

Crime Victims' Rights Report 2010

Summary – uscourts.gov

This is the sixth 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 78,400 criminal cases filed involving more than 100,300 defendants during fiscal year 2010. The Department of Justice informs us that a recent survey found that on average more than 320,000 new federal victims are added to their notification system each year. In the past year, the AO has received reports from the appellate courts on ten mandamus actions brought per the provisions of the Act and has similarly identified six 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.

In re: Zulma Natazha Chacin de Henriquez. et al., No. 10-3051 (D.C. Cir. June 10, 2010). Defendant, a drug trafficker, murdered petitioners' relative in Colombia. He was extradited to the U.S. for prosecution in the underlying case of United States v. Hernan Giraldo- Serna, et al., No. 1:04-cr-00114-RBW-1 (D.D.C. Apr. 26, 2010), and petitioners filed three motions seeking to be recognized as crime victims. The government objected to granting the victims Crime Victims' Rights Act (CVRA) status, and the district court ordered the government to show cause as to why they should not be afforded rights under the CVRA. After several-delays by the government, the petitioners sought a writ of mandamus in the United States Court of Appeals for the District of Columbia, pursuant to 18 U.S.C. § 3771(d)(3), compelling the district court to "take up and decide forthwith" petitioners' motion on victims' rights. Because proceedings in the district court were ongoing, the appellate court determined that a writ of mandamus was not appropriate at that time. Although the petition was denied, the appellate court directed the district court to promptly inform the petitioners of the outcome of their motion. The district court proceedings have been sealed.

In re: David Sieverding. et al., No. 10- 3029 (D.C. Cir. June 3, 2010). In a civil action, plaintiffs sought a writ of mandamus in the United States Court of Appeals for the District of Columbia, pursuant to 18 U.S.C. § 3771(d)(3), seeking to overturn the district court's dismissal of their motion. The clerk of court ordered the petitioners to pay a filing fee or file a motion to

proceed in forma pauperis. Petitioners failed to respond, and the case was dismissed for lack of prosecution.

United States v. Zev Saltsman. et al., No. 1:07-CR-00641-NGG (E.D.N.Y. Mar. 11, 2010). Defendant agreed to plead guilty to one count of securities fraud involving his purchase of shares in the Xybernaut Corporation. As part of the plea agreement, the defendant forfeited \$5 million that the government intended to use to compensate victims. A day before the plea hearing, Xybernaut Corporation filed a motion pursuant to 18 U.S.C. § 3771(a) asserting the right to be reasonably heard, requesting a 30-day postponement of the plea hearing, and objecting to the omission of a restitution order in the plea agreement. In court, the government argued that it had prosecutorial discretion to negotiate a plea agreement that was in the best interest of all victims. In addition, the government argued that although victims were entitled to rights under the CVRA, they could not preempt proceedings. In reaching its decision to deny the motion, the court held that "...it would not be in the interest of justice to bring this proceeding to a halt in order to address the specific claims of one specific claimant." The court also noted that the terms of the plea agreement provided a sufficient amount of money for claimants who could prove that they were victims.

In re: David Zackey, No. 10-3772 (3'd Cir. Sept. 20, 2010). Petitioner Zackey was a victim of financial fraud in the underlying case of United States v. Joseph P. Donahue, No. 3:08-CR-00221-JMM (M.D.Pa. Sept. 13, 2010). In district court, his attorney filed a motion seeking permission to make an appearance on petitioner Zackey's behalf to represent him at sentencing and seek restitution. According to 18 U.S.C. § 3771(d)(1), "a crime victim or the crime victim's lawful representative, and the attorney for the Government" may assert a victim's rights under the act. Because local court procedure did not usually allow victims' attorneys to "participate in sentencing hearings" and the CVRA did not require such representation for victims, the district court denied the motion. The district court, however, emphasized that petitioner Zackey was entitled to all rights accorded victims under the CVRA and that he could exercise his right to be heard at sentencing. Petitioner Zackey 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 his right to be reasonably heard was violated because his attorney was not permitted to speak on his behalf at sentencing. The appellate court observed that the district court properly recognized petitioner Zackey as a victim, and that assistance from the U.S. Attorney's Office was sufficient to protect the victim's rights regarding sentencing and restitution in this case. Thus, the appellate court declined to grant the writ of mandamus, determining that the district court properly used its discretionary power to deny the motion

In re: Kwame Gyamfi. No. 10-1093 (4th Cir. Jan. 22, 2010). Petitioner Gyamfi sought a writ of mandamus in the United States Court of Appeals for the Fourth Circuit, pursuant to 18 U.S.C. § 3771, asserting that his rights were violated because the district court would not grant

him a default judgment against the U.S. government. Noting that petitioner did not assert any victims' rights in the district court as required by the statute, and further noting that the district court proceedings were civil in nature, the appellate court denied petitioner's request for a writ of mandamus.

