NO. 18-9043

In The

SUPREME COURT OF THE UNITED STATES

>>>>>>>>>>>>>>>>>>>>

BRYAN BINKHOLDER,

Petitioner

V.

United States of America

Respondent

On Petition For A Writ Of Certiorari

To The United States Court Of Appeals

For The Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

****

Bryan Binkholder,

pro se

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PO Box 1002
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QUESTIONS PRESENTED

1. Did the Crime Victims Rights Act, 18 USC 3771 (CVRA), and its 72 hour review requirement for a petition of Writ of Mandamus violate the Constitutionally protected 5th & 6th Amendment Rights of the defendant when;

A.) The defendant was not afforded the opportunity to challenge and confront claims of victimization in the writ which subsequently altered a finalized plea agreement and increased the defendant's Guideline Sentencing Range by nearly two years,

B.) Provided no means by which the defendant could challenge and overturn the CVRA Mandate even as the claims of victimization were documented from the Record to be misrepresentations while becoming the focal point of all future court decisions.

2. In granting a Petition for Writ of Mandamus under 18 USC 3771 CVRA, did the 8th Circuit Court violate the Jurisdictional time requirements of 18 USC 3771(d)(5) and subsequently violate the Defendant's Due Process Rights?

3. Did the 8th Circuit err when an individual, granted Immunity From Prosecution in exchange for cooperation, was afforded the same rights under the CVRA 18 USC 3771 and the Mandatory Victims' Restitution Act 18 USC 3663 as other victims; or should the Court have interpreted the Immunity Agreement as a form of Co-Conspirator, Un-Indicted Co-Conspirator or Deferred Prosecution Agreement which would negate restitution and CVRA rights under 18 USC 3771(d)(1)(a)?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Bryan Binkholder, pro se, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in United States v Binkholder, 832 F.3d 923 (8th Cir. 2016) No. 15-2125 filed on August 12, 2016 and also United States V. Binkholder 909 F.3d 215 (8th Cir. 2018) No. 17-2688 filed on November 20, 2018 and Petition for Panel Rehearing denied on January 25, 2019.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals remanding Binkholder's case for further consideration is reported at United States V. Binkholder, 832 F.3d 923 (8th Cir. 2016). The opinion affirming the lower court in the most recent direct appeal is found at United States v. Binkholder 909 F.3d 215 (8th Cir. 2018). Petition for Panel Rehearing was denied January 25, 2019.

The unpublished Judgment in a Criminal Case of the district court is reproduced in the Appendix, attached hereto.

JURISDICTION

The Eighth Circuit's jurisdiction was based on 28 USC §1291. Jurisdiction of this Court is invoked under 28 USC §1254 (a). The Court of Appeals for the Eighth Circuit affirmed the conviction and sentence on January 25, 2019 with its denial of a Pro Se motion for Panel Rehearing. This Petition is filed within 90 days of that date pursuant to the Rules of the United States Supreme Court, Rule 13.1.

STATEMENT OF THE CASE

I. Indictment

August 13, 2014 Petitioner, Bryan Binkholder (Hereafter referred to as "Petitioner," "Binkholder," "Defendant"), was indicted on four counts of wire fraud in violation of 18 USC 1343, one count of bank fraud in violation of 18 USC 1334 along with a forfeiture allegation. (Doc. 1).

As relevant, Binkholder and his business partner (referred in court papers as "M.U.") operated various entities in the St. Louis Area involved in real estate and hard money lending. Beginning in approximately 2006, the purpose of their companies was to purchase and rehab homes. Binkholder and M.U initially began by using their own funds. (Doc. 143). To provide additional capital, M.U. and Binkholder established Private Placement Memorandums under the rules for Regulation D. Offerings. (MU Evidentiary Hearing Exhibits UB UC). Most of the investors into the "Hard Money Lending Entities" were Binkholder's clients from his Registered Investment Advisory Firm (Doc 143.). M.U. was a client of Binkholder's firm, active partner in the real estate and hard money lending entities and an investor in the Private Placements. In the Curriculum Vitale of the offering documents, Binkholder and M.U. listed their business experience and background for potential investors to evaluate (Doc. 115, Exhibit UA). The companies ended up making 178 loans from 2008-2014 in the amount of $10,835,742 (Doc. 143). Some rehabbers did however, default on their loans. M.U. and Binkholder took the properties back and maintained them as rental homes until such time as they could sell them.

In June 2011, the USPS opened an investigation on Binkholder after a referral from the Missouri Secretary of States Office--Securities Division. On December 31, 2011 Binkholder settled with the state via a consent order. Binkholder consented that he had failed to disclose potential conflicts of interest and commingled funds across various companies creating a potential conflict of interest. (Missouri Order Case No. AP-11-29, Secretary of State).

M.U. and Binkholder continued to work together throughout the state investigation and the USPS investigation. In January 2013, MU negotiated Immunity From Prosecution in return for cooperation with the government as they investigated Binkholder. (Doc. 115, pg 79). Binkholder was fully aware of the Immunity Agreement and the two continued to work closely together.

Approximately one month prior to the Indictment, MU and Binkholder had completed the sale of 32 properties to Hamilton Investments through an owner-financed sale. (Doc. 143). After Binkholder was indicted, Lis Pendans were placed on the properties involved in the sale along with other properties owned by MU and Binkholder. (Doc 143.).

II. PLEA AGREEMENT

On January 8th, 2015, Binkholder pled guilty to the four counts of wire fraud while the government agreed to dismiss the bank fraud charge at the time of sentencing. (Doc. 92). Binkholder agreed that during the course of the Hard Money Lending Program, he made materially false and fraudulent representations, promises and material omissions of fact to the investors. (Doc. 92). In addition, he routinely commingled investor funds across a number of different accounts associated with Binkholder's businesses. (Doc. 92).

In the Guilty Plea Agreement, the parties stipulated to a number of enhancements including the number of victims, the use of sophisticated means, and abuse of trust. (Doc 92). The parties further agreed that restitution would be determined by the district court pursuant to the MVRA 18 USC 3663A along with forfeiture of assets. (Doc. 92, Pg. 14, 16).

Of relevance, the sole area of dispute within the Guilty Plea Agreement revolved around the role of M.U. (Doc. 92, Pg. 11) The government contended M.U. was a victim of Binkholder's and his investment of $1,075,000

in the various entities should be included in the loss enhancement. (Doc. 92 Pg. 7-8). Binkholder maintained M.U. was an actively involved partner who was given immunity from prosecution in return for assisting the government. As such, M.U. should not be considered a victim for sentencing purposes. Per the plea agreement, the parties agreed to allow the district court to determine if M.U. was a victim or not "For sentencing purposes." (Doc. 92 pg. 7-8).

