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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

IN RE ZULMA NATAZHA CHACÍN DE HENRÍQUEZ, NADIEZHDA NATAZHA HENRÍQUEZ CHACÍN, AND BELA HENRÍQUEZ CHACÍN,
Petitioners.

ON PETITION FOR WRIT OF MANDAMUS TO THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRIT OF MANDAMUS

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STATEMENT OF THE RELIEF SOUGHT

Petitioners Zulma Natazha Chacín de Henríquez, Nadiezhda Natazha Henríquez Chacín, and Bela Henríquez Chacín respectfully petition this Court, pursuant to the Crime Victims' Rights Act, 18 U.S.C. § 3771(d)(3), the All Writs Act, 28 U.S.C. § 1651, and Federal Rule of Appellate Procedure 21, for a writ of mandamus: (1) reversing the United States District Court for the District of Columbia's August 7, 2015 Order in *United States v. Giraldo-Serna*, No. 1:04-cr-00114-RBW-1 (D.D.C.) that denied Petitioners their statutory status as crime victims and the statutory rights conferred by that status; and (2) granting that status and those rights.

ISSUE PRESENTED

Whether Petitioners are entitled to the statutory rights assured crime victims under the Crime Victims' Rights Act, 18 U.S.C. § 3771 ("CVRA").

INTRODUCTION

Hernán Giraldo-Serna ("Mr. Giraldo-Serna" or the "Defendant") is a criminal defendant who pleaded guilty to conspiring to manufacture and distribute cocaine in Colombia for eleven years with knowledge that it would be imported into the United States. Defendant is awaiting sentencing in the District Court. Petitioners are the widow and two daughters of Julio Eustacio Henríquez Santamaria ("Mr. Henríquez"). Defendant ordered the kidnapping and murder of Mr. Henríquez in 2001. Defendant was convicted for that by a Colombian criminal court and ordered incarcerated and to pay restitution. Defendant was extradited to the United States before any part of his sentence was satisfied.

No one disputes that Mr. Henríquez was a victim of the Defendant. At issue is whether Mr. Henríquez was the victim of a federal offense. That turns on whether his death was a direct and proximate result of the commission of Defendant's cocaine conspiracy. It was for at least the following reasons.

First, the abduction and killing of Mr. Henríquez occurred in the same place and at the same time as the cocaine conspiracy. The conspiracy was perpetrated over at least an eleven-year period, from 1994 to 2005; and the killing

occurred in 2001. Mr. Henríquez was abducted in the region of Colombia where the Defendant, by his own admission, committed the conspiracy.[1]

Second, the abduction and killing were carried out by at least some of the same people Defendant explicitly admitted were co-conspirators in his cocaine conspiracy, including Walter Torres, Alvaro Padilla-Redondo, and Jairo Antonio Musso-Torres.[2]

Third, causing the abduction and killing was part and parcel of Defendant's role in the conspiracy and furthered the conspiracy's objective of manufacturing cocaine. Defendant admitted controlling areas where coca (cocaine's precursor) was grown and providing protection for the cocaine manufacturing and distribution conspiracy. Mr. Henríquez had founded a non-profit organization called *Madre Tierra* (mother earth) that publicly opposed coca cultivation and encouraged local farmers not to grow the Defendant's coca. Mr. Henríquez was abducted and murdered by Defendant's co-conspirators only after – and immediately after – forming *Madre Tierra*. In fact, Mr. Henríquez was abducted

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[1] A-44-47 at ¶¶ 1-7 (Statement of Facts, *United States v. Giraldo-Serna*, No. 04-CR-114-1, Dkt. No. 505 (D.D.C. Jan 29, 2009) ("Statement of Facts")); A-137-139, 163 (Statement of Charges for Expected Judgment for Hernán Giraldo-Serna (Mar. 20, 2007)); A-240, 254-256, 260, 272-274 (Conviction of Hernán Giraldo-Serna (Jan. 21, 2009)); A-279 (Declaration of Carmelo Sierra Urbina (Sept. 25, 2003)); A-303 (Declaration of Julio Nelson de la Cruz Barros (July 4, 2003)); A-396 (Affidavit of Alberto Segundo Manjarres Charris (Aug. 22, 2003)).

[2] A-45-46 at ¶¶ 5-6; *cf.* A-136, A-233, A-278.

from an anti-coca meeting he was conducting. His killing made good on a threat of the Defendant that farmers in the region grow coca or risk death.[3]

In short, the death was a direct and proximate result of the conspiracy because the Defendant killed Mr. Henríquez to protect the object of the conspiracy to which Defendant has pleaded guilty. That object included manufacturing cocaine, and the production of coca is an essential prerequisite to the manufacture of cocaine. Consequently, Mr. Henríquez is a victim of a federal offense, and Petitioners are entitled to all of the rights granted under the CVRA.[4]

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[3] A-44-47 at ¶¶ 1-7; A-317 at ¶ 8 (Declaration of Zulma Natazha Chacín de Henríquez (Oct. 23, 2009)); A-321 at ¶ 7 (Declaration of Nadiezhda Natazha Henríquez Chacín (Oct. 23, 2009)); A-325 at ¶ 5 (Declaration of Bela Henríquez (Oct. 30, 2009)); A-137-139, 153, 163, 179; A-240; A-279; A-303; A-8 (Government's Motion for Pretrial Detention, *United States v. Giraldo-Serna*, No. 1:04-cr-00114-RBW-1, Dkt. No. 124 (D.D.C. May 15, 2008)); A-19 (Government's Motion to Exclude Time Under the Speedy Trial Act and Declare the Case Complex, *United States v. Giraldo-Serna*, No. 04-CR-114-1, Dkt. No. 139 (D.D.C. Jan. 29, 2009)).

[4] The rights afforded by the CVRA include: (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; (9) the right to be informed in a timely manner of any plea bargain or

(continued...)

In concluding that Mr. Henríquez was not a victim, the District Court made three key errors:

First, the District Court mistakenly believed it was constrained in resolving Petitioner's motion to consider only facts Defendant had admitted in pleading guilty. The CVRA imposes no such limitation and contemplates the recognition of victims long before a guilty plea or trial. The District Court misapplied language from restitution cases where fact-finding was constrained out of Sixth Amendment concerns. There are no such concerns here where Petitioners are not seeking restitution. The District Court's mistakenly pinched approach to fact-finding resulted in key facts not being considered. This approach was particularly unfair to Petitioners because their fate was determined based on a plea process from which they had been excluded and about which they were actively deceived.

Second, the District Court failed to recognize that the role in the conspiracy to which Defendant did admit involved the use of force and violence in providing "protection" for other parts of the conspiracy. Defendant admitted to being a

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(...continued from previous page)
deferred prosecution agreement; and (10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. § 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice. 18 U.S.C. § 3771(a) (attached as ADD 2 to the Addendum). Family members of a deceased victim assume the deceased victim's CVRA rights. 18 U.S.C. § 3771(e)(2)(B).

paramilitary commander; he used armed troops under his control to conduct his role in that conspiracy. That role included providing "protection" against impediments to the conspiracy's objectives (manufacture, distribution, and importation of cocaine) including through the use of hundreds of armed troops for security when massive amounts of cocaine were being loaded and performing surveillance on law enforcement and rival drug trafficking groups. Defendant further admitted to protecting the conspiracy's manufacturing and shipping operations from insurgent groups, criminals, and government drug control efforts. All of what Defendant admitted as his role in the conspiracy reflects a willingness to use force, violence, and the threat of force and violence as he did against Mr. Henríquez.

Third, the District Court erroneously applied the law of direct causation under the CVRA. The District Court explicitly acknowledged evidence reflecting that at least one of the reasons for the killing was Mr. Henríquez "was impeding the objectives of the AUC to continue planting coca, which . . . was not permitted by [the defendant] who, in revenge and with malice[,] decided . . . to make Henríquez . . . disappear . . . ." A-434. Having recognized that to be at least one of the reasons Defendant killed Mr. Henríquez, the District Court erred in interpreting causation law to conclude that to satisfy direct requirements under the CVRA Petitioners also had to prove there was only one motive for the killing.

The direct cause requirement under the CVRA is not so limited and the District Court erred in concluding that it was.

By misconstruing the law to narrow its factual inquiry, misinterpreting the facts it did consider, and misapplying the law of causation, the District Court failed to recognize that Mr. Henríquez was a crime victim. A writ of mandamus should, therefore, award Petitioners the status and rights to which they are entitled.

STATEMENT OF FACTS

I. DEFENDANT'S ADMITTED ROLE WAS TO PROVIDE "PROTECTION" FOR THE CONSPIRACY

Defendant was a leader in the Colombian narco-terrorist paramilitary organization, known as the *Autodefensa Unidas de Colombia* ("AUC"). A-9. The Defendant admitted that he was the leader of a subdivision of the AUC that controlled areas on the North Coast of Colombia involved in "the growing, processing, manufacturing and transportation of cocaine." A-44 at ¶ 2.

Defendant's group funded its operation through the imposition of so-called "war taxes" on manufacturers and traffickers of cocaine. *Id.* Defendant's role in the conspiracy was to provide "protection" against impediments to drug trafficking. A-44-48 at ¶¶ 1-7. Defendant ensured that other traffickers worked unmolested; he provided surveillance; and, most importantly, he controlled and protected the areas where cocaine was manufactured and trafficked. *Id.* He did

so using armed troops under his command. A-45 at ¶ 4. And he himself carried weapons in connection with the conspiracy. *Id.* In addition, the DOJ represented to the District Court, in his role providing "protection," Defendant "require[d] local farmers growing coca in the [Santa Marta] area, the primary ingredient for cocaine, to sell their coca only to his organization under *a penalty of death*." A-8 (emphasis added); *see also* A-19.

II. MR. HENRÍQUEZ WAS DISAPPEARED WHEN ATTEMPTING TO THWART THE CONSPIRACY FOR WHICH DEFENDANT ADMITTED PROVIDING PROTECTION

In January of 2001, Mr. Henríquez formed *Madre Tierra*, a non-profit organization that publicly opposed coca cultivation on Colombia's northern coast and encouraged local farmers not to grow the Defendant's coca. A-317 at ¶ 8; A-321 at ¶ 7; A-325 at ¶ 5. Mr. Henríquez offered training on, and access to government funding for, the use of substitute crops such as cacao and fruit trees. A-317 at ¶ 8; A-321 at ¶ 7.

On January 30, 2001, Mr. Henríquez traveled to Calabazo, a village in the Middle Magdalena region, to give a lecture to farmers about the eradication of coca crops. A-137-139; A-279; A-303. According to Carmelo Sierra Urbina, a former AUC paramilitary under the Defendant's command, three days prior to Mr. Henríquez's forced abduction, the Defendant had his son, "El Grillo," personally threaten Mr. Henríquez to either "leave the town . . . [or] face the consequences." A-279; *see also* A-153, 179. Mr. Henríquez, nonetheless,

remained in the area and continued his efforts in convincing local farmers to give up growing the Defendant's coca.

On February 4, 2001, Mr. Henríquez hosted a *Madre Tierra* meeting to call on local farmers to stop growing coca. A-137-139, 163. At approximately 9:45 am, several of the Defendant's subordinates barged into the meeting and forced Mr. Henríquez into a white pickup truck. A-240, 254-256; A-137-139. Mr. Henríquez was not seen alive again. A-318 at ¶¶ 9-11; A-321-322 at ¶¶ 8-9; A-325.

After Mr. Henríquez's forced "disappearance," the Defendant and his co-conspirators took control of Mr. Henríquez's farm and grew coca on his land. A-127. Mr. Henríquez's body was not discovered until October 11, 2007, after the Defendant provided the location of his remains. A-332-333.

