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Not Reported in F.Supp.2d, 2008 WL 501321 (S.D.Tex.)
(Cite as: 2008 WL 501321 (S.D.Tex.))



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United States District Court,
S.D. Texas,
Houston Division.
UNITED STATES of America

v.

BP PRODUCTS NORTH AMERICA INC.

Criminal No. H-07-434.
Feb. 21, 2008.

II. The Crime Victims' Rights Act

A. The Statutory Provisions

In 2004, Congress passed the CVRA to give **crime victims** enforceable rights to participate in federal criminal proceedings. The literature on the CVRA describes the developments that led to its enactment.^{FN4} The statute was enacted to overcome the effects of a criminal justice system that had become "out of balance-while criminal defendants have an array of rights under law, **crime victims** have few meaningful rights." See 150 Cong. Rec. S4260, S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). The Act was intended to show that the criminal justice system "can and should care about both the rights of accused and the rights of victims." *Id.* The rights under the statute were described as "basic" and not "at the expense of defendant's rights." *Id.*

FN4. See, e.g., Douglas E. **Beloof**, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U.L.REV. 1135 (2007); Douglas E. **Beloof** & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L.REV. 482 (2005); Paul G. Cassell, *Re-*

cognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act, 2005 BYU L.REV. 835; The Honorable John Kyl, Steven J. Twist, & Stephen Higgins, *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 (7,005).

The CVRA defines a "**crime victim**" as "a person directly and proximately harmed as a result of the commission of a Federal offense." 18 U.S.C. § 3771(e). The CVRA permits the legal guardians of the **crime victim** or the representatives of the **crime victim's** estate, family members, or other persons appointed as suitable by the court to assume the **crime victim's** rights if the victim is under 18 years of age, incompetent, incapacitated, or deceased. *Id.*

A **crime victim** has the following rights under the CVRA:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- *8 (5) The reasonable right to confer with the attorney for the Government in the case.

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

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

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

18 U.S.C. § 3771(a).

The Act also provides that the government must make its best efforts to "see that crime victims are notified of, and accorded, the rights described in subsection (a)," including the "reasonable right to confer with the attorney for the Government in the case" and the right to be "treated with fairness." § 3771(c)(1).^{FNS}

FNS. This notice obligation is to 42 U.S.C. § 60207, which provides: "[d]uring the investigation and prosecution of a crime, a responsible official shall provide a victim the earliest possible notice of ... the status of the investigation of the crime, to the extent it is appropriate to **inform** the victim and to the extent that it will not interfere with the investigation ... [and] the filing of charges against a suspected offender."

In any "court proceeding involving an offense against a crime victim," the court has the obligation to "ensure that the crime victim is afforded the rights described in subsection (a)." § 3771(b)(1). The Act recognizes the need for flexibility in cases in which there are multiple victims, providing that "[i]n a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims" their rights under the CVRA, "the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings." § 3771(d)(2).

The CVRA states that a violation cannot provide a basis for a new trial. § 3771(d)(5). "In no case shall a failure to afford a right under this

chapter provide grounds for a new trial." *Id.* A victim may move to reopen a plea or sentence only if "the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied" or, "in the case of a plea, the accused has not pled to the highest offense charged." *Id.* No basis for a damages claim is provided. The CVRA states that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." § 3771(d)(6).

Enforcement under the CVRA is provided through a motion for relief in the district court, which must decide "any motion asserting a victim's right forthwith." If the relief sought is denied, the movant may petition the court of appeals for a writ of mandamus, which must decide the petition not only "forthwith," but within 72 hours after it has been **filed**. § 3771(d)(3).

***10** The appellate cases emphasize that the CVRA rights are broad and expansive but subject to express statutory limits, such as prosecutorial discretion, and to express qualifiers, such as the "**reasonable** right to confer," the right to be "**reasonably** heard," and the right to proceed "free from **unreasonable** delay." The cases also emphasize the flexibility provided in the multiple-victim section. The cases faced with applying the CVRA to specific facts and circumstances **carefully** examine whether the approach taken or proposed in fact achieved the purposes of the CVRA.

