No. 09-70529

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: Melvin and Lerah Parker,

Petitioners

-against-

United States District Court
for the District of Montana,

Respondent.

PARKERS' REPLY TO DEFENDANTS' AND DISTRICT JUDGE'S OPPOSITION TO A PETITION FOR A WRIT OF MANDAMUS

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COME NOW petitioners Melvin and Lerah Parker, having been invited by the Court to reply to opposition to their petition from the defendants (hereinafter cited as "Def's Opp.") and the district judge (hereinafter cited as "Dist. Ct. Opp.."), to file a reply.

I. THE STANDARD OF REVIEW OF THE DISTRICT COURT'S SEQUESTRATION ORDER IS *DE NOVO*.

A. The Parkers Are Entitled to Ordinary Appellate Review of Their Claims Raised Under the CVRA.

1. The Law of the Circuit is that CVRA Petitioners Are Entitled to Ordinary Appellate Review.

The defendants first suggest that, because the Parkers have sought review of the district court's order through the vehicle of a CVRA mandamus petition, the standard of review is only for an "abuse of discretion." Def's Opp. at 15. The defendants concede that this Court has reached exactly the opposite conclusion. In *Kenna v. U.S. Dist. Court for C.D. Cal.*, 435 F.3d 1011, 1017 (2006), this Court specifically held that the

> CVRA contemplates active review of orders denying victims' rights even in routine cases. The CVRA explicitly gives victims aggrieved by a district court's order the right to petition for review by writ of mandamus, provides for expedited review of such a petition, allows a single judge to make a decision thereon, and requires a reasoned decision in case the writ is denied. The CVRA creates a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute.

The defendants would apparently have this panel ignore the law of the Circuit established in *Kenna*, on grounds that it is "dicta." Def's Opp. at 15. But how this is so remains a mystery. Moreover, this Court has applied *Kenna* at least twice in reviewing CVRA mandamus petitions, so its holding is now well-settled in the Circuit. In *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006) ("*Kenna II*"), this Court applied the standard of review established in *Kenna*. *See id.* at 1137 (citing standard of review language from *Kenna*). The defendants do not cite or discuss *Kenna II.* Similarly, in *In re Mikhel*, 453 F.3d 1137 (9th Cir. 2006), this Court simply followed the principle articulated in *Kenna* and gave a crime victim ordinary appellate review of an asserted legal error made by the district court.

Finally, if *Kenna* was somehow offering mere "dicta" on how to approach CVRA petitions, that fact has eluded four others circuits – all of which have read *Kenna* as establishing Ninth Circuit precedent. *See In re Dean*, 527 F.3d 391, 394 (10th Cir. 2008); *In re Antrobus*, 519 F.3d 1123, 1125 (10th Cir. 2008); *In re Walsh*, 229 Fed. Appx. 58, 60 (3rd Cir. 2007); *In re Brock*, 262 Fed.Appx. 510, 512 (4th Cir. 2008).

For all these reasons, *Kenna* is the well-settled law of the Circuit and entitles the Parkers to ordinary appellate review of their claim.

2. The Plain Language of the CVRA Confirms that the Parkers are Entitled to Ordinary Appellate Review of their Claims.

The result reached by *Kenna* is the only one that the language of the CVRA permits. One significant hurdle faced by a petitioner bringing a conventional petition for a writ of mandamus is that review of that petition is a matter of judicial discretion. *San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1099 (9th Cir. 1999) ("Mandamus review is at bottom discretionary . . . ."). By contrast, under the CVRA, the right to appellate review is non-discretionary. Section 3771(d)(3) provides that "[t]he court of appeals *shall take up and decide* such application forthwith within 72 hours after the petition has been filed." Clearly, Congress put in place for crime victims something other than traditional mandamus review – i.e., ordinary appellate review. *See* Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. Rev. 255, 347.

Other provisions of the CVRA also indicate that the statute provides normal appellate review for crime victims. The CVRA directs that "[i]n *any* court proceeding" – presumably including appellate proceedings – "the court shall *ensure* that the crime victim is *afforded* the rights described in [the CVRA]." 18 U.S.C. § 3771(b)(1) (emphases added). The congressional command that appellate courts "ensure" that crime victims are "afforded" their rights would be fatally compromised if those courts were confined to examining lower court proceedings

for indisputable errors. The CVRA also broadly requires that crime victims must "be treated with fairness" throughout the criminal justice process. 18 U.S.C. § 3771(a)(8). Victims are not treated fairly if they are "left to the mercy of the very trial court that may have erred." 150 CONG. REC. S10911 (statement of Sen. Kyl) (Apr. 22, 2004).

