# **United States v. Kaufman**

Appellate Project

Table of Contents

# United States v. Kaufman

Petition for Writ of Mandamus from the Decision and Order of the U.S. District Court, District of New London, June 9, 2008

## Summary of the Facts

In August 2007, 17-year-old Evan Nolan went on a shooting spree in the Riverwalk Theater Complex in Greenhaven, New London. He killed two people and injured six others before killing himself. Janelle Mendoza, the 22-year-old daughter of Margaret and Alan Dawson, was one of the two individuals Mr. Nolan killed.

Mr. Nolan bought the gun he used in the shooting spree three months earlier from Alexander Kaufman, a co-worker at the local grocery store. Mr. Kaufman initially offered Mr. Nolan a hunting rifle, but Mr. Nolan refused, remarking "I'm gonna stick up a 7-11, so I need something I can hide in my jacket." About two weeks later, Mr. Kaufman sold Mr. Nolan the semiautomatic handgun used in the massacre. Mr. Kaufman was indicted under several federal criminal statutes and ultimately convicted of illegally selling a firearm to a person he reasonably believed to be a minor.

After learning of Mr. Kaufman's conviction, Margaret and Alan Dawson moved to claim rights under the Crime Victims Rights Act (CVRA), 18 U.S.C. § 3771. The Dawsons argued their deceased daughter, Janelle Mendoza, was a crime victim of Mr. Kaufman's illicit gun sale. Under a provision of the CVRA permitting family members to assert the rights of the crime victim, the Dawsons sought to make an In-Court Victim Impact Statement at Mr. Kaufman's sentencing, and to receive restitution from Mr. Kaufman for their daughter's funeral expenses and some of her lost future earnings.

The United States District Court for the District of New London denied the Dawsons' motion, ruling that neither Janelle Mendoza nor her parents were "crime victims" of Mr. Kaufman's offense. The court concluded the connection between the illegal firearm sale and Mrs. Mendoza's death in the Riverwalk shooting was too attenuated to satisfy the "proximate cause" requirement of the CVRA.

Pursuant to 18 U.S.C. § 3771(d)(3), Margaret and Alan Dawson filed a petition for a writ of mandamus to appeal the denial of their Motion to Have Janelle Mendoza Recognized as a Crime Victim, to Be Recognized As Her Representative, to Make an In-Court Victim Impact Statement, and to Receive Restitution.

You will be assigned to write a brief and prepare oral argument, for either the United States or the Dawsons, on this petition to the United States Court of Appeals for the Thirteenth Circuit. Your argument must address the following two issues.

## Issues on Appeal

1. What is the appellate standard for reviewing the district court's decision to deny the Dawsons relief under the Crime Victims Rights Act (CVRA), 18 U.S.C. § 3771?

2. Did the district court properly deny Mr. and Mrs. Dawson's motion to assert rights under the CVRA because Mr. Kaufman's illegal sale of the gun to Mr. Nolan was not a proximate cause of Mrs. Mendoza's death?

U.S. v. Kaufman
D.New London, 2008.

United States District Court, D. New London,
UNITED STATES of America, Plaintiff,
v.
Alexander Andrew KAUFMAN, Defendant.
**No. 2:08CR172APK.**

June 9, 2008.

Andrea L. Halverson, Federal Defender Office, Manuel C. Guarch, Greenhaven, NL, for Defendant. David A. Miller, Eka M. Akenep, US Attorney's Office, Greenhaven, NL, for Plaintiff.

**MEMORANDUM DECISION & ORDER**

Mary E. Hutton, District Judge.
***1** This matter is before the court on Margaret and Alan Dawson's Motion to Have Janelle Mendoza Recognized as a Crime Victim, to Be Recognized As Her Representative, to Make an In-Court Victim Impact Statement, and to Receive Restitution. The Dawsons did not request oral argument on their motions, and the court concludes that oral argument would not significantly aid in its determination of the motions. *See* DUCrimR 12-1(b)(3). After carefully considering the law and facts relevant to the Dawsons' motions, the court enters the following Memorandum Decision and Order.

**BACKGROUND**

On August 22, 2007, the Dawsons' 22-year old daughter, Janelle Mendoza, was tragically killed by Evan Nolan at the Riverwalk Theater Complex in one of New London's most devastating recent criminal incidents. Mr. Nolan used a 9mm Ruger semiautomatic handgun to kill two and seriously injure six innocent people in a Riverwalk movie theater before taking his own life. Mr. Nolan bought the 9mm Ruger handgun from Defendant Kaufman three months before the shooting. At the time, both men worked at a grocery store on the east side of New London. According to the testimony of Valerie Park, another grocery store employee, Ms. Park overheard Mr. Nolan tell Mr. Kaufman he wanted to buy a handgun in early May 2007. Mr. Kaufman replied that he did not own any handguns, and initially offered to sell Mr. Nolan a Winchester hunting rifle. Ms. Park testified that in reply to the offer for the Winchester, Mr. Nolan stated, "I'm gonna stick up a 7-11, so I need something I can hide in my jacket." Mr. Kaufman does not dispute that this comment was made, but he testified that he did not take the statement seriously because he thought Mr. Nolan was "just trying to act tough." About two weeks later, Mr. Kaufman remembered that his grandfather, who had recently passed away, had kept a handgun for personal protection. He offered to sell this firearm to Mr. Nolan for $300. In mid-May 2007, Messrs. Nolan and Kaufman completed the sale of the 9mm Ruger inside the rental storage unit that contained Mr. Kaufman's grandfather's belongings.

At trial, Mr. Kaufman admitted to selling Mr. Nolan the firearm used in the Riverwalk shooting. However, Mr. Kaufman maintained that he did not know Mr. Nolan well and was unaware that Mr. Nolan was a minor. Nonetheless, Mr. Kaufman was convicted of unlawfully selling, delivering, or otherwise transferring a handgun to a person he knew or had reasonable cause to believe was a juvenile in violation of 18 U.S.C. §§ 922(x)(1) and 924(a)(6)(B)(i).

The court set Mr. Kaufman's sentencing for June 16, 2008. The Dawsons then filed the present motion on May 26, 2008.

## DISCUSSION

### *Motion to Determine Crime Victim Status*

The Dawsons' motion seeks declarations that Janelle Mendoza is a victim of Mr. Kaufman's offense and that they can assert her rights on her behalf pursuant to the Crime Victims Rights Act ("CVRA"), 18 U.S.C. § 3771. As Janelle Mendoza's parents, the Dawsons undoubtedly qualify to be representatives for their deceased daughter under the provision of the CVRA that allows "family members" to assume the crime victim's rights when the victim is not able to assert her own rights. *Id.* § 3771(e). Therefore, the principal issue raised by the Dawsons' motion is whether Mrs. Mendoza is a victim of Mr. Kaufman's crime under the CVRA.

### A. CVRA

***2** Unlike other victims' rights acts, the CVRA was passed as a means of making "victims independent participants in the criminal justice process" with standing to assert certain procedural and substantive rights. *Kenna v. United States District Court for the Central Dist. of California*, 435 F.3d 1011, 1013 (9th Cir.2006); *United States v. Sharp*, 463 F.Supp.2d 556, 560 (E.D.Va.2006). The CVRA guarantees crime victims eight different rights: (1) the right to be reasonably protected from the accused; (2) the right to notice of any public proceedings; (3) the right to be present during public court hearings; (4) the right to be reasonably heard at court proceedings; (5) the reasonable right to confer with the government's attorney; (6) the right to restitution; (7) the right to proceedings without unreasonable delay; and (8) the right to be treated with fairness and with respect for the victim's dignity and privacy. 18 U.S.C. § 3771(a). In this case, the Dawsons assert that they have the right to make a victim impact statement at Mr. Kaufman's sentencing and should be awarded $161,000 in restitution to cover funeral expenses and lost income.[FN1]

> FN1. Mrs. Mendoza's memorial services and funeral cost approximately $11,000. At the time of her death, Mrs. Mendoza was employed as a promoter and publicist for a local night club, at a base salary of $21,000, plus average yearly commission of approximately $9,000. In addition to funeral expenses, the Dawsons seek a portion of Mrs. Mendoza's lost future earnings, in the amount of $150,000.

In the CVRA, the term "crime victim" is defined as "a person directly and proximately harmed as a result of the commission of a Federal offense." *Id.* at 3771(e). Thus, a person must be directly harmed as a result of the offense and the harm must be proximate to the crime. During the floor debate of the CVRA, one of the bill's primary sponsors noted that the definition of "victim" in the CVRA is an "intentionally broad definition because all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged." 150 Cong. Rec. S 10910, 10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). But despite this legislative history, at least one court has noted that the full Congress passed the CVRA knowing that the Supreme Court has interpreted similar language in prior victims' rights acts not to refer to uncharged conduct. *See United States v. Turner*, 367 F.Supp.2d 319, 326 (E.D.N.Y.2005) (recognizing that the House report on the CVRA noted that 18 U.S.C. § 3771(a)(6) "makes no change in the law with respect to victims' ability to get restitution.").

In any event, the court must apply the language of the act itself. Under the CVRA, a victim must be both "directly and proximately" harmed by the offense. The term "proximate" means "lying very near or close" with the additional senses "(1) 'soon forthcoming; imminent'; (2) 'next preceding' <proximate cause>; and (3) 'nearly accurate; approximate." Bryan A. Garner, *Modern Legal Usage,* at 711 (2d ed.1995). "Proximate cause," of course, is a term of art in the law that while "elusive" emphasizes "the continuity of the sequence that produces an event" and refers to "a cause of which the law will take notice." *Id.* While one commentator "terms proximate cause 'concise gibberish,'" *id.*, *Black's Law Dictionary* fairly aptly defines it as "[t]hat which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have happened." Black's Law Dictionary, at 1225 (6th ed.1990).

***3** The only other court to examine the extent to which a person may qualify as a victim under the CVRA, looked not only to the language of the CVRA but to cases applying the VWPA and the Mandatory Victims Restitution Act ("MVRA") because all three statutes use the language "directly and proximately harmed." *Sharp*, 463 F.Supp.2d at 561-64. The definitions in these statutes are nearly identical. *See also* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L.Rev. 835, 857 (noting that the CVRA's definition of "victim" comes from the earlier MVRA).

In *Hughey v. United States*, 495 U.S. 411 (1990), the Supreme Court addressed the authorization of restitution under the Victim and Witness Protection Act ("VWPA"). The VWPA defines a victim as "a person directly and proximately harmed as the result of the commission of an offense for which restitution may be ordered."18 U.S.C. § 3663(a)(2). The Court found that restitution was only authorized for loss caused by the specific conduct which forms the basis for a defendant's offense of conviction. 495 U.S. at 413. Because the district court included restitution for the damage caused by the defendant's behavior surrounding all six original counts, rather than the much smaller amount of damage from the single count to which he pled guilty, the Court found that the district court exceeded its authority in granting restitution for loss not caused by the specific conduct that was the basis of the loss. *Id.* at 422.

As with the VWPA, the MVRA allows restitution only for those who are "directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." 18 U.S.C. § 3663A(a)(2). In *United States v. Davenport*, 445 F.3d 366, 374 (4th Cir.2006), the court stated that "[a] person is directly harmed, for purposes of the MVRA, when the harm results 'from conduct underlying an element of the offense of conviction.'" In *Davenport,* the defendant stole a woman's wallet and used her credit cards. The defendant pled guilty to using stolen credit cards. *Id.* at 367. The court found that only the credit card companies who were liable for the fraudulent charges were directly harmed by the defendant's offense conduct. *Id.* at 374. The court, therefore, reversed the district court's award of restitution to the woman whose wallet was stolen. *Id.*

Courts applying the VWPA and MVRA have also grappled with the issue of proximate cause. In *United States v. Vaknin*, 112 F.3d 579 (1st Cir.1997), the First Circuit recognized precedent dealing with the standard of causation between the defendant's criminal conduct and the victim's losses required for awarding restitution under the VWPA crossed the spectrum. *Id.* at 587-88. The court determined that the VWPA required the government to show "not only that a particular loss would not have occurred but for the conduct underlying the offense of

conviction, but also that the causal nexus between the conduct and the loss is not too attenuated (either factually or temporally)." *Id.* at 590. The court explained that "[t]he watchword is reasonableness. A sentencing court should undertake an individualized inquiry; what constitutes sufficient causation can only be determined case by case, in a fact-specific probe." *Id.*

***4** The First Circuit's approach in relation to a determination of causation under the VWPA is similar to the *Sharp* court's analysis in relation to the definition of victim under the CWPA. The *Sharp* court concluded that the determination of "victim" under the CVRA is a "fact-specific question" because "foreseeability is at the heart of proximate harm; the closer the relationship between the actions of the defendant and the harm sustained, the more likely that proximate harm exists." *Id.*

The Dawsons argue that Mr. Nolan threatened to commit a violent crime when he told Mr. Kaufman he needed a gun to rob a convenience store. Therefore, according to the Dawsons, the commission of a different violent crime like the shooting spree Mr. Nolan actually committed should have been foreseeable to Mr. Kaufman as well, and the illegal sale of the gun to Mr. Nolan was a proximate cause of Janelle Mendoza's death.

In applying the recognized standards for proximate harm, this court concludes that Janelle Mendoza was not directly and proximately harmed by Mr. Kaufman's sale of a firearm to a minor. Mrs. Mendoza and the Dawsons are undoubtedly victims of Evan Nolan's crimes. But the nexus between Mr. Kaufman's act of selling a firearm to a minor and Mr. Nolan's deadly rampage through a movie theater three months later is too factually and temporally attenuated. Although Mr. Nolan did declare, "I'm gonna stick up a 7-11," Mr. Kaufman testified he believed Mr. Nolan was "just trying to act tough," and did not think the statement was serious. Mr. Kaufman did not know Mr. Nolan to be a violent or dangerous person, and indeed Mr. Nolan had no previous criminal record. Given that Mr. Kaufman did not believe Mr. Nolan's statement to be credible, Mr. Nolan's use of the gun to commit a violent crime three months after the gun sale was not reasonably foreseeable at the time of the exchange. Even if Mr. Kaufman believed that Mr. Nolan might rob a convenience store with the handgun, the nature of the shooting spree that ultimately occurred was unforeseeable to Mr. Kaufman. "Stick[ing] up a 7-11" and firing twelve rounds into a crowded movie theater are vastly disparate crimes.