III. The Alleged Violations

A. The Right to Notice Under Section **3771(a)(2)**

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The right to "reasonable notice" under section 3771(a)(2) is expressly tied in subsection (a)(2) to "any public court proceeding ... involving the crime." The legislative history makes clear that this right applies to public court proceedings, specifically excluding, for example, grand jury proceedings. See 150 Cong. Rec. **S4260, S2468** (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). It is also limited by the right of a court to order judicial proceedings to be closed under "existing laws." The legislative history states that the CVRA was not intended to alter such laws. *Id.*

There is no right to notice under section 3771(a)(2) of the filing of an information or of the existence of plea negotiations. Neither is a "public proceeding." A court filing is not the same as a "public proceeding" under section 3771(a)(2) of the CVRA. The term "proceeding," as used in the CVRA, appears to refer to such events as hearings held in open court rather than filings on the court's docket. See, *e.g.*, § 3771(a)(3) (the right not to be excluded from a public court proceeding at which testimony is presented); § 3771(a)(4) (the right to be "reasonably heard" at a public proceeding in the

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district court involving release, plea, sentencing, or parole); *Kenna v. District Court*, 435 F.3d at 1015 (“When Congress used the word ‘public’ in [§ 3771(a)(4)] it most likely meant to refer to proceedings in open court—much as the word is used in the common phrase ‘public hearing.’”).

*11 The notices of the right to appear and be heard at court proceedings met the section 3771(a)(2) requirements. The violation of the right to notice that the victims’ latest motion asserts is not a violation of section 3771(a)(2), but rather of the government’s obligation under section 3771(c)(1) to use its best efforts to provide notice of the subsection (a)(5) right to confer with the government and of the subsection (a)(8) right to be treated with fairness.

B. “The “Reasonable Right to Confer”

The “reasonable right to confer” under subsection (a)(5) is tied to the “case.” A threshold issue is the relationship of this right and the related notice obligation under section 3771(c)(1) to the period before a charging instrument is filed. The CVRA states that the “rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, *if no prosecution is underway*, in the district court in the district in which the crime occurred.” 18 U.S.C. § 3771(d) (3) (emphasis added). There are clearly rights under the CVRA that apply before any prosecution is underway. For example, the right to be “reasonably protected from the accused” is not tied to a “proceeding” or “case.” The right to reasonable notice of “any release or escape of the accused” is not tied to a “proceeding” or “case.” The right to be treated with fairness and with respect for the victim’s dignity and privacy may apply with great force during an investigation, before any charging instrument has been filed. The government’s obligation to give victims notice of their rights under subsection (a) can apply before any charging instrument is filed, depending on which subsection (a) right is at issue and the circumstances involved.

The legislative history makes it clear that, like

other CVRA rights, the right to confer was intended to be broad. In a floor statement relating specifically to the right to confer, Senator Feinstein, one of the CVRA’s sponsors, stated that the right to confer was “intended to be expansive,” applying to “any critical stage or disposition of the case.” See 150 Cong. Rec. at S4260, S2468 (daily ed. Apr. 22, 2004). But the legislative history also reflects the clear limit recognized in the CVRA that it does not limit prosecutorial discretion. Decisions on whether to charge, who to charge, and what to charge, are all in the prosecutor’s discretion. See *United States v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978)); *Deal v. United States*, 508 U.S. 129, 134 n. 2, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993) (referring to “the prosecutor’s universally available and unavoidable power to charge or not to charge an offense.”). The following statement is part of the legislative history:

This right to confer does not give the crime victim any right to direct the prosecution. Prosecutors should consider it part of their profession to be available to consult with crime victims about concerns the victims may have which are pertinent to the case, case proceedings or dispositions. Under this provision, victims are able to confer with the Government’s attorney about proceedings *after charging*.

*12 150 Cong. Rec. S4260, S2468 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added). This statement appears to contemplate that victims have a statutorily protected right to “confer” with the government *after* a charging instrument has been filed.

