandamus within 10 days after the denial, and the writ is granted; and

(C) in the case of a plea, the accused has not pleaded to the highest offense charged.

(6) No New Trial. A failure to afford a victim any right described in these rules is not grounds for a new trial.

U.S. 36 (2004); the right to compulsory process, Taylor v. Illinois, 484 U.S. 400 (1988); *Washington v. Texas*, 388 U.S. 14, 19 (1967); the right to present a complete defense, *Crane v. Kentucky*, 476 U.S. 683, 690-91(1986); the right to effective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984); the right to obtain favorable evidence that is relevant to guilt or punishment, *Kyles v. Whitley*, 514 U.S. 419 (1995); the right to an impartial jury, *United States v. Gaudin*, 515 U.S. 506 (1995); and the **right to notice and opportunity to challenge any information that may be used to deprive the defendant of life, liberty or property in sentencing**. See *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007); *Burns v. United States*, 501 U.S. 129, 137-38 (1991); *Gardner v. Florida*, 430 U.S. 349, 351, 358 (1977); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

B. CVRA requires a motion and notice

In addition to the constitutional rights above that require a motion in the instant case, the plain language of the CVRA compels the same conclusion. According to the CVRA, a victim must “assert” any rights described in subsection (a) by “motion.” See 18 U.S.C. § 3771(d)(3). The “motion” may be made by the victim, the victim’s “lawful representative,” or

the government. 18 U.S.C. § 3771(d)(1), (e). Any such “motion” must comport with Fed. R. Crim. P. 47 and 49 (like any other motion) so that the parties receive notice and have a full and fair opportunity to respond. See *United States v. Eight Automobiles*, 356 F.Supp.2d 223, 227 n.4 (E.D.N.Y. 2005) (victim’s motion must “be made on notice to all parties”).

To date, no such motion with notice to counsel has been filed.

C. “Reasonably Heard” as used in the CVRA

“Reasonably heard” as used in the CVRA is a legal term of art meaning to bring one’s position to the attention of the court, in person or in writing, as the court deems reasonable under the circumstances. When Congress uses a legal term of art, it is presumed to intend its traditional meaning. Congress apparently chose deliberately to enact a right to be “reasonably heard,” rather than a right to “speak.” A principal objection to the failed constitutional amendment allowing a victim to speak was that it would have created an absolute right to be heard and would have prohibited judges from responding flexibly if, for example, there were multiple victims, the victim was involved in the criminal activity, the victim provoked the crime, or the victim’s statement would violate the defendant’s right to due process. See S. Rep. No. 108-191 at 76, 85, 106-107 & n.133 (Nov. 7, 2003). See, e.g., *O’Connor v. Pierson*, 426 F.3d 187, 198 (2d Cir. 2005); *Fernandez v.*

*Leonard*, 963 F.3d 459, 463 (1st Cir. 1992); *Commodities Futures Trading Com. V. Premex, Inc.*, 655 F.2d 779, 783 n.2 (7th Cir. 1981); USSG. § 6A1.3, backg'd. comment; *Morissette v. United States*, 342 U.S. 246, 263 (1952) (minority views).

At least one circuit court has held that the right to be reasonably heard entitles the victim to speak directly to the court at sentencing. See *Kenna v. U.S. District Court for C.D. California*, 435 F.3d 1011 (9<sup>th</sup> Cir. 2006).

#### 1. Limitations on the Right to be “Reasonably Heard”

However, victims, like any other witness, are not free to “speak” without notice, limitation or challenge. Even a defendant’s right to allocute at sentencing is not absolute, and may be denied in certain situations, or limited as to duration and content. *United States v. Marcello*, 370 F.Supp.2d 745, 750 & n.10 (N.D. IL, 2005).

Moreover, when a defendant wishes to testify to facts, he is placed under oath, subjected to cross-examination, and limited to matters that are relevant and material and about which he is competent to testify. *Id.* at 750. The defendant may be precluded from testifying at all if he fails to comply with rules requiring notice. *Michigan v. Lucas*, 500 U.S. 145, 152-53



(1991); *Taylor v. Illinois*, 484 U.S. 400, 417 (1988); *Williams v. Florida*, 399 U.S. 78, 81-82 (1970).

Nor do defendants have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under the rules of evidence, *Taylor*, 484 U.S. at 410, nor may they “testify *falsely*.” *Nix v. Whiteside*, 475 U.S. 157, 173 (1986). They also have no right to introduce inadmissible hearsay, *Chambers v. Mississippi*, 410 U.S. 484 (1973), or evidence that is otherwise unreliable. *United States v. Scheffer*, 23 U.S. 303, 309 (1998). Certainly victims cannot be afforded greater rights than defendants, whose liberty is at stake.

WHEREFORE, counsel respectfully requests that this Court issue an order directing the prosecutor to file a formal motion, with notice to defense counsel, seeking permission for the child complainant's mother to speak at sentencing.

FURTHERMORE, since a victim's ability to speak at sentencing pursuant to the terms of the Crime Victims' Rights Act is not unlimited, counsel further requests that the Court direct the prosecution to specify what it anticipates the complainant's mother will say, so that counsel may appropriately respond and ensure Mr. Aleo's rights are protected.

Respectfully Submitted,  
s/ John Freeman  
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