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UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff,</p> <p>vs.</p> <p>W.R. GRACE, HENRY A. ESCHENBACH, JACK W. WOLTER, WILLIAM J. McCAIG, ROBERT J. BETTACCHI, O. MARIO FAVORITO, ROBERT C. WALSH,</p> <p>Defendants.</p>	<p>CR 05-07-M-DWM</p> <p>BRIEF IN SUPPORT OF MOTION TO ACCORD RIGHTS TO VICTIM-WITNESSES PURSUANT TO RULE 60(a)(2) AND (b)(1) OF THE FEDERAL OF CRIMINAL PROCEDURE AND 18 U.S.C. § 3771(a)(3) AND (d)(3)</p>
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Pursuant to Rule 60(a)(2) and (b)(1) of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3771(a)(3) and (d)(3), the United States respectfully moves this court to declare that the thirty-four persons named in Attachment B (filed under seal) meet the definition of “crime victim” under the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771(e) and are entitled to observe the court proceedings, including the trial in this case, absent a showing, by clear and convincing evidence, that their testimony would be materially altered by that attendance.

I. Background

During the motions hearing on January 22, 2009, the court considered the CVRA’s interaction with Fed. R. Evid. 615, and ruled as follows:

This case is unusual because if you have a case where there is someone who is caught with drugs, child pornography, someone who’s allegedly robbed a credit union or a bank, someone who’s been involved in a violent act, there is generally a person or persons who are identifiable as victims.

Under the definition of 18 U.S. Code 3771(e), it says that, For purposes of this chapter, the term, quote, crime victim, means a person directly and proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia.

Of course, that obviously is the critical issue or issues that are going to be tried and, consequently, it is my determination, as the Congress has defined the term crime victim, there are no crime victims identifiable in this case.

So if 615 is invoked, that means that all of the witnesses who will be called are excluded.

Hearing Tr. (Jan 22, 2009) at 304-05 (emphasis added) (attached as Attachment A). The United States respectfully disagrees with this application of the crime victim definition and asks the court to accord the victim-witnesses the rights in 18 U.S.C. § 3771(a)(3) as required by 18 U.S.C. § 3771(b)(1).

As is the case with an indictment alleging a violent crime or virtually all indictments alleging fraud crimes, in this case there are individuals who believe they are victims of the crimes alleged in the indictment given the statutory definition of a crime victim in 18 U.S.C. § 3771(e). In this case, for example, a large number of victims, including some of the government's trial witnesses, believe they have been harmed as a direct result of deliberate acts of the defendants. That harm includes exposure to asbestos that has resulted in both physical injury and increased risk of future adverse health effects, as well as property damage. The United States does not believe the victims in this case who are witnesses in the government's case in chief can be treated differently than a victim in a bank fraud case or a rape case. If the court wishes to exclude a victim who is also a witness before the victim-witness testifies, it must make the findings contemplated by 18 U.S.C. § 3771(a)(3).

With respect to its obligations to provide services and afford statutory rights under the CVRA, the United States considers some 2000 people to be victims of the crimes alleged in the Superseding

Indictment. Of those, at least thirty-four listed in Attachment B (filed under seal) are expected to testify. Under the CVRA, attorneys for the United States are obligated to apply their “best efforts” to see that victims such as these are afforded eight specific rights. 18 U.S.C. § 3771(a)(1)-(8) & (c)(1). One of those rights is the “right not to be excluded from . . . public court proceeding[s].” 18 U.S.C. § 3771(a)(3). In particular, victim-witnesses may not be excluded unless the presiding court determines, by clear and convincing evidence, that “testimony by the victim would be materially altered if the victim heard other testimony at [the] proceeding.” *Id.* Subsection (a)(2) of Federal Rules of Criminal Procedure 60 and 18 U.S.C. § 3771(b)(1) require even more. Specifically, “In determining whether to exclude a victim, the court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record.”

II. The Superseding Indictment Properly Identifies Crime Victims

As the court recognized, CVRA rights are only available to persons who were “directly and proximately harmed as a result of the commission of a Federal offense.” Hearing Tr. (Jan 22, 2009) 304-05; *see* 18 U.S.C. § 3771(e). The court appeared to conclude that because the crimes alleged in this case have yet to be proven, no one can be considered a victim. *Id.* 304-05. The United States respectfully

disagrees with this blanket approach to the pre-trial identification of victims.

