

## Crime Victims' Rights Report 2013

### Summary – uscourts.gov

This is the ninth 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 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 68,900 criminal cases filed involving more than 91,200 defendants during fiscal year 2013. In the past year, the AO has received reports from the appellate courts on nine mandamus actions brought per the provisions of the Act and has similarly identified three 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.

In re: Rick Thaler. Director. Texas Department of Criminal Justice. Correctional Institutions Division: Teresa Wooten. sister of crime victim, Vicki Ann Garner, No. 13-40171 (5th Cir. Feb. 15, 2013). In a death penalty case, defendant Ladd filed a successive petition for a writ of habeas corpus in the Eastern District of Texas on June 20, 2003 (Ladd v. TVC, 1:03-cv-00239-RAS). Nine years later, petitioners 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), asserting the right to proceedings free from unreasonable delay and directing the district court to rule on the defendant's successive petition for a writ of habeas corpus. While the petition was pending in the Fifth Circuit, the district court denied defendant's application for a writ of habeas corpus with prejudice. Shortly thereafter, the appellate court dismissed the petition for a writ of mandamus as moot.

In re: Amy Unknown, No. 09-41238 consolidated with 09-41254 and 09-31215 (5th Cir. Nov. 19, 2012). Petitioner Amy sought restitution in the underlying case of United States v. Paroline, 672 F.Supp. 2d 781 (E.D. Tex. 2009). Applying a but-for causation standard, the district court determined that the government had not met its burden of showing which losses were proximately caused by defendant's offense and declined to award restitution. Petitioner Amy sought a petition for 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 order defendant Paroline to pay restitution for the entire amount of her losses. The petition for a writ of mandamus was granted by a panel in In re: Amy Unknown, 636 F.3d. 190 (5th Cir. 2011).

At issue was whether 18 U.S.C. § 2259 requires a victim to establish a causal connection between the defendant's conduct and the victim's loss for all categories under 18 U.S.C. § 2259(b)(3) or only 18 U.S.C. § 2259(b)(3)(F) to award restitution. The panel found that only 18 U.S.C. § 2259(b)(3)(F) required a showing of proximate cause in order to recover restitution. This holding was applied to another appeal by a subsequent panel, but it was questioned in a special concurrence that emulated the reasoning of other circuits. See *United States v. Wright*, 639 F.3d 679 (5th Cir. 2011). To resolve the issue of how to award restitution under 18 U.S.C. § 2259, the Fifth Circuit granted rehearing en banc and vacated the panel opinions.

Petitioner Amy asserted that the "plain language" of § 2259 limits the proximate result language to the category of losses in 18 U.S.C. § 2259(b)(3)(F). The government argued that a victim must show that all of the recoverable losses under 18 U.S.C. § 2259(b)(3)(A)-(F) proximately resulted from the defendant's offense. The government also emphasized that seven circuits had rejected petitioner's interpretation of the statute. Examining the structure of the statute, the appellate court observed that the rule of last antecedent implies that a limiting phrase applies to the "noun or phrase that it immediately follows." Accordingly, the appellate court determined that the phrase "suffered by the victim as a proximate result of the offense" only applied to the miscellaneous "other losses" category in 18 U.S.C. § 2259(b)(3)(F) and none of the categories of losses preceding that subsection. As a result, each defendant that possessed victim's images was liable for the full amount of victim's losses even though other defendants also contributed to her harm. Because the district court denied restitution to petitioner Amy in *United States v. Paroline*, 672 F.Supp. 2d 781 (E.D. Tex. 2009), the appellate court vacated the judgment and remanded the case to the district court to enter a restitution order for the "full amount of Amy's losses."

Defendant Paroline petitioned the Supreme Court of the United States for a writ of certiorari. The petition was granted in part to determine "what, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. § 2259." On April 23, 2014, the Supreme Court of the United States held that "the proximate-cause requirement applies to all the losses described in § 2259." See *Paroline v. United States*, 572 U.S. \_\_\_, 2014 WL 1612426, at 1-33 (S.Ct. Apr. 23, 2014). Determining that defendant's possession of two images of the victim did not cause all of her losses from the continued dissemination of her images, the Court concluded that defendant Paroline should only be liable for his conduct which proximately harmed the victim, not the conduct of others. The Court also ruled that the but-for causation standard utilized by the district court did not apply in this case because a large number of loosely connected individuals possessed and continued to traffic in the victim's images. Signaling the intent of Congress to provide restitution for victims of child pornography in § 2259, the Supreme Court emphasized that when a traditional causal inquiry does not suffice, a court should award restitution "in an amount that comports with the defendant's relative role in the causal process underlying the victim's general losses." This approach compensates the victim for her losses and holds the defendant accountable for the consequences of his conduct. Finding that the Fifth Circuit incorrectly interpreted the requirements of § 2259 and the District Court erred by applying

