

## Crime Victims' Rights Report 2019

### Summary – uscourts.gov

This is the fifteenth 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 2019, more than 75,000 criminal cases were filed in the federal trial courts, involving more than 92,600 defendants. For that year, the AO received reports from the appellate courts on three mandamus actions brought per the provisions of the CVRA and identified four appellate court cases and four 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 Shahin, 767 F. Appx 376 (3d Cir. 2019). Plaintiff who filed two civil actions in state court sought to remove them to federal court. The district court found that no federal jurisdiction existed, that the removal was untimely, and that both actions had been fully adjudicated in state court. In a pro se petition for a writ of mandamus, plaintiff sought relief under the CVRA, arguing that a pattern of harassment, intimidation, and deprivation of her constitutional rights had made her a victim of the judicial process. The United States Court of Appeals for the Third Circuit denied the petition. The CVRA grants rights to victims of federal crimes and is limited solely to the criminal justice process, whereas plaintiff “is seeking only to advance her civil actions.” The CVRA provides that it shall not “be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation” whereby the United States could be held liable in damages for breaching such a duty.

In re Brown, 932 F.3d 162 (4th Cir. 2019). Defendant who had caused a car accident pled guilty to traffic violations. A man injured in the accident claimed he could not currently work as an electrician, sought restitution for past lost wages as a condition of probation, and said he would not pursue civil action against defendant. The U.S. magistrate judge denied the request, holding that sentencing was not the proper forum for addressing contested restitution amounts and that the victim should file a civil suit to conduct discovery and address “big figures.” The United States Court of Appeals for the Fourth Circuit granted the victim's petition for a writ of mandamus. Defendant did not prevail in arguing that the circuit court lacked jurisdiction to hear

a challenge to a denial of a request by a magistrate judge, for the Federal Magistrates Act established that magistrate judges function “as an arm of the district court,” see 28 U.S.C. §636 and 18 U.S.C. §401. As to the merits of the petition, although judges may decline to order restitution whenever assessing amounts owed would prolong and complicate sentencing hearings, in this case “the court abused its discretion because it improperly failed to articulate the balancing analysis” the CVRA requires whereby the victim’s needs are weighed against the burden on the sentencing process and specific findings of fact are made. On remand, the lower court was advised that its concern about calculating the victim’s future lost earnings was irrelevant when the requested restitution was limited to past lost wages. Also, the lower court was told that in making its balancing analysis, it should not give great weight to civil remedies available to the victim, and that because the victim did not seek compensation for medical expenses, the court’s review should not include those costs.

United States v. Binkholder, 909 F.3d 215 (8th Cir. 2019). Defendant pled guilty to wire fraud. A person identified as M.U. had lost money because of the fraud, but the district court declared him complicit in the real estate investment scheme and thus not a victim pursuant to the United States Sentencing Guidelines. M.U. sought a writ of mandamus directing the district court to recognize him as a victim under the CVRA, which the United States Court of Appeals for the Eighth Circuit granted. Defendant argued anew that M.U. did not qualify as a victim under the Guidelines, but, citing the writ, the district court disagreed and calculated the penalty accordingly. On appeal, the appellate court ruled that the district court had “improperly collapsed the two victim status determinations” and remanded for a determination of whether M.U. was a victim under the Guidelines. Thereafter, the district court determined that evidence presented at sentencing established that M.U. qualified as a victim under Guidelines. Defendant appealed a second time, but the judgment was affirmed. Although the appeals court had not actually described the CVRA’s definition of a victim as “narrower” than that of the Guidelines as the district court suggested, the findings of fact that M.U.’s money had been used to further the scheme without his knowledge and that he had lost more than \$1 million because of the offense were not clearly erroneous.

Frank v. United States, 789 F. Appx 177 (11th Cir. 2019), and Frank v. United States, Case No. 18-cv-62832-BLOOM/White, 2018 WL 6803710 (S.D. Fla. Dec. 17, 2018) (slip copy). A Florida prisoner asserted that various agencies’ failure to respond to his attempts to report federal crimes committed against him by state agencies and a bank violated his right under the CVRA to confer with a government attorney. A magistrate judge determined that pursuant to the Younger doctrine, the claim could not be adjudicated because doing so would interfere with a pending criminal investigation and, in the alternative, that the complaint should be dismissed as frivolous. The prisoner objected, clarifying that the matter did not involve his criminal prosecution and claiming that he became the victim of kidnapping, robbery, and RICO Act violations when he was removed from prison and taken to foreclosure proceedings after he had refused to attend a previously scheduled hearing. The district court agreed that Younger did not

apply, but dismissed the complaint, finding that the prisoner's "dissatisfaction with the results of the foreclosure case" did not establish he was a crime victim pursuant to the CVRA. The United States Court of Appeals for the Eleventh Circuit affirmed. Although the CVRA grants the right to confer with a government attorney "even if there is no ongoing prosecution in connection with the applicable crime," in this case the complaint gave no information about the alleged offenses beyond dates and purported perpetrators. "Such conclusory statements are insufficient to establish a cause of action" or to allege that one is a crime victim under the CVRA.

