Nos. 09-70529, 09-70533

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

REPLY OF THE UNITED STATES

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INTRODUCTION

As we demonstrated in our petition for writ of mandamus, the district court erred when it denied 34 prospective government witnesses the protections of the CVRA without considering whether they are "victims" of the conspiracy alleged in Count I of the Superseding Indictment. A conspiracy is an "ongoing offense" – a proposition the defendants do not dispute – and in this case the conspiracy stretched from 1976 until 2002. Anyone who was directly and proximately harmed as a result of that conspiracy, throughout its duration, is a victim within the meaning of the CVRA and is entitled to its protections. We have identified 34 of those victims in our petition and explained how the conspiracy harmed them.

In their response, the defendants do not dispute that the United States has provided sufficient facts to show that the alleged conspiracy harmed its witnesses before November 3, 1999.[1] Instead, the defendants make two arguments in an attempt to account for the district court's failure to consider the harmed caused by the ongoing conspiracy. The defendants first reiterate the prevailing theme of their opposition – that the indictment itself must (and fails to) identify each and every victim and how they were harmed before CVRA rights can be accorded. Def's Opp. at 29. The defendants next contend that a conspiracy under 18 U.S.C. § 371 is a crime solely

[1] The defendants do dispute that there are sufficient facts to show harm *after* November 3, 1999, but that is irrelevant to whether the witnesses were victims of the ongoing offense of conspiracy. In view of the short-time frame in which the United States must reply and because it is clear that all 34 victims-witnesses were harmed by the ongoing conspiracy alleged to have run from 1976 to 2002, the United States will limit this reply to a discussion of the conspiracy charges.

against the United States and thus there are no victims of that crime for CVRA purposes. Def's Opp. at 30. Neither argument has merit.

The CVRA does not require the United States to name every victim of each crime and describe how they were harmed in its indictments before those victims can receive the protections of the Act. Victims' rights under the CVRA do not turn on the ability of the prosecutor to identify every victim of a crime at the time of the indictment. And indictments are supposed to be brief documents setting forth allegations on each element of the crime, not catalogues of those victimized by the offense. The defendants' suggested rule conditions a crime victim's rights under the CVRA on the prosecutor's willingness to identify them in an indictment. Such a rule, however, runs counter to the CVRA's purpose of protecting all crime victims and must be rejected as inconsistent with that purpose and the prevailing case law.

The defendants' argument that all conspiracies under 18 U.S.C. § 371 are offenses only against the United States fares no better, because as this Court has said, "the definition of a 'victim' under the CVRA is not limited to the person against whom a crime was actually perpetrated." *In re Mikhel*, 453 F.3d 1137, 1139 n.2 (9th Cir. 2006). Indeed, the analogous provisions of the Mandatory Victim Rights Act (MVRA) have been applied by this Court and others to provide restitution to "victims" of conspiracies under § 371. Just as in those cases, the 34 victim-witnesses of the ongoing conspiracy from 1976 to 2002 were directly and proximately harmed by the defendants' alleged conduct and therefore each of these 34 individuals are crime victims under the CVRA and entitled to their statutory rights.

This Court should issue a writ of mandamus, directing the district court to recognize the 34 victim-witnesses in Attachment B as crime victims.

ARGUMENT

I. The 34 Victim-Witnesses Were Directly And Proximately Harmed By The Defendants' Ongoing Criminal Conspiracy From 1976 to 2002 And Are Crime Victims For Purposes Of The CVRA.

A. Crime Victims Do Not Have To Be Named In An Indictment.

The defendants argue "that the question of whether a given individual has *pre-conviction* rights under the CVRA must be resolved 'by reference to the factual allegations in the charging instrument.'" Def's Opp. at 21. While this statement is essentially correct, the defendants grossly misinterpret what it means.

The defendants apparently believe that it means that crime victims must be identified in the allegations in the indictment. They argue, "where a criminal indictment . . . identifies a particular person as the victim of an alleged crime . . . the evidence giving rise to the allegation has been vetted by an independent grand jury, and thus provides a reasonable basis for tentatively treating that individual as the 'victim." Def's Opp. at 22. That interpretation is obviously incorrect.

The CVRA does not require crime victims to be identified in a charging document. The CVRA defines a "crime victim" as a "person directly proximately harmed as a result of the commission a Federal offense," not as a person harmed who can be identified solely from the four corners of the charging instrument. *See* 18 U.S.C.§ 3771(e). This definition thus "instructs the district court to look at the offense itself only to determine the harmful effects the offense has on parties." *In re Stewart*, 552 F.3d at 1289. Not only does the defendants' interpretation add a non-existent

requirement to the statute, that interpretation makes the rights of the victims contingent upon whether the prosecutor chooses to identify the victims in the indictment. Congress could not have intended such important rights to be contingent upon the form of the pleading instead of the substance of the crime.