a but-for causation standard, the Supreme Court vacated the judgment of the Court of Appeals and remanded the case for further proceedings.

In re: Amy Unknown: Vicky Unknown, No. 13-20485 (5th Cir. Aug. 30, 2013). Petitioners Amy and Vicky sought restitution in the underlying case of *United States v. Gammon*, No. 4:10-cr-00340-1 (S.D. Tex. Dec. 2011). The district court awarded each victim \$125,000 in restitution pursuant to 18 U.S.C. § 2259(b). Defendant appealed the restitution order to the United States Court of Appeals for the Fifth Circuit, which affirmed the original district court order. Even with the affirmance, the lower court held a restitution hearing at which it stated for the first time that the restitution was "joint and several." As a result, the defendant did not have to pay restitution because each victim had already collected more than \$125,000 from other defendants.

Petitioners 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), contending that the amended district court order imposing joint and several liability should be reversed. To satisfy the traditional standard for mandamus relief, the court noted that petitioners would have to show that they have no other means to obtain the requested relief, they have a clear and indisputable right to the writ, and a writ is appropriate. First, the court noted that because petitioners could not directly appeal the district court order, they had no other means of relief. Second, the court observed that the district court did not indicate that the initial restitution award was joint and several. The court further noted that imposing a joint and several restitution award would be equivalent to issuing no restitution award in this case. The appellate court found that petitioners were entitled to the restitution amounts originally ordered by the district court and that the awards were not joint and several. Third, because the CVRA specifically authorizes mandamus relief, the court concluded that the writ was appropriate. Thus, the writ was granted and the initial restitution award was reinstated.

In re: George May, No. 13-30773 (5th Cir. July 24, 2013). Petitioner May sought \$27.5 billion in damages as a citizen intervenor on behalf of the state of Florida in the underlying case of *United States v. Transocean Deepwater Inc., et. al.*, 2:13-cr-00001-JTM-SS (E.D. La. May 30, 2013), alleging that the "terrorist defendants" were involved in a continuing conspiracy of economic terrorism, crimes against humanity, and other terrorist acts. The district court did not act on petitioner's request for a default judgment, so petitioner sought a writ of mandamus from the United States Court of Appeals for the Fifth Circuit pursuant to the CVRA. Without comment, the appellate court denied his petition for a writ of mandamus.

*United States v. John Emerson Tuma*, No. 11-cr-0031-01 (W.D. La. Dec. 5, 2012). A jury found defendant Tuma guilty of five counts related to illegally discharging untreated wastewater. His employer, CCS Midstream Services LLC, sought restitution pursuant to the CVRA and the

Victim Witness Protection Act (VWPA). To receive restitution, the employer would have to show that it was "directly and proximately harmed as a result of the commission of a Federal Offense." The court observed that the information submitted during defendant's trial did not establish the employer was proximately harmed by the defendant's actions. Concluding that there were complicated issues of causation and damages that would prolong the sentencing process, the court denied the request for restitution.

In re: Vicky. Child Pornography Victim, No. 12-2769 (8th Cir. Mar. 11, 2013). Petitioner Vicky sought restitution in the amount of \$952,759.81 pursuant to 18 U.S.C. § 2259 in *United States v. Robert M Fast*, 4:11-cr-03018-RGK-CRZ (D. Neb. July 13, 2012).<sup>1</sup> The district court originally granted restitution of \$19,863.89, but later reduced the restitution award to \$3,333. Petitioner sought 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. Petitioner also filed a direct appeal. Emphasizing that petitioner lacked standing to appeal the district court's restitution order, the appellate court dismissed her direct appeal. Using the traditional mandamus standard of review, the Eighth Circuit ruled that proximate cause was required for all categories of loss under 18 U.S.C. § 2259. Accordingly, the appellate court held that the district court did not err in awarding restitution in the amount of \$3,333 and denied the petition for a writ of mandamus.

