

VALIDATING VICTIMS: ENFORCING VICTIMS' RIGHTS THROUGH MANDATORY MANDAMUS

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I. INTRODUCTION

The American criminal justice system “has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard.”¹ As a result of this assumption, for centuries, crime victims and their families have been excluded from participation in criminal proceedings, often leaving them secondary victims to the very system to which they had turned for justice.² In an effort to end this tradition, in October 2004, the United States Congress enacted the “the most sweeping federal victims’ rights law in the history of the nation,”³ the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act (CVRA).⁴ This historic piece of legislation was specifically designed to provide crime victims with substantive and procedural rights enforceable in federal criminal proceedings.⁵ To ensure that these rights are not capriciously denied, the CVRA also grants crime victims the right to appeal any district court decision denying them any one of these rights through a writ of mandamus, which the Act requires appellate courts to “take up and decide.”⁶ Congress’s use of this seemingly mandatory “take up and decide” language in conjunction with the term “mandamus,” a traditionally discretionary writ,⁷ has caused much debate among United States circuit courts regarding the appropriate standard of review for these appeals, currently resulting in a four-circuit split.⁸ This Note resolves this debate through the use of statutory interpretation. Part II briefly discusses the history of the crime victims’ rights

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¹ *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1013 (9th Cir. 2006).

² 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, 236.

³ 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, 583 (2005).

⁴ 18 U.S.C. § 3771 (2006).

⁵ See Kyl et al., *supra* note 3, at 583.

⁶ See 18 U.S.C. § 3771 (d)(3).

⁷ See BLACK’S LAW DICTIONARY 984 (8th ed. 2004) (defining mandamus as “[a] writ issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly”); see also *United States v. Malmin*, 272 F. 785, 789 (3d Cir. 1921) (explaining that “ordinarily a writ of mandamus is not demandable, as a matter of right, but is awarded in the discretion of the court”).

⁸ See *infra* Part III.

movement and provides a general overview of the 2004 Crime Victims' Rights Act. Part III explores the four-circuit split that has emerged over the CVRA's standard of review and briefly discusses the prevailing arguments on each side of the issue. Finally, this Note concludes by arguing that the CVRA's enforcement provision entitles crime victims to ordinary appellate review of district court decisions denying their rights and offers some potential solutions for resolution of the current circuit split.

II. THE CRIME VICTIMS' RIGHTS ACT: HISTORY AND OVERVIEW

A. *History of the Crime Victims Rights Movement*

As justification for the exclusion of crime victims from the criminal justice process, the American justice system long treated crimes as acts committed against the community, rather than against individual victims and their families.⁹ Consequently, "rather than affording victims such basic guarantees as the right to be heard, the right to be present at criminal proceedings, and the right to be treated with fairness and dignity, the system . . . treated victims as nothing more than useful tools for the reporting and prosecution of criminal offenses."¹⁰ Thus, as Senator Feinstein noted, "[i]n case after case . . . victims and their families, were ignored, cast aside, and treated as non-participants in a critical event in their lives . . . by prosecutors too busy to care enough . . . , judges focused [solely] on defendant's rights, and . . . a court system that simply did not have a place for them."¹¹

The results of this treatment were often terrible, leaving crime victims and their families "secondary victims" to the flawed criminal justice system.¹² Such was the case following the 1977 murder of Wendy Preston, a twenty-three-year-old woman who was viciously murdered in her parents' Florida home.¹³ Soon after Wendy's killing, the state of Florida informed her grieving parents that they would not be notified of criminal proceedings in the case, because the state, and not the family, was being considered the victim of the crime.¹⁴ Similarly, after Louarna Gillis was murdered in 1979 as part of a gang initiation process, not only was her family not notified of the proceedings in her case, but they were also later barred from entering the courtroom when they attempted to attend the trial of their daughter's killer.¹⁵

⁹ See Kyl et al., *supra* note 3, at 583.

¹⁰ Riley, *supra* note 2, at 236 (citing DOUGLAS E. BELOOF ET AL., VICTIMS IN CRIMINAL PROCEDURE 11–18 (2d ed. 2006)).

¹¹ 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

¹² See *id.*

¹³ See Kyl et al., *supra* note 3, at 582.

