WHO CAN STAY AND WHO MUST GO

The Tension between Witness Sequestration and the Right of Crime Victims to Be Present

I. INTRODUCTION

In February 2009, a federal district court judge in Missoula, Montana, prepared to begin a trial in what has been described as the largest environmental criminal prosecution in United States history. The case was *United States v. W.R. Grace et al.*, Case No. 9:05-cr-00007-DWM. The trial was expected to last three to five months. The defendants were W.R. Grace and seven of its current and former employees. One of those former employees was a South Carolina man.

The charges concerned events that happened in the 1970s and 1980s at a mining operation in Libby, Montana. The mine was used to extract vermiculite, a mineral used in potting soil and attic insulation. But there was a problem with the vermiculite in Libby: It was contaminated with asbestos. The asbestos had to be removed, and during the removal process, asbestos fibers were released into the air.

In connection with this operation, the defendants were charged in 2005 with conspiring to release asbestos into the air, knowingly placing residents of Libby and surrounding communities in imminent danger of death or serious bodily injury. According to the indictment, one of the objects of the conspiracy was to violate the Clean Air Act. But the relevant provision of the Clean Air Act did not go into effect until 1990, and the mine closed in 1989.

If a crime had been committed, who were its victims? The government contended that the victims were all Libby residents who had asbestos-related illnesses. Some of those residents were prepared to testify at trial.

The Crime Victims' Rights Act, 18 U.S.C. § 3771, gives victims the right to be present at trial. At the same time, however, Fed. R. Evid. 615 provides that at the request of a party, the court must exclude witnesses from the courtroom before they testify.

This article will discuss the tension between a victim's right to be present at trial and a defendant's right to have witnesses excluded from the courtroom, and will recount how one judge--the Hon. Donald W. Molloy, who presided over the W.R. Grace trial in Montana--resolved the competing interests.

II. THE LAW

A. The Crime Victims' Rights Act

According to the Act, a crime victim is "a person directly and proximately harmed as a result of the commission of a Federal offense ..." 18 U.S.C. § 3771(e) (2006). A victim has "[t]he right to reasonable, accurate, and timely notice of any public court proceeding ... involving the crime ..." 18 U.S.C. § 3771(a)(2). In addition, a 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." 18 U.S.C. § 3771(a)(3). The prosecution must "make [its] best efforts to see that crime victims are notified of, and accorded" these rights. 18 U.S.C. § 3771(c)(1).

B. Federal Rules of Criminal Procedure

The Federal Rules of Criminal Procedure were amended in 2008 to reflect the mandates in the Crime Victims' Rights Act. According to the rules, "[t]he government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime." Fed. R. Crim. P. 60(a)(1). Further, "[t]he court must not exclude a victim from a public court proceeding involving the crime, unless the court determines by clear and convincing evidence that the victim's testimony would be materially altered if the victim heard other testimony at the proceeding." Fed. R. Crim. P. 60(a)(2).

"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." *Id*. "The reasons for any exclusion must be clearly stated on the record." *Id*.

C. Federal Rules of Evidence

The Federal Rules of Evidence require that upon request of a party, the court must exclude witnesses from the courtroom before they testify. Fed. R. Evid. 615. The rule is designed to prevent witnesses from tailoring their testimony based on what prior witnesses have said and to "aid[] in detecting testimony that is less than candid." *Geders v. United States*, 425 U.S. 80, 87 (1976). There are exceptions, however. One exception is that people authorized to attend by statute must be permitted to do so. Fed. R. Evid. 615. The Crime Victims' Rights Act is one such statute.

Although the advisory committee notes to Rule 615 state that there is no conflict between the rule and the Act, case law and practice reveal otherwise.

D. Judicial decisions

1. Federal courts

Federal courts tend to interpret the Crime Victims' Rights Act broadly and to permit testifying victims to be present in the courtroom, despite a defendant's request to exclude them. This view has developed in part from the language in the Act itself, which states that, "The court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding." 18 U.S.C. § 3771(b).