The Dawsons rely on several cases in which the court determined direct and proximate harm existed. But in each of those cases, the harm was a result of the defendants' own actions, not the actions of an intervening actor. Because a determination of proximate harm is necessarily a fact-specific inquiry, the court finds these cases factually distinguishable from the present case. In *United States v. Donaby*, 349 F.3d 1046 (7th Cir.2003), the court determined that a police department could be considered a victim under the MVRA because damage to a police department's car in a high-speed chase was directly and proximately caused by the defendant's bank robbery. *Id.* at 1053. The court recognized that the high-speed chase was a direct and foreseeable consequence of the robbery. *Id.* at 1055. In *Donaby*, there is no intervening actor, no temporal separation, and the defendant could foresee the damage as a result of the chase.

Moreover, in contrast to this case, the defendant in *Donaby* made the decision to engage in the high-speed chase in an attempt to successfully conclude his robbery. He also could have surrendered to police before the damage occurred. In this case, even at the time the gun was sold, Mr. Kaufman had

no knowledge as to Mr. Nolan's intention to commit a mass shooting spree.

The Dawsons also rely on *United States v. Checora*, 175 F.3d 782 (10th Cir.1999), in which the Tenth Circuit determined that a murder victim's children were victims of the murder under the MVRA because his death eliminated the child support payments they received. *Id.* at 795. The court concluded that the children were directly and proximately harmed as a result of their father's death because they lost, among other things, a source of financial support. *Id.* The defendant in *Checora*, however, committed the murder. There was no intervening actor. If the defendant in the present case were Evan Nolan, there is no question that Janelle Mendoza would be a victim under the CVRA.[FN2] Because this case is against Mr. Kaufman, not Mr. Nolan, the court finds *Checora* factually inapplicable.

> FN2. There would also be a stronger argument that the Dawsons themselves would be victims in a case involving Mr. Nolan as the defendant. However, *Checora* would remain factually distinguishable with respect to the Dawsons' request for Mrs. Mendoza's lost income. While the children in *Checora* were recipients of their father's financial support, there is no indication in the record in this case that the Dawsons relied on the income of their daughter.

***5** The only case to both analyze the definition of "victim" under the CVRA and involve the conduct of an intervening actor is *Sharp*. In *Sharp*, a woman sought to make a victim impact statement at the sentencing of a drug dealer who sold drugs to her former boyfriend. 463 F.Supp. at 557. The woman asserted that when her boyfriend consumed the drugs he purchased from the drug dealer, he abused her. *Id.* at 558-59. The court concluded that there was not sufficient evidence to demonstrate that the defendant's wrongful act of distributing marijuana directly and proximately harmed the girlfriend. *Id.* at 567. The court stated that the girlfriend "must show more than a mere *possibility* that an alleged act (the Defendant's federal crime) caused her boyfriend to physically and emotionally abuse her."*Id.* The court noted that "[i]ndividuals, whether 'high' on drugs or drug-fee, are responsible for their actions. The act of consuming marijuana by [the former] boyfriend, not the furnishing of it to him by the Defendant, was, at most, the proximate cause of [the girlfriend's] sustained injuries." *Id.* The court, therefore, concluded that the "former boyfriend's alleged behavior was an independent, intervening cause which broke the chain of necessary causation." *Id.* at 568.

This court agrees with the analysis of *Sharp*. Mr. Nolan's actions were an independent, intervening cause which broke the necessary chain of causation. While the court does not want to minimize in any way the harm suffered by those who were killed, injured, or had loved ones killed or injured in the Riverwalk shooting, that harm is not sufficiently connected to Mr. Kaufman's offense of unlawfully selling a firearm to a minor for this court to consider his actions to be the direct and proximate cause of the harm. The fact-specific inquiry necessary in this determination does not support a finding that Mr. Kaufman could foresee Evan Nolan's future shooting spree. There are cases that find an adequate connection in instances when a defendant hands a gun to a friend during a fight. But this is not such a case. The sale of the handgun was not in the heat of the moment, as Mr. Kaufman sold the gun to Mr. Nolan three months before the shooting. Additionally, because Mr. Nolan had never shown criminal tendencies, Mr. Kaufman did not believe the remark made about robbing a 7-11 was a serious expression of intent to commit a violent act. At most, Mr. Kaufman surmised that Mr. Nolan might use it to rob a convenience store. This type of speculation

does not demonstrate the type of knowledge or foreseeability necessary to finding Mr. Kaufman's sale of the firearm to a minor to be the proximate cause of Mrs. Mendoza's death.

Because the court concludes that Janelle Mendoza is not a victim of Mr. Kaufman's crime, it necessarily follows that the court concludes that her parents are not victims of Mr. Kaufman's crime in their own right. The Dawsons cite to *United States v. Bedonie,* for the proposition that they are also victims because they were directly and proximately harmed by Mrs. Mendoza's murder. 317 F.Supp.2d 1285, 1301-02 (D.Utah 2004), *rev'd on other grounds sub nom. United States v. Serawop,* 410 F.3d 656 (10th Cir.2005). Although the Dawsons state that the court need not reach this more complicated issue because they would have the same rights as Mrs. Mendoza's representative, the court does not conclude that *Bedonie* supports a finding that the Dawsons are victims in their own right. *Bedonie* involved restitution against a defendant convicted of involuntary manslaughter because her intoxication while driving caused the death of a passenger in her vehicle. *Bedonie* would only be analogous to Mr. Kaufman's case if it dealt with the person who sold Defendant Bedonie the alcohol.

***6** The selling of a firearm to a minor is actually similar to cases involving the unlawful sale of alcohol to a minor. In *Corrigan v. United States,* 815 F.2d 954, 956-57 (4th Cir.1987), the court found that the United States was not liable under the Federal Tort Claims Act for providing, through Army taverns, alcohol to an underage Army private who then struck a third party because providing alcohol was not a proximate cause of the injury. Likewise, a store clerk who sells alcohol to a minor would not be the proximate cause of injuries sustained in an automobile accident if the minor decides to get drunk and drive.

While Mrs. Mendoza and the Dawsons are clearly victims of a tragic crime, the court concludes that neither are victims, as that term is defined in the CVRA, of Alexander Kaufman's offense of selling a firearm to a minor. The court concludes that the Dawsons cannot demonstrate that Mr. Kaufman's sale of a firearm to a minor "directly and proximately" caused Mrs. Mendoza's death.

## CONCLUSION

Based on the above reasoning, the court denies the Dawsons' Motion to Have Janelle Mendoza Recognized as a Crime Victim, to be Recognized as Her Representative, to Make an In-Court Victim Impact Statement, and to Receive Restitution.

D.New London, 2008.
U.S. v. Kaufman
Slip Copy, 2008 WL 3142561 (D.New London)

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**Effective: July 27, 2006**

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 237. Crime Victims' Rights (Refs & Annos)
**§ 3771. Crime victims' rights**

**(a) Rights of crime victims.**--A crime victim has the following rights:

**(1)** The right to be reasonably protected from the accused.

**(2)** The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

**(3)** The 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.

**(4)** The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

**(5)** The reasonable right to confer with the attorney for the Government in the case.

**(6)** The right to full and timely restitution as provided in law.

**(7)** The right to proceedings free from unreasonable delay.

**(8)** The right to be treated with fairness and with respect for the victim's dignity and privacy.

**(b) Rights afforded.**--

**(1) In general.**--In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), 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. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

**(2) Habeas corpus proceedings.**--

**(A) In general.**--In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

**(B) Enforcement.**--

**(i) In general.**--These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).

**(ii) Multiple victims.**--In a case involving multiple victims, subsection (d)(2) shall also apply.

**(C) Limitation.**--This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

**(D) Definition.**--For purposes of this paragraph, the term "crime victim" means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative.

**(c) Best efforts to accord rights.**--

**(1) Government.**--Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

**(2) Advice of attorney.**--The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

**(3) Notice.**--Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

**(d) Enforcement and limitations.**--

**(1) Rights.**--The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

**(2) Multiple crime victims.**--In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

**(3) Motion for relief and writ of mandamus.**--The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

**(4) Error.**--In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

**(5) Limitation on relief.**--In no case shall a failure to afford a right under this chapter 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 10 days; and

**(C)** in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

**(6) No cause of action.**--Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

**(e) Definitions.**--For the purposes of this chapter, the term “crime victim” means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

**(f) Procedures to promote compliance.**--

**(1) Regulations.**--Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

**(2) Contents.**--The regulations promulgated under paragraph (1) shall--

**(A)** designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

**(B)** require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

**(C)** contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

**(D)** provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.

CREDIT(S)

(Added Pub.L. 108-405, Title I, § 102(a), Oct. 30, 2004, 118 Stat. 2261, and amended Pub.L. 109-248, Title II, § 212, July 27, 2006, 120 Stat. 616.)

Current through P.L. 110-243 (excluding P.L. 110-234) approved 6-3-08



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injury has to be fairly ... trace [able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *Id.* (internal quotation marks omitted; alteration in original). "Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561, 112 S.Ct. 2130 (internal quotations omitted).

Appellant asserts that he and other class members will suffer injury in fact as described above and that this injury satisfies the requirements of Article III standing. We strongly doubt whether this injury is sufficiently non-conjectural or non-hypothetical to constitute a cognizable injury in fact or whether its redressability is sufficiently non-speculative. We need not reach this issue, however, because we conclude that the necessary causal connection between defendants' alleged conduct and the alleged injury is lacking.

**[3]** The alleged injury of which appellant complains would be caused by a chain of events including actions taken by the press and by class members themselves. The alleged injury to appellant is therefore "highly indirect" and results from both the plaintiffs' own actions and the independent actions of third parties not before the court. *Allen v. Wright,* 468 U.S. 737, 757, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). We therefore conclude that "the links in the chain of causation," *id.* at 759, 104 S.Ct. 3315, between Ross's execution and the asserted injury are too attenuated and too numerous to satisfy "the irreducible constitutional minimum of standing," *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130, with respect to appellant's claims, all of which are directed toward challenging Ross's execution. "[W]e may affirm the judgment of the district court on any ground appearing in the record." *Boy Scouts of Am. v. Wyman,* 335 F.3d 80, 90 (2d Cir.2003). Because we conclude that appellant does not have standing to bring the claims raised below, we affirm the order of the district court denying appellant's application for a temporary restraining order, and we deny appellant's motion in this Court for a stay of Ross's execution.

For the foregoing reasons, the order of the district court be and it hereby is AFFIRMED and appellant's motion for a stay is DENIED.


**In re W.R. HUFF ASSET MANAGEMENT CO., LLC, Appaloosa Management, L.P. and Franklin Mutual Advisers LLC, Argent Classic Convertible Arbitrage Fund L.P., Argent Classic Convertible Arbitrage Fund (Bermuda) Ltd., and Argent Lowlev Convertible Arbitrage Fund Ltd., and the Commonly–Managed Funds UBS O'Connor LLC F/B/O UBS Global Equity Arbitrage Master Ltd. and UBS O'Connor LLC F/B/O UBS Global Convertible Portfolio and Eminence Capital LLC, on behalf of themselves and others similarly situated, Consolidated Petitioners (pursuant to 18 U.S.C. § 3771).**

**United States of America, Plaintiff,**

**v.**

**John Rigas, Timothy Rigas, Michael Rigas, Defendants.**

**Docket Nos. 05–2619–OP(L), 05–2628–OP(CON).**

United States Court of Appeals, Second Circuit.

Argued June 3, 2005.

Decided June 3, 2005.

Opinion Revised June 6, 2005.

**Background:** Defendants were convicted of securities fraud, conspiracy to commit

securities fraud, false statements in Securities and Exchange Commission (SEC) filings, and bank fraud. Victims filed two petitions for a writ of mandamus under the Crime Victims' Rights Act (CVRA), seeking to vacate settlement agreement approved by the United States District Court for the Southern District of New York, Leonard B. Sand, J., which established $715 million fund to compensate victims.

**Holding:** The Court of Appeals, Hall, Circuit Judge, held that District Court was within its discretion under the CVRA in approving settlement agreement, although fund would not be sufficient to ensure that victims were afforded full restitution as provided for under the Mandatory Victim Restitution Act (MVRA).

Petitions denied.

**1. Mandamus ⚿26, 28**

Ordinarily, the Court of Appeals grants mandamus relief when the district court has usurped power or clearly abused its discretion.

**2. Mandamus ⚿1**

To obtain mandamus relief, the petitioner must usually demonstrate: (1) the presence of a novel and significant question of law; (2) the inadequacy of other available remedies; and (3) the presence of a legal issue whose resolution will aid in the administration of justice.

**3. Mandamus ⚿187.9(5)**

Abuse of discretion standard was applicable upon review of District Court's denial of mandamus relief under the Crime Victims' Rights Act (CVRA). 18 U.S.C.A. § 3771(d)(3).

**4. Criminal Law ⚿1220**

District Court was within its discretion under the Crime Victims' Rights Act (CVRA) in approving settlement agreement which established $715 million fund to compensate victims of securities and bank fraud perpetrated by defendants, although fund would not be sufficient to ensure that victims were afforded full restitution as provided for under the Mandatory Victim Restitution Act (MVRA), where there were potentially tens of thousands of victims, and complexity of resolving a multitude of factual and causal issues to determine amount of losses of those victims would extend sentencing process inordinately. 18 U.S.C.A. §§ 3663A(c)(3), 3771(a)(6).

**5. Criminal Law ⚿1220**

Government or District Court did not act unreasonably in entering into or approving settlement agreement which established $715 million fund to compensate victims of securities and bank fraud perpetrated by defendants, given that victims would have difficulty in effecting any recoveries from defendants because of difficulties in proof of culpability and because of security interests affecting their assets. 18 U.S.C.A. § 3771.

**6. Criminal Law ⚿1220**

**Sentencing and Punishment ⚿2131**

The Crime Victims' Rights Act (CVRA) does not grant victims any rights against individuals who have not been convicted of a crime; concomitantly, neither the government nor the sentencing court are restricted by the CVRA from effecting reasonable settlement or restitution measures against non-convicted defendants. 18 U.S.C.A. § 3771.

**7. Criminal Law ⚿1220**

Government was not required under the Crime Victims' Rights Act (CVRA) to consult with or seek approval of victims before negotiating or entering into a settlement agreement regarding restitution; rather, CVRA required only that victims be provided with an opportunity to be

heard concerning proposed settlement agreement. 18 U.S.C.A. § 3771.

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Before: SOTOMAYOR, and HALL, Circuit Judges.*

HALL, Circuit Judge.

