UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-3009

IN RE AMY, PETITIONER

RESPONSE OF MICHAEL M. MONZEL TO PETITION FOR A WRIT OF MANDAMUS

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District Court
Cr. No. 09-243 (GEK)

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ISSUE PRESENTED

In the opinion of Respondent Michael A. Monzel, the following issue is presented:

Whether petitioner is entitled to mandamus relief where she has failed to establish that (1) she has a clear and indisputable right to relief and (2) there is no other adequate remedy available to her.

ARGUMENT

MANDAMUS RELIEF DOES NOT LIE IN THIS CASE BECAUSE THE DISTRICT COURT DID NOT CLEARLY AND INDISPUTABLY ERR IN DENYING PETITIONER THE FULL AMOUNT OF RESTITUTION SOUGHT WHERE NO EVIDENCE WAS PRESENTED TO ESTABLISH THE AMOUNT OF LOSSES PROXIMATELY CAUSED BY RESPONDENT'S OFFENSES AND BECAUSE THERE ARE ADEQUATE ALTERNATIVE MEANS TO OBTAIN THE RELIEF PETITIONER SEEKS

A. Standard Of Review

To secure mandamus relief, petitioner must demonstrate that 1) she has a "clear right to relief;" 2) the respondent has a " clear duty to act;" and 3) there is no other adequate remedy available to petitioner. Walpin v. Corporation For National And Community Services, et al., No. 10-5221, 2011 WL 9328, *2 (D.C. Cir. Jan. 4, 2011) (quoting Baptist Memorial Hospital v. Sebelius, 603 F.3d 57, 62 (D.C. Cir. 2010) (internal quotations omitted). See also Doe v. Exxon Mobil Corporation , et al., 473 F.3d 345, 353 (D.C. Cir. 2007) (courts will issue

mandamus only if petitioners' right to relief is "clear and indisputable" and if petitioners "lack adequate alternative means to obtain the relief they seek.").

As petitioner notes, there is a division among the circuits as to the appropriate standard for obtaining mandamus relief under the Crime Victims' Rights Act (CVRA). (Petition at 8-12) For the reasons explained below, this Court should apply its long-standing deferential standard of review of mandamus petitions for clear and indisputable errors only.

The Fifth, Sixth, and Tenth Circuits have held that the CVRA gives victims only deferential review for clear and indisputable errors. See In re: Amy, 591 F.3d 792, 793 (5th Cir. 2009); In re McNulty, 597 F.3d 344, 348-49 (6th Cir. 2010); In re Antrobus, 519 F.3d 1123, 1124 (10th Cir. 2008). In In re: Amy, which involved the same petitioner as in the instant case, the court stated that the standard of review was the "usual standard for mandamus petitions." 591 F.3d at 793. That standard is the same as the standard this Court has consistently applied in reviewing mandamus petitions. Petitioner has failed to establish that a different standard should apply for petitions filed pursuant to the CVRA.

Petitioner asks this Court to adopt a more lenient standard for § 3771(e) mandamus actions, in effect creating a form of appeal as a matter of right for victims aggrieved by a claimed violation of their § 3771 rights. For this

extraordinary proposition, petitioner relies on four cases: In re WR. Huff Asset Management Co., 409 F.3d 555 (2d Cir. 2005), Kenna v. United States District Court, 435 F.3d 1011 (9th Cir. 2006), In re: Stewart 552 F.3d 1285 (11th Cir. 2008), and an unpublished opinion from the Third Circuit, In re Walsh, 229 Fed.Appx. 58 (3d Cir. 2007).

Neither Stewart nor Walsh supports the Petitioner's position. In Stewart, the only statement concerning the standard for mandamus and its relationship to appeal is:

> The mandamus proceeding before us is a free standing cause of action, brought by persons claiming to be CVRA victims against the district judge who denied them the right to appear and be heard. That is, the proceeding is not an appeal of a district court judgment, nor is it an interlocutory appeal of an intermediate order.

552 F.3d at 1288.

If anything, Stewart is contrary to the petitioner's assertion that a § 3771(e) mandamus is akin to an appeal. The Stewart Court did not conduct a mandamus analysis because the error by the district court and the government (precluding victims of the defendant's crimes to appear and be heard, as required under 18 U.S.C. §3771(a)(4)), was clear and based on a clearly erroneous determination of the applicable law.

