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MANDAMUS MUDDLE: THE MANDAMUS REVIEW STANDARD FOR THE FEDERAL CRIME VICTIMS' RIGHTS ACT

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I. INTRODUCTION

Over forty years ago, a renewed focus on crime victim rights began to emerge in this country. During the following years, every state enacted legislative provisions addressing crime victim rights and a majority of states adopted constitutional provisions concerning victim rights. Congress enacted several laws addressing aspects of crime victim rights, but efforts to initiate a federal constitutional amendment regarding crime victim rights proved unsuccessful.¹ In 2004, following another unsuccessful constitutional amendment effort, Congress enacted the Crime Victims' Rights Act ("CVRA") to strengthen and expand crime victim rights in the federal criminal justice system and to serve as a model for state criminal justice systems. Unlike past federal crime victim-related statutory enactments, the CVRA was designed to bring together the "critical components [of] rights, remedies, and resources."²

Included in the CVRA enforcement mechanisms is the authority for a crime victim, or the prosecutor on the victim's behalf, to petition the applicable court of appeals for a writ of mandamus if a trial judge denies relief to the victim pursuant to the CVRA.³ In the ten years since the enactment of the CVRA, petitioners have filed over 70 mandamus petitions pursuant to the statute. The appellate courts have denied or dismissed the majority of these petitions.⁴ In resolving the mandamus petitions, the federal appellate circuits have adopted a variety of review standards, resulting in a clear conflict among the circuits in the interpretation of this aspect of the CVRA.⁵

This Article examines the legislative history of the CVRA mandamus provision, and the varied review standards that the federal appellate courts have adopted to resolve CVRA mandamus petitions.⁶ It also analyzes the issues raised and outcomes in the CVRA mandamus petitions reviewed thus far.⁷ Finally, the Article discusses the impact—or lack thereof—that the differing review standards have had on the outcomes of the mandamus petitions filed pursuant to the CVRA.⁸

¹ See generally PEGGY M. TOBOLOWSKY ET AL., CRIME VICTIM RIGHTS AND REMEDIES 5–13 (2d ed. 2010).

² See *id.* at 12; see also 150 CONG. REC. S4,261–62 (daily ed. Apr. 22, 2004) (statement of Sen. Dianne Feinstein); 150 CONG. REC. S4,266 (daily ed. Apr. 22, 2004) (statement of Sen. Jon Kyl). The CVRA, formally designated as the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, was included as Title I in the Justice for All Act of 2004. Pub. L. No. 108-405, § 102(a), 118 Stat. 2260, 2261–63 (codified as amended at 18 U.S.C.A. § 3771 (West Pamp. 2014)).

³ See 18 U.S.C.A. § 3771 (d)(1), (d)(3).

⁴ See *infra* CVRA Mandamus Outcomes Table; *infra* notes 193–428 and accompanying text (discussing CVRA petitions and outcomes).

⁵ See *infra* notes 46–192 and accompanying text (discussing the review standards).

⁶ See *infra* notes 9–32, 46–192 and accompanying text.

⁷ See *infra* notes 193–428 and accompanying text.

⁸ See *infra* notes 429–64 and accompanying text. It is not the purpose of this Article to assess which of the appellate circuits has "correctly" interpreted the CVRA mandamus review provisions. Cf. *Crime Victims Rights Act of 2004: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 46–47, 49–50 (2009) (testimony and statement of Douglas E. Beloof, Professor of Law, Lewis and Clark Law School); 157 CONG. REC. S7,359–60 (daily ed. Nov. 10, 2011) (letter of Assistant Attorney General Ronald Weich discussing, in part, the CVRA mandamus review standard); 157 CONG. REC. S3,607–09 (daily ed. June 8, 2011) (letter of Sen. Jon Kyl discussing, in part, the CVRA mandamus review standard); David E. Aaronson, *New Rights and Remedies: The Federal Crime Victims' Rights Act of 2004*, 28 PACE L. REV. 623, 664–65, 668–72 (2008); Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. U. L. REV. 599 (2010); Paul G. Cassell & Steven Joffee, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims Rights' Act*, 105 NW. U. L. REV. COLLOQUY 164 (2011); Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims Rights' Act*, 9 LEWIS & CLARK L. REV. 581, 618–20 (2005); Steven Joffee, Note, *Validating Victims: Enforcing Victims' Rights through Mandatory Mandamus*, 2009 UTAH L. REV. 241; Julie Kaster, Note,

II. CONGRESS ADOPTS THE CVRA MANDAMUS ENFORCEMENT MECHANISM

More than twenty years before the enactment of the CVRA, Congress began enacting significant crime victim-related legislation, including provisions addressing victim restitution and compensation and aspects of victim participation in criminal justice proceedings (e.g., inclusion of victim impact statements in presentencing information).⁹ Included in this legislation is the Victims' Rights and Restitution Act of 1990 in which Congress codified a statutory list of rights for federal crime victims.¹⁰ Pursuant to this legislation, officers and employees of federal agencies and departments involved in the "detection, investigation, or prosecution of crime shall make their best efforts to see that victims of crime are accorded" the seven rights identified in the statute: 1) to notice of court proceedings; 2) to confer with the prosecutor; 3) to be present at public court proceedings regarding the crime (subject to potential limitations); 4) to reasonable protection from the accused; 5) to be treated with fairness and respect for the victim's dignity and privacy; 6) to restitution; and 7) to information about the offender's conviction, sentencing, imprisonment, and release.¹¹ This statute required only "best efforts" to provide the enumerated rights and contained no enforcement mechanism.¹²

When Congress repealed this victim rights provision and replaced it with the CVRA provisions in 2004, it not only expanded the statutory list of federal crime victim rights, but also added enforcement provisions designed to ensure the rights.¹³ The federal crime victim rights provided by the CVRA are:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

The Voices of Victims: Debating the Appropriate Role of Fraud Victim Allocution Under the Crime Victims' Rights Act, 94 MINN. L. REV. 1682, 1690–1702 (2010); Danielle Levine, Note and Comment, *Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution*, 104 NW. U. L. REV. 335 (2010) (discussing the CVRA mandamus review standard). Ultimately, either Congress or the United States Supreme Court must resolve the conflict in interpretation that has developed. The focus of this Article is to identify the nature of the conflict in the circuits that has developed, analyze the outcomes in CVRA mandamus cases reviewed thus far, and discuss any impact that the interpretation conflict may have had on the outcomes of these CVRA mandamus petitions.

⁹ See TOBOLOWSKY ET AL., *supra* note 1, at 11–12. See generally U.S. GOV'T ACCOUNTABILITY OFFICE, CRIME VICTIMS' RIGHTS ACT: INCREASING AWARENESS, MODIFYING THE COMPLAINT PROCESS, AND ENHANCING COMPLIANCE MONITORING WILL IMPROVE IMPLEMENTATION OF THE ACT 14–17, 113–16 (2008) (describing federal victim-related legislation).

¹⁰ See Pub. L. No. 101-647, § 502, 104 Stat. 4789, 4820 (1990) (codified at 42 U.S.C. § 10606, *repealed* by Pub. L. No. 108-405, § 102(c), 118 Stat. 2260, 2264 (2004)). This legislation also contained a provision identifying required services to federal crime victims, including notification of specified prosecution proceedings and post-conviction events and information regarding available assistance. See Pub. L. No. 101-647, § 503, 104 Stat. 4789, 4820–22 (1990) (codified as amended at 42 U.S.C.A. § 10607 (West 2013)).

¹¹ 42 U.S.C. § 10606 (repealed 2004).

¹² *Id.*

¹³ Compare 18 U.S.C.A. § 3771 (West Pamp. 2014), with 42 U.S.C. § 10606 (repealed 2004).

- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.¹⁴

Unlike the predecessor victim rights statute, Congress also included a definition of the "crime victim" eligible to assert the CVRA victim rights, i.e., a "person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia."¹⁵ Designated representatives can assert CVRA rights on behalf of crime victims who are minors, incompetent, incapacitated, or deceased.¹⁶

When the CVRA was introduced in Congress, Senator Dianne Feinstein, one of its primary co-sponsors, articulated the importance of the CVRA's enforcement provisions:

We have written a bill that we believe is broad. We have written a bill that provides an enforcement remedy: namely, the writ of mandamus.

This part of the bill is what makes this legislation so important, and different from earlier legislation: It provides mechanisms to enforce the set of rights provided to victims of crime.

These mechanisms fall into four categories:

A direction to our courts that they "shall ensure that the crime victim is afforded the rights described in the law."

A direction to the Attorney General of the United States to take steps to ensure that our Federal prosecutors "make their best efforts" to see that crime victims are aware of, and can exercise these rights.

¹⁴ 18 U.S.C.A. § 3771(a); cf. S. 2329, 108th Cong. (2004); H.R. 5107, 108th Cong. (2004) (reflecting articulation of these rights in the underlying bills, as initially introduced in each chamber of Congress). By comparison, the victim rights constitutional amendment that was under consideration at the time of the CVRA's enactment provided the following rights:

the right to reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused; the rights not to be excluded from such public proceeding and reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings; and the right to adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender.

S.J. Res. 1, 108th Cong. (2003); H.R.J. Res. 48, 108th Cong. (2003); see S. REP. NO. 108-191, at 33-41 (2003).

¹⁵ Compare 18 U.S.C.A. § 3771(e), with 42 U.S.C. § 10606 (repealed 2004). Although there was no crime victim definition in the previous victim rights statute, the accompanying victim services provision defined "victim" for purposes of that section as a "person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime." 42 U.S.C.A. § 10607(e). By comparison, the victim rights constitutional amendment that was under consideration at the time of the CVRA's enactment was limited to victims of "violent crime." See S.J. Res. 1, 108th Cong. (2003); H.R.J. Res. 48, 108th Cong. (2003); S. REP. NO. 108-191, at 30-32 (2003).

¹⁶ 18 U.S.C.A. § 3771(e); cf. 42 U.S.C.A. § 10607.

A specific statement that the victim of a crime, or their representative, may assert these rights; the result is that, for the first time victims will have clear standing to ask our courts to enforce their rights.

And a new use of a very old procedure, the writ of mandamus. This provision will establish a procedure where a crime victim can, in essence, immediately appeal a denial of their rights by a trial court to the court of appeals, which must rule “forthwith.” Simply put, the mandamus procedure allows an appellate court to take timely action to ensure that the trial court follows the rule of law set out in this statute.

These procedures, taken together, will ensure that the rights defined in the first section are not simply words on paper, but are meaningful and functional.¹⁷

Senator Feinstein subsequently engaged in a colloquy on the Senate floor regarding the mandamus provision with Senator Jon Kyl, the other primary co-sponsor of the legislation:

Mrs. FEINSTEIN. ... I now want to turn to another critical aspect of enforcement of victims’ rights, section 2, subsection (d)(3). This subsection provides that a crime victim who is denied any of his or her rights as a crime victim has standing to appellate review of that denial. Specifically, the provision allows a crime victim to apply for a writ of mandamus to the appropriate appellate court. The provision provides that court shall take the writ and shall order the relief necessary to protect the crime victim’s right. This provision is critical for a couple of reasons. First, it gives the victim standing to appear before the appellate courts of this country and ask for review of a possible error below. Second, while mandamus is generally discretionary, this provision 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.

Mr. President, does Senator KYL agree?

Mr. KYL. Absolutely. 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. For a victim’s right to truly be honored, a victim must be able to assert the rights in trial courts, to then be able to have denials of those rights reviewed at the appellate level, and to have the appellate court take the appeal and order relief. By providing for all of this, this bill ensures that victims’ rights will have meaning.¹⁸

¹⁷ 150 CONG. REC. S4,261–62 (daily ed. Apr. 22, 2004) (statement of Sen. Dianne Feinstein); *see* S. 2329, 108th Cong. (2004); 150 CONG. REC. S4,279 (daily ed. Apr. 22, 2004) (text of bill).

¹⁸ 150 CONG. REC. S4,270 (daily ed. Apr. 22, 2004) (statements of Sens. Dianne Feinstein and Jon Kyl); *see also* 150 CONG. REC. S4,271 (daily ed. Apr. 22, 2004) (statement of Sen. Patrick Leahy); 150 CONG. REC. S4,230 (daily ed. Apr. 21, 2004) (statement of Sen. Patrick Leahy) (referencing the inclusion of the mandamus enforcement mechanism in the proposed legislation).

The mandamus provision, as introduced in the Senate and as passed there with almost no opposition, stated:

If a Federal court denies any right of a crime victim under this chapter or under the Federal Rules of Criminal Procedure, the Government or the crime victim may apply for a writ of mandamus to the appropriate court of appeals. The court of appeals shall take up and decide such application forthwith and shall order such relief as may be necessary to protect the crime victim's ability to exercise the rights.¹⁹

The proposed Senate legislation also authorized the Government, in any appeal in a case, to assert as error the trial court's denial of any crime victim's right in the underlying criminal proceeding.²⁰

After passage in the Senate, the House of Representatives included the crime victim rights provisions in a broader piece of legislation.²¹ Without specifically articulating their rationale, the chamber's sponsors made some slight revisions to the mandamus provisions in their introduced version of the proposed legislation:²²

The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide such motion forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five day [sic], or affect the defendant's right to a speedy trial, for purposes of enforcing this chapter.²³

In addition to the mandamus procedure, the House of Representatives retained the additional option in the Senate bill for the Government to assert a trial court's denial of a victim's right as error in a criminal appeal in the underlying case.²⁴ On the other hand, the House of Representatives version of the bill preserved or expanded some Senate limitations on remedies regarding victim rights violations, including prohibition of a cause

¹⁹ S. 2329, 108th Cong. (2004); *see* 150 CONG. REC. S4,279 (daily ed. Apr. 22, 2004) (reflecting text of the bill and 96 favorable votes, 1 unfavorable vote, and 3 members not voting).

²⁰ S. 2329, 108th Cong. (2004); 150 CONG. REC. S4,279 (daily ed. Apr. 22, 2004) (text of bill).

²¹ *See* Justice for All Act of 2004, Pub. L. No. 108-405, § 102(a), 118 Stat. 2260, 2261-63 (codified as amended at 18 U.S.C.A. § 3771).

²² *See* H.R. 5107, 108th Cong. (2004); H.R. REP. NO. 108-711, at 10 (2004); *id.* at 122-24 (statements of Rep. James Sensenbrenner).

²³ H.R. 5107, 108th Cong. (2004) (as introduced on September 21, 2004); *see* 150 CONG. REC. H8,180 (daily ed. Oct. 6, 2004) (text of bill); *see also* 150 CONG. REC. H8,188 (daily ed. Oct. 6, 2004) (statement of Rep. James Sensenbrenner).

²⁴ *See* H.R. 5107, 108th Cong. (2004) (as introduced on September 21, 2004); *see* 150 CONG. REC. H8,180 (daily ed. Oct. 6, 2004) (text of bill).

of action for damages or grounds for a new trial.²⁵ The House of Representatives bill also stated that none of its provisions should be construed to impair prosecutorial discretion.²⁶

Prior to passage in the House of Representatives, Representative James Sensenbrenner, the bill's manager, offered some amendments to the mandamus provision:

The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.²⁷

In his remarks on the floor of the House of Representatives, and consistent with the legislation's provision that both the crime victim and the prosecutor may assert the specified victim rights, Representative Sensenbrenner stated that the crime victim or the Government can pursue the writ of mandamus remedy to "ensure that the crime victim's rights are protected."²⁸ In addition to the mandamus amendment, Representative Sensenbrenner proposed an amendment that would permit a crime victim to move to reopen a plea or sentence if 1) the victim had asserted a right to be heard before or during the plea or sentencing proceeding and this right was denied; 2) the victim petitioned the appellate court for a writ of mandamus within ten days; and 3) the accused had not entered a plea to the highest offense charged.²⁹

The CVRA, as amended in the House of Representatives, was overwhelmingly passed in the House of Representatives³⁰ and subsequently passed in the Senate by unanimous consent.³¹ President George Bush signed the CVRA into law on October 30, 2004.³²

²⁵ Compare H.R. 5107, 108th Cong. (2004) (as introduced on September 21, 2004), and 150 CONG. REC. H8,180 (daily ed. Oct. 6, 2004) (text of bill), with S. 2329, 108th Cong. (2004), and 150 CONG. REC. S4,279 (daily ed. Apr. 22, 2004) (text of bill).

²⁶ See 150 CONG. REC. H8,180 (daily ed. Oct. 6, 2004) (text of bill).

²⁷ Compare 150 CONG. REC. H8,180 (daily ed. Oct. 6, 2004) (text of bill as introduced), with 150 CONG. REC. H8,195 (daily ed. Oct. 6, 2004) (amendments offered by Rep. James Sensenbrenner).

²⁸ 150 CONG. REC. H8,188 (daily ed. Oct. 6, 2004) (statement of Rep. James Sensenbrenner); see 150 CONG. REC. H8,180 (daily ed. Oct. 6, 2004) (text of bill as introduced).

²⁹ See 150 CONG. REC. H8,195 (daily ed. Oct. 6, 2004) (amendments offered by Rep. James Sensenbrenner). After enactment of the CVRA, the time period in which the crime victim must seek mandamus relief was amended and extended to 14 days. See 18 U.S.C.A. § 3771(d)(5) (West Pamp. 2014).

³⁰ See 150 CONG. REC. H8,204, H8,208–09 (daily ed. Oct. 6, 2004) (reflecting 393 favorable votes, 14 unfavorable votes, and 25 members not voting). See generally *All Actions: H.R. 5107 108th Congress (2003-2004)*, CONGRESS.GOV, <https://www.congress.gov/bill/108th-congress/house-bill/5107/all-actions-with-amendments> (last visited Sept. 23, 2014).

³¹ See 150 CONG. REC. S10,910–17 (daily ed. Oct. 9, 2004). Senator Jon Kyl, one of the CVRA's primary Senate co-sponsors, offered additional remarks about the CVRA provisions similar to those he and Senator Dianne Feinstein made when the CVRA was introduced, including statements regarding the importance of the mandamus and direct appeal by the Government provisions. See 150 CONG. REC. S10,910–13 (daily ed. Oct. 9,

III. THE FEDERAL APPELLATE COURTS ADOPT CVRA MANDAMUS REVIEW STANDARDS

A. *Writ of Mandamus General Principles*

The writ of mandamus is part of the common law heritage that shaped American jurisprudence.³³ In its landmark decision addressing the issuance of a writ of mandamus in *Marbury v. Madison*,³⁴ the United States Supreme Court (the “Court”) quoted Blackstone’s mandamus definition:

a command issued in the King’s name from the court of King’s Bench, and directed to any person, corporation, or inferior court of judicature within the King’s dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of King’s Bench has previously determined, or at least supposed, to be consonant to right and justice.³⁵

In considering its authority to issue the requested writ of mandamus, the *Marbury* Court also noted that “to render the mandamus a proper remedy,” the person to whom the writ is directed must be a legally appropriate subject of the writ and the person seeking the writ must be “without any other specific and legal remedy.”³⁶ Further, the propriety of the issuance of the writ is determined by the “nature of the thing to be done.”³⁷ For example, the Court noted that mandamus would not be an appropriate remedy regarding acts pursuant to executive discretion.³⁸

Over one hundred years after *Marbury*, the Court reviewed its mandamus jurisprudence in *Roche v. Evaporated Milk Association*.³⁹ In determining that the federal appellate court had improperly issued a writ of mandamus, the *Roche* Court noted that the “traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.”⁴⁰ The Court further noted that the function of mandamus is to correct “an abuse of judicial power, or refusal to exercise it.”⁴¹ Finally, because “common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court,” the Court’s review of the lower court’s issuance of the writ focused not on its “power to grant the writ but whether in the light of all the circumstances the case was an appropriate one for the exercise of that power.”⁴²

2004) (statement of Sen. Jon Kyl, including described remarks); cf. 150 CONG. REC. S4,261–70 (daily ed. Apr. 22, 2004) (statements of Sens. Jon Kyl and Dianne Feinstein).

³² See *All Actions: H.R. 5107*, supra note 30.

³³ See Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 IND. L. REV. 343, 351–61 (2012).

³⁴ 5 U.S. 137 (1803).

³⁵ *Id.* at 168 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *110).

³⁶ *Id.* at 169.

³⁷ *Id.* at 170.

³⁸ *Id.* at 170–71.

³⁹ 319 U.S. 21, 22 (1943).

⁴⁰ *Id.* at 26.

⁴¹ *Id.* at 31.

⁴² *Id.* at 25–26.

Over fifty years later, and during Congress's consideration of the CVRA, the Court again reviewed its mandamus jurisprudence in *Cheney v. United States District Court*.⁴³ The *Cheney* Court quoted prior Court statements that the "extraordinary remedy" of the mandamus writ is justified only in "exceptional circumstances amounting to a judicial 'usurpation of power'" or a "clear abuse of discretion."⁴⁴ The *Cheney* Court then summarized the requirements, previously articulated by the Court, for the issuance of a writ of mandamus:

As the writ is one of "the most potent weapons in the judicial arsenal," three conditions must be satisfied before it may issue. First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires," – a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy "the burden of showing that [his] right to issuance of the writ is "clear and indisputable.""⁴⁵ Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.⁴⁵

B. Federal Courts of Appeals Diverge in Their Adoption of CVRA Mandamus Review Standards

It is in the context of the above-described long-standing Court mandamus jurisprudence and the previously described articulation by its two primary Senate sponsors of the goals of the CVRA mandamus remedy that the federal appellate courts have announced their CVRA mandamus review standards.⁴⁶ The initial appellate circuits that adopted CVRA mandamus review standards departed, to varying degrees, from the traditional mandamus review standards described above. However, the majority of appellate circuits that have adopted CVRA mandamus review standards have adopted some variation of the traditional mandamus standards in reviewing CVRA mandamus

⁴³ 542 U.S. 367 (2004).

⁴⁴ *Id.* at 380 (quoting *Will v. United States*, 389 U.S. 90, 95 (1967); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953)). The Court noted that the common law mandamus writ "against a lower court" was codified, as follows: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.* (quoting 28 U.S.C.A. § 1651(a) (West 2006)).

⁴⁵ *Id.* at 380–81 (quoting *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 403 (1976); *Will*, 389 U.S. at 107; *Schlagenhauf v. Holder*, 379 U.S. 104, 112 n.8 (1964); *Bankers Life & Cas. Co.*, 346 U.S. at 384; *Ex parte Fahey*, 332 U.S. 258, 260 (1947)).

⁴⁶ See *supra* notes 17–18, 33–45 and accompanying text. The legislative history concerning the goals and purposes of the CVRA mandamus remedy primarily consists of the statements offered by Senators Feinstein and Kyl on the Senate floor. In their remarks, Senator Leahy and Representative Sensenbrenner simply referenced the mandamus remedy as a mechanism to assert or protect the statutory victim rights. See H.R. REP. NO. 108-711, at 122–24 (2004) (statements of Rep. James Sensenbrenner); 150 CONG. REC. H8,188 (daily ed. Oct. 6, 2004) (statement of Rep. James Sensenbrenner); 150 CONG. REC. S4,271 (daily ed. Apr. 22, 2004) (statement of Sen. Patrick Leahy); 150 CONG. REC. S4,230 (daily ed. Apr. 21, 2004) (statement of Sen. Patrick Leahy). There had been previous hearings and reports regarding the proposed crime victim rights constitutional amendments, but these did not address the mandamus remedy. See, e.g., S. REP. NO. 108-191 (2003). There were no hearings on the CVRA in either the Senate or the House of Representatives and no Senate committee report. The House of Representatives committee report simply stated that the crime victim or the Government could apply to the appellate court for a writ of mandamus to enforce the statutory victim rights if a trial court had denied a request for "appropriate relief." See H.R. REP. NO. 108-711, at 5, 10 (2004); 150 CONG. REC. S4,261–62 (daily ed. Apr. 22, 2004) (statement of Sen. Dianne Feinstein); 150 CONG. REC. S4,266 (daily ed. Apr. 22, 2004) (statement of Sen. Jon Kyl); *All Actions: S. 2329 108th Congress (2003-2004)*, CONGRESS.GOV, <https://www.congress.gov/bill/108th-congress/senate-bill/2329/all-actions-with-amendments> (last visited Sept. 23, 2014).

petitions. A few appellate circuits have not yet articulated their CVRA mandamus review standards.⁴⁷

1. Initial Circuit Courts Depart, to Varying Degrees, From the Traditional Mandamus Review Standard

Less than a year after the CVRA was enacted, the Second Circuit was the first appellate circuit to articulate its CVRA mandamus review standard in *In re W.R. Huff Asset Management Co.*⁴⁸ The *Huff* petitioners asserted that their CVRA rights to notice, confer with the prosecutor, fair treatment, and restitution had been violated in connection with a fraud proceeding.⁴⁹ In establishing its CVRA mandamus review standard, the *Huff* court first reviewed circuit precedent that required mandamus petitioners to demonstrate a “novel and significant” legal question, the inadequacy of alternative available remedies, and a legal issue the resolution of which would “aid in the administration of justice.”⁵⁰ The Second Circuit court concluded, however, that under the “plain language” of the CVRA regarding the mandamus remedy and re-opening of a plea or sentence procedure, Congress had “chosen” the mandamus remedy “as a mechanism by which a crime victim may appeal” a trial court’s denial of relief under the CVRA.⁵¹ Thus, a CVRA mandamus petitioner “need not overcome the hurdles” of a traditional mandamus proceeding.⁵²

The Second Circuit court stated that because CVRA crime victims, as mandamus petitioners, “have a right to appellate review,” it must determine the appropriate review standard for these CVRA appellate proceedings.⁵³ In this connection, the appellate court reviewed the three traditional appellate review standards: de novo review of questions of law, clear error review of questions of fact, and abuse of discretion review of matters entrusted to the lower court’s discretion.⁵⁴ The *Huff* court found instructive the Court’s selection of the abuse of discretion appellate review standard in a decision concerning a trial court’s award of attorneys’ fees pursuant to the Equal Access to Justice Act.⁵⁵ Applying the rationale of the Court’s attorneys’ fees decision, the Second Circuit court found that the CVRA entrusts the trial court with ensuring that crime victims are afforded their CVRA rights.⁵⁶ In addition, the trial court is in a better position than an appellate court to determine whether CVRA relief is warranted in an individual case and to make the determinations of “reasonableness” required regarding most of the CVRA rights.⁵⁷ Finally, the *Huff* court stated that, just as regarding the attorneys’ fees case, there is not a “clear statutory prescription” or a “historical tradition” to determine the appropriate review standard.⁵⁸ Finding that the factors utilized by the Court in adopting the abuse of discretion review standard in the attorneys’ fees decision applied “with equal force” to the

⁴⁷ See *infra* notes 48–192 and accompanying text (discussing the CVRA review standards).

⁴⁸ 409 F.3d 555 (2d Cir. 2005). Most of the appellate courts’ CVRA mandamus decisions have been rendered through published and unpublished per curiam opinions or orders. Because all of these decisions are presented in this Article for illustrative purposes, the per curiam and “unpublished” designations will not be used in the citations of these opinions.

