

## It's Their Turn

The 9th Circuit has drawn a strong line under crime victims' right to be heard.

**BY GREGORY STUART SMITH**

**S**uddenly, the sleepy Crime Victims' Rights Act has awoken with a vengeance. A Jan. 20 decision on the scope of CVRA rights may dramatically strengthen the role of victims in federal sentencing.

Though the focus of victims' rights is usually on the harm suffered by individuals, the broad sweep of *Kenna v. U.S. District Court* also should not be lost on corporate victims. Their ability to recover criminal losses may be materially advanced by this seminal decision from the U.S. Court of Appeals for the 9th Circuit.

After years of debate over whether crime victims had been unfairly shunted aside in the justice system, Congress passed the CVRA in October 2004. Codified at 18 U.S.C. §3771, the statute guarantees victims of federal crimes eight rights: (1) to be reasonably protected from the accused, (2) to fair notice of any court or parole proceeding or any release or escape, (3) not to be excluded from public court proceedings, (4) to be reasonably heard at such proceedings, (5) to reasonably confer with the prosecutor, (6) to obtain full and timely restitution, (7) to proceedings without undue delay, and (8) to be treated with fairness and with respect for their dignity and privacy. The act also gives victims certain procedural opportunities to enforce these rights directly.

In the 9th Circuit case, W. Patrick Kenna and numerous others had been swindled out of almost \$100 million by Moshe Leicher and his son Zvi. The Leichers pleaded guilty to wire fraud and money laundering. More than 60 victims submitted written victim-impact statements, and some spoke at Moshe's sentencing. He received 20 years.

But when Zvi was sentenced, three months later, the judge

denied victims' requests to speak again. The judge said that he had already heard them at Moshe's sentencing, had reviewed all the victim-impact statements again, and had concluded that nothing further any victim could say would have any effect. When Kenna protested and wanted to discuss new victim impacts, the judge said that the prosecutor could address those developments. Zvi received 11 1/4 years.

Kenna then filed a mandamus petition, seeking an order vacating Zvi's sentence and the chance to speak at the resentencing. The prosecutor filed no brief and took no position on the merits before the 9th Circuit, leaving the trial judge to respond on his own. Sens. Jon Kyl (R-Ariz.) and Dianne Feinstein (D-Calif.), co-authors of the CVRA, weighed in heavily with an amicus brief for Kenna.

The result was a far-reaching opinion, including an unusual public apology, written by Judge Alex Kozinski. (Senior Judge Daniel Friedman of the Federal Circuit, sitting by designation, wrote separately to concur in the result but express concern about "the seemingly broad sweep of the opinion.")

### RIGHT TO BE HEARD

Before the 9th Circuit weighed in, only two trial courts had examined the scope of the CVRA right to be "reasonably heard," and they had reached different conclusions. The U.S. District Court for the Northern District of Illinois ruled in *United States v. Marcello* (May 16, 2005) that the right to be heard is not necessarily the right to speak. But a bare month before *Kenna*, the U.S. District Court for Utah in *United States v. Degenhardt* (Dec. 21, 2005) found that there was a "right to speak" under the CVRA. Any right to speak had previously been limited to victims of "a crime of violence or sexual abuse" under Federal Rule of Criminal Procedure 32(i)(4)(B).

The 9th Circuit took the Utah court one better, ruling that the CVRA's right to be heard means that victims have "an infeasible right to speak, similar to that of the defendant."

Though the CVRA itself permits judges to place reasonable restrictions on victims' speech, the 9th Circuit held that victims have the right to confront "every defendant who has wronged them." The court continued, "[S]peaking at a co-defendant's sentencing does not vindicate the right of the victims to look this defendant in the eye and let him know the suffering his misconduct has caused." And the court did not mince words when it said that the CVRA had ended the justice system's "assumption that crime victims should behave like good Victorian children—seen but not heard."

### RAPID RESPONSE

Perhaps even more powerfully, the 9th Circuit discussed the unusual appellate rights that victims have when they remain unsatisfied. The 9th Circuit stated that the CVRA's explicit authorization of mandamus petitions means that the court need not go through the normal balancing test for granting such extraordinary relief—to Kenna or others. Instead, the court wrote, we "must issue the writ whenever we find . . . an abuse of discretion or legal error." In essence, the court equated the standard for granting a CVRA mandamus petition with that for granting a direct appeal. (For a useful critique of this and other portions of the 9th Circuit opinion, see the California Appellate Report blog at [calapp.blogspot.com](http://calapp.blogspot.com).)

Further, the court stated that it was required by the statute to "take up and decide the application within 72 hours." The court apologized to Kenna for its "inexcusable delay" in deciding his appeal and noted that it was rewriting its rules to ensure future CVRA compliance.

The impact of *Kenna* is potentially dramatic. All circuits are now on notice that victims arguably can force them to pause from their busy dockets to address any CVRA appeal on a 72-hour basis—and that their reasons for any denial must be "clearly stated on the record in a written opinion." *Kenna* also openly invites victims to request postponements of sentencing hearings while their CVRA appeals progress. If a trial court declines to postpone, *Kenna* further suggests that a victim may be able to vacate the court's decision and force a new sentencing hearing at which the victim can speak.

Ironically, that relief was not directly granted to Kenna, because the defendant, Zvi Leicher, had not participated in the mandamus proceeding. The 9th Circuit said that it would be "imprudent and perhaps unconstitutional" to vacate his sentence without giving him a chance to respond. (Future CVRA petitioners may wish to serve and invite a response from defendants in their mandamus petitions.) Instead the 9th Circuit remanded the case to let the trial court consider the motion to reopen the sentence.

