

## Crime Victims' Rights Report 2012

### Summary – uscourts.gov

This is the eighth annual report to Congress on crime victims' rights as required under the Justice for All Act of 2004, § 104(a), Pub. L. No. 108-405. Section 104(a) requires the Administrative Office of the United States Courts (AO) to report "the number of times that a right established in Chapter 237 of title 18, United States 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 Chapter 237 of title 18, and the result reached." Title I of the Justice for All Act is commonly referred to as the Crime Victims' Rights Act (CVRA) and is codified at 18 U.S.C. § 3771.

In the federal trial courts, there were more than 71,300 criminal cases filed involving more than 94,100 defendants during fiscal year 2012. In the past year, the AO has received reports from the appellate courts on 7 mandamus actions brought per the provisions of the Act and has similarly identified 9 district court cases that meet the statute's reporting criteria. A summary of those mandamus and trial court actions follows, including the reasons provided for the decisions in each of the cases.

United States of America v. Michael J Daly, No. 3:11-cr-00121 (D.Conn. Feb. 1, 2012). Defendant pled guilty to one count of embezzlement as the trustee for the Lehman Brothers bankruptcy estate. As part of the plea agreement, he agreed not to seek fees from three other bankruptcy estates from which he was also suspected of embezzling funds.

Around the same time, the government was also investigating independent charges that the defendant as trustee had embezzled funds from yet another bankruptcy estate, that of Robert and Michelle DiLieto, which was not one of the bankruptcy estates mentioned in the plea agreement. In connection with that investigation, the government had entered Michelle DiLieto into its victim notification system.

The DiLietos moved under the CVRA to set aside the defendant's plea agreement on the embezzlement charge from the Lehman Brothers estate or, in the alternative, to amend that plea agreement to provide that the defendant could not seek fees from the DiLieto bankruptcy estate either.

The district court denied the DiLietos' motion on the ground that they were not "victims" for purposes of the CVRA. They certainly may have been victims of a crime of embezzlement, but the district court found that they were not victims of the specific crime alleged in the information to which the plea agreement pertained. That specific crime was embezzlement from the Lehman Brothers estate, not from the DiLietos' estate.

In re: Shapat Ahdawan Nabaya and Dinah Abbott, No. 12-1979 (4th Cir. Aug. 13, 2012). During civil litigation in the district court, the pro se petitioners were sanctioned in the amount of \$1,000 and prohibited from future filings until they paid the sanction and received court permission to submit any new filings. They sought a writ of mandamus in the United States Court of Appeals for the Fourth Circuit pursuant to 18 U.S.C. § 3771(d)(3), asserting that they were "crime victims of felony offenses by the U.S. government." Concluding that the rights conferred by the CVRA were limited to criminal proceedings, the appellate court held that the Act did not apply to civil litigation. Thus, the petitioners were not crime victims under the CVRA, and their petition for a writ of mandamus was denied.

United States of America v. Bernie Metz, 5:09-cr-51 (N.D.W.Va. October 18, 2011). Defendant pled guilty to embezzling from a credit union and money laundering. He was ordered to pay restitution to the National Credit Union Association (NCUA) and Elks Lodge, who were identified as direct victims of the defendant's actions. The court set aside a 90-day period during which the government could identify other victims who may be entitled to restitution. The government received 38 responses from individuals who believed that they were entitled to restitution, but had been previously told by the NCUA that credit union records did not support their claims.

The court noted that the CVRA defines "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense." The court further noted that under 18 U.S.C. § 3663, only a victim of the offense for which the defendant was convicted is entitled to restitution. Because the crime was committed against a financial institution, the court determined that the victim was the institution and its liquidating agent, not credit union members and employees. Thus, credit union members were only entitled to seek compensation from the NCUA for their financial losses, and the district court lacked jurisdiction to address the validity of claims by most claimants because they had not exhausted administrative remedies under the NCUA. Based on documents submitted by the government, the court further concluded that even if the defendant could be ordered to pay restitution to individual credit union members, the claimants were not entitled to court-ordered restitution because there was no evidence connecting the claimants' alleged losses to the defendant's actions.

United States of America v. Gerald Stone and Barbara Hildenbrand. 3:04-cr-00318-1 (N.D.Tex. Nov. 11, 2011). and In re: Community Housing Fund, No. 11-11155 (5th Cir. Dec. 9, 2011, Motion for Reconsideration Jan. 16, 2012). Defendants pled guilty to diverting money from the Community Housing Fund for non-business purposes. As part of their sentence, they were ordered to pay restitution to the Department of Housing and Urban Development in the amount of \$228,400. Community Housing Fund filed a motion pursuant to 18 U.S.C. § 3771 seeking to alter the criminal judgment so that restitution would be paid to the Community Housing Fund instead of the Department of Housing and Urban Development.