Walsh noted, in *dicta,* that § 3771 had a lower standard than traditional mandamus but the court conducted no analysis of what standard was to be applied. The court wrote:

> While mandamus relief is available under a different, and less demanding, standard under 18 U.S.C. § 3771 in the appropriate circumstances, *see* 18 U.S.C. § 3771(d)(3); Kenna v. U.S. Dist. Court, 435 F.3d 1011,1017 (9th Cir. 2006); In re W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 562 (2nd Cir. 2005), neither it, nor the other relief Walsh requests under § 3771, is available to Walsh here. Even assuming that Walsh is a crime victim for whom mandamus and other relief is available under *§ 3771* (a generous assumption, *see* 18 U.S.C. § 3771(e) (defining "crime victim")), Walsh applies for relief in the wrong court. See *id.* at § 3771(d)(3). As Walsh is not entitled to a writ of mandamus under § 3771 or otherwise, he is not entitled to summary action on his mandamus petition.

229 F. App'x. at 60-61.

Thus, regardless of the mandamus standard to be applied, the holding in Walsh was that the court of appeals lacked jurisdiction because he did not seek relief in the district court before filing in the court of appeals.

In Huff, the Second Circuit analogized § 3771(e) mandamus with the right of appeal. 409 F.3d, at 562.[1] The Kenna Court likewise treated § 3771(e)

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[1] "Congress has chosen a petition for mandamus as a mechanism by which a crime victim may appeal a district court's decision denying relief sought under the provisions of the CVRA. See 18 U.S.C. § 3771(d)(3) ("the movant may petition the court of appeals for a writ of mandamus"); § 3771(d)(5)(B) ("A victim may make a motion to re-open a plea or sentence only if... the victim petitions the

mandamuses as a form of appeal. 435 F.3d, at 1017.[2]

The enforcement scheme in 18 U.S.C. §3771, however, does not provide an express right of appeal for crime victims. United States v. Hunter, 548 F.3d 1308 (10th Cir. 2008). "[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 19 (1979). This is especially so when the statute contains a "carefully crafted and detailed enforcement scheme" because such a scheme "provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." Mertens

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court of appeals for a writ of mandamus within 10 days ...."). It is clear, therefore, that a petitioner seeking relief pursuant to the mandamus provision set forth in § 3771 (d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus."

[2] "[W]e need not balance the usual *Bauman* factors because the CVRA contemplates active review of orders denying victims' rights claims 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. We thus need not balance the *Bauman* factors in ruling on mandamus petitions brought under the CVRA; rather, we must issue the writ whenever we find that the district court's order reflects an abuse of discretion or legal error."

v. Hewitt Associates, Inc. 508 U.S. 248, 254 (1993) (citation omitted).

Section 3771 is one such example of this axiom. Section 3771(d)(3) explicitly describes how the *movant*, which may be the victim or the government, may seek mandamus relief if a district court denies one of the crime victim's rights. Section 3771 (d)(4) however states that in any appeal in a criminal case, the *Government* may assert as error the district court's denial of any crime victims' rights in the proceeding to which the appeal relates.

The use of "movant" in (d)(3) and "Government" in (d)(4) clearly was not accidental. Section 3771(d)(3) demonstrates that Congress knows how to confer a particular right on both "victims" and "the government" when it desires to do so, and Section 3771(d)(4) shows Congress also knows how to differentiate between "victims" and "the government." If Congress had intended to give victims (and not merely the government) the right to appeal, it would have referred to the "movant" in Section 3771(d)(4), just as it did in Section 3771(d)(3). The omission of "movant" from Section 3771(d)(4), therefore, must be presumed to have been deliberate and intentional. See Rusello v. United States, 464 U.S. 16, 23 (1983)("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or

exclusion.").

Congress is familiar with the difference between appeal and mandamus. Compare the Mandamus Act, 28 U.S.C. § 1361, and the All Writs Act, 28 U.S.C. § 1651 with 28 U.S.C. § 1291 (granting jurisdiction to the courts of appeals for direct appeals from federal district courts). Congress knows the difference between a writ of mandamus and appeal. If Congress had desired to grant victims the right to appeal purported denials of their rights under § 3771, including restitution orders, it knew how to do so. Instead, it chose a vehicle with a long history, the writ of mandamus. Congress knew the requirements for writs of mandamus. If it sought to abolish some or all of them, it had the ability to do so.

