

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-3009
(Cr. No. 09-243 (GEK))

IN RE AMY,

Petitioner.

RESPONSE OF THE UNITED STATES TO PETITION FOR WRIT OF MANDAMUS
PURSUANT TO THE CRIME VICTIMS' RIGHTS ACT

The United States of America, a party to the criminal case that gave rise to petitioner's mandamus petition, which is filed pursuant to the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, respectfully files this response to that petition. The government (1) submits that the traditional standard generally applicable to mandamus petitions is applicable to mandamus petitions brought pursuant to the CVRA, and thus that a writ of mandamus could issue here only if petitioner could show a "clear and indisputable right to relief," In re Brooks, 383 F.3d 1036, 1041 (D.C. Cir. 2004); (2) agrees with petitioner that the district court properly should have ordered the defendant to pay full rather than "nominal" restitution; and (3) submits that the district court's more limited restitution order does not amount to "clear and indisputable" error permitting the issuance of a writ of mandamus. In support of this response, the government respectfully submits the following.

I. Factual and Procedural Background

The petition arose from the criminal case of United States v. Michael M. Monzel, No. 09-243 (D.D.C. filed Sept. 24, 2009). Defendant Monzel pleaded guilty on December 10, 2009, to one count of distribution of child pornography, in violation of 18 U.S.C. § 2252(a)(2); and one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). See United States v. Monzel, - F. Supp. 2d -, 2010 WL 4261429, at *1 (D.D.C. 2010). Following the plea, the government received three requests for restitution from among the thirty identified victims portrayed in child pornography images possessed or distributed by defendant. Id. at *2. Petitioner was one of the claimant-victims, and was identified by the pseudonym "Amy" to protect her privacy. Id.¹

The government submitted the three requests (including petitioner's) to the district court, the Honorable Gladys Kessler, presiding. Monzel, 2010 WL 4261429, at *3. Defendant opposed the request, arguing that neither Amy nor any other identified victim was entitled to any restitution at all (Pet. Ex. 231). On October 22, 2010, the district court held that restitution was appropriate, but deferred ruling on the precise amount of restitution until that

¹ The specific series of child pornography images in which petitioner was depicted was referred to as the "Misty" series, and petitioner therefore was sometimes referred to as "Misty" in the district court. See Monzel, 2010 WL 4261429, at *2; Petitioner's Exhibits ("Pet. Ex.") 449.

issue could be more fully briefed. Id. at *10.

The government subsequently submitted a memorandum requesting that defendant be ordered to pay the full amount of petitioner's damages, namely \$3,134,332 (see Pet. Ex. 449). The government argued that, under 18 U.S.C. § 2259(b)(1), the court was required to order restitution for the "full amount of the victim's losses" (Pet. Ex. 451-52). Defendant, however, argued that the district court, if it awarded any restitution at all, should award only "nominal" restitution of \$100 for each claimant (id. at 472). In particular, defendant claimed that the government had failed to show what proportion of the damages to the victims had been caused by defendant himself (id. at 474).

In a written order entered on January 11, 2011, the district court denied the government's request that defendant pay petitioner the entire \$3,134,332 (Pet. Ex. 483). Instead, the district court agreed with defendant that the government had not shown how much of petitioner's losses were caused by defendant's possession of the child-pornography images depicting her (id. at 481). The trial court also held that it would not order joint and several liability in the case, because of the "substantial logistical difficulties in tracking awards made and money actually received" (id. at 483). Accordingly, the trial court ordered defendant to pay petitioner "nominal" restitution, in the amount of \$5,000 (id.).

Petitioner subsequently filed a petition for a writ of mandamus pursuant to the CVRA, asking this Court to order the district court to award the full amount of restitution requested by the government.

II. Statutory Framework

A. The Crime Victims' Rights Act (CVRA)

The CVRA, which grants crime victims the right, inter alia, to receive "full and timely restitution as provided by law," 18 U.S.C. § 3771(a)(6), also permits victims and the government to enforce those rights by filing a motion with the district court. 18 U.S.C. § 3771(d)(3). If the district court denies such a motion, then "the movant may petition the court of appeals for a writ of mandamus." Id.² The court of appeals "shall take up and decide such application forthwith within 72 hours after the petition has been filed." Id.