⁴⁹ See *id.* at 560–61.

⁵⁰ See *id.* at 562.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See *id.* (referencing *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)).

⁵⁵ See *id.* at 562–63.

⁵⁶ *Id.* at 562.

⁵⁷ *Id.* at 562–63.

⁵⁸ *Id.* at 563.

CVRA, the Second Circuit held that a trial court's CVRA determinations should be reviewed for abuse of discretion and found no abuse of discretion in the instant case.⁵⁹

In *In re Galvis*,⁶⁰ the Second Circuit subsequently expanded its CVRA mandamus review standards in reviewing a trial court's determination that the petitioner was not an eligible "crime victim" under the CVRA.⁶¹ The *Galvis* court retained the *Huff* standard that a trial court's CVRA determinations are reviewed for abuse of discretion in the mandamus process.⁶² However, the Second Circuit court also determined that the appellate court reviews for "clear error any factual findings made by the district court in determining a putative victim's motion to enforce her [CVRA] rights."⁶³ In adding this CVRA mandamus review standard, the *Galvis* court quoted a previous Court decision regarding the interrelationship of the abuse of discretion and clear error review standards: "When an appellate court reviews a district court's factual findings, the abuse-of-discretion and clearly erroneous standards are indistinguishable. A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous."⁶⁴ The *Galvis* court denied the mandamus petition, concluding that there was no clear error in the trial court's determination of the facts concerning the petitioner's CVRA victim status and therefore the trial court did not abuse its discretion in denying her motion to assert CVRA rights.⁶⁵

The Ninth Circuit announced its CVRA mandamus review standard regarding a petition alleging a denial of the crime victim's right to be orally heard at sentencing in *Kenna v. United States District Court*,⁶⁶ issued a few months after the Second Circuit's *Huff* decision. The *Kenna* court noted the usual circuit application of "strict standards" in mandamus review, granting the writ only in "truly extraordinary" cases, such as those involving clear or frequently repeated legal error, absence of alternative review mechanisms, or issues of first impression.⁶⁷ The appellate court further stated that the instant case may warrant review under the circuit's traditional mandamus standards.⁶⁸

However, the Ninth Circuit court stated that the application of the circuit's traditional mandamus factors was not required because the "CVRA contemplates active review of orders denying victims' rights claims even in routine cases. ... The CVRA [mandamus provisions create] a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute."⁶⁹ In agreement with the Second Circuit's decision in *Huff* and in the absence of any contrary appellate decisions, the Ninth Circuit court stated that "we must issue the writ [in CVRA mandamus proceedings] whenever we find that the district court's order reflects an abuse of discretion or legal error."⁷⁰ Finding that the trial court clearly erred in declining to permit the petitioner to be orally heard at sentencing, the *Kenna* court granted the writ of

⁵⁹ See *id.* at 562–64 (discussing *Pierce*, 487 U.S. at 558–62); *infra* notes 254–60, 344–51 and accompanying text (discussing this petition); see also *In re Local #46 Metallic Lathers Union*, 568 F.3d 81, 85–88 (2d Cir. 2009) (utilizing the abuse of discretion standard to deny a CVRA mandamus petition).

⁶⁰ 564 F.3d 170 (2d Cir. 2009).

⁶¹ *Id.* at 174–76.

⁶² *Id.* at 174 (citing *W.R. Huff Asset Mgmt. Co.*, 409 F.3d at 563).

⁶³ *Id.*

⁶⁴ *Id.* at 174–75 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990)).

⁶⁵ *Id.* at 175–76; see *infra* notes 209–12 and accompanying text (discussing this petition).

⁶⁶ 435 F.3d 1011 (9th Cir. 2006).

⁶⁷ *Id.* at 1017.

⁶⁸ See *id.* (citing *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654–55 (9th Cir. 1977)).

⁶⁹ *Id.*

⁷⁰ *Id.*

mandamus to permit the petitioner to pursue a CVRA motion in the trial court to re-open the sentencing proceeding.⁷¹

The Ninth Circuit has maintained the *Kenna* CVRA mandamus review standard in subsequent decisions, i.e., utilizing its abuse of discretion or legal error standard regarding CVRA mandamus petitions rather than the circuit's traditional mandamus balancing test.⁷² However, in applying this review standard in *In re Andrich*,⁷³ in which the petitioners sought mandamus both pursuant to the CVRA and traditional mandamus, the Ninth Circuit described the interrelationship between the *Kenna* CVRA mandamus review standard and the circuit's traditional mandamus review standard.⁷⁴ In establishing its CVRA review standard, the *Andrich* court stated that the *Kenna* court (and subsequent circuit decisions following *Kenna*) had focused on one of the several factors identified in the circuit's traditional mandamus review standard, i.e., that a trial court's order is "clearly erroneous as a matter of law," and that prior circuit precedent had determined that this traditional factor is "dispositive" in the mandamus analysis.⁷⁵ Moreover, this circuit precedent is consistent with the Court's mandamus jurisprudence that a petitioner's entitlement to mandamus must be "clear and indisputable."⁷⁶ In the instant case, the Ninth Circuit court found that the trial judge did not "clearly err as a matter of law, nor did he abuse his discretion" in determining the petitioner's CVRA victim status.⁷⁷ The *Andrich* court therefore denied the mandamus petition under "either the CVRA or our traditional mandamus authority."⁷⁸

Slightly over a year after the Ninth Circuit announced its CVRA mandamus review standard in *Kenna*, the Third Circuit, in *In re Walsh*,⁷⁹ denied a mandamus petition presented generally and pursuant to the CVRA.⁸⁰ In denying the mandamus petition pursuant to the CVRA, the *Walsh* court, citing the Ninth Circuit's *Kenna* decision and the Second Circuit's *Huff* decision, stated that "mandamus relief is available under a different, and less demanding, standard under [the CVRA] in the appropriate circumstances."⁸¹ The *Walsh* court did not explicitly state what this "different" CVRA mandamus standard was.⁸² Moreover, in reviewing a CVRA mandamus petition in *In re Zackey*,⁸³ the Third Circuit stated, "[W]e assume that Congress understood the implications of using a term of art such as 'mandamus' when drafting the statute."⁸⁴ However, the *Zackey* court found it unnecessary to decide whether to apply the traditional mandamus review standard or the "more expansive abuse of discretion standard" to the petitioner's claim regarding the right to be heard through his attorney.⁸⁵ The appellate court found that, even under the abuse of

⁷¹ *Id.* at 1017–18; see *infra* notes 364–75 and accompanying text (discussing this petition); see also 18 U.S.C.A. § 3771(d)(5) (West Pamp. 2014) (describing the motion to re-open sentencing procedure).

⁷² See, e.g., *In re K.K.*, 756 F.3d 1169 (9th Cir. 2014); *In re Morning Star Packing Co.*, 711 F.3d 1142, 1143 (9th Cir. 2013).

⁷³ 668 F.3d 1050 (9th Cir. 2011).

⁷⁴ *Id.* at 1051.

⁷⁵ *Id.*

⁷⁶ See *id.* (quoting *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 403 (1976)).

⁷⁷ *Id.*

⁷⁸ *Id.*; see *infra* notes 213–15 and accompanying text (discussing this petition).

⁷⁹ 229 F. App'x 58 (3d Cir. 2007).

⁸⁰ *Id.* at 60.

⁸¹ *Id.*

⁸² See *id.*; accord *In re Mujaddid*, 563 F. App'x 874, 875 (3d Cir. 2014); *In re El*, 553 F. App'x 113, 115 (3d Cir. 2014).

⁸³ No. 10-3772, 2010 U.S. App. LEXIS 19914 (3d Cir. Sept. 22, 2010).

⁸⁴ *Id.* at *3.

⁸⁵ *Id.*

discretion standard, the petitioner was not entitled to CVRA mandamus relief.⁸⁶ Thus, there appears to be some ambiguity in the Third Circuit's articulation of its CVRA mandamus review standard and the degree to which it has departed from the traditional mandamus review standard.

2. Subsequent Circuit Courts Adopt a Traditional Mandamus Review Standard

As described above, the initial appellate circuits that addressed the CVRA mandamus review standard, i.e., the Second, Third, and Ninth Circuits, interpreted the CVRA mandamus provisions—to varying degrees—to support a mandamus review standard less stringent than their circuits' traditional mandamus review standard.⁸⁷ However, all of the appellate circuits that have subsequently adopted a CVRA mandamus review standard, i.e., the Fifth, Sixth, Eighth, Tenth, Eleventh, and District of Columbia Circuits, have adopted a traditional mandamus review standard for their review of CVRA mandamus petitions.⁸⁸ The First, Fourth, and Seventh Circuits have not yet adopted a CVRA mandamus review standard.⁸⁹

The Tenth Circuit was the first appellate circuit to adopt a traditional mandamus review standard in connection with its review of a trial court's determination of CVRA crime victim status in *In re Antrobus*.⁹⁰ The *Antrobus* petitioners had asserted that, "even though the CVRA provides for mandamus review, this court should apply those standards that would apply on normal appellate review," citing the *Huff* and *Kenna* decisions.⁹¹ However, the *Antrobus* court "respectfully disagree[d]" with the decisions of the Second and Ninth Circuits.⁹² Applying the "plain language" of the CVRA, the Tenth Circuit court stated that Congress "authorized and made use of the term 'mandamus'" in the CVRA rather than terms such as "immediate appellate review" or "interlocutory appellate review" that Congress had previously used in statutes.⁹³ The *Antrobus* court cited Court interpretive precedent regarding statutory use of terms of art:

[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.⁹⁴

Finding that "[m]andamus is the subject of longstanding judicial precedent," the Tenth Circuit court applied the above-described Court interpretive precedent to the "plain language" of the CVRA and reviewed the petition under "traditional" mandamus standards.⁹⁵ The *Antrobus* court cited Court mandamus precedent that reflected that mandamus is a "drastic" remedy reserved for "extraordinary situations," such as to compel

⁸⁶ *Id.*; see *infra* notes 393–99 and accompanying text (discussing this petition).

⁸⁷ See *supra* notes 48–86 and accompanying text.

⁸⁸ See *infra* notes 90–167 and accompanying text.

⁸⁹ See *infra* notes 168–82 and accompanying text.

⁹⁰ 519 F.3d 1123, 1125 (10th Cir. 2008).

⁹¹ *Id.* at 1124.

⁹² *Id.*

⁹³ *Id.* at 1124–25.

⁹⁴ *Id.* at 1124 (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

⁹⁵ *Id.* at 1125; see *id.* at 1126 (Tymkovich, J., concurring) (noting the "relaxed" CVRA mandamus review standards adopted by the Second and Ninth Circuits and stating that the *Antrobus* court had "part[ed] company" with these circuits and applied the traditional mandamus review standard).

a lower court to “exercise its authority when it is its duty to do so,” and requiring a petitioner to demonstrate a “clear and indisputable” right to the writ.⁹⁶ Although characterizing the instant petition as a “difficult case,” the *Antrobus* court denied the writ because it was unable to conclude that the trial court was “clearly wrong” in its victim status determination or that the petitioners’ right to mandamus was “clear and indisputable,” as required under the traditional mandamus review standard.⁹⁷

In a subsequent CVRA mandamus proceeding involving the *Antrobus* petitioners, the Tenth Circuit maintained its use of traditional mandamus review standards.⁹⁸ In articulating these standards, the appellate court cited additional Court precedent requiring that a mandamus petitioner have “no other adequate means” to attain the requested relief.⁹⁹ The Tenth Circuit also cited its own mandamus precedent that a petitioner’s “clear and indisputable” right to mandamus can be demonstrated by a “judicial usurpation of power or a clear abuse of discretion.”¹⁰⁰ The Tenth Circuit declined the *Antrobus* petitioners’ request to apply “ordinary appellate standards of review” to the instant petition regarding the trial court’s denial of their discovery request concerning their attempt to establish their CVRA victim status.¹⁰¹ However, the appellate court stated that the review standard would make no difference in the instant matter because the trial court’s action would be reviewed under an abuse of discretion standard under either review standard.¹⁰² Finding no “clear abuse of discretion” by the trial court, the Tenth Circuit denied the *Antrobus* mandamus petition.¹⁰³

In their subsequent petition for rehearing regarding their initial mandamus petition, the *Antrobus* petitioners re-asserted their position that “normal appellate” rather than traditional mandamus review standards should apply to their CVRA mandamus petition.¹⁰⁴ Once again, in rejecting the petitioners’ position, the Tenth Circuit cited the “plain language” of the CVRA that incorporated the mandamus remedy, a “well worn term of art in our common law tradition,” and Court interpretive precedent regarding statutory use of terms of art.¹⁰⁵ The Tenth Circuit also found nothing in the *Huff* and *Kenna* decisions—departing from the traditional mandamus review standard—that explained Congress’s use of “mandamus” rather than “appeal” in the CVRA and it found the *Huff* court’s reliance on the Court’s attorneys’ fees review standard decision misplaced.¹⁰⁶

In addition to the general interpretive concept that Congress, having authorized interlocutory appeals in other legislation, should be presumed to have intentionally selected the mandamus remedy for use in the CVRA, the Tenth Circuit concluded that the CVRA’s “structure and language” supported the incorporation of traditional mandamus in the CVRA. In this connection, the Tenth Circuit referenced the CVRA’s alternative option for the Government to assert CVRA error in an ordinary appeal from the underlying conviction and the 72 hour time frame for CVRA mandamus decision-making that was

⁹⁶ *Antrobus*, 519 F.3d at 1124 (quoting *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980)).

⁹⁷ *Id.* at 1125–26.

⁹⁸ *In re Antrobus*, No. 08-4013, 2008 U.S. App. LEXIS 27527, at *2–3 (10th Cir. Feb. 1, 2008).

⁹⁹ *Id.* (quoting *Allied Chem. Corp.*, 449 U.S. at 35).

¹⁰⁰ *Id.* at *3 (quoting *In re Qwest Commc’ns Int’l Inc.*, 450 F.3d 1179, 1184 (10th Cir. 2006)).

¹⁰¹ *Id.* at *3 n.1.

¹⁰² *Id.*

¹⁰³ *Id.* at *12; see *infra* note 226 (discussing this petition).

¹⁰⁴ *In re Antrobus*, 519 F.3d 1123, 1127 (10th Cir. 2008).

¹⁰⁵ *Id.* at 1127–28 (citing *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004); *Morissette v. United States*, 342 U.S. 246, 263 (1952); *Marbury v. Madison*, 5 U.S. 137, 170–71 (1803)).

¹⁰⁶ *Id.* at 1128 & n.3.

inconsistent with typical appellate review of often complex legal issues.¹⁰⁷ Contrary to the petitioners' alternative assertions, the Tenth Circuit explained that the "clear and indisputable right" requirement that it imposed regarding CVRA mandamus petitions was consistent with traditional mandamus circuit precedent.¹⁰⁸ Finally, the Tenth Circuit found that the *Antrobus* petitioners had failed to "even suggest" how adopting their proposed review standard would affect their petition's outcome.¹⁰⁹ The Tenth Circuit denied the *Antrobus* petition for rehearing,¹¹⁰ and has subsequently maintained the traditional mandamus review standard regarding CVRA mandamus petitions.¹¹¹

The Fifth Circuit was the next circuit to adopt traditional mandamus review standards regarding the CVRA. In resolving the mandamus petition in *In re Dean*,¹¹² the appellate court stated that the parties disputed the applicable review standard.¹¹³ The appellate court stated that despite the use of the term "mandamus" in the CVRA, the petitioners asserted that "ordinary appeal standards" apply to CVRA mandamus petitions.¹¹⁴ The *Dean* court noted that two circuits agreed with the petitioners, citing the *Kenna* and *Huff* decisions. However, citing the *Antrobus* rehearing petition decision described above, the *Dean* court stated that the Tenth Circuit had recently held that mandamus standards apply to CVRA petitions. The Fifth Circuit announced, "We are in accord with the Tenth Circuit for the reasons stated in its opinion."¹¹⁵

The *Dean* court then described the three-part Court mandamus standard that the Fifth Circuit had adopted, requiring a mandamus petitioner 1) to have "no other adequate means" to attain the requested relief and 2) to demonstrate a "clear and indisputable right" to the writ, and 3) further requiring that the court, in exercising its discretion, concludes the writ is "appropriate under the circumstances."¹¹⁶ The *Dean* court found that the trial court, "with the best of intentions, misapplied the law and failed to accord the victims the rights conferred by the CVRA," i.e., the rights to notice and to confer with the prosecutor.¹¹⁷ However, in determining whether to issue the mandamus writ, the *Dean* court found that it did not need to decide whether the first two mandamus requirements were met because "for prudential reasons, a writ of mandamus is not 'appropriate under the circumstances'" presented by the case.¹¹⁸

The Fifth Circuit has continued to apply to CVRA mandamus petitions the traditional three-part mandamus review standard announced in *Dean*.¹¹⁹ In an en banc

¹⁰⁷ See *id.* at 1128–30. The *Antrobus* court stated that the petitioners' additional arguments regarding why they should have greater appellate rights pursuant to the CVRA were "best directed to Congress. Our job is to apply the CVRA as written, not to rewrite it as one might wish the law to be." *Id.* at 1129.

¹⁰⁸ *Id.* at 1130 (stating that a multi-factor analysis sometimes used in the circuit is simply "one, non-exclusive means of applying" the "clear and indisputable right" standard).

¹⁰⁹ *Id.* at 1130–31.

¹¹⁰ *Id.* at 1131; see *infra* notes 223–26 and accompanying text (discussing this petition); cf. *United States v. Hunter*, 548 F.3d 1308, 1312–16 (10th Cir. 2008) (finding the CVRA did not authorize a non-party right to appeal the underlying sentence and dismissing the *Antrobus* attempt to directly appeal from the defendant's sentence).

¹¹¹ See *In re Olesen*, 447 F. App'x 868, 869–70 (10th Cir. 2011); *In re Antrobus*, 563 F.3d 1092, 1097 (10th Cir. 2009).

¹¹² 527 F.3d 391 (5th Cir. 2008).

¹¹³ *Id.* at 393.

¹¹⁴ *Id.* at 393–94.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 394 (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380–81 (2004)).

¹¹⁷ *Id.*

¹¹⁸ *Id.*; see *infra* notes 352–63 and accompanying text (discussing this petition).

¹¹⁹ See, e.g., *In re Allen*, 701 F.3d 734, 735 (5th Cir. 2012); *In re Fisher*, 640 F.3d 645, 647–48 (5th Cir. 2011).

opinion in *In re Amy Unknown*,¹²⁰ however, the Fifth Circuit not only rejected the petitioner's contention that the review standard governing direct criminal appeals applies to CVRA mandamus petitions, but also more fully articulated its rationale for adopting the traditional mandamus review standard for CVRA mandamus petitions.¹²¹ After reviewing the nature of the traditional mandamus writ as an "extraordinary remedy" and not a substitute for an appeal or a mechanism to control trial court decision making in discretionary matters,¹²² the Fifth Circuit found that aspects of the CVRA supported its conclusion that Congress intended to incorporate traditional mandamus when it adopted the statutory "mandamus" remedy for crime victims.¹²³

For example, the en banc court found that the CVRA's identification of an exclusive list of crime victim rights and authorization of mandamus only when a trial court denies a motion regarding one of these identified rights "suggests that in granting relief, the district court retains discretion to select the appropriate means to ensure victims' rights, and that victims may only properly seek appellate intervention where the district court clearly fails to 'exercise its authority when it is its duty to do so.'"¹²⁴ Moreover, the CVRA's express limitation to the Government, in the exercise of its prosecutorial discretion, of the alternative right to appeal based on a claim of CVRA-related error further supports Congress's intentional adoption of a traditional mandamus remedy for crime victims. The CVRA's requirement that its mandamus petitions must be resolved by the appellate court within 72 hours and its authorization for resolution by a single appellate judge further support Congress's adoption of a traditional mandamus remedy, i.e., reflecting that appellate courts must "grant relief quickly, but rarely" as consistent with a remedy reserved for "extraordinary" cases.¹²⁵ Acknowledging the petitioner's contention that "it may be more difficult for a crime victim to enforce rights through mandamus than appeal, [the Fifth Circuit en banc court concluded] this limitation reflects the express language of the statute and honors the common law tradition in place when the CVRA was drafted."¹²⁶

The Sixth Circuit, in *In re Simons*,¹²⁷ its initial CVRA mandamus petition, noted the conflict in the appellate circuits regarding the CVRA mandamus review standard.¹²⁸ The *Simons* court, however, found it unnecessary to resolve the issue of the "proper" CVRA review standard in the case because it found the petitioner had established his "clear and indisputable" right to relief, i.e., a prompt ruling on his motion to unseal case

¹²⁰ 701 F.3d 749 (5th Cir. 2012) (en banc), *vacated and remanded on other grounds sub nom.* Paroline v. United States, 134 S. Ct. 1710 (2014) (determining restitution).

¹²¹ See *id.* at 756–58. In its en banc decision, the Fifth Circuit also held that the CVRA does not grant crime victims an independent right to appeal from the underlying criminal proceedings. See *id.* at 754–56; *cf. id.* at 758–59 (finding it unnecessary to resolve whether the appellate court's supervisory mandamus power of review applied to the petition).

¹²² *Id.* at 757.

¹²³ *Id.* at 757–58.

¹²⁴ *Id.* at 757 (quoting *Kerr v. U. S. Dist. Court*, 426 U.S. 394, 402 (1976)).

¹²⁵ *Id.* at 757–58; see 18 U.S.C.A. § 3771(d)(3), (4) (West Pamp. 2014).

¹²⁶ *Amy Unknown*, 701 F.3d at 757–58. Contrary to the petitioner's assertion, the en banc court found that the CVRA requirements that the appellate court "take up and decide" a CVRA mandamus petition and "ensure" crime victims are afforded their rights did not support an appellate rather than a mandamus review standard. *Id.* The en banc court also did not find persuasive the reasoning of the Second and Ninth Circuits in *Huff* and *Kenna*, respectively, regarding a non-traditional review standard, and questioned other cited circuits' support for a non-traditional mandamus standard. See *id.* at 758 n.6; *cf. infra* notes 284–96 and accompanying text (discussing this petition).

¹²⁷ 567 F.3d 800 (6th Cir. 2009).

¹²⁸ *Id.* at 801.

records.¹²⁹ He was therefore entitled to relief under the “stricter” traditional mandamus review standard.¹³⁰

The Sixth Circuit subsequently adopted the traditional mandamus standard in *In re Acker*.¹³¹ The Sixth Circuit found “persuasive” the Tenth Circuit’s *Antrobus* decision that concluded the CVRA’s “plain language” compelled application of the “normal mandamus standards.”¹³² Specifically, the *Acker* court cited the CVRA’s use of the term “mandamus” that is governed by “well-established standards” and the “truncated” review period required for CVRA mandamus petitions as factors that “convince[d]” it that the “usual” mandamus standards apply to CVRA petitions.¹³³ The *Acker* court cited Court and Sixth Circuit precedent regarding the requirements for the “extraordinary” remedy of mandamus, including “exceptional circumstances amounting to a ... clear abuse of discretion.”¹³⁴ Finding no such abuse of discretion in the trial court’s acceptance of a plea agreement in the case, the appellate court denied the mandamus petition.¹³⁵ In the related mandamus petition of *In re McNulty*,¹³⁶ the Sixth Circuit added that, as a discretionary remedy, mandamus can be denied if it is not “appropriate under the circumstances” even if a petitioner has shown a “clear and indisputable” right to the writ. The *McNulty* court found that the petitioner, who challenged the denial of his CVRA victim status and restitution, had not established his “clear and indisputable” right to the writ and thus the trial court did not abuse its discretion in making its determinations.¹³⁷

As was the case in the Sixth Circuit, the District of Columbia Circuit found it unnecessary to determine the appropriate review standard in resolving its initial CVRA mandamus petition in *In re Jacobsen*.¹³⁸ The *Jacobsen* court found that the petitioner had not satisfied either a “clear and indisputable right” or an “abuse of discretion” review standard regarding an alleged denial of the right to be heard and denied the petition as moot.¹³⁹ Subsequently, in *In re Amy*,¹⁴⁰ the District of Columbia Circuit adopted the traditional mandamus review standard for CVRA petitions.¹⁴¹ After noting the conflict in the circuits regarding the issue, the District of Columbia Circuit court concluded that the “best reading” of the CVRA supports the application of the traditional mandamus standard.¹⁴²

In support of its conclusion, the District of Columbia Circuit court cited the Court interpretive precedent regarding statutory use of a term of art, such as “mandamus”; the CVRA inclusion of the alternative direct appeal remedy solely for the Government to assert CVRA-related errors; and the “abbreviated” deadline for resolution of CVRA

¹²⁹ *Id.*

¹³⁰ *See id.*; *infra* note 343 (discussing this petition); *cf. In re Siler*, 571 F.3d 604, 608–10 (6th Cir. 2009) (addressing an appeal and mandamus action regarding the trial court’s refusal to disclose the presentence report to crime victims for use in a civil suit following the conclusion of the criminal proceeding, and finding the victims’ request was outside the scope of the CVRA and that the trial court had not abused its discretion regarding the appellate action).

¹³¹ 596 F.3d 370, 372 (6th Cir. 2010).

¹³² *Id.* (citing *In re Antrobus*, 519 F.3d 1123, 1124–25 (10th Cir. 2008)).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 373; *see infra* notes 274–76, 363 and accompanying text (discussing this petition).

¹³⁶ 597 F.3d 344 (6th Cir. 2010).

¹³⁷ *Id.* at 349, 352–53; *see infra* note 220 and accompanying text (discussing this petition).

¹³⁸ No. 05-7086, 2005 U.S. App. LEXIS 13990 (D.C. Cir. July 8, 2005).

¹³⁹ *Id.* at *2–4; *see infra* note 406 (discussing this petition).

¹⁴⁰ 641 F.3d 528 (D.C. Cir. 2011).

¹⁴¹ *Id.* at 534.