¹⁴ *Id.*

¹⁵ *Id.*

In an effort to end this secondary victimization, the crime victims' rights movement began to take shape in the mid-1970s when advocates began calling increased public attention to the justice system's poor treatment of victims and their families.¹⁶ The efforts of these early advocates began to gain considerable impetus in 1981 "when Ronald Reagan became the first president to publicly acknowledge the [important] role of the victim in the criminal justice system."¹⁷ As part of this historic call for reform, President Reagan issued a proclamation calling for the first National Victims' Rights Week and, later, established the President's Taskforce on Victims of Crime ("Taskforce").¹⁸ After conducting extensive hearings throughout the country, in 1982, the Taskforce concluded that the American "criminal justice system ha[d] lost an essential balance . . . depriv[ing] the innocent, the honest, and the helpless of its protection . . . [and] transform[ing] [crime victims] into a group oppressively burdened by a system designed to protect them."¹⁹ Upon demanding that "[t]his oppression . . . be redressed,"²⁰ the President's Taskforce provided multiple solutions and reforms to fix the country's flawed system.²¹ "In its most sweeping recommendation,"²² the Taskforce proposed an amendment to the United States Constitution designed to protect crime victims by giving them the right "to be present and . . . heard at all critical stages of judicial proceedings."²³ Recognizing the difficulty of "obtaining the consensus required to amend the United States Constitution,"²⁴ the victims' rights movement instead turned its focus toward creating a federal statute designed to create substantive rights for crime victims.²⁵ In 1982, this objective was achieved through Congress's passing of our nation's first federal victims' rights statute, The Victim and Witness Protection Act (VWPA).²⁶ Specifically, the VWPA granted crime victims the right to make victim-impact statements at sentencing hearings and provided for increased victim restitution.²⁷ In the years following the

¹⁶ See Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 865.

¹⁷ Kyl et al., *supra* note 3, at 584.

¹⁸ *Id.*

¹⁹ Cassell, *supra* note 16, at 865 (quoting PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT 114 (1982)); Kyl et al., *supra* note 3, at 584 (citations omitted).

²⁰ Cassell, *supra* note 16, at 865 (citations omitted).

²¹ *See id.*

²² *Id.* at 866.

²³ *Id.*; see also Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. 835, 842 ("The Task Force proposed adding to the Sixth Amendment's protections for defendants' rights a provision allowing crime victims to be present and heard: 'Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings.'" (citations omitted)).

²⁴ Cassell, *supra* note 23, at 842.

²⁵ *See id.* at 843.

²⁶ *See id.*

²⁷ Kyl et al., *supra* note 3, at 584–85.

enactment of the VWPA, Congress sought to expand the scope of these provisions through additional legislation²⁸; in the Victims of Crime Act of 1984,²⁹ the Victims' Rights and Restitution Act of 1990,³⁰ the Violent Crime Control and Law Enforcement Act of 1994,³¹ and the Victim Rights Clarification Act of 1997.³²

While these statutes initially appeared to advance the goals of the victims' rights movement, they failed to include procedures for the enforcement of the rights they provided and ultimately each statute proved to be largely ineffective.³³ Nowhere was this failure more obvious than during the 1997 trial of Oklahoma City bomber Timothy McVeigh, during which a district court judge forbade victims wishing to provide impact statements at sentencing from observing any of the prior proceedings in the case.³⁴ Following the media coverage and public outrage concerning this event,³⁵ victims' rights advocates renewed their efforts to create a federal constitutional amendment.³⁶ However, after several attempts to amend the constitution failed,³⁷ the movement shifted its focus toward creating a comprehensive federal statute that could overcome the shortcomings of previous attempts to codify federal rights for crime victims.³⁸ This objective was finally

²⁸ See Cassell, *supra* note 23, at 843.

²⁹ Victims of Crime Act of 1984, Pub. L. No. 98-473, 98 Stat. 2170 (codified as amended at 42 U.S.C. §§ 10601–03 (2006)) (creating a crime victim fund and the Department of Justice Office for Victims of Crime).

³⁰ Victims' Rights and Restitution Act of 1990, Pub. L. No. 101-647, tit. V, 104 Stat. 4820 (codified as amended at 42 U.S.C. § 10601 (2006)) (creating a comprehensive bill of rights for crime victims in the federal criminal justice system including: the right to be treated with fairness and respect; the right to be notified of all court proceedings; the right to confer with the government's attorney; and the right to attend all court proceedings).

³¹ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18, 21, 28 & 42 U.S.C. (2006)) (mandating restitution for sexual assault, domestic violence, to abused and sexually exploited children).