If determined by the district court to 'not be a victim for sentencing purposes, the loss stipulated in the plea--without M.U.-- was approximately $2,332,969. (Doc 92, Pg. 7) Based on the 2013 Federal Sentencing Guidelines a loss of $1 Million to $2.5 Million would result in a loss enhancement of 16 levels (USSG 2B1.1(b)(1)(I). The resulting total offense level would be 26 with 3 levels having been deducted for Acceptance of Responsibility. (Doc92)

If determined to 'be a victim for sentencing purposes' the parties stipulated that the loss to M.U. was approximately $1,075,000 for a total loss of $3,407,969. (Doc. 92). This would result in an 18 level enhancement based on a loss greater than $2.5 Million but less than $7 Million. USSG 2B1.1 (b)(1)(J).(Doc 92). This would result in a total offense level of 28 after the 3 levels deducted for acceptance. Sentencing was set for April 10th, 2015, although it would later be moved to May 15, 2015. (Plea Hearing 91).

III. M.U. EVIDENTIARY HEARING---Victim Status Determination

January 27, 2015, the district court conducted an evidentiary hearing to determine if M.U. was a victim under the sentencing guidelines (Doc 115). M.U testified of his past experience as a sales executive at Ralston Purina and his many years of working with Binkholder. He admitted he was aware of the commingling of funds from one program to another which gave rise to the charges against Binkholder and that he himself engaged in similar conduct to cover shortfalls. (Doc 115, Pg.85). He also admitted that he had 90% plus decision

making when it came to approving loans and that we was solely responsible for 'escrow accounts' which were set up by M.U. to fund repairs on properties in which their companies lent money. (Doc 115, Pg 31-35). These accounts ended up being depleted without any work being done on the properties. M.U. admitted that he had improperly distributed funds and that Binkholder had no access or control on these accounts. (Doc 115, Pg 64, 81). An F.B.I. agent testified they were not aware of the depleted escrow accounts by M.U. although they were aware of his commingling of funds from one program to another. (Doc. 115, Pg 98)

After the hearing, Binkholder filed an additional brief arguing M.U. should not be considered a 'victim for sentencing purposes' and listing all of the information revealed at the evidentiary hearing. (Doc. 101).

IV. DISTRICT COURT DETERMINATION --- M.U. NOT A VICTIM FOR SENTENCING PURPOSES

On February 9, 2015, the district court issued an order finding M.U was 'Not a Victim for Sentencing Purposes.' (Doc. 102). The district court concluded although M.U. may have lost some money through his involvement with Binkholder, such loss was due to his complicit relationship with Binkholder and his own involvement in Binkholder's criminal scheme. (Doc 102, Pg 3-4).

First, he was a clearly sophisticated businessman and his own testimony indicted he was aware of the commingling of funds. M.U. himself admitted to using money from one program to another to fund shortfalls. Further, although M.U. attempted to distance himself from the programs, his own testimony belies his blamelessness. (Doc. 102 Pg. 3).

On February 27, 2015, M.U. filed a 'Motion to Intervene' and a motion to reconsider or in the alternative motion for relief pursuant to FRCP 59 & 60 pursuant to the Crime Victims Rights Act (CVRA 18 § USC 3771).("Motion to Reconsider") (Doc. 105, 106).

As relevant, M.U.'s Motion to Reconsider was the 1st occurrance of the term CVRA and its statute, 18§ USC 3771. Until this point, the case was devoid

of any discussion of the CVRA. Instead, the Guilty Plea Agreement simply noted that the parties 'disagree as to whether M.U. is a victim of Binkholder's scheme.' (Doc. 92, Pg 7). The district court's order of February 9, 2015 holding M.U. was not a victim for sentencing purposes was similarily devoid of any CVRA language.

On March 3, 2015, M.U. filed a reply in support of his Motion to Reconsider. (Doc. 108). In this filing he would include new information from the Bond Revocation Filing by the government. March 3, 2015, the district court denied M.U.'s motion noting that "even if M.U. were a victim under the CVRA, the court does not believe that he has a right to intervene in Binkholders criminal case." (Doc 110, Pg 1). "[I]n any event, even if the court were to allow M.U. to intervene, the Court's decision would not be different." (Doc. 110, Pg 2).

V. Finalization of Plea Agreement and Creation of The PSR

Pursuant to the guilty plea, the sole disputed item of the agreement had been finalized and MU was not a victim. This resulted in a stipulated loss of $2,332,969 and a corresponding 16 level enhancement for a loss between $1 Million to $2.5 Million (2B1.1(b)(1)(I). A PSR was created showing M.U. to not be a victim and noting MU's testimony from the evidentiary hearing of his commingling of funds and other involvement in the scheme. Binkholder motioned for an extension to file replies to the PSR and it was granted. (Doc. 118,119)

VI. Bond Revocation Hearing & Revocation

Around the same time, the government filed a petition to revoke Binkholder's pretrial release. (Doc. 103). The government alleged Binkholder had tried to sell certain properties ("Hamilton Properties") fraudulently out from under the governmnet. These properties had been sold one month prior to the Indictment through an owner-financed sale (Doc. 143, Pg11). Hamilton was supposed to be making paymnets on the loan but had ceased sometime after Binkholder's indictment. (Doc. 103, 143). Binkholder testified at the bond

hearing that he had approached his attorney who then approached the AUSA Stephen Casey to undo the sale and work had begun on unwinding it. (Doc. 195) He testified he had sold three properties since his indictment, all of which had Lis Pendans on them, using a protocol of bringing legitimate offers to purchase to the government for approval. (Doc. 195, Pg. 6-7).

Of particular relevance to this Certiorari, in December of 2014, Kyle Sprysa had contacted Binkholder's realtor about properties he had available for sale. Sprysa had previously purchased four properties from Binkholder in December of 2013. (Doc 143, Item 31). Binkholder offered homes from the 'Hamilton Properties' under his belief the deal was being unwound. (Doc. 195, Pg. 8). Binkholder had emailed M.U. about the potential sale on December 31, 2014. Binkholder described the terms of the proposed deal and wrote "I'm going finalize it [sic] and give it to Stephen Casey [AUSA] and see if he'd approve it (doubtful but will try).....I'll forward the info once I get it from Ray/Kyle." (Doc 240-2, Bond Hearing Exhibit). M.U. replied one day later on January 1, 2015 saying "Thanks for update. Have a better year". (Doc. 240-2). Binkholder was also questioned during the bond revocation hearing by AUSA Casey (Doc. 195).

On March 12, 2015 Magistrate Judge Noce revoked Binkholder's bond based on the grounds his conduct was similar to what he had pled guilty. Citing the Bond Reform Act, he noted the court must find by Clear and Convincing evidence that the defendant was not likely to continual criminal acts if released. (Doc 116).

VII. WRIT OF MANDAMUS PETITION

On April 27, 2015, M.U. filed a Petition for a Writ of Mandamus under 18 USC 3771(d)(3) of the Crime Victim's Rights Act. (Doc. 128). The petition came fifty-five days (55) after the district courts denial of M.U's Motion to

Reconsider on March 3, 2015. New claims of victimization were included in the Writ of Mandamus. Specifically, M.U. claimed that "Binkholder has taken additional steps to victimize M.U. because the conduct that precipitated the revocation of Binkholder's bond was Binkholder's attempt to sell [properties in which MU had a financial interest] without informing MU." (Doc. 128 Pg 18-19)

This was shown from the record and exhibit during the bond hearing to be contrary to the evidence produced and admitted into hearings by binkohlder. Under 18 USC 3771(d)(3), the Appellate Court took up the Writ of Mandamus and decided within 72 hours. On April 30, 2015, the Court issued a Mandate directing the district court to vacate its February 9, 2015 order and to enter an order recognizing M.U. as a crime victim pursuant to the Crime Victim's Rights Act 18 USC 3771. The Judgment was issued a day before on April 29, 2015. (Doc. 129, 130). The district court then vacated its previous orders of February 9 and March 3, 2015. (Doc. 131).