¹⁴² *Id.* at 532–33.

mandamus petitions that is more consistent with a review for only “clear and indisputable” errors.¹⁴³ The *Amy* court found unpersuasive the petitioner’s assertions that CVRA statutory language that appellate courts “take up and decide” mandamus petitions and “ensure” a victim’s rights, or the statements offered on the Senate floor by Senators Feinstein and Kyl, supported an appellate-type rather than a traditional CVRA mandamus review standard.¹⁴⁴ Instead, the appellate court applied the District of Columbia Circuit’s three-part traditional mandamus review standard to the petitioner’s restitution-related claim, requiring her to demonstrate that 1) she has a “clear and indisputable right” to relief; 2) the trial court has a “clear duty to act”; and 3) no other “adequate remedy” is available.¹⁴⁵ Applying this traditional standard, the *Amy* court granted her mandamus relief, in part, regarding her restitution claim.¹⁴⁶

In reviewing its only CVRA mandamus petition thus far, in *In re Vicky*,¹⁴⁷ the Eighth Circuit was the next circuit to adopt the traditional mandamus review standard. In rejecting the petitioner’s request that the direct appeal review standard be applied to her CVRA mandamus petition, the Eighth Circuit court cited aspects of the rationale utilized by the Fifth, Sixth, Tenth, and District of Columbia Circuits in adopting the traditional mandamus review standard for CVRA petitions.¹⁴⁸ The *Vicky* court noted the Court interpretive precedent regarding statutory use of a term of art, such as mandamus; the express provision of the alternative opportunity for direct appeal for the Government regarding CVRA-related errors; and the short statutory time frame for the resolution of CVRA mandamus petitions. The appellate court found that the *Huff* and *Kenna* decisions cited by the petitioner regarding alternative review standards lacked “detailed analysis” and were “unpersuasive” and the cited decisions of the Third and Eleventh Circuits did not clearly adopt an alternative review standard.¹⁴⁹ The Eighth Circuit therefore adopted the Court and circuit “traditional standard” for mandamus, requiring a petitioner to demonstrate 1) the absence of an “adequate alternative means” to attain relief, 2) a “clear and indisputable” right to the writ, and 3) that the writ is “appropriate under the circumstances.”¹⁵⁰ Finding that the trial court did not “clearly and indisputably” err in its determination of restitution, the *Vicky* court denied the mandamus petition.¹⁵¹

The Eleventh Circuit’s articulation of its CVRA mandamus review standard has evolved over time. In *In re Stewart*,¹⁵² the appellate court characterized the CVRA mandamus proceeding as a “free standing cause of action” and “not an appeal” or an “interlocutory appeal of an intermediate order.”¹⁵³ In granting the petitioners’ writ regarding their CVRA victim status, the *Stewart* court described the question for resolution as a “mixed question of law and fact,” but did not explicitly state the review standard that it was applying.¹⁵⁴ However, the basis for the dissenting opinion was that the petitioners had failed to demonstrate the “clear and indisputable” right to the writ or the

¹⁴³ *Id.* at 533.

¹⁴⁴ *Id.* at 533–34.

¹⁴⁵ *Id.* at 532, 534.

¹⁴⁶ *Id.* at 534–44; see *infra* notes 302–08 and accompanying text (discussing this petition).

¹⁴⁷ 709 F.3d 712 (8th Cir. 2013), *vacated and remanded on other grounds sub nom.* *Vicky v. Fast*, 134 S. Ct. 1934 (2014) (requiring further proceedings regarding restitution).

¹⁴⁸ *Id.* at 718–719.

¹⁴⁹ *Id.* at 719.

¹⁵⁰ *Id.* at 718–20.

¹⁵¹ *Id.* at 719–23; see *infra* notes 309–13 and accompanying text (discussing this petition).

¹⁵² 552 F.3d 1285 (11th Cir. 2008).

¹⁵³ *Id.* at 1288.

¹⁵⁴ *Id.* at 1288–89; see *infra* notes 234–39, 400 and accompanying text (discussing this petition).

“clear abuse of discretion” required for the “drastic and extraordinary remedy” of mandamus.¹⁵⁵

When the *Stewart* petitioners filed a subsequent CVRA mandamus petition, in *In re Stewart*,¹⁵⁶ regarding the trial court’s denial of restitution to them, the appellate court noted that it “did not explicitly indicate the standard” used in resolving the initial mandamus writ.¹⁵⁷ Regarding the restitution-related petition, the *Stewart* court stated that it made “no difference” whether it treated the matter as an appeal of a trial court judgment or an original mandamus proceeding because the questions for resolution were identical, i.e., whether the trial court’s findings of fact were “clearly erroneous” or whether it had misapplied the law to the factual findings.¹⁵⁸ Finding the legal principle in the case undisputed and the trial court’s factual findings not clearly erroneous, the *Stewart* court denied the mandamus petition.¹⁵⁹

Almost ten years after the enactment of the CVRA, the Eleventh Circuit explicitly adopted a CVRA mandamus review standard in *In re Wellcare Health Plans, Inc.*¹⁶⁰ The Eleventh Circuit repeated its previous statements that the CVRA mandamus proceeding is a “free-standing cause of action” and not an “appeal of a district court judgment” or an “interlocutory appeal of an intermediate order.”¹⁶¹ The *Wellcare* court noted that, in the *Stewart* decision, it had previously “left open” whether “traditional” mandamus or “normal appellate” review standards apply to CVRA mandamus petitions.¹⁶² In *Wellcare*, the Eleventh Circuit concluded that, in accord with the Fifth, Sixth, Tenth, and District of Columbia Circuits, the traditional mandamus review standard applied to CVRA petitions.¹⁶³ The appellate court stated that the “plain text” and other “compelling textual clues” of the CVRA supported its conclusion: the Court interpretive precedent regarding statutory use of a term of art, such as mandamus; the express provision of the alternative opportunity for direct appeal for the Government regarding CVRA-related errors; and the “compressed” statutory time frame for the resolution of CVRA mandamus petitions that is consistent with a “highly deferential” review standard.¹⁶⁴

Having adopted the traditional mandamus review standard for CVRA petitions, the appellate court noted that it is an “extraordinary remedy” to be utilized in circumstances constituting a “judicial usurpation of power” or a “clear abuse of

¹⁵⁵ See *Stewart*, 552 F.3d at 1290 (Wilson, J., dissenting) (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380–81 (2004)).

¹⁵⁶ 641 F.3d 1271 (11th Cir. 2011).

¹⁵⁷ *Id.* at 1274.

¹⁵⁸ *Id.* at 1274–75.

¹⁵⁹ *Id.*; see *infra* notes 277–79 and accompanying text (discussing this petition); see also *In re Aquino*, No. 12-13238-B (11th Cir. June 22, 2012) (citing *Stewart* and reviewing the trial court’s determination of CVRA crime victim status for “clear error”); *In re Instituto Costarricense de Electricidad*, Nos. 11-12707-G, 11-12708-G (11th Cir. June 17, 2011) (quoting *Stewart* and stating that in reviewing a CVRA mandamus petition, the appellate court must determine whether the trial court based its decision on clearly erroneous factual findings or a misapplication of the law to the findings). In *In re Aquino*, the appellate court found that the petitioners had not demonstrated that the trial court made “clearly erroneous” factual findings or misapplied the law to the facts. No. 12-11757-B, slip op. at 1 (11th Cir. Apr. 06, 2012). However, it cited *Stewart* for the proposition that the Eleventh Circuit had not decided whether CVRA mandamus petitions are reviewed under the “clear-abuse-of-discretion standard generally applicable to mandamus petitions or the less-demanding standard of review applied to ordinary appeals” and concluded that the petitioners had not demonstrated entitlement to relief under “any potentially applicable standard of review.” *Id.*, slip op. at 2 & n.1.

¹⁶⁰ 754 F.3d 1234, 1238 (11th Cir. 2014).

¹⁶¹ *Id.* at 1236–37.

¹⁶² *Id.* at 1237 n.3.

¹⁶³ *Id.* at 1238.

¹⁶⁴ See *id.* at 1237–38.

discretion.”¹⁶⁵ The Eleventh Circuit also stated the Court’s three-part standard a petitioner must satisfy for the issuance of a writ, i.e., the demonstration of 1) the absence of an adequate alternative means to attain relief, 2) a “clear and indisputable” right to the writ, and 3) that the writ is “appropriate under the circumstances.”¹⁶⁶ In the instant case, the *Wellcare* court found that the petitioner had not met its burden to demonstrate a “clear and indisputable” right to the writ and that the trial court had not “clearly abuse[d] its discretion” in denying the petitioner CVRA victim status or restitution.¹⁶⁷

3. Remaining Circuits Have Not Yet Adopted a CVRA Mandamus Review Standard

Over ten years after the enactment of the CVRA, three appellate circuits, i.e., the First, Fourth, and Seventh Circuits, have not yet adopted a review standard regarding CVRA mandamus petitions. Although the Seventh Circuit has denied several CVRA mandamus petitions, it has not identified a standard of review for its actions.¹⁶⁸ In the sole CVRA mandamus petition it has considered, the First Circuit simply found that the trial court “did not er” in determining the petitioner was not a CVRA crime victim and denied the petition in *In re Haas*.¹⁶⁹ In another case in which crime victims had attempted to file an appeal rather than a mandamus petition concerning the denial of restitution, the First Circuit noted the conflict in the circuits regarding the applicable CVRA mandamus review standard.¹⁷⁰ The appellate court further found that the victims would not be entitled to CVRA mandamus relief under either the “exacting standard” of traditional mandamus review or the “more lenient” abuse of discretion standard.¹⁷¹ As a result, conversion of their attempted appeal into a mandamus petition would be “futile” and the First Circuit therefore found it unnecessary to decide the applicable CVRA mandamus review standard.¹⁷²

The Fourth Circuit has also addressed, but not resolved, the standard of review issue in some of its CVRA mandamus rulings. For example in *In re Doe*,¹⁷³ the first of these decisions, the appellate court described the traditional mandamus review standard; observed that CVRA mandamus petitions are “not necessarily subject to this stringent” review standard; and noted that the Second and Ninth Circuits had adopted a “normal abuse of discretion” standard for CVRA mandamus petitions rather than the higher abuse of discretion standard associated with mandamus petitions.¹⁷⁴ However, the *Doe* court concluded that it did not need to decide the review standard issue because the petitioner was not entitled to mandamus relief regarding her CVRA victim status and restitution claims “even under the lower standard.”¹⁷⁵

¹⁶⁵ *Id.* at 1238 (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004)).

¹⁶⁶ *Id.* (quoting *Cheney*, 542 U.S. at 380–81).

¹⁶⁷ *Id.* at 1238–40; see *infra* note 219 and accompanying text (discussing this petition).

¹⁶⁸ See, e.g., *In re Hamilton*, No. 12-1059 (7th Cir. Jan. 12, 2012); *In re Bustos*, No. 10-2752 (7th Cir. July 26, 2010); *In re Sabbia*, No. 10-3316, 2010 U.S. App. LEXIS 27411 (7th Cir. Oct. 7, 2010); cf. *In re Oak Brook Bank*, No. 06-2331 (7th Cir. May 12, 2006) (citing *Kenna* and *Huff* in connection with general statements regarding the CVRA).

¹⁶⁹ No. 08-2378 (1st Cir. Oct. 30, 2008).

¹⁷⁰ *United States v. Aguirre-Gonzales*, 597 F.3d 46, 55–56 (1st Cir. 2010).

¹⁷¹ *Id.* at 56.

¹⁷² *Id.*; see *id.* at 52–55 (holding that crime victims do not have a right of direct appeal pursuant to the CVRA and that their sole appellate remedy for asserted CVRA rights violations is through the CVRA mandamus remedy).

¹⁷³ 264 F. App’x 260 (4th Cir. 2007).

¹⁷⁴ *Id.* at 261–62.

¹⁷⁵ See *id.* at 262; *id.* at 264 (finding no abuse of discretion); *infra* notes 242–43 and accompanying text (discussing this petition).

In *In re Brock*,¹⁷⁶ the Fourth Circuit similarly noted the traditional mandamus standard and the “ordinary abuse of discretion” standard adopted by the Second and Ninth Circuits for review of CVRA mandamus petitions.¹⁷⁷ As in *Doe*, the *Brock* court concluded that it did not need to decide the review standard issue because “even applying the more relaxed abuse of discretion standard,” the petitioner was not entitled to relief regarding his claimed violations of his CVRA rights to be heard and treated fairly.¹⁷⁸

In ruling on a CVRA mandamus petition almost ten years after the enactment of the CVRA, in *In re Bankruptcy Estate of AGS, Inc.*,¹⁷⁹ the Fourth Circuit once again declined to adopt a standard of review for use regarding CVRA mandamus petitions.¹⁸⁰ The *AGS* court noted the traditional mandamus review standard, as well as the conflict that had developed among the appellate circuits regarding whether the traditional mandamus or “traditional appeal” standard applies to the CVRA petitions. Once again, the Fourth Circuit found it unnecessary to decide the applicable review standard, stating, “It is sufficient simply to note that to issue a writ of mandamus to a district court is not something to be undertaken lightly.”¹⁸¹ The *AGS* court found that the petitioner was not a CVRA victim and that the trial court “did not err” in denying restitution to the petitioner, and denied the petition.¹⁸²

C. Conclusion Regarding Appellate Adoption of CVRA Mandamus Review Standards

In the ten years since the enactment of the CVRA, at least eight of the twelve federal appellate circuits have adopted review standards for the CVRA mandamus remedy. The initial two appellate circuits to announce CVRA mandamus review standards interpreted the CVRA to support their selection of a review standard more similar to that used in direct appellate review than that utilized in traditional mandamus review. The Second Circuit selected the abuse of discretion standard in *Huff*¹⁸³ and the Ninth Circuit selected an abuse of discretion or legal error standard in *Kenna*.¹⁸⁴ The Third Circuit has cited *Huff* and *Kenna* as authority for a “different, and less demanding”—but not explicitly articulated—CVRA mandamus review standard.¹⁸⁵ However, it has also referenced the implications of Congress’s use of a term of art, such as “mandamus,” in the CVRA, in finding it unnecessary to decide the applicable review standard regarding a CVRA mandamus petition.¹⁸⁶ The First, Fourth, and Seventh Circuits have not yet adopted CVRA mandamus review standards.¹⁸⁷

¹⁷⁶ 262 F. App’x 510 (4th Cir. 2008).

¹⁷⁷ *Id.* at 512.

¹⁷⁸ *Id.* (finding no abuse of discretion); see *infra* notes 415–22 and accompanying text (discussing this petition).

¹⁷⁹ 565 F. App’x 172 (4th Cir. 2014).

¹⁸⁰ *Id.* at 174.

¹⁸¹ *Id.*

¹⁸² *Id.* at 175; see *infra* note 241 and accompanying text (discussing this petition).

¹⁸³ See *supra* notes 48–59 and accompanying text; cf. *supra* notes 60–65 and accompanying text (describing subsequent Second Circuit discussion of the interrelationship between an abuse of discretion and a clear error review in CVRA mandamus review).

¹⁸⁴ See *supra* notes 66–71 and accompanying text; cf. *supra* notes 72–78 and accompanying text (describing subsequent Ninth Circuit discussion of the interrelationship of the *Kenna* review standard and traditional mandamus review).

¹⁸⁵ See *supra* notes 79–86 and accompanying text.

¹⁸⁶ See *id.*

¹⁸⁷ See *supra* notes 168–82 and accompanying text.

Six appellate circuits have interpreted the CVRA to require a traditional mandamus review standard regarding CVRA petitions, i.e. the Fifth, Sixth, Eighth, Tenth, Eleventh, and District of Columbia Circuits.¹⁸⁸ In this connection, the Fifth, Eighth, and Eleventh Circuits have adopted the three-part Court standard requiring the unavailability of an alternative adequate means to attain relief, a clear and indisputable right to the writ, and the appropriateness of the grant of the writ under the circumstances.¹⁸⁹ The Sixth, Tenth, and District of Columbia Circuits also require a petitioner's showing of a clear and indisputable right to the writ. The Tenth and District of Columbia Circuits additionally reference the unavailability of other adequate means to relief. The Sixth and the Tenth Circuits state that a clear and indisputable right to the writ can be demonstrated by a showing of a "clear" abuse of discretion. The Sixth Circuit also includes a showing of the appropriateness of the requested relief under the circumstances. The District of Columbia Circuit additionally requires a showing that the trial court has a clear duty to act.¹⁹⁰ Thus, all of these circuits require a CVRA mandamus petitioner to demonstrate a clear and indisputable right to relief, plus additional specified factors associated with the traditional mandamus remedy, in order to obtain CVRA mandamus relief.

A conflict in the circuits has clearly developed between the majority of appellate circuits (i.e., six circuits) that have adopted some variation of the traditional mandamus review standard regarding CVRA petitions and the minority of circuits (i.e., two or three circuits) that have adopted a review standard more like an ordinary appellate review standard. Additionally, a significant minority of circuits (i.e., three or four circuits) have not yet adopted a CVRA mandamus review standard.¹⁹¹ This conflict must await resolution either by congressional action amending the CVRA to specify the desired review standard for CVRA mandamus petitions or by Court action interpreting the CVRA and resolving the existing conflict in the circuits.¹⁹²

In the meantime, however, the federal appellate courts continue to review CVRA mandamus petitions. The next section of this Article examines the outcomes regarding the CVRA mandamus petitions reviewed thus far and the actual impact the appellate courts' differing review standards (or lack of review standards) have had on the outcomes of these petitions.

IV. THE OUTCOMES OF CVRA MANDAMUS PETITIONS AND THE IMPACT OF THE REVIEW STANDARD UTILIZED

A. The Overall Outcomes of CVRA Mandamus Petitions

As described in the CVRA Mandamus Outcomes Table below, in the ten years since the enactment of the CVRA, the federal appellate courts have resolved 73 mandamus petitions filed pursuant to the CVRA. These mandamus petitions have involved 62 separate petitioners (or petitioner groups). Seven of these 62 petitioners have been the same (regarding the "Amy" and/or "Vicky" petitions), but they have filed their petitions regarding separate underlying prosecutions.¹⁹³

¹⁸⁸ See *supra* notes 90–167 and accompanying text.

¹⁸⁹ See *supra* notes 112–26, 147–67 and accompanying text.

¹⁹⁰ See *supra* notes 90–111, 128–46 and accompanying text.

¹⁹¹ See *supra* notes 183–90 and accompanying text.

¹⁹² See *infra* notes 468–69 and accompanying text.

¹⁹³ See *infra* CVRA Mandamus Outcomes Table. The mandamus petitions included in the table were identified through two sources, i.e., the annual reports prepared for Congress by the Administrative Office of the United States Courts pursuant to the CVRA and a search of the LexisNexis data base. The Administrative Office of the

Overall, the federal appellate courts have denied or dismissed 62 (85%) of the 73 CVRA mandamus petitions.¹⁹⁴ The appellate courts have denied or dismissed 23 of these petitions (indicated with an “*” in the table), with limited discussion, on the ground that the petitioners’ claims were not properly raised pursuant to the CVRA, e.g., petitioners attempting to raise claims in connection with civil proceedings, petitioners attempting to intervene in criminal proceedings unrelated to them, and petitioners attempting to utilize the CVRA mandamus remedy to pursue relief on other grounds.¹⁹⁵ In the remaining 39 CVRA mandamus petition denials, the federal appellate courts have more fully addressed specific claims raised pursuant to the CVRA before ultimately determining to deny the requested relief.¹⁹⁶ Of the 73 CVRA mandamus petitions reviewed, the federal appellate courts have granted 11 petitions (15%) to some degree.¹⁹⁷

CVRA MANDAMUS OUTCOMES TABLE

FIRST CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re Haas</i> , No. 08-2378	Victim definition/CVRA eligibility/	Denied

United States Courts has thus far filed nine annual reports with Congress describing the CVRA mandamus actions brought and their outcomes, with the most recent report filed on April 30, 2014. *See* Justice for All Act of 2004, Pub. L. No. 108-405, § 104(a), 118 Stat. 2260, 2265. A search of the LexisNexis United States Courts of Appeals data base was also conducted for CVRA mandamus petitions resolved as of October 30, 2014, ten years after the enactment of the CVRA, using the search terms “Crime Victims’ Rights Act” or “Crime Victims Rights Act” or 3771. Thus, the materials described in this Article are current, as of October 30, 2014.

In addition to these mandamus petitions filed pursuant to the CVRA, in *United States v. Burkholder*, 590 F.3d 1071 (9th Cir. 2010), the Government raised a crime victim-related issue in its appeal of an offender’s sentence, as authorized by the CVRA. *See* 18 U.S.C.A. § 3771 (d)(4) (West Pamp. 2014). The federal appellate courts that have addressed the issue have generally concluded that the CVRA does not authorize non-parties, including crime victims, to appeal an offender’s sentence. *See, e.g., United States v. Fast*, 709 F.3d 712, 715–18 (8th Cir. 2013), *vacated and remanded on other grounds sub nom. Vicky v. Fast*, 134 S. Ct. 1934 (2014); *In re Amy Unknown*, 701 F.3d 749, 755–56 & n.5 (5th Cir. 2012) (en banc), *vacated and remanded on other grounds sub nom. Paroline v. United States*, 134 S. Ct. 1710 (2014); *United States v. Alcatel-Lucent France, SA*, 688 F.3d 1301, 1304–07 (11th Cir. 2012); *United States v. Monzel*, 641 F.3d 528, 540–44 (D.C. Cir. 2011); *United States v. Aguirre-Gonzalez*, 597 F.3d 46, 52–55 (1st Cir. 2010); *In re Brock*, 262 F. App’x 510, 513 (4th Cir. 2008); *United States v. Hunter*, 548 F.3d 1308 (10th Cir. 2008); *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1017–18 (9th Cir. 2006); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 562–63 (2d Cir. 2005); *compare In re Acker*, 596 F.3d 370, 373 (6th Cir. 2010), *with In re Siler*, 571 F.3d 604, 608–09 (6th Cir. 2009).

¹⁹⁴ *See infra* CVRA Mandamus Outcomes Table.

¹⁹⁵ *See id.*; *see also, e.g., In re Mujaddid*, 563 F. App’x 874 (3d Cir. 2014) (attempting to utilize the CVRA mandamus remedy to obtain other forms of relief); *In re Bond*, No. 13-2462 (4th Cir. Dec. 6, 2013) (attempting to intervene in criminal proceedings unrelated to him); *In re Nabaya*, 481 F. App’x 64 (4th Cir. 2012) (attempting to assert CVRA claims in connection with a civil proceeding); *In re Hamilton*, No. 10-3294 (7th Cir. Oct. 6, 2010) (attempting to intervene in criminal proceedings unrelated to her); *In re Ross*, 380 F. App’x 356 (4th Cir. 2010) (attempting to use the CVRA mandamus remedy to attack the legality of his confinement); *Williamson v. U.S. Dist. Court*, No. 06-74584 (9th Cir. Sept. 29, 2006) (attempting to utilize the CVRA mandamus remedy to pursue claims against government officials and to seek a wide range of relief, including an injunction prohibiting the use of “microwaves” on him).

¹⁹⁶ *See, e.g., In re Wellcare Health Plans, Inc.*, 754 F.3d 1234 (11th Cir. 2014); *In re Acker*, 596 F.3d 370 (6th Cir. 2010); *W.R. Huff Asset Mgmt. Co.*, 409 F.3d at 555.

¹⁹⁷ *See, e.g., In re Morning Star Packing Co.*, 711 F.3d 1142 (9th Cir. 2013); *In re Allen*, 701 F.3d 734 (5th Cir. 2012); *In re Amy*, 641 F.3d 528 (D.C. Cir. 2011). Although the Fifth Circuit initially granted mandamus, in part, to stay trial court action pending further order of the appellate court, it ultimately denied the petitioners’ mandamus petition in *In re Dean*, 527 F.3d 391, 393, 396 (5th Cir. 2008). *See infra* notes 352–63 and accompanying text (discussing this petition). Therefore, this petition is included with the mandamus petition denials rather than those petitions that have been granted.