³² Victim Rights Clarification Act of 1997, Pub. L. No. 105-6, 111 Stat. 12 (codified as amended at 18 U.S.C. § 3510 (2006)) (clarifying for judges a crime victims right to attend court proceedings even if the victim intends to give impact testimony at sentencing).

³³ See Kyl et al., *supra* note 3, at 586.

³⁴ 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

³⁵ See Jo Thomas, *New Law Forces a Reversal in Oklahoma Bombing Case*, N.Y. TIMES, Mar. 26, 1997, at A18.

³⁶ See Cassell, *supra* note 16, at 867.

³⁷ See Cassell, *supra* note 16, at 867–70 (discussing the crime victims' movement's numerous attempts between 1996 and 2004 to gain congressional support for a crime victims' rights amendment to the United States Constitution); see also Paul G. Cassell, *Barbarians at the Gate? A Reply to Critics of the Victims Rights Amendment*, 1999 UTAH L. REV. 479, 479–82 (providing a more detailed history of the efforts to enact a federal crime victims' rights amendment).

³⁸ See Cassell, *supra* note 16, at 868–69.

achieved in 2004 when President George W. Bush signed into law the Crime Victims' Rights Act.³⁹

B. Overview of the Crime Victims' Rights Act

In a conscious effort “to correct . . . the legacy of . . . poor treatment of crime victims in the criminal process,”⁴⁰ and overcome the failings of previous legislation, the Crime Victims' Rights Act was specifically drafted to bring together three critical components: “rights, remedies, and resources,”⁴¹ in an effort to guarantee crime victims substantive and procedural rights enforceable in federal courts.⁴² Specifically, this unprecedented piece of legislation provides crime victims, whom the Act defines as “person[s] directly and proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia,”⁴³ with the following eight enumerated rights:

- (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 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 the proceeding.
- (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.⁴⁴

Additionally, in what might be described as the Act's most essential component, the CVRA provides for enforcement of these rights through a writ of mandamus that the court of appeals must “take up and decide” within seventy-two hours of

³⁹ See 18 U.S.C. § 3771 (2006).

⁴⁰ Cassell, *supra* note 16, at 880 (citations omitted).

⁴¹ 150 Cong. Rec. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

⁴² See Kyl et al., *supra* note 3, at 583.

⁴³ 18 U.S.C. § 3771(e).

⁴⁴ *Id.* § 3771(a)(1)–(8).

receipt of a victim's petition.⁴⁵ As previously noted, Congress's use of the phrase "take up and decide," in conjunction with the term "mandamus," has raised much debate concerning the appropriate standard of review for appeals brought under this provision. On one side of the debate, judges and lawyers argue that by using the term "mandamus," Congress could have intended nothing other than its traditional meaning,⁴⁶ while the opposing side argues that Congress intended the words, "shall take up and decide," to transform the traditionally discretionary mandamus standard into a mandatory standard requiring ordinary appellate review.⁴⁷ The remainder of this Note discusses these opposing viewpoints and attempts to resolve this debate.

III. CIRCUIT CONFUSION: THE CURRENT DEBATE

The confusion discussed above has created a four-circuit split between the Second and Ninth Circuits and the Fifth and Tenth Circuits on the issue of whether appeals brought by victims under the CVRA's enforcement provision are to be reviewed according to the discretionary standards associated with traditional mandamus petitions, or rather under an expedient form of ordinary appellate review.⁴⁸ The following discussion briefly explores the various opinions of the four circuit courts that have ruled on this issue.

⁴⁵ *Id.* § 3771(d)(3).

⁴⁶ *See in re Antrobus*, 519 F.3d 1123, 1129 (10th Cir. 2008); Response of the United States to Petition for Rehearing or Rehearing En Banc at 8–13, *in re Antrobus*, 519 F.3d 1123 (10th Cir. 2008) (No. 08-4002).

⁴⁷ *See Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1017–18 (9th Cir. 2006); Petition for Panel Rehearing with Suggestion of Rehearing En Banc at 4–11, *in re Antrobus*, 519 F.3d 1123 (10th Cir. 2008) (No. 08-4002).

⁴⁸ *See infra* Parts III.A–B. In further demonstrating the complexity of this issue, it is worth mentioning that the Fourth Circuit Court of Appeals has twice discussed the CVRA's standard of review; however, finding that the petitioners in both cases were not entitled to relief regardless of the standard of review, the court has twice chosen not to rule on the issue. *See in re Brock*, 262 F. App'x 510, 512 (4th Cir. 2008); *see in re Doe*, 264 F. App'x 260, 261–62 (4th Cir. 2007). The Court in *in re Doe* stated:

Normally, petitions for mandamus are subject to an extraordinarily stringent standard in order to prevent them from becoming a substitute for appeal.

