

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-CIV-MARRA/JOHNSON

JANE DOE #1 and JANE DOE #2,

Petitioners,

vs.

UNITED STATES,

Respondent.

_____ /

UNITED STATES' RESPONSE TO JANE DOE #1 AND JANE DOE #2'S
MOTION FOR ORDER DIRECTING THE U.S. ATTORNEY'S OFFICE NOT
TO WITHHOLD RELEVANT EVIDENCE

Respondent, United States of America, by and through its undersigned counsel, files its Response to Jane Doe #1 and Jane Doe #2's Motion for Order Directing The U.S. Attorney's Office Not to Withhold Relevant Evidence, and states:

I. THE CRIME VICTIMS RIGHTS ACT CREATES NO LEGAL DUTY UPON
THE U.S. ATTORNEY'S OFFICE TO PROVIDE RELEVANT EVIDENCE

Petitioners maintain the U.S. Attorney's Office is "withholding" relevant evidence, which suggests there is a legal obligation to disclose such information to them. Petitioners contend the government has an obligation under 18 U.S.C. § 3771(c)(1) "to make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)."

Section 3771(c)(1) is no authority to impose a duty upon the U.S. Attorney's Office to provide evidence to petitioners, or allow them a right of access to records maintained by the U.S. Attorney's Office. Petitioners do not point to any of the eight rights enumerated in section

3771(a) that provides a right to access to information in the government's possession, either in the context of the criminal case in which the requesting individual is a crime victim under section 3771(e), or in a motion for relief filed under section 3771(d)(3).

Petitioners' attempt to engraft a right of access to government information to section 3771(c)(1) should be rejected. In Pennsylvania v. Ritchie, 480 U.S. 39 (1987), the Supreme Court recognized that the Confrontation Clause grants a criminal defendant a trial right to cross-examine a witness. It hastened to add, "[t]he ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony." Id. at 52(footnote omitted). In the same vein, the obligation of the government to use its best efforts "to see that crime victims are notified of, and accorded, the rights described in subsection (a)," does not include a duty to provide information supporting whatever claim a victim may wish to assert in a motion for relief under section 3771(d)(3).

In United States v. Rubin, 558 F.Supp.2d 411 (E.D.N.Y. 2008), an alleged victim of a stock swindle claimed the right to confer in section 3771(a)(5) included a right to obtain information to base his views to express to the court. This argument was rejected by the district court, which noted that "[a]ny information-gathering aspect of the right to confer is necessarily circumscribed, in the first instance, by its relevance to a victim's right to participate in the federal criminal proceedings at hand and to do so within the bounds demarked by the CVRA." Id. at 425(citation omitted). The court found the CVRA no more requires disclosure of the pre-sentence report to meet its remedial goal of giving crime victims a voice in sentencing than it does disclosure of all discovery in a criminal case to promote the goal of giving victims a voice at

plea proceedings. Id., citing United States v. Ingrassia, 2005 WL 2875220 at *17 (E.D.N.Y. Sep. 7, 2005). The district court concluded, “[t]he CVRA, therefore, does not authorize an unbridled gallop to any and all information in the government’s files.” 558 F.Supp.2d at 425.

Similarly, in United States v. Coxton, 598 F.Supp.2d 737 (W.D.N.C. 2009), several crime victims invoked the CVRA in an attempt to obtain portions of the pre-sentence investigation report (PSR). The victims argued that the CVRA granted them the implicit right to access to the request portions of the PSR in order to prepare for sentencing. Id. at 739. The district court rejected the victims’ argument. The court first noted the confidential nature of a PSR, Id. at 738-39, and then found that a victim’s right to be reasonably heard at sentencing did not grant a right of access to the PSR. The court relied upon In re Brock, 262 Fed.Appx. 510 (4th Cir. 2008), which held that a victim’s right to be heard does not afford access to a PSR, since the victim had been provided ample information concerning the applicable Sentencing Guidelines and other issues related to the defendants’ sentencing. The district court in Coxton found that the victims in that case were present during trial and continued to enjoy access to the United States Attorney’s Office. Id. at 740.