Instead, the government asks this court to adopt an approach taken by the district court in *United States v. Turner*, 367 F. Supp. 2d 319, 326 (E.D.N.Y. 2005). The court's reasoning in *Turner* is persuasive and offers a manageable way to say who qualifies as a victim before the merits are decided:

The CVRA defines a "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." At this stage of the case, however, the defendant continues to enjoy a presumption that he is innocent of the charge that he committed a Federal offense. Strictly speaking, then, I might be constrained to presume that there is no person who meets the definition of "crime victim" in this case. That syllogism—which renders the CVRA inapplicable to this or any other criminal case unless and until the defendant is proved guilty beyond a reasonable doubt—produces an absurd result that I must presume Congress did not intend. Nevertheless, I cannot ignore the possibility that by requiring me to afford rights to "crime victims" in this case, the CVRA may impermissibly infringe upon the presumption of Turner's innocence.

Unlike the Bail Reform Act, the CVRA does not include a provision expressly preserving the presumption of the accused defendant's innocence. I conclude, however, that such a reasonable limitation must be inferred as a matter of due process and to avoid an interpretation that would render the statute unconstitutional. Accordingly, I interpret the definition in § 3771(e) to include any person who would be considered a "crime victim" if the government were to establish the truth of the factual allegations in its charging instrument.

Id. at 326-27 (internal citations omitted); *see also In re Mikhel*, 453 F.3d 113, 1139 (9th Cir. 2006) (writ of mandamus decision overturning a

district court order excluding from trial certain witnesses who were related to a murder victim, and requiring further proceedings where “the district court excluded the victim-witnesses without determining whether their testimony would be ‘materially altered’ were they allowed to witness the entire trial.)

In this case, the Superseding Indictment charges knowing endangerment under the Clean Air Act, 42 U.S.C. § 7413(c)(5)(A), and a conspiracy to violate the Clean Air Act (with a knowing endangerment object). Applying the *Turner* approach, the government maintains that each of the people listed at Attachment B would meet the definition of “crime victim” if the government were to establish the truth of the indictment’s factual allegations.

The plain language of the knowing endangerment statute contemplates the existence of a victim: knowing endangerment involves conduct that “places another person in imminent danger of death or serious bodily injury.” *Id.* (emphasis added).¹ The question facing the court, then, is whether the Superseding Indictment alleges facts that, if taken as true, show that each of the thirty-four victim-witnesses suffered harm, i.e., whether the Superseding Indictment alleges that the

¹ The fact that victims may have not suffered an immediate toxic effect during their asbestos exposure is immaterial to the question of whether those exposed were harmed, especially in light of the latency period for asbestos-related diseases. The question then, is whether the thirty-four victim-witnesses are part of a class of people who suffered an increased risk of asbestos-related disease due to the defendants’ actions.

action and/or inaction of one or more of the defendants placed these specific individuals in imminent danger of death or serious bodily injury.

The Superseding Indictment describes several ways in which defendants placed members of the community of Libby, Montana in imminent danger:

- “From on or about 1977 until on or about 1993, defendant W.R. GRACE gave away vermiculite materials contaminated with tremolite asbestos to the Libby community without disclosing the hazardous nature of the material.” Superseding Indictment at ¶ 133.
- “[D]efendant W.R. GRACE failed to provide workers with adequate changing and shower facilities that would have minimized take-home dust and exposure to tremolite asbestos to the families of defendant W.R. GRACE's employees.” *Id.* at ¶ 139.
- “[D]efendants W.R. GRACE and McCAIG provided mill tailings [containing tremolite asbestos] to the Plummer Elementary School for use as a foundation for an outdoor ice skating rink.” *Id.* at ¶ 141.
- “Defendant W.R. GRACE provided mill tailings to the Libby Public School District for use on the Junior and Senior High School running tracks.” *Id.* at ¶ 144.
- “[D]efendants W.R. GRACE and McCAIG, knowing the Export Plant property was contaminated with tremolite asbestos, leased a portion of said property to Mon-Ida, a business owned by James Regh, and failed to disclose the health hazard associated with said property.” *Id.* at ¶ 159.
- “[D]efendants W.R. GRACE and STRINGER, knowing the Export Plant property was contaminated with tremolite asbestos, leased a portion of said property to Millwork West, a business owned by Melvin Burnett, and failed to disclose the health hazard associated with said property. *Id.* at ¶ 160.