Before us are two petitions for a writ of mandamus brought by W.R. Huff Asset Management Co., LLC, *et al.* ("the Huff Petitioners") and Eminence Capital, LLC, *et al.* ("the Class Action Petitioners" and, together with Huff Petitioners, "the Petitioners"). Both petitions seek to vacate a settlement agreement of a forfeiture action among the United States and John J. Rigas, Timothy J. Rigas, and other members of the Rigas family that establishes a $715 million fund to compensate victims of a fraud perpetrated in part by John J. Rigas and Timothy J. Rigas. Both petitions are based on the recently-enacted Crime Victims' Rights Act of 2004 ("CVRA" or "the Act"), 18 U.S.C. § 3771.

Because the district court did not abuse its discretion in approving the settlement agreement, we deny both petitions.

## I. *Background*

### A. *Facts*

In July 2004, a jury found John J. Rigas and Timothy J. Rigas ("the Rigases") guilty of securities fraud, conspiracy to commit securities fraud, false statements in Securities and Exchange Commission ("SEC") filings, and bank fraud. *See* Dist. Ct. Dkt. Sht. No. 02–cr–1236 at 7/8/04

* The Honorable Joseph M. McLaughlin and Chester J. Straub, Circuit Judges, originally members of this panel, recused themselves from consideration of the petition. The Honorable Sonia Sotomayor and Peter W. Hall, Circuit Judges, who are in agreement, have decided the petition pursuant to 2d Cir. R. § 0.14(b). *See also* 18 U.S.C. § 3771(d)(3) (permitting a single judge to issue a writ of mandamus pursuant to circuit rule or the Federal Rules of Appellate Procedure).

Entry. The jury acquitted Michael J. Rigas on various charges in the indictment and deadlocked on others. The Government has indicated its intent to retry Michael Rigas on the deadlocked charges.

The Petitioners and their clients allege they purchased high-yield debt securities issued by Adelphia Communications Corporation ("Adelphia"), a company founded by John J. Rigas, in reliance on materially false and misleading statements, resulting in money damages to them. *See* Huff Mot. at 6–7. Apart from the criminal case, the Petitioners, along with other plaintiffs, filed individual actions against the Rigases and other defendants—including Deloitte & Touche LLP, investment and commercial banks, and lawyers—under various provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. *See* Dist. Ct. Dkt. Sht. No. 03–md–1529. The actions are still pending in the district court. *See id.* The SEC has also brought a civil action under the Securities Exchange Act of 1934 against, among others, John J. Rigas, Timothy J. Rigas, Michael J. Rigas, and James Rigas. See Dist. Ct. Dkt. Sht. No. 02–cv–5776.

In April 2005, the Government entered into a proposed settlement agreement ("the Settlement Agreement") with the Rigases and other members of the Rigas family who had either not been named or were not convicted in the criminal action.[1] *See* Huff Mot. at Exh. D (Settlement Agreement). Under the Settlement Agreement, the entire Rigas family consented to forfeiture of designated assets, including numerous cable television systems, companies, Adelphia securities, and real estate holdings. *See id.* at ¶¶ 1–4. In exchange, the Government agreed not to request an order of restitution or a criminal fine against John J. Rigas and Timothy J. Rigas at their sentencing and not to seek "further forfeiture, restitution, fine or other economic sanction or recovery in relation to the ownership, control or management of Adelphia by the Rigas Family." *Id.* at ¶¶ 9–10. Paragraph 8 of the Settlement Agreement further provided, in relevant part:

> As a condition to receiving a distribution from the forfeited assets or the Victim Fund, the Attorney General shall require any such victim recipient, other than Adelphia, to release and discharge the Rigas Family (except for John J. Rigas and Timothy J. Rigas) and Peter L. Venetis from any and all actions, claims or liabilities of any nature in relation to the ownership, control or management of Adelphia by the Rigas Family, . . . and to dismiss any such claim or litigation commenced by such recipient against the Rigas Family (except for John J. Rigas and Timothy J. Rigas) or Peter L. Venetis. Such recipients shall also reduce and mark satisfied any judgment that they obtain against third parties, or otherwise indemnify the Rigas Family (except for John J. Rigas and Timothy J. Rigas) and Peter L. Venetis, to the extent of any liability (for contribution, indemnity or the like) of the Rigas Family (other than John J. Rigas and Timothy J. Rigas) or Peter L. Venetis to the third party on account of such judgment.

Huff Mot. at Exh. D at ¶ 8.

At the same time, the Government also entered into a non-prosecution agreement with Adelphia. *See* Huff Mot. at Exh. H (Letter). The non-prosecution agreement provided that, if Adelphia forbore from criminal activity and continued to cooperate with the Government, the Government

1. These individuals are Doris Rigas, Michael J. Rigas, James P. Rigas, Ellen Rigas Venetis, and their affiliated entities. *See* Mot. at Exh. D at 1.

would not charge the company for the criminal actions of its executives relating to the crimes of which the Rigases were convicted. *See id.* The non-prosecution agreement also provided that Adelphia would pay the Government $715 million for a victim compensation fund ("Victim Fund"), which would distribute funds to eligible victims "in such forms and amounts as determined by the Attorney General and the SEC, in their sole discretion, subject to any applicable court approval process." *Id.* at 3.

On April 25, 2005, the Government moved for the district court to designate the case as one with "multiple crime victims," under subsection (d)(2) of the Crime Victims' Rights Act of 2004 ("CVRA"), codified at 18 U.S.C. § 3771. *See* Huff Mot. at Exh. F (Order) at Exh. 1 (Affirmation). The Government argued that there were tens of thousands of victims of the crimes committed by the Rigases and that it was virtually impossible to identify and notify each victim personally. *See id.* at 3. The Government proposed an alternative plan for notification, involving a listing of the settlement and other agreements reached with Adelphia and the Rigases at a website maintained by the Department of Justice. *See id.* at 4–5. The district court filed an order directing any person or entity wishing to be heard concerning the Settlement Agreement to make a written submission by May 10, 2005, and the court scheduled a hearing on the Government's motion for May 18, 2005. *See* Huff Mot. at Exh. F (Amended Order). Petitioners objected to the settlement, raising arguments under the CVRA. *See* Huff Mot. at Exh. C, Class Action Mot. at Exh. 4.

At the May 18 hearing, the Government described to the district court the numerous steps it had taken to notify potential victims of the proposed settlement. *See* Huff. Mot. at Exh.G (Transcript) at 2–3. Those steps included: On April 26, 2005, the Government provided the bankruptcy court presiding over the bankruptcy action brought by Adelphia against the Rigases with copies of the proposed Settlement Agreement and other agreements and served the parties listed in the bankruptcy proceedings with notice of the settlement. In addition, the Government contacted the company and the equity committee involved in the Adelphia bankruptcy proceedings and asked them to provide information about the proposed agreements to any potential victims. The Government also submitted the agreements to the district court hearing the civil action brought by the SEC against various members of the Rigas family. The Government further held a press conference during which it disseminated information about the agreements on national television and issued a press release to media outlets throughout the United States. On April 27, 2005, the Government posted on its designated website copies of the proposed settlement and other agreements, along with contact information for the victim witness coordinator at the United States Attorney's Office in the Southern District of New York.

At the May 18 hearing, various objectors, including the Petitioners herein, were heard and the following colloquy, *inter alia*, occurred:

> THE COURT: Tell me what [the Government] should do now that they have not done and how long it would take and what impact that would have on the sentence [of the Rigases].
>
> [Attorney for Class Action Petitioners]: Your Honor, there is no question that hiring the claims administrator tomorrow and sending out notice to determine who the victims are and how to allocate those funds would delay the sentencing

> set for June 1. But I think the government—
>
> THE COURT: How long would it delay it? Months?
>
> [Assistant United States Attorney]: Years.
>
> [Attorney for Class Action Petitioners]: I think, your Honor, it would certainly delay the matter for months.
>
> THE COURT: Yes. That's unacceptable. That is unacceptable. You would have to satisfy me that that type of a delay was necessary to ensure compliance with the statute and fairness to the victims and would be of sufficient value to run the risk of this whole global settlement coming apart.

Huff Mot. at Exh. G. (Transcript) at 11. At the conclusion of the hearing, the district court accepted the settlement, subject to the approval of (1) the district court judge presiding over the action brought against the Rigases by the SEC, and (2) the bankruptcy judge presiding over the action brought by Adelphia against the Rigases and other parties.[2] *See id.* at 19–20. The district court found that "[o]bviously, the settlement order entails the interests of many diverse parties and reflects obvious compromises," but that "[t]he alternatives to this settlement are not at all attractive, not only in terms of the complexity and the contingencies which would result." *Id.* The district court filed an opinion and order consistent with its oral opinion. *See* Huff Mot. at Exh. A.

B. *Huff's Mandamus Petition*

The Huff Petitioners argue that mandamus relief is warranted because the Settlement Agreement violates the CVRA—specifically §§ 3771(a)(6) and (8)—in that it subjects them to "a Hobson's choice of either foregoing compensation from the approximately $715 million in Victim Fund proceeds or accepting a distribution (under an as-yet unknown plan of allocation) under unreasonable constraints that unnecessarily jeopardize the viability of their civil claims against other participants in the Adelphia fraud." *See* Huff. Mot. at 15. According to the Huff Petitioners, the settlement violates the victims' rights under the CVRA to be treated fairly and to be provided with full and timely restitution. *See id.*

The Huff Petitioners further contend that paragraph 8 of the Settlement Agreement is unfair under the CVRA because the Settlement Agreement violates the Mandatory Victim Restitution Act ("MVRA"), codified at 18 U.S.C. § 3663A, by making "it virtually impossible for victims to obtain anything close to full recovery for their losses." *See id.* at 18. They argue that the Settlement Agreement "places victims in a worse position than they would be in had the Court ordered the Rigas Defendants to pay restitution under the MVRA." *Id.* at 23.

C. *Class Action Petitioners' Mandamus Petition*

The Class Action Petitioners also assert that they were denied their right to restitution, arguing that "[t]he Government sought an order designating this matter as a case involving multiple crime victims in order to avoid the victims' right to full and timely restitution" and that "[t]he District Court ignored the Government's failure to satisfy its obligations under the [CVRA] and under the [Attorney General] Guidelines [for Victim and Witness Assistance]." *See* Class Action Petition, 22, 24. With

**2.** Both the district court judge presiding over the SEC action and the bankruptcy judge have since approved the global settlement.

respect to the notification provision of the CVRA, they contend that the Government failed to make its "best efforts" to identify and personally notify all the crime victims, as required by § 3771(c). *See id.*

The Class Action Petitioners also contend that they were not afforded an opportunity to confer with the Government concerning the disposition of the case—a right enumerated in § 3771(a)(5). *See id.* at 21–22. In addition, they argue that: (1) the district court did not have the authority to approve the Settlement Agreement at the May 18 hearing because the notice to victims merely stated that the hearing was for the purpose of addressing the Government's motion to use alternative victim-notification procedures, not for approving the settlement; (2) the non-prosecution agreement between Adelphia and the Government violated laws governing civil and criminal forfeitures; and (3) the district court improperly rejected the Class Action Petitioners' challenges to the Government's proposed notice procedures because those procedures omitted material facts and violated federal and New York laws. *See id.* at 24–29.

## II. *Statutory Framework and Standard of Review*

Enacted in October of 2004, the CVRA provides "crime victim[s]" with the following eight rights:

> (1) The right to be reasonably protected from the accused.
>
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
>
> (3) The 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.
>
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
>
> (5) The reasonable right to confer with the attorney for the Government in the case.
>
> (6) The right to full and timely restitution as provided in law.
>
> (7) The right to proceedings free from unreasonable delay.
>
> (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

18 U.S.C. § 3771(a). "In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded" these rights. *Id.* at § 3771(b). If, however, "the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings." *Id.* at § 3771(d)(2).

Pursuant to the mechanism set forth in the CVRA, the crime victim, the crime victim's lawful representative, and the Government "may assert the rights described in [§ 3771(a) ]." *Id.* at § 3771(d)(1). These rights must first be "asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred." *Id.* at § 3771(d)(3). The district court "shall take up and decide any motion asserting a victim's right forthwith." *Id.* If the court denies relief, "the movant may petition the court of appeals for a writ of mandamus." *Id.* The

court of appeals shall, in turn, "take up and decide" the petition "within 72 hours after the petition has been filed." *Id.*

**[1, 2]** This Court has often characterized a writ of mandamus as an "extraordinary remedy." *United States v. Coppa (In re United States),* 267 F.3d 132, 137 (2d Cir.2001). Ordinarily, this Court grants mandamus relief when the district court has usurped power or clearly abused its discretion. *See Bulow v. Bulow (In re von Bulow),* 828 F.2d 94, 97 (2d Cir.1987) (stating that the "touchstones" for exercise of mandamus are a showing of "usurpation of power, clear abuse of discretion and the presence of an issue of first impression"). Accordingly, " 'mere error, even gross error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support issuance of the writ.' " *In re "Agent Orange" Product Liability Litigation,* 733 F.2d 10, 13 (2d Cir.1984) (quoting *United States v. DiStefano,* 464 F.2d 845, 850 (2d Cir.1972)). Pursuant to this standard, the petitioner must usually demonstrate: (1) the presence of a novel and significant question of law; (2) the inadequacy of other available remedies; and (3) the presence of a legal issue whose resolution will aid in the administration of justice. *Coppa,* 267 F.3d at 137–38; *In re United States,* 10 F.3d 931, 933 (2d Cir.1993).

Under the plain language of the CVRA, however, Congress has chosen a petition for mandamus as a mechanism by which a crime victim may appeal a district court's decision denying relief sought under the provisions of the CVRA. *See* 18 U.S.C. § 3771(d)(3) ("the movant may petition the court of appeals for a writ of mandamus"); § 3771(d)(5)(B) ("A victim may make a motion to re-open a plea or sentence only if ... the victim petitions the court of appeals for a writ of mandamus within 10 days ...."). It is clear, therefore, that a petitioner seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus.

Because crime victims, as petitioners for mandamus, have a right to appellate review, we must determine the appropriate standard of that review. "For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo* ), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood,* 487 U.S. 552, 558, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988). In *Pierce,* the Supreme Court determined that a district court's decision concerning an attorneys'-fees provision of the Equal Access to Justice Act was entitled to abuse of discretion review because: (1) the language of the statute emphasized that the determination to award attorneys' fees was one for the district court to make; (2) the district court was better positioned than the court of appeals to decide the issue in question, as it may have had "insights not conveyed by the record"; and (3) the problem was non-amenable to regulation by rule because of the "diffuseness of circumstances, novelty, vagueness, or similar reasons." *Id.* at 559–62, 108 S.Ct. 2541.