The briefs have not cited cases addressing whether the CVRA requires prosecutors to “confer” with victims before any charging instrument is filed.^{FN7} The cases, the legislative history, and the Attorney General’s Manual appear to recognize the right to “confer” as generally applying to any critical stage or disposition of the “case,” including plea

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negotiations. *See Heaton*, 458 F.Supp.2d at 1272; *Ingrassia*, 2005 WL 2875220, at *17 n. 11; U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 30 (2005) ("Responsible officials should make reasonable efforts to notify identified victims of, and consider victims' views about, prospective plea negotiations."). In most cases resolved by a guilty plea, the plea is entered well **after** the indictment is filed. In the present case, by contrast, in addition to the issues raised by the number of victims and the intense media coverage, the information was filed just two days before the plea agreement was reached. No source has been cited that addresses how the CVRA "conferral" right and related notice obligation should apply when there is no charging instrument and the defendant agrees to plead guilty to an information that is filed a few days before the agreement is reached.

FN7. Several courts have held that the CVRA defines "victim" in a way that only applies after a charging instrument is filed. *See, e.g., Turner*, 367 F.Supp.2d at 326 (explaining why, despite a contrary statement in the legislative history, the actual language of the CVRA appeared to exclude victims of uncharged conduct from those covered by the CVRA); *Searcy*, 2007 WL 1875802, at *6 (noting cases that interpret the definition of "victim" to require the existence of a charging instrument); ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 9 (defining a "victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense, ... if the offense is charged in Federal district court."). This reading of "victim" appears inconsistent with the CVRA recognition of certain subsection (a) rights that apply during investigation, before any charging instrument is filed.

Indeed, there are few cases addressing the con-

ferral provision at all. In *In re W.R. Huff Asset Management Co.*, 409 F.3d 555 (2d Cir.2005), the appellate court considered a district court's orders entered in a case relating to the prosecution of the **Rigas** family for fraud arising out of the finances of Adelpia. The victims had civil claims pending against the members of the **Rigas** family. The government entered into a settlement agreement with members of the **Rigas** family who had not been convicted. Under the agreement, these **nonconvicted** family members agreed to forfeit certain assets, the government agreed not to prosecute the corporation, and victims who wanted to receive restitution from a fund established by Adelpia or from forfeited assets had to comply with certain requirements, including releasing claims against these family members. The court ordered that any person who wanted to be heard about the proposed settlement make a written submission. The government took steps to ensure broad notice to victims, including holding a press conference about the proposed settlement, setting up a **website** with information about the proposed settlement, and providing contact information for the victim coordinator in the U.S. Attorney's Office. The court accepted the settlement after a hearing at which objectors were heard. Certain of the victims filed a mandamus petition, asserting that the settlement violated their CVRA rights to be treated fairly and to be provided with full and timely restitution. The victims also challenged the notice given as inadequate under the CVRA. Finally, the victims argued that they were not afforded an opportunity "to confer" with the government concerning the case disposition. The court of appeals rejected the fairness and restitution arguments, stating as follows:

***13** the CVRA does not grant victims any rights against individuals who have not been convicted of a crime. Concomitantly, neither the Government nor the sentencing court are restricted by the CVRA from effecting reasonable settlement or restitution measures against non-convicted defendants. To the extent that the Government recognizes that victims would have **difficulty** in ef-

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fecting any recoveries from the Rigas family members because of difficulties in proof of culpability and because of security interests affecting the family's assets, petitioners cannot meet their burden in showing that the Government or the district court acted unreasonably in entering the Settlement Agreement or approving it. Additionally, the district court in no way treated the victims unfairly or without "respect for [their] dignity and privacy," 18 U.S.C. § 3771(a) (8), but rather took into consideration the numerosity of victims, the uncertainty of recovery, and the prospect of unduly prolonging the sentencing proceedings when adopting the settlement, factors which Congress has required the court to consider. *See* 18 U.S.C. § 3771(d)(2).