(Oct. 30, 2008).*	Hearing	
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SECOND CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re Galvis</i> , 564 F.3d 170 (2009).	Victim definition/CVRA eligibility/Restitution	Denied
<i>In re W.R. Huff Asset Mgmt. Co.</i> , 409 F.3d 555 (2005).	Confer/Notice/ Fairness/Restitution	Denied
<i>In re Local #46 Metallic Lathers Union</i> , 568 F.3d 81 (2009).	Victim definition/CVRA eligibility/Restitution	Denied

THIRD CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re Dawalibi</i> , 338 F. App'x 112 (2009).*	Victim definition/CVRA eligibility/ Fairness/Privacy	Denied
<i>In re El</i> , 553 F. App'x 113 (2014).*	Victim definition/CVRA eligibility	Denied
<i>In re Mujaddid</i> , 563 F. App'x 874, <i>cert. denied sub nom. Mujaddid v. U.S. Dist. Court</i> , 135 S. Ct. 133 (2014).*	Victim definition/CVRA eligibility	Denied
<i>In re Walsh</i> , 229 F. App'x 58 (2007).*	Victim definition/CVRA eligibility	Denied
<i>In re Zackey</i> , No. 10-3772, 2010 U.S. App. LEXIS 19914 (Sept. 22, 2010).	Hearing	Denied

FOURTH CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re Bankr. Estate of AGS, Inc.</i> , 565 F. App'x 172 (2014).	Victim definition/CVRA eligibility/Restitution	Denied
<i>In re Bond</i> , 547 F. App'x 348 (2013).*	Victim definition/CVRA eligibility	Dismissed
<i>In re Brock</i> , 262 F. App'x 510 (2008).	Hearing/Fairness/Disclosure of presentence report	Denied

<i>In re</i> Doc, 264 F. App'x 260 (2007).	Victim definition/CVRA eligibility/ Restitution	Denied
<i>In re</i> Gyamfi, 362 F. App'x 385 (2010).*	Victim definition/CVRA eligibility	Denied
<i>In re</i> Nabaya, 481 F. App'x 64 (2012).*	Victim definition/CVRA eligibility	Dismissed
<i>In re</i> Rochester, 292 F. App'x 226 (2008).*	Victim definition/CVRA eligibility	Dismissed
<i>In re</i> Rodriguez, 275 F. App'x 192 (2008).*	Victim definition/CVRA eligibility	Denied
<i>In re</i> Ross, 380 F. App'x 356 (2010).*	Victim definition/CVRA eligibility	Dismissed
<i>In re</i> Searcy, 202 F. App'x 625 (2006).*	Victim definition/CVRA eligibility	Denied

FIFTH CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re</i> Allen, 701 F.3d 734 (2012).	Victim definition/CVRA eligibility	Granted (for trial court to consider new arguments raised re victim status)
<i>In re</i> Allen, 568 F. App'x 314 (2014).	Restitution	Denied
<i>In re</i> Amy Unknown, 701 F.3d 749 (2012), vacated and remanded sub nom. Paroline v. United States, 134 S. Ct. 1710 (2014).	Restitution	Granted (re restitution determination), but vacated by the Court and remanded
<i>In re</i> Amy Unknown, No. 13-20485 (Aug. 30, 2013).	Restitution	Granted (re restitution determination)
<i>In re</i> Butler, No. 06-20848 (Nov. 1, 2006).	Restitution/Abatement	Denied
<i>In re</i> Community Housing Fund, No. 11-11155 (Dec. 9, 2011).	Restitution	Denied
<i>In re</i> Dean, 527 F.3d 391 (2008).	Notice/Confer	Granted in part (to temporarily stay further trial court action); Denied
<i>In re</i> Fisher, 640 F.3d 645 (2011).	Victim definition/CVRA eligibility/ Restitution	Denied
<i>In re</i> Fisher, No. 11-10006, 2011 U.S. App. LEXIS 26500 (Oct. 1, 2011).	Victim definition/CVRA eligibility/ Restitution	Denied
<i>In re</i> May, No. 13-30773 (July 24, 2013).*	Victim definition/CVRA eligibility	Denied

<i>In re</i> Thaler, No. 13-40171 (Feb. 15, 2013).	Delay	Dismissed as moot
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SIXTH CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re</i> Acker, 596 F.3d 370 (2010).	Victim definition/CVRA eligibility/Notice/Restitution	Denied
<i>In re</i> McNulty, 597 F.3d 344 (2010).	Victim definition/CVRA eligibility/Restitution	Denied
<i>In re</i> Siler, 571 F.3d 604 (2009).	Disclosure of presentence report	Denied
<i>In re</i> Simons, 567 F.3d 800 (2009).	Fairness/Dignity	Granted (to require trial court action on pending motion)

SEVENTH CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re</i> Bustos, No. 10-2752 (July 26, 2010).	Intervention in proceedings/Hearing	Denied
<i>In re</i> Hamilton No. 10-3294 (Oct. 6, 2010).*	Victim definition/CVRA eligibility	Denied
<i>In re</i> Hamilton, No. 12-1059 (Jan. 12, 2012).*	Victim definition/CVRA eligibility	Denied
<i>In re</i> Oak Brook Bank, No. 06-2331 (May 12, 2006).	Victim definition/CVRA eligibility/Hearing/Restitution	Denied
<i>In re</i> Sabbia, No. 07-1368 (Feb. 21, 2007).*	Victim definition/CVRA eligibility	Denied
<i>In re</i> Sabbia, No. 10-3316, 2010 U.S. App. LEXIS 27411 (Oct. 7, 2010).*	Victim definition/CVRA eligibility	Denied

EIGHTH CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re</i> Vicky, 709 F.3d 712 (2013), <i>vacated and remanded sub nom.</i> Vicky v. Fast, 134 S. Ct. 1934 (2014).	Restitution	Denied, but vacated by the Court and remanded

NINTH CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re Amy & Vicky</i> , 710 F.3d 985 (2013).	Restitution	Granted in part (to determine an amount of restitution), Denied in part
<i>In re Amy & Vicky</i> , 714 F.3d 1165 (2013).	Restitution	Denied
<i>In re Amy & Vicky</i> , 698 F.3d 1151 (2012), <i>vacated and remanded sub nom. Amy and Vicky v. U.S. Dist. Court</i> , 134 S. Ct. 1959 (2014).	Restitution	Denied, but vacated by the Court and remanded
<i>In re Andrich</i> , 668 F.3d 1050 (2011).	Victim definition/CVRA eligibility	Denied
<i>Kenna v. U.S. Dist. Court</i> , 435 F.3d 1011 (2006).	Hearing	Granted (re right to be heard and to permit motion for re-opening of sentencing proceeding)
<i>In re Kenna</i> , 453 F.3d 1136 (2006).	Disclosure of presentence report	Denied
<i>In re K.K.</i> , 756 F.3d 1169 (2014).	Privacy	Denied (but ordered preliminary in camera review of documents)
<i>In re Mikhel</i> , 453 F.3d 1137 (2006).	Exclusion	Granted in part (for trial court to conduct CVRA exclusion analysis)
<i>In re Morning Star Packing Co.</i> , 711 F.3d 1142 (2013).	Restitution	Granted (to make restitution determination using correct standards)
<i>In re Parker</i> , Nos. 09-70529, 09-70533, 2009 U.S. App. LEXIS 10270 (Feb. 27, 2009).	Victim definition/CVRA eligibility/ Exclusion	Granted (re victim status and to make particularized finding re exclusion of each petitioner)

<i>In re Stake Ctr. Locating, Inc.</i> , 717 F.3d 1089 (2013).	Restitution	Denied (as premature)
<i>In re Stake Ctr. Locating, Inc.</i> , 731 F.3d 949 (2013).	Forfeiture	Denied
<i>Williamson v. U.S. Dist. Court</i> , No. 06-74584 (Sept. 29, 2006).*	CVRA eligibility	Denied
<i>In re Zito</i> , No. 09-70554 (Feb. 26, 2009).	Privacy	Denied without prejudice

TENTH CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re Antrobus</i> , 519 F.3d 1123 (2008).	Victim definition/CVRA eligibility	Denied
<i>In re Antrobus</i> , No. 08-4013, 2008 U.S. App. LEXIS 27527 (Feb. 1, 2008).	Victim definition/CVRA eligibility discovery	Denied
<i>In re Antrobus</i> , 563 F.3d 1092 (2009).	Victim definition/CVRA eligibility issue re-opening	Denied
<i>In re Olesen</i> , 447 F. App'x 868 (2011).	Delay/Fairness	Denied
<i>In re Pinson</i> , No. 11-1425 (Oct. 14, 2011).*	CVRA filing fee provisions	Dismissed as moot

ELEVENTH CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re Aquino</i> , No. 12-11757-B (Apr. 6, 2012).	Victim definition/CVRA eligibility/Hearing	Denied
<i>In re Aquino</i> , No. 12-13238-B (June 22, 2012)	Victim definition/CVRA eligibility	Denied
<i>In re Instituto Costarricense de Electricidad</i> , Nos. 11-12707-G, 11-12708-G (June 17, 2011).	Victim definition/CVRA eligibility	Denied
<i>In re Miller</i> , No. 06-15182 (Sept. 28, 2006).*	Victim definition/CVRA eligibility	Denied
<i>In re Searcy</i> , No. 06-14951 (Sept. 15, 2006).*	Victim definition/CVRA eligibility	Denied
<i>In re Stewart</i> , 552 F.3d 1285 (2008).	Victim definition/CVRA eligibility/Hearing	Granted (re victim status)
<i>In re Stewart</i> , 641 F.3d 1271 (2011).	Restitution	Denied

<i>In re Wellcare Health Plans, Inc.</i> , 754 F.3d 1234 (2014).	Victim definition/CVRA eligibility/ Restitution	Denied
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DISTRICT OF COLUMBIA CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re Amy</i> , 641 F.3d 528 (2011).	Restitution	Granted in part (to determine amount of restitution)
<i>In re Chacin de Henriquez</i> , No. 10-3051, 2010 U.S. App. LEXIS 12129 (June 11, 2010).	Victim definition/CVRA eligibility	Denied without prejudice to renewal
<i>In re Jacobsen</i> , No. 05-7086, 2005 U.S. App. LEXIS 13990 (July 8, 2005).	Hearing	Denied as moot
<i>Rodriguez v. Editor in Chief, Legal Times</i> , No. 07-5234, 2008 U.S. App. LEXIS 28154 (Apr. 23, 2008).*	Victim definition/CVRA eligibility	Denied
<i>Sieverding v. American Bar Ass'n</i> , No. 07-5126, 2007 U.S. App. LEXIS 13756 (June 8, 2007).*		Dismissed for lack of prosecution

B. The Issues Addressed in CVRA Mandamus Petitions

As reflected in the CVRA Mandamus Outcomes Table, the issues most frequently addressed in the mandamus petitions filed in the ten years since the CVRA's enactment have concerned 1) the CVRA crime victim definition and petitioners' eligibility for CVRA crime victim status; 2) the CVRA right to restitution; and 3) the CVRA participatory rights to confer with the prosecutor, to notice of proceedings, not to be excluded from the proceedings, and to be heard in the proceedings.¹⁹⁸ In all, 68 of the 73 CVRA mandamus petitions (93%) involve some aspect of these issues. Of the 50 petitions in which the federal appellate courts have more fully addressed specific claims raised pursuant to the CVRA, 45 (90%) address these issues. To illustrate the extent to which the specific mandamus review standards have had an impact on the outcomes of CVRA petitions addressing these issues, the following discussion of the outcomes of these 45 petitions is grouped by appellate circuit review standard. These three groups are, as follows: the traditional mandamus review standard adopted by the Fifth, Sixth, Eighth, Tenth, Eleventh, and District of Columbia Circuits; the more expansive review standards adopted by the Second and Ninth Circuits, and arguably the Third Circuit; and the "standardless" First, Fourth, and Seventh Circuits.¹⁹⁹

¹⁹⁸ See *supra* CVRA Mandamus Outcomes Table.

¹⁹⁹ See *id.*; *supra* notes 46-192 and accompanying text (discussing the CVRA mandamus review standards); *cf. infra* note 343 (describing the outcomes regarding the five petitions that have raised other CVRA issues).

1. CVRA Crime Victim Status

The issue most frequently addressed in the CVRA mandamus petitions resolved thus far concerns petitioners' attempts to be deemed eligible "crime victims" for purposes of asserting CVRA rights.²⁰⁰ In their mandamus review, the federal appellate courts have thus considered federal trial courts' application of the CVRA "crime victim" definition, i.e., whether a petitioner is a "person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia,"²⁰¹ a definition incorporating well-known concepts of causation and foreseeability of harm.²⁰²

a. More Expansive Review Standard Circuits

Utilizing their more expansive review standards, the Second and Ninth Circuits have each reviewed two mandamus petitions dealing with a petitioner's eligibility for CVRA crime victim status.²⁰³ Applying its abuse of discretion review standard, the Second Circuit has denied mandamus in both of the cases it has considered.²⁰⁴ In *In re Local #46 Metallic Lathers Union*,²⁰⁵ in which the defendant was convicted of a money laundering conspiracy, the trial court determined that the defendant's subsequent use of the laundered cash to make employee payments that deprived the petitioner union of related union benefit funds did not make the union a CVRA victim of the defendant's money laundering crime entitled to restitution.²⁰⁶ The trial court found that the defendant's

²⁰⁰ See *supra* CVRA Mandamus Outcomes Table.

²⁰¹ 18 U.S.C.A. § 3771(e) (West Pamp. 2014); see *id.* (identifying eligible representatives for minor, incompetent, incapacitated, and deceased crime victims). During the discussion of the CVRA on the Senate floor, Senator Jon Kyl, one of the CVRA's primary sponsors, stated that the legislation defined a "crime victim" as a "person directly and proximately harmed as a result of any offense, felony or misdemeanor. This is an intentionally broad definition because all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged." 150 CONG. REC. S4,270 (daily ed. Apr. 22, 2004) (statement of Sen. Jon Kyl); *accord id.* (statement of Sen. Dianne Feinstein); see 150 CONG. REC. S10,912 (daily ed. Oct. 9, 2004) (statement of Sen. Jon Kyl) (indicating the inclusion of victims "whether or not they are the victim of the count charged"). But see *W.R. Huff Asset Mgmt. Co.*, 409 F.3d at 564 (stating that the CVRA does not confer rights against "individuals who have not been convicted of a crime").

²⁰² See, e.g., *In re Fisher*, 640 F.3d 645, 648 (5th Cir. 2011); *In re McNulty*, 597 F.3d 344, 349–53 (6th Cir. 2010); cf. Aaronson, *supra* note 8, at 637–42 (discussing the CVRA victim definition); Kyl et al., *supra* note 8, at 594–95 (stating that the CVRA crime victim definition "invokes" the concept of foreseeability and is not limited to the crime of conviction). The CVRA requirement of direct and proximate harm is similar to the crime victim definition used in the primary federal restitution statutes:

[T]he term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

18 U.S.C.A. §§ 3663(a)(2), 3663A(a)(2) (West 2000 & Pamp. 2014) (defining victim status in the primary federal discretionary and mandatory restitution provisions); see Kyl et al., *supra* note 8, at 594 & n.65 (stating that the CVRA crime victim definition is "based on" these restitution statutes); cf. 18 U.S.C.A. §§ 1593(c), 2248(c), 2259(c) (West 2000 & Supp. 2014) (defining a "victim" as "the individual harmed as a result of a commission of" the applicable crime in the mandatory restitution provisions regarding human trafficking, sexual abuse, and sexual exploitation and abuse of children).

²⁰³ The Third Circuit has not reviewed any mandamus petitions regarding this issue. See *supra* CVRA Mandamus Outcomes Table.

²⁰⁴ See *infra* notes 205–12 and accompanying text (describing these petitions).

²⁰⁵ 568 F.3d 81 (2d Cir. 2009).

²⁰⁶ *Id.* at 85–88.

crime of conviction was complete at the moment the defendant received the cash.²⁰⁷ The Second Circuit found that the trial court did not abuse its discretion in finding the union was not directly and proximately harmed by the defendant's offense.²⁰⁸

In *In re Galvis*,²⁰⁹ the Second Circuit also found that the trial court did not abuse its discretion in denying CVRA victim status to the mother of a decedent who was murdered in Columbia by members of an organization that the offender led and regarding which he was convicted in Columbia.²¹⁰ The offender, however, was extradited to the United States and convicted for drug conspiracy charges.²¹¹ The appellate court found no clear error in the trial court's factual finding that there was an insufficient causal connection between the Columbian murder and the drug conspiracy conviction charge to establish the direct and proximate harm required for CVRA victim status.²¹²

Without a discussion of the specific facts in *In re Andrich*,²¹³ the Ninth Circuit found the trial court did not clearly err as a matter of law or abuse its discretion in concluding that the CVRA rights did not apply to the petitioners.²¹⁴ The appellate court concluded that the mandamus petition should be denied under either the CVRA or its traditional mandamus authority.²¹⁵ On the other hand, again without a discussion of the specific facts in *In re Parker*,²¹⁶ the Ninth Circuit granted a CVRA mandamus petition addressing crime victim status.²¹⁷ The appellate court found that the trial court had erred in its conclusion that the petitioners in the underlying air pollution prosecution did not satisfy the CVRA crime victim definition and thus were not eligible for the CVRA-prescribed determination concerning their exclusion from court proceedings.²¹⁸

b. Traditional Review Standard Circuits

The appellate circuits utilizing the traditional mandamus review standard have also denied most, but not all, of the petitions regarding CVRA victim status. The Eleventh Circuit has denied petitions in which the petitioner has actually played a role in the

²⁰⁷ *Id.* at 86.

²⁰⁸ *Id.* at 85 & n.2 (applying similar "victim" definition of applicable restitution statute (18 U.S.C.A. § 3663A(a)(2) (West 2000 & Pamp. 2014)) because the petitioner had presented its case under this provision). Although the defendant planned to use the laundered money to pay employees in cash and thereby avoid taxes and union obligations, he was only charged with and convicted of the money laundering crime. The appellate court found the fact that the Government agreed not to charge the defendant for acts related to defrauding union benefit funds further supported the trial court's determination that this conduct was separate from the money laundering conviction offense. *See id.* at 86–87.

²⁰⁹ 564 F.3d 170 (2d Cir. 2009).

²¹⁰ *Id.* at 174–76.

²¹¹ *Id.* at 172.

²¹² *See id.* at 175–76; *cf. supra* notes 60–65 and accompanying text (discussing the review standard).

²¹³ 668 F.3d 1050 (9th Cir. 2011).

²¹⁴ *Id.* at 1051.

²¹⁵ *See id.*; *supra* notes 73–78 and accompanying text (discussing the review standard). The petitioners had asserted that they were victims of additional unrelated and uncharged federal offenses committed after the defendant entered a plea to mail fraud. The trial court denied their motion to intervene in the criminal case and to be heard at the defendant's sentencing. *See United States v. McMahan*, No. 8:07-cr-00249-CJC (C.D. Cal. Nov. 11, 2011).

²¹⁶ Nos. 09-70529, 09-70533, 2009 U.S. App. LEXIS 10270 (9th Cir. Feb. 27, 2009).

²¹⁷ *Id.* at *1.

²¹⁸ *See id.*; *infra* notes 381–84 and accompanying text (discussing this petition); *see also* 18 U.S.C.A. § 3771(a)(3) (West Pamp. 2014); *cf. United States v. W.R. Grace*, 597 F. Supp. 2d 1157, 1159–66 (D. Mont. 2009) (describing the basis of the trial court's findings regarding the petitioners' crime victim status), *vacated*, CR 05-07-M-DWM, 2009 U.S. Dist. LEXIS 124996 (D. Mont. Feb. 27, 2009).

underlying crime regarding which CVRA crime victim status has been sought.²¹⁹ The Sixth Circuit concluded that the trial court did not abuse its discretion in finding that an employee, who refused to participate in his defendant company's antitrust conspiracy and was subsequently fired and "blackballed" in the related industry, was not a CVRA victim of the conspiracy and that the petitioner had not demonstrated a clear and indisputable right to the writ.²²⁰ In two related mandamus proceedings, the Fifth Circuit considered a trial court's denial of CVRA victim status to the petitioners who invested funds to gain city approval and financing of housing projects that were granted to co-defendants who engaged in a public corruption-related bribery conspiracy.²²¹ The appellate court found that the trial court's factual findings—that the petitioners' claims that they were directly and proximately harmed by the defendants' bribery conspiracy were too speculative—were not clearly erroneous, and the petitioners had not clearly and indisputably established their CVRA victim status.²²²

In *In re Antrobus*,²²³ the Tenth Circuit considered a trial court's denial of CVRA victim status to the parents of a decedent subsequently murdered (with others) with a gun the defendant illegally sold to the murderer when he was a juvenile.²²⁴ The appellate court found that the trial court was not clearly wrong in concluding the defendant's crime of the gun sale was "too factually and temporally attenuated" from the murder over seven months later when the murderer was an adult, and that the murderer's acts were an "independent, intervening cause" of the petitioners' daughter's death.²²⁵ Although characterizing it as a "difficult case," the Tenth Circuit concluded that the petitioners had not established a clear and indisputable right to the writ.²²⁶

²¹⁹ See *In re Wellcare Health Plans, Inc.*, 754 F.3d 1234, 1239 (11th Cir. 2014) (finding no clear abuse of discretion in trial court denial of CVRA victim status to un-indicted co-conspirator and no showing of clear and indisputable right to the writ); *In re Aquino*, No. 12-13238-B (11th Cir. June 22, 2012) (finding no clear error in trial court denial of CVRA victim status to persons who sought fraudulent foreign worker visas from the offender and her co-conspirators); *In re Aquino*, No. 12-11757-B (11th Cir. Apr. 6, 2012) (finding no clearly erroneous factual findings or misapplication of law regarding the above-described victim status determination, actual trial court affording of right to be heard regarding victim status, and no entitlement to relief under any potential CVRA review standard); *In re Instituto Costarricense de Electricidad*, Nos. 11-12707-G, 11-12708-G (11th Cir. June 17, 2011) (finding that the trial court did not clearly err in denying CVRA victim status to the entity that functioned as the offenders' co-conspirator); cf. 18 U.S.C.A. § 3771(d)(1) (prohibiting a person "accused of the crime" from obtaining relief pursuant to the CVRA).

²²⁰ See *In re McNulty*, 597 F.3d 344, 349–53 (6th Cir. 2010); *supra* notes 136–37 and accompanying text (discussing the review standard).

²²¹ *In re Fisher*, 640 F.3d 645 (5th Cir.), *reconsideration denied*, 649 F.3d 401 (5th Cir. 2011); *In re Fisher*, No. 11-10006, 2011 U.S. App. LEXIS 26500 (5th Cir. Oct. 1, 2011).

²²² *Fisher*, 640 F.3d at 647–50 (addressing trial court findings regarding speculation as to the role that the bribery played in the award of city support to the co-defendants rather than the petitioners and the petitioners' decision to invest funds in their projects); *Fisher*, 2011 U.S. App. LEXIS 26500, at *1–4 (finding no clear and indisputable error in the trial court's determination regarding the petitioners' victim status).

²²³ 519 F.3d 1123 (10th Cir. 2008).

²²⁴ *Id.* at 1123–24.

²²⁵ *Id.* at 1125–26 (quoting *United States v. Hunter*, No. 2:07CR307DAK, 2008 U.S. Dist. LEXIS 413, at *4–5 (D. Utah Jan. 3, 2008)).

²²⁶ See *id.* at 1125–26, 1130–31; *supra* notes 90–97, 104–10 and accompanying text (discussing the review standard). A contested fact regarding the causation issue was whether the defendant had heard the murderer say, at the time of the gun sale, that he intended to commit a bank robbery (i.e., a crime different than the one in which the petitioners' daughter and others were murdered). The trial judge had stated that his determination of CVRA victim status would not change even assuming the existence of this fact. See *Antrobus*, 519 F.3d at 1124, 1125 & n.1; *United States v. Hunter*, No. 2:07CR307DAK, 2008 U.S. Dist. LEXIS 1323, at *4 (D. Utah Jan. 8, 2008); see also *In re Antrobus*, 563 F.3d 1092, 1094 (10th Cir. 2009) (denying mandamus based on petitioners' claim of newly discovered evidence establishing that the defendant heard the murderer say that he planned to rob a bank with the gun purchased from the defendant); cf. *In re Antrobus*, No. 08-4013, 2008 U.S. App. LEXIS 27527, at *7 (10th Cir. Feb. 1, 2008) (finding no clear abuse of discretion in trial court's denial of discovery of

The federal appellate circuits utilizing the traditional mandamus review standard have granted two CVRA mandamus petitions concerning CVRA crime victim status.²²⁷ In *In re Allen*,²²⁸ the Fifth Circuit reviewed a petition in which the trial court, finding insufficient evidence of harm, had initially denied the Government's motion to grant victim status to identified community members who resided in the area of the defendants' Clean Air Act violations.²²⁹ Four years later, and two months before sentencing, the petitioners, now through their own pro bono counsel, again attempted to be declared CVRA crime victims. The trial judge denied their request as untimely without addressing the merits of their claim.²³⁰ In its mandamus review of the trial court's action, the Fifth Circuit found that the CVRA does not have a time limit for obtaining trial court relief that would preclude the potential granting of relief under the facts of this case.²³¹ The appellate court found that the circuit's three-part mandamus standard was satisfied, including the fact that it was clear and indisputable that no time bar prevented the trial court from considering the new arguments made by the petitioners' counsel in support of their victim status and the consequent appropriateness of the issuance of the writ.²³² The Fifth Circuit granted the petitioners' writ to require the trial court to consider the new arguments presented by their counsel in support of the petitioners' victim status.²³³

In *In re Stewart*,²³⁴ the Eleventh Circuit considered a mandamus petition brought by home purchasers seeking CVRA victim status regarding a defendant bank official who conspired to deprive the bank of honest services by charging the petitioners an additional mortgage brokerage fee which he and his co-conspirator split.²³⁵ The trial court found that the petitioners were not victims of the defendant's conspiracy to deprive the bank of honest services and denied their request to be heard.²³⁶ The appellate court rejected the respondents' claim that the petitioners were not harmed by the conspiracy because their

Government investigative files and grand jury transcripts in petitioners' attempt to establish CVRA victim status); *supra* notes 98–103 and accompanying text (describing this petition).

In denying mandamus in another case, the Sixth Circuit found it unnecessary to resolve the petitioners' claim that the trial court had refused to recognize them as CVRA crime victims. Regardless whether the petitioners met the CVRA crime victim definition, the appellate court found that the trial court had allowed the petitioners a full opportunity for participation in the proceedings, as petitioners themselves acknowledged, and had actually afforded them the status of CVRA crime victims. See *In re Acker*, 596 F.3d 370, 372–73 (6th Cir. 2010); *supra* notes 131–35 and accompanying text (discussing the review standard).

The District of Columbia Circuit denied without prejudice to renewal a mandamus petition seeking a writ directing the trial court to decide the petitioners' CVRA victim status. Because this matter was already proceeding toward resolution in the trial court, the appellate court determined that mandamus relief was not currently warranted. See *In re Chacin de Henriquez*, No. 10-3051, 2010 U.S. App. LEXIS 12129, at *1–2 (D.C. Cir. June 11, 2010).

²²⁷ See *supra* CVRA Mandamus Outcomes Table.

²²⁸ 701 F.3d 734 (5th Cir. 2012).

²²⁹ *Id.* at 735.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*; compare *United States v. Citgo Petroleum Corp.*, 893 F. Supp. 2d 848, 852–54 (S.D. Tex. 2012) (finding that it had previously applied an incorrect legal standard to determine the community members' victim status, reversing its prior ruling, and deeming the community members CVRA victims), with *United States v. Citgo Petroleum Corp.*, No. C-06-563, 2011 U.S. Dist. LEXIS 37371 (S.D. Tex. Apr. 5, 2011), *reconsideration denied*, 2011 U.S. Dist. LEXIS 82818 (S.D. Tex. July 27, 2011) (describing the basis of the trial court's initial ruling regarding the community members' CVRA victim status). See generally Andrew Atkins, Note, *A Complicated Environment: The Problem with Extending Victims' Rights to Victims of Environmental Crimes*, 67 WASH. & LEE L. REV. 1623 (2010); Ashley Ferguson, Comment, *We're Victims, Too!: The Need for Greater Protection of Environmental Crime Victims Under the Crime Victims' Rights Act*, 19 PENN ST. ENVTL. L. REV. 287 (2011).

²³⁴ 552 F.3d 1285 (11th Cir. 2008).

²³⁵ *Id.* at 1286–87.

²³⁶ *Id.* at 1287.

real estate developers had agreed to pay their closing costs, including the inflated mortgage brokerage fee.²³⁷ The Eleventh Circuit found that the petitioners remained liable to the bank for the closing costs, regardless of the developers' agreement to pay the costs.²³⁸ As a result, the petitioners, as well as the bank, were directly and proximately harmed by the conspiracy and were CVRA victims. The appellate court granted the writ and ordered the trial court to recognize the petitioners as CVRA victims and afford them the CVRA rights associated with this status.²³⁹

c. "Standardless" Review Circuits

The Fourth Circuit, which has not adopted a CVRA mandamus review standard, has denied two mandamus petitions regarding a petitioner's crime victim status.²⁴⁰ One petition involved the bankruptcy estate of an entity that the defendant had utilized to carry out his health care fraud scheme. The appellate court found that neither the entity nor its creditors were directly and proximately harmed by the defendant's fraud offenses.²⁴¹ The other petition involved a petitioner who had become addicted to a prescription drug she used to treat chronic pain, and who sought CVRA victim status in the criminal prosecution of an entity accused of misbranding the drug with the intent to defraud or mislead.²⁴² Because the appellate court concluded that the petitioner's addiction-related harm was not directly and proximately caused by the defendant's misbranding of the drug, she did not qualify as a victim of the crime charged.²⁴³

2. Restitution

The CVRA provides crime victims the right to "full and timely restitution as provided in law."²⁴⁴ Thus, the CVRA does not provide an *additional* right to restitution for CVRA crime victims, but ensures the provision of restitution to the degree afforded by

²³⁷ *Id.* at 1288–89.

²³⁸ *Id.* at 1289.

²³⁹ *Id.*; see *supra* note 152–55, *infra* note 400 and accompanying text (discussing this petition). *But see Stewart*, 552 F.3d at 1290 (Wilson, J., dissenting) (finding no clear abuse of discretion or clear and indisputable right to the writ, as required under the traditional review standard). In finding that the petitioners had established their CVRA victim status, the appellate court stated that, as long as the requisite harm was established, a CVRA victim did not have to be named in the charging document or have an identity that constituted an element of the crime. *Id.* at 1289.

²⁴⁰ See *supra* CVRA Mandamus Outcomes Table.

²⁴¹ See *In re Bankruptcy Estate of AGS, Inc.*, 565 F. App'x 172, 174–75 (4th Cir. 2014) (describing the petitioner's ineligibility for restitution due to its lack of victim status); *supra* notes 179–82 and accompanying text (discussing the review standard).