This view has also developed from an early recognition that the rule of sequestration is not constitutionally based and that a criminal defendant does not have a "constitutional right to exclude witnesses from the courtroom." *United States v. Edwards*, 526 F.3d 747, 758 (11th Cir. 2008) (citing *Mathis v. Wainright*, 351 F.2d 489, 489 (5th Cir. 1965) and *Bell v. Duckworth*, 861 F.2d 169, 170 (7th Cir. 1988)). Further, federal courts view the Crime Victims' Right Act as abrogating Rule 615. *In re Mikhel*, 453 F.3d 1137, 1139 (9th Cir. 2006).

In addition, federal courts may be more lenient about who is a victim. One judge has stated: "I will presume that any person whom the government asserts was harmed by the conduct attributed to a defendant, as well as any person who self-identifies as such, enjoys all of the procedural and substantive rights set forth in [the Crime Victims' Rights Act]." *United States v. Turner*, 367 F. Supp. 2d 319, 327 (E.D.N.Y. 2005). *But see* *United States v. Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 545 (D.N.J. 2009) (holding that workers of an industrial company were not victims of OSHA violations because the link between the violations and the alleged harm was too factually attenuated).

2. State courts

State courts have a different view. At least two state courts have recognized that a defendant's right to a fair trial is superior to a victim's right to be present. One court has said that the state victims' rights statute is "subordinate to the right of the defendant to a fair trial." *State v. Heath*, 957 P.2d 449, 471 (Kan. 1998).

A second court has found that the rights afforded victims "are subordinate to the rights of an accused when the rights involved are in conflict." *Booker v. State*, 773 So. 2d 1079, 1095 (Fla. 2000). *See also* *Gore v. State*, 599 So. 2d 978, 985-86 (Fla. 1992) (holding that the right of relatives of a murder victim to be present "must yield to the defendant's right to a fair trial"); *Martinez v. State of Florida*, 664 So. 2d 1034, 1035 (Fla. Dist. Ct. App. 1995) (explaining that "any doubts should be resolved in favor of the defendant receiving a fair trial").

State courts may favor defendants' rights because the language in state statutes may not be as strong as the language in the Crime Victims' Rights Act. Further, state court rules may not require judges to exclude witnesses at a party's request like the federal rules do. For example, in South Carolina, the rule governing witness exclusion does not require exclusion at a party's request and does not contain an exception for people permitted to attend by statute. S.C. R. Evid. 615. *See also* *State v. Simmons*, 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009) (explaining that a party is not entitled to have witnesses sequestered as a matter of right and that the decision to sequester is within the court's discretion).

E. Additional resources

Two commentators on this topic assert that crime victims should have unequivocal rights to attend trial, even if they plan to testify. Douglas E. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 Cath. U. L. Rev. 1135 (2007); Douglas E. Beloof and Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 Lewis & Clark L. Rev. 481, 542 (2005) ("Given that the defendant has no constitutional right to exclude a victim and given that the victim has concededly compelling reasons to attend the trial, the defendant simply has no good case to demand sequestration.").

III. THE W.R. GRACE CASE

A. Pre-Trial

From the beginning of the W.R. Grace case, the government took the position that the entire community of Libby, Montana, was a crime victim. The trial judge disagreed. The first time the victim issue arose was in the context of pre-trial publicity. Shortly after the indictment was returned, the court instructed all lawyers in the case not to speak to the press. The very next day, a victim witness specialist from the U.S. Attorney's Office met with members of the Libby community at a community action group (CAG) meeting. *United States v. W.R. Grace*, 401 F. Supp. 2d 1057, 1059 (D. Mont. 2005). The defendants objected to certain statements made by the specialist, and the government defended the statements by stating that they were made for the purpose of fulfilling the government's duties under the Crime Victims' Rights Act. *Id.* The court agreed with the government, but stated that "[w]hile the entire community of Libby is affected by asbestos issues, I am confident in this case the word *victim* was not intended to mean community." *Id.* (emphasis in original).