Id. at 564.

The court then turned to the allegation that the government had violated the CVRA conferral obligation. The court noted that "no petitioner has alleged that it asked the Government to confer with it and was denied the opportunity to do so." (*Id.* at 564). In the present case, of course, the victims' argument is that the reason they did not ask to confer with the government on the proposed plea agreement is that the government improperly obtained an *ex parte* order to keep the plea negotiations secret. And the lawyer for some of the victims also alleges that after the plea agreement was disclosed, he did ask the government for an explanation of how the \$50 million fine was derived but received no response. The Huff court's conclusion is not, however, linked to, or limited by, the absence of any request by victims to confer with the government and the resulting absence of any refusal to do so. The Huffcourt stated:

Nothing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement. The CVRA requires only that the court provide victims with an opportunity to be heard concerning a proposed settlement agreement, and the court provided the victims with a **full** opportunity to do

so in this case.

Id. at 564,

In *United States v. Heaton*, 458 F.Supp.2d 1271, the court held that the right to confer applies to a motion to dismiss charges involving a specific victim filed by the government under Rule 48(a). Such a motion is dispositive. The court stated that in **ruling** on such a motion in a victim-related case, "a prosecutor must recount that the victim has been consulted on the dismissal and what the victim's views were on the matter." *Id.* at 1273. The court construed the right to confer with the government as a mechanism to give the government information about the victim's views so that the government could provide that information to the court, necessary to treat the victim with fairness.

*14 Other courts have similarly emphasized that one purpose of the "confer" requirement is to enable the victims to obtain information on which to base views to express to the court. In *United States v. Ingrassia*, 2005 WL 2875220, a fraud case involving approximately 200 potential victims, the court concluded that the CVRA "right to be heard" did not require the disclosure to all victims of any part of the presentence investigation report. The court described the CVRA right to be "heard" as a right for victims to provide information and opinions to the court and the CVRA right to confer as one way to realize the right to be heard. "To the extent victims might wish to obtain information on which to base their input, the contemplated mechanism for doing so was conferral with the prosecutor rather than the implicit creation of an affirmative disclosure right." *Id.* at *17 n. 11. The same conclusion was reached in *In re Sacane*, 2007 WL 951666, in which the court considered a request by fraud victims to obtain more detailed financial disclosures in advance of a hearing on restitution. The victims relied on the CVRA conferral right. The court held that this right did not provide a basis for the crime victims to obtain information directly from the defendant. Instead, the court held that crime victims seeking additional information from

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the defendant must work through the government using the right to confer. The court noted that the conferral right was limited by section 3771(d)(6), which states that “[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.” *Id.* at *2. The court noted that even if it had the discretion to order the defendants to turn over financial information to the **crime victims**, ordering this would be repetitive and unnecessary because the government had served the defendants with subpoenas seeking the same financial information. *Id.* In *United States v. Sharp*, 463 F.Supp.2d 557 (E.D.Va.2006), the court examined whether the right to notice and confer was violated. The court rejected the claim in part because the record showed that there had been “extensive and ongoing communication” between the individual and the government. *Id.* at 568.

As described in these cases, the purposes of the conferral provision are to ensure that victims can obtain information from prosecutors and convey information to prosecutors, to enable the victims to form and express opinions. Conferring with prosecutors allows victims to obtain information necessary to form and communicate the victims' views to the court. *See Heaton*, 458 F.Supp.2d at 1273; *Ingrassia*, 2005 WL 2875220. at *17 n. 11; *see also* 150 Cong. Rec. S2460, S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) (“The victims of crime ... should be able to provide any information, as well as their opinion, directly to the court concerning the ... plea, or sentencing.... Of course, in providing victim information or opinion it is important that the victim be able to confer with the prosecutor concerning a variety of matters and proceedings.”). Other sources support the victims' argument that a purpose of the conferral right is also to allow victims to express their views on proposed dispositions, including plea negotiations, for the prosecutors to consider. *See* ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 30 (2005). Section 3771(c)(1) requires government officials to use best efforts to

give victims notice of their rights under subsection (a), including the right to confer, at a time that will enable the victims to exercise these rights meaningfully.