III. DEFENDANT WAS CONVICTED OF DISAPPEARING MR. HENRÍQUEZ IN COLOMBIA BECAUSE MR. HENRÍQUEZ WAS ACTING TO THWART THE CONSPIRACY

On March 20, 2007, the Colombian Office of the Prosecutor General instituted charges against the Defendant for conspiracy to commit a criminal act and for aggravated forced disappearance of Mr. Henríquez. A-137; A-274. That investigation resulted in criminal charges against Defendant in a Colombian court.

While the Prosecutor General posited multiple related theories as to why Mr. Henríquez was murdered, the Colombian court determined that there were two reasons Defendant had Mr. Henríquez disappeared and killed:

(1) Mr. Henríquez was impeding the objectives of the AUC to continue planting coca, which Henríquez wished to see eradicated in order to cultivate cacao;[5] and

(2) Mr. Henríquez had long-before been a member of a guerilla group known as M-19. A-260. The Colombian court based this finding on testimony by members of the Defendant's own paramilitary group that the Defendant ordered to kill Mr. Henríquez:

> I think the reason why I am here is due to the disappearance of a delegate of an NGO in Calabazo. In 2001 he arrived at the district to give a lecture to the farmers for the eradication of coca crops. He gave his normal lecture. He had been in that district for 3 days and he got a message from Commander HERNAN GIRALDO SERNA, telling him he had to leave the town otherwise he would have to face the consequences, that he already knew what was going to happen to him. The message was delivered to him directly by HERNAN's son, also known as GRILLO. Three days went by and he then went to Las Tinajas. The gentleman kept on giving his lectures, so Mr. HERNAN pulled out a commander in charge, commander WALTER who was up in the mountains and orders he gave him were to gather their people and make the gentleman of the NGO disappear.

A-279-281.

[5] As noted by the District of Columbia, Circuit Court of Appeals, foreign criminal convictions constitute *prima facie* evidence of the facts underlying the judgment. *See Donnelly v. F.A.A.*, 411 F.3d 267, 270-71 (D.C. Cir. 2005).

> I do not know [the objective of Mr. Henríquez's organization] but the BOSS had said that it was a co-op that was going to be set up but I do not know for what purpose, but he did not want to allow it to be set up.

A-396. The Colombian court similarly recognized the connection:

> The testimony by the relatives of Henríquez Santamaría is consistent with the above, as they reach the same conclusion as the demobilized individuals, in that the former had to be disappeared at all costs since he was impeding the objectives of the AUC to continue planting coca, which Henríquez wished to see eradicated in order to cultivate cacao. This was not permitted by Hernán Giraldo who, in revenge and with malice decided, together with his right-hand man, Leónidas Acosta Ángel, aka Troilo, to make Henríquez Santamaría disappear.

A-260. *See also* A-175-183, 37; A-244; A-289.

The Colombian criminal court sentenced Defendant to more than thirty-eight years of imprisonment and ordered him to pay restitution. A-274-276. No part of the sentence was satisfied because Defendant was extradited to the United States. A-327.

PROCEDURAL HISTORY

Petitioners do not know the content of the original Indictment or the first Superseding Indictment returned against Defendant because they apparently remain under seal and they do not appear in the docket sheet. On March 2, 2005, Defendant was charged in a superseding indictment with conspiracy to manufacture and distribute cocaine with intent to import into the United States, aiding and abetting the conspiracy, and a forfeiture allegation. A-1. On May 13,

2008, the defendant was extradited from Colombia to the United States. A-327. The defendant appeared before Magistrate Judge Alan Kay on May 15, 2008, and entered a plea of not guilty. A-439 at May 15, 2008. The DOJ moved for detention and Defendant was ordered detained. *Id.*

On July 17, 2008, Petitioners' counsel and counsel for other victims of other extradited Colombians wrote DOJ asserting their rights as victims. A-404. Seven months later, DOJ responded and refused to acknowledge Petitioners as a victim. A-105.

On January 28, 2009, unbeknownst to Petitioners, the Court granted a sealed motion by DOJ to seal upcoming plea proceedings. A-440 at Dkt. No. 506.[6] On January 29, 2009, and again unbeknownst to Petitioners, Defendant changed his plea from "not guilty" to "guilty." A-30. Defendant pleaded guilty pursuant to a negotiated plea agreement to a count of conspiracy to manufacture and distribute cocaine, with the intent or knowledge that the cocaine would be imported into the United States. *Id.* This plea agreement was negotiated without Petitioners' input.

Subsequently, the Petitioners' representatives submitted a second letter, dated June 22, 2009 to DOJ, again asserting CVRA rights. A-335. The June 22,

[6] On May 27, 2010, a DOJ attorney told Petitioners in response to their inquiry as to why the docket was sealed that "I do not know why, or even if, the docket is sealed." A-417.

2009, letter alleged additional facts about the killing of Mr. Henríquez and the Defendant's role in the killing. In response to concerns Petitioners raised to DOJ about possible activity occurring in the case while DOJ was considering its position, on October 20, 2009, DOJ committed to apprise Petitioners before there was a guilty plea, stating:

> I can tell you that any issues related to possible plea or sentencing matters in this case will not move forward until we can discuss the matter.

A-420. The Government did not inform Petitioners of the January plea at this time. Petitioners received further assurances that they would be included in proceedings when the District Court's staff informed them of the following on November 9, 2009:

> Judge Walton recognizes his obligation to consider your clients' statements at the time of release, plea, sentencing, or at any parole proceeding. It is his practice to do so after he has provided a copy of the written statement to both the government and the defendant, and the parties have had a chance to file any objections to the Court's consideration of those materials. Or, in the case of any oral statement that your clients wish to make, Judge Walton will consider your clients' representations at any proceedings when the parties have an opportunity to make oral representations in response.

See A-345-346.

At the time of each of these representations, and unbeknownst to Petitioners, Defendant had already entered a plea agreement filed with the District

Court and changed his plea to guilty on January 29, 2009, in a sealed courtroom. A-30.

After having initially refused to allow Petitioners to file any Motion at all asserting their entitlement to victims' rights,[7] on April 26, 2010, the District Court issued an order stating that "the United States must show cause by May 28, 2010, why the Court should not recognize the movants' stat[us] as victims under the [CVRA] and order the government to comply with the provisions of that Act." A-50. On May 25, 2010, unbeknownst to Petitioners, the Court sealed Defendant's case in its entirety effectively de-docketing the proceedings and rendering it impossible for Petitioners to follow it in any way. A-441.

Because DOJ appeared to have been stalling in responding to Petitioners' second letter and then again in responding to Petitioner's motion, on June 8, 2010 Petitioners sought a writ from this Court directing the District Court to undertake and decide their Motion forthwith. A-67. On June 10, 2010 the Government opposed Petitioners' writ. A-104. Knowing full well that Defendant had negotiated and entered a guilty plea and that Federal Rule of Criminal Procedure 11(b) requires that the change of plea proceeding occur in "open court," DOJ nevertheless asserted that "there have not been any proceedings scheduled in the

[7] A-335; A-341; A-344; A-348; A-352; A-356; A-360; A-366; A-368.

defendant's criminal case to which the petitioners, even assuming they were crime victims . . . would have participatory rights." A-105.

This Court denied the writ without prejudice on June 11, 2010, but directed the District Court to "promptly notify the petitioners of its disposition of their motion." A-116.

Briefing was completed on the show cause order on Petitioners' Motion on August 5, 2010. A-441 at Dkt. No. 212. Notwithstanding the CVRA requirement that District Courts decide any motions asserting crime victim status "forthwith,"[8] the District Court remained silent on the Motion for nearly five years. During that time, Petitioners received no resolution of their Motion, no request for further evidence, and no notice of any case activity whatsoever. Finally, on January 27, 2015, DOJ informed counsel for Petitioners that "[t]he District Court has authorized me to inform you that the defendant . . . has a sentencing hearing coming up in the near future." A-414. This was the first time any indication was given to Petitioners that a plea agreement had been entered in the matter. DOJ also informed counsel that the District Court "stated it would like you to file any additional CVRA pleadings, if you desire to do so, by February 13, 2015." *Id*.

Petitioners filed a supplemental submission with the District Court on February 13, 2015. A-446 at Dkt. No. 458. Therein, they requested that the

[8] 18 U.S.C. § 3771(d)(3).

District Court: (1) grant their Motion pending since 2010; and (2) make future proceedings in the matter public, or at least available to Petitioners. Over the following months, Petitioners, DOJ and counsel for the Defendant made further submissions at the request of the District Court, and the District Court held several conferences on the matter. A-447-451. The record was partially unsealed on May 11, 2015. A-449.

On August 7, 2015, the District Court issued its Opinion and Order denying Petitioner's Motion. A-422, A-438.

APPELLATE JURISDICTION AND STANDARD OF REVIEW

This Court's jurisdiction is conferred by the CVRA, which provides that a "movant may petition the court of appeals for a writ of mandamus" when the district court has ruled on a motion asserting a victim's right. *See* 18 U.S.C. § 3771(d)(3). The CVRA requires that a mandamus petition be resolved by the appellate court in 72 hours, but a very recent amendment allows the litigants to stipulate to a different period with the Court's approval.[9] 18 U.S.C. § 3771(d)(3) ("The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed unless the litigants, with the approval of the court, have stipulated to a different time period for consideration.").

[9] Petitioners are willing to stipulate to a longer period but as of this writing had not yet discussed that with counsel for the government or the Defendant.

Writ petitions under the CVRA are no longer to be reviewed under the rigorous mandamus standard. An amendment to the CVRA in May, 2015,[10] resolved a split among the Circuits on the issue. *See United States v. Monzel*, 641 F.3d 528, 533 (2011). Congress amended the CVRA to direct that in deciding CVRA writ petitions, "the court of appeals shall apply ordinary standards of appellate review." 18 U.S.C. § 3771(d)(3) (2015). Consequently, this Court reviews the District Court's legal conclusions *de novo* and its factual findings for clear error. *See, e.g.*, *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 316 (D.C. Cir. 2015).

ARGUMENT

I. THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS BECAUSE MR. HENRÍQUEZ'S DEATH WAS A DIRECT AND PROXIMATE RESULT OF THE DEFENDANT'S CONSPIRACY

A central question for this Court is whether Mr. Henríquez was "directly and proximately harmed as a result of the *commission of*" the conspiracy. 18 U.S.C. § 3771(e)(2) (emphasis added). The definition of "crime victim" under the CVRA is intentionally broad and unambiguous.

> 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.

[10] Justice for Victims of Trafficking Act of 2015, Pub. L. 114-22, Title 1, § 113(a), (c)(1), 129 Stat. 240, 241 (2015) (attached as ADD 3 to the Addendum).

18 U.S.C. § 377l(e)(2)(A) (emphasis added). The definition of "crime victim" under the CVRA, by its plain language, only requires that the harm caused to a victim be direct and proximate. In *In re Stewart*, 552 F.3d 1285 (11th Cir. 2008), the Eleventh Circuit explained what the District Court agreed is the correct approach for determining who is a "crime victim":

> [F]irst, we identify the behavior constituting "commission of a Federal offense." Second, we identify the direct and proximate effects of that behavior . . . .