The district court also rejected the victim’s argument that their right to restitution granted a right of access to the PSR. Id. The Coxton court relied upon United States v. Sacane, 2007 WL 951666 (D.Conn. Mar. 28, 2007), where the victim of a fraud sought access to the convicted defendant’s financial status by invoking the CVRA. The Sacane court relied upon the caselaw finding a victim had no right to the defendant’s PSR, and found that, “if the CVRA does not provide crime victims with a right to disclosure of the presentence report, that *a fortiori* it would not provide crime victims with a right to obtain such disclosures directly from a defendant.”

2007 WL 951666 at *1.

Other attempts to engraft discovery rights onto the CVRA have also been rejected. In United States v. Moussaoui, 483 F.3d 220 (4th Cir. 2007), several victims in the September 11, 2001 terrorist attacks sought access to files and records provided by the government to defendant Moussaoui, in satisfaction of the government's criminal discovery obligations. The victims were plaintiffs in civil actions filed in the Southern District of New York, against private airlines, airports, and security services. Id. at 224. The victims sought non-public criminal discovery materials for use in their civil actions.

In its opinion, the Fourth Circuit noted the victims had relied heavily upon the CVRA and the Air Transportation Safety and Stabilization Act (ATSSSA) in the district court, to support their claim of a right to access the criminal discovery information. Id. at 234. On appeal, however, the civil plaintiffs abandoned the argument that those two statutes provided the district court the authority to enter an order compelling the government to provide to the civil plaintiffs certain categories of information. The appellate court observed that, "[t]his was wise strategy, as nothing in those two statutes supports the district court's exercise of power." Id.

As to the CVRA, the Fourth Circuit found "[t]he rights codified by the CVRA, however, are limited to the criminal justice process; the Act is therefore silent and unconcerned with victims' rights to file civil claims against their assailants." Id. at 234-35, citing In re Kenna, 453 F.3d 1136, 1137 (9th Cir. 2006). There is no criminal justice process in the instant case since no criminal charges have been filed. Even if the criminal justice process has been initiated by the filing of charges, courts have rejected claims by victims that one or more of the rights in section 3771(a) create a right of access to information in the government's possession; Coxton (no right

to PSR); Kenna (same); and Sacane (no right to financial information from defendant). The CVRA imposes no duty on the U.S. Attorney's Office to provide evidence to petitioners to assist them in presenting their claims under the CVRA.

II. PETITIONERS HAVE NO DUE PROCESS RIGHTS UNDER THE CVRA

Petitioners also contend they have a right to due process under the CVRA, and liken their situation to the rights enjoyed by criminal defendants. DE 50 at 5-9. This argument suffers from a fundamental defect, the absence of any protected life, liberty, or property interest, which would trigger the due process clause.

"The necessary first step in evaluating any procedural due process claim is determining whether a constitutionally protected interest has been implicated." Tefel v. Reno, 180 F.3d 1286, 1299 (11th Cir. 1999), citing Economic Dev. Corp. v. Stierheim, 782 F.2d 952, 954-55 (11th Cir. 1986)("In assessing a claim based on an alleged denial of procedural due process a court must first decide whether the complaining party has been deprived of a constitutionally protected liberty or property interest. Absent such a deprivation, there can be no denial of due process."). Petitioners concede that "the victims in this case do not rely on a federal *constitutional* right to due process." DE 50 at 6(emphasis in original).

However, they contend that section 3771(a)(8), which provides that a crime victim should be treated with fairness and with respect for the victim's dignity and privacy, creates a statutory right. Petitioners argue that Congress intended to provide a substantive due process right to crime victims. DE 50 at 6. This argument is plainly incorrect. There is no life, liberty, or property interest implicated in the CVRA, and courts are hesitant to find that a substantive due process right has been created. See Collins v. City of Harker Heights, Texas, 503 U.S. 115,

125 (1992)(“As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open ended. (citation omitted). The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.”). This judicial reluctance would be particularly well-founded in the instant case, where petitioners are maintaining that Congress’s use of the amorphous terms “fairness” and “respect for the victim’s dignity and privacy” have created a substantive due process right.

