

Crime Victims' Rights Report 2009

Summary – uscourts.gov

This is the fifth annual report to Congress on crime victims' rights as required under the Justice for All Act of 2004, §104(a), 18 U.S.C. § 3771 note (supp. I 2005). Pursuant to that legislation, the Administrative Office of United States Courts (AO) is 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 247 of title 18, and the result reached." Id.

In the federal trial courts, there were more than 76,200 criminal cases filed involving more than 97,500 defendants during fiscal year 2009. In the past year, the AO has received reports from the appellate courts on 10 mandamus actions brought per the provisions of the Act and has similarly identified 12 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 v. Daniel Riley. et al., 1:07-CR-00189-GZS (D.N.H. July 31, 2008 and Oct. 27, 2008) and In re: Joseph Haas, No. 08-2378 (1st Cir. Oct.30.2008}. Petitioner submitted a victim impact statement in the district court, which orally ruled that he was not a crime victim in this case. Several months later, petitioner tried to file a duplicate copy of the victim impact statement with the district court. The filing was rejected in accordance with a court-issued procedural order to refuse any more motions or filings from petitioner. Petitioner sought a writ of mandamus in the United States Court of Appeals for the First Circuit, pursuant to 18 U.S.C. § 3771(d)(3), asserting that he was a crime victim and should be allowed to participate in the sentencing hearing of defendant. In his filing with the appellate court, petitioner acknowledged that he was not harmed by the defendant, but rather "by the government goons in this case." Finding that the district court did not err in determining that the petitioner was not a crime victim as defined in 18 U.S.C. § 3771(e), the appellate court denied the petition for mandamus relief.

United States v. Diego Fernando Murillo-Beriarano. No. 03-CR-1188 (RMB) (S.D.N.Y. Mar.4.2009) and In re: Alba Ines Rendon Galvis. No. 09-1576-op (2nd Cir. Apr.27.2009). Defendant led a paramilitary group in Colombia that was responsible for the victim's murder. After defendant pled guilty to those offenses in Colombia, he was extradited to the U.S. where he pled guilty to a conspiracy to import and distribute cocaine. The mother of the murder victim sought to enforce her deceased son's rights under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. In denying her motion to be recognized as a crime victim, the court held that the defendant's offense of conspiring to import and distribute cocaine in the U.S. was not the proximate cause of her son's death in Colombia. Therefore, the mother did not meet the

definition of a crime victim under the CVRA. The mother sought a writ of mandamus in the United States Court of Appeals for the Second Circuit pursuant to 18 U.S.C. § 3771(d)(3). The appellate court dismissed the petition for mandamus relief concluding that the district court did not err in determining that defendant's involvement in a drug conspiracy was not the proximate cause of petitioner's son's death.

In re: Local# 46 Metallic Lathers Union and Reinforcing Iron Workers and Its Associated Benefit and Other Funds. No. 09-2113-op (2nd Cir. June 22, 2009). Defendant was charged and convicted of conspiracy to engage in money laundering in the underlying case of *United States v. Charles Doherty*, No. 05-CR-0494 (JS WDW) (E.D.N.Y. May 7, 2009). The union asserted the right to restitution under the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. §§ 3663A and 3664, claiming that it was a victim because the union lost money when the defendant paid employees in cash and thus avoided paying union obligations required by collective bargaining agreements. Finding that the offense was already complete before the union workers were paid in cash, the district court ruled that the union was not a victim because defendant's conspiracy to convert forged checks into cash was not the direct and proximate cause of the union's losses. Union petitioned for a writ of mandamus in the United States Court of Appeals for the Second Circuit, arguing that it was entitled to certain rights under the MYRA and the CVRA, 18 U.S.C. § 3771(a)(6). The appellate court upheld the district court determination that the union was not a crime victim under the CVRA or the MVRA, and denied the petition for the writ of mandamus.