Id. at 1288. *See also* A-428. As the Court in *Stewart* rightly noted, "[u]nder the plain language of the statute, a party may qualify as a victim, even though it may not have been the target of the crime, *as long as it suffers harm as a result of the crime's commission*." 552 F.3d at 1289 (emphasis added). *Stewart* also recognized that "[t]he CVRA . . . does not limit the class of crime victims to those whose identity constitutes an element of the offense or who happen to be identified in the charging document. The statute, rather, instructs the district court to look at the offense itself only to determine the harmful effects the offense has on parties." *Id.*

Other courts have adhered to Congress' legislative intent and the statute's plain language to expansively define "crime victim" and adopt an "inclusive approach" to determining who are "crime victims." *See United States v. Hunter*, No. 2:07CR307DAK, 2008 WL 53125, at *2 (D. Utah Jan. 3, 2008) (noting that

the sponsors of the CVRA expected an expansive definition of the term); *United States v. Turner*, 367 F. Supp. 2d 319, 327 (E.D.N.Y. 2005) (presuming that "any person whom the government asserts was harmed by conduct attributed to a defendant, as well as any person who self-identifies as such, enjoys all of the procedural and substantive rights set forth in § 3771."); *see also United States v. Rubin*, 558 F. Supp. 2d 411,418-19 (E.D.N.Y. 2008) (same) (citations omitted).

If the District Court had used the correct approach to determining who is a crime victim to decide Petitioners' Motion, the Court should have considered how the conspiracy was committed, including the Defendant's conduct to protect the object of the conspiracy. The District Court did not adequately follow this approach. Instead, as described below, the District Court improperly narrowed the universe of facts under consideration to only those admitted by the Defendant, mischaracterized the Defendant's role in the conspiracy, and misapplied the law of causation to hold Petitioners to higher standard than what is contemplated by CVRA.

As a result of these clear errors of fact and law, the District Court failed to appropriately consider ample evidence that Mr. Henríquez satisfies the statutory definition of "crime victim." The evidence that Mr. Henríquez's death was directly and proximately caused by the conspiracy to manufacture and distribute cocaine includes that Mr. Henríquez was killed during the time period covered by

Defendant's drug conspiracy, at the same location as Defendant admitted was involved in his drug conspiracy, with the participation of the very men Defendant admitted were involved in his drug conspiracy, and in furtherance of the object of Defendant's drug conspiracy. The plea materials also establish that eliminating impediments like Mr. Henríquez was precisely the role Defendant admitted he played in the conspiracy when he admitted he was paid to provide protection. Had the District Court applied the law properly and understood the nature of the Defendant's role in the conspiracy, it would have afforded the Petitioners' rights as crime victims. *See* pages 7-11, above.

II. THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS BECAUSE THE DISTRICT COURT ERRED IN LIMITING ITS CONSIDERATION TO ONLY FACTS ADMITTED BY DEFENDANT

The District Court based its denial of Petitioners' Motion at least in part on the mistaken notion that, in resolving the Motion, the District Court was limited to consideration of facts "admitted by the defendant." In fact, the District Court explicitly so stated three times. *See* A-428, 431 & 433 (citing *McNulty*); *see also id*. at 429 & 432. The District Court erred in imposing that constraint on itself. The CVRA neither contains nor contemplates such a limitation. To the contrary, the statute expressly contemplates the existence and participation of victims

before a defendant has pleaded guilty or made any factual admissions.[11] The CVRA was recently amended to make clear that victims were entitled to "be informed in a timely manner of any plea bargain or deferred prosecution agreement." 18 U.S.C. § 3771(a)(9). The legislative history to the amendment explained that it was intended to overturn a DOJ Legal Counsel opinion that relieved prosecutors of their obligation to notify victims of plea agreements that occur prior to the filing of a formal charge.[12] The drafters of the CVRA "intended to protect crime victims throughout the criminal justice process – from the investigative phases to the final conclusion of a case"[13] and intended the rights afforded by CVRA were to be expansive.[14] The CVRA expressly provides for enforcement of victims' rights even "if no prosecution is underway." 18 U.S.C. § 3771(d)(3).

Indeed, when the Federal Rules of Criminal Procedure implemented the CVRA in 2008, the drafters expressly addressed the issue of how the district

[11] Congress also permitted crime victims to assert their rights "if no prosecution is underway, in the district court in the district in which the crime occurred." 18 U.S.C. § 3771(d)(3).

[12] H.R. Rep. No. 114-7, at 7-8 (2015) (attached as ADD 4 to the Addendum).

[13] Letter from Jon Kyl, U.S. Sen., to Eric H. Holder, Jr., Att'y Gen. (June 6, 2011), reprinted in 157 CONG. REC. S3607, S3608 (daily ed. June 8, 2011) (statement of Sen. Jon Kyl) (attached as ADD 5 to the Addendum).

[14] This is consistent with how the drafters of the CVRA intended the Government to apply it: the right to confer was to apply at "any critical stage or disposition of the case" and was "intended to be expansive." A-379.

courts would determine, as a factual matter, disputes concerning a purported victim's status. The 2008 amendments included a definition of "victim" in Rule 1. Fed. R. Crim. P. 1(b)(12).[15] In the notes to that Rule, the Advisory Committee recognized the Court's authority to make necessary findings: "Upon occasion, disputes may arise over the question whether a particular person is a victim. Although the rule makes no special provision for such cases, *the courts have the authority to do any necessary fact finding and make any necessary legal rulings*." Fed. R. Crim. P. 1 (Committee Notes on Rules – 2008 Amendment) (emphasis added).

The District Court's reliance on *McNulty* to justify the limitation is misplaced. *See* A-428, 431 & 433 (citing *McNulty*). The *McNulty* court limited the inquiry because petitioner sought restitution – a punishment for a federal offense. *In re McNulty*, 597 F.3d 344, 349 (6th Cir. 2010). As explained by *United States v. Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 535 (D.N.J. 2009), ruling on a disputed issue of "crime victim" status under the CVRA can create "victim" status for purposes of restitution under the VWPA or the MVRA, thus courts must be careful to avoid violating the Sixth Amendment and *United States v. Booker*, 543 U.S. 200 (2005). Here, unlike in *McNulty*, Petitioners *do*

[15] Attached as ADD 6 to the Addendum.

not seek restitution, only the right to be heard at Defendant's sentencing and in future proceedings.

Indeed, courts have already rejected the narrower interpretation of CVRA used by the District Court to reject the Petitioners' Motion. In *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008), for example, the Fifth Circuit held that the government had the obligation to afford victims their rights *before* reaching a plea agreement with the defendant ("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 was also mistaken in stating that "[n]either the government nor the defendant has suggested that the conduct in furtherance of the conspiracy is anything more than what has already been admitted to by the defendant in his Statement of Facts in support of his guilty plea." *See* A-431. In particular, in its pretrial detention memorandum, DOJ represented to the District Court that Defendant "require[d] local farmers growing coca in the area, the primary ingredient for cocaine, to sell their coca only to his organization under a penalty of death." A-8. DOJ similarly represented to the District Court in its Speedy Trial Act motion that Defendant was responsible for the manufacture of cocaine and required farmers growing coca to only sell to his terrorist organization in his role in the conspiracy. A-19. The District Court should have,

but did not, consider such facts alleged by DOJ that illustrate that Defendant's role in the conspiracy was precisely the activity that led him to order the murder of Mr. Henríquez.

This erroneous interpretation of CVRA to limit the factual inquiry made by a district court to consideration of facts "admitted by the defendant" is fundamentally prejudicial to Petitioners. The statement of facts in support of the plea agreement, and other plea-related documents, were created in a plea negotiation and change of plea process from which Petitioners were entirely excluded. The government sought, and the District Court issued, an order sealing the plea proceedings notwithstanding the requirement in Federal Rule of Criminal Procedure 11(b) that such proceedings occur in open court.[16] Petitioners were not only excluded from the proceedings, they were led to believe by DOJ and the District Court that they would be allowed to participate in the plea process, notwithstanding that a plea had already been entered. A-30; A-44; A-344; A-419.

If they had been allowed to participate – either to confer with DOJ as contemplated by 18 U.S.C. §§ 3771(a)(5) & (9) or to be heard by the District Court in connection with the plea as contemplated by 18 U.S.C. § 3771(a)(4) –

[16] After Petitioners finally learned that the proceedings had been sealed, they asked DOJ why. Although DOJ had caused the sealing, it nevertheless falsely asserted to Petitioners' counsel that it did not know whether or why the docket was sealed. A-416; *see also* A-440 at Dkt. 502.

Petitioners would certainly have pushed for a more detailed and accurate statement of Defendant's activities in furtherance of the charged conspiracy (including the murder of Mr. Henríquez) to be incorporated into the plea materials. It was fundamentally unfair for the District Court to limit its consideration to only facts admitted in a sealed proceeding from which Petitioners were excluded and about which they were subsequently misled.

III. THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS BECAUSE THE DISTRICT COURT MISCONSTRUED DEFENDANT'S ACKNOWLEDGED ROLE IN THE CONSPIRACY

The District Court also erred in its conclusion that "neither the Indictment charging the defendant with conspiracy nor the Statement of Facts in support of the defendant's plea agreement makes reference to the defendant using force or violence in furtherance of the charged conspiracy." A-429. The District Court's characterization of the Statement of Facts as not referencing violent activity is implausible. To the contrary, the Statement of Facts (which Defendant agreed to as part of his plea) provides that: (1) Defendant frequently carried firearms in his activities, and had a personal security detail of 200; (2) commanded between 500 – 2000 paramilitary troops; (3) used those resources to provide "security" and "protection" against other criminal elements (and the Columbian government) for drug manufacturers and traffickers; and (4) Defendant's organization funded itself

by imposing "war taxes" on the cocaine manufacturers and traffickers. A-44-47 at ¶¶ 1-7.

Such admitted activity by Defendant lays bare that Defendant's essential role in the conspiracy *was* to provide protection by violence, and the threat thereof. The District Court's conclusion that Defendant's admitted activities did not necessarily involve violence was erroneous.

IV. THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS BECAUSE THE DISTRICT COURT MISINTERPRETED THE LAW OF CAUSATION UNDER THE CVRA TO DENY PETITIONERS THEIR STATUTORY RIGHTS

The District Court strained to point to additional potential motives for the murder of Mr. Henríquez[17] concluding that because Defendant may have had additional reasons to kill him, his death is therefore "too factually attenuated from the charged conspiracy" to confer CVRA rights. A-434-436. This conclusion reflects an erroneous interpretation of causation under the CVRA.

Even if there were concurrent or multiple motives for abducting and murdering Mr. Henríquez, he would still satisfy the statutory definition of "crime victim." The CVRA's definition requires only that Mr. Henríquez have been "directly and proximately harmed" as a result of the conspiracy to constitute a

[17] None of these additional potential motives – that Mr. Henríquez was a former paramilitary member, that he was a leader, and that he was warned to leave – are inconsistent with the fact that he was murdered because he was interfering with the conspiracy by resisting the cultivation of Coca. *See* A-434-436.

victim. 18 U.S.C. § 3771(e)(2)(A). For the harm to be "direct" it must be "closely related to the conduct inherent to the offense, rather than merely tangentially linked." *McNulty*, 597 F.3d at 352 (whistleblower who was harmed by being "blackballed" from packaged-ice industry was not a victim of a price-fixing conspiracy on which he blew the whistle). The analysis for determining direct causation when there is no issue of multiple causes has often been phrased as the "but-for" test. Courts applying the CVRA, however, have recognized that the CVRA does *not limit* direct causation analysis to the "but-for" test but rather that the definition "*encompasses* the traditional 'but for' and proximate cause analyses." *Id*. at 350 (emphasis added) (quoting *In re Rendon-Galvis*, 564 F.3d 170, 175 (2d Cir. 2009). Consequently, courts have considered alternatives to "but-for" causation in applying the CVRA. For example, in *United States v. Sharp*, 463 F. Supp. 2d 556,567 (E.D. Va. 2006), the court considered whether a conspiracy was a "substantial factor" in causing the victim's harm before reaching the unsurprising conclusion that a girlfriend abused by her boyfriend who bought marijuana from the drug-dealing defendant would not be recognized as a victim of the defendant's drug dealing. *See also United States v. Crandon*, 173 F.3d 122, 126 (3d Cir. 1999) (concluding that although the victim had a preexisting mental illness, it was reasonable for the District Court to conclude that the defendant's conduct was a substantial factor in causing the victim's

hospitalization and the defendant could be required to pay the victim's medical expenses).