Finally, the defendants' position violates a cardinal rule of statutory construction that a statute's provision should not be interpreted so as to be "superfluous." *Pacific Northwest Generating Coop v. Dept. of Energy*, 550 F.3d 846, 862 (9th Cir. 2008). The defendants interpret the CVRA's language that "the movant may petition the court of appeals for a writ of mandamus" to mean only that the movant may petition for an ordinary writ of mandamus. But before Congress enacted the CVRA, a crime victim could (like anyone else) petition for a writ of mandamus under the All Writs Act. 28 U.S.C. § 1651.[1] Thus, under the defendants' interpretation, the CVRA mandamus provision becomes superfluous.

For all of these reasons, under the plain language of the CVRA, ordinary appellate review applies to crime victims' petitions.

3. Congress Clearly Intended to Give Crime Victims Ordinary Appellate Review.

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1 For an example of a crime victim's mandamus petition before the CVRA, *see United States v. McVeigh*, 106 F.3d 325 (10th Cir. 1997)

Not only does the plain language of the CVRA clearly demonstrate that ordinary appellate review applies to CVRA mandamus petitions, but the legislative history also shows that Congress intended to create, as *Kenna* recognized, "a unique regime that does, in fact, contemplate interlocutory appellate review of district court decisions denying rights asserted under the statute." *Kenna*, 435 F.3d at 1017.

The CVRA comes with detailed legislative history in the form of a section-by-section discussion by its two primary sponsors, Senator Kyl and Senator Feinstein. This discussion is entitled to considerable weight; in ruling on a disputed point addressed in that discussion, this Court "can draw from the fact that no one registered disagreement with Senators Kyl and Feinstein on this point the reasonable inference that the views they expressed reflected a consensus, at least in the Senate." *Kenna*, 435 F.3d at 1015-16.

One of the CVRA's two co-sponsors (Senator Kyl) stated that:

> [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.
>
> Without the right to seek appellate review and a guarantee that the appellate court will hear *the appeal* and order relief, a victim is left to the mercy of the very trial court that may have erred. This country's appellate courts are designed to *remedy errors of lower courts* and this provision *requires them to do so* for victim's rights.

150 CONG. REC. S10912 (emphases added). Likewise, the other co-sponsor (Senator Feinstein) said that this provision "provides that [the appellate] court shall take the writ and shall order the relief necessary to protect the crime victim's right," 150 CONG. REC. S4260, S4270 (Apr. 22, 2004), leading Senator Kyl to agree that crime victims must "be able . . . to have the appellate courts *take the appeal* and order relief." *Id.* (emphasis added).

This definitive legislative history cannot be squared with the argument that crime victims can obtain a writ only when their right to do so is "clear and indisputable." *In re Antrobus*, 519 F.3d 1123, 1124 (10th Cir. 2008); *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008). It is impossible for appellate courts to "broadly defend" victims' rights and "remedy errors of lower courts" under the CVRA if they are confined to granting mandamus petitions only where the right to obtain the writ is "clear and indisputable." The only way that the Fifth and Tenth Circuits could reach a contrary conclusion was to entirely ignore legislative history, apparently on the ground that the "plain language" of the statute showed that crime victims should not receive ordinary appellate review. But given that four circuit court opinions have now read exactly the same "plain language" of the statute in favor of crime victims, *see* Parkers' Petn. at 12, legislative history might shed some light on the subject. The legislative history plainly shows that Congress wanted

crime victims to have normal appellate review. This Court should therefore follow the law of the Circuit to that effect set out in *Kenna*.

B. The Defendants Do Not Dispute That the Determination of Who is a "Crime Victim" Is a Question of Law Reviewed *De Novo.*

In their Petition, the Parkers explained that the issue of who qualifies as a "crime victim" is a legal one reviewed *de novo.* Parkers' Petn. at 12-13 (*citing, inter alia*, *United States v. Brock-Davis*, 504 F.3d 991, 996, 998-99 (9th Cir. 2007). The defendants do not dispute this standard of review.

C. The Defendants Do Not Dispute That the CVRA is Remedial Legislation That Must Be Broadly Construed and that Generously Defines the Term "Crime Victim."

In their Petition, the Parkers also explained that the CVRA is remedial legislation that must be "construed broadly so as to achieve the Act's objective." Parkers' Petn. at 16-17 (*citing, inter alia, Padilla v. Lever*, 463 F.3d 1046, 1057 (9th Cir. 2006)). The Parkers further recited the legislative history that the definition of "crime victim" in the CVRA is "intentionally broad." Parkers' Petn. at 17 (*citing* 150 CONG. REC. S10912 (Oct. 9, 2004) (statement of Sen. Kyl)). The defendants do not dispute that these are the governing interpretive standards in this case.