VIII. Sentencing Hearing

A new PSR was created pursuant to the CVRA Mandate and order. Binkholder's sentencingguidelines range increased by 2 levels due to the inclusion of M.U. as a victim for sentencing. This represented a loss between $2.5 Million to $7 Million when including M.U.'s $1,075,000. (2B1.1(b)(1)(J) The revised PSR calculated a total offense level of 31 which did not include a 3 level reduction for acceptance of responsibility due to the bond revocation. With a criminal history of Category I, Binkholder's advisory guideline range was now 108-135 months as compared to the 87-108 prior to the M.U. Mandate and 63-78 months prior to the loss of acceptance.

Binkholder objected to the inclusion of M.U. for sentencing purposes Regarding M.U. the district court '[stood] by the 8th circuit decision' and included M.U's investments in the loss enhancement.(Doc. 156, p9.). Ultimately the district court sentenced Binkholder to 108 months followed by 3 years

supervised release and ordered him to pay $3,655,968.89 in resitution which included $1,205,000 to M.U. and $274,000 to Bank of America(Doc. 156). A timely appeal followed. (Doc 148).

IX. Initial Appeal --- Binkholder I

On January 4, 2016 Binkholder filed his appellant brief arguing six issues. Concerning M.U. and the CVRA Designation, Binkholder argued the Plea Agreement was a defendant-centric question focusing on Binkholder's culpability and it revealed the parties disagreement on M.U.'s involvement and complicity. The CVRA was a victim-centric inquiry focusing on victim's rights and voice rights predominatly with a clause for restitution. (Appellant Brief 15-2125).

Binkholder also directed the Court's attention to the Record and MU's misrepresentations of continued victimization by Binkholder in his Writ of Mandamus Petition. (Appellant Brief 15-2125 Pg. 33 Footnote 3).

> "MU additionally misrepresented in his petition for writ of mandamus the evidence adducced at Mr. Binkholder's revocation of bond hearing. In M.U.s petition, he accuses that Mr. Binkholder "has taken additional steps to victimize [M.U.] because the conduct that precipitated the revocation of Mr. Binkholder's bond was Mr. Binkholder's attempt to sell [properties in which M.U. had a financial interest] without informing [M.U.]." (citing Doc 128, pg 18-19). However, this arguement is wholly repudiated by the evidence at the bond revocation hearing that included an email from Binkohlder to M.U. specifically discussing the possibility of that sale. (Doc. 195)

X. Appeals Court Judgment

On August 12, 2016, the 8th Circuit Court issued it's opinion finding that the April 29th decision by the Court determining M.U. to be a victim pursuant to the CVRA 18 USC 3771 did not require that M.U. also be a victim for sentencing purposes. "The determination of who is a victim under the CVRA is not necessarily dispositive of who is a victim under the Sentencing Guidelines." (United States v. Binkholder 832, F.3d 923 (8th Cir., 2016). The Court recognized that its previous mandate resolved the question of M.U.'s victim status for restitution. The court held, however, that the case should be remanded for further consideration of whether M.U. should be considered

a victim of Binkholder's scheme for purposes of sentencing. "[T]he district court appears to have concluded at sentencing that our Mandate requiring the [district] court to recognize M.U. as a crime victim pursuant to the CVRA also required it to find M.U. was a victim for Guidelines purposes." ID.

In dissent, Judge Gruender wrote that he felt if one is considered a victim under the CVRA then they must also be a victim for sentencing purposes. In speaking of the term 'victim', he wrote that the "CVRA appears to provide the narrower definition". (ID, Pg 16). "[A] finding that a person is a victim under the CVRA's narrower definition necessarily requires finding that the person is also a victim under the apparently broader definition in the Guidelines." (ID, pg. 16).

XI. Remand and Victim Intervention

On September 15, 2016 the district court ordered the parties to submit briefings as to whether MU was a victim for sentencing purposes. DOC. 202 The parties submitted briefs. (Doc. 203, 204, 205). On December 30, 2016, nine of Binkholder's victims moved to be heard through their counsel, James Bick ("Bick"). They requested a modification of the restitution order. (Doc 210) Citing MU's complicity, the victims argued that there were threee types of victims and each should be treated differently in terms of priority for restitution. They viewed MU as complicit in Binkholder's scheme and his Immunity From Prosecution in return for assistance as evidence that he was more of a Co-Conspirator than victim. (ID).

On March 15, 2017, MU agreed to the Subordination of his restituion claims. (Doc. 222). On April 4, 2017, the district court delivered its opinion that the Victim's would receive priority restitution followed by Bank of America and M.U. (Doc. 227).

XII. District Court Victim Determination of M.U.

On May 3, 2017, the district court issued a Memorandum and Order finding that M.U. 'was a victim for sentencing purposes.' (Doc. 237) The

district court concluded that the 'unrebutted evidence' showed that "MU's money was used to further Binkholder's scheme, without the knowledge of M.U." (Doc 237, pg5). The order noted Binkohlder's filing failed to cite any evidence to support his contention that MU was not a victim other than the district court's February 9 2015 order. (Doc 237 pg5). "Thus, this [district] Court's February 9, 2015 Order cannot constitute evidence to support Binkholder's position." (ID). The reason for this was the order had been vacated by the 8th Circuits CVRA Mandate on April 29, 2015.

The district court took the additional step of basing its decision on the dissenting judges opinion from the appeal. "Given the CVRA's narrower definition of a victim, the [district] Court holds that M.U. 'must be a victim' under the broader definition of a victim in the Sentencing Guidelines." (ID) (Emphasis added). No new evidence was submitted to make this determination. The sole evidence were the briefs and the MU Evidentiary Hearing from 2015.. (Doc 203, 204, 205, 115).

XIII. Resentencing After Remand

Both Binkholder and the government filed sentencing memorandums prior to resentencing. (Doc. 240, 241). Binkholder argued that the district court should use the 2016 Sentencing Guidelines which were revised 5 months after the defendant's original sentencing in May 2015. These changes would afford Binkholder a 2 level reduction for the loss enhancement whether MU was considered a victim or not. He also argued for acceptance of responsibility for his assistance with the victims and their attorney. This included transferring $3,417,547.68 in company assets to a victim's trust. (Doc. 234-2) Attached to the memorandum was a letter from victim's attorney Bick describing the efforts of Binkholder to assist the victims. (Doc 240-1). Also included was the email from Binkholder to MU alerting him of the potential sale of properties which he had claimed in his Writ not to have known of. (Doc 240-2).

