

Crime Victims' Rights Report 2017

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This is the thirteenth 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 2017, more than 59,700 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 one appellate court case and 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 a single summary.

United States v. Wharton et al., Criminal Action No. ELH-13-0043, 2017 WL 1862466 (D. Md. May 8, 2017). Defendants convicted of offenses related to their improper receipt of Social Security benefits, including those belonging to family members, were directed to pay restitution to these relatives and to the Social Security Administration (SSA). Because one defendant had no income apart from Social Security benefits, the order recommended that the SSA withhold no more than 10 percent of her benefits. The SSA withheld all the defendants' benefits, however, to recoup its overpayments to them. Neither defendant paid any restitution to their relatives. E.W., their granddaughter, moved to adjust the schedule of restitution payments and asked the court to order SSA to cease withholding defendants' benefits and to have their previously withheld benefits distributed to their victimized relatives. The district court denied the motion, finding that the CVRA prohibits claims against the government. Also, 42 U.S.C. § 404(a)(1) and SSA regulations authorize SSA to withhold defendants' benefits "independent of this criminal action" to recover overpayments to defendants. The district court lacked jurisdiction to enjoin SSA from exercising this authority. Persons challenging SSA's recovery procedures must employ the mechanism described in 42 U.S.C. § 405(g). Although withholding their benefits "adversely affects defendants' ability to pay restitution," no "fatal conflict" exists between the Social Security Act or its enabling regulations and the criminal restitution statutes "because the SSA recoups overpayments, not restitution." E.W. petitioned for a writ of mandamus pursuant to the CVRA. In *In re E.W.*, 689 Fed.Appx. 769 (Mem) (4th Cir. 2017) (per curiam), the United States Court of Appeals for the Fourth Circuit rejected the petition, holding that "the district court correctly applied the law in denying E.W.'s motion."

In re Nabaya, 697 Fed. Appx. 170 (Mem) (4th Cir. 2017) (per curiam). Defendant charged with making a false claim against a federal officer and a false statement in bankruptcy had his conditions of release revoked for cause. He petitioned for a writ of mandamus under the CVRA, asserting that the government attorneys had not taken proper oaths of office, that failure to pay taxes is not a crime, that his pretrial detention violated due process and constituted cruel and unusual punishment, and that the district court had not protected his rights. The United States Court of Appeals for the Fourth Circuit dismissed the petition. Defendant did not satisfy the CVRA's definition of a crime victim, which is a "person directly and proximately harmed" by the commission of a federal offense or a crime in the District of Columbia. Moreover, the CVRA provides that the "person accused of the crime may not obtain any form of relief under this chapter."

In re Redd, 672 Fed. Appx. 279 (Mem) (4th Cir. 2016) (per curiam). After defendant pled guilty to a drug crime, he challenged his conviction and sentence on appeal and in post-conviction proceedings. In a petition for a writ of mandamus, defendant argued that he was entitled to relief under the CVRA because of alleged "plea bargaining abuse" and sought to reopen his plea and sentence. The United States Court of Appeals for the Fourth Circuit dismissed the petition. Defendant did not meet the CVRA's definition of a crime victim, and the CVRA provides that the "person accused of the crime may not obtain any form of relief under this chapter."

In re Surgery Center Management LLC et al., D.C. No. 2:12-cr-00636-RGK-1 (9th Cir. Feb. 15, 2017) (order). Defendant who tried to sell patient records from medical offices was convicted of wrongful disclosure of individually identifiable health information for personal financial gain. Nearly two months after sentencing, owners of the medical offices filed an emergency petition under the CVRA. The district court denied their requests for unsealing and for ex parte relief. The next day, petitioners filed a second petition on the same grounds, which the district court rejected, finding that petitioners did not meet the CVRA's definition of a crime victim. Petitioners sought a writ of mandamus. The United States Court of Appeals for the Ninth Circuit denied their petition. Petitioners did not meet any of the CVRA requirements to obtain their requested relief of reopening the plea and sentence in the criminal case because they did not file their mandamus petition within the 14-day statutory deadline but instead waited until more than 60 days after the district court had issued its order, and because defendant pled guilty to the highest offense charged. Petitioners' claimed rights to notice or to be heard at plea and sentencing proceedings are conferred only in public proceedings, whereas here the district court sealed the proceedings, and petitioners did not meet statutory requirements to reopen the plea and sentence. The CVRA does not give crime victims a general right to confidential information such as presentence reports. Also, the CVRA was "not a substantive basis for an award of

restitution" in this case. Finally, the rejection of these claims meant that the appeals court did not need to decide whether petitioners qualified as crime victims under the CVRA.