II. THE PARKERS WERE DIRECTLY AND PROXIMATELY HARMED BY THE CHARGES ALLEGED IN THE INDICTMENT.

A. The Parkers Are Victims of the Conspiracy Count.

1. Victims Can Be Harmed By Conspiracies to Violate Federal Law.

The defendants initially stake out a sweeping position that the Crime Victims' Rights Act is simply inapplicable to conspiracy charges filed under 18 U.S.C. § 371. In the defendants' view, the fact that § 371 refers to conspiring to "commit any offense against the United States" means that no conspiracy can ever be committed against a victim.

This position is facially absurd. If accepted it would mean, for example, that while one bank robber who robs bank tellers at gun point leaves "victims" in his wake, two bank robbers who are charged with conspiring to do so do not. Congress simply cannot have intended to have crime victims' rights evaporate whenever multiple defendants are charged with a conspiracy.

The defendants' position has been rejected by other courts of appeals. For instance, the very recent case of *In re Stewart*, 552 F.3d 1285 (11th Cir. 2008), held that various borrowers on bank loans were the "victims" under the CVRA of a § 371 conspiracy. *See id.* at 1287, 1289-90 (noting that the defendant has pled guilty to conspiring to commit wire fraud and that the borrower were CVRA "victims" of this conspiracy). As another example, in *United States v. Rand*, 403 F.3d 489 (7th Cir. 2005), the defendant plead guilty to a conspiracy under § 371 to commit

various offenses related to identity theft. The Seventh Circuit had no difficulty in awarding restitution under the Mandatory Victim Restitution Act, which employs a parallel definition of "crime victim" to that used in the CVRA. The Circuit simply noted "all of the losses included in the restitution order stemmed from fraudulent acts taken pursuant to a single identity theft conspiracy . . . ." *Id.* at 495. These cases clearly prove that criminal conspiracies create "victims" under the Crime Victims' Rights Act. Any other conclusion would lead to the bizarre result that if the Government files a broad charge – conspiracy – there would be fewer "victims" than if it elects to file a narrow, substantive charge.

2. The Parkers Were Harmed By The Conspiracy Charged in this Case.

Turning to the particular conspiracy that was charged in this case, the Parkers were plainly harmed by it. Indeed, they are listed – by name! – in five of the overt acts alleged in the conspiracy. *See* Superseding Indictment at ¶¶ 163-67

To avoid the seemingly foregone conclusion that the Parkers are victims of their conspiracy, the defendants attempt to create a smokescreen. They first argue that these five overt acts can, by virtue of the statute of limitations, link only to the second object charged in the conspiracy (defrauding the Government) – not the first object charged (knowing endangerment of persons). Then, they conclude, this object does not create any "victims" under the CVRA. Def's Opp. at 35.

The defendants' position is wrong on both scores. The defendants' position that the statute of limitations bars certain of the overt acts rests on what they describe as an "unappealed" order. *See* Def's Opp. at 35 (citing *United States v. W.R. Grace*, 434 F.Supp.2d 879 (D. Mont. 2006)). That description of the order as "unappealed" is incorrect. The relevant procedural history is that, after the district court ruled on the statute of limitations issues, the Government obtained a Superseding Indictment to try and fix the statute of limitations problem that the district court identified. When the district court, relying on its earlier order, rejected that "fix," the Government appealed. This Court then reviewed the district court order – citing the very district court order that the defendants now rely upon. *See United States v. W.R. Grace*, 504 F.3d 745, 751 (9th Cir. 2007) ("Under the district court's reading, the superseding indictment was not protected by the savings clause of 18 U.S.C. § 3288. Order at 17, *United States v. W.R. Grace*, 434 F.Supp.2d 879 ("order Dismissing Indictment") (D. Mont. 2006) (docket #690). The Government now appeals that determination."). This Court then *reversed* the Order. 504 F.3d at 754 ("For the reasons articulated herein, we reverse the district court's dismissal of the knowing endangerment object of Count I in the superseding indictment and reinstate that portion of the count."). Therefore, the defendants' reliance on the

order is unavailing. What is controlling is this Court's "reversal" of the district court's dismissal.

