

Crime Victims' Rights Report 2016

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This is the 12th annual report to Congress on crime victims' rights under § 104(a) of the Justice for All Act of 2004, 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 of 2004 is commonly referred to as the Crime Victims' Rights Act (CVRA) and is codified at 18 U.S.C. § 3771.

During fiscal year 2016, more than 59,000 criminal cases were filed in the federal trial courts, involving more than 77,000 defendants. Last year, the AO received reports from the appellate courts on four mandamus actions brought per the provisions of the CVRA and identified six district court cases that meet the statute's reporting criteria. Summaries of those mandamus and trial court actions follow, including the reasons provided for the decisions in each of the cases. Related cases are combined into one summary.

United States v. Binkholder, 832 F.3d 923 (8th Cir. 2016). Defendant pled guilty to four counts of wire fraud. The district court found that a person identified as M.U. had been complicit in defendant's scheme and was not a victim pursuant to the U.S. Sentencing Guidelines, then denied M.U.'s request for victim status under the CVRA. The United States Court of Appeals for the Eighth Circuit granted M.U.'s petition for a writ of mandamus, ordering the district court to declare M.U. a victim under the CVRA. Thereafter, when making loss calculations during sentencing, the district court included M.U.'s investment. Defendant appealed. The Eighth Circuit reversed and remanded for a determination of M.U.'s victim status under the Sentencing Guidelines. Being a victim under the CVRA does not per se establish that one also is a victim under the Sentencing Guidelines, as the two definitions of victim are "similar" but "not necessarily coextensive." The CVRA addresses the victim's rights and restitution, whereas the Sentencing Guidelines address the victim's losses associated with the offense and the appropriate penalty. However, the appeals court upheld the amount of restitution defendant was ordered to pay M.U., as the differences between this amount and previous estimates of M.U.'s losses did not establish plain error.

In re Wallace, 649 F. App'x 298 (4th Cir. 2016) (mem. op.). After petitioner Wallace filed a civil action asserting tortious interference with contract, he sought to stay his action to obtain counsel. The district court order granting the request noted that other courts had sanctioned petitioner for his filings and that having counsel might clarify his complaint. Petitioner moved to vacate this order because of its reference to prior sanctions, to disqualify the

district judge due to bias, and to continue the stay of proceedings. In a petition for a writ of mandamus, petitioner argued that he is a crime victim under the CVRA. The United States Court of Appeals for the Fourth Circuit dismissed the petition, finding that petitioner is not a crime victim, but "is, instead, a civil plaintiff seeking to challenge orders entered in his case." The appeals court thus had no jurisdiction under the CVRA to review the district court's orders.

In re de Henriquez, 1:04-cr-00114-RBW-01 (D.C. Cir. Oct. 16, 2015). The leader of a Colombian paramilitary organization pled guilty to drug crimes. Neither the indictment nor the statement of facts in the plea agreement mentioned violence. The family of Julio Henriquez sought victim status under the CVRA, arguing that defendant had killed Henriquez to further a drug conspiracy. The district court denied their motion, finding they had not shown that the conspiracy was the direct and proximate cause of Henriquez's death. The United States Court of Appeals for the D.C. Circuit granted the family's petition for a writ of mandamus. The CVRA allows victims to participate in proceedings even when no formal charges have been filed, indicating "that Congress intended courts to look beyond the four corners of an indictment or plea agreement." Here, both logic and court materials from Colombia supported the inference that defendant's organization used violence, and although Henriquez's death may have had more than one cause, "a 'but-for' cause" may have been his leadership of a group seeking to end coca production in the region defendant's organization controlled. Although a "satisfactory nexus" must exist between a charged offense and victim status, requiring "direct traceability between, say, the importation of a single coca plant and the eventual murder of Henriquez is a prohibitively onerous burden." Instead, the CVRA requires a determination of whether the murder was sufficiently connected to the overall conspiracy to manufacture and distribute cocaine for unlawful importation into the United States. The appeals court, noting that the district court had "done much to the benefit of the petitioners" by permitting their limited participation in the proceedings, directed that court to reconsider their motion to be recognized as victims under the CVRA.

United States v. Vergez, No. 5:15-cr-00086-LSC-HGD-1, 2016 WL 695709 (N.D. Ala. Feb. 22, 2016). Defendant pled guilty to making false statements and taking actions constituting a conflict of interest while serving as a U.S. Army colonel responsible for procurement matters. Three individuals claiming to be victims of the conflict of interest crime and three corporations claiming to be victims of all of defendant's crimes moved for leave to appear and be heard at sentencing. The district court found that none of the movants were victims under the CVRA and denied their requests. The individuals, who had worked for the same helicopter manufacturing firm, complained that they had lost their jobs in retaliation for cooperating with the investigation of defendant, but they did not allege that defendant had any role in or awareness of their employment termination. Thus, any harm they experienced was not closely related to the offenses to which defendant pled guilty. The corporations maintained that they had been deprived of the ability to compete for business with the Army "on a level playing field," but none of defendant's actions forming the basis of his crimes caused the loss of business opportunities

cited. The corporations could not say that but for defendant's conduct, the Army would have awarded contracts to them, so they were not directly and proximately harmed by the offenses.