At sentencing, Judge White again sentenced Binkholder to the same 108 months and declined to use the new 2016 Sentencing Guidelines. A timely appeal followed.

As relevant, Binkholder's attorney, Joel Schwartz was unaware of the May 3, 2017 order recognizing MU as a Victim. This was learned by Counsel and Defendant at resentencing on May 8 2017. Due to this, Counsel was unprepared to object and argue many of the issues of MU, the CVRA/MVRA, and other issues of importance found in this Writ of Certiorari. (Doc 270 pg 3).

XIV. Subsequent Appeal-- Binkholder II US v Binkholder 909, F.3d, 215 (8thCir)

In Binkohlder's subsequent appeal, he argued the district court had erronously determined the victim status of MU when the district court wrote that MU Must be a victim since the CVRA was narrower in determining the status of a victim. The case had been remanded to determine if MU was a victim under the guidelines and as such, if MU 'Must be a victim' the Court would have never needed to return it to the district level. (Doc 17-2688 Appellant brief).

Of relevance, once again Binkholder also argued the Record showed information within the Writ of Mandamus to be fraudulent and his claims of victimization attempting to sell properties without MU's knowledge were proven to be untrue. Binkholder also challenged the restitution being paid to MU due to his involvement and Immunity Agreement with the Government noting MVRA Case law of co-conspirators. (Doc Appellant Brief 17-2688).

The government filed its brief arguing Judge Gruenders view that the victim definition under the CVRA was narrower and thus MU had to be a victim for sentencing purposes was correct (AppellateBrief 17-2688). "Judge White [district court] had reasoned that MU must be a victim under the broader definition in the sentencing guidelines given this Court's [8th Circuit] mandated MU Victim Status under the CVRA." (ID).

On Novermber 20, 2018 the 8th Circuit affirmed two parts of the decision while it refused to hear two other arguments. As to MU, the Court

noted that "We did not describe the CVRA definition of a victim as narrower than the guideline definitions. Nevertheless, we do not believe the [district] courts ultimate decision--that MU is a victim under the guidelines--was erronous." (Binkholder II, 909 F. 3d, 215 (8th Cir, 2018).

XV. Binkholder Pro Se Petition for Panel Rehearing

On December 4, 2018, Binkholder and his previous counsel disagreed on various issues including not arguing violations of CVRA rules. Counsel agreed to remove himself along with requesting more time for Binkholder to file a request for a panel rehearing. This request was approved and a new deadline set for January 4, 2019.

Binkholder filed his Pro Se motion asking the court to consider some of the legal issues missed and misconstrued. Binkholder argued that statute requirements for filing petitions of Mandamus Relief were violated by MU and missed by the Court and his counsel. Per 18 USC 3771(d)(5), Limitations on Relief; Binkholder noted the requirement that a writ of mandamus must be filed by a victim within 14 days of being denied in the district court if they are seeking to re-open a plea. Since MU's writ and mandate altered Binkholder's finanlized plea and increased his Federal Sentencing Guideline range by nearly two years, MU had re-opened his plean. Having filed his Mandamus Petition fifty five days (55) after being denied in district court on May 3, 2015, this was an obvious procedural error.

Binkholder once again challenged the'Fraud withing the Writ' by again alerting the Court to the Record and the email to MU from Binkholder alerting him of the very sale he claimed in his writ to have no knowledge of. (Rehearing Petition, Doc 240-2). Binkholder also challenged the lack of due process and rights to confront his accusser and challenge the writ of mandamus. In not affording him of Due Process Rights and 6th Amendment Confrontation rights, Binkholder argued he was subjected to a longer prison sentence due

to the increase in his sentencing guideline range from MU's inclusion. Lastly, Binkholder argued that the CVRA determination by the Court voided his plea agreement because the parties never contemplated the CVRA Designation and a third-party being able to disturb the plea made between the Government and Binkholder.. Using the May 3, 2017 district court order, Binkholder suggested Judge White never considered the facts that led him to his decision two years earlier that MU 'was not a victim' but instead looked to the CVRA determination as the main determinator. In Binkholder's view, the CVRA had become the Focal Point by which all decisions had been made in this case.

On January 25, 2019, the Court denied Binkholder's request for a panel rehearing. On February 5, 2019 a Mandate was issued by the Court. This certiorari now follows pursuant to 28 USC §1254(a). This certiorari is being filed within 90 days of denial by the 8th Circuit Court of Appeals and the petition for a panel rehearing on January 25, 2019.

Bryan Binkholder filing Pro Se is a prisoner in the Federal system currently located at Thomson Federal Prison Camp ID 41868-044. As such, rules for prisonsers confined in an institution apply and are being followed.

REASONS FOR GRANTING THE PETITION

Petitioner prays the Court will address important and compelling legal questions of the Crime Victim Rights Act 18 USC 3771 which are found within this Certiorari. Petitioner is unaware of any challenges to this Court concerning the CVRA, however this case has set precedent in areas which substantially violate constitutional rights of the accussed. While circuits are split on the issue of standard of review for mandamus petitions, no court has ruled or decided on issues concerning a Mandamus Petition altering a defendant's finalized plea and increasing the defendants Guideline Sentencing Range.

Only the 9th Circuit in Kenna and the 8th Circuit in this case have even addressed the 72 hour review requirement of 18 USC 3771(d)(3) and its implications of Due Process violations. They have both, however, varied in their approaches. In regards to the Limitations and Enforcemnt of the statute, 18 USC 3771(d)(5), the Act has jurisdictional time requirements which were violated by MU when he filed his Writ outside of 18 USC 3771 (d)(5) rules.

Finally, the Petitioner requests the Court decide how the courts should view a individual given Immunity from Prosecution who admits complicity in the defendants scheme but is allowed to seek restitution via the CVRA/MVRA. Case law is non-existent when it comes to Immunity Agreements and how Courts should view these contracts. While the CVRA states that "[A] person accussed of a crime may not obtain any form of relief under this chapter [section]," in this case the court allowed MU to still attain rights under the CVRA and the MVRA. See 18 USC 3771(d)(1)(a). The Petitioner prays this Court reviews the 8th Circuit's Opinions along with the case law from various circuits and grant this Certiorari request.

Due Process rights of the 5th Amendment and 6th Amendment Rights to confront your accusser are Constitutionally safeguarded rights of the accussed. Many times in the past, the courts have victims of crimes as silent bystanders with no rights. With the creation of the CVRA in 2004, Congress attempted to give Crime Victims rights to be a part of the process and to have their voices heard.

The CVRA, Pub L. NO. 108-405, 118 Stat 2261 (codified at 18 USC 3771) is part of the Justice for All Act of 2004. Originally there were eight rights of which all were voice rights to be heard, except for the right to restitution. See 18 USC 3771(a). These rights include rights to be heard, rights to be protected, rights to be a part of the process, right to be treated fairly and rights to be informed. On May 29, 2015, the statute was amended and two additional rights were added which included the right to be timely informed of a plea bargain or deferred prosecution agreement and rights to be informed. See 18 USC 3771 (a) 1-10.