In re: Saad Dawalibi. No. 09-2658 (3rd Cir. July 23, 2009). Petitioner Dawalibi sought a writ of mandamus in the United States Court of Appeals for the Third Circuit, pursuant to 18 U.S.C. § 3771(d)(3), asserting that the government violated his right to be treated with fairness when it failed to file a motion under Rule 35(b) or the Federal Rules of Criminal Procedure to reduce petitioner's 365-month prison sentence. Although petitioner assisted with the prosecution of another inmate who assaulted him, he did not have a cooperation agreement with the government. Without a cooperation agreement, the court determined that petitioner could not establish "a clear and indisputable right" to the writ and dismissed the petition for mandamus relief. The court further noted that petitioner's attempt to use the CVRA to seek mandamus review was "unavailing" because petitioner had not been denied any rights under 18 U.S.C. § 3771(a) in the assault case.

United States v. Atlantic States Cast Iron Pipe Company et al., No.03-852-MLC (D.N.J. Mar. 23, 2009). Corporate defendant and four employees were convicted of conspiracy to violate environmental laws and obstruct Federal Occupational Safety and Health Administration (OSHA) proceedings. During sentencing, the government sought to have six employees that suffered serious or fatal injuries at the workplace recognized as crime victims under 18 U.S.C. § 3771 based on violations of the OSHA workplace standards. Finding that defendants were convicted of offenses related to deceiving OSHA and not violations of OSHA workplace

standards, the court ruled that the injuries sustained by the six employees were "too factually attenuated" in relation to the defendants' convictions. Thus, the court denied the government's motion to recognize the six employees as crime victims.

United States v. Dion Caxton, No. 3:05-CR-00339-FDW (W.D.N.C. Feb. 24, 2009). Pursuant to 18 U.S.C. § 3771, family members of a deceased victim filed a motion requesting access to portions of a presentence report in order to prepare for the sentencing hearing and seek timely restitution. Citing case law that established a strong presumption of confidentiality for presentence reports, the court found that disclosure of the presentence report was not mandatory under the CVRA. In denying the motion, the court emphasized that the family members of the deceased victims did not need information from the presentence report because they already had sufficient information to prepare for sentencing and seek restitution.

United States v. BP Products of North America, Inc., No. 4:07-CR-00434 (S.D.Tex. Mar. 12, 2009). A previous motion by victims asking the court to reject a proposed plea agreement under the CVRA was denied by the district court in February of 2008, see letter from James C. Duff, Director, Administrative Office of the United States Courts, to Honorable Joseph R. Biden, Jr., President, United States Senate (Mar. 3, 2009). The United States Court of Appeals for the Fifth Circuit declined to grant the victims a writ of mandamus, but acknowledged that there was a statutory violation of the victims right to confer during the plea process as set forth in 18 U.S.C. § 3771(a)(5). *Id.* In district court, the victims filed another motion arguing that the proposed plea agreement should be rejected because it was negotiated without their involvement. The court clarified that the purpose of the right to confer was to allow victims to exchange information with the government and express their views in court. The right to confer did not give victims the right to determine if a plea agreement was acceptable or not. In denying the motion, the court ruled that the CVRA violation "does not provide a basis to reject the plea."

In re: Simons, No. 09-3109 (6th Cir. Feb. 5, 2009). Pursuant to 18 U.S.C. § 3771(d)(3), petitioner sought a writ of mandamus in the United States Court of Appeals for the Sixth Circuit compelling the district court to unseal a record so that petitioner could assert his rights as a crime victim in that case. Both the government and the district judge argued that the petitioner's action was premature because the district court judge had not yet ruled upon the petitioner's motion. Although the statute requires a district court to rule on CVRA motions "forthwith," petitioner's motion had been pending in district court for three months. The appellate court held that the district court's failure to rule on petitioner's motion within a three-month period resulted in an "effective denial" of petitioner's rights under the CVRA. In granting the writ, the appellate court directed the district court to rule on petitioner's motion to unseal within two weeks of this order. The district court issued an order within the two-week period granting petitioner's motion to unseal.