The evidence of the motive of and purpose for the murder of Mr. Henríquez stands in stark contrast to situations where victims have been unable to establish such a nexus. For example, the putative victim in *Rendon-Galvis* was unable to establish a motive for the killing. 564 F.3d at 175. Instead, she had to resort to arguing "only that there was a symbiotic relationship between the AUC's drug-trafficking and its terrorist operations and that [the] abduction and murder took place in a geographic area that was significant for the AUC's drug-trafficking operations." *Id.* That was insufficient in light of the fact that there were active military operations in the region at the time of the killing, and the record showed that the organization obtained financing by means other than drug trafficking. *Id.*

As a result, the *Rendon-Galvis* court found an insufficient nexus between the killing and that defendant's drug trafficking conspiracy. *Id.* *Rendon-Galvis* recognized, however, that the necessary causation inquiry for determining whether someone is a victim of an offense "is a fact-specific one." *Id.* In marked contrast to the facts of *Rendon-Galvis*, the facts in this case establish the causal connection. Mr. Henríquez was actively opposing the object of the conspiracy and that is why he was killed. In fact, he was forcibly abducted from a meeting

where he was teaching coca eradication. A-240, 254-256. Critically lacking from *Rendon-Galvis* was any contention, much less proof or a judicial finding, that the decedent was opposing coca production or otherwise thwarting an object of the conspiracy. Also absent in *Rendon-Galvis* was evidence of the motive for the killing, but here the motive has been established and it ties the killing directly to the conspiracy. *See* A-44.

Courts are to interpret legislation to impose an appropriate causation test when necessary to "vindicate the law's purpose." *Paroline v. United States*, 134 S.Ct. 1710, 1724 (2014). The District Court did not do that here. The definition of "crime victim" under the CVRA is intentionally broad, and Congress indicated that it intended the statute to apply in an expansive manner to "correct, not continue, the legacy of the poor treatment of crime victims in the criminal process." A-380-381. The CVRA definition of crime victim is therefore inclusive. The District Court's Order misapprehends the law of causation resulting in the erroneous denial of Petitioner's CVRA rights.

CONCLUSION

For the reasons stated above and based on the record in the case, a writ should issue directing the District Court to grant Petitioners their statutory rights as crime victims under the Crime Victims' Rights Act, 18 U.S.C. § 3771.

Dated: September 11, 2015

Respectfully submitted,

P.P. Gabriel Gutierrez

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(C) because this brief contains 6,870 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements for Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point typeface.

Dated: September 11, 2015

p.p. Johanna M. Gutierrez

Leo P. Cunningham
Counsel for Petitioners
Zulma Natazha Chacín de Henríquez,
Nadiezhda Natazha Henríquez Chacín
and Bela Henríquez Chacín

CERTIFICATE OF SERVICE

In Re Zulma Natazha Chacín De Henríquez, Nadiezhda Natazha Henríquez Chacín and Bela Henríquez Chacín

I hereby certify that one copy of this Petition for Writ of Mandamus was sent by hand delivery to:

Paul Laymon, Jr.
U.S. Department of Justice
Narcotic and Dangerous Drug Section
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Washington, DC 20530

Robert A. Feitel
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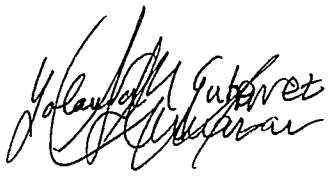
Honorable Reggie B. Walton
U.S. District Court for the District of Columbia
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, NW
Washington, DC 20001

on this 11th day of September, 2015.



Yolanda Gutierrez-Almazan

TABLE OF CONTENTS

TO PETITIONERS' ADDENDUM

ADD 1

CERTIFICATE OF INTERESTED PARTIES AND AMICI CURIAE

There are no other parties to this litigation, including persons or other entities financially interested in the outcome of the litigation, not revealed by the caption of this petition, except for the United States and Hernán Giraldo-Serna, the parties in the underlying criminal action, *United States v. Giraldo-Serna*, No. 1:04-cr-00114-RBW-1 (D.D.C. 2004).

Petitioners further certify that to their knowledge no amici appeared before the district court in the underlying criminal action and that there are no amici appearing in this Court.

ADD 2

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

18 U.S.C.A. § 3771

§ 3771. Crime victims' rights

Effective: May 29, 2015
Currentness

(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.

(9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.

(10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

(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, unless the litigants, with the approval of the court, have stipulated to a different time period for consideration. In deciding such application, the court of appeals shall apply ordinary standards of appellate review. 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 14 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:

(1) Court of appeals.--The term "court of appeals" means**--**

(A) the United States court of appeals for the judicial district in which a defendant is being prosecuted; or

(B) for a prosecution in the Superior Court of the District of Columbia, the District of Columbia Court of Appeals.

(2) Crime victim.--

(A) In general.--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.

(B) Minors and certain other victims.--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.

(3) District court; court.--The terms "district court" and "court" include the Superior Court of the District of Columbia.

(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; amended Pub.L. 109-248, Title II, § 212, July 27, 2006, 120 Stat. 616; Pub.L. 111-16, § 3(12), May 7, 2009, 123 Stat. 1608; Pub.L. 114-22, Title I, § 113(a), (c)(1), May 29, 2015, 129 Stat. 240, 241.)

Notes of Decisions (45)

18 U.S.C.A. § 3771, 18 USCA § 3771
Current through P.L. 114-49 approved 8-7-2015

End of Document

ADD 3

PL 114-22, May 29, 2015, 129 Stat 227

UNITED STATES PUBLIC LAWS

114th Congress - First Session

Convening January 06, 2015

Additions and Deletions are not identified in this database.
Vetoed provisions within tabular material are not displayed
Vetoes are indicated by ~~Text~~ ;
stricken material by **Text** .

PL 114–22 [S 178]
May 29, 2015
JUSTICE FOR VICTIMS OF TRAFFICKING ACT OF 2015

An Act To provide justice for the victims of trafficking.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1 SHORT TITLE; TABLE OF CONTENTS.

<< 18 USCA § 1 NOTE >>

(a) SHORT TITLE.—This Act may be cited as the "Justice for Victims of Trafficking Act of 2015".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

(b) HOLDING SEX TRAFFICKERS ACCOUNTABLE.—Section 2423(g) of title 18, United States Code, is amended by striking "a preponderance of the evidence" and inserting "clear and convincing evidence".

SEC. 112. MONITORING ALL HUMAN TRAFFICKERS AS VIOLENT CRIMINALS.

<< 18 USCA § 3156 >>

Section 3156(a)(4)(C) of title 18, United States Code, is amended by inserting "77," after "chapter".

SEC. 113 CRIME VICTIMS' RIGHTS.

(a) IN GENERAL.—Section 3771 of title 18, United States Code, is amended—

(1) in subsection (a), by adding at the end the following:

<< 18 USCA § 3771 >>

"(9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.

<< 18 USCA § 3771 >>

"(10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.";

<< 18 USCA § 3771 >>

(2) in subsection (d)(3), in the fifth sentence, by inserting ", unless the litigants, with the approval of the court, have stipulated to a different time period for consideration" before the period; and

(3) in subsection (e)—

<< 18 USCA § 3771 >>

(A) by striking "this chapter, the term" and inserting the following: "this chapter:

<< 18 USCA § 3771 >>

"(1) COURT OF APPEALS.—The term 'court of appeals' means—

"(A) the United States court of appeals for the judicial district in which a defendant is being prosecuted; or

"(B) for a prosecution in the Superior Court of the District of Columbia, the District of Columbia Court of Appeals.

<< 18 USCA § 3771 >>

"(2) CRIME VICTIM.—

"(A) IN GENERAL.—The term";

<< 18 USCA § 3771 >>

(B) by striking "In the case" and inserting the following:

<< 18 USCA § 3771 >>

"(B) MINORS AND CERTAIN OTHER VICTIMS.—In the case"; and

(C) by adding at the end the following:

***241**

<< 18 USCA § 3771 >>

"(3) DISTRICT COURT; COURT.—The terms 'district court' and 'court' include the Superior Court of the District of Columbia.".

<< 42 USCA § 10601 >>

(b) CRIME VICTIMS FUND.—Section 1402(d)(3)(A)(i) of the Victims of Crime Act of 1984 (42 U.S.C. 10601(d)(3)(A)(i)) is amended by inserting "section" before "3771".

(c) APPELLATE REVIEW OF PETITIONS RELATING TO CRIME VICTIMS' RIGHTS.—

<< 18 USCA § 3771 >>

(1) IN GENERAL.—Section 3771(d)(3) of title 18, United States Code, as amended by subsection (a)(2) of this section, is amended by inserting after the fifth sentence the following: "In deciding such application, the court of appeals shall apply ordinary standards of appellate review.".

<< 18 USCA § 3771 NOTE >>

(2) APPLICATION.—The amendment made by paragraph (1) shall apply with respect to any petition for a writ of mandamus filed under section 3771(d)(3) of title 18, United States Code, that is pending on the date of enactment of this Act.

ADD 4

114TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
114–7

JUSTICE FOR VICTIMS OF TRAFFICKING ACT OF 2015

JANUARY 27, 2015.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 181]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 181) to provide justice for the victims of trafficking, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

CONTENTS

Purpose and Summary

H.R. 181, as reported, is a comprehensive response to the growing crime of child sex trafficking. Among other things, this legislation addresses victim services and provides additional resources to law enforcement through the new victim-centered grant program; helps to facilitate these investigations by providing that sex traf-

ficking and other similar crimes are predicate offenses for state wiretap applications; addresses the demand side of this crime by clarifying that under existing 18 U.S.C. § 1591, it is a Federal crime to solicit or patronize for sex minors or adults who are involved in the sex trade through force, fraud, or coercion; and improves the reporting of missing children.

Background and Need for the Legislation

According to the Federal Bureau of Investigation, sex trafficking is the fastest-growing business of organized crime and the third-largest criminal enterprise in the world.[1] Because this crime usually occurs outside of the public eye, it is difficult to estimate the number of minor victims of sex trafficking.[2]

The problem, however, is extensive. Demand for the prostitution (and other forms of commercial sexual exploitation) of children is steady, and profit to sex pimps (or more aptly called "traffickers"), has increased. One study estimates that over 290,000 American youth are at risk of becoming a victim of sex trafficking, and the National Center for Missing and Exploited Children estimates that one of every seven endangered runaways reported to the Center are likely victims of minor sex trafficking.[3] And, from 2004 through 2008, the Internet Crimes Against Children Task Forces have experienced an increase of more than 900 percent in the number of child victims of prostitution.[4]

Victims of sex trafficking are exploited by traffickers who may operate alone or as part of a criminal network. Shared Hope International estimates that human trafficking in the United States is a $9.8 billion industry.[5] It is more profitable for a trafficker to sell the sexual services of a child or adult than to commit other crimes such as dealing in drugs—drugs can only be sold once, whereas victims can be, and are, prostituted multiple times a day.[6] In fact, traffickers will often set daily monetary quotas for their victims, usually ranging between $500 and $1,000, which goes to the trafficker and not the victim. Failure to meet these quotas can result in violence and other types of retaliation against the victim.[7]

Many traffickers increase their profits by working together and sharing information about "hot spots" where there may be higher demand or areas of increased police activity to avoid. For example, traffickers will often transport their victims to cities that are hosting major sporting events or conventions in order to find increased demand. The practice of moving children from city to city

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[1] *See* AMANDA WALKER-RODRIGUEZ & RODNEY HILL, THE FBI, FBI Law Enforcement Bulletin: Human Sex Trafficking, Mar. 2011.