²⁴² *In re Doe*, 264 F. App'x 260, 261 (4th Cir. Aug. 9, 2007).

²⁴³ See *id.* at 263–64 (describing the petitioner's ineligibility for restitution due to her lack of victim status). The appellate court found that the petitioner did not allege that she directly relied on or was even aware of the drug misbranding. Even assuming that she became aware of "common misperceptions" regarding the drug resulting from the misbranding, the appellate court found the causation chain between the misbranding and the petitioner's addiction was "too attenuated" to establish the requisite causation. See *id.*; *cf. id.* at 264–65 (King, J., concurring) (finding it unnecessary to resolve the causation issue in order to deny mandamus). The appellate court found it unnecessary to determine the applicable review standard because it concluded that the petitioner would not be entitled to relief even under the "lower standard" and concluded that the trial court did not abuse its discretion. See *id.* at 262, 264; *supra* note 173–75 and accompanying text (discussing the review standard).

The Seventh Circuit denied a petition that the appellate court found was prematurely filed in that the trial court had not expressly denied the petitioner CVRA victim status and was actually permitting the petitioner to participate in the determination of victim status. See *In re Oak Brook Bank*, No. 06-2331 (7th Cir. May 12, 2006).

²⁴⁴ 18 U.S.C.A. § 3771(a)(6) (West Pamp. 2014).

other statutes.²⁴⁵ The federal statutes include both mandatory and discretionary restitution provisions,²⁴⁶ with victim eligibility definitions in the primary restitution statutes similar to the definition adopted in the CVRA.²⁴⁷ Restitution is mandatory for all federal violent and property crimes in which an “identifiable” victim has suffered a physical injury or pecuniary loss.²⁴⁸ Restitution is discretionary regarding other crimes.²⁴⁹ Regarding property crimes, however, restitution is not mandatory if the court determines that the large number of victims makes restitution “impracticable” or the determination of complex factual issues regarding a victim’s loss would “complicate or prolong” the sentencing process such that the burden on the sentencing process outweighs the need to provide restitution.²⁵⁰ The court may also decline discretionary restitution if the complication and prolongation of sentencing proceedings required to fashion a restitution order outweigh the need for restitution.²⁵¹

The CVRA restitution-related mandamus claims thus far include those described in the previous section in which the petitioner was not deemed to be an eligible crime victim either under the CVRA or restitution statutory definition or both, and thus was not eligible for restitution.²⁵² They also include petitions, described in this section, by eligible crime victims who have contested the denial or grant of restitution in their individual cases. Almost half of these petitions involve the pursuit of restitution by two child pornography victims in multiple appellate circuits.²⁵³

a. Restitution Petitions Generally

i. *More Expansive Review Standard Circuits*

Applying its abuse of discretion review standard in *In re W.R. Huff Asset Management Co.*,²⁵⁴ the Second Circuit denied mandamus petitions brought by two groups of claimants that had purchased securities from an entity associated with defendants convicted of securities fraud.²⁵⁵ The interrelated criminal, civil, and bankruptcy proceedings involved potentially tens of thousands of victims. The petitioners sought to vacate a settlement agreement incorporating forfeiture of defendant assets in lieu of

²⁴⁵ See *Doe*, 264 F. App’x at 262 n.2; *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 563 (2d Cir. 2005); 150 CONG. REC. S4,268 (daily ed. Apr. 22, 2004) (statement of Sen. Jon Kyl) (stating that the CVRA restitution right, in combination with the rights to be heard and confer with the prosecutor, “means that existing restitution laws will be more effective”); *accord id.* (statement of Sen. Dianne Feinstein); see also 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Jon Kyl) (repeating this statement and adding an endorsement of the “expansive definition” of restitution given in cited decisions); Kyl et al., *supra* note 8, at 610–11 (repeating this statement and describing the interplay between the CVRA restitution right and the restitution statutes).

²⁴⁶ See *infra* notes 247–51 and accompanying text.

²⁴⁷ See *supra* notes 201–02 and accompanying text (discussing victim definitions).

²⁴⁸ 18 U.S.C.A. § 3663A(c) (West 2000 & Pamp. 2014); see also 18 U.S.C.A. §§ 1593, 2248, 2259 (West 2000 & Supp. 2014) (describing the mandatory restitution provisions regarding human trafficking, sexual abuse, and sexual exploitation and abuse of children).

²⁴⁹ 18 U.S.C.A. § 3663 (West 2000 & Pamp. 2014); see also 18 U.S.C.A. § 3664 (West 2000 & Pamp. 2014) (describing restitution procedures including an initial award of restitution in the full amount of the victim’s loss).

²⁵⁰ 18 U.S.C.A. § 3663A(c)(3).

²⁵¹ See 18 U.S.C.A. § 3663(a)(1)(B)(ii).

²⁵² See, e.g., *In re Wellcare Health Plans, Inc.*, 754 F.3d 1234, 1240 (11th Cir. 2014); *In re Bankr. Estate of AGS, Inc.*, 565 F. App’x 172, 175 (4th Cir. 2014); *In re Fisher*, 640 F.3d 645, 650 (5th Cir.), *reconsideration denied*, 649 F.3d 401, 405 (5th Cir. 2011); *In re Fisher*, No. 11-10006, 2011 U.S. App. LEXIS 26500 (5th Cir. Oct. 1, 2011); *In re McNulty*, 597 F.3d 344, 353 (6th Cir. 2010); *In re Local #46 Metallic Lathers Union*, 568 F.3d 81, 88 (2d Cir. 2009); *In re Galvis*, 564 F.3d 170, 176 (2d Cir. 2009); *In re Doe*, 264 F. App’x 260, 264 (4th Cir. Aug. 9, 2007).

²⁵³ See *infra* notes 254–327 and accompanying text.

²⁵⁴ 409 F.3d 555 (2d Cir. 2005).

²⁵⁵ *Id.* at 564.

restitution or a fine at sentencing and adopted in connection with a related non-prosecution agreement that established a \$715 million fund to compensate victims of the securities fraud.²⁵⁶ The petitioners contended that the fund provided less than the required full restitution for the fraud victims and further limited their opportunities for additional recoveries by including releases and indemnifications for various defendants.²⁵⁷

The Second Circuit found that the trial court had not abused its discretion both in finding that the number of crime victims and the complexity of determining victim losses satisfied the above-described exceptions to the mandatory restitution provision and by accepting the settlement agreement as “reasonable substitute restitution.”²⁵⁸ The appellate court further noted that the trial court’s acceptance of the settlement in lieu of a complex restitution determination with an uncertain recovery was consistent with the CVRA’s provision regarding prosecutions with multiple crime victims.²⁵⁹ “In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights [identified 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.”²⁶⁰

In *In re Morning Star Packing Co.*,²⁶¹ the Ninth Circuit, however, found that the trial court had committed legal error in denying restitution to petitioners who claimed they were entitled to mandatory restitution for the full amount of their losses caused by the defendant’s crime.²⁶² The trial court had based its denial on determinations that it “would be an unduly complex and time-consuming exercise” to determine restitution, the defendant could not financially satisfy a restitution award, and the victims could pursue relief in civil proceedings.²⁶³ The appellate court concluded that the trial court committed legal error by basing its denial on these factors because the defendant’s financial capacity and the availability of a civil remedy are not proper statutory factors to consider regarding the imposition of mandatory restitution.²⁶⁴ In addition, the record was unclear whether the trial court had conducted the required statutory balancing test that the burden on the sentencing process outweighed the need for restitution in the case.²⁶⁵ The Ninth Circuit granted the mandamus petition and required the trial court to vacate its judgment denying restitution and conduct further proceedings using appropriate factors to determine whether to award restitution in the case.²⁶⁶

²⁵⁶ *Id.* at 557–59.

²⁵⁷ *See id.* at 560–61.

²⁵⁸ *Id.* at 563–64.

²⁵⁹ *See id.* at 564; *supra* notes 48–59; *infra* notes 344–51 and accompanying text (discussing this petition).

²⁶⁰ 18 U.S.C.A. § 3771(d)(2) (West Pamp. 2014).

²⁶¹ 711 F.3d 1142 (9th Cir. 2013).

²⁶² *Id.* at 1143–44.

²⁶³ *Id.*

²⁶⁴ *See id.*

²⁶⁵ *Id.* at 1144.

²⁶⁶ *See id.* (applying provisions in 18 U.S.C.A. §§ 3663A, 3664 (West 2000 & Pamp. 2014)). The Ninth Circuit denied, as “unripe,” a restitution-related petition filed prior to the defendant’s sentencing. *In re Stake Center Locating, Inc.*, 717 F.3d 1089, 1090 (9th Cir. 2013); *cf. In re Oak Brook Bank*, No. 06-2331 (7th Cir. May 12, 2006) (denying the petitioner’s restitution claim as premature without reference to a review standard). The Ninth Circuit subsequently found that the trial court did not abuse its discretion or commit legal error by denying the petitioner’s motion to compel the Government to initiate forfeiture proceedings to obtain property “traceable” to the defendant’s crimes, in addition to the restitution already awarded to the petitioner. The appellate court found that the CVRA did not provide a victim right to criminal forfeiture or impair the Government’s “broad discretion” regarding seeking such forfeiture. *See In re Stake Center Locating, Inc.*, 731 F.3d 949, 950–51 (9th Cir. 2013).

ii. Traditional Review Standard Circuits

Applying traditional mandamus review standards in *In re Allen*,²⁶⁷ the Fifth Circuit denied a CVRA petition regarding which the trial court had denied restitution, in part, based on a conclusion that the difficulties of determining restitution and resultant burden on the sentencing process outweighed any need for restitution.²⁶⁸ The petition concerned a Clean Air Act prosecution in which the trial court had determined that all persons who lived near the refinery that caused the violation during a specified period, demonstrated specified symptoms, and submitted victim impact statements by a specified date would be deemed CVRA crime victims.²⁶⁹ Over 800 individuals submitted victim impact statements and experts and over 90 victims had offered oral testimony in connection with the restitution claims.²⁷⁰ The trial court found that the crime victims had not established the factual basis for their restitution claims based on the presented evidence and that the difficulties of determining restitution and resultant burden on the sentencing process outweighed any need for restitution under the discretionary restitution provisions.²⁷¹ The Fifth Circuit found that the petitioners had not demonstrated that the trial court clearly and indisputably erred in invoking this exception to the discretionary grant of restitution.²⁷²

In *In re Acker*,²⁷³ the Sixth Circuit denied a restitution-related petition after adopting the traditional mandamus standard that included a required showing of a “clear abuse of discretion.”²⁷⁴ The petitioners sought 1) to vacate the plea agreement in this antitrust prosecution that did not include restitution “in deference to” the related pending civil litigation, and 2) to participate as parties to its renegotiation to include restitution.²⁷⁵ The appellate court found that the trial court had considered all appropriate factors and had reasonably applied the exception to the grant of restitution for cases in which the burden on the sentencing process due to a determination of restitution outweighed any need for restitution. The Sixth Circuit found that the CVRA did not compel restitution in this case and that the trial court had not abused its discretion in accepting the plea agreement.²⁷⁶

In *In re Stewart*,²⁷⁷ the Eleventh Circuit denied a restitution-related petition prior to its formal adoption of the traditional mandamus review standard, but based on its conclusion that a petitioner showing of a clearly erroneous factual finding by the trial court in denying restitution was required in the instant case regardless of what review standard was applied.²⁷⁸ The appellate court agreed with the trial court that the petitioners’

²⁶⁷ 568 F. App’x 314 (5th Cir. 2014).

²⁶⁸ *Id.* at 315–16.

²⁶⁹ *See id.*; *United States v. Citgo Petroleum Corp.*, No. C-06-563, 2014 U.S. Dist. LEXIS 60172 (S.D. Tex. Apr. 30, 2014); *see also* 18 U.S.C.A. § 3663 (West 2000 & Pamp. 2014); *cf. supra* note 228–33 and accompanying text (describing previous grant of mandamus for the trial court to consider additional arguments regarding the petitioners’ CVRA victim status and the trial court’s subsequent redetermination of its previous denial of victim status).

²⁷⁰ *Allen*, 568 F. App’x at 315.

²⁷¹ *See id.* at 315–16.

²⁷² *See id.* The Fifth Circuit denied two other restitution-related CVRA mandamus petitions. *See In re Community Housing Fund*, No. 11-11155 (5th Cir. Dec. 9, 2011) (petition regarding restitution denied to the petitioner fund controlled by the defendants); *In re Butler*, No. 06-20848 (5th Cir. Nov. 1, 2006) (petition denied concerning an abated prosecution regarding which the petitioner claimed restitution).

²⁷³ 596 F.3d 370 (6th Cir. 2010).

²⁷⁴ *Id.* at 372–73.

²⁷⁵ *Id.* at 373.

²⁷⁶ *See id.*; *supra* notes 131–35, *infra* note 363 and accompanying text (discussing this petition).

²⁷⁷ 641 F.3d 1271 (11th Cir. 2011).

²⁷⁸ *Id.* at 1274–75.

claimed loss resulted from their builders' failure to complete their construction projects and the resulting default on their construction loans rather than the defendant's fraudulent collection of an additional mortgage brokerage fee. As a result, the petitioners were not entitled to restitution from the defendant and the appellate court denied their mandamus petition.²⁷⁹

b. "Amy" and "Vicky" Petitions

Seven CVRA mandamus petitions thus far have involved trial courts' application of the specific mandatory restitution provision concerning sexual exploitation and abuse of children.²⁸⁰ This provision requires mandatory restitution to an individual "harmful as a result of" an applicable crime in the "full amount" of the victim's loss in specifically identified areas, such as medical services, therapy, attorney's fees, and lost income, as well as any other losses suffered as a "proximate result" of the crime.²⁸¹ The CVRA petitions have concerned one or both petitioners, designated by the pseudonyms "Amy" and "Vicky," who were sexually abused as children and whose abusers filmed and distributed images of the abuse. The petitions have addressed prosecutions in which Amy or Vicky, or both, have sought restitution in the full amount of their losses—as much as approximately \$3.4 million for Amy and \$1.3 million for Vicky—from defendants subsequently convicted of possessing, transporting, or distributing child pornography that included images of Amy and/or Vicky.²⁸² In addressing these petitions, the appellate courts reached different conclusions regarding whether all of a victim's claimed losses must be proximately caused by a defendant's conduct or only the "catchall" non-specific category of losses in the restitution statute. The Court ultimately resolved the conflict among the circuits regarding the proximate causation requirement in *Paroline v. United States*.²⁸³

i. Traditional Review Standard Circuits

Appellate circuits that had adopted traditional mandamus review standards initially addressed CVRA petitions regarding this issue. The Fifth Circuit was the first to address a CVRA mandamus petition filed by Amy regarding a child pornography possession prosecution in which two images of Amy were found among a large number of images of children on the defendant's computer.²⁸⁴ The trial court concluded that the

²⁷⁹ See *id.* at 1275 (finding that the petitioners approved the construction draws and were therefore on notice that the bank would deduct the mortgage-related fee from them); *supra* notes 156–59 and accompanying text (discussing the review standard); *cf. supra* notes 234–39 and accompanying text (granting mandamus regarding the petitioners' victim status).

²⁸⁰ See *infra* notes 281–327 and accompanying text.

²⁸¹ See 18 U.S.C.A. § 2259 (West 2000).

²⁸² In the years since the sexual abuse images were filmed, they have been widely circulated by and among third parties. At least 35,000 images of Amy's abuse have been found among the evidence in over 3,200 child pornography cases since 1998. Amy's restitution claim of approximately \$3.4 million is based on the total amount of her losses from the production, distribution, and possession of the images and primarily consists of losses for future psychological care and lost income. Restitution has been ordered to Amy in amounts ranging from \$100 to over \$3.5 million in at least 174 child pornography cases. See *In re Amy Unknown*, 701 F.3d 749, 752–53 & n.3 (5th Cir. 2012) (en banc), *vacated and remanded sub nom. Paroline v. United States*, 134 S. Ct. 1710 (2014). Vicky's losses of over \$1.3 million primarily include lost income, counseling expenses, and attorney's fees. She has received restitution to some extent in at least 309 prosecutions. See *United States v. Cantrelle*, No. 2:11-cr-00542-GEB, 2013 U.S. Dist. LEXIS 53767, at *18–23 (E.D. Cal. Apr. 15, 2013).

²⁸³ 134 S. Ct. at 1718, 1722–30; see *infra* notes 328–36 and accompanying text (discussing the Court's decision).

²⁸⁴ See *In re Amy*, 591 F.3d 792, 794 (5th Cir. 2009), *reh'g granted sub nom. In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011), *reh'g en banc granted*, 701 F.3d at 749, *vacated and remanded sub nom. Paroline*, 134 S. Ct. at 1710.

Government had failed to establish that the defendant's conduct proximately caused any of Amy's approximately \$3.4 million loss and denied her any restitution.²⁸⁵ In its mandamus review of the restitution determination, the initial appellate panel noted that existing precedent in other circuits required a proximate causation showing for restitution under this statute and that the Fifth Circuit had not yet construed this aspect of the statute.²⁸⁶ This panel denied mandamus, finding that Amy had neither clearly nor indisputably established the correctness of her contention that the statute did not require a showing of proximate causation between the categories of her claimed losses and the defendant's conduct.²⁸⁷

On rehearing, a different appellate panel concluded that the trial court had clearly and indisputably erred by requiring proximate causation as to all of Amy's losses as opposed to only the catchall non-specific category of victim loss. The rehearing panel granted the mandamus writ and remanded the matter for the determination of restitution owed to Amy.²⁸⁸ The Fifth Circuit reheard Amy's petition en banc.²⁸⁹ The en banc court recognized that the other circuits that had addressed the issue had concluded that the sexual exploitation of children restitution statute requires a showing of proximate causation between a defendant's criminal conduct and all categories of a victim's losses. However, the en banc court concluded that the language and rationale of the statute supported a limitation of the proximate causation requirement solely to the catchall category of restitution losses.²⁹⁰

Pursuant to the Fifth Circuit en banc court's statutory interpretation, in order to obtain restitution under the statute, a person must first establish victim status by demonstrating that images possessed, received, or distributed by a defendant include an image(s) of the individual.²⁹¹ Once victim status is established, the individual is entitled to full restitution for all categories of losses specifically identified in the statute, e.g., medical services and therapy, and any additional catchall categories of loss that the victim can establish were proximately caused by the defendant's criminal conduct.²⁹² In awarding restitution in cases with multiple offenders, such as this, a trial court can use available

²⁸⁵ *Id.* at 794–95.

²⁸⁶ *Id.* at 794.

²⁸⁷ *Id.* at 795. *But see id.* at 795–98 (Dennis, J., dissenting) (finding that Amy was entitled to some amount of restitution and supporting a remand for a determination of an appropriate amount).

²⁸⁸ *Amy Unknown*, 636 F.3d at 192–202. In addition to her mandamus petition, Amy attempted to file a direct appeal from the trial court's restitution ruling that was assigned to this panel. Her request for rehearing of the mandamus panel ruling was consolidated with her attempted appeal before this second appellate panel. *See id.* at 193–94; *cf. id.* at 192–93 (determining there was no need to resolve the issue of a CVRA victim right to appeal because of the grant of mandamus).

²⁸⁹ *See Amy Unknown*, 701 F.3d at 752. In addition to the conflict between the initial and rehearing panel opinions, another Fifth Circuit panel had addressed the same proximate causation issue in a direct appeal by an offender in a child pornography possession case that included some images of Amy and in which the trial court had awarded over \$500,000 in restitution to Amy. *See United States v. Wright*, 639 F.3d 679, 681 (5th Cir. 2011), *reh'g en banc granted*, 701 F.3d 749 (5th Cir. 2012). Although the *Wright* panel applied the *Amy* rehearing panel's interpretation that proximate causation is only required regarding the catchall loss category, it concluded that the trial court had not adequately articulated a rationale for its restitution award, vacated the restitution order, and remanded the case for the trial court to better explain the basis for its restitution award. *See id.* at 684–86. Moreover, although they applied the *Amy* rehearing panel interpretation of the restitution statute concerning proximate causation, all of the judges on the panel specially concurred to express their disagreement with this interpretation and to urge the court to rehear both cases en banc. *See id.* at 686–92 (Davis, J., joined by King and Southwick, JJ., specially concurring).

²⁹⁰ *See Amy Unknown*, 701 F.3d at 759–72.

²⁹¹ *Id.* at 773.

²⁹² *Id.*

statutory procedures, such as joint and several liability.²⁹³ The en banc court applied its statutory interpretation to Amy's restitution-based mandamus petition. It concluded that, as a victim of the defendant's child pornography possession offense, Amy was entitled to the full amount of her losses and that the trial court had clearly and indisputably erred in awarding her no restitution.²⁹⁴ Thus, the appellate court granted her mandamus petition, vacated the underlying trial court judgment, and directed the trial court to enter a restitution order for the full amount of Amy's losses pursuant to the restitution statute.²⁹⁵ The Court subsequently vacated and remanded this judgment in *Paroline*, as described later in this section.²⁹⁶

The Fifth Circuit also applied the traditional mandamus standards to grant mandamus to Amy and Vicky in a child pornography possession prosecution that included images of both of them.²⁹⁷ In this case, the trial court had awarded \$125,000 restitution to each petitioner (of the over \$3 million sought) based on their counseling expenses for ten years and attorneys' fees, but had not explicitly stated whether the defendant had joint and several liability for this restitution.²⁹⁸ Following the affirmance of the restitution award on the offender's appeal,²⁹⁹ the trial court granted the offender's motion for a hearing regarding the restitution award. The trial court stated at the hearing that the previously imposed restitution obligation was to be joint and several. It then entered an order that the offender had no obligation to pay any of the awarded amounts of restitution because Amy and Vicky had each already received more than \$125,000 in restitution from defendants in other cases.³⁰⁰

²⁹³ See *id.* at 772–73 (including a description of the interplay between 18 U.S.C.A. §§ 2259, 3664 (West 2000 & Pamp. 2014)).

²⁹⁴ *Id.* at 773–74.

²⁹⁵ See *id.* The appellate court also found that Amy satisfied the two other criteria for mandamus, i.e., she had no other available remedy because mandamus was her only CVRA remedy and the grant of mandamus was appropriate in light of the court's statutory interpretation. See *id.* at 773; see also *id.* at 754–56 & n.5 (finding no CVRA victim right to appeal); *id.* at 774 (affirming the award of over \$500,000 restitution to Amy in the *Wright* case despite the fact that it erroneously did not reflect the full amount of Amy's loss because the Government did not appeal the sentence and Amy did not seek mandamus regarding it); *id.* at 774–75 (Dennis, J., concurring in part in the judgment) (suggesting trial courts can take steps to craft restitution orders in cases with multiple defendants pursuant to the applicable restitution statutes); *cf. id.* at 775–80 (Davis, J., joined by King, Smith, and Graves, JJ., concurring in part and dissenting in part) (finding proximate causation is required, but satisfied here; agreeing with the remand for a determination of restitution; and disagreeing with the majority's analysis regarding its award in cases with multiple offenders). But see *id.* at 780–82 (Southwick, J., dissenting) (finding that proximate causation is required and can be shown through aggregate causation; that additional restitution proceedings are necessary in the case; and disagreeing with the majority's analysis regarding its award in cases with multiple offenders).

²⁹⁶ *Paroline v. United States*, 134 S. Ct. 1710, 1730 (2014) (vacating and remanding the judgment); *infra* notes 328–36 and accompanying text (discussing the *Paroline* decision).

²⁹⁷ See *In re Amy Unknown*, No. 13-20485, slip op. at 1 (5th Cir. Aug. 30, 2013).

²⁹⁸ See *id.*; *United States v. Gammon*, No. 11-20902, slip op. at 2–3 & n. 1 (5th Cir. Apr. 29, 2013).

²⁹⁹ On appeal, the offender challenged the restitution order because there was no showing that the victims' losses were proximately caused by his conduct. The appellate court rejected this challenge on the basis of its en banc opinion in *In re Amy Unknown*, described *supra* notes 289–95 and accompanying text, and found that the categories of the victims' losses did not require a showing of proximate causation. See *Gammon*, No. 11-20902, slip op. at 3–5. The offender also claimed that the trial court abused its discretion by failing to explain the reasons for the restitution amount and by not stating whether he was jointly and severally liable for the victims' losses. The appellate court found that the trial court adequately explained the basis for its restitution award (in the absence of a Government appeal or victim mandamus petition seeking an award of the full amount of claimed victim loss). The appellate court also found 1) no abuse of discretion based on the trial court's failure to indicate whether the offender's liability was joint and several; 2) that the offender's liability was limited to the amounts of restitution awarded; and 3) that, pursuant to the restitution procedural statute, the offender could seek to suspend restitution payments in the future if the victims were fully compensated for the full amount of their losses by other offenders. See *id.*, slip op. at 5–8.

³⁰⁰ See *Amy Unknown*, No. 13-20485, slip op. at 2.

In its mandamus review, the Fifth Circuit found that its previous affirmance of the restitution award included a determination that the offender's obligation to pay \$125,000 each to Amy and Vicky was *not* joint and several and that the trial court intended a restitution award separate from the victims' recovery in other cases. As a result, the appellate court found that the traditional mandamus criteria were satisfied, including the petitioners' clear and indisputable right to the writ. It granted the writ and ordered the reinstatement of the original restitution award of \$125,000 to each victim without regard to any other recovery they might receive.³⁰¹

Contrary to the Fifth Circuit, the District of Columbia Circuit concluded that the child sexual exploitation restitution statute requires a showing of proximate causation between an offender's criminal conduct and all of a victim's losses.³⁰² However, applying traditional mandamus standards, the appellate court granted Amy's mandamus petition in part.³⁰³ In this case, the offender was convicted of possessing child pornography that included one image of Amy. The trial court awarded Amy \$5,000 that it characterized as "nominal" restitution regarding the over \$3.2 million she sought as her total losses from the creation and distribution of the pornographic images of her.³⁰⁴ The trial court indicated that the restitution amount was less than the actual harm the offender caused Amy, but that the Government and Amy had failed to establish the specific amount of loss that was caused by the offender's possession of the image of Amy.³⁰⁵ The trial court also declined to hold the offender jointly and severally liable for all of Amy's losses based on the conduct of others.³⁰⁶

On mandamus review, the District of Columbia Circuit found that because the record did not establish that the offender's conduct proximately caused all of Amy's losses, the trial court did not clearly and indisputably err in declining to impose joint and several liability on the offender for the full amount of Amy's losses. However, she was entitled to the loss that the offender did proximately cause and which the trial court acknowledged was in excess of the \$5,000 restitution awarded. By awarding restitution in an amount less than that the offender proximately caused, the trial court did clearly and indisputably err, entitling Amy to the grant of mandamus.³⁰⁷ On remand, the District of Columbia Circuit directed the trial court to reconsider the existing evidence presented by the Government to establish the losses the offender's conduct proximately caused Amy or to permit the submission of additional evidence or a formula or some "principled method" for determining the amount of restitution owed to Amy.³⁰⁸

The Eighth Circuit also concluded that the child sexual exploitation restitution statute requires a showing of proximate causation between an offender's criminal conduct

³⁰¹ See *id.*, slip op. at 2–3. The appellate court noted that the petitioners had already recovered more than \$125,000 each at sentencing which would have rendered the restitution award a nullity if based on joint and several liability and that the trial court did not indicate a joint and several restitution obligation at sentencing. See *id.*

³⁰² See *In re Amy*, 641 F.3d 528, 534–37 (D.C. Cir. 2011).