A year later, the victim issue arose again. The government requested that the court broadcast the trial on closed-circuit television. Order at 1-2, *United States v. W.R. Grace et al.*, No. 9:05-cr-00007-DWM (D. Mont. May 15, 2006). The government argued that "victims

in Libby will be essentially excluded from the proceedings without a closed circuit broadcast because of their poor health and the difficulty of traveling to Missoula for a lengthy trial." *Id.* at 2-3.

In response, the court stated: "From the beginning, the government has pushed the definition of who might be a victim, if any, in this case, beyond reason. No doubt individuals in Libby have concerns. No doubt the community has concerns. Nonetheless, it is beyond the pale to suggest that the legitimate concerns of an individual or a community transform the meaning of 'victim' as intended by Congress." *Id.* at 3. The court ruled that a closed-circuit broadcast would not be permitted, in part because the Crime Victims' Rights Act does not give crime victims "the right to have the court proceedings broadcast to a place within a convenient distance from the victim's home." *Id*.

A month before trial, the defendants requested that all witnesses be excluded from the courtroom before they testified pursuant to Fed. R. Evid. 615. As required under the rule, the court granted the request. The government contended, however, that the order should not apply to victim-witnesses. The court disagreed.

The court ruled that there were no identifiable crime victims in the case. Ruling from the bench, the judge stated: "It is my determination, as the Congress has defined the term crime victim, there are no crime victims identifiable in this case." (Hr'g Tr. 305, Jan. 22, 2009.) The judge further stated that "[t]his case is unusual because if you have a case where there is someone 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." *Id.* at 304.

After this ruling, the government persisted, filing a motion to accord rights to the victim-witnesses. The government contended that 34 of its witnesses were crime victims and should be permitted to attend the proceedings before testifying. *United States v. W.R. Grace et al.*, 597 F. Supp. 2d 1157, 1159 (D. Mont. 2009). Two witnesses--Melvin and Lerah Parker--retained private counsel and filed their own motion.

On February 13, just six days before jury selection, the court found, again, that it could not "identify any crime victims as the Act defined them, and the government's motion and the Parkers' motion must be denied." *Id.* at 1160. The court explained that whether someone is a crime victim depends on "whether there has been direct and proximate harm to a person as a result of the commission of a federal offense." *Id.* at 1161-62 (citing 18 U.S.C. § 3771(e)). In this regard, the court highlighted the novel theory of the government's case.

To prove that there was a conspiracy to endanger, the government had to show that asbestos was released into the ambient air after November 3, 1999, the applicable statute

of limitations, and that the release placed another person in imminent danger of death or serious bodily injury at that time. This was difficult to do. The mine closed in 1989. The government had to prove that asbestos was released into the air after November 3, 1999. A crime victim would have to be someone who was harmed or placed in imminent danger after November 3, 1999. *Id.* at 1164. The judge was not satisfied that the people identified by the government as victims met this requirement.

After the motions were denied, the government and counsel for the Parkers petitioned the Ninth Circuit for a writ a mandamus. The petitions were filed on February 23, 2009, the first day of trial.

B. Trial and mandamus

On the first day of trial, the government called eight witnesses to the stand, all of whom, according to the government, were crime victims. The witnesses testified that they had been exposed to asbestos during their day-to-day life in Libby and that they had an asbestos-related illness. The exposures allegedly occurred 30 or 40 years ago. Where or when or how the exposures occurred was uncertain.

In the meantime, and as the trial proceeded, the Ninth Circuit invited the trial judge to respond to the petitions seeking a writ of mandamus. The judge responded and stood by his earlier decision. Dist. Ct. Resp. at 3, *In re: Melvin Parker; Lerah Parker and In re: United States of America*, No. 09:70529 (9th Cir. Feb. 25, 2009). In doing so, he told the Ninth Circuit about the eight witnesses who testified on the first day of trial. *Id.* at 2-3. He said that "After listening to eight lay witnesses try to remember times, dates, and places from as long as thirty to forty years ago, … allowing the witnesses to listen to other testimony before testifying would impact their memories and recall." *Id.* at 4.