While the 9th Circuit acknowledged that the lower court "must avoid upsetting constitutionally protected rights," it also strongly suggested that the only way to give effect to Kenna's right to speak would be to hold a new sentencing hearing. Perhaps anticipating that Zvi might argue that a new motion to reopen was untimely, or that his sentence should be deemed

final if he was never timely served with an appellate challenge, the 9th Circuit added that if the District Court does not reopen the sentence, Kenna could petition the appeals court for mandamus again.

However this case works out for Kenna, victims clearly have new procedural firepower. If followed by other circuits, the 9th Circuit's decision will likely encourage trial judges, who presumably won't want to postpone hearings or bother appellate colleagues with emergency petitions, to bend over backward to give victims whatever relief they seek. In short, there will likely be a generous application of CVRA rights.

### A LITTLE PAYBACK

The 9th Circuit recognized that it was opening a door, declaring that "We expect CVRA claims to become more frequent." But the court may not have realized just how wide open the door is. The CVRA clearly states that the ability to have these rights enforced in the trial court "forthwith" and via a mandamus petition decided "within 72 hours" applies to all of the statute's eight rights.

Thus, the CVRA gives this same procedural hammer to victims trying, for instance, to vindicate the right to "full and timely restitution." If full restitution is denied or even delayed, a trial judge could similarly face a demand that the sentencing hearing be postponed until the appeals court decides a mandamus petition. In effect, *Kenna* turns crime victims into parties with rights to a stay and interlocutory review of any restitution question. The result: Trial judges may take the "safe" route of simply ordering full restitution in most cases, deviating from their current course of often finding that defendants are indigent and unable to make full repayment.

It's true that many criminal defendants cannot pay anything. But not all defendants lack means. Especially in cases of white-collar crime, corporate victims may find the practice of sending a legal representative to monitor the sentencing hearing much more useful. Obtaining full restitution in the criminal case—and a probation officer's free efforts as collection agent—has always been more cost-effective than pursuing civil awards, but in the past corporate legal representatives could do little more than sit in the back of the courtroom and watch the sentencing. Now, thanks to the CVRA, an active effort to obtain criminal restitution is more likely to succeed.

Sometimes, active involvement by institutional victims in criminal cases may even prevent later conflicts between those victims. Consider the U.S. government's current prosecution of Walter Anderson, which has been described by the Internal Revenue Service as the largest individual federal tax case ever. Anderson also allegedly failed to pay millions in District of Columbia taxes. After *Kenna*, the D.C. government might be able to get directly involved in Anderson's case—as a victim—to ensure that the District is reimbursed for its losses, rather than letting all restitution be sent directly to the federal government.

That said, government entities may not be covered by the CVRA, which defines "crime victim" as "a person directly or proximately harmed." While 1 U.S.C. §1's definition of "person" clearly extends beyond individuals to cover corporate and most other entities, the Supreme Court noted in *Vermont*

*Agency of Natural Resources v. United States ex rel. Stevens* (2000) that there is a “presumption that ‘person’ does not include the sovereign,” although this presumption is “not a hard and fast rule of exclusion.”

#### VICTIMS EVERYWHERE

The effects of *Kenna* don’t end with sentencing hearings, either. The CVRA applies to any “public proceeding in the district court involving release, plea, sentencing or any parole proceeding.” Thus, a victim might demand a right to speak immediately after a defendant’s arrest in order to argue for detention or stiffer bond conditions—including conditions designed to avoid depletion of a defendant’s assets (even to pay his lawyer).

A victim’s right to address the court at such pretrial detention hearings is less clear. In *United States v. Marcello*, the trial court specifically denied a victim’s request to speak at a detention hearing. But *Marcello*’s reasoning has arguably been cast into doubt by *Kenna*.

A victim might also demand the opportunity to speak against a plea bargain and, if unsuccessful, can even move to re-open a plea where the defendant did not plead guilty to the most serious charge. And a victim with unpaid restitution might demand its full payment at a hearing on revoking probation or terminating supervision early. Beyond these public proceedings, a victim who feels that a prosecutor or other Justice Department official violated his CVRA rights can file an internal complaint with the

department, seeking sanctions pursuant to new regulations established under the CVRA.

In short, opportunities for victims to insist on being heard are myriad. It’s also worth noting that these broad CVRA rights apply not only to federal victims but also to victims of “an offense in the District of Columbia.”

The CVRA’s use has been sporadic to date, but *Kenna* suggests a new day. There is no guarantee, of course, that *Kenna* will be widely followed—though the 9th Circuit issued its mandate in *Kenna* on Feb. 13 without *en banc* review. How future courts will accommodate the scope of these newly codified, directly enforceable rights is not immediately clear. Balancing the various interests in a case involving hundreds, or even thousands, of victims will prove challenging. One can imagine, for example, all the potential Enron victims who might wish to speak at various stages of the case against Kenneth Lay and Jeffrey Skilling.

But what is clear is that after *Kenna*, victims come to federal court with substantial power. The show cannot go on without them. And that is just what the CVRA’s sponsors say they wanted.

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*Gregory Stuart Smith, a counsel at D.C.’s Sutherland Asbill & Brennan, serves as co-chair of the U.S. Sentencing Commission’s Practitioner’s Advisory Group. He previously served on the Executive Council of the ABA’s Criminal Justice Section and the steering committee of the D.C. Bar’s Criminal Law and Individual Rights Section. The opinions expressed here are his own.*