The defendants cite no case that limits crime victims to those persons specifically identified in the charging document. In fact, courts unanimously have rejected that proposition. As this Court stated when awarding restitution to a crime victim under the MVRA's parallel "crime victim" definition, "the fact that the [victim] was not mentioned in the indictment is immaterial." *See United States v. Brock*, 504 F.3d 991, 999 (9th Cir. 2007), and cases cited therein. And, similarly, when interpreting the MVRA's parallel definition, the Seventh Circuit stated that "while the *conduct* underlying a restitution order must be specifically articulated in the charge or a plea agreement, specific victims need not be, especially in a case involving 'as an element a scheme, conspiracy, or pattern of criminal activity.'" *United States v. Rand*, 403 F.3d 489, 494-95 (7th Cir. 2005).

While *Brock*, *Rand*, and other similar cases involve post-conviction proceedings, courts have reached similar holdings for pre-conviction proceedings. As the Eleventh Circuit has concluded in examining crime victims rights under the CVRA in pre-conviction proceedings, "[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 . . . petitioners are not automatically disqualified as victims merely because they are not mentioned in the information. " *In re Stewart*, 552 F.3d at 1289.

Moreover, the defendants are incorrect that no one yet can be considered a crime victim "at this stage" because the offenses alleged in the Superseding Indictment have yet to be proven. Def's Opp. at 25, 27, 33. Requiring a conviction before a crime victim's rights attach, however, runs expressly counter to the CVRA. An important set of CVRA rights exist regarding notice of and attendance at "any public court proceeding . . . involving the crime." 18 U.S.C. §§ 3771(a)(2)-(3) . Such "proceedings" necessarily include the trial on the merits. Congress could not have intended for trial itself to be the factual predicate underlying a determination about whether someone has suffered "direct and proximate harm from commission of a Federal offense" and is therefore entitled to CVRA rights. To hold otherwise would render part of the CVRA a nullity and must be avoided. *See Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162, 1175 (9th Cir. 2006).

Finally, the defendants' position that crime victims must be identifiable solely from the facts alleged in the indictment should be rejected because there is no indication Congress intended to amend the pleading rules when enacting the CVRA. The Federal Rules of Criminal Procedure define an indictment as "plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). "An indictment is sufficient if it contains the elements of the charged crime in adequate detail to inform the defendant of the charge and to enable him to plead double jeopardy." *United States v. Awad*, 551 F.3d 930, 935 (9th Cir. 2009) (quotation omitted). The test for sufficiency of the indictment is "not whether it could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards." *United States v. Hinton*, 222 F.3d 664, 672 (9th

Cir. 2000); *see also United States v. Henson*, 848 F.2d 1374, 1385 (6th Cir. 1988) ("it is axiomatic that all the overt acts in furtherance of a conspiracy need not be alleged in the indictment"). The defendants' position, if adopted, would greatly expand the minimum standards for indictments by requiring prosecutors attempting to satisfy their statutory best efforts obligation in § 3771(c)(1) to assure that crime victims are accorded their rights under the Act to name each victim and explain how the defendants' alleged conduct harmed that person. Nothing in the CVRA, however, indicates that Congress intended such an unprincipled departure from established pleading law as a precondition to crime victims being accorded their rights.

In sum, while courts should refer to the indictment to determine what offenses have been charged, the court is not restricted to the four corners of the indictment when determining whether there has been direct and proximate harmed as a result of the offenses charged. Just because a crime victim's identity is not readily identifiable from the facts alleged in the charging document, that does not preclude him or her from being accorded crime victim rights.

B. The Status Of "Crime Victim" Is Not Limited To Those Whose Harm Constitutes An Element Of A Federal Offense.

In our petition for writ of mandamus we explain that a crime victim may suffer harm as a result of the commission of a federal offense even though his or her harm is not contemplated as an element of the federal offense. U.S. Pet. at 24-26. Ignoring this explanation and the case law supporting it, the defendants argue that because § 3771(b) states that the CVRA applies only to court proceedings "involving an offense against a crime victim" there can be no crime victims stemming from the

defrauding object of the conspiracy (or the obstruction of justice charges in Counts V-VIII).[2] This must be the case, they assert, because the conspiracy charged under 18 U.S.C. § 371 consists of conspiring "either to commit any offense against the United States, or to defraud the United States." The defendants believe that this phrase implies that only the United States can be a victim of a § 371 conspiracy.