In re: Amy & Vicky. Child Pornography Victims, No. 12-73414 (9th Cir. Oct. 24, 2012). In a previous appeal by defendant in the underlying case of *United States v. Kennedy*, 643 F.3d 1251 (9th Cir. 2011), a three-judge panel vacated the restitution order and remanded the case back to the district court to determine if there was a causal connection between the defendant's offense and the victims' losses as set out in *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999). On remand, the district court declined to award petitioner Amy restitution, and awarded petitioner Vicky \$4,545.08 in restitution.

Both petitioners sought a writ of mandamus in the United States Court of Appeals for the Ninth Circuit, pursuant to 18 U.S.C. § 3771, contending that the appellate court erroneously decided *Kennedy* and that the district court orders should be reversed. Pointing to a Fifth Circuit ruling in *In re: Unknown*, 697 F.3d 306 (5th Cir. 2012), the petitioners urged the court to overrule *Kennedy*. To issue the writ, the appellate court noted that it must find a legal error or abuse of discretion. While acknowledging that the Fifth Circuit interpretation differed from the Ninth Circuit, the appellate court emphasized that *Laney* and *Kennedy* remained binding on the

---

<sup>1</sup> See Letter from Honorable Thomas F. Hogan, Director, Administrative Office of the U.S. Courts, to Honorable John A. Boehner, Speaker, United States House of Representatives (Mar. 14, 2013).

Ninth Circuit absent intervention from the Supreme Court or the Ninth Circuit sitting en banc. Thus, the petition for a writ of mandamus was denied.

United States v. Deborah A. DiFrancesco, No. 2:13-cr-00089-JCM-GWF-1 (D. Nev. May 29, 2013 and Sept. 4, 2013) and In re: Stake Center Locating Inc., No. 13-72062 (9th Cir. June 19, 2013) and No. 13-73267 (9th Cir. Sept. 26, 2013). Defendant, who embezzled funds from her former employer, pled guilty to one count of tax evasion and three counts of wire fraud. As part of the plea agreement, defendant agreed to pay \$763,846 in restitution to her former employer, Stake Center Locating Inc. Prior to sentencing, Stake Center Locating Inc. filed a motion for relief pursuant to the CVRA and the Mandatory Victim Restitution Act (MYRA) seeking to set aside the plea agreement and compel the government to begin criminal forfeiture proceedings.

After the district court denied the motion, Stake Center Locating Inc. sought a writ of mandamus in the United States Court of Appeals for the Ninth Circuit directing the district court to order criminal forfeiture proceedings. Because sentencing had not taken place, the appellate court held that petitioner's claim was not ripe yet. Petitioner filed another motion for victims' rights in district court that was denied. Petitioner then filed a second petition for a writ of mandamus in the United States Court of Appeals for the Ninth Circuit seeking criminal forfeiture. The court noted that the CVRA gives victims the right to "full and timely restitution," but not to criminal forfeiture. Emphasizing that criminal forfeiture is not a type of restitution, the appellate court ruled that the district court did not err or abuse its discretion when it denied petitioner's motion for forfeiture. Thus, the petition was denied.

In re: The Morning Star Packing Company, LP & Liberty Packing Company, LLC, No. 13-71048 (9th Cir. Mar. 29, 2013). Petitioners' request for restitution under the Mandatory Victim Restitution Act (MYRA) was denied in the underlying case of United States v. Frederick Scott Salyer, 2:10-cr-00061-LKK-1 (E.D. Cal. Mar. 29, 2013). The district court determined that assessing restitution would be unduly complex and time consuming. The district court further noted that defendant did not have the financial means to make restitution and that civil remedies were available to petitioners.

Petitioners sought a writ of mandamus in the United States Court of Appeals for the Ninth Circuit, pursuant to 18 U.S.C. § 3771, asserting the right to restitution. The appellate court noted that the MYRA does not require a restitution award if the determination would be unduly complex and time consuming. The MVRA does, however, specifically state that the defendant's ability to pay should not be considered when ordering restitution. See 18 U.S.C. § 3664(f)(1)(A). Precedent in the Ninth Circuit also clearly established that the availability of a civil suit should not be considered when calculating restitution. See also United States v. Cienfuegos, 462 F.3d 1160, 1168 (9th Cir. 2006). The appellate court concluded that the district court erred by taking into consideration defendant's financial situation and other civil remedies, and further noted that it was unclear if the district court "conducted the balancing test required by 18 U.S.C. § 3663A(c)(3)" to determine if the burden on the sentencing process would outweigh the need to

provide restitution. As a result, the petition for a writ of mandamus was granted. Proceedings to determine restitution amounts in the district court are still pending.