*Doe v. United States*, 411 F.Supp. 3d 1321 (S.D. Fla. 2019). Sex crime victims sought relief for the U.S. government's failure to confer with them before it entered into a non-prosecution agreement (NPA) with defendant Jeffrey Epstein. The district court found that the government had violated the CVRA and allowed the parties to submit briefs and additional evidence regarding appropriate remedies. While the matter was under advisement, defendant died. The district court ruled that it lacked jurisdiction under Article III to address the appropriateness of the victims' request to rescind the NPA, for defendant's death meant that no criminal prosecution could proceed against him. A request to have the NPA rescinded with respect to alleged co-conspirators also was denied for lack of jurisdiction, for they were not parties to this case. The court declined to issue an injunction requiring the U.S. Attorney's Office to put forth its "best efforts" to protect the CVRA rights of defendant's victims, for petitioners showed only "past exposure to illegal conduct" and did not establish any "continuing, present adverse effects," no current or future CVRA rights required protection from defendant, and the U.S. government had agreed to confer with the victims about alleged co-conspirators in this case, to participate in a forum with the victims, and to train prosecutors in victims' rights under the CVRA. For these reasons, the court also declined to order a meeting with the former U.S. attorney—now a private citizen—and the victims. The finding of a violation of the CVRA did not entitle the victims to documents previously deemed privileged or related to an ongoing investigation, including those addressing the government's decision to enter into the NPA. The victims did not show that they would suffer an injustice without access to grand jury materials or that such access "is compelling or particularized to their asserted interests under the CVRA." The victims sought monetary sanctions, but the cases they cited involved bad acts occurring during the course of litigation, whereas here the conduct at issue arose prior to the institution of the lawsuit. An award of restitution would be improper because "it is essentially a request for money damages from the Government, which is not allowed under the CVRA." The victims also were not entitled to attorney's fees, as the record contained no evidence that the government had acted in bad faith, and it took "legitimate and legally supportable positions" even though it was "unsuccessful on the merits of the issue of whether there was a violation of the CVRA."

*United States v. Reid*, No. 18-20023, 2018 WL 4853542 (E.D. Mich. Oct. 5, 2018). Defendant entered into a plea agreement whereby he pled guilty to being a felon in possession of a firearm. The presentence report noted that police found a handgun while investigating a report that defendant was physically assaulting his former girlfriend. At sentencing, the government

asked the district court to order defendant to pay \$7,680 to the woman to compensate her for physical and emotional injuries caused by the assault. The motion was denied. The CVRA provides that the victim of a crime is entitled to “full and timely restitution as provided in law,” but the crime of which defendant was convicted was not a crime of violence, and “it is difficult to identify a ‘victim’ of a possessory offense, like the one in this case.” The woman was not harmed by defendant’s mere possession of the firearm, but rather by the assault that included actions that preceded and followed the handgun possession. “[T]herefore she cannot be ‘an identifiable victim . . . [who] has suffered a physical injury’ as a result of the offense of conviction.” Although defendant unquestionably caused his former girlfriend to suffer a loss, that loss cannot be redressed by the Mandatory Victims Restitution Act or the CVRA based on defendant’s conviction in this case.

United States v. Thuna, 382 F.Supp. 3d 166 (D.P.R. 2019). Defendant pled guilty to introducing misbranded drugs into interstate commerce with the intent to defraud. The plea agreement stipulates that the court may impose restitution, but that the parties agree that restitution is not proper given the lack of readily identifiable consumers and health care benefit programs related to the offense. A pharmaceutical firm that is not a party sought to be recognized as a victim under statutes including the CVRA, asserting it was owed restitution because introducing drugs mislabeled as the firm’s products undermined its image, its brand name, the trust doctors and patients placed in its brands, and its efforts to recoup the investment in its drugs. The firm alleged that defendant’s acts displaced sales of its “legitimate products,” causing it to lose at least \$2 million in wholesale sales. The motion for restitution was denied. The CVRA defines a crime victim as someone “directly and proximately harmed” by a federal offense, and this harm must be a “reasonably foreseeable consequence of the criminal conduct” and closely related to the offense of conviction, not “merely tangentially linked.” Any restitution “must be based on actual loss, not intended or expected loss.” No element of defendant’s offense directly harmed the firm. Defendant’s introduction of mislabeled drugs to the marketplace did not necessarily displace the firm’s products. The sale of mislabeled drugs to buyers who allegedly otherwise would have purchased the firm’s drugs was not an element of the offense of conviction, so the firm was not a crime victim under the CVRA, and the firm’s loss “is too attenuated for restitution.”