

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

September 20, 2010
ECO-050E

No. 10-3772

IN RE: DAVID ZACKEY,
Petitioner

(Related to M.D. Pa. No. 08-cr-00221)

Present: SCIRICA, HARDIMAN and VANASKIE, Circuit Judges

- 1) Petition by David Zackey for Writ of Mandamus Pursuant to 18 U.S.C. Section 3771(d)(3), Crime Victims' Rights Act;
- 2) Response by USA to Petition for Writ of Mandamus Pursuant to 18 U.S.C. Section 3771(d)(3), Crime Victims' Rights Act;
- 3) Reply by David Zackey to Response by USA.

/s/ Tina Koperna
Case Manager (267)299-4930

ORDER

Petitioner David Zackey, victim of a fraudulent scheme perpetrated by Defendant Joseph P. Donahue, seeks a writ of mandamus to enforce his right under the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771(d)(3), to be reasonably heard at sentencing. 18 U.S.C. § 3711(a)(4). Under Count Fifteen of the Indictment, Donahue was found guilty of credit card fraud under 18 U.S.C. § 1029(a)(2) for engaging in a course of conduct in which Zackey was victimized. Zackey seeks full restitution as provided by law, including attorneys fees, and an upward departure of the sentencing guidelines. Zackey contends that the District Court failed to afford him the full scope of his rights available under the CVRA by improperly denying his motion to allow Attorney Jessica Richman to enter an appearance on the record and represent Zackey at sentencing. Because we find that the District Court did not abuse its discretion, his petition is DENIED.

The CVRA provides that 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. 18 U.S.C. § 3771(d)(1). In denying Richman's motion to enter an appearance, the District Court held that the CVRA "does not

require that [a victim] be represented by counsel when being heard, or that victim's counsel be allowed to speak during the sentencing or any other proceeding in the case," and it concluded that the assistance of the U.S. Attorney would be "sufficient for determining a proper sentence." Significantly, the District Court held that it "recognizes that David Zackey has a right to be heard regarding the defendant's sentence and any restitution ordered in this case, and nothing in this order precludes the victim from exercising that right." Subsequent to the District Court's order, the government filed Zackey's motion for restitution and attorneys fees under the name of the United States Attorney's Office. Additionally, it has represented that it will seek an upward departure of the sentencing guidelines on account of Donahue's acts that precipitated the destruction of Zackey's credit rating and caused him severe emotional trauma. Because the government has not entered into any agreement that would compromise its ability to advocate unequivocally at sentencing for the rights of Donahue's victims, these measures ensure Zackey's rights under the CVRA will not be diluted in the absence of individual counsel.

The CVRA provides that a movant denied his requested relief by a district court may petition a court of appeals for a writ of mandamus. 18 U.S.C. § 3771(d)(3). Although we assume that Congress understood the implications of using a term of art such as "mandamus" when drafting the statute, we need not decide whether to apply the traditional mandamus standard of review or the more expansive abuse of discretion standard. Even under the abuse of discretion standard, Zackey would not be entitled to the requested relief. The District Court properly recognized Zackey's interest in this matter, and the U.S. Attorney has assumed responsibility for securing these rights. The District Court's denial of Richman's motion to enter appearance on Zackey's behalf thus fell within the proper exercise of its discretionary powers.

BY THE COURT,

/s/ Anthony J. Scirica

Circuit Judge

DATED: September 22, 2010
tmk/cc: Russell P. Butler, Esq.
Bridgette Harwood, Esq.
Philip D. Lauer, Esq.
Gordon A.D. Zubrod, Esq.



Marcia M. Waldron

Marcia M. Waldron, Clerk