United States v. Kovall, 857 F.3d 1060 (9th Cir. 2017). Defendants who convinced the Twenty-Nine Palms Band of Mission Indians ("the Tribe") to enter into a contract at inflated prices, then received kickbacks from the overpayments, pled guilty to conspiracy to commit federal programs bribery. The district court ordered defendants to pay restitution to the Tribe. The Tribe filed an appeal challenging the restitution amounts ordered for "direct loss" and "other fees." The United States Court of Appeals for the Ninth Circuit dismissed the appeal, holding, in part, that although the CVRA "expands the rights afforded to victims of crime, ... [t]here are limitations on the relief a victim may obtain." This law expressly provides that it does not create a cause of action for damages, and it does not grant victims the right to directly appeal a district court's restitution order. When a district court denies the relief sought, victims may petition the appeals court for a writ of mandamus.

United States v. Benevides, No.: 6:13-cr-234-Orl-31KRS, 2017 WL 474369 (M.D. Fla. Feb. 6, 2017) (order). Defendant who pled guilty to conspiracy to commit bank fraud was required to pay restitution. The day before the restitution hearing, Roderic Lee Boling filed a motion to intervene, asserting that he was a victim of defendant's crimes and wished to present a claim for restitution, and requested a continuance so that his recently retained counsel could prepare this claim. The court denied the motion and ordered defendant to pay restitution to others, but not to Boling. Boling filed a pro se petition for victim restitution and a motion for reconsideration of the order preventing him from intervening in the case. The district court denied the petition and motion, finding that the CVRA contains "the procedure for enforcing victims' rights, including the right to restitution." *United States v. Alcatel-Lucent France, SA*, 688 F.3d 1301 (11th Cir. 2010), held that the CVRA does not allow crime victims to intervene in criminal cases, and as Boling cited no authority permitting him to do so, he did not show that the denial of his motion to intervene was erroneous. The CVRA requires a victim challenging the denial of a restitution claim to file a petition for a writ of mandamus with the court of appeals no more than 14 days after the denial. Boling did not meet this deadline. His restitution claim was denied, at the latest, on the day defendant was ordered to pay restitution to victims other than Boling. Moreover, the court could not award restitution to Boling without reopening defendant's sentence, and the CVRA provides that such reopening requires a petition for a writ of mandamus filed within 14 days. Boling did not file a petition within this time frame, so "his effort to obtain restitution is procedurally barred." Boling did not prevail in his argument that because the court never ruled on his motion for a continuance, his deadline for filing a mandamus petition had not yet begun to run, for "the motion for continuance was implicitly denied when the Court denied the motion to intervene," and even if that motion remained pending, "it would not trump the denial of Boling's restitution claim."

United States v. Fradella, Criminal Action No. 12-207, 2017 WL 3686549 (E.D. La. Aug. 25, 2017). Defendant was indicted by a federal grand jury in the Northern District of Texas on charges of securities fraud, false certification, and making false and misleading statements about his company's finances. As part of a plea bargain, defendant agreed to a Rule 20 transfer of his case to the Eastern District of Louisiana, where he was convicted of bribing the mayor of New Orleans and falsely certifying financial reports. Steven Scott Sewell filed a motion under the CVRA and other laws, alleging that he suffered financial losses because of defendant's false certification. Over Sewell's objections, the district court found that the clean hands doctrine precluded Sewell from having victim status, for defendant's crime was not the "but for" cause of Sewell's losses, and Sewell had known about the activities of his business partners that formed the basis of the charges against defendant. Sewell filed a petition for a writ of mandamus under the CVRA, which the United States Court of Appeals for the Fifth Circuit dismissed as untimely. Sewell moved to have the district court reconsider the dismissal of the Texas indictment against defendant, arguing that this was obtained by fraud and in violation of the CVRA. The motion was dismissed for lack of jurisdiction. First, Sewell's reliance on Fed. R. Civ. P. 60(b)(3) was misplaced, for Rule 60 "provides no procedural avenue for relief in this criminal proceeding." Second, Sewell lacked standing to object to or seek reconsideration of the dismissal of defendant's indictment, for *United States v. Kovall*, 857 F.3d 160 (9th Cir. 2017), held that "[u]nlike the Federal Rules of Civil Procedure, there is no procedure for nonparty intervention into criminal cases." The CVRA does nothing that "disturbs this well settled rule."