B. Mandatory Restitution for Victims of the Sexual Exploitation of Children

Although the question whether to order restitution lies within the discretion of the district court in most federal criminal cases, see 18 U.S.C. § 3663, restitution in "the full amount of the

² The government is also authorized to "assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates." 18 U.S.C. § 3771(d)(4).

victim's losses" is "mandatory" in cases involving the sexual exploitation of children. 18 U.S.C. § 2259. Section 2259 defines the "full amount of the victim's losses" broadly, to include medical services (including psychiatric and psychological care); physical and occupational therapy or rehabilitation; "necessary" transportation, temporary housing, and child care expenses; lost income; attorney's fees and other litigation costs; and "any other losses suffered by the victim as a proximate result of the offense." 18 U.S.C. § 2259(3). Section 2259 also provides that the district court may not decline to issue an order of restitution because of (1) the defendant's economic circumstances; or (2) the fact that the victim has received, or is entitled to receive, compensation for his or her injuries from any other source. 18 U.S.C. § 2259(b)(4)(B).

Section 2259 further provides that the order of restitution "shall be issued and enforced in accordance with [18 U.S.C. §] 3664." 18 U.S.C. § 2259(b)(2). Section 3664 in turn provides that "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of evidence," and places on the government the "burden of demonstrating the amount of the loss sustained by a victim as a result of the offense." 18 U.S.C. § 3664(e). The district court is also empowered to assign the "burden of demonstrating such other matters as the court deems

appropriate" on the party that the court determines "justice requires." Id. Finally, pursuant to 18 U.S.C. § 3664(h), where more than one defendant contributed to the victim's loss, the district court is authorized either to make each defendant liable for the full amount of the victim's loss or to apportion liability among the responsible defendants.

III. Argument

A. Standard of Review

As petitioner implicitly acknowledges (Pet. at 8-9), the traditional standard for issuance of a writ of mandamus requires "the party seeking the writ [to] demonstrate[] a clear and indisputable right to relief," see Brooks, 383 F.3d at 1041 (citation omitted). This is because mandamus is "an extraordinary remedy, to be reserved for extraordinary situations." Id. (citation omitted).

Petitioner claims, however, that because her mandamus petition was brought under the CVRA, the petition should be treated differently from other mandamus petitions, and should trigger "ordinary appellate review," namely de novo analysis of the restitution statute's application (Pet. at 9, 13). She argues that a different standard of review applies to mandamus petitions brought under the CVRA because (1) the CVRA mandates that the court

of appeals take up and decide the petition within 72 hours (*id.* at 7-8); (2) the CVRA requires that, in "any" court proceeding, the court shall "ensure" that a victim is afforded his or her rights under the CVRA (*id.* at 9); and (3) the legislative history of the CVRA "unequivocally demonstrates" that the CVRA was intended to grant crime victims ordinary appellate review of their claims (*id.* at 11). Petitioner's arguments are incorrect.

First, the CVRA's requirement that this Court "take up and decide" a mandamus petition within 72 hours does not imply that such a petition is governed by a standard different from the one generally applicable to the granting of mandamus relief. Although petitioner argues that the requirement of a decision means that Congress meant to abrogate the "discretionary" nature of traditional mandamus actions (Pet. at 7-8), petitioner misinterprets both the directive of Section 3771(d)(3) and what this Court has meant by the "discretionary" nature of mandamus relief. To begin with, the plain language of Section 3771(d)(3)'s requirement of a decision requires simply that: a decision. It requires this Court to decide whether to grant mandamus relief; it does not itself require or imply that this Court apply any particular standard of review to that decision.

Moreover, in the case cited by petitioner, In re Cheney, 406 F.3d 723, 729 (2005) (en banc), this Court held that the

"discretionary" decision whether to "issue" mandamus relief only comes after a mandamus petitioner "overcomes" the "hurdle[]" of showing a "clear and indisputable" right to relief. In other words, even if Section 3771(d)(3) overrode the traditionally "discretionary" nature of mandamus relief, it would still not override any of the other "hurdles" to that relief, see Cheney, 406 F.3d at 729.