Even more fundamental is the defendants' misunderstanding of how the CVRA operates. The CVRA does not require that the elements of the offense be committed "against" a person (Def's Opp. at 35) in order for that person to be recognized as a protected "victim" under the CVRA. To the contrary, this Court has observed that "[t]he definition of a 'victim' under the CVRA is *not* limited to the person against whom a crime was actually perpetrated. Rather the term 'victim' includes any 'person directly and proximately harmed as a result of the commission of a Federal offense . . . .'" *In re Mikhel*, 453 F.3d 1137, 1139 n.2 (9th Cir. 2006) (emphasis added) (*quoting* 18 U.S.C. § 3771(e)). The net result of this broad language is, as the Eleventh Circuit recently explained, that "[t]he CVRA . . . does not limit the class of 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." *In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008).

Here, the "harmful effects" of the overt acts on the Parkers are obvious. The Superseding Indictment explains that the defendants sold them property and "failed

to disclose the health hazard associated with [the] property." Superseding Indictment at ¶ 166. Thus, the Parkers are specifically identified as the very target of the defendants' wrongdoing – even though this goes far beyond what the CVRA requires. *See In re Stewart*, 552 F.3d at 1289 ("Under the plain language of the statute, a party may qualify as a victim, even though [he] may not have been the target of the crime, as long as [he] suffers harm as a result of the crime's commission.").

Nor does the statute of limitations have any particular relevance to CVRA determinations.[2] The defendants seem to be asserting the curious position that only if a particular overt act fell inside the statute of limitations period does it count for purposes of establishing rights under the CVRA. *See* Def's Opp. at 34-35 (discussing sale of property to the Parkers and noting that it took place before the statute of limitations began to run). But this is obviously false. Consider a conspiracy to rob three banks with three overt acts: robbing Bank A in 2002, Bank B in 2005, and Bank C in 2008. Assuming a conspiracy charge is filed in 2009 and

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2 At various points in their pleading, the defendants appear to be contesting whether the Government will be able to factually prove that the crimes took place within the statute of limitations period at trial. At this juncture, however, the only issue is whether the Government has properly alleged crimes committed within the relevant statute of limitations period, as the defendants' concede that the "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 (internal quotation omitted).

the general five-year federal statute of limitations controls (*see* 18 U.S.C. § 3282(a)), then on the defendants' interpretation of the CVRA the tellers at Bank A are not protected under the CVRA, while the tellers at Bank B and C are. This makes absolutely no sense; Congress would certainly have wanted the tellers at the first bank to have been protected under the Act no less than the others.

For all these reasons, the defendants' position that the Parkers are not victims under the CVRA of the conspiracy count should be rejected.

B. The Parkers Are Victims of the Knowing Endangerment Count That Specifically Identifies Them.

The Parkers are also victims of the "knowing endangerment" counts in the Indictment. As explained at length in the Parker's Petition, knowing endangerment charges have "victims" within the protections of the CVRA. Parkers' Petn. at 28-34. Many federal criminal offenses are defined in terms of "endangerment" or "risk" – including the most important environmental crimes, attempted murder, drive-by shootings, assault, stalking, child endangerment, mailing threatening communications, and a whole host of other crimes where the essence of the offense is placing a person at risk physically, psychologically, or economically. These crimes are not by any stretch of the imagination "victimless" crimes – particularly given Congress' "intentionally broad definition of 'victim' [in the CVRA]." 150 CONG. REC. S4270 (Apr. 22, 2004) (statement of Sen. Kyl).

The defendants do not contest any of these points in their response. Instead of arguing that "victim" status is impossible for a knowing endangerment crime,[3] they attempt to carve out the very narrow position that the Parkers are not victims of the particular knowing endangerment crime charged in Count III. The defendants' argument boils down to a hyper technicality that belies the well-settled rule that an indictment "should be . . . construed according to common sense." *United States v. Lazarenko*, 546 F.3d 593, 599 (9th Cir. 2008). The defendants compare Count II of the Superseding Indictment with Count III and purport to see a tremendous distinction because of the absence of the single word "namely" from Count III. Here are relevant parts of the two counts:

Count II
(Clean Air Act - Knowing Endangerment)

> 185. Paragraphs 1 through 69 and 84 through 184 are incorporated by references as if realleged in full.
>
> 186. That beginning on or about November 3, 1999, and continuing until on or about February 3, 2005, at Libby, within the State and District of Montana, defendant W.R. Grace did knowingly