The defendants' belief is misplaced. The superseding indictment alleges a conspiracy with two objects. The knowing endangerment object of the conspiracy alleges an offense against the United States. The law, however, does not support the defendants' view that the "offense against the United States" language in 18 U.S.C. § 371 limits victims of the offense to the U.S. Government. The defendants' argument entirely ignores the abundant case law holding that anyone could be a victim of a conspiracy under § 371. *See, e.g., United States v. Brandon*, 17 F.3d 409, 421-22 (1st Cir. 1994) ("The 'any offense' clause of 371 (to 'commit offenses against the United States') is aimed at conspiracies to violate the laws of the United States. It does not refer to a particular victim of a particular crime like the second clause does, but instead applies generally to federal offenses"); *United States v. Mendez*, 528 F.3d 811, 815 (11th Cir. 2008) ("under 371's 'any offense' clause, the government is not

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[2] Contrary to the defendants' suggestion (Def's Opp. at 31), the United States asserted below that the harm resulting from the defrauding object of the conspiracy triggered the CVRA. *See* Brief/Memorandum In Support Of USA, Dkt. # 897, Feb. 2, 2009, at 8 (citing ER 38-40 ¶¶ 165, 173-76). In any case, there is no basis for the defendants' claim that the United States' actions or inactions could have waived the victims' rights. While the CVRA authorizes the United States to assert a victim's rights, *see* 18 U.S.C. § 3771(d)(1), the rights do not belong to the United States, they belong to the crime victims. Nothing the United States does or fails to do in the course of its prosecution waives a victim's rights.

required to allege that the United States was the intended victim of the conspiracy"); *United States v. Falcone*, 960 F.2d 988, 990 (11th Cir. 1992) (*en banc*) ("we hold that in establishing a conspiracy 'to commit any offense against the United States,' the government need not allege or probe that the United States or an agency thereof was an intended victim of the conspiracy"); *United States v. Ellis*, 121 F.3d 908, 913 (4th Cir. 1997) ("We . . . conclude, consistent with other circuits, that a conspiracy to commit 'any offense against the United States' under the first clause of 371 extends generally to cover any offense made illegal by federal law."); *United States v. Loney*, 959 F.2d 1332, 1340 (5th Cir. 1992) ("the better reading of the statute is that the "offense" clause criminalizes those conspiracies that contemplate the commission of an offense that is made illegal by federal law.").

Moreover, the defendants grossly misunderstand the phrase "offenses against the United States." "[O]ffenses against the United States encompass all offenses against the laws of the United States, not just offenses directed at the United States as target or victim." *United States v. Gabrion*, 517 F.3d 839, 855 (6th Cir. 2008), *cert. filed* No. 08-7512. This includes classic victim creating offenses such as kidnaping, murder, and rape. Yet nobody would suggest that these federal offenses – or even a conspiracy to commit these federal offenses– are victimless crimes. The defendants' argument thus cannot be correct. If it were, there would be no victims resulting from any federal offense. Put simply, while a violation of federal criminal law technically is an "offense against the United States" as a Sovereign, not against any individual, that legal concept does not limit or define who is a "crime victim."

Instead, the CVRA, MVRA, and other similar victim rights statutes define who is a crime victim. A crime victim is "a person directly and proximately harmed as a result of the commission of a Federal offense." 18 U.S.C. § 3771(e) (CVRA). *See also* 18 U.S.C. § 3663A(a)(2) (MVRA); 18 U.S.C. § 3663(a)(2) (VWPA). By incorrectly focusing on § 3771(b), the defendants ignore these intentionally broad definitions. *See* 150 CONG. REC. S10912 (daily ed. Oct. 9, 2004).

The defendants also ignore the case law interpreting the scope of the term "crime victim," remarkably failing to cite in their analysis section a single case interpreting the CVRA. This failure is not entirely surprising considering that every appellate court to interpret the Act's definition of crime victim, including this Court, has rejected the defendants' position that the substantive elements of the offense limit the potential scope of the offense's victims. *See In re Mikhel*, 453 F.3d at 1139 ("[t]he definition of a 'victim' under the CVRA is not limited to the person against whom a crime was actually perpetrated."); *In re Stewart*, 552 F.3d at 1289 ("[A] party may qualify as a victim, even though it may not have been the target of the crime.").

The defendants are also wrong that victims of the conspiracy must have suffered from ambient (outdoor) releases, so that the 7 victim-witnesses listed in Attachment B that were exposed to asbestos at work could not be crime victims. Def's Opp. at 28. The defendants again confuse the elements of the substantive crimes with the harm suffered as a result of the conspiracy. While the substantive knowing endangerment offense requires the government to prove ambient (outdoor) releases of hazardous air pollutants, *see* 42 U.S.C. § 7413(c)(5)(A), that element of the

substantive offense does not limit the manner in which the victims of the conspiracy may be harmed.