- “[D]efendants W.R. GRACE and BETTACCHI knowing the Screening Plant property was contaminated with tremolite asbestos, signed a deed transferring title of the Screening Plant property to the Parkers and failed to disclose the health hazard associated with said property.” *Id.* at ¶ 165.
- “[D]efendants W.R. GRACE and STRINGER told the EPA On-Scene Coordinator that Libby Mine vermiculite concentrate at the Export Plant and at the Screening Plant contained less than one percent tremolite asbestos, thereby concealing the true hazardous nature of the asbestos contamination, delaying EPA’s investigation and causing releases of asbestos into the air in the Libby community.” *Id.* at ¶ 173.
- “[D]efendants W.R. GRACE and STRINGER told the EPA On-Scene Coordinator that historical asbestos contamination problems at the Libby Mine had been resolved and provided one page of air monitoring data gathered during closure of the mine site to demonstrate that current conditions were safe, thereby concealing the true extent and hazardous nature of the asbestos contamination, delaying EPA’s investigation and causing releases of asbestos into the air in the Libby community.” *Id.* at ¶ 174.
- “[D]efendants W.R. GRACE and STRINGER led EPA employees and contractors associated with EPA’s Superfund cleanup, to various locations that were contaminated with tremolite asbestos, including: the “Mine Site,” “Rainy Creek Road,” the “Screening Plant,” the “Flyway” and the “Export Plant,” thereby disturbing and causing to be disturbed asbestos-contaminated vermiculite, releasing asbestos into the air, all without disclosing the extent and hazardous nature of the asbestos contamination at these locations.” *Id.* at ¶ 175.
- “[D]efendants W.R. GRACE and STRINGER responded to an EPA CERCLA 104(e) Request For Information regarding the “Libby Asbestos Site” and provided the following false and misleading information: that defendant W.R. GRACE did not provide vermiculite contaminated with tremolite asbestos to the general public in Libby, thereby concealing the true extent of the asbestos contamination, delaying EPA’s investigation and causing releases of asbestos into the air in the Libby community.” *Id.* at ¶ 176.

The list at Attachment B describes how each individual is linked to one or more of these allegations, and thus shows how each one is a crime victim under the CVRA.

III. The Victim-Witnesses Should be Permitted to Attend Trial

Rule 615 of the Federal Rules of Evidence regulates the exclusion of witnesses from court proceedings, including trials. The rule generally requires courts to exclude witnesses at the request of a party, but it does not apply to, *inter alia*, “a person authorized by statute to be present.” Fed. R. Evid. 615(4). Crime victims fall into this exception. Under 18 U.S.C. § 3771(a), a crime victim has:

[t]he right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

In the case at bar, no evidence has been presented suggesting that any witness’s testimony would be materially altered by the hearing of other testimony. None of the defendants have made this assertion. The United States does not believe that such a showing can be made. Therefore, no crime victims should be excluded.

IV. This Motion Is Governed by a Specific CVRA Timing Provision.

The United States brings this motion now because of its obligation to “make . . . best efforts to see that crime victims are notified of, and accorded, the rights described in [18 U.S.C. § 3771(a)].” 18 U.S.C.

§ 3771(c)(1).² Under the Act, when a victim’s rights are asserted in the district court, the CVRA requires “[t]he district court [to] take up and decide any motion asserting a victim’s right forthwith.” 18 U.S.C. § 3771(d)(3).

IV. Conclusion

For the reasons set forth above, the United States respectfully asks this court to declare that the persons listed at Attachment B qualify as victims of the crimes alleged in the Superseding Indictment and to declare that they may attend trial absent a showing, by clear and convincing evidence, that their testimony would be materially altered by that attendance.

DATED this 2nd day of February, 2009.

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² Courts have admonished Department of Justice attorneys who have failed to address the CVRA’s requirements. For example, in a recent, published opinion the Eleventh Circuit wrote, “[a]lthough the petition does not seek relief against the Assistant United States Attorney prosecuting the case we expect that attorney to be mindful of the obligation imposed by section 3771(c) of [the CVRA]” *In re Stewart*, ___ F.3d ___, 2008 WL 5265344, at *4 (11th Cir. 2008).

CERTIFICATE OF SERVICE
L.R. 5.2(b)

I hereby certify that on February 2, 2009, a copy of the foregoing document was served on the following persons by the following means:

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