³⁰³ See *id.* at 530.

³⁰⁴ *Id.*

³⁰⁵ See *id.*

³⁰⁶ *Id.* at 530–31; cf. *United States v. Monzel*, 641 F.3d 528, 540–44 (D.C. Cir. 2011) (dismissing Amy's companion attempted direct appeal after finding no CVRA victim right or other right to appeal the restitution award).

³⁰⁷ *Amy*, 641 F.3d at 539–40.

³⁰⁸ *Id.* at 540; *id.* at 540–44 (finding that mandamus was Amy's only adequate remedy); see *supra* notes 140–46 and accompanying text (discussing the review standard).

and all of a victim's losses.³⁰⁹ The appellate court reached this conclusion in a mandamus review of a trial court's award of \$3,333 in restitution to Vicky as part of the offender's receipt and distribution of child pornography sentence rather than the full amount of her losses that included the conduct of other offenders. The amount was calculated based on Vicky's medical care, therapy, lost income, and attorney's fees expenses after the date of the offender's crime.³¹⁰ Applying traditional standards of mandamus review, the appellate court concluded that the full amount of losses that Vicky sought included losses prior to the commission of the offender's crime and which he could not have proximately caused.³¹¹ Thus, the trial court did not clearly and indisputably err in declining to award Vicky the full amount of her losses that included these pre-crime losses. In addition, the trial court articulated the basis for the restitution award for Vicky's post-crime losses which the trial court found represented the full amount of her losses proximately caused by the conduct of this offender. The Eighth Circuit found that the trial court did not clearly and indisputably err in its restitution determination and denied the mandamus petition.³¹² The Court subsequently vacated and remanded this judgment for further consideration "in light of" *Paroline*, as described later in this section.³¹³

ii. More Expansive Review Standard Circuits

Prior to the CVRA, the Ninth Circuit had concluded that the child sexual exploitation restitution statute requires a showing of proximate causation between an offender's criminal conduct and all of a victim's losses.³¹⁴ In their mandamus petition, Amy and Vicky challenged the trial court's denial of any restitution to Amy and the award of \$4,545 to Vicky for the offender's transportation of child pornography including their images.³¹⁵ Utilizing its more expansive abuse of discretion or legal error review standard and applying circuit precedent regarding the requirement of proximate causation regarding

³⁰⁹ See *In re Vicky*, 709 F.3d 712, 720–22 (8th Cir. 2013), *vacated and remanded sub nom. Vicky v. Fast*, 134 S. Ct. 1934 (2014). *But see id.* at 723–28 (Shepherd, J., concurring in part, dissenting in part) (finding that proximate causation is only required for the catchall category of restitution loss).

³¹⁰ See *id.* at 715. Vicky sought from the offender her full losses of over \$1.2 million minus the almost \$300,000 she had already recovered from other defendants. The trial court awarded restitution of almost \$20,000 and found that proximate causation was only required for the catchall restitution category. On the offender's appeal, the Government agreed that proximate causation was required regarding all losses. The appellate court remanded the matter for the reconsideration of restitution. On remand, the trial court calculated an amount of restitution based on Vicky's medical care, therapy, lost income, and attorney's fees expenses after the date of the offender's crime. See *id.*

³¹¹ See *id.* at 718–20; *supra* notes 147–51 and accompanying text (discussing the review standard); cf. *United States v. Fast*, 709 F.3d 712, 715–18 (8th Cir. 2013), *vacated and remanded on other grounds sub nom. Vicky*, 134 S. Ct. at 1934 (dismissing Vicky's companion attempted direct appeal after finding no CVRA victim right or other right to appeal the restitution award).

³¹² See *Vicky*, 709 F.3d at 722–23. *But see id.* at 723–28 (Shepherd, J., concurring in part, dissenting in part) (finding that proximate causation is only required for the catchall category of restitution loss and supporting the grant of the petition and remand for entry of restitution in the full amount of Vicky's loss).

³¹³ *Vicky*, 134 S. Ct. at 1934; see *infra* note 337 and accompanying text.

³¹⁴ See *United States v. Lancy*, 189 F.3d 954, 965 (9th Cir. 1999).

³¹⁵ See *In re Amy & Vicky*, 698 F.3d 1151, 1152 (9th Cir. 2012), *vacated and remanded sub nom. Amy and Vicky v. U.S. Dist. Court*, 134 S. Ct. 1959 (2014). In the trial court, Amy sought restitution for losses of \$3 million and Vicky sought restitution for over \$225,000. The trial court had initially awarded restitution to Amy and Vicky based on \$1,000 per image of them that the offender had on his computer, resulting in \$17,000 for Amy and \$48,000 for Vicky. On the offender's direct appeal, the Ninth Circuit expanded the discussion of its prior precedent regarding the required proximate causation for restitution under the statute. It concluded that the Government had not proven that the offender's crime proximately caused the victims' losses, such proof needed to support an award of any restitution. The appellate court also questioned whether the formula the trial court used to determine the amount of restitution was an adequate measure of victim loss. The appellate court vacated the restitution award and remanded the matter for a redetermination regarding restitution. See *United States v. Kennedy*, 643 F.3d 1251, 1254–56, 1259–66 (9th Cir. 2011).

victim loss, the Ninth Circuit denied the mandamus petition.³¹⁶ The Court subsequently vacated and remanded this judgment for further consideration “in light of” *Paroline*, as described later in this section.³¹⁷

In a separate Ninth Circuit-based prosecution, Amy sought over \$3.3 million and Vicky sought over \$1.3 million for losses associated with the offender’s child pornography distribution conviction that included Amy and Vicky in at least one of the images he distributed.³¹⁸ The presentence report did not recommend restitution based on the lack of information establishing a causal connection between the offender’s conduct and the victims’ losses. In the absence of any additional evidence by the Government or the victims establishing such a causal connection, the trial court did not order restitution to Amy and Vicky.³¹⁹

In its mandamus review of the restitution denial, the Ninth Circuit found that the trial court did not err in requiring a showing of proximate causation in determining restitution, pursuant to circuit precedent, and denied the petition in this regard.³²⁰ However, the appellate court found that the trial court had abused its discretion in denying any restitution to Amy and Vicky.³²¹ Contrary to the presentence report recommendation adopted by the trial court, the appellate court found that the petitioners had offered sufficient record evidence to establish the required causal connection between their losses and the offender’s crime.³²² Therefore, the Ninth Circuit granted the mandamus petition, in part, and remanded the matter for the vacation of the restitution aspect of the judgment and a determination of the amount of restitution owed to Amy and Vicky.³²³

On remand, the trial court reviewed the victims’ claimed losses, made some adjustments, and then deducted from the pool of each victim’s remaining total losses any losses that were specifically traceable to another defendant’s conduct and any losses that predated the defendant’s conduct. To determine the offender’s share of the victims’ losses, the court then divided the resulting sums by the number of restitution orders in other prosecutions associated with the victims’ images. This formula resulted in a restitution award of \$2,881 for Vicky and \$17,307 for Amy.³²⁴

In their mandamus proceeding regarding these restitution awards, Amy and Vicky contended that the trial court had used an “improper methodology” to determine the restitution amounts and the court should have imposed joint and several liability on the defendant for all of their losses.³²⁵ The Ninth Circuit found that 1) the imposition of joint and several liability was not expressly authorized in the applicable restitution statutes; 2) the Ninth Circuit had not yet determined the appropriate method for calculating restitution pursuant to the child sexual exploitation statute; and 3) a conflict in the circuits existed on

³¹⁶ See *Amy & Vicky*, 698 F.3d at 1152–53 (declining the petitioners’ request to overrule its proximate causation precedent and adopt the Fifth Circuit interpretation that proximate causation is only required regarding the catchall category of statutory losses).

³¹⁷ See *Amy and Vicky*, 134 S. Ct. at 1959; *infra* note 338 and accompanying text.

³¹⁸ See *United States v. Cantrelle*, No. 2:11-cr-00542-GEB, 2013 U.S. Dist. LEXIS 53767, at *2–3 (E.D. Cal. Apr. 15, 2013).

³¹⁹ *Id.* at *3–5.

³²⁰ See *In re Amy & Vicky*, 710 F.3d 985, 986–87 (9th Cir. 2013) (declining the petitioners’ request to overrule its proximate causation precedent and adopt the Fifth Circuit interpretation that proximate causation is only required regarding the catchall category of statutory losses).

³²¹ *Id.* at 987.

³²² See *id.*

³²³ See *id.*

³²⁴ See *Cantrelle*, 2013 U.S. Dist. LEXIS 53767, at *10–27.

³²⁵ *In re Amy & Vicky*, 714 F.3d 1165, 1167 (9th Cir. 2013).

this issue with the weight of the authority declining to impose joint and several liability.³²⁶ As a result, the trial court did not commit legal error or abuse its discretion by declining to impose joint and several liability on the defendant for all of the victims' losses. The Ninth Circuit therefore denied the mandamus petition.³²⁷

iii. Court Resolution of the Causation Issue

Almost ten years after the enactment of the CVRA and twenty years after the enactment of the child sexual exploitation restitution statute, the Court granted certiorari, in *Paroline v. United States*,³²⁸ the Fifth Circuit en banc case involving Amy's images, to resolve the conflict that had developed between the circuits regarding the proximate causation requirement.³²⁹ The *Paroline* Court concluded that the proximate causation requirement applies to all categories of loss described in the statute and that restitution under the statute is thus "proper" only to the degree that an offender's crime proximately caused a victim's loss.³³⁰ The Court, however, recognized the challenges of applying this proximate causation requirement, and the accompanying actual causation requirement, in cases like Amy's in which hundreds or thousands of individuals might have participated in creating her losses and in which attributing specific losses to an individual offender through traditional causal analysis might not be possible.³³¹

In this "special context," the *Paroline* Court concluded that courts applying the statute should award restitution in an amount that reflects a defendant's "relative role in the causal process that underlies the victim's general losses."³³² Although the Court entrusted the application of these interpretive principles and the resulting determination of restitution in these circumstances to the discretion of the trial courts, it suggested possible factors a trial court might consider in determining a specific offender's relative role in the overall causal process resulting in a victim's losses. For example, after first determining a victim's overall losses from the continuing distribution of pornographic images of the victim, the Court stated that a trial court could consider the estimated number of prosecuted and not yet prosecuted offenders engaged in related conduct generating the losses as well as factors concerning the defendant's individual conduct (e.g., possession vs. distribution of images, the number of images of the victim involved, and any connection to the images' production).³³³ The *Paroline* Court stated that a restitution amount based on a consideration of such types of factors would be deemed the amount of a victim's overall losses that were the "proximate result" of an offender's crime and the "full amount" of the losses owed to the victim under the statute.³³⁴

³²⁶ *Id.* at 1167–68; *cf. id.* (declining the petitioners' request to overrule its proximate causation precedent)

³²⁷ *See id.*

³²⁸ 134 S. Ct. 1710, 1718 (2014).

³²⁹ The Court identified the conflict as one "over the proper causation inquiry for purposes of determining the entitlement to and amount of restitution" under the child sexual exploitation restitution statute. *Id.* The Fifth Circuit's position applying a proximate causation requirement only to the catchall category of loss conflicted with decisions of the First, Second, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuits that applied a proximate causation requirement to all losses under the statute. *See id.* at 1719 (citing cases).

³³⁰ *See id.* at 1718–22.

³³¹ *See id.* at 1722–27.

³³² *Id.* at 1727.

³³³ *Id.* at 1727–28.

³³⁴ *Id.* at 1728 (applying 18 U.S.C.A. § 2259 (West 2000)). *But see id.* at 1730–35 (Roberts, C.J., joined by Scalia and Thomas, JJ., dissenting) (finding that the statute requires actual and proximate causation between a defendant's conduct and a victim's loss and that no actual causation was shown here that would support a restitution award); *id.* at 1735–44 (Sotomayor, J., dissenting) (supporting an aggregate causation interpretation that would permit restitution in the full amount of a victim's losses from each defendant).

The *Paroline* Court concluded that the Fifth Circuit's interpretation of the restitution statute's requirements was "incorrect" and that the trial court in the matter had erred in requiring a "strict showing of but-for causation."³³⁵ The Court vacated the Fifth Circuit judgment granting mandamus and remanded the matter for further proceedings consistent with its opinion.³³⁶ The Court subsequently vacated—and remanded for further consideration "in light of" *Paroline*—the judgments related to the Eighth Circuit's denial of mandamus to Vicky³³⁷ and the Ninth Circuit's denial of mandamus to Amy and Vicky in their initial mandamus action there.³³⁸

3. Participation Rights

The CVRA includes four crime victim participatory rights regarding notice, an opportunity to confer with the prosecutor and to be heard, and an exemption from exclusion from court proceedings for testifying victims. The notice right provides crime victims the right to "reasonable, accurate, and timely notice" of public court proceedings and parole proceedings concerning the crime or the defendant's release or escape.³³⁹ The CVRA provides crime victims the "reasonable right to confer" with the prosecutor in the case.³⁴⁰ The right of testifying victims not to be excluded from public court proceedings is granted unless the court finds, by clear and convincing evidence, that a victim's testimony would be "materially altered" if the crime victim heard other testimony at the applicable proceeding.³⁴¹ The CVRA right to be "reasonably heard" relates to public proceedings in the trial court regarding release, plea, and sentencing and parole proceedings.³⁴² The federal appellate circuits have reviewed mandamus petitions regarding each of these participatory rights, with the most petitions concerning the right to be reasonably heard.³⁴³

³³⁵ *Id.* at 1730.

³³⁶ *Id.*; see *supra* notes 284–96 and accompanying text (discussing this petition).

³³⁷ See *Vicky v. Fast*, 134 S. Ct. 1934 (2014); *supra* notes 309–13 and accompanying text (discussing this petition).

³³⁸ See *Amy and Vicky v. U.S. Dist. Court*, 134 S. Ct. 1959 (2014); *supra* notes 314–17 and accompanying text (discussing this petition).

³³⁹ 18 U.S.C.A. § 3771(a)(2) (West Pamp. 2014); see 18 U.S.C.A. § 3771(a)(3)–(5).

³⁴⁰ 18 U.S.C.A. § 3771(a)(5).

³⁴¹ 18 U.S.C.A. § 3771(a)(3), (b)(1); 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 (2005).

³⁴² 18 U.S.C.A. § 3771(a)(4); see 150 CONG. REC. S4,267–68 (daily ed. Apr. 22, 2004) (statements of Sens. Jon Kyl and Dianne Feinstein) (describing the participatory rights); see also 150 CONG. REC. S10,910–12 (daily ed. Oct. 9, 2004) (statement of Sen. Jon Kyl); cf. Aaronson, *supra* note 8, at 646–62; Richard A. Bierschbach, *Allocation and the Purposes of Victim Participation Under the CVRA*, 19 FED. SENT'G REP. 44 (2006); Russell P. Butler, *What Practitioners and Judges Need to Know Regarding Crime Victims' Participatory Rights in Federal Sentencing Proceedings*, 19 FED. SENT'G REP. 21 (2006); Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocation, Defendant Allocation, and the Crime Victims' Rights Act*, 26 YALE L. & POL'Y REV. 432 (2008); Kyl et al., *supra* note 8, at 597–610; Erin C. Blondel, Note, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237 (2008) (describing the participatory rights).

³⁴³ See *infra* notes 344–428 and accompanying text. In addition to the mandamus petitions regarding these participatory rights, the appellate courts have addressed three petitions relying exclusively on "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy." See 18 U.S.C.A. § 3771(a)(8); *In re K.K.*, 756 F.3d 1169 (9th Cir. 2014) (finding no abuse of discretion or legal error by trial court's denial of motions to quash, but requiring an initial in camera review of documents); *In re Zito*, No. 09-70554 (9th Cir. Feb. 26, 2009) (finding the in camera review of subpoenaed documents was not a "cognizable harm" to the petitioner); *In re Simons*, 567 F.3d 800 (6th Cir. 2009) (finding a clear and indisputable right to a writ due to the trial court's three-month delay in ruling on the petitioner's motion to unseal and directing the trial court to make a ruling within two weeks); see also 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Jon Kyl); 150 CONG. REC. S4,269 (daily ed. Apr. 22, 2004) (statements of Sens. Jon Kyl and Dianne Feinstein); Kyl et al., *supra* note 8, at 613–14 (describing this right). Petitioners have also asserted this right in connection with other rights raised. See *In re Olesen*, 447 F. App'x 868 (10th Cir. 2011); *In re Brock*, 262 F. App'x 510 (4th Cir. 2008); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555 (2d Cir. 2005).

a. The Rights to Notice and to Confer with the Prosecutor

i. *More Expansive Review Standard Circuits*

The Second Circuit considered two petitioner groups' claims that their rights to notice and to confer with the prosecutor had been violated regarding a securities fraud prosecution in *In re W.R. Huff Asset Management Co.*³⁴⁴ The Government had asserted that it was impossible to identify and personally notify each of the tens of thousands of affected victims of the proposed settlement in the case.³⁴⁵ It sought authorization to use alternative notification procedures pursuant to the CVRA provision concerning prosecutions with multiple victims, including notification through the related bankruptcy and civil proceedings, a nationally televised press conference and a press release through media outlets, and postings on the prosecutor's office web site. The Government engaged in all of these notifications regarding the proposed settlement. The trial court also ordered written submissions by persons or entities desiring to be heard regarding the proposed settlement.³⁴⁶ After the due date for these submissions, at the hearing scheduled to rule on the Government's motion to utilize the alternative notifications, the Government informed the trial court of the notification actions it had taken. At this proceeding, the petitioners objected to the proposed settlement agreement, but the trial court accepted the settlement agreement subject to approval by the judges in the related proceedings.³⁴⁷

On mandamus review, the Second Circuit found that the trial court did not abuse its discretion in determining that, in light of the time delays and challenges of identifying victims and calculating related losses, the Government had given "reasonable notice" to victims of the proposed settlement through the alternative notification methods.³⁴⁸ The appellate court found that no petitioner had requested and been denied an opportunity to confer with the prosecutor in the case.³⁴⁹ The Second Circuit stated that "[n]othing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement."³⁵⁰ Instead, the CVRA gave the petitioners an opportunity to be heard regarding the proposed settlement agreement, which they received. In denying the mandamus petition, the *Huff* court found that the trial court

The appellate courts have also addressed two petitions raising claims regarding "unreasonable delay" in the proceedings. See 18 U.S.C.A. § 3771(a)(7); *In re Thaler*, No. 13-40171 (5th Cir. Feb. 15, 2013) (dismissing as moot a mandamus petition challenging the nine-year delay in the resolution of a habeas corpus petition because the trial court took action and denied the underlying petition); *Olesen*, 447 F. App'x at 868 (finding no clear and indisputable right to a writ based on delay in resolution of habeas corpus proceeding); see also 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Jon Kyl); 150 CONG. REC. S4,268-69 (daily ed. Apr. 22, 2004) (statements of Sens. Jon Kyl and Dianne Feinstein); Kyl et al., *supra* note 8, at 611-13 (describing this right).

The appellate courts have not yet addressed any petitions asserting the right to be "reasonably protected" from the defendant. See 18 U.S.C.A. § 3771(a)(1); see also 150 CONG. REC. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Jon Kyl); 150 CONG. REC. S4,267 (daily ed. Apr. 22, 2004) (statement of Sen. Dianne Feinstein); Kyl et al., *supra* note 8, at 595-97 (describing this right).

³⁴⁴ 409 F.3d at 555.

³⁴⁵ *Id.* at 559.

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 559-60; see 18 U.S.C.A. § 3771 (d)(2); *supra* note 260 and accompanying text (describing options in cases involving multiple crime victims).

³⁴⁸ *W.R. Huff Asset Mgmt. Co.*, 409 F.3d at 564.

³⁴⁹ *Id.*

³⁵⁰ *Id.*

had engaged in “extensive successful efforts to provide notice of the proposed settlement and to solicit and hear objections to it.”³⁵¹

ii. *Traditional Review Standard Circuits*

In *In re Dean*,³⁵² the Fifth Circuit also considered an alternative notification procedure concerning a plea agreement and its impact on victims’ rights to notice and to confer with the prosecutor.³⁵³ The Government filed an ex parte motion in the trial court seeking to establish alternative CVRA procedures in light of the large number of crime victims in the underlying industrial explosion-related prosecution and the potential accompanying media coverage that could harm the plea negotiation process.³⁵⁴ The trial court entered an ex parte order that permitted the Government to enter into a plea agreement with the defendant without prior notice to the crime victims. Pursuant to this order, the crime victims were notified of the agreement before the plea’s entry in court.³⁵⁵ The crime victims had and exercised opportunities to express their opposition to the plea agreement. The trial court denied their request that it reject the plea agreement based on asserted violations of their CVRA rights to notice, confer with the prosecutor, and fairness.³⁵⁶ The petitioners filed a mandamus petition seeking that the trial court’s decision be reversed and the matter be remanded with instructions that the plea agreement not be accepted at that time. The Fifth Circuit initially granted the mandamus petition, in part, to stay further trial court actions to “effect the plea agreement” pending further order of the appellate court.³⁵⁷

The Fifth Circuit found that “Congress made the policy decision [in the CVRA]—which we are bound to enforce—that the victims have a right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached.”³⁵⁸ In this prosecution involving less than 200 victims, the *Dean* court concluded that it was not “impracticable” for the Government to notify the victims of the plea discussions and to permit the crime victims to “communicate meaningfully” with the prosecutor before the plea agreement was reached.³⁵⁹ The trial court therefore misapplied the CVRA and the alternative procedure it approved violated the victims’ CVRA rights to notice and to confer with the prosecutor.³⁶⁰

³⁵¹ *Id.*; cf. *supra* notes 48–59, 254–60 and accompanying text (discussing this petition).

³⁵² 527 F.3d 391 (5th Cir. 2008).

³⁵³ *Id.* at 392–93.

³⁵⁴ *Id.* at 392.

³⁵⁵ *Id.* at 392–93.

³⁵⁶ *Id.* at 393; see *United States v. BP Prods. N. Am. Inc.*, No. H-07-434, 2008 U.S. Dist. LEXIS 12893 (S.D. Tex. Feb. 21, 2008) (describing the trial court proceedings).

³⁵⁷ *Dean*, 527 F.3d at 392–93.

³⁵⁸ *Id.* at 395.

³⁵⁹ *Id.*

³⁶⁰ *Id.*; see 18 U.S.C.A. § 3771 (d)(2) (West Pamp. 2014); *supra* note 260 and accompanying text (describing options in cases involving multiple crime victims). The appellate court stated that the Government should have found a “reasonable way” to inform the victims of the likely criminal charges and find out their views regarding the potential plea bargain. *Dean*, 527 F.3d at 394. The appellate court found that the stated reasons for the ex parte order’s alternative notification procedure, i.e., the number of victims and the possible impairment of the plea negotiations, did not “pass muster.” The Government had not claimed that identification and notification of the victims would be too difficult or expensive and, in fact, suggested a notification procedure to be implemented

However, the *Dean* court also found that the victims were allowed “substantial and meaningful participation” at the plea proceeding and thereafter to convey their opposition to the plea agreement to the trial court.³⁶¹ In ultimately denying the writ under the traditional mandamus standards, the Fifth Circuit concluded that its issuance would not be “appropriate under the circumstances” of the case.³⁶² Finding that the decision to grant mandamus is “largely prudential[,] [w]e conclude that the better course is to deny relief, confident that the district court will take heed that the victims have not been accorded their full rights under the CVRA and will carefully consider their objections and briefs as this matter proceeds” in the court’s determination whether to accept the plea agreement.³⁶³

b. The Rights to be Heard and not to be Excluded from Proceedings

i. *More Expansive Review Standard Circuits*

In *Kenna v. United States District Court*,³⁶⁴ the matter in which the Ninth Circuit established its abuse of discretion or legal error review standard for CVRA mandamus petitions, the appellate court reviewed a petitioner’s challenge to the trial court’s denial of his asserted CVRA right to be orally heard at sentencing.³⁶⁵ This prosecution involved father and son co-defendants whose investment fraud resulted in victim losses of almost

after the plea agreement was signed. *Id.* at 394–95. The appellate court also rejected the stated concern about impairment of the plea negotiation process as a basis for the alternative notification procedure:

In making that observation [about the impairment of plea negotiations], the court missed the purpose of the CVRA’s right to confer. In passing the Act, Congress made the policy decision—which we are bound to enforce—that victims have a right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached. That is not an infringement, as the district court believed, on the government’s independent prosecutorial discretion; instead, it is only a requirement that the government confer in some reasonable way with the victims before ultimately exercising that broad discretion.

Id. at 395 (citation omitted). The Fifth Circuit stated that it did not matter whether the victims’ exercise of their conferral right “impair[ed]” or facilitated the plea negotiation process— “[t]he Act gives the right to confer.” *Id.*

³⁶¹ *Dean*, 527 F.3d at 395–96.

³⁶² *Id.* at 395.

³⁶³ *Id.* at 396; see *supra* notes 112–18 and accompanying text (discussing the review standard); cf. *United States v. BP Prods. N. Am. Inc.*, 610 F. Supp. 2d 655, 730 (S.D. Tex. 2009) (accepting the plea agreement).

The Sixth Circuit applied traditional mandamus standards to deny a petition asserting a right to notice prior to the filing of charges in the case and “direct involvement” in the negotiation of the plea agreement. The appellate court found the asserted right to notice “uncertain” and not a ground for relief in this case in which the petitioners were given a “full opportunity” for participation, beginning at the arraignment and continuing throughout the proceedings. *In re Acker*, 596 F.3d 370, 372–73 (6th Cir. 2010); see *supra* notes 131–35, 273–76 and accompanying text (discussing this petition); cf. *Dean*, 527 F.3d at 394; *Crime Victims Rights Act of 2004: Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 53, 56–57 (2009) (testimony and statement of Susan Howley, Director of Public Policy, National Center for Victims of Crime); 157 CONG. REC. S7,359–60 (daily ed. Nov. 10, 2011) (letter of Assistant Attorney General Ronald Weich); 157 CONG. REC. S7,060–61 (daily ed. Nov. 2, 2011) (letter of Sen. Jon Kyl); 157 CONG. REC. S3,607–09 (daily ed. June 8, 2011) (letter of Sen. Jon Kyl); U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 8, 41–42 (rev. 2012); Paul G. Cassell et al., *Crime Victims’ Rights During Criminal Investigations? Applying the Crime Victims’ Rights Act Before Criminal Charges are Filed*, 104 J. CRIM. L. & CRIMINOLOGY 59 (2014); Elliot Smith, Comment, *Is There a Pre-Charge Conferral Right in the CVRA?*, 2010 U. CHI. LEGAL F. 407 (discussing applicability of the CVRA prior to the initiation of formal charges).