This Court should follow the lead of the Fifth Circuit in a case involving this petitioner, as well as the Sixth and Tenth Circuits, and apply its usual deferential standard of mandamus review in this case.

B. Petitioner Has Failed To Demonstrate A Clear And Indisputable Right To Full Restitution In This Case

The Court should deny mandamus relief in the first instance because the record establishes that the district court did not clearly and indisputably err in denying petitioner full restitution. As the district judge noted, "issues raised in determining restitution under the MVRA have spawned a huge amount of District

Court litigation throughout the country – probably well over 50 opinions have been issued, all detailed and thoughtful . . . [and] [i]t is telling that the legal analyses and the final outcomes reached vary significantly in these cases." Restitution Order filed 1/11/11 in United States v. Monzel, Cr. No. 09-243 (GK) (hereinafter "Order"), at 1. Of those "well over 50" opinions, only one granted the relief Amy seeks here, full restitution for her losses. The remainder of the courts have either denied Amy's restitution request in its entirety,[3] or only partially granted Amy's restitution request.[4]

The district court held extensive hearings on the restitution issue in this case. It also received extensive briefs from the parties. Neither the government

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[3] See United States v. Woods, 698 F. Supp 2d 1102, (N.D. Iowa 2010) United States v. Paroline, 672 F. Supp. 2d 781, (E.D. Texas 2009) United States v. Berk, 666 F .Supp. 2d 182 (D. Maine 2009) United States v. Axon, 689 F. Supp. 2d 1344 (S.D. Florida, February 5, 2010)(Vicky and Amy); United States v. Simon, 2009 WL 2424673 (N.D. California, Aug. 7, 2009) (Amy); United States v. Van Brickle, 2009 WL 4928050 (N.D. Georgia, Dec. 17, 2009)(Vicky and Amy); United States v. Carter, (D. Hawaii, No. 08-cr-579, October 29, 2009)(Amy); United States v. Near (D. Montana, No. CR 08-02, Dec. 14, 2009)(Vicky). See also United States v. Cook, No. 4:08-cr-24 (D. Alaska Sept. 9, 2009); United States v. Raplinger, 2007 WL 3285802 (N.D. Iowa Oct. 9, 2007).

[4] See United States v. Hardy, 707 F. Supp. 2d 597 (W.D. Pa. April 19, 2010);United States v. Hicks, 2009 WL 4110260 (E.D. Va. Nov. 24, 2009); United States v. Aumais, 2010 WL 3033821 (N.D.N.Y. Jan. 13, 2010); United States v. Ferenci, 2009 WL 2579102 (E.D. Cal. Aug. 19, 2009); United States v. Brunner, 2010 WL 148433 (W.D.N.C. Jan. 12, 2010).

nor petitioner made any effort to show what portions of the total $3,367,854 claimed as restitution was specifically caused by Mr. Monzel's possession of petitioner's images. In fact, the court specifically found that "the Government failed to submit any evidence whatsoever 'as to what losses were caused by Defendant's possession of the [victim's] images.'" Order, p.3 (quoting United States v. Church, 701 F.Supp. 2d 814, 832 (W.D. Va. 2010)).

Both petitioner and the government took an "all or nothing" approach to the determination of the amount of restitution. While determining the amount of restitution to be awarded in any case is an inexact science, district courts must have *some* evidence to make a reasonable determination of the proper amount of restitution. In doing so, it must limit the restitution order to losses proximately caused by the specific conduct underlying the offense of conviction. In re: Amy, 591 F.3d at 794 (noting that courts around the country have applied proximate cause requirement in imposing restitution and finding that correctness of petitioner's claim that such requirement does not exist under restitution statute was "neither clear nor indisputable").

In the present case, the district court found that Mr. Monzel's conduct was a proximate cause of petitioner's losses but noted that "the amount of the victim's loss is a separate and distinct issue from a defendant proximately caused harm to

them." Order, p. 3. The court then found that the government utterly failed to present evidence to demonstrate what proportion of petitioner's total harm was proximately caused by Monzel's offense. Order, p. 3. There was no evidence before the court as to the incremental loss to petitioner resulting from Mr. Monzel's offense conduct. Thus, the district judge concluded that petitioner was entitled to nominal damages only. As in In re: Amy, 591 F.3d at 795, the district court's ruling here "reflects careful and thoughtful consideration of the law and facts, as well as sensitivity to Amy and other victims of child pornography." Because the lower court's findings are completely supported by the record, there is no basis for this Court to hold that the district judge had a "clear duty" to award petitioner full restitution or that the court clearly and indisputably erred in denying full restitution. Accordingly, the mandamus petition must be denied on that ground alone.