Indeed, if petitioner were right that the statutory duty to decide CVRA mandamus petitions is incompatible with the deferential standards normally applicable to the granting of mandamus relief, then it would seem to follow that the statutory duty to decide would also be incompatible with other deferential standards applicable to ordinary appellate review, including the review of discretionary rulings only for abuse of that discretion and the review of factual rulings only for clear error.

Moreover, the 72-hour time limit imposed on this Court's decision comports with the traditional understanding that mandamus relief is an "extraordinary remedy" requiring a showing of "a clear and indisputable right to relief." Brooks, 383 F.3d at 1041. Under the traditional standard for mandamus petitions, the compressed 72-hour time limit is understandable, because resolving such petitions would not normally require extensive briefing or long deliberations; instead, this Court simply would decide whether

the district court had committed a clear and indisputable legal error. By contrast, it would be extraordinary to require full briefing by all of the parties and plenary appellate review by this Court within Section 3771(d)(3)'s compressed deadline, as would be necessary if traditional standards of mandamus review did not apply.

Second, for similar reasons, Section 3771(b)(1)'s directive that courts "ensure" that a crime victim be afforded his or her CVRA rights is not incompatible with application of traditional mandamus standards to mandamus petitions brought under the CVRA. Contrary to petitioner's argument, that limitation is no more "fatal[]" to victims' rights than any other standard of appellate review that involves deference to the decisions and findings of the district court. Again, if Section 3771(b)(1)'s use of the word "ensure" foreclosed typical standards of mandamus review, it would seem equally to foreclose other deferential standards applicable to direct appeals, including the abuse-of-discretion and clear-error standards.

Third, the legislative history petitioner cites simply does not "unequivocally demonstrate[]" (Pet. 11) that Congress intended mandamus proceedings pursuant to the CVRA to be governed by the standards applicable to direct appellate review. The cited statements made by two of the legislation's Senate co-sponsors show

only that a major purpose of the CVRA was to enable crime victims to obtain, in their own right, some sort of review by an appellate court of their claims (see id. at 11-12). Although those Senators occasionally referred to CVRA's creation of an avenue of "appeal" for crime victims, neither Senator addressed the applicable standard of review at all, much less stated that the traditional standards governing mandamus petitions were being abrogated (see id.).³

Instead, in light of Congress's specific selection in the CVRA of the mandamus procedure, a procedure in which is "accumulated the legal tradition and meaning of centuries of practice," this Court should presume, in the absence of compelling evidence to the contrary, that the CVRA intended to "adopt[] the cluster of ideas that were attached to [that term] in the body of learning from which it was taken." Morissette v. United States, 342 U.S. 246, 263 (1952). Thus, given the accumulated "body of learning" from over two centuries of precedent declaring the writ of mandamus "an extraordinary remedy . . . reserved for extraordinary situations," this Court should presume that Congress intended mandamus relief under the CVRA to require a showing of a "clear and indisputable"

³ Moreover, as the Supreme Court has noted, comments of individual Members of Congress, and statements from floor debates, are entitled to less weight in assessing legislative history than committee reports. Garcia v. United States, 469 U.S. 70, 76 (1984).

right to such relief. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

Petitioner cites published decisions from the Second, Ninth, and Eleventh Circuits, and an unpublished decision from the Third Circuit, in support of his claim that Congress intended the mandamus petition created by the CVRA to be decided under the principles governing ordinary appellate review. See Pet. at 9-10 (citing Kenna v. District Court, 435 F.3d 1011, 1017 (9th Cir. 2006); In re W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 562-63 (2nd Cir. 2005); In re Stewart, 552 F.3d 1285 (11th Cir. 2008); and In re Walsh, 229 Fed. Appx. 58 at *2 (3rd Cir. 2007) (unpublished)). These decisions, however, give insufficient weight to the basic fact that Congress, in establishing the specific procedure for crime victims to assert claims of error in an appellate court, specifically chose the writ of mandamus, and not "immediate appellate review" or "interlocutory appellate review." Nor did those decisions identify any convincing evidence in the CVRA's text or legislative history supporting the proposition that Congress intended to alter the traditional standards applicable to mandamus petitions.