[2] Starting in January 2013, the FBI began collecting data regarding sex trafficking specifically as part of its Uniform Crime Report program. This information should help to provide a more fulsome picture of the impact of minor sex trafficking nationwide. *See* FBI, UCR Program Continues to Adapt, Evolve, http://www.fbi.gov/about-us/cjis/cjis-link/september-2011/ucr-program-continues-to-adapt-evolve.

[3] *Oversight Hearing: The State of Efforts to Stop Human Trafficking,* H. Subcomm. on Commerce, Justice, Science, and Related Agencies of the H. Comm. on Appropriations, 113th Congress (statement of John Ryan, CEO, National Center for Missing and Exploited Children).

[4] U.S. DEPARTMENT OF JUSTICE, *The National Strategy for Child Exploitation Prevention and Interdiction,* 32, 2010, *available at* http://www.justice.gov/psc/docs/natstrategyreport.pdf.

[5] SHARED HOPE INTERNATIONAL, Domestic Minor Sex Trafficking in the U.S., http://sharedhope.org/wp-content/uploads/2013/11/DMSTinfographic.pdf.

[6] U.S. DEPARTMENT OF JUSTICE, *supra* note 4 *at* 32–33.

[7] Domestic Sex Trafficking: The Criminal Operations of the American Pimp, Polaris Project, *available at* http://www.dcjs.virginia.gov/victims/humantrafficking/vs/documents/Domestic__Sex__Trafficking__Guide.pdf.

also makes it more difficult for law enforcement to investigate and stop trafficking enterprises.

The average age of minors entering the sex trade is between 12 and 14 years.[8] Traffickers often target vulnerable youth, who are more easily lured into prostitution and other forms of child exploitation. For example, runaways and children in the foster care system are particularly vulnerable to becoming victims of sex trafficking—one federally funded study found that approximately 1.7 million youth had run away from home or were forced to leave their homes at some point in 1999, and that, while away from home, an estimated 38,600 (2.2%) of these youth were sexually assaulted, were in the company of someone known to be sexually abusive, or were engaged in sexual activity in exchange for money, drugs, food, or shelter.[9] Victims of minor sex trafficking, however, are not always runaways or in foster homes. Instead, these victims can and do come from any type of home or socioeconomic background.[10]

Traffickers are often able to lure victims with false promises to address their emotional and physical vulnerabilities. These manipulative, abusive, and traumatizing relationships, however, can help to ensure that the victims will remain loyal to their traffickers in spite of their victimization. Other reasons that victims are often unable to leave their traffickers include being kept in captivity or confinement, the use of violence and threats, debt bondage, and fear of retaliation or arrest.[11] This applies not only to child victims but also adults who, by force, fraud, or coercion, are victims of traffickers.

The investigation and prosecution of human trafficking has often been carried out by state and local law enforcement. Congress has focused recent attention on domestic sex trafficking of children, which includes commercial sex acts involving children under the age of 18. Under the Victims of Trafficking and Violence Protection Act of 2000 (TVPA), the primary law that addresses trafficking, sex trafficking of children in interstate commerce is a Federal crime.[12] Further, regardless of whether a child is believed to have consented to sex or whether the child represents himself or herself as an adult, the child is considered a trafficking victim under Federal law.[13]

While much of the efforts to combat this crime have focused on the supply-side of sex trafficking, it is also a Federal (and state) crime to purchase sex with a minor.[14] There is no uniform profile

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[8] RIGHTS4GIRLS, http://www.rights4girls.org/uploads/child%20welfare%20and%20child%20trafficking.pdf.

[9] HEATHER HAMMER, DAVID FINKELHOR, & ANDREA J. SEDLAK, U.S. DEPARTMENT OF JUSTICE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OJJDP NISMART Bulletin RUNAWAY/THROWNAWAY CHILDREN: NATIONAL ESTIMATES AND CHARACTERISTICS, Oct. 2002, *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/196469.pdf.

[10] *See* "You're Pretty—You Could Make Some Money," Washingtonian Mag., June 10, 2013 (discussing the growth of minor sex trafficking victims coming from "the affluent Northern Virginia suburbs").

[11] *See* Domestic Sex Trafficking: The Criminal Operations of the American Pimp, *supra* note 7.

[12] P.L. 106–386.

[13] 18 U.S.C. § 1591.

[14] *United States v. Jungers,* 702 F.3d 1066, 1075 (8th Cir. 2013) (holding that purchasers of minor sex services can be held criminally liable under 18 U.S.C. § 1591. *See also* UNITED STATES ATTORNEY'S OFFICE FOR THE WESTERN DISTRICT OF MISSOURI, LEBANON MAN SENTENCED TO 20 YEARS FOR COERCING A MINOR TO BECOME A SEX SLAVE (announcing the conviction of sex traf-

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of a buyer of commercial sex with a minor, making buyers particularly difficult to identify. Research has suggested that these predators are often encouraged by online solicitations, temptations, and exploitation. In addition to those actively seeking out sex with minors, some buyers may engage in sex with minors unknowingly, to wit, those perpetrators may assume that a prostituted individual is an adult, not a child. Alternatively, they may or may not inquire about the age of that individual and may still decide to engage in a sex act even if she or he is a minor.[15]

Hearings

The Committee on the Judiciary held no hearings on H.R. 181.

Committee Consideration

On January 21, 2015, the Committee met in open session and ordered the bill H.R. 181 favorably reported by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 181.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

With respect to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, an estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 was not submitted to the Committee before the of filing of the report.

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ficking customers), *available at* http://www.justice.gov/usao/mow/news2013/bagley.sen.html (announcing the conviction of sex trafficking customers).

[15] *See generally* Malika Saada Saar, *There is No Such Thing As A Child Prostitute,* Wash. Post, Feb, 17, 2014 (discussing Tami, who pleaded with her purchasers for months to take her to the police because she was a minor, but none did), *available at* http://www.washingtonpost.com/opinions/there-is-no-such-thing-as-a-child-prostitute/2014/02/14/631ebd26-8ec7-11e3-b227-12a45d109e03_story.html.

Duplication of Federal Programs

No provision of H.R. 181 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 181 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R.181 is a comprehensive response to the growing crime of child sex trafficking that focuses on prosecuting offenders and providing assistance and services to victims.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 181 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short Title. This section cites the short title of the bill as the "Justice for Victims of Trafficking Act of 2015."

Section 2. Victim-Centered Sex Trafficking Deterrence Grant Program. This section creates a victim-centered model grant program to help States and local governments develop and implement comprehensive victim-centered programs to train law enforcement, rescue exploited children, prosecute human traffickers, and restore the lives of victims. Specifically, these grant funds could be used for specialized training programs, the establishment of anti-trafficking task forces, victims' services, and the establishment or enhancement of problem-solving court programs for trafficking victims all focused on victim rescue and restoration. This grant program amends the existing grant program codified at 42 U.S.C. § 14044b, and has the same authorization of $5 million a year over 5 years.

Section 3. Amendments to the Victims of Child Abuse Act of 1990. This section clarifies that Child Advocacy Centers (CACs) may provide assistance and services to victims of child pornography and minor sex trafficking, and provides that existing grant programs can support these efforts.

Section 4. Streamlining State and Local Human Trafficking Investigations. Under current law (18 U.S.C. § 2516), state and local law enforcement may obtain a wiretap warrant in their state courts upon a showing that the investigation may provide evidence of "murder, kidnapping, gambling, robbery, bribery, extortion, or deal-

use its existing law enforcement task forces through the Innocence Lost National Initiative to focus on fighting demand for human trafficking through the investigation, arrest, and prosecution of persons who purchase sexual acts with human trafficking victims.

Section 8. Holding Sex Traffickers Accountable. Current Federal law allows interstate child predators to claim an affirmative defense under the Mann Act (18 U.S.C. § 2423) where they can show, by a preponderance of the evidence (more likely than not), that they believed the person with whom they engaged in a commercial sex act was 18 years of age or older. This section increases the standard for claiming this affirmative defense by requiring defendants to show, by clear and convincing evidence (highly and substantially more probable than not), that they believed the victim to be 18 years of age or older.

Section 9. Oversight and Accountability. This section provides accountability measures for the new Victim-Centered Sex Trafficking Deterrence Grant Program by allowing the DOJ Inspector General to conduct audits of grant recipients under the bill in order to prevent waste, fraud, and abuse of funds by grantees; prohibiting grantees with unresolved audit findings from receiving grant funds for a 2-year period; giving grantee priority to eligible entities that have not had an unresolved audit finding for the previous 3 years; and ensuring that grantees under the bill who have improperly received funds are required to reimburse the Federal Government in an amount equal to the improper award, among other things. This section also provides that grantees must seek approval when using more than $20,000 in grant funds to support or host a conference, except that a conference that uses more than $20,000 but less than $500 in grant funds per person is not subject to the approval requirements. This is intended to encourage grantees to be cost effective when holding conferences, and to not discourage large conferences that provide information and training in an efficient manner.

Section 10. Crime Victims' Rights. This section clarifies Congress' intent with regard to several important provisions of the Crime Victims' Rights Act (CVRA), enacted in 2004, and makes several technical and conforming changes to the CVRA. The CVRA gives crime victims "the right to participate in the system," including the "right to be treated with fairness and with respect for the victim's dignity and privacy" and "the reasonable right to confer with the attorney for the Government in the case." The law also instructs that these rights must be provided not just by the Justice Department but by "other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime." Despite this mandate, in 2010, the Justice Department's Office of Legal Counsel issued an opinion concluding that the CVRA does not confer rights on victims of Federal crimes until prosecutors initiate formal criminal proceedings via the filing of a complaint, information, or indictment. The result of this opinion is that Federal prosecutors are not required to notify crime victims of plea agreement or deferred prosecution agreement negotiations that occur prior to the filing of a formal charge. This section clarifies Congress' intent that crime victims be notified of plea agreements or deferred prosecution agreements, including those that may take place prior to a formal charge.

The CVRA also empowers crime victims to challenge the denial of their rights through a writ of mandamus. However, since its enactment, the circuit courts have split on the issue of what standard of review should apply to such writs. This section adopts the approach followed by the Ninth Circuit in *Kenna v. U.S. District Court for Central District of California,* 435 F.3d 1011 (9th Cir. 2006), and the Second Circuit in *In re W.R. Huff Asset Management Company,* 409 F.3d 555 (2d Cir. 2005), namely that, despite the use of a writ of mandamus as a mechanism for victims' rights enforcement, Congress intended that such writs be reviewed under ordinary appellate review standards.

Sec. 11. Sense of Congress. This section provides a sense of Congress that minor sex trafficking is a terrible crime that should be prosecuted to the fullest extent of the law.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2005

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TITLE II—COMBATTING DOMESTIC TRAFFICKING IN PERSONS

* * * * * * *

SEC. 203. PROTECTION OF JUVENILE VICTIMS OF TRAFFICKING IN PERSONS.

[(a) ESTABLISHMENT OF PILOT PROGRAM.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Health and Human Services shall establish and carry out a pilot program to establish residential treatment facilities in the United States for juveniles subjected to trafficking.