**[3]** Similarly, the CVRA provides that the determination to "ensure" that the crime victim is afforded the rights enumerated in the CVRA is entrusted to the district court to make. See 18 U.S.C. § 3771(b). Further, the district court is in a better position than this 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 does a court of

appeals. Most of the rights provided to crime victims under the CVRA require an assessment of "reasonableness." 18 U.S.C. § 3771(a)(1), (2), (4), (5) and (7). The district court is far better positioned to make these assessments and to determine what constitutes "a reasonable procedure" for effecting these rights, 18 U.S.C. § 3771(d)(2), than a court of appeals.

The Supreme Court has noted that "neither a clear statutory prescription nor a historical tradition exists" to determine which standard of review to apply under the Equal Access to Justice Act. *Pierce,* 487 U.S. at 558, 108 S.Ct. 2541. The same observation applies to the CVRA. Because the factors that warranted application of the abuse of discretion standard of review for the Equal Access to Justice Act apply with equal force to the CVRA, we hold that a district court's determination under the CVRA should be reviewed for abuse of discretion.

## III. *Discussion*

### A. *The Right to Restitution*

The principal argument made by both sets of petitioners is that the Settlement Agreement, by requiring releases of third parties, unfairly compromises the right of crime victims to receive full restitution. Specifically, the petitioners contend that (1) the $715 million Victim Fund that will be made available to victims will not have the capacity to provide full restitution to the many victims of the Rigases' crimes; and (2) paragraph 8 of the Settlement Agreement, which releases members of the Rigas Family (except for John J. and Timothy J. Rigas) from liability and indemnifies them from judgments against third parties, also jeopardizes the victims' ability to obtain full restitution from parties who might be found jointly and severally liable with the Rigases.

[4] Petitioners assert that § 3771(a)(6) entitles them to "full and timely restitution," omitting to mention, however, that such restitution must be "as provided in law." *See* 18 U.S.C. § 3771(a)(6). This important modifier makes it clear that Congress recognized that there would be numerous situations when it would be impossible for multiple crime victims of the same set of crimes to be repaid every dollar they had lost. The question before us is whether the district court abused its discretion by approving the Settlement Agreement, given its obligation under the CVRA to ensure that the victims are afforded rights to restitution as provided by law. We hold that the district court did not.

Under the MVRA, victims of any offense against property under Title 18, including any offense committed by fraud or deceit, are not entitled to mandatory restitution if the district court determines that "the number of identifiable victims is so large as to make restitution impracticable," or that "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." 18 U.S.C. § 3663A(c)(3). Thus, the MVRA provides that, under these two circumstances, victims are not entitled to mandatory restitution. The district court determined that the victims in this case were numerous and that the complexity of resolving a multitude of factual and causal issues would extend the sentencing process inordinately. As a basic predicate to this complexity, it is undisputed that there are potentially tens of thousands of victims of the Rigases' crimes. Second, the amount of losses of those victims has not been established and doing so would indisputably take a great deal of time. Clearly, this case fits within the dual exceptions contained in the

MVRA, and the district court did not abuse its discretion by deciding to accept the provisions of the Settlement Agreement as reasonable substitute restitution, as permitted by the MVRA.

**[5, 6]** Further, the CVRA does not grant victims any rights against individuals who have not been convicted of a crime. Concomitantly, neither the Government nor the sentencing court are restricted by the CVRA from effecting reasonable settlement or restitution measures against non-convicted defendants. To the extent that the Government recognizes that victims would have difficulty in effecting any recoveries from the Rigas family members because of difficulties in proof of culpability and because of security interests affecting the family's assets, petitioners cannot meet their burden in showing that the Government or the district court acted unreasonably in entering the Settlement Agreement or approving it. Additionally, the district court in no way treated the victims unfairly or without "respect for [their] dignity and privacy," 18 U.S.C. § 3771(a)(8), but rather took into consideration the numerosity of victims, the uncertainty of recovery, and the prospect of unduly prolonging the sentencing proceedings when adopting the settlement, factors which Congress has required the court to consider. *See* 18 U.S.C. § 3771(d)(2).

B. *Other Rights Asserted by Petitioners*

Petitioners' other arguments unrelated specifically to restitution come in a variety of forms. They assert variously that some victims were denied rights to confer with the attorney for the Government; that the manner of obtaining forfeited assets as part of the Victims Fund violates regulations regarding sharing of forfeited assets with those who committed the crimes at issue; and that they did not get notice of certain aspects of the various settlement agreements in the other court forums that made up the entire interconnected plan for ensuring that $715 million is available for distribution to the victims. As to each of these arguments, they are either without factual support or a legal basis, or they were implicitly considered in an appropriate fashion by the district court in its extensive successful efforts to provide notice of the proposed settlement and to solicit and hear objections to it.

**[7]** First, no petitioner has alleged that it asked the Government to confer with it and was denied the opportunity to do so. Nothing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement. The CVRA requires only that the court provide victims with an opportunity to be heard concerning a proposed settlement agreement, and the court provided the victims with a full opportunity to do so in this case. Second, the district court did not abuse its discretion by approving a settlement that would send funds to Adelphia, because the Government may by statute compromise claims in the context of a forfeiture. *See* 21 U.S.C. § 853(i)(2). Finally, the district court did not abuse its discretion in determining that, given the time delays and the difficulty of identifying victims and calculating losses, the Government gave reasonable notice to crime victims in the extensive alternative notice procedures it employed.

## IV. *Conclusion*

For the foregoing reasons, we hold the district court did not abuse its discretion in approving the Settlement Agreement at issue and DENY the petitions for mandamus.

## III.

The petitioner has had the misfortune to hire two attorneys, if not three, who have provided woefully inadequate legal assistance. At the same time, the BIA has dismissed his pleadings on procedural grounds, using the blatant errors of his attorneys to avoid addressing the merits of his complaints against them. Because these attorneys violated Ray's due process rights, we conclude that the BIA abused its discretion in denying Ray's motions to reopen on procedural grounds. On remand, the BIA shall consider the merits of Ray's underlying claim of ineffective assistance regarding Jang Im's alleged failure to file a brief on appeal. If, on remand, the BIA determines that Mr. Im provided ineffective assistance to Ray by failing to file a brief on direct appeal, it should permit Ray to file a brief in support of his appeal and should consider the merits of his direct appeal from the IJ's decision denying him asylum. The petition is **GRANTED** and the case **REMANDED** for further proceedings.

**W. Patrick KENNA, Petitioner,**

**v.**

**UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent.**

**No. 05–73467.**

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Jan. 11, 2006.

Filed Jan. 20, 2006.

**Background:** Crime victim petitioned for writ of mandamus after the United States District Court for the Central District of California, John F. Walter, J., refused to allow him to allocute at sentencing of second of two co-defendants convicted of financial frauds.

**Holdings:** The Court of Appeals, Kozinski, Circuit Judge, held that:

(1) crime victims' right under CVRA to be "reasonably heard" included right to allocute at sentencing;

(2) crime victim's right to allocute was not vindicated when he was given opportunity to speak at sentencing of first co-defendant, but not at sentencing at second;

(3) determination of proper remedy was for district court in first instance.

Petition granted.

Friedman, Senior Circuit Judge, filed opinion dubitante.

**1. Sentencing and Punishment ⚿361**

Crime victims' right under Crime Victims' Rights Act (CVRA) to be "reasonably heard" during sentencing was not limited to written impact statements, but included right to speak at sentencing. 18 U.S.C.A. § 3771(a)(4).

**2. Statutes ⚿216, 217.3**

Floor statements by members of Congress are not given the same weight as some other types of legislative history, such as committee reports, in interpreting ambiguous statutes; however, floor statements by sponsors of legislation are entitled to more weight than floor statements by other members, and even more weight where other legislators do not offer any contrary views.

**3. Criminal Law ⚿1220**

Crime Victims' Rights Act (CVRA) was enacted to make crime victims full participants in the criminal justice system. 18 U.S.C.A. § 3771.

**4. Sentencing and Punishment ⚿361**

Statutory right under Crime Victims' Rights Act (CVRA) to be "reasonably heard" during sentencing proceeding was not vindicated when crime victim was given opportunity to speak at sentencing of one co-defendant, and thus sentencing court could not deny victim opportunity to speak at second co-defendant's sentencing merely because it believed that it had heard victim's concerns at first sentencing. 18 U.S.C.A. § 3771(a)(4).

**5. Mandamus ⚿172**

Crime victim seeking relief pursuant to mandamus provision of Crime Victims' Rights Act (CVRA) need not overcome hurdles typically faced by petitioners seeking mandamus review of district court determinations; Court of Appeals must issue writ whenever its finds that district court's order reflects abuse of discretion or legal error under CVRA without regard to balancing of factors designed to ensure that mandamus does not become vehicle for interlocutory review in routine cases. 18 U.S.C.A. § 3771.

**6. Sentencing and Punishment ⚿361**

Determination of proper remedy for district court's refusal to allow crime victim to allocute at sentencing of defendant, in violation of Crime Victims' Rights Act (CVRA), was for district court in first instance; district court was to avoid upsetting constitutionally protected rights of defendant while being cognizant that only way to give effect to victim's right to speak was to vacate sentence and hold new sentencing hearing. 18 U.S.C. (1982 Ed.) § 3771(d)(5).

Steven J. Twist, Scottsdale, AZ; Keli B. Luther, Crime Victims Legal Assistance Project, Tempe, AZ; John A. Case, Jr., Law Offices of John A. Case, Jr., Los Angeles, CA; for Petitioner.

The Honorable John F. Walter, Los Angeles, CA, Respondent.

Viet D. Dinh, Wendy J. Keefer, Bancroft Associates PLLC, Washington, DC; Richard Stone, Hogan & Hartson L.L.P., Los Angeles, CA; H. Christopher Bartolomucci, Hogan & Hartson L.L.P., Washington, DC; for Amici Curiae United States Senators Jon Kyl and Dianne Feinstein.

Assistant United States Attorney R. Stephen Kramer was present at oral argument on behalf of the United States and answered questions, but did not file a brief or take a position on the merits.

Petition for Writ of Mandamus to the United States District Court for the Central District of California; John F. Walter, District Judge, Presiding. D.C. No. CR–03–00568–JFW.

Before GOODWIN, FRIEDMAN* and KOZINSKI, Circuit Judges.

Opinion by Judge KOZINSKI;
Dubitante by Judge FRIEDMAN

KOZINSKI, Circuit Judge.

We consider whether the Crime Victims' Rights Act, 18 U.S.C. § 3771, gives victims the right to allocute at sentencing.

**Facts**

Moshe and Zvi Leichner, father and son, swindled scores of victims out of almost $100 million. While purporting to make investments in foreign currency, they spent or concealed the funds entrusted to

* The Honorable Daniel M. Friedman, Senior United States Circuit Judge for the Federal Circuit, sitting by designation.

them. Each defendant pleaded guilty to two counts of wire fraud and one count of money laundering. More than sixty of the Leichners' victims submitted written victim impact statements. At Moshe's sentencing, several, including petitioner W. Patrick Kenna, spoke about the effects of the Leichners' crimes—retirement savings lost, businesses bankrupted and lives ruined. The district court sentenced Moshe to 240 months in prison.

Three months later, at Zvi's sentencing, the district court heard from the prosecutor and the defendant, as required by Federal Rule of Criminal Procedure 32(i)(4). But the court denied the victims the opportunity to speak. It explained:

> I listened to the victims the last time. I can say for the record I've rereviewed all the investor victim statements. I have listened at Mr. Leichner's father's sentencing to the victims and, quite frankly, I don't think there's anything that any victim could say that would have any impact whatsoever. I—what can you say when people have lost their life savings and what can you say when the individual who testified last time put his client's [sic] into this investment and millions and millions of dollars and ended up losing his business? There just isn't anything else that could possibly be said.

One victim protested that "[t]here are many things that are going on with the residual and second and third impacts in this case that have unfolded over the last 90 days since we were last in this courtroom." But the district judge told the victims that the prosecutor could bring those developments to his attention, and continued to refuse to let the victims speak. Zvi was sentenced to 135 months in prison.

Kenna filed a timely petition for writ of mandamus pursuant to the Crime Victims' Right Act (CVRA), 18 U.S.C. § 3771(d)(3). He seeks an order vacating Zvi's sentence, and commanding the district court to allow the victims to speak at the resentencing.

## Analysis

**[1] 1.** The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard. The Crime Victims' Rights Act sought to change this by making victims independent participants in the criminal justice process. *See* Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108–405, §§ 101–104, 118 Stat. 2260, 2261–65 (2004) (codified at 18 U.S.C. § 3771). The CVRA guarantees crime victims eight different rights, and unlike the prior crime victims' rights statute, allows both the government and the victims to enforce them. *See* 18 U.S.C. § 3771(a), (d)(1); *United States v. McVeigh*, 106 F.3d 325, 335 (10th Cir.1997) (per curiam).

Kenna and the district court disagree over the scope of one of the rights guaranteed by the CVRA: "The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." 18 U.S.C. § 3771(a)(4). Kenna contends that his right to be "reasonably heard" means that he is entitled to speak in open court at Zvi's sentencing, if that is how he chooses to express himself. The district court argues that the words "reasonably heard" vest the judge with discretion about how to receive the views of the victims, and that the judge is entitled to limit Kenna to written victim statements or his prior statements at Moshe's sentencing. No court of appeals has considered the scope of this CVRA right, and the two district courts that have closely considered it have reached opposite conclusions. *Compare United States v. Degenhardt*, 405

F.Supp.2d 1341, 1344, 2005 WL 3485922, at *3 (D.Utah 2005) (CVRA grants victims a right to speak) *with United States v. Marcello,* 370 F.Supp.2d 745, 748 (N.D.Ill.2005) (no it doesn't).