...

However, mandamus petitions filed under the CVRA are not necessarily subject to this stringent standard of review. In creating the CVRA, Congress specifically chose a mandamus petition as the appropriate vehicle for appellate review of an order denying a crime victim's assertion of a right protected thereunder. Because the use of mandamus in this context results from a deliberate legislative choice and not adroit or devious pleading, it is not clear that a petitioner under the CVRA should be subjected to the same stringent standard of review as traditional petitioners. At least two other circuits have

A. *The First Approach: The CVRA Calls for Mandatory Mandamus Review*

In 2005, approximately one year after the CVRA was signed into law, the United States Court of Appeals for the Second Circuit became the first federal court to address the appropriate standard of review for appeals brought under the CVRA's enforcement provision.⁴⁹ The court began its opinion by noting that "[u]nder the plain language of the CVRA . . . Congress has chosen a petition for mandamus as a mechanism by which a crime victim may appeal a district court's decision denying relief sought under the provisions of the CVRA."⁵⁰ However, in distinguishing the CVRA's use of the term "mandamus" from more traditional usage, the court explained that "petitioner[s] seeking relief pursuant to the mandamus provision set forth in [the CVRA] need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus."⁵¹ Upon recognizing the nondiscretionary nature of the CVRA's mandamus procedure, the court proceeded to address the appropriate standard of review for appeals brought under this provision.⁵² After explaining that "for purposes of standard of review, decisions of judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion'),"⁵³ the court concluded its discussion of the issue by holding that "a district court's determination under the CVRA should be reviewed for abuse of discretion."⁵⁴

found that CVRA petitioners should not be so constrained and each has applied a normal abuse of discretion standard to CVRA mandamus petitions. We need not decide the issue today, however, because Petitioner would not be entitled to relief even under the lower standard.

Id. (citations omitted).

⁴⁹ *See in re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 561–63 (2d Cir. 2005).

⁵⁰ *Id.* at 562.

⁵¹ *Id.*

⁵² *See id.* at 562–63. Under traditional standards,

[a] writ of mandamus may issue only if (1) the petitioner has "no other adequate means" to attain the desired relief; (2) the petitioner has demonstrated a right to the issuance of a writ that is "clear and indisputable;" and (3) the issuing court, in the exercise of its discretion, is satisfied that the writ is "appropriate under the circumstances."

In re Dean, 527 F.3d 391, 394 (5th Cir. 2008).

⁵³ *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d at 562 (quoting *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)).

⁵⁴ *Id.* at 563.

Following the Second Circuit's first-impression decision, the Ninth Circuit returned to the same issue in its 2006 decision, *Kenna v. United States District Court*.⁵⁵ Prior to bringing his appeal, the appellant in this case, W. Patrick Kenna, had fallen prey to Moshe and Zvi Leichner, a father-and-son team who swindled numerous victims, including Mr. Kenna, out of almost \$100 million in a foreign investment scam.⁵⁶ After exercising his right to be heard at the sentencing of the first defendant, Moshe Leichner, Mr. Kenna again attempted to give impact testimony at the later sentencing of Moshe's son Zvi.⁵⁷ However, instead of allowing Mr. Kenna to exercise this guaranteed right,⁵⁸ a district court judge denied the request, stating that he had previously listened to the victims at the father's sentencing, reviewed their impact testimony, and did not foresee "anything else that could possibly be said."⁵⁹ Outraged that "the judge was [not] taking into consideration the victims in the case,"⁶⁰ and armed with the CVRA's enforcement provision, Mr. Kenna turned to the Ninth Circuit Court of Appeals to challenge the district court's ruling forming the basis of the above-mentioned appeal.

