Crime Victims' Rights Report 2021

Summary – uscourts.gov

This is the seventeenth 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 2021, more than 58,800 criminal cases were filed in the federal trial courts, involving more than 74,400 defendants. For that year, the AO received reports from the appellate courts on 3 mandamus actions brought per the provisions of the CVRA and identified 16 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.

In re Akebia Therapeutics, Inc., 981 F.3d 32 (1st Cir. 2020). A corporation victimized by its former director's conspiracy to commit securities fraud petitioned for a writ of mandamus under the CVRA, challenging the restitution awarded under the Mandatory Victims Restitution Act (MVRA) for the firm's costs in assisting the government. The district court declared many categories of expenses outside the scope of the MVRA and therefore not reimbursable. The United States Court of Appeals for the First Circuit denied the petition. Noting that the CVRA provides the sole mechanism for appellate review of a sentencing order affecting crime victims' rights, the appeals court examined the district court's final restitution order for abuse of discretion, assessed its relevant factual findings for clear error, and reviewed its legal conclusions de novo. In making its restitution award, the district court had relied on *Lagos v. United States*, 584 U.S. ___, 138 S.Ct. 1684 (2018), which held that the MVRA did not cover costs of a private investigation a victim elected to conduct and emphasized that the MVRA focused on necessary expenses incurred during an investigation or prosecution. Petitioner argued that *Lagos* did not apply to a government-driven investigation and that the district court should have applied *United States v. Janosko*, 642 F.3d 40 (1st Cir. 2011). However, the appeals court found that the district court did not disregard *Janosko* and had properly evaluated whether expenses were foreseeable and necessary. The district court "painstakingly considered" each category and each item within each category, and it did not abuse its discretion in applying the law, making a series of decisions, or determining the resulting award.

Timothy J. Hufman v. John F. Kness, No. 20-3547 (7th Cir. Jan. 8, 2021). In July 2020, the United States filed a one-count information against Commonwealth Edison Company ("ComEd") for alleged bribery. Along with the information, it filed a deferred prosecution agreement (DPA) whereby the government would move to dismiss the information if ComEd met certain obligations, including payment of a "criminal penalty" of $200 million. The district court, finding that the DPA was intended to allow ComEd to demonstrate good conduct rather than to evade requirements of the Speedy Trial Act, excluded time until July 17, 2023, to allow ComEd to comply with the DPA. One month later, a ComEd customer filed a motion to create a non-federal rate-paying victims' restitution fund, an injunction requiring ComEd to pay its criminal penalty to this fund, a process for disbursing monies in this fund, and appointment of a special master to advise the court on "restitution issues." The district court denied the motion, finding that absent a criminal conviction, it had no power to order restitution. It also determined that because the government had exercised its executive power in creating the DPA, the court could not properly encumber the criminal penalty. The customer sought a writ of mandamus. The United States Court of Appeals for the Seventh Circuit denied the petition, ruling that petitioner did not cite any statutory authority or appellate decision establishing that a DPA is a conviction, that petitioner failed to show he was entitled to the broad relief requested, and that 18 U.S.C. §3771(d)(6) provides that the CVRA shall not be construed to impair prosecutorial discretion.