Petitioner notes that in a review of cases on the district and Appellate level, most cases and Mandamus petitions revolve around being heard at sentencing and submitting victim impact statements. Courts have ruled since the implementation of the CVRA that those two items do not violate a defendants rights and a defendant does not have a right to confront their accusser in the sentencing context nor their Impact Statements. United States v Green, 718 Fed. Appx. 141, (3rd Cir., 2018)(while not subject to confrontation or due process rights [victim impact statements] still must have some 'minimal indicium of reliability'beyond mere allegation to be admissible at sentencing) United States v. Robinson, 482 F.3d 244, 246 (3rd Cir.2007)(Both the supreme court and this court of appeals have determined that the confrontation clause does not apply in the sentencing context).

Petitioner thoroughly agrees that the CVRA was and is an important act for victims rights and the Criminal Justice System. Just like many laws,

however, good intentions meet reality and produce a concoction of unexpected results. It is the courts duty to reign in laws that violate Constitutional Rights. In this case, a law designed to provide crime victims with the rights to be heard and other "voice rights" has instead produced a result contrary to established Constitutional Rights and Due Process. This was done when a Third-Party (non-party in court decisions), was allowed to intervene and disturb a finalized plea even as it violated the time requirements of 18 USC 3771(d)(5).

The courts have consistently ruled that Victims' are a non-party and cannot intervene in a criminal case. Nor are they allowed Appellate Rights even for restitution which is predominantly covered by 18 USC 3663, MVRA. See United States V Monzel 641 F.3d 528, (DC Circuit, 2011); United States V Aguirre-Gonzalez 597 F.3d 46 (1st Cir,2010). As such, a "Writ of Mandamus is a crime victim's only recourse for challenging a restitution order." (Quoting Monzel at 540.

These rules for advancing a Petition of Writ of Mandamus, however do carry requirements on the part of the victim who is asserting their right. As spelled out under the "Limitation of Relief" of 18 USC 3771(d)(5):

> (5) Limitation on Relief. In no case shall a failure to afford a right under this chapter [section] provide grounds for a new trial. A victim may make a motion to **re-open a plea** or sentence only if-
> (A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;
> (B) the victim petitions the court of appeals for a writ of mandamus **within 14 days;** and
> (C) in the case of a plea, the accussed has not pled to the highest offense charged.
> This paragraph does not affect the victims right to restitution as provided in title 18, United State Code

Courts have continually noted the importance of the time requirements of 18 USC 3771 because of the myriad of issues involved in a criminal case. The courts in United States v. Slovacek 699 F.3d, 423 (5th Cir.2012), and Aguirre-Gonzalez have specifically pointed out the 14 day requirement. In

fact, the Aguirre-Gonzalez court pointed out the importance of time requirements.

> "The CVRA plainly evisions that crime victims' petitions challenging a denial of their rights will be taken up and decided in short order It requires expeditious consideration by the district court, quick appellate review, and provides that a victim may not move to disturb a defendant's plea or sentence unless, among other things, "the victim petitions the court of appeals for a writ of mandamus within 14 days" of denial of the victim's motion in the district court. Citing 18 USC 3771(d)(3), 3771(d)(5).

While the Aguirre-Gonzalez court took the position that the 14 day requirement was after denial by the district court, the District Court in Northern District of Alabama, Southern Division in United States V. Thetford, 935 F. Supp. 2d 1280, 2013 U.S. Dist. Lexis 45751 took it even further by denying a victim's assertion of their rights in the district court citing 18 USC 3771(d)(5) but ruling that since the plea was finalized on March 11, 2013 and the crime victims' attempt to re-open the plea came 18 days later on March 29 it was outside the time allowed for a victim to re-open a defendants plea per 3771 (d)(5).

> "[S]he did not assert and have denied her right to be heard at the plea hearing; she did not petition the court of appeals for mandamus within 14 days of March 11, 2013."
> Thetford, 935 F. Supp. 2d 1280, US Dist. Lexis 45751

While denying the victims request to "re-open the plea" the court still granted voice rights and restitution under 18 USC 3771(a). "Although not entitled to have the plea re-opened, the Winsletts are still entitled to certain rights under the CVRA." ID.

Recently in Federal Insurance Company v United States 882 F.3d 348 (2nd Cir.2018) the court there also noted the 14 day requirement for a victim to petition the court of appeals for CVRA rights. They took a totally different view of the courts in the 1st and 5th Circuits by viewing the 14 day requirement of 18 USC 3771(d)(5) to only deal with re-opening a plea or a sentence. While they ended up sidestepping the issue and using another means to rule on the Mandamus Petition, they seemed to view "restitution rights" as not controlled by the 14 day filing timeline under the act. They noted that since the MVRA

controls the restitution process and since it is mandated to be done at sentencing or within 90 days of sentencing Congress must not have intended the 14 day requirement to petition the court via a writ of mandamus to apply to restitution claims. ID at 360.

Regardless of how this Court would interpret the statutory rules of 18 USC 3771(d)(5), the fact remains the 8th Circuit clearly errored and violated a jurisdictional time requirement when granting MU's writ. The plea agreement Petitioner entered into with the government was accepted by the district court on January 8 2015 (Doc 92). The **sole disputed item** of the plea was the victim status determination of MU. Being a co-equal business partner of Binkholder's for nearly 10 years, the Petitioner viewed MU as a fully complicit partner who had done the vary things that he had been charged with doing. The mere fact that the government had granted MU Immunity From Prosecution spoke for itself. If MU wasn't guilty of crimes, then why the need for Immunity? On the flipside, the government claimed he was a victim. The two parties began in November 2013 discussing plea options and the entire dispute revolved around the loss amount and the status of MU. The government even offerred inducements for Binkholder to plead guilty "IF" he would accept MU as a victim. Binkholder rejected these offers and eventually he was indicted. Even after indictment, Binkholder's counsel negotiated 2 plea agreements. One with a "hard 26 points" which would include MU as a victim and restitution to him in the full amount of atleast $1,075,000 but only $130,000 would be included for the Loss enhancement thus resulting in a loss between $1 Million to $2.5 Million and a 16 level enhancement. Binkholder refused this and instead opted with the Plea Agreement he entered into that left the determination up to the district court and the potential for a higher Sentencing Guideline Level if the district court ruled in favor of MU.

Binkholder would have never entered into such an agreement if he had known that there was no way for him to win the status determination of MU.

With the plea agreement being accepted by the district court on January 8, 2015, an evidentiary hearing was held on January 27, 2015 to determine the status of MU for the purposes of sentencing. On February 9, 2015 the district judge issued his order that MU 'Was not a victim for sentencing purposes.' (Doc 102) At this point the plea became "finalized" and pursuant to the plea agreement the loss enhancement would be 16 levels for a loss of $1 Million to $2.5 Million. See 2B1.1(B)(1)(J)

While up until this point there has **never been** any discussion of the CVRA and the plea, plea colloquy and hearing are void of such language; even if one to be persuaded the term "victim" in the plea could include the CVRA's definition or the MVRA's then the proposition fails because of 18 USC 3771 violations under (d)(5).