*15 Even under an expansive approach, the reasonable right to confer on a proposed plea agreement and the government's obligation to provide notice of that right is subject to the limit that the CVRA not impair prosecutorial discretion. The right to confer is not a right to approve or disapprove a proposed plea in advance of the government's decision. *See In re W.R. Huff Asset Management &. LLC*, 409 F.3d at 564. The right to confer is a right to obtain and provide information and to express opinions. The right to confer about a proposed plea and the obligation to provide notice of this right are also subject to the multiple-victim provisions.

C. The Right to Fairness

The CVRA also provides that victims have the “right to be treated with fairness.” 18 U.S.C. § 3771(a)(8). As one court has noted, although “[n]either the text of the statute nor its legislative history provides guidance as to what specific procedures or substantive relief, if any, Congress intended this provision to require or prohibit,” and although “[t]he provision's broad language will undoubtedly lead to litigation over the extent to which courts must police the way victims are treated inside and outside the courtroom,” the Senate sponsors of the law were clear in their articulation of the overall import of the provision: to promote a liberal reading of the statute in favor of interpretations that promote victims' interest in fairness, respect, and dignity. *See Turner*, 367 F.Supp.2d at 335-36. “It is not the intent of this bill that its significance be whittled down or marginalized by the courts or the executive branch. This legislation is meant to correct, not continue, the legacy of the poor treatment of **crime victims** in the criminal process.” *See* 150 Cong. Rec. S4260, S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). In *Turner*, the court applied section 3771(a)(8) “liberally to the extent

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consistent with other law." 367 F.Supp.2d at 335. In *United States v. Heaton*, 458 F.Supp.2d at 1272, the court similarly emphasized the need for a robust reading of the rights afforded by the CVRA, finding that section 3771(a)(8) requires the court to consider the views of a victim before giving leave of court to dismiss an indictment under Federal Rule of Criminal Procedure 48(a). The court cited the legislative history addressing section 3771(a)(8):

The broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of due process.... This provision is intended to direct government agencies and employees, whether they are in executive or judicial branches, to treat victims of crime with the respect they deserve and to afford them due process.

Id. at 1272 (citing 150 CONG REC.S10910 (daily ed. Oct. 9, 2004)); *see also United States v. Kaufman*, 2005 WL 2648070, at *4 (D.Kan. Oct. 17, 2005) ("[T]he court finds that 18 U.S.C. § 3771(a)(8) requires that sketch artists' activities in the courtroom be restricted under the circumstances of this case."); *United States v. Patkar*, 2008 WL 233062, at *4-6 (upholding government's argument that order keeping information confidential was justified by the need to protect victims' CVRA right to be treated fairly and with respect for privacy).

*16 The reasonable right to confer with the government and the government's obligation to use its best efforts to provide notice of this right are not only a right and an obligation, but also mechanisms through which the CVRA guarantees victims' right to fairness. The reasonable right to confer and the obligation to provide notice of that right must be read expansively in light of the CVRA's broad goal of ensuring that victims are treated fairly. *See Heaton*, 458 F.Supp.2d at 1272 ("When the government files a motion to dismiss criminal charges that involve a specific victim, the only way to protect the victim's right to be treated fairly and with re-

spect for her dignity is to [have the court] consider the victim's views on the dismissal.").

IV. The Procedure Used in this Case

The victims argue that the government acted improperly in asking a district court judge, *ex parte*, to use the multiple victims provision to delay notifying the victims of the proposed plea. The government argues that the *ex parte* motion filed on October 18, 2007 and the order were necessary, given the large number of potential victims and the extraordinary publicity the possibility of a criminal resolution would create.