Kenna would have us interpret the phrase "reasonably heard" as guaranteeing his right to speak. For support, he points to the dictionary definition of "hear"—"to perceive (sound) by the ear." The American Heritage Dictionary of the English Language (4th ed.2000), available at http://www.bartleby.com/61/69/H0106900.html. Kenna concedes that the district court may place reasonable constraints on the duration and content of victims' speech, such as avoiding undue delay, repetition or the use of profanity.[1] However, in Kenna's view, the district court may not prohibit victims from speaking in court altogether or limit them to making written statements. This is the interpretation adopted by the district court in *Degenhardt.*

But this isn't the only plausible interpretation of the phrase "reasonably heard." According to the district court, to be "heard" is commonly understood as meaning to bring one's position to the attention of the decisionmaker orally or in writing. *See, e.g., Fernandez v. Leonard,* 963 F.2d 459, 463 (1st Cir.1992) ("Where the parties have had a 'fair opportunity to present relevant facts and argument to the court,' a matter may be ' "heard" on the papers' alone.' " (quoting *Aoude v. Mobil Oil Corp.,* 862 F.2d 890, 894 (1st Cir.1988))). The district court urges us to follow *Marcello* and hold that the CVRA guarantees victims only a right to make their position known by whatever means the court reasonably determines. *See Marcello,* 370 F.Supp.2d at 748. Even though "heard" has been held to include submission on the papers in some contexts, it does not follow that the CVRA calls for an equally broad construction. It merely shows that the district court's interpretation of the term is also plausible.[2]

The district court also argues that, had Congress meant to give victims a right to speak at sentencing hearings, it could easily have done so by using the word "speak" which clearly connotes only oral communications, not written ones. This is the term used in Federal Rule of Criminal Procedure 32(i)(4)(B), which gives the victims of certain types of crimes the right "to speak or submit any information about the sentence." The district court would have us infer from the fact that Congress used the more ambiguous term "heard" that it meant to give victims of crimes not covered by Rule 32 a more circumscribed right to present their views. However, the term "heard" does not appear in isolation in the CVRA. The full phrase we are construing is "[t]he right to be reasonably

**1.** The CVRA itself contains one such nod to judicial economy. In crimes with multiple victims, the CVRA allows district courts to fashion "a reasonable procedure to give effect to [the act] that does not unduly complicate or prolong the proceedings." 18 U.S.C. § 3771(d)(2). Such a procedure may well be appropriate in a case like this one, where there are many victims.

**2.** We do not read *Paladin Associates, Inc. v. Montana Power Co.,* 328 F.3d 1145, 1164–65 (9th Cir.2003), as compelling a contrary result. In *Paladin,* a party seeking to avoid discovery sanctions argued that its right to be heard under Federal Rule of Civil Procedure 37(c)(1) entitled it to an evidentiary hearing. We held that "under the facts and circumstances of the present case, the opportunity to submit briefs was an 'opportunity to be heard' within the meaning of Rule 37(c)(1)." *Paladin,* 328 F.3d at 1164–65. Kenna does not claim the right to present evidence or testify under oath; he seeks the right of allocution, much like that traditionally guaranteed a criminal defendant before sentence is imposed. *Paladin* thus not only construed the term "heard" in a different context, but also dealt with the right to present evidence, which is not at issue here.

heard at any public proceeding in the district court involving . . . sentencing." Virtually all proceedings in district court are public in the sense that the papers and other materials may be viewed by anyone on request to the clerk's office.[3] When Congress used the word "public" in this portion of the CVRA, however, it most likely meant to refer to proceedings in open court—much as the word is used in the common phrase "public hearing."[4] So read, the right to be "heard" at a "public proceeding" becomes synonymous with "speak" and we can draw no negative inference from the congressional choice of one term over the other.

In the end, we find none of these textual arguments dispositive and conclude, as did *Degenhardt,* that both readings of the statute are plausible. The statute is therefore ambiguous as to what it means for crime victims to be heard. To resolve this ambiguity, we turn to the legislative history of the CVRA. *See Toibb v. Radloff,* 501 U.S. 157, 162, 111 S.Ct. 2197, 115 L.Ed.2d 145 (1991) ("[A] court appropriately may refer to a statute's legislative history to resolve statutory ambiguity. . . ."). The Senate considered the CVRA in April 2004, and at that time the primary sponsors of the bill, Senators Jon Kyl and Dianne Feinstein, discussed this very issue:

> It is not the intent of the term "reasonably" in the phrase "to be reasonably heard" to provide any excuse for denying a victim the right to appear in person and directly address the court. Indeed, the very purpose of this section is to allow the victim to appear personally and directly address the court.

150 Cong. Rec. S4268 (daily ed. April 22, 2004) (statement of Sen. Kyl); *see also id.* (statement of Sen. Feinstein) ("That is my understanding as well."). Six months later, the CVRA was attached to a House bill, and Senator Kyl reiterated his understanding of the CVRA language.

> It is important that the "reasonably be heard" language not be an excuse for minimizing the victim's opportunity to be heard. Only if it is not practical for the victim to speak in person or if the victim wishes to be heard by the court in a different fashion should this provision mean anything other than an in-person right to be heard.

150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

**[2]** Floor statements are not given the same weight as some other types of legislative history, such as committee reports, because they generally represent only the view of the speaker and not necessarily that of the entire body. However, floor statements by the sponsors of the legislation are given considerably more weight than floor statements by other members, *see NLRB v. St. Francis Hosp. of Lynwood,* 601 F.2d 404, 415 n. 12 (9th Cir. 1979), and they are given even more weight where, as here, other legislators did not offer any contrary views. Silence, the maxim goes, connotes assent, *see* Robert Bolt, *A Man for All Seasons* act 2, at 88 (1962), and so we can draw from the

**3.** The rare exception involves cases where certain portions of the record are sealed. This can occur only in rare and exceptional circumstances for compelling reasons. *Phoenix Newspapers, Inc. v. United States Dist. Court for the Dist. of Ariz.,* 156 F.3d 940, 946–47 (9th Cir.1998).

**4.** We rather suspect that Congress may have used the phrase "heard at any public proceeding" rather than "heard at any public hearing" in a fastidious effort to avoid saying "heard" and "hearing" within 5 words of each other. Of course, repetition—as well as ambiguity—could also have been avoided by using the phrase "speak at any public hearing," which is why we don't view the reference to a "public proceeding" as dispositive.

fact that no one registered disagreement with Senators Kyl and Feinstein on this point the reasonable inference that the views they expressed reflected a consensus, at least in the Senate.

We also note that the CVRA passed as a compromise measure after a lengthy effort to amend the Constitution to protect victims' rights. The proposed constitutional amendment used language almost identical to that ultimately enacted in the CVRA; it guaranteed victims the right "reasonably to be heard." S.J. Res. 1, 108th Cong. (2003). But the legislative history of the proposed amendment is more substantial than that of the CVRA. The Senate Report on the amendment notes that:

> The victim's right is to "be heard." The right to make an oral statement is conditioned on the victim's presence in the courtroom.... [V]ictims should always be given the power to determine the form of the statement. Simply because a decision making body, such as the court ... has a prior statement of some sort on file does not mean that the victim should not again be offered the opportunity to make a further statement.... The Committee does not intend that the right to be heard be limited to "written" statements, because the victim may wish to communicate in other appropriate ways.

S.Rep. No. 108–191, at 38 (2003). The statements of the sponsors of the CVRA and the committee report for the proposed constitutional amendment disclose a clear congressional intent to give crime victims the right to speak at proceedings covered by the CVRA.

**[3]** Our interpretation advances the purposes of the CVRA. The statute was enacted to make crime victims full participants in the criminal justice system. Prosecutors and defendants already have the right to speak at sentencing, *see* Fed. R.Crim.P. 32(i)(4)(A); our interpretation puts crime victims on the same footing. Our interpretation also serves to effectuate other statutory aims: (1) To ensure that the district court doesn't discount the impact of the crime on the victims; (2) to force the defendant to confront the human cost of his crime; and (3) to allow the victim "to regain a sense of dignity and respect rather than feeling powerless and ashamed." Jayne W. Barnard, *Allocution for Victims of Economic Crimes,* 77 Notre Dame L. Rev. 39, 41 (2001). Limiting victims to written impact statements, while allowing the prosecutor and the defendant the opportunity to address the court, would treat victims as secondary participants in the sentencing process. The CVRA clearly meant to make victims full participants.

**[4]** Nor was Kenna's statutory right vindicated because he had the opportunity to speak at Moshe's sentencing three months earlier. The statute gives victims a "right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." 18 U.S.C. § 3771(a)(4). This language means that the district court must hear from the victims, if they choose to speak, at more than one criminal sentencing. The court can't deny the defendant allocution because it thinks "[t]here just isn't anything else that could possibly be said." Victims now have an indefeasible right to speak, similar to that of the defendant, and for good reason: The effects of a crime aren't fixed forever once the crime is committed—physical injuries sometimes worsen; victims' feelings change; secondary and tertiary effects such as broken families and lost jobs may not manifest themselves until much time has passed. The district court must consider the effects of the crime on the victims at the time it makes its decision with respect to punishment, not as they were at

some point in the past. Moreover, the CVRA gives victims the right to confront every defendant who has wronged them; speaking at a co-defendant's sentencing does not vindicate the right of the victims to look *this* defendant in the eye and let him know the suffering his misconduct has caused.

**2.** We normally apply strict standards in reviewing petitions for a writ of mandamus, in large part to ensure that they not become vehicles for interlocutory review in routine cases. To this end, we grant the writ only when there is something truly extraordinary about the case—for example, clear or oft-repeated legal error by the district court, no other means for the petitioner to obtain review or an issue of first impression. This may well be such a case: The petitioner raises an issue of first impression, the district court clearly erred in its interpretation and Kenna has no other means of vindicating his rights. This case may thus merit review even under the strict standard announced in *Bauman v. United States District Court*, 557 F.2d 650, 654–55 (9th Cir.1977).

**[5]** However, we need not balance the usual *Bauman* factors because the CVRA contemplates active review of orders denying victims' rights claims even in routine cases. The CVRA explicitly gives victims aggrieved by a district court's order the right to petition for review by writ of mandamus, provides for expedited review of such a petition, allows a single judge to make a decision thereon, and requires a reasoned decision in case the writ is denied. The CVRA creates a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute. We thus need not balance the *Bauman* factors in ruling on mandamus petitions brought under the CVRA; rather, we must issue the writ whenever we find that the district court's order reflects an abuse of discretion or legal error. The Second Circuit has come to the same conclusion. *See United States v. Rigas* (*In re W.R. Huff Asset Mgmt. Co.*), 409 F.3d 555, 562 (2d Cir.2005) (holding that "a petitioner seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus"). We are aware of no court of appeals that has held to the contrary.

**[6] 3.** As we explained above, the district court here committed an error of law by refusing to allow petitioner to allocute at Zvi's sentencing and we must therefore issue the writ. We turn now to the scope of the remedy. Kenna asks us to vacate Zvi's sentence, and order the district court to resentence him after allowing the victims to speak. The problem is that the CVRA gives district courts, not courts of appeals, the authority to decide a motion to reopen in the first instance. *See* 18 U.S.C. § 3771(d)(5). Moreover, defendant Zvi 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.

We could delay further our consideration of the petition and order briefing from the defendant, but we think it more advisable to let the district court consider the motion to reopen in the first instance. In ruling on the motion, the district court must avoid upsetting constitutionally protected rights, but it must also be cognizant that the only way to give effect to Kenna's right to speak as guaranteed to him by the CVRA is to vacate the sentence and hold a new sentencing hearing. We note that if the district court chooses not to reopen the

sentence, Kenna will have another opportunity to petition this court for mandamus pursuant to the CVRA. Likewise, defendant will be able to contest any change in his sentence through the normal avenue for appeal (assuming he has not waived such rights as part of the plea bargain).

**4.** Finally, we recognize that under 18 U.S.C. § 3771(d)(3), we were required to "take up and decide [this] application forthwith within 72 hours after the petition [had] been filed." *Id.* We acknowledge our regrettable failure to consider the petition within the time limits of the statute, and apologize to the petitioner for this inexcusable delay. It may serve as a small comfort for petitioner to know that, largely because of this case, we are in the process of promulgating procedures for expeditious handling of CVRA mandamus petitions to ensure that we comply with the statute's strict time limits in future cases. As victim participation in the criminal justice system becomes more common, we expect CVRA claims to become more frequent, and thus encourage district courts to modify their own procedures so as to give full effect to the CVRA.[5]

## Conclusion

We grant the petition for writ of mandamus and hold that the district court erred in refusing to allow Kenna and other victims to speak at Zvi Leichner's sentencing hearing. The district court shall deem timely a motion pursuant to 18 U.S.C. § 3771(d)(5) filed by Kenna or any other of Zvi's victims within 14 days of the date of our opinion. If the district court grants the motion, it shall conduct a new sentencing hearing, according Kenna and the other victims the right to speak as described above.

**PETITION GRANTED.**

The panel retains jurisdiction over any future mandamus petitions arising from the Zvi Leichner criminal case.

FRIEDMAN, Senior Circuit Judge, dubitante.

Although I agree that the writ should issue, I am concerned about the seemingly broad sweep of the opinion.

1. The court decides—and I agree—that the requirement in the Crime Victims Rights Act ("the Act") that crime victims may be "reasonably heard" at sentencing entitles them to speak there. The court then holds—and I again agree—that the district court could not justify its refusal to permit the victims of this huge swindle to speak at Zvi's sentencing because it had permitted them to speak at his father's sentencing three months earlier (both father and son participated in the fraud).

My concern is that the court seems to hold that a victim has an absolute right to speak at sentencing, no matter what the circumstances. As the court states, "the CVRA gives victims the right to confront every defendant who has wronged them; speaking at a co-defendant's sentencing does not vindicate the right of the victims to look *this* defendant in the eye and let him know the suffering his misconduct has caused." Suppose that the present case were changed so that Zvi's sentencing took place immediately after his father's on the same day, and that Kenna had been allowed to speak at the father's sentencing (as he did). Would he have an absolute

**5.** We note, for example, that our task in crafting an effective remedy would have been greatly simplified, had the district court postponed Zvi's sentencing until the petition for writ of mandamus was resolved. District courts may consider whether to routinely postpone final imposition of sentence in cases where they deny a request by victims to exercise rights granted by the CVRA.

right to speak an hour later at Zvi's sentencing and to repeat what he had just stated? Perhaps the Act would give him that right, but it is not clear to me that this statute goes that far. I would leave that issue open and issue an opinion of more limited scope.