In re Korff, No. 16-cv-12984, 2016 WL 4537815 {E.D. Mich. Aug. 31, 2016} (slip opinion). After a medical doctor pled guilty to malfeasance in treating patients, the district court established a restitution plan. Forty-three persons who had filed civil litigation against defendant and other alleged tortfeasors in state court petitioned the district court under the CVRA to change its restitution plan either by ordering Medicare and other medical expense lien holders to waive petitioners' obligation to repay them from the civil suit settlement award or by declaring any required payments from the settlement award to be "out-of-pocket" expenses, which would allow petitioners to recoup these payments from the restitution fund. The district court dismissed the petition, finding that it lacked subject matter jurisdiction over claims requiring interpretation of the Medicare Secondary Payer provisions of the Social Security Act and that petitioners did not establish any violation of their rights under the CVRA. When a case involves multiple crime victims, the CVRA directs the court to avoid complexity or delay, and "the Court has discretion to order less than full restitution and to accord fewer than all of the rights listed." More than 550 victims were identified in this case, and the relief petitioners sought would give them a disproportionately large share of the restitution fund as reimbursement for "losses" they never had to pay or for which the state court settlement compensated them, thereby reducing the amount available for victims who did not file state court actions.

United States v. Womack, Case No. 13-00441-01-CR-W-GAF, 2016 WL 1417867 (W.D. Mo. Mar. 17, 2016). Defendant moved to dismiss an indictment against her on the grounds that the government violated her rights under the Due Process Clause and CVRA when it used her status as a victim in another case to interview defendant without counsel present and got her to incriminate herself. Defendant also argued that her victim's rights were abused because her former employee, Brandy Wheeler, was ordered to pay defendant only \$150 per month in restitution, the government had not attempted to obtain or liquidate assets Wheeler had purchased with money embezzled from defendant, and defendant's civil tax case had been put on hold. The district court denied the motion. The magistrate judge had found that defendant was not a victim under the CVRA in the other case, that the restitution amount was appropriate, and that putting defendant's tax case on hold was neither unreasonable nor a violation of due process. The district court declined "defendant's invitation to dismiss the charges against her to counter the purported message to other crime victims" that cooperating with the government might endanger their own rights, for recommending that defendant's statements made during the interview be suppressed "appears to be a sufficient sanction" for violating her rights.

Jordan v. Dep't of Justice, 173 F. Supp. 3d 44 (S.D.N.Y. 2016). Plaintiff sought enforcement of her rights under the CVRA, asserting she was a victim of crimes committed by her former husband, Raymond Mirra, Jr. The district court dismissed the petition. Plaintiff qualified as a victim of Mirra's financial frauds pursuant to the CVRA, but even if plaintiffs

rights had attached when the government learned of possible crimes and began investigating Mirra, the government fulfilled its CVRA obligations to plaintiff when it reasonably conferred with her by meeting with her counsel, reviewed documents she gave prosecutors, listened to her allegations, did not unduly delay proceedings, and gave her the dignity and respect due crime victims. The CVRA did not entitle plaintiff to obtain documents and information related to government investigations or to have additional meetings with prosecutors. The right to confer did not bestow a right to direct the prosecution or the "manner, timing, or quantity of conferrals," and plaintiff acknowledged that "obligations to CVRA victims are 'truncated'" during the investigative stage. Neither declining to meet with plaintiff again after the prosecution considered her allegations many times nor deciding against filing an indictment violated her right to be treated with dignity and respect. Plaintiff did not qualify as a victim under the CVRA of Mirra's alleged healthcare frauds, for even if Mirra had used plaintiff's funds to finance these crimes, the financial frauds-not the healthcare frauds-were what harmed her.

In re Jordan, 16-2584 (2d Cir. Oct. 26, 2016). Petitioner Jordan, plaintiff in the case described in the preceding paragraph, sought a writ of mandamus from the United States Court of Appeals for the Second Circuit, pursuant to 18 U.S.C. § 3771, to direct the district court to grant her victim's rights under the CVRA. The court held that the government had satisfied the requirements of the CVRA regarding the financial frauds allegedly committed against petitioner when it met with her counsel, took documents from petitioner and counsel, and spoke to petitioner on the telephone. The CVRA provides a "reasonable right to confer," not "an unfettered right to meet with law enforcement." Petitioner did not show she was a victim of the alleged healthcare frauds, which were perpetrated against third parties.

United States v. Whipple. 155 F. Supp. 321 (W.D.N.Y. 2015). Defendant pled guilty to financial institution fraud. Bank customers alleging that defendant had stolen their identities moved before sentencing to be declared crime victims under the CVRA. The district court denied the motion without deciding on the merits of the claims, for even after reviewing "voluminous" exhibits, it could not decide this issue without multiple hearings and additional evidence, which would delay sentencing proceedings in violation of Federal Rule of Criminal Procedure 32. Moreover, if the customers were found to be crime victims, the court was unsure that it could reasonably assess appropriate restitution when the record did not show whether and to what extent the alleged damage to the customers' credit worthiness directly resulted from the financial institution fraud. The customers raised the same issues in a civil action in state court, which they conceded "is the proper venue for determination of the amount of restitution."

United States v. Christian Keller & John Grav, No. CR 15-00428 (N.D. Cal. Sept. 20, 2016). Defendants pled guilty to conspiracy and securities fraud committed while using confidential information about Rovi Corporation. Rovi sought restitution for attorney's fees incurred while responding to subpoenas from the U.S. Securities and Exchange Commission (SEC). The district court denied the request for lack of "a sufficient factual basis to find by a

preponderance of the evidence that the SEC investigation has the requisite nexus to a criminal case." Nothing established that the SEC and the U.S. attorney's office had engaged in a joint investigation. Moreover, no evidence was provided about the nature of the SEC's investigation, so the court could not determine whether it had resulted directly from the defendants' crimes.