United States v. Babich et al., Criminal No. 16-10343-ADB, 2017 SL 8180771 (D. Mass. Aug. 8, 2017). Pharmaceutical company employees indicted on RICO conspiracy charges were accused of seeking to deprive patients of their right to honest services from their prescribers by bribing practitioners to prescribe the company's fentanyl spray and scheming to mislead insurers into approving payment for the drug. The government sought to use five alternative procedures for giving notice to patients prescribed this drug by co-conspirator physicians and to insurers who paid for it. The district court granted the motion in part and denied it in part. The court agreed with the "inclusive approach" of *United States v. Turner*, 367 F.Supp.2d 319 (E.D.N.Y. 2005), whereby anyone "whom the government asserts was harmed by the conduct attributed to a defendant" qualifies as a crime victim under the CVRA. The government asserted that potentially thousands of persons were victims of the conspiracy over four and one-half years, making individual notification impractical. Of the proposed notification procedures, the court permitted the use of web pages on websites operated by the Federal Bureau of Investigation and the office of the U.S. attorney for the District of Massachusetts. The court also allowed the government to issue press releases, but, to protect the defendants' Sixth Amendment rights to an impartial jury and a fair trial, barred the government from "reciting allegations contained in the pleadings except as is necessary to comply with the notification obligations" and required the releases to note that defendants were to be "presumed innocent unless and until proven guilty." Finding that the government had not sufficiently explained why it needed to discuss the case on a Department of Justice website and that its proposal for a system of "blast emails" was "too vague," the court rejected the requests to use these procedures.

United States v. Liang, Criminal Case No. 16-20394, 2017 WL 1425975 (E.D. Mich. Apr. 21, 2017). Volkswagen AG entered into a plea agreement whereby it pled guilty to conspiracy to defraud the United States, to commit wire fraud, and to violate the Clean Air Act; obstruction of justice; and entry of goods by false statement. Two alleged victims filed cases seeking restitution. The government and Volkswagen jointly moved to have individual restitution declared inappropriate in the criminal case on the grounds that this would unduly protract the litigation and that restitution could be obtained more efficiently and comprehensively through two civil settlements in the multidistrict litigation against Volkswagen. At a plea hearing in the criminal case, the court stated that pursuant to Fed. R. Crim. P. 11(c), it could accept, reject, or defer a decision on the plea agreement, then permitted victims to be heard at the hearing. At the sentencing hearing the following month, the court noted that the Rule 11 agreement under consideration provided no restitution for victims in the criminal case, then overruled the victims' objections, denied all of their motions and requests for restitution, and granted the joint motion. The court found that "determining complex issues of fact related to the cause or amount of victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process."

United States v. Nix, 256 F.Supp.3d 272 (W.D.N.Y. June 12, 2017). After defendants were found guilty of Hobbs Act violations and related offenses, they filed post-trial motions alleging that a juror's failure to disclose felony convictions during voir dire required a new trial. Defendant Matthew Nix separately filed a motion in which he asserted he had been directly and proximately harmed by the juror's perjury and therefore met the CVRA definition of a crime victim; he also asked the court to force the juror to be charged with a crime and not to be granted immunity. The district court denied Nix's motion. Nix's conviction did not arise from the juror's purported perjury. Any link between the two was "too attenuated," for a unanimous jury had agreed on the verdict, so Nix could not show that the juror's revealing alleged felony convictions or being replaced by a different juror would have changed the trial outcome. As for the emotional distress from the "continued incarceration" Nix cited, this did not stem solely from his conviction, as he was jailed not only for that reason, but also for a pending drug crime prosecution and a supervised release violation. Moreover, even if Nix were a crime victim pursuant to the CVRA, his requested relief was not cognizable under that law, which clearly provides that crime victims shall not intrude on prosecutorial discretion. Several courts have ruled that this prevents crime victims from requiring U.S. attorneys to "undertake certain prosecutions." Thus, Nix had no grounds for demanding that the government charge the juror and deny him immunity.