Taking the courts view in Thetford , the plea was finalized on February 9, 2015 and MU's Motion to reconsider wasn't filed until March 3. This is well outside the 14 day rule. Even if what most courts have considered the standard that once a victim is denied in district court they have 14 days to petition the appellate court in order to re-open a plea or sentence,the proposition also fails. See In Re: Allen 701 F.3d 734 (5th Cir,2012); (the only time limit described in the statute applies when a victim seeks to reopen a plea or sentence).

When MU was denied his Motion to Reconsider on March 3, 2015 the 18 USC 3771(d)(5) clock began for his 14 days to petition the Court. This was especially true since in seeking to be ruled a victim, it would "re-open" Binkholder's plea and subject him to a higher Federal Sentencing Guideline Range. By filing his writ of Mandamus on April 27 2015, he obviously was well outside the window allowed under 3771 (d)(5).

One may argue MU was only fighting for CVRA rights pertaining to restitution since it was mentioned multiple times along with the MVRA which deals with restitution. If this is the case, then in granting the Mandamus

the 8th Circuit should have ruled as other circuits and denied the CVRA writ but written for the court to decide for MVRA purposes--which was already in the plea agreement. MU already had voice rights since he was under an Immunity Agreement and there was no mention of 'reopening the plea' in his Mandamus petition. Zero. Either way this order should be vacated by this Court due to either Jurisdictional time violations under 3771(d)(5) or if this Court were to view his writ as purely for restitution and not to be held to the 14 day requirement as the court in Federal seemed inclined; the Peitioners Plea was disturbed and should be reset to its place prior to the MU writ.

Due Process and Confrontation Clause Violations

Besides the time violations of 3771(d)(5), an entire pandora's box has opened up because the Writ contained misrepresentations that have been proven from the Record itself to be false (doc. 240-2). The Petitioner has tried in every subsequent direct appeal and resentencing to direct the courts to the misrepresentations and obvious fraud within the writ. The problem appears to be there exists no means of review once a Mandate has been issued for the CVRA. With only 72 hours to review under 18 USC 3771(d)(2), the defendant's due process rights and 6th Amendment rights to confronting his accusser were violated. In fact, the 8th Circuit appears to have even decided this writ in 48 hours since it was filed April 27th and decided April 29.

Petitioner understands that the saying "Fruit of a Poisenous tree" refers to search and seizure laws, however, the visual fits appropriately in this case. Every decision reached from Petitioners sentencing in 2015, Binkholder I in 2016, Resentencing in 2017 and Binkholder II in 2018 have all been viewed through the lens of the CVRA Mandate. One need not look any further than the district court's determination in 2017 that MU was a victim. The Judge wrote, "MU must be a victim".

> "Moreover, the Eighth Circuit has already determined that MU is a 'victim' under the CVRA.....Given the CVRA's narrower definition of a victim, the [district] Court holds that MU **must be a victim** under the broader definition of a victim in

the Sentencing Guidelines." (Doc. 237, Pg. 5). Emphasis added

When given the opportunity during a full day hearing on January 27, 2015, Binkholder showed MU to be involved in the very acts he was charged with and even more. Binkholder's filing after the hearing evisorates the idea that MU was a victim. (Doc. 101).

MU was aware of the commingling of funds from one program to another and participated in it. He had extensive investment and Business evaluation experience that transcended his involvement with Binkholder (Doc 101, #18) He alone controlled escrow accounts meant for rehabbing homes that were only to have funds released after work was completed. These accounts mysteriously were depleted without work being completed. He alone controlled these accounts so it could not be blamed on binkholder. The FBI also was cross-examined and testified that they were not aware of the escrow account missing funds. (Doc 101 Items 29-31). The veracity of MU's claims and truthfulness were also questioned in the hearing. He testified he took a loan out on his own home in order to raise capital for the cmpany but later under cross examination MU "remembered" that the funds were actually used to fund a cash-value life insurance policy with a $2.9 Million dollar death benefit and cash value accumulation for retirement. This was for him and his family. (Doc 101, 49, 50) The mortgage on his house to fund the policy was then paid for by a "salary" from one of the companies in the exact amount of his mortgage. Ironically, the Petitioners own home went into forclosure in 2012 so the companies were obviously not paying his mortgage. (PSR 143).

Yet when MU filed his Writ of Mandamus, the petition was cherry picked with examples without including the cross examination or other information. As noted, it also included the new claim of victimization (Doc 128, pg 18,19). Included in the Case Setting are the details of the claims which revolved around Binkholder supposedly attempting to sell properties out from under MU.

Binkholder was unable to point out to the Appellate court that the truth of the issue was found in the bond hearing and AUSA Casey's own questioning of Binkholder on an email sent from Binkholder to MU concerning the sale in question. (Doc 195). Confounding the situation more, MU submitted only the exhibits of the government and did not include Binkholder's exhibit at the hearing which was the email alerting MU of the sale. (Doc 128, exhibit list). Binkholder included this entire email in his Petition for Panel Rehearing on January 4, 2019 but again, the Appellate Court has never written or ruled on the Fraud within the writ that he has continually pointed out.

This is not new. Throughout the case, Binkholder has attempted to attain Due Process rights to confront the misrepresentations in the writ. In Binkholder I in his appellant brief he spelled out the misrepresentations as was highlighted in the Statement of The Case. (Appellent Brief 15-2125 pg.33) In Binkholder II he once again cited the fraudulent statements within the writ. (Appellant Brief 17-2688 Pg. 18). The court never addressed the elephant in the room and never addressed the Due process concerns they had expressed in Binkholder I, Footnote 4. As Petitioner will expand upon, the writ of mandamus is an extraordinary remedy. By granting the writ, the court altered the defendant's plea. The defendant's basic right to confront his accuser and their claims was granted in the MU Evidentiary Hearing, however now in the writ, this right was violated. The 8th circuit ironically in United States V. Kohley 784 F.2d, 332,334 (8thCir, 1986)(per curiam) wrote:

> "The Due Process Clause of the Fifth Amendment is implicated when a sentencing court considers evidence that the defendant had no meaningful opportunity to rebut and only then when that consideration results in a sentence based on material misinformation."

How much of the one-sided arguments in the writ moved the Judges one will not know. Was it the misrepresentations made of the new claim of victimization? Again, one cannot say for sure but the result is obvious. Faced with a 72 hour requirement to decide, the court took 48 hours and issued their ruling. The district court, on the otherhand, experienced a full day hearing and then

ruled 13 days later. This Court is asked by the Petitioner to examine the procedural requirements of 18 USC 3771. Did the 8th Circuit know about the Immunity Agreement that MU acquired? Did they understand and even know that MU was the **sole disputed item** in the plea agreement? Obviously, 72 hours or this courts 48 hours didn't allow them to fully understand the Record. Were they even able to review the MU Evidentiary Hearing Transcript?

> "The established safeguards of the Anglo-American Legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." United States V Crenshaw 359 F.3d, 977 (8th Cir 2003) citing Hoffa V. United States, 385 U.S. 293, 17 L. Ed. 2d 374, 87 S.Ct. 408 (1966).