In re Wild, 994 F.3d 1244 (11th Cir. 2021) (en banc). Petitioner, an alleged victim of child sexual abuse and sex trafficking, brought a civil suit alleging that the government violated the CVRA by failing to confer with her before negotiating and entering into a non-prosecution agreement (NPA) with Jeffrey Epstein. The district court found that the government had infringed her rights under the CVRA, but while remedies were being considered, Epstein died. The district court then dismissed the lawsuit on the grounds that Epstein's death mooted any claims related to the NPA, that the court lacked jurisdiction to consider the NPA's application to Epstein's coconspirators, and that Petitioner was not entitled to injunctive relief because she had not proven any ongoing or future threats of CVRA violations. Petitioner sought a writ of mandamus. The United States Court of Appeals for the Eleventh Circuit denied the petition, holding that crime victims' rights under the CVRA do not attach until proceedings are initiated against defendants. Although both petitioner and the district court concluded that the CVRA possibly may apply pre-charge, it "is neither best nor most naturally read that way" given its text and structure, the historical context of its passage, and "the prosecutorial-discretion principles that the Act was designed to safeguard." The appeals court considered additional arguments made by petitioner, who pointed to the CVRA's guarantee of the right to confer with an attorney for the government in a case, but *Chavez v. Martinez*, 538 U.S. 760 (2003), established that a criminal case does not commence with an investigation and "at the very least requires the initiation of legal proceedings," and "it makes little sense that Congress would have tethered the conferral right to a single government lawyer" if it had intended to have the CVRA apply pre-charge. The appeals court determined that none of the CVRA's provisions related to coverage, requiring law enforcement officers to confer with victims before conducting investigations, and venue demonstrated that the CVRA applies before the initiation of criminal proceedings. Finally, the appeals court determined that petitioner did not meet the CVRA's definition

of a crime victim, as this required a court to determine if a federal offense has occurred, which it cannot do before the government has elected to press charges without placing "enormous pressure on the government's charging decisions" and possibly damaging any ongoing investigation. After sitting en banc, the appeals court declined to provide mandamus relief, ruling that the CVRA does not authorize crime victims to seek judicial enforcement of their rights under § 3771 "before the commencement of (and in the absence of) any preexisting criminal proceeding." Under *Alexander v. Sandoval*, 532 U.S. 275 (2001), only when statutory language constitutes "a clear expression of congressional intent to authorize a would-be plaintiff to sue" may a federal law create a private remedy; and absent this, no cause of action exists or may be created by the courts. No clear evidence indicates that Congress sought to authorize crime victims to seek enforcement of their rights under the CVRA before criminal proceedings begin. Neither of the two provisions of the law pertaining to judicial enforcement--§§ 3771(b) and (d)—suggests that courts may enforce any CVRA rights outside criminal proceedings. Moreover, § 3771(d)(6) expressly states, "Nothing in this chapter shall be construed to authorize a cause of action for damages." The dissent maintained that this did not bar private suits seeking declaratory or injunctive relief, but the majority stated that "the question isn't whether Congress 'intended to preclude' a private right of action . . . but rather, whether it *intended to provide* one." Petitioner argued that § 3771(d)(3), which provides that CVRA rights shall be asserted, if no prosecution is underway, in the district where the crime happened, authorized a pre-charge civil action; but the majority found that one could "more sensibly" see this as referring to a time following prosecution and conviction. The appeals court found that, under the plain language of the CVRA, "[t]he commencement of criminal proceedings marks a clear and sensible boundary on the prosecutorial-discretion spectrum" such that before charges are filed, the government's "authority and discretion are understood to be 'exclusive' and 'absolute,'" *United States v. Nixon*, 418 U.S. 683 (1974). The law's final provision, which lists "robust" administrative procedures to promote compliance, also reflects a lack of Congressional intent to authorize crime victims to file stand-alone civil suits in federal court. Finally, petitioner argued that § 3771(c)(1) requires government officials involved in detecting, investigating, and prosecuting crimes to seek to have victims notified of and accorded their CVRA rights, but the appeals court determined that this "can't provide the basis for discerning a private right of action to seek pre-charge judicial enforcement of those rights."

United States v. Ray, 337 F.R.D. 561 (S.D.N.Y. Nov. 25, 2020). Defendant accused of sex trafficking and other crimes issued ex parte subpoenas for pretrial production of alleged victims' medical records. Two victims and the government moved to quash the subpoenas; the government moved to quash on behalf of all victims. The motion was granted in part. The district court found that the government lacked standing to move to quash any subpoena for which the court had not received an objection from a specific victim. The statutory language of the CVRA does not grant the government an independent right to seek confidentiality for information on behalf of a victim who never requested it. The statutory right "to be treated with fairness and with respect for the victim's dignity and privacy" is satisfied by the court's recognition of the victims' right to decide whether to ask to have their own personal information kept confidential or publicized. The CVRA requires a court to give victims notice of and the opportunity to