C. Other Adequate Remedies Are Available To Petitioner

In the instant case, the government and the petitioner are taking the identical position that petitioner is entitled to full restitution. Therefore, petitioner's interests will be protected by the government in the pending direct appeal of Mr. Monzel's conviction and sentence (No. 11-3008). *See* 18 U.S.C. § 3771(d)(4) (providing that in any appeal in a criminal case, the government "may assert as

error the district court's denial of any crime victim's right in the proceeding in which the appeal relates."). In that respect, this case is unlike Stewart where the government actively opposed the victim's right to be heard, both in the trial court and in the court of appeals. 552 F.3d at 1287, 1289. Thus, in Stewart, a government appeal was insufficient to protect the rights of those seeking mandamus relief because the government took a position directly contrary to theirs. The opposite is true here.

Moreover, on January 21, 2011, petitioner filed her own notice of appeal from the district court's restitution order and this Court has docketed that case and assigned it Case Number 11-3008. Indeed, petitioner has now moved this Court to consolidate that appeal with her mandamus petition proceeding. To the extent petitioner is permitted to proceed with her appeal in the criminal case, she will be able to assert her rights independent of the government. Therefore, petitioner's pending appeal in the criminal case is another adequate remedy that dictates that her mandamus petition be denied.

Finally, petitioner has a statutory civil remedy for her particular losses under 18 U.S.C. § 2255, which enables her to pursue a civil cause of action against Mr. Monzel for damages. Accordingly, there are a number of adequate remedies other than mandamus available to petitioner. Under these circumstances, the petition

should be denied on that ground, as well.

D. Prudential Reasons Exist To Deny Mandamus Relief In This Case

First and foremost, this Court should deny the mandamus petition because petitioner has failed to demonstrate her clear right to relief, the district court's clear duty to award her full restitution, or that no other adequate remedies are available to her. In addition to those grounds for denial of the petition, mandamus relief is not appropriate here for prudential reasons. As petitioner acknowledges in her filings in this case, the mandamus petition asks this Court to decide two issues of first impression in this Circuit – the standard of review for CVRA mandamus petitions – an issue on which the circuits are split – and the substantive issue of whether a child pornography victim is entitled to restitution only for the amount of her losses proximately caused by the defendant's offense conduct or, as petitioner argues, whether causation is not required for the victim to receive full restitution for all losses, not limited to losses proximately caused by the defendant's individual acts.[5]

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[5] The one reported decision supporting petitioner's position, United States v. Staples, 2009 WL 2827204 (S.D. Fla. Sept. 9, 2009), is an outlier in that it is a four-page opinion devoid of any legal analysis of the issue. Significantly, every subsequent reported case to address the issue has declined to follow Staples and has either denied restitution entirely or awarded a nominal amount, as the district court did here.

Issues of such complexity and consequence are not appropriately decided in a mandamus proceeding – especially, given the incredibly small window in which the Court has to rule on the petition under § 3771(d)(3). While the tight deadlines in § 3771(d)(3) might be appropriate when an appellate court is asked to apply settled law or mere questions of fact, they are inappropriate when the court is making a legal determination involving issues of first impression. Rather than mandamus, the direct appeal of the criminal case is the proper forum for the Court to resolve these thorny issues. Deciding these issues on direct appeal rather than on mandamus - with such a short deadline - would give the Court the benefit of full, well-developed briefing by all parties to the pending criminal appeal and the opportunity to hear and consider oral arguments. Accordingly, this Court should deny mandamus relief on prudential grounds, as well.

CONCLUSION

For the foregoing reasons, Respondent Michael A. Monzel respectfully requests that the Court deny the mandamus petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I filed the foregoing Response Of Michael M. Monzel To Petition For A Writ Of Mandamus with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/EFC system on January 27, 2011.

Assistant U.S. Attorney Roy W. McLeese, III, roy.mcleese@usdoj.gov, counsel for respondent United States of America; and Paul Cassell, cassellp@law.utah.edu, counsel for petitioner, who are registered CM/ECF users, will be served by the appellate CM/ECF system.

/s/

NEIL H. JAFFEE