[(b) PURPOSES.—The purposes of the pilot program established pursuant to subsection (a) are to—

[(1) provide benefits and services to juveniles subjected to trafficking, including shelter, psychological counseling, and assistance in developing independent living skills;

[(2) assess the benefits of providing residential treatment facilities for juveniles subjected to trafficking, as well as the most efficient and cost-effective means of providing such facilities; and

[(3) assess the need for and feasibility of establishing additional residential treatment facilities for juveniles subjected to trafficking.

[(c) SELECTION OF SITES.—The Secretary of Health and Human Services shall select three sites at which to operate the pilot program established pursuant to subsection (a).

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specifically, how do we get businesses to do more in terms of hiring, spend less on redtape, less on bureaucracy, and reduce the regulatory burden in smart ways?

The current administration has said some of the right things but actually moved in the wrong direction. We have seen a sharp increase in the last couple of years in what are deemed to be major economically significant rules. That is defined as regulations that impose a cost on the economy of $100 million or more.

According to the administration's Office of Management and Budget, the current administration has been regulating at a pace of 84 major rules per year. By way of comparison, that is about a 50-percent increase over the regulatory output during the Clinton administration, which had about 56 rules per year, and an increase from the Bush administration as well. So we have seen more regulations and more significant regulations.

I was encouraged to hear President Obama's words when he talked about the Executive order in January, which is entitled ''Improving Regulation and Regulatory Review.'' But now we need to see action. We need to see it from the administration, from individual agencies to provide real regulatory relief for job creators to be able to reduce this drag on the economy.

One commonsense step we can take is to strengthen what is called the Unfunded Mandates Relief Act. It was passed in 1995. It was bipartisan. I was a cosponsor in the House of Representatives. It is an effort to require Federal regulators to evaluate the cost of rules, to look at the benefits and the costs, and to look at less costly alternatives on rules.

The two amendments I would like to offer over the next few days as we consider the legislation before us would improve this Unfunded Mandates Reform Act, and it would reform it in ways that are entirely consistent with the principle President Obama has laid out and committed to in his Executive order on regulatory review.

The first amendment would require agencies specifically to assess potential effects of new regulations on job creation—so focusing in on jobs—and to consider market-based and nongovernmental alternatives to regulation. This would broaden the scope of the Unfunded Mandates Relief Act to require cost-benefit analysis of rules that impose direct or indirect costs of $100 million a year or more. So, again, this is for major rules of $100 million or more. It would also require agencies to adopt the least costly or least burdensome option that achieves whatever policy goals have been set out by Congress. It seems to me it is a commonsense amendment. I hope we will get bipartisan support for it.

The second amendment would extend the Unfunded Mandates Relief Act to so-called independent agencies which today are actually exempt from the cost-benefit rules that govern all other agencies. In 1995, we had this debate and determined at that time we would not extend the legislation to independent agencies. In the interim, independent agencies have been providing more and more rules, have put out more and more regulations, and are having a bigger and bigger impact. An example of an independent agency would be the SEC, the Securities and Exchange Commission, or the CFTC, which is the Commodity Futures Trading Commission. These are agencies that, although independent in the executive branch, are very much involved in putting out major rules and regulations. It is sometimes called the ''headless fourth branch'' of government because their rules are not reviewed for cost-benefit analysis, even by the OMB, the Office of Management and Budget, in its Office of Information and Regulatory Affairs, so-called OIRA.

We have looked at some GAO data and put together various studies, and it appears to us that there are about 200 regulations that were issued between 1996 until today that would be deemed to have an impact of $100 million or more on the economy but were automatically excluded from the Unfunded Mandates Relief Act because they were deemed to be from independent agencies.

So it is basically closing a loophole and closing this independent agency loophole, which I believe is a sensible reform. It has been endorsed by many people, including, interestingly, the current OIRA Administrator and the President's regulatory czar, Cass Sunstein, who, in a 2002 Law Review article, talked about the fact that this is an area where UMRA ought to be extended because, again, there were so many independent agencies that were putting out regulations impacting job creation in this country.

No regulation, whatever its source, should be imposed on American employers or on State and local governments without serious consideration of the costs, the benefits, and the availability of a least-burdensome alternative. Both these amendments would move us further toward that sensible goal, and I hope the leadership will allow these amendments to be offered. I think they fit well with the underlying legislation. If they are offered, I certainly urge my colleagues on both sides of the aisle to support them.

I yield the floor. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call.

The bill clerk proceeded to call the roll.

Mr. DURBIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

MORNING BUSINESS

Mr. DURBIN. Mr. President, I ask unanimous consent that Senators be allowed to speak as in morning business for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

TRIBUTE TO LOUIS E. GIVAN

Mr. MCCONNELL. Mr. President, I rise today to recognize a distinguished Kentuckian who has worked tirelessly on behalf of our Nation's soldiers, sailors and marines for more than 40 years. Louis E. Givan, a lifelong resident of my hometown of Louisville, has played a vital role in protecting the men and women of our Armed Forces and our country's defense.

Formerly a sailor himself in the U.S. Navy, he has served for the last 11 years as the general manager of Raytheon Missile Systems operations in Louisville. I was saddened to hear of his retirement from that position this coming July 5. He will certainly be missed.

Mr. Givan—or, to those who know him, Ed—was a 1966 graduate of St. Xavier High School in Louisville and in 1970 earned his bachelor of science degree in mechanical engineering from the J.B. Speed School of Engineering at the University of Louisville. In 1968, he began working at the Naval Ordnance Station in Louisville, and he stayed at that post until 1996, in various engineering and supervisory positions.

In 1996 the Naval Ordnance Station transitioned to private ownership, and Ed's leadership was crucial in making that transition a successful one. The facility eventually became part of Raytheon Missile Systems, and Ed was appointed general manager in 2000. As general manager, Ed has led Raytheon Missile Systems in Louisville to great success, success for both the company and for the local community. They design, develop, and produce vital weapons systems for our armed forces, enabling America to have the most formidable military force in the world. Weapons produced at the Louisville facility are used by our forces in all parts of the globe, including in Iraq.

Kentucky is lucky to have benefitted from Ed's dedication, commitment to excellence, and leadership for so many years. I am sure his wife Velma; his sons Eddie, Tony, and Chris; and his grandchildren Benjamin, Nathan, Isaac, Macy and Natalie are all very proud of what Ed has accomplished. I wish him the very best in retirement, and I am sure my colleagues join me in saying that this U.S. Senate thanks Mr. Louis E. ''Ed'' Givan for his faithful service.

CRIME VICTIMS' RIGHTS ACT

Mr. KYL. Mr. President, I ask unanimous consent that the following letter be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. SENATE,
Washington, DC, June 6, 2011.

Hon. ERIC H. HOLDER, Jr.,
Attorney General, U.S. Department of Justice, Washington, DC.

DEAR ATTORNEY GENERAL HOLDER: I am writing about the Justice Department's implementation of the Crime Victims' Rights Act—an act that I co-sponsored in 2004. These questions relate to an Office of Legal Counsel (''OLC'') Opinion made public on May 20, 2011 and more broadly to concerns I have heard from crime victims' advocates that the Department has been thwarting effective implementation of the Act by failing to extend the Act to the investigative phases of criminal cases and by preventing effective appellate enforcement of victims' rights. I am writing to ask you to answer these questions and explain the Department's actions in these areas.

GOVERNMENT PROTECTION OF VICTIMS' RIGHTS DURING INVESTIGATION OF A CRIME

When Congress enacted the CVRA, it intended to protect crime victims throughout the criminal justice process—from the investigative phases to the final conclusion of a case. Congress could not have been clearer in its direction that using ''best efforts'' to enforce the CVRA was an obligation of ''[o]fficers 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 . . . .'' 18 U.S.C. §3771(c)(1) (emphasis added). Congress also permitted crime victims to assert their rights either in the court in which formal charges had already been filed ''or, *if no prosecution is underway*, in the district court in the district in which the crime occurred.'' 18 U.S.C. §3771(d)(3) (emphasis added).

Despite Congress' clear intention to extend rights to crime victims throughout the process, the Justice Department is reading the CVRA much more narrowly. In the recent OLC opinion, for example, the Department takes the position that ''the CVRA is best read as providing that the rights identified in section 3771(a) are guaranteed from the time that criminal proceedings are initiated (by complaint, information, or indictment) and cease to be available if all charges are dismissed either voluntarily or on the merits (or if the Government declines to bring formal charges after the filing of a complaint).'' The Availability of Crime Victims' Rights Under the Crime Victims' Rights Act of 2004, Memorandum from John E. Bies (Dec. 17, 2010, publicly released May 20, 2011) (hereinafter ''OLC Opinion''). Indeed, in that same opinion, I am surprised to see the Department citing a snippet from my floor remarks during the passage of the CVRA for the proposition that crime victims can confer with prosecutors only after the formal filing of charges. See id. at 9 (citing 150 Cong. Rec. S4260, S4268 (Apr. 22, 2004) (statement of Sen. Kyl).

I did want to express my surprise that your prosecutors are so clearly quoting my remarks out of context. Here is the full passage of my remarks, which were part of a colloquy with my co-sponsor on the CVRA, Senator Feinstein:

Senator Feinstein: Section . . . (a)(5) provides a right to confer with the attorney for the Government in the case. *This right is intended to be expansive*. For example, the victim has the right to confer with the Government concerning any critical stage or disposition of the case. *The right, however, is not limited to these examples*. I ask the Senator if he concurs in this intent.

Senator Kyl: Yes. The intent of this section is just as the Senator says. This right to confer does not give the crime victim any right to direct the prosecution. Prosecutors should consider it part of their profession to be available to consult with crime victims about concerns the victims may have which are pertinent to the case, case proceedings or dispositions. Under this provision, *victims are able to confer with the Government's attorney about proceedings after charging*.

150 Cong. Rec. S4260, S4268 (Apr. 22, 2004) (statements of Sens. Feinstein & Kyl) (emphases added). Read in context, it is obvious that the main point of my remarks was that a victim's right to confer was ''intended to be expansive.'' Senator Feinstein and I then gave various examples of situations in which victims could confer with prosecutors, with the note that the right to confer was ''not limited to these examples.'' It is therefore troubling to me that in this opinion the Justice Department is quoting only a limited portion of my remarks and wrenching them out of context to suggest that I think that crime victims do not have any right to confer (or to be treated with fairness) until after charging.

In giving an example that the victims would have such rights after charging, I was not suggesting that they had no such right earlier in the process. Elsewhere in my remarks I made clear that crime victims had rights under the CVRA even before an indictment is filed. For example, in the passage quoted above, I made clear that crime victims had a right to consult about both ''the case'' and ''case proceedings''—i.e., both about how the case was being handled before being filed in court and then later how the case was being handled in court ''proceedings.'' As another example, Senator Feinstein and I explained that we had drafted the CVRA to extend a right to victims to attend only ''public'' proceedings, because otherwise the rights would extend to grand jury proceedings. See, e.g., 150 Cong. Rec. S4260, S4268 (Apr. 22, 2004) (statements of Sens. Feinstein & Kyl). Of course, no such limitation would have been necessary under the CVRA if CVRA rights attach (as the Department seems to think) only after the filing of a grand jury indictment.

Courts have already rejected the Justice Department's position that the CVRA applies only after an indictment is filed. For example, in *In re Dean*, 527 F.3d 391 (5th Cir. 2008), the Department took the position that crime victims had no right to confer with prosecutors until after the Department had reached and signed a plea agreement with a corporation (BP Products North America) whose illegal actions had resulted in the deaths of fifteen workers in an oil refinery explosion. Of course, this position meant that the victims could have no role in shaping any plea deal that the Department reached. In rejecting the Department's position, the Fifth Circuit held that ''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.'' Id. at 394.