By contrast, three other Circuits - the Fifth, Sixth, and Tenth - have properly focused on Congress's choice of the mandamus procedure, reflected in the CVRA's text itself, as incorporating

the traditional standards applicable to the granting of mandamus relief. See In re Dean, 527 F.3d 391, 394 (5th Cir. 2008); In re Acker, 596 F.3d 370, 372 (6th Cir. 2010); In re Antrobus, 519 F.3d 1123, 1128-29 (10th Cir. 2008). As the Tenth Circuit has concluded, neither the Second nor the Ninth Circuits, in their contrary opinions, explained why, if Congress really intended to create a form of direct appeal for crime victims, it would have chosen the highly specific word "mandamus" as opposed to the word "appeal." Antrobus, 519 F.3d at 1128. Moreover, Congress has shown that it knows how to create ordinary interlocutory appellate review (which, in essence, is what petitioner claims the mandamus procedure in the CVRA really is) when it wishes to do so. See id. at 1128-29 (citing the example of the Class Action Fairness Act, which created an accelerated interlocutory appeal of removal orders). Accordingly, Congress's deliberate selection of the mandamus procedure clearly shows that Congress was not simply creating an ordinary appeal by another name.

As the Tenth Circuit has also noted, the fact that the CVRA specifically provides the opportunity for mandamus relief to crime victims, but also expressly gives the government the right obtain ordinary appellate review of the same decision, see 18 U.S.C. § 3771(d)(4), invokes the "usual rule" of statutory interpretation, that "when the legislature uses certain language in one part of the

statute and different language in another," that "different meanings were intended." Antrobus, 519 F.3d at 1129. Thus, the mandamus procedure was simply not intended to serve as the equivalent of direct appellate review.

Petitioner argues that it would be "absurd to impute to Congress the intent that crime victims should have less ability to protect their own rights than the government" (see Pet. at 9 n.6), but in fact Congress expressly did just that when it set up the different review procedures of subsections (3) and (4) of Section 3771(d). Nor is this an "absurd" policy, in light of the fact that, before the CVRA's enactment, crime victims had no right to any sort of review before an appellate court. Congress may well have intended to preserve the government's right to conduct all aspects of a criminal prosecution, including the prosecution of an appeal, while creating a more limited right for non-parties to the case to intervene.

In sum, petitions for writs of mandamus under the CVRA, like other petitions for writs of mandamus, cannot properly be granted in the absence of a showing of a clear and indisputable right to relief.⁴

⁴ As petitioner states, she has also noted an appeal in this case (see Pet. at 12 n.8). Although this Court need not address the issue in deciding whether to grant petitioner's claim for mandamus relief, the government notes that in similar proceedings in other courts of appeals, it has taken the position

B. Analysis

The restitution order in this case does not constitute a clear and indisputable error permitting the issuance of a writ of mandamus. The petition must therefore be denied.

As the United States explained at length in its pleadings in the district court (Pet. Ex. 179-207, 376-390, 449-471), the position of the United States is that the district court should have granted petitioner's request for full restitution from defendant, holding defendant jointly and severally liable with other defendants whose similar crimes have also injured the victim. The district court correctly found that petitioner is a victim of defendant's crime, and that defendant's crime proximately caused injury to petitioner (Pet. Ex. 433-445). The district court declined to grant full restitution, however, because it was concerned that it could not determine with adequate certainty "the share of the harm for which the Defendant is responsible" (*id.* at 482; internal quotation omitted). The district court therefore imposed "nominal" restitution in the amount of \$5,000 (*id.* at 482-83).

that the CVRA creates no right of direct appeal for crime victims, and that a mandamus petition is the exclusive means for a crime victim to obtain review of a district-court order.