The district court noted that defendant Hildenbrand controlled the Community Housing Fund, that the defendants had filed several motions attempting to avoid their restitution obligations, and that filing a motion on behalf of the Community Housing Fund was just one more attempt by them to avoid paying restitution. Without addressing the merits, the district court determined that it lacked jurisdiction at this late date to reopen the sentence. Petitioner sought a writ of mandamus in the United States Court of Appeals for the Fifth Circuit, pursuant to 18 U.S.C. § 3771(d)(3), directing the district court to modify the sentence to make restitution payable to the Community Housing Fund. To reopen the sentence, the appellate court stated that the petition should have been filed within 14 days of the district court's denial (18 U.S.C. § 3771(d)(5)(B)). For that reason, and alternatively for the reasons stated by the district court, the appellate court declined to grant the petition for a writ of mandamus.

United States of America v. Citgo Petroleum Corporation, et al., 2:06-cr-00563 (S.D.Tex. Aug. 22, 2012), and In re: Jewell Allen, et al., No. 12-40954 (5th Cir. Sept. 6, 2012). The government previously filed a motion in the district court to recognize community members as crime victims pursuant to 18 U.S.C. § 3771. See Letter from Honorable Thomas F. Hogan, Director, Administrative Office of the U.S. Courts, to Honorable Joseph R. Biden, Jr., President, United States Senate (March 5, 2012). At that time, the court ruled that the government had not established that the emissions violations of the corporate defendant were the proximate cause of the alleged victims' health conditions and declined to recognize the community members as victims.

Sixteen months later, with the assistance of pro bono counsel, the community members filed their own motion to be recognized as crime victims. Determining that the filing was untimely, the district court said the victims should have filed their motion "... four years ago, not two months before sentencing is set to occur in this matter." After the district court declined to recognize the community members as crime victims, they sought a writ of mandamus in the United States Court of Appeals for the Fifth Circuit, pursuant to 18 U.S.C. § 3771(d)(3), directing the district court to provide them with crime victim status.

The appellate court noted that the only time limit set forth in the CVRA for relief in the district court involved requests to reopen a sentence or a plea (18 U.S.C. § 3771(d)(5)). Because no such request had been made by the petitioners, the appellate court determined that the time limit in 18 U.S.C. § 3771(d)(5) was not applicable. Emphasizing that the petitioners had a right to seek crime victim status under the CVRA and that no time limit barred the district court from hearing new arguments raised by the community members' pro bono counsel, the appellate court directed the district court to hear arguments from the petitioners' pro bono counsel regarding their status under the CVRA. Accordingly, the petition for a writ of mandamus was granted. On remand, the district court ruled that the community members were crime victims for purposes of the CVRA.

In re: Maisha I. Hamilton, No. 12-1059 (7th Cir. Jan. 12, 2012). A previous petition for a writ of mandamus was denied in October of 2010 because the case did not involve any of the offenses that the petitioner claimed the defendant committed against her. See Letter from Honorable Thomas F. Hogan, Director, Administrative Office of the U.S. Courts, to Honorable Joseph R. Biden, Jr., President, United States Senate (March 5, 2012). In this petition, the appellate court reiterated that the petitioner was not a victim in this case and was not entitled to any rights under the CVRA. Thus, the petition for a writ of mandamus was denied.

United States of America v. Stewart K. Ray, 2:11-cr-00019-DCR-JGW and 2:11-cr-00075 (E.D.Ky. Feb. 24, 2012). Defendant pled guilty to two counts of bank robbery and agreed to pay \$13,909 in restitution. Pursuant to 18 U.S.C. § 3771 and 18 U.S.C. § 3663A, one of the victims sought additional restitution for mental health counseling. At sentencing, the government and the defendant argued that 18 U.S.C. § 3663A permits restitution for mental health counseling only if the counseling was related to a victim's physical injury, whereas the victim in this case had not suffered a physical injury. Agreeing, the district judge orally ruled that additional restitution would not be appropriate here and denied the victim's request.

United States of America v. Greene, 0:11-cr-00296-DWF-LIB (D.Minn. Sept. 12, 2012). Defendant requested a continuance of his criminal trial date due to a cancer diagnosis that required further testing and treatment. The government opposed the continuance on behalf of the crime victim, asserting the right to proceedings that are free from unreasonable delay pursuant to 18 U.S.C. § 3771(a)(7). Although sympathetic to the victim's concerns, the court determined that the current trial date was not feasible because of the defendant's health condition and granted a continuance of the trial date.

United States of America v. Robert M Fast, 4:11-cr-03018-RGK-CRZ (D.Neb. July 13, 2012). Defendant was found guilty of receiving child pornography. Victim Vicky sought restitution in the amount of \$952,759.81 under 18 U.S.C. § 2259. The district court originally granted restitution of \$19,863.89, but later reduced the restitution award to \$3,333 after the United States Court of Appeals for the Eighth Circuit ruled that proximate cause was required for all categories of loss under 18 U.S.C. § 2259 and remanded the case to the district court. Noting that it was difficult to quantify the harm caused by defendant's actions, the district court acknowledged that the damages suffered by the victim far exceeded the amount of restitution that was awarded. The victim filed a petition for a writ of mandamus in the United States Court of Appeals for the Eighth Circuit, pursuant to 18 U.S.C. § 3771(d)(3), asserting that her right to "full and timely restitution" had been violated and directing the district court to award restitution in the amount of \$952,759.81. Oral arguments have been scheduled and the petition is currently pending in the Eighth Circuit.