³⁶⁴ 435 F.3d 1011 (9th Cir. 2006).

³⁶⁵ *Id.* at 1013.

\$100 million.³⁶⁶ More than 60 victims submitted written victim impact statements and the petitioner and several other victims orally addressed the trial court at the father's sentencing.³⁶⁷ However, the judge did not permit the petitioner or other victims to make oral presentations at the son's sentencing three months later. In declining their requests to speak, the judge stated that he had listened to the victims at the first sentencing, re-reviewed the impact statements, did not think there was any additional information that would impact the son's sentencing, and would receive any new victim-related information through the prosecutor.³⁶⁸

In this first mandamus review concerning the CVRA right to be heard, the Ninth Circuit found that the CVRA statutory text was not dispositive and hence was ambiguous regarding whether a crime victim's right to be heard included a right to be orally heard or only a right to make the victim's "position known by whatever means the court reasonably determines."³⁶⁹ To resolve this ambiguity, the *Kenna* court reviewed the legislative history of the CVRA and the proposed victim's rights constitutional amendment that used the same language, and found that it revealed a "clear congressional intent to give crime victims the right to speak" at the proceedings designated in the CVRA.³⁷⁰ The Ninth Circuit also concluded that this interpretation, i.e., that victims have an "indefeasible right to speak" at sentencing (like the prosecutor and the defendant), advanced the CVRA's purpose to make crime victims "full participants" in the criminal justice process.³⁷¹

Thus, the *Kenna* court found that the petitioner's CVRA right to orally address the court at the co-defendant son's sentencing was not satisfied by the petitioner's oral address at the father's sentencing.³⁷² The appellate court observed that the trial court's denial of the petitioner's CVRA right to be heard might satisfy its circuit's traditional mandamus review standard. However, the Ninth Circuit stated that it was not required to make that determination because the trial court clearly erred and thereby satisfied the review standard it had adopted for CVRA mandamus review.³⁷³ The *Kenna* court thus granted the petitioner's writ and authorized the petitioner and other victims to pursue a CVRA motion in the trial court to re-open the sentencing proceeding.³⁷⁴ If granted, the

³⁶⁶ See *id.* at 1012.

³⁶⁷ *Id.* at 1013.

³⁶⁸ *Id.*

³⁶⁹ *Id.* at 1013–15. The Ninth Circuit not only addressed the differing interpretations of the CVRA right to be heard presented by the petitioner and the trial court, but also addressed the differing interpretations of the two other trial courts that had previously addressed the issue. *Id.*; compare *United States v. Degenhardt*, 405 F. Supp. 2d 1341 (D. Utah 2005), with *United States v. Marcello*, 370 F. Supp. 2d 745 (N.D. Ill. 2005).

³⁷⁰ *Kenna*, 435 F.3d at 1015–16.

³⁷¹ *Id.* at 1016. The appellate court noted the petitioner's concession that the CVRA permits a trial court to "place reasonable constraints on the duration and content of victims' speech, such as avoiding undue delay, repetition or the use of profanity" and further noted the potential application of the CVRA's provision regarding alternative procedures in prosecutions with multiple victims. *Id.* at 1014 & n.1 (referencing 18 U.S.C.A. § 3771(d)(2) (West Pamp. 2014)); cf. *id.* at 1018–19 (Friedman, J., *dubitante*) (agreeing with the application of the CVRA right to speak in the instant case, but expressing concern about the "broad sweep" of the opinion's language regarding an "absolute" CVRA right to speak regardless of the circumstances and its application to victims in the instant case beyond the petitioner).

³⁷² *Id.* at 1016–17 (finding a CVRA victim right to "confront every defendant who has wronged them" at potentially multiple sentencings and have the victim's then current impact information considered at the time of the imposition of punishment).

³⁷³ *Id.* at 1017.

³⁷⁴ *Id.* at 1017–18 (referencing 18 U.S.C.A. § 3771(d)(5) regarding re-opening sentencing proceedings).

trial court was required to conduct a new sentencing hearing at which the petitioner and other victims would be permitted to speak, as described in the appellate court's opinion.³⁷⁵

This petitioner subsequently filed a CVRA mandamus petition with the Ninth Circuit seeking release of the defendant son's entire presentence report, after the trial court rejected the petitioner's assertion that the CVRA provides crime victims a "general right" to obtain disclosure of the report.³⁷⁶ The Ninth Circuit agreed with the trial court's position after finding that neither the CVRA statute's text nor its legislative history supported the petitioner's position.³⁷⁷ The appellate court additionally noted that the trial court found that the petitioner had not demonstrated that his reasons for requesting the report outweighed its confidentiality and had refused to consider the trial court's offer to consider disclosing specific parts of the report.³⁷⁸ The Ninth Circuit concluded that the trial court did not abuse its discretion or commit legal error and denied the writ.³⁷⁹

The Ninth Circuit granted aspects of two writs regarding the CVRA right not to be excluded from specified public proceedings by requiring trial court determinations, by clear and convincing evidence, as to whether individual victims could be excluded because their testimony would be "materially altered" by their presence in court.³⁸⁰ In *In re Parker*,³⁸¹ the trial court had determined that 34 witnesses did not satisfy the CVRA's crime victim definition and thus could be excluded from court proceedings based on traditional practices involving witnesses.³⁸² The Ninth Circuit found that the trial court had erred in its determination of victim status and granted the mandamus petition.³⁸³ The appellate court further instructed the trial court to vacate its order excluding the victim-witnesses and to conduct proceedings to make individualized findings regarding the presence or exclusion of each of the 34 victim-witnesses pursuant to the CVRA.³⁸⁴

The other Ninth Circuit petition, *In re Mikhel*,³⁸⁵ was filed by the Government regarding a kidnapping and murder prosecution in which the prosecutor had filed an unopposed motion in limine to permit the murder victims' families to be present during the entire trial despite the fact that some of them would be testifying.³⁸⁶ Citing concerns about "collusive" witness testimony and "proper" courtroom decorum, the trial court

³⁷⁵ *Id.*; see *supra* notes 66–71 and accompanying text (discussing the review standard); cf. Amy Baron-Evans, *Traps for the Unwary Under the Crime Victims' Rights Act: Lessons the Kenna Case*, 19 FED. SENT'G REP. 49 (2006); Douglas E. Beloof, *Judicial Leadership at Sentencing Under the Crime Victims' Rights Act: Judge Kozinski in Kenna and Judge Cassell in Degenhardt*, 19 FED. SENT'G REP. 36 (2006).

³⁷⁶ *In re Kenna*, 453 F.3d 1136, 1137 (9th Cir. 2006).

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.*; see Matthew B. Riley, Note, *Victim Participation in the Criminal Justice System: In re Kenna and Victim Access to Presentence Reports*, 2007 UTAH L. REV. 235 (2007).

³⁸⁰ See *infra* notes 381–92 and accompanying text (discussing these petitions); see also 18 U.S.C.A. § 3771(a)(3), (b)(1) (West Pamp. 2014).

³⁸¹ Nos. 09-70529, 09-70533, 2009 U.S. App. LEXIS 10270 (9th Cir. Feb. 27, 2009).

³⁸² *Id.* at *1.

³⁸³ *Id.*

³⁸⁴ See *id.*; *supra* notes 216–18 and accompanying text (discussing this petition); see also *In re Parker*, Nos. 09-70529, 09-70533, 2009 U.S. App. LEXIS 7158, at *3 (9th Cir. Mar. 2, 2009); *United States v. W.R. Grace*, CR 05-07-M-DWM, 2009 U.S. Dist. LEXIS 124996, at *1–2 (D. Mont. Feb. 27, 2009) (describing the trial court's compliance responses).

³⁸⁵ 453 F.3d 1137 (9th Cir. 2006).

³⁸⁶ *Id.* at 1138.

denied the motion and prohibited testifying family members to be present in court prior to their testimony.³⁸⁷

In response to the Government's mandamus petition seeking that the testifying family members be permitted to observe the entire trial, the Ninth Circuit noted the traditional rule regarding courtroom exclusion of witnesses incorporated in Rule 615 of the Federal Rules of Evidence.³⁸⁸ However, the appellate court stated that Rule 615's exception regarding persons "authorized by statute to be present" was satisfied by the CVRA's crime victim right not to be excluded from designated proceedings unless there was clear and convincing evidence establishing a risk that the victim's testimony would be "materially altered" and unless "reasonable alternatives" to exclusion were considered.³⁸⁹ Moreover, the appellate court stated that there must be a "highly likely" risk of altered testimony to warrant CVRA victim-witness exclusion.³⁹⁰ The Ninth Circuit therefore concluded that the CVRA "abrogated" Rule 615 with regard to crime victims and effectively replaced it with the exclusion procedure prescribed by the CVRA—which the trial court had not performed before summarily excluding the victim-witnesses from the proceedings.³⁹¹ Rather than ordering the trial court to permit the victim-witnesses to be present, the Ninth Circuit granted the Government's petition, in part, and remanded the matter for the trial court to conduct the exclusion analysis required by the CVRA and described in its opinion.³⁹²

In addressing a CVRA petition asserting a crime victim's right to be heard in *In re Zackey*,³⁹³ the Third Circuit stated that it did not need to determine the applicable review standard because the petitioner was not entitled to relief even under the "more expansive" abuse of discretion standard.³⁹⁴ In this fraud prosecution, the trial court denied the petitioner's motion to permit his lawyer to enter an appearance and represent him at sentencing. The trial court recognized the petitioner's right to be heard regarding the defendant's sentence (which he was free to exercise). However, the trial court found that the CVRA did not require a victim's legal representation when exercising his right to be heard or require a victim's lawyer to be permitted to speak during sentencing or other proceedings.³⁹⁵ The trial court concluded that the prosecutor's assistance would be "sufficient" to determine an appropriate sentence.³⁹⁶

On mandamus review, the Third Circuit observed that the prosecutor had already requested restitution and attorney's fees on the victim's behalf, had represented he would seek the upward sentencing guideline departure requested by the victim, and had not entered into any agreements that would prevent full advocacy at sentencing on behalf of the defendant's victims.³⁹⁷ The *Zackey* court concluded that the petitioner's CVRA rights

³⁸⁷ *Id.*; see also *id.* at 1138 n.1 (stating that it was proper for the Government to file the mandamus petition because the CVRA authorized the prosecutor, as well as the victim, to assert the CVRA rights, and referencing 18 U.S.C.A. § 3771 (d)(1) (West Pamp. 2014)).

³⁸⁸ *Id.* at 1139.

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² See *id.* at 1140; *id.* at 1139 n.4 (expressing no opinion regarding the merits of the exclusion claims in the absence of record evidence regarding the proposed testimony of the victim-witnesses); FED. R. EVID. 615; *cf.* *United States v. Johnson*, 362 F. Supp. 2d 1043, 1056 (N.D. Iowa 2006) (permitting presence of victim-witnesses).

³⁹³ No. 10-3772, 2010 U.S. App. LEXIS 19914 (3d Cir. Sept. 22, 2010).

³⁹⁴ *Id.* at *3.

³⁹⁵ *Id.* at *2–3.

³⁹⁶ *Id.* at *2.

³⁹⁷ *Id.* at *2–3.

were ensured by these measures and would not be “diluted in the absence of individual counsel.”³⁹⁸ The Third Circuit found that the trial court had properly recognized the petitioner’s sentencing interests; that the prosecutor had “assumed responsibility” for securing the petitioner’s CVRA rights; and that the trial court had properly exercised its “discretionary powers” in denying the appearance motion of the petitioner’s lawyer. It therefore denied the petition.³⁹⁹

ii. *Traditional Review Standard Circuits*

Prior to expressly adopting the traditional mandamus review standard, the Eleventh Circuit granted a CVRA mandamus petition and ordered the trial court to recognize the petitioner home buyers as CVRA victims of the defendant’s mortgage brokerage fee-related fraud. The appellate court’s grant of mandamus also included an order to the trial court to afford the petitioners their CVRA rights, including the right to be heard that the petitioners had sought to exercise in *In re Stewart*.⁴⁰⁰

In *In re Aquino*,⁴⁰¹ the Eleventh Circuit denied another petition concerning CVRA victim status and the right to be heard.⁴⁰² The appellate court found that the petitioners had not demonstrated that the trial court had made clearly erroneous factual findings or misapplied the law to the findings regarding the defendant’s sentencing hearing.⁴⁰³ Assuming arguendo that the petitioners were eligible CVRA crime victims, the trial court had afforded them the right to be “reasonably heard” by postponing the sentencing to give them additional time to establish their CVRA victim status and by permitting them to provide written statements to be considered at sentencing.⁴⁰⁴ The petitioners failed to provide support to establish their victim status or to submit the permitted statements as of the defendant’s sentencing.⁴⁰⁵ The Eleventh Circuit concluded that the petitioners had not established their entitlement to relief under “any potentially applicable standard of review” and denied their petition.⁴⁰⁶

In a consolidated appeal and CVRA mandamus petition in *In re Siler*,⁴⁰⁷ the Sixth Circuit found that the trial court did not abuse its discretion in denying the petitioners access to the presentence reports from a previous prosecution in which they were CVRA victims.⁴⁰⁸ The petitioners had sought the presentence reports in connection with a civil suit filed eighteen months after the conclusion of the criminal proceedings.⁴⁰⁹ The trial

³⁹⁸ *Id.* at *3.

³⁹⁹ *Id.* at *2–4; see *supra* notes 83–86 and accompanying text (discussing the review standard).

⁴⁰⁰ 552 F.3d 1285, 1286–89 (11th Cir. 2008); see *supra* notes 152–55, 234–39 and accompanying text (discussing this petition).

⁴⁰¹ No. 12-11757-B (11th Cir. Apr. 6, 2012).

⁴⁰² *Id.*, slip op. at 1–2.

⁴⁰³ *Id.*, slip op. at 1.

⁴⁰⁴ *Id.*, slip op. at 1–2.

⁴⁰⁵ *Id.*, slip op. at 2.

⁴⁰⁶ *Id.*, slip op. at 2 n.1 (stating that the circuit had not yet adopted a CVRA mandamus review standard); see *supra* notes 159, 219 and accompanying text (discussing this petition).

In their CVRA petition in the District of Columbia Circuit, the petitioners sought to be heard prior to the acceptance of the plea and proposed plea agreement in the prosecution. Finding that the trial judge had not yet accepted the plea or plea agreement and had stated that he would not do so without hearing from the victims, the appellate court denied the CVRA petition as moot under either the traditional or more expansive review standard. See *In re Jacobsen*, No. 05-7086, 2005 U.S. App. LEXIS 13990 (D.C. Cir. July 8, 2005); *supra* notes 138–39 and accompanying text (finding the petition should be denied under either review standard).

⁴⁰⁷ 571 F.3d 604 (6th Cir. 2009).

⁴⁰⁸ *Id.* at 611.

⁴⁰⁹ *Id.* at 607.

court rejected their claim that the CVRA supported the reports' release to them and concluded that the CVRA did not provide crime victims a "general right" to obtain presentence reports.⁴¹⁰ In addition, the trial court found that these reports are generally not available to non-parties in the prosecution and the petitioners had not demonstrated any special need for access to the reports in this matter.⁴¹¹

At the outset, the Sixth Circuit concluded that the petitioners' requests for access to presentence reports in a completed criminal prosecution fell outside the CVRA's "scope of protection" and the trial court's authority pursuant to the CVRA.⁴¹² Even if the trial court retained authority to release the reports, the appellate court found that the CVRA provides no independent victim right to obtain presentence reports and thus did not require disclosure in this matter. Even if the CVRA were interpreted to include a right of access to presentence reports, the petitioners' request of the reports for use in a civil suit subsequent to the completed criminal proceedings would be outside of the CVRA's scope. The petitioners presented no evidence of their "special need" or other adequate basis for obtaining the nonpublic, confidential reports.⁴¹³ The Sixth Circuit found that the trial court had appropriately weighed the petitioners' need for the presentence reports against the need to maintain the reports' confidentiality and had not abused its discretion in denying the petitioners' request. Concluding that the trial court had "properly" denied the request for the presentence reports, the *Siler* court affirmed the trial court's denial order and it denied the mandamus petition.⁴¹⁴

iii. "Standardless" Review Circuits

In *In re Brock*,⁴¹⁵ the Fourth Circuit reviewed a mandamus petition asserting violations of an assault victim's rights to be heard and treated with fairness in connection with the defendants' sentencing.⁴¹⁶ Although he had materials that summarized the presentence reports, the petitioner requested disclosure of parts of the presentence reports themselves regarding restitution, sentencing guideline calculations, and upward departures, two days before the defendants' sentencing.⁴¹⁷ The reports are confidential, with access limited to the court and parties to the prosecution. The trial court denied this request at the sentencing hearing, concluding that the petitioner had sufficient information to make his victim impact statement without the presentence reports.⁴¹⁸ The trial court permitted the petitioner to add his oral impact presentation to submitted written impact and restitution materials, but declined to hear his testimony or arguments regarding the guidelines calculations.⁴¹⁹

On mandamus review, the Fourth Circuit concluded that it did not need to determine the applicable CVRA review standard because the petitioner was not entitled to relief even under the "more relaxed" abuse of discretion standard.⁴²⁰ The *Brock* court

⁴¹⁰ *Id.* at 608.

⁴¹¹ *See id.* at 607–08 (reflecting additionally that the petitioners had not conducted discovery in their civil suit and sought to use the presentence reports as evidence in the civil suit).

⁴¹² *Id.* at 609.

⁴¹³ *Id.* at 609–11.

⁴¹⁴ *Id.* at 611; *cf. id.* at 608–09 (discussing the petitioners' ability to appeal the trial court order under the facts of this case).

⁴¹⁵ 262 F. App'x 510 (4th Cir. 2008).

⁴¹⁶ *Id.* at 510–11.

⁴¹⁷ *Id.* at 511.

⁴¹⁸ *Id.* (citing 18 U.S.C.A. § 3552(d) (West 2000), FED. R. CRIM. P. 32(e)(2), and a local court rule regarding access to the presentence reports).

⁴¹⁹ *See id.*

⁴²⁰ *Id.* at 512; *see supra* notes 176–78 and accompanying text (discussing the review standard).

rejected the petitioner's assertion that, without access to the reports, he had insufficient information to meaningfully exercise his CVRA right to be heard. The appellate court found that he had "ample" sentencing-related information and found no abuse of discretion in the trial court's denial of his access to portions of the presentence reports.⁴²¹ In light of the petitioner's ability to offer written and oral impact and related information to the court and the judge's statement that the guideline calculations did not affect the sentence imposed, the *Brock* court found that the trial court's refusal to consider the petitioner's guideline-related arguments did not prevent him from being reasonably heard or fairly treated. Finally, the appellate court characterized the petitioner's attempt to challenge the trial court's guideline calculations as a crime victim attempt to appeal the defendant's sentence, which is not authorized by the CVRA. Concluding that the petitioner was both reasonably heard and fairly treated, the Fourth Circuit denied the mandamus petition.⁴²²

In *In re Bustos*,⁴²³ the Seventh Circuit addressed the trial court's denial of a motion to intervene in the underlying securities fraud prosecution by the petitioner and other investors who disagreed with aspects of the court-appointed receiver's proposed agreements.⁴²⁴ The appellate court found that the CVRA does not provide a crime victim right to intervene in the prosecution, but instead ensures that victims are "heard out": "Giving victims a voice in the criminal process differs from giving them a veto power, which often is both the goal and the effect of intervention."⁴²⁵ The appellate court found that the trial court had not "refused to listen" to the victims, and that the petitioner's and others' requests had in fact resulted in some modifications of the receiver's proposals.⁴²⁶ The appellate court found no "concrete" violations of the CVRA identified in the petition, but noted that mandamus remained available if the trial court refused to accept victim comments during future court proceedings.⁴²⁷ However, the petitioner's anticipated opposition to the receiver's final proposal did not constitute a CVRA violation or a basis for intervention.⁴²⁸

C. *The Impact of the Mandamus Review Standard on the CVRA Petition Outcomes*

Of the 73 mandamus petitions resolved in the ten years since the enactment of the CVRA, the federal appellate courts have denied or dismissed 62 petitions (85%) and granted 11 petitions (15%) to some degree. The appellate courts denied or dismissed 23 of the petitions (indicated with an "*" in the CVRA Mandamus Outcomes Table) with limited discussion on the ground that the petitioners' claims were not properly raised pursuant to the CVRA, e.g., petitioners attempting to raise claims in connection with civil proceedings. The appellate circuit's CVRA mandamus review standard consequently did not affect the outcome of these petitions. Focusing on the remaining 50 petitions in which the federal appellate courts have more fully addressed specific claims raised pursuant to the CVRA, the federal appellate courts have denied 39 petitions (78%) and granted 11

⁴²¹ *Brock*, 262 F. App'x at 512.

⁴²² *See id.* at 512-13.

⁴²³ No. 10-2752 (7th Cir. July 26, 2010).

⁴²⁴ *Id.*, slip op. at 1.

⁴²⁵ *Id.*, slip op. at 1-2; *see also id.*, slip op. at 2 (finding it unnecessary to decide if victim intervention in a prosecution is ever appropriate and questioning dicta in *In re Siler*, 571 F.3d 604, 609 (6th Cir. 2009), regarding this).

⁴²⁶ *Id.*, slip op. at 2.

⁴²⁷ *Id.*

⁴²⁸ *See id.* In another petition, the Seventh Circuit found a petitioner had been allowed to participate in the proceedings and there had been no violation of the petitioner's right to be heard as of yet in a petition filed "to preserve [the petitioner's] objections." *See In re Oak Brook Bank*, No. 06-2331 (7th Cir. May 12, 2006).

petitions (22%) to some degree.⁴²⁹ As discussed in this section and assessed in multiple ways, the appellate circuit's CVRA mandamus review standard has had a limited impact on the outcomes of these 50 petitions.

Reviewing the denial rate alone, an appellate circuit's adoption of a more expansive mandamus review standard does not automatically guarantee a lower mandamus denial rate. The Second Circuit's application of its abuse of discretion standard in the 3 mandamus petitions it has reviewed has resulted in a denial rate of 100%. Using its abuse of discretion or legal error review standard, the Ninth Circuit has granted 5 of the 13 mandamus petitions it has reviewed, resulting in a denial rate of 62%. If one includes the Third Circuit in the category of more expansive mandamus review standards, its denial rate is 100% based on the sole petition it has reviewed. Collectively, the denial rate for the appellate circuits that have adopted more expansive CVRA mandamus review standards is 71%.⁴³⁰

The mandamus denial rate in the appellate circuits that have adopted traditional mandamus review standards is somewhat higher. The Fifth Circuit has denied 7 of the 10 reviewed petitions (70%). The Sixth Circuit has denied 3 of the 4 reviewed petitions (75%). The Eighth Circuit has denied the sole petition it has reviewed (100%). The Tenth Circuit has denied all 4 petitions it has reviewed (100%). The Eleventh Circuit has denied 5 of the 6 petitions it has reviewed (83%). The District of Columbia Circuit has denied 2 of the 3 petitions it has reviewed (67%). Collectively, the denial rate for the circuits that have adopted traditional mandamus review standards is 79%.⁴³¹

The mandamus denial rate in the appellate circuits that have not yet adopted a CVRA mandamus review standard is the highest of the review standard categories. The Fourth Circuit has denied all 3 reviewed petitions (100%). The Seventh Circuit has denied both of its reviewed petitions (100%). The First Circuit has not yet reviewed any petitions included in this analysis. Collectively, the denial rate for the appellate circuits that have not yet adopted a CVRA mandamus review standard is 100%.⁴³²

Looking at the mandamus grant and denial outcomes from another perspective, the traditional mandamus review standard circuits have actually granted more CVRA mandamus petitions than the appellate circuits with more expansive review standards, i.e., 6 vs. 5 granted petitions. It is also important to note the disproportionate impact on the overall petition success ratios that two circuits—the Fifth and Ninth Circuits—have had. The Ninth Circuit, a more expansive review standard circuit, has both reviewed and granted the largest number of CVRA mandamus petitions: granting 5 of the 13 reviewed petitions. The Fifth Circuit, a traditional review standard circuit, has reviewed and granted the second largest number of CVRA mandamus petitions: granting 3 of 10 reviewed petitions. Collectively, these two circuits account for 46% of the reviewed petitions and 73% of the petitions that have been granted.⁴³³ The comparison of these two circuits and the successful outcomes overall indicates that a traditional CVRA mandamus review standard does not foreclose the possibility of the grant of a CVRA petition.

⁴²⁹ See *supra* CVRA Mandamus Outcomes Table; *supra* notes 193–428 and accompanying text (discussing CVRA petitions and outcomes).

⁴³⁰ See *supra* CVRA Mandamus Outcomes Table; *cf. supra* notes 48–86 and accompanying text (discussing the adoption of more expansive mandamus review standards).

⁴³¹ See *supra* CVRA Mandamus Outcomes Table; *cf. supra* notes 90–167 and accompanying text (discussing the adoption of traditional mandamus review standards).

⁴³² See *supra* CVRA Mandamus Outcomes Table; *cf. supra* notes 168–82 and accompanying text (discussing the circuits that have not yet adopted mandamus review standards).

⁴³³ See *supra* CVRA Mandamus Outcomes Table.

The above-described data thus reflect that the CVRA mandamus review standard does not guarantee, or even necessarily predict, a petition's outcome. Circuits that have adopted more expansive CVRA review standards nevertheless have petition denial rates ranging between 62-100%. Denial rates for circuits with traditional CVRA mandamus review standards range from 67-100%. The denial rate for circuits that have not yet adopted a CVRA mandamus review standard is 100%.⁴³⁴ These denial rates indicate that the CVRA mandamus review standard is generally not outcome-determinative.

Another way to assess the impact of the review standard is to examine petitions that have raised similar issues in circuits with different review standards. For example, the Fourth, Sixth, and Ninth Circuits, representing all three review standard categories, have each denied petitions seeking disclosure of some or all of confidential presentence reports.⁴³⁵ In addition, four circuits have addressed seven petitions brought by one or both of two petitioners regarding the sexual exploitation of children restitution statute. The traditional review standard circuits granted 3 of the 4 petitions they reviewed (75%); the Fifth Circuit granting both of its petitions, the District of Columbia Circuit granting its petition, and the Eighth Circuit denying its petition. Applying its more expansive review standard, the Ninth Circuit granted 1 of the 3 petitions it reviewed (33%).⁴³⁶ Although there were obviously factual variations in the individual petitions, this review of outcomes in petitions raising similar issues reflects that the likelihood of CVRA mandamus success was not enhanced by the availability of a more expansive review standard.