He further stated: "I have no doubt that if any of the witnesses is allowed to sit in the courtroom to listen before testifying, it will significantly impact the ability of any or all of the defendants to cross examine witnesses to point out lack of memory, bias, confusion, and any other matter inherent to the notion that cross examination and confrontation are the crucible in which the truth must be tested." *Id.* at 3-4.

Finally, the trial judge told the Ninth Circuit that he invited each of the eight witnesses who testified to stay and watch the proceedings after their testimony, and none of them did. *Id.* at 3. He also noted that the hundreds of people whom the government had deemed victims (but not witnesses) were welcome to attend the proceedings. *Id.* Virtually none of them did.

Despite the court's explanation of his ruling, the Ninth Circuit granted the petitions for writ of mandamus. Order at 1, *In re: Melvin Parker; Lerah Parker and In re: United States of America*, No. 09:70529 (9th Cir. Feb. 27, 2009). The Ninth Circuit instructed the court "to

vacate its February 13, 2009 order and to conduct further proceedings so that it may make particularized findings with respect to each of the 34 victim-witnesses consistent with 18 U.S.C. § 3771 (a)(3)." *Id.* at 2.

C. Trial suspended

Because the mandamus required the trial judge to conduct further proceedings to make particularized findings, the trial was suspended, and a procedure was put in place to examine the 26 people remaining on the government's witness list who were allegedly victims. The procedure required the government to "call, one at a time, each of the remaining witnesses" and to "conduct [the government's] entire direct examination of each witness, including specific reference to any exhibits that may be used in the witness' testimony before the jury." Order at 2, *United States v. W.R. Grace et al.*, No. 9:05-cr-00007-DWM (D. Mont. Feb. 27, 2009.)

The proceeding would be closed to the public, and only the parties, their counsel and support staff, and government agents could attend. *Id*. The jury would not be present, and cross-examination would not be permitted. *Id*.

Counsel learned about this procedure on a Friday. On Monday morning at 9 a.m., counsel and the parties arrived at court. But none of the alleged crime victims were present.

Counsel for the government said that most of the 26 witnesses were contacted over the weekend, and that all but two of them--Melvin and Lerah Parker--waived their right to be present during trial. Apparently the victims did not want to undergo the procedure outlined by the court. They did not want to give the defense a preview of their testimony before testifying in front of the jury, which would give the defense time to prepare cross examination.

D. Resolution

Now that there were only two witnesses (the Parkers) who wanted to assert their rights under the Crime Victims' Rights Act, the trial judge did what no one anticipated: He ordered the government to call the Parkers as its next witnesses. Requiring them to testify immediately would accommodate their desire to be present and would accommodate the defendants' right to exclude them.

Although this solution balanced the victims' rights and the defendants' rights, it was a huge blow to the government's case. The Parkers were "star witnesses" who were expected to testify at the end of the government's case. Instead of having the option to call them last, the government had to put these witnesses on the stand right away, which seemed to disrupt the government's trial strategy.

E. The verdict

After 11 weeks of trial and a day-and-a-half of deliberations, the jury found the defendants not guilty. A week before the case went to the jury, the government decided to dismiss the charges against two of the defendants, including the South Carolina man.

Not only were there no crime victims, but according to the jury, there was no crime.

IV. CONCLUSION

Here are some conclusions that can be drawn from the W.R. Grace case:

• Crime victims may not be easy to identify, particularly in environmental crime cases and cases involving entire communities.

• Do not overlook the fact that a person may not satisfy the definition of a crime victim.

• The question of whether witnesses are crime victims should be raised early so that the issue does not disrupt the trial or trial strategy.

• The defense may get to preview a victim's testimony if the court conducts a hearing to determine whether victim-witnesses would be susceptible to altering their testimony.

• The court may order crime victims to testify first or early. Courts have broad discretion to do so under Fed. R. Evid. 611.

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