Inconsistentcy of testimony on issues of facts and outright contradictions in testimony are important for a defendant in challenging Witness testimony--especially when an accusser has been granted Immunity From Prosecution. The 8th Circuit in Crenshaw cited the Supreme Courts findings in Hoffa:

> "Testimony does not become legally unsubstantial because the witness stands to gain by lying; the defendant is entitled to cross-examine such witnesses to expose their motivations, and it is up to the jury to decide whether the witness is telling the truth despite the incentive to lie."

The district court had heard and observed all of the testimony of MU during the full day hearing along with the FBI agents cross-examination. The district court heard the FBI agent claim that nothing in their investigation pointed to MU's using investor funds for himself (Doc. 115, pg 96 1-11). However, the district court also heard the FBI testify they were totally unaware of the missing money from escrow accounts that only MU had access to and was only to be disbursed **after** rehab construction had taken place. (Doc 115, Pg 64 Ln 11-24, Pg. 81 Ln 4-20, Pg.98).

This is why Apellate Courts have written that the District Court is best suited for determining CVRA rights. The 2nd Circuit in United States v. Riggs (in re: WR Huff Asset Management) 409 F.3d, 555 (2nd Cir.2005) noted,

> "[T]he district court is in a better position than an appellate court to decide whether or not relief is warranted under the CVRA, and whether the settlement agreement is appropriate as it has far

more insight into the complexities of a pending litigation than a court of appeals."

The Fifth Circuit in denying a Writ of Mandamus in In re: James r. Fisher wrote that they "will not reweigh these arguments in our deferential review, but rather note that these are premissible reasons [citing the district courts rejection of rights]." In re: James R. Fisher,(5th circuit, 2011), Lexis 26500. Fisher's argument was also pertaining to a plea agreement and certain agreements the government and defendant had made. Most interesting, the court pointed out that the district court had "heard the evidence" and that they did not "make a clear and indisputable error." ID.

Recently the 6th Circuit in re: Alec Lang (6th Cir. 2018), 2018 U.S. App. Lexis 10741 cited that in ruling on a writ of mandamus pursuant to the CVRA, that they should look to the guilty plea and any agreements. Citing the case In reMcNulty 597 F.3d 344, (6th Cir.2010)(was convicted pursuant to a guilty plea rather than by a jury, the court should look to the plea agreement the plea colloquy, and other statements made by the parties to determine the scope of the offense of conviction for purposes of restitution).

The view that district courts are best suited for determining CVRA rights since they are closer to the dynamics of the case, pleas and disagreements goes along with the fact that a writ of mandamus is an "extraordinary remedy that we will not issue absent a compelling justification." In re: Prof'ls Direct Ins. Co., 578 F.3d 432, 437 (6th Cir.2009). "Only exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion, will justify the invocation of this extraordinary remedy." McNulty 597 F.3d 344 (6th Cir, 2010).

The Eighth Circuit in United States V Fast wrote that the 8th circuit would apply the traditional standard of review for a mandamus petition. Fast 709 F.3d 712 (8th Cir. 2013). The 6th Circuit also subscribes to a traditional standard of review and in In re: Alec Lang they laid out five factors for reviewing if they should grant a mandamus petition.

Of particular interest to this certiorari, they cited a district courts order being clearly erroneous as a matter of law as a reason to grant a writ and if the district court's order is an oft-repeated error, or manifest a persistent disregard of the federal rules. (Factors 3 & 4 of Lang).

This case law and five factor test for reviewing a district court order puts into question why the Eighth Circuit granted MU's writ of mandamus. What error was made by the district court? What was the persistant disregard of federal rules? If anything, the 8th Circuit errored in allowing the writ since it was 41 days past the allowed time to file under 18 USC 3771(d)(5) Couple the untimely filing with the disturbing of the Plea Agreement by a non-party and there are obvious Due Process violations that Petitioner prays the Court will address.

The 9th Circuit has been the only court to address the Due Process violations of the Writ of Mandamus and the 72 hour review requirement. When a victim moved to have a sentencing hearing re-opened because he had not been given the opportunity to speak at sentencing the court noted his rights but they also expressed concerns that reopening the sentencing without the defendants participation could violate constitutional rights.

> "[M]oreover, defendant Avi Leichner is not a party to this Mandamus action, and reopening his sentence in a proceeding where he did not participate may well violate his right to due process. It would therefore be imprudent and perhaps unconstitutional for us to vacate Zvi's sentence without giving him an opportunity to respond."
> In re: Kenna 435 F.3d 1011, (9th Cir.2006)

While the 10th Circuit in Hunter was addressing the issue of non-parties trying to change pleas and sentences they offerred terrific insight into the CVRA and why procedural rules and timelines must be followed. After focusing on 18 USC 3771(d)(6) and the governments ability to prosecute crimes, they wrote

> "This provision evinces the impropriety of re-opening sentences--especially those resulting from plea agreements.....if individuals were allowed to re-open criminal sentences after all issues have been resolved--including any mandamus petitions by victims--

> then the government's prosecutorial discretion would be limited." United States v Hunter,, 548 F.3d 1308 at 1316 (10th Cir.2008)

Petitioner would like to draw this courts attention to the fact we have the 9th Circuit aware of the defendant's rights in the process and then the 10th Circuit aware of the government's prosecutorial powers under the CVRA. What we have in Petitioners case is a writ that violated the defendant's rights but it also sets a dangerous precedent for allowing plea agreements to be disturbed. This is why the Court must decide in favor of the Petitioner's writ because the CVRA allows a plea to reopened but only under the conditions of USC 3771 (D)(5). The 8th Circuit in Binkholder I noted their Due Process concerns but nothing was ever done to afford him rights to challenge the actual CVRA Mandate. The court wrote:

> "An additional relevant factor here is that Binkholder apparently did not contest and may not have had the opportunity to contest MU's petition for a writ of mandamus. See 18 USC 3771(d)(3) ("[t]he court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed"). We have **significant concerns about the due process** implications of the writ effectively increasing Binkholder's Guideline range by two years if he did not have the opportunity to contest the petition." Citing Footnote 4 of Binkholder 832, F.3d (8th Cir.2016) Emphasis added by Petitioner

It cannot be disputed. Petitioner was sentenced using a higher sentencing guideline range after his plea was disturbed. Petitioner has never been afforded the Due Process rights discussed by the court in his own case. He has never been allowed to challenge the materially false information that he was then sentenced upon. United States v Atl. States Cast Iron Pipe Co., 612 F. Supp. 2d 453 (D.N.J.2009)("Due process right not to be sentenced upon materially false information).

There are also Due Process Rights concern for the true victims of the case. Here, the true victims were impacted by the 8th Circuits granting of the writ certifying MU to be a CVRA Victim. The true victims were owed approx.

approximately $2.1 Million and the PSR calculated nearly $3.7 Million in assets of the companies owned by MU and Binkholder. By issuing the writ and by the government granting Immunity to a partner of Binkholder without informing the true victims--it appears to have violated the spirit of 18 USC 3771 and caselaw. In addition, if it hadn't been for the remand of binkholder, the true victims would have been reduced to accepting crumbs of the restitution payments. As it was, MU would have received 30% of the restitution payments by Binkholder but, as was presented by the government to Binkholder two months after sentencing in 2015; MU would have still received his LLC distributions of profits. In most of the companies MU owned 49% or 50%. (PSI 143).