move to suppress or quash subpoenas, but it does not authorize the government to act in victims' stead when they have not chosen to do so. Moreover, the CVRA definition of a victim "is expansive" and includes persons who sometimes become witnesses for the defense or wish not to be involved at all; therefore, absent a victim's desire to quash a subpoena, the government "neither is entitled to know of the subpoena nor hear the defense's justification for why the documents are relevant and should be produced." The district court determined that it had erred in permitting service of the subpoenas without giving prior notice to the victims and thus sufficient time for them to move to quash or modify them. However, it rejected the government's argument that the victims also were entitled to notice of their rights under the CVRA when their records were sought. Nothing in the statute establishes this requirement, and when a defendant requests a victim's information, "[i]t is not up to the defendant to advise the victim of her rights when the exercise of those rights would impede the defense."

United States v. Clinesmith, No. 20-CR-165 (JEB), 2021 WL 184316 (D.D.C. Jan. 19, 2021). Defendant pled guilty to making a false statement in connection with the preparation of an application to renew a surveillance warrant from the U.S. Foreign Intelligence Surveillance Court (FISC). The target of this application moved to be found a victim under the CVRA and thus to be entitled to be heard at sentencing. The district court granted the motion in part, permitting the target to speak at sentencing, but chose not to decide whether the CVRA applied to him. In ruling that the target may testify at the sentencing hearing, the court did not have to answer the "complicated question" of whether he qualified as a victim under the CVRA. Both defendant and the government argued that the target failed to show that the FISC would not have approved the application without defendant's false statement. The district court also declined to award restitution to the target because it was uncertain he met the CVRA definition of a victim; because even if he did, the court would have great difficulty calculating how much defendant's actions cost the target; because the target had not asked the court for an actual award and instead sought damages through civil actions filed against defendant and others; and because defendant claimed he had limited resources given that he was unemployed and expecting the birth of his child.

United States v. Cornett, No. 5:19-CR-408-FL-1, 515 F. Supp. 3d 367 (E.D.N.C. Jan. 27, 2021). Defendant who pled guilty to making a false statement while buying a firearm and to possession of a firearm by a prohibited person filed a motion seeking, in part, a finding that his estranged wife was not a crime victim under the CVRA. The district court, granting the motion in part, determined that because defendant's wife was not present when the false statement was made and was not a party to the transaction involving the weapons, she was not "directly and proximately harmed" by "conduct underlying an element of the offense of conviction," *United States V. Blake*, 81 F.3d 498 (4th Cir. 1986). A "closer question" involved defendant's second offense, as he possessed the firearms when he came to his estranged wife's home. In doing so, defendant intimidated his wife and violated a domestic violence protective order, and if he had been charged with crimes arising from either of those behaviors, his wife would qualify as a crime victim. However, the possibility that additional crimes could have been charged does not entitle a person to victimhood status, and defendant's "use of the

firearm to intimidate is not conduct underlying the offense of conviction," *see United States v. Crow*, 256 F. App'x 595 (4th Cir. 2007).

United States v. Sims, No. 2:21-CR-00026-GMN-BNW, 2021 WL 1062548 (D. Nev. Mar. 18, 2021). The government moved for a pretrial no-contact order under the CVRA barring a defendant charged with sex trafficking and other crimes against minors from having any contact with four victims and their relatives and from having anything other than limited contact with a fifth victim who is his biological child. The district court granted the motion in part and denied it in part, finding that sections §§3771(a)(1) and (c)(1) "do not appear, at least on their face, to vest the Court with any power to impose no-contact orders that may infringe on a defendant's First Amendment rights." Instead, the court relied on *Wheeler v. United States*, 640 F.2d 1116 (9th Cir. 1981), whereby an appropriate standard for obtaining a no-contact order arises when the government shows that the activity to be restrained presents a clear and present danger or serious and imminent threat to a "protected competing interest," when the restraint is narrowly drawn, and when no reasonable alternatives with less impact on First Amendment rights are available. Defendant's efforts to get the first four victims to recant their statements established a clear and present danger "and serious and imminent threat to the administration of justice." However, the proposed blanket no-contact order was not sufficiently narrow; therefore, the district court issued an order directing defendant not to contact the victims about the case nor to respond to them if they contacted him about the case.