The scant case law does not support the argument that the procedure of asking a court *ex parte* for approval of a proposed approach for complying with the CVRA when multiple victims are involved, based on a need to maintain confidentiality, violates the CVRA. In *United States v. Ingrassia*, 2005 WL 2875220, at *9, the court held that the government did not seek, but should have sought, advance permission from a court to use a method other than mail (regular or electronic) to satisfy section 3771(a)(2). The government relied on the multiple-victim provision of section 3771(d)(2). The court rejected reliance on this section as a basis for unilateral action by the government:

The statute allows reliance on an alternate "reasonable procedure" in lieu of full compliance with subsection (a)(2) only where "the court finds" that full compliance is impractical and thus forbids a unilateral decision by the government to give up on strict adherence. *Id.* § 3771(d)(2). Moreover, the "reasonable procedure" that the statute permits must be one that "the court shall fashion." *Id.* Accordingly, even if [the notice system] does constitute "a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings," *id.*, the government could not properly rely on it to accomplish victim notification without advance permission from the court, which it did not secure in this case.

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The latter interpretation of the CVRA not **only** respects the statute's text, it also reflects a sensible procedure for the administration of criminal justice for two reasons. First, the statute imposes on the judiciary an independent obligation to "ensure" that victims are afforded their rights. *Id.* § 3771(b). Requiring that a court make a finding of need and then fashion (or at least approve) an alternate "reasonable procedure" for notification plainly makes it more likely that the judiciary will meet its own statutory obligation. Second, a substitute "reasonable procedure" for notification that is crafted by the government alone without the court's input may later be found-as it is here-to be insufficient, resulting in a finding that victims have not been afforded their rights. In such circumstances, providing a full remedy to the aggrieved victims (such as vacating the results of the improperly conducted proceeding and seeking to re-do it later on proper notice) either may not be possible or, if possible, may have adverse consequences for law enforcement. By requiring judicial approval in advance of any **reliance** on a substitute procedure pursuant to subsection (d)(2), the statute guards against such problems.

•17 *Id.*

The government did not violate the CVRA by seeking judicial **permission** for the approach it wanted to take to giving notice to the victims, and which included delaying notice until **after** the charging instrument was filed and after the plea negotiations had concluded. The CVRA contemplates judicial supervision over a procedure used under section 3771(d)(2). Filing a motion *ex parte* because of a need for confidentiality is not in itself improper.

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The victims' and the government's primary dispute is whether the combined presence of multiple victims and intense media coverage was a sufficient factual basis for the court to enter the *ex parte* order allowing notice to the victims of plea negotiations to be deferred until the negotiations concluded. The victims assert that the government had no constitutional obligation to protect BP Products's right to a fair trial in the event the plea negotiations failed because " 'there is no constitutional right to plea bargain.' " (Docket Entry No. 65 at 4). The victims assert that if there was a choice between protecting the rights of the crime victims or the rights of BP Products, the CVRA required the government to side with the victims. (*Id.*). Finally, the victims argue that even if confidentiality of the plea negotiations was required, the procedure the court approved in the October 18, 2007 order was not adequately supported and was overbroad.

To the extent the victims are arguing that neither BP Products nor the government had a legitimate interest in confidentiality during the plea negotiations, that argument proves too much. Plea bargaining has long been recognized as an essential component of the administration of justice. "Properly administered, it is to be encouraged." *Santobello v. New York*, 404 U.S. 257, 260, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). "If such a policy is to be fostered, it is essential that plea negotiations remain confidential to the parties if they are unsuccessful." *United States v. Verdoorn*. 528 F.2d 103, 107 (8th Cir.1976). Rule 11(f) of the Federal Rules of Criminal Procedure, amended in 2002, provides that "[t]he admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410." ^{FN9} Under Rule 410, "evidence of the following is not, in any civil or criminal proceeding, admiss-

ible against the defendant who made the plea or was a participant in the plea discussions: (1) a plea of guilty which was later withdrawn; (2) a plea of *nolo contendere*; (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn." ^{FN10}