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3 This was the sweeping basis on which the district court denied the Parkers' rights under the CVRA. *See* Order of Feb. 13, 2009, at 18. As the defendants' failure to defend this holding suggests, this sweeping conclusion is inconsistent with the CVRA. It is also inconsistent with this Court's holding in a restitution case that a defendant had "harmed [a worker] by knowingly exposing him to hazardous waste." *United States v. Elias*, 269 F.3d 1003, 1021-22 (9th Cir. 2001). To end litigation about these issues in environmental and other comparable cases, this Court should make clear that victims of endangerment crimes are protected by the CVRA.

release and caused to be released into the ambient air a hazardous air pollutant, namely, asbestos, and at the time, knowingly placed another person, *namely* the residents of the town of Libby and Lincoln County in imminent danger of death or serious bodily injury by providing and distributing asbestos contaminated vermiculite materials to the community . . . in violation of 42 U.S.C. § 7413(c)(5)(A), 18 U.S.C. § 2.

Count III
(Clean Air Act - Knowing Endangerment)

187. Paragraphs 1 through 69 and 84 through 184 are incorporated by reference as if realleged in full.

188. That beginning on or about November 3, 1999 and continuing until on or about June 15, 2000, at Libby within the State and District of Montana, the defendants, W.R. GRACE, ALAN R. STRINGER, JACK W. WOLTER, and ROBERT J. BETTACCHI did knowingly release and caused to be released into the ambient air a hazardous air pollutant, namely, asbestos, and at the time knowingly placed another person in imminent danger of death or serious bodily injury *by selling real property known as the "Screening Plant" to the Parker family,* in violation of 42 U.S.C. § 7413(c)(5)(A), 18 U.S.C. § 2.

It is true that Count III could have been written differently – with the word "namely" inserted before the clause "by selling real property known as the 'Screening Plant' to the Parker family." But to ascribe some great significance to the alleged "absence" of this single word is surely to defy the requirement of reading the indictment with "common sense and practicality." *United States v. Awad*, 551 F.3d 930, 936 (9th Cir. 2009). The clear thrust of Count III (particularly since it reincorporates by reference the overt acts of the conspiracy count

specifically mentioning the Parkers, i.e., ¶¶ 163-67) is that the Parkers were at least among the group of people who were placed in imminent danger.[4]

But even if the Court were to grant the defendants' their premise that "namely" needed to appear in Count III, that hardly helps their ultimate position. The defendants, of course, concede that Count II includes the word "namely" – thereby identifying the persons who were endangered by the defendants as "*namely* the residents of the town of Libby and Lincoln County." The residents of Lincoln County are, therefore, victims – and the Parkers are residents of Lincoln County. The indictment specifically alleges (a seemingly uncontested and uncontestable fact) that the Parkers "resided" on the "Screening Plant property." Superseding Indictment at ¶¶ 30, 166. That property is in Lincoln County. *See id.* at ¶ 16. Therefore, if the defendants' gnarled logic is accepted to somehow eliminate the Parkers from having "victim" status under Count III, they clearly are victims of Count II as residents of Lincoln, County.

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4 The defendants grasp at straws in their response in gamely maintaining that "it is equally possible that the charged release allegedly endangered someone else [than the Parkers] entirely" because customers came to the nursery that the Parkers built on the Screening Plant property. Def's Opp. at 38. This borders on farcical. In the defendants' view, then, it is "equally possible" that the indictment is alleging harm to a customer who came to the nursery one afternoon to buy a few geraniums as it was to the Parkers, who (in the words of the indictment) used the property as "their personal residence" from "approximately 1993 to on or about June 2000." Superseding Indictment at ¶ 30. This not only defies common sense, but the rule that an indictment should be "interpreted to include facts which are necessarily implied." *United States v. Berger*, 473 F.3d 1080, 1103 (9th Cir. 2007).

The defendants seem unwilling to concede that the Parkers (and other government witnesses) would be victims of the broadly-written Count II. At various points in their response, the defendants seem to imply that the CVRA has some sort of free-standing requirement that a victim of an offense must be "identifiable," Def's Opp. at 24.

Problematically for the defendants, the word "identifiable" appears nowhere in the CVRA. To the contrary, the plain language of the CVRA specifically recognizes that there will be some federal offenses that fall within the CVRA that involve mass numbers of victims. The CVRA provides that "[i]n a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in [the CVRA], the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings." 18 U.S.C. 3771(d)(2). This provision is necessary because "it is an unfortunate reality that in today's world there are crimes that result in multiple victims. The reality of those situations is that a court may find that the sheer number of victims is so large that it is impracticable to accord each victim the rights in this bill." 150 CONG. REC. S4260 (Apr. 22, 2004) (statement of Sen. Kyl). The "mass victim" provision accordingly signals Congress' recognition that some cases would involve large numbers of victims. Here, the number of victims at issue

is relatively small – 34 persons specifically identified by the Government as witnesses. Therefore, they should all be recognized as protected by the CVRA.