In spite of this binding decision from the Fifth Circuit, crime victims' advocates have reported to me that the Justice Department is still proceeding in the Fifth Circuit and elsewhere on the assumption that it has no obligations to treat victims fairly or to confer with them until after charges are formally filed. Given the Fifth Circuit's Dean decision, this position appears to place the Department in violation of a binding court ruling that extends rights to thousands of crime victims in Louisiana, Mississippi, and Texas. And more generally, the Department's position simply has no grounding in the clear language of the CVRA.

My first question: What is the Justice Department doing to extend to victims their right to fair treatment and their right to confer with prosecutors when the Justice Department is negotiating pre-indictment plea agreements and non-prosecution agreements with defense attorneys, including negotiations within the Fifth Circuit?

CRIME VICTIMS' RIGHT TO APPELLATE PROTECTION

Protection of crime victims' rights in appellate courts is an important part of the CVRA. As you know, when Congress passed the CVRA, the federal courts of appeals had recognized that crime victims could take ordinary appeals to protect their rights. See, e.g., *Doe v. United States*, 666 F.2d 43, 46 (4th Cir. 1981) (rape victim allowed to appeal district court's adverse ''rape shield statute'' ruling); *United States* v. *Kones*, 77 F.3d 66 (3rd Cir. 1996) (victim allowed to appeal adverse restitution decision). Congress sought to leave these protections in place, while expanding them to ensure that crime victims could obtain quick vindication of their rights in appellate courts by providing—in §3771(d)(3)—that ''[i]f the district court denies the relief sought, the [victim] may petition the court of appeals for a writ of mandamus.'' 18 U.S.C. §3771(d)(3). Ordinarily, whether mandamus relief should issue is discretionary. The plain language of the CVRA, however, specifically and clearly overruled such discretionary mandamus standards by directing that ''[t]he court of appeals *shall take up and decide such application forthwith* . . . .'' 18 U.S.C. §3771(d)(3) (emphasis added). As I explained when the Senate considered the CVRA:

[W]hile mandamus is generally discretionary, this provision [18 U.S.C. §3771(d)(3)] means that courts *must* review these cases. Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. This provision ensures review and encourages courts to *broadly defend* the victims' rights.

150 CONG. REC. S4270 (Apr. 22, 2004) (statement of Sen. Kyl) (emphases added). Similarly, the CVRA's co-sponsor with me, Senator Feinstein, stated that the Act would create ''a new use of a very old procedure, the writ of mandamus. This provision will establish a procedure where a crime victim can, in essence, immediately *appeal* a denial of their rights by a trial court to the court of appeals.'' 150 CONG. REC. S4262 (statement of Sen. Feinstein) (emphases added); see also id. (statement of Sen. Kyl) (crime victims must ''be able to have . . . the appellate courts take the appeal and order relief). In short, the legislative history shows that §3771(d)(3) was intended to allow crime victims to take accelerated appeals from district court decisions denying their rights and have their appeals reviewed under ordinary standards of appellate review.

In spite of that unequivocal legislative history, the Justice Department has in past cases asserted a contrary position. In *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008), Ken and Sue Antrobus sought to obtain appellate review of a ruling by a trial court that they could not deliver a victim impact statement at the sentencing of the man who sold the murder weapon used to kill their daughter. The Tenth Circuit ruled against them on the basis that the Antrobuses were not entitled to regular appellate review, but only discretionary mandamus review. See id. at 1124–25. The Tenth Circuit did not consider the legislative history in reaching this conclusion, leading the Antrobuses to file petitions for rehearing and rehearing en banc—petitions that recounted this legislative history. In response, the Justice Department asked the Tenth Circuit to deny the victims' petitions. Remarkably, the Justice Department told the Tenth Circuit that it could ignore the

legislative history because the CVRA ''is unambiguous.'' Response of the United States, *In re Antrobus*, No. 08–4002, at 12 n.7 (10th Cir. Feb. 12, 2008).

At the time that the Justice Department filed this brief, no Court of Appeals agreed with the Tenth Circuit. At the time, three other Circuits had all issued unanimous rulings that crime victims were entitled to regular appellate review. See *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 562 (2d Cir. 2005); *Kenna v. US. Dist. Ct. for the Cent. Dist. of Ca.*, 435 F.3d 1011, 1017 (9th Cir. 2006); *In re Walsh*, 229 Fed.Appx. 58, at 60 (3rd Cir. 2007).

My next question for you is, given that the Justice Department has an obligation to use its ''best efforts,'' 18 U.S.C. §3771(c)(1), to afford crime victims their rights, how could the Department argue in Antrobus (and later cases) that the CVRA ''unambiguously'' denied crime victims regular appellate protections of their rights when three circuits had reached the opposite conclusion?

GOVERNMENT'S RIGHT TO ASSERT ERROR DENIAL OF VICTIMS' RIGHTS

To further bolster protection of crime victims' rights, Congress also included an additional provision in the CVRA—§3771(d)(4)—allowing the Justice Department to obtain review of crime victims' rights issues in appeals filed by defendants: ''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.'' 18 U.S.C. §3771(d)(4). The intent underlying this provision was to supplement the crime victims' appeal provision found in §3771(d)(3) by permitting the Department to also help develop a body of case law expanding crime victims' rights in the many defense appeals that are filed. It was not intended to in any way narrow crime victims' rights to seek relief under §3771(d)(3). Nor was it intended to bar crime victims from asserting other remedies. For instance, it was not intended to block crime victims from taking an ordinary appeal from an adverse decision affecting their rights (such as a decision denying restitution) under 28 U.S.C. §1291. Crime victims had been allowed to take such appeals in various circuits even before the passage of the CVRA. See, e.g., *United States v. Kones*, 77 F.3d 66 (3rd Cir. 1996) (crime victim allowed to appeal restitution ruling); *United States v. Perry*, 360 F.3d 519 (6th Cir. 2004) (crime victims allowed to appeal restitution lien issue); *Doe v. United States*, 666 F.2d 43, 46 (4th Cir. 1981) (crime victim allowed to appeal rape shield ruling).

As I explained at the time the CVRA was under consideration, this provision supplemented those pre-existing decisions by ''allow[ing] the Government to assert a victim's right on appeal even when it is the defendant who seeks appeal of his or her conviction. This ensures that victims' rights are protected throughout the criminal justice process and that they do not fall by the wayside during what can often be an extended appeal that the victim is not a party to.'' 150 CONG. REC. S4270 (Apr. 22, 2004) (statement of Sen. Kyl).

I have heard from crime victims' advocates that the Department has not been actively enforcing this provision. Indeed, these advocates tell me that they are unaware of even a single case where the Department has used this supplemental remedy. My final question: Is it true that the Department has never used this provision in even a single case in the more than six years since the CVRA was enacted?

Sincerely,

JON KYL,
U.S. Senator.

HONORING OUR ARMED FORCES

SERGEANT VORASACK T. XAYSANA

Mr. BENNET. Mr. President, it is with a heavy heart that I rise today to honor the life and heroic service of SGT Vorasack T. Xaysana. Sergeant Xaysana, assigned to the Headquarters and Headquarters Company, 2nd Battalion, based in Fort Hood, TX, died on April 10, 2011. Sergeant Xaysana was serving in support of Operation New Dawn in Kirkuk, Iraq. He was 30 years old.

A native of Westminster, CO, Sergeant Xaysana enlisted in the Army in 2005. During over 6 years of service, he distinguished himself through his courage and dedication to duty. Sergeant Xaysana's exemplary service quickly won the recognition of his commanding officers. He earned, among other decorations, the Iraq Campaign Medal, the Global War on Terrorism Service Medal, and the Army Good Conduct Medal.

Sergeant Xaysana worked on the front lines of battle, serving in the most dangerous areas of Iraq. Mark Twain once said, ''The fear of death follows from the fear of life. A man who lives fully is prepared to die at any time.'' Sergeant Xaysana's service was in keeping with this sentiment—by selflessly putting country first, he lived life to the fullest. He lived with a sense of the highest honorable purpose.

At substantial personal risk, he braved the chaos of combat zones throughout Iraq. Though his fate on the battlefield was uncertain, he pushed forward, protecting America's citizens, her safety, and the freedoms we hold dear. For his service and the lives he touched, Sergeant Xaysana will forever be remembered as one of our country's bravest.

To Sergeant Xaysana's parents, Thong Chanh and Manithip, and to his entire family, I cannot imagine the sorrow you must be feeling. I hope that, in time, the pain of your loss will be eased by your pride in Vorasack's service and by your knowledge that his country will never forget him. We are humbled by his service and his sacrifice.

GRAZING IMPROVEMENT ACT

Mr. BARRASSO. Mr. President, I rise today to submit for the RECORD an article written by Karen Budd-Falen and published May 28, 2011, in the Wyoming Livestock Journal. The article's title is ''Leveling the Playing Field: Support for the Grazing Improvement Act of 2011.''

The title of the article is instructive. Anyone living and working in rural communities knows the playing field is not level. The National Environmental Policy Act has become the preferred tool to delay and litigate grazing permit renewals for American ranchers.

Livestock grazing on public lands has a strong tradition in Wyoming and all Western States. Ranchers are proud stewards of the land, yet the permitting process to renew their permits is severely backlogged due to litigation aimed at eliminating livestock from public land.

During times of high unemployment and increasing food prices, we need to be encouraging jobs in rural economies. We need to be fostering an environment to raise more high quality, safe, American beef and lamb; not litigating less.

That is why I introduced the Grazing Improvement Act of 2011. This legislation will provide the certainty and stability public grazing permit holders desperately need in order to continue supporting rural jobs, providing healthy food, and maintaining open spaces for recreation and wildlife.

It is time to help level the playing field for hard working ranching families across the West. Their livelihood should not be held hostage by litigation and anti-grazing special interest groups. I thank my colleagues, Senators ENZI, CRAPO, HATCH, HELLER, RISCH, and THUNE, in supporting ranching families and this legislation.

Mr. President, I ask unanimous consent to have printed in the RECORD the article to which I referred.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the Wyoming Livestock Roundup, May 28, 2011]

LEVELING THE PLAYING FIELD: SUPPORT FOR THE GRAZING IMPROVEMENT ACT OF 2011

(By Karen Budd-Falen)

If jobs and the economy are the number one concern for America, why are rural communities and ranchers under attack by radical environmental groups and overzealous federal regulators?

America depends upon the hundreds of products that livestock provide, yet radical groups and oppressive regulations make it almost impossible for ranchers to stay in business. Opposition to these jobs comes in the form of litigation by radical environmental groups to eliminate grazing on public lands, radical environmental group pressure to force ''voluntary'' grazing permit buyouts from ''willing sellers,'' and holding permittees hostage to the court deference given to regulatory ''experts.'' The playing field is not level and the rancher is on the losing side. The Grazing Improvement Act of 2011 will level the playing field. I urge your support.

The Grazing Improvement Act of 2011 does the following:

1. Term of Grazing Leases and Permits. Both BLM and Forest Service term grazing permits are for a 10-year term. This bill extends that term to 20 years. This extension does not affect either the BLM's or Forest Service's ability to make interim management decisions based upon resource or other needs, nor does it impact the preference right of renewal for term grazing permits or leases.

2. Renewal, Transfer and Reissuance of Grazing Leases and Permits. This section codifies the various ''appropriation riders'' for the BLM and Forest Service requiring that permits being reissued, renewed or transferred continue to follow the existing terms and conditions until the paperwork is complete. Thus, the rancher is not held hostage to the ability of the agency to get its

ADD 6

United States Code Annotated
Federal Rules of Criminal Procedure for the United States District Courts (Refs & Annos)
I. Applicability

Federal Rules of Criminal Procedure, Rule 1

Rule 1. Scope; Definitions

Currentness

(a) Scope.