In re: Siler. Nos. 08-5215/5280/5364/5366/5367 (6th Cir. July 13, 2009). Defendants pled guilty to conspiracy to violate petitioner's constitutional rights and were sentenced to prison time. Two years later, in a subsequent civil suit, petitioner Siler and his family sought access to the defendants' presentence reports. After the district court denied the motion, the Silers petitioned for a writ of mandamus in the United States Court of Appeals for the Sixth Circuit asserting that the CVRA allowed for the release of defendants' presentence reports. The appellate court denied the writ, ruling that the protections provided by the CVRA apply to criminal proceedings, not civil proceedings. The court further noted that the statute does not confer upon victims the right to access presentence reports.

United States v. William J. Gallion and Shirley A. Cunningham. Jr., No. 2:07-39-S-DCR (E.D.Ky. Aug. 19, 2009). Defendants were convicted of offenses related to wire fraud, and the jury determined that defendants should forfeit \$30,000,000 to the federal government. The government in turn suggested that the funds could possibly be used to provide restitution for crime victims. Pursuant to 18 U.S.C. § 3771 (a)(6), a legal representative for the crime victims sought appointment as a trustee to manage and disburse any restitution funds. Although victims have the right to receive restitution under the CVRA, the court observed that the provisions that govern the restitution process are specified in the Mandatory Victims Restitution Act of 1996 (MVRA). The statute directs the court to set a restitution payment schedule, and this authority cannot be delegated because it is a core judicial function. Finding that the MVRA makes no provisions for a private lawyer to act as a trustee in restitution matters, the court denied the crime victims' representative's motion.

United States v. WR. Grace et al. No. 9:05-CR-00007-DWM (D.Mont. Feb. 13, 2009) and In re: Parker, No. 09-70529. 09-70533 (9th Cir. Feb.27.2009). In a superseding indictment, defendants were charged with violating the known endangerment provision of the Clean Air Act by placing individuals in imminent danger of death or serious bodily harm through the dangerous release of a hazardous pollutant. Defendants invoked Rule 615 of the Federal Rules of Evidence, and in accordance with that rule, the court excluded lay witnesses from the proceedings. The government filed a motion seeking to recognize 34 witnesses as crime victims and allow them to assert rights under 18 U.S.C. § 3771, including the right not to be excluded from court proceedings. Government witnesses filed a separate motion to assert their rights pursuant to 18 U.S.C. § 3771. The court noted that since the defendants were only charged with placing individuals in imminent danger of harm, the court could not conclude that the witnesses were directly and proximately harmed "as a result of the commission of a federal offense." Petitioners sought two separate writs of mandamus in the United States Court of Appeals for the Ninth Circuit. The appellate court granted both writs, ordering the district court to conduct further proceedings to determine the CVRA status for each of the 34 witnesses. On remand, the

petitioners withdrew their demand to be accorded the right to be present throughout the proceedings.

United States v. Sanwal. No. 2:08-CR-00330-EJG-1 (E.D.Cal. Feb. 24, 2009) and In re: Vicki Zito. No. 09-70554 (9th Cir. Feb. 26, 2009). In a sex trafficking case, the district court granted defendant's motion to subpoena the crime victim's juvenile records for in camera review. Parent for the minor victim sought a two-week stay, asserting that her daughter's CVRA rights under 18 U.S.C. § 3771(a)(8) had been violated. After the district court denied her request as moot, petitioner sought a writ of mandamus in the United States Court of Appeals for the Ninth Circuit. The appellate court denied the writ because in camera review of the subpoenaed materials did not cognizably harm the petitioner. However, the appellate court noted that if any of the material from the in camera review was to be turned over to the real parties in interest, the district court should stay the turnover so that petitioner can seek another writ of mandamus.