Nor is there any requirement that the victims be identified by name in the indictment. *See United States v. Brock-Davis*, 504 F.3d 991, 999 (9th Cir. 2007) (awarding restitution to a "crime victim" not mentioned in the indictment because mention in the indictment is "immaterial" to obtaining status as a "victim"). The Parkers are, therefore, not only covered by Count III in which they are specifically named, but also by Count II as "residents of . . . Lincoln County" during the relevant time.

III. THE PARKERS HAVE BEEN HARMED "AS THE RESULT OF" CHARGES ALLEGED IN THE INDICTMENT.

For all these reasons, even looking solely at the language of the Superseding Indictment, the Parkers were "directly and proximately harmed" by the offenses alleged against the defendants. But the Parkers have offered an additional reason for being identified as victims – one that the defendants fail to contest. The Parkers explained in detail in their Petition that they were victims because they have asbestosis. Parkers' Petn. at 38-41. The CVRA extends right to those who have been harmed "as the result of" a federal offense. The offense alleged here involves release of asbestos. And the harm that has resulted to the Parkers is asbestosis.

The CVRA "instructs the district court to look at the offense . . . to determine the harmful effects the offense has on parties." *In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008). The district court completely failed to determine the harmful effects here. And the defendants have not contested the Parkers' detailed argument that, if the district court had, it would have concluded that the Parkers had suffered harm from the alleged crimes – namely asbestosis.[5] Accordingly, for this independent reason, the Parkers are entitled to be recognized as protected "crime victims" under the CVRA.

IV. THE COURT SHOULD OBVIATE FURTHER LITIGATION IN THE DISTRICT COURT BY FINDING THAT THE DEFENDANTS HAVE NOT SUBMITTED CLEAR AND CONVINCING EVIDENCE THAT THE PARKERS' TESTIMONY WOULD BE MATERIALLY ALTERED IF THEY ATTENDED THE TRIAL.

For all these reasons, this Court should issue a writ of mandamus directing the district court to recognize Melvin and Lerah Parker as "crime victims" entitled to exercise rights under the CVRA – including their right to attend the trial, 18 U.S.C. § 3771(a)(3).

The Parkers had assumed that such a ruling would bring this litigation to an end. Then last night they received a short pleading from the judge presiding over

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5 Nor have the defendants contested the Parkers' argument that they were harmed, even before they suffered asbestosis, by the need to undertake medical monitoring for the appearance of the disease after they had been exposed to asbestos by the defendants. *See* Parkers' Petn. at 34-36.

the trial that seems designed to prevent them from exercising their protected rights under the CVRA. The district judge's submission requires a brief response, because it contains several irrelevant and inaccurate statements about the Parkers and because it appears to prejudge future victims' rights litigation.

A. The District Judge's Submission Makes Irrelevant and Inaccurate Representations About the Parkers' Right to Attend the Trial.

The district judge's submission makes several assertions that are, at least with respect to the Parkers, wholly irrelevant and untrue. First, the district judge stated that "[n]one of the eight witnesses [who testified during the first day of trial] wished to do anything but go home." Dist. Ct. Opp. at 3. This fact is irrelevant to the Parkers' situation. As they proffered in their submission below, they "are keenly interested in observing the trial and, if permitted, would attend many of the trial proceedings." Brief in Support of Parkers' Motion to Assert Rights Pursuant to the CVRA at 4, Mandamus Ex. 3. They noted specifically that they wish to see particularly the medical testimony and, more generally, "to observe the trial in person to see whether justice is being done in the proceedings." *Id.* at 5.

Second, the district judge stated "[t]he entire issue here is resolved if the government does what it has so far and calls the proclaimed 'victims'[6] to testify,

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6 The Parkers respectfully submit that this Court should not repeat the language of the district court in describing their situation. They are not "proclaimed" victims. A more accurate term would be "afflicted" victims: They have asbestosis.

after which each may stay for any part, or the whole, of the trial." Dist. Ct. Opp. at 3-4. This, again, is inaccurate. Because of the length of time involved in preparing their Petition, the Parkers have already forever forfeited the right to see opening statements in this case and the testimony of at least eight witnesses. Moreover, the Parkers have been advised by the Government that they should be prepared to travel from their home in Libby to testify near the end of March or the first part of April – meaning they are expected to miss weeks of important testimony. That result is, as they have argued at length here, something that Congress did not intend. As Senator Feinstein explained in defending the victim's right to attend the trial:

> Victims are the persons who are directly harmed by the crime and they have a stake in the criminal process because of that harm. Their lives are significantly altered by the crime and they have to live with the consequences for the rest of their lives. To deny them the opportunity to . . . be present at proceedings is counter to the fundamental principles of this country. It is simply wrong.

