UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA **Plaintiff,** **vs.** **KIRK MCMAHAN,** **Defendant.**	**Case No.: SACR 07-00249-CJC** **ORDER DENYING INTERVENERS' MOTION FOR RECONSIDERATION**

INTRODUCTION & BACKGROUND

On October 26, 2011, alleged victim-interveners Vince Andrich, Don Aspinal, Scott Connelly, Jeff Corbett, Charlene Egland, Jeffrey Gilbert, Darren Meade, Glenn Puit, Michael Roberts, and Mark Warner (collectively "interveners") filed a motion to intervene and be heard at a second sentencing hearing for Defendant Kirk McMahan

pursuant to the Crime Victims' Rights Act, 18 U.S.C. § 3771(a)(4) ("CVRA").[1] On November 16, 2011, the Court denied the interveners' motion. The Court held that the interveners did not have a right to be heard under the CVRA because permitting them to present evidence at Mr. McMahan's sentencing regarding conduct unrelated to the offense of conviction would raise separation of powers problems and would deprive Mr. McMahan of fundamental due process under the Fifth and Sixth Amendments.[2] Additionally, the Court declined to exercise its discretion to consider the evidence presented by the interveners. On November 22, 2011, the interveners filed the present motion for reconsideration for two reasons. They assert that new facts regarding the connection between Mr. McMahan's post-plea conduct and the crime of conviction have emerged. They also assert that this Court should reconsider its decision because the decision was based on constitutional concerns not raised by the parties, and which they did not have an opportunity to brief. For the following reasons, the interveners' motion for reconsideration is DENIED.

ANALYSIS

The standard for obtaining reconsideration of a previously-entered order is rigorous. Local Rule 7-18 provides that a motion for reconsideration may be made only on the grounds of "(a) a material difference in fact or law from that presented to the Court . . . that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of [the Court's previous] decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the

[1] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* FED. R. CIV. P. 78; LOCAL RULE 7-15.

[2] Typically, a crime victim desires to make a statement about the injury or harm that he or she suffered as a result of the crime of conviction. In contrast, the interveners here desire to provide percipient testimony about whether a crime completely unrelated to the crime of conviction occurred.

Court before such decision." LOCAL RULE 7-18. "No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion." *Id.*; *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

A. New Facts

As an initial matter, the interveners do not explain how the facts presented in this motion have only newly emerged or "in the exercise of reasonable diligence could not have been known to the party moving for reconsideration." In any event, the "new" facts presented do not persuade the Court to change its determination that the criminal conduct alleged by the interveners is completely unrelated to the offense of conviction. Mr. McMahan pled guilty to a single count of mail fraud, based on an equipment leasing scheme perpetrated against lending institutions during 2004 and 2005. The sole victims of this scheme were the lending institutions that funded the fraudulent equipment leases. In contrast, the victims of the advanced fee scheme allegedly perpetrated by Mr. McMahan while he was on pre-trial release were not lending institutions. The victims were small businesses and individuals like the interveners. The interveners allege that Mr. McMahan was involved with a company called X-Banker who purported to offer credit services to small businesses for fees paid in advance, but then allegedly neither performed such services nor returned the fees. The interveners do point to one alleged advertisement in which "equipment leases," among other credit services, are listed. However, there are no other similarities between the two schemes. The nature of the alleged fraud, the manner in which it allegedly was carried out, and the alleged victims are quite distinct. Indeed, the scheme alleged by the interveners occurred years after the equipment lease scheme took place. Accordingly, the "new" facts presented by the interveners do not warrant reconsideration of the Court's previous order.