2. There is a similar sweep to the mandamus writ the court issues. Although only Kenna filed a petition for mandamus, the "Conclusion" of the opinion gives not only Kenna but the "other victims" of the fraud the right to speak at Zvi's sentencing. Suppose a case with five defendants and 20 victims. Does each victim have the right to speak at the sentencing of each defendant? Although the court notes that "Kenna concedes that the district court may place reasonable constraints on the duration and content of victims' speech, such as avoiding undue delay, repetition or the use of profanity," it stops short of accepting this concession. In the hypothetical I have just posed, it is difficult to believe that the Act requires the court to listen to 100 victim statements. Once again, I think that the statutory standard of "reasonably heard" may permit a district court to impose reasonable limitations on certain oral statements. Perhaps in my hypothetical, the court could require multiple victims, as a condition to speaking, to state what they would add to the prior statements of other victims. In any event, I would think that our writ would only require the district court to consider allowing Kenna to speak at any resentencing. I would leave it to the district court initially to decide whether other victims also may speak there.


**Raj KUMAR, Petitioner,**

**v.**

**Alberto R. GONZALES, Attorney General, Respondent.**

**Raj Kumar, Petitioner,**

**v.**

**Alberto R. Gonzales, Attorney General, Respondent.**

**Nos. 03–70191, 03–73449.**

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 12, 2005.

Filed Jan. 23, 2006.

**Background:** Alien, Indian citizen and native of northern Indian state of Jammu and Kashmir, petitioned for review of order of Board of Immigration Appeals (BIA) that affirmed, without opinion, denial of his applications for asylum, withholding of removal, and relief under Convention Against Torture (CAT). He also petitioned for review of BIA's denial of his motion to reopen.

**Holdings:** The Court of Appeals, Reinhardt, Circuit Judge, held that:

(1) substantial evidence did not support adverse credibility determination made by IJ that was based upon conclusion that death certificate submitted in support of asylum application likely was forgery;

(2) alien was entitled to opportunity to respond to questions regarding his credibility;

(3) discrepancies attributable to clerical errors could not form basis of adverse credibility finding;

(4) adverse credibility determination could not be based upon personal conjecture;

**In re Sue ANTROBUS and Ken Antrobus, Petitioners.**

**No. 08–4002.**

United States Court of Appeals, Tenth Circuit.

March 14, 2008.

**Background:** In gun dealer's prosecution for transferring handgun to juvenile, the United States District Court for the District of Utah, 2008 WL 53125, denied murder victim's parents' application under Crime Victims' Rights Act (CVRA) to have victim recognized as victim of dealer's crime. Parents filed petition for writ of mandamus.

**Holdings:** The Court of Appeals held that:

(1) petition was subject to review under traditional mandamus standards, and

(2) parents were not entitled to mandamus relief.

Petition denied.

Tymkovich, Circuit Judge, concurred and filed opinion.

**1. Mandamus ⚿10**

Petitioners must show that their right to writ of mandamus is clear and indisputable.

**2. Statutes ⚿212.6**

Where Congress borrows terms of art in which are accumulated legal tradition and meaning of centuries of practice, it presumably knows and adopts cluster of ideas that were attached to each borrowed word in body of learning from which it was taken and meaning its use will convey to judicial mind unless otherwise instructed.

**3. Mandamus ⚿187.9(1)**

Mandamus petition challenging district court ruling denying murder victim's parents application under Crime Victims' Rights Act (CVRA) to have victim recognized as victim of defendant's crime was subject to review under traditional mandamus standards, rather than standards applicable on normal appellate review. 18 U.S.C.A. § 3771(d)(3).

**4. Criminal Law ⚿1220**

District court's finding that shooting victim was not victim of gun dealer who illegally transferred handgun to juvenile was not clearly erroneous, and thus victim's parents were not entitled to mandamus relief under Crime Victims' Rights Act (CVRA) to have victim recognized as victim of dealer's crime, where dealer was unaware of juvenile's intentions for firearm, and shooting did not occur until after juvenile had become adult. 18 U.S.C.A. §§ 922(x)(5), 3771(e).

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Brigida Benitez, Jason Metha, P. Davis Oliver, Wilmer Cutler Pickering Hale & Dorr LLP, Washington, DC, Rebecca C. Hyde, Gregory G. Skordas, Skordas, Caston & Hyde, Salt Lake City, UT, Paul G. Cassell, for Petitioners.

Sue Antrobus, Salt Lake City, UT, pro se.

Before HARTZ, TYMKOVICH, and GORSUCH, Circuit Judges.

**ORDER**

This is an original proceeding in the nature of mandamus under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771(d)(3). Sue and Ken Antrobus, the parents of Vanessa Quinn, request that Ms. Quinn be recognized as a victim of Mackenzie Glade Hunter's crime of transferring a handgun to a juvenile in violation of 18 U.S.C. § 922(x)(1). Mr. Hunter is scheduled to be sentenced on Monday, January 14, 2008.

## I

On February 12, 2007, Sulejman Talovic murdered five people, including Ms. Quinn, and injured four others at the Trolley Square Shopping Center in Salt Lake City, Utah. One of the guns Talovic used in his rampage was a handgun that he had purchased from Mr. Hunter in the summer of 2006, when Talovic was a "juvenile" as defined in § 922(x). Talovic was killed on the scene.

Mr. Hunter pleaded guilty to two charges. Only one count, that of transferring a handgun to a juvenile, is relevant to this action. After the plea hearing, the Antrobuses sought to have Ms. Quinn declared a victim of Mr. Hunter's crime so that they, on her behalf, could assert certain rights provided by the CVRA. *See* 18 U.S.C. § 3771(a)(4) (establishing "[t]he right to be reasonably heard" at the sentencing); *id.* § 3771(d)(6) (establishing "[t]he right to full and timely restitution as provided in law"). The district court denied the motion. *United States v. Hunter,* No. 2:07CR307DAK, 2008 WL 53125 (D.Utah Jan. 3, 2008). In doing so, it proceeded on the basis that the handgun sold by Mr. Hunter killed Ms. Quinn, *id.* at *1, though Mr. Hunter asserts before us that this fact is not discernible from the record of this case. The district court also indicated that other allegations were unsupported, particularly whether Talovic remarked to Mr. Hunter or in Mr. Hunter's hearing that he intended to commit a bank robbery, but stated that its ruling would not change even assuming such facts. *Id.* at *4.

As permitted by the CVRA, 18 U.S.C. § 3771(d)(3), the Antrobuses filed a petition for a writ of mandamus seeking review of the district court's decision. Pursuant to this court's order, Mr. Hunter filed a response.

## II

*Standard of Review*

**[1]** The Supreme Court has made it clear that mandamus is a "drastic" remedy that is "to be invoked only in extraordinary situations." *Allied Chem. Corp. v. Daiflon, Inc.,* 449 U.S. 33, 34, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980) (per curiam). "[T]he writ of mandamus has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Id.* at 35 (quotations omitted). Petitioners must show that their right to the writ is "clear and indisputable." *Id.* (quotations omitted).

The Antrobuses argue that, even though the CVRA provides for mandamus review, this court should apply those standards that would apply on normal appellate review. *See In re W.R. Huff Asset Mgmt. Co., LLC,* 409 F.3d 555, 562–63 (2d Cir. 2005); *Kenna v. U.S. Dist. Ct.,* 435 F.3d 1011, 1017 (9th Cir.2006). We respectfully disagree, however, with the decisions of our sister circuit courts.

**[2, 3]** Congress could have drafted the CVRA to provide for "immediate appellate review" or "interlocutory appellate review," something it has done many times. Instead, it authorized and made use of the term "mandamus."

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

*Morissette v. United States,* 342 U.S. 246, 263, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

Mandamus is the subject of longstanding judicial precedent. "We assume that Congress knows the law and legislates in light of federal court precedent." *Bd. of County Comm'rs v. U.S. E.E.O.C.*, 405 F.3d 840, 845 (10th Cir.2005). Applying the plain language of the statute, we review this CVRA matter under traditional mandamus standards.

*Analysis*

The CVRA defines a "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." 18 U.S.C. § 3771(e). While acknowledging that Ms. Quinn undeniably was a crime victim, the district court held that she was not a victim of the particular crime to which Mr. Hunter pleaded guilty because Mr. Hunter's offense and Talovic's rampage were "too factually and temporally attenuated." *Hunter*, 2008 WL 53125, at *4. Following the rationale of *United States v. Sharp*, 463 F.Supp.2d 556 (E.D.Va.2006), the district court determined that Talovic's actions were an "independent, intervening cause" of Ms. Quinn's death. *Id.* at *5.

**[4]** This is a difficult case, but we cannot say that the district court was clearly wrong in its conclusion. The only court that has decided an analogous case under the CVRA held that the movant was not a "crime victim" under that statute. *See Sharp*, 463 F.Supp.2d 556. Based on its factual finding that Mr. Hunter was unaware of Talovic's intentions for the firearm,[1] to find for the Antrobuses we would have to determine that selling a gun to a minor is the proximate cause of any resulting injury to third persons. This area of the law, however, is not well-developed and is evolving. While authority is mixed in the common law context, some courts have held as a matter of law that proximate cause does not exist between a sale of a firearm to a person statutorily disqualified from making the purchase and later injuries to a third person through use of the firearm. *See, e.g., Robinson v. Howard Bros. of Jackson, Inc.*, 372 So.2d 1074, 1076 (Miss.1979). Others have held that proximate cause can be found in some such circumstances but may not (as would be required here) be found on a *per se* basis. *See, e.g., Olson v. Ratzel*, 89 Wis.2d 227, 278 N.W.2d 238, 250, 249–51 (1979); *Phillips v. Roy*, 431 So.2d 849, 853 (La.Ct.App. 1983). Such questions have not yet been decided in this jurisdiction. Finally, at most the statute Mr. Hunter violated indicates the foreseeability of the foolish (or, sadly, as here, worse) use of firearms by juveniles. But such foreseeability does not obviously extend to an individual who employs a gun only after becoming an adult as a matter of law. And here, the Antrobuses have not shown that Talovic was still a juvenile when he committed the murders more than seven months after purchasing the handgun from Mr. Hunter. *See* 18 U.S.C. § 922(x)(5) (defining juvenile as a "person who is less than 18 years of age").

1. "Even at the time the gun was sold, Hunter had no knowledge as to Talovic's intentions. And, after the gun was sold, Hunter had no contact with Talovic." *Hunter*, 2008 WL 53125, at *4; *see also id.* at *5 ("[T]here is no indication that he spoke to Talovic about his intentions. At most, Hunter surmised that Talovic might use [the gun] to rob a bank."). One might question whether, with additional discovery, the Antrobuses might have been able to determine whether, in fact, Hunter knew about Talovic's intentions and what such knowledge might mean for the foreseeability to Mr. Hunter of Talovic's crimes. However, petitioners have not sought mandamus on the basis that the district court should have afforded them such discovery. Accordingly, the issue is not before us and we must take as true the district court's finding that Mr. Hunter was not aware of Talovic's intentions.

In light of these circumstances, we cannot say that the Antrobuses' right to the writ is "clear and indisputable." *Allied Chem. Corp.,* 449 U.S. at 35, 101 S.Ct. 188 (quotations omitted).

## III

The Antrobuses' motion to proceed in forma pauperis is GRANTED. Their Motion to Strike Anticipated Defense Objection to Petition for Writ of Mandamus and Renewed Motion to Strike Defense Objection are DENIED. Their alternative motion for leave to supplement the record is GRANTED and their proffered exhibit is accepted for filing under seal. Their alternative motion for order directing the government to supplement the record is DENIED. Mr. Hunter's motion to unseal the portions of his presentence report that were submitted as Exhibit D to his response is GRANTED. The petition for a writ of mandamus is DENIED.

TYMKOVICH, Circuit Judge, concurring.

We live in a post-Columbine High School massacre world. In that world, juveniles are willing to procure guns and use them to commit violent, horrific crimes. In this case, the previously unthinkable act of random killing took place in a mall in Salt Lake City. Sulejman Talovic was the shooter and he used a handgun and shotgun to kill five people. One of the murder weapons was procured from Mackenzie Hunter, and used to kill Vanessa Quinn. I write separately because the process in this case failed to adequately support the rights of crime victims such as Ms. Quinn as guaranteed by the CVRA.

Two issues are presented for review. The first is the standard of review. The Second and Ninth Circuits have applied a relaxed standard for resolving appeals under the CVRA. The Ninth Circuit, for example, would "issue the writ whenever [it] find[s] that the district court's order reflects an abuse of discretion or legal error." *Kenna v. U.S. Dist. Ct.,* 435 F.3d 1011, 1017 (9th Cir.2006). The Second Circuit holds that in reviewing a petition under the CVRA, we should review factual determinations for clear error, legal issues de novo, and the resolution of the application for a writ for abuse of discretion. *In re W.R. Huff Asset Mgmt. Co., LLC,* 409 F.3d 555, 562 (2d Cir.2005). We part company with these circuits and apply the traditional standard of review for petitions of mandamus.

Whatever the mandamus standard, the central issue is whether Vanessa Quinn's parents may seek to have her declared as a "crime victim" under the CVRA. Applying traditional rules of "but-for" and "proximate" causation, they argue that the district court should have concluded that she was a victim. In my view, the district court and the government erred in failing to permit the Antrobuses reasonable access to evidence which could support their claim. With this information, the Antrobuses may have been able to demonstrate the requisite causal connection between Hunter's crime and Ms. Quinn's murder. The government's cooperation is mandated by the CVRA, which requires the government to "make their best efforts to see that crime victims are notified of, and accorded, the rights" set forth in the Act. 18 U.S.C. § 3771(c)(1).

Here is what the Antrobuses might have demonstrated given the government's cooperation. First of all, the victim must be "directly" harmed by the crime. This encompasses a "but-for" causation notion that is met here.

In addition, the harm must "proximately" result from the crime. That is the more difficult issue, but the record suggests that the following evidence could be developed to show that Talovic's crime was a reasonably foreseeable result of the ille-

gal gun sale. (1) Hunter knew Talovic was a minor and could not legally purchase a gun in the first place; (2) the murder weapon was previously stolen; (3) Hunter heard Talovic's intent to commit bank robbery, a crime of violence where the use of a gun could reasonably result in a shooting; and, finally; (4) the shooting was not so remote in time as to be unforeseeable. I do not think it matters that Talovic committed a crime that is different from what he told Hunter; only that the crime could obviously and likely lead to violence. The language included in the indictment in fact makes clear that the government believed Hunter knew that Talovic "intended to carry or otherwise possess, or discharge or otherwise use the handgun in the commission of a crime of violence." If the intervening cause was foreseeable then proximate cause can be established.[1]

Taken together, these facts could establish that Ms. Quinn was a crime victim for purposes of the CVRA. This evidence may well be contained in the government's files. Sadly, the Antrobuses were not allowed a reasonable opportunity to make a better case.