In an opinion written by Judge Alex Kozinski, the Ninth Circuit began its analysis by addressing the substantive meaning of the CVRA's "right to be reasonably heard" provision, and then turned to a discussion of the appropriate standard of review for decisions denying victims this right.⁶¹ To begin this discussion, the court first explained that while they ordinarily "apply strict standards in reviewing petitions for a writ of mandamus" and "grant the writ only when there is something truly extraordinary about the case,"⁶² such strict application was not required, "because the CVRA contemplates active review of orders denying victims' rights claims even in routine cases."⁶³ Rather, under the "unique regime" created by the CVRA, appellate courts "must issue the writ whenever [they] find that the district court's order reflects an abuse of discretion or legal error."⁶⁴

While the Second and Ninth Circuits' opinions vary slightly in their articulation of the types of error that will result in the grant of a writ of mandamus under the CVRA, their opinions agree that through the CVRA's enforcement provision, Congress intended to modify traditional mandamus standards to create a

⁵⁵ 435 F.3d 1011, 1017–18 (9th Cir. 2006).

⁵⁶ *Id.* at 1012.

⁵⁷ *Id.* at 1013.

⁵⁸ See 18 U.S.C. § 3771 (a)(4) (2006) (granting crime victims "[t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding").

⁵⁹ *Kenna*, 435 F.3d at 1013.

⁶⁰ Emma Schwartz, *Giving Crime Victims More of Their Say*, U.S. NEWS & WORLD REP., Dec. 24, 2007, at 28.

⁶¹ *Kenna*, 435 F.3d at 1016–17.

⁶² *Id.* at 1017.

⁶³ *Id.*

⁶⁴ *Id.*

unique appellate procedure allowing for expedient, mandatory, and active review of decisions denying crime victims' rights.⁶⁵

B. The Second Approach: Mandamus Means Mandamus

More than two years after *Kenna*, the Tenth Circuit Court of Appeals turned to the CVRA standard of review issue in the 2008 case *in re Antrobus*.⁶⁶ The facts underlying this appeal involved the February 12, 2007 shooting at the Trolley Square shopping mall in Salt Lake City, Utah, where a man opened fire at random targets, killing five people.⁶⁷ Among the victims of the shooting was Vanessa Quinn, the daughter of Sue and Ken Antrobus, appellants in this appeal.⁶⁸ On that tragic day, Vanessa went to Trolley Square to meet her husband of four years to purchase a long-awaited wedding ring they had been unable to afford at the time of their marriage.⁶⁹ As she anxiously rounded a corner headed toward a jewelry store, eighteen-year-old Sulejman Talovic gunned her down with a .38 Special handgun, killing her instantly.⁷⁰ Following the shooting, police investigators learned that Talovic had purchased the .38 Special eight months prior to the shooting, when he was only seventeen years old, from a man named Makenzie Hunter.⁷¹ After Mr. Hunter pleaded guilty to the unlawful "transfer[] of a handgun to a juvenile," Vanessa's family "sought to have [her] declared a victim of [his] crime so that they, on her behalf, could assert certain rights provided by the CVRA."⁷² However, much to their dismay, a district court judge denied their request, finding that Vanessa was not a direct victim of Hunter's crime.⁷³ Unhappy with this decision, the Antrobuses filed a petition for mandamus with the Tenth Circuit Court of Appeals.⁷⁴

Upon turning to the relevant standard of review issue, the Tenth Circuit began by observing that to receive a writ of mandamus, "[p]etitioners must show that their right to the writ is 'clear and indisputable.'"⁷⁵ Following this assertion, the court proceeded to explain that while "Congress could have drafted the CVRA to provide for 'immediate appellate review' or 'interlocutory appellate review,'

⁶⁵ See *supra* notes 49–54, 61–64 and accompanying text.

⁶⁶ 519 F.3d 1123, 1124–25 (10th Cir. 2008).

⁶⁷ *Id.* at 1124.

⁶⁸ *Id.* at 1123–24.

⁶⁹ Ben Winslow, *Quinn's Husband Hopes to Turn his Grief into a Force for Good*, DESERET NEWS, Feb. 16, 2007 at A19.

⁷⁰ See *id.*

⁷¹ Aaron Falk, *Parents Appeal for 'Victim' Status*, DESERET NEWS, Sept. 23, 2008, at A1.

⁷² *Antrobus*, 519 F.3d at 1124.

⁷³ *Id.* at 1125.

⁷⁴ *Id.* at 1124.

