

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 11-10006

In re: JAMES R FISHER; ODYSSEY RESIDENTIAL HOLDINGS, LP

Petitioners

Appeal from the United States Petition for a Writ of Mandamus to the
Northern District of Texas, Dallas

Before WIENER, PRADO, and OWEN, Circuit Judges.

WIENER, Circuit Judge:

Petitioners seek a writ of mandamus, claiming that the district court incorrectly denied them restitution from Brian Potashnik, a criminal defendant who pleaded guilty to conspiracy to commit bribery. Because our precedent requires us to apply a highly deferential standard when reviewing petitions for writs of mandamus, even under the statutes at issue here,¹ we deny the writ.

Petitioners seek relief under the Crime Victim's Rights Act (CVRA)² and the Mandatory Victims Restitution Act (MVRA).³ To receive relief under either of these statutes, a putative victim must qualify under the legal definition of

¹ See *In re Dean*, 527 F.3d 391 (5th Cir. 2008).

² 18 U.S.C. § 3771.

³ 18 U.S.C. § 3663A.

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“crime victim.” Such a victim is one who is “directly and proximately harmed as a result of the commission of an offense.”⁴

In *In re Dean*, we made clear that writs of mandamus filed under the CVRA are reviewed as we would review other writs of mandamus:

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;” [sic] and (3) the issuing court, in the exercise of its discretion, is satisfied that the writ is “appropriate under the circumstances.”⁵

We conclude that the Petitioners have satisfied the first and third requirements, but that they have failed to satisfy the heavy burden required by the second requirement.

We perceive no clear and indisputable error in the district court’s determination that the Petitioners were not victims for purposes of the CVRA and MVRA. Petitioners’ main claim involves the roughly \$1.8 million in development costs they incurred for the project that was eventually awarded to Potashnik as a result of bribery. During the sentencing hearing, the district court heard evidence that, when reasonably construed, could lead to the conclusion that the amount of restitution claimed was too speculative to label Petitioners directly or proximately harmed by the actions of Potashnik. For example, evidence was adduced that the approval of Potashnik’s project did not

⁴ *Id.* at 3663A(a)(2); *see also* 18 U.S.C. § 3771(e).

⁵ *Dean*, 527 F.3d at 394 (citations omitted).

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necessarily preclude the approval of the Petitioners', that Potashnik's project could have been denied irrespective of the bribes, that the bribes were tendered to obtain general good will rather than to secure this specific project, among other explanations. We will not reweigh these arguments in our deferential review, but rather note that these are permissible reasons for the district court to determine that the Petitioners were not victims of Potashnik's crime because the harm is too speculative to be considered direct or proximate.⁶ Again, we stress that this result is compelled by our deferential review of writs of mandamus.

We also conclude that the district court did not make a clear and indisputable error in interpreting the plea agreement's language of restitution as simply setting the maximum that the district court could impose, rather than as requiring Potashnik to provide restitution to victims for his "relevant conduct." The Petitioners would rely on their construction of the plea agreement as an alternative reason to grant restitution, which would allow them to sidestep the definition of a "crime victim" in the CVRA and MVRA and receive restitution as "victims" under the more expansive concept of "relevant conduct." We are

⁶ Because we conclude that the district court did not clearly err in refusing to label the Petitioners "crime victims," we need not address the Petitioners' argument that the underlying crimes at issue here fall under the MVRA, which has as a prerequisite the existence of a "victim."

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satisfied that the district court's construction of the plea agreement is permissible under our standard of review.

Finally, the Petitioners contend that the district court should have made Potashnik jointly and severably liable for the restitution required of his convicted co-conspirators. Petitioners provide no authority that expressly requires the district court to do this. Indeed, the law appears to give the district court the discretion whether or not to do so: "If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution."⁷ Given that the district court found that Petitioners were not victims of Potashnik's crime, we cannot say that the court clearly erred by failing to hold this defendant jointly and severably liable for the restitution required of his co-conspirators.

⁷ 18 U.S.C. § 3664(h).