## ORDER

Petitioners seek panel rehearing of our order of January 11, 2008 denying their petition for mandamus under the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771(d)(3).[1] We do not believe rehearing is appropriate, but offer here some additional words of explanation in light of petitioners' latest filing and the time constraints under which we operated when initially disposing of their mandamus petition.

### I

In their petition for rehearing, petitioners restate and develop their argument that this court should apply normal appellate standards of review rather than those applicable to writs of mandamus. We cannot agree. The plain language of the CVRA provides that "[i]f the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3). Mandamus is a well worn term of art in our common law tradition. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170–71, 2 L.Ed. 60 (1803) (discussing mandamus standard for relief); *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004).[2] And the Supreme Court has made clear that "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed

**1.** The CVRA limits its causal nexus to traditional standards. *See, e.g., Restatement (Second) of Torts* §§ 302, 390, 449; *and see McDermott v. Midland Management, Inc.*, 997 F.2d 768, 770 (10th Cir.1993) (''[L]iability will still attach despite the existence of an intervening cause where the intervening cause was foreseen or might reasonably have been foreseen.'').

**1.** Petitioners' petition for rehearing *en banc* in this matter is addressed at the end of this order. On February 1, 2008, we denied a second mandamus petition from petitioners in a separate matter, No. 08–4013; we note that rehearing has not been sought in that matter.

**2.** ''The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction. Although courts have not confined themselves to an arbitrary and technical definition of jurisdiction, only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy.'' *Cheney*, 542 U.S. at 380, 124 S.Ct. 2576 (internal citations and alterations omitted).

word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

To be sure, petitioners point us to *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555 (2d Cir.2005). There, the Second Circuit held that ordinary mandamus standards do not apply in the CVRA context, stating that

> [u]nder the plain language of the CVRA, however, Congress has chosen a petition for mandamus as a mechanism by which a crime victim may appeal a district court's decision denying relief sought under the provisions of the CVRA. It is clear, therefore, that a petitioner seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus.

*Id.* at 562 (internal quotations and citations omitted). The Ninth Circuit, in an equally brief passage, reached the same result. *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1017 (9th Cir.2006); *see also In re Walsh*, 229 Fed.Appx. 58, 60 (3d Cir.2007). With respect to our sister circuits, and aware of the time pressures under which they operated, we see nothing in their opinions explaining why Congress chose to use the word *mandamus* rather than the word *appeal*. To us, Chief Justice Marshall's admonition in *Marbury* seems to control here: "the appellate jurisdiction may be exercised in a variety of forms, and [ ] if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed." 5 U.S. at 175.[3]

Along these lines, it seems to us relevant that Congress well knows how to provide for ordinary interlocutory appellate review, rather than mandamus review, when it wishes to do so. In fact, merely four months after the CVRA was enacted, Congress passed the Class Action Fairness Act ("CAFA"), altering the general rule that an order by a district court remanding a previously removed case to the state court is not reviewable on appeal. Specifi-

**3.** Having decided the appeal vs. mandamus issue, the Second Circuit proceeded to decide the appropriate appellate standard of review, analogizing to *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988). Because under the statute at issue in *Pierce* "neither a clear statutory prescription nor a historical tradition" existed regarding the appropriate standard of review, the Supreme Court opted to apply an abuse of discretion standard. *Id.* at 558. Arguing that the same held true in the CVRA context, the Second Circuit likewise chose to apply an abuse of discretion standard of review. *In re W.R. Huff Mgmt. Co.*, 409 F.3d at 563; *see also Kenna*, 435 F.3d at 1017 (relying on *In re W.R. Huff Mgmt. Co.*). But, in *Pierce* the Supreme Court was asked to decide the standard of review applicable to a district court's award of attorney's fees under the Equal Access to Justice Act ("EAJA"). The provisions of the EAJA before the Court indicated that attorney's fees shall be awarded "unless the court finds that the position of the United States was substantially justified." *Pierce*, 487 U.S. at 559, 108 S.Ct. 2541. In analyzing what standard of review such language dictated, the Court stated that "[f]or some few trial court determinations, the question of what is the standard of appellate review is answered by relatively explicit statutory command. For most others, the answer is provided by a long history of appellate practice." *Id.* at 558, 108 S.Ct. 2541. The Court concluded, however, that the "substantial justification" language neither provided a clear statutory command nor was it enacted against the backdrop of historical appellate practice. By contrast, and as discussed above, the CVRA contains a clear statutory prescription regarding the nature of the appellate review petitioners may seek, and it also happens to be one imbued with a long history. We thus respectfully suggest that a correct application of *Pierce* leads back to mandamus review.

cally, CAFA provides that a court of appeals may, in its discretion, hear an appeal from such an order if application to the court of appeals is made within seven days, and having taken the case, the court of appeals must, again as a general rule, enter its judgment no more than 60 days after the appeal is filed. 28 U.S.C. § 1453(c). Of course, Congress equally could have opted for a different, mandamus, procedure in CAFA; the fact that it did not, we think, ought not be ignored. And, although it is only a rough measure, a computer-aided search of the United States Code indicates that the phrase "interlocutory appeal" appears 62 times, and the word "interlocutory" appears 123 times in the same sentence as the word "appeal."

Petitioners' argument that Congress could not practicably provide for an expedited form of interlocutory appellate review without modifying a host of standing legal rules is likewise without merit. Congress has placed time limits on when interlocutory appeals must be filed that differ from ordinary deadlines to file a notice of appeal,[4] and has placed time constraints on how long the court of appeals may take to rule.[5] In light of the fact that Congress regularly provides for and delineates the nature and scope of ordinary interlocutory appellate review, we see no reason to suppose that the use of the word mandamus in the CVRA has other than its traditional meaning.

This is especially so in light of the CVRA's own structure and language. While the CVRA provides individuals seeking review of a district court's "victim status" decision with mandamus review, it simultaneously affords the government with the ability to obtain ordinary appellate review of the same decision. *See* 18 U.S.C. § 3771(d)(4). Given this, to read the CVRA's mandamus provisions as requiring ordinary appellate review would "run[ ] afoul of the usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez–Machain*, 542 U.S. 692, 712 n. 9, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) (internal quotations omitted). To be sure, petitioners offer arguments why individuals like themselves should be afforded greater appellate rights, more akin to the government's, but their arguments are best directed to Congress. Our job is to apply the CVRA as written, not to rewrite it as one might wish the law to be.

Additionally, petitioners claim that our reading of the statute renders the CVRA superfluous in light of the fact that the All Writs Act, 28 U.S.C. § 1651, already grants crime victims, or anyone else for that matter, the ability to petition for a writ of mandamus. On the contrary, however, we read Section 3771(d)(3) and (4) as affording litigants considerably more rights than they would otherwise have, with the former requiring that putative crime victims receive a decision from the court of appeals within 72 hours, a substantial expansion on the common law right codified in the All Writs Act, and the latter providing the government with a right to appeal a decision adverse to other

**4.** *See, e.g.,* 28 U.S.C. § 1292(b) (providing that the court of appeals may, in its discretion, consider an interlocutory appeal if, *inter alia,* the appeal is filed within ten days of the interlocutory order appealed).

**5.** Indeed, it did so just four months later in CAFA. 28 U.S.C. § 1453(c)(2). *See also* 18 U.S.C. § 2339B(f)(5)(B)(iii) (stating that in an interlocutory appeal by the government from an order authorizing, *inter alia,* the disclosure of classified information, the court of appeals shall hear argument within 4 days of the filing of the appeal and issue its decision no more than 4 days after argument).

parties (those seeking crime victims status).

Finally, to the extent that the 72–hour requirement can be read to suggest anything about Congress's intended standard of review, we think it too favors application of the deferential mandamus standard of review. It seems unlikely that Congress would have intended *de novo* review in 72 hours of novel and complex legal questions, such as, as here, whether the sale of a gun to a minor in violation of a statute is a proximate cause of any subsequent violent act committed with the gun by its purchaser.

II

In the alternative, petitioners contend that even if traditional mandamus standards apply, the application in our January 11, 2008 order of a "clear and indisputable" standard is inconsistent with our precedent. That simply is not the case.

Petitioners argue that in this circuit we consider five factors to determine whether to grant a writ of mandamus, asking whether (1) the petitioner has alternative means to secure relief; (2) the petitioner will be damaged in a way not correctable on appeal; (3) the district court's order constitutes an abuse of discretion; (4) the order represents an often repeated error and manifests a persistent disregard of federal rules; and (5) the order raises new and important problems or issues of law that are questions of first impression. *See, e.g., In re Qwest Commc'ns Int'l Inc.,* 450 F.3d 1179, 1184 (10th Cir.), *cert. denied,* —— U.S. ——, 127 S.Ct. 584, 166 L.Ed.2d 429 (2006); *United States v. Gonzales,* 150 F.3d 1246, 1253–54 (10th Cir. 1998); *United States v. McVeigh,* 119 F.3d 806, 810 (10th Cir.1997). Contrary to petitioners' suggestion, however, these five factors are not an alternative to the "clear and indisputable right" standard, which the Supreme Court has reaffirmed as recently as 2004. *See Cheney,* 542 U.S. at 381, 124 S.Ct. 2576 & *supra* note 2. Rather, the five factors are simply one, nonexclusive means of *applying* that standard.

The five factors apparently first came into use in this circuit in *Dalton v. United States (In re Dalton),* 733 F.2d 710 (10th Cir.1984). There, we explained that the issuance of writs of mandamus is "limited strictly ... to those exceptional cases where the inferior court acted wholly without jurisdiction or so clearly abused its discretion as to constitute usurpation of power," and that "in order to justify the invocation of this extraordinary remedy, the petitioning party has the burden of showing that its right to issuance of the writ is 'clear and undisputable.' " *Id.* at 716. Although we went on to offer five factors to help guide that analysis, we declined to hold that the satisfaction of those factors necessarily constituted a sufficient basis for the writ to issue. *Id.* at 716–17. Indeed, most of the cases petitioners cite in support of the five factors acknowledge as much. *See, e.g., In re Qwest,* 450 F.3d at 1182–83 ("The Supreme Court has required that a party seeking mandamus demonstrate that he has no other adequate means of relief and that his right to the writ is 'clear and indisputable.' "); *United States v. Roberts,* 88 F.3d 872, 882 (10th Cir.1996) ("The petitioner must demonstrate its right to a writ of mandamus is clear and indisputable."); *Pacificare of Okla., Inc. v. Burrage,* 59 F.3d 151, 153 (10th Cir.1995) ("The party seeking the writ must show that the right to the writ is 'clear and indisputable.' ").

III

Petitioners spend virtually no time arguing that our earlier order erred on the merits, instead focusing their efforts on the standard of review. In doing so, they fail to explain how the outcome would nec-

essarily change under the standard of appellate review they seek. Neither is it obvious to us that the outcome would change.

If we were to hold, on this record, that petitioners' daughter is a crime victim within the meaning of the CVRA, we would effectively establish a *per se* rule that any harm inflicted by an adult using a gun he or she illegally obtained as a minor is directly and proximately caused by the seller of the gun. In the instant case, and on this record, Mackenzie Glade Hunter knew only that Sulejman Talovic was a minor at the time the gun changed hands; the record before us is silent on the question whether Mr. Hunter had knowledge of Mr. Talovic's intentions with the firearm, *see* January 11, 2008 Order at 5, and Mr. Talovic was apparently an adult when he committed his terrible crimes. *Id.* at 6; Appellee's Response to Petition for Writ of Mandamus, Ex. B at 2. To be sure, some courts hold that the seller of a gun to a minor in violation of a statute is *per se* the proximate cause of harm inflicted by the minor (during his or her minority) with that gun. And to be sure, there are courts that refuse to apply a *per se* rule, but will hold sellers liable for harm inflicted by minors (again, during their minority) when there is some indicia that the seller of the gun knew of the minor's intent to misuse it. But petitioners have directed us to no authority of any kind suggesting that harm inflicted by an adult with a gun purchased during the adult's minority is, without more, *per se* directly and proximately caused by the seller of the gun. Thus, they fail to demonstrate or even suggest how adopting their proposed standard of review would affect the outcome of their petition.

* * *

The petition for panel rehearing is denied. The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition also is denied.


**NAVAIR, INC., Plaintiff–Appellant,**

**v.**

**IFR AMERICAS, INC.; IFR Systems, Inc.; Aeroflex, Inc., Defendants–Appellees.**

**No. 07–3008.**

United States Court of Appeals, Tenth Circuit.

March 17, 2008.

**Background:** Exclusive distributor brought action against manufacturer alleging breach of contract. The United States District Court for the District of Kansas, Monti L. Belot, J., 2006 WL 3533093, granted summary judgment for manufacturer. Distributor appealed.

**Holdings:** The Court of Appeals, Hartz, Circuit Judge, held that:

(1) fact issue existed as to whether manufacturer and its exclusive distributor agreed to extension protecting distributor on particular purchase even if deal closed after distributorship agreement otherwise would have expired prior to purchase but for extension;

(2) Kansas law implied that extension of distributorship agreement ended after reasonable time;

(3) fact issue existed as to whether reasonable time lapsed before purchase closed under distributorship agreement

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In re Dean
C.A.5 (Tex.),2008.
Only the Westlaw citation is currently available.
United States Court of Appeals,Fifth Circuit.
In Re: Alisa DEAN; Ralph Dean; Racy Donaie; Tyrone Smith; Ronald Duhan; Mary Ann Duhan; Michael Jordan; Kelly Porter; Henry Rivera; Maria Rivera; Sandra Thomas; Calvin Thomas, Petitioners.
**No. 08-20125.**

May 7, 2008.

**Background:** Twelve victims of criminal offenses, arising out of an explosion at an oil refinery operated by corporate defendant, petitioned for writ of mandamus, after the United States District Court for the Southern District of Texas, Lee H. Rosenthal, J., 2008 WL 501321, denied victims' request for rejection of the plea agreement.

**Holdings:** The Court of Appeals held that:
(1) District Court violated the Crime Victims' Rights Act (CVRA), but
(2) writ of mandamus was not warranted.

Petition denied.