150 CONG. REC. S4268 (Apr. 22, 2004) (statement of Sen. Feinstein). Indeed, it is instructive to compare the situation of the Parkers with that of criminal defendants on trial. If they had been denied the right to see even a single witness in this case, this Court would have ordered a new trial. *See Coy v. Iowa*, 487 U.S. 1012 (1988). Unfortunately, no such possibility exists for the Parkers.

B. The District Judge Has Prejudged the Issue of Sequestering the Parkers In Potential Violation of the Their Right to "Be Treated With Fairness" Under the CVRA.

Far more troubling than these irrelevant and inaccurate statements, however, are the district judge's *obiter dicta* on whether the Parkers might be subject to exclusion under an extremely narrow exception to the CVRA's right to observe the trial. The CVRA guarantees a crime victim the right to attend the trial "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). The CVRA goes on to provide that "[b]efore making a determination described in subsection (a)(3) [the victim attendance provision], 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." 18 U.S.C. § 3771(b)(1). These restrictive requirements for sequestering a victim are designed to assure that "in the vast majority of cases" crime victims will be able to attend the trial. 150 CONG. REC. S4268 (Apr. 22, 2004) (statement of Sen. Kyl).

Nonetheless, without acknowledging these limitations, the district judge's submission to this Court contained a seeming "preemptive strike" on this issue, through an assertion that the defendants' rights would be affected if the Parkers attended:

> In light of the testimony of the eight witnesses who have testified I have no doubt that if *any* of the witnesses is allowed to sit in the

> courtroom to listen before testifying, it will significantly impact the ability of any [or] all of the defendants to cross examine witnesses to point out lack of memory, bias, confusion, and any other matter inherent to the notion that cross examination and confrontation are the crucible in which the truth must be tested.

Dist. Ct. Opp. at 3-4 (emphasis added). The district judge went on to effectively state how he would rule if the issue of sequestering all of the victims were to be presented to him:

> I made no determination in my ruling regarding Rule 615, and in denying the government's request for reconsideration of whether the witnesses might have altered testimony if not excluded under Rule 615. If I am asked to make that determination *I would have to find*, by much more than clear and convincing evidence, after listening to eight lay witnesses try to remember times, dates, and places from as long as thirty or forty years ago, that allowing the witnesses to listen to other testimony before testifying would impact their memories and recall. This in turn would raise serious questions about the defendant's right to confrontation and cross examination.

Id. at 4 (emphasis added).

The district judge's analysis is unsettling to the Parkers for several reasons. First, the district judge seems to be implying that victim-witness sequestration issues raise "serious questions" about the constitutional rights of defendants. They raise no such questions at all. The defendants simply have no constitutional right to sequester the Parkers or, indeed, any witness. As the Seventh Circuit has explained, "A refusal to exclude . . . witnesses until they testify is not a denial of due process . . . . [T]he due process clause does not incorporate every refinement of legal

procedure designed to make trials fairer or more accurate . . . ." *See Bell v. Duckworth*, 861 F.2d 169, 170 (7th Cir. 1988). Similarly, the Fifth Circuit has summarily denied a challenge to a trial court's failure to sequester witnesses on the ground that failure to do so "does not amount to a deprivation of [the defendant's] constitutional rights." *Mathis v. Wainwright*, 351 F.2d 489, 489 (5th Cir. 1965). The Maryland Court of Appeals has agreed that "[n]othing in the constitution touches on the exclusion of witnesses during criminal trials." *Wheeler v. State*, 596 A.2d 78, 88 (Md. 1991). Numerous other courts have reached the same conclusion. *See* Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481, 520-34 (2005) (comprehensively reviewing the issue and concluding that "the bulk of the cases . . . hold that defendants have no constitutional right to exclude victims").

The defendants have no constitutional right to exclude witnesses because they have other ways to protect their interests. In particular, they have a right to cross-examine victims about whether attending the trial has affected their testimony and to argue that it has to the jury. This is all that the Constitution requires, because "[t]he Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to

whatever extent, the defense might wish." *United States v. Owens*, 484 U.S. 554, 559 (1988).