Another measure of the limited impact of the CVRA mandamus review standard is the fact that, in resolving 10 of the 50 CVRA petitions (20%), appellate courts explicitly stated that they would have reached the same result regardless whether they applied a traditional or more expansive mandamus review standard.⁴³⁷ In reviewing petitions prior to adopting their traditional CVRA mandamus review standards, appellate courts in three circuits took action on four CVRA mandamus petitions based on their determination that the review standard was not outcome-determinative. The Eleventh Circuit found it unnecessary to adopt a review standard in denying one petition because it found the issue for resolution under either review standard was whether the trial court made clearly erroneous factual findings.⁴³⁸ The Eleventh Circuit found it unnecessary to adopt a review standard to deny another petition because it concluded that the petitioners had not established their entitlement to relief under "any potentially applicable standard of review."⁴³⁹ Before denying the petition as moot, the District of Columbia Circuit similarly found that the petitioner had failed to satisfy either an abuse of discretion or a clear and indisputable right review standard.⁴⁴⁰ On the other hand, the Sixth Circuit found it

⁴³⁴ See *supra* notes 430–33 and accompanying text.

⁴³⁵ See *supra* CVRA Mandamus Outcomes Table; *supra* notes 376–79, 407–22 and accompanying text (discussing these petitions).

⁴³⁶ See *supra* CVRA Mandamus Outcomes Table; *supra* notes 280–327 and accompanying text (discussing these petitions).

⁴³⁷ See *infra* notes 438–45 and accompanying text; see also *United States v. Aguirre-Gonzalez*, 597 F.3d 46, 52–56 (1st Cir. 2010) (finding no crime victim right to appeal and finding conversion of attempted appeal into a mandamus petition would be "futile" because the victim was not entitled to CVRA relief under the traditional or "more lenient" abuse of discretion standard).

⁴³⁸ See *In re Stewart*, 641 F.3d 1271, 1274–75 (11th Cir. 2011); *supra* notes 156–59, 277–79 and accompanying text (discussing this petition).

⁴³⁹ See *In re Aquino*, No. 12-11757, slip op. at 2 & n.1 (11th Cir. Apr. 6, 2012); *supra* notes 159, 219, 401–06 and accompanying text (describing this petition).

⁴⁴⁰ See *In re Jacobsen*, No. 05-7086, 2005 U.S. App. LEXIS 13990, at *2 (D.C. Cir. July 8, 2005); *supra* notes 138–39, 406 and accompanying text (discussing this petition).

unnecessary to adopt a review standard in granting a petition because it found the petitioners had established a right to the writ even under the “stricter” traditional review standard.⁴⁴¹ In addition to these circuits, the Fourth Circuit found it unnecessary to adopt a review standard in denying two petitions because it concluded that the petitioners had not established a right to the writ even under an abuse of discretion standard.⁴⁴²

Three additional circuits denied CVRA mandamus petitions in circumstances in which they explicitly determined that the review standard was not outcome-determinative. The Ninth Circuit, a more expansive CVRA review standard circuit, denied a petition in which the petitioner sought mandamus both pursuant to the CVRA and traditional mandamus authority. The appellate court denied the petition pursuant to “either the CVRA or our traditional mandamus authority.”⁴⁴³ The Third Circuit, arguably a more expansive CVRA review standard circuit, found it unnecessary to determine the applicable review standard in denying a CVRA writ because it found the petitioner was not entitled to relief even under the abuse of discretion standard.⁴⁴⁴ In denying two petitions, the Tenth Circuit, a traditional CVRA review standard circuit, found that the review standard was not outcome-determinative. In denying one of these petitions, the Tenth Circuit observed that the review standard did not impact the petition’s outcome because it found that the disputed trial court ruling would be reviewed for an abuse of discretion under either review standard.⁴⁴⁵ In denying the other petition and rejecting the petitioner’s request for a “more relaxed” review standard, the Tenth Circuit noted that the review standard did not affect the outcome of the petition because relief “must be denied under any standard of review.”⁴⁴⁶

Of course, among the 50 CVRA petitions, there are some instances in which the review standard appears to be outcome-impactful, if not outcome-determinative. For example, in one matter, the Tenth Circuit characterized the petitioners’ claim regarding the trial court’s denial of their victim status as a “difficult case.” It, however, denied mandamus because it did not find that the trial court was clearly wrong in its victim status determination or that the petitioners had established a clear and indisputable right to the writ, as required under the traditional mandamus review standard.⁴⁴⁷ In another matter, the Fifth Circuit actually determined that the trial court had erred in its application of the CVRA and had violated the petitioners’ rights to notice and to confer with the prosecutor. However, the appellate court also considered the petitioners’ “substantial and meaningful participation” at the contested plea proceeding and their opportunity to express their opposition to the plea agreement before concluding that the grant of mandamus would not be “appropriate,” a dispositive factor included in the traditional mandamus review standard.⁴⁴⁸

⁴⁴¹ *In re Simons*, 567 F.3d 800, 801 (6th Cir. 2009); *supra* notes 127–30, 343 and accompanying text (discussing this petition).

⁴⁴² *See In re Brock*, 262 F. App’x 510, 512 (4th Cir. 2008); *In re Doe*, 264 F. App’x 260, 261–62 (4th Cir. 2007); *supra* notes 173–78, 243, 415–22 and accompanying text (discussing these petitions).

⁴⁴³ *See In re Andrich*, 668 F.3d 1050, 1051 (9th Cir. 2011); *supra* notes 73–78, 213–15 and accompanying text (discussing this petition).

⁴⁴⁴ *See In re Zackey*, No. 10-3772, 2010 U.S. App. LEXIS 19914, at *3–4 (3d Cir. Sept. 22, 2010); *supra* notes 83–86, 393–99 and accompanying text (discussing this petition).

⁴⁴⁵ *See In re Antrobus*, No. 08-4013, 2008 U.S. App. LEXIS 27527, at *3 n.1 (10th Cir. Feb. 1, 2008); *supra* notes 98–103, 226 and accompanying text (discussing this petition).

⁴⁴⁶ *See In re Antrobus*, 563 F.3d 1092, 1097 (10th Cir. 2009); *supra* note 226 (discussing this petition).

⁴⁴⁷ *See In re Antrobus*, 519 F.3d 1123, 1125–26 (10th Cir. 2008); *supra* notes 90–97, 104–10, 223–26 and accompanying text (discussing this petition); *cf. Antrobus*, 519 F.3d at 1126–27 (Tymkovich, J., concurring).

⁴⁴⁸ *See In re Dean*, 527 F.3d 391, 394–96 (5th Cir. 2008); *supra* notes 112–18, 352–63 and accompanying text (discussing this petition).

Although the traditional review standard circuits have applied the clear and indisputable right requirement to both deny and grant mandamus petitions,⁴⁴⁹ its impact on outcomes has also been diminished by the fact that some appellate courts have intermingled and blurred the distinctions between adopted CVRA traditional mandamus review standards and the more expansive abuse of discretion (or legal error) standard adopted by some circuits. This intermingling of standards is perhaps facilitated by Court mandamus precedent that recognizes a “clear abuse of discretion” as one of the “exceptional circumstances” that would justify the “extraordinary remedy” of mandamus.⁴⁵⁰ For example, the Eleventh Circuit concluded that, if established, a trial court’s clearly erroneous factual finding regarding CVRA crime victim status would satisfy the abuse of discretion required under traditional mandamus analysis as well as a direct appellate review standard.⁴⁵¹ The Second Circuit concluded that such a clearly erroneous factual finding concerning CVRA victim status would satisfy its adopted CVRA abuse of discretion review standard.⁴⁵² The Tenth Circuit stated that it would be reviewing the trial court’s action regarding a discovery request related to CVRA victim status for abuse of discretion under its traditional mandamus review standard and would have also done so under the rejected “ordinary appellate” review standard.⁴⁵³ Perhaps best reflecting the intermingling of the adopted CVRA review standards, the Sixth Circuit, a traditional review standard circuit, found that the petitioner had not established a clear and indisputable right to the writ and thus concluded that the trial court had not abused its discretion in finding that the petitioner was not a CVRA crime victim.⁴⁵⁴

As a practical matter, this intermingling or blurring of review standards also results from the nature of the trial court actions that appellate courts review in many CVRA petitions. In this connection, most CVRA rights have a “reasonableness” limitation e.g., the right to “reasonable, accurate, and timely notice,” the “reasonable right” to confer with the prosecutor, and the right to be “reasonably heard.” The right of victim-witnesses not to be excluded from the courtroom is conditioned on a trial court determination that the testimony of the victim-witnesses would not be materially altered by their presence. The right to restitution is governed by other statutes that permit, in some instances, a trial court balancing of the burdens of determining restitution in a complex prosecution against the victim’s need for restitution. The CVRA authorizes “reasonable” alternative procedures in prosecutions in which the large number of victims makes it “impracticable”

⁴⁴⁹ Compare *In re Fisher*, No. 11-10006, 2011 U.S. App. LEXIS 26500, at *1-4 (5th Cir. Oct. 1, 2011) (finding no clear and indisputable error in the trial court’s determination regarding the petitioners’ victim status), with *In re Allen*, 701 F.3d 734, 735 (5th Cir. 2012) (finding clear and indisputable error in trial court’s determination that a time bar prevented its consideration of new arguments regarding the petitioners’ CVRA victim status).

⁴⁵⁰ See, e.g., *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004); see also *supra* notes 34-45 and accompanying text (describing Court mandamus precedent).

⁴⁵¹ See *In re Stewart*, 641 F.3d 1271, 1274-75 (11th Cir. 2011); *supra* notes 156-59, 278-79 and accompanying text (discussing this petition).

⁴⁵² See *In re Galvis*, 564 F.3d 170, 174-76 (2d Cir. 2009) (citing precedent finding that clearly erroneous and abuse of discretion standards are “indistinguishable” in this context); *supra* notes 60-65, 209-12 and accompanying text (discussing this petition).

⁴⁵³ See *In re Antrobus*, No. 08-4013, 2008 U.S. App. LEXIS 27527, at *3 n.1 (10th Cir. Feb. 1, 2008); *supra* notes 98-103, 226 and accompanying text (discussing this petition).

⁴⁵⁴ See *In re McNulty*, 597 F.3d 344, 348-53 (6th Cir. 2010); *supra* notes 136-37, 220 and accompanying text (discussing this petition); accord *In re Wellcare Health Plans, Inc.*, 754 F.3d 1234, 1236-40 (11th Cir. 2014); *supra* notes 160-67, 219 and accompanying text (discussing this petition).

There is a similar intermingling of review standards regarding the legal error component of the Ninth Circuit’s more expansive CVRA review standard. The Ninth Circuit subsequently stated that its analysis in previous CVRA petitions had focused on whether the trial court’s action was “clearly erroneous as a matter of law,” a “dispositive” factor in its traditional mandamus review. See *In re Andrich*, 668 F.3d 1050, 1051 (9th Cir. 2011); *supra* notes 73-78, 213-15 and accompanying text (discussing this petition).

to accord the enumerated rights to all of the victims.⁴⁵⁵ These provisions consequently entrust the trial court with a significant degree of discretion in implementing the CVRA.⁴⁵⁶

In fact, in *In re W.R. Huff Asset Management Co.*,⁴⁵⁷ the Second Circuit identified the nature of the CVRA rights and their implementation as support for its selection of a CVRA abuse of discretion mandamus review standard.⁴⁵⁸

[T]he CVRA provides that the determination to “ensure” that the crime victim is afforded the rights enumerated in the CVRA is entrusted to the district court to make. Further, the district court is in a better position than this Court to decide whether or not relief is warranted under the CVRA ... as it has far more insight into the complexities of a pending litigation than does a court of appeals. Most of the rights provided to crime victims under the CVRA require an assessment of “reasonableness.” The district court is far better positioned to make these assessments and to determine what constitutes “a reasonable procedure” for effecting these rights than a court of appeals.⁴⁵⁹

These factors that led the Second Circuit to select a CVRA abuse of discretion review standard—that it has used to deny all of the CVRA petitions it has reviewed—have also limited the likelihood that a trial court action regarding the CVRA would be deemed a clear and indisputable error upon mandamus review under the traditional review standard.

They are also the same factors that have likely limited the scope of mandamus relief when CVRA petitions have been granted under either the traditional or a more expansive review standard. For example, when the Ninth and Eleventh Circuits concluded that the trial courts had erred in their victim status determinations, the appellate courts nevertheless entrusted the trial courts with the responsibility to subsequently provide the requested rights by performing the CVRA-required determination regarding victim-witness exclusion from proceedings and by hearing from the victims, respectively.⁴⁶⁰ When the Ninth Circuit determined that the trial court had violated the petitioner’s right to be orally heard at sentencing, it nevertheless required the petitioner to follow the CVRA-prescribed procedure of filing a motion to re-open the sentencing in the trial court.⁴⁶¹ Almost half of the petitions granted involved trial court errors concerning restitution. Regarding two of these petitions, the Fifth Circuit, a traditional review standard circuit, dictated what the “correct” restitution award should be.⁴⁶² Regarding the other three

⁴⁵⁵ 18 U.S.C.A. § 3771(a), (d)(2) (West Pamp. 2014); see also 18 U.S.C.A. §§ 3663, 3663A (West 2000 & Pamp. 2014) (describing restitution provisions).

⁴⁵⁶ See, e.g., *In re Zackey*, No. 10-3772, 2010 U.S. App. LEXIS 19914, at *1-4 (3d Cir. Sept. 22, 2010) (finding that the trial court’s action denying the petitioner a right to be heard through his attorney “fell within the proper exercise of its discretionary powers”).

⁴⁵⁷ 409 F.3d 555 (2d Cir. 2005).

⁴⁵⁸ *Id.* at 562-63.

⁴⁵⁹ *Id.* (citations omitted).

⁴⁶⁰ See *In re Parker*, Nos. 09-70529, 09-70533, 2009 U.S. App. LEXIS 7158, at *3-7 (9th Cir. Mar. 2, 2009); *In re Stewart*, 552 F.3d 1285, 1287, 1289 (11th Cir. 2008); *supra* notes 152-55, 216-18, 234-39, 382-84, 400 and accompanying text (discussing these petitions); cf. *supra* notes 156-59, 278-79 and accompanying text (discussing denial of *Stewart* petitioners’ subsequent petition regarding denial of restitution).

⁴⁶¹ See *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1017-18 (9th Cir. 2006); *supra* notes 66-71, 364-75 and accompanying text (discussing this petition); cf. *supra* notes 376-79 and accompanying text (discussing denial of *Kenna* petitioner’s subsequent petition regarding access to the presentence report).

⁴⁶² See *In re Amy Unknown*, No. 13-20485, slip op. at 2-3 (5th Cir. Aug. 30, 2013); *In re Amy Unknown*, 701 F.3d 749, 773-74 (5th Cir. 2012) (en banc), *vacated and remanded sub nom.* *Paroline v. United States*, 134 S. Ct. 1710 (2014); *supra* notes 120-26, 284-301 and accompanying text (discussing these petitions).

petitions, the Ninth and District of Columbia Circuits, representing both traditional and more expansive review standard circuits, authorized the trial courts to attempt to properly re-determine the restitution award.⁴⁶³

As assessed across multiple measures, the CVRA mandamus review standard, i.e., a traditional or more expansive mandamus review standard, has had a limited impact on the outcomes of CVRA mandamus petitions in the ten years since the statute's enactment. The appellate circuits have denied the majority (from 62-100%) of the mandamus petitions, regardless of the review standard. Appellate circuits with traditional mandamus review standards have actually granted more CVRA petitions than those with more expansive review standards. The review standard has not differentially impacted the outcomes in petitions resolving similar issues. In a significant minority of the petition opinions, the appellate courts explicitly stated that the same outcome would have been reached regardless which review standard was utilized. Several other appellate courts have intermingled or blurred the distinctions between the review standards in resolving their petitions. Finally, both in granting and denying the presented CVRA petitions, regardless of the review standard used, appellate courts have shown significant deference to trial courts' implementation of the CVRA and its required "reasonableness" and other determinations.⁴⁶⁴

V. CONCLUSION

When Congress considered the enactment of the CVRA in 2004, one of its primary sponsors identified its mandamus enforcement remedy as a feature that made the legislation "so important, and different from earlier legislation" and a remedy that would allow an "appellate court to take timely action to ensure that the trial court follows the rule of laws set out in this statute."⁴⁶⁵ In the ten years since the CVRA's enactment, federal appellate courts have considered 73 mandamus petitions asserting violations of the CVRA. In the course of their review of these petitions, the appellate circuits have addressed most of the crime victim rights prescribed in the CVRA and other aspects of the statute, including the definition of crime victim status for purposes of CVRA eligibility.

⁴⁶³ See *In re Morning Star Packing Co.*, 711 F.3d 1142, 1144 (9th Cir. 2013); *In re Amy & Vicky*, 710 F.3d 985, 987 (9th Cir. 2013); *In re Amy*, 641 F.3d 528, 540 (D.C. Cir. 2011); *supra* notes 140–46, 261–66, 302–08, 318–23 and accompanying text (discussing these petitions); *cf. supra* notes 324–27 and accompanying text (discussing denial of Amy and Vicky's subsequent petition regarding the award of restitution).

The scope of relief ordered upon granting the remaining CVRA mandamus petitions was also limited, regardless of the review standard utilized. See *In re Allen*, 701 F.3d 734, 735 (5th Cir. 2012) (requiring the trial court to hear new arguments regarding the petitioners' victim status); *In re Simons*, 567 F.3d 800, 801 (6th Cir. 2009) (requiring the trial court to rule on the petitioner's motion within two weeks); *In re Mikhel*, 453 F.3d 1137, 1139–40 (9th Cir. 2006) (requiring the trial court to make the CVRA-prescribed determination regarding victim-witness exclusion from proceedings); *supra* notes 127–30, 228–33, 343, 385–92 and accompanying text (discussing these petitions); *cf. supra* notes 267–72 and accompanying text (discussing denial of *Allen* petitioners' subsequent petition regarding restitution).

The breadth of the appellate circuit's mandamus review standard also has not predicted which circuits are most likely to broadly interpret the scope of the CVRA itself. For example, the Ninth Circuit, a more expansive review standard circuit, more broadly interpreted the CVRA rights to be heard and not to be excluded from court proceedings. See *Mikhel*, 453 F.3d at 1139; *Kema*, 435 F.3d at 1016. However, the Fifth Circuit, a traditional review standard circuit, more broadly interpreted the CVRA right to confer with the prosecutor and the sexual exploitation of children restitution statute. See *Amy Unknown*, 701 F.3d at 773; *In re Dean*, 527 F.3d 391, 394–95 (5th Cir. 2008).

⁴⁶⁴ See *supra* notes 429–64 and accompanying text (discussing the impact of the CVRA review standard).

⁴⁶⁵ See 150 CONG. REC. S4,261–62 (daily ed. Apr. 22, 2004) (statement of Sen. Dianne Feinstein).

The appellate courts have granted 11 of these mandamus petitions and denied 62 petitions.⁴⁶⁶

In their CVRA mandamus review, a conflict has developed among the circuits regarding the appropriate review standard to be utilized. The initial appellate circuits to identify a CVRA mandamus review standard adopted standards that were more expansive than traditional mandamus review standards: an abuse of discretion standard in the Second Circuit and an abuse of discretion or legal error standard in the Ninth Circuit. The circuits that have subsequently adopted a CVRA mandamus review standard have adopted some version of a traditional mandamus review standard, with all incorporating a requirement of a petitioner showing of a clear and indisputable right to the writ. These circuits include the Fifth, Sixth, Eighth, Tenth, Eleventh, and District of Columbia Circuits. The Third Circuit's review standard is ambiguous in that it has referred both to the more expansive standards adopted by the Second and Ninth Circuits and the traditional standard. The First, Fourth, and Seventh Circuits have not yet adopted a CVRA mandamus review standard.⁴⁶⁷

This conflict in the circuits regarding the review standard can be resolved by either congressional or Court action. In this connection, legislation was recently introduced, but not enacted, in both the Senate and House of Representatives to amend the CVRA to reflect that appellate courts "shall apply ordinary standards of appellate review" in deciding CVRA mandamus petitions.⁴⁶⁸ Alternatively, the Court could grant certiorari review to resolve the conflict among the circuits, as it did regarding the child sexual exploitation restitution statute in the *Paroline* decision,⁴⁶⁹ and determine whether the CVRA requires a traditional or more expansive mandamus review standard.

The mandamus remedy is an important component of the CVRA. To achieve the most effective implementation of the CVRA, the circuit conflict regarding the mandamus review standard should be resolved—regardless of the review standard selected. As a practical matter, however, this Article has demonstrated that the difference in review standards has had a limited impact on the outcomes of the CVRA mandamus petitions reviewed thus far. It is therefore unlikely that a resolution of the circuit conflict regarding

⁴⁶⁶ See *supra* CVRA Mandamus Outcomes Table; *supra* notes 193–428 and accompanying text (identifying and discussing these petitions).

⁴⁶⁷ See *supra* notes 46–192 and accompanying text (discussing the circuit conflict regarding the CVRA mandamus review standard).

⁴⁶⁸ S. 2646, 113th Cong. § 302 (2014); H.R. 4165, 113th Cong. § 2 (2014); S. 822, 113th Cong. § 2 (2013). This provision was added, during Judiciary Committee consideration, to proposed Senate legislation reauthorizing the Justice for All Act and including some amendments to the CVRA. The bill was reported out of the Judiciary Committee and placed on the Senate legislative calendar. No further action was taken on the CVRA amendments prior to the expiration of the congressional session. *All Actions: S. 822 113th Congress (2013-2014)*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/822/all-actions> (last visited Jan. 7, 2015). This provision was also added, during Judiciary Committee review, to proposed Senate legislation addressing runaway and homeless youth and trafficking prevention. The bill was reported out of the Judiciary Committee and placed on the Senate legislative calendar. No further action was taken prior to the expiration of the congressional session. *All Actions: S. 2646 113th Congress (2013-2014)*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/2646/all-actions> (last visited Jan. 7, 2015). The provision was in legislation introduced in the House of Representatives containing proposed amendments to the CVRA and other crime victim-related legislation. It was referred for subcommittee consideration, but no action was taken prior to the expiration of the congressional session. *All Actions: H.R. 4165 113th Congress (2013-2014)*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/4165/all-actions> (last visited Jan. 7, 2015).

⁴⁶⁹ See *supra* notes 328–36 and accompanying text (discussing the *Paroline* decision).

the review standard will significantly change the outcomes of CVRA mandamus petitions in the future.⁴⁷⁰

⁴⁷⁰ See *supra* notes 429–64 and accompanying text (discussing the limited impact of the CVRA mandamus review standard on petition outcomes).

POSTSCRIPT: OUT OF THE MANDAMUS MUDDLE

After completion of this Article, both the Senate and House of Representatives approved an amendment to the CVRA to resolve the circuit conflict regarding the CVRA mandamus review standard.⁴⁷¹ In separate legislation approved regarding other matters, both chambers included a provision that explicitly states that the appellate courts “shall apply ordinary standards of appellate review” in deciding CVRA mandamus petitions.⁴⁷² Prior to the publication of this Article, the House of Representatives adopted the Senate version of the broader legislation containing the CVRA mandamus review standard amendment previously approved in both chambers.⁴⁷³ President Barack Obama signed the legislation into law on May 29, 2015.⁴⁷⁴ This CVRA amendment resolves the circuit conflict regarding the mandamus review standard that has existed throughout the first ten years of the CVRA implementation and it will provide appellate courts greater guidance in considering CVRA mandamus petitions in the future.⁴⁷⁵ However, as this Article has demonstrated, the resolution of the circuit conflict regarding the mandamus review

⁴⁷¹ See S. 178, 114th Cong. § 113 (2015); H.R. 181, 114th Cong. § 10 (2015); 161 CONG. REC. S2,338 (daily ed. Apr. 22, 2015) (reflecting passage of the legislation); 161 CONG. REC. H607 (daily ed. Jan. 27, 2015) (reflecting passage of the legislation); see also *All Actions: S. 178 114th Congress (2015-2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/178/all-actions> (last visited June 6, 2015); *All Actions: H.R. 181 114th Congress (2015-2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/181/all-actions> (last visited May 21, 2015); cf. *supra* note 468 and accompanying text (describing previous legislative proposals to resolve the mandamus review standard issue).

⁴⁷² S. 178, 114th Cong. § 113 (2015); H.R. 181, 114th Cong. § 10 (2015). Both the Senate and House of Representatives included this CVRA amendment in legislation addressing victims of trafficking. In this legislation, both chambers also approved additional CVRA amendments, such as 1) the addition of CVRA rights to timely information about plea bargains and deferred prosecution agreements and to information about the CVRA rights themselves and 2) a provision to permit the mandamus litigants and the appellate court to agree to a different time period for mandamus resolution than the 72 hour time period established in the CVRA. S. 178, 114th Cong. § 113 (2015); H.R. 181, 114th Cong. § 10 (2015); *All Actions: S. 178, supra* note 471; *All Actions: H.R. 181, supra* note 471.

⁴⁷³ See 161 CONG. REC. H3,329–30 (daily ed. May 19, 2015) (reflecting passage of the legislation); *All Actions: S. 178, supra* note 471.

⁴⁷⁴ See Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 113; *All Actions: S. 178, supra* note 471.

⁴⁷⁵ Although intended to resolve the circuit conflict regarding the CVRA mandamus review standard, the review standard Congress has selected may not be entirely clear. The amendment provides for the use of “ordinary standards of appellate review” in CVRA mandamus proceedings. S. 178, 114th Cong. § 113 (2015). Traditional appellate review standards include de novo review of questions of law, clear error review of questions of fact, and abuse of discretion review of matters entrusted to the trial court’s discretion. See *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 562 (2d Cir. 2005). The only discussion of the proposed legislative clarification of the CVRA mandamus review standard appears in the House of Representatives Committee on the Judiciary report:

This section adopts the approach followed by the Ninth Circuit in *Kenna v. U.S. District Court for the Central District of California*, 435 F.3d 1011 (9th Cir. 2006), and the Second Circuit in *In re W.R. Huff Asset Management Company*, 409 F.3d 555 (2d Cir. 2005), namely that, despite the use of a writ of mandamus as a mechanism for victims’ rights enforcement, Congress intended that such writs be reviewed under ordinary appellate review standards.

H.R. REP. NO. 114-7, at 8 (2015). As described in this Article, the Second Circuit adopted an abuse of discretion mandamus review standard for CVRA petitions in *W.R. Huff Asset Management Co.*, 409 F.3d at 562–63, and the Ninth Circuit adopted an abuse of discretion or legal error mandamus review standard in *Kenna*, 435 F.3d at 1017. See *supra* notes 48–59, 66–71 and accompanying text (discussing the CVRA mandamus review standards established in these decisions). Although similar, these two review standards are not identical and they do not include all of the traditional appellate review standards. Thus, even after the enactment of this CVRA amendment, there may be some continuing questions about the applicable CVRA mandamus review standard.

standard is not likely to significantly change the outcomes of CVRA mandamus petitions.⁴⁷⁶

⁴⁷⁶ See *supra* notes 429–64 and accompanying text (discussing the limited impact of the CVRA mandamus review standard on the petition outcomes).