(1) In General. These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States.

(2) State or Local Judicial Officer. When a rule so states, it applies to a proceeding before a state or local judicial officer.

(3) Territorial Courts. These rules also govern the procedure in all criminal proceedings in the following courts:

(A) the district court of Guam;

(B) the district court for the Northern Mariana Islands, except as otherwise provided by law; and

(C) the district court of the Virgin Islands, except that the prosecution of offenses in that court must be by indictment or information as otherwise provided by law.

(4) Removed Proceedings. Although these rules govern all proceedings after removal from a state court, state law governs a dismissal by the prosecution.

(5) Excluded Proceedings. Proceedings not governed by these rules include:

(A) the extradition and rendition of a fugitive;

(B) a civil property forfeiture for violating a federal statute;

(C) the collection of a fine or penalty;

(D) a proceeding under a statute governing juvenile delinquency to the extent the procedure is inconsistent with the statute, unless Rule 20(d) provides otherwise;

(E) a dispute between seamen under 22 U.S.C. §§ 256-258; and

(F) a proceeding against a witness in a foreign country under 28 U.S.C. § 1784.

(b) Definitions. The following definitions apply to these rules:

(1) "Attorney for the government" means:

(A) the Attorney General or an authorized assistant;

(B) a United States attorney or an authorized assistant;

(C) when applicable to cases arising under Guam law, the Guam Attorney General or other person whom Guam law authorizes to act in the matter; and

(D) any other attorney authorized by law to conduct proceedings under these rules as a prosecutor.

(2) "Court" means a federal judge performing functions authorized by law.

(3) "Federal judge" means:

(A) a justice or judge of the United States as these terms are defined in 28 U.S.C. § 451;

(B) a magistrate judge; and

(C) a judge confirmed by the United States Senate and empowered by statute in any commonwealth, territory, or possession to perform a function to which a particular rule relates.

(4) "Judge" means a federal judge or a state or local judicial officer.

(5) "Magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-639.

(6) "Oath" includes an affirmation.

(7) "Organization" is defined in 18 U.S.C. § 18.

(8) "Petty offense" is defined in 18 U.S.C. § 19.

(9) "State" includes the District of Columbia, and any commonwealth, territory, or possession of the United States.

(10) "State or local judicial officer" means:

(A) a state or local officer authorized to act under 18 U.S.C. § 3041; and

(B) a judicial officer empowered by statute in the District of Columbia or in any commonwealth, territory, or possession to perform a function to which a particular rule relates.

(11) "Telephone" means any technology for transmitting live electronic voice communication.

(12) "Victim" means a "crime victim" as defined in 18 U.S.C. § 3771(e).

(c) Authority of a Justice or Judge of the United States. When these rules authorize a magistrate judge to act, any other federal judge may also act.

CREDIT(S)

(As amended Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 28, 1982, eff. Aug. 1, 1982; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 23, 2008, eff. Dec. 1, 2008; Apr. 26, 2011, eff. Dec. 1, 2011.)

ADVISORY COMMITTEE NOTES

1944 Adoption

1. These rules are prescribed under the authority of two acts of Congress, namely: the Act of June 29, 1940, c. 445, 18 U.S.C. former § 687 [now § 3771] (Proceedings in criminal cases prior to and including verdict; power of Supreme Court to prescribe rules) and the Act of November 21, 1941, c. 492, 18 U.S.C. former § 689 [now §§ 3771 and 3772] (Proceedings to punish for criminal contempt of court; application to §§ 687 and 688).

2. The courts of the United States covered by the rules are enumerated in Rule 54(a). In addition to Federal courts in the continental United States they include district courts in Alaska, Hawaii, Puerto Rico and the Virgin Islands. In the Canal Zone only the rules governing proceedings after verdict, finding or plea of guilty are applicable.

3. While the rules apply to proceedings before commissioners when acting as committing magistrates, they do not govern when a commissioner acts as a trial magistrate for the trial of petty offenses committed on Federal reservations. That procedure is governed by rules adopted by order promulgated by the Supreme Court on January 6, 1941 (311 U.S. 733, 61 S.Ct. clv), pursuant to the Act of October 9, 1940, c. 785, secs. 1 to 5. See 18 U.S.C. former §§ 576-576d [now §§ 3401, 3402] (relating to trial of petty offenses on Federal reservations by United States commissioners).

1972 Amendments

The rule is amended to make clear that the rules are applicable to courts of the United States and, where the rule so provides, to proceedings before United States magistrates and state or local judicial officers.

Primarily these rules are intended to govern proceedings in criminal cases triable in the United States District Court. Special rules have been promulgated, pursuant to the authority set forth in 28 U.S.C. § 636(c) [now (d)], for the trial of "minor offenses" before United States magistrates. (See Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates (January 27, 1971).)

However, there is inevitably some overlap between the two sets of rules. The Rules of Criminal Procedure for the United States District Courts deal with preliminary, supplementary, and special proceedings which will often be conducted before United States magistrates. This is true, for example, with regard to rule 3--The Complaint; rule 4--Arrest Warrant or Summons Upon Complaint; rule 5--Initial Appearance Before the Magistrate; and rule 5.1--Preliminary Examination. It is also true, for example, of supplementary and special proceedings such as rule 40--Commitment to Another District, Removal; rule 41--Search and Seizure; and rule 46--Release from Custody. Other of these rules, where applicable, also apply to proceedings before United States magistrates. See Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates, rule 1--Scope:

These rules govern the procedure and practice for the trial of minor offenses (including petty offenses) before United States magistrates under Title 18, U.S.C. § 3401, and for appeals in such cases to judges of the district courts. To the extent that pretrial and trial procedure and practice are not specifically covered by these rules, the Federal Rules of Criminal Procedure apply as to minor offenses other than petty offenses. All other proceedings in criminal matters, other than petty offenses, before United States magistrates are governed by the Federal Rules of Criminal Procedure.

State and local judicial officers are governed by these rules, but only when the rule specifically so provides. This is the case of rule 3--The Complaint; rule 4--Arrest Warrant or Summons Upon Complaint; and rule 5--Initial Appearance Before the Magistrate. These rules confer authority upon the "magistrate," a term which is defined in new rule 54 as follows:

"Magistrate" includes a United States magistrate as defined in 28 U.S.C. §§ 631-639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed in rules 3, 4, and 5.

Rule 41 provides that a search warrant may be issued by "a judge of a state court of record" and thus confers that authority upon appropriate state judicial officers.

The scope of rules 1 and 54 is discussed in C. Wright, Federal Practice and Procedure: Criminal §§ 21, 871-874 (1969, Supp.1971), and 8 and 8A J. Moore, Federal Practice chapters 1 and 54 (2d ed. Cipes 1970, Supp.1971).

1982 Amendments

The amendment corrects an erroneous cross reference, from Rule 54(c) to Rule 54(a), and replaces the word "defined" with the more appropriate word "provided."

1993 Amendments

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101-650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

2002 Amendments

Rule 1 is entirely revised and expanded to incorporate Rule 54, which deals with the application of the rules. Consistent with the title of the existing rule, the Committee believed that a statement of the scope of the rules should be placed at the beginning to show readers which proceedings are governed by these rules. The Committee also revised the rule to incorporate the definitions found in Rule 54(c) as a new Rule 1(b).

Rule 1(a) contains language from Rule 54(b). But language in current Rule 54(b)(2)-(4) has been deleted for several reasons: First, Rule 54(b)(2) refers to a venue statute that governs an offense committed on the high seas or somewhere outside the jurisdiction of a particular district; it is unnecessary and has been deleted because once venue has been established, the Rules of Criminal Procedure automatically apply. Second, Rule 54(b)(3) currently deals with peace bonds; that provision is inconsistent with the governing statute and has therefore been deleted. Finally, Rule 54(b)(4) references proceedings conducted before United States Magistrate Judges, a topic now covered in Rule 58.

Rule 1(a)(5) consists of material currently located in Rule 54(b)(5), with the exception of the references to the navigation laws and to fishery offenses. Those provisions were considered obsolete. But if those proceedings were to arise, they would be governed by the Rules of Criminal Procedure.

Rule 1(b) is composed of material currently located in Rule 54(c), with several exceptions. First, the reference to an "Act of Congress" has been deleted from the restyled rules; instead the rules use the self-explanatory term "federal statute." Second, the language concerning demurrers, pleas in abatement, etc., has been deleted as being anachronistic. Third, the definitions of "civil action" and "district court" have been deleted. Fourth, the term "attorney for the government" has been expanded to include reference to those attorneys who may serve as special or independent counsel under applicable federal statutes. The term "attorney for the government" contemplates an attorney of record in the case.

Fifth, the Committee added a definition for the term "court" in Rule 1(b)(2). Although that term originally was almost always synonymous with the term "district judge," the term might be misleading or unduly narrow because it may not cover the many functions performed by magistrate judges. *See generally* 28 U.S.C. §§ 132, 636. Additionally, the term does not cover circuit judges who may be authorized to hold a district court. *See* 28 U.S.C. § 291. The proposed definition continues the traditional view that "court" means district judge, but also reflects the current understanding that magistrate judges act as the "court" in many proceedings. Finally, the Committee intends that the term "court" be used principally to describe a judicial officer, except where a rule uses the term in a spatial sense, such as describing proceedings in "open court."

Sixth, the term "Judge of the United States" has been replaced with the term "Federal judge." That term includes Article III judges and magistrate judges and, as noted in Rule 1(b)(3)(C), federal judges other than Article III judges who may be authorized by statute to perform a particular act specified in the Rules of Criminal Procedure. The term does not include local judges in the District of Columbia. Seventh, the definition of "Law" has been deleted as being superfluous and possibly misleading because it suggests that administrative regulations are excluded.

Eighth, the current rules include three definitions of "magistrate judge." The term used in amended Rule 1(b)(5) is limited to United States magistrate judges. In the current rules the term magistrate judge includes not only United States magistrate judges, but also district court judges, court of appeals judges, Supreme Court justices, and where authorized, state and local officers. The Committee believed that the rules should reflect current practice, i.e., the wider and almost exclusive use of United States magistrate judges, especially in preliminary matters. The definition, however, is not intended to restrict the use of other federal judicial officers to perform those functions. Thus, Rule 1(c) has been added to make it clear that where the rules authorize a magistrate judge to act, any other federal judge or justice may act.

Finally, the term "organization" has been added to the list of definitions.

The remainder of the rule has been amended as part of the general restyling of the rules to make them more easily understood. In addition to changes made to improve the clarity, the Committee has changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

2008 Amendments

Subdivision (b)(11). This amendment incorporates the definition of the term "crime victim" found in the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(e). It provides that "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."

Upon occasion, disputes may arise over the question whether a particular person is a victim. Although the rule makes no special provision for such cases, the courts have the authority to do any necessary fact finding and make any necessary legal rulings.

2011 Amendments

Subdivisions (b)(11) and (12). The added definition clarifies that the term "telephone" includes technologies enabling live voice conversations that have developed since the traditional "land line" telephone. Calls placed by cell phone or from a computer over the internet, would be included, for example. The definition is limited to live communication in order to ensure contemporaneous communication and excludes voice recordings. Live voice communication should include services for the hearing impaired, or other contemporaneous translation, where necessary.

Notes of Decisions (52)

Fed. Rules Cr. Proc. Rule 1, 18 U.S.C.A., FRCRP Rule 1
Including Amendments Received Through 7-1-15

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