United States of America v. Kirk McMahan, 8:07-cr-00249-CJC (C.D.Cal. Nov. 11, 2011), and In re: Vince Andrich et al., No. 11-73630 (9th Cir. Dec. 2, 2011). Defendant pled guilty to one count of mail fraud. In the district court, the petitioners alleged that defendant committed additional federal offenses after he entered his plea. Although a government investigation was conducted, no additional charges were brought against defendant. Arguing that they were victims of defendant's offenses committed post plea, petitioners filed a motion to intervene and to be heard at sentencing pursuant to the CVRA. At issue was whether the petitioners could invoke the right to be heard at sentencing if they were not proximately harmed by the conviction offense, but were harmed by an unrelated offense for which no charges were brought.

Determining that the Constitution affords the defendant certain rights, the district court concluded that it would be a violation of defendant's due process rights if any matter unrelated to the conviction offense was introduced at sentencing. Thus, the alleged victims' motion to intervene and be heard at sentencing was denied. Petitioners sought a writ of mandamus in the United States Court of Appeals for the Ninth Circuit, pursuant to 18 U.S.C. § 3771(d)(3), challenging the district court's denial of their motion to intervene and be heard at sentencing. Finding that the district court did not err or abuse its discretion, the appellate court declined to grant petitioners a writ of mandamus.

In re: Gary Olesen, No. 11-4190 (10th Cir. Nov. 4, 2011). Defendant, who was convicted of murdering petitioner's mother, sought habeas corpus relief under 28 U.S.C. § 2254 and filed a motion to stay proceedings in *Carter v. Bigelow*, 2:02-cv-00326-TS (D.Utah, Oct. 24, 2011). The petitioner filed a motion in the district court asserting that the 9½-year delay in proceedings violated his rights under the CVRA and that the court should dismiss defendant's motion. The district court "acknowledged" the petitioner's filing, but made no further mention of his CVRA rights in its order. The petitioner sought a writ of mandamus in the United States Court of Appeals for the Tenth Circuit, pursuant to 18 U.S.C. § 3771(d)(3), arguing that the district court failed to specifically address his rights as the victim's representative under the CVRA and should have dismissed defendant's motion.

The appellate court agreed that petitioner had been prejudiced by the delay and that the district court "could have been more clear about stating its reasons on the record," but said that to prevail, the petitioner must demonstrate a clear and indisputable right to the writ. Because the district court "acknowledged" petitioner's CVRA motion and set a briefing schedule, the appellate court could not say that the district court's denial of petitioner's motion was clearly erroneous. Concluding that petitioner did not have a "clear and indisputable" right to the writ, the appellate court denied the petition for a writ of mandamus.

United States of America v. Rafaela Dutra Toro, 6:11-cr-00022-ACC-GJK (M.D.Fla. Apr. 2, 2012 and June 5, 2012). and In re: Teresita Aquino. Gomer Avancea. et al., No. 12-11757-B 01 th Cir. Apr. 6, 2012 and June 22, 2012). Defendant filed fraudulent visa applications

and obtained fraudulent foreign worker visas for the petitioners. A jury found defendant guilty of conspiracy and immigration fraud. In the district court, 17 petitioners filed a motion to be recognized as crime victims, to receive restitution, and to be heard at sentencing pursuant to 18 U.S.C. § 3771. The district court delayed the sentencing hearing so that the petitioners' attorney could file a memorandum addressing petitioners' status as crime victims. Because no memorandum was submitted, the district court proceeded with sentencing, indicating that it would accept written submissions from the petitioners. The district court also scheduled an evidentiary hearing for the following month to determine whether petitioners were crime victims. In the interim, the district court ordered petitioners to re-file several motions and exhibits that were struck as improper.

Instead, the petitioners sought a petition for a writ of mandamus in the United States Court of Appeals for the Eleventh Circuit. Finding that the district court did not make any erroneous findings of law or fact, the appellate court denied the writ. Subsequently, petitioners re-filed the motions and exhibits in the district court. Because the petitioners paid the defendant to file the fraudulent visa petitions and understood that their legal status in the U.S. had expired, the district court determined that defendant's actions did not directly and proximately harm the petitioners. Thus, they were denied crime victim status by the district court. Once again, petitioners sought a writ of mandamus in the United States Court of Appeals for the Eleventh Circuit. Ruling that the district court did not err on the issue of causation, the appellate court declined to grant the writ of mandamus.