Similarly unavailing is petitioners’ reliance upon Brady v. Maryland, 373 U.S. 83 (1963), and other criminal law cases finding a due process obligation on the government’s part to disclose exculpatory and impeachment information. Petitioners are charged with no crime, and they are in no jeopardy of losing their liberty. Consequently, the government has no due process obligation to provide information to petitioners.

III. PETITIONERS HAVE NO RIGHT TO DISCOVERY UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

Petitioners argue they are entitled to discovery under the Federal Rules of Civil Procedure, but they point to no particular rule, or case, which provides that such a discovery rights exists. Instead, petitioners seize upon the government’s assertion that the right to confer under section 3771(a)(5) only applied to the criminal case, not to a civil action filed to attempt to enforce rights under the CVRA.

Petitioners filed their motion for relief under section 3771(d)(3). Such motions for relief are filed in the district court “in which a defendant is being prosecuted for the crime,” or “if no prosecution is underway, in the district court in which the crime occurred.” If a motion under

section 3371(d)(3) is filed in the district court in which the defendant is being prosecuted, the motion is being entertained as part of the criminal case, not a civil action. In the instant case, petitioners filed their motion under the second provision. Presumably, because there was no criminal case, the Clerk's Office assigned the motion a civil case number.

Congress created a procedure by which a putative victim could seek relief for alleged violations of CVRA rights. If a section 3771(d)(3) motion were filed in an existing criminal case, the Federal Rules of Civil Procedure would not apply, since it is not a civil case. Under petitioners' theory, because of the happenstance that no criminal case was pending, and the Clerk's Office assigned the motion a civil case number, they are entitled to full discovery under the Federal Rules of Civil Procedure.

Petitioner's theory is illogical because there is no basis for believing that Congress intended individuals seeking relief under section 3771(d)(3) to enjoy widely differing procedural rights, depending on whether there was a criminal case pending. If a putative victim filing a motion in an existing criminal case would be entitled to no discovery under the Federal Rules of Civil Procedure, then none should exist where there is no existing criminal case.

IV. THE GOVERNMENT ATTORNEYS' DUTY OF CANDOR DOES NOT CREATE A RIGHT OF ACCESS TO INFORMATION

Petitioners argue that, because the government's attorneys owe a duty of candor to the Court, they are entitled to have access to government records in order to ensure the government attorneys are honoring their ethical obligations. DE 50 at 11-13.

The government's attorneys are well-aware of their obligations of candor to the Court. If the Court believes any attorney in the instant case has breached that ethical duty, it has the

authority to take remedial action to factually determine whether the duty has been breached. However, the mere existence of an attorney's duty of candor to a court does not a right of access to information in the opposing party, to ensure the ethical duty is being met.

CONCLUSION

Petitioners' motion for order directing the U.S. Attorney's Office not to withhold relevant evidence should be denied.

Respectfully submitted,

WIFREDO A. FERRER
UNITED STATES ATTORNEY

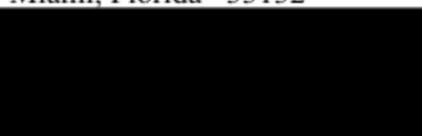
By:

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Assistant U.S. Attorney



Miami, Florida 33132



Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 7, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

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Assistant U.S. Attorney

SERVICE LIST

Jane Does 1 and 2 v. United States,
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United States District Court, Southern District of Florida

Bradley J. Edwards, Esq.,
Farmer, Jaffe, Weissing, Edwards, Fistos & Lehrman, P.L.
425 North Andrews Avenue, Suite 2
Fort Lauderdale, Florida 33301
(954) 524-2820
Fax: (954) 524-2822
E-mail: brad@pathtojustice.com

Paul G. Cassell
S.J. Quinney College of Law at the
University of Utah
332 S. 1400 E.
Salt Lake City, Utah 84112
(801) 585-5202
Fax: (801) 585-6833
E-mail: casselp@law.utah.edu

Attorneys for Jane Doe # 1 and Jane Doe # 2