United States v. Jackson, No. 3:19-CR-0015, 2021 WL 1325610 (D.V.I. Mar. 19, 2021). Defendant accused of production of child pornography, transportation with intent to commit sex crimes, and rape moved for a continuance, asserting that the COVID-19 pandemic had severely restricted his ability to prepare for trial. The government opposed this motion, arguing, in part, that the CVRA established that the victims had a "right to proceedings free from unreasonable delay." The district court granted defendant's motion, finding that the delay was not unreasonable given the "extraordinary difficulties" the pandemic presented for effective trial preparation, including travel restrictions and suspension of visitation at defendant's prison. Extending the period required under the Speedy Trial Act "would be in the best interest of justice" pursuant to *United States v. Fields*, 39 F.3d 439 (3d Cir. 1994), which established that "an 'ends of justice' continuance in appropriate circumstances may be granted."

United States v. Hamm, No. 4:19-CR-00613 SRC, 2021 WL 1561913 (E.D. Mo. Apr. 21, 2021). Defendant who pled guilty to possessing and accessing child pornography sought to have his sentencing memorandum sealed, arguing, in part, that he was entitled to protection under the CVRA because the memorandum described his own prior sexual abuse as a mitigating factor. The district court denied the motion. Nothing in the statute offers "protections to convicted criminals," and "non-sensical consequences would result" from providing them, as defendant "would be entitled to be protected from himself" and have the rights to confer with the government, to seek restitution, and more. Defendant's "sexual victimization, while tragic, does not warrant affording him the rights provided to his victims."

United States v. Flores, No. 1:17-CR-00537-CBA (E.D.N.Y. May 14, 2021) (unpublished). Defendant pled guilty to a money-laundering scheme whereby he bribed officials of Ecuador's state-owned oil company, EP Petroecuador. This firm, alleging that defendant had obtained contracts for millions of dollars less than they were worth, moved for restitution under the CVRA. The district court denied the motion. Even if movant qualified as a victim entitled to damages, it did not prove it had suffered the losses claimed. Its evidence merely suggested that bribe amounts were tied to contract prices, whereas defendant affirmed under oath that he had paid the bribes out of his own profits and did not build them into the contract prices. "At bottom, Petroecuador has adduced little evidence regarding contract over-pricing—and the evidence it has adduced has been wildly inconsistent," which prevented the court from determining "an amount of loss suffered by the company using any sound methodology." The documentation did not show by a preponderance of the evidence that the contract prices were inflated, by how much they were inflated, and that such inflation was tied to the crimes charged. Petroecuador also failed to prove by a preponderance of the evidence that it was entitled to honest-services restitution equal to 20 percent of the salaries it paid employees who accepted defendant's bribes, for it offered no evidence establishing "a reasonable approximation of the honest services it lost" due to misconduct. Petroecuador cited *United States v. Fiorentino*, 149 F. Supp. 3d 1352 (S.D. Fla. 2016), as an example of a case in which 20 percent was awarded for honest-services restitution, but it did not perform the multi-factor analysis described in that decision. Finally, the district court declared Petroecuador's request for an evidentiary hearing unwarranted, finding the "two rounds of briefing and argument that the parties had presented" sufficient to deny the motion.

United States v. Parker, No. 2:97-CR-00202-TLN-EFB, 2021 WL 1966409 (E.D. Cal. May 17, 2021). After defendant, who was convicted of armed bank robbery and other crimes, served approximately 288 months of an 867-month sentence, he moved for compassionate release. The government argued that if the district court considered this motion, all victims had the right to be heard pursuant to the CVRA. Defendant responded that the CVRA requires victim notification only when public hearings will occur in open court, citing *United States v. Ebbers*, 432 F. Supp. 3d 421 (S.D. N.Y. 2020); *United States v. Burkholder*, 590 F.3d 1071 (9th Cir. 2010); and *Kenna v. U.S. Dist. Court for Cent. Dist. Cal.*, 435 F.3d 1011 (9th Cir. 2006). The district court found that defendant was correct and that "Congress did not create any separate right to be heard when a decision on a motion for compassionate release is made based only on written presentations of the parties." Moreover, even if the victims had this right, the government had been unable to find current contact information for them given the passage of time. Defendant's motion was granted.