**[1] Mandamus 250 3(1)**

250 Mandamus
250I Nature and Grounds in General
250k3 Existence and Adequacy of Other Remedy in General
250k3(1) k. In General. Most Cited Cases

**Mandamus 250 7**

250 Mandamus
250I Nature and Grounds in General
250k7 k. Discretion as to Grant of Writ. Most Cited Cases

**Mandamus 250 10**

250 Mandamus
250I Nature and Grounds in General
250k10 k. Nature and Existence of Rights to Be Protected or Enforced. Most Cited Cases
A writ of mandamus may issue only if (1) the petitioner has no other adequate means to attain the desired relief, (2) the petitioner has demonstrated a right to the issuance of a writ that is clear and indisputable, and (3) the issuing court, in the exercise of its discretion, is satisfied that the writ is appropriate under the circumstances.

**[2] Criminal Law 110 1220**

110 Criminal Law
110XXVI Incidents of Conviction
110k1220 k. Civil Liabilities to Persons Injured; Reparation. Most Cited Cases
District Court violated the Crime Victims' Rights Act (CVRA) by issuing sealed order in response to prosecution's *ex parte* motion, excusing the government from notifying the crime victims of a potential plea agreement until one had been executed with corporate defendant, in connection with crimes arising out of an explosion at oil refinery operated by defendant; the CVRA gave victims the right to confer with prosecutors during the plea negotiation process, before a plea agreement was reached, and the number of victims did not render notice to, or conferring with, the victims to be impracticable. 18 U.S.C.A. § 3771(a)(5).

**[3] Criminal Law 110 1220**

110 Criminal Law
110XXVI Incidents of Conviction
110k1220 k. Civil Liabilities to Persons Injured; Reparation. Most Cited Cases
Writ of mandamus to compel the District Court to reject plea agreement between government and corporate defendant, arising out of criminal offenses in connection with an explosion at an oil refinery operated by corporate defendant, was not appropriate, notwithstanding violation of Crime Victims' Rights

Act (CVRA) provision, requiring prosecutor to confer with victims prior to reaching plea agreement; victims were notified after parties' reached plea agreement, the District Court allowed all the victims who were present at the plea hearing to speak, the victims' counsel asked for, and were granted, the opportunity to submit additional briefing, victims filed multiple victim impact statements, and District Court could fully consider victims' objections and concerns in deciding whether to accept plea agreement. 18 U.S.C.A. §§ 3771(a)(5), 3771(d)(3).

Paul G. Cassell, University of Utah School of Law, Salt Lake City, UT, Rene Marie Haas, David L. Perry, Perry & Haas, Corpus Christi, TX, Brent Wayne Coon, Provost Umphrey, Beaumont, TX, W. Mark Lanier, The Lanier Law Firm, Edward A. Mallett, Mallett Guiberson Saper, Houston, TX, for Petitioners.
Douglas Beloof, Margaret Ann Garvin, Nat. Crime Victim Law Inst., Portland, OR, for Nat. Crime Victim Law Inst., Amicus Curiae.
John Smeltzer, U.S. Dept. of Justice, Envir. & Natural Resources Div., Washington, DC, James Lee Turner, Asst. U.S. Atty., Houston, TX, for U.S.
Carol Eggert Dinkins, George O. Wilkinson, Vinson & Elkins, Houston, TX, for BP Products North America, Inc.

Petition for Writ of Mandamus to the United States District Court for the Southern District of Texas.

Before SMITH, BARKSDALE and ELROD, Circuit Judges.

PER CURIAM:
***1** In the related criminal proceeding, twelve of the victims asked the district court to reject the plea agreement, alleging violations of the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771. The district court denied the request. See *United States v. BP Prods. N. Am. Inc.,* No. H-07-434, 2008 WL 501321, 2008 U.S. Dist. LEXIS 12893 (S.D.Tex. Feb. 21, 2008). The victims petition for writ of mandamus with the prayer that "[t]he decision of the district court should be reversed and the case remanded with instructions that the plea agreement [not be] accepted and the parties are permitted to proceed as they determine-so long as it is in a way that respects crime victims' rights."We find a statutory violation but, for reasons we explain, we deny relief.

I.

The factual background and the judicial events that led to the mandamus petition are cogently set forth in the district court's Memorandum and Order, *id.* 2008 WL 501321, at *1-6, 2008 U.S. Dist. LEXIS 12893, at *3-*18, in the criminal case. As there explained, an explosion at a refinery operated by the criminal defendant, BP Products North America Inc. ("BP"), killed fifteen and injured more than 170. Extensive civil litigation ensued.

The Department of Justice investigated the possibility of federal criminal violations. Before bringing any charges, the government, on October 18, 2007, filed a sealed *ex parte* motion for "an order outlining the procedures to be followed under the [CVRA]." The government announced that a plea agreement was expected to be signed in about a week and that because of the number of victims, "consulting the victims prior to reaching a plea agreement would not be practicable" and that notifying the victims would result in media coverage that "could impair the plea negotiation process and may prejudice the case in the event that no plea is reached."

As explained in the district court's order, the government, in its sealed *ex parte* motion, made specific recommendations for how the court should fashion a "reasonable procedure" under the CVRA's multiple crime victim exception. The district court, per an order signed by a district judge who had been assigned to the case in its status as a miscellaneous matter, *see id.* 2008 WL 501321, at *1 n. 1, 2008 U.S. Dist. LEXIS 12893, at *4 n. 1, responded with impressive speed, issuing on that same day a

sealed order finding that notification to victims in advance of the public announcement of a plea agreement was impracticable because of the "large number of victims" and because, on account of the extensive media coverage, "any public notification of a potential criminal disposition resulting from the government's investigation [of the] explosion would prejudice [BP] and could impair the plea negotiation process and may prejudice the case in the event that no plea is reached."The *ex parte* order prohibited the government from notifying victims of a potential plea agreement until one had been executed; it directed that once an agreement had been signed, the government "shall provide reasonable notice to all identifiable victims and afford the victims the rights set forth [in the CVRA] prior to actual entry of the guilty plea ...."

The government filed the criminal information under seal on October 22. Two days later, the government and BP signed the plea agreement. The next day, the information was unsealed, and the plea agreement was announced. The government mailed three notices to the victims, in November and January, advising of scheduled proceedings and of their right to be heard. On November 20 and 23, various victims moved to appear and asked that the plea agreement be rejected or at least that the court handling the criminal matter require a presentence report.

***2** After two district judges had declared themselves recused, the matter was permanently assigned, as a criminal matter, to the judge who entered the February 21 order that is the subject of this mandamus petition. Some victims appeared through counsel at a status conference on November 28 and presented their opposition to the plea agreement; 134 of them filed victim impact statements.

BP pleaded guilty at a hearing on February 4. All victims who wished to be heard, personally or through counsel, were permitted to speak. The attorneys reiterated the victims' request that the court reject the plea agreement on the basis of the CVRA violations alone; the district court reserved decision on the victims' other challenges to the plea agreement. As the district court describes it, "the victims focused on three challenges: the fine was too low; the probation conditions were too lenient; and certain CVRA requirements had been violated."*BP Prods.,* 2008 WL 501321 at *5, 2008 U.S. Dist. LEXIS 12893, at *15.The victims and their attorneys supplemented their appearances at the hearing with substantial post-hearing submissions.

On February 21, the district court entered the above-cited order, denying the victims' request that the court reject the plea agreement. Feeling aggrieved by the order, the victims filed the instant mandamus petition on February 28. Also on that date, a panel of this court, in compliance with the requirement of 18 U.S.C. § 3771(d)(3) that we act within seventy-two hours, entered an order granting the mandamus petition in part: It directed the district court to take no further action to effect the plea agreement, pending further order and awaiting additional briefing.

II.

The parties dispute the standard of review. The victims assert that despite the fact that the CVRA states that "[i]f the district court denies the relief sought [by a victim], the movant may petition the court of appeals for a writ of mandamus,"18 U.S.C. § 3771(d)(3), the ordinary appeal standards (instead of the stricter standards for obtaining a writ of mandamus) apply. Two circuits agree with the victims. *See Kenna v. United States Dist. Court,* 435 F.3d 1011, 1017 (9th Cir.2006); *In re W.R. Huff Asset Mgmt. Co.,* 409 F.3d 555, 563 (2d Cir.2005).

The Tenth Circuit, however, taking the view that "[m]andamus is a well worn term of art in our common law tradition," most recently has held that mandamus standards apply. *In re Antrobus,* 519 F.3d 1123, 1127 (10th Cir.2008) (per curiam) (on petition for rehearing and rehearing en banc). We are in accord with the Tenth Circuit for the reasons

stated in its opinion.

III.

A.

***3** We have carefully examined the pleadings, the thorough order of the district court, and the applicable law. We conclude that although the district court, with the best of intentions, misapplied the law and failed to accord the victims the rights conferred by the CVRA, the mandamus standard is not satisfied.

[1] A writ of mandamus may issue only if (1) the petitioner has "no other adequate means" to attain the desired relief; (2) the petitioner has demonstrated a right to the issuance of a writ that is "clear and indisputable;" and (3) the issuing court, in the exercise of its discretion, is satisfied that the writ is "appropriate under the circumstances." *In re United States,* 397 F.3d 274, 282 (5th Cir.2005) (quoting *Cheney v. United States Dist. Court,* 542 U.S. 367, 380-81, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004)). We need not decide whether the first two prongs are met because, for prudential reasons, a writ of mandamus is not "appropriate under the circumstances."

B.

[2] With due respect for the district court's diligent efforts to do justice, we conclude that, under the specific facts and circumstances of this case, it was contrary to the provisions of the CVRA for the court to permit and employ the *ex parte* proceedings that have taken place-proceedings that have no precedent, as far as we can determine. To obtain the order, the government filed only a brief *ex parte* statement, apparently with a proposed order. The fact of the *ex parte* motion and order was compounded by the intentional delay of three months before the victims were notified that the *ex parte* proceeding had occurred.

The district court acknowledged that "[t]here are clearly rights under the CVRA that apply before any prosecution is underway."*BP Prods.,* 2008 WL 501321 at *11, 2008 U.S. Dist. LEXIS 12893, at *36.Logically, this includes the CVRA's establishment of victims' "reasonable right to confer with the attorney for the Government."18 U.S.C. § 3771(a)(5). At least in the posture of this case (and we do not speculate on the applicability to other situations), the government should have fashioned a reasonable way to inform the victims of the likelihood of criminal charges and to ascertain the victims' views on the possible details of a plea bargain.

The district court's reasons for its *ex parte* order do not pass muster. The first consideration is the number of victims. The government and the district court relied on the provision of the CVRA that states that "[i]n a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings."18 U.S.C. § 3771(d)(2). Here, however, where there were fewer than two hundred victims, all of whom could be easily reached, it is not reasonable to say that notification and inclusion were "impracticable." There was never a claim that notification itself would have been too cumbersome, time-consuming, or expensive or that not all victims could be identified and located; the government itself suggested a procedure whereby the victims would be given prompt notice of their rights under the CVRA after the plea agreement was signed.

The real rub for the government and the district court was that, as the district judge who handled the *ex parte* proceeding as a miscellaneous matter reasoned, " '[d]ue to extensive media coverage of the ... explosion ..., any public notification of a potential criminal disposition resulting from the government's investigation ... would prejudice BP ...

and could impair the plea negotiation process and may prejudice the case in the event that no plea is reached.' "*BP Prods.,* 2008 WL 501321 at *2, 2008 U.S. Dist. LEXIS 12893, at *6-*7.In making that observation, the court missed the purpose of the CVRA's right to confer. In passing the Act, Congress made the policy decision-which we are bound to enforce-that the victims have a right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached. That is not an infringement, as the district court believed, on the government's independent prosecutorial discretion, *see id.* 2008 WL 501321, at *11-12, 2008 U.S. Dist. LEXIS 12893, at *37-*38; instead, it is only a requirement that the government confer in some reasonable way with the victims before ultimately exercising its broad discretion.

***4** It is true that communication between the victims and the government could, in the district court's words, "impair the plea negotiation process," *id.* 2008 WL 501321, at *2-3, 2008 U.S. Dist. LEXIS 12893, at *7, if, by using the word "impair," the court meant that the views of the victims might possibly influence or affect the result of that process. It is also true (and we cannot know whether the court considered) that resourceful input from victims and their attorneys could facilitate the reaching of an agreement. The point is that it does not matter: The Act gives the right to confer. The number of victims here did not render notice to, or conferring with, the victims to be impracticable, so the victims should have been notified of the ongoing plea discussions and should have been allowed to communicate meaningfully with the government, personally or through counsel, before a deal was struck.

C.

[3] As announced above, we decline to issue a writ of mandamus in this specific situation, because a writ is not "appropriate under the circumstances." *In re United States,* 397 F.3d at 282.The unfortunate fact is that the plea agreement was reached without the victims' being able to participate by conferring in advance. On the other hand, as we have explained, the victims were notified-albeit much too late in the process-and were allowed substantial and meaningful participation at the February 4 hearing. As the district court recounted,

> the court heard from all those present who wanted to speak, whether represented by counsel or not and whether they had previously indicated an intent to appear or not. Ten individuals spoke in open court. The lawyers representing the victims presented arguments on the asserted grounds for asking the court to reject the proposed plea agreement ....
>
> At the conclusion of the ... hearing, the victims' counsel asked for, and were granted, an opportunity to submit additional briefing focused on specific legal issues .... The court also granted the victims' request to delay filing their brief until the transcript was prepared and allowed the government and BP ... to file responsive briefing.

***5** *BP Prods.,* 2008 WL 501321 at *4-5, 2008 U.S. Dist. LEXIS 12893, at *13-*16 (footnote omitted).

The district court, therefore, has the benefit of the views of the victims who chose to participate at the hearing or by their various filings. The victims do have reason to believe that their impact on the eventual sentence is substantially less where, as here, their input is received after the parties have reached a tentative deal. As we have explained, that is why we conclude that these victims should have been heard at an earlier stage. We are confident, however, that the conscientious district court will fully consider the victims' objections and concerns in deciding whether the plea agreement should be accepted.

The decision whether to grant mandamus is largely prudential. We conclude that the better course is to deny relief, confident that the district court will take heed that the victims have not been accorded their full rights under the CVRA and will carefully

consider their objections and briefs as this matter proceeds.

The petition for writ of mandamus, to the extent that it has not already been granted in part, is DENIED.

C.A.5 (Tex.),2008.
In re Dean
--- F.3d ----, 2008 WL 1960245 (C.A.5 (Tex.))

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