⁷⁵ *Id.* (quoting *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980)).

something it has done many times,”⁷⁶ they instead made use of the term mandamus,⁷⁷ “a well worn term of art in our common law tradition.”⁷⁸ In an attempt to interpret the CVRA’s use of this term, the court referred to the United States Supreme Court’s 1951 ruling in *Morissette v. United States*, in which the Court stated that:

[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.⁷⁹

Applying this “rule,” the court explained they saw “no reason to suppose that the use of the word mandamus in the CVRA has anything other than its traditional meaning,”⁸⁰ thus holding that petitions made under the Act’s enforcement provision are to be reviewed under traditional mandamus standards.⁸¹

Just two months later, the Fifth Circuit became the fourth federal court to address the CVRA’s standard of review in *in re Dean*.⁸² Rather than attempting to interpret the CVRA’s enforcement provision, the court simply began its analysis by stating they were “in accord with the Tenth Circuit for the reasons stated in its opinion.”⁸³ Applying the Tenth Circuit’s standard, the court found that the lower court had violated the victims’ rights by failing to confer with them before reaching a plea agreement.⁸⁴ However, rather than enforcing those rights, the court explained that, because “[t]he decision whether to grant mandamus is largely prudential,” they felt “the better course [was] to deny relief,” and leave it to the district court who denied the victim’s rights in the first instance, to “carefully consider their objections and briefs as th[e] matter proceed[ed].”⁸⁵

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 1127.

⁷⁹ *Id.* at 1124 (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

⁸⁰ *Id.* at 1129.

⁸¹ *See id.* at 1129–31.

⁸² 527 F.3d 391, 393–94 (5th Cir. 2008).

⁸³ *Id.* at 394.

⁸⁴ *Id.* at 394–96 (“With due respect for the district court’s diligent efforts to do justice, we conclude that, under the specific facts and circumstances of this case, it was contrary to the provisions of the CVRA for the court to permit and employ the *ex parte* proceedings that have taken place—proceedings that have no precedent, as far as we can determine.”).

⁸⁵ *Id.* at 396.

IV. RESOLVING THE DEBATE: THE CASE FOR MANDATORY MANDAMUS AND POTENTIAL SOLUTIONS

A. *The Case for Mandatory Mandamus*

For several reasons, the Second and Ninth Circuits were correct in their conclusion that the CVRA's enforcement provision entitles crime victims to ordinary appellate review of district court decisions denying any of their eight enumerated rights. While it may be difficult for some to suppose that Congress intended its use of the term mandamus to have anything "other than its traditional meaning,"⁸⁶ through the use of statutory interpretation, the following discussion demonstrates that this was precisely the case.

The starting point for any sound statutory-interpretation analysis begins in the statute's "plain language."⁸⁷ This basic insight was made clear by the United States Supreme Court in its declaration that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed."⁸⁸ Thus, "when the statutory language is clear on its face, and its words 'neither create ambiguity nor lead to an entirely unreasonable interpretation,' an inquiring court must apply the statute as written, and 'need not consult other aids to statutory construction.'"⁸⁹ However, "when the statutory language chosen by Congress is unclear, or capable of more than one reasonable interpretation, it is proper for a court to consult extrinsic sources, such as legislative history, for guidance."⁹⁰ Beginning with the CVRA's plain language, the Act's enforcement provision states that when a "district court denies the relief sought [by a crime victim], the movant may petition the court of appeals for a writ of mandamus," which "[t]he court . . . shall take up and decide . . . within 72 hours."⁹¹ That four circuit courts have found these words to have different substantive meanings makes clear that this language is "capable of more than one reasonable interpretation," making it appropriate to turn to the canons of statutory construction to resolve this issue.⁹² Rather than attempt such an analysis, the Tenth Circuit focused solely on the Act's use of the word "mandamus," and promptly ended its analysis by assigning the word its traditional meaning.⁹³ Although courts do often interpret Congress's use of terms of art

⁸⁶ See *Antrobus*, 519 F.3d at 1129.

⁸⁷ For a detailed explanation of the "plain meaning" rule of statutory interpretation, see NORMAN J. SINGER, SUTHERLAND'S STATUTORY CONSTRUCTION § 46.01 (6th ed. 2000).

⁸⁸ See *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917).

⁸⁹ *Passa v. Derderian*, 308 F. Supp. 2d 43, 51 (D.R.I. 2004) (quoting *Atlantic Fish Spotters Ass'n. v. Evans*, 321 F.3d 220, 224 (1st Cir. 2003)).

⁹⁰ *Id.* at 5152.

⁹¹ 18 U.S.C. § 3771(d)(3) (2006) (emphasis added).

⁹² See *Passa*, 308 F. Supp. at 51–52.