Forde v. Shinn, No. CV-21-00098-TUC-SHR, 2021 WL 2555430 (D. Ariz. June 22, 2021). A state death row inmate filed notice of her intent to seek federal habeas corpus relief. State prison officials moved to preclude petitioner from directly contacting any victims in this case and to have the district court order that any contact be initiated through counsel for respondents. The motion was denied. Respondents lacked standing to enforce provisions of state law through the CVRA, because only a crime victim or the victim's lawful representative may assert CVRA rights in federal habeas proceedings.

Moreover, even if respondents had standing to enforce the CVRA and the court "liberally construed" the CVRA as giving victims "the right to be free from unsolicited, direct contact with a prisoner's agents," the Arizona law provision respondents sought to enforce ceased to apply when state court proceedings ended. Finally, respondents maintained that a habeas petitioner has no right to discovery; however, because petitioner had not asked the court for formal discovery, the issue was not ripe for consideration.
Although respondents correctly asserted that the district court has inherent authority to regulate habeas proceedings, "[i]t does not necessarily follow the Court has the inherent authority to proscribe otherwise lawful conduct outside the courtroom by Petitioner's defense team." No federal law prohibits a defense team from contacting victims. The court noted that it expected all counsel in this case to abide by the CVRA's provisions that victims are entitled to the rights to be "reasonably protected from the accused" and "treated with fairness and with respect for the victim's dignity and privacy."

United States v. Guerrero, 14 CR 732-4, 2021 WL 2550154 (N.D. Ill. June 22, 2021). After it seized assets of a defendant who pled guilty to conspiracy to launder proceeds of a health care fraud scheme, the government moved for a preliminary order of forfeiture. The ex-husband of the woman who had masterminded the scheme, but who had fled to the Philippines before she could be prosecuted, filed a claim asserting an interest in the seized assets. Claimant alleged that, without his knowledge and with no compensation to him, his ex-wife and other co-owners had embezzled funds from claimant and removed claimant as president of a home health care firm he had co-founded, then transferred the money to other ventures involved in the crime. The district court granted the government's motion for summary judgment and denied claimant's cross-motion for summary judgment. The district court determined that claimant did not qualify as a crime victim under the CVRA because defendant pled guilty to defrauding the government, defendant did not admit to conspiring to launder money belonging to claimant, and claimant did not prove that the seized assets were traceable to funds stolen from him. No reasonable jury could find that the evidence provided "shows a causal nexus between the charged offense and Claimant's loss" that would meet the requirements of the CVRA.

In re Davis, No. 20-CV-6557 (CJS), 2021 WL 2649574 (W.D.N.Y. June 28, 2021). A robbery and kidnapping defendant failed to prevail when she sought to prohibit her prosecution on the grounds that her indictment was based on perjured testimony. Thereafter she petitioned for enforcement of her CVRA rights, complaining she had not been "respectfully heard by a federal prosecutor" or "treated with dignity" when she asserted that persons who had manufactured false evidence and suborned perjury to obtain her conviction and imprisonment had also subjected her to aggravated sexual abuse. The district court dismissed her petition. The CVRA expressly states that it shall not be "construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." *In re Wild*, 994 F.3d 1244 (11th Cir. 2021), noting that a court asked to enforce the CVRA first must determine whether the requesting party was harmed by a federal offense, ruled that "the CVRA does not provide a private right of action authorizing crime victims to seek judicial enforcement of CVRA rights outside the

confines of a preexisting proceeding." No evidence in this case proved that a federal crime took place. Petitioner's attorney had contacted the U.S. attorney, the FBI had conducted a preliminary investigation, and thereafter the government chose not to prosecute the alleged offenders. Petitioner thus did not show she had been deprived of a reasonable right to confer with a government attorney or that the government had acted to deny her dignity or violate her privacy. Nothing in the statute supported her contention that she was entitled to "recourse to a federal court to make a record and receive at least some judicial recognition" when no prosecution occurs.