B. Additional Briefing

The additional briefing also does not warrant reconsideration of the Court's previous order. Before this Court was a statutory interpretation issue of first impression. More specifically, the Court had to determine whether the definition of "crime victim" under the CVRA refers only to a victim of the offense of conviction, or whether the statute grants rights to any individual professing to be a victim of any alleged Federal offense committed by the defendant, as suggested by the interveners. The effect of the interveners' interpretation would require the Court to hear evidence presented by any private individual of an alleged offense even if the defendant has not been charged or convicted of that offense, there has been no evidence presented of the truth of the allegations, and the alleged offense is not related to the offense for which the defendant is being sentenced. The Court concluded that "increasing [a defendant's] sentence based upon the procedure and evidence proposed by the interveners would be constitutionally improper and would be a flagrant violation of [the defendant's] due process rights." (Dkt. No. 62.) The Court based this interpretation on the Supreme Court's rule that "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the [c]ourt." *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005). The Court remains convinced that its interpretation of the CVRA is correct.

The cases presented by the interveners do not mandate a different result as they are inapposite to the issue before this Court: the interpretation of the CVRA. All of the cases cited by the interveners involve appellate review of a sentencing judge's discretionary decision to consider evidence of uncharged offenses presented by the Government. Not only did none of these courts consider whether the CVRA requires a court to permit any

person claiming to be a victim of a Federal offense to be heard, they were not even required, even as a general matter, to examine the constitutional issues related to sentencing for purposes of statutory interpretation. In those cases which assess the constitutional propriety of considering uncharged offenses, the courts which held that consideration of uncharged conduct did not violate the Sixth Amendment did so when the conduct related to the conviction offense (it was part of the same course of conduct or common scheme or plan as the conviction offense or occurred to facilitate the conviction offense) and when the evidence was presented by the Government with some indicia of reliability. Most importantly, these courts increased the sentence for the conviction offense because the uncharged conduct informed the courts' assessment of the manner in which the conviction offense was committed, and, thus, the sentence increase was based upon the conviction offense itself. *United States v. Watts*, 519 U.S. 148, 149–154 (1997) (finding in two consolidated cases that consideration of facts from an acquitted offense was permissible because the facts were relevant to manner in which the conviction offense was committed for purposes of sentencing where both offenses were part of the same course of conduct); *United States v. Fitch*, 659 F.3d 788, 793–96 (9th Cir. 2011) (quoting *Watts*, 519 U.S. at 154) (finding that the courts consideration of defendant's murder of his was wife in sentencing for fraud was permissible where defendant used his wife's death to commit the fraud as it informed the manner in which the fraud was committed); *U.S. v. Meza de Jesus*, 217 F.3d 638, 642–44 (9th Cir. 2000) (finding that consideration of an uncharged kidnapping during which the conviction offense of possession of a firearm allegedly occurred was improper where the court found only by a preponderance of the evidence that the kidnapping had occurred).[3]

[3] The interveners do cite to two cases regarding post-offense criminal conduct, but both cases involve an assessment of a court's discretion to consider post-offense conduct presented by the Government. *United States v. Myers*, 41 F.3d 531(9th Cir. 1994); *United States v. Mara*, 523 F.3d 1036 (9th Cir. 2008). These cases do not mandate reconsideration of the Court's prior decision. They are inapposite because they do not deal with interpretation of the CVRA, nor anything to do with empowering private parties with prosecutorial authority.

The interveners' interpretation of the CVRA also conflicts with plain and clear wording of the statute itself. Subsection (d)(6) of the statute states "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6). In this case, the Government has investigated the interveners' allegations and decided not to bring any new charges against Mr. McMahan or present any evidence regarding those allegations against him at his sentencing hearing. The Court must respect the Government's decision in this regard. The Court simply cannot do an end run around the Government's decision and empower the interveners with the authority of private attorneys general. To do so would be not only contrary to Congress' directive, but also a constitutional violation of the separation of powers. "[T]he great security against a gradual concentration of the several powers in the same [branch of government], consists in giving to those who administer each [branch] the necessary constitutional means and personal motives to resist encroachments of the others.... Ambition must be made to counteract ambition." *The Federalist No. 51* (James Madison) (1788).

CONCLUSION

For the foregoing reasons, the interveners' motion for reconsideration is DENIED.

DATED: December 5, 2011

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE