No. 09-_____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: UNITED STATES OF AMERICA,

Plaintiff-Petitioner,

-v.-

U.S. DISTRICT COURT FOR THE DISTRICT OF MONTANA,

Respondent,

-and-

W.R. GRACE & CO., HENRY A. ESCHENBACH, JACK W. WOLTER, WILLIAM J. MCCAIG, ROBERT J. BETTACCHI, O. MARIO FAVORITO, and ROBERT C. WALSH,

Defendants-Real Parties in Interest.

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

PETITION FOR WRIT OF MANDAMUS PURSUANT TO 18 U.S.C. § 3771(d)(3)

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INTRODUCTION AND RELIEF SOUGHT

This petition concerns the U.S. District Court for the District of Montana's refusal to recognize 34 prospective government witnesses as "crime victims" under the Crime Victims Rights Act ("CVRA"), and its failure to accord them their rights under the Act. *See* Excerpts of Record ("ER") at 83. The 34 prospective witnesses, along with other residents of Libby, Montana, are victims of the alleged conduct of W.R. Grace & Company and six of its high level officials in Libby, a small "seemingly rustic and picturesque" town that is "plagued with asbestos-related contamination" from W.R. Grace's nearby vermiculite mining and processing operations. *United States v. W.R. Grace*, 429 F.3d 1224, 1226-27 (9th Cir. 2005), *cert. denied*, 127 S. Ct. 379 (Oct. 10, 2006). Since at least the mid-1970s, W.R. Grace distributed asbestos-contaminated vermiculite for a variety of public and private uses by the people of Libby, even though the company and these officials knew – yet deliberately concealed – the devastating health effects that would result from exposure to the asbestos, including asbestosis, a scarring of the lungs that destroys the lung's ability to absorb oxygen, and mesothelioma, an aggressive and fatal form of lung cancer. ER 1-49. As a result of their exposure to releases attributable to W.R. Grace's asbestos-contaminated vermiculite, many Libby residents are dying, or have already died, from mesothelioma, asbestosis, and other asbestos-related diseases. ER 10-11; *W.R. Grace*, 429 F.3d at 1226-27 ("we cannot escape the fact that people are sick and dying as a result of this continuing exposure").

A federal grand jury indicted W.R. Grace and the six officials – Henry A. Eschenbach, Jack W. Wolter, William J. McCaig, Robert J. Bettacchi, O. Mario

Favorito, Robert C. Walsh ("the defendants")[1] – for criminal conduct in connection with the mining, processing, and marketing of vermiculite contaminated with asbestos in and around Libby. ER 1-49. The Superseding Indictment alleges that the defendants conspired from approximately 1976 to 2002 (1) to knowingly release asbestos, a hazardous air pollutant, into the ambient air, thereby knowingly placing persons in imminent danger of death or serious bodily injury, in violation of Section 113(c)(5)(A) of the Clean Air Act, 42 U.S.C. § 7413(c)(5)(A) ("knowing endangerment object"); and (2) to defraud the United States by impairing, impeding and frustrating the government functions of its agencies, in violation of 18 U.S.C. § 371 ("defrauding object"). ER 15-43. In addition to the two-object conspiracy alleged in Count One, the Superseding Indictment contained three substantive counts against W.R. Grace and certain individual defendants for knowing endangerment in violation of Section 113(c)(5)(A) of the Clean Air Act, 42 U.S.C. § 7413(c)(5)(A); and four counts of obstruction of justice, 18 U.S.C. §§ 1505 and 1515(b). ER 44-49.

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[1] Defendant Henry A. Eschenbach was a W.R. Grace industrial hygienist and then the Director of Health, Safety and Toxicology. ER 8 ¶ 40. Defendant Jack W. Wolter was Vice President of Mining and Engineering and then Vice President and General Manager of W.R. Grace's Construction Products Division. ER 8 ¶ 41. Defendant William J. McCaig was a maintenance engineer, then the Maintenance Superintendent, and then General Manager of Operations at the Libby mine. ER 8 ¶ 42. Defendant Robert J. Bettacchi was General Manager, then Vice President and then President of W.R. Grace's Construction Products Division. ER 9 ¶ 43. Defendant O. Mario Favorito worked as a legal counsel for W.R. Grace. ER 9 ¶ 44. Defendant Robert C. Walsh was President of W.R. Grace's Construction Products Division and then a Senior Vice President for W.R. Grace. ER 9 ¶ 45. A seventh defendant, Alan R. Stringer, has since died.

Jury selection commenced on February 19, 2009, with opening statements set to begin February 23, 2009. ER 189 (dkt. # 817).

On February 13, 2009, however, the district court entered an order prohibiting 34 victims of the defendants' alleged criminal conspiracy and other criminal misconduct, whom the government plans to call as witnesses at trial, from attending the court proceedings as audience members based upon an order it had previously entered under Rule 615 of the Federal Rules of Evidence.[2] ER 63-83. This order precludes those 34 individuals from exercising a right specifically conferred upon them by the CVRA. *See* 18 U.S.C. § 3771(a)(3). By wrongly concluding that there are no identifiable victims of the federal offenses alleged in the Superseding Indictment, the district court did not see a need to analyze before sequestering the 34 victim-witnesses whether, as required for crime victims by the CVRA, their testimony would be "materially altered" if they heard other testimony.

Pursuant to the CVRA, 18 U.S.C. § 3771(d)(3), the All Writs Act, 28 U.S.C. § 1651, Fed. R. App. P. 21, and Circuit Rule 21-5, the United States petitions for a writ of mandamus compelling the U.S. District Court for the District of Montana to recognize that the 34 victim-witnesses listed at Attachment B to the United States' Motion To Accord Rights To Victim-Witnesses (ER 61-62) are "crime victims" under

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[2] Rule 615 of the Federal Rules of Evidence regulates the exclusion of witnesses from court proceedings, including criminal trials. That rule generally requires courts to exclude witnesses from court proceedings at the request of a party, but it does not apply to "a person authorized by statute to be present." Fed. R. Evid. 615. Crime victims fall squarely into the Rule 615 exception. *See In re Mikhel*, 453 F.3d 1137, 1139 (9th Cir. 2006) ("the CVRA abrogated Rule 615, at least with respect to crime victims").

the CVRA, and to permit them to attend the defendants' criminal trial unless, as required by the CVRA, clear and convincing evidence proves that each of the 34 excluded victim-witnesses' testimony is highly likely to be "materially altered" if they are allowed to attend. The United States does not believe either consideration of the petition nor issuance of the writ requires delaying any aspect of trial.

ISSUE PRESENTED

Whether 34 prospective government witnesses who were exposed to asbestos by the defendants' alleged actions during the course of a criminal conspiracy to defraud the United States and to knowingly release listed hazardous air pollutants into the ambient air, *contra* 18 U.S.C. § 371 and 42 U.S.C. § 7413(c)(5)(A), and by other federal offenses, are "crime victims" for purposes of the CVRA, so that these persons have "the right not to be excluded from any [] public court proceeding [involving the crime] unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding," 18 U.S.C. § 3771(a)(3) & (e).

STATEMENT

I. Legal Background

Congress enacted the CVRA, part of the Justice For All Act of 2004 (JFAA), to reform the federal criminal justice system by providing an uncomplicated procedure for crime victims, many of whom lack legal counsel, to "force the criminal justice system to be responsive to a victim's rights in a timely way." 150 CONG. REC. S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein); *see also* 150 CONG. REC. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). The CVRA effectuates

this goal "by making victims independent participants in the criminal justice process." *See Kenna v. U.S. District Court*, 435 F.3d 1011, 1013 (9th Cir. 2006). The CVRA makes crime victims part of the process by guaranteeing them eight different statutory rights, and unlike the prior crime victims' rights statute, allows both the government and the victims to enforce those rights.[3] *Id.* (citing 18 U.S.C. § 3771(a) & (d)(1)). Of significance here, a crime victim has:

> (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 of 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.

Id. at § 3771(a)(2) & (3).

The CVRA extends these rights to all persons who have been "directly and proximately harmed as the result of the commission of a Federal offense." 18 U.S.C. § 3771(e). As one of the Act's two co-sponsors, Senator Jon Kyl, has explained, this language creates "an intentionally broad definition because all victims of crime deserve to have their rights protected." 150 CONG. REC. S10912 (daily ed. Oct. 9, 2004). This broad "directly and proximately harmed" language accords crime

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[3] The CVRA also created new responsibilities and expectations for the United States. For example, § 3771(c)(1) states that officers and employees of the Department of Justice engaged in the prosecution of crime shall make their best efforts to see that crime victims are accorded the rights denominated in § 3771(a). In addition, federal prosecutors and investigators must make best efforts to ensure that a victim is "treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(7) & (8).

victims' rights to all persons incurring foreseeable harms as a result of defendants' criminal acts. *See In re Antrobus*, 519 F.3d 1123, 1126-27 (10th Cir. 2008) (Tymkovich, J., concurring). Thus, as long as a person "suffers harm as a result of the crime's commission" he or she is a crime victim under the CVRA, regardless of whether defendants intended to victimize that particular person. *See In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008).

II. Statement of Alleged Facts

As alleged in the Superseding Indictment, in the late 1800s, gold miners discovered a significant body of vermiculite ore in a mountainous area located approximately seven miles northeast of the town of Libby, Montana (the "Libby mine"). ER 2 ¶ 1. Vermiculite, a mineral that expands at high temperatures, is used in attic insulation, fireproofing products, masonry fill, fertilizer and potting soil. ER 2 ¶ 2. The Libby mine vermiculite deposits contained naturally occurring amphibole asbestos. ER 2 ¶ 4. Exposure to airborne asbestos causes various lung diseases in humans, including asbestosis, a progressive and fatal disease that destroys the lungs' ability to absorb oxygen; mesothelioma, a fatal and aggressive form of lung cancer; and pleural fibrosis, a scarring of the pleural tissues surrounding the lungs. ER 10-11. There is no known safe level of asbestos exposure; any inhalation of airborne asbestos increases the risk of contracting asbestos-related disease. ER 10 ¶ 47. The amphibole asbestos found at the Libby mine is composed of a family of closely related minerals commonly referred to as "tremolite" asbestos. ER 2 ¶ 4.

Defendant W.R. Grace & Company mined, milled, processed, and exported vermiculite ore and concentrate at the Libby mine and associated facilities from the

early 1960s until the early 1990s. ER 3-7. As part of its operations, W.R. Grace mined vermiculite ore at the Libby mine and then milled vermiculite ore into vermiculate concentrate. ER 4 ¶ 12. W.R. Grace then used a mechanical process to separate vermiculite concentrate into different sized grades. ER 4 ¶ 14. This process was accomplished at a facility known as the Screening Plant, at which W.R. Grace shipped the graded vermiculite concentrate in railroad hopper cars to its distributors and customers throughout the United States. ER 4-5 ¶ 14-16, 20. W.R. Grace also trucked some of the graded vermiculite concentrate from the railroad loading station near the Screening Plant to an Export Plant located in downtown Libby, where it was stockpiled, bagged, and then distributed throughout the country. ER 4-5 ¶¶ 18-19.

W.R. Grace has known of the dangerous nature of the Libby vermiculite products and mining and processing activities since at least 1976. ER 19-24. For example, a 1976 internal study documented extensive lung disease among W.R. Grace's employees in Libby, finding that an astounding 63% of all employees with ten or more years of service had lung disease. ER 19 ¶ 84. Internal W.R. Grace documents showed that "each additional year of tremolite exposure for an employee adds a significant 1.5 percent to the incidence of abnormal x-rays." ER 22 ¶ 97. And W.R. Grace's 1982 mortality study of persons employed at the Libby mine from 1950 to 1981 concluded that an excessive number of former employees had died of lung cancer and mesothelioma, leading one of the defendants to comment in a written memorandum, "Our major problem is death from respiratory cancer. This is no surprise." ER 24 ¶¶ 103-04. Over the years, various internal studies repeatedly

reconfirmed to the defendants the dangerous nature of their asbestos-contaminated vermiculite. ER 19-24, 28-30.

These studies led the defendants to attempt to reduce the tremolite asbestos content of their vermiculite products. ER 28-30. But efforts to make Libby vermiculite safe failed. Even with very small amounts of tremolite asbestos in their products, the vermiculite released dangerously high levels of asbestos fibers into the air. ER 29 ¶¶ 125-26.

The defendants went to great lengths to prevent the Libby community, W.R. Grace employees, and the government from learning of the dangers posed by the asbestos in Libby vermiculite, because such information would have reduced W.R. Grace's profits and increased its liabilities. ER 16 ¶¶ 72-73; ER 17-43. The defendants, for example, refused to permit one of their scientists to publish the results of a hamster toxicological study that showed tremolite fibers of the size and type released by their products caused mesothelioma. ER 19-20 ¶¶ 85-88. The defendants also worked strenuously to obstruct the National Institute for Occupational Health and Safety's effort ("NIOSH") to conduct an epidemiological study of Libby. ER 24-27 ¶¶ 105-14.

Despite their knowledge of the dangers posed by Libby vermiculite, the defendants continued to take actions that caused further airborne releases of asbestos in Libby and thereby increased Libby residents' exposure to asbestos. W.R. Grace often spilled or dumped vermiculite concentrate on the grounds of the Screening Plant. ER 5 ¶ 22. From approximately 1977 until 1994, W.R. Grace distributed asbestos-contaminated vermiculite to its employees and Libby residents to use as

foundation for youth athletic facilities and other community and household uses, without disclosing that the vermiculite contained asbestos or that it was hazardous. ER 5 ¶¶ 23-25; ER 19-30. W.R. Grace, for instance, provided asbestos-contaminated vermiculite mill tailings as a surface for the high school and junior high school running tracks and as a foundation for an elementary school outdoor ice skating rink and summer play area. ER 5-6 ¶¶ 24-26; ER 33-35 ¶¶ 141-49.

W.R. Grace ceased its vermiculite mining and processing activities in and around Libby in the early 1990s. ER 6 ¶ 27. By the mid-1990s, W.R. Grace was trying to rid itself of its contaminated properties and associated liabilities. ER 35-38 ¶¶ 150-67. After the 3M Company and Phelps Dodge Mining Company each declined to purchase the Libby mine in 1991 because of the presence of so much asbestos, W.R. Grace decided to sell its properties to "some small organization" that would be less likely to discover and be scared off by the asbestos contamination. Er 35-36 ¶¶ 150-55. Consistent with this plan, W.R. Grace sold or transferred several of its former vermiculite mining and processing properties to small, unsophisticated entities and individuals without disclosing to the purchasers or operators the health hazards associated with those properties. ER 6-7 ¶¶ 28-35; ER 36 ¶¶ 155-67. In 1993, it sold the former Screening Plant to Mel and Lerah Parker, who used the asbestos-contaminated property for their personal residence and for a commercial nursery and mushroom farm. ER 6 ¶¶ 29-30; ER 38 ¶¶ 163-67. It transferred the Export Plant in 1993 to the City of Libby, which – as W.R. Grace had done for years previously – leased portions of the property for use as youth baseball facilities and other portions for use as a retail lumber yard. ER 6-7 ¶¶ 31-35; ER 36-37 ¶¶ 156-62.

This Court considered the health implications of the defendants' activities when it upheld EPA's emergency removal action. *See generally W.R. Grace*, 429 F.3d at 1224-50. As noted in that opinion, as a result of the permeation of W.R. Grace's asbestos-ridden vermiculite throughout the Libby community, Libby residents have experienced a significantly higher incidence of asbestos-related disease than the general population. *Id.* at 1230; ER 10-11 ¶¶ 47-59. For example, according to a study by the Agency for Toxic Substances and Disease Registry, the asbestosis mortality rate of Libby's population is 40 to 80 times higher than that of the general population of Montana or of the United States. ER 10 ¶ 50. To date, more than 1,200 residents of Libby and surrounding areas have been identified as having asbestos-related health problems. ER 11 ¶ 57. For example, at least 20 of the approximately 8,000 Libby residents have been diagnosed with mesothelioma, an extremely rare and incurable cancer associated exclusively with asbestos exposure that occurs in just 9 cases in a million in the general population. ER 10 ¶¶ 53-54. Some of Libby's victims were exposed to asbestos as W.R. Grace employees. But many of them are ordinary citizens exposed to asbestos only through asbestos-contaminated vermiculite materials spread by the defendants throughout the Libby community. ER 11 ¶ 57. And new cases of lung disease are expected to be revealed in the years to come due to the long delay that frequently occurs between exposure and the manifestation of symptoms. ER 11 ¶ 58.

In November 1999, as healthcare officials diagnosed a large number of Libby residents with asbestos-related diseases, the Environmental Protection Agency ("EPA") dispatched a response team to investigate reports of a potential hazardous

waste emergency related to the asbestos-contaminated vermiculite. ER 7 ¶ 37. "To put it mildly," said this Court in its 2005 opinion upholding EPA's emergency removal action, EPA's "testing showed asbestos contamination to be pervasive," requiring a "truly extraordinary" and "unique removal action of a size and cost not previously seen." *W.R. Grace*, 429 F.3d at 1226, 1230, 1232.

During EPA's investigation, W.R. Grace, in an attempt to conceal the true extent and hazardous nature of the asbestos contamination in the community, provided EPA investigators false and misleading information. ER 39-49 ¶¶ 173-84, 191-98. For instance, when EPA asked W.R. Grace to disclose all locations of asbestos-contaminated vermiculite so that EPA could mitigate the danger posed by these areas, W.R. Grace failed to disclose that it had donated asbestos-contaminated vermiculite materials to the junior high and elementary schools. ER 41 ¶¶ 177-78. As another example, W.R. Grace told EPA that their employees "did not regularly leave the facility with dust contaminated with tremolite asbestos on their clothing" (ER 42 ¶ 181), when it knew as far back as 1977 that its employees carried asbestos dust home and that this dust adversely affected its employees' families (ER 32-33 ¶¶ 135-40). These omissions and misinformation delayed EPA's investigation and clean-up efforts, causing additional releases of asbestos fibers into the Libby community beyond November 1999. ER 39-42 ¶¶ 173-83.

Despite W.R. Grace's attempts to obstruct and impede the investigation, EPA eventually gathered enough data to conclude that conditions in and around Libby presented an imminent and substantial endangerment to human health and the environment. ER 7 ¶ 38. On the Governor of Montana's recommendation, EPA

declared the areas containing contaminated vermiculite a Superfund Site. *Id.* During EPA's clean-up of Libby, W.R. Grace's obstruction continued. When EPA negotiated with Kootenai Development Corporation ("KDC"), the company to which W.R. Grace had sold the Libby mine, to use the mine to dispose safely of contaminated soil, W.R. Grace acquired a controlling interest in KDC and denied EPA access to the mine site and other properties. ER 38-39, 48 ¶ 168-72, ER ¶ 196. This resulted in civil litigation. *See United States v. W.R. Grace*, 134 F. Supp. 2d 1182 (D. Mont. 2001).

In early 2004, while EPA was cleaning up the contaminated sites, the United States initiated a criminal investigation into the conduct of W.R. Grace and company officials. The investigation revealed that the defendants intentionally concealed the dangers that Libby vermiculite posed to the people of Libby. Even as the defendants examined studies confirming the highly dangerous nature of their asbestos-contaminated vermiculite (ER 19-24 ¶¶ 84-104, ER 28-31 ¶¶ 115-32), they continued to donate it to schools for a surface on which children would play and exercise (ER 33-35 ¶¶ 141-49). Although the defendants knew as far back as 1978 that even small amounts of the Libby asbestos in their vermiculite released dangerously high levels of asbestos fibers (ER 29-30 ¶¶ 121-27), the defendants told EPA in 1983 that they had "no reason to believe there is any risk associated with the current uses of Libby vermiculite-containing products" (ER 30 ¶ 130). And even though the defendants internally discussed the dangerous levels of asbestos dust workers were bringing home to their families, the defendants refused to provide

adequate changing and shower facilities for their employees that would have reduced their employees' families exposure to asbestos. ER 32-33 ¶¶ 135-40.

III. Procedural History

On February 7, 2005, these and other allegations prompted a federal grand jury to return an indictment (now superseded) against the defendants, charging them with the offenses of (1) conspiracy to defraud the United States and to knowingly endanger; (2) knowing endangerment; and (3) obstruction of justice. ER 101 (dkt. #1); ER 15, 44-49. Before the then-established trial date, however, the district court entered a series of orders that cumulatively eviscerated the government's knowing endangerment case, both as part of the conspiracy and as part of the substantive charges against certain defendants. ER 151, 171, 173-74, 179 (dkt. # 524, 690, 701, 707, 740, 741, 743). The United States accordingly sought interlocutory appellate review of those orders pursuant to 18 U.S.C. § 3731. ER 178, 182 (dkt. # 730, 755).

This Court affirmed in part, reversed in part, and granted a writ of mandamus on one issue, which, as a whole, restored the government's knowing endangerment case against the defendants. *See United States v. W.R. Grace*, 504 F.3d 745 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 2964 (2008). Upon receiving this Court's mandate, the district court rescheduled trial for February 19, 2009. ER 189 (dkt. # 817).

On January 22, 2009, during a pre-trial motions hearing, the district court discussed the CVRA's interaction with Federal Rule of Evidence 615, and stated:

> This case is unusual because if you have a case where there is someone who is caught with drugs, child pornography, someone who's allegedly robbed a credit union or a bank, someone who's been involved in a violent act, there is generally a person or persons who are identifiable as victims.

> Under the definition of 18 U.S. Code 3771(e), it says that, For purposes of this chapter, the term, quote, 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.
>
> Of course, that obviously is the critical issue or issues that are going to be tried and, consequently, it is my determination, as the Congress has defined the term crime victim, there are no crime victims identifiable in this case.
>
> So if 615 is invoked, that means that all of the witnesses who will be called are excluded.

ER 58-59. Later in the hearing the defendants invoked Rule 615. ER 60.

In view of the court's statements, on February 2, 2009, the United States moved the district court to declare that 34 victims, who are also witnesses in this case, are "crime victims" under the CVRA, entitling them to observe all court proceedings absent clear and convincing evidence that their testimony would be materially altered by attending those proceedings. ER 198 (dkt. #896). As Attachment B to that motion, filed under seal to protect the victims' health information, the United States included a list of 34 individuals who the government intended to call as witnesses at trial, but also who incurred harm from the defendants' activities in Libby. ER 61-62. Attachment B identified how each individual was exposed to the defendants' asbestos-contaminated materials and whether that individual had been diagnosed with asbestos-related disease or lung abnormalities. *Id.* Later, on February 11, 2009, Mel and Lerah Parker, victim-witnesses specifically named in the Superseding Indictment, independently also asserted their rights under the CVRA. ER 199 (dkt. #908).

On February 13, 2009, the district court denied the motions to accord rights to the victim-witnesses, concluding that no identifiable crime victims existed for the federal offenses alleged in the Superseding Indictment. ER 83. This petition follows.

STANDARD OF REVIEW

This Court normally applies strict standards in reviewing petitions for a writ of mandamus. *See Kenna*, 435 F.3d at 1017. However, this Court has held that a different standard applies where, as here, the issue involves deprivation of rights due crime victims under the CVRA. *Id.* Congress in the CVRA explicitly authorized a crime victim's lawful representative and the government to petition for a writ of mandamus upon denial by the district court of any rights asserted under the Act. *Id.* Under prevailing Ninth Circuit law, this Court must issue a writ of mandamus whenever it finds that the district court's order reflects an abuse of discretion or legal error.[4] *Id.*

REASONS FOR GRANTING THE WRIT

The district court erred under the CVRA when it failed to recognized as "crime victims" the 34 victim-witnesses of the defendants' alleged criminal misconduct identified in Attachment B to the United States' Motion To Accord Rights To Victim-Witnesses (ER 61-62). The Act defines "crime victims" as "person[s] directly and proximately harmed as a result of the commission of a Federal offense." 18 U.S.C.

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[4] The United States agrees with the positions of Fifth and Tenth Circuits, which have held that traditional mandamus standards apply to petitions filed under 18 U.S.C. § 3771(d)(3). *See In re Dean*, 527 F.3d 391, 393-94 (5th Cir. 2008); *In re Antrobus*, 519 F.3d 1123, 1127 (10th Cir. 2008). Even under the more traditional mandamus standard, however, the district court in this case committed "clear and indisputable" error and a writ of mandamus should issue.

§ 3771(e). Each of the 34 individuals meets the definition of crime victim. Each lived or worked in and around Libby during the alleged ongoing criminal conspiracy from 1976 to 2002, and each has been "directly and proximately harmed" by their exposure to W.R. Grace's asbestos-contaminated vermiculite materials and the defendants' alleged actions in this case. This exposure placed them in "imminent danger of death or seriously bodily injury" and significantly increased their risk of developing asbestos-related disease or lung abnormalities, even if they already have not developed such disease or abnormalities.

The district court declined to recognize these individuals as "crime victims" because of what it labeled the government's "unusual theory of criminal liability." ER 66. The government's theory, however, is straight-forward. As alleged in the Superseding Indictment, from approximately 1976 to the mid-1990s, the defendants scattered their vermiculite waste materials throughout Libby (ER 5-7 ¶¶ 21-35; ER 31-38), knowing and concealing from the government and the public that those materials contained dangerous amounts of extremely friable amphibole asbestos (ER 19-31). These asbestos-contaminated materials remained at W.R. Grace's former properties, school running tracks, town baseball fields, and in the homes of Libby citizens, where the defendants had either deposited or allowed those materials to be deposited, beyond November 1999, when EPA began its investigation of a potential hazardous waste emergency at Libby. ER 7 ¶ 37-38; *see also W.R. Grace*, 429 F.3d at 1226-27 ("the population of Libby and nearby communities, which the EPA estimates at about 12,000, faces ongoing, pervasive exposure to asbestos particles being released through documented exposure pathways"). During this nearly 30-year

period, with the defendants' knowledge, including at points after November 3, 1999, the earliest date within the statute of limitations period, Libby citizens used the facilities containing the asbestos-contaminated vermiculite materials, causing through their use of those asbestos-contaminated facilities dangerous releases of asbestos into the air. ER 44-45. A number of these dangerous releases occurred post-November 3, 1999, after the defendants' concealed the true location, hazard, and extent of the asbestos-contamination at Libby, thereby delaying EPA's investigation and cleanup of certain asbestos-contaminated sites. ER 39-42 ¶¶ 173-83; ER 46-49.

These and other allegations prompted a federal grand jury to charge the defendants with the offenses of (1) conspiracy to defraud the United States and to knowingly endanger; (2) knowing endangerment; and (3) obstruction of justice. ER 15, 44-49. The district court apparently believes these charges to be "novel" and "unusual" because the defendants are alleged to have completed some of the acts necessary to establish the criminal conspiracy and substantive offenses before November 3, 1999, the earliest date within the statute of limitations. ER 11-15. In the district court's view, where no federal offense is alleged entirely to have been completed within the statute of limitations, there can be no federal offense; hence, no identifiable crime victims. At a minimum, in the district court's view, there are no identifiable crime victims because no individual is alleged to have suffered physical injury after November 3, 1999, flowing from the "imminent danger" element of the substantive knowing endangerment offense charged in Counts II-IV. ER 16-19.

The district court's views are incorrect. The statute of limitations does not prevent the identification of crime victims. The district court fails to appreciate the

significance of the conspiracy alleged in Count I of the Superseding Indictment, which is an "ongoing" offense from approximately 1976 to 2002 that directly and proximately harmed each of the 34 excluded victim-witnesses in this case. The district court further misapplies the statute of limitations to Counts II-IV by conflating its procedural requirement of filing an indictment within five years of a completed offense with an evidentiary rule requiring all elements or evidence of an offense to come after the earliest date within the limitations period.

Moreover, contrary to the district court's apparent belief, the status of "crime victim" is not limited to those who manifest physical symptoms of injury and whose physical injury constitutes an element of a federal offense. Each of the 34 victim-witnesses suffered harm as a result of their asbestos exposure directly and proximately caused by the conspiracy, knowing endangerment, and the obstruction of justice offenses alleged in the Superseding Indictment. In fact, the district court's order ignores entirely the harms resulting from the obstruction of justice allegations in Counts V-VIII. The district court's order thus rests upon numerous legal errors and violates the CVRA. This Court should issue a writ of mandamus, directing the district court to recognize the 34 victim-witnesses in Attachment B as crime victims.

I. The District Court Failed To Appreciate The Significance Of The Conspiracy Charged In Count I.

Crucially, the district court's statute of limitations analysis overlooks that Count I of the Superseding Indictment alleges a criminal conspiracy in violation of 18 U.S.C. § 371. "Conspiracy is a continuing offense, which is charged and punished as one crime from beginning to end." *United States v. Inafuku*, 938 F.2d 972, 973

(9th Cir. 1991). The offense is established at the formation of an agreement, with the requisite intent to commit an underlying substantive crime, as implemented by one or more overt acts, and continues "on an ongoing basis until withdrawal or cessation of the conspiracy." *Id.* at 974. Here, the Superseding Indictment alleges that the defendants' conspiracy began on or about 1976 with the implementation of overt acts and continued on an ongoing basis to on or about 2002. ER 15, 19 ¶¶ 71, 84-85.

To survive a statute of limitations challenge, an indictment must allege that a co-conspirator committed at least one overt act in furtherance of the conspiracy within the limitations period. *See, e.g., Grunewald v. United States*, 353 U.S. 391, 396-97 (1957) ("[W]here substantiation of a conspiracy charge requires proof of an overt act, it must be shown . . . that at least one overt act in furtherance of the conspiratorial agreement was performed within that period."); *United States v. Walker*, 653 F.2d 1343, 1347 (9th Cir. 1981) ("[T]he statute of limitations starts to run on the date of the last overt act.") (citation and internal quotation marks omitted). The Superseding Indictment alleges several overt acts in furtherance of the conspiracy occurring within the limitations period, *i.e.*, after November 3, 1999. ER 39-43 ¶¶ 170-84. In fact, this Court already has found that the Superseding Indictment properly alleged overt acts falling within the limitations period when it reinstated the knowing endangerment object of the conspiracy in a previous interlocutory appeal. *See United States v. W.R. Grace*, 504 F.3d 745, 749-54 (9th Cir. 2007). Accordingly, because the Superseding Indictment alleges and the United States intends to prove at least one overt act occurring after November 3, 1999, all other overt acts in furtherance of the conspiracy are admissible to prove the existence of a criminal

conspiracy. *See, e.g., Flintkote Co. v. United States*, 7 F.3d 870, 873 (9th Cir. 1993) ("As long as some part of the conspiracy continued into the five-year period preceding the indictment, the statute of limitations did not insulate [the defendant] from criminal liability for actions taken more than 5 years prior to the time of indictment."). "In other words, although the statute limits how much time the government has to indict an alleged violator once a conspiracy is complete, it does not limit the temporal scope of a conspiracy for which a violator is liable." *Id.*

Moreover, for purposes of a conspiracy prosecution, "the overt act required as an element of conspiracy need not have as immediate a connection to the intended crime . . . It is enough that the overt act is taken to implement the agreement." *See United States v. Harper*, 33 F.3d 1143, 1148 (9th Cir. 1994) (quotation omitted). To say it another way, the defendants need not have completed any substantive crime to be convicted of conspiracy, they only need to have committed some overt act in furtherance of their criminal agreement. See *Salinas v. United States*, 522 U.S. 52, 63-64 (1997).

In sum, while the district court based its CVRA order upon its concerns regarding the introduction of evidence "spanning a period of decades" or "from before the earliest date within the statute of limitations period," those concerns were misplaced. The statute of limitations does not bar the introduction of pre-limitations period evidence nor does it prevent the identification of crime victims. Any person "directly and proximately harmed" by the defendants' ongoing criminal conspiracy between 1976 and 2002 is a "crime victim" for purposes of the CVRA and should be

allowed to attend court proceedings, regardless of whether the harm occurred before or after November 3, 1999.

II. Regarding Counts II-IV, The Statute Of Limitations Neither Prevents Crime Victim Identification Nor The Introduction Of Evidence.

The district court further misapplies the statute of limitations when analyzing the substantive knowing endangerment allegations at Counts II-IV. In determining that no identifiable crime victims exist in this case, the district court seemingly concludes that each element of, and any evidence regarding, the federal offenses alleged in the Superseding Indictment must occur within the statute of limitations. ER 74-75. The statute of limitations, however, neither restricts the introduction of evidence nor requires all elements to occur within it. *See United States v. Musacchio*, 968 F.2d 782, 790 (9th Cir. 1992). It is simply "a procedural rule that requires the bringing of a complaint within a certain time after the completion of a crime." *Id.* "A statute of limitations begins to run when the crime is complete. A crime is complete as soon as every element in the crime occurs." *Id.* (citations and quotations omitted). Here, the defendants knowingly took numerous actions before November 3, 1999, precipitating the eventual completion of the alleged federal offenses, but the Superseding Indictment alleges and the United States intends to prove that the acts necessary to complete any federal offense occurred on or after November 3, 1999. ER 39-49. The Indictment first returned on February 7, 2005,[5] and subject to 97-days

[5] Beginning on November 3, 2004, the defendants entered into three tolling agreements with the United States that extended the statute of limitations for a total of 97 days, until the filing of the Indictment on February 7, 2005. As a result, the five-year limitations period applicable to this case, *see* 18 U.S.C. § 3282(a), began on November 3, 1999.

worth of tolling agreements, thus was timely filed. "The function of the statute of limitations ends with this determination." *Musacchio*, 968 F.2d at 790. The statute of limitations does not support a conclusion that there are no identifiable crime victims of Counts II-IV nor "does [it] not bar the introduction of evidence of acts that occurred outside the limitations period." *Id.*

III. The Excluded Victim-Witnesses Were Harmed By The Asbestos Exposure Caused By The Defendants' Alleged Criminal Conduct.

The CVRA broadly defines a crime victim as a "person directly and proximately harmed as a result of the commission of a Federal offense." 18 U.S.C. § 3771(e); *see also* 150 CONG. REC. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (the CVRA includes "an intentionally broad definition because all victims of crime deserve to have their rights protected."). There can be little doubt that each of the 34 excluded victim-witnesses falls within this intentionally broad definition because each was "directly and proximately" harmed by the defendants' criminal conspiracy alleged to have run from 1976 to 2002, or by the commission of substantive offenses completed after 1999.

The harm caused by the defendants' alleged actions has often manifested itself in the form of asbestos-related diseases such as mesothelioma, lung cancer, and asbestosis. In fact, as this Court noted when it upheld EPA's emergency removal action at Libby, the percentage of Libby residents who had pleural (lung) abnormalities on chest radiographs was between 37% for former Grace workers to 14% for community members without any apparent exposure pathway. *See W.R. Grace*, 429 F.3d at 1246. "In comparison . . . [s]tudies of differing groups within the

United States believed to have no substantive work-related asbestos exposures have found the prevalence of pleural abnormalities ranging from 0.02% among blue collar workers in North Carolina, to 0.9% among loggers in Washington and Oregon, to 1.8% among New Jersey residents, and 2.3% among patients at Veterans Administration hospitals in New Jersey." *Id.* at 1246 n.2 (citations omitted). Here, 21 out of the 34 excluded victim-witnesses have developed asbestos-related diseases or lung abnormalities (ER 61-62) – a portion of the more than 1,200 residents of Libby and surrounding areas that have been identified as having asbestos-related health problems. ER 11 ¶ 57. These persons suffering physical injury from the defendants' alleged actions clearly were harmed for CVRA purposes.

That is not to say, however, that persons exposed to asbestos but currently not suffering from asbestos-related diseases or lung abnormalities were not "directly and proximately" harmed by the defendants' alleged misconduct. ER 15, 18. Because of the typically lengthy latency period between asbestos exposure and the onset of asbestos-related disease (ER 11 ¶ 58), a victim need not physically manifest symptoms to be harmed. Simply increasing the future risk of developing one of these diseases suffices as harm. *See United States v. Protex Indust.*, 874 F.2d 740, 743-44 (10th Cir. 1989) (upholding conviction under RCRA's knowing endangerment provision based upon an enhanced future risk of cancer); *United States v. Thorn*, 446 F.3d 378, 386 (2d Cir. 2006) (finding risk to health from asbestos exposure sufficiently serious to reject downward departure at sentencing). As this Court has observed in citing a report by the Agency for Toxic Substances and Disease Registry:

> "Asbestos exposure is associated with several changes in the pleura (lining of the lungs and internal chest wall).... They indicate past exposure to asbestos, and can often be detected in chest radiographs (CXW), also known as X-rays." The report goes on to explain that "[t]he presence of any of these pleural abnormalities on chest radiograph, associated with asbestos exposure, indicates increased risk for mesothelioma and lung cancer."

W.R. Grace, 429 F.3d at 1246 n.24. Thus, each of the excluded 34 victim-witnesses was harmed by the exposure to the defendants' asbestos-contaminated vermiculite because, even if they have not yet developed a disease, their exposure has increased the risk of such disease.

Moreover, the district court was incorrect that a "victim must be 'another person' who is 'place[d] . . . in imminent danger of death or serious bodily injury' as the result of the *actus reas*, i.e., a 'release,' committed with the requisite intent." ER 15. While being placed in "imminent danger of death or serious bodily injury" certainly constitutes harm, the definition of "crime victim" is not limited to those whose identity or whose physical injury constitutes an element of the substantive knowing endangerment offense, 42 U.S.C. § 7413(c)(5)(A) (knowing endangerment crime). *See In re Mikhel*, 453 F.3d 1137, 1139 n.2 (9th Cir. 2006). "[A] party may qualify as a victim, even though it may not have been the target of the crime." *In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008). As long as a person suffers harm, any harm, as a result of a crime's commission, that person is a crime victim. *Id.*

In addition to the harm caused by the substantive knowing endangerment and knowing endangerment object of the conspiracy, this harm includes any harm caused by the defendants' obstruction of justice as alleged in Counts V-VIII, or by the "defrauding object" of the conspiracy alleged in Count I. As the Superseding

Indictment alleges, the defendants obstructed EPA's cleanup of Libby by denying its emergency response team access to places at which it could safely disposed of hazardous materials and by providing false and misleading information regarding the true location, hazard, and extent of the asbestos-contamination at Libby ER 24-28 ¶¶ 105-14; ER 30-31 ¶¶ 128-32; ER 39-43 ¶¶ 173-83; ER 46-49. These obstructive actions prevented EPA, other federal agencies, and the general public from discovering the extent of the asbestos problem at Libby and acting upon that information in the early 1980s. ER 24-27 ¶¶ 105-14; ER 30-31 ¶¶ 128-32. These actions also delayed EPA's investigation and cleanup of certain asbestos-contaminated sites, causing additional releases of asbestos into the air and the community of Libby after November 3, 1999. ER 39-43 ¶¶ 173-83; ER 46-49. The district court thus improperly narrowed the focus of its analysis to Counts II-IV (ER 68); the defendants' obstructive efforts dating back to at least the early 1980s and continuing past November 3, 1999 also harmed the victim-witnesses.

The allegations in the Superseding Indictment, about which the excluded victim-witnesses intend to testify at trial, show the link between the defendants' alleged criminal misconduct and the harm caused to the 34 excluded victim-witnesses. The Superseding Indictment alleges, as part of the criminal conspiracy, for example, that even though the defendants internally discussed the dangerous levels of asbestos dust workers were bringing home to their families, the defendants refused to provide adequate changing and shower facilities for their employees that would have reduced their employees' families exposure to asbestos. ER 32-34 ¶¶ 135-48. The wife of excluded Victim-Witness #30, a former W.R. Grace employee,

died of mesothelioma, an aggressive form of lung cancer caused by the asbestos brought home on the clothes of W.R. Grace employees. ER 61-62. Because his wife's death was a foreseeable result of the defendants' alleged conduct, Victim-Witness #30 was harmed and is a victim under the CVRA. *Cf. United States v. De La Fuente*, 353 F.3d 766, 772-73 (9th Cir. 2003) (interpreting an analogous "direct and proximate" provision in Mandatory Victims Restitution Act (MVRA)); 18 U.S.C. § 3771(e) ("In case of a crime victim who is . . . deceased . . . representatives of the crime victim's . . . family . . . may assume the crime victim's rights.").

As another example, as part of the criminal conspiracy, the Superseding Indictment alleges that, even as the defendants examined studies confirming the highly dangerous nature of their asbestos-contaminated vermiculite (ER 19-24 ¶¶ 84-104; ER 28-30 ¶¶ 115-27), they continued to provide and allow access to asbestos-contaminated vermiculite by Libby citizens, including these 34 victim-witnesses, by, *inter alia*, providing asbestos-contaminated vermiculite for use as surfaces for school tracks, permitting community members to take vermiculite home for use in their gardens, and allowing public access, including by children, to piles of vermiculite at their facility adjacent to town baseball fields (ER 5-7 ¶¶ 23-35; ER 33-35 ¶¶ 141-49); *see also W.R. Grace*, 429 F.3d at 1230 ("residents described halting baseball games when large dust clouds swept over the field carrying particles from exposed piles of vermiculite"). Excluded Victim-Witnesses #11, #14, #15, #19, and #31 were all exposed to asbestos through these community exposures and, moreover, all have been diagnosed with various asbestos-related lung diseases and abnormalities. ER 61-62. These persons were directly and proximately harmed within the CVRA's meaning.

In addition to the above-mentioned examples, the Superseding Indictment is replete with allegations of other acts taken by the defendants both as part of the criminal conspiracy and the substantive crimes that caused dangerous releases of asbestos into the ambient air, placing others in imminent danger of death or serious bodily injury by increasing their risk of developing asbestos-related disease. ER 1-49. Attachment B explains how each of the 34 excluded victim-witnesses was exposed to asbestos (and thus harmed) by the defendants' criminal misconduct. ER 61-62 Therefore, each of the 34 excluded victim-witnesses listed at Attachment B are part of a class of victims that would satisfy the definition of "crime victim" if the government were to establish the truth of the allegations in the Superseding Indictment and each victim should be afforded his or her rights under the CVRA.

CONCLUSION

For the foregoing reasons, this Court should grant the United States' petition for writ of mandamus, compelling the district court to recognize the 34 victim-witnesses identified in Attachment B as "crime victims" entitled to the rights specified in the CVRA.

Respectfully Submitted,

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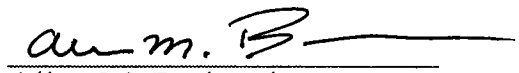
February 2009

STATEMENT OF RELATED CASES

This Court has published opinions in earlier appeals in this criminal proceeding at *United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008) (*en banc*), and *United States v. W.R. Grace*, 504 F.3d 745 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 2964 (2008). This Court also has published an opinion in a related civil case, *United States v. W.R. Grace*, 429 F.3d 1224, 1226-27 (9th Cir. 2005).

CERTIFICATE OF COMPLIANCE

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the attached petition is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this petition complies with Fed. R. App. P. 21(d) and Fed. R. App. P. 32(a)(1)-(7) and is a principle petition of no more than 30 pages.



Allen M. Brabender
Feb. 23, 2009

CERTIFICATE OF SERVICE

Pursuant to an agreement of the parties, on February 23, 2009, I served an electronic copy of the PETITION FOR A WRIT OF MANDAMUS PURSUANT TO 18 U.S.C. § 3771(D)(3), by electronic mail to the addresses identified below:

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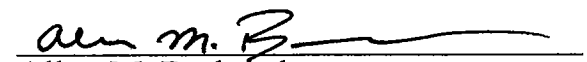
I also have served a copy of this document by Federal Express overnight upon the U.S. District Court for the District of Montana at the following address:

The Honorable Donald W. Molloy
U.S. District Court
Russell Smith Courthouse
201 East Broadway
Missoula, MT 59801



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