United States v. FCA US LLC, No. 21-cr-20031, 2021 WL 3032521 (E.D. Mich. July 19, 2021). Fiat Chrysler Automobiles (FCA) pled guilty pursuant to a plea agreement to conspiracy to violate the Labor Management Relations Act by giving money and things of value to officers and employees of the United Auto Workers Union. In the plea agreement, the parties agreed that no restitution would be made in this matter. In a civil action against defendant, FCA employees belonging to United Auto Workers moved to be designated crime victims under the CVRA. The district court denied the motion, holding that movants were not directly and proximately harmed by the specific offense for which defendant was convicted here and therefore were not crime victims entitled to restitution. Moreover, *In re McNulty*, 597 F.3d 344 (6th Cir. 2010), stated, "The CVRA was not enacted to short circuit civil litigation to those with valid civil remedies available." The court declined to exercise oversight of the U.S. Attorney's Office and accepted the plea agreement, which expressly declares that no restitution will be awarded.

United States v. Prior, No. 3:18-CR-00019-LRH-CLB, 2021 WL3276139 (D. Nev. July 30, 2021). A murder defendant subpoenaed the mother and brother of the man he was accused of killing to testify at trial. The government moved *in limine* to allow them to attend the trial in full, despite their potential testimony in response to defendant's subpoena. The district court granted the government's motion. Fed. R. Evid. 615(d) allows a nonparty witness to be excluded from hearing other witness testimony unless authorized by statute to be present. The CVRA authorized the mother and brother to be present absent a finding that clear and convincing evidence showed that hearing other testimony would affect their own testimony. However, the court also ruled that, pursuant to *In re Mikhel,* 453 F.3d 1137 (9th Cir. 2006), defendant could move "to exclude the witnesses should he make a proffer 'by clear and convincing evidence that it is *highly likely*, not merely *possible*, that the victim-witness will alter his or her testimony,'" at which time the court will determine if exclusion is appropriate.

United States v. Garcia, No. 1:20-CR-01370-KWR, 2021 WL 4137642 (D.N.M. Sept. 10, 2021). Defendant, who asserted he had not been impaired at the time of a collision, challenged the elements of intent, recklessness, and causation. The government filed a motion in limine to preclude the introduction of medical records showing the

victim's blood ethanol level at the hospital after she was injured. The district court denied the government's motion to exclude these records. Although the CVRA provides that the victim has a right to be treated with fairness and with respect for her privacy, the government cited no case that relied on this statute to exclude relevant evidence, and the court did not find that the CVRA bars the defendant "from putting on evidence which appears to be relevant to whether the victim caused the accident or whether the Defendant had the requisite state of mind." The court instead decided to allow both parties to "propose reasonable measures to treat the victim fairly and with respect."

United States v. Paquin, No. CR 21-568-MV, 2021 WL 4319663 (D.N.M. Sept. 23, 2021). Defendant accused of assault with a dangerous weapon and other crimes was detained. The magistrate judge ordered defendant to refrain from contacting the victim, except for investigative purposes, and to refrain from contacting his son, a witness to the crimes, except in matters unrelated to the case. Defendant moved to amend the detention order. The government argued, in part, that the CVRA grants victims the right to reasonable protection. The district court granted defendant's motion, joining other courts that have determined that the CVRA does not authorize courts to impose no-contact conditions of detention, *see United States v. Sims*, No. 21-CR-26, 2021 WL 1062548 (D. Nev. Mar. 18, 2021). The government cited no authority "in support of inferring such power," and the court declined to interpret the CVRA as "authorizing the challenged condition of detention." Furthermore, no evidence indicated that defendant had attempted to contact the victim or had tried to influence her testimony or that of his son. Therefore, the district court found no reasonable grounds for believing the victim needed protection from harassment.