^{*18} Under Rule 11(f) and Rule 410, guilty pleas later withdrawn, or statements made to government attorneys in the course of plea discussions that do not result in a guilty plea or that result in a guilty plea later withdrawn, are inadmissible in subsequent proceedings. The purpose of the rule is "to permit the unrestrained candor which produces effective plea discussions." *United States v. Mezzanatto*, 513 U.S. 196, 214, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995) (quoting advisory committee notes); *accord United States v. El-Sayegh*, 131 F.3d 158, 159-60 (D.C.Cir.1997) (reversing district court judge's order releasing plea agreement after it had been repudiated, the defendant had pleaded not

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guilty, and the government had moved to dismiss indictment, without prejudice, based on the need for confidentiality of plea negotiations); *United States v. Grant*, 622 F.2d 308, 312 (8th Cir.1980); *United States v. Davis*, 617 F.2d 677, 683 (D.C.Cir.1979); *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1148 (3d Cir.1978); *United States v. Robertson*, 582 F.2d 1356, 1364-67 (5th Cir.1978). There is no "constitutional right to plead guilty," but there is a recognized interest in plea negotiations, which may require confidentiality. The courts recognize that "[e]xploring possible plea negotiations is an important part of providing adequate representation of a criminal client." *Mannhalt v. Reed*, 847 F.2d 576, 582 (9th Cir.1988) (citing *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)).

The victims also argue that the government and BP Products had no need to delay notice of the proposed plea to protect BP Products's right to a fair trial in the event the plea negotiations failed. An accused-individual or corporate-has a Sixth Amendment right to a fair trial. The courts have long recognized an obligation on the part of district courts to take affirmative steps necessary to protect a criminal defendant's right to a fair trial untainted by prejudicial media exposure. *See Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966) ("The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences."); *United States v. Brown*, 218 F.3d 415, 425 (5th Cir.2000) (quoting *Sheppard*); *Levine v. U.S. Dist. Court for Cent. Dist. of California*, 764 F.2d 590, 596 (9th Cir.1985) (holding that the Supreme Court "unequivocally imposed a duty upon trial courts to take affirmative steps to insure the fairness of a criminal proceeding in the face of excessive publicity"); *United States v. Elfgech*, Nos. 06-0638-cr(L), 06-0744-cr(con), 2008 WL 383046, at *38 (2d Cir. Feb. 14, 2008) (quoting *Sheppard*); *Hale v. Gibson*, 227 F.3d 1298, 1332-33 (10th Cir.2000) (quoting *Sheppard*). Courts have limited the public's right to access to judicial records, pro-

tected by the First Amendment. when it collides with the defendant's right to a fair trial, protected by the Sixth Amendment. *See Press-Enterprise Co. v. Superior Court of Cal., Riverside County*, 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); *In re Providence Journal Co., Inc.* 293 F.3d 1, 13 (1st Cir.2002).

*19 In the present case, the district court order granting the *ex parte* motion made specific findings that: there was a need to maintain confidentiality until the plea negotiations were concluded in order to protect the negotiations and to protect the defendant's right to a fair trial in the event no agreement was reached; and that the large number of victims and the extraordinary media coverage meant that it was impracticable for the victims to be given notice of the potential criminal resolution before public announcement of a plea agreement. Neither the number of victims nor the extensive media coverage is disputed. The number of victims was not presented to show that it was difficult to provide them notice, but rather to show that it would be impracticable for the government to consult with them before a plea agreement was reached and to show that providing the victims notice would widely publicize the plea negotiations, destroying any confidentiality about BP Products's willingness to plead guilty. The court found a cognizable threat to the plea negotiations and to the defendant's Sixth Amendment right if the negotiations failed, which required the use of the flexibility the CVRA affords in cases involving multiple victims. The court order ensured full notice under the CVRA and a full opportunity to communicate information and views before and during the entry of the plea.

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~~stages~~. There was no charging instrument on file, a large number of victims and others affected by the explosion, and a history of extraordinary publicity. The victims suggest that the court should have picked a few lawyers representing some of the victims in the civil cases and directed the government to give them notice of the proposed plea agreement and to solicit reaction from them, subject to some confidentiality orders. But it is unclear how the court would have picked which lawyers and victims to include without any involvement by the victims, and unclear how confidentiality could be reliably achieved.