In re: Darnell E. Ross. No. 10-1587 (4th Cir. May 28. 2010). Petitioner sought a writ of mandamus in the United States Court of Appeals for the Fourth Circuit challenging the legality of his state court sentence and confinement. The appellate court dismissed the petition for mandamus relief, stating that the CVRA did not apply to the claims that petitioner asserted. The court, however, did note that the petitioner could challenge his confinement through a direct appeal in state court, in post-conviction proceedings, or habeas corpus actions.

In re: AMY. the victim in the Misty Child Pornography Series. No. 09-41238 (5th Cir. Dec.21.2009). Defendant pled guilty to one count of possessing images on his computer involving the sexual exploitation of children in the underlying case of United States v. Doyle Randall Paroline, No. 6:08-CR-00061-LED-JDL (E.D.Tex. Dec. 7, 2009). The victim asserted the right to mandatory restitution under 18 U.S.C. § 2259, claiming that she was harmed because defendant possessed two abusive images of her when she was a child. Concluding that numerous other individuals possessed the same images of the victim, the district court held that the victim did not establish that the defendant's offense was the proximate cause of the victim's losses. The victim petitioned for a writ of mandamus in the United States Court of Appeals for the Fifth Circuit, arguing that her rights were violated under 18 U.S.C. § 3771. The victim sought a writ compelling the district court to order the defendant to pay her restitution or, in the alternative, to remand the case to the district court for reconsideration of its ruling on restitution. The appellate court noted that the district court allowed extensive briefing and held two evidentiary hearings on the issue of restitution. Consequently, the appellate court ruled that the district court's determination that proximate cause was required to impose restitution was "not indisputably wrong." Accordingly, the appellate court denied the petition for a writ of mandamus.

United States of America v. Arctic Glacier International. Inc., 1:09-cr-149-HJW-1 (S.D. Ohio Nov. 12. 2009 and Feb.22.2010) and In re: Martin McNulty. No. 10-3201 (6th Cir. March L 2010). Defendant Arctic Glacier participated in a conspiracy to suppress competition in the packaged-ice market by dividing up customers in certain locations. Petitioner McNulty, an employee of Arctic Glacier, was told to participate in the scheme. He refused to participate and began to serve as an informant for the government. This caused his employment with Arctic Glacier to be terminated, and he was blackballed from the industry. As part of the plea agreement, Arctic Glacier pled guilty to a violation of the Sherman Act and paid a fine. The government, however, did not seek restitution on behalf of the victims. In district court, petitioner asked to be recognized as a victim and requested restitution. The court observed that the victims of Arctic Glacier's offense were its customers, not its employees. Accordingly, the court ruled that defendant was not a crime victim in this case because he was not proximately

harm by the conspiracy. Petitioner sought a writ of mandamus in the United States Court of Appeals for the Sixth Circuit, to enforce his rights as a victim under the CVRA, 18 U.S.C. § 3771. In denying the petition, the court held that the district court did not err in finding that the petitioner was not directly and proximately harmed by the company's violation of the Sherman Act. He was harmed by the firing and the subsequent blackballing in the industry, which was not criminal in nature or directly related to the Sherman Act violation. The court emphasized that although the harm to petitioner was not criminal in nature, civil remedies were available to petitioner.

In re: Lawrence J. Acker et al., No. 10-3159 (6th Cir. Feb. 22, 2010). Asserting that the district court refused to treat them as victims pursuant to 18 U.S.C. § 3771, petitioners sought a writ of mandamus from the United States Court of Appeals for the Sixth Circuit to enforce their rights under the CVRA in *United States of America v. Arctic Glacier International, Inc.*, supra. Petitioners were customers of Arctic Glacier who overpaid for ice as a result of Arctic Glacier's participation in the conspiracy to allocate customers. They argued that they should have been afforded earlier notice prior to the filing of the criminal action, direct involvement in plea negotiations, and the right to restitution. The appellate court emphasized that "a writ of mandamus is an extraordinary remedy that we will not issue absent a compelling justification." Finding that the district court allowed the victims to participate fully at the arraignment, the plea hearing, and sentencing, the appellate court determined that the district court had treated the petitioners as crime victims. The appellate court further noted that the district court's acceptance of the plea agreement without restitution was reasonable in light of the appropriate factors. Thus, the court concluded that the district court did not abuse its discretion, and declined to grant the writ of mandamus.

United States v. Thomas Joseph Petters, No. 0:08-CR-00364-RHK-AJB (D.Minn. May 5, 2010 and June 23, 2010). Defendant operated a multi-billion dollar Ponzi scheme for over a decade. He was convicted on 20 counts of financial fraud, money laundering, and conspiracy. Because of the vast scope of the Ponzi scheme and the difficulty in identifying victims and their losses, the issue of restitution was deferred until after sentencing. Following the penalty phase, the government submitted its preliminary restitution order, and approximately 100 victims objected to the order. Citing 18 U.S.C. § 3771 and 18 U.S.C. § 3663A, *Ritchie Special Credit Investments, Ltd.*, and its affiliates filed an emergency motion to intervene for the purpose of obtaining the forensic accounting report and the government criteria used to compile the list of victims and proposed restitution amounts. Without the report, the victims argued that they could not meaningfully object to the proposed order. The court denied the request, stating that "the movants have failed to show their entitlement to the requested relief pursuant to the provisions of 18 U.S.C. § 3771(a)."