Thankfully the true victims were able to Motion to be heard and MU eventually agreed to deprioritized restitution payments--being paid after the true victims are repaid. (Doc. 210,222, 227).

CVRA & MVRA Pertaining to Immunity Agreements

Finally the Petitioner prays the Court will vacate the CVRA Mandate and determination that MU was a victim under 18 USC 3771. The statute says that "A person accussed of the crime may not obtain any form of relief under this chapter[this section]." See 18 USC 3771 (d)(1). MU was granted Immunity from Prosecution meaning the government could have prosecuted him but instead entered into an agreement with him. As the court in Mcfarlane wrote,

> "Prosecutors often enter into informal immunity agreements with criminal defendants, promising immunity in exchange for information from the defendant about other criminal activity, which information may also incriminate the defendant in the wrongdoing."
> United States V. McFarlane 309 F.3d 510 (8th Cir. 2002)

But how should the courts view an immunity agreement in light of the case law revolving around the MVRA that Co-Conspirators, Un-indicted Co-Conspirators and Deferred Prosecution Agreements negate an individuals rights to restitution? Case law in general is slim but for the CVRA it's non-existent. Some suggest this is due to the newness of the law and the fact most restitution claims

arise from white-collar financial fraud cases and most are settled via a Guilty Plea Agreement. Due to this, many already have made decisions as to victims and restitution. Furthermore, most Plea Deals today have appellate waivers so many never make it to the appellate level for greater case law. This case in fact, almost never made it due to an Appellate Waiver Clause however it was ruled in Binkholder I to be an ambigious waiver.

It would be the rarest of financial fraud cases when the participants in the fraud experienced no decrease in their assets upon discovery of the offense. Since MU used MVRA & CVRA statutes within his writ of mandamous the courts must look to existing MVRA case law. The plain language of the MVRA provides two classes of individuals--defendant and victims. There is an obvious third class--Co-Conspirators (indicted or otherwise). A literal application of the MVRA would mean that individuals with equal culpability could recover restitution from the defendant. As a result, courts have recognized that Congress could not have intended that result. Otherwise, the federal courts would be involved in redistributing funds among wholly guilty co-conspirators, where one or more co-conspirators may have cheated their comrades. Indeed, the Second Circuit has held that an order of restitution from one co-conspirator to another was an 'error so fundamental and so adversly reflecting on the public reputation of the judicial proceedings that we may, and do, deal with it sua sponte.' United States v Reifler, 446 F.3d 65, 127 (2nd Cir.2006); see also United States v Weir, 861 F.2d 542, 546 (9th Cir.1988) (suggesting it would be improper to consider a participant to a crime as a victim of the crime for purposes of restitution)," United States V Lazarenko, 624 F.3d 1247, 1251 (9thCir. 2010).

This same rationale has been applied to the CVRA. As mentioned above, the CVRA states thatone accussed of the crime is not entitled to relief. This means that "[A]n entity that admits to engaging in illegal fraud cannot be a victim of that fraud for purposes of the CVRA and MVRA." In re Wellcare

Health Plans, Inc. 754 F.3d 1234, 1239 (11th cir.2014). This includes an entity that is not necessarily a co-defendant; in Wellcare Health Plans, the titular company had entered into a deferred prosecution agreement and was cooperating with the government. ID at 1236.

Applying this paradign to the instant matter resolves any ambigiouty with regards to whether one could be a culpable victim for guideline purposes. A culpable individual would almost necessarily have contributed their time and money to a fraud, but their culpability, and their superior knowledge of the fraud, means they cannot complain of being harmed. And by the same token, they cannot claim their financial losses were part of the "actual harm" of the offense. MU may have used some of his personal funds to advance the offense conduct, but he had knowledge of and access to the actual state of the companies. He knew that funds were being moved around from company to company to cover shortfalls, he knew that proceeds from sales were being redirected. He knew payments were being made or money was being siphoned out of escrow accounts that only he controlled and had access to. He knew and participated in all of this only to attain an Immunity From Prosecution agreement. The true victims knew noneof this and this is why MU also agreed to Subordinate his restitution claim when the true victims began mounting a civil case against him. His testimony was clear. He was knowledgable and participated. But should he really be treated under the CVRA & MVRA as all the other victims?

Most telling out of all MU's testimonty was when he was cross-examined about his immunity agreement and he admitted his attorney told him it was best for him to be a designated victim. (Doc 115 Pg. 79). Earlier in the hearing AUSA Casey spelled out the terms of the agreement by asking MU,

> "And you met with the Government pursuant to a letter you received from my office, me specifically, saying that you had immunity for **any events that would transpire;** is that right?"

It's a shock to the conscience to think that this letter and offer was 1 1/2

years prior to Binkholder's Indictment. Many of the actions that MU took were the same actions Binkholder took;were after his Immunity Agreement. (Doc 115). Now the 8th Circuit reads the Record and decides he's a victim and the district court made an abuse of discretion in their ruling?

If left unchanged, this case opens the door for white collar participants to run to the door seeking Immunity in return for their protection from both prosecution but also guaranteeing them their restitution from their co-conspirators. This is a case that needs to be addressed. Petitioner prays this Court will take up and decide that Immunity from Prosecution should be viewed by the courts exactly as Co-Conspirators, Unindicted Co-Conspirators and Deferred Prosecution Agreements.

CONCLUSION AND PRAYER FOR RELIEF

Petitioner, Bryan Binkholder, respectfully requests this Honorable Supreme Court to grant certiorari in this matter. The Eighth Circuit has not adequately addressed the violations on the Petitioner of his Due Process Rights and his rights under the 6th Amendment to confront his accusser. While the court expressed concerns about defendants due process rights, they have never afforded him the opportunity to confront the original writ of mandamus petition that subsequently disturbed and altered his plea agreement that the defendant had made with the government.

Further, the writ of mandamus by M.U. was substantially out of the time requirements under 18 USC 3771(d)(5) and should have been dismissed as an untimely filing. By granting the writ, the Eighth Circuit violated the defendants rights while disregarding Jurisdictional time requirements.

Finally, Petitioner prays this Court will overturn the ruling by the Eighth Circuit that M.U. is entitled to restitution under the CVRA & MVRA. The statutes are clear, Co-conspirators are not entitled to reap the rewards from other charged partners in a scheme. Immunity from Prosecution should be treated exactly as the caselaw exists in the MVRA that parties under such an agreement should be considered Co-Conspirators, Un-indicted Co-Conspirators or operating under a deferred prosecution agreement. As such, no restitution is allowed and Petitioner prays this Court will offer relief in this case.

Petitioner asks this court to vacate the 8th Circuits order recognizing M.U. as a Crime victim pursuant to the CVRA and remand the case for resentencing without MU as a victim of Petitioner's crimes.

Respectfully Submitted,

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