In our view, the better approach would have been for the district court to have held defendant jointly and severally liable for the total amount of harm defendant and other similar offenders have caused to petitioner, as is explicitly authorized under 18 U.S.C. §§ 3664(h) (where more than one defendant has contributed to loss to victim, court may make each defendant liable for full amount of injury or may apportion liability), 2259(b)(2) (incorporating section 3664). As petitioner persuasively explains (Pet. at 14-26; see also Pet. Ex. 179-207, 376-390, 449-471 (United States's district court submissions)), that approach best serves the purposes of the mandatory restitution provisions applicable to child-pornography offenses.⁵ Nevertheless, Section

⁵ Petitioner contends (Pet. at 19 n.11) that a defendant can be ordered to pay restitution under Section 2259 even if there is no showing that the defendant's offense proximately caused injury to the victim. We do not agree. See Pet. Ex. 190-201, 378-85. Section 2259(c) defines "a victim" as someone "harmed as a result of a commission of a crime under this chapter," and Section 2259(b)(3) defines "the full amount of the victim's losses" as including various specified costs and "any other losses suffered by the victim as a proximate result of the offense." See also 18 U.S.C. § 3664(e) (requiring district court to determine "the amount of the loss sustained by a victim as a result of the offense") (emphasis added). Taken together, these provisions indicate that, as many courts have held, a defendant cannot be ordered to pay restitution to a victim unless the defendant's conduct proximately caused some injury to the victim. See, e.g., United States v. Hardy, 707 F. Supp. 2d 597, 605-610 (W.D. Pa. 2010) (citing cases); see also Pet. Ex. 190-201, 436). In this case, however, the district court correctly held that defendant's offense did proximately cause injury to petitioner, and the issue is how to determine the amount of restitution that defendant should be required to pay.

3664(h) grants district courts discretion about how to proceed when more than one defendant has contributed to a victim's loss, and district courts around the country have reached different conclusions about the best way to proceed in child-pornography cases involving claims of restitution (see Pet. Ex. 463-69 (citing cases)).⁶

Because the district court's restitution ruling was an exercise of discretion, and because courts around the country have reached varying conclusions about how that discretion is best exercised, petitioner cannot make the showing necessary to justify issuance of a writ of mandamus. See, e.g., Baptist Mem'l Hosp. v. Sebelius, 603 F.3d 57, 63 (D.C. Cir. 2010) (provision using word "may" is "permissive rather than obligatory," and "cannot provide the 'clear duty to act' necessary to sustain the hospitals' requests for mandamus relief"); In re DRC, Inc., 358 Fed. Appx. 193, 194, 2009 WL 5125602, *1 (D.C. Cir. 2009) (unpublished) ("The

⁶ We agree with petitioner (see Pet. 21-22 n.12) that, if full restitution is not ordered, a district court judge, in determining the amount of restitution to order in a particular case, should appropriately be guided by Congress's decision to specify a minimum damages award of \$150,000 in civil actions brought by a victim, under 18 U.S.C. § 2255, against a defendant who possessed child pornography depicting the victim. The district court in this case provided little explanation for the \$5,000 figure it selected, other than to refer to that amount as "nominal" and to concede that the restitution it was ordering understated "the actual harm this particular Defendant caused each victim" (Pet. Ex. 482-483).

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writ will issue only to compel the performance of a clear nondiscretionary duty. The requirement of a clear duty is inimical to a discretionary determination that is vested in the district court.")(citations and internal quotation omitted); United States v. Horak, 833 F.2d 1235, 1250 (7th Cir. 1987) ("Because the court was able to cite conflicting authorities construing [the statute at issue,] we find that the government's position is, although persuasive, not 'indisputable.'").

CONCLUSION

WHEREFORE, the United States respectfully submits that the petition for a writ of mandamus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2011, I have caused a copy of the foregoing to be served by electronic means, through the Court's CM/ECF system, upon:

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I hereby certify that on January 27, 2011, I have caused a copy of the foregoing to be served by e-mail and first-class mail upon:

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I hereby certify that on January 27, 2011, I have caused a copy of the foregoing to be served by hand upon:

The Honorable Gladys Kessler
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Respondent

/s/

ROY W. MCLEESE III
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