Separately, pursuant to the CVRA and Federal Rule of Criminal Procedure 60(b)(1), another victim filed an ex parte motion to clarify the judge's sua sponte order denying restitution.

In that order, the court decided not to order restitution because it would be very complex and time consuming to determine the validity of restitution amounts. The court further noted that many victims had already filed claims in the ongoing bankruptcy proceeding, and the U.S. Trustee's Office had offered to assist those victims that had not filed claims yet. Thus, the victim's motion to clarify the court's order was also denied.

In re: Ernest Bustos, No. 10-2752 (7th Cir. July 26, 2010). Defendant was under indictment for securities fraud and was also the target of a civil action filed by the Securities and Exchange Commission. The district court appointed a receiver to preserve the defendant's assets in the event that the defendant was convicted and restitution was ordered in the underlying case of *United States v. Michael E. Kelly*, 1:06-CR-00964-1 (N.D.Ill. May 25, 2010). As part of this process, the receiver sent the victim investors several proposals that would require the victims to waive their rights to separate proceedings in order to maximize the value of the assets that were available for restitution. Petitioner Bustos, along with the other victim investors, moved to intervene in the district court proceedings. After the district court denied his request, the victim petitioned for a writ of mandamus in the United States Court of Appeals for the Seventh Circuit, arguing that his rights were violated under 18 U.S.C. § 3771. The appellate court noted that victims have eight specific rights under 18 U.S.C. § 3771(a), but the right to intervene is not one of the rights. The court emphasized that "giving victims a voice in the criminal process differs from giving them veto power, which often is both the goal and the effect of intervention." Determining that the district court had listened to the victims, the appellate court ruled that the petitioner had failed to identify a violation of any of the rights listed in 18 U.S.C. § 3771(a). Thus, the petition for a writ of mandamus was denied.

United States v. Dennis Burkholder, No. 08-50446 (9th Cir. Jan. 8, 2010). In district court, the defendant pled guilty to one count of possessing child pornography. The victims submitted written victim impact statements, which were attached to the presentence investigation report. At sentencing, the court found that several victim impact statements "concerned conduct that was unrelated to the defendant" and struck them from the presentence investigation report. The government appealed the sentence to the United States Court of Appeals for the Ninth Circuit, arguing that the victims' right to be reasonably heard was violated because the victim impact statements were struck from the presentence investigation report. Noting that the CVRA did not require victim impact statements to be appended to the presentence investigation report, the appellate court held that the victims' right to be reasonably heard under 18 U.S.C. § 3771(a)(4) had not been violated because the district court read and considered the victim impact statements before removing them from the presentence investigation report.

United States v. Melvin Pascal Nash. et al., No. 2:08-CR-01377-JAT (D.Ariz. Nov. 4, 2009 and Dec. 2, 2009). Two days prior to sentencing, the victims filed a motion requesting a delay in sentencing and access to portions of the presentence report based on 18 U.S.C. § 3771(d)(3). In an oral ruling, the judge declined to delay sentencing because the victims' motion

was not filed in a timely manner. The judge, however, allowed the crime victims to view ("eyes only") portions of the presentence report that pertained to victim impact statements and restitution. Thus, the victims' motion was denied in part and granted in part.

United States v. Mark Winson Pace, No. I:09-CR-30026-PA (D.Or. Feb.22.2010). The defendant pled guilty to one count of mailing child pornography. Two victims sought restitution because the defendant had images of them in his possession. No evidence, however, proved that the defendant had disseminated those images. Therefore, the government was unable to establish that the defendant's possession of the images proximately harmed the two victims. The judge denied restitution because there was no showing of proximate cause.

United States v. Derrick Anton Rogers, No. 1:09-CR-441-TWT (N.D.Ga. May 7, 2010). At the time of his arrest, the defendant possessed weapons that were stolen from the movant's locked truck. In a single count indictment, the defendant was charged with being a felon in possession of firearms affecting commerce, and the government sought forfeiture of both weapons in his possession. The movant asserted that he was a crime victim pursuant to 18 U.S.C. § 3771(e) because he was deprived of the firearms that the defendant unlawfully possessed. 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 observed that the movant was harmed by the theft of his firearms from the locked truck, which occurred prior to the offense that was committed by the defendant. Because it was not clear that the defendant was responsible for the theft, the court ruled that the movant was not harmed as a result of the defendant's unlawful possession of his firearms. The court, however, did note that if the defendant had been responsible for the theft, the outcome would have been different and the movant would have been granted victim status.