Second and more important to the Parkers, the district judge appears to have now fully prejudged the question of what would happen if the defendants were to make an argument that Parkers' testimony would be materially altered if they heard other testimony at trial. The Parkers have not been heard on this question below – because it was never raised below. Nonetheless, in his pleading to this Court submitted last night, the district judge stated that he has "no doubt" that if "any" of the witnesses is allowed to watch the trial, it would "significantly" impact the ability of the defendants to cross-examine them. Dist. Ct. Opp. at 3-4. Indeed, the district judge has also promised that he would "*have to*" find by '"much more than clear and convincing evidence" that the Parkers would have their memories and recall affected. *Id.*

The district judge's statements trouble the Parkers because he appears to be making a conclusion *en mass* about all victims, rather than making a narrowly tailored, victim-by-victim and testimony-by-testimony assessment that the CVRA calls for. He also appears to have fully decided how he would rule on the question – even before it has been raised and the Parkers have been heard. The CVRA was designed to create "broad rights," the significance of which should not 'be whittled

down or marginalized by the courts. . . . This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process" – 150 CONG. REC. S4269 (Apr. 22, 2004) (statement of Sen. Feinstein) – a congressional command that the district judge does not appear to be implementing.

Because of the district judge's statements, it appears to be the case that the Parkers are now entitled to have a decision on whether they could be sequestered decided by another judge who had not offered pronouncements on the issue before receiving an adversarial presentation on the issue. The Crime Victims' Rights Act guarantees all victims the right "to be treated with *fairness* and with respect for the victim's dignity . . . ." 18 U.S.C. § 3771(a)(8) (emphasis added). According to the Senate sponsors, these "broad rights" are "meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of due process." 150 CONG. REC. 4269 (Apr. 22, 2004). Due process is fundamentally about getting "a fair trial in a fair tribunal." *Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995). Due process notions of fairness are violated where the adjudicator "has prejudged, or reasonably appears to have prejudged, an issue." *Kenneally v. Lungren*, 967 F.2d 329, 333 (9th Cir. 1992) (internal quotation omitted).

This Court, however, need not reach that difficult issue of the appearance of prejudging the sequestration issue because the defendants have simply waived the right to present it. Consistent with this Court's obligation to "ensure" the protection of crime victims' rights, 18 U.S.C. § 3771(b)(1), this Court should therefore pretermit further litigation that could deprive the Parkers of their right to attend trial by holding that the defendants cannot belatedly raise the issue now.

In the district court, the defendants have waived their right to object by not responding to the Government's and the Parkers' briefs arguing that they should be allowed to attend the trial. *See* Parkers' Petn. at 19 n.5, 39 n.13 (explaining how the defendants have waived this argument by not challenging the Parkers' arguments in the district court). In this Court, the defendants have compounded their waiver below by declining to respond to the Parkers' specific argument that the issue had been waived. *See* Parkers' Petn. at 19 n.5.

The district judge is not empowered to *sua sponte* deprive crime victims like the Parkers of the important rights promised through the CVRA. To the contrary, the district court is obligated to "ensure" that crime victims receive their right and "shall make every effort to permit the fullest attendance possible by the victim." 18 U.S.C. § 3771(b)(1). Under the CVRA, a district judge can sequester a victim only after "receiving" clear and convincing evidence regarding material alteration of

testimony – a formulation that obviously implies that the defendants would have to give the evidence that the judge would "receive." Because the defendants have never offered any such evidence – and because the trial has already started and the defendants' opportunity for presenting this argument in a timely fashion has long since passed – the defendants should be barred from tardily presenting such a claim. Accordingly, the writ should issue directing the district court to admit the Parkers to the trial and to not permit further challenges to their right to attend.

CONCLUSION

The writ should to direct the district court to recognize the Parkers as "crime victims" with rights under the CVRA. The writ should also issue to direct the district court to find that the defendants have waived their right to argue that the Parkers' testimony would be "materially altered" if they heard other testimony at trial and that no further litigation on the Parkers' right to attend the trial is therefore allowed under the CVRA.

The Court should also publish its decision on this Petition, because the decision will answer important questions regarding which "crime victims" can obtain protections under the CVRA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of February, 2009 the foregoing Reply to Opposition to a Petition for a Writ of Mandamus Pursuant to the Crime Victim's Rights Act, 18 U.S.C. §3771(d)(3) was served upon the following by, pursuant to agreement with counsel, sending an electronic copy of the foregoing to the e-mail addresses indicated below:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)

The undersigned certifies that this Petition complies with the limitations contained in FRAP 21 and FRAP 32(a)(7)(B) because it contains 6,994 words, fewer than the 7,000-word limit for a 15-page document, according to the Wordperfect software that counsel employs.

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