In re: Amy and Vicky, No. 13-70858 (9th Cir. Mar. 18, 2013) and No.13-71486 (9th Cir. May 3, 2013). Petitioners Amy and Vicky requested restitution pursuant to 18 U.S.C. § 2259 in the underlying case of *United States v. Joseph Cantrelle*, 2:11-cr-00542-GEB (E.D. C 1. Feb. 22, 2013 and Apr. 15, 2013). Restitution was not recommended in the presentence report because the writer felt that he did not have enough information to determine if the government had met its burden of establishing a causal connection as required by *United States v. Kennedy*, 643 F.3d. 1251 (9th Cir. 2011). Adopting the presentence report's recommendations, the district court denied restitution.

Petitioners sought a writ of mandamus in the United States Court of Appeals for the Ninth Circuit, pursuant to 18 U.S.C. § 3771, asserting that the district court erred by applying *Kennedy*, and by refusing to award restitution. In *Kennedy*, the Ninth Circuit imposed a general proximate cause requirement when applying 18 U.S.C. § 2259(b)(3). Petitioners argued that *Kennedy* should be overruled based on a recent Fifth Circuit decision that did not impose a general proximate cause requirement for 18 U.S.C. § 2259(b)(3). See *In re: Amy Unknown*, 701 F.3d 749, 762 (5th Cir. 2012) *supra*. Finding that *Kennedy* remained binding precedent in the Ninth Circuit absent an "intervening higher authority," the court held that the district court did not err in applying a proximate cause requirement to 18 U.S.C. § 2259(b)(3). However, the appellate court found that the district court abused its discretion when it declined to award any restitution to the petitioners. Determining that the record established a sufficient causal connection between the defendant's offense and the petitioners' losses, the court found that the petitioners were entitled to restitution. Thus, the petition for a writ of mandamus was denied in part, granted in part and remanded to the district court for further proceedings to determine the amount of restitution that should be paid to the victims.

On remand, the district court utilized a method recommended by the Sixth Circuit to calculate the restitution amounts. See *United States v. Gamble*, 709 F.3d 541, 553-54 (6th Cir. 2013). The district court awarded Amy \$17,307.44 and Vicky \$2,881.05 in restitution. Petitioners once again sought a writ of mandamus in the United States Court of Appeals for the Ninth Circuit, pursuant to the CVRA, challenging the methodology used by the district court and its refusal to impose joint and several liability. The court noted that the general criminal restitution statutes (18 U.S.C. §§ 2259 and 3664(h)) do not expressly authorize joint and several liability. In fact, several circuits have declined to impose joint and several liability under 18 U.S.C. § 2259(b)(1). Determining that the methodology used to determine restitution awards under 18 U.S.C. § 2259 "is an open question in the Circuit," the appellate court held that the district court did not err or abuse its discretion when it refused to impose joint and several liability. Accordingly, the petition for a writ of mandamus was denied.

United States v. Michael Heath Thetford. 2:11-cr-495-KOB-HGD (N.D. Ala. Mar. 29, 2013). Defendant Thetford fraudulently sold a boat owned by Jack and Shirley Winslett. Pursuant to the plea agreement, he pled guilty to felon in possession of a firearm and wire fraud. The Winsletts sent a letter to chambers complaining that the boat stolen by defendant was not returned to them and that the government failed to prosecute the third-party purchaser of the boat. The court determined that the letter should be treated as a motion to reopen a plea under 18 U.S.C. § 3771(d). Finding that the Winsletts were proximately harmed as a result of the defendant's actions, the court ruled that the Winsletts were crime victims. However, because the defendant pled guilty to the highest offense charged, the victims were not entitled to reopen the plea. Although the motion was denied, the court emphasized that the victims have rights under the CVRA including the "right to full and timely restitution as provided by law" as well as a civil remedy to recover their boat.