As the Superseding Indictment alleges, as part of their criminal conspiracy, the defendants obtained knowledge of the hazardous nature of their asbestos-contaminated materials and concealed that knowledge from the government and public in order to increase their profits and avoid potential liability. ER 15-19. These alleged conspiratorial actions prevented the government and the public from discovering the true location, hazard, and extent of the asbestos-contamination at Libby and acting upon that information in the late 1970s or early 1980s, and continuing past November 1999. ER 24-27 ¶¶ 105-14; ER 30-31 ¶¶ 128-32. This deception is directly responsible for numerous asbestos exposures which could have been avoided had the defendants provided timely and truthful information. It is simply irrelevant for CVRA purposes that their deception may have caused indoor exposures that harmed crime victims in addition to their outdoor exposures. For CVRA purposes, a person suffering harm, any harm, as a result of a crime's commission, is a crime victim. *See In re Stewart*, 552 F.3d at 1289.

The defendants' arguments regarding pre-1990 or pre-1999 exposures suffer from a similar flaw.[3] Def's Opp. at 28. It is irrelevant for purposes of the conspiracy

[3] The defendants make various assertions regarding the district court's so-called "Continuing Offense Order. " Def's Opp. at 6, 7, 14, 35 (citing *United States v. W.R. Grace*, 429 F. Supp. 2d 1207, 1248 (D. Mont. 2006)). That order, however, pertained to the substantive knowing endangerment offenses in Counts II-IV – the order had nothing to do with the conspiracy offense in Count I. *Id.* Moreover, even as applied to those substantive offenses, that order has no bearing here. The government is not relying on a continuing offense theory for Counts II-IV, nor is

crime that Congress did not criminalize knowing releases of asbestos until 1990. The defendants' alleged fraudulent actions still exposed the 34 excluded victim-witnesses to asbestos and thus harmed them. And, in any event, the Superseding Indictment makes clear that a number of the 34 victim-witnesses were exposed to asbestos as a result of the conspiracy and thus harmed post-1990 and/or post-1999, including Mel and Lerah Parker. *See, e.g.*, ER 34-35, 37-38, 44-45 ¶¶ 143, 149, 161-67, 188, 190.

In sum, 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. Because each of the 34 excluded victim-witnesses listed at Attachment B was harmed by this criminal conspiracy, each should be afforded his or her rights under the CVRA.

II. The District Court's Response Does Not Cure Its Error.

The district court has made a number of observations regarding the petitions. We make the following points in response.

First, none of the district court's observations cure the legal errors in its ruling that we demonstrated in our petition or in this reply. Indeed, our arguments regarding the misapplication of the statute of limitations and those regarding the harm caused by mere exposure to asbestos essentially are uncontested.

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the government relying on substantive crimes completed before November 3, 1999. The defendants' repeated statements regarding the government's decision not to appeal that order are therefore nothing more than distractions.

Second, the district court implies that this petition is a waste of time because none of the 8 victim-witnesses that the government called during the first 2 days of trial chose to observe further court proceedings after their testimony. In fact, we believe that at least 2 of the witnesses stayed to observe further portions of the trial. But whether they chose to watch further trial proceedings is irrelevant to the question of whether they should be recognized as crime victims. If they do not wish to observe trial proceedings, they are free not to do so. But that should be a choice they make; not one that is made for them based on a determination that they do not qualify as crime victims.

Third, the district court admits that if it were called on to make the determination required by the CVRA of whether a prospective witness might alter his testimony if he heard other trial witnesses prior to giving his own testimony, it "would have to find, by much more than clear and convincing evidence," that allowing these prospective witnesses to hear other testimony before testifying "would impact their memories and recall." D.Ct. Resp. at 3-4. The court is making this judgment, not based on having questioned these prospective witnesses and hearing the strength of their own testimony, but on having listened to the testimony of other prior witnesses. This constitutes an impermissible prejudging of the situation.

Finally, the CVRA gives crime victims many rights, of which observing trial proceedings is only one. *See* 18 U.S.C. § 3771(a). For the reasons outlined in our petition and stated in this reply, we believe the 34 witnesses named in Attachment B qualify as crime victims. They should be so recognized so they may assert any and all rights they are entitled to under the CVRA.

CONCLUSION

For the foregoing reasons and those in our principle petition, 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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DJ # 198-44-00607
February 2009

CERTIFICATE OF COMPLIANCE

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the attached reply is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this reply complies with Fed. R. App. P. 21(d) and is a reply of no more than 15 pages.

_____
/s/ Allen M. Brabender
Feb. 26, 2009

CERTIFICATE OF SERVICE

Pursuant to an agreement of the parties, on February 26, 2009, I served an electronic copy of the REPLY OF THE UNITED STATES, 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:

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/s/Allen M. Brabender
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