⁹³ See *In re Antrobus*, 519 F.3d 1123, 1127–30 (10th Cir. 2008).

according to their traditional usage, an important exception to this technique, one which the Tenth Circuit seemingly ignored, is readily apparent in various courts' application of this rule. For example, in *McDermott International, Inc. v. Wilander*,⁹⁴ the Supreme Court stated that, “[i]n the absence of contrary indication, [a court] assume[s] that when a statute uses such a term [of art], Congress intended it to have its established meaning.”⁹⁵ Similar language was expressed in the Supreme Court's opinion in *United States v. Trans-Missouri Freight Ass'n*, in which it expressed:

[t]he well-settled rule is that where technical words are used in an act, and their meaning has previously been conclusively settled, by long usage and judicial construction, the use of the words *without an indication of an intention to give them a new significance* is an adoption of the generally accepted meaning affixed to the words at the time the act was passed.⁹⁶

Thus, while courts may interpret terms of art according to their traditional meaning when the legislature has not expressed a contradictory intent, when such intent *is* expressed, further analysis is required.

Additionally, courts have made clear that statutory interpretation is to be a “holistic endeavor,”⁹⁷ in which courts “must not be guided by a single sentence or member of a sentence.”⁹⁸ Rather than focusing solely on the CVRA's use of the word “mandamus,” one needs only to continue reading a few words more to find a manifestation of Congress's intent to modify this term in the words “shall take up and decide.”⁹⁹ While greater specificity likely would have helped prevent the current confusion associated with this clause, Congress's use of the word “shall” indicates its intent to transform the traditionally discretionary standard associated with mandamus into a mandatory and expedient form of appellate review. In fact, according to the Supreme Court, legislative use of the term “shall,” “normally creates an obligation impervious to judicial discretion.”¹⁰⁰

Additional support for this interpretation can be found in another often-cited rule of statutory construction that “requires [that] every part of a statute be presumed to have some effect and not be treated as meaningless unless absolutely

⁹⁴ 498 U.S. 337 (1991).

⁹⁵ *Id.* at 342 (emphasis added).

⁹⁶ 166 U.S. 290, 353 (1896) (emphasis added).

⁹⁷ *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (quoting *United Sav. Ass'n. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)).

⁹⁸ *U.S. Nat. Bank of Or. v. Indep. Ins. Agents of America, Inc.* 508 U.S. 439, 455 (1993) (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1850)).

⁹⁹ 18 U.S.C. § 3771(d)(3) (2006).

¹⁰⁰ *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (quoting *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)).

necessary.”¹⁰¹ Similarly, the Supreme Court has suggested that “provision[s] that may seem ambiguous in isolation [are] often clarified by the remainder of the statutory scheme . . . because *only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.*”¹⁰² With regard to the CVRA’s enforcement provision, only two permissible interpretations exist, either Congress intended to import traditional mandamus standards or, alternatively, they sought to modify those standards by creating a mandatory, nondiscretionary, mandamus procedure. Assuming the correctness of this proposition, it readily becomes clear that only a nondiscretionary writ of mandamus would produce a substantive effect compatible with the rest of the CVRA because, “[w]ithout 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[,]”¹⁰³ leaving any rights afforded by the statute mere “rhetoric.”¹⁰⁴ This was precisely the result of the Fifth Circuit’s holding in *in re Dean*, in which the court recognized that victim’s rights had been violated, but, through their discretion, chose to deny the victim’s relief.¹⁰⁵

Beyond the plain language and spirit of the CVRA, further support for this mandatory mandamus standard can be found in the legislative statements of the statute’s two cosponsors, Senators Jon Kyl and Dianne Feinstein.¹⁰⁶ While the use of legislative history in statutory interpretation has become somewhat controversial in recent years,¹⁰⁷ “[w]hen aid to construction of the meaning of words . . . used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use”¹⁰⁸ Rather, it is entirely appropriate for courts to turn to legislative history to resolve perceived ambiguity.¹⁰⁹ Additionally, courts have made clear that statements made by sponsors of legislation “deserve[] to be accorded substantial

¹⁰¹ *Cal. v. Arias*, 195 P.3d 103, 109 (Cal. 2008); *see also* *Comm’r. v. Ewing*, 439 F.3d 1009, 1014 (9th Cir. 2006) (stating that “the basic principle of statutory construction [is] that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’” (quoting *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 928 (9th Cir.2004))).

¹⁰² *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. at 371 (emphasis added) (citations omitted).

¹⁰³ *Kyl et al.*, *supra* note 3, at 620.