United States v. MacKenzie Glade Hunter. No. 2:07-CR-307DAK {D.Utah Feb. 10, 2009) and In re: Antrobus. No. 08-4010, 09-4024 (10th Cir. Dec.2.2008. Feb.28.2009 and Apr. 22, 2009). A previous motion by the parents of a deceased woman to have their daughter recognized as a crime victim under the CVRA was denied by the district court in January of 2008, see letter from James C. Duff, Director, Administrative Office of the United States Courts, to Honorable Joseph R. Biden, Jr., President, United States Senate (Mar. 3, 2009). After sentencing, parents appealed defendant's conviction and sentence in the United States Court of Appeals for the Tenth Circuit. The court dismissed the appeal, ruling that the only avenue for an alleged crime victim to seek appellate review under the CVRA was through a petition for a writ of mandamus. Subsequently, parents filed a motion requesting another hearing in district court on the CVRA issue, referring to newly discovered evidence. After determining that the evidence was not new, the district court denied the motion. Parents sought a writ of mandamus in the United States Court of Appeals for the Tenth Circuit to compel the district court to hold an evidentiary hearing or grant victim status. Observing that petitioners did not provide a "detailed explanation of how the district court erred," the appellate court denied the application for mandamus relief.

Douglas Stewart Carter v. Steven Turley. No. 2:02-CV-326 TS (D.Utah Oct.9.2008). In a capital habeas case, petitioner's counsel sought repeated extensions of time to respond because of illness. Pursuant to 18 U.S.C. § 3771(a)(7), the crime victim's representative opposed the motion and asserted the right for proceedings to be free from unreasonable delay. While the court acknowledged that the delay in this case "has been intractable," it granted the extension because of counsel's health. However, the court also noted that it will not grant any further extensions in this case.

United States v. Philip William Coon, No. 8:08-CR-441-T-17MAP (M.D.Fla. Nov. 14, 2008) and In re: Janis W Stewart and Other Borrower Crime-Victims. No. 08-16753 (11th Cir. Dec. 19, 2009). Defendant colluded with a mortgage originator to charge borrowers a mortgage brokerage fee of two percent, instead of one percent as agreed to by his employer, Coast Bank. Defendant, who pocketed a portion of the excess fees, was charged with conspiracy to commit wire fraud by depriving his employer of honest services. The borrowers, who were responsible for paying the closing costs, filed a motion to be recognized as crime victims under 18 U.S.C. § 3771. They sought access to portions of the presentence report and objected to the report and recommendation. Because the borrowers were not listed in the information filed by the government, the court concluded that only Coast Bank could be recognized as a crime victim. As a result, the court ruled that the borrowers lacked standing to demand portions of the presentence report and object to the report and recommendation. Borrowers petitioned for a writ of mandamus in the United States Court of Appeals for the Eleventh Circuit seeking to be recognized as crime victims. The court clarified that crime victim status under the CVRA is not dependent on whether the crime victims are specified in the information or indictment, but rather whether they are harmed by the commission of a federal offense. Concluding that petitioners were directly and proximately harmed by the commission of defendant's offense, the appellate court granted the writ ordering the district court to recognize petitioners as victims in accordance with the CVRA.

United States v. Michael L. Cone et al, No. 8:06-CR-43-T-24MAP (M.D.Fla. Aug. 12, 2009). Defendants pled guilty to bankruptcy fraud and agreed to forfeit real property as part of the plea agreement. At sentencing, defendants were directed to pay restitution to the U.S. Bankruptcy Court and St. Paul's Traveler's Insurance Company. The U.S. Bankruptcy Court and St. Paul's Traveler's Insurance Company assigned their interests in the restitution to two other companies, ClearGlass and BRA. After sentencing, the government vacated its preliminary order of forfeiture. ClearGlass, St. Paul's Traveler's Insurance Company, and BRA filed a motion pursuant to 18 U.S.C. § 3771 asserting that their rights to be heard and to receive full and timely restitution had been violated. They also asked the court to deny the government's motion to vacate the preliminary order of forfeiture and hold ancillary proceedings. According to 18 U.S.C. § 3771(e), a crime victim is "a person directly and proximately harmed as a result of the commission of a Federal offense" The court held that ClearGlass and BRA were not crime victims because they were not harmed as a result of the bankruptcy fraud. With regards to St. Paul's Traveler's Insurance Company, the court determined that no public proceedings were scheduled to take place. However, the court surmised that if a restitution hearing was held, St. Paul's Traveler's Insurance Company "may very well have the right to be heard" as a crime victim.