The government should have provided information in the October 18, 2007 motion showing that it considered and rejected alternatives and why. If there was an in-court hearing when the *ex parte* motion was submitted, that hearing should have been on the record for later review. And when the government obtained the court order unsealing the information, it should have unsealed the motion and order filed on October 18, 2007 in light of the fact that there was no longer a need for confidentiality. *See* 150 Cong. Rec. **S4260, S4268** (daily ed. Apr. 22, 2004) (statement of Sen. Kyl). At that point, the need for the seal had ended. But the issue is **not** whether the procedure used was the best, but rather whether it is a basis for rejecting the plea because it deprived victims of CVRA rights.

*20 The court's October 18, 2007 order made specific findings that justified the use of the procedure under the CVRA. The order made it clear that after the proposed plea agreement and information were made public, the victims would be given notice of their CVRA rights and the hearing on the proposed plea agreement and sentence would be deferred so that the victims could fully exercise their rights to attend and be heard. That procedure was followed and the well-represented victims have taken full advantage of the rights afforded. The victims received and provided extensive information and fully presented their views on the proposed plea agreement before it was entered in this court.

The October 18, 2007 order did mean that the victims could not inform the prosecution of their views about the specific terms of the proposed plea agreement *before* it was signed. Given the unusual circumstances, however, this order did not frustrate the purposes of the CVRA's conferral provision. The purpose of the conferral right is, as noted, not to give the victims a right to approve or disapprove a proposed plea in advance or to participate in the plea negotiations. The purpose of the reasonable right to confer is for victims to provide information to the government, obtain information from the government, and to **form** and express their views to the government and court. *See In re W.R. Huff Asset Management Co., L.L.C.*, 409 F.3d at 564; *In re Sacane*, 2007 WL 951666, at *2; *Ingrassia*, 2005 WL 2875220, at *17 n. 11; 150 Cong. Rec. **S4260, S4262** (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

In this case, the record shows that the unusual circumstances of the presence of multiple victims and the intense media coverage made it impracticable for the victims to receive notice of the plea negotiations and to confer with the government before the negotiations concluded. The record also shows that the government had been in communication with many of those affected by the explosion well in advance of any plea negotiations. (Docket Entry No. 26 at 31-32; Docket Entry No. 63 at 5). The government's extensive investigation had allowed it to learn much from the victims before any plea negotiations. The government knew before it agreed to the plea that the families of those who died, the individuals injured in the explosion and their families, and others affected by the explosion, had strong views that BP Products should receive the maximum available punishment. The government had the victims' opinions about the need for a criminal charge and a severe sanction. To read the right to confer as an inflexible right to express an opinion on specific terms that the government and defendant are negotiating would both endanger the confidentiality of plea negotiations and suggest that crime victims have a right to join in plea negotiations and

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to approve the proposed terms, inconsistent with the CVRA recognition of prosecutorial discretion.

***21** In addition to the extensive communications between the government and the victims during the investigation, the victims have been provided a full opportunity to express their views on the proposed plea agreement in court. The hearings were set to maximize the opportunity for victims to attend and speak. Full opportunity was provided for victims to submit written statements. The victims' lawyers have filed extensive briefs and supporting materials, ensuring that their clients' CVRA rights are fully realized. The victims have been provided with ample opportunity to obtain information about the plea agreement, to provide information, and to make their views known to both the government and to this court. The victims asked this court to order a "town meeting" as a way to remedy the CVRA violations they assert. The process that has been followed is an orderly approach to such a town meeting, in the context of court hearings.

V. Conclusion

***22** The asserted CVRA violations are not in themselves a basis for rejecting the plea agreement between BP Products and the government. The government is ordered to disclose any other **ex parte** contacts concerning the CVRA. The other grounds asserted for rejecting the plea agreement will be addressed in a separate memorandum and opinion after the briefing is concluded.

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