¹⁰⁴ *Id.* at 617.

¹⁰⁵ *See In re Dean*, 527 F.3d 391, 394–96 (5th Cir. 2008).

¹⁰⁶ *See* 150 CONG. REC. S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein & Sen. Kyl); 150 CONG. REC. at S10912 (daily ed. Oct. 9, 2004) (statements of Sen. Kyl & Sen. Feinstein).

¹⁰⁷ For more discussion of the controversy surrounding the use of legislative history, *see* WILLIAM D. POPKIN, *STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION* 248 (1999).

¹⁰⁸ *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 66 n.1 (2004) (citing *United States v. Am. Trucking Ass’ns., Inc.*, 310 U.S. 534, 543–44 (1940)).

¹⁰⁹ *See Toibb v. Radloff*, 501 U.S. 157, 162 (1991) (“[A] court appropriately may refer to a statute’s legislative history to resolve statutory ambiguity . . .”).

weight in interpreting the statute[s].”¹¹⁰ A look at the statements of the CVRA’s sponsors plainly demonstrates that Congress intended to grant crime victims ordinary appellate review through the CVRA’s enforcement provision. As Senator Kyl clearly explained:

[The] provision [that courts “shall take up and decide”] 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.

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 the lower courts and this provision requires them to do so for victims’ rights.¹¹¹

Clearly, the intent of Congress was not to create a discretionary standard whereby courts could deny crime victims the rights guaranteed to them by the CVRA, but rather, as the Act’s legislative history makes clear, to rigorously safeguard these rights by requiring that appellate courts “take up and decide” crime victims’ appeals using ordinary, nondiscretionary, appellate review.

B. Potential Solutions

Because of the four-circuit split, the United States Supreme Court should grant certiorari to resolve this issue. Alternatively, Congress should amend the language used in the CVRA to provide a more understandable explanation of the standard of review the Act intends to provide. For example, leaders in the crime victims’ rights movement have suggested the following amended language to avoid further litigation on this issue:

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 if necessary to protect the movant’s rights and in any event within 30 days after the petition has been filed and shall issue the writ when, after a de novo

¹¹⁰ Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976).

¹¹¹ 150 CONG. REC. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

review, it finds any legal error or a clear factual error applying ordinary standards of appellate review. In no event shall proceedings be stayed or subject to a continuance of more than 30 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. This section 3771 shall be liberally construed to effectuate its purposes.¹¹²

While this language may seem to be somewhat of a departure from the CVRA's original language, it appears to spell out in more detail what the drafters of the CVRA intended, something apparently necessary in light of the current circuit split. This is especially true given the fact that the Second and Ninth circuits, both of whom agreed that the CVRA modified the traditional mandamus standard, have reached slightly different solutions for the standard of review for reviewing such petitions.

V. CONCLUSION

Through the 2004 Crime Victims' Rights Act, the United States Congress intended to end the long-standing tradition of excluding crime victims and their families from the American justice system.¹¹³ As part of this historic effort to give victims a voice in criminal proceedings, the CVRA was enacted to guarantee victims eight enumerated rights enforceable in federal courts.¹¹⁴ Although Congress intended to avoid the capricious denial of these rights by giving victims the ability to seek a writ of mandamus, to be granted using ordinary standards of review, their lack of specificity failed to make this clear and has resulted in much confusion. As a result of this confusion, the Fifth and Tenth Circuits have held that the enforcement of victims' rights is subject to the discretion of appellate courts,¹¹⁵ ultimately rendering the right provided to victims in the CVRA mere rhetoric. To resolve this debate and end the further victimization of crime victims, the United States Supreme Court should grant certiorari to decide the issue, or alternatively, Congress should amend the statute to make the appropriate standard of review more clear. Only by resolving this issue will the rights provided to crime victims in the CVRA be guaranteed, ensuring that victims will never again be treated "as good Victorian school children—seen but not heard."¹¹⁶

¹¹² E-mail from Steven J. Twist, Adjunct Professor of Law, Arizona State University College of Law, to Paul G. Cassell, Professor of Law, S.J. Quinney College of Law (Oct. 6, 2008, 09:39 MST) (on file with author).

¹¹³ See *supra* notes 40–44 and accompanying text.

¹¹⁴ See 18 U.S.C. § 3771(a)(1)–(8) (2006).

¹¹⁵ See *supra* notes 81–85, and accompanying text.

¹¹